Presidential Signing Statements as Legislative Strategy and the Expansion of Presidential Power: An Examination of the Bush II Administration

by

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Abstract:

This article explores the use of presidential signing statements during the George W. Bush administration. Given the existence of united government for much of Bush's term in office, why could the Bush administration and Congress not reach agreements on issues where much common ground should have existed? Its principal argument contends that the administration's use of presidential signing statements constitutes a new and important tool in the executive's efforts to influence legislation and expand the powers of the presidency. The paper employs case study and interview-based research to explore why the Bush administration has chosen to pursue this unprecedented path.
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Introduction:

The primary focus of this article will concern the use of presidential signing statements by the George W. Bush administration. Signing statements have become an increasingly important tool wielded by presidents in their efforts to affect the legislative process. As noted by the recent American Bar Association’s Task Force on Presidential Signing Statements and the Separation of Powers Doctrine: “From the inception of the Republic until 2000, Presidents produced fewer than 600 signing statements taking issue with the bills they signed. According to the most recent update, in his one-and-a-half terms so far, President George Walker Bush ... has produced more than 800” (American Bar Association 2006).

For the majority of the Bush administration’s tenure under consideration in this piece, Bush was operating under conditions of united government. Excluding the Jeffords defection, which altered who could take the initiative in the Senate, but did not significantly alter the ability of the Senate to pass legislation. Bush dealt with Republican majorities in the both House and Senate for his first six years in office. Furthermore, it can be argued that any shift in power towards the Democrats with the defection of
Sen. Jeffords was more or less rendered ineffectual by the events of September 11, 2001 (Ornstein and Fortier 2003). Additionally, the Republican majorities in the House and Senate bore striking ideological resemblance to the occupants of the executive branch (Ornstein and Fortier 2006). From a logical perspective, one might expect this to be a period of negotiation and compromise, assuming any were necessary. Yet, as outlined above, the reality could not be further from what one might reasonably expect.

Thus begs the question: given the existence of ideologically coherent, united government for the majority of his tenure in office, what explains the proliferation of signing statements and constitutional challenges made by the Bush administration?

I argue that the driving force behind the extensive use of presidential signing statements during the Bush administration is the desire to set precedents which will extend the power of the presidency. In light of the fact that the Bush administration was operating under conditions of united government, I suggest that much of the sources of disagreement could have been resolved during the legislative process, given the relative homogeneity of policy positions between the Bush administration and the Republican Congress (Pierson and Hacker 2005). Instead, I
argue that the Bush administration in fact invites Congressional encroachment (or appearance thereof) in order to extend a unitary vision of the executive that dominates the Bush administration.
Statement of Issues:

The first critical literature to be discussed concerns the use of presidential signing statements. There is a near consensus among scholars in this area that the Bush administration’s use of signing statements is unconstitutional. To be more precise, by using presidential signing statements to constrain the practical application of law, the Bush administration is bypassing the constitutional process by making the executive branch (indeed, the president himself) the ultimate authority on constitutional interpretation (ABA 2006; Cooper 2002, 2005; Kelley 2003). The second key theoretical issue to be explored in the article is the question of the importance of the party as an organizational unit in Congress and the influence of united government on policy outcomes. There are a wide range of views on the subject of party and its importance in Congress. I shall adopt the viewpoint that parties do in fact matter, drawing on the insights of Cox and McCubbins (2005), among others.

The most well known opponent of the view that parties play a crucial role in the organization of Congress is Krehbiel (1991, 1998). The substance of his research yields the conclusion that the influence of party is
minimal. This arises from Kreibel’s observation that policy preferences would remain similar in the absence of organizations. That is, in the absence of party, policy outcomes would not change in any significant way. Krebiel’s key insight here is that the measure of party influence is its ability to make legislators vote in a way that is contrary to their policy preferences.

