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THE USE OF PRESIDENTIAL SIGNING STATEMENTS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JUNE 27, 2006

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THE USE OF PRESIDENTIAL SIGNING STATEMENTS

TUESDAY, JUNE 27, 2006

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:02 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Cornyn, Leahy, Kennedy, Feinstein, Feingold, and Durbin.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Judiciary Committee will now proceed with our hearing on presidential signing statements.

The issue has come into sharp focus as a result of the extensive use by President Bush of signing statements. There have been many signing statements issued by Presidents in the past, and there are good purposes which are not subject to challenge; for example, if the signing statement is one which contains instructions to the executive branch as to how to carry out the legislation. But there is a sense that the President has taken the signing statements far beyond the customary purview as, for example, with the heated controversy on the issue of interrogation of prisoners and the alleged use of torture.

When the Senate passed 89–9 a prohibition on that kind of interrogation practice, and after very extensive negotiations with the White House on the so-called McCain amendment, the President issued a signing statement which appeared to undercut what had been negotiated.

In the PATRIOT Act, which was a measure which came out of this Committee, very extensively negotiated, unanimous on the Committee and the Senate bill, and without any dissent on the floor, went through on the unanimous consent calendar—rather unusual. We did have some points of controversy when it got to the conference with the House of Representatives. And the administration had every opportunity to weigh on in the provisions of the bill, but when the President signed it, he put a notation in that he could withhold information. We had put into the bill oversight provisions intended to make sure that law enforcement did not abuse the special terrorism-related powers to search homes and secretly seize paper. It also required the Department of Justice to keep a

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closer track of how often the FBI used the new powers and in what types of situations.

The President then in his signing statement added an addendum that that disclosure would not be made if, in his judgment, it would "impair foreign relations, national security, the deliberative process of the Executive, or the performance of the Executive's constitutional duties."

Now, if the President had intended to put that limitation into law, that is something I believe should have been submitted to the Congress. We should have weighed it. We should have evaluated it, and, if we under the exercise of our legislative powers granted in the Constitution, thought it appropriate, we would have put it in. But there is a real issue here as to whether the President may, in effect, cherrypick the provisions he likes and exclude the ones he does not like and add addenda as to what he may prefer.

There is no doubt that the President's constitutional power under Article II cannot be limited by statute. But as a matter of comity and negotiation, these are things which we would all be better served if they were brought to the attention of the legislative branch before the legislation is finished. Then, as we all know, the President has the option under the Constitution to veto or not. And the Framers, in leaving with the Congress the authority to legislate, provided for an override of the veto, again, as we all know.

And in the decision of the Supreme Court of the United States in the *Chadha* case, the Court said, "It emerges clearly that the prescription for legislative action in Article I, Section 1, Clause 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure." And that language of the Court I think bears very heavily on the issue of presidential signing statements and where they may appropriately go.

Let me yield now to the distinguished Ranking Member of this Committee, Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. I am sorry that the administration—and this is nothing against you, Ms. Boardman, but I am sorry they did not want to send up anybody who would have authority to speak on this. But, considering the fact that they are using basically an extraconstitutional and extrajudicial step to enhance the power of the President, it is not unusual.

I commend the Chairman for holding this hearing, even though we will not get the answers that we need. The President has made unprecedented claims for unchecked Executive power. I have never seen anything quite like this. Historically, these signing statements have been basically press releases sent out by Presidents to commend themselves or others, which is fine, on enactment of laws. But this administration has so expanded it that I believe it is a practice which poses a grave threat to our constitutional system of checks and balances.

The President has not vetoed any bills, but basically he has done a personal veto. He has used his bill signing statements to sign his own interpretation of laws, and he has also said which laws he will

not follow, and basically said certain laws do not apply to the President. He has put himself above the law, even the same laws he signs. According to a review of these statements conducted by the Boston Globe, President Bush has employed signing statements to ignore or disobey more than 750 laws enacted by a Republican Congress. I mean, this is a rubber-stamp Congress to begin with, and he is still saying that he will not even follow the laws that he signs. That 750, incidentally, is far more than all the signing statements signed by every single President from George Washington to Bill Clinton put together.

When the President signed the Sarbanes-Oxley law, combating corporate fraud, he used a signing statement to attempt to narrow a provision protecting corporate whistle-blowers in a way that would have afforded them little protection. Senator Grassley and I wrote a letter to the President stating that the President's narrow interpretation, which we now understand was signed off on by Vice President Cheney's office first, did not reflect the law. And after a great deal of public exposure and pressure, they relented and agreed with Senator Grassley and myself.

We had months of debate and negotiations in Congress on the USA PATRIOT Act reauthorization language. I commend the Chairman for working with those who had differing views. Former Congressman Dick Armey of Texas and I had put in amendments that required sunset provisions so we would have to look at it again. And we negotiated and negotiated. Again, I commend the Chairman on this, but when we finally got down to the end—after negotiating a number of things, I voted against it because I did not believe, even with those things that the administration agreed to, that they had followed the law. And, of course, when the President signed it, he stated his intention not to follow the reporting and oversight provisions contained in that bill. He also used signing statements to challenge laws banning torture, affirmative action, or those laws that prohibited censorship of scientific data. He had great press conferences and a lot of press, for example, on the McCain torture bill, with the President saying how we had negotiated all this, and the Vice President negotiated all this, and then the President signs it, to great fanfare, but quietly says, "Of course, it will not apply to people I do not want it to apply to."

Basically, the President signs laws enacted by the people's Representatives in Congress, while he is crossing his fingers behind his back. And when he proudly says he has never had to make a veto, heck, why? He just signs laws and says he is not going to follow them.

It is hard to see a situation where somebody so blatantly says that they are above the law. I was always brought up to believe that in this society no one is above the law. We are not and the President is not either. But we are not going to hear from the Attorney General or the Deputy Attorney General, somebody we confirmed in a bipartisan way. We are not going to hear from a spokesman for the White House, although they are all too willing to spin to the press or friendly audiences. We will not hear from the Acting Assistant Attorney General for the Office of Legal Policy, who we were initially told would be attending.

Ms. Boardman, I wish you well, but, you know, it is almost irrelevant what you say because, once again, this administration said, even with a rubber-stamp Republican Congress, they do not care what we think because they are going to decide what laws to follow and what laws to disobey. And they have been doing that a great deal because nobody up here will call them on it.

Thank you, Mr. Chairman. I will put my full statement in the record.

Chairman SPECTER. Thank you, Senator Leahy. Without objection, your full statement will be made a part of the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. I do not want to dispute too much your statement about the rubber-stamp Congress since you did not call it a rubber-stamp Judiciary Committee.

Senator LEAHY. I did not.

Chairman SPECTER. Senator Cornyn, would you care to make an opening statement?

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Just briefly. Thank you, Mr. Chairman, for the opportunity. I think this is a fascinating topic, I guess something mainly law students and lawyers can love. I do not know why the issue of Presidents' issuing signing statements is controversial at all since the practice dates back to 1821 and James Monroe and was something done by President Clinton and defended by Walter Dellinger when he was President Clinton's Assistant Attorney General for the Office of Legal Counsel.

As a practical matter, I do not really know what impact it has other than the fact that, of course, when there is a possibility of someone acquiring standing and actually filing a lawsuit, ultimately it is not the executive branch that determines what the law means. It is not even the legislative branch, which writes it. It is the judicial branch that makes the decision, and, of course, that is by interpreting what Congress' intent is, legislative intent, not Executive intent.

But I do think it is helpful for the Executive to identify areas of concern in the course of signing statements. Actually, it promotes public discourse and discussion about what the roles of the legislative branch are and the roles of the executive branch are insofar as all of us, all three branches, take an oath to uphold and defend the Constitution and laws of the United States. But recognizing that there are a whole variety of decisions made by Congress and by the executive branch in signing legislation that never make their way to court and there is really no likelihood that any court will ever actually resolve the disputes between the Executive and the legislative branches over what a statute or a bill may mean, I find the use of the presidential signing statements is helpful for us to understand the rationale of the executive branch in signing the legislation rather than vetoing it, and promoting the kind of discussion that we are going to have here today about the relative powers of executive, legislative, and judicial branches when it comes to each of their oaths to uphold and defend the Constitution.

Thank you very much.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Senator Durbin, would you care to make an opening statement?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Just very briefly, Mr. Chairman. I thank you for calling this hearing, and I think it is a critical constitutional issue which we are considering. This President has yet to veto a bill, but he seems to be a prolific author of signing statements. It suggests, I would say to my friend and colleague from Texas, that this administration believes that they can sign whatever they want, as long as they put a disclaimer, and the disclaimer basically says, "We are not going to follow certain portions of this law." And that to me is troublesome. I am afraid it is part of a much larger pattern which we have seen in the last several years, at least since 9/11, where this Congress continues to cede its authority and power to the executive branch. Every Executive that I have witnessed has always wanted more power and authority. They have resisted following even constitutional requirements for declaration of war, if they could.

In this circumstance, this administration continues to reach into the province and authority of our legislative branch of Government with impunity. The President's own party is complicit in ceding this power to the executive branch. I think it is a serious constitutional mistake of historic consequence, and I hope that the day will come, and soon, when we assert our responsibility, not just for personal pride—that has nothing to do with it—but, rather, because I do believe checks and balances is still a very viable concept and principle.

Witness what is going on now with this whole warrantless wiretap. We are now waiting for Vice President Cheney to rule on the constitutionality of the Bush-Cheney administration's policies. I think I know how he is going to rule. I think he is going to find that they are very constitutional, thank you, and that Congress should keep its nose out of it.

In the past, Congresses dominated even by the President's political party would pay little or no attention to that sort of subterfuge, but, sadly, today that passes for a meaningful dialogue between the executive and legislative branches. I do not buy it, and I think history is going to judge us very poorly for standing by as so many precious rights and responsibilities under our Constitution are ceded away.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Durbin.

We now turn to Ms. Michelle Boardman, Deputy Assistant Attorney General in the Office of Legal Counsel of the Department of Justice. Before joining the Department, Ms. Boardman was an assistant professor at George Mason Law School. She joined George Mason in 2002 after practicing appellate law for several years with Wiley, Rein & Fielding. She clerked for Judge Frank Easterbrook of the Seventh Circuit, has a bachelor's degree from Brown, and a law degree from the University of Chicago.

Thank you for joining us today, Ms. Boardman, and the floor is yours for 5 minutes.

STATEMENT OF MICHELLE E. BOARDMAN, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. BOARDMAN. Thank you very much, Mr. Chairman. I hope that today I can persuade Senator Leahy, among others, that I actually have something of value to offer to you, and not just because the words "Attorney General" appear in my title. I may not be the—

Chairman SPECTER. As Senator Thurmond used to say, would you pull "the machine" a little closer?

[Laughter.]

Ms. BOARDMAN. Sure, the machine. Does that work, Mr. Chairman?

Chairman SPECTER. That works—not for Senator Thurmond, but it does for us.

[Laughter.]

Ms. BOARDMAN. Mr. Chairman, Senator Leahy, and members of the Committee, I appreciate the opportunity to appear here today to talk about the purpose and history of presidential signing statements. I will use my brief initial time to make two points: first, signing statements serve a legitimate and important function and are not an abuse of power; second, the Congress need not fear signing statements but should instead welcome the openness that they provide.

It is important to establish at the outset what presidential signing statements are not. They are not an attempt to cherrypick parts of the law that the President can choose to follow or an attempt to redefine an established law. Many constitutional signing statements are an attempt to preserve the Executive's role in the separation of powers, but this preservation does not mean that the President will not enforce the provision as enacted. And this is a point that is often lost in the public discourse.

The President takes an oath to preserve, protect, and defend the Constitution of the United States. The President also has the responsibility and duty to see that the laws of the United States are faithfully executed. Are these duties in tension? No.

The President must execute the law faithfully, but the Constitution is the highest law. It is the supreme law of the land. If the Constitution and the statutory law conflict, the President's duty requires him to choose the statutory law as construed under the Constitution. It may interest you to know that every President since President Eisenhower has issued signing statements in which he said that he would not execute an unconstitutional provision.

Signing statements are only one method where a President can fulfill this duty. For example, the presidential responsibility may arise sharply if a President is charged with executing a law passed by a previous Congress, signed by a prior President, that the President considers to be unconstitutional under intervening case law. A President that places statutory law over the Constitution in this context does not fulfill his duty of executing the law faithfully, and the principle is equally sound if the Supreme Court has not yet

ruled but the President finds the statutory law violates the Constitution.

Most will agree with this principle, but everyone will disagree with its application some of the time because there are legitimate and difficult questions about constitutional interpretation. But whether a particular constitutional objection should be made is a different question from whether constitutional signing statements are an appropriate exercise of every President's power.

The consistent history of signing statements reveals that this President's statements are in keeping with those of past Presidents. And while the use of signing statements has increased in the past several decades, starting with President Reagan, this President's signing statements are not substantially greater in number than those of prior Presidents. I look forward to discussing those numbers with members of the Committee.

To quote Walter Dellinger, the Assistant Attorney General for the Office of Legal Counsel in the Clinton administration, signing statements have frequently expressed the President's intention to construe or administer a statute in a particular manner, often to save the statute from unconstitutionality. Some have argued that this President has increased the use of signing statements, but even if there is a modest increase, allow me to suggest that it must be viewed in light of current events and the legislative response to those events.

While the President has issued numerous signing statements involving issues such as the foreign affairs power and his power as Commander-in-Chief, the significance of legislation affecting national security has increased markedly since September 11th. Congress has been more active; the President has been more active. The kind of tension in this area of concurrent powers is precisely how the Founders envisioned the system of separation of powers as working when we have this kind of dispute.

Now to my second point, the desirability of signing statements. To appreciate the value of signing statements, you must, of course, consider the alternatives. As I understand the argument, some would rather the President either veto the legislation—and I hope we can talk about that—or remain silent while signing the legislation. But it has never been the case that the President's only option when confronting a constitutionally difficult bill is to veto it. The Supreme Court, among others, has noticed that it is not uncommon for Presidents to approve legislation containing parts which are objectionable on certain grounds.

Allow me to suggest that, in closing, respect for the legislative branch is not shown through veto. Respect for the legislative branch, when we have a well-crafted bill, the majority of which is constitutional, is shown when the President chooses to construe a particular section in keeping with the Constitution as opposed to defeating an entire bill that would serve the Nation. In short, presidential signing statements are an established part of the President's responsibility to take care that the laws be faithfully executed. Members of Congress and Presidents will occasionally disagree on constitutional questions, but this disagreement does not relieve the President of his responsibility to defend the Constitu-

tion. It instead supports an open and public statement of the President's views.

Chairman SPECTER. Thank you very much, Ms. Boardman.

Ms. Boardman, you do agree, do you not, that the President does not have a blank check?

Ms. BOARDMAN. A blank check, no. No, Mr. Chairman.

Chairman SPECTER. You agree.

Ms. BOARDMAN. Yes.

Chairman SPECTER. In the decision to issue a signing statement, wouldn't the President be better advised if he vetoed a bill, sent it back to the Congress, and said, "I am not going to sign it unless you take this provision out"? When we had all the negotiations with the McCain amendment, when he inserted the language in the signing statements on the PATRIOT Act, which I read in my opening statement, that he would disregard the limitations of the legislation if he concluded it would "impair foreign relations, national security," et cetera, wouldn't the President be better off on the constitutional comity if he followed the Constitution, vetoed it, and then challenged the Congress to pass it in accordance with what he would accept?

