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HOUSE COMMITTEE ON ARMED SERVICES

U.S. House of Representatives

Washington, DC 20515-6035

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July 15, 2008

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MEMORANDUM FOR CHAIRMAN SKELTON AND RANKING MEMBER HUNTER

FROM: Subcommittee on Oversight and Investigations

RE: Presidential Signing Statements: Findings, Conclusions, and Recommendations for House Armed Services Committee Response

“Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion The informing functions of Congress should be preferred even to its legislative function. The argument is not only that a discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.”

-- Woodrow Wilson¹

Introduction

On Tuesday, March 11, 2008, the Subcommittee on Oversight and Investigations (O&I) met in open session to receive testimony on “Signing Statements and the National Defense Authorization Act for FY 2008.” The purpose of the hearing was to determine the practical effect of the President’s recent signing statement accompanying the 2008 authorization act. Although the Department of Defense and Department of Justice (DOJ) declined to provide witnesses, Deputy Secretary of Defense England, in a telephone conversation with Chairman Skelton, stated, “The Department of Defense always obeys the law.” Experts from the Congressional Research Service (CRS), Government Accountability Office (GAO), American

¹ Woodrow Wilson, *Congressional Government* 195, 198 (Meridian Books, 1956) (1885).

Bar Association (a former Reagan Administration DOJ attorney), and Georgetown University Law Center (a former Bush Administration DOJ attorney) testified.²

Based upon the results of that hearing, and O&I staff research and analysis, we put forward a number of findings and recommendations for your consideration.³

Findings

(1) The signing statement accompanying the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA) did not fulfill the function of communicating the President's concerns to the House Armed Services Committee and the public, both because it is a non-exclusive list of potentially problematic provisions and because it does not adequately explain the nature of any specific concerns with the four provisions singled out by the President. The functionality of a given signing statement is greatly reduced if it is too vague to identify the concerns of the President and the interpretation of the law that the President is trying to convey to the executive branch. Unfortunately, the FY08 NDAA signing statement did not provide an inclusive list of the provisions that raised concerns for the President, stating only that "provisions of the Act, *including* section 841, 846, 1079, and 1222" were potentially constitutionally problematic (emphasis added).⁴

In addition, this statement failed to identify the specific nature of concerns, stating only that the provisions "could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief."⁵ The nature of these objections, however, is not clarified or substantiated.⁶ As pointed out, the statement leaves the President's constitutional objections "somewhat theoretical," at best.⁷

(2) While presidents have issued signing statements for quite some time, this President has issued a significantly larger percentage of signing statements challenging or objecting to various provisions of the law. The Congressional Research Service (CRS) has reviewed the last 15 years of National Defense Authorization Acts and determined that every one has been accompanied by a signing statement expressing constitutional concerns, whether signed into law by President Clinton or President Bush.⁸ However, when reviewing *all* signing statements issued

² The O&I subcommittee issued formal letters on February 28 and 29, requesting DOD and DOJ witnesses for its hearing. By email and phone conversation over the next two weeks, both DOD and DOJ declined the subcommittee's request.

³ Relevant background information is available in **Attachment A**, the Memorandum for HASC Oversight and Investigations Subcommittee, "RE: The Impact of the Presidential Signing Statement on Implementation of the National Defense Authorization Act for FY 2008," dated March 7, 2008.

⁴ Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 Weekly Comp. Pres. Doc. 115 (January 28, 2008).

⁵ Id.

⁶ Statement of T.J. Halstead, *Signing Statements and the National Defense Authorization Act for Fiscal Year 2008: Hearing Before the House Armed Services Subcommittee on Oversight and Investigations*, draft transcript at page 14 (March 11, 2008).

⁷ Prepared statement of Nicholas Quinn Rosenkranz, Associate Professor, Georgetown University Law Center, *Signing Statements and the National Defense Authorization Act for Fiscal Year 2008: Hearing Before the House Armed Services Subcommittee on Oversight and Investigations*, at 9 (March 11, 2008).

⁸ Prepared statement of T.J. Halstead, *Signing Statements and the National Defense Authorization Act for Fiscal Year 2008: Hearing Before the House Armed Services Subcommittee on Oversight and Investigations*, at 9-22

in the past 15 years, 78 percent of President Bush's more than 150 signing statements have raised constitutional or legal objections, compared with only 18% of all of President Clinton's.⁹ In fact, more than 1,000 distinct provisions of law have been called into question in the Bush Administration's signing statements for a variety of reasons.¹⁰

(3) Signing statements may, if used appropriately, serve a legitimate function as a tool for continuing dialogue between the President, Congress, and the public. On the other hand, signing statements may be a mechanism to expand executive authority at the expense of that of the legislature. The presidential act of issuing a signing statement is generally not, in and of itself, problematic from a legal or institutional standpoint.¹¹ The President may use such statements to express his interpretation of a law, and to direct the Administration on how to execute the law.¹² This informs the public and Congress of the President's interpretation of legislation, and gives Congress the opportunity, if it disagrees with the President's construction of a statute, to pass clarifying legislation.¹³