The scholarly literature on the theory of the unitary executive is a substantial body of work, notably in recent years (Eastland 1992; Ellis and Nelson 2006; Fisher 1997; Pfiffner 1999). The theory of unitary executive is grounded in the Founders “admonition to ‘take care that the laws be faithfully executed’” in Article II, Section 3 of the Constitution (Deering 2005). Despite the widely noted dubious nature of the rationale used to forward this theory of government, it holds sway with some scholars and good many of the current White House (ABA 2006; Cooper 2005, 2002). Indeed as Former Democratic Representative Skaggs notes, the experiences of Rumsfeld (as Chief of Staff) and Cheney (as Deputy Chief of Staff) in the Ford administration left an indelible mark on their conception of executive power (Skaggs 2006). Rumsfeld and Cheney (and their key aides, subsequently came to occupy numerous key positions in the Bush administration) and this has impacted
the strategy of the Bush administration’s conception of executive power (Woodward 2002).

The hypothesis I shall explore in this article is that the primary motivation behind the Bush administration’s use of presidential signing statements to challenge as unconstitutional certain provisions in legislation passed by Congress (and signed by the President) is three-fold.

The first element of my argument contends that Bush’s use of signing statements is to extend a particular vision of the U.S. government commonly known as the unitary executive. This view, advocated by such key members of the Bush administration as Vice-President Richard Cheney and former Defense Secretary Donald Rumsfeld (among numerous other key figures), holds that the executive should have powers well beyond the currently accepted norm in certain key policy areas.

The second element of my hypothesis is that the use of signing statements is somehow preferable to an outright veto. A veto destroys a bill in its entirety, killing whatever aspects of the bill the president actually supported. Using signing statements as a legislative tool to nullify certain provisions the executive is not in favor of is a much more efficient way of producing law from the executive’s perspective. In effect, using signing
statements in this manner is much like the President yielding his long sought-after line item veto.

The final element of my hypothesis contends that the Bush administration is forced to issue signing statements and is unable to resolve their objections to provisions of legislation due to ineffective legislative relations. In other words, incompetence (or indifference) on the part of the administration in negotiating over legislation is a product of the administration's efforts to accrue power to the executive branch. In other words, negotiation becomes a moot point when the goal is to assert the authority of signing statements as a legitimate tool of the executive branch.

An alternative hypothesis to be considered is that policy differences within the Republican-led Congress and the Republican-led Bush administration. That is, positions on the content of the bills to be analyzed later in this article are not partisan issues, but instead may resonate with members according to some other rationale, such as institutional interests, district interests or geographical imperatives.

It is the objective of this article to demonstrate that the primary motivation behind the Bush administration's use of presidential signing statements is not the product of
substantial policy divergence between the administration and the Congress; rather, it is a product of a widespread belief within the Bush administration that the presidency has become weak (Dean 2006). Presidential signing statements are thus a tool in the arsenal of these officials to take back and extend powers that they believe is under the proper purview of the executive branch. This sense of weakened presidency arises from not from the contemporary period, rather it is a reflection of Congress’ efforts to peel back authority in the post-Watergate period - when many of the key figures in the Bush administration gained their formative experience in government1 (Rudalevige 2005). Furthermore, I shall seek to demonstrate that the current power grab by the executive vis-à-vis the Congress represents a radical attempt at readjustment within the context of the historical ebb and flow of executive-legislative relations.

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**Research Design:**

The research design for this article employs a case-study approach to the question of motivations behind the Bush administration's use of presidential signing statements. In order to explore the nature and content of negotiations between Congress and the Bush administration on legislation that subsequently had signing statements with significant constitutional challenges attached to them, it is necessary to conduct interviews with key players on these particular pieces of legislation.

The key pieces of legislation to be analyzed have been selected in order to be considered representative of the range of legislation, covering the key areas that the Bush administration has sought to constrain the practical application of bills due to differing constitutional interpretations of some provisions within these pieces of legislation. The bills to be analyzed will be the Homeland Security Act, the Intelligence Reform and Terrorism Prevention Act and the Medicare Modernization and Prescription Drug Act. Each is a significant piece of legislation. Each deals with a different area of substantive policy, and has a presidential signing statement which makes significant constitutional challenges
to certain provisions within the bill, rendering these provisions inoperative in terms of practical application, despite the fact that they are in fact now law.