Ms. BOARDMAN. Well, Mr. Chairman, you ask two very interesting questions, and I will start with the veto question, and perhaps we can get into the way in which the President's signing statement on the McCain amendment is in keeping with other signing statements of past Presidents.

Chairman SPECTER. No, do not do that. You had an opening statement for that. I want you to answer my question.

Ms. BOARDMAN. Yes. No, no. First I would like to talk about the veto question. There are three reasons, I believe, why it is better for the President to not veto in that circumstance, or at least, not obviously, preferable for him to veto. The first is he is not required to do so. Some have suggested—and I know you have not—that a President who finds a portion of a law unconstitutional must veto the law—

Chairman SPECTER. You say he is not required to do so. Of course he is not if he signed the bill. But if he disagrees with the bill, isn't the constitutional provision to veto?

Ms. BOARDMAN. Well, the second reason why I think he should not veto in that circumstance is especially in modern legislation we have large omnibus bills, hundreds of pages long, involving, as you say, difficult compromise and negotiation, a lot of work on behalf of Congress, and it is often—

Chairman SPECTER. Deal with the McCain amendment and the PATRIOT Act. Don't give me an omnibus bill. Why didn't he veto those bills and lay the challenge down for Congress either to comply with what he wanted or he would veto?

Ms. BOARDMAN. Mr. Chairman, can I answer the veto question? And then we can talk about the other two bills. I would like to set up a framework here because I think—we can talk about those bills. The vast majority of the time when a President does not veto, it is because there is a minor provision in a large bill. There are some bills where that is not the case, and obviously you feel strongly about those bills.

The one point I would like to make before discussing those bills in the context of the history of signing statements is this: The veto does not actually avoid the problem. If the President vetoes a bill and then the Congress overrides that veto, the President still has the constitutional obligation to uphold and defend the Constitution and to execute the law faithfully. So if a veto is overridden, including a veto that a President expressly makes because he believes something is unconstitutional, it does not give the President free rein to then ignore the dictates of the Constitution. He is still required to construe the provision in keeping with the Constitution. So, to some extent, I really think a veto only delays the question.

Now, if you would like, I can talk about the similarities of the McCain situation to other legislative signing statements.

Chairman SPECTER. Well, you are going to have less than a minute because I have another question for you. It is a little difficult if you choose what you are going to say in response to questions. That is what you have an opening statement for. We did not interrupt you. But supply those answers in writing. That is what I would like you to do since you chose to talk about framework rather than to respond to the questions.

Let me go to another question which I consider to be very important. When we had the PATRIOT Act, we had a lot of negotiations. Then it went over to the House of Representatives, and we had a lot of negotiations there. If the President wanted to have an exception, if he decided that it would "impair foreign relations, national security, or the deliberative process of the Executive," wouldn't it have been preferable as a matter of comity for the administration to have come to the Judiciary Committee and said, "This is something we would like to have in the bill, would you consider putting that in the bill?" instead of working with us on all the provisions that he liked, which we put in, and then in the signing statement eliminate that? Would it, as a matter of comity and recognition of co-equal branches of government, be preferable to take it up with Congress before unilaterally putting those provisions in?

Ms. BOARDMAN. Well, Mr. Chairman, that signing statement is in keeping with a long line of signing statements that address the question of furnishing information to entities outside of the executive branch in a manner consistent with the President's foreign relations power. And the President has a duty to generally protect classified information, but the President, like the courts, also assumes that, in lieu of anything to the contrary, Congress intends to pass a constitutional law.

So it is often the case—and this is true for many Presidents, including Presidents Clinton, Carter, and Reagan, that when Congress passes a bill that touches on those issues, requesting types of information, the President says in his signing statement, "I accept this to be in keeping and not in contravention of my general power and duty to control sensitive foreign relations and national security information."

I think those statements really say not "I believe the bill means to impinge on these powers and I will not let it," but, "I take this bill to mean that we all understand I have some duties to protect sensitive information and that I will not violate those duties in keeping with the bill."

Chairman SPECTER. Well, my red light is on, so I will not ask you another, nor will I press you to answer the last question. But I will ask you to submit in writing an answer to my question, and that question was: Wouldn't it be better, as a matter of comity, for the President to have come to the Congress and said, "I would like to have this in the bill. I would like to have these exceptions in the bill" so that we could have considered that? Submit that for me in writing, if you will, please.

In order of arrival on the Democratic side, the early-bird rule, Senator Durbin is next.

Senator DURBIN. Thank you, Mr. Chairman.

Ms. Boardman, you have used many words carefully, and that is what lawyers should do. But you have carefully avoided two words: "unitary executive." Are you familiar with that theory?

Ms. BOARDMAN. I am familiar with those words.

Senator DURBIN. I guess you should be if you are part of this administration. The Reagan administration mentioned the unitary executive publicly once; the first Bush administration, six times; the Clinton administration never cited it. Your current administration has cited the unitary executive theory an astounding 110 times in Executive orders, signing statements, and elsewhere. And for those who are following this and puzzled by what this could possibly mean, I think you understand. It is a largely Federalist Society inspired theory which suggests that the President has exceptional powers.

Time and again, President Bush has cited the so-called unitary executive theory in claiming the right to ignore laws passed by Congress. I will give you one illustration from the Wall Street Journal, and I quote: "Bush administration lawyers contended that the unitary nature of presidential power over national security meant Mr. Bush could not be constrained either by treaties or laws passed by Congress that govern treatment of enemy prisoners. The Justice Department has not backed away from its theory on presidential power, which also underlies domestic surveillance programs and the detention of U.S. citizens as enemy combatants."

I know why you carefully avoided using these two words, because they go to the heart of the issue here. Twice the Supreme Court on issues raised in the case *Morrison* v. *Olson* and in the *Hamdi* case rejected the unitary executive theory, but, clearly, it is the inspiration of this executive branch to ignore the prerogative of the legislative branch.

So the nonpartisan Congressional Research Service has said that the Supreme Court has "clearly dispelled the so-called theory of the unitary executive." Do you disagree?

Ms. BOARDMAN. With everything you have said, Senator, or with parts of it? I do disagree with part of what you have just said, and I do disagree with the law statement. I think, unfortunately, we still do not have necessarily a joint understanding of what unitary executive means. And one reason I think that earlier Presidencies did not use the phrase "unitary executive" is that it just was not really coined until rather recently. That does not mean the concept was not out there.

President Clinton, for example, would refer in his signing statements, and I will quote, to his "power to supervise and guide my

subordinates, including the review of the proposed communications to the Congress." This is often under what people call the unitary executive theory, a source of concern—the ability of the President to control the delegates within the executive branch and control their communications with Congress.

President Clinton also said in another signing statement that he would pay attention to "concerns of depriving the President and his department and agency heads of the ability to supervise and control the operations and communications of the executive branch."

That is really what I think about when I think about the unitary executive.

Senator DURBIN. But don't you also agree that since 9/11 that has changed dramatically when it comes to issues of national security and that this administration has used signing statements and this Federalist Society theory of the unitary executive to suggest that, regardless of what Congress passes in law, the President as Commander-in-Chief, with the authority and responsibility to protect America, will do what he wants to do?

Ms. BOARDMAN. Respectfully, Senator, I have to disagree. The unitary executive theory really tells you about the structure of power within the executive branch. It does not have that much to say about the separation of powers and the struggle for power between the two branches.

You are right that after 9/11 this issue has come to the fore, and in large part that is because Congress has some more powers and the President has some more powers, we have concurrent powers. And when you have two separate branches in a difficult time with a lot of high opinions, you end up with that kind of a struggle. But I do not believe that this administration's use of unitary executive differs from other administrations.

Senator DURBIN. I want to use one example as my time closes here. The McCain torture amendment that passed 90–9, when Vice President Cheney said that the employees of the intelligence agencies would not be bound by it got into quite a flap over a period of time, and then when the President signed it, here is what he said in the signing statement: He would construe the McCain torture amendment "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch as Commander-in-Chief."

So do you believe the President feels, based on that signing statement, that he can set aside and ignore the torture, the McCain torture amendment?

Ms. BOARDMAN. No, Senator. I think we should look at the President's public statements where he has said, "No American will be allowed to torture another human being anywhere in the world, and I sign the appropriations bill, the McCain amendment, because that is the way it is."

Senator DURBIN. So why the disclaimer?

Ms. BOARDMAN. Signing statements like that often serve the function of setting aside an issue that could in some unknown future application cause a potential unconstitutional difficulty. I do not propose to speak for this President as to what was in his head when he signed it, but it is of a piece with many other presidential signing statements that say—not I will not follow the law, but

there is a difficult constitutional issue here, I sign the bill because I anticipate being able to apply the law without constitutional difficulty, but we should all be aware to be up front and honest that there may be circumstances where a constitutional difficulty could arise.

Senator DURBIN. It is interesting to me, in the operative legal language of the signing statement, he has created a disclaimer, an exception, and then goes to the microphones and makes a public statement, "Don't worry, be happy." I just do not think that that is consistent.

Thank you very much.

Chairman SPECTER. Thank you very much, Senator Durbin.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Ms. Boardman, do you agree with me that every person in this country is bound by the decision of a court of law in a case that decides the pertinent legal issue at hand?

Ms. BOARDMAN. Yes, in general, we are all bound—

Senator CORNYN. In other words, the President of the United States is bound by a court judgment, just like you are, just like I am, just like every other person in the country, correct?

Ms. BOARDMAN. Yes, and as a matter of course, Presidents choose to follow Supreme Court precedent. It is very unusual for a President to attempt not to.

Senator CORNYN. My point is choose to do so or not, if a court ultimately decides a case or an issue, that binds everybody who is a party to that decision, correct?

Ms. BOARDMAN. In general, yes.

Senator CORNYN. But there is a whole body of legal decisions that Congress makes, that the President makes, in the course of executing their duties that never end up in a court of law, correct?

Ms. BOARDMAN. That is true.

Senator CORNYN. And that is where, if I understand you correctly, these presidential signing statements, perhaps even legislative history by Congress, help inform the public debate as to precisely what it is the Executive intended and exactly what the legislature has intended. In those cases, it never will go to court and will never be decided in a court of law. Do you agree with that?

Ms. BOARDMAN. I do agree with that, Senator. You raise an interesting point, which is that signing statements do not point out every potential constitutional error in a bill. Signing statements, for the most part, point out those constitutional difficulties that it is the job of the Executive to enforce. The President, all Presidents are focusing on retaining the appropriate scope of the executive power and the separation of the branches and can only in that regard focus on those laws that he has the power to execute.

Senator CORNYN. And I happened to go back and look at some of the signing statements that President Clinton has signed, and I found a number of them, one that I want to bring to your attention, the statement on signing the Balanced Budget Act of 1997. Senator Durbin asked about a quotation from a signing statement by President Bush in signing the so-called ban against torture, which Senator McCain introduced in the Senate. And I want to ask you whether the words in that signing statement sound awfully

similar to these contained in a signing statement by President Clinton on signing the Balance Budget Act of 1997.

He said, "I will construe this provision in light of my constitutional authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and to supervise and guide my subordinates, including the review of their proposed communications to the Congress."

Does that sound awfully similar to the one that Senator Durbin referenced?

Ms. BOARDMAN. It does, Senator. That is a reference both to the Recommendations Clause and to what today we might call the unitary executive. But at the time, President Clinton was more inclined to explain in a longer phrase.

Senator CORNYN. And I am not really exactly sure what the bogeyman of the theory of the unitary executive—what the implications of that mean, but what I understand President Clinton to have said here is roughly equivalent to what has now been coined as the unitary executive concept. Is that right?

Ms. BOARDMAN. I would agree with that, Senator.

Senator CORNYN. And I think you have indicated that, dating back to the early part of this country, Presidents have used signing statements. Have almost all or maybe all administrations used signing statements much as the President did similar to the McCain amendment statement and the PATRIOT Act statement that have already been referred to?

Ms. BOARDMAN. Every President since Eisenhower has used constitutional signing statements. The other Presidents that have used them in the ballpark number that this President has start with President Reagan. President Carter issued, we believe, approximately 30 for one term. The numbers differ for President Reagan depending on how you count. You can go from 80 to 105. For President Clinton, it is also around 80. There is one study that says 105. I think that is probably a little high.

We believe this President to date has issued 110. The President who has issued the most number of signing statements was George H.W. Bush, who in one term issued approximately 147.

Senator CORNYN. But you would agree with me, if there was something wrong with a presidential signing statement, just issuing one would be bad, if there was something wrong with it.

Ms. BOARDMAN. One bad act is a bad act, Senator.

Senator CORNYN. So if there is nothing wrong with it from the standpoint of executing the President's duties, how many a President chooses to issue doesn't strike me as a significant consideration. Do you disagree?

Ms. BOARDMAN. No, and I think you can envision a circumstance where Congress might feel, as Senator Specter does, that perhaps there is a lack of good communication between the parties, if the President is signing a thousand signing statements that touch on constitutional issues, or perhaps that could be a sign that Congress is rampantly passing unconstitutional laws. You know, that could reflect on either branch.

But because all of these numbers are basically in the ballpark, I think we do not have to worry about that.

Senator CORNYN. Thank you very much.

Chairman SPECTER. Thank you, Senator Cornyn.

Under the early-bird rule, Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman.

Ms. Boardman, on page 5 of your testimony, you talk in the top paragraph, "This presidential responsibility may arise most sharply when the President is charged with executing a statute, passed by a previous Congress and signed by a prior President, a provision of which he finds unconstitutional under intervening Supreme Court precedent." So far, so good.

Then, "A President that places the statutory law over the constitutional law in this instance would fail in his duty faithfully to execute the laws." Okay.

Now, "The principle is equally sound where the Supreme Court has yet to rule on an issue, but the President has determined that a statutory law violates the Constitution." This goes beyond signing statements. You believe the principle is equally sound, the Supreme Court has not ruled, but the President has determined that a statutory law violates—this is the President that has determined, the Supreme Court has not ruled, the President has determined that a statutory law violates the Constitution.

Now, can you give us a list of the laws already on the books before the beginning of this Presidency that President Bush has decided not to enforce?

Ms. BOARDMAN. I cannot give you that list, Senator.

Senator KENNEDY. Pardon?

Ms. BOARDMAN. I cannot give you that list.

Senator KENNEDY. Well, who can?

Ms. BOARDMAN. Well, I suppose we could ask the President, but, Senator—

Senator KENNEDY. Well, is there any way for the Congress or the public to know when the President decides to enforce a law? How are we going to know whether the President has made a judgment down there in the White House he is not going to enforce it? How is the American public and how is the Congress going to know? And shouldn't we be entitled to know which laws on the books now he is not going to enforce because he believes that they are unconstitutional, and yet he is not going to tell us, he is not going to tell the American people which laws he is not going to enforce?

Ms. BOARDMAN. I believe he will tell the American people, but, Senator, this is not out of keeping with what all prior Presidents—

Senator KENNEDY. I am not asking. I am just saying this is your testimony. This is your testimony here. I am asking you if that is—you are giving the testimony. You are speaking on this. We want to know what laws. I want to know what laws the President feels today—what are they?

