

From Cowboy Republic: Six Ways the Bush Gang Has Defied the Law

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Chapter Six: Refusing to Execute the Law

Our Founding Fathers created three separate, co-equal branches of government to check and balance each other so that no one branch would become all powerful. Indeed, James Madison wrote in the *Federalist Papers*, "The preservation of liberty requires that the three great departments of power should be separate and distinct." Madison warned, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."¹ This was not a hollow fear. The American colonists had suffered mightily at the hands of the tyrant King George III. Thus they charged in the Declaration of Independence that the King "has refused his Assent to Laws, the most wholesome and necessary for the public good."

Two hundred and twenty years later, we have another King George. Since he became President in 2001, George W. Bush has increasingly sought to accumulate all governing powers in the same hands—his. Contrary to the Constitution's command that the President "shall take Care that the Laws be faithfully executed,"² Bush has repeatedly violated some of them and refused to enforce others, including those governing nuclear proliferation.

¹ THE FEDERALIST No. 47, at 300 (J. Madison) (H. Lodge ed. 1888).

² U.S.CONST., art II, § 3.

But he has also asserted unparalleled executive power by putting his stamp of supremacy on more than one thousand provisions of law enacted by Congress. The Constitution grants Congress the power to make laws, and after both houses pass a bill, the President has two options: he can either sign it or veto it. In his first six years in office, Bush vetoed only one bill—the stem cell research law. Yet he has quietly attached "signing statements" to 1,132 laws passed by Congress. The language of these statements is obscure, but they declare his intention to violate the law. Rather than veto laws he disagrees with, Bush has used his signing statements as a line-item veto, indicating which parts of each law he intends to enforce—despite the fact that the Supreme Court has ruled that the line-item veto is unconstitutional.³

George W. Bush hasn't only defied Congress; he has also usurped the power of the courts, which have exclusive jurisdiction to interpret the laws. The Supreme Court said, "it is, emphatically, the province and duty of the judicial department to say what the law is."⁴ When judges review statutes for constitutional infirmity, they frequently look to legislative history by referring to the Congressional Record. Presidential signing statements do not constitute legislative history, and the courts do not use them for statutory interpretation. But Bush's signing statements frequently graft his own interpretation onto the law, reserving the right to refuse to follow those parts he deems unconstitutional.

³ Clinton v. City of New York, 524 U.S. 417 (1998).

⁴ Marbury v. Madison, 5 U.S. (1 Cranch) 137, 1777 (1803).

Although the Constitution nowhere authorizes signing statements, presidents dating back to James Monroe have employed them. But none before George W. Bush has used them to so extensively to shift the balance of power to the President. That shift has some vocal advocates. When he was deputy assistant attorney general in the Reagan administration, Supreme Court Justice Samuel Alito argued for enhancing the role of presidential signing statements. He advised the Office of Legal Counsel, "Our primary objective is to ensure that Presidential signing statements assume their rightful place in the interpretation of legislation." Although he admitted that Congress would resent the use of signing statements that allow the President to "get in the last word on questions of interpretation," Alito advocated "the issuance of interpretive signing statements" to "increase the power of the Executive to shape the law."⁵

Faced with a Congress controlled by Democrats, Ronald Reagan began to use signing statements to put his political imprimatur on Congressional legislation. Reagan's attorney general Edwin Meese sought to make presidential signing statements part of the legislative history by arranging to have them published in the *U.S. Code Congressional and Administrative News*. Meese said, "To make sure that the President's own understanding of what's in a bill is the same . . . or is given consideration at the time of statutory construction later on by a court, we have now arranged with West Publishing Company that the presidential statement on the signing of a bill will accompany the

⁵ Samuel A. Alito Jr., Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law, Memorandum to the Litigation Strategy Working Group, Office of Legal Counsel, Department of Justice, Feb. 5, 1986, <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>.

legislative history from Congress so that all can be available to the court for future construction of what that statute really means."⁶

