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**'SIGNING STATEMENTS' ARE A PHANTOM TARGET**

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THE FINAL REPORT of the American Bar Association Task Force opposing presidential "signing statements" barks up a constitutionally barren tree. It's not the statements that are the true source of constitutional difficulty. On the contrary, signing statements, which a president can issue to indicate the way he intends to direct his administration to construe ambiguous statutes, are informative and constitutionally unobjectionable. So too are many signing statements signaling a president's intention not to enforce a particular provision that he deems constitutionally offensive in an otherwise unobjectionable omnibus measure that he's not prepared to veto.

Statements of the latter character have been issued by prior presidents of both political parties without protest from critics in Congress or elsewhere, and wisely so, for it seems to me a serious mistake to maintain that a president's only legitimate options are either to veto an entire bill or to sign it and then enforce it in its entirety regardless of his good-faith views as to constitutional infirmities, either of some part of the bill or of some set of possible applications.

A number of US senators, on both sides of the aisle, appear to be interested in knowing what Congress might be able to do legislatively to increase the likelihood that a lawsuit challenging these statements can go forward, so that what they regard as executive lawmaking in defiance of the powers of Congress won't go unchallenged. But these requests for assistance presuppose that issuing signing statements represents "executive lawmaking" in "defiance of the powers of Congress," a premise I cannot share.

To be sure, I believe that President Bush has abused the practice of using signing statements as signals of presidential intentions regarding both ambiguous statutes and ones with embedded unconstitutional provisions. But the fact that the incumbent president has used such statements in ways that expose a certain cynicism in signing rather than vetoing measures that he has no intention of applying and enforcing as Congress intended asserting that he regards Congress as having trespassed on his constitutional prerogatives is objectionable not by virtue of the signing statements themselves but rather by virtue of the president's failure to face the political music by issuing a veto and subjecting that veto to the possibility of an override in Congress. It is also objectionable on occasion because of the inflated view of executive prerogative that the president has often

announced.

Challenging the signing statements themselves, or the general practice of using them, does not represent even a plausible way of contesting this president's manifestly unreviewable decision to sign rather than veto any particular law, however cynical that decision might be and however unconvincing his explanations are. Nor does challenging such statements represent a plausible way of contesting the overblown character of this president's views of his constitutional prerogatives. That is something that can be tested judicially only in a genuine "case or controversy" that arises out of a decision to carry out the threat of non-enforcement made by his signing statement, and by someone with the constitutional standing to press such a challenge against what amounts to an executive omission to act.

Nothing Congress could possibly do seems to me capable of generating a ripe "case or controversy," within the meaning of Article III of the Constitution, out of the president's mere issuance of the underlying threat. Nor is it clear that Congress could endow anyone with the proper legal interest in a matter, without which Article III's standing to press such a challenge would be absent, even if the requisite case or controversy was thought to exist.

None of this is meant to deny that, when presidential defiance of a congressional directive takes the form not simply of an omission to act but of a course of conduct by members of the executive branch that causes injury to others as, for example, by subjecting to inhumane treatment those whom the president deems "unlawful combatants" and whom he refuses to shield in accord with the Geneva Conventions, as in *Hamdan v. Rumsfeld* the individuals subjected to such treatment may have suitable standing to mount a challenge under Article III. But such a challenge would not be to the signing statement that arguably predicted those individuals' fates, but instead to the conduct that made good on the president's threat.

And Congress may surely confer standing on individuals and groups that it reasonably deems likely to be victims of such practices as warrantless electronic surveillance in violation of the Fourth Amendment or of the Foreign Intelligence Surveillance Act standing to challenge programs of the National Security Agency or others when individuals or groups reasonably believe they are being targeted. Suitable congressional legislation may replace judicial findings with legislative findings of fact regarding the risk that members of a designated group are indeed likely to be so victimized, in circumstances where they might be unable to demonstrate the relevant facts themselves. But no form of legislation that Congress might enact, it seems to me, could manufacture an injury where there is none. And I see no injury but only insult in the signing statements to which both the ABA Task Force and various senators have objected.

On the related matter of presidential signing statements that tout the "unitary executive" theory in particular, what seems crucial to recognize is that the concept that would limit congressional oversight of the president, as it is bandied about both by Bush in his signing statements and by many of his critics, is too amorphous to

represent a useful organizing principle for assessing the undoubtedly dangerous and inflated views of unilateral presidential power that have characterized much of what this administration has done with respect to the Guantanamo detention camps, the treatment of detainees in the "war on terror," the NSA's once-secret program of warrantless electronic surveillance in defiance of FISA and in purported reliance on the Authorization to Use Military Force, and much else.

Far more useful would be deflating the concept itself, demonstrating its obfuscatory character, and insisting, in some more focused form than the Task Force report does, that the Necessary and Proper Clause of Article I of the Constitution empowers Congress, not the president, both to structure and to regulate the overall conduct of officials in the executive branch an undertaking entailing an exercise of lawmaking authority that is not part of "the executive power" vested by Article II in the president.

Finally, insofar as President Bush has exercised his powers to engage in surreptitious electronic surveillance without court-issued warrants in violation of FISA, on the basis of an implausibly broad construction of his inherent Article II powers and a reading of the Authorization to Use Military Force that was rightly repudiated in a slightly different context by the Supreme Court's Hamdan decision, the "fix" reportedly negotiated between the White House and Senator Arlen Specter, in which the legality of the NSA program of warrantless surveillance would be submitted for adjudication on the basis of a one-sided presentation to the FISA court by the executive branch, is as transparently phony and futile as is the suggestion of a congressionally enacted vehicle to confer standing on someone to obtain a judicial ruling on the legality of this president's signing statements. The FISA court would be authorized to control the evidence to be considered, the forum for its consideration, whether the proceedings would be public or secret, and whether the result would be published or kept under wraps. And it alone would be authorized to appeal an adverse ruling.

Although Congress has ample authority to identify various groups as likely victims of the contested warrantless wiretapping practice and to authorize such groups to sue in federal court to obtain a definitive ruling on the constitutional and other legal questions presented, Congress has no authority of which I am aware to create a secret, one-sided pseudo-adjudication of those questions on the basis of a non-adversary presentation fully controlled by one side.

Whatever else one might say about the sound of one hand clapping, it is most assuredly not the sound of a genuine court resolving a genuine case or controversy in the way that courts have functioned for centuries, whether with or without special safeguards to protect national security from the perils of leaky courtrooms.

What the ABA Task Force attack on the phantom of the Bush signing statements, the legislative platform for challenging those statements judicially that its position is inspiring, and the phony Bush-Specter deal for an asymmetrical whitewash of the contested program of NSA surveillance have in common is that all three compound rather than correct the distortions in the separation of powers and the system of

checks and balances that the Framers had the farsightedness to design but that latter-day pretenders to the throne of constitutionalism and the crown of original intent routinely flout even as they profess fealty to the ideals they embody.

It's about time to take the Constitution seriously rather than playing it for whatever partisan advantage its symbols appear to offer. Durable though the constitutional system has been, and enduring though I have long believed it to be, there's only so much abuse that even it can take without collapsing under the weight of the garbage being heaped on its sturdy but far from invincible frame.