Ms. BOARDMAN. This is not a discussion that I have had with the President, but if I could say, please, Senator, you are touching on the value, to my mind, of signing statements, which is it is a public and open—

Senator KENNEDY. No, no. I am not talking—let's leave signing statements alone on this. We are talking here—

Ms. BOARDMAN. Executive orders often serve the function in the case that you are discussing. Executive orders, which are open and public documents giving orders to the executive branch about the

way in which those members should construe the law, are other examples of public statements where the President explains that he may choose to construe a law in a particular way.

Senator KENNEDY. I have to come back. That is not what I am referring to on page 5. It is very clear that what you are saying here is that the President has a signing statement, we have gone over—others have questioned that. He does not have to enforce a law if the Supreme Court says it is unconstitutional. So far, so good.

But you go further than that. "The principle is equally sound where the Supreme Court has yet to rule on an issue, but the President has determined that a statutory law violates the Constitution." He does not have to enforce that either.

Ms. BOARDMAN. That is not a disputed point of constitutional law.

Senator KENNEDY. Well, I am just asking you—and evidently you can say no, or whatever answer—what laws. What laws. This is your testimony.

Ms. BOARDMAN. The answer, Senator, is I—

Senator KENNEDY. If you will listen to the question. If you will listen to the question.

Ms. BOARDMAN. Yes, Senator.

Senator KENNEDY. In response to this, "The principle is equally sound where the Supreme Court has yet to rule. . . .the President has determined that a statutory law violates the Constitution." I want to know what laws have we passed, the Congress has passed that are on the books that this President does not feel that he is going to enforce.

Ms. BOARDMAN. The direct answer to your question, Senator, is I do not know the answer to that. The second answer is, though, that that sentence refers to "Presidents," not this President. It refers to "the President."

Senator KENNEDY. All right. Well, Mr. Chairman, I would ask you if you would consider a legislative mandate for Congressional notification that may be sensible and be willing to work with us in a bipartisan way to ensure accountability to the American people. It seems to me we ought to be able to work out in a bipartisan way, at least legislatively, what in the world—notification to Congress, the people's Representatives, and the American people, what in the world this President is going to say is going to be enforced and what he is not going to enforce. I will raise this with the Chair. The other members ought to be able to work this out in a bipartisan way. I think the idea is absolutely—when will it end? Where does it stop?

I thank the Chair.

Chairman SPECTER. Senator Kennedy, you have directed a question to me, and I am pleased to give you a response. The specific issue which concerns me the most at this moment is what is happening to the Foreign Intelligence Surveillance Act. And it may well be that the President has constitutional authority on electronic surveillance with one party in the United States, but that determination requires a balancing act. And when the President has objected to informing the Intelligence Committees, which he is required to do under the National Security Act of 1947, there were

a lot of objections made for his failure to do that. And, finally, when this Committee prodded him, they informed the Subcommittee of both the House and the Senate, 7 in the Senate and 11 in the House. Then when we had the Hayden hearings, they had to inform the full committees to get Hayden confirmed. But this Committee has not yet had an answer to why the President would not submit the electronic surveillance program to the Foreign Intelligence Surveillance Court as four former members of the Court said should be done and could be done, maintaining confidentiality, where he does not have a blank check. And as Senator Cornyn pointed out, it is the Court to decide the parameters. The Court writes the check. And that is an issue which has not yet been answered by the Attorney General, and we are going to try again on July 18th. And, Ms. Boardman—

Senator KENNEDY. Just on that, Mr. Chairman—

Chairman SPECTER. Wait 1 second. I would appreciate it if, among the written responses that I have requested, you would respond to that question in the context of the President being able to maintain confidentiality with the submission to the Foreign Intelligence Surveillance Court what reasons that there should not be that judicial review for the Court to write the check. And if it is made out to the President, he cashes it. And if the Court declines to write the check, he cannot run the program.

Senator Kennedy.

Senator KENNEDY. Well, I had heard over the weekend that there was at least a tentative agreement between you and the Vice President. Are we going to have some opportunity to hear about that some time?

Chairman SPECTER. You will, and I would be glad to discuss it with you privately when this hearing is over.

Senator KENNEDY. Thank you.

Chairman SPECTER. It is not with the Vice President. It is with the Department of Justice and the National Security Council, and I would be glad to inform you fully as to where we stand.

Senator KENNEDY. Thank you.

Chairman SPECTER. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman. I do thank you very much for holding this hearing.

The administration has issued signing statements at an astonishing rate to express the view that it does not have to comply with the laws that Congress has passed. This unprecedented use of so-called constitutional signing statements raises very serious questions and concerns, and I am glad that it is being examined closely today.

We are all familiar with the controversy surrounding the signing statement on the Congressional ban on torture, and I want to just talk about that briefly, as others have, because it is at the core of the issue.

This Nation had a protracted public debate about torture that spans several years. As a result of that debate, the administration withdrew a memo, arguing that the President had the constitutional authority to disregard the already existing ban on torture. And despite reported backroom attempts by the administration to

water it down, late last year Congress passed yet another clear prohibition on torture, no exceptions.

You would think that would be the end of the matter. But what happened? The President responded by issuing a signing statement making clear that he would retain the right not to comply with the law if he chose not to do so. He made clear that he had no respect for Congressional authority in this area and that he would do just whatever he pleased, despite Congress' clear direction.

Now, as witness testimony is pointing out, this administration certainly is not the first to issue signing statements, nor is it the first to express concern about the constitutionality of particular provisions of laws and signing statements. But this administration has taken this approach far more often than prior administrations, and it has done so, in my view, to advance a view of Executive power that, as far as I can tell, has no bounds. What is more, this administration has shown no sense of obligation to resolve thorny constitutional questions by trying to facilitate judicial review of questions provisions. And it has denied Congress the opportunity to overcome a presidential veto. It has instead assigned itself the sole responsibility for deciding which laws it will comply with and, in the process, has taken upon itself the powers of all three branches of Government.

As one law professor recently put it, in a piece on signing statements, "Because President Bush has found constitutional problems with statutes so readily, and because he takes such a radically expansive view of his own power, President Bush's position amounts to a claim that he is impervious to the laws that Congress enacts."

So, Mr. Chairman, I do believe that this is dangerous to our system of Government. As I said, I am glad we are talking about it, and I would like to ask the witness a couple of questions.

Back to the PATRIOT Act, the signing statement on the PATRIOT Act reauthorization conference report states that the executive branch will construe provisions that "call for furnishing information to entities outside the executive branch in a manner consistent with the President's constitutional authority." In particular, as you know, it references two provisions of the PATRIOT Act that call for detailed audits of the use of two of the most controversial authorities, Section 215, business record orders and national security letters, and that require that the results of these audits be shared with the Congress. These audit provisions were two of the strongest oversight measures contained in the reauthorization package.

Is it the position of the administration that those audit provisions are unconstitutional?

Ms. BOARDMAN. Well, Senator, I think the President has been clear in his statement, and I do not think there is any value to my attempting to reinterpret it.

If you will allow me, I would like to quote from a signing statement that President Clinton gave similar to this type of signing statement, and then I would like to make a general—

Senator FEINGOLD. That is going to use up all my time.

I am sorry. I just asked a straight question. Does the administration take the position that these audit provisions are unconstitutional? Yes or no.

Ms. BOARDMAN. I believe the answer to that is no, but it is not for me to reinterpret the President's statement.

Senator FEINGOLD. All right. So is it your view the administration thinks it does not have to conduct these audits or that it does not have to share the results of these audits with Congress, or both?

Ms. BOARDMAN. It is my understanding that these audits are already taking place and some of the results have already been given to Congress.

Senator FEINGOLD. That is fine. That is a factual statement about what is happening. I am asking whether the administration thinks it would not have to conduct these audits despite the clear language of the law?

Ms. BOARDMAN. Again, Senator, I think that the signing statement gives the President's view, and I do not want to put words in his mouth. What I will say is Presidents repeatedly say in this context, "The Congress has asked us for information. We are pleased to give it. My national security requirements and duty to take care of sensitive information continues to apply."

That is often simply a statement saying, "Just so we all know, there are some circumstances, maybe none here, maybe none will occur, just so we all know, there is this one constitutional duty I as President have." It is often not at all a suggestion that the President does not intend to completely enact the bill as written.

Senator FEINGOLD. Just to be clear, the administration does not take the position that all reporting requirements are unconstitutional, does it?

Ms. BOARDMAN. Oh, no, of course not, Senator.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feingold. Were you finished, Senator Feingold?

Senator FEINGOLD. Yes.

Chairman SPECTER. Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I would like to use my time, if I might, to make a statement.

Approximately a month ago, I gave a speech to 85 judges and about 400 lawyers and spoke about my concern regarding this President's efforts to seriously expand executive authority and, in my opinion, push a constitutional confrontation between the three branches of Government. I am very concerned that, under the Bush administration, our country is experiencing a fundamental change in direction. In fact, I would argue that the calculated expansion of executive power under this President will be one of the lasting legacies of the Bush administration and could have a longer impact on our country than most, if not all, of his own policies.

The expansion of power has been implemented through many different avenues, including the President's prolific use of signing statements to alter or reject legislation at the time he is signing it into law. I believe this new use of signing statements is a means to undermine and weaken the law and that it should be a serious concern to all Americans.

If the President is able to nullify or alter a law with a stroke of a pen without issuing a veto, without going through the legal and community channels, then the structure of our Government and its inherent checks and balances are fundamentally altered. Ironically, this week the President is asking Congress to give him the authority to issue what are called line-item vetoes, in effect giving the President the power of the pen to strike down a portion of a statute that the Congress has passed, without invalidating the entire bill.

Previously, this has been a policy I have supported. This is a serious issue, and deciding whether to grant the President this authority is now being debated in a very different atmosphere than in previous Congresses. Whether my colleagues agree or disagree with granting the President this authority, I would hope we could all agree that if the President is going to have the power to nullify all or part of a statute, it should only be through veto authority that the Congress has authorized and can reject, rather than through a unilateral action taken outside the structures of our democracy.

So I am very pleased that you are having these hearings. I think it is a very serious situation when you see an expanded Article I authority combined with signing statements, and I think this has really put our democracy in a totally different direction. And when one really goes out and examines the specific signing statements, as we have, you find that they are in a multitude of different directions, essentially saying to the Congress, you know, "What you do is not really important. I am going to do whatever I want to do."

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feinstein.

Thank you, Ms. Boardman. You are an accomplished attorney. You have faced some tough questions, and I think your responses have been very, very helpful, and we appreciate your coming in. And we have left you some homework, which we would very much appreciate your directing your attention to and providing us written answers. If you could do that within the course of the next week, we would appreciate it. Is that a realistic timetable for you?

Ms. BOARDMAN. It is a little hard for me to know, Senator, only because the Department of Justice is flooded, and I do not have access to my office. As you may know, the Department is shut down for the next week. But I will do my best, Mr. Chairman.

Chairman SPECTER. Well, let's say a week from the time you get back to your desk.

Ms. BOARDMAN. I hope that is next Monday. Yes, Mr. Chairman, I will do my best.

Chairman SPECTER. Okay. Thank you very much.

Senator KENNEDY. Mr. Chairman, could I ask just one quick question?

Chairman SPECTER. Yes, Senator Kennedy.

Senator KENNEDY. Would you provide an answer in writing to my question about the President complying with the existing law as set forth. It is 28 U.S.C. Section 530(d), the President is required to report to Congress and the American people on laws that he is not enforcing because of constitutional objections. Can we get that in writing?

Ms. BOARDMAN. Yes, Senator.

Senator KENNEDY. Thank you.

Chairman SPECTER. Thank you very much.

[The prepared statement of Ms. Boardman appears as a submissions for the record.]

Chairman SPECTER. We now turn to our second panel: Professor Ogletree, Professor Yoo, Mr. Fein, and Professor Rosenkranz.

Our first witness on panel two is Professor Charles Ogletree, the Jesse Climenko Professor of Law at Harvard, where he is also the Executive Director of the Charles Hamilton Houston Institute for Race & Justice. Professor Ogletree is the recipient of many honors, including being named in the National Law Journal as one of the 100 most influential lawyers in America; published extensively on race relations and criminal law; currently the co-chair of the Reparations Coordinating Committee, a group which seeks reparations for defendants of African slaves.

Thank you for being with us today, Professor Ogletree, and we look forward to your testimony.

STATEMENT OF CHARLES J. OGLETREE, JR., PROFESSOR, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. OGLETREE. Senator Specter, it is good to see you. Good to see you again and glad to be here. I am Charles Ogletree, the Jesse Climenko Professor of Law and the Executive Director of the Charles Hamilton Houston Institute for Race & Justice.

At the outset, I want to make clear that my remarks here today are neither on behalf of the ABA task force, which I sit on—called the American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine—nor am I speaking on behalf of Harvard Law School.

I am pleased to have this opportunity to speak with you briefly on what I think and what others think are some profound and serious issues concerning the separation of powers and the way that the executive branch has exercised its powers with respect to signing statements. There are three central points that I want to make.

The first is that signing statements in and of themselves are not necessarily objectionable. They have been used by Presidents on many occasions to help clarify and even salute important principles of law, and that is not an issue of debate.

The second point, the more profound point, is that we have seen an incredible juxtaposition over the past 5 years with President Bush, and that juxtaposition is the absence of this President, unless his predecessors, of ever exercising an actual veto of legislation, but instead using signing statements to interpret and challenge congressional action in ways that I believe are unprecedented and that raise serious questions.

The third point is that despite what the executive branch has done—and it has been done by Republican and Democratic administrations; it has been done on many important issues—the third most important point here is the legislative function, and in many respects, one of the great challenges that this Congress faces is that much of these efforts have taken place right in the presence of Congress, but with little notice and little response. And I would urge this Committee in particular, with this responsibility to create the laws, to take it as an ultimate responsibility to find ways to

challenge this use of authority and to make sure that there is a balance of authority between the executive, the legislative, and the judicial branches of Government.

One way that would obviously have to happen would be for this Committee to look very carefully at some of its own laws and how they have been interpreted by the executive branch and to determine whether and to what extent, given issues of standing and other important constitutional limitations there is any basis upon which Congress might challenge the authority of presidential signing statements.

Let me say a word about the ABA task force, a final point before taking any questions that members may have. One of the great things about the American Bar Association and President Mike Greco, who appointed this task force, is that it is bipartisan and has a wide range of perspectives. Among the members are people familiar to this Committee. Bruce Fein, who worked in the Reagan administration; William Sessions, the former Director of the FBI; Patricia Wald, the former Chief Judge of the D.C. Circuit, and who also has been involved in a number of the War Tribunals; and, additionally, Congressman Mickey Edwards, who served with distinction in the House for many years. We are also joined by a number of legal scholars, including former Dean of Stanford Law School, Kathleen Sullivan; current Dean of Yale Law School, Howard Koh; and a variety of other private lawyers who have had extensive administrative experience in the executive branch and some in the legislative branch. And it is chaired by Neal Sonnett, a Miami lawyer, who also has been very active in the American Bar Association.

To put it bluntly, I think that the great issue here is one of transparency. To what extent has President Bush, through the exercise of his authority with these signing statements, frustrated the intent of Congress and avoided having these matters, which may be unconstitutional, examined by a higher court?

It seems clear on a cursory examination of the decisions that have been made over the past 5 years, that it is very incumbent upon the legislative branch of Government to take this matter quite seriously and to make sure that when the President refuses to enforce the law on constitutional grounds without interacting with the other branches of Government, it is not only bad policy, public policy, but it also creates a unilateral and unchecked exercise of authority in one branch of Government without the interaction and consideration of the other branches of Government. And I would urge this Senate judiciary Committee to examine very carefully what has been done, but also to think what responsibilities and authority it has to address it more completely.

