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SOUND OF DEMOCRACY

Justice Talking Radio Transcript

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Presidents have long used signing statements to add their views on legislation they dislike but won't veto. President Nixon used them to point out excessive expenditures in spending bills. President Carter used them to make sure that Congress did not encroach on executive duties established by the Constitution. But President George W. Bush has used them more frequently than any other president, over 700 times since taking office. Join us on this edition of Justice Talking when we look at the use and abuse of presidential signing statements. Are they a legitimate statement of the president's interpretation of a law? Do they establish how federal agencies must enforce the law? Or do they violate separation of powers by usurping the courts' power to set the meaning of contested laws?

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. In our show today we'll look at presidential signing statements, a technical manipulation of a bill by the president in which he issues his own interpretation of the bill before signing it into law. Most people have never heard of the practice, but presidents have done this throughout history. However, president George W. Bush has used signing statements over 800 times, more than all U.S. presidents combined. There are questions about what this means for the laws and for presidential power.

To find out how presidential signing statements work I spoke with Charles Savage. He's a reporter for the Boston Globe, where he covers legal affairs and homeland security. He was the first to report on the president's use of signing statements. Welcome to Justice Talking.

CHARLES SAVAGE: Thanks for having me on.

MARGOT ADLER: Charles, your articles on presidential signing statements brought focus to something many people know nothing about. Tell us what signing statements are and how they work.

CHARLES SAVAGE: A signing statement is an official document that a president issues and enters into the federal record on the day that he signs the bill into law. Although it is a public document it is not intended for public consumption. It's different than a proclamation in which the president says: This is a great bill. Thank you, Congress. Here are all the great things it's going to do. Instead it is a technically dense legal document that consists of instructions to the executive branch about how they are to implement and to interpret the law that the president has just signed. And President Bush, more than any president before him, in fact more than all presidents before him combined, has used signing statements as a mechanism to essentially nullify sections of bills that he is signing by declaring them to be unconstitutional in his view. Overwhelmingly these are laws that restrict his own powers as president and commander-in-chief. And President Bush has a very expansive and aggressive interpretation of his own powers and says that basically anything Congress says that would limit or restrict or channel what he does with the government is unconstitutional, and thus need not be obeyed as written.

MARGOT ADLER: And what brought your attention to these?

CHARLES SAVAGE: I had been covering 9/11 related legal issues for the past several years, especially detention and interrogation issues, such as at Guantanamo Bay. Last year I extensively covered the fight in Congress led by Senator John McCain to pass a new and airtight torture ban following revelations that the administration believed it need not obey an existing torture ban outside of U.S. territory. At the end of that fight President Bush agreed to accept the torture ban because both houses of Congress had passed it by such overwhelming margins that he could not veto it. He had a press conference with John McCain and said maybe this is a good idea, I accept it, and left the impression on the front pages of the newspapers around the country and the world that this was going to be a hard law in the United States that the U.S. would obey. When he signed the bill he issued a signing statement that said that he had the powers as commander-in-chief to circumvent or bypass the torture ban if he thought that would be necessary in his own mind to protect the country from terrorism. I wrote about that signing statement in January of 2006, and then I began covering the Patriot Act Reauthorization fight, which also fell into my sphere of interest. And the same thing happened at the end of that. To get the bill passed Bush agreed to a whole series of new oversight provisions that would allow Congress to have a much greater idea of how the law was being used in individual situations, required the Justice Department to keep track of how the law was being used and provide regular reports to Congress.

MARGOT ADLER: Now how often has President Bush used these signing statements?

CHARLES SAVAGE: It turns out that he has attached signing statements to more than a 130 bills, but because bills often contain many different laws that have been lumped together by Congress he's actually challenged, at the point that I wrote that article--it was April 2006--he had challenged more than 750 laws. Now it's supposed to be closer to 1,000 because, of course, he

has kept doing this with a whole series of additional bills that have come through since that time. This is far more than all other presidents in American history combined.

MARGOT ADLER: Now, how does a signing statement differ from a presidential veto?

CHARLES SAVAGE: presidential veto is the power the Constitution gives a president to deal with legislation that he believes is unconstitutional. In a veto the president says: I reject this entire bill. Here's why I reject it, because I think this provision and this other provision are unconstitutional. And it returns it to Congress and then Congress has a chance to disagree with that interpretation by voting to override the veto. A signing statement, by contrast, is a unilateral final word on what in the law is going to count and what might as well not have been there in the first place because it's not constitutional. And, therefore, it allows the president to go through the bill and selectively take what he wants and throw out the rest. And it prevents Congress from having an opportunity to override that judgment.

