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United States Government Accountability Office  
Washington, DC 20548

B-308603

June 18, 2007

The Honorable Robert C. Byrd  
Chairman, Committee on Appropriations  
United States Senate

The Honorable John Conyers, Jr.  
Chairman, Committee on the Judiciary  
United States House of Representatives

Subject: *Presidential Signing Statements Accompanying the Fiscal Year 2006  
Appropriations Acts*

This letter responds to your request that we examine the fiscal year 2006 appropriations acts and the President's accompanying signing statements to identify the provisions in the acts to which the President took exception and to determine how the President executed those provisions. We also examined how the federal courts have treated signing statements in their published opinions.

We found that in 11 signing statements the President singled out 160 specific provisions from the fiscal year 2006 appropriations acts. We examined 19 of these provisions to determine whether the agencies responsible for their execution carried out the provisions as written.<sup>1</sup> Of these 19 provisions, 10 provisions were executed as written, 6 were not, and 3 were not triggered and so there was no agency action to examine.<sup>2</sup> With regard to the use of signing statements by the federal courts, we found that they cite or refer to them infrequently and only in rare instances have relied on them as authoritative interpretations of the law.

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<sup>1</sup> This group includes at least one provision from each appropriations act and at least one provision from the various categories of presidential concern or objection we identified. A detailed scope and methodology appears at Enclosure I.

<sup>2</sup> For an example, see page 10.

In this review, we did not assess the merits of the President's objections, nor did we examine the constitutionality of the provisions to which the President objected.

## BACKGROUND

There is no established definition of "signing statement." Signing statements usually take the form of a presidential statement or press release issued in connection with the President's signing of a bill. There is even some disagreement as to the first historical use of a signing statement. Many scholars cite President Andrew Jackson's statement accompanying an appropriations act involving internal improvements as the first signing statement.<sup>3</sup> Other scholars point to a statement made by President James Monroe a month after signing a law regulating the appointment of military officers.<sup>4</sup> Various presidential administrations have used signing statements since the early nineteenth century with a variety of responses by Congress and the courts.<sup>5</sup>

Some signing statements praise the newly signed law and those involved in its passage. An example of such a signing statement was President Clinton's statement upon signing the Omnibus Consolidated Appropriations Act, 1997:

"This bill is good for America, and I am pleased that my Administration could fashion it with the Congress on a bipartisan basis. It moves us further down the road toward our goal of a balanced budget while protecting, not violating, the values we share as Americans—opportunity, responsibility, and community."<sup>6</sup>

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<sup>3</sup> President Jackson's statement declared that a road, which Congress meant to run from Detroit to Chicago, would not extend beyond the Territory of Michigan. This statement sparked criticism by the House of Representatives as being an item veto of some of the bill's provisions. Louis Fisher, *Constitutional Conflicts Between Congress and the President*, 128 (1991); Library of Congress, Congressional Research Service (CRS), *Presidential Signing Statements: Constitutional and Institutional Implications*, No. RL33667 (Apr. 13, 2007), at 2.

<sup>4</sup> Congress criticized President Monroe for not following the law, and he responded with a statement declaring that he, the President, had the constitutional authority to appoint officers, not Congress. Christopher Kelley, *A Comparative Look at the Constitutional Signing Statements: The Case of Bush and Clinton* (Apr. 2003) (paper presented at the 61<sup>st</sup> Annual Meeting of the Midwest Political Science Association, available at <http://mpsa.indiana.edu/conf2003papers/1031858822.pdf> (last visited June 14, 2007)), citing Christopher May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 116 (1998).

<sup>5</sup> For a brief history of presidential signing statements, see CRS No. RL33667, at 2–10.

<sup>6</sup> *Statement by President William J. Clinton upon Signing H.R. 3610*, 32 Weekly Comp. Pres. Doc. 1935 (Sept. 30, 1996).

The signing statement goes on to discuss specific parts of the act in similar fashion. In other signing statements, presidents have offered their interpretation of or have explained how agencies will execute a new law. Presidents also have raised constitutional concerns or objections to new statutes in signing statements. In some instances, a single signing statement serves some or all of these purposes. In other cases, presidents have issued multiple signing statements with different purposes for a single law. Not all laws have accompanying signing statements.

According to the Congressional Research Service, presidential “signing statements have become increasingly common since the Reagan Administration” and have been used by Presidents to raise constitutional or interpretive objections to congressional enactments.<sup>7</sup> Both the Senate and House of Representatives have held hearings in the past year on signing statements.<sup>8</sup>

For fiscal year 2006, the President issued signing statements for 11 of the 12 appropriations acts passed by Congress.<sup>9</sup> These signing statements<sup>10</sup> single out 160 provisions in the appropriations acts that raise some constitutional concern or objection of the President. In some cases, the President used these signing statements to direct the executive branch to construe the provisions in a manner that the President believed would cure the provisions’ perceived constitutional deficiencies.

#### PRESIDENTIAL CONCERNS AND OBJECTIONS

We categorized each of the 160 provisions specifically identified by the President in the signing statements according to the nature of the President’s concern with or

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<sup>7</sup> CRS No. RL33667, at 27. According to CRS, President Reagan issued 276 signing statements over eight years, 71 of which (26 percent) raised constitutional concerns or objections. President George H. W. Bush issued 214 signing statements over four years, 146 of which (68 percent) raised constitutional concerns or objections. President Clinton issued 391 statements in eight years, 105 of which (27 percent) raised constitutional concerns or objections. President George W. Bush has issued 149 signing statements, 127 of which (85 percent) raised constitutional concerns or objections. *Id.* at 2.

<sup>8</sup> On June 27, 2006, the Senate Committee on the Judiciary of the 109<sup>th</sup> Congress held a hearing on presidential signing statements. On January 31, 2007, the House Committee on the Judiciary of the 110<sup>th</sup> Congress also held a hearing on signing statements.

<sup>9</sup> The President did not issue a signing statement for the Legislative Branch Appropriations Act for fiscal year 2006.

<sup>10</sup> Hereinafter “signing statements” refers to these 11 signing statements unless otherwise noted.

objection to the provision. These concerns or objections are rooted in the President's understanding of his constitutional role and powers. Based on the language used in the signing statements, we identified 12 interconnected categories of concern or objection. Our understanding of each of the categories and their constitutional bases comes from the brief statements in the signing statements themselves, from the provisions cited therein, and, in some cases, from other executive branch statements.<sup>11</sup>

We list the 12 categories in Enclosure II. For ease of explanation, we sorted these categories into four groups: (1) objections related to the theory of the unitary executive; (2) objections related to the Commander in Chief power, national security, foreign relations, or law enforcement; (3) objections related to the bicameralism and presentment clauses of the Constitution; and (4) miscellaneous categories related to the Recess Appointments Clause and the Fifth Amendment.

We did not address the merits of the President's interpretation of his constitutional role and powers. Nor did we address the applicability of any particular concern or objection to the specific provisions addressed under that concern or objection. We also did not examine the constitutionality of the provisions to which the President objected.

### The Theory of the Unitary Executive

Four of the 12 categories we identified relate to the theory of the unitary executive. The signing statements themselves do not explain the unitary executive theory, but simply assert it as a basis for the President's concern or objection to a number of different provisions. According to the Office of Legal Counsel (OLC), the theory of the unitary executive is rooted in Article II of the Constitution and, specifically, in the vesting in the President of the executive power<sup>12</sup> and the instruction that the President "take Care that the Laws be faithfully executed."<sup>13</sup> OLC has opined that these constitutional provisions provide the President a right to control executive branch employees and officers:

"In order to fulfill those [constitutional] responsibilities, the President must be able to rely upon the faithful service of subordinate officials. To the extent that Congress or the courts interfere with the President's

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<sup>11</sup> For more views of the executive branch on some of these issues, see *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124 (1996); *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. Off. Legal Counsel 248 (1989).

<sup>12</sup> "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1.

<sup>13</sup> U.S. Const. art. II, § 3.

right to control or receive effective service from his subordinates within the Executive Branch, those other branches limit the ability of the President to perform his constitutional function.”<sup>14</sup>

OLC has also described the unitary executive theory this way:

“Because no one individual could personally carry out all executive functions, the President delegates many of these functions to his subordinates in the executive branch. But because the Constitution vests this power in him alone, it follows that he is solely responsible for supervising and directing the activities of his subordinates in carrying out executive functions.”<sup>15</sup>

These two versions are not exclusive, and other versions exist.<sup>16</sup> The signing statements do not specify whether they are adopting either of these versions of the unitary executive theory or some other version.

The provisions in the categories relating to the unitary executive require some action or organization within the executive branch. Common examples are provisions that require some type of communication by an executive branch employee or officer to Congress, such as transmitting information to Congress,<sup>17</sup> consulting with Congress

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<sup>14</sup> Letter Opinion for the General Counsel, Department of Health and Human Services, *Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, OLC Opinion, May 21, 2004, available at [www.usdoj.gov/olc/crsmemoresponse.html](http://www.usdoj.gov/olc/crsmemoresponse.html) (last visited June 14, 2007).

<sup>15</sup> *Statute Limiting the President's Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet*, 12 Op. Off. Legal Counsel 47, 48 (1988).

<sup>16</sup> For example, Christopher S. Yoo, Steven G. Calabresi, Laurence D. Nee, and Anthony J. Colangelo have published a four-part series defending the unitary executive theory by detailing how each presidential administration has interpreted and applied the theory. Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 Case. W. Res. L. Rev. 1451 (1997); Steven G. Calabresi and Christopher Yoo, *The Unitary Executive During the Second Half-Century*, 26 Harv. J.L. & Pub. Pol'y 667 (2003); Christopher S. Yoo, Steven G. Calabresi, and Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 Notre Dame L. Rev. 1 (2004); Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 Iowa L. Rev. 601 (2004).

<sup>17</sup> Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, § 719, 119 Stat. 2120, 2152 (Nov. 10, 2005).

or congressional committees,<sup>18</sup> or making legislative recommendations to Congress.<sup>19</sup> According to OLC, the provisions similar to these are constitutionally suspect because they interfere with the President's right to control executive branch employees and officers.<sup>20</sup>

The President also objects to certain provisions based on an asserted authority to withhold from Congress information sometimes considered privileged. These provisions require an executive branch entity to provide Congress with information that the President believes could compromise the deliberative processes of the President or interfere with his general constitutional duties.<sup>21</sup> In one case the signing statement links the authority to withhold information to the authority to supervise the unitary executive branch.<sup>22</sup>

#### Commander in Chief, National Security, Foreign Relations, and Law Enforcement

Four of the twelve categories relate to a function of the federal government in which the President asserts he has the primary constitutional role. The first of these categories contains provisions that could, according to the President, interfere with his constitutional role as Commander in Chief.<sup>23</sup> Such provisions relate to transferring defense articles or services to other nations or international organizations, integrating foreign intelligence information, conducting foreign

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<sup>18</sup> Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Pub. L. No. 109-102, § 534(k), 119 Stat. 2172, 2210 (Nov. 14, 2005).

<sup>19</sup> Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-54, § 101, 119 Stat. 499, 520 (Aug. 2, 2005).