During the course of this study, I was able to secure interviews with a limited number of aides to committee members of the Committee on Homeland Security created by the Homeland Security Act, the House Permanent Select Committee on Intelligence and the House Ways and Means Committee who played a role in the negotiation of the three bills mentions above. In total, I interviewed six congressional aides to Lamar S. Smith (R - Texas) and Tom Davis (R - Virginia) of the Committee on Homeland Security; congressional aides to Terry Everett (R - Alabama) and Heather Wilson (R - New Mexico) of the House Permanent Select Committee on Intelligence; congressional aides to Dave Camp (R - Mississippi) and Jerry Weller (R - Illinois).

In addition to conducting interviews, I will survey the discussion of the three bills mentioned above in order to ascertain the extent of negotiation between the executive and legislative branches over the constitutional challenges raised by the Bush administration in the signing statements attached to these bills. This will be done by drawing upon the journalistic record (Congressional
Quarterly Weekly, New York Times and Washington Post), as well as examining the Bush administration's statements of administration policy, which are sent to Congress. A brief quantitative picture to be provided will be examining the number of signing statements attached to legislation passed during the first Bush administration, as well as the number of constitutional challenges made with these presidential signing statements. In addition to this, I will be looking at the sources of conflict the White House cites to justify their objections to aspects of the legislation passed during the Bush administration. This shall be used to demonstrate that the number of signing statements issued by the Bush administration is exceptionally high, and that the objections to provisions of the three pieces of legislation above are used in a fashion that renders President Bush the final arbiter of constitutionality.
Signing Statements: A Quantitative View

During the George W. Bush’s first term in office, he signed a total of 108 signing statements that contained within them 505 constitutional challenges. Below you will find a breakdown of signing statements and constitutional challenges made during Bush’s first term.

Table 1: Signing Statements Used by George W. Bush (2001-2004)

<table>
<thead>
<tr>
<th>Year</th>
<th># of Signing Statements</th>
<th>Constitutional Challenges</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>23</td>
<td>20</td>
</tr>
<tr>
<td>2002</td>
<td>34</td>
<td>168</td>
</tr>
<tr>
<td>2003</td>
<td>27</td>
<td>142</td>
</tr>
<tr>
<td>2004</td>
<td>23</td>
<td>175</td>
</tr>
</tbody>
</table>


The quantity of presidential signing statements attached to various pieces of is striking in its own right. Indeed, as Prof. Christopher Kelley notes: “What we haven’t until this administration is the sheer number being raised on every bill passing through the White House. That is what is staggering. The numbers are well out of the norm from any previous administration. However, the quantity of
signing statements and constitutional challenges would be interesting to note, but of little theoretical interest if their content were benign. In other words, if the signing statements had not been used to mount constitutional challenges, but rather in a manner consistent with previous administrations' use of signing statements as public relations documents.

This however is not the case. The Bush administration has raised serious constitutional issues in their signing statements. Declaring important sections of law inoperable due to constitutional objections that are never followed up on or subject to further scrutiny. Below you will find a table describing the rationale used by the Bush administration in objecting to provisions within pieces of legislation passed by the Congress and subsequently signed into law by President Bush.