Courts have declined to use presidential signing statements as authoritative legislative history. Nonetheless, Bush continues to employ them to rewrite myriad laws. By December 25, 2006, Bush had issued a total of 147 signing statements, which included 1,132 distinct challenges to provisions of law. "The administration does a shuck and jive with the figures, suggesting that they have issued fewer signing statements than previous presidents, which is true. But the devil is in the details--he has blown the lid off the number of challenges--1,132," said Miami University political science professor Christopher Kelley, an expert on presidential power. "By the end of his first term," Kelley added, "he had issued more challenges than all previous presidents combined."⁷

The Unitary Executive

Many of Bush's signing statements say that he will follow the statutory provision consistent with the powers of "the unitary executive." A seemingly innocuous phrase, this term actually represents a radical, ultra rightwing interpretation of the powers of the presidency. Championed by the conservative Federalist Society, the unitary executive doctrine gathers all power in the hands of the President and insulates him from any oversight by the congressional or judicial branches. In a November 2000 speech to the Federalist Society, then Judge Samuel Alito said the Constitution "makes the president

⁶ Address by Attorney General Edwin Meese III, National Press Club, Washington D.C., Feb. 25, 1986.

⁷ E-mail to author from Christopher Kelley (Dec. 25, 2006) (on file with author).

the head of the executive branch, but it does more than that. The president has not just some executive powers, but the executive power -- the whole thing."⁸ These "unitarians" claim that all federal agencies, even those constitutionally created by Congress, are beholden to the Chief Executive, that is, the President. This means that Bush could disband agencies like the Federal Communications Commission, the Food and Drug Administration, the Federal Reserve Board, etc., if they weren't to his liking. Indeed, Bush signed an executive order stating that each federal agency must have a regulatory policy office run by a political appointee. Consumer advocates were concerned that this directive was aimed at weakening the Environmental Protection Agency and the Occupational Safety and Health Administration. The unitary executive dogma represents audacious presidential overreaching into the constitutional province of the other two branches of government.

This doctrine took shape within the Bush administration shortly after 9/11. On September 25, 2001, former deputy assistant attorney general John Yoo used the words "unitary executive" in a legal memo he wrote for the White House: "The centralization of authority in the president alone is particularly crucial in matters of national defense, war, and foreign policy, where a *unitary executive* can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch."⁹ Six weeks later, Bush began using that phrase in his signing

⁸ Jess Bravin, *Judge Alito's View Of the Presidency: Expansive Powers. Court Pick Endorsed Theory Of Far-Reaching Authority; Tenet of Bush White House A Debate Over Terror Tactics*, WALL STREET JOURNAL, Jan. 5, 2006, at A1 (citing Christopher Kelley).

⁹ *Id.* (emphasis added).

statements.¹⁰ As of December 22, 2006, Bush had used the words "unitary executive" 145 times in his signing statements and executive orders.¹¹ Yoo, one of the chief architects of Bush's doctrine of unfettered executive power, wrote memoranda advising Bush that because he was Commander in Chief, he could make war any time he thought there was a threat, and he didn't have to comply with the Geneva Conventions. In a December 1, 2005 debate with Notre Dame professor Doug Cassel, Yoo argued there is no law that could prevent the President from ordering that a young child of a suspect in custody be tortured, even by crushing the child's testicles.¹² In John Yoo's world, the President is the law.

Similar language has already cropped up in Supreme Court opinions. In his lone dissent in *Hamdi v. Rumsfeld*, Justice Clarence Thomas cited "the structural advantages of a unitary Executive." He disagreed with the Court that due process demands an American citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker. Thomas wrote, "Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive."¹³

¹⁰ Statement on Signing the Energy and Water Development Appropriations Act, 2002, Nov. 12, 2001, <http://www.presidency.ucsb.edu/ws/index.php?pid=73462>; Statement on Signing the National Defense Authorization Act for Fiscal Year 2002, Dec. 28, 2001, <http://www.presidency.ucsb.edu/ws/index.php?pid=63433>.

¹¹ Jess Bravin, *supra* note 8; E-mail to author from Christopher Kelley (Dec. 23, 2006) (on file with author).