<sup>20</sup> *See, e.g.*, 12 Op. Off. Legal Counsel at 47; May 21, 2004, OLC Opinion.

<sup>21</sup> *Statement on Signing the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1800 (Dec. 5, 2005); *Statement on Signing the Military Quality of Life and Veterans Affairs Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1799 (Dec. 5, 2005) (Veterans Affairs Statement); *Statement on Signing the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1920 (Jan. 2, 2006) (Labor Statement). These statements object to such provisions because they “could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.”

<sup>22</sup> Veterans Affairs Statement.

<sup>23</sup> U.S. Const. art. II, § 2, cl. 1.

intelligence operations, and managing the command and control relationships within the Armed Forces.

A second category, also based on the President's authority as Commander in Chief, relates to the President's authority to classify and control access to national security information. The signing statements assert that the Supreme Court of the United States has held that the power to classify and control access to national security information does not depend on a legislative grant of authority but flows from the Constitution. The provisions in this category relate to access to or disclosure of national security information to nonexecutive entities, such as congressional committees.

In a third category are provisions that, according to the signing statements, "purport to direct or burden the Executive's conduct of foreign relations."<sup>24</sup> According to one signing statement, the Constitution commits to the President the primary responsibility for conducting the foreign relations of the United States.<sup>25</sup> There is no single constitutional provision establishing presidential authority over foreign relations like the Commander in Chief clause. The President does have specific constitutional authority to make treaties and appoint ambassadors with the advice and consent of the Senate, and to receive ambassadors.<sup>26</sup>

A fourth category contains one provision relating to the President's law enforcement powers. According to the signing statement addressing this provision, decisions on the deployment of law enforcement officials are part of the President's executive power, and Congress cannot dictate to the President how to wield this power.<sup>27</sup>

#### Bicameralism and Presentment Clauses of the Constitution

Two of the 12 categories relate to the bicameralism and presentment requirements of the Constitution. The Constitution requires that before a bill can become a law it must pass both the House of Representatives and the Senate (bicameralism) and be

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<sup>24</sup> *Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1718 (Nov. 21, 2005); Veterans Affairs Statement; *Statement on Signing the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1764 (Nov. 28, 2005).

<sup>25</sup> Veterans Affairs Statement.

<sup>26</sup> U.S. Const. art. II, § 2, cl. 2; § 3.

<sup>27</sup> *Statement on Signing the Department of Homeland Security Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1558 (Oct. 24, 2005).

presented to the President for his signature (presentment).<sup>28</sup> The President then can sign or veto the bill, but if a bill is vetoed, Congress can vote to override the President's veto.<sup>29</sup>

The first category related to bicameralism and presentment contains over 70 provisions. The President identified these 70 provisions as implicating the constitutional principles enunciated by the Supreme Court in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). At issue in *Chadha* was a statute which allowed a resolution passed by only one house of Congress to override a determination made by the Attorney General under a grant of statutory authority. The Court held that such a "legislative veto" was unconstitutional because it allowed one house of Congress to overrule the Attorney General's lawful action, instead of both houses voting to overrule the action and presenting the passed bill to the President. *Chadha*, 462 U.S. at 959. Some of the provisions in this category require agencies to obtain congressional committee approval prior to making certain types of obligations, expenditures, or reprogrammings of appropriated funds. Other provisions require prior approval for a plan for expenditure. In a few cases, the provision directs the agency to submit a report for approval.

In the second category the President refers to bicameralism and presentment, but does not cite *Chadha*. Many of these provisions require an agency to act in accordance with existing documents, such as joint statements of managers, committee reports, or Senate reports. Although the law refers to these documents, the President declares, "These documents do not satisfy the constitutional requirements of bicameral approval and presentment to the President needed to give them the force of law."<sup>30</sup>

### Miscellaneous Objections

The President also objects to certain provisions that he feels implicate two constitutional clauses not directly related to the others discussed above.

The first of these is the recess appointments clause, which grants the President the power to fill all vacant appointments that occur during the recess of the Senate with a commission that expires at the end of the next congressional session.<sup>31</sup> The President identified one provision in relation to his power to make recess appointments. That provision prohibited the use of appropriated funds to pay the salary of any person serving in a position for which the President nominated the person and the Senate

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<sup>28</sup> U.S. Const. art. I, § 7, cl. 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Statement on Signing H.R. 2361*, 41 Weekly Comp. Pres. Doc. 1243 (Aug. 2, 2005).

<sup>31</sup> U.S. Const. art. II, § 2, cl. 3.

voted not to confirm the nomination. The President declared that the executive branch would “construe this provision in a manner consistent with the President’s constitutional authority to make recess appointments.”<sup>32</sup>

The second of these categories involves the Fifth Amendment to the Constitution, which prohibits the federal government from depriving any person of life, liberty, or property without due process of law.<sup>33</sup> Several signing statements observe that the act accompanied by the signing statement contains provisions which raise an objection or concern under the Fifth Amendment. According to the signing statements, these provisions relate to race, ethnicity, gender, and state residency. Although four signing statements make this observation generally, only one signing statement identified specific provisions.

## AGENCY ACTIONS

Of the 160 provisions of law to which the President raised some concern or objection, we selected 19 provisions to examine to determine how the agencies were executing them. This group includes at least one provision from each appropriations act and at least one provision from 11 of the 12 categories of presidential concern or objection we identified.<sup>34</sup>

We contacted the relevant agencies and asked them how they were executing the provisions. After evaluating the responses we received, we determined that agencies failed to execute six provisions as enacted. Ten provisions were executed as written and three provisions were not triggered so there was no agency action to assess. Of the six provisions that agencies did not execute as written, the President objected to three on the grounds that they violated the bicameralism and presentment clauses of the Constitution as enunciated in *Chadha*. The President objected to two others on unitary executive grounds, and a single provision on the grounds that it infringed on his law enforcement powers. A detailed summary of our findings for each of the 19 provisions appears in Enclosure III. Although we found the agencies did not execute the provisions as enacted, we cannot conclude that agency noncompliance was the result of the President’s signing statements.

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<sup>32</sup> *Statement on Signing the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1800 (Dec. 5, 2005).

<sup>33</sup> U.S. Const. amend. V.

<sup>34</sup> We did not investigate provisions to which the President objected on the grounds that they impinged upon his general authority as Commander in Chief. *See* Scope and Methodology, Enclosure I.

Agencies did not execute six provisions as follows:

- Chadha: The Pension Benefit Guaranty Corporation (PBGC) did not seek approval from the congressional appropriations committees prior to incurring obligations for administrative expenses beyond the level set by Congress in the appropriations act. However, PBGC did notify the committees of its action.
- Chadha: The Federal Emergency Management Agency (FEMA) did not submit a proposal and expenditure plan for housing as directed by Congress in the appropriations act because, according to FEMA, it does not normally produce such plans.
- Chadha: The Department of Agriculture did not obtain prior approval for a transfer of funds as required by the applicable appropriations act. However, it did notify the committees prior to transferring the funds and responded to a subsequent congressional request for information.
- Unitary Executive: The Department of Defense (DOD) did not include as part of the fiscal year 2007 budget submission to Congress separate budget justification documents for the costs of all contingency operations for the Military Personnel, Operation and Maintenance, and Procurement accounts. DOD did provide a separate justification document that included the costs of contingency operations in the Balkans and Guantanamo Bay but did not include costs for any other contingency operations, such as those in Iraq.
- Unitary Executive: DOD responded to an inquiry from the Chairman of the Subcommittee on Military Quality of Life and Veterans Affairs, House Committee on Appropriations, in 38 days, instead of 21 days as directed by the appropriations act.
- Law Enforcement: Customs and Border Patrol (CBP) did not relocate its checkpoints in the Tucson sector every 7 days as directed by Congress in the appropriations act. CBP told us that such relocations were not always consistent with CBP's mission requirements. Instead, CBP shut down its checkpoints for short periods in an effort to comply with what CBP termed the "advisory provision" in the appropriations act.

Three provisions required agencies to take an action only if a certain prior event occurred. The event did not occur, so the portion of the provision to which the President objected was not triggered. For example, if the Department of the Interior (Interior) used its 2006 appropriation for "the emergency reconstruction, replacement, or repair of aircraft, buildings, utilities, or other facilities or equipment damaged or destroyed by fire, flood, storm, or other unavoidable causes," it was required to seek a supplemental appropriation to replenish the funds promptly.<sup>35</sup>

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<sup>35</sup> Pub. L. No. 109-54, § 101.

Interior did not use any of its fiscal year 2006 appropriation for these purposes and did not trigger the requirement that it seek a supplemental appropriation.

## SIGNING STATEMENTS AND THE FEDERAL COURTS

We also examined how the federal courts have treated presidential signing statements in their published opinions. A search of all federal case law since 1945 found fewer than 140 cases that cited presidential signing statements. When courts did cite signing statements, it was for a variety of reasons. The most common use of a signing statement was to supplement legislative history such as committee reports. Courts have also cited signing statements to establish the date of signing, to provide a short summary of the statute, to explain the purpose of the statute, or to describe the underlying policy behind the statute. After reviewing the courts' use of presidential signing statements, we determined that, overall, federal courts infrequently cite or refer to them in their published opinions.

Cases containing citations to the signing statements of three acts in particular—the act disapproving the amendments to the Sentencing Guidelines,<sup>36</sup> the Antiterrorism and Effective Death Penalty Act,<sup>37</sup> and the Civil Rights Act of 1991<sup>38</sup>—account for over a third of the cases in which courts have cited or referred to signing statements. Further, citations to signing statements that raise constitutional concerns have appeared in a few cases dealing with the constitutional issues discussed in the signing statements. These constitutional issues include separation of powers principles, foreign relations matters, and federalism constraints. The federal courts have only in rare instances treated signing statements as authoritative sources of interpretation of either statutes or the Constitution. For more information, see Enclosure IV.

## SUMMARY

In 11 of the 12 appropriations acts for fiscal year 2006, the President issued signing statements identifying constitutional concerns or objections with some provisions appearing in the acts. In total, the President singled out 160 provisions of law in these 11 signing statements, which we categorized on the basis of the President's stated concern or objection. We examined 19 of these provisions and found that agencies did not execute 6 of the provisions as written. In 3 instances, the relevant portion of the provision was not triggered. Agencies executed the remaining 10 provisions as written. We also found that federal courts infrequently cite or refer to

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<sup>36</sup> Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995); *Statement by President William J. Clinton Upon Signing S.1254*, 31 Weekly Comp. Pres. Doc. 1961 (Nov. 6, 1995).

<sup>37</sup> Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996); *Statement by President William J. Clinton upon Signing S.1965*, 32 Weekly Comp. Pres. Doc. 719 (Apr. 29, 1996).

<sup>38</sup> Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991); *Statement of President George Bush upon Signing S. 1745*, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 21, 1991).

signing statements and have only in rare instances relied on them as authoritative interpretations of the law.

