

**Rhetoric of Exception: Signing Statements, Sovereignty, and the Bush
Presidency**

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Chapter 1

Introduction

After the terrorist attacks of September 11, 2001 the normal functioning of the United States government changed dramatically. In an attempt to respond to perceived threats abroad the federal government rapidly reorganized and centralized power. This rapid movement was not new, but rather the result of a political move begun decades before. Tracing this evolution and the rhetoric that it enabled under the Bush administration is necessary to respond to the rapid changes being made in how the government functions.

My contention in this project is that the functioning of the federal government has changed such that sovereignty is now increasingly centered in the executive branch. As I will show this centering of sovereignty has been achieved by the use of rhetorical mechanisms that carry with them the force of law despite although they are not strictly speaking legal. This creates a paradox where legally nothing has been substantively changed, but effectually the changes are significant.

In particular, my aim is to focus on the effects of presidential signing statements. This once obscure tool was made famous in a 2006 Boston Globe piece by Charlie Savage that criticized the Bush administration's use of signing statements. Despite Savage's criticism, the popularity of signing statements has only grown in recent years. Understanding this particular mechanism will illustrate the larger trend in centralizing sovereignty by using signing statements to formulate policy. The unique functioning of signing statements, and the way they are being deployed will show that the fundamental nature of sovereignty and government in the United States is defined by the use of exceptions in the juridical and legislative order.

My literature review proceeds in three parts. The first is a brief history of the use of signing statements. The second shows what studies of signing statements to date can

demonstrate about their function. The third addresses attempts by rhetoricians to analyze signing statements.

The Evolution of the Signing Statement

Signing statements have been used since the early days of the presidency as a way to proclaim the official position of the executive branch on various pieces of legislation (Bradley and Posner). In their early use, signing statements were relatively infrequent and had a primarily informative function, letting Congress and the public know the position of the executive on the piece of legislation being signed. In this context the signing statement does not seem to be capable to influencing federal policy as it merely describes what the legislature has already approved. One example of this earlier form of signing statement was issued by President Jackson. In this legislation an unclear provision concerning a road to be constructed between Detroit and Chicago could have been interpreted as spanning east of Michigan. In response Jackson issued a statement that explained that he presumed that the intent was that the road not to extend east of Michigan (Jackson Para. 1). In examples such as this, we see a good faith attempt to enact the legislation as intended by Congress. Early signing statements also served an epideictic function where the President would celebrate the passage of particularly important pieces of legislation without commenting on the substance of the bill. From these relatively tame purposes signing statements evolved into an entirely different sort of animal.

These early statements basically clarify the intent of the executive branch charged with enforcing the legislation. The signing statements in particular focus on trying to give a clearer explanation for vaguely worded parts of the legislation. In these signing statements the aim was to provide a more clear explanation of legislative intent, rather than present a differing opinion of the legislation held by the executive. There is little evidence of anyone questioning these early

signing statements.

The first evolution of these statements to take place happened in 1842 as President Tyler issued one of the first signing statements to express reluctance or dissent in response to a bill (Tyler, Para. 5). The bill in question would have required the states to change their process for creating electoral districts. Tyler issued a statement after signing the legislation that said he was unsure about the constitutionality of the act. Although he was signing the bill, he did not want his decision to do so to be taken as precedent. In this case the Executive was not attempting to subvert or modify the legislation, but merely express concerns about it. In later cases concern over constitutionality would become a prominent recurring topos in signing statements.

Though Tyler's signing statement certainly expanded the number of ways in which a signing statement could be used as an explanatory tool, the use of signing statements remained relatively rare. The next evolution was for signing statements to become a more standardized and frequent practice. Although signing statements would very occasionally be used by all President's after Hoover, they would see frequent use until the Reagan administration.

The Reagan presidency's use of signing statements was part of a larger trend in thought about the role of the presidency. With Reagan's election in the early 1980's, a group of young Republicans were swept into the White House and given the ability to test a new theory regarding the functioning of the presidency. Known as Unitary Executive Theory, this new understanding of how the government should function would dramatically change the relationship between the executive and legislative branches (Savage 230). The exact changes created by Unitary Executive Theory will be addressed later; for the purposes of explanation here it is sufficient to say that Unitary Executive Theory contends that the President needs to be able to have complete dominion over all federal agencies in order to execute the demands of the

office (Knott 149-150). The result was that subtle non-legislative mechanisms such as signing statements became important not just to explain unclear provisions made by Congress, but also to inform agencies how the president interprets the law (Bradley and Posner 307-309).

This set the stage for the last development, when the signing statement became used to make more direct policy changes by explaining how the law as written should function. This complex final stage of the signing statement is the concern of this research project. From its humble beginnings as a celebratory and explanatory function the signing statement has taken on the force of law in a much more overt sense, prompting some academics to treat signing statements as a “de facto line item veto” that serves a legislative function (Campbell & Jamieson 195). In the next section I will interrogate these different perspectives to explain the more far-reaching claims made about signing statements.

Breaking the story on signing statements

To date most media coverage of signing statements views them primarily as a deliberative rhetoric that has an unclear legal basis. The academic work done to criticize these documents has tended to reach similar conclusions. Explicating the way both the media and academia describe signing statements is necessary to understand the unique intervention offered by rhetorical analysis of the statements.

Journalists such as Savage tend to focus on the way signing statements have been used in recent times by presidents as a way to manipulate legislation to suit their policy objectives. Savage’s 2006 Boston Globe article claimed that President Bush had challenged “750 new laws” (Savage, Para. 1). This assertion was factually inaccurate; Bush only issued 220 signing statements, meaning that only 220 pieces of legislation were called into question. The number Savage presents actually represents how many provisions were challenged by the Bush

administration. This semantic difference may seem small, but its effect is substantial. Rather than 750 laws being “overturned”, 750 provisions of a smaller number of laws were modified, but not necessarily overturned. Though Savage’s portrayal is not wholly inaccurate, the number is not entirely arbitrary and some changes were made in how the laws were implemented, it also leads to misunderstandings of both the scale and function of signing statements.

The portrayal by Savage indicated that Bush used far more signing statements than any other president, which is false. In fact, President Bush issued fewer than President Clinton, or the sitting President Obama (Savage 153-155). Despite using fewer signing statements than either his predecessor or successor, President Bush is much more noted for his use of signing statements. This was magnified by the misunderstanding perpetuated by Savage’s (inaccurate) claim that signing statements were used to overturn laws.

The prevalence of the vision of signing statements reported by Savage demands criticism. This Savage’s claim that signing statements overturn legislation misses a number of fine distinctions. First, the signing statement does not challenge the law or legislation as a whole, but instead particular provisions of the law. Thus the legislation remains intact, except for the provisions mentioned in the signing statement. Second, signing statements are a problem not because the law isn’t enacted, but instead because the law is not enforced in the way Congress envisioned. Third, the effect is that the law is no longer legally binding; instead parts of it will not be enforced by the agencies responsible. Thus the law is in place, but it lacks the force of law. Fourth, and perhaps most important, many signing statements do not object to the law, but rather interpret the law in a manner contrary to the intent of Congress. In this way, signing statements are effective without calling the legitimacy of the law into question.

The journalist's job is made more complex in the case of signing statements because the very nature of the document is unclear. It is described as a policy document, in that policy is implicated and affected by it; at the same time, it isn't "legal" in that it does not legislate. This in-between status makes it very difficult for journalists to describe their function. It also makes it difficult to create a public understanding signing statements. As a result, there was no public debate about signing statements until Savage's 2006 article, which was successful largely by creating less than complete and accurate definitions of signing statements.

The inaccuracies of the first Savage story published in April of 2006 did not prevent Congress from taking significant direct action. In June of the same year, there was a hearing dealing with the legitimacy of signing statements. In July of the same year, Senator Arlen Specter introduced legislation that would have instructed all states, federal government agencies, and the courts to ignore signing statements. In the end nothing came of the hearings, and the bill died in committee. Since then hearings have periodically been held, and the media have occasionally reported on the existence of signing statements, but no substantive action has been taken to curtail their use. Despite the lack of action beyond maintaining an ongoing discourse about signing statements, there is a rapidly developing literature surrounding their use.

The literature on signing statements is already quite large. Though to date no book has been written that is dedicated solely to signing statements, there are a large and rapidly growing number of book chapters and journal articles dedicated to that purpose. Academia seems to be well aware of the existence of signing statements (thanks in part to the work of journalists such as Charlie Savage), but is unable to find a key defining characteristic that can be extended to all of them. The result of this is a great deal of misdirection which makes understanding the function and the potential benefits and problems associated with signing statements impossible.

Defenses of Executive Signing Statements

There are two defenses offered for signing statements. The first contends that signing statements are a legal practice of limited utility that has been hijacked for a particularly problematic political agenda. The second contends that the use of signing statements is a way to direct policy is entirely legitimate. This divide does not seem to be, as one might predict, driven by support for this or that candidate (with one notable extreme to be dealt with later), but instead by questions about the proper role of the executive is.

The first way signing statements are defended as a practice takes a limited view of how they should function. Authors such as Curtis Bradley and Eric Posner contend that the power to define should be limited to adding clarity to legislation. For these authors the implicit standard is that the clarification offered in the signing statement must remain faithful to the intent of the legislators. Therefore, the President under this interpretation is strictly limited by what the legislature intends, strictly limiting the power of the signing statement. This group contends that the way the Bush administration has used these documents over steps the bounds of the office, but that the signing statements themselves are a necessary tool for the executive to function.

One noteworthy approach to defending signing statements taken by Brian Marshall and Christopher Kelley contends that the Bush administration used signing statements as a bargaining tool. They contend that the president uses the threat of signing statements as a way to influence what legislation is passed. Because the signing statement can affect legislation without any oversight, the legislative has a weaker bargaining position relative to the executive and will change how legislation is written to meet the demands of the President. Kelley and Marshall argue that this bargaining tool helps resolve congressional gridlock by creating agreement between divided parties in Congress based on the demands of the President. Although this

position does not rely on the notion of a unitary executive, it is similar in that it defends the usage of signing statements as a way to expand presidential power.

These approaches focus on signing statements only as a means toward enacting policy. Advocates for this view often acknowledge and provide rebuttals to the criticisms of signing statements, but the defenses typically defend signing statements absent consideration of what is being done to the legislation. This view of signing statements, though helpful in describing how they function lacks the critical perspective necessary to describe their material effects. To draw this distinction I will describe the politics that have been tied to the recent history of signing statements.

Unitary Executive Theory and Signing Statements

A distinct approach to justifying signing statements takes a more expansive view of the role of the executive. This expansive view, although not unrelated to claims that expanded Presidential power dated to the New Deal era, gained new life under the Reagan administration when signing statements became a regular foreign policy tool. This was no mere coincidence but a concerted effort by Reagan Administration lawyers to enhance the power of the presidency (Pfiffner 199-200). This concerted effort consisted not only of using signing statements, but also included the use of memorandums defending signing statements as a necessary tool for the president.