<table>
<thead>
<tr>
<th>Reason</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power to Supervise the Executive</td>
<td>82</td>
</tr>
<tr>
<td>Exclusive Power over Foreign Affairs</td>
<td>77</td>
</tr>
<tr>
<td>Sole Control to Make Recommendations to Congress</td>
<td>54</td>
</tr>
<tr>
<td>Inherent National Security Powers</td>
<td>48</td>
</tr>
<tr>
<td>Constitutional Duties</td>
<td>40</td>
</tr>
</tbody>
</table>
Table 2: Rationale Offered by the Bush Administration for Constitutional Challenges

<table>
<thead>
<tr>
<th>Rationale</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commander in Chief Powers</td>
<td>37</td>
</tr>
<tr>
<td>Separation of Powers <em>(INS v. Chada)</em></td>
<td>24</td>
</tr>
<tr>
<td>Appointment Powers</td>
<td>23</td>
</tr>
<tr>
<td>Rejection of Mandatory Reporting or Approval by Congress</td>
<td>22</td>
</tr>
<tr>
<td>Unimpeded Authority to Negotiate in Foreign Affairs</td>
<td>15</td>
</tr>
<tr>
<td>Equal Protection of Due Process <em>(5\textsuperscript{th} Amendment)</em></td>
<td>15</td>
</tr>
<tr>
<td>Faithful Execution</td>
<td>9</td>
</tr>
<tr>
<td>Rejection of Power to Require Opinion in Writing from the Executive</td>
<td>6</td>
</tr>
<tr>
<td>Rejection of Involvement by Congressional Officers</td>
<td>6</td>
</tr>
<tr>
<td>Bicameralism and Presentment Clause</td>
<td>5</td>
</tr>
<tr>
<td>Federalism Limits <em>(Printz v. US)</em></td>
<td>3</td>
</tr>
</tbody>
</table>

**Signing statements at work:**

*Homeland Security:*

The creation of the Department of Homeland Security represented the largest expansion of the federal bureaucracy since Johnson's War on Poverty. Its creation also occurred in the context of the attacks of 9/11. That is to say, the Homeland Security Act of 2002 was a substantial piece of legislation. It would not be unreasonable to assume that serious negotiations took place between the Congress and the executive in passing this bill. Such an assumption would be partially correct.

The administration did in fact express concerns about provisions in the draft legislation. The Office of Management and Budget (OMB) released Statements of Administration policy on both the House and Senate versions of the bill, due to the divergent views that emerged from each chamber (OMB 2002; 2002a). These statements put out by OMB are interesting on a number of levels. Not only do they illuminate the Administration's thinking on issues of good public policy and constitutional authority, but also the extent to which the different houses of Congress
differ. The administration takes almost no issue with the contents of the House bill. No negotiation was required to reconcile the differences between the House and administration, there were none.

For this reason, I shall focus on the Senate bill and discuss the issues the administration took issue with and were subsequently included in the signing statement was attached to the final version of the Homeland Security Act 2002. The statement stipulates that the president would veto the bill unless "the new restrictions on the President's authority are removed" (OMB 2002a). These restrictions (including the requirement to submit regular reports to Congress) were in fact not removed, yet the bill was not vetoed. Instead the signing statement attached stated that these provisions would "be construed ... in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties" (Bush 2002).

Thus, the executive stated clearly in its statement of administration policy that it would veto any bill that included the above provisions. When the opportunity came
to veto such a bill, the administration chose not to. Rather, it attached a signing statement taking issue with those provisions, and in effect announced its intention to modify the original understanding of what those provisions actually meant. There appears to be a significant disconnect between the stated intentions of the administration and its actions. The existence of documents sent to Congress stating the administration’s position and subsequent journalistic discussion of this battle suggests that negotiation occurred to resolve these issues (Bettelhiem 2002, Williams and Nather 2002). Unfortunately, detailed evidence of the content of these discussions is lacking. This is the area where more research is required.

**Prescription Drug Bill:**

The Medicare Prescription Drug, Improvement and Modernization Act of 2003 was an equally significant piece of legislation passed during President Bush’s first term. The bill significantly expanded the size and scope of Medicare to include coverage to senior citizens for prescription drugs.² The OMB statement of administration policy is largely supportive of most provisions in the

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² This is an admittedly crude portrayal of this bill. The legislation requires seniors sign up for the proposed benefits and the actual savings to both seniors and the wider healthcare system is a point of contention. See Roig-Franzia, Manuel. “Seniors Skeptical of Medicare Bill.” *Washington Post.* 29 November 23, 2003, A03.
prescription drug bill (OMB 2003). In fact, excluding minor differences over a provision that would extend the proposed legislation to cover legal immigrants (a contradiction of current welfare policy the OMB contends), the administration appears to be wholly supportive of the Senate version.