We hope you find this information useful. Should you have any questions, please contact Susan A. Poling, Managing Associate General Counsel, at 202-512-2667. Assistant General Counsel Carlos Diz, Senior Staff Attorney Wesley Dunn, and Staff Attorney Andrew Jackson Stephens made key contributions to this opinion.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger  
General Counsel

- Enclosure I: Scope and Methodology
- Enclosure II: Categories of the President's Objections
- Enclosure III: Agency Actions
- Enclosure IV: Presidential Signing Statements and Federal Court Opinions

## SCOPE AND METHODOLOGY

GAO initiated this undertaking at the request of the Chairmen of the Senate Committee on Appropriations and the House Committee on the Judiciary. We began by reviewing the presidential signing statements for all the appropriations acts for fiscal year 2006. The President issued statements upon signing all of the appropriations acts, including the emergency supplemental, with the exception of the Legislative Branch Appropriations Act.<sup>1</sup>

We reviewed the 11 signing statements and identified 160 specific provisions in the appropriations acts that the President addressed in the signing statements. The signing statements indicate that the provisions that the President specifically identifies are not the only provisions in the acts that might raise the cited concerns or objections of the President. Further, in several signing statements, the President raises a concern or objection without specifically identifying any provisions in the act raising that concern or objection. We arrived at the number of 160 provisions by listing all the provisions specifically identified in the signing statements. We chose to be conservative in how we counted. The President cited some provisions under more than one objection; we counted these only once. The President separately cited some subsections of a single provision; we counted all subsections of a provision as only one provision.

We sorted the provisions into 12 categories according to the language the President used in the signing statements to describe his basis of concern or objection. Different signing statements share identical or almost identical language describing the President's concerns with specific provisions. For example, six signing statements share the following, almost identical, language:

“The executive branch shall construe certain provisions of the Act that purport to require congressional committee approval for the execution of the law as calling solely for notification, as any other construction would be inconsistent with the constitutional principles enunciated by the Supreme Court of the United States in *INS v. Chadha*.”<sup>2</sup>

Two more signing statements share similar language: “The executive branch shall construe as calling solely for notification those provisions of the Act that are inconsistent with the requirements of bicameral passage and presentment set forth in the

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<sup>1</sup> Pub. L. No. 109-55, 119 Stat. 565 (Aug. 2, 2005).

<sup>2</sup> *E.g., Statement on Signing the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1920 (Jan. 2, 2006).

## Enclosure I

Constitution, as construed by the Supreme Court of the United States in 1983 in *INS v. Chadha*.<sup>3</sup> We categorized all the provisions noted under this language together.<sup>4</sup>

We then considered which provisions would be appropriate for further inquiry. In examining the provisions, we identified some for which it would be difficult to determine whether the President was executing the provision, either because of the breadth of executive action covered by the provision or because the information would not be readily available due to national security or foreign relations concerns. For example, a provision in the Foreign Operations Appropriations Act conditions funding for counterdrug activities in the Andean region of South America on consultation and reporting to Congress.<sup>5</sup> To assess whether the executive branch complied with this provision, we would have had to inquire about all the counterdrug activities in the Andean region of South America. An example of a provision that was too broad is section 107 of the Military Quality of Life and Veterans Affairs Appropriations Act, which states, “None of the funds made available in this title for minor construction may be used to transfer or relocate any activity from one base or installation to another, without prior notification to the Committees on Appropriations of both Houses of Congress.”<sup>6</sup> For us to determine whether the agencies carried out this provision as written, we would need information regarding how the military has used all the funds appropriated in the act for minor construction and would need to assess whether the military has used them to transfer activities between bases or installations. Of the 160 provisions which the President addressed, 31 fit into these categories, including all of the provisions to which the President objected on the grounds that the provision impinged on his general authority as Commander in Chief.

We did not pursue one provision because it had been overtaken by subsequent events. In his signing statement, the President noted provisions that dealt with the legal rights of detainees in the war on terror, specifically restricting the right of *habeas corpus*.<sup>7</sup> Subsequently, the United States Supreme Court found that these provisions preserved

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<sup>3</sup> *E.g., Statement on Signing the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1800 (Dec. 5, 2005).

<sup>4</sup> The President identified 70 provisions in this category.

<sup>5</sup> Pub. L. No. 109-102, 119 Stat. 2172, 2186–87 (Nov. 14, 2005).

<sup>6</sup> Pub. L. No. 109-114, § 107, 119 Stat. 2372, 2377 (Nov. 30, 2005).

<sup>7</sup> Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, div. A, title X, 119 Stat. 2680, 2739 (Dec. 30, 2005).

## Enclosure I

the right of some detainees to petition for *habeas corpus*.<sup>8</sup> On October 17, 2006, Congress responded with the Military Commissions Act of 2006 which again restricted the right of *habeas corpus* for detainees.<sup>9</sup>

Of the remaining 128 provisions for which action on the part of agencies was more readily determinable, we identified 19 provisions to pursue further. These 19 include at least 1 from 11 of the 12 different categories<sup>10</sup> of concern and at least 1 from each of the 11 appropriations acts. For every category that applied to 12 or more provisions, we selected at least 2 provisions to pursue.

For 18 of the 19 provisions, we identified the agency responsible for executing the provision. We then sent a letter to the General Counsels of these agencies describing the provision and the President's signing statement and asking how the agency had complied with the provision in the appropriations act, what form that compliance or noncompliance took, and to provide us with all relevant documentation. After receiving the agency responses, we contacted the agencies with follow-up questions as needed. We also researched the history of some of the provisions to better understand the nature of the requirement and the agencies' responses. We did not determine whether agency noncompliance was a result of the President's signing statement.

One of the 19 provisions did not relate to action by an agency. That provision forbids the payment of any appropriated funds to any person filling a position for which he or she was nominated if the Senate voted not to approve the nomination.<sup>11</sup> Regarding this provision, we searched for all nominees on whom the Senate voted not to approve their nomination within the last 20 years and then confirmed that the nominees were not currently employed in the positions for which they were nominated.

We also reviewed the history of the use of signing statements in the federal courts. We searched in legal databases for federal court cases from 1945 to May 2007 that cited presidential signing statements. We reviewed these cases and analyzed the purposes for which the courts cited the signing statements.

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<sup>8</sup> *Hamdan v. Rumsfeld*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2749 (2006).

<sup>9</sup> Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

<sup>10</sup> As noted, we determined that information on provisions purportedly impinging on the President's general authority as Commander in Chief would be not be readily available due to national security or foreign relations concerns.

<sup>11</sup> Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, § 809, 119 Stat. 2396, 2497 (Nov. 30, 2005).

Enclosure II

CATEGORIES OF THE PRESIDENT’S OBJECTIONS

Categories of provisions	Appropriation acts <sup>1</sup> where provision appears	Specific provisions cited by the President in the signing statements <sup>2</sup>	Number of provisions in each act in each category	Number of provisions in each category
<b>Categories related to the theory of the unitary executive</b>				
Provisions that the executive branch shall construe “in a manner consistent with the President’s authority to supervise the unitary executive branch”	Agriculture	§ 719	1	4
	Transportation	§ 836; <b>Office of Management and Budget, “Salaries and Expenses”</b>	2	
	Homeland Security	§ 529	1	
Provisions that “purport to make consultation with Congress a precondition to the execution of the law” which shall be construed “in a manner consistent with the President’s authority to supervise the unitary executive branch”	Energy and Water	<b>§ 101</b> ; § 303	2	18
	Foreign Operations	§ 506; § 509; § 512; <b>§ 534</b> ; § 543; § 564; § 576; § 595; USAID, “Transition Initiatives”; Department of State, “Andean Counterdrug Initiative”; Department of the Treasury, “Debt Restructuring”	11	
	Defense	<b>Office of Justice Programs, “State and Local Law Enforcement Assistance”</b>	1	
	Interior	National Park Service, “Historic Preservation Fund”; Environmental Protection Agency, “State and Tribal Assistance Grants”; Smithsonian Institution, “Administrative Provisions”	3	
	Emergency Supplemental	§ 1304	1	
Provisions that purport to require the executive branch to make recommendations to Congress which shall be construed in a manner consistent with the President’s authority to supervise the unitary executive branch	Agriculture	§ 715	1	13
	Defense	§ 8010; <b>§ 8100</b> ; § 8032; § 8037; “Operation and Maintenance, Defense-Wide”	5	
	Interior	<b>§ 101</b> ; § 103	2	
	Transportation	§ 182; § 208; § 219; § 315; § 818	5	
Provisions that mandate or regulate the submission to Congress or other entities of information that “could	Labor	Health and Human Services, “Office of the Secretary, General Departmental Management”	1	7
	Veterans Affairs	<b>§ 126</b>	1	

<sup>1</sup> Citations for the Appropriations Acts and the provisions cited therein can be found in Enclosure III.

<sup>2</sup> Indicated in bold are the 19 statutory provisions we selected to determine how the agencies were executing the law.

Enclosure II

Categories of provisions	Appropriation acts <sup>1</sup> where provision appears	Specific provisions cited by the President in the signing statements <sup>2</sup>	Number of provisions in each act in each category	Number of provisions in each category
impair . . . the deliberative processes of the Executive, or the performance of the Executive's constitutional duties"	Transportation	§ 120; § 182; § 818; § 820; "Operating Subsidy Grants to the National Railroad Passenger Corporation"	5	
<b>Categories related to the Commander in Chief power, national security, foreign relations, and law enforcement</b>				
Provisions the executive branch will construe consistent with the President's constitutional authority as Commander in Chief <sup>3</sup>	Defense	§ 8059; § 8104; § 8106; § 8119	4	4
Provisions that infringe on "the President's authority to classify and control access to information on national security"	Defense	§ 8007; § 8011; § 8093	3	11
	Homeland Security	<b>§ 516</b>	1	
	Veterans Affairs	§ 107; § 110; § 113; § 118	4	
	Emergency Supplemental	§ 1209; § 2202; "Joint Improvised Explosive Device Defeat Fund"	3	
Provisions that "purport to direct or burden the Executive's conduct of foreign relations"	Foreign Operations	§ 506; § <b>514</b> ; § 551; § 561; § 562; § 575; § 590; § 593	8	16
	Veterans Affairs	§ 118	1	
	Science	§ 405; § 413; § 414; § <b>631</b> ; § 637; "International Trade Administration, Operations and Administration"; "Contributions for International Peacekeeping Activities"	7	
Provision relating to decisions on the deployment of law enforcement officials	Homeland Security	<b>Customs and Border Protection, "Salaries and Expenses"</b>	1	1
<b>Categories related to the bicameralism and presentment clauses of the Constitution</b>				
Provisions that require the approval of a congressional entity and implicate "the principles enunciated by the Supreme Court of the United States in <i>INS v. Chadha</i> "	Agriculture	§ 705; § <b>716</b> ; § 732; Food and Drug Administration, "Salaries and Expenses"	4	70
	Defense	§ 8005	1	
	Veterans Affairs	§ 128; § 129; § 130; § 201; § 211; § 216; § 225; § 226; § 227; § 229; "Department of Defense Base Closure Account 2005"; Department of Veterans Affairs, "Information Technology Systems"; Department of Veterans Affairs, "Construction, Major Projects"	13	

<sup>3</sup> We determined that information on these provisions would not be readily available due to national security or foreign relations concerns. See Enclosure I.