¹² Philip Watts, *Bush Advisor Says President Has Legal Power to Torture Children*, Jan. 8, 2006, <http://www.informationclearinghouse.info/article11488.htm>.

¹³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 582 (2004)(Thomas, J., dissenting).

In 1926, Justice Louis Brandeis explained the constitutional role of the separation of powers. He wrote, "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."¹⁴ Eighty years later, noted conservative Grover Norquist, describing the unitary executive theory, echoed Brandeis's sentiment. Norquist said, "you don't have a constitution; you have a king."¹⁵

Signing Away Checks and Balances

Let's examine some of King George W. Bush's signing statements. He issued his most notorious one after he signed the Detainee Treatment Act in December 2005, which prohibited the United States from subjecting prisoners to cruel, inhuman or degrading treatment or punishment. It also upheld federal court access for Guantánamo detainees whose habeas corpus petitions were already pending.¹⁶ The Bush gang resisted the measure, which was proposed as an amendment to an appropriations bill for the Iraq and Afghanistan wars. Bush finally signed the bill with great fanfare. He then quietly attached a signing statement declaring that his administration would interpret the new law

¹⁴ Myers v. United States, 272 U.S. 52 (1926)(Brandeis, J., dissenting).

¹⁵ Elizabeth Drew, *Power Grab*, NEW YORK REVIEW OF BOOKS, June 22, 2006, at 10.

¹⁶ Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, PL 109-148, 119 Stat. 2680.

"in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power."¹⁷ These words are tantamount to saying Bush will follow the law when he wants and refuse to do so when he doesn't.

The Supreme Court didn't buy it. In *Hamdan v. Rumsfeld*, the high court made no mention of Bush's signing statement when it rejected the President's contention that the Detainee Treatment Act did not apply to pending habeas corpus petitions of Guantánamo detainees. In his dissent, Justice Antonin Scalia chided the majority for ignoring Bush's signing statement, but Justice John Paul Stevens, writing for the Court's majority, categorically declared that "the Executive is bound to comply with the Rule of Law."¹⁸

Bush made good on his vow to violate the Detainee Treatment Act. His gang continues to subject prisoners to cruel, inhuman and degrading treatment, notwithstanding the dictates of the Detainee Treatment Act that Congress passed. Although Bush denies that United States forces are torturing and mistreating prisoners, an American who was mistakenly detained by US authorities reported being subjected to what amounts to cruel, inhuman and degrading treatment for three months in mid 2006. Donald Vance was a Navy veteran who worked in Iraq as a security contractor. While he was there, Vance became an informant for the FBI, blowing the whistle on possible illegal arms trading. While Vance was held at Camp Cropper in Baghdad, U.S. military

¹⁷ President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," Dec. 30, 2005, <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

¹⁸ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2798 (U.S.,2006).

personnel subjected him to 24- hour florescent lights in his cell, constant blaring of heavy metal or country music, and forced standing in his cell. Five months after Vance was released, he still suffers from nightmares, depression, shame and paranoia.¹⁹

Another signing statement that garnered intense opposition when it became public followed the renewal of the USA Patriot Act. Bush and the Congress had fought a pitched battle over the legislation. After the revelation of Bush's secret executive order creating his warrantless domestic spying program, the Senate refused to renew the Patriot Act, which was set to expire on December 31, 2005. After granting an extension, the Senate eventually agreed to the bill three months later.²⁰ The new law contained several provisions requiring congressional oversight so Congress could ensure the Justice Department was not illegally violating the privacy of Americans. When Bush signed the bill in a White House ceremony, he called it "a piece of legislation that's vital to win the war on terror and to protect the American people."²¹ Then he quietly issued a signing statement citing "the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."²² In other words, Bush reserved the right to refuse to turn over the reports Congress mandated when it renewed the Patriot Act.

¹⁹ Michael Moss, *American Recalls Torment As a U.S. Detainee in Iraq*, NEW YORK TIMES, Dec. 18, 2006 at A1.

²⁰ USA PATRIOT Improvement and Reauthorization Act of 2005, PL 109-177, Mar. 9, 2006, 120 Stat. 192.