Thank you.

[The prepared statement of Mr. Ogletree appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Ogletree.

Our next witness is Professor Christopher Yoo, professor at the Vanderbilt University Law School, where he is also Director of the Technology and Entertainment Law Program. Before going to Vanderbilt, Professor Yoo was an associate at Hogan & Hartson, clerked for Judge Randolph on the document Circuit and Supreme

Court Justice Anthony Kennedy. He was an author on the issue of presidential authority, a co-author of the forthcoming book, "A History of the Unitary Executive: Executive Branch Practice from 1789 to 2005."

We appreciate your being here, Professor Yoo, and the floor is yours for 5 minutes.

STATEMENT OF CHRISTOPHER S. YOO, PROFESSOR, VANDERBILT UNIVERSITY LAW SCHOOL, NASHVILLE, TENNESSEE

Mr. YOO. Thank you very much, Mr. Chairman, members of the Committee. I am Christopher Yoo, professor of law at Vanderbilt University and visiting professor of law at the University of Pennsylvania Law School. I am grateful for the opportunity to testify today about presidential signing statements.

Presidential signing statements have a long and storied history that dates back to the earliest days of our Republic. For example, in 1821, President James Monroe issued a signing statement indicating that he would construe a statutory provision in a manner that did not conflict with his power to appoint executive officers. Similarly, in 1830, President Andrew Jackson issued a signing statement indicating that he would interpret a particular statute as authorizing the construction of a road only in the Michigan Territory, and not outside.

Signing statements began to become a more regular feature of the political landscape during the administration of Franklin Delano Roosevelt, with subsequent Presidents of both parties, including Presidents Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, and Carter each issuing signing statements on a regular basis. Signing statements began to appear with even greater frequency during the Presidencies of Ronald Reagan, George H.W. Bush, and Bill Clinton.

The popularity of signing statements over the years should come as no surprise. The enactment of a major piece of legislation is a momentous occasion, and it is natural for those responsible for bringing it about to commemorate it with some remarks. The increase in the frequency of their use should also come as no surprise. The role of the media in politics has been on the ascent since the days of FDR's fireside chats, and this has heightened the incentives to turn a political milestone, like the enactment of major legislation, into a public event.

Presidential signing statements, as Professor Ogletree has noted, have served a wide range of purposes, the vast majority of which are completely uncontroversial. For example, they are often used to thank legislators for their support for legislation, to inform the public about the legislation's overarching purposes and general effects, to call for further legislation, and to communicate to the public and to executive branch officials how a statute will be implemented, just to name a few. The broad appeal of each of these purposes underscores that signing statements are not partisan in nature. Presidents of both parties have placed ever increasing reliance on signing statements, and we should expect that trend to continue into the future.

Another use of signing statements that is relatively uncontroversial is to offer the President's interpretation of a statu-

tory provision that is susceptible of more than one interpretation. As anyone in this room recognizes, the limitations of the English language, the realities of the legislative process, and the inability to anticipate every possible contingency makes perfect precision in drafting statutes infeasible.

When enforcing a statute, executive officials are inevitably confronted with such ambiguities, and they must proceed on the basis of some understanding of what the statute means. To use a classic example coming from H.L.A. Hart, suppose that Congress were to enact a statute saying no vehicles in the park. A police officer confronting a child's bicycle, a motorized wheelchair, and an ambulance rushing to the scene of a medical emergency would have to interpret what the terms of that statute actually meant. For this reason, it is generally accepted that some executive role in statutory interpretation is inevitable. Indeed, agency experience with administering statutes often leads courts to accord executive branch interpretations special respect. Given the inevitability of the executive branch's role in statutory role in interpretation, there seems little reason to prevent such interpretations from being offered as early and in as transparent a manner as possible, as is the case with presidential signing statements.

The last category includes signing statements that raise concerns about the constitutionality of a particular provision. It is quite common for Presidents to be confronted with statutes that are open to two interpretations, one of which would be constitutional and the other of which would raise serious constitutional doubts. It has long been accepted that courts confronted with such a statute should favor the interpretation that avoids raising constitutional doubts. This doctrine is based in part on the presumption that Congress and the President take seriously their duty to uphold and defend the Constitution, and in part on a desire to minimize constitutional holdings and to minimize conflict among the branches. As a formal opinion issued by the Clinton Justice Department makes clear, the law expects the executive branch officials to do the same and to adopt interpretations when confronted with ambiguous statutes that tend to render the statute constitutional.

This is not to say that the President's opinion about constitutionality of a statute is necessarily binding. The process for resolving the constitutionality of a statute is demonstrated by the statute that led to the impeachment of Andrew Johnson, which remains one of the most politically important events in our Nation's history. The Tenure of Office Act left unclear whether the President could remove the Cabinet members that Johnson had inherited from President Lincoln. The House and the Senate were unable to resolve the dispute, with the House believing that the statute should prevent Johnson from removing holdover Cabinet members, and the Senate believing that the statute should not. Congress, thus, drafted an ambiguous statute that was open to either interpretation. President Johnson believed the statute gave him the power to remove those Cabinet members. Consistent with its understanding of the statute, the House impeached Johnson. And consistent with its understanding of the statute, the Senate exonerated Johnson. Eventually, the Congress, based on its concerns about the constitutionality of the statute, repealed it, and eventually, the Supreme

Court held, some 50 years after the fact, that it was, in fact, unconstitutional.

It seems to me this is precisely the way such disputes should be resolved, through an inter-branch dialogue among all three branches. It also is clear to me that President Johnson's removal of a Cabinet member was not improper. Like every Member of the Congress, he takes an oath to support and defend the Constitution.

Together these arguments suggest that presidential signing statements are inherent in our system of checks and balances, and as well in the role of the President as Chief Executive. I discuss these arguments at greater length in my submitted remarks, and I am happy to answer any questions based on either of my remarks today or my submitted remarks that the Committee might have.

[The prepared statement of Mr. Yoo appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Yoo.

We will now turn to Mr. Bruce Fein, a partner in the consulting firm of Fein & Fein. He has a very extensive record of Government service, a research director for the Joint Congressional Committee on the Iran-Contra Affair back in 1986–87; General Counsel for the FCC under President Reagan; Assistant Director of the Department of Justice Office of Legal Policy for 3 years; law clerk to Judge Kauffman, graduate of Harvard Law School cum laude, bachelor's degree from University of California, where he was Phi Beta Kappa.

Thank you for joining us here today, Mr. Fein, and we look forward to your testimony.

STATEMENT OF BRUCE FEIN, PARTNER, FEIN & FEIN LLC, WASHINGTON, D.C.

Mr. FEIN. Thank you, Mr. Chairman and members of the Committee. I think a page of history is worth volumes of logic in examining the President's use of signing statements to neglect to faithfully enforce the laws.

In 1688, the Parliament in Great Britain convened and declared basically the overthrow of King James II, and they voted as follows in declaring the English Bill of Rights, and I am quoting: "By assuming and exercising a power of dispensing with and suspending of laws and execution of laws without the consent of Parliament, King James II was threatening the laws and liberties of the kingdom." And they continued in the Declaration of Rights to conclude that, "The pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal." And continued on that, "The pretended power of dispensing with laws or the execution of laws by regal authority as it has been assumed and exercised of late by King James II is illegal." And he lost his throne for failing to execute the laws.

Now, the Founding Fathers wrote upon British history when they were crafting our own Constitution, and the Take Care Clause in Article II is modeled after the problem that the British Parliament confronted with King James II. It requires the President to take care that the laws be faithfully executed, not sabotaged.

Now, that does not mean that the President has to blind himself to constitutional problems that he may see in legislation that is

presented to him. Indeed, he takes an oath to faithfully defend the Constitution, and in executing his official authority to sign or veto legislation, it is incumbent upon the President to consider the constitutional issues that may be raised and to veto—to veto—a bill if it is believed, in whole or in part, to violate the Constitution. The veto enables then Congress to reconsider that with an override vote.

Now, this was clearly the understanding of the Founding Fathers. As the Supreme Court explained in *Clinton* v. *New York*, a decision holding the line-item veto unconstitutional, "Our first President understood the text of the Presentment Clause as requiring that he either 'approve all the parts of a bill, or reject it in toto.'"

Now, the first President was George Washington, who, of course, you remember, was President of the Constitutional Convention, and his views and practices are given enormous weight in providing the gloss on the constitutional provisions. So it was understood at the outset that the President, when confronted with a law, in whole or in part, that was unconstitutional had to veto it in toto if he was to defend the Constitution as he saw it. There were not any other options.

Now, President George Washington's view was not an aberrational one. President William Howard Taft, who had a very expansive view of Executive authority, which he expounded later on as Chief Justice in United States and Myers, similarly wrote that, "The President has no power to veto part of a bill and let the rest become a law."

Presidents, nevertheless, have sought to evade their obligation to veto a bill by issuing signing statements saying that they simply will refuse to enforce parts of the law or all of the law, precisely the evil that led to the overthrow of King James II, precisely the evil the Founding Fathers wished to avoid by requiring the President to sign a bill and enforce it or veto it if he thought parts were unconstitutional.

Now, it is said that somehow the Constitution ought to be changed because initially the volume of legislation that Congress considered was relatively slim, and the President did not confront thousand-page laws that contained many provisions he might like and others he might dislike. But simply because there has been a change in the political dimension of the Federal Government is no excuse for violating the original intent of the Founding Fathers. And I give as an example the Supreme Court's approach to the use of the legislative veto in the *Chadha* case.

You may recall the legislative veto arose after the welfare state began to blossom under Franklin Delano Roosevelt, and Congress said to itself, Gee, we are confronting these thousands of regulations, we are delegating enormous power to the President, and, therefore, we need the legislative veto to exercise some kind of supervision over the executive branch that was not required in earlier times when the executive branch was much smaller.

That was thoroughly unpersuasive with the United States Supreme Court. It said the Presentment Clause is the Presentment Clause; the legislative veto violates that clause; and it is no excuse to say Government is more complicated these days than then;

therefore, we can torture the architecture of the Constitution. If the Constitution needs to be changed in structural format, there is an amendment process to do so, and it has been undertaken from time to time.

It is also said that the President should not be confronted—

Chairman SPECTER. Pardon me for interrupting. Our timekeeper lost track of time. Just let me ask you how much more time you need.

Mr. FEIN. If you could give me just 1 minute.

Chairman SPECTER. That would be fine.

Mr. FEIN. Now, what is an appropriate response for the Congress to take? One method would be to provide as a generic rule that anytime a President announces that he will simply refuse to execute part of a law that he then will have no money to execute any of the law, so he has to default on the entire law, although that has the problem of not enabling Congress to override a veto. So that is at least partially unsatisfactory.

A second approach would be to attempt to confer standing on the House and Senate collectively to sue in Federal court to obligate the President to enforce a statute that he says he will not enforce. There may be problems under Article III as to whether that would be constitutional, but at least it would provide a method short of impeachment where you could get a judicial resolution of constitutional disputes between Congress and the President. And I don't think anyone would dispute that. If a President ignores a decree of the United States Supreme Court, we are talking about offenses that are impeachable.

It may well be that it is very difficult for the President to veto legislation that he finds generally commendable but in small parts unconstitutional. But Presidents repeatedly, like Congress, have to make tough political decisions. Harry Truman said, "If you can't stand the heat, stay out of the kitchen." If you do not want to make tough political decisions, then do not be President. And if the President is to faithfully execute his office, he is required, if he believes a bill is unconstitutional, to veto it, not simply to bury it and say he will not enforce it.

Thank you.

[The prepared statement of Mr. Fein appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Fein.

Our final witness on this panel is Professor Nicholas Rosenkranz, Professor of Constitutional Law at Georgetown Law Center. He is the author of two articles in the Harvard Law Review: "Federal Rules of Statutory Interpretation" and "Executing the Treaty Power." He was attorney adviser in the Office of Legal Counsel at the Department of Justice from 2002 to 2004, clerked for Judge Easterbrook on the Seventh Circuit and Justice Kennedy on the Supreme Court, attended Yale Law School.

Thank you for being with us today, Professor Rosenkranz, and we look forward to your testimony.

STATEMENT OF NICHOLAS QUINN ROSENKRANZ, ASSOCIATE PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. ROSENKRANZ. I thank the Committee for the opportunity to express my views about presidential signing statements. I largely agree with the position put forth by Deputy Assistant Attorney General Michelle Boardman earlier this morning. Rather than reiterate her testimony, I will just briefly make two points. First, I will explain that signing statements, including those that mention constitutional provisions, are generally nothing more than exercises of the uncontroversial power of the President to interpret the law in the course of executing it. Second, I will discuss the possibility of legislative responses to this practice.

The most common, most important, and most uncontroversial function of presidential signing statements is to announce the President's interpretation of the law. As the Supreme Court has explained, "interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." And the President interprets statutes in much the same way that courts do, with the same panoply of interpretive rules.

One such rule is of particular interest today: the canon of constitutional avoidance. This is the canon that the President is applying when he says, in signing statements, that he will construe a particular provision to be consistent with a particular constitutional command.

It is crucial to understand what these statements do and do not say. These statements emphatically do not "reserve the right to disobey" the law, and they do not declare that the statutes enacted by Congress are unconstitutional. In fact, they declare exactly the opposite.

As President Clinton's Office of Legal Counsel has explained, these sorts of signing statements are "analogous to the Supreme Court's practice of construing statutes, if possible, to avoid holding them unconstitutional." In effect, these statements say simply that if one possible meaning of a statute would render it unconstitutional, then the President, out of respect for Congress, will presume a different, constitutional meaning. The clear and crucial implication of these statements is that he will faithfully execute the statute so understood.

Now, at least three legislative proposals on this topic are pending in the House of Representatives, so I shall address the balance of my testimony to the constitutionality and the wisdom of such proposals.

One bill that has been introduced in the House provides that Federal entities, including executive agencies, shall not consider presidential signing statements when construing Federal statutes. This provision is almost certainly unconstitutional for the simple reason that it is the President's duty to "take care that the laws be faithfully executed."

The House resolution would impede the President's performance of this duty, by closing the ears of the executive branch to his interpretation of the law. For that reason alone, it would be unconstitutional.

A different section of the same bill would forbid the President to spend any money on signing statements. This provision, too, is arguably unconstitutional. Congress possesses broad power over appropriations, but for Congress to use its power of the purse to impede a core executive function would raise serious constitutional concerns. And in any case, this President's use of signing statements does not justify such a constitutionally contentious response.

By contrast, one resolution that has been introduced in the House would merely require the President to report to Congress whenever he determined not to carry out a duly enacted law. This resolution may be sensible. On very rare occasions, the President may determine that a statute is thoroughly unconstitutional and that no saving construction is possible. When he does so, basic separation-of-powers principles do suggest that the other branches should have notice and an opportunity to respond.

Most interestingly, one of the House resolutions would also forbid Federal courts from considering presidential statements when construing Federal statutes. The question here is whether Congress can tell courts what tools and methods to use when interpreting Federal statutes. I considered this question at length in the Harvard Law Review 4 years ago, and I concluded that the answer is generally yes. Congress does have power to tell courts what methods to use when interpreting Federal statutes.

The only question remaining is whether this particular rule of statutory interpretation, forbidding reliance on presidential signing statements, would be wise.