Enclosure II

Categories of provisions	Appropriation acts <sup>1</sup> where provision appears	Specific provisions cited by the President in the signing statements <sup>2</sup>	Number of provisions in each act in each category	Number of provisions in each category
	Homeland Security	§ 504; § 538; § 518; § 505; § 509; § 511; § 526; “United States Visitor and Immigrant Status Indicator Technology”; Customs and Border Protection, “Automation Modernization”; Customs and Border Protection, “Air and Marine Interdiction, Operation, Maintenance, and Procurement”; Immigration and Customs Enforcement, “Automation Modernization”; United States Secret Service, “Salaries and Expenses”; “Research, Development, Acquisition, and Operations—Science and Technology”	13	
	Interior	§ 130; § 405; § 421; § 422; § 435; <b>United States Fish and Wildlife Service, “Administrative Provisions”</b> ; National Park Service, “Construction”; Department Management, “Salaries and Expenses”; Natural Resources Damage Assessment and Restoration, “Administrative Provisions”; Forest Service, “Wildland Fire Management”; Forest Service, “Administrative Provisions”; Indian Health Service, “Administrative Provisions”; Smithsonian Institution, “Administrative Provisions”	13	
	Labor	§ 103; § 208; <b>“Pension Benefit Guaranty Corporation Fund”</b>	3	
	Transportation	§ 183; § 201; § 205; § 211; § 212; § 217; § 218; § 603; § 608; § 710; § 711; § 720; § 838; § 841; Department of Transportation, “Office of the Secretary, Salaries and Expenses”; Department of Transportation, “Office of the Secretary, Working Capital Fund”; Federal Transit Administration, “Administrative Expenses”; Department of the Treasury, “Departmental Offices, Salaries and Expenses”; Internal Revenue Service, “Business Systems Modernization”; “High Intensity Drug Trafficking Area Program”; General Services Administration, “Federal Buildings Fund”; National Archive and Records Administration, “Electronic Records Archives”	22	

Enclosure II

Categories of provisions	Appropriation acts <sup>1</sup> where provision appears	Specific provisions cited by the President in the signing statements <sup>2</sup>	Number of provisions in each act in each category	Number of provisions in each category
	Emergency Supplemental	<b>Federal Emergency Management Agency, “Disaster Relief”</b>	1	
Provisions that require an agency to act in accordance with documents that “do not satisfy the constitutional requirements of bicameralism and presentment”	Defense	§ 5022; § 5023; § 5024; § 8073; § 8044; § 8082; Natural Resources Conservation Service, “Conservation Operations”	7	19
	Homeland Security	§ 527	1	
	Interior	Environmental Protection Agency, “State and Tribal Assistance Grants”; Department of Health and Human Services, “Indian Health Services”	2	
	Transportation	§ 710; “ <b>Community Planning and Development, Community Development Fund</b> ”; Department of Housing and Urban Development, “Management and Administration, Salaries and Expenses”; Office of Management and Budget, “Salaries and Expenses”	4	
	Emergency Supplemental	§ 7030; § 7031; § 7032; § 7033; <b>Federal Highway Administration, “Emergency Relief Program”</b>	5	
<b>Miscellaneous categories related to the Recess Appointments Clause and the Fifth Amendment</b>				
Provision that relates to “the President’s constitutional authority to make recess appointments	Transportation	<b>§ 809</b>	1	1
Provisions that relate to “race, ethnicity, gender, and State residency”	Agriculture	No specific provisions listed.	0	3
	Defense	§ 8014; <b>§ 8020</b> ; § 8057	3	
	Labor	No specific provisions listed.	0	
	Transportation	No specific provisions listed.	0	
<b>Total<sup>4</sup></b>			<b>167</b>	<b>167</b>

Source: GAO analysis of presidential signing statements.

<sup>4</sup> The total here is greater than 160 because the President objected to some provisions multiple times. The provision in the Defense Appropriations Act relating to detainees is not included because it had been overtaken by subsequent events. See Scope and Methodology, Enclosure I.

AGENCY ACTIONS

The following summary of agency action regarding the 19 statutory provisions we examined is arranged by category of the President's objection. Of the 6 provisions that agencies did not execute as written, the President objected to 3 on the grounds that they violated the bicameralism and presentment of the Constitution as set forth in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). The President objected to 2 others on unitary executive grounds, and a single provision on the grounds that it infringed on his law enforcement powers. Although we found that some agencies did not execute the provisions as enacted, we cannot conclude that agency noncompliance was the result of the President's signing statements. Bold face indicates whether or not the agency executed the provision as written or whether the provision was not triggered.

THEORY OF THE UNITARY EXECUTIVE

Provisions that "purport to make consultation with Congress a precondition to the execution of the law"

Section 534(k) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act—**Executed as Written**

This provision made available up to \$35 million in no-year funds from the Economic Support Fund for the creation and operation of a Middle East Foundation following consultations with the congressional appropriations committees (hereinafter committees). Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Pub. L. No. 109-102, § 534(k), 119 Stat. 2172, 2210 (Nov. 14, 2005). The purpose of the Middle East Foundation is to support democracy, governance, human rights, and the rule of law in the Middle East region. *Id.*

Upon signing the act, the President identified this provision as one which purported "to make the consultation with Congress a precondition to the execution of the law" and stated that the executive branch would therefore construe it "as calling for, but not mandating such consultation." *Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1718 (Nov. 21, 2005) (Foreign Ops Statement).

As of February 28, 2007, the Department of State (State) had not yet established a Middle East Foundation. However, it had performed some preliminary work and, in doing so, obligated some of the funds made available by the 2006 Foreign Operations Appropriations Act. As required by the act, prior to obligating the funds, State consulted

### Enclosure III

with the committees. After consulting with the committees, State also gave formal notification on November 16, 2005, and July 31, 2006.<sup>1</sup>

The July 31 notification concerned both the obligation of \$10,750,000 from the 2006 Appropriations Act and the reprogramming of \$171,064 from the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005. State transmitted the notification on behalf of the Bureau of Near Eastern Affairs. The funds would be used for five different projects: (1) a National Democratic Institute political party strengthening program in Mauritania in advance of elections following a military *coup d'etat*, (2) a preliminary assessment and due diligence exercise contract for the Broader Middle East North Africa Foundation for the Future, (3) a contract for a monitoring and evaluation system for Middle Eastern Partnership Initiative projects, (4) a pilot scholarship program for schools at the seventh grade level, and (5) support for American schools and universities in the region. We conclude that State executed this provision as written.

#### **Section 101 of the Energy and Water Development Appropriations Act—Not Triggered**

This provision has three subsections implicated by the signing statement. Section 101(c) required the United States Army Corps of Engineers (USACE) to submit a report by January 19, 2006, to Congress to establish a baseline for reprogramming and transfer authorities. Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, § 101, 119 Stat. 2247, 2252 (Nov. 19, 2005). Section 101(a)(5) forbids the obligation or expenditure of funds through a reprogramming that augmented existing programs, projects, or activities in excess of \$2 million or by 50 percent, whichever is less, without the committees' prior approval. Section 101(a)(6) does the same for reducing existing programs, projects, or activities. *Id.*

The President's signing statement indicates that the executive branch would construe section 101 as "calling for, but not mandating, consultation with Congress." *Statement on Signing the Energy and Water Development Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1751 (Nov. 28, 2005).

Section 101(c) required the report to include: (1) a table for each appropriation with a separate column to display the President's budget request, adjustments made by Congress, adjustments due to enacted recessions, and enacted level; (2) a delineation in the table for each appropriation by both object class and program, project, and activity, as detailed in the budget appendix for the respective appropriations; and (3) an identification of the items of special congressional interest. The report construes

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<sup>1</sup> The November 16, 2005, notification concerned Fiscal Year 2005 Economic Support Funds and the July 31, 2006, notification concerned Economic Support Funds from Fiscal Years 2005 and 2006.

### Enclosure III

“special congressional interest” to mean programs, projects, or activities specified in Public Law 109-103 or discussed in the accompanying committee reports or Statement of Managers. The report met the requirements of the provision and was submitted on January 18, 2006, as requested.

With regard to section 101(a)(5) and (6), USACE issued guidance to its field offices instructing them that Congress should be notified of reprogrammings which met the requirements of § 101(a)(5) and (6). Engineering Circular No. 11-2-189 states that reprogramming will not exceed the limits established by § 101(a)(5) and (6) without prior notification of the committees. This guidance memorandum is silent regarding seeking congressional approval. USACE EC Cir. No. 11-2-189, *Programs Management, Execution of the Annual Civil Works Program*, 9 (Dec. 31, 2005).

On September 29, 2006, USACE sent the committees letters regarding some of USACE’s reprogramming actions. USACE reprogrammed funds to four projects. The letters included a table that detailed which four projects received funds and from which projects those funds were derived. The reprogramming in this instance did not trigger the section 101 requirement because it was not for the purpose of “making funds available for obligation or expenditure.” Instead, it was the result of actions by USACE while operating under the Continuing Resolution in effect from October 1, 2005, to November 18, 2005. No other USACE reprogramming actions in fiscal year 2006 reached the levels described by sections 101(a)(5) and (6), so USACE did not provide the committees with any additional letters regarding reprogramming. As of March 23, 2007, USACE had made no reprogrammings that require committee approval under section 101. Therefore, the portions of section 101 dealing with reprogramming were not triggered.

Office of Justice Programs, State and Local Law Enforcement Assistance,  
Department of Defense, Emergency Supplemental Appropriations to Address  
Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act—Executed as  
Written

This provision appropriated \$125 million for the Office of Justice Programs “for necessary expenses related to the direct or indirect consequences of hurricanes in the Gulf of Mexico in calendar year 2005.” Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, Pub. L. No. 109-148, div. B, title I, ch. 8, 119 Stat. 2680, 2776 (Dec. 30, 2005). It further provides that the Attorney General shall consult with the committees on the allocation of these funds prior to expenditure.

The signing statement for the 2006 Defense Appropriations Act asserted that “the President’s constitutional authority to supervise the unitary executive branch and take care that the laws be faithfully executed cannot be made by law subject to a requirement to consult with congressional committees or to involve them in executive decision-making.” *Statement on Signing the Department of Defense, Emergency*

### Enclosure III

*Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006*, 41 Weekly Comp. Pres. Doc. 1918 (Jan. 2, 2006) (Defense Statement). The signing statement directed the executive branch to construe the provision to require only notification. *Id.*

The Department of Justice and congressional staff held three meetings on the allocation of the \$125 million. The January 19, 2006, meeting was with the Senate Appropriations Committee and Senator Thad Cochran's staffs. The January 24, 2006, meeting was with Senators Mary L. Landrieu's and David Vitter's staffs. The March 3, 2006, meeting was with the Senate Appropriations Committee staff.

Following these meetings, on March 17, 2006, the Office of Justice Programs obligated the \$125 million in three grants to the Louisiana Commission on Law Enforcement, the Alabama Department of Economic and Community Affairs, and the Mississippi Division of Public Safety Planning. We conclude that the Office of Justice Programs executed this provision as written.