²¹ Charlie Savage, *Bush Shuns Patriot Act In Addendum To Law, He Says Oversight Rules Are Not Binding*, BOSTON GLOBE, Mar. 24, 2006 at A1.

²² George W. Bush, Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, Mar. 9, 2006, <http://www.presidency.ucsb.edu/ws/index.php?pid=65326>.

Bush's signing statement propelled House Intelligence Committee Ranking Member Jane Harman and House Judiciary Committee Ranking Member John Conyers, Jr. to send a letter of protest to Attorney General Alberto Gonzales. Citing Bush's claim of "authority to ignore reporting requirements to Congress," the lawmakers wrote, "The signing statement, and many of the 107 similar statements the President has issued on other legislation, have the effect of corrupting the legislative process. Indeed, during consideration of this matter, many Members who supported the final law did so based upon the guarantee of additional reporting and oversight. This Administration cannot, after the fact, unilaterally repeal provisions of the law implementing such oversight."²³

In response to the publication of reports of Bush's secret domestic spying program, Congress passed a law mandating the Defense Department to provide Congress with "a report providing a comprehensive inventory of Department of Defense Intelligence and intelligence-related programs and projects."²⁴ Bush responded by issuing a signing statement directing the Defense Department to essentially ignore the statute.²⁵

²³ Harman and Conyers Demand Administration Rescind Patriot Act "Signing Statement," Mar. 27, 2006, http://www.house.gov/list/press/ca36_harman/pr_060327_patriotact.html.

²⁴ National Defense Authorization Act for Fiscal Year 2006, PL 109-163, Jan. 6, 2006, 119 Stat. 3136.

²⁵ George W. Bush, Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, Jan. 6, 2006, <http://www.presidency.ucsb.edu/ws/?pid=65172>.

It is well established that Congress may impose reporting requirements upon Executive Branch officials.²⁶ Yet Bush has issued other signing statements saying he can decline to provide Congress with reports from the Defense Secretary detailing the conduct of military operations for Operation Enduring Freedom in Afghanistan, plans for ballistic missile defense systems, and discussions with Russia on non-proliferation agreements. He says he can make the CIA refuse to report to Congress on intelligence activity, and decline to require the Inspector General of the Justice Department and the Attorney General to document oversight of the FBI. Bush's signing statements also would prevent the National Board for Education Services from chronicling the progress in improving the nation's educational system.

There was a great public outcry when the *Washington Post* revealed that Bush had signed an executive order establishing secret "black sites" where prisoners were illegally secreted from the International Committee of the Red Cross and many subjected to torture. Yet after Congress passed legislation requiring the President to tell Congress before diverting funds from authorized programs to "special access programs," such as the "black sites," Bush maintained he had the right to refuse to so notify Congress.

When he signed the bill in which Congress authorized him to use military force against Iraq, Bush wrote, "While I appreciate receiving that support, my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use

²⁶ Walter Dellinger, Assistant Att'y Gen., Memorandum for the General Counsels of the Federal Government, *The Constitutional Separation of Powers between the President and Congress*, at 54-56, May 7, 1996, 1996 WL 876050.

force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution."²⁷ The Constitution gives only Congress the power to declare war; the President has no authority to mount a war of aggression as Bush did when he invaded Iraq.²⁸

In 1978, Congress passed the Office of Inspector General Act, which requires the Inspector General in every U.S. government agency to investigate every complaint that agency receives and report its findings to Congress.²⁹ As a result, inspector generals provide independent oversight to keep our government honest. There is much corruption to investigate in Iraq. In an August 2005 interview, Former Army Reserve Brigadier General Janis Karpinski told me that she "saw corruption like I've never seen before - millions of dollars just being pocketed by contractors. Everything was on a cash basis at that time," she said. "You take a request down - literally, you take a request to the Finance Office. If the Pay Officer recognized your face and you were asking for \$450,000 to pay a contractor for work, they would pay you in cash: \$450,000. Out of control."³⁰

In November 2003, Congress enacted a law requiring that the Inspector General in Iraq tell Congress whenever officials refuse to cooperate with its investigations.³¹

²⁷ Authorization for Use of Military Force Against Iraq Resolution of 2002, PL 107-243, Oct. 16, 2002, ___ 116 Stat. 1498; George W. Bush, Statement on Signing the Authorization for Use of Military Force Against Iraq Resolution of 2002, Oct. 16, 2002, <http://www.presidency.ucsb.edu/ws/index.php?pid=64386>.

