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Signing Away the Constitution?

By William Fisher

06/30/06 -- NEW YORK, (IPS) - Last March, the U.S. Congress passed legislation requiring Justice Department officials to give them reports by certain dates on how the Federal Bureau of Investigation (FBI) is using the USA Patriot Act to search homes and secretly seize papers.

But when President George W. Bush signed the measure into law, he added a "signing statement". The statement said the president can order Justice Department officials to withhold any information from Congress if he decides it could impair national security or executive branch operations.

Late last year, Congress approved legislation declaring that U.S. interrogators cannot torture prisoners or otherwise subject them to cruel, inhuman, and degrading treatment.

But President Bush's signing statement said the president, as commander in chief, can waive the torture ban if he decides that harsh interrogation techniques will assist in preventing terrorist attacks.

These are but two examples of more than 100 signing statements containing over 500 constitutional challenges President Bush has added to new laws passed by the Congress -- many times more than any of his predecessors.

While he has never vetoed a law, many constitutional scholars say the president is, in effect, exercising a "line item veto" by giving himself authority to waive parts of laws he doesn't like.

The practice has infuriated members of Congress in both parties because it threatens to diminish their power. They consider it an assault on the notion that the constitution establishes the United States' three branches of government -- legislative, judicial, and executive -- as co-equal.

Further fuelling Congressional anger is Bush's defence of his National Security Agency (NSA) "domestic eavesdropping" programme, in which the president claimed he could ignore a 1978 law prohibiting wiretaps of U.S. citizens without "probable cause" and a warrant issued by a court.

The NSA programme was revealed by the New York Times last December. Since then, newspapers have disclosed other secret programmes, including amassing millions of domestic phone call records and examining perhaps thousands of financial transactions in an effort to track and interrupt possible terrorist activity.

A member of Bush's own party, Senator Arlen Specter of Pennsylvania, chairman of the Senate Judiciary Committee, opened hearings on the subject this week. He said, "The real issue here is whether the president can cherry-pick what he likes."

And the senior Democrat on the committee, Senator Patrick Leahy of Vermont, said, "The president hasn't vetoed any bills, but basically he has done a personal veto. He has said which laws he will not follow and... put himself above the law, even the same law he has signed."

The hearing is part of a continuing effort by many in Congress to reclaim authority that they say the president has usurped as he has expanded the power of the executive branch.

Bush claims that the constitution gives the executive branch of government "inherent power" to do "whatever it takes" to protect the people of the United States.

Testifying at the Judiciary Committee hearing on behalf of the Bush administration, Michelle Boardman, deputy assistant attorney general in the Office of Legal Counsel at the U.S. Department of Justice, said that signing statements serve a "legitimate and important function" and are not an abuse of power.

"Congress should not fear signing statements, but welcome the openness they provide," she said. "The president must execute the law faithfully, but the constitution is the highest law of the land. If the constitution and the law conflict, the president must choose," she said.

But many constitutional scholars disagree.

Among them is Barbara Olshansky, director of the Global Justice Initiative at the Centre for Constitutional Rights, a prominent advocacy group. She told IPS, "I think it is hard evidence of (Bush's) continued aggressive arrogation of power. It is a blatant attempt to expand power by pulling the rug out from under Congress each time it passes a bill that he dislikes."

She added, "Many of the laws that Bush has decided to bypass or overwrite by this method involve the military, where he once again invokes the idea that as commander-in-chief he can ignore any law that seeks to regulate the military."

Another opposition view came from Prof. Edward Herman of the University of Pennsylvania, who told IPS, "The brazenness of Bush's use of this practice is remarkable. But even more remarkable is the fact that this de facto further nullification of congressional authority fails to elicit sustained criticism and outrage. It is part of a step-by-step abrogation of constitutional government, and it is swallowed by the flag-wavers and normalised."

"We are in deep trouble," he added.

Signing statements are not new -- their use started with the fifth U.S. President, James Monroe (1817-1825), and from that time they were used sparingly and mostly for rhetorical purposes. Until Ronald Reagan became President in 1980, only 75 statements had been issued. Reagan and his successors, George H. W. Bush and Bill Clinton, made 247 signing statements between them.

But President Bush has taken the practice to a new level, attracting criticism both for the number of statements he has issued as well as for his apparent attempts to nullify any legal restrictions on his actions

Democratic members of both the House of Representatives and the Senate are viewing President Bush's signing statements as a dangerous over-reach of presidential power -- and a campaign issue for the congressional elections in November.

Last week House Democrats introduced a resolution requiring the president to notify Congress if the president "makes a determination to ignore a duly enacted provision of law".

And Senator Edward M. Kennedy, known as the "lion" of the Senate, declared this week, "For far too long, Congress has stood by and watched while President Bush has slowly expanded the unilateral powers of the presidency at the expense of the rest of the government and the people."

The U.S. legal community is also concerned. Earlier this month, the American Bar Association's board of directors formed a Task Force on Presidential Signing Statements and the Separation of Powers Doctrine to review the use of signing statements and whether or not this use is consistent with the U.S. Constitution.

Bush's signing statements have covered a wide variety of subjects, ranging from the ability of military lawyers to give independent legal advice to their commanders to timely transmission of government-funded scientific information to Congress to

rules for firing a government employee whistle-blower who tells Congress about possible wrongdoing.

But until President Bush's signing statement on the anti-torture legislation, the subject went virtually unreported by the U.S. press. According to Phillip Cooper, a Portland State University public administration professor who is an authority on signing statements, "I think one of the important things here is for reporters to apply their journalistic instincts to this story."

Cooper concludes that the Bush White House "has very effectively expanded the scope and character of the signing statement not only to address specific provisions of legislation that the White House wishes to nullify, but also in an effort to significantly reposition and strengthen the powers of the presidency relative to the Congress." (END/2006)

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