The journalistic record supports this version of events only in its absence of coverage. Most articles discuss the need for compromise between the two chambers of Congress and the generally uninspired content of the legislation relative the hype it received as a transformative piece of legislation (Nather and Adams 2003; Adams 2003; Carey 2003). Despite this apparent satisfaction with the Senate version of the prescription drug bill, the Bush administration attached a signing statement to the final version of the bill that took issue with certain provisions.

Among these provisions, was the creation of a commission and working group that would seek information from the executive branch is performing their duties. The administration objected to this and stated the administration would “construe these provisions in a manner

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3 As the Senate plays a much larger role in foreign affairs and intelligence matters, relative to the House, the Senate is more concerned with abdicating authority in this realm. Despite this, the Senate version was largely in tune with the Administration’s position (at least according to the Statement of Administration Policy).
consistent with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair the deliberative processes of the Executive or the performance of the Executive's constitutional duties." In other words, the executive would see fit to deny information to this commission if it deemed information requested by said commission as sufficiently sensitive. Once again, a disconnect exists between the apparently innocuous objections issued by the administration's statement of policy and the subsequent objections raised in the signing statement after President Bush signed the Medicare Prescription Drug, Improvement and Modernization Act of 2003. The extent and content of negotiation between Congress and the Bush administration is an area where more research is required.

Intelligence Reform:

The passage of the National Intelligence Reform and Terrorism Prevention Act of 2004 is the most significant piece of legislation in this policy arena since the Truman administration (Babington 2004). The principal features of the bill creates a National Intelligence Director to coordinate the myriad intelligence agencies, and establishes a National Counterterrorism Centre where this
coordination will take place. Other comparatively minor provisions of the act include the creation of a transportation security strategy, the tightening of visa requirements. The legislation also broadly mandates better coordination among levels of government on intelligence matters.

The OMB's statement of policy on the intelligence reform bill expresses concerns about "provisions that purports to reorganize the President's internal policy staff" on the grounds that this contravened the separation of powers principle (OMB 2004). The statement also requests a broad statement that would recognize that all provisions would be executed according to the President's constitutional authority to oversee the unitary executive (OMB 2004). Thus, the administration's specific objections to provisions of the intelligence reform bill are rather sparse. Rather, the objections are rather broad, and largely serve as warning that provisions inconsistent with the President's understanding of his constitutional authority would be implemented according to that understanding, regardless of legislative intent.

Yet the Bush administration chose to attach a signing statement to the Intelligence Reform and Terrorism Prevention Act of 2004. In it, Bush raises constitutional
objections over the provisions requiring the executive to provide Congress with unimpeded information, provisions that call upon the submission of executive officials to legislative recommendations, and congressional attempts to regulate access to classified information (Bush 2004). Bush notes that all of these provisions will be construed “in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties” (Bush 2004). It is worth noting that while the administration offered only vague objections to the bill prior to passage, they now invoke the same objections to specific provisions of the bill.

Once again, the journalistic record remains rather quiet on the subject of executive-legislative negotiation over provisions of the bill. Given the rather vague objections issued by the Bush administration, this is not overly surprising. The majority of articles published about the intelligence reform bill concern issues of inter-chamber negotiation and the problem of budget authority (Fessenden 2004; Kady II 2004; Kandy II and Fessenden 2004).
Why were signing statements necessary?

The interviews I conducted, along with a prodigious amount of secondary evidence, reveal an interesting pattern that tentatively confirms the various elements of my argument regarding the motivation of the Bush administration's use of signing statements. These include a desire to extend the powers of the executive branch into the areas of legislative interpretation; a perceived disregard for the role of Congress due to a belief both in the superiority of the executive branch as well as a political calculation concerning the popularity of the president and thus his reluctance to negotiate in good faith with Congress, and the desire to fashion signing statements as an effective back-door line item veto. I shall deal with each in order below.