²⁸ U.S. CONST., art. I, § 8; see Chapter One.

²⁹ Inspector General Act of 1978, PL 95-452, Oct. 12, 1978, 92 Stat. 1101.

³⁰ Marjorie Cohn, *Abu Ghraib General Lambastes Bush Administration*, Aug. 24, 2005, http://www.truthout.org/docs_2005/082405Z.shtml.

³¹ Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, PL 108-106, Nov. 6, 2003, 117 Stat. 1209.

Bush declared in his signing statement that the IG need not issue such notification to Congress.³² One year later, Congress passed a law that created a Special Inspector General for Iraq Reconstruction to succeed the Coalition Provisional Authority, and required the IG to conduct investigations and report to Congress.³³ In his signing statement, Bush wrote that this Special Inspector General "shall refrain" from investigating intelligence or national security matters, or any crime the Pentagon decides it wants to investigate.³⁴ So much for accountability for our tax dollars in Iraq.

The Bush gang frequently touts its support for our troops, some of whom are on their fifth tour of duty in Iraq and Afghanistan. But Bush issued a signing statement scoffing at the limits Congress has placed on the number of days a member of the Armed Forces may be deployed. Bush has also reserved the right to disobey congressional mandates that the Defense Secretary report to Congress about whether the prohibition against requiring injured troops to pay for their hospital meals is being enforced, and about the effectiveness of detection and diagnosis of Post Traumatic Stress Disorder. He has likewise signed away his obligation to have his Defense Secretary institute studies about brain injuries suffered by our troops, and mental health benefits for members of the Armed Forces.

In other signing statements, Bush has indicated he will not follow laws that:

³² George W. Bush, Statement on Signing the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Nov. 6, 2003, <http://www.presidency.ucsb.edu/ws/index.php?pid=64639>.

³³ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, PL 108-375, Oct. 28, 118 Stat. 1811.

³⁴ George W. Bush, Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Oct. 28, 2004, <http://www.presidency.ucsb.edu/ws/index.php?pid=72803>.

- Ban the use of U.S. combat troops against Colombian rebels;
- Forbid the use in military intelligence of evidence collected in violation of the Fourth Amendment;
- Mandate new regulations for military prisons in which military lawyers could advise commanders on the legality of certain treatment even if Justice Department lawyers disagreed;
- Require the retraining of prison guards in humane treatment under the Geneva Conventions;
- Mandate background checks for civilian contractors in Iraq;
- Prohibit the firing or punishment of employee whistleblowers at the Department of Energy and the Nuclear Regulatory Commission;
- Require expanded recruitment of minorities for Foreign Service and Civil Service jobs; and
- Direct the Department of Homeland Security to tell Congress when it is unable to deploy explosive detection systems at airports.

Contrast Bush's signing statements with the one President Jimmy Carter issued when he signed the Foreign Intelligence Surveillance Act in 1978. Carter wrote:

The bill requires, for the first time, a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the

United States in which communications of U.S. persons might be intercepted.

It clarifies the Executive's authority to gather foreign intelligence by electronic

surveillance in the United States. It will remove any doubt about the legality

of those surveillances which are conducted to protect our country against espionage and international terrorism. It will assure FBI field agents and others

involved in intelligence collection that their acts are authorized by statute and,

if a U.S. person's communications are concerned, by a court order. And it will

protect the privacy of the American people.

In short, the act helps to solidify the relationship of trust between the American

people and their Government. It provides a basis for the trust of the American

people in the fact that the activities of their intelligence agencies are both effective and lawful. It provides enough secrecy to ensure that

intelligence

relating to national security can be securely required, while permitting review

by the courts and Congress to safeguard the rights of Americans and others.³⁵

Whereas Bush purports to rewrite the laws Congress has passed, Carter sought to underscore the importance of following them.