I have written that Congress should indeed exercise its power over the tools that courts use to interpret Federal statutes, but a crucial aspect of my thesis is that Congress should approach this project comprehensively. For this reason, I think that any rule on this matter should ideally be adopted as part of a coherent and cohesive code of statutory interpretation.

In conclusion, the recent brouhaha over presidential signing statements is largely unwarranted. Signing statements are an appropriate means by which the President fulfills his constitutional duty to "take care that the laws be faithfully executed." However, I do applaud Congress' interest in the proper judicial use of presidential signing statements, and I hope that this interest will blossom into a more comprehensive and general initiative for Federal rules of statutory interpretation.

Thank you.

[The prepared statement of Mr. Rosenkranz appears as a submission for the record.]

Chairman SPECTER. Professor Rosenkranz, why do you say it is an unwarranted brouhaha when the Congress takes up the McCain amendment and has an overwhelming vote, 89–9, directing what the executive branch may do as a matter of public policy on interrogation techniques, and the Executive responds and says we are not going to pay any attention to it?

Mr. ROSENKRANZ. Well, Senator, I do not think that is a fair reading of the President's signing statement. He does not say there and, indeed, he never says, "I am not going to pay any attention to a provision of law." What he says sometimes and what he said there is, "I will construe this statute to be consistent with my con-

stitutional obligations." There are only two choices. He can either construe it to be consistent with his constitutional obligations or construe it to be inconsistent with his constitutional obligations. And it is a well-settled canon of construction which finds its rationale in respect for the Congress that he opts for the constitutional interpretation. He assumes that you mean to pass a constitutional bill.

Chairman SPECTER. But in that context, he makes the unilateral determination as to what is constitutional, so that he does not take the route which the Constitution provides to veto the bill and seek to have a legislative determination as to whether his veto will be upheld or not.

It may well be that a presidential veto would be respected by the Congress on the McCain bill if he states his reasons for the veto. But that was never a part of the process, the legislative process, or the determination of constitutionality. And when he handles the McCain amendment as he did, isn't he pretty much saying, "I am going to decide what interrogation tactics are appropriate, I am going to decide the parameters of the tactics, it is not going to be up to the Congress, and I am not going to veto the bill to give you a chance to override it, or I am not going to veto the bill to provide an opportunity for the Congress to rethink what it has done," which is what the Constitution says he should do?

Mr. ROSENKRANZ. Well, Senator, it is novel in a way for Congress to protest that the President is not vetoing a sufficient number of bills. When a statute is thoroughly unconstitutional in every provision, the President probably should veto such a bill.

Chairman SPECTER. Well, was the McCain amendment thoroughly unconstitutional?

Mr. ROSENKRANZ. No, Senator, but if a provision of law is arguably constitutional, or even probably constitutional, but it may raise constitutional issues, it is quite right and consistent with a settled canon of construction, that the President tries to interpret that statute to be constitutional; and then once he has done that, he can sign it and he can enforce it as interpreted.

Chairman SPECTER. Professor Yoo, Professor Rosenkranz suggests that the alternative of having legislation which would say the courts may not consider the reasons given by the President in a signing statement for not enforcing the law, that the courts may not consider that. Do you think that that is a provision which would be constitutional? Can the courts be instructed by Congress on what they may consider and what they may not consider, especially on constitutional issues?

Mr. YOO. In fact, the Congress already has. There is a wonderful statute that is often called "the Dictionary Act." It is 1 U.S.C. 1 through 1 U.S.C. 8, the very first part of the U.S. Code. That gives very specific guidance about how courts, agencies, everyone, people in the country, should interpret Federal statutes. It says, for example, when we say "corporations" and "persons" may not do that, it means one person as well as multiple people. It lays out a wide number of rules of construction that will govern. There is no question that that is the case. Whether—

Chairman SPECTER. Well, you can have guidance on statutory construction, but can you direct the court what the court may con-

sider on a constitutional issue? Isn't the court the ultimate arbiter, the Supreme Court the ultimate arbiter of the constitutional issue?

Mr. YOO. The answer under the doctrine of *Cooper* v. *Aaron* is yes. The actual answer to me is somewhat more complicated than that, as the example put forward by—

Chairman SPECTER. More complicated than *Cooper* v. *Aaron*?

Mr. YOO. I think so. For example, think about the New Deal era where the Court was holding unconstitutional minimum wage laws and maximum hours laws. A number of State legislatures continued to pass them, and the Court struck them down for a time, but eventually reversed course, reconsidered its actions, and began to uphold them. And that was a proper way for the law to evolve. The question would be: Would a legislature who disagreed and thought that minimum wage legislation continued to be a good idea, were they acting lawlessly by continuing to put that issue before the Court?

In that case, for example, those actors continued to engage in a dialogue with the Supreme Court to resolve what the ultimate meaning of the Constitution is, and eventually the meaning of the Constitution evolved.

Chairman SPECTER. My time is up, but your hand is raised, Professor Rosenkranz, so we will acknowledge your hand.

Mr. ROSENKRANZ. I just wanted to speak to that question for a moment. I just wanted to be clear. I believe that Congress can instruct the courts in how to read statutes, not in how to read the Constitution. So a provision which instructed the court about statutory interpretation is permissible, not one that instructs the courts about constitutional interpretation.

Chairman SPECTER. Well, the signing statements customarily reach constitutional issues.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. I think this hearing has already been very enlightening, although it does not quite up meet the billing that some have presented ahead of time. For example, some have said that this is an unprecedented practice or new practice, and we find out that it is precedented and it is not new.

Some have complained that Congress needs to be notified anytime the President thinks that it has passed an unconstitutional statute. But to me, that is one of the purposes that a presidential signing statement might fulfill, identifying those statutes which the executive branch considers problematic.

For example, one here that I have, a statement on signing the National Defense Authorization Act for Fiscal Year 1996, where President Clinton said, "I have concluded that this discriminatory provision is unconstitutional. In accordance with my constitutional determination, the Attorney General will decline to defend this position." So neither new nor unprecedented, and serve, in fact, the desirable purpose of Congressional notification and transparency.

I guess I would like to ask Mr. Fein—I know you, of course, served with distinction in the Reagan administration, and the figures that we have in front of us show that it was President Reagan who, although he did not begin this practice, certainly was responsible for generating more presidential signing statements than his

predecessors had. Would you just agree with me that this was also a practice that President Reagan used to identify what he considered to be statutes to which the administration was not legally bound because he interpreted them as being unconstitutional?

Mr. FEIN. Yes, I do not believe President Bush is charting new ideological territory here or claims of power. Certainly it was periodic since the Eisenhower administration, but I still think the structural problems are identical, that is, the President, instead of vetoing a provision he thinks is unconstitutional, disables Congress from reconsidering a provision of a bill he thinks should be null and void and exercises de facto line-item veto authority. That is a structural problem, and it is not unique to this President.

Senator CORNYN. I think I understand your argument that really the President, if he thinks any part of a statute is unconstitutional, he ought to veto the entire statute. But I would just ask as a practical matter, given the contentiousness of debates on legislation, not only within the Senate but within the branches of the legislature and the difficulties navigating important legislation—for example, the PATRIOT Act that Chairman Specter spent an awful lot of time and effort navigating to successful completion—it seems like it would be counterproductive if the President had some concern with a relatively small, from a percentage standpoint, portion of that statute, have to veto everything and start over from the beginning. Wouldn't that create a logjam?

Mr. FEIN. No, not necessarily. I remember the Republicans, when Newt Gingrich was the Speaker of the House, shut down the Government because he could not get consensus with President Clinton, and I think the Republicans—

Senator CORNYN. It did not go very well, if my memory is—

Mr. FEIN. And I think the Republicans lost politically on that score. It may be difficult, but I want to recall the same kind of argument that I think you have articulated, Senator, that was made in defense of the legislative veto. Surely you did not want Congress, now confronted with just thousands of regulations issued by administrative agencies, as you well know, to be disabled from exercising a legislative veto because they could not keep accountability, as Congress was able to do in the early years of the country. And the Supreme Court said that does not matter. You may think legislative vetoes are now required in order to exercise greater supervision of executive branch agencies that, in terms of numbers and power, vastly exceeded anything that was contemplated at the founding. But that is not good enough.

Senator CORNYN. Let me reclaim the last 30 seconds so I can ask another question of Professor Yoo in this instance. There seems to be a lot of concern expressed that because so few cases are actually going to be decided by the courts, that there is this vast body of law out there that there is going to be no final judicial determination on either what the statute means or whether it is constitutional; that the executive and legislative branches simply do not have any role in that process—in this instance, the executive branch—in interpreting it perhaps in a way that avoids constitutional problems or the like.

Could you speak to the responsibility of the executive branch to try to uphold and defend the Constitution as well as the legislative and judicial branches?

Mr. YOO. Certainly. Every officer of the executive branch swears an oath to uphold and defend the Constitution, just as every Member of Congress and every judge, and, in fact, they confront—the President himself has an obligation to take care that the laws be faithfully executed. And when a statute is applied for the first time or applied to a particular person, the executive officer is usually the first person to confront how a particular statute applies and what the scope of that statute would be and what the proper—whether constitutional limits permit—how the Constitution permits that statute to be applied.

That is inevitable in this process, and, in fact, many of those decisions do not make it into court. What I would suggest is, in fact, our system is not a system of courts. It is a system of laws. And it is a finely crafted system of three branches of Government, which is much more robust in how it handles that.

As this Committee knows, if the Congress becomes dissatisfied with the way the President is administering a statute, even if that matter never appears in court, there can be hearings on reauthorization, there can be simple hearings in the Committee, there can be hearings before the Subcommittee on Appropriations, there can be hearings in front of the subcommittees on oversight, and, in fact, there can be a great deal of confirmation of appointees, discussion during confirmation of appointees, and, in fact, there is a great deal of communication between individual members raising specific concerns about the way the law has been administered, and that, in fact, we have a system that is not court-centered but is, in fact, a much more robust one with a much more dynamic interaction between the legislature and the Executive about how the law should be interpreted.

Chairman SPECTER. Thank you, Senator Cornyn.

Professor Ogletree, you heard Mr. Fein offer a suggestion about legislation which would give Congress standing to sue in court, take the case to the Supreme Court of the United States. Do you think that would pose a case in controversy and not be an advisory opinion and be constitutional?

Mr. OGLETREE. Senator Specter, I think it is a difficult but an achievable issue, and I think that this Congress should look very carefully at the opportunities to raise this matter to the Court.

I think Congress is going to rue the day that it examined the use of signing statements the way this President has used them and really frustrates the idea of separation of powers. We live in a democracy, not in a monarchy, and I think what we are seeing clearly, in case after case, is the excessive application of the executive power and in a sense ignoring the legislative respect.

It is important for this final and important reason: Professor Yoo is right when he talks about HLA Hart. I remember reading the great work he has done on legal process, no vehicles in the park. That is an interesting issue for interpretation. Senator McCain said a ban on torture. There is a distinct and substantive difference. And when this Congress has spoken time and time again on fundamental issues consistent with the war on terrorism, consistent with

our changed issues since 9/11/2001, it has not given up its responsibility in making laws to ensure that the executive branch responds.

I think it is time that Congress does two things: One, require the President to provide an official copy of all signing statements. I don't know where they are. You don't know where they are. They are done in the dark of night or in the light of day, but we just do not know. And, second, to examine the likelihood of a constitutional challenge that will allow this to happen. The Constitutional Project has issued a report, a bipartisan report, outlining some of these issues, and I would urge Congress to accept its responsibility and the duty to not just let this continue to happen, but to think about legislative alternatives, including a case before the Supreme Court of the United States of America.

Chairman SPECTER. So you think we could draft a statute, take the President to court on his signing statements, which would be constitutional.

Mr. YOO. I think not only you can, I think you must. If the view is going to be that these are harmless, simple interpretations of law and the President's authority cannot be checked, I see no alternative except to let the Court decide. That is what *Marbury* v. *Madison* told us many years ago, and I think that is what this Supreme Court may have to tell us now.

Chairman SPECTER. Mr. Fein, do you want to reinforce your—

Mr. FEIN. Well, I would like to—

Chairman SPECTER. Wait a minute. You have not heard the question yet. Do you want to reinforce your position that there could be a constitutional statute prepared?

Mr. FEIN. Yes, and I also would indicate that there are reasons why Congress should do that, because there are many instances where there is no private litigant to bring a case.

For instance, you may recall in the Detainee Treatment Act signing statement the executive branch said there is not any private right of action here, that is, no one who is subject to torture could bring a suit claiming that there was a violation of the Detainee Treatment Act. Unless Congress then has standing to challenge the President's application and claim that he has constitutional authority to gather foreign intelligence by torture, that statute is hollow.

I also think that this President is not using signing statements to provide a gloss on ambiguous language, and let me read you language from a provision that has been repeatedly enacted by Congress in the Intelligence Authorization Act to try to keep the United States out of military combat in Colombia. And Section 502 of the Intelligence Authorization Act that has been repeatedly reenacted provides that, "No United States Armed Forces personnel or United States civilian contractor employed by the United States Armed Forces will participate in any combat operation in connection with assistance made available under this section to Colombia."

Now, that is pretty straightforward. No one can participate. And yet the President claims—in his signing statement, he says, "The executive branch shall construe the restriction"—no combat use—"in that section as advisory." Now, it is clear that that was not an advisory limitation in the statute.

So the suggestion that the President is not declining to enforce laws but simply providing a gloss on ambiguous language I think is counterhistorical and counterfactual. He is doing that, and as King James II, declining to faithfully execute the laws, and an appropriate response is needed.

Chairman SPECTER. Professor Yoo, would such a statute be constitutional?

Mr. YOO. My reaction is that if a statute is unambiguous, what the President says in the signing statement is irrelevant. It has been established since the days of Chief Justice John Marshall that, where a statute is plain on its face, there is no room for interpretation. And a legislative history, whether from the President or from this body or from the House of Representatives, has no place in the judicial decisionmaking.

So if the statute is plain, whether the President says—whatever the President says in a signing statement is beside the point. A plainly worded statute might violate the terms of the Constitution, but that is a separate issue from the role of the signing statements and is a separate matter that will be litigated in terms of the Court. But in that determination, what the President said in his or her signing statement would not matter.

Chairman SPECTER. Well, you may say it does not matter, and it may be plain on its face. But where the President has stated he does not intend to follow it, the question is: Would it be constitutional for Congress to enact legislation where the Congress concludes that the President has flouted the plain language of the statute, that it gives itself standing to take the case to the Federal court, would that statute be constitutional in your opinion?

Mr. YOO. It is a difficult issue that has not been fully litigated in front of the courts.

Chairman SPECTER. Well, of course, it has not been litigated. We have not drafted the statute yet. But I am interested in your judgment if you care to give it.

Mr. YOO. My judgment is that it would be very difficult for the Congress to meet Article III standing. The biggest obstacle is a decision called *Raines* v. *Byrd,* decided by the Supreme Court, debating whether Members of Congress had standing to challenge the line-item veto. And the first time that the Court—

Chairman SPECTER. Congress had not given standing to challenge it.

Mr. YOO. But it wasn't a question of whether—it is not just a question of whether a statute confers standing on the Congress. There is also a constitutional limitation of whether the Constitution allows a party like Congress to appear in court. And as you know, the basic requirement is that there be a case in controversy. And the Supreme Court has defined that to mean a pocketbook issue, that is, something that affects someone's individual rights directly and—

Chairman SPECTER. Well, a case in controversy is different from standing, but I take it your answer is no.