#### Provisions requiring the executive branch to make recommendations to Congress

##### Section 101 of the Department of the Interior, Environment, and Related Agencies Appropriations Act—**Not Triggered**

Section 101 provides that any appropriations made available to the Department of the Interior (Interior) in the fiscal year 2006 Interior appropriations act could be expended or transferred for "the emergency reconstruction, replacement, or repair of aircraft, buildings, utilities, or other facilities or equipment damaged or destroyed by fire, flood, storm, or other unavoidable causes." Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-54, 119 Stat. 499, 520 (Aug. 2, 2005). Section 101 also states in relevant part that "all funds used pursuant to this section must be replenished by a supplemental appropriation which must be requested as promptly as possible." *Id.* The President noted in his statement that "[t]he executive branch shall construe [section 101] in a manner consistent with the President's constitutional authority to recommend for congressional consideration such measures, including requests for appropriations, as he judges necessary and expedient." *Statement on Signing H.R. 2361*, 41 Weekly Comp. Pres. Doc. 1243 (Aug. 2, 2005) (Interior Statement).

Interior states that it did not use any of the funds appropriated by the 2006 appropriations act for the purposes authorized by section 101. Because it did not use any of the appropriated funds for such purposes, Interior says, it did not need to request a supplemental appropriation. Therefore, this provision was not triggered.

Enclosure III

Section 8100 of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act—Not Executed as Written

Section 8100 provides in relevant part:

“The budget of the President for fiscal year 2007 . . . shall include separate budget justification documents for costs of United States Armed Forces’ participation in contingency operations for the Military Personnel accounts, the Operation and Maintenance accounts, and the Procurement accounts: *Provided*, That these documents shall include a description of the funding requested for each contingency operation, for each military service, to include all Active and Reserve components, and for each appropriations account: *Provided further*, That these documents shall include estimated costs for each element of expense or object class, a reconciliation of increases and decreases for each contingency operation, and programmatic data including, but not limited to, troop strength for each Active and Reserve component, and estimates of the major weapons systems deployed in support of each contingency.”

Pub. L. No. 109-148, § 8100. 119 Stat. at 2721.

The President noted in his statement that the “executive branch shall construe [section 8100] in a manner consistent with the President's constitutional authority to . . . recommend for congressional consideration such measures as the President shall judge necessary and expedient.” Defense Statement.

DOD submitted a separate budget justification document for contingency operations as part of its fiscal year 2006 budget submission to Congress, but this document contained fiscal year 2007 data only for operations in the Balkans and Guantanamo Bay. It did not contain fiscal year 2007 information for other contingency operations such as Operation Iraqi Freedom and Operation Enduring Freedom. DOD states that it did not include this information in its budget justification because the costs of these operations were “difficult to predict because of the continuing insurgent activity.” Thus, DOD was “not able to estimate with a great certainty” its fiscal year 2007 costs for these operations. DOD determined because of this uncertainty “any estimate prepared in time to be included in the FY 2007 Presidents [sic] request would have been flawed.” We conclude that DOD did not execute this provision as written.

Enclosure III

Provision that the executive branch shall construe “in a manner consistent with the President’s authority to supervise the unitary executive branch.”

Office of Management and Budget, Salaries and Expenses, Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act—Executed as Written

This provision states:

“For necessary expenses of the Office of Management and Budget, . . . \$76,930,000, of which not to exceed \$3,000 shall be available for official representation expenses: . . . *Provided further*, That none of the funds appropriated in this Act for the Office of Management and Budget may be used for the purpose of reviewing any agricultural marketing orders or any activities or regulations under the provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*): *Provided further*, That none of the funds made available for the Office of Management and Budget by this Act may be expended for the altering of the transcript of actual testimony of witnesses, except for testimony of officials of the Office of Management and Budget, before the Committees on Appropriations or their subcommittees: *Provided further*, That the preceding shall not apply to printed hearings released by the Committees on Appropriations: *Provided further*, That none of the funds provided in this or prior Acts shall be used, directly or indirectly, by the Office of Management and Budget, for evaluating or determining if water resource project or study reports submitted by the Chief of Engineers acting through the Secretary of the Army are in compliance with all applicable laws, regulations, and requirements relevant to the Civil Works water resource planning process: *Provided further*, That the Office of Management and Budget shall have not more than 60 days in which to perform budgetary policy reviews of water resource matters on which the Chief of Engineers has reported. The Director of the Office of Management and Budget shall notify the appropriate authorizing and Appropriations Committees when the 60-day review is initiated. If water resource reports have not been transmitted to the appropriate authorizing and appropriating committees within 15 days of the end of the OMB review period based on the notification from the Director, Congress shall assume OMB concurrence with the report and act accordingly.”

Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-115, 119 Stat. 2396, 2474 (Nov. 30, 2005).

The President noted in his signing statement that the executive branch would construe this provision “in a manner consistent with the President’s authority to supervise the

### Enclosure III

unitary executive branch and take care that the laws be faithfully executed, including the authority to direct which officers in the executive branch shall assist the President in faithfully executing the law. *Statement on Signing the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1800 (Dec. 5, 2005) (Transportation Statement).

According to OMB, after a reasonable inquiry, they determined that OMB had not reviewed any agricultural marketing orders. OMB identified no instances in which OMB altered any transcript of actual testimony of non-OMB witnesses before the committees.

OMB did conduct budget reviews of 13 water resource and study projects submitted by the Chief of Engineers through the Secretary of the Army. OMB stated that it did not conduct any legal reviews of these projects. All 13 of the budget reviews were completed within 60 days. For each of the reviews, OMB sent a letter notifying the Chairman of the Subcommittee on Energy and Water Development, Committee on Appropriations, United States Senate, of the review. These letters were dated September 27, 2005; October 12, 2005; November 28, 2005; March 7, 2006; March 22, 2006 (three letters); April 11, 2006; August 10, 2006; August 30, 2006; and October 11, 2006 (three letters). We conclude that OMB executed this provision as written.

#### Provision that the President believes impinges on the deliberative process of the executive branch

##### Section 126 of the Military Quality of Life and Veterans Affairs Appropriation Act—Not Executed as Written

This section provides that:

“Whenever . . . any . . . official of the Department of Defense is requested by the subcommittee on Military Quality of Life and Veterans Affairs, and Related Agencies of the Committee on Appropriations of the House of Representatives or the subcommittee on Military Construction and Veterans Affairs, and Related Agencies of the Committee on Appropriations of the Senate to respond to a question or inquiry submitted by the chairman or another member of that subcommittee pursuant to a subcommittee hearing or other activity, the . . . [official] shall respond to the request, in writing, within 21 days of the date on which the request is transmitted.”

Military Quality of Life and Veterans Affairs Appropriations Act, 2006, Pub. L. No. 109-114, § 126, 119 Stat. 2372, 2380 (Nov. 30, 2005).

The President’s statement declared that the “executive branch shall construe [section 126] in a manner consistent with the President's constitutional authority to . . . withhold

### Enclosure III

information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties." *Statement on Signing the Military Quality of Life and Veterans Affairs Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1799 (Dec. 5, 2005).

The Department of Defense (DOD) identified two instances in which a DOD official received an inquiry implicated by section 126. DOD responded to one of these inquiries in 38 days, instead of the 21 required by section 126. On July 18, 2006, the Secretary of Defense received an inquiry from the Chairman of the Subcommittee on Military Quality of Life and Veterans Affairs requesting DOD to provide the Subcommittee with proposals to fill a potential funding gap in the Defense Health Program. DOD responded on August 24, 2006, 38 days later. According to DOD, the tardy response was "due to a delay in staffing." DOD did not execute this provision as written.

### BICAMERALISM AND PRESENTMENT

Provisions that require the approval of a congressional entity and implicate "the principles enunciated by the Supreme Court of the United States in *INS v. Chadha*."

Administrative Provisions, Department of the Interior, Environment, and Related Agencies Appropriations Act, United States Fish and Wildlife Service—**Not Triggered**

The relevant portion of this provision reads:

"[N]otwithstanding any other provision of law, the Secretary of the Interior may not spend any of the funds appropriated in this Act for the purchase of lands or interests in lands to be used in the establishment of any new unit of the National Wildlife Refuge System unless the purchase is approved in advance by the House and Senate Committees on Appropriations . . . ."

Pub. L. No. 109-54, 119 Stat. at 506. In his statement the President declared,

"Provisions of the Act that purport to require congressional committee or individual leaders' approval prior to execution of the law shall be construed as calling solely for notification, as any other construction would be inconsistent with the principles enunciated by the Supreme Court of the United States in *INS vs. Chadha*."

Interior Statement.

Interior says that it has not spent any of the funds appropriated in its fiscal year 2006 appropriations act to purchase lands or interests in lands to be used in the establishment of any new unit of the National Wildlife Refuge System. The United States Fish and Wildlife Service (FWS) established two refuges in fiscal year 2006, but it did not use

### Enclosure III

funds appropriated by Public Law 109-54 to do so. FWS used funds from the Migratory Bird Conservation Fund to establish one of the refuges, and the other resulted from a donation of land. Therefore, Interior did not trigger the advance approval requirement of this provision.

#### Pension Benefit Guaranty Corporation Fund, Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act—**Not Executed as Written**

This provision required the Pension Benefit Guaranty Corporation (PBGC) to obtain the approval of OMB and the congressional appropriations committees before incurring obligations greater than \$296,978,000 for administrative expenses. Department of Labor Appropriations Act, 2006, Pub. L. No. 109-149, title I, 119 Stat. 2833, 2837 (Dec. 30, 2005). In his statement upon signing the act, the President declared that the executive branch would construe this provision as calling solely for notification. *Statement on Signing the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1920 (Jan. 2, 2006).

Over the course of fiscal year 2006, PBGC obligated \$381,151,175 for administrative expenses, which was enough to trigger the provision in question. On three separate occasions, PBGC requested reapportionment from OMB to obligate funds for administrative expenses in excess of \$296,978,000. In each case, PBGC obtained OMB's approval and then notified the committees of OMB's approval and PBGC's intention to obligate more funds. On December 9, 2005, PBGC notified the committees of an increase to its obligational authority of \$76,806,000. On March 23, 2006, the increase was \$5,200,000, and on June 8, 2006, the increase was \$6,663,500. Although PBGC did not execute the provision as written, it did notify the committees of its intention to obligate funds. We conclude that PBGC did not execute this provision as written.

#### Disaster Relief, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery—**Not Executed as Written**

The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror and Hurricane Recovery, 2006, appropriated \$6 billion to the Federal Emergency Management Agency (FEMA) for disaster relief and emergency assistance. Pub. L. No. 109-234, title II, ch. 4, 120 Stat. 418, 459 (June 15, 2006). This provision required that the Secretary of Homeland Security by July 30, 2006, "submit for approval a proposal and an expenditure plan for housing, including alternative housing pilot programs under section 2403 of this Act, to the Committees on Appropriations of the Senate and House of Representatives." *Id.* Upon signing the act, the President issued a statement declaring that the executive branch would construe this provision as "calling solely for notification, as any other construction would be inconsistent with the constitutional principles enunciated by the Supreme Court of the United States in *INS v. Chadha*." *Statement on Signing of Emergency Supplemental Appropriations Act for Defense, the*

### Enclosure III

*Global War on Terror, and Hurricane Recovery, 2006*, 42 Weekly Comp. Pres. Doc. 1159 (June 19, 2006) (Supplemental Statement).