In its September 2006 report, the nonpartisan Congressional Research Service determined that Bush's use of signing statements is emblematic of his "comprehensive strategy to strengthen and expand executive power." Arlen Specter, the Republican senator from Pennsylvania and former chairman of the Senate Judiciary Committee, has pointed out that Bush is trying to do an end-run around the veto process. Specter said, "Under the Constitution if the president doesn't like a bill he vetoes it. You don't cherry-pick the legislation."³⁶

In one of his last signing statements of 2006, Bush declared that he considered as only "advisory" Congress's directive prohibiting transfers of certain nuclear material to India.³⁷ In doing so, he highlighted his refusal to execute the law governing one of the most critical issues of our time—nuclear proliferation.

³⁵ Statement on Signing S.1566 Into Law, Oct. 25, 1978, <http://www.cnss.org/Carter.pdf>.

³⁶ Elizabeth Drew, *Power Grab*, *supra* note 15.

³⁷ Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006, PL 109-401, Dec. 18, 2006, 120 Stat. 2726. President's Statement on H.R. 5682, the "Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006," Dec. 18, 2006, <http://www.whitehouse.gov/news/releases/2006/12/20061218-12.html>.

Courting Nuclear Disaster

Throughout his presidency, Bush has thumbed his nose at our legal obligations under the 1970 Nuclear Non-Proliferation Treaty (NPT). When the United States ratified this treaty, it became part of the supreme law of the land under the Supremacy Clause of the Constitution. The treaty commits the countries that possess nuclear weapons (Britain, China, France, Russia and the United States) to negotiate their elimination. To gain the agreement of the non-nuclear-weapon parties to the treaty's extension in 1995, the United States made promises in connection with a UN Security Council resolution calling for what are known as negative security assurances, in which the US promised not to use nuclear weapons against non-nuclear-weapon parties unless they attack the US while in alliance with another nuclear-weapon country.

The International Court of Justice (World Court) issued an advisory opinion on the legality of the threat or use of nuclear weapons in 1996. The World Court said that under humanitarian law, countries must "never use weapons that are incapable of distinguishing between civilian and military targets." It held that the threat or use of nuclear weapons was generally contrary to international law. Although the divided Court was unable to reach a definitive conclusion regarding threat or use in extreme circumstances of self-defense where the survival of a nation was at stake, the overall thrust of the decision was toward categorical illegality. It strongly implied that the doctrine of deterrence is illegal. The Court said the radioactive effects of nuclear

explosions cannot be contained in space and time.³⁸ Thus, the use of nuclear weapons can never conform to the requirements of the law.

In 2002, Bush's Defense Department presented its Nuclear Posture Review (NPR) to Congress, which actually expands the range of circumstances in which the United States could use nuclear weapons. This document explicitly allows the option of using nuclear weapons against non-nuclear nations. It permits pre-emptive attacks against biological and chemical weapons capabilities and in response to "surprising military developments." It provides for the development of nuclear warheads, including earth penetrators. Alarming, classified portions of the NPR obtained by the *Los Angeles Times* and the *New York Times* call for contingency planning for the use of nuclear weapons against Russia, China, North Korea, Iraq, Iran, Syria, and Libya.³⁹

The NPR sets forth policies that explicitly violate the legal obligations the United States undertook when it ratified the Nuclear Non-Proliferation Treaty and again in 1995: namely, a prohibition on the use of nuclear weapons against non-nuclear countries and the obligation to negotiate the cessation of the arms race at an early date.

When the NPR was introduced in 2002, the *New York Times* said, "Where the Pentagon review goes very wrong is in lowering the threshold for using nuclear weapons and in undermining the effectiveness of the Nuclear Nonproliferation Treaty ... Nuclear weapons are not just another part of the military arsenal. They are different, and lowering

³⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, International Court of Justice, <http://www.icj-cij.org/icjwww/idecisions/isummaries/iunanaummary960708.htm>.