These justifications required a new theory supporting an expansive use of executive power which would become known as Unitary Executive Theory. This theory holds that the president must exercise complete control over the agencies of the Executive. This theory was given definition by the memoranda written by the Reagan administration lawyers. As Amanda Hollis-Brusky notes this definition was rearticulated and most clearly described by Executive

branch lawyers by the Bush Administration Deputy Assistant Attorney General John C. Yoo who argued that the Executive was obligated to maintain unity of purpose especially in the face of a global terrorist threat (197-198). This argument makes it clear that the Unitary Executive Theory invests in the role of the President in creating national security through the unification of the country.

This role of the President as unifier forms the basis for the memorandums issued during the Reagan administration. One noteworthy comment was offered by administration lawyer and future Supreme Court Justice Samuel Alito. Alito argued that the use of signing statements has two primary advantages. First, they are a way to expand the role of the president in the legislative process. Second, they could be included in Supreme Court deliberations alongside legislative history. In the defense of these roles, Alito claims that because the president's approval is necessary for legislation to be enacted, the president should have comparable legislative powers.

Although the language of unification is absent here, the value of it is sustained. This argument is designed to unify the executive and congressional branches in legislative purpose. This sense of unity is distinct from the nationalistic sense that is evident in Yoo's argument, but the aim is similar. Both arguments use a theoretical role of the executive as unifier to justify expanding executive power.

This argument has gained ground in some academic circles as well. This is especially true of academics committed to defending the Bush legacy. Stephen Knott is among the most notable, arguing that the Bush signing statements were "a healthy corrective to decades of congressional intrusions into constitutionally mandated presidential powers." (149) Knott's argument is distinctive in that it does not altogether reject the notion that signing statements exist

in a legally undefined zone. Rather, he argues that such mechanisms are derived from the constitutional provisions that empower the president to enact the legislation passed by Congress. Knott views the signing statement as a way to preserve the power of enactment in the face of demands from Congress that the president be accountable for how policies are carried out.

My thesis is a rebuttal to this position taken by Knott. My approach, rather than directly disproving the claims made by Knott, questions the underlying presumptions that ground Knott's argument. I claim that the balance of powers approach advocated by Knott is no longer descriptive of the way government functions. Instead, a logic based on sovereignty constructed and defended through the rhetoric used in signing statements has supplanted the balance of power argument that grounds Knott's defense of the use of signing statements.

Resistance to Signing Statements

There is a distinct view of signing statements as a practice that is wholly illegitimate. Much of this has been prompted by the 2007 article written by Savage and later journalistic reporting. These journalists and academics have criticized the Bush and Obama administrations for radically expanding the way signing statements are used to illegitimately expand presidential power. Either by allowing the president unlimited legislative power, or by giving the president a de facto line item veto that is roundly rejected as unconstitutional (Shane 3). These positions are united in their rejection of signing statements as a policy mechanism, but their reasons for rejecting them are very different.

Those that argue that the signing statement unjustly expands presidential power tend to view them, not as a way to interpret legislation, but instead as a form of policy directive. As Pfiffner argues, "signing statements cannot be considered idle threats or harmless declarations. The Bush administration used them with the clear purpose of expanding executive power at the

expense of Congress and the courts and to accomplish goals it could not achieve through the legislative process” (226). For Pfiffner the signing statement is a targeted mechanism used to circumvent separation of powers.

The position taken by Campbell and Jameson is distinct, but also reaches a similar conclusion regarding signing statements. Their institutional analysis of the presidency defines several genres of presidential rhetoric. They identify signing statements as a distinctive form of Presidential rhetoric defined largely by their use. As they point out, signing statements enact all of a bill except for the parts deemed to be unconstitutional (203). The dilemma they point out is that this exception taking gives the president the ability to use a de facto line item veto that undermines separation of powers as a whole (203-204). This approach relies on the notion that the majority of a bill would still be operative absent the provision being challenged.

This approach makes a great deal of sense given how many of the signing statements are used. The de facto line item veto approach accurately identifies that signing statements rely on taking exception with particular provisions while leaving the legislation itself primarily intact. The identification of signing statements as fundamentally based on exception taking is important and distinct from the other arguments in the literature. The other approaches taken by academics focus primarily on how the executive asserts power by mooting the efforts of the other branches, but the approach taken by Campbell and Jameson demonstrates that the signing statement is made effective not by mitigating the power of the legislative or judicial branches, but rather by co-opting the powers of the other two branches. The signing statement does not eliminate the power of the legislative or the judicial; rather it redirects that power such that the executive maintains the ability to decide on the exception.

Campbell and Jamieson's approach focuses on separating signing statements into distinct genres. They do this by identifying signing statements that function as line item vetoes as a distinct genre that becomes the center of their analysis (196). This approach makes sense for a narrow analysis of signing statements that perform a particular function. It comes with the disadvantage that it ignores similarities between signing statements that are used in other ways. I offer a broader view of signing statements to expand the genre outlined by Campbell and Jamieson. Rather than looking at signing statements as a line item veto that only takes exception to particular parts of legislation, I look at signing statements as a rhetorical means to perform a broader executive function based on taking exception. Our approaches are linked, because both recognize the exceptional nature of the signing statement, but distinct because I will argue that signing statements and parts of signing statements that do not take exception with parts of legislation, work to create the role of the president as exceptional.

This broader view has two purposes. First, it provides the means to describe the function of signing statements that are not engaged in exception taking. I argue that these signing statements serve a purpose that is not distinct from the way signing statements are used to take exception legislation. Second, it acknowledges and emphasizes the exceptional nature of signing statements as a technique for defending and deploying presidential power. Neither of these is incompatible with the analysis done by Campbell and Jamieson; rather it expands on the implications of their more narrow analysis.

Despite the significant differences among these approaches, there is one consistent theme. All camps try to read the signing statement as a legally active statement that affects the functioning of government. Even those who view the signing statement as an illegal practice acknowledge that it has de facto legal power. In the next section I describe a new way to view

signing statements congruent with the approach taken by Campbell and Jamieson, but will offer a different vision of how signing statements relate to legislation.

Signing Statements as Rhetorical Artifacts

The primary function of signing statements is rhetorical. When presidents issue a signing statement their primary intent is to use language as a means to guide other branches of government, executive agencies, and individuals to view the documents in a particular manner. As other critics have pointed out, this often has legal consequences, but those consequences are the result of the effective use of rhetoric, not because the signing statement itself has any legal power.

The temptation is either to say that signing statements are legal under a broad interpretation of constitutional powers or that they are illegal but effective because they are not recognized as such. Both of these approaches gloss over the humble beginnings and practices that surround signing statements. As previously described, signing statements originally signaled how a law was being interpreted. It wasn't binding, but more like a memorandum between the office of the president and Congress. It was not until the 1980's that the signing statement began to take on a different purpose. Even in the modern era, the force of law behind signing statements is not based in some legal mechanism being triggered, but instead in that they change the way the legislation that they are attached to is perceived or enforced.

Due to the extra-legal nature of signing statements, there is little utility in thinking of signing statements as legal or illegal uses of executive power. Both of these labels are attempts to ascribe a character to the document that it by definition does not have. Indeed, part of the reason that signing statements have become so popular with presidents is since that because are not legally binding, they are not subject to the same scrutiny. Signing statements are neither legal

nor illegal, but instead are “non-legal” in the strictest sense. They are not an enumerated power under the Constitution, nor is there any law or court case to date that recognizes them and brings them into legal jurisprudence (Shane 137). Yet they have the force of law, despite the lack of legal standing.

Because of the non-legal status of signing statements, looking at them as legal documents makes little sense. In the first paragraph of this section I argued that the primary effect of signing statements was to use language to persuade the executive agencies. This bold claim may seem tenuous in the face of conventional knowledge that tries to posit signing statements as legal documents because of their effect, but the interpretation that I am proposing holds more true to the way they are used. As Christopher Kelley argues, the primary purpose of the signing statement seems to be directing executive agencies (Kelly, 2007, 238-239). However, as these documents lack legal standing, they work instead by persuading the agencies to interpret the legislation in the manner desired by the president.

First, reading signing statements as rhetorical artifacts allows a greater appreciation for their context. Instead of treating the document as a legally binding piece of legislation, it makes more sense to read it as an attempt to persuade the audience to adopt a particular position on the piece of legislation in question. As I demonstrate in my analysis, the tone of the signing statement is persuasive rather than directive.

Second, reading the signing statement as a policy directive obscures their exceptional nature. The signing statement, when seen as an alternative to a veto, is clearly not a rejection of the bill, but an attempt to insure that the bill’s implementation matches a particular view of how the legislation should operate. By treating the signing statement as an attempt to frame legislation rather than as policy it is clear that the presidential interpretation is not grounded in

legal necessity. Instead it is viewed as a rhetorical tool aimed at directing the concerned agencies to interpret legislation in a particular way.

Third, viewing the signing statement as a rhetorical artifact allows for new and distinctive conclusions to be reached regarding its function. From a rhetorical approach a scholar can identify and analyze the ideological and political commitments embedded in the signing statement as well as understanding it as a tool of executive power. Other studies of signing statements identify their ability to create policy, but they are unable to come to grips with the ideology that grounds both the signing statement itself, and the policies it is used to advance. To date, rhetorical studies have done little work to unpack the ideological commitments attached to particular signing statements. My project attempts to outline what ideologies¹ were bound up in the signing statements deployed by the Bush administration to mitigate attempts at limiting the power of the executive branch to pursue war.

Re-centering Sovereignty

A discussion of how signing statements violate the typical understanding of checks and balances is relevant, has with it an inherent limitation. It does not describe what the nature of government is; only what it is not. To overcome this limitation a change in the discourse describing the effect on governance of the use of signing statements; a shift to a different theoretical description of signing statements is necessary. Accordingly I turn to sovereignty as a frame to discuss the functioning of government.

In describing the way rhetoric is used to constitute sovereign power and create a state of exception, I am asserting that rhetoric is a particular tool used to construct sovereignty. My argument broadens the position taken by Campbell and Jamieson that the presidency is created in

¹ Here I use the term ideology to refer to the political ideologies that are both advanced by, and used to justify, signing statements.

part through language to account for the possibility that rhetoric is not merely deployed as a tool of the presidency, but is directly implicated in the recent centralization of power in the presidency. This is not to say that signing statements are analogous to other forms of executive power. Although there are similarities to other ways of enacting a sovereign politics, such as executive orders, the distinctly rhetorical nature and unclear legal ground on which signing statements operate makes the way they create sovereignty distinctive.