Mr. YOO. My initial judgment would be no. I would have to look, obviously, at the particular language in the particular context, but it is clear to me it would face formidable obstacles.

Chairman SPECTER. Do you think it is constitutional, Professor Rosenkranz?

Mr. ROSENKRANZ. I am inclined to agree with Professor Yoo. I think it is quite a difficult question. Standing doctrine—

Chairman SPECTER. Sufficiently difficult to take it to court?

Mr. ROSENKRANZ. There could be a case that would resolve this question in court, but standing doctrine is notoriously complicated, and Congress' ability to confer standing on itself is a vexed question.

Chairman SPECTER. Well, if it is not up to Congress to confer standing, who confers standing?

Mr. ROSENKRANZ. Well, there are also constitutional limitations, so Congress can confer standing to a point, but there may well be constitutional limits on what Congress can do to confer standing.

Chairman SPECTER. But are those limits beyond the issue of case in controversy?

Mr. ROSENKRANZ. I am sorry? I am not sure I understand.

Chairman SPECTER. Are the constitutional limit to get this into court beyond the question of case in controversy?

Mr. ROSENKRANZ. Well, Senator, I think what you are imagining is a statute which confers standing on Congress to challenge a presidential signing statement. Is that what we are talking about?

Chairman SPECTER. Correct.

Mr. ROSENKRANZ. I think a presidential signing statement simpliciter, a provision that purported to allow Congress to challenge any presidential signing statement, almost certainly would be unconstitutional in at least some applications. If the President issues a signing statement which says, "I applaud this bill, and I thank Senator Specter for his work on it," obviously there would not be a case in controversy if you chose to challenge that presidential signing statement.

Chairman SPECTER. Mr. Fein, would you be willing to undertake the first line of drafting such a bill?

Mr. FEIN. Yes, there is—I know at least one precedent that is somewhat analogous—

Chairman SPECTER. If you send it to me, send a copy to Professor Yoo and Professor Rosenkranz.

Mr. FEIN. The *Senate Select Committee* v. *Nixon* was a case where a Committee of Congress was afforded standing to sue President Nixon, seeking documents that they thought were important to legislate on campaign finance. That hit the U.S. Court of Appeals for the District of Columbia Circuit. It did not get to the U.S. Supreme Court. But at least there is some analogy in conferring standing on a Committee with conferring standing on the entire Congress.

Chairman SPECTER. Professor Ogletree, do you think it would be better to put this issue to the Supreme Court as opposed to this panel?

Mr. OGLETREE. Absolutely.

Chairman SPECTER. One final question. The House of Representatives passed a resolution to—passed "an amendment to prohibit the use of funds from being available to engage in electronic surveillance in the United States, except as authorized under the For-

eign Intelligence Surveillance Act." It lost, but narrowly, by a vote of 207–219.

I filed such an amendment on the appropriations bill, the supplemental appropriations bill, and had grave concerns about the wisdom of such an amendment. And to see 207 votes in the House, including many Republican votes, rekindles the thought. Do you think as a matter of public policy it is a good idea, Mr. Fein?

Mr. FEIN. Yes. Indeed, James Madison, the Father of the Constitution, writing in the Federalist Papers, celebrated the power of the purse as the most efficacious way for the legislative branch to redress grievances against the President. As you well know, being around at the enactment of FISA, it says that there shall be no gathering of foreign intelligence, except specifically in accord with this statute. And the power-of-the-purse remedy seems entirely appropriate. It has been used in the past by Congress to prevent covert actions in Angola, to prevent the Vietnam War from slipping in Laos and Cambodia, and those were not questioned as to their constitutionality or wisdom. And I think an appropriate amendment, as you have crafted, would be right in line.

Chairman SPECTER. Professor Yoo, two parts to your question. One, would it be constitutional to do that? And, second, would it be wise as a matter of public policy?

Mr. YOO.T1 THERE ARE CERTAINLY A LOT OF CONSTITUTIONAL ASPECTS ABOUT REQUIRING ELECTRONIC SURVEILLANCE TO BE OVERSEEN BY A COURT. THE FOURTH AMENDMENT CLEARLY PROVIDES THAT—PUTS LIMITATIONS ON THE ABILITY OF THE UNITED STATES LAW ENFORCEMENT AGENCIES TO GATHER SURVEILLANCE. THERE ARE SOME VERY DIFFICULT QUESTIONS ABOUT EXTRATERRITORIAL APPLICATION WHICH GO BEYOND THE STRICT LIMIT OF THE CONSTITUTION, WHICH ARE VERY DIFFICULT TO RESOLVE IN PARTICULAR CASES. BUT IT IS FAIRLY CLEAR TO ME THAT, IN ADDITION TO THE CONSTITUTIONAL QUESTION, LAW ENFORCEMENT HAS TO BE AUTHORIZED BY SOME BASIC FEDERAL LAW BEFORE IT CAN ACT. AND, IN FACT, THE CONSTITUTION HAS A LIMIT ON THE KINDS OF AUTHORIZATIONS THAT CAN BE GIVEN, BUT CAN VERY RARELY AUTHORIZE ACTIONS IN ITS OWN RIGHT.

So my guess is that you could—it would be entirely constitutional for this Congress, the Senate and the House, to put limitations on the ability of the Government to gather intelligence consistent with certain broad requirements.

Now, there are limitations that come out of the nature of the executive branch itself. For example, there is a deliberative process privilege. When the executive asks questions amongst itself in trying to make a decision, that information is generally not considered reachable by any other means, and there are some things inherent in the executive—the nature of the executive branch that defend certain kinds of information from being gathered.

Chairman SPECTER. Is that a yes?

Mr. YOO. The answer is mostly yes, but as any lawyer would probably do, it would depend on the details of the specific proposal.

Chairman SPECTER. I do not think any lawyer; perhaps any professor but not any lawyer.

Part two, would it be a wise policy?

Mr. YOO. I think that it is always wise to put some check on any exercise of power. I do believe that—

Chairman SPECTER Even one as drastic as cutting off funding? Wouldn't you worry a little bit that without knowing what the President is doing exactly—because we do not know—that we may be curtailing some very important anti-terrorism data gathering to fight terrorists if we do it in the dark?

Mr. YOO. I would share that concern with you, Senator. As with most of these tough issues, it requires a balance.

Chairman SPECTER. Maybe if it looked like it was going to pass, the President would tell us what it was so we would not pursue the legislative remedy of cutting off funding.

Mr. YOO. What is fascinating to me is the executive that we have is the direct product of our frustrations with a multi-headed executive under the Articles of Confederation. And if you go back to the Federalist Papers, they say one of the reasons we like executive power is because it is energetic when it is concentrated in one person, and that, in fact, laws get implemented, liberty is protected, public safety is better preserved by that, and there has to be a proper sphere of action in which the President can direct the executive branch to achieve those goals.

Is that power unlimited? No. There is appropriate judicial and legislative checks on that process, and it is all part of this complex dialogue in which the three branches enter into every day.

Chairman SPECTER. I don't detect in that answer any clue to the answer to my question as to whether it might get the President to tell us what the program is.

Mr. YOO. Without knowing the details of the program—it is clear to me that it is appropriate for the Congress to insist on the disclosure of the details of many parts of the program.

Chairman SPECTER. Professor Rosenkranz, would the provision that failed in the House be constitutional?

Mr. ROSENKRANZ. I agree with Professor Yoo that the question is a difficult one and that one would have to study the details of the specific language.

Chairman SPECTER. Well, I just read you the language.

Mr. ROSENKRANZ. Well, Congress has very broad appropriations power. The President, though, has a certain scope of inherent Commander-in-Chief power, and the interaction—

Chairman SPECTER. And he should spend money that Congress prohibits him from spending?

Mr. ROSENKRANZ. It is arguably possible that an appropriation so cunningly tailored to restrict inherent executive powers would be unconstitutional. This is a controversial point and one that scholars debate. But the interaction of Congress' appropriation power with inherent Article II powers is complicated and uncertain.

Chairman SPECTER. Well, maybe you could organize a course at the Yale Law School. Do you think it would be wise as a public policy matter, Professor Rosenkranz?

Mr. ROSENKRANZ. Sir, I am a law professor. I am not going to purport to speak to the wisdom of that as a matter of public policy.

Chairman SPECTER. You may not be invited back then.

[Laughter.]

Chairman SPECTER. Well, this has been illuminating, and it is always a challenge when we get you guys from Harvard and Yale, et cetera, to debate these issues as to where we come out. You expose a lot more nuances than we customarily hear in this room, especially when the Senators are here alone.

Thank you all very much, and that concludes our hearing.

[Whereupon, at 12:02 p.m., the Committee was adjourned.]

[Questions and answers and submissions follow.]

QUESTIONS AND ANSWERS

Senator Feinstein
The Use of Presidential Signing Statements
June 27, 2006

Background and Questions for Professor Ogletree: In your written testimony you discussed the juxtaposition of signing statements and lack of vetoes issued by this President.

- *In your opinion what is a fair balance between signing statements and vetoes? Or said another way, when is it appropriate for a President to issue a signing statement rather than a veto? Are there situations where it is inappropriate?*

Also in your written testimony you mentioned that the President has objected to a "a bill's constitutionality on the grounds that it interferes with his 'power to supervise the unitary executive.'" My understanding is that the unitary executive is a relatively new theory, and one that was rejected by the Supreme Court case of *Morrison v. Olson* in a 7 to 1 decision.

- *Given this lack of historical context and lack of foundation from the Framers, as well as a rejection in the Supreme Court, I am wondering what supports the President's actions to unilaterally interpret a law based on his understanding of the "unitary executive"?*

43109.001

Senator Edward M. Kennedy
Questions for the Record for Charles Ogletree
"Signing Statements" Hearing
June 27, 2006

I. Expanding Standing

One of the problems with the practice of using signing statements to nullify portions of law is that most of these decisions are not reviewable by the courts because it is difficult to identify plaintiffs directly injured by the statement. While the occasional statement will direct specific Executive Branch members to act in a specific way, these statements seem to be less and less frequent. President Reagan learned that lesson in 1984, when a statement that prompted specific directives to the head of the Office of Management and Budget triggered considerable litigation.

Ironically, this may encourage the administration to issue vague, sweeping interpretive statements which reserve the right to modify or nullify any portion of a given law on constitutional grounds without even indicating which provisions might be at issue. As you know, the ABA has named a bipartisan panel to investigate the constitutionality of these signing statements and suggest ways for Congress to deal with this practice.

Question: On the question of standing, what can Congress do to increase the likelihood that a lawsuit challenging these statements will be able to go forward, so that executive lawmaking in defiance of the powers of Congress won't go unchallenged?

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 1, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the June 27, 2006, appearance before the Committee of Deputy Assistant Attorney General Michelle Boardman at the hearing entitled "The Use of Presidential Signing Statements." We hope that this information is of assistance to the Committee. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

Chairman Patrick Leahy
Questions for the Record
for
Michelle Boardman
Deputy Assistant Attorney General
"Presidential Signing Statements"
June 27, 2006

1. **In your testimony, you stated that many of the President's constitutional signing statements have sought to preserve the Appointments, Recommendations and Presentment clauses of the Constitution. You also stated that the President has issued numerous signing statements involving his foreign affairs and commander-in-chief powers, because of the significant increase in legislation involving national security since September 11, 2001.**

   (a) **Has the Department cited or otherwise relied upon any of President Bush's signing statements in legal briefs or memoranda filed in court proceedings involving national security or other matters since January 2001? If so, please identify the cases in which these signing statements were cited or relied upon and the federal statutes involved.**

   (b) **Please provide copies of any and all legal memoranda or briefs responsive to question 2(a).**

ANSWER: The Department refers only rarely to signing statements in legal briefs or memoranda submitted in court proceedings. Of the several thousand briefs and memoranda the Department has submitted in court in the six years since January 2001, we were able to identify a total of only 26 briefs or memoranda in which the Department cited signing statements. Of those, only 3 involved signing statements issued by President George W. Bush; the balance were signing statements issued by former presidents. Those briefs and memoranda are described below and copies are attached. We understand that it is not practicable to search the innumerable briefs and memoranda filed by the 94 U.S. Attorney's Offices over the past six years, the vast majority of which were not subject to review by personnel at Main Justice. The briefs listed below therefore are those of which we are aware filed by lawyers within the Civil Division, the Civil Rights Division, the Criminal Division, the Environment and Natural Resources Division, the Tax Division, and the Office of the Solicitor General.

1. Gov't Brief, *Zivotofsky v. Secretary of State,* D.C. Cir. No. 04-5395, 444 F.3d 614 (2006) (citing Statement on Signing the Foreign Relations Authorization Act, 38 Weekly Comp. Pres. Doc. 1658 (Sept. 30, 2002))

2. Gov't Brief, *Al-Odah v. Bush*, D.C. Cir. No. 05-5064 (citing statements of principal sponsors of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005), as well as the President's signing

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statement for the Act, 2005 WL 3562509 (Dec. 30, 2005))

3. Gov't Opposition to Petitioner's Emergency Motion, *Al-Adahi v. Bush*, No. 05-280 (D.D.C. Mar. 1, 2006) (citing statements of principal sponsors of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005), as well as the President's signing statement for the Act, 2005 WL 3562509 (Dec. 30, 2005))

Since January 20, 2001, the Department of Justice has filed approximately 23 briefs and memoranda citing signing statements made by previous Presidents. In the vast majority of these briefs, the Department cited the signing statements in order to help defend the constitutionality of congressionally enacted legislation, by citing the President's statements supporting relevant claims.