The first component of my hypothesis deals with a concerted effort within the Bush administration to promote a unitary theory of the executive. That is, to set precedents which would permit a further shift in the balance of power between the executive and Congress. The majority of congressional aides interviewed confirmed that, in their opinions, this played a role in the tenor and tone
of negotiation between their respective committees and the White House (Colinson; Little; Smith; Wilcox; Snedeker; Adamson 2007). Indeed as James Colinson, congressional aide to Rep. Davis noted: "One got the sense that, even though many Republicans on the Hill were in favor of some of these provisions, the White House simply did not make the necessary effort to placate its supporters on the Hill" (Colinson 2007). This can be described as a common refrain one heard from staffers I interviewed throughout this project.

The proffered reasoning varied somewhat more than the sentiment regarding what actually occurred. Part of the story, from the aides' perspectives was about a power grab by the White House that arose from their belief that the executive branch was the preeminent institution within the federal government. One aide, Wesley Little, expressed a belief that the administration’s use of signing statements were a strategy to set a precedent upon which later president’s could draw as a source of legitimacy for Bush’s use of signing statements. As he put it, this “would level the playing field between the Congress and White House in making claims about legislative intent” (Little 2007).

This line of reasoning seems to be mirrored in most of the secondary literature to found on the subject of White
House intent regarding the use of signing statements. The key figure in pushing this unitary theory of the executive is the Vice President Dick Cheney and his now chief of staff David Addington. Their conception of executive power is remarkably broad. For Cheney, the use of signing statements represented a key pillar in the strategy of shifting the balance of power decisively toward the executive branch. According to Charlie Savage, the Bush administration's reasoning on this matter is as follows:

If a president has the power to instruct the government not to enforce laws that he alone has declared to be unconstitutional, then he can free himself from the need to obey laws that he alone says restrict his actions unconstitutionally - even when the Supreme Court, were it given the opportunity to review his theory, would be unlikely to agree with it (Savage 2007)

This view is elucidated in more legalistic terms by one of the key architects of the Bush administration's legal strategy, Pro. John C. Yoo, who served as Deputy Assistant Attorney General in the Justice Department's Office of Legal Council during much of the Bush administration and is now teaching at the University of California - Berkeley. Yoo argues the constitution gives the executive broad authority to interpret the law, especially in times of war. In Yoo's interpretation of the constitution, neither Congress nor the courts have any
standing to check this power (Yoo 2006; 2005). Indeed, Yoo explicitly argues, "the White House has declared that the Constitution allows the president to sidestep laws that invade his executive authority. That is why Mr. Bush has issued hundreds of signing statements — more than any previous president — reserving his right not to enforce unconstitutional laws" (Yoo 2006). Of course, Yoo conveniently omits any mention of how Congress or the Courts might counteract this strategy, leaving the President the final say as what is unconstitutional or not. Furthermore, he fails to offer a plausible explanation as to Bush simply doesn’t veto these bills. Nevertheless, these words represent the thinking inside the Bush White House.

This sentiment (though in the context of refutation) is echoed by numerous other scholars and journalists (Cooper 2002, 2005; Kelley 2002; Skaggs 1006) and seems to bear itself out in the manner in which the Bush administration has used signing statements in the three bills outlined above.

Unfortunately, secondary research is all one has to go on in deigning the motivations of the White House, as I was unsuccessful in securing any interviews with past or present White House aides. Perhaps in the coming years, as
the veil of secrecy is lifted from the inner workings of the Bush administration the definitive account of their motivations will be brought to light. In the meantime, the available evidence suggests this is one of the key rationales for the administration's use of signing statements.