The decision to move beyond focusing on the presidency to discuss sovereignty has two justifications. First, it asserts a unique relationship between rhetoric and power that is not tied to a designated position. The presidents are able to gain power through their speech that is not associated with the position they occupy. By taking this stance the standard views of checks and balances are called into question, as power is no longer limited by the enumerated powers under the Constitution.

Second, by expanding the position taken by Campbell and Jamieson, it is possible to begin a broader critique of sovereignty. Rather than viewing rhetoric as a means to create sovereignty in the unique case of the U.S. Constitution, it becomes a feature of liberal democracies more broadly. This argument frames the analysis that follows as a particular problem within the current functioning of the United States government as part of a broader universal problem with liberal democracies globally.

Reviewing Sovereignty

Defining sovereignty is complex. Sovereignty must have the power to create law, while also possessing the power to suspend law. Accordingly I briefly describe the relationship between law and sovereignty. Then I describe what constitutes sovereignty, and I place signing

statements in the context of this relationship to explain the distinctive way in which they change how law functions in relation to sovereign power.

Modern discourses on sovereignty are framed by the tension between Carl Schmitt's defense of central state power and various criticisms of it. As Agamben has argued, Schmitt's argument about sovereignty was created in response to the work done by Walter Benjamin (State of Exception 52). Understanding this debate in simple terms helps to clarify the way sovereignty comes to be defined.

In his early work Benjamin argues that a concept of violence outside of the state is necessary to explain history; violence often originates outside of the state's normal functioning (Critique of Violence 236). He concludes that violence is always engaged either in making law or in the preserving law. These two ways of deploying violence are dialectically opposed with one generally taking precedence over the other (Critique of Violence 251-252). These two forms of violence are mythic in character. They are controlled by people, pernicious, and transitory. This is contrasted with divine violence, which is sovereign and stands above and outside of all other forms of violence (Critique of Violence 251-252). This divine violence that exists outside of the state, either as an extra-legal form of violence carried out by state apparatuses or by illegal violence carried out by non-state actors.

Benjamin's example using legal contracts is constructive as a way to understand the nature of violence. The violence of law making and sustaining are represented in the legal functioning of a binding contract. By agreeing to and maintaining a contract, both parties are violent in that they foreclose other possibilities. However, there exists a divine violence that lies outside the contract. This divine violence is what allows for a contract to be dissolved when it no longer serves its intended purpose (249-250).

As Agamben points out, Carl Schmitt's reply is an attempt to place this divine violence inside of the juridical order (State of Exception 54). As Benjamin places sovereign violence outside of law as the way a divine violence asserts order with no tie to law, Schmitt wants to explain this same violence as a tool of sovereignty that operates inside a juridical order. This prompts Schmitt to create the notion of violence as something that is inside the order while simultaneously outside of it.

Schmitt begins his reply to Benjamin by making clear the technique Benjamin uses to describe violence. In *Political Theology*, Schmitt makes the bold claim that all modern political thought is secularized theology. This clarifies the discussion offered by Benjamin of sovereignty. The decision to associate sovereign violence with the divine is deliberately intended to create an analogy between sovereign and divine power. Enumerating two important characteristics of this analogy clarifies the applicability of Benjamin's definition, and Schmitt's modification of it.

The first characteristic Schmitt points to is the unitary² nature of the divine, which is transcribed onto the sovereign by Benjamin. This unitary view makes clear that the sovereign is inherently undemocratic in this view because there is no space for opposition for dissent. Schmitt goes a step farther, arguing that where decisions are made by groups of people, they lack the sense of rightness that emanates from the decision made by a "personal sovereign" (Political Theology 49).

The second important characteristic of this analogy is the notion of omnipotent power and absolute decision. Although it is mentioned in *Political Theology*, Schmitt declines to

² It is no coincidence that the term unitary is used both by Schmitt and the discourse surrounding signing statements. While drawing a direct line from Schmitt's usage of the term to its use by the Reagan and Bush legal council is difficult, my analysis will show that a very similar ideology is embedded in both Schmitt's thought and the claims advanced in the signing statements I analyze.

elucidate this characteristic until his next work. In *Concept of the Political*, Schmitt argues that the omnipotent nature of this power is created by the need to define an enemy. Schmitt argues that the need to have the ability to declare and conclude the primary goal of the political, which is defined by the need to begin and conclude conflict. Conflict may only be concluded or conducted by the sovereign, as war requires the suspension of the juridical functioning of society so efforts may be focused on preparing for war.

Benjamin tells us that law is intimately tied to violence.³ The application of violence sustains law by providing punishment when the law is violated.. To change the law requires a different kind of violence; either revolutionary violence in a complete unmaking of the juridical order or through violence done against the law by the legislature changing it. Distinct from these two types of violence is a third kind that provides the fundamental grounds for sovereignty.

Defining Sovereignty

As Schmitt defines it, “Sovereign is he who decides on the exception.” (Political Theology 5) This definition in its initial presentation is not prescriptive, but rather describes the way violence is deployed. Sovereign power is responsible for wielding the violence necessary for the maintenance of law.

From the outset, Schmitt defines sovereignty as a borderline concept, not in that it is vague, but in that it is not routine (Political Theology 5). There is an accepted order that governs the functioning of the state. Fundamentally this order does not rely on sovereign power. In the main, laws are made and maintained following an order defined by an abstract understanding of sovereignty. Through this abstract acknowledgment of sovereignty, law is maintained and made

³ Although he is not cited, Weber’s definition that the state is the body which retains a monopoly on the legitimate use of violence is influential on Benjamin. What is distinctive about Benjamin is the conception that there exists violence outside of the juridical order which may wield violence. Schmitt’s reply should be read as an argument that only the sovereign may wield such violence.

without the need of a sovereign (Political Theology 5-7). The sovereign governs without the need for violence because the juridical order exists.

Sovereign power is demonstrated in creating exceptions to this accepted order. An exception cannot come from outside the order because it would not have the authority to wield sovereign violence. Rather, the sovereign creates exceptions that stand outside of the order. As Schmitt explains, “The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.” (Political Theology 6) The exception is not a routine power exercised by sovereignty. It is the instantiation of martial law to maintain order or to prepare for conflict.

At this catastrophic point where the nature of sovereignty becomes most clear. Schmitt adds that,

The most guidance the constitution can provide is to indicate who can act in such a case. If such action is not subject to controls, if it is not hampered in some way by checks and balances, as is the case in a liberal constitution, then it is clear who the sovereign is. He decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety (Political Theology 7).

Schmitt is criticizing the reliance on the constitution to address crisis. In Schmitt’s view a constitution at best can identify who should make decisions because the unpredictable nature of crisis prevents the ability to outline specific steps to be taken. Thus, the sovereign’s ability to decide is necessarily unlimited. The sovereign, in the exception, must be able to take whatever

action is needed to address the crisis. This vision of sovereignty carries with it two distinct implications. The first is that sovereignty has the ability to determine when to enact the exception. Any check on the ability to decide interferes with the ability to respond to crisis. The second is that the sovereign has unlimited power to respond to the crisis because it stands and acts outside the normal legal system.

The lingering concern is the relationship between sovereignty and violence. Sovereignty, especially in the context of signing statements, deploys a violence that exists outside of the juridical order. This divine violence should be read, as Schmitt argues, in a secular manner. This violence does not necessarily mean military violence against rebels (although that would certainly qualify), but instead is violence that suspends the protections that make the juridical order function. An example such as the internment of Japanese citizens demonstrates the more extreme versions of this sovereign violence. However, more subtle forms of violence, such as the executive resisting normal standards for congressional oversight, qualify as well. Divine violence in this context always carries with it the latent threat of real violence, but may not always take that form.

Sovereign Fascism

It is no coincidence that Schmitt was writing the juridical foundation for what would become Nazi style fascism. As Geoff Waite argued, Schmitt was concerned with the need to maintain a distinction between the ruler and the ruled so that order may be maintained (Waite 115-116). Waite points out that Schmitt's commitment to Nazism is both complex, and instructive in understanding sovereignty. Schmitt was committed to the leadership offered by the Nazi policy, but was disturbed by its racist and, in many cases, its arbitrarily targeted policy. He envisioned instead a fascism more like that found in Italy where commitments to ideologies

premised on race was a political non-starter (Waite 128-130). He loved the system of governance created by fascism, but was frustrated by the political and ideological choices made within the system.

The Schmittian view of sovereignty has been widely criticized, but to make sense of how signing statements function will require an analysis that acknowledges the value in Schmitt's definition while providing criticism of the effect of sovereignty. I apply Agamben's critique of Schmitt's theory of sovereignty as a basis for a critique of the function of signing statements. This requires first, going beyond defining sovereignty discuss the limits of sovereignty. Second, I foreshadow the means by which sovereignty asserts itself to create power.

Agamben agrees to aspects of the definition of sovereignty offered by Schmitt. For Agamben, the sovereign is still the body that is able to decide the exception, and this decision is necessarily absolute. Where Agamben calls into question the definition offered by Schmitt is the location of the sovereign in the case of the exception. For Agamben, the sovereign always has a relation to the rule, but uses the exception as a means to modify this relation. Rather than the sovereign being inside the juridical order and suspending it, as Schmitt would argue, Agamben contends that the exception should be understood as the sovereign taking itself outside of the order as well as the decision to create exceptions that suspend the normal functioning of the order (Homo Sacer 17-18).

Accepting Schmitt's argument in favor of giving this power to the sovereign so the state may inaugurate an exception during times of crisis, Agamben asks a more basic question. Why do we need the state? To answer this question he turns to the implicit critique of Schmitt's position offered by Foucault. He contends that the state exists not to prevent the Hobbesian state of nature that concerns Schmitt. Rather, the state exists as a means to incorporate subjects in a

manner that brings them into a political relation to the state (Homo Sacer 5-7). The aim of the state is to create political subjects who are incorporated into the state such that the state may function in a manner that best serves the population (Homo Sacer 8).

This vision of the state and its relation to the population intuitively sounds reasonable. In the U.S. legal and philosophical tradition there is a strong presumption that more political participation is good. However, there is an underside to such a system that makes it not so distinct from the totalitarianism that it opposes. This underside to liberal democracy begins with the decision to value life. Citing Foucault, Agamben claims that liberal democracy begins with the presumption that life has value; therefore, violence, even against the population, is legitimate in its the defense (Homo Sacer 3). The very logic that allows the liberal democratic state to maximize life is also the logic that permits the limiting and taking of it. The conduit between the state and life is the sovereign who intervenes in the juridical order on the behalf of life. By deciding on the exception, the sovereign intervenes both in favor of, and against, life.