1. United States Response To WMATA's Motion To Dismiss On Eleventh Amendment Grounds, *Disability Rights Council* v. *WMATA*, No. 1:04-cv-00498 (D.D.C. July 17, 2006) (citing President George H.W. Bush's signing statement on Americans with Disabilities Act)

2. Brief for the United States As Intervenor, *Everybody Counts* v. *Northwest Indiana Regional Planning Commission*, No. 98-97 (N.D. Ind. Sept. 14, 2004) (citing President George H.W. Bush's signing statement on Americans with Disabilities Act)

3. Brief for the United States As Intervenor, *Lieberman* v. *Delaware*, No. 01-3540 (3d Cir. Feb. 28, 2003) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

4. Brief for the United States As Intervenor, *Thomas* v. *University of Houston*, No. 02-20988 (5th Cir. Jan. 29, 2003) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

5. Brief for the United States As Intervenor, *Danny R.* v. *Spring Branch Indep. Sch. Dist.*, No. 02-20816 (5th Cir. Dec. 11, 2002) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

6. Brief for the United States As Intervenor, *Boudreau* v. *Ryan*, No. 02-1730 (7th Cir. Nov. 25, 2002) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

7. Brief for the United States As Intervenor, *A.W.* v. *Jersey City Public Schools*, No. 02-2056 (3d Cir. Oct. 24, 2002) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

8. Brief for the United States As Intervenor, *Bowers* v. *NCAA*, Nos. 01-4226, 01-4492, 02-1789 (3d Cir. June 28, 2002) (citing President Reagan's 1986 signing

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statement regarding Section 504 of the Rehabilitation Act)

9. Brief for the United States As Intervenor, *Wilson* v. *Pennsylvania State Police Department*, No. 02-1531 (3d Cir. Apr. 23, 2002) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

10. Brief for the United States As Intervenor, *Chisolm* v. *McMamimon*, No. 00-1865 (3d Cir. Nov. 2, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

11. Brief for the United States As Intervenor, *Koslow* v. *Commonwealth of Pennsylvania*, No. 01-2782 (3d Cir. Oct. 23, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

12. Petition For Rehearing And Rehearing En Banc for the United States As Intervenor, *Garrett* v. *University of Alabama*, Nos. 98-6069, 98-6070 (11th Cir. Sept. 27, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

13. Brief for the United States As Intervenor, *Lovell, Delmendo* v. *Chandler*, Nos. 98-16545, 98-16548 (9th Cir. July 10, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

14. Brief for the United States As Intervenor, *Vinson* v. *Thomas*, No. 00-15534 (9th Cir. June 12, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

15. Brief for the United States As Intervenor, *McAleese* v. *Pennsylvania Dep't Of Corrections*, No. 00-1875 (3d Cir. May 16, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

16. Brief for the United States As Intervenor, *Garcia* v. *SUNY*, No. 00-9223 (2d Cir. Apr. 13, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

17. Brief for the United States As Intervenor-Appellee, *Robinson* v. *Kansas*, No. 00-3315, 00-3332 (10th Cir. Feb. 5, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)

18. Brief for Appellee, *Schneider v. Kissinger*, No. 04-5199, 412 F.3d 190 (D.C. Cir. 2005) (citing Statement on Signing H.R. 2092 (the Torture Victims Protection Act), 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) (President George H.W. Bush))

19. Gov't Motion to Dismiss, *Schneider v. Kissinger*, No. 01-1902 (D.D.C. 2001) (citing Statement on Signing H.R. 2092 (the Torture Victims Protection Act), 22

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Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) (President George H.W. Bush))

20. Brief for Appellee, *Gonzalez-Vera v. Kissinger,* No. 05-5017, 449 F.3d 1260 (D.C. Cir. 2006) (citing Statement on Signing H.R. 2092 (the Torture Victims Protection Act), 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) (President George H.W. Bush)

21. Gov't Motion to Dismiss, *Gonzalez-Vera v. Kissinger*, No. 1:02-cv-02240 (D.D.C. 2003) (citing Statement on Signing H.R. 2092 (the Torture Victims Protection Act), 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) (President George H.W. Bush))

22. Brief for Appellee, *United States v. 191.07 Acres of Land (Martinek)*, No. 04-35131 (9th Cir. 2005) (citing, in passing for background purposes, statement of President George H.W. Bush upon signing 1991 Interior Appropriations Act, 1990 U.S.C.C.A.N. 3283-4 to 3283-5 (Nov. 5, 1990))

23. Brief for the Appellees, *Marrita Murphy v. Internal Revenue Service*, No. 05-5139 (D.C. Cir. 2007) (responding to Appellant's opening brief, which cited President Clinton's signing statement upon signing the Small Business Job Protection Act, Pub. L. No. 104-188 § 1605(a), 110 Stat. 1755, 1838 (Aug. 20, 1996), by arguing that the "[appellant]'s reliance . . . on President Clinton's signing statement with respect to the 1996 amendment is misplaced")

In addition, although the briefing was not handled by the Department of Justice, the United States Trade Representative cited one of President Clinton's signing statements in *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (World Trade Organization # WT/DS285). *See* First Written Submission of the United States, ¶ 34 & n. 53 (Nov. 7, 2003) (citing President William J. Clinton, *Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriation Act, 2001*, 36 Weekly Comp. Pres. Doc. 3153, 3155-56 (Dec. 21, 2000)); Appellant Submission by the United States, ¶ 198 (Jan. 14, 2005) (citing First Written Submission and referring to signing statement). Copies of the relevant portions of those documents are attached.

2. Has the Office of Legal Counsel developed any guidance on whether, and under what circumstances, federal agencies should rely upon Presidential signing statements in interpreting and enforcing the laws that are accompanied by these statements? If so, please provide a copy of this guidance.

ANSWER: During the Clinton Administration, Walter Dellinger, then-Assistant Attorney General for the Office of Legal Counsel, issued a memorandum regarding presidential signing statements. *See The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131 (1993) ("*Signing Statements*"), *available at*

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http://www.usdoj.gov/olc/signing.htm. The memorandum explained that signing statements serve several "useful and legally significant functions," including the "generally uncontroversial[] function" of "directing subordinate officers within the Executive Branch how to interpret or administer the enactment." *Id.* at 131, 132. Assistant Attorney General Dellinger explained:

> The President has the constitutional authority to supervise and control the activity of subordinate officials within the Executive Branch. *See Franklin v. Massachusetts*, 112 S. Ct. 2767, 2775 (1992). In the exercise of that authority he may direct such officials how to interpret and apply the statutes they administer. *Cf. Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."). Signing statements have frequently expressed the President's intention to construe or administer a statute in a particular manner (often to save the statute from unconstitutionality), and such statements have the effect of binding the statutory interpretation of other Executive Branch officials.

Id. at 132 (footnotes omitted); *see also Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202 (1994), *available at* http://www.usdoj.gov/olc/nonexcut.htm (citing and discussing *Signing Statements* opinion). The memorandum does not, however, provide detailed guidance on how federal agencies should use presidential signing statements in interpreting and enforcing the laws that are accompanied by the statements.

3. One criticism of Presidential signing statements is that they are essentially a tool used to give the President a line-item veto over provisions contained in laws that he does not like. Yet, the Supreme Court clearly rejected the idea of a line-item veto in *Clinton v. City of New York* as contrary to Article 1 of the Constitution. How do you reconcile the President's signing statements with the plain ruling of the Supreme Court in the *Clinton* case?

ANSWER: Presidents' use of signing statements is plainly consistent with the holding of *Clinton v. City of New York,* 524 U.S. 417 (1998). There, the Court held that the President's power under the Line Item Veto Act to "change the text of duly enacted statutes" and to "amend . . . Acts of Congress by repealing a portion of each" violated the Presentment Clause of the Constitution. *Id.* at 438, 447. A signing statement, however, neither changes the text of a statute nor amends a statute by repeal or otherwise.

To begin with, a signing statement does not mean that the President will not enforce the law as written. A signing statement provides guidance for members of the Executive Branch, and its binding effect is limited to the Executive Branch. Thus, "a bill that is signed by the President retains its legal effect and character, irrespective of any pronouncements made in a signing statement, and remains available for interpretation and application by the courts (if the provision is justiciable) and monitoring by Congress." Congressional Research Service, *Presidential Signing Statements:*

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Constitutional and Institutional Implications at CRS-24 (Sept. 20, 2006). By contrast, a line-item veto immediately would render the provision a legal nullity to be given no effect by courts, Congress, private litigants, and future Presidents. In addition, a President can exercise his veto power for any reason (including simple disagreement with a policy), or for no reason at all. By contrast, constitutional signing statements typically only embody concerns or issues that a newly enacted provision raises in light of fundamental law, the Constitution. Thus, as the Congressional Research Service explained, "[a] signing statement does not have the effect of a veto." *Id.*

4. The Supreme Court ruled in the *Hamdan* case that al Qaeda fighters captured in Afghanistan are entitled to the protections of Common Article 3 of the four Geneva Conventions signed in 1949. Common Article 3 guarantees humane treatment "in all circumstances", and specifically prohibits "cruel treatment," "torture," and "outrages upon personal dignity, in particular humiliating and degrading treatment." How do you reconcile the President's statement upon signing the McCain Detainee Amendment with the Court's ruling in *Hamdan*?

ANSWER: The President's signing statement regarding the Detainee Treatment Act (or "McCain Amendment") is entirely consistent with the guarantees of humane treatment and the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The President's signing statement is not an indication that the Government will fail to abide by the Act. On the contrary, as the President clearly stated in January 2006, "[n]o American will be allowed to torture another human being anywhere in the world. And I signed the appropriations bill with the McCain amendment attached on because that's the way it is. . . . [M]ake no mistake about it, the McCain amendment is an amendment we strongly support and will make sure it's fully effective." *See* http://www.whitehouse.gov/ news/releases/2006/01/20060126.html.

The President determined in February 2002 that members of al Qaeda and the Taliban are not entitled to the protections that the Geneva Convention provides to lawful combatants. He also determined that Common Article 3, which applies to conflicts "not of an international character," would not apply to the conflict with al Qaeda, which involves a transnational terrorist movement with global reach and a proven record of targeting United States citizens and interests in multiple countries and is therefore decidedly a war of an international character. The Administration accepted the Supreme Court's contrary conclusion in *Hamdan* and worked closely with Congress to enact the Military Commissions Act to resolve how Common Article 3 would apply going forward.

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Senator Edward M. Kennedy
Questions for the Record
for
Michelle Boardman
Deputy Assistant Attorney General
"Presidential Signing Statements"
June 27, 2006

I. Constitutional Review Process

Question: Please explain in detail the process by which the Executive Branch identifies constitutional defects in legislation, and how these defects are collected and assembled into the president's signing statement. Can any agency raise constitutional objections? Do objections originate in the Office of Legal Counsel? Who has the final word on which objections make it into the signing statements?

ANSWER: The Office of Management and Budget coordinates the process by which the Executive Branch reviews legislation. Legislation is initially reviewed to analyze the potential legal and policy consequences of a bill, and the comments of the Executive Branch are embodied in testimony, views letters and Statements of Administration Policy that are submitted to Congress before enactment. As part of that process, the Department of Justice reviews legislation to determine its constitutionality, but anyone in the Executive Branch who participates in the legislative review process may comment on the constitutionality of a provision. Any analysis of pending or enrolled legislation is reviewed by the relevant agencies, as well as the White House staff and other staff within the Executive Office of the President and the Office of the Vice President. The President has the final authority to determine whether a signing statement is warranted and the content of any such statement.

II. Statutory Reporting Requirements

Question: At the hearing, you indicated your willingness to provide an accounting of the existing statutes that the President has declined to enforce on constitutional grounds. Please provide a full and complete list of any existing statutes, rules, regulations, programs, policies or other laws that the President has declined to enforce on constitutional grounds since January 20, 2001. Has the Attorney General complied with the reporting requirements of 28 U.S.C. § 530D? Please provide a full accounting of all of the times that the Attorney General has complied with this statute, along with copies of any transmittals to Congress that have been issued thus far.

ANSWER: On January 18, 2007, the Department provided a response to identical questions submitted in connection with another hearing. Please see the answer to

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questions 104 and 105 in the set of questions for the record the Committee submitted to the Attorney General after the Department of Justice Oversight hearing on July 18, 2006. Since January 18, the Department has issued another quarterly report regarding settlements in accordance with the provisions of section 530D(a)(1)(C). In addition, we have located a copy of the section 530D(a)(1)(C) report for the first quarter of 2004, which we had not located by the time we returned our response on January 18, 2007. Copies of both reports are attached.

III. Signing Statement Implementation

Much of your testimony focused on the use of signing statements to inform Congress, the courts and the public of the President's position – as distinct from indicating his intent not to enforce a law. Specifically, you stated that "[i]t's often not at all a suggestion that the president did not intend to completely enact the bill as written." But it would seem from the text of these statements that the President, at minimum, is reserving the right not to enforce these statutes at his discretion.

Question: With respect to actual implementation, how many challenges in which the president reserves the right to refuse to execute a provision of law are actually carried out by Executive Branch officers? Who is responsible for oversight within the Executive Branch to ensure that officers within the Executive Branch are implementing the non-enforcement mandates of the signing statements? Please provide a list of all challenges that have actually been carried out by officers of the Executive Branch.

ANSWER: The fact that the President issues a signing statement with respect to a newly enacted statute is not an indication that the Executive Branch will fail to enforce the law as written. Indeed, ordinarily, such laws are enforced as written. We therefore do not agree that signing statements are "non-enforcement mandates."

As we have noted, it is not practicable for the Department to identify and respond with respect to provisions of law enforced by other agencies, *see* Answer to Question 79, Questions for the Record (Jan. 18, 2007). The Department takes the reporting provisions of 28 U.S.C. § 530D very seriously. We are not aware of any Department of Justice policy adopted since January 20, 2001, to refrain from enforcing or applying any federal statute, rule, regulation, program, policy or other law within the responsibility of the Department on the grounds that such provision is unconstitutional.

The head of an agency or establishment that administers or enforces a statute is responsible, in the first instance, for implementation of that statute. The Constitution vests executive power in the President, who ultimately is responsible to take care that the law is faithfully executed.

43109.011

Senator Feinstein
Questions for the Record
for
Michelle Boardman
Deputy Assistant Attorney General
"Presidential Signing Statements"
June 27, 2006

Questions for Ms. Boardman:

1. Background: In your written testimony you talk about extreme or unanticipated circumstances that "could raise the possibility of an unconstitutional application" of a statute. However, in the signing statements that I have seen President Bush is not making such a qualification. He does not say, only in the extreme or unanticipated circumstances will I not report to Congress, or whatever qualification he is making. And when it comes to the signing statement on the provision against the use of torture, Congress was specifically stating there is no circumstance where its use is allowed.

A. So, if the point of these statements is to reserve the President's authority in such rare and unanticipated situations, why not make that clear in the signing statement?

ANSWER: The signing statements issued by the President regarding possible, but unanticipated, unconstitutional applications of statutory provisions follow the practice of previous Presidents, who have issued virtually identical statements. For example, President Clinton issued a statement on signing the Department of Defense Appropriations Act of 2000 that he had some "concern[]" about a reporting requirement "that could materially interfere with or impede this country's ability to provide necessary support to another nation or international organization in connection with peacekeeping or humanitarian assistance activities otherwise authorized by law," and President Clinton therefore stated that he "will interpret this provision consistent with my constitutional authority to conduct the foreign relations of the United States and my responsibilities as Commander in Chief." *Statement by President William J. Clinton upon Signing the Department of Defense Appropriations Act of 2000*, 2 Pub. Papers of William J. Clinton 1981, 1981 (Nov. 4, 1999).

Please note that the President's signing statement respecting the Detainee Treatment Act (the "McCain Amendment") is not an indication that the President views the provision to be unconstitutional or that the Government will not abide by it. On the contrary, as the President clearly stated in January 2006, "No American will be allowed to torture another human being anywhere in the world. And I signed the appropriations bill with the McCain amendment attached on because that's the way it is. . . . [M]ake no mistake about it, the McCain amendment is an amendment we strongly support and will make sure it's fully effective." *See* http://www.whitehouse.gov/news/ releases/2006/01/20060126.html.

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B. In addition, aren't the signing statements of this President, in fact different, because unlike other Presidents President Bush is using these statements to expand executive authority under the theory of the unitary executive?