MARGOT ADLER: Now, Presidents Reagan, Bush Sr. and Clinton all issued signing statements during their time in office. Clearly not as many as George W. Bush, but they did. How is Bush's use of signing statements any different than the other presidents besides the number that he's issued?

CHARLES SAVAGE: The increased frequency itself becomes a substantive difference. The legal theory is that President Bush is advancing through his signing statements are far more aggressive than the presidents that came before.

MARGOT ADLER: And I gather that many of these signing statements are in areas that involve the military, security, espionage, and so forth?

CHARLES SAVAGE: Many of them are, absolutely: the torture ban, famously; the Patriot Act reauthorization bill; inspector general statutes in Iraq; limits on the use of the number of forces, and the use of those forces, in Colombia, in combat. These are the sorts of things he's challenging. But there are also things that have nothing to do with national security: whistleblower statutes in the Energy Department; affirmative action provisions; requirements that federally funded scientific research cannot be censored or altered if Congress asks to see what the results of that information are. These are things that don't have a national security aspect but still implicate in the president's view his own prerogative powers.

MARGOT ADLER: Now critics of the use of signing statements, particularly those done by the Bush administration, say it violates the separation of powers doctrine. Give me the argument here.

CHARLES SAVAGE: Well, the argument is that no one, under the Constitution, is supposed to have absolute power, with a very few specifically enumerated exceptions, like a president's power to pardon someone, for example. When you have the enforcer of the rules and the executer of the laws also picking and choosing which laws he thinks he needs to--he wants to--obey and which he can ignore, it eliminates the ability of Congress to restrain and channel and regulate the executive branch of government. It essentially frees a president to do what he wants

to do and that is contrary to the spirit of separation powers with checks and balances that is at the foundation of the Constitution.

MARGOT ADLER: Is this an issue that could come before the courts?

CHARLES SAVAGE: Well, this is a great problem with this area because most of the kinds of laws that we're talking about are not the kinds of laws where you're going to have a specific individual victim who the courts have jurisdiction over, who can therefore file a lawsuit saying this was wrong and get the question before the Supreme Court ultimately. If Congress says that you can't have more than 800 people stationed in Colombia from the military, and the president says I'm the commander-in-chief and I'm going to put 900 there, or 100,000 there, you know, who exactly is the person whose rights have been violated by that? And because our court system, unlike many countries' court systems, does not allow for advisory opinions--that is, you ask the court what is the answer to this legal question--but rather requires a specific case or controversy before a legal question can get put to the court. It's unlikely that most of these questions are going to ever come before the court. And that's why when you have a unilateral declaration of what the Constitution says, even if 99 percent of legal scholars and law schools around the country say that's crazy, there's not really a mechanism for enforcing the mainstream view.

MARGOT ADLER: When, and how, does Congress find out that the president has issued a signing statement?

CHARLES SAVAGE: They are public documents. They are entered in the federal register. They are collected in the weekly compilation of presidential documents, which anyone can go on the Internet to the Government Printing Office website and look at. And they're posted in this administration, at least, on the White House Press website along with every other statement and document that comes out with the president's name. But Congress has to want to look at them. And they weren't for the first five years of this administration--I think that people just weren't used to the idea of them. They have been a very obscure device for most of our country's history. They haven't been used in particularly aggressive ways until now. And so it took the torture ban signing statement and then the Patriot Act signing statement in the subsequent coverage, and then the American Bar Association's outraged report before, I think, Congress and the rest of the media fully became aware of what these things were and their potential power.

MARGOT ADLER: You're writing a book about presidential power, so you're thinking about this a lot. Why should the general public care about this issue of signing statements?