Sovereignty's ability to determine the exception is not as clear as the definition of sovereignty infers. As Agamben claims, the juridical order is no longer the only realm where sovereign decisions are exercised (Homo Sacer 122). Sovereignty is increasingly concerned with the efforts of science, medicine, religion, and social sciences to maximize life. This expansion demonstrates that though the definition of sovereignty is clear, that clarity does not translate to a clear limitation on power.

Sovereign power and language

Understanding this ambiguity in the functioning of sovereign power requires a theory that explains relevant parts of the complex relationship between sovereignty and language. Agamben argues that the functioning of sovereign power has an analogical relationship the functioning of

language. Language gains power through a self-referential logic. Like the sovereign exception, language creates exceptions to assist in the gaining and production of meaning. Because language always carries more denotations than can be literally ascribed to words, language uses the logic of exception to create a zone of indistinction. This zone of indistinction allows words to have a relationship to denotative meanings while not being reduced to pure language. Sovereignty works to create meaning. Language works by claiming meanings because it is the only means by which meaning can be created (Homo Sacer 26).

The tie between language and sovereignty goes beyond analogy. Because it is self-referential language provides the means for sovereignty to enact the exception. Thinking literally about what changes are made in the order helps to clarify this tie. Materially, nothing changes with the inauguration of the exception. The law is the same, and the checks and balances that would restrain sovereignty still exist in the legal order. Yet language creates new power that overcomes the checks and balances that come with sovereignty. As Agamben claims, “This is why the separation of powers that characterizes the liberal-democratic state loses its meaning here, even if it remains formally in effect. Hence the difficulty of judging according to normal juridical criteria when judging those officials who, like Adolf Eichmann, did nothing other than execute the word of the Führer as law (Homo Sacer 173).”

This demonstrates the real power of the sovereign: To be able to deploy language as if it had the full force of the juridical order, while the language itself supersedes the juridical order. Because of the inherently self-referential nature of both language and sovereignty there is no limit to the ability to deploy them effectively. I argue that signing statements are a paradigmatic example of such sovereign expansion. By using only language to change law they represent in both a literal and analogical manner the extreme unlimited character of sovereign power.

Rhetorics of Exception

To make sense of signing statements as a rhetorical exception I begin with an explanation of how an exception operates. In its most generic form an argument in favor of the exception takes this form, “Include all things sharing characteristic X except particular Y”. There are two crucial clauses in this sentence.

The first clause, “Include all things sharing characteristic X” is its own argument in favor of either creating a new order, or assuming the pre-existing value of an order. In the context of signing statements, of this first argument is assumed literally by the legislation that the Executive is taking exception with. In a more metaphoric sense, the clause is fulfilled by the proper functioning of the juridical order, where legislation is enacted in keeping with the demands of the legislation.

The second clause, “except particular Y,” is an argument that aims to describe the particular Y in such a way that it makes sense to exclude it from the order. This exclusion can be justified on one or more of the following grounds. First, the particular Y could have a lack⁴ of the characteristic X such that including it in the order makes the order nonsensical. In Orwell’s novel Animal Farm, the farmers initially refuse to accept the animal’s possession of the farm because they lack the human qualities associated with ownership. The rule in this case is that humans, even those as inept as Mr. Jones, are fit for ownership. The animals, because they are not human, are excluded from the order of farm owners. This demonstrates how an exception by lack is created. An order is created based on one or more characteristics and where an example lacks sufficient quantities of the characteristic, as animals lack the quality of being human, they

⁴ I use the term lack here to describe a shortage or absence of a characteristic. Although the similarities to the use of the term in psychoanalytic literature are evident, I wish to avoid appearing to psychologize the intent of the legislative and executive branches. Such an approach would distract from the attempt to describe the rhetorical forms of the signing statement and carries with it methodological concerns that make it incongruent with the argument I am making.

are excluded. By contrast, later as the Pigs become more human, they are accepted by the other farm owners.

Second, the particular Y could have an excess of the characteristic X such that its inclusion in the order is similarly nonsensical. In both of the parts of the argument the claim being made is that a particular should be excluded for having an inappropriate measure of the characteristic that defines the order. Thus, the claim is not just that something should be excluded from the defined order, but that the order needs a refined definition that accounts for an appropriate quantity of characteristic X. This exception by excess is the inverse of an exception by lack. Revisiting Orwell's novel, after the overthrow of the government, the pigs assert superiority over the animals by modifying the seven commandments which governed farm life under the animals. In particular, the seventh commandment, "All animals are equal," is changed to "All animals are equal but some animals are more equal than others". In this case, the characteristic defining the order is equality, the pigs having so much "equality" are excepted from it. Not in the sense that they do not fit within the order all together, but rather that they are so "equal" that they have the ability to change the order in a way that other animals cannot. This places them in a paradoxically unequal position, which allows them to except them from the order of animals.

The third type of exception uses differentiation from the order. This exception by differentiation claims that particular Y has a characteristic distinct from the characteristics being used to define the order that make the exclusion of the particular appear desirable. This other characteristic defines the particular in such a way that its inclusion in the order either makes the order nonsensical or negates meaningful characteristics of the particular. Returning again to Animal Farm this appears in the closing passage of the novel. The animals peek into the

farmhouse where the pigs now live as Farmer Jones had, and see the pigs playing cards and drinking with the humans. As they survey the scene they “looked from pig to man, and from man to pig, and from pig to man again; but already it was impossible to say which was which.” In this instance, the animals, who identify the order of animal based appearance, recognize physical markers of the pigs that are not animal. They notice that the physical appearance of the pigs is not animalistic at all, but instead is humanoid. Thus the pigs are recognized as distinct from the animals.

Explicitly stating the different ways in which the exception is related to the order demonstrates the tenuous nature of the order. The particular simultaneously affirms the order, and rejects its universality. This makes the fundamental relationship between the two parts of the argument paradoxical. In the examples above from Animal Farm, there are distinctly different ways these exceptions could be described based on how the reader wishes to describe them. Indeed, what I recognize as exception by excess could also be described as a difference by lack depending on the characteristics that one wants to identify as characteristic of the order.

The ability to describe the order in multiple ways demonstrates its rhetorical nature. Because the order is only created through the language used to describe it, rather than by an externally objective classification scheme, the order is a rhetorical creation. As described above, this makes the exception from the order equally rhetorical. By describing the order and the exception differently, it is possible to change the classification scheme to include the exception in the order. At the same time, the rhetorical nature of the order means that the order itself is always tenuous, with the exception always calling into question the nature of the order.

In the context of signing statements the question of the order and the exception is even more tenuous. There are two distinct orders at play. The first is the order defined by the

accepted functioning of the state. In this order a system of checks and balances and separated powers is presumed to describe the proper order. The exception to this order is represented by the Executive justifying removing itself from the order. This order and exception is created by the work being done within signing statements to create exceptions in the order created by the legislation. This makes the use of signing statements a complicated rhetorical double move, that simultaneously creates an exception in the text as well as in the juridical order.

Methodology

As previously discussed, signing statements are themselves an exceptional technology in that the very way they work is to create an exception. It is tempting to limit the discussion of signing statements to only the tie between the exceptional nature of signing statements and how they become a technology for sovereignty. Such an approach ignores the rhetorical nature of signing statements. Though their nature is exceptional, as discussed in the last section, this exception is only created through the use of language. Thus, attempting to discuss signing statements in a vacuum proves insufficient for a critical approach.

To study these documents therefore requires a close hermeneutic reading of the text. My reading will emphasize not only what is done as a result of the signing statement, but also what the signing statement does to the legislation in order to maintain the sovereignty of the executive. This distinction is not a perfectly clean one. The enactment of these policies is both the final act of, as well as a means to reinforce, sovereignty. The decision to focus on the policy itself comes at a cost however, as it takes the discussion away from what is being done rhetorically because the policies themselves do not necessarily reflect signing statements. This would especially be the case where the aim of a signing statement is in fact to prevent anything from being done. In short the cause and effect relationship between signing statements and policy is sufficiently

unclear that overemphasis on that question detracts from an understanding of the function of signing statements.

This distinction becomes manifest in two distinct interpretive theories. As Mailloux argues, a formalist approach will emphasize what the text approximates (Mailloux 123). A formalist in this case would look at what policies are being represented by the signing statement. This approach is important for understanding the practical relationship between ideology and policy implementation, but has a limitation because drawing relationships between texts actively excludes the intent of the author.

By contrast an intentionalist approach foregrounds the intent of the author. This approach maintains a focus on the text, but by considering the likely intent of the author this approach accounts for what is being done beyond policies being implemented (Mailloux 123). In short, an intentionalist approach allows for the identification of ideologies that influence the text, and how they implicate the meaning in the signing statement. This approach also provides a sense of how the signing statement could influence prevailing ideologies surrounding the signing statement.

Because the intent of this project is not so much to describe policy as it is to see how signing statements work as a technology to construct sovereignty, I emphasize the intent behind the use of signing statements. This approach does not exclude questions of form; indeed, my project indicates that signing statements tend to share a similar form defined by exception taking. My project therefore incorporates elements of both approaches in an attempt to describe the relationship between intent and form in the use of signing statements. Looking at each of these documents I consider the signing statement as a means to advance the ideology that has

generated it. My close textual analysis will describe rhetorical techniques that are used to create and defend a vision of sovereign power that is defined by the ability to decide on the exception.

The signing statements selected here are not meant to represent all the ways that signing statements can be used, nor are they meant to be viewed as a survey of all of the important signing statements made. The signing statements I analyze are selected for three reasons. The first reason is they demonstrate a rhetorical technique which requires further examination. My hope is to use these signing statements as a way to demonstrate how rhetoric is used to create exceptions within established orders, both those specific to the functioning of the state, and those in which rhetoric is used to create exceptions more generally. The second reason is that these particular signing statements are used to significantly change the way the United States government functions. I use these signing statements as way to help describe the shift from a government defined by checks and balances to a government defined by sovereignty. As previously mentioned, these signing statements are not intended to represent all signing statements, but are representative of the techniques used. The third reason is that these signing statements reveal the ideology used to justify them, and make sense of what was done with the powers defended and created by them.

Chapter 2

Exception by lack

The first signing statement to be analyzed was attached to the “Statement on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002”. This piece of legislation was intended to provide emergency funding to deal with the attacks on September 11, including but not limited to increases in funding for areas considered necessary to respond to the threat posed by terrorism. This included increased appropriations to fund special operations as well increased funds to assist in expanding intelligence-gathering activities. On its face this legislation does not appear to be objectionable, as Bush had requested funding was increased, and Congress passed the legislation with relatively little contention.

Despite the clear need for this legislation and its congruence with his demands, President Bush took exception to some provisions of the bill. Some of these objectionable provisions were left unchanged but were denounced in the signing statement. One example showed the less than formal nature of the legislation. In response to limits on spending for increases in quality of life spending for the military the statement argued, “As a result, these cuts will place our military, forces in the all too familiar predicament of having to choose either to sacrifice near-term readiness or to forego critical repair of family housing, defer important depot maintenance of our weapon systems, and reduce base operations.”