With regard to FEMA's Alternative Housing Pilot Program, FEMA conducted a series of briefings and communications with committee and members' staffs between August and December 2006 prior to FEMA issuing its grant guidance. FEMA stated it did not provide the committees with a proposal and an expenditure plan for housing because it does not have such plans with respect to its disaster housing program. FEMA provides direct housing, usually in the form of travel trailers or mobile homes, and rental assistance to all eligible disaster victims. Since the number of eligible victims is uncertain, FEMA does not operate the disaster housing program pursuant to the type of expenditure plans typically applicable to a grant program with fixed costs.

Under a separate statutory provision,<sup>2</sup> FEMA provides the committees with monthly reports detailing its spending under the disaster relief fund, including FEMA's expenditures for disaster housing. Since a key part of the provision was to submit for approval a proposal and an expenditure plan for housing, which FEMA did not do, we conclude that FEMA did not execute this provision as written.

Provisions that direct agencies to act in accordance with a document that did not satisfy "the constitutional requirements of bicameralism and presentment."

Community Planning and Development, Community Development Fund,  
Department of Housing and Urban Development Appropriations Act—Executed  
as Written

This provision provided, among other amounts, \$310 million for grants for the Economic Development Initiative (EDI). Department of Housing and Urban Development Appropriations Act, 2006, Pub. L. No. 109-115, title III, 119 Stat. 2396, 2447 (Nov. 30, 2005). Congress directed the Department of Housing and Urban Development (HUD) to administer these grants in accordance with the terms and conditions specified in the statement of managers accompanying the act. *Id.*

The President declared in his statement that the "executive branch shall construe [this provision] in a manner consistent with the bicameral passage and presentment requirements of the Constitution for the making of a law." Transportation Statement.

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<sup>2</sup> Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 528, 120 Stat. 1355, 1383 (Oct. 4, 2006). This reporting requirement amends the reporting requirement of section 548 in Pub. L. No. 109-90, which amended the reporting requirement found in the Second Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising From the Consequences of Hurricane Katrina, 2005, Pub. L. No. 109-62, 119 Stat. 1990, 1991 (Sept. 8, 2005).

### Enclosure III

HUD tells us that it has made EDI grants with funds provided by Public Law 109-115 in accordance with the statement of managers, as amended by Public Law 109-234, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006. Pub. L. No. 109-234, § 7030(a). HUD executed this provision as enacted.

Federal-Aid Highways, Emergency Relief Program, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery—Executed as Written

This provision appropriated \$702,362,500 in no-year funds for the Federal Highway Administration's Emergency Relief Program, to be expended for "expenses identified under 'Formal Requests' in the Federal Highway Administration table entitled 'Emergency Relief Program Fund Requests—updated 06/06/06.'" Pub. L. No. 109-234, title II, ch. 9, 120 Stat. 418, 471 (June 15, 2006). The request table is a Federal Highway Administration (FHWA) compilation of outstanding state requests for emergency funding for highway repairs, updated as of June 6, 2006.

The President's signing statement declared the "executive branch shall construe [this provision] in a manner consistent with the bicameral passage and presentment requirements of the Constitution for the making of a law." Supplemental Statement.

According to FHWA, it has obligated funds appropriated by this provision only for expenses identified in the request table, with the exception of \$4,916,356.60 expended for costs associated with a June 23, 2006, flood in Pennsylvania. Pennsylvania's request for Emergency Relief Funds to repair damage done by this storm did not appear on the request table, since the flood occurred after the date of the table's compilation. However, FHWA has independent statutory authority to make this obligation. If an emergency arises requiring FHWA's immediate attention but for which FHWA has no appropriation currently available, FHWA may obligate against existing highway aid appropriations to respond to the urgent emergency. 23 U.S.C. § 125(c)(2). When FHWA next receives an appropriation, it reimburses the lending appropriation. *Id.* Using its authority under section 125(c)(2), FHWA used funds appropriated by Public Law 109-234 to respond to the Pennsylvania storm.<sup>3</sup> FHWA executed this provision as enacted.

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<sup>3</sup> FHWA interprets section 125(c)(2) as granting FHWA the flexibility it needs to respond to disasters as they occur, without waiting for appropriations to become available at a later time.

Enclosure III

Section 716 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act—Not Executed as Written

Section 716 provides that “notwithstanding any other provision of law, none of the funds appropriated or otherwise made available by this Act may be transferred to the Office of the Chief Information Officer without the prior approval [of the committees].”

Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, 119 Stat. 2120, 2151 (Nov. 10, 2005). The President declared in his signing statement that the executive branch would “construe certain provisions of the Act that purport to require congressional committee approval for the execution of a law as calling solely for notification, as any other construction would be inconsistent with the constitutional principles enunciated by the Supreme Court of the United States in *INS v. Chadha*.”

According to the Department of Agriculture (USDA), it transferred funds appropriated or otherwise made available under this Act to the Office of the Chief Information Officer. USDA notified the committees of its intent to transfer such funds on December 16, 2005. On January 31, 2006, Senator Robert F. Bennett, Chairman, Subcommittee on Agriculture, Rural Development, and Related Agencies, Committee on Appropriations requested additional information regarding the transfers. USDA replied to Chairman Bennett’s request on March 10, 2006, providing details on the transfers.

USDA states that “[i]t has been our longstanding practice to notify the appropriations committees of all such proposed transfers, and, in the absence of objections, then to proceed as we have proposed.” USDA also states that its “actions in this instance were in keeping with past practices followed consistently during this Administration and prior Administrations since at least the 1980s.” USDA did not execute this provision as written.

COMMANDER IN CHIEF, NATIONAL SECURITY, FOREIGN RELATIONS,  
AND LAW ENFORCEMENT

Provision that the President contends encroaches on his authority to classify and control access to national security information

Section 516 of the Department of Homeland Security Appropriations Act—  
Executed as Written

Section 516 provides that the Office of Personnel Management’s (OPM) authority to conduct personnel background investigations for certain entities of the Department of Homeland Security (DHS) be transferred to DHS. Department of Homeland Security Appropriations Act, 2006, Pub. L. No. 109-90, § 516, 119 Stat. 2064, 2084 (Oct. 18, 2005). Section 516 also states in relevant part:

### Enclosure III

“That [section 516] shall cease to be effective at such time as the President has selected a single agency to conduct security clearance investigations pursuant to section 3001(c) of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108-458; 50 U.S.C. 435b) and the entity selected under section 3001(b) of such Act has reported to Congress that the agency selected pursuant to such section 3001(c) is capable of conducting all necessary investigations in a timely manner or has authorized the entities within the Department of Homeland Security covered by [section 516] to conduct their own investigations pursuant to section 3001 of such Act.”

*Id.* The Intelligence Reform and Terrorism Prevention Act of 2004 directed the President to select an executive branch entity to oversee security clearance investigations in the executive branch and to formulate uniform policies and procedures for the conduct of such investigations. 50 U.S.C. § 435b(b). Further, the Act directed the President, in consultation with this entity, to choose another entity to perform all security clearance investigations in the executive branch. 50 U.S.C. § 435b(c). The entity selected under section 435b(b) could also designate additional agencies to conduct investigations if that entity deems it necessary. *Id.* Thus, section 516 of the fiscal year 2006 Homeland Security appropriations act provides that DHS is to administer the powers transferred to it from OPM until the President has selected the entity to conduct security clearance investigations for the entire executive branch pursuant to section 435b(c), and the entity selected by the President pursuant to section 435b(b) has reported favorably to Congress on the entity selected under section 435b(c); or, DHS may keep such powers if the President has made his selection under section 435b(c) and the entity selected by the President under section 435b(b) has authorized DHS to conduct its own security clearance investigations for the entities named in section 516 of the appropriations act.

The President declared in his signing statement,

“To the extent that section 516 relates to access to classified national security information, the executive branch shall construe this provision in a manner consistent with the President’s exclusive constitutional authority . . . to classify and control access to national security information and to determine whether an individual is suitable to occupy a position in the executive branch with access to such information.”

*Statement on Signing the Department of Homeland Security Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1558 (Oct. 24, 2005) (Homeland Security Statement).

DHS told us that the entities who received authority to conduct their own security clearance investigations are still doing so, pursuant to authorization under section 516 from OMB, the entity selected by the President under section 435b(b).

### Enclosure III

By Executive Order No. 13,381, June 27, 2005, the President designated OMB as the agency to oversee security clearance policy in the executive branch under section 435b(b). This order also granted OMB authority to assign to any other agency “any process relating to determinations of eligibility for access to classified national security information.”

On June 30, 2005, OMB assigned to OPM the “responsibility for the day-to-day supervision and monitoring of security clearance investigations.” OMB Memorandum No. M-05-17, *Allocation of Responsibilities for Security Clearances under the Executive Order, Strengthening Processes Relating to Determining Eligibility for Access to Classified National Security Information*, Attachment A, § 1(a) (June 30, 2005). This fulfilled the President’s responsibility under section 435b(c) to choose an entity to conduct security clearance investigations governmentwide.

On September 27, 2006, OMB, the agency designated by the President under section 435b(b), granted to the DHS entities listed in section 516 the authority to continue conducting their own security clearance investigations. Letter from Clay Johnson III, Deputy Director for Management, OMB, to Kathy L. Dillaman, Associate Director, Federal Investigative Services Division, OPM, Sept. 27, 2006. Thus, because the President has made both of his selections required by section 435b(b), and OMB, the entity selected pursuant to section 435b(c), has authorized the DHS entities listed in section 516 to conduct their own investigations, section 516 has been satisfied. According to DHS, the DHS entities listed therein are thus conducting their own investigations under proper authority. Therefore DHS executed this provision was written.

Provisions that mandate or regulate the submission to Congress or other entities of information that “could impair foreign relations”

Section 514 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act—Executed as Written

Section 514 provides,

“The Secretary of the Treasury shall instruct the United States Executive Directors of [various international financial institutions] to use the voice and vote of the United States to oppose any assistance by these institutions, using funds appropriated or made available pursuant to this Act, for the production or extraction of any commodity or mineral for export, if it is in surplus on world markets and if the assistance will cause substantial injury to United States producers of the same, similar, or competing commodity.”

Pub. L. No. 109-102, § 514.

### Enclosure III

The President declared in his signing statement that because section 514 “purport[s] to direct or burden the President’s constitutional authority to conduct foreign relations . . . by purporting to direct the content of certain international negotiations,” executive agencies “shall construe [section 514] as advisory.” Foreign Ops Statement.