³⁹ William M. Arkin, *Secret Plan Outlines the Unthinkable.*, LOS ANGELES TIMES, Mar. 10, 2002 at 1.

the threshold for their use is reckless folly."⁴⁰ Yet according to the Lawyers' Committee on Nuclear Policy, today the United States stands "ready to rapidly launch 2,000 strategic warheads with land- and submarine-based missiles. Each warhead would inflict vast heat, blast and radiation 7 to 30 times that of the Hiroshima bomb."⁴¹

The Pentagon's March 2005 "Doctrine for Joint Nuclear Operations" would allow the United States to use nuclear weapons to counter potentially overwhelming conventional adversaries, to secure a rapid end of a war on US terms, or simply "to ensure success of US and multinational operations"—a shockingly broad permission. This also violates the NPT.

Under the NPT, countries that don't have nuclear weapons agreed not to acquire them in exchange for the promise from nuclear states to progressively disarm. Disarmament and non-proliferation are two sides of the same coin or two contractual promises exchanged. Thus, when the Bush administration unilaterally decides not to disarm, but instead to develop and even contemplate using new nukes, it stands in flagrant violation of the NPT. Bush cannot "choose" non-proliferation over disarmament.

Bush's nuclear policy is not just illegal and hypocritical. It's downright dangerous. When North Korea and Iran - two members of Bush's "axis of evil" - see the third member invaded and occupied by the Bush gang, coupled with Bush's aggressive development of nuclear weapons, it is hardly surprising that they would develop their own nukes.

⁴⁰ Editorial, *America as Nuclear Rogue*, NEW YORK TIMES, Mar. 12, 2002 at A26.

⁴¹ *Threat or Use of Nuclear Weapons: Illegal Then, Illegal Now*, LAWYERS' COMMITTEE ON NUCLEAR POLICY, NEW YORK, Aug. 2005, <http://www.lcnp.org/disarmament/threatoruse.pdf>.

The President Cannot Be a Lawmaker

Bush has frequently rationalized his overreaching across the lines separating the three branches of government by professing the need to protect the American people against terrorism. We have seen this in Bush's claims of authority to hold prisoners indefinitely with no access to courts and to listen in on our conversations without a warrant. In his signing statements, Bush asserts the right to violate the will of Congress because he is Commander in Chief and the "unitary executive."

This is by no means a new issue. During the Korean War, President Harry Truman claimed he had "inherent power" under his Commander in Chief authority to seize America's steel mills for the war effort, proclaiming "the existence of a national emergency." In a landmark ruling in 1952, *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court disagreed, saying the seizure did not stem from a congressional policy prescribed by Congress, but rather an executive policy prescribed by the President. Significantly, the Court held that Truman's seizure violated the constitutional doctrine of separation of powers in spite of what the President claimed was an emergency that threatened the ability of the United States to defend itself. The Court held that "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his

functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."⁴²

Justice Robert Jackson's famous concurrence in *Youngstown* is widely cited as a formula for gauging the powers of the President in relationship to Congress. Jackson wrote: "(1) When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . (2) When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . (3) When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."⁴³

When Bush sets up his secret spying program in violation of FISA, when he establishes military commissions that violate Congress's Uniform Code of Military Justice, when he defies the Nuclear Non-Proliferation Treaty, and when Bush attaches signing statements to Congressional bills indicating his intention to defy the will of Congress, he falls squarely into Jackson's third category.

⁴² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

⁴³ *Id.* at 635-37.

The Task Force on Presidential Signing Statements and the Separation of Powers Doctrine of the American Bar Association (ABA) decried Bush's use of signing statements as "contrary to the rule of law and our constitutional system of separation of powers." The ABA's blue-ribbon task force found Bush has used his signing statements to "claim the authority or state the intention to disregard or decline to enforce" laws adopted by Congress. In its report, the task force urged the President to communicate his concerns about legislation to Congress prior to passage and to use his veto power if he thinks all or part of a bill is unconstitutional. It urged Congress to enact legislation requiring the President to promptly submit to Congress all signing statements he issues as well as his rationale for their issuance, and to pass legislation allowing the President, Congress, or other entities or individuals to seek judicial review of any presidential claim to disregard or decline to enforce all or part of any law he has signed.