In denouncing the limits on spending the President not only is voicing an objection, but also framing reaction to the legislation. By considering the legislation as insufficient to meet the demands of the executive, the President is excepting himself from the legislative order. Rather than being in concert with the legislative, in this case the President is excepting himself from the

legislation by opposing the conclusions reached. This exposes an exception by describing a lack in the powers given to the Executive. The President lacks the authority to enact legislation, and so is excepted from the order.

On the surface this seems to be a move to preserve a separation of branches which would tend to decenter sovereignty, but strategically there is another move at work here. By choosing this provision as a frame, the President takes advantage of the content in the legislation. The legislative branch in this case is posited as forcing the President to deny better treatment to a group that deserves public sympathy, namely the families of soldiers. The cuts are also described so they seem to limit the ability of the executive to effectively pursue the war on terror. These moves discredit the legislative branch. Here of the discourse of unity is used to defend signing statements. The legislative is cast as opposed to the executive, and by extension, responsible for dividing the branches. Exceptional executive power is then cast as a corrective to the failure of the legislature. By concluding that this will result in the executive making difficult choices and being unable to effectively pursue the war on terror, the executive is absolved of responsibility for the problems that arise from the legislation, as well as the failures to effectively perform the constitutional duty of the branch.

Taking advantage of this frame created by the lack of the Executive's ability to fulfill the juridical order, the next section of the signing statement operationalizes the exception. Attempting to prevent limitations on the ability of the Executive to make decisions, the signing statement continues:

Section 8007 of the Act prohibits use of funds to initiate a special access program until 30 calendar days of congressional session have elapsed after the executive branch has notified the congressional defense committees of initiation of the

program. The U.S. Supreme Court has stated that the President's authority to classify and control access to information bearing on national security flows from the Constitution and does not depend upon a legislative grant of authority. Although 30-day advance notice can be provided in most situations as a matter of comity, situations may arise, especially in wartime, in which the President must promptly establish special access controls on classified national security information under his constitutional grants of the executive power and authority as Commander in Chief of the Armed Forces. The executive branch shall construe section 8007 in a manner consistent with the constitutional authority of the President (Bush para. 4).

In this objection the statement begins with the premise that the executive must be able to make decisions about how to classify information. Yet what makes this statement strange is that there is no restriction on that power in this particular section of the act. Instead the President is merely being told to delay action on the information being kept secret. This renders the first objection given by the President, that the section would infringe on his ability to classify information, non-responsive. This poses two questions. First, why does the President want to keep information secret? Second, how does the decision to respond to an unstated provision inform our understanding of the function of signing statements?

The first question has a simple answer; the President wishes to retain sovereignty. The demand made in this section of the act is perceived as infringing on the sovereign right to choose. In a superficial reading this perception is based on the apparent backlash against a potentially unpopular program. This perhaps is a concern for the executive, but the nature of the oversight committees insures that little or no backlash will occur. The bigger concern is that the

bill would impair the President's ability to decide on whether or not to begin a program. Absent funding, the special program isn't feasible; as a result, the President's ability to function as commander in chief is impaired. The aim of this signing statement is not merely to protect secrecy, but also an affirmative claim that the sovereign right to choose should not be infringed.

The grounds proposed for this right to choose are telling. The first is that the Supreme Court has given the executive an unconditional constitutional mandate to make decisions regarding information. If such a mandate is granted, even the notion of oversight is meaningless. That seems redundant in light of the second ground offered; that the President needs the ability to make decisions without oversight to deal with circumstances that may arise unpredictably. In these circumstances an emphasis placed on the President's absolute ability to make decisions regarding the initiation of special programs.

This part of the signing statement is of particular concern because it demonstrates a vision of sovereignty that is tied to the exception in multiple ways: it defends military programs that are by definition exceptional, it defends funding practices that are exceptional, it defends informational practices that are exceptional, and it defends a constitutional exception in division of powers for the President. The stakes in this statement are immense. The traditional means for restricting sovereign power are oversight, public exposure, restrictions on funding, or congressional review. This signing statement asserts that those constraints are unequivocally illegitimate under any circumstances.

In a system that proposes that checks and balances are supposed to limit executive power, my description that this signing statement eliminates limits is bold. However it is important to note that the signing statement places no limits on executive power. Even the demand that the President notify Congress is not treated as an absolute demand. Rather, it is treated as a matter

of “comity”. The decision to use the word comity indicates the nature of the sovereign relationship of the executive in the juridical order. The President is taking the view that the Congress deserves respect, but not deference. In taking this position the President is asserting that he has power that goes beyond law. This places the sovereign in a relationship to congress, that in certain circumstances is cooperative, but the decision to be cooperative is based on the desire of the sovereign.

A critic taking a more limited view of the claims to power made in the signing statement would look to the emphasis that such denial of information is especially important in wartime conduct. The wording of the relevant sentence points toward a major problem with such a reading. Namely, it only emphasizes a period of time when the decision to deny information is more important. There are two distinct problems that make such a reading unsustainable. First, the signing statement does not provide limits on this power, merely emphasizes a time when its use is more important. Second, that non-constraint is based on a time of the Presidents choosing. To exercise this power, the President need only determine that the country is in a state of war.

This objection takes advantage of the legislation to articulate an exception based on lack. The objection is written such that the exception is worded in the negative. It outlines the ways that the President is using the lack of legislative power to justify the need to act unilaterally. The law’s intent, to outline the limits of Presidential power with regards to creating special projects, is subverted when only a negation of the law is used. Rather than creating new law, the wording deployed here negates the law by declaring it an illegitimate constraint on Presidential powers outlined by the Constitution.

By claiming that oversight on spending for special programs would interfere with constitutional powers, the President asserts a constitutional authority. By going further, to claim

the Supreme Court has defended this power, should illustrate the nature of these powers. However, in that paragraph there is no specific articulation of where in the Constitution those powers come from or the Supreme Court decision that affirmed those powers. Campbell and Jamieson infer that this may be a reference to the powers given to Lincoln to lead the United States during the Civil War. This contextually makes sense, but is also not articulated in the signing statements. By asserting where the powers come from, but not what they are, the executive is able to defer the question of the legitimacy of the argument. As a result, the signing statement itself can't be questioned, but the burden of proof to identify the grounds mentioned and why they are illegitimate is placed on the critic.

Here we see a distinct rhetorical technique; by asserting unclear grounds for sovereignty creating boundaries for it becomes impossible. The signing statement asserts a constitutional mandate, without justifying the interpretation being used, or even what parts of the Constitution provide such powers. The statement continues this strategy by asserting support for this interpretation from the Supreme Court; but the statement fails to state or identify where the Supreme Court has voiced this opinion. This unbounded sovereignty creates a system of language that makes it impossible to define constraints on sovereign power. By using lack of the characteristics that define the juridical and legislative order, the executive is able to place itself and its powers outside of the order.

A generous reading of the signing statement attached to the "Statement on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002" could argue that it is an attempt to preserve Presidential control over a relatively minor issue. Beyond the rhetorical positing of the objection indicating a much broader view of Presidential power, this piece of legislation is

relatively unchanged by the signing statement. The signing statement did little to modify most of the legislation. The important lesson here is that where legislation is written that constrains the President's ability to exercise choice, the signing statement is used to reassert this choice, and thereby center sovereignty in the executive office.

Exception by Excess

In a separate signing statement we see a departure from the exception-taking technique that objects to particular parts of the legislation described above. Where the decision to take exception to particular parts of legislation tends to take the form of a negation, in "The Authorization for Use of Military Force Against Iraq Resolution of 2002" President Bush took a dramatically different approach. Rather than taking objection to the legislation for attempting to limit, his powers Bush saw an opportunity to assert power absent any constraint on it in the legislation. In so doing, Bush created an exception defined by an excess⁵ of power.

The authorization was passed at the urging of President Bush shortly after a presentation to the United Nations urging quick action be taken to impose sanctions on Iraq. In the days leading up to the passage of the legislation there was a heated debate in Congress regarding the passage of the legislation. In light of this debate the Bush administration had to maintain public support for and assert the authority to pursue military action against Iraq. The signing statement attached to the authorization was a part of an effort to create support and defend the sovereign right to decide on the initiation of conflict.

Bush begins the signing statement with a congratulatory statement and explanation of the import of this piece of legislation:

⁵ Excess is used here to refer to an excess of the characteristic used to define the order, rather than excesses in the language.

Today I have signed into law H.J. Res. 114, a resolution "To authorize the use of United States Armed Forces against Iraq." By passing H.J. Res. 114, the Congress has demonstrated that the United States speaks with one voice on the threat to international peace and security posed by Iraq. It has also clearly communicated to the international community, to the United Nations Security Council, and, above all, to Iraq's tyrannical regime a powerful and important message: the days of Iraq flouting the will of the world, brutalizing its own people, and terrorizing its neighbors must—and will—end. Iraq will either comply with all U.N. resolutions, rid itself of weapons of mass destruction, and in its support for terrorists, or it will be compelled to do so. I hope that Iraq will choose compliance and peace, and I believe passage of this resolution makes that choice more likely (Bush, para. 1).

This demands a momentary break from the discussion of signing statements as a rhetorical means to maintain sovereign power to discuss the rhetorical moves being used here to advance a geopolitical position. Though they are not unrelated, we see distinct rhetorical moves being used here that help make clear the ideology associated with this vision of sovereignty.

Bush introduces this signing statement in a very different manner. The introduction of this signing statement has an epideictic function. Rather than offering a criticism or a rejoinder to the legislation, the signing statement celebrates it. This would indicate that this signing statement carries a function distinct from exception taking. We are meant to see the signing statement as an affirmation of the legislation, changing how this signing statement should be understood rhetorically. Rather than analyzing the techniques used to create an exception, the focus becomes what is affirmed in the legislation.

Importantly, the signing statement begins by creating a sense that the United States as a whole is united against Iraq. The claim that the country speaks with one voice asserts that a decision passed by Congress means that the United States is unified. This clearly ignores a significant amount of dissent within congress over the decision to pass the resolution. Indeed, over one hundred members of the House of Representatives voted against the resolution as well as twenty-three Senators. This also ignores public opposition outside the government to U.S. intervention in Iraq. As Rodger Payne notes, the transition towards the use of preemptive military force was remarkably controversial and stirred up intense public debate (Payne 116-117). Although the public debates are mentioned later in the signing statements, by introducing the legislation as representative of a unified purpose, the debates become a secondary concern, which I will discuss in greater depth later. The first sentence uses the resolution as an opportunity to create a sense of unity that might limit such opposition.