CHARLES SAVAGE: The reason ordinary people should care about signing statements but also executive power issues in general is that we are all Americans. We are the current holders and recipients of 200 years of history, of democracy in the United States, of a Constitution written in 1789 that generations and generations of Americans have lived under and thrived under because it works. Because the country is best off when Congress makes the rules as our elected representatives and then the president is bound to obey those rules. On occasion this system has gotten out of whack. It got out of whack a generation ago, in the late 60s and early 70s, culminating in the Vietnam War and Watergate, when too much power became centered in the

office of the presidency, became unaccountable and easy to abuse those powers. And those powers were abused and society needed a major correction to get the system back into equilibrium again. Over the last 30 years that system has gradually come into question, again, especially over the last five years. And it's worth thinking about what it is that the Constitution means, why it is that this is the foundation of our society, and if that's going to be changed we ought to be at least be aware of what's happening and debate it, rather than just sort of wake up one morning and notice that it's happened.

MARGOT ADLER: Thank you so much for talking with me.

CHARLES SAVAGE: Thank you for having me on.

MARGOT ADLER: Charles Savage is a reporter for the Boston Globe, where he covers legal affairs and homeland security.

MARGOT ADLER: Coming up: When does presidential power become too much?

UNIDENTIFIED MALE: I think if the president is going to state an objection to a dually enacted law of Congress, the president ought to be forthcoming about the specifics of what that objection is and let people know when it is that he intends not to apply it, if that's his position. But once he signs it, it's the law, and he doesn't have any more authority than anybody else to say and I'll decide whether I'm going to obey it or not.

MARGOT ADLER: More on presidential power and signing statements--stay with us.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. On today's show we're taking a look at presidential signing statements, when a president attaches his own interpretation to a bill before signing it into law. Constitutional lawyers are divided on the relevance of these statements. Some say the practice is within the realm of the president's power, while others say it is a blatant abuse of executive power. We recently hosted a debate between Mickey Edwards and Christopher Schroeder, two lawyers who have different viewpoints on the use of presidential signing statements. Our conversation was taped in front of an audience in Philadelphia.

Mickey Edwards is the executive director of the Aspen Institute-Rodel Fellowships in Public Leadership. From 1977 to 1992 he was a Republican congressman from Oklahoma. He recently served as a member of the American Bar Association's special task force on signing statements. Christopher Schroeder is a professor of law and public policy studies, and the director of the program in public law at Duke University. He was deputy assistant attorney general in the office of legal counsel at the U.S. Department of Justice. He is one of a group of lawyers that oppose the ABA's position on signing statements.

Mickey was part of a bipartisan task force assembled by the American Bar Association to look into the issue of presidential signing statements. I asked him why the task force was created and what it found.

MICKEY EDWARDS: Well, the task force was created after Charlie Savage's articles that pointed out not only that the current president had issued more signing statements at the time that he signed a bill into law than every other previous president combined, but also with a very different scope, and a very different intent, and very clear expressions that the president when he signed a bill into law didn't necessarily feel bound to obey those laws.

MARGOT ADLER: And, Chris, you joined a group of lawyers who had a different opinion than that taken by the American Bar Association. Tell us what your position is on signing statements.

CHRISTOPHER SCHROEDER: Well, we think there's a lot to admire in the ABA report and we're glad that this issue has been looked into. The group of us from the Office of Legal Counsel who posted a blog entry about the ABA report were basically interested in one thing, which is to say we think the ABA report was shooting at the wrong target. We think signing statements are the messenger and not the message. And the problem with the signing statements that have been issued by the Bush administration is that they give evidence that the president holds views on constitutional issues and his constitutional authority that are wrong. All the signing statements do is tell you what those views are. And we are inclined to think that in so far as they reveal information about the president's intentions, they're actually a good thing. So we think there are too many of them because we think the president has too reckless a view about the scope of his presidential autonomy. But we think signing statements as a general proposition in revealing what the president and how the president interprets a law aids democracy because it lets the other branches of government and the people know what the president's thinking.

MARGOT ADLER: Now, I'd like to take one example of the president's use of a signing statement. President Bush in 2005, he signed the 2005 Defense Authorization Bill that contained the McCain Amendment banning inhumane treatment of detainees held in the war on terrorism. After approving the bill, the president issued a signing statement. Mickey, what was the president, in effect, in your view, saying when he did this?

MICKEY EDWARDS: Well, the president believes that in a time of war that he has certain powers--not only in a time of war, but his ability as president to do interpretations of the Constitution... Basically, what the president was saying, Margot, was to the Congress: Thank you very much, we're really glad to get your opinion on this, but I'm president and I'm the decider.

MARGOT ADLER: Chris, would you agree?