On January 26, 2006, the Department of the Treasury (Treasury) sent letters to the United States Executive Directors of all but one of the institutions listed in section 514, instructing the Directors in accordance with section 514. According to Treasury, the institution that was not sent a letter, the North American Development Bank, does not have a United States Executive Director and is not in any way involved with the production or extraction of commodities or minerals for export. We conclude Treasury executed this provision as written.

#### Section 631 of the Science, State, Justice, and Commerce Appropriations Act— Executed as Written

Section 631 forbids the use of any funds to include in any new bilateral or multilateral trade agreements the text of paragraph 2 of article 16.7 of the United States-Singapore Free Trade Agreement; paragraph 4 of article 17.9 of the United States-Australia Free Trade Agreement; or paragraph 4 of article 15.9 of the United States-Morocco Free Trade Agreement. Science, State, Justice, Commerce and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, § 631, 119 Stat. 2290, 2344 (Nov. 22, 2005). The President, in his signing statement, identified this provision as one that purported “to direct or burden the Executive’s conduct of foreign relations, including the authority to recognize foreign states and negotiate international agreements on behalf of the United States.” *Statement on Signing the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1764 (Nov. 28, 2005). The statement declared that the executive branch would view this provision as advisory. As of February 28, 2007, consistent with the act, the specified language has not appeared in any new bilateral or multilateral trade agreements. This provision was executed as enacted.

#### Provision that impinges on the President’s law enforcement authority

#### Customs and Border Protection, Salaries and Expenses, Department of Homeland Security Appropriations Act—Not Executed as Written

This provision provides, in relevant part, that the “Border Patrol shall relocate its checkpoints in the Tucson sector at least once every seven days in a manner designed to prevent persons subject to inspection from predicting the location of any such checkpoint.” Pub. L. No. 109-90, title II, 119 Stat. at 2067.

The President declared in his signing statement, “Decisions on deployment and redeployment of law enforcement officers in the execution of the laws are a part of the executive power vested in the President by Article II of the Constitution. Accordingly,

### Enclosure III

the executive branch shall construe the relocation provision as advisory rather than mandatory.” Homeland Security Statement.

Customs and Border Protection (CBP) told us that “during fiscal year 2006, while the Border Patrol relocated its checkpoints in the Tucson sector frequently, relocation did not occur within seven days in every instance, as relocation within seven days was not always consistent with Border Patrol mission requirements.” CBP says that relocating checkpoints “diverts resources away from CBP’s critical border security mission,” because for several hours during redeployment, CBP has one less checkpoint devoted to border security.

CBP also states that selection of checkpoint sites “entails significant public safety and engineering considerations, as well as consultation with the state transportation authority.” Consequently, CBP has approved only one location for some of its checkpoints in the Tucson sector, so that relocation of these checkpoints to a suitable location is not possible. While these checkpoints were also operated in excess of seven continuous days, according to CBP, they often shut down for a “short period in an endeavor to satisfy the advisory provision” appearing in the 2006 appropriations act. CBP did not execute this provision as written.

### OTHER CATEGORIES

#### Provision relating to the Recess Appointment Power

##### Section 809 of the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act—Executed as Written

This provision prohibits the use of any appropriations from this or any other act for payment to “any person filling a position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person.” Pub. L. No. 109-115, § 809, 119 Stat. 2396, 2497 (Nov. 30, 2005). Upon signing the act, the President addressed this provision in his signing statement, declaring, “The executive branch shall construe this provision in a manner consistent with the President’s constitutional authority to make recess appointments.” Transportation Statement. In the last 20 years, the Senate has voted not to approve the nomination of three people. During fiscal year 2006, none of them served in the position for which their nomination was not approved. Therefore this provision was executed as written.

Enclosure III

Provision relating to the Fifth Amendment

Section 8020 of the Department of Defense Appropriations Act—**Executed as Written**

This provision appropriated \$8 million for incentive payments authorized by section 504 of the Indian Financing Act of 1974. Pub. L. No. 109-148, § 8020, 119 Stat. at 2702. Section 504 of the Indian Financing Act provides that an agency's contractor may be allowed additional compensation equal to 5 percent of an amount paid by the contractor to a subcontractor or supplier if that subcontractor or supplier is an Indian organization or Indian-owned enterprise. 25 U.S.C. § 1544. Public Law 109-148 provided that DOD could also use the \$8 million to make incentive payments to subcontractors at any level, in addition to prime contractors as authorized section 504.

The President declared in his statement that the “executive branch shall construe [section 8020] in a manner consistent with the requirement to afford equal protection of the laws under the Due Process Clause of the Constitution's Fifth Amendment.” Defense Statement. The Fifth Amendment prohibits the federal government from depriving any person of life, liberty, or property without due process of law. U.S. Const. amend. V.

DOD states that it obligated \$7.9 million of the \$8 million appropriated for incentive payments. All payments went to prime contractors or subcontractors as authorized by section 504. DOD executed this provision as written.

PRESIDENTIAL SIGNING STATEMENTS AND FEDERAL COURT OPINIONS

We examined how the federal courts have treated presidential signing statements in their published opinions. Our research revealed that federal courts infrequently cite or refer to presidential signing statements and, when cited or referred to, these signing statements appear to have little impact on judicial decisionmaking. One of the earliest court opinions to note the existence of a presidential signing statement was in 1899.<sup>1</sup> In our search of all reported federal court cases from 1945 to May 2007, we found approximately 137 federal court opinions citing or referring to presidential signing statements. These opinions cite or refer to presidential signing statements for a variety of purposes, ranging from providing support for a particular interpretation of a statutory provision to merely establishing the date of enactment.

Presidential signing statements can be characterized as either nonconstitutional or constitutional. Some nonconstitutional signing statements describe or praise the accompanying law, while others explain the President's understanding of the law or its purpose, or declare how the executive is to implement the law. Signing statements raising constitutional concerns or objections take exception to the constitutionality of a provision or provisions and can declare that the law will be executed in a certain manner because of constitutional concerns.

Included in the 137 federal court opinions are five Supreme Court opinions. In *Hamdan v. Rumsfeld*, Justice Scalia's dissent criticizes the Court's use of legislative history.<sup>2</sup> As part of this criticism, Scalia points out that the Court "wholly ignores the Presidential signing statement" and quotes the signing statement to show that it does not support the result in that case.<sup>3</sup> In *United States Department of Commerce v. United States House of Representatives*, Justice Stevens's dissent cites a signing statement issued by President Ford, in conjunction with a legislative history source, to make a claim about consensus of legislative intent.<sup>4</sup> The remaining three Supreme Court cases,

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<sup>1</sup> See Christopher S. Kelley, *A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton* (Apr. 3–6, 2003) (presented at the 61<sup>st</sup> Annual Meeting of the Midwest Political Science Association). The case was *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899) (the Court noted a presidential practice of sending a message to Congress upon signing a bill into law).

<sup>2</sup> \_\_\_ U.S. \_\_\_, 126 S. Ct. 2749, 2816 (2006) (Scalia, J., dissenting).

<sup>3</sup> *Id.* at 2816.

<sup>4</sup> 525 U.S. 316, 361 n.6 (1999) (Stevens, J., dissenting).

## Enclosure IV

*United States v. Lopez*,<sup>5</sup> *Bowsher v. Synar*,<sup>6</sup> and *Immigration & Naturalization Service v. Chadha*<sup>7</sup> are discussed below in the section on constitutional signing statements.

### NONCONSTITUTIONAL SIGNING STATEMENTS

Courts have varied in their use of nonconstitutional signing statements in their opinions. In some cases, judges have cited signing statements simply to identify the date a bill was signed into law.<sup>8</sup> Courts also have referred to signing statements as a way of providing a short summary of a statute,<sup>9</sup> the purpose of a statute,<sup>10</sup> or the underlying policy behind a statute.<sup>11</sup> When construing a statute, courts occasionally cite to signing statements in their discussion of the legislative history or intent of the law. When signing statements are used in this manner, courts often note that the presidential signing statements “echo” the views expressed in congressional documents, such as committee reports.<sup>12</sup> About 40 court opinions have used signing statements in conjunction with legislative history documents.

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<sup>5</sup> 514 U.S. 549, 561 n.3 (1995).

<sup>6</sup> 478 U.S. 714, 719 n.1 (1986).

<sup>7</sup> 462 U.S. 919, 942 n.13 (1983).

<sup>8</sup> *Saleh v. United States Department of Justice*, 962 F. 2d 234, 238 n.7 (2<sup>nd</sup> Cir. 1992).

<sup>9</sup> Often the overall intent of the statute is not in dispute, and the signing statement is just a concise, convenient source. *E.g.*, *Williams v. United States*, 240 F.3d 1019, 1023–24 (Fed. Cir. 2001) (summarizing the Ethics Reform Act of 1989); *Clinton v. Babbitt*, 180 F.3d 1081, 1087 n.4 (9<sup>th</sup> Cir. 1999) (summarizing the Navajo-Hopi Land Dispute Settlement Act of 1996).

<sup>10</sup> *E.g.*, *Pigford v. Glickman*, 206 F.3d 1212, 1215 n.3 (D.C. Cir. 2000) (stating the purpose of a statute waiving the statute of limitations on USDA discrimination complaints from the 1980s is to “address the long-standing discrimination claims of many minority farmers”).

<sup>11</sup> *E.g.*, *United States v. Yacoubian*, 24 F.3d 1, 8 (9<sup>th</sup> Cir. 1994) (listing presidential policy objectives met by a statute).

<sup>12</sup> *E.g.*, *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1196 (9<sup>th</sup> Cir. 1998). *See also* *United States v. Venture*, 338 F.3d 1047, 1053–54 (9<sup>th</sup> Cir. 2003); *Burrus v. Vegliante*, 336 F.3d 82, 89 (2<sup>nd</sup> Cir. 2003); *Thrifty Oil Co. v. Bank of America National Trust and Savings Ass’n*, 322 F.3d 1039, 1056 n.22 (9<sup>th</sup> Cir. 2003); *Calloway v. District of Columbia*, 216 F.3d 1, 15 (D.C. Cir. 2000) (Ginsburg, J., dissenting).

## Enclosure IV

Cases containing citations to the signing statements of three acts in particular—the act disapproving the amendments to the Sentencing Guidelines,<sup>13</sup> the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>14</sup> and the Civil Rights Act of 1991 (CRA)<sup>15</sup>—account for over a third of all the cases in which courts have cited or referred to signing statements. Over a dozen court opinions have cited or referred to President Clinton’s statement upon signing into law the statute disapproving the recommendations of the Federal Sentencing Commission. The courts have used this signing statement to reinforce or supplement legislative history sources in cases challenging the disparity between sentences for crack and powder cocaine convictions. Both the congressional documents setting forth congressional intent and the signing statement have been cited to support the view that the intent of the statute was to adjust but not end the disparity in the law.<sup>16</sup>

Courts have cited or referenced President Clinton’s statement accompanying AEDPA in at least 13 opinions.<sup>17</sup> Among other things, the act limits the authority of the federal courts to entertain an application for a writ of *habeas corpus* on behalf of a person held in custody by a state.<sup>18</sup> Many courts have cited or referenced President Clinton’s introductory remarks explaining the purpose of the act: “I have long sought to streamline Federal appeals for convicted criminals sentenced to the death penalty. For too long, and in too many cases, endless death row appeals have stood in the way of justice being served.”<sup>19</sup> One federal court noted, “Although the President’s statement is not evidence of congressional intent, we refer to it because we agree with his

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<sup>13</sup> Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995); *Statement by President William J. Clinton upon Signing S.1254*, 31 Weekly Comp. Pres. Doc. 1961 (Nov. 6, 1995).