The signing statement proceeds by providing justifications for the resolution and for the executive's justifications for preemptive military force. Iraq is posited as a threat to international peace that must be dealt with. The grievances that make Iraq a threat are then outlined. As Goodnight has noted, many of these grievances are less than accurate and in some cases would have been impossible for the Iraqi government to disprove. (Goodnight 105-108) Accordingly, it makes more sense to consider these grievances not as comments on Iraq, but as a way for the executive to argue that war is necessary based on grievances to which the Iraqi government would not be able to provide an acceptable response.

This is done by using grievances to construct Iraq as a threat to international security, and in particular as a threat to the United States. This construction is simplistic. Rather than elaborating on evidence used to create these justifications, the signing statement provides a list.

Again, the obfuscation becomes apparent, as the audience is compelled to search elsewhere to verify the veracity of the grievances offered. Yet, despite the obvious lack of grounds for the claim presented, they have an intuitive appeal. If there is any truth to those claims, then Iraq pose a significant threat. The signing statement relies on a presumption of credibility.

Taken as a whole, this section operates as the grounds for the exercise of sovereign power. As Agamben notes, in an era where the role of the state is increasingly defined by the demand that it provide security, the very threat of terrorism will make it behave in a terroristic manner (Agamben Para. 3). The United States at various (and present) times has been guilty of all the grievances written above. The signing statement should not be viewed as an isolated incident, but instead as a particular incident in a centering of sovereignty around the need to deploy violence.

Turning to the signing statement as a means to create exception requires a closer look at the language used in the signing statement. This interpretation is affirmed by the next section of the signing statement:

The debate over this resolution in the Congress was in the finest traditions of American democracy. There is no social or political force greater than a free people united in a common and compelling objective. It is for that reason that I sought an additional resolution of support from the Congress to use force against Iraq, should force become necessary. 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 force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War

Powers Resolution. On the important question of the threat posed by Iraq, however, the views and goals of the Congress, as expressed in H.J. Res. 114 and previous congressional resolutions and enactments, and those of the President are the same (Bush, para. 2).

This section has two important characteristics. First, the President acknowledges the heated debate that took place in Congress. Rather than criticizing this process, the President glorifies it. The debate is treated as one of the positive characteristics of United States democracy. This sanctions the debate, but does so under the presumption of the conclusion elaborated above. In this context, the dissent becomes permitted, but its subversive character is muted by incorporating it into the same values that justify the exceptional politics of sovereignty.

The signing statement then develops a peculiar argument, indicative of the emphasis on maintaining sovereign power. The signing statement asserts that while the President appreciates the support Congress has demonstrated, it does not represent a departure from the emphasis on the sovereign right to decide on the exception. Using language similar to that in the previous signing statement analyzed, there is a reference to constitutional authority; again there is no explanation as to what the nature of that authority is or where in the Constitution it is enumerated. The request for the resolution therefore is not a departure from the view that the sovereign must retain the right to choose, but instead is an act of comity rather than deference.

The final statement, making the point that on the question of Iraq the views of Congress and the views of the President are the same, is crucial. Rather than agreement being considered standard conduct, it is presented as an exception to the rule. This makes clear the executive intent to invert the relationship between the exception and the rule. Where the exception would typically be understood as the executive choosing to use force prior to congressional consent, the

signing statement is asserting the opposite. This signing statement is asserting that the state of exception is now permanent. The Executive now holds the constitutionally sanctioned power to preemptively commit the United States to war without any constraints from Congress.

This is a distinct form of exception taking. Although this signing statement continues to defer to ambiguous constitutionally grounded powers, the way the exception is created is distinct. Rather than creating an exception within the piece of legislation, here an exception is created within the order governing the legislation. Rather than being based on an absence of legislative power, this exception is based on an excess of Presidential power to exercise military might. This excessive exception works to create a justification for pursuing military action in spite of public criticism.

In both of the sections above a distinct argumentative strategy based on the use of signing statements is used. Rather than merely trying to do things with legislation, the signing statement is attempting to attach values and meaning to it. This interpretive work is grounded in an ideology that affirms the sovereign right to make war and to act unilaterally to do so. Even where public consent is sought, the consent is cast as universal and objections to it are marginalized in the name of preserving sovereign power.

This signing statement uses concepts such as unity and United States democracy to frame the public perception of the resolution. This move is consistent with larger strategies for justifying military conflict. The signing statement uses these value-laden terms to explain the import of having Congress and the executive share the same concerns and position. In this case, the purpose is to demonstrate that Congress is united with the sovereign executive in its concern over the threat posed by Iraq, and has the same willingness to use military force as a response. Again the unity frame is deployed to justify expanding the power of the Executive. In this

particular case it goes farther, working to marginalize opposition to the resolution by making those who oppose the executive appear divisive and opposed to the unity represented by the President.

This signing statement operates outside of the typical understanding of how signing statements function. Rather than taking exception by demonstrating limitations on sovereign power, in this case exception-taking is used as a means to affirm the powers offered in legislation such that whatever external limitations may exist become immaterial. The sovereign is posited as having so much power that it stands outside of the juridical order.

Exception by Differentiation

The next signing statement offers a unique perspective on sovereignty. Where the previous signing statements took exception by asserting a lack or excess of a characteristic, namely legislative power, this signing statement creates an exception based on a characteristic that differentiates the executive from the juridical order. After Congress passed the “Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004” to help with the War on Terror, Bush attached a signing statement that helps explain how sovereignty addresses the threat posed by terrorism. The signing statement provides a very basic understanding of the sovereign role in intelligence gathering:

Many provisions of the Act deal with the conduct of United States intelligence activities and the defense of the Nation, which are two of the most important functions of the Presidency. The executive branch shall construe the Act, including amendments made by the Act, in a manner consistent with the constitutional authority of the President to conduct the Nation's foreign relations, as Commander in Chief of the Armed Forces, and to supervise the unitary

executive branch, which encompass the authority to conduct intelligence operations (Bush, para 2).

The signing statement asserts that defense and intelligence gathering are two of the primary functions of the Presidency. This basic premise defines how the rest of the signing statement should be read. The concluding sentence outlines the principles that will guide the interpretation of the legislation; here a tie between the military and intelligence gathering is being created. The President's constitutional authority to conduct foreign relations, serve as Commander in Chief, and supervise the unitary executive branch is conflated into one purpose, which justifies the executive involvement in intelligence gathering.

Through the move to completely integrate intelligence gathering under the executive branch, and especially as a military function, the signing statement claims grounds for the executive branch that it wouldn't otherwise have. By incorporating intelligence gathering as a military function; the signing statement places intelligence-gathering activities outside of the jurisdiction of Congress. Doing so reduces the requirements for congressional oversight making it difficult to restrict the power of the Executive. It also insures that the sovereign maintains control over the apparatus necessary for conducting war. In this case control is not limited to the ability to declare war but also includes the ability to control the release of information needed to justify or denounce war.

In the next section there is a reappearance of just how the control of information is used to secure this exception and the sovereign right to choose. As discussed in my analysis of the "Statement on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002," signing statements can be used to circumvent the demand to disclose information that would impair the

functioning of sovereignty. In the next section of the signing statement there is an different approach used:

The executive branch shall construe provisions in the Act that mandate submission of information to the Congress, entities within or outside the executive branch, or the public, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. Such provisions include sections 1022, 1061, 3001(f)(4), 5201, 5403(e), and 8403, and sections 101A(f) and 102A(c)(7) of the National Security Act of 1947 as amended by sections 1011 and 1031, section 703(b), 704, and 706(f) of the Public Interest Declassification Act of 2000 as amended by section 1102, section 601 of the Foreign Intelligence Surveillance Act of 1978 as amended by section 6002, section 207 of the Afghan Freedom Support Act of 2002 as amended by section 7104, section 112(b) of title 1, United States Code, as amended by section 7120, and section 878 of the Homeland Security Act as amended by section 7407 (Bush, para. 3).

The use of the term “construe” significantly influences how this section of the signing statement should be read. This term carries with it a connotation that the interpretation may not be tied to a purely semantic reading of the text. The author is exercising agency over the text directing how it will be interpreted. The use of this term demonstrates the power of the signing statement.

Because the Executive has the power to interpret the legislation, the legislation is to be

interpreted in a manner that best serves the interest of the office, rather than what serves the best interest of the order with which it is associated.

The next section of the signing statement indicates what will be interpreted. The signing statement asserts the authority to withhold any and all information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. This broad mandate posits unclear constitutional authority as justification for the executive to exempt itself from piece of legislation. There are two Executive functions that are specifically defended. The move to defend these specific provisions has important implications for sovereignty.

The first of these is "the deliberative processes of the Executive." In a literal sense, this would defend the sovereign ability to deliberate on a decision. The intuitive question is how the disclosure of information interferes with this process. Realistically, there are two ways this could become a problem. The first is that disclosing information would spread information within the Executive branch that makes the deliberative process difficult. This part of the signing statement is intended to insure that the President has the ability to exclude input from parts of his cabinet. In other words sovereignty does not reside in the Executive branch as a whole, but rather with the "decider." This demonstrates the danger that sovereignty carries with it; the ability of a leader to decide to create an exception carries the possibility of descent into militaristic thought.

The other interpretation is that the Executive wishes to prevent public opinion from influencing the debate over what policies to pursue. In cases where the President realizes a veto may be politically untenable, the signing statement could be perceived as a low profile way to prevent legislation from taking effect. Although the signing statement is on the public record, at

the same time it is more obscure and less well understood, which can minimize the public reaction. This move is by definition anti-democratic in that it denies the public input on policy. It also allows the Executive to avoid any backlash or review from the legislative branches. This part of the signing statement is deliberately designed to prevent any input on policy and to preserve the sovereign right to choose. In doing so, this part of the signing statement reinforces the fascistic tendencies described earlier.

Disclosure is also denied where it could interfere with the sovereign's ability to perform the constitutional duties of the Executive. It is easy to say that secrecy is necessary for the President to pursue some policies, but the broad language used here prevents any oversight of any function. As a result, the Executive is able not only to avoid influence on deliberation, but render moot any public review of the policies being pursued. This is fundamentally antithetical to democratic participation. Without the ability to know what activities the country is engaged in, citizens are unable to take advantage of the means afforded to intervene in the government. Equally, Congress is unable to exercise control over the Executive branch, allowing the Executive the absolute ability to decide upon the exception.

One other section of this signing statement requires particular scrutiny. One of the provisions of the bill requires the President to disclose significant intelligence information to Congress during the transition between the outgoing President and the President elect. The signing statement singled out this provision in a way that demonstrates a more fundamental problem with the role of the President as sovereign.