CHRISTOPHER SCHROEDER: I agree. And I think my problem with that whole exchange is two-fold. One, the signing statement the president issued actually tells you extraordinarily little about what his position is. It just tells you that he might not enforce the amendment at some point of time. It says I feel free to interpret this language in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and its

commander-in-chief. So it's opaque. You don't know what--you suspect what it means because of positions the president has taken but it doesn't inform the Congress or anyone else for that matter as to under what circumstances the president would invoke this power. So it's vague and opaque. The other problem I have with the whole sequence is it's a little like negotiating with somebody who's got their fingers crossed behind their back. Senator McCain and the president engaged in face-to-face and staff-level discussions over this specific language. And the president and the senator, and then the Senate and the House, agreed to this language, and the president issues a statement that says, in effect: Oh never mind, I might not live by this language. And that, it seems to me, borders on dishonest government. I think that's a problem.

MARGOT ADLER: So in other words your problem is not the signing statement as much as what you think it sort of portends?

CHRISTOPHER SCHROEDER: Well, the vagueness of the signing statement is a general problem with the Bush signing statements--and I must say with some of the Clinton signing statements, which is this hard to distinguish boilerplate from that--and I think if the president is going to state an objection to a dually enacted law of Congress, the president ought to be forthcoming about the specifics of what that objection is and let people know when it is he intends not to apply it if that's his position.

MICKEY EDWARDS: Margot, can I add one thing at that point? The negotiation process that we're talking about when these signing statements are issued--the negotiation process is over. The interaction with the Congress is over. The moment he signs it is now the law. Now he can have all kinds of positions about what he thinks is good or bad or what he'd like to see changed. The moment he signs it, it is the law. And it is binding on every American citizen including the president. And that's what he doesn't seem to get. When he--he could veto it if he doesn't want to live by it and give the Congress a chance then to engage and perhaps override his veto. But once he signs it, it's the law and he doesn't have any more authority than anybody else to say and I'll decide whether I'm going to obey it or not.

MARGOT ADLER: Mickey Edwards is a former Republican congressman from Oklahoma. Chris, more generally if the president finds part of a bill ambiguous or unconstitutional should he just veto the entire bill?

CHRISTOPHER SCHROEDER: Well, I think this is where we actually have a substantive disagreement with the idea of the ABA. We think that generally speaking the president should not sign bills that the president conscientiously believes is unconstitutional. At the same time it's in the nature of the legislative process that from time to time the president will be presented with legislation that is extremely important: a defense appropriations bill, some other piece of legislation for which there's a high degree urgency but there's one provision in it that the president thinks is unconstitutional. We think the president can sometimes make the choice to sign that piece of legislation and announce his interpretation of that provision as being one that he believes is unconstitutional and shouldn't be enforced. I think the ABA report and resolutions do take a different position on that issue.

MARGOT ADLER: Mickey, some bills have hundreds of provisions in them tucked within the bill. If the president has a problem with one of these provisions, why should the entire bill be vetoed?

MICKEY EDWARDS: Well, let me tell you how the legislative process actually works. First of all, go back to the beginning here. Under Article I, Section 7 in the Constitution, the president actually only has constitutionally two choices. He can sign a bill and make it law, or he can veto it and give the Congress a chance to then try to override it. But in specific, one of the problems we have here in this whole process is that when a president sees coming down the pike--he sees something in a bill that is being considered in the House or the Senate, or both, he sees provisions that he believes are objectionable because they're unconstitutional or for any other reason, the history is the presidents then always engage members of Congress and they send messages to the Congress. And they say if this provision remains as it is, I will veto the bill or it will be recommended. At which point negotiations ensue. Most often the offending provision is taken out. If it is not taken out then the president can veto it. And in order for his veto to be overturned by Congress, you know, it takes two-thirds of the house and two-thirds of the Senate. So the president is probably going to prevail. Most of the time a president is not going to have to live with something that he finds unconstitutional. In addition to which, the whole process can take place very quickly. Members of Congress also want to fund the military. They also want to fund health programs. You know, it's not true that the president has no ability to go through the normal constitutional process and try to remove offending provisions.

MARGOT ADLER: Mickey Edwards is a former Republican congressman from Oklahoma. Before him, Christopher Schroeder is director of the program in public law at Duke University. What about the Supreme Court? How has the Supreme Court ruled on laws where the president has issued signing statements? I mean, have they taken them into account or not? Mickey?