"The President's constitutional duty is to enforce the laws he has signed into being unless and until they are held unconstitutional by the Supreme Court or a subordinate tribunal," the task force concluded. "The Constitution is not what the President says it is."⁴⁴ ABA president Michael S. Greco cautioned, "We will be close to a constitutional crisis if this issue, the president's use of signing statements, is left unchecked."⁴⁵

⁴⁴ American Bar Association, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, Aug. 2006, http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

⁴⁵ Michael Abramowitz, *Bush's Tactic of Refusing Laws Is Probed. Bar Association's Panel Criticizes President's Many Challenges to Legislation*, WASHINGTON POST, July 24, 2006, at A5.

Bruce Fein, deputy attorney general in the Reagan administration and one of the members of the ABA's task force, testified at the Senate Judiciary Committee's June 2006 hearing on presidential signing statements. Fein warned of the disastrous consequences of Bush's use of signing statements. "Suppose Congress were to enact a law forbidding the President to employ military force in Iran aiming to destroy its nuclear facilities," Fein told the senators. "President Bush might sign the law but in a signing statement declare that he would treat it as advisory to preserve his Commander in Chief prerogatives. The ability of Congress to participate in shaping the foreign relations and national security of the United States would be crippled, and the express congressional authority to enact laws to regulate the constitutional powers of the President in Article I, section 8, clause 18 would be a dead letter."⁴⁶

New York University law professor David Golove, an expert on executive power, said Bush has cast a cloud over "the whole idea that there is a rule of law." A president like Bush, who ignores the rulings of the Supreme Court, coupled with a Congress that is unwilling to stand up to him can simply make the Constitution "disappear," Golove noted.⁴⁷ Professor Edward Herman of the University of Pennsylvania issued a similar warning. "The brazenness of Bush's use of [signing statements] is remarkable," Herman said. "But even more remarkable is the fact that this de facto further nullification of congressional authority fails to elicit sustained criticism and outrage. It is part of a step-

⁴⁶ Statement of Bruce Fein Before the Senate Judiciary Committee Re: Presidential Signing Statements, June 27, 2006, http://judiciary.senate.gov/testimony.cfm?id=1969&wit_id=5482.

⁴⁷ Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006 at A1.

by-step abrogation of constitutional government, and it is swallowed by the flag-wavers and normalized. We are in deep trouble," Herman added.⁴⁸

In a 2006 speech marking the birthday of Martin Luther King Jr., former Vice President Al Gore said, "An Executive who arrogates to himself the power to ignore the legitimate legislative directives of the Congress or to act free of the check of the judiciary becomes the central threat that the Founders sought to nullify in the Constitution – an all-powerful Executive too reminiscent of the King from whom they had broken free."⁴⁹ Eight days before Bush penned his infamous intent to disobey the Detainee Treatment Act, Senator Edward M. Kennedy wrote in the *Boston Globe*, "The president is not above the law; he is not King George."⁵⁰

The Constitution is unequivocal. It is George W. Bush's job to enforce, not to rewrite, the laws Congress has passed. If we allow our President to become a King, we will find ourselves in the same predicament that spawned the American Revolution. As the Founding Fathers wrote in the Declaration of Independence, "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security."

⁴⁸ William Fisher, *Signing Away the Constitution?*, INTER PRESS SERVICE, June 29, 2006, <http://ipsnews.net/news.asp?idnews=33805>.

⁴⁹ Al Gore, *Restoring the Rule of Law*, Jan. 16, 2006 (Martin Luther King Day Speech), <http://www.epic.org/privacy/terrorism/fisa/gorespeech0106.pdf>.

⁵⁰ Edward M. Kennedy, *On Wiretapping, Bush Isn't Listening to the Constitution*, BOSTON GLOBE, Dec. 22, 2005 at A19.