Several provisions of the Act, including Title III and section 7601, purport to regulate access to classified national security information. The Supreme Court of the United States has stated that the President's authority to classify and control

access to information bearing on national security flows from the Constitution and does not depend upon a legislative grant of authority. The executive branch shall construe such provisions in a manner consistent with the Constitution's commitment to the President of the executive power, the power to conduct the Nation's foreign affairs, and the authority as Commander in Chief (Bush, para. 5).

The signing statement begins by characterizing what the provisions claim to do. The use of the term “purport” directs the reader to think that the provisions are specious. This functions rhetorically to minimize the apparent strength and import of the provisions, lowering the threshold for the interpretive work to be done in this section of the signing statement. The signing statement then deploys a familiar tactic by asserting that the Supreme Court has stated the President has the authority to classify and control access to information bearing on national security based on constitutional grounds. Then the term “construe” is again used, indicating that interpretive agency is being exercised. The conclusion is that the outgoing President does not have to disclose information to Congress.

This indicates an aspect of the signing statements that is not accounted for. Although signing statements are often thought of as being directly tied to the President issuing them, in this case, the ability to exercise the decision is being made not only for the sitting President, but is being preserved for future Presidents. In other words, sovereignty is not associated with the President, but rather with the office of the President. This expresses an ideological view of the role of President rather than simply a defense of a particular President’s right to decide.

The emphasis on secrecy in this signing statement has a distinct function. The exception taking here is based on a characteristic that differentiates the executive from the legislative branch. Specifically, the Executive has a right to secrecy and control of information that the

legislative does not. This distinction negates the similarities that would merit the inclusion of the executive in the juridical order. In this case, the exception is particularly problematic because it limits the ability to question the sovereign's actions. The sovereign exception by differentiation makes the executive cease to be subject to the order altogether, and completely apart from it in the context of the conduct of secrecy.

This should not be taken to mean the sovereign is entirely separate from the system. Rather, by strategically asserting an exception from rules governing secrecy, the sovereign is able to expand the decision in such a way that it has the effect of making the order and the controls that come with it meaningless. The sovereign ability to decide on war making and controlling intelligence becomes near absolute with this signing statement.

Exception Taking and Sovereign Violence

The last signing statement, but perhaps the one that most clearly demonstrates sovereign power is the signing statement attached to the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006". My analysis here focuses on the "Detainee Treatment Act", which was presented as an amendment to the emergency supplemental appropriations act. The unique circumstances surrounding this act make clear the sovereign power of the executive.

The legislation was passed after an agreement was negotiated between Senator McCain and President Bush regarding the rules for the treatment of detainees. At the conclusion of the negotiations both parties appeared to agree on the rules for treatment of persons held by the United States. However, after the legislation was passed Bush attached a signing statement that mooted any restrictions imposed. In one of the more thoroughly described objections in a signing statement, the Executive asserted:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, 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, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks. Further, in light of the principles enunciated by the Supreme Court of the United States in 2001 in *Alexander v. Sandoval*, and noting that the text and structure of Title X do not create a private right of action to enforce Title X, the executive branch shall construe Title X not to create a private right of action. Finally, given the decision of the Congress reflected in subsections 1005(e) and 1005(h) that the amendments made to section 2241 of title 28, United States Code, shall apply to past, present, and future actions, including applications for writs of habeas corpus, described in that section, and noting that section 1005 does not confer any constitutional right upon an alien detained abroad as an enemy combatant, the executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005 (Bush, para. 8).

This signing statement again begins with the use of the term “construe”, meaning that interpretive work is taking place. The act is being interpreted as a limitation on sovereign power that has no meaningful effect. This is done, in preceding signing statements, by construing the act in keeping with on the President’s power to supervise the unitary executive branch or the

powers of the commander in chief. This signing statement will be read through the lens of an ideology constructed around sovereign power. The signing statement reserves the sovereign right to choose how the detainees are treated. This power is an exception of excess, where sovereign power is so strong that it can't be constrained by the Congress.

What is new is the defense against oversight by the Supreme Court. As the signing statement argues, because the act does not give the Supreme Court the right to act, they do not have oversight either. In other words, the signing statement makes clear that the sovereign right to choose comes prior to the consideration of the law. This is an exception from lack. Because the actions taken by the Executive would not be legislative, the Supreme Court would require a private right of action for the Supreme Court to have jurisdiction over the actions taken by the Executive with regards to the treatment of detainees.

The decision not to argue that the Executive has legislative power is strategic. Many of the defenses of signing statements argue that the Executive needs legislative power, but in this case, having legislative authority would be detrimental to the Executive's ability to wield sovereign power. The decision not to defend the legislative authority leads to two important conclusions. First, this shows that signing statements are used strategically to provide the optimal outcome for the Executive in maintaining the ability to exercise the ability to decide. Second, this shows the direct way signing statements work to create sovereignty. The very issuance of this signing statement reserves for the executive the right to wield sovereign authority. The signing statement is simultaneously the enactment of the sovereign decision and the justification of it.

This signing statement also attempts to create an exception by difference. It uses section 1005 as a justification for the Executive to exercise decisions regarding the treatment of

detainees. Because detainees are considered enemy combatants, they are not conferred constitutional rights the signing statement reserves for the President the right to determine their treatment. In other words, because none of the powers held by the other branches apply, the Executive power of enactment controls the treatment of detainees.

This is not an example of the Executive having an excessive power, but rather a distinctive power to define. This power to define in extraordinary circumstances is distinct from the definitional power given to Congress to define through legislation. The claim that exceptional circumstances exist is embedded in the exceptional circumstances for detention. An enemy combatant detained abroad is placed in an exceptional class that does not fall under the jurisdiction of Congress. This justification does not exist in a vacuum however. It exists in the context created by the signing statement discussed above authorizing military intervention in Iraq as well as the public discourse used by the Bush administration to justify the war on terror.

This signing statement was perhaps most responsible for publicizing the role signing statements played in the Bush administration. It was in response to this signing statement that Charlie Savage wrote the article that led to national coverage of the use of signing statements. What made this signing statement noteworthy was a combination of dealing with a controversial topic, the treatment of detainees, and what Savage described as a clear over extension of presidential power.

As has already been described, the media coverage though not inaccurate, creates an inaccurate perception. The expansion of presidential power here is not the ability to suspend rights; the rights were never given, so they could be taken away. The problem here is that the detainees exist in a space that is entirely outside the juridical order. Agamben describes this figure as *homo sacer*, a figure who cannot be killed because they are outside of the law, but are

not subject to the protection of the law because they lie outside it. As a result, these figures are kept in a state where their lives are forfeit, but also impossible for the sovereign to take. This is not to say that the United States has never intentionally or through neglect taken the lives of detainees. Rather, it is to say that the taking of that life has no meaning because it was already forfeit. The system as it exists registers detainees as dead in all but the biological sense.

This signing statement operationalizes three distinct techniques to create an unchallengeable exception to the juridical order. By creating an exception from lack, excess, and differentiation, this signing statement constructs the management of life as the grounds for sovereignty. In so doing it not only expands the power of the Executive, but deliberately targets the lives of those subjects affected by the legislation. The signing statement becomes a technology for the regulation and control of life. The decision by the Executive to use signing statements is at its core a decision to maintain the sovereign ability to make these decisions.

Chapter 3

Signing off on the rhetoric of exception

These signing statements demonstrate the complicated relationship between order and exception. On the one hand, the signing statements do not reject the entirety of a piece of legislation. They limit their objection to specific provisions of the legislation, and in so doing affirm the legislation as part of the juridical order. At the same time, signing statements object to parts of the order created. This paradoxical relationship complicates the understanding of how signing statements function.

Reading these signing statements demonstrates that these exceptions are created in a variety of ways using a variety of mechanisms. The use of exception by lack, excess, or differentiation represents a set of distinct rhetorical tools to simultaneously affirm the order while creating an exception from it. This should not be read as entirely distinct from the original uses of signing statements such as those of President Tyler. By affirming the order and creating exceptions to it, the signing statement does in fact define the order.

Definition does not happen without material implication. In this case the very acts that define the order also change it. The signing statement offers an interpretation of the legislation that has the effect of changing its material effect. The signing statements in this case affirm Schiappa's claim that, "Once metaphysical and linguistic absolutism are set aside, definitions can be appreciated as part of our creative and ever changing efforts to make sense of the world. Once in place definitions become 'institutional facts' that guide our understanding of the world." (68) Because signing statements do the work of defining legislation, they also change our understanding of them. Signing statements force us to change our view of legislation, not just

because of what a particular signing statement does to the corresponding piece of legislation but also because the signing statement changes the role legislation plays.

Despite the change being made to the order, the order itself has a residual persistence. Congress still exists and still passes meaningful legislation that remains largely unchanged. In the same paradoxical way that the exception calls the value of the order into question, it also affirms it. Because what is not mentioned in signing statements is enacted, the signing statement does not say the order as a whole ought to be rejected; instead the value of the order created both by the system of government and the legislature is broadly affirmed.

The paradoxical relationship of the order and the exception means that neither is ascendant over the other. If the order becomes too well defined the exception is irrelevant. If the exception becomes too noteworthy then the order is disproven. What exists in the tension between the exception and the order is a principle that exceptions can exist. This principle is the rhetorical ground on which signing statements operate. At times the signing statements both affirm the order, as in the first paragraph of the signing statement attached to the authorization for the use of military force in Iraq, and create exceptions in the order, such as exceptions to disclosure rules. What exists between these moves is the principle that the sovereign has the right to decide the exception.

The Impact of Signing Statements and Sovereignty

The signing statement exploits the tension between the exception and the order. At the same time it affirms parts of legislation, while taking exception to others. In this way it functions like the line item veto described by Campbell and Jamieson. Like a line item veto, it changes the legislation by preventing parts of the legislation from taking effect. The important distinction between signing statements and the line item veto is that the signing statement, as a

non-legal mechanism that is not recognized by the Supreme Court or Congress, signing statements are able to affect legislation without negating it.

This effect without negation demonstrates that signing statements are rhetorical acts directed toward executive agencies intending to persuade them to ignore the provisions that the executive deems unconstitutional. These arguments are also directed at least in some cases toward the public, as illustrated by the epideictic characteristics found in certain signing statements. There is also some reason to believe, based on the early defenses of signing statements, that they are also meant to persuade the Supreme Court to consider signing statements alongside legislative history when rendering their decisions. Despite the diverse audiences available and targeted by signing statements, they have effect through the persuasion of executive agencies to ignore the provisions questioned in the signing statements.

These attempts to persuade not only are effective, but also demonstrate an ideological view of the role of the President. In both the Reagan and Bush administrations signing statements were viewed as a way to enhance the power of the President to maintain unity. This expanded view of the Presidency builds on, but also makes important additions too, the growth in the perceived importance of the President since Roosevelt's New Deal. The important addition made during the Reagan and Bush administrations is that the signing statements emphasized uniting the country behind the President, rather than uniting the country as a nation. It is no coincidence that the unity described in these signing statements looks so much like Hobbes' Leviathan.