MICKEY EDWARDS: Well, one thing the president wants to do is to change--often the court will look at the legislative intent in passing the bill. One reason the presidents have signing statements, and previous presidents have done it, is because they would like to have their point of view also taken into account by the courts. Courts have not generally tended to do that because they're not--the president is not the one who passed the bill. It's kind of strange to ask him what the Congress intended. But there is an important thing here. Getting this issue before the courts is really difficult. And it's difficult because courts have traditionally refused to allow individuals, including individual members of Congress, or 50 individual members of Congress, to bring something like this before the court on the grounds that they lack standing.

MARGOT ADLER: This is Article III of the Constitution?

MICKEY EDWARDS: Yeah, which says that the courts can deal with cases and controversies. And what Congressman Barney Frank's legislation would do is have a resolution by Congress that allows it to take something before the court to get its judgment. That's very hard to do at the moment.

MARGOT ADLER: Chris, did you want to add to that?

CHRISTOPHER SCHROEDER: Senator Specter has a similar bill.

MARGOT ADLER: And we'll talk with him later about it, yes.

CHRISTOPHER SCHROEDER: My difficulty with Barney Frank and Senator Specter's legislation is I don't think it's going to get at the root of the problem, because both bills would purport to give members of Congress standing to ask the court to opine on the legality of the signing statement. In my judgment the signing statements are legal. It's whether or not the subsequent action the president takes consistent with the signing statements are legal that is the question. And I don't think the courts will rule on that question in the abstract. I don't think they will take the signing statements and rule on the ultimate legality of some action that the president hasn't yet taken.

MICKEY EDWARDS: Yeah, there is a similar problem here. It's hard to get the courts to act on it, and also by using signing statements rather than vetoes--you know one thing that has been very unusual about this president is...

MARGOT ADLER: He's only had one veto.

MICKEY EDWARDS: He's only issued one veto, and he's using signing statements instead of vetoes, which takes away from the Congress its constitutional right to try to overturn a presidential desire not to enact a piece or not to follow a piece of legislation.

MARGOT ADLER: In 1998 the Supreme Court ruled that the line item veto was unconstitutional. The court said that the president did not have authority to pencil out specific spending items approved by Congress. Explain to me, Chris, the difference between a signing statement and a line item veto.

CHRISTOPHER SCHROEDER: Well, the signing statement has no legal effect. The line item veto would. And assuming the statement has some effect it doesn't remove the piece of legislation that's being objected to from the U.S. Code. It remains the law. The president may or may not act on the signing statement down the road. And subsequent presidents if they disagree with this president's interpretation would have that law on the books that would then be put into effect by those subsequent presidents. The similarity between what the president is purporting to do with a signing statement and a line item veto I think is not trivial but I think it's overstated, because I think that most presidents short of this one have looked at their responsibility to enforce the laws of Congress as of utmost importance. They take a pledge to secure the faithful execution of the laws. They also take a pledge to preserve, protect and defend the Constitution. So they sometimes face dilemmas of situations in which the law looks like it would dictate that the president do acts, and yet the president is also getting advice that subjecting an individual or taking an action that comports with that law in this circumstance would violate the constitutional rights of the individual, or would violate the constitutional rights of the president. And in those limited circumstances there's a conflict between the president's duty to the law that Congress has passed and the president's interpretation of the Constitution. It's in those narrow circumstances that I think this conflict properly arises. And it shouldn't arise as a matter of routine business of the president discharging his duties.

MARGOT ADLER: Now I know that many governors have, still have, line item vetoes and many strict constitutionalists believe the president shouldn't have this power. I'd love you to weigh in on this. Mickey?

MICKEY EDWARDS: Well, I'm very much opposed to the line item veto. I think the courts made a very wise decision, because under Article I, Section 1 of the Constitution, all legislative authority is in the Congress. It's not shared by the Congress and the president. There are--in many states, governors have line item authority, but a state is not a little federal government. You know, they don't deal with foreign policy. They don't deal with the national defense. So any attempts to make a parallel between a state line item veto authority and a federal I just don't think fit.

MARGOT ADLER: Well, bottom line, I'd like to ask both of you this. Do you believe that President Bush is taking some of the powers of Congress to make laws and some of the powers of the Courts to interpret laws? Chris?