The second explanatory factor I identified earlier in the piece was the lack of communication between the White House and Congress over contentious issues in the bills discussed above and the White House's apparent lack of focus on this problem. As Wilcox discusses in his interview, "the White House, despite its grandstanding in the media over the McCain amendment, seemed comparatively disengaged from the negotiation process to have the language removed from the bill" (Wilcox 2007). While it is plausible Wilcox simply was not informed regarding communications at the highest levels, this does provide at least some indication of the Bush administration's lack of concern for good faith negotiations. Furthermore, that key aides were unaware of concerted efforts on the part of the White House to have this highly contentious issue dealt with prior to the signing of the bill suggests their engagement on more minor issues that found their way into signing statements to be lacking.
While an understanding of the White House’s lack of engagement during negotiation of contentious provisions of bills must include the Bush administration’s general distaste for the necessities of working with Congress, one must also take into account the political context under which these bills were being negotiated. The President enjoyed enormous popular support within the country for much of his first term, particularly after the events of September 11, 2001, staying above 50% (and often substantially so) for much of his post September 11 first term (Brody 2003). This led to a perceived arrogance within the White House that it could simply tell Congress what it wanted and no further efforts were needed. As former Majority Leader Dick Armey put it, the Bush administration failed to “grasp a basic truth about congressional relations: ‘You can’t call her ugly all year and expect her to go to the prom with you’” (Green 2007).

In other words, the Bush team approached their legislative proposals as a sort of fait accompli, requiring little more than presenting their legislative agenda to Congress.

Thus, as one can see from the interviews conducted and the secondary evidence provided, the Bush administration appear to have used signing statements in place of

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4 All bills under consideration in this piece were enacted post-9/11.
meaningful negotiation with Congress on issues where the White House deemed constitutionality to be at stake. Out of a combination of their desire to extend the power of the executive branch, buttressed by their standing in the court of public opinion, the administration chose to use signing statements as legislative strategy in place good faith negotiation.

The final element of my argument put forth in this paper concerns the Bush administration’s desire to use signing statements as a line-item veto. This has been a long sought-after tool by many presidents and was briefly made a reality during the Clinton administration. A subsequent Supreme Court decision, however, ruled that the line-item veto was unconstitutional (Clinton v. City of New York, 1998). In a stroke of potential irony current presidential contender, Rudy Giuliani, brought this lawsuit forth. Despite this setback for presidents seeking an official line-item veto, the Bush administration appears to have stumbled upon the next best thing, the signing statement.

Over the course of my interviews three of the six interviewees mentioned this a possible reason for the Bush administration’s penchant for using signing statements in place of either meaningful negotiation or outright veto
(Snedeker, Smith and Adamson 2007). To quote Smith, the "signing statement seems to be the White House’s answer to the Court’s rejection of the line-item veto" (Smith 2007). Indeed, as Savage notes, “Bush’s legal team was using signing statements as something better than a veto - something close to a line-item veto” (Savage 2007). This seemed like the perfect strategy: an effective line-item veto that cannot be overridden by the Congress, and until the legal process works itself out, it can’t be overridden by the Courts either. This is largely how things have played out to this point. Bush has successfully, at least for the time being, wielded the line-item veto pen through the use of signing statements, and in the process expanded the power of the presidency.

Of course, it is not at all clear how long this state of affairs will persist. Certainly this signing statement strategy will endure through the end of the Bush presidency, but how much longer? If successful, which seems ever more plausible given the rightward shift in the Court’s balance of power, this could indeed represent Bush’s most important legacy. This however is a topic for future scholars.