The way signing statements are used creates an exception with the political system, while also defending the sovereign right to decide when to suspend the normal functioning of the political system. This vision of sovereignty described by Carl Schmitt is the foundation for

modern conservative thought. While the overt fascism described by Stephen Waite did not arise under the Bush administration, the functioning of the government took on eerie similarities. A President was able to initiate two military interventions and use dubiously constitutional mechanisms to pursue an unconventional war against a less than clearly defined enemy.

The signing statements went beyond protecting the sovereign ability to make the decision to pursue those conflicts free from congressional restraint. They were part of the rhetorical effort to justify those conflicts. They identify enemy combatants, describe foreign nations as threats, and are worded to create a sense of unity behind the efforts to pursue those conflicts. In signing statements we see the terroristic turn made by nations threatened with terrorism that Agamben describes.

The last signing statement I analyze lays bare the politics behind this vision of sovereignty. The sovereign decision to pursue conflict finds its justification in the ability to make a decision on life. The justification for pursuing conflict to protect the lives of United States citizens carries with it the ability to decide the value of the lives of non-citizens. The signing statement that was attached to the appropriations bill containing the Detainee Treatment Act demonstrates that the sovereign has the power to determine that enemy combatant's lives register as unimportant. For the sovereign, these lives are irrelevant to political consideration, and while the taking of that life may not be reserved as a sovereign power in the signing statements, consigning them to a life absent right makes permanent detention and enhanced interrogation techniques permissible.

The unique nature of signing statements makes this condition potentially permanent. Because the court does not recognize them, and any legislation passed by Congress is subject to signing statements, there is no way for the juridical order to account for them. Because public

perception of them is relatively weak, and the public has no recourse against signing statements, the democratic aspects of the process are significantly muted. Signing statements pose a unique and dangerous threat to the proper functioning of the United States government.

Policy Recommendations

Sovereignty is inevitable within the United States Constitution. By giving the executive the power to decide the exception and make war, the executive was given unlimited power under certain circumstances. Changing the constitution to limit the power of the Executive would certainly be the most direct solution, but a logistical problem makes it also the least feasible, and indeed, does not resolve the concerns created by the power of the rhetorical presidency.

Legislative solutions are inherently limited because signing statements would be issued that could affect those as well. However, Christopher Kelley offers two alternative solutions that deserve comment. The first is aggressive legislative oversight. Kelley argues that while there is no legal means to overturn the signing statement, members of Congress have had some success using press releases to raise enough attention to push Bush away from signing statements. (745) Although his arguments that this approach has had success are slim, it does offer hope because it offers a non-legal solution to a non-legal problem. Although the President could easily ignore the protests of Congress, such efforts indicate that the President is concerned about public perception.

The second solution is for Congress to use the power of the purse to withhold appropriations. However, as previously demonstrated, the executive accounts for this approach in signing statements by using the withholding of appropriations as grounds to discredit Congress. This approach also does not provide an effective response in cases where signing statements are attached to legislation that does not involve funding. If there are no funds to

withhold, then the withholding threat can only be applied to other pieces of legislation. All this would do is add another factor into the horse trading practices in the status quo. Finally, and most importantly, withholding appropriations does not clearly serve the interests of Congress, so it is hard to imagine the legislative branch taking advantage of this approach in any significant manner.

The other problem with these approaches is that they do nothing to deal with signing statements proper. They only address signing statements that affect specific pieces of legislation. These solutions only deal with proximate concerns, rather than dealing with the signing statement as a threat to democratic process and a dangerous expansion of Presidential power. There are certainly cases where these approaches should be used, but they are at best incomplete.

Second, the Supreme Court must begin to account for these documents. To continue to render decisions as if they do not exist will only allow these documents to retain their power. Perhaps the best option available was the one initially proposed by Justice Alito under the Reagan administration. Under this interpretation the signing statement functions primarily as a brief to the court that would be accounted for in decisions. In this way the Supreme Court is given the rhetorical agency required to interpret the signing statement and speak to whether or not the interpretation that is being offered is persuasive. Although this does not insure that the politics of the signing statement will disappear, it at least allows for a response that can account for the rhetorical nature of the signing statement.

The added benefit of the Supreme Court accepting the signing statement as a part of jurisprudence is that it brings the signing statement back within the juridical order. Although much of the signing statement's power stems from its unique standing in relation to the law, by incorporating it as part of the jurisprudence, the signing statement would be brought within the

juridical order. In so doing, it becomes defanged; it still has the ability to speak on how legislation is interpreted, but its effects are subject to change, modification, and interpretation by another branch. As a result, the more egregious statements by the Bush administration become far weaker and lack their unique rhetorical status. Rather than being treated as a command that can't be challenged, they are treated as a standard part of the legislative process and therefore subject to the same challenges.

This approach to date has not been tried. The Supreme Court has refused to consider signing statements in any context. Realistically this approach is the least likely to be tried. The Supreme Court is insulated from public opinion, so pressure from the electorate does not have much leverage. Similarly instruction from Congress regarding the issue would be non-binding at best and realistically would violate separation of powers. However, it is a means to address signing statements as a tool to expand Presidential power, rather than dealing with particular signing statements on a case by case basis.

Suggestions for future study

The approach taken here provides multiple directions for further analysis. Although this argument was constructed around a particular set of signing statements analyzed in a particular manner informed by a particular theory, it is by no means exhaustive. Continued research on all of these fronts offers significant further challenges to political scientists, rhetoricians, and critics concerned with questions of method.

This is especially true in the context of the Obama administration. Given a President from a different political party with a radically different political background and an apparently different set of values could use signing statements in a very different way to defend very different policies. A similar analysis to the one presented in this thesis would be applicable to

signing statements used by the Obama administration. This is especially true as Obama has issued a comparable number of signing statements to those issued in the first term of the Bush administration.

Signing statements pose a legitimate concern for our understanding of how government functions. As my literature review demonstrated, political scientists are in large part drawing conclusions that focus only on the proximate effects of signing statements. Broader analysis that has been done focuses on the number of signing statements used and in what context, but often understates the conclusions of their evidence. Reading signing statements only through the lens of a balance of power question misses the logic that allows the Executive to dominate the federal government. Further research into the nature of changes being made in the functioning of the government in light of expansive presidential power is necessary. By positing sovereignty as the dominant paradigm for viewing the functioning of government, further research can foreground the way excessive executive power increases the possibility for conflict as well as interferes with the normal functioning of government. An expanded analysis and application of the work done by thinkers debating sovereignty such as Agamben, Jean Luc Nancy, Carl Schmitt, and Leo Strauss is a helpful corrective to the prescriptive/descriptive problem that plagues more standard analysis of balance of powers and separation of powers.

As a corollary to this project, a more rigorous history of the influence of conservative thought in the United States is necessary. Although the modern foundations for social conservatism are hotly debated, the ideological foundations are not well understood. There is a need to research how conservative ideology about the functioning of government shifted from the Hobbesian visions of the Leviathan into the conservative critiques of Roosevelt's New Deal, to the militarist policies of Eisenhower, which were defended by subsequent Republican

politicians until the rise of Neoconservatism, culminating in the election of George W. Bush. There is a desperate need to understand not only the political figures in this history, but the ideological thinkers as well, and how they did or did not influence politics.

Signing statements provide ample ground for rhetorical analysis. The signing statements selected for analysis here are by no means exhaustive. They were selected because they demonstrated an important concept that needed discussion. A broader survey of signing statements would provide more information about the rhetorical tropes and ideological commitments made in signing statements. The approach taken here analyzes a particular set of tropes present in a particular set of signing statements. Future research analyzing other signing statements would be productive in identifying other tropes as well as shifts in ideology.

My analysis in this thesis also points towards important research areas for rhetoricians. My discussion of a rhetoric of exception taking is based in discussions that are largely happening outside of rhetoric. Although Agamben has done an extensive amount of work in describing the philosophical nature of the exception and how it influences politics, little work has been done to describe how rhetoric is implicated in this process. Rhetoricians have a lot of important things to say. A broader application of rhetorical theories regarding definition would provide for important discussions regarding how exceptions work to create politics.

Some methodological issues also are raised in this thesis. My use of the intentionalist approach is somewhat controversial in that I determined the intent based on what was present in the signing statements and how they fit into rhetorical tropes.⁶ I stand by this approach because it is effective in describing the signing statements. However, it has intrinsic limitations in describing rhetorical artifacts that are ineffective. Failed attempts at communication would make

⁶ It is important to distinguish this approach from attempts to psychologize the intent of the author. My aim is to describe the intent embedded in the collected documents.

my analysis at least problematic. The utility of this approach is undeniable, but there needs to be a discussion about how this approach deals with failed attempts at communication. Critics and rhetoricians who study figures such as presidents or institutions such as the executive branch need to begin resolving questions regarding how the intent of rhetors can be determined in the event of failed communication. The example described by Kelley when the Executive backed off of a signing statement that had been issued indicates exactly the type of failure that an intentionalist approach would need to adapt to account for.

The last research area that I would suggest is expanding the research into rhetorical tools to describe legal language. One concern that hamstrung much of the research for this project was the difficulty in making sense of extremely short, vague, and non-descriptive claims being made. There needs to be rhetorical work done to better understand how the legal language found in signing statements and similar documents functions to create persuasive meaning. This implication would also go beyond debates regarding the presidency to include discussions concerning the rhetoric used to write legislation. Understanding the tie between this distinctive form of communication and the force of law is an important area for rhetoricians to expand their research.

Conclusion

The attacks of September 11, 2001, dramatically changed the way the government functioned. The groundwork for this change was laid almost twenty years earlier in the Reagan Administration as an attempt to unify the country behind a combination of executive and legislative power held by the office of the president. Though this effort was largely unrecognized, it remained latent until a president with a conservative political ideology and an impetus for action used the signing statement to assert and defend exceptional power. Under the

Bush administration, signing statements became a tool to change the functioning of government to unify the United States public behind the Executive branch. This unification, coupled with the creation and defense of exceptional power, permitted the government to engage in unchecked violence against bodies excluded from political consideration.

Although signing statements were not the only tool responsible for this change, or even necessarily the most powerful, they demonstrate the strategic move being made to construct sovereign power in the executive branch. The centering of power in the executive branch helped to create the legal grounds and persuasive power necessary to justify two military interventions as well as the global war on terror. Most telling is the non-legal linguistic tools used to make this change and to render the subsequent wars necessary. In order to understand sovereign power and provide effective criticism of said power, rhetoric needs to be foregrounded as a means to understand the United States presidency.

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