However, the broad and unsubstantiated objections raised in the FY08 NDAA signing statement do not contain "explicit, measurable refusals to enforce a law," but instead "appear simply to be hortatory assertions of executive power."¹⁴ As pointed out during the hearing, "[T]his orchestrated use of signing statements to raise abstract, conjectural constitutional issues is more to . . . advance an ideology than it is to deal with any particular issues of the moment."¹⁵ Some believe that the real import of signing statements by the Bush Administration is "part of a comprehensive strategy to strengthen and expand executive authority generally," by using vague language to assert Presidential prerogative at every opportunity.¹⁶

(4) Signing statements may provide a roadmap by which the House Armed Services Committee can determine which provisions of law merit a higher degree of oversight, but the House Armed Services Committee has not systematically tracked the implementation of such provisions. While the Committee must conduct oversight over all of the laws, programs, and agencies within its jurisdiction, signing statements identify provisions about which the President has particular concerns that could lead to implementation of the law in a manner that differs from the intent of Congress. A limited but systematic review by the Government Accountability Office (GAO) of provisions that were the subject of signing statements in prior years has shown that the provisions in question are usually, but not always, executed as written.¹⁷ While GAO did not find direct evidence that the failure to execute any given provisions was a result of a signing statement, it did note that "Congress may wish to focus its oversight work to include those provisions to which the President objects to ensure that the laws are carried out."¹⁸ Of course, where a specific signing statement does not provide an inclusive list of objectionable

(March 11, 2008).

⁹ Id. at 2.

¹⁰ Id.

¹¹ Id.

¹² Rosenkranz prepared statement at 3-4.

¹³ Id.

¹⁴ Halstead testimony, transcript page 15.

¹⁵ Statement of Gary Kepplinger, *Signing Statements and the National Defense Authorization Act for Fiscal Year 2008: Hearing Before the House Armed Services Subcommittee on Oversight and Investigations*, draft transcript at page 83 (March 11, 2008).

¹⁶ Halstead prepared statement at 4.

¹⁷ Kepplinger prepared statement at 1-2.

¹⁸ Kepplinger prepared statement at 12. See also, Halstead prepared statement at 8-9.

provisions, as noted previously about the FY08 NDAA statement, additional investigatory work may be required to determine precisely what provisions should be the subject of such focused oversight. The GAO study focused exclusively on signing statements accompanying the 2006 appropriations acts, and it did not address provisions of previous defense authorization acts called out in signing statements.

Determining whether specific provisions of defense authorizations are implemented in a manner consistent with the intent of Congress is a core function of Committee oversight.¹⁹ Currently, the Committee conducts oversight over the laws, programs, and agencies within its jurisdiction in accordance with its oversight plan, adopted pursuant to House rules.²⁰ The Committee has not, however, implemented any type of systematic tracking or oversight mechanism to ensure that the provisions identified within signing statements are executed in accordance with the intent of Congress.

(6) There are other potential mechanisms for increasing oversight of signing statement provisions, including legislative proposals and a statute requiring disclosure of executive branch policies against implementing specific laws, but the advisability of such mechanisms has not been fully explored. H.R. 264, H.R. 3045, and H.R. 3835 would all take certain steps to limit signing statements, or permit Congress to challenge them in various ways. In addition, a current statute, 28 U.S.C. § 530d, requires the Attorney General “to submit a report to Congress of any instances in which the Attorney General or the Department of Justice implements a formal or informal policy to refrain from enforcing or defending a federal law or regulation on the grounds that such provision is unconstitutional.”²¹ This requirement extends, to a lesser extent, to the heads of executive agencies and military departments.

¹⁹ Congressional Research Service *Congressional Oversight Manual*, at 2-6 (May 1, 2007).

²⁰ Rule X, clause 2(d).

²¹ Keplinger prepared statement at 12.

Recommendations

(1) The House Armed Services Committee should publicly establish mechanisms for ensuring enhanced oversight of provisions in laws that are the subject of signing statements. For the FY08 NDAA, this includes sections 841, 846, 1079, and 1222. The Committee should amend its oversight plan to require timely, specific oversight on signing statement provisions through hearings, requests for information, and other formal or informal mechanisms.

(2) The House Armed Services Committee should task the GAO to conduct a study of National Defense Authorization Acts, or other laws within House Armed Services Committee jurisdiction as appropriate, to determine whether provisions that have been the subject of signing statements have been executed consistently with the intent of Congress.

(3) The House Armed Services Committee should monitor and explore other potential avenues for oversight of signing statement provisions, including legislative proposals and the reporting requirement of 28 U.S.C. § 530d.