CHRISTOPHER SCHROEDER: Yes, but again I think it's because he believes that's his constitutional authority and he--I would give you the same answer whether or not he had issued a single signing statement.

MICKEY EDWARDS: I would say it differently. You know, maybe I'm a little too hard here. Yes, of course, he's trying to take more power. Every president tries to take more power. Most presidents don't really understand why there is a Congress because it gets in the way. It's inefficient. I don't blame the president. I blame the Congress. I blame them for having let him get away with this for as long as he has. And that's why I hope the Congress will use every bit of its authority and power to bring a halt to this.

MARGOT ADLER: Mickey Edwards is the executive director of the Aspen Institute-Rodel Fellowships in public leadership. From 1977 to 1992 he was a Republican congressman from Oklahoma. He was a member of the American Bar Association's task force on signing statements. Christopher Schroeder is a professor of law and public policy studies and the director of the program in public law at Duke University. He was one of a group of lawyers opposing the American Bar Association's position on signing statements. Thank you both so much for being on Justice Talking.

MICKEY EDWARDS: You're welcome.

CHRISTOPHER SCHROEDER: My pleasure.

MARGOT ADLER: Coming up, why Senator Arlen Specter would like to make presidential signing statements illegal.

ARLEN SPECTER: I think they're inappropriate, unlawful, and unconstitutional. That's the only thing I have against them.

MARGOT ADLER: More on what Senator Arlen Specter thinks about presidential signing statements and why Harvard law professor Laurence Tribe thinks he's wrong.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. We're talking about presidential power and the use of signing statements, written interpretations that the president can issue when he signs a bill into law. Republican Senator Arlen Specter has put his own bill before Congress that would make the use of signing statements illegal. Senator Arlen Specter was elected to the Senate in 1980 and is currently serving his fifth term. He is chairman of the Senate Judiciary Committee and a senior member of the Appropriations and Veterans Affairs Committees. I asked him about his position on signing statements.

ARLEN SPECTER: I think they're inappropriate, unlawful, and unconstitutional. That's the only thing I have against them.

MARGOT ADLER: Why should the average American care about presidential signing statements?

ARLEN SPECTER: Because when Congress passes a law, and it is signed by the president, the American people have a right to expect that it will be followed. Where you have, for example, in the Patriot Act, which was very carefully negotiated by the Senate Judiciary Committee and the White House, and it is a balance on civil rights versus law enforcement authority, and one of the important safeguards was to have reporting by the FBI on what they did, the president negotiates it through his subordinates. We pass the law. He issues a signing statement saying that he will not necessarily follow the reporting requirements because they may be inconsistent with authority under Article II of the Constitution. And I think that's wrong because he's already agreed to it. And it is not a red herring; it has enormous practical influence.

MARGOT ADLER: Now, last summer you held Judiciary Committee hearings on the issue of signing statements. What was the impetus that led you to call the hearings?

ARLEN SPECTER: Well, it was the Patriot Act, which I was personally involved in. It was the McCain presidential controversy. I don't like it as a general matter. Former Congressman Edwards talks about oversight. I've tried as chairman of the Judiciary Committee to do a lot of oversight with the president of my own party because I think it is indispensable. If the president decided he didn't want to follow a law, that he had inherent constitutional power to disregard it, he wouldn't necessarily have to issue a signing statement. The biggest area of oversight failure in the past year almost has been our inability to get the electronic surveillance program up for judicial review. It was disclosed on December 16th last year by the New York Times that for years the president has a program of wiretapping without following the Foreign Intelligence Surveillance Act, which flatly says it's the exclusive way to get authority to wiretap. Now the president didn't have a chance to issue a signing statement. It was passed in 1978 but he just

decided to disregard it. And there's raging contention now as to whether he's violated the law or whether in fact he has Article II power, because if he does, constitutional power supersedes a statute. But that can be determined only by a court interpretation weighing the intrusion of privacy against the value to law enforcement.

MARGOT ADLER: Senator Specter, what makes President Bush's use of signing statements so different from other presidents?

ARLEN SPECTER: Because he uses them in a totally different way. A signing statement within the bounds of propriety can, say it be a direction to his subordinates in the executive branch, how they should carry it out, because legislation cannot cover all contingencies. So it's necessary to interpret the law. But to take specific provisions and say I'm not going to follow them is very different.

MARGOT ADLER: Does a signing statement have any legal force?