<sup>14</sup> Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996); *Statement by President William J. Clinton upon Signing S.1965*, 32 Weekly Comp. Pres. Doc. 719 (Apr. 29, 1996).

<sup>15</sup> Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991); *Statement of President George Bush upon Signing S. 1745*, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 21, 1991).

<sup>16</sup> *E.g., United States v. Castillo*, 460 F.3d 337, 347 (2<sup>nd</sup> Cir. 2006); *United States v. Petersen*, 143 F. Supp. 2d 569, 578 (E.D. Va. 2001).

<sup>17</sup> Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996).

<sup>18</sup> *Id.* § 104; 28 U.S.C. § 2254.

<sup>19</sup> *E.g., Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1067 n.6 (6<sup>th</sup> Cir. 1997) (the portion of the decision for which the signing statement was cited was effectively overruled by *Lindh v. Murphy*, 521 U.S. 320); *Hill v. Butterworth*, 133 F.3d 783, 784 (11<sup>th</sup> Cir. 1997), *vacated*, *Hill v. Butterworth*, 147 F.3d 1333 (11<sup>th</sup> Cir. 1998); *Stewart v. Gillmore*, No. 97 C 6672 (N.D. Ill. Nov. 5, 1997).

## Enclosure IV

interpretation of the plain language of [the provision], and we find no other contrary interpretation in the legislative history.”<sup>20</sup>

President George H.W. Bush’s signing statement accompanying CRA<sup>21</sup> appears in approximately 24 court opinions. The President’s signing statement sought to influence the execution and interpretation of CRA by adopting the position of Senator Dole that, among other points, CRA was intended to be applied prospectively only.<sup>22</sup> One federal district court, struggling to determine if CRA applies retroactively, considered the President’s signing statement, combined with an EEOC policy statement and a highly conflicted legislative history, as part of its statutory construction analysis.<sup>23</sup> However, the majority of courts have accorded the signing statement, along with all of CRA’s legislative history, little weight.<sup>24</sup> Only a small number of the many federal court decisions involving the CRA mention the signing statement at all. One court expressed its opinion thus: “We give little credence to President Bush’s statement accompanying his signing of the bill. . . . It is not the President’s place to write federal statutes.”<sup>25</sup> Another court observed, “Designating his own party leader’s statements to the record as the sole authoritative statements seems suspect.”<sup>26</sup>

## CONSTITUTIONAL OBJECTIONS OR CONCERNS IN SIGNING STATEMENTS

In approximately 20 opinions, the courts cite or refer to signing statements involving constitutional issues. In some cases, a court has noted the position taken by the President in his signing statement as background to the case. In other cases the court has noted that its conclusion that a particular provision is unconstitutional was shared by the President, as expressed in his signing statement. The courts have also used a signing statement to show that a particular provision with constitutional implications might be implemented in a way that would make the matter in question nonjusticiable.

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<sup>20</sup> *Love v. Morton*, 112 F.3d 131, 137 (3<sup>rd</sup> Cir. 1997).

<sup>21</sup> Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991).

<sup>22</sup> *Statement of President George Bush upon Signing S. 1745*, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 21, 1991).

<sup>23</sup> *Ribando v. United Airlines, Inc.*, 787 F. Supp. 827, 832 (N.D. Ill. 1992).

<sup>24</sup> *See, e.g., Butts v. City of New York Department of Housing Preservation and Development*, 990 F.2d 1397, 1405–06 (2<sup>nd</sup> Cir. 1993).

<sup>25</sup> *Estate of Reynolds v. Martin*, 985 F.2d 470, 477 n.8 (9<sup>th</sup> Cir. 1993).

<sup>26</sup> *Petitti v. New England Telephone and Telegraph Co.*, No. 89-3951, n.6 (D. Mass. Nov. 16, 1992).

## Enclosure IV

The constitutional signing statements cited by the courts address the separation of powers between Congress and the President, foreign relations, and federalism limits on congressional authority.

In *Immigration & Naturalization Service v. Chadha*, the Supreme Court held that the exercise of a legislative veto was unconstitutional because it violated the bicameralism and presentment requirements of the Constitution.<sup>27</sup> The Court stated that determining the constitutionality of a statute is a decision for the courts, rejecting a suggestion that a law is shielded from judicial review because it was passed by Congress and signed by the President. The Court went on to note that “in any event, eleven Presidents, from Mr. Wilson to Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge Congressional vetoes as unconstitutional.”<sup>28</sup> The Court, however, did not rely on the existence of the signing statements in reaching its decision. Nor did the Supreme Court rely on a signing statement in reaching its decision in *Bowsher v. Synar*. In that case, the Supreme Court held the Gramm-Rudman-Hollings Act unconstitutional because it permitted an officer controlled by Congress to execute the laws.<sup>29</sup> In describing the background of the case, the Court noted that the signing statement accompanying the Act asserted that the Act was unconstitutional because it would allow the Comptroller General to have supervisory authority over the President.<sup>30</sup>

Citations to a series of signing statements with a common constitutional objection also appeared in *Federal Election Commission v. National Rifle Association Political Victory Fund*.<sup>31</sup> In its discussion of a statutory restriction on the President to select no more than three FEC Commissioners from one party, the court discussed how Presidents have, in signing statements, expressed the view that legislative restrictions on the appointment power are advisory and not binding on the President.<sup>32</sup> The court considered these signing statements in the larger context of the appointment process and concluded that it was not clear that the statute at issue actually restricted the President in choosing who to appoint. Thus, the court found that the challenge to an action taken by the FEC was

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<sup>27</sup> 462 U.S. 919 (1983).

<sup>28</sup> The Court cited President Roosevelt’s statement upon signing the Lend-Lease Act of 1941 as an example of one instance where a President went “on the record.” *Id.* at 942.

<sup>29</sup> 478 U.S. 714 (1986).

<sup>30</sup> 478 U.S. 714, 719 n.1 (1986).

<sup>31</sup> 6 F.3d 821 (D.C. Cir. 1993).

<sup>32</sup> *Id.* at 824–25.

## Enclosure IV

not justiciable on the grounds that the statute unconstitutionally restricted the President's power to appoint FEC Commissioners.<sup>33</sup>

Signing statements have also appeared in a number of cases in the foreign relations area. One such example is *Zivotofsky ex rel. Ari Z. v. Secretary of State*. In *Zivotofsky*, the court was presented with the issue of whether a particular provision of the Foreign Relations Authorization Act, Fiscal Year 2003, entitled a plaintiff born in Jerusalem to have "Israel" listed on his U.S. passport as his place of birth.<sup>34</sup> While on its face, the statute provided for such a listing, the court pointed out that the President had declared in his signing statement that this provision of the Act interfered with the President's constitutional authority to conduct the nation's foreign affairs and to determine the terms on which recognition is given to foreign states.<sup>35</sup> In light of these constitutional concerns, the circuit court directed the district court to develop a more complete record and determine whether the case presents a political question that is nonjusticiable.<sup>36</sup> In another case, *Southern Offshore Fishing Ass'n v. Daley*, a court held that the enforcement of a statute directing an executive officer to pursue certain international fishing agreements was a nonjusticiable political question.<sup>37</sup> The court referred to the signing statement in which the President had said that the act encroached on the President's authority to conduct foreign relations.<sup>38</sup>

In *United States v. Lopez*, the Supreme Court held that the enumerated powers of Congress, in particular, Commerce Clause authority, did not permit Congress to enact the Gun-Free School Zone Act (GFSZA).<sup>39</sup> The Court held that the Act's provisions criminalizing possession of handguns near schools violated constitutional principles of federalism. The Supreme Court noted that President George H.W. Bush's signing statement condemned the Act as "inappropriately [overriding] legitimate State firearms

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<sup>33</sup> However, the court held against the FEC on different grounds, that the inclusion of the Secretary of the Senate and the Clerk of the House of Representatives as *ex officio* members of the Commission violated separation of powers principles. *Id.* at 826–28.

<sup>34</sup> 444 F.3d 614 (D.C. Cir. 2006).

<sup>35</sup> *Id.* at 616.

<sup>36</sup> *Id.* at 619.

<sup>37</sup> 995 F. Supp. 1411 (M.D. Fla. 1998).

<sup>38</sup> *Id.* at 1427–28.

<sup>39</sup> 514 U.S. 549 (1994).

## Enclosure IV

laws with a new and unnecessary Federal law.”<sup>40</sup> Following *Lopez*, a few lower courts have cited and discussed signing statements in federalism cases.<sup>41</sup> In one such case, the court distinguishes the reasoning of the Supreme Court in *Lopez* from the views of President Bush as expressed in his signing statement.<sup>42</sup>

In another case, in which the constitutionality of the Anti Car Theft Act of 1992 was challenged on federalism grounds, the court’s decision compared President George H.W. Bush’s signing statement for the Anti Car Theft Act with the signing statement for GFSZA. Although not central to the court’s analysis, it noted that, while the President voiced federalism concerns over GFSZA, he did not voice a federalism objection with regard to the Anti Car Theft Act, which made carjacking a federal offense.<sup>43</sup> The court upheld the Anti Car Theft Act as within Congress’s power.

## CONCLUSION

Federal courts infrequently cite or refer to presidential signing statements in their published opinions, and these signing statements appear to have little impact on judicial decisionmaking. When they do cite signing statements, it is for a variety of reasons. The most common use of a signing statement is to supplement discussion of legislative history such as committee reports. Courts have also cited signing statements independently from citations to legislative history sources for purposes as varied as establishing the date of a bill’s signing to providing interpretative guidance. Courts have used signing statements raising constitutional issues as background or context in some decisions, but each of these cases presents a unique set of issues and the signing statements are cited or referred to in different ways. Courts have cited constitutional signing statements in cases involving separation of powers principles, foreign relations matters, and federalism constraints. The federal courts have only in rare instances treated presidential signing statements as an authoritative source of statutory or constitutional interpretation.

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<sup>40</sup> *Id.* at 561.

<sup>41</sup> *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4<sup>th</sup> Cir. 1999); *United States v. Bishop*, 66 F.3d 569 (3<sup>rd</sup> Cir. 1995).

<sup>42</sup> In *Brzonkala*, the appellants tried to distinguish GFSZA from the Violence Against Women Act (VAWA), the statute at issue in their case, by arguing that VAWA did not override otherwise applicable state laws, while GFSZA did. The *Brzonkala* court rejected the appellant’s argument and stated that the appellant misattributed President’s Bush’s views as expressed in his signing statement with the Supreme Court’s views. *Brzonkala*, 169 F.3d at 841.

<sup>43</sup> *Bishop*, 66 F.3d at 585.