To conclude, the evidence gleaned from interviewing a limited number of congressional aides, as well as an
examination of secondary sources suggests the validity of the hypothesis I have put forward. The primary motivations behind the Bush administration's use of signing statements as a legislative strategy arise from its desire to extend the powers of the presidency, as formalized in the unitary theory of the executive. This theory seeks to make the executive branch the preeminent institution within the federal government. Signing statements assist in facilitating this by acting as signifiers of legislative intent on the part of the executive in court proceedings. Furthermore, it acts as an effective line-item veto for the president to eschew aspects of a piece of legislation that he regards as unconstitutional. In addition, it permits the president the last word on these constitutional objections. This is a product of the administration's belief in the power of the presidency, and their desire to extend it led the Bush White House to either ignore or only half-heartedly engage in negotiation with the Congress on these matters.
Further Research:

As has been noted above, more research is required in order to satisfactorily answer this pressing question of why, given the conditions of united government in a relatively ideologically cohesive party, were issues of constitutionality not resolved during the legislative process. I have proposed a series of in-depth interviews of the aides to key players in the negotiation of the Homeland Security Act (2002), the Prescription Drug, Improvement and Modernization Act (2003) and the Intelligence Reform and Terrorism Prevention Act (2004). This would involve meeting with officials both in the Bush administration responsible for legislative affairs and a greater number of aides from the relevant committees in the Congress.

I propose to ask questions of White House staff regarding the strategy they chose to employ in engaging Congress about their concerns over the provisions of the pieces of legislation that were identified in the signing statements issued by the Bush administration. Indeed, if there was a conscious discussion of strategy at all.

- In the White House’s opinion, how did these negotiations proceed?
• Did Congress respond to their specific concerns?
• Was there a point where an impasse was reached and negotiation was then stymied?
• If so, what were the issues that led to that? Was it resolved?
• What is the process of constructing a signing statement like?
• Why choose to attach a signing statement rather than veto a bill?
• What are the advantages and disadvantages to using signing statements?

The above represents a sampling of the line of questioning I intend to pursue with White House officials.
Conclusion:

This article has demonstrated that throughout the administration of George W. Bush, there has been a marked increase of signing statements. Not only has there been a significant increase in the number of signing statements, but the nature of the signing statements has also changed in a dramatic way. Signing statements are now used to express the administration’s position regarding the constitutionality of provisions contained in legislation the President signs into law. These constitutional objections effectively render these provisions inoperative, as the statements signify the administration’s intent to ignore these provisions, or to implement them in a manner consistent with its understanding of the constitution (which may amount to not implementing them).

I have put forward the question of why, given the existence of united government and an ideologically homogenous party in power, has the Bush administration chosen (or been forced) to use so many signing statements? The underlying assumption embedded in this question is that reconciliation of these issues should be able to be
achieved during the legislative process, given the context noted above (united government, ideological cohesion).

I have forwarded the thesis that this is a deliberate strategy by the Bush administration in order to extend the power of the presidency relative to the Congress, both as a means of inserting the executive into the question of legislative intent, but also to bypass Supreme Court decisions regarding the constitutionality of the line-item veto. In practical effect, the Bush administration has attempted to usurp congressional authority by stealth - allowing Congress to deliberate and then constraining the practical application of legislation via the signing statement. Alternative hypotheses include the possibility that real ideological differences exist within the Republican leadership in the Congress and the Bush administration. While this may be true on relatively minor issues dealing with institutional prerogative, this paper has demonstrated that the Bush administration’s use of signing statements as a legislative strategy goes beyond these differences.

I have employed a case-study approach to the question by looking at three pieces of legislation: the Homeland Security Act (2002), the Medicare Prescription Drug, Improvement and Modernization Act (2003), and the
Intelligence Reform and Terrorism Prevention Act (2004).

There is some evidence, based on the administration’s statements of policy and the journalistic record, that some of the administration’s objections, which later found their way into Bush’s signing statements, were aired during the legislative process. None of the evidence on public record, however, details the extent of the administration’s objections or the scope of negotiation that actually occurred between the White House and the relevant committees in Congress. While the interviews conducted with congressional aides close to negotiations on legislation that resulted in the Bush administration’s issuing of signing statements with substantial constitutional challenges shed important light on that side of the equation, it does not tell the whole story. In order for a more complete picture of the administration’s machinations regarding their unprecedented use of signing statements to come to light, in-depth interviews with administration officials will be necessary.
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