ARLEN SPECTER: Sure, sure. It has the authority to subordinates in the executive branch to act, to disregard, for example, law enforcement to report to Congress on the Patriot Act, or to disregard the prohibition against inhumane or degrading treatment if that person thinks it's appropriate, short of torture.

MARGOT ADLER: New York University law professor Sam Golove was quoted as saying: "Bush has essentially said that 'We're the executive branch, and we're going to carry this law out as we please. And if Congress wants to impeach us, go ahead and try it.'" How would you respond to what he said?

ARLEN SPECTER: Well, how would I respond to that? I would say that my response is you ought to ask Congressman Conyers. He's going to be head of the Judiciary Committee in the House, and he has already said he intends to file a bill of impeachment.

MARGOT ADLER: I'd like you to talk for a moment about your bill, the presidential Signing Statements Act of 2006. What would it actually allow Congress to do if it became law?

ARLEN SPECTER: It would give Congress standing to go into court and to seek a judicial determination that the president is obligated to report as the Patriot Act specifies. Professor Schroeder has a point that it's hard to structure what we call a case in controversy. But Congress has the authority to grant standing. We can do that. We can grant standing to ourselves. And I think that would put the fact in the fire. And also you don't always have to succeed on what you're doing, to raise the issue, to pass the bill. You have to pass it over presidential veto because he's going to veto it.

MARGOT ADLER: What's the status of the signing statements bill right now?

ARLEN SPECTER: It's pending. It's not been reached because there are many other matters of greater importance, immediate importance. I have put emphasis--for example, we've had the Supreme Court confirmations, which have taken precedent over it, and I've considered the

judicial review of the surveillance--electronic surveillance program, wiretapping--more important. So we've had a lot of important things we're doing. We have to establish priorities.

MARGOT ADLER: We just had mid-term elections. Do you think that some of these issues, including your bill on signing statements, what's going to happen to it in the new Congress?

ARLEN SPECTER: Well, I think we will pursue them. Senator Leahy will become the chairman of the committee. That's second best, but that's the law. And he's a good man and he and I have worked coordinately. I think occasionally he may even listen to me. We'll move ahead. The country will survive.

MARGOT ADLER: If Congress passes your bill, aren't you afraid the president will issue a signing statement after he signs it saying he doesn't have to obey it?

ARLEN SPECTER: I think he'll veto it and if it's passed over his veto, he'll probably issue another signing statement.

MARGOT ADLER: Senator Arlen Specter, thank you so much for talking with us.

ARLEN SPECTER: Glad to be here.

MARGOT ADLER: Senator Arlen Specter was elected to the Senate in 1980 and is currently serving his fifth term. He is chairman of the Senate Judiciary Committee and a senior member of the Appropriations and Veteran Affairs Committees.

MARGOT ADLER: Harvard law professor Laurence Tribe has looked at the constitutionality and legality of presidential signing statements. I asked him when is the use of a signing statement an abuse and when it is the president's constitutional duty.

LAURENCE TRIBE: The president has no duty, ever, to make a statement in connection with the laws that he signs. When he does it, it is simply informational. And there is nothing abusive about the fact that he provides the information. The confusion is to confuse the statement, which is simply a signal to the world about what the president intends to do, with the content of what he intends to do.

MARGOT ADLER: Well, one of the difficulties seems to be that when a president interprets a law in a way that challenges what Congress intended, the feeling is that there's not a lot of way for Congress to challenge the president's position in court.

LAURENCE TRIBE: Well, it's not Congress' business, really, to challenge it. Congress may feel insulted, but when Congress passes a law, for example, to protect detainees from being abused in certain ways, being subjected to water-boarding or some other technique, and if the president disregards that or says I interpret it to mean something other than what it really means, and proceeds to do the things to detainees that Congress has said he must not do, it will be the

detainees or those who represent their interests who go to court and challenge the president. The only role that Congress has in overseeing presidential power is to conduct hearings, use the subpoena power, find out what the president is doing, use the power of the purse, and in sufficiently extreme cases, use the power to impeach and remove from office. But the idea that Congress can kind of boot-strap itself into the position of being a litigant, suing the president for daring to challenge it in the signing statement that he makes is itself a misunderstanding of the separation of powers. The attempt by Senator Specter and others to give Congress standing to go to court and attack the president for saying something when he signs the law is completely outside the realm of what the American separation of powers is all about. It's as though the president in his State of the Union message made some insulting statements about Congress' competence and his intention not to pay any attention to Congress and Congress tried to take him to court over that. It's not an injury that the courts can redress when the president announces in a formal way that he intends to interpret a law out of existence or that he intends not to be bound by it.

MARGOT ADLER: Why did the founding fathers create a separation of powers to begin with?

LAURENCE TRIBE: They believed that the union of all power in any one branch of government—giving one branch the ability to make the laws, interpret the laws, enforce the laws—would amount to tyranny; that the most effective check against the tyrannical concentration of power in the hands of any one person or any one branch is to adopt a hydraulic system of checks and balances so that power would offset power, ambition would offset ambition. In the end, one can have elegant paper guarantees written in constitutional concrete, but unless they are enforceable by an independent judiciary, they amount to nothing. Unless the power of the purse can offset the power of the sword, unless the legislative branch can check the executive branch, the executive may exercise power that ultimately destroys liberty and eliminates the genius of diversity.

MARGOT ADLER: So in a sense you're saying it's symbolic in some way of Congress' lesser power, but it has no force in relationship to making Congress have less power.

LAURENCE TRIBE: That's right. Not only is it merely symbolic—symbols sometimes make a huge amount of difference—but it is a bid for power on the part of the president. He is in effect saying I am going to interpret my power more broadly than you guys interpret it: make my day—here's what I'm going to do. Our system doesn't necessarily provide any ultimate judge. I mean if, for example, Congress were to insist that the president appoint only women to the next three openings to the Supreme Court, to take an implausible example, and if the president says well that's an invasion of my power, I'm going to appoint whomever I choose, the only role Congress has is through the Senate to decide either to confirm or not confirm. But there is no lawsuit, no federal case that can be made out of the president's decision in a case like that not to pay attention to an impermissible constraint on his power.

MARGOT ADLER: Has there been a time in our history when a signing statement actually had an important effect in changing what happened as far as the law, or as far as our country?

LAURENCE TRIBE: It's never been the case that anyone has taken a signing statement as anything more than a flourish on the part of the chief executive, rhetoric. It's a symbolic, rhetorical announcement of the view the president intends to take. Of course, signing statements of a very conventional kind, interpreting ambiguous laws, have been useful in alerting people to what the president would instruct the executive bureaucracy to do with respect to ambiguities. And that has happened quite often, but it's not the statement that has any legal effect. It's the ultimate interpretation of a particular ambiguous statute that is followed by agencies of the executive branch. And those interpretations, when they are reasonably within the ambit of what Congress has said, are often deferred to by the courts. But it's not the signing statement that is the subject of deference; it's the executive interpretation that an agency will make of an ambiguous law.

MARGOT ADLER: And in your view, where are we now, as far as the powers of the three branches of government?

LAURENCE TRIBE: Well, I think the judicial branch is teetering dangerously on the cusp of providing less of an independent check than is healthy for the system. Dramatically, the court has on several occasions reminded the president that a war is not a blank check: it is not a way of disregarding the Constitution altogether, although it sometimes changes the balance. But in decisions that the court has rendered, dealing sometimes with American citizens and sometimes with foreigners, it has been divided. It has been divided sometimes so closely that one or two more appointments of justices who would defer almost limitlessly to the executive when the executive says we are at war would eliminate the effective judicial check that we still hang on to by a thread. I think that now that Congress has changed hands and has been perhaps reminded of the importance that people attach to having an active and independent legislative branch, it is likely that the president will be checked by the legislature to an extent that is greater than what we had grown accustomed to with a fairly spineless and supine Congress. And as long as either the legislative or the judicial branch remains active in containing the power of an overweening executive, we are still in a zone of checks and balances where our liberties are if not secure at least not as endangered as they might be if Congress again falls asleep at the switch, and if the people of the United States let the courts abandon their historic role of checking the abuse of power.

MARGOT ADLER: Laurence Tribe is a professor of constitutional law at Harvard Law School. Thank you so much for coming on Justice Talking.

LAURENCE TRIBE: My pleasure.

MARGOT ADLER: Let us know what you have to say about presidential signing statements.

Give us your thoughts on our website, justicetalking.org, and sign up for our email newsletter there. Check out our podcasts of previous shows and thanks for joining me. I hope you'll tune in next week. I'm Margot Adler.