ANSWER: No. President Bush's signing statements indicating that he intends to construe a particular statutory provision consistent with his constitutional obligation to "supervise the unitary Executive Branch" are substantively indistinguishable from similar statements made by past Presidents. For example, President Reagan in 1987 issued the following signing statement:

> I wish to make clear my understanding that sections 252(a)(1) and (2) of the amended Act—which direct the President to issue an order "in strict accordance" with the report submitted by the Office of Management and Budget—do not preclude me or future Presidents from exercising our authority to supervise the execution of the law by overseeing and directing the Director of OMB in the preparation and, if necessary, revision of his reports. If this provision were interpreted otherwise so as to require the President to follow the orders of a subordinate, it would plainly constitute an unconstitutional infringement of the *President's authority as head of a unitary Executive branch.*

Statement by President Ronald Reagan upon Signing H.J. Res. 324, 2 Pub. Papers of Ronald W. Reagan 1096, 1097 (Sept. 29, 1987) (emphasis added). *See also, e.g., Statement by President William J. Clinton upon Signing the Balanced Budget Act of 1997*, 2 Pub. Papers of William J. Clinton 1053, 1054 (Aug. 5, 1997) ("Section 4422 of the bill purports to require the Secretary of Health and Human Services to develop a legislative proposal . . . . I will construe this provision in light of my constitutional duty and authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and *to supervise and guide my subordinates, including the review of their proposed communications to the Congress.*") (emphasis added); *Statement by President William J. Clinton upon Signing the Treasury and General Government Appropriations Act*, 2 Pub. Papers of William J. Clinton 1339, 1340 (Oct. 10, 1997) ("Any broader interpretation of the provision that would apply to 'nonwhistleblowers' would *raise substantial constitutional concerns in depriving the President and his department and agency heads of their ability to supervise and control the operations and communications of the executive branch.* I do not interpret this provision to detract from my constitutional authority in this way.") (emphasis added); *Statement by President George Bush upon Signing H.R. 3792*, 1 Pub. Papers of George H.W. Bush 239, 241 (Feb. 16, 1990) ("I shall interpret these provisions consistent with my authority *as head of the unitary executive branch.*") (emphasis added); *Statement by President George Bush upon Signing H.R. 5019*, 2 Pub. Papers of George H.W. Bush 1561, 1562 (Nov. 5, 1990) ("This provision must be interpreted in light of my constitutional responsibility, *as head of the unitary executive branch*, to supervise my subordinates.") (emphasis added).

Indeed, the Congressional Research Service recently issued a report in which it wrote that "it is important to note that the substance of [President George W. Bush's] statements do

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not appear to differ substantively from those issued by either Presidents Reagan or Clinton." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-1, CRS-9 (Sept. 20, 2006); *accord* Prof. Curtis Bradley & Prof. Eric Posner, *Signing statements: It's a president's right*, Boston Globe, Aug. 3, 2006 ("The constitutional arguments made in President Bush's signing statements are similar—indeed, often almost identical in wording—to those made in Bill Clinton's statements.").

Moreover, these statements explaining that the President is constitutionally obligated to supervise the Executive Branch in the execution of the law are uncontroversial and consistent with well-established law. The Supreme Court specifically has stated that the President has the authority to "supervise and guide [Executive officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone," *Myers v. United States*, 272 U.S. 52, 135 (1926); *accord Administrative Procedure—Rulemaking—Department of the Interior—Ex Parte Communications—Consultation with the Council of Economic Advisors—Surface Mining Control and Reclamation Act (30 U.S.C. § 1201 et seq.)*, 3 Op. O.L.C. 21, 23 (1979) (Carter Administration) (same). As the Supreme Court has explained, "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

2. Background. You argue that when it comes to the recommendations Clause President Bush's statements are "indistinguishable from President Clinton's." However, as I read the statements you quoted to support of this argument it seems to me that they do in fact use very different wording.

President Clinton's read: "I therefore direct executive branch officials to carry out these provisions in a manner that is consistent with the President's constitutional responsibilities."

President Bush's read: "the executive branch shall construe such provisions in a manner consistent with the President's constitutional authority <u>to supervise the unitary executive branch and to submit for congressional consideration such measures as the President judges necessary and expedient</u>."

As I read it the last phrase in the Bush signing statement does seem distinguishable.

A. Are you arguing that the word choice was meant to convey the same message as previous Presidents?

<u>ANSWER</u>: Yes. As noted by the Congressional Research Service and scholars, the President's signing statements are substantively identical to those of President Clinton. Some of President Clinton's other signing statements demonstrate that point more clearly. Upon signing the Balanced Budget Act of 1997, President Clinton issued a signing statement that is virtually identical to the signing statement of President Bush's quoted above: "I will construe this provision in light of my constitutional duty and authority to

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recommend to the Congress such legislative measures *as I judge necessary and expedient,* and *to supervise and guide my subordinates, including the review of their proposed communications to the Congress.*" *Statement by President William J. Clinton upon Signing the Balanced Budget Act of 1997*, 2 Pub. Papers of William J. Clinton at 1053 (emphasis added); *see also Statement by President William J. Clinton upon Signing the Treasury and General Government Appropriations Act*, 2 Pub. Papers of William J. Clinton 1339, 1340 (Oct. 10, 1997) ("Any broader interpretation of the provision that would apply to 'nonwhistleblowers' would *raise substantial constitutional concerns in depriving the President and his department and agency heads of their ability to supervise and control the operations and communications of the executive branch.* I do not interpret this provision to detract from my constitutional authority in this way.") (emphasis added).

B. If so, why use different language?

ANSWER: Each President speaks in his own voice, even while Presidents consistently use signing statements to note constitutional issues in newly enacted law and seek to preserve the authority of the Executive Branch. While President Clinton used the phrase "to supervise and guide my subordinates," President Bush uses the phrase "to supervise the unitary executive branch." The equivalence of the two phrases is demonstrated by the signing statements of President George H. W. Bush, who referred to his duty "as head of the unitary executive branch, to supervise [his] subordinates." *Statement by President George Bush upon Signing H.R. 5019*, 2 Pub. Papers of George H.W. Bush at 1562. The fact that President Clinton "direct[ed] executive branch officials to carry out these provisions" in the manner he wished suggests that he considered himself to be the sole head of a unitary Executive Branch. A group of distinguished scholars noted, after comprehensively reviewing the practices of every President, that President Clinton was "quite committed to executive unitariness," and took "extraordinary steps . . . to augment presidential control over the executive branch," Christopher S. Yoo, Steven G. Calabresi, & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 Iowa L. Rev. 601, 716 (2005), including by "issu[ing] many more such directives" to "other federal officials about how they should exercise their discretionary authority across a wide range of areas," than did "any of his predecessors," including "both [Presidents] Reagan and Bush," *id.* at 714.

C. Please explain what the phrase "to supervise the unitary executive branch" means to this Administration.

ANSWER: Because the Constitution directs that "[t]he executive power shall be vested in [the] President," U.S. Const., art. II, § 1, the President has broad authority to direct the exercise of discretion by officials within the Executive Branch. As noted above, that principle is widely accepted. The Supreme Court specifically has stated that the President has the authority to "supervise and guide [Executive officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone," *Myers v. United States*, 272 U.S. 52, 135 (1926).

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As several scholars concluded after an exhaustive survey of historical practice, "each of the first thirty-two presidents—from George Washington up through Franklin D. Roosevelt—believed in a unitary executive" and "every president between 1945 and 2004 defended the unitariness of the executive branch." Yoo, Calabresi, & Colangelo, 90 Iowa L. Rev. at 607, 730; *see also* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 Case W. Res. L. Rev. 1451 (1997); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 Harv. J.L. & Pub. Pol'y 667 (2003); Christopher S. Yoo, Steven G. Calabresi, & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 Notre Dame L. Rev. 1 (2004).

D. Please list any circumstances under which the President or Administration did not execute a statute because it was inconsistent with the President's "power to supervise the unitary executive."

ANSWER: As we have noted, it is not practicable for the Department of Justice to identify and respond with respect to provisions of law enforced by other agencies, *see* Answer to Question 79, Questions for the Record (Jan. 18, 2007). As we noted in the questions for the record returned to the Committee on January 18, *see id.*, we are not aware of any Department of Justice policy adopted since January 20, 2001, to refrain from enforcing or applying any federal statute within the responsibility of the Department on the grounds that the provision is unconstitutional, including on the ground that the statute is inconsistent with the President's power to supervise his subordinates.

3. Background. In explaining the use of constitutional signing statements you argued that the President has issued statements to safeguard his "well-established role in the Nation's foreign affairs and the President's wartime power." Your argument essentially boils down to the President is simply protecting his constitutional authority as Commander in Chief.

However, as you know, the Constitution gives the Congress Article I power: "to declare war... to raise and support armies... to make rules for the government and regulation of the land and naval forces... and for governing such part of them as may be employed in the service of the United States... And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

A. Is it, at a minimum, debatable as to whether Congress's enactment of the ban on the use of torture falls under the Article I authority given to Congress or the Article II authority given to the President? Who should decide which constitutional authority trumps?

ANSWER: The President has not authorized torture and will not do so. As the President has reaffirmed: "I want to be absolutely clear with our people and the world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it, and I will not authorize it." *President Discusses Creation of*

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Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html; *see also Statement on United Nations International Day in Support of Victims of Torture* (June 26, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/06/20050626.html ("[T]he United States reaffirms its commitment to the worldwide elimination of torture. Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law."). It is strictly prohibited by United States law, and by the policies of the Administration. As noted above, far from stating that the Executive Branch will not abide by the Detainee Treatment Act, the President has stated that "we strongly support [it] and will make sure it's fully effective." In light of that, we do not anticipate that there would be a dispute that would require a resolution of the respective authority of Congress and the President in this area of the law. It is important to note, however, that signing statements do not change which Branch's "constitutional authority trumps."

As the Attorney General noted during his testimony before the Committee on January 18, 2007, "the framers clearly intended that during a time of war, that both branches of government would have a legitimate role to play." As he noted, Congress has many powers relevant during wartime, including the power to declare war, and the authority to raise and support armies, and to provide and maintain a navy, among others. The Constitution vests the President with authority as Commander in Chief and makes him the sole organ of the Nation in foreign affairs. But as Justice Jackson noted, "[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

B. Can the President order the use of torture in violation of the language contained in the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006?

ANSWER: As noted above, the President has stated unequivocally that he has no intention to permit torture under any circumstance.

4. Background. You say "the President is *bound* to defer to the Constitution;" and that this responsibility may "arise most sharply when the President is charged with executing a statute, passed by a previous Congress and signed by a prior President" and is found to be unconstitutional under intervening Supreme Court precedent.

A. While I suspect we can agree that there are clearly times where the Congress will be wrong about the constitutionality of a statute, and there are times when the President and Congress will disagree. And if there is a disagreement, isn't the proper place for the issue to be decided in the courts, and not unilaterally by the President?

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ANSWER: The President has an independent responsibility to consider the constitutionality of a provision in executing it. *See* Unpublished Memorandum of James Madison, *quoted in* Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 921 (1990) ("[E]ach [department] must in the exercise of its functions be guided by the text of the Constitution according to his own interpretation of it . . . .") (alterations in original); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2088 n.7 (2002) ("Each branch has an independent obligation to read the Constitution in the best way it knows how."). The Constitution requires the President to "take care that the laws be faithfully executed," U.S. Const., art. II, § 3, and to "preserve, protect and defend the Constitution of the United States," *id.* § 1. These provisions obligate the President to determine the constitutionality of a law that he is required to execute.

As Assistant Attorney General Walter Dellinger explained during the Clinton Administration: "The President's office and authority are created and bounded by the Constitution; he is required to act within its terms. Put somewhat differently, in serving as the executive created by the Constitution, the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law. This obligation is reflected in the Take Care Clause and in the President's oath of office." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994), *available at* http://www.usdoj.gov/olc/nonexcut.htm. *See also Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 46 (1990) ("Where a statute enacted by Congress conflicts with the Constitution, the President is placed in the position of having the duty to execute two conflicting 'laws': a constitutional provision and a contrary statutory requirement. The resolution of this conflict is clear: the President must heed the Constitution—the supreme law of our Nation."). Thus, if a statute appears to conflict with the Constitution, the President "can and should exercise his independent judgment to determine whether the statute is constitutional." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 200. But in making that determination, "the President should give great deference to the fact that Congress passed the statute and that Congress believed it was upholding its obligation to enact constitutional legislation. Where possible, the President should construe provisions to avoid constitutional problems." *Id.*

B. If the Court has not yet decided whether a law is or is not constitutional, what is the Department of Justice's position on whether the President must enforce the law as passed?

ANSWER: As stated above, it has long been the view of the Executive Branch that, in executing a provision, the President has an independent responsibility to consider its constitutionality. *See, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 200 ("[W]hen a statute appears to conflict with the Constitution . . . [then] the President can and should execute his independent judgment to determine whether the statute is constitutional."); *see also* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 Law & Contemp. Probs.

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7, 50 (2000) (former OLC Deputy Assistant Attorney General during Clinton Administration concludes that "[t]he Dellinger [memorandum's] position is consistent with past executive branch policy and practice"). The President will, of course, presume that Congress has enacted constitutional legislation and will therefore construe provisions wherever possible to avoid constitutional problems. *See Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 200. Indeed, one purpose of presidential signing statements regarding constitutionally problematic provisions is to put forward a "saving" construction in order to give the greatest effect to Congress's wishes while avoiding unconstitutional applications. *See The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 133 (1993) (stating this practice is "analogous to the Supreme Court's practice of construing statutes, where possible, to avoid holding them unconstitutional").

C. You argued that these "constitutional concerns involve relatively minor provisions of major legislation." Does that description apply statements issued with respect to:

- ✓ ***Use of torture;***
- ✓ ***Affirmative-action programs;***
- ✓ ***Reporting requirements to Congress about immigration services;***
- ✓ ***"Whistle-blower" protections;***
- ✓ ***Safeguards against political interference in federally funded research***

If not, please explain the rationale and scope of what the statements were intended to convey, and whether these statutes are being enforced.

ANSWER: The statement in Ms. Boardman's testimony referenced in your question simply observed that, for presidential signing statements, it "is often the case [that] the constitutional concerns involve relatively minor provisions of major legislation." That is most definitely the case. For example, 67 of the President's 126 constitutional signing statements involved provisions in which Congress simply directed the President, as parts of a broader bill, to submit legislative recommendations to Congress on particular subjects. In keeping with the consistent practice of recent past Presidents, *see, e.g.*, *Statement on Signing the Shark Finning Prohibition Act*, 3 Pub. Papers of William J. Clinton 2782, 2782 (Dec. 26, 2000) ("Because the Constitution preserves to the President the authority to decide whether and when the executive branch should recommend new legislation, Congress may not require the President or his subordinates to present such recommendations (section 6). I therefore direct executive branch officials to carry out these provisions in a manner that is consistent with the President's constitutional responsibilities."), President Bush has noted that the Constitution provides him discretion to recommend such legislation "as he shall judge necessary and expedient," U.S. Const., art. II, § 3. It is more common for presidential signing statements to address minor provisions such as directives for legislative recommendations than for the signing statements to address the sorts of significant legislative initiatives noted in your question.

As noted above, the mere issuance of a signing statement does not indicate that a statute will not be enforced as written. Frequently, signing statements simply reflect the understanding that Congress enacted legislation against the backdrop of the President's well-understood duties and responsibilities.

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Senator Arlen Specter
Questions for the Record
for
Michelle Boardman
Deputy Assistant Attorney General
"Presidential Signing Statements"
June 27, 2006

1) **For the McCain Amendment or the PATRIOT Act, if the President thinks that the legislation needs a provision added to make the Act constitutional, wouldn't the President be better off if he followed the Constitution, vetoed the Bill, and then asked the Congress to pass it in accordance with what he would accept?**

ANSWER: On January 18, 2007, the Department responded to an identical question submitted to the Attorney General after the Committee's July 18, 2006 Department of Justice oversight hearing. Please see the answer to question 15 in that set of questions for the record.

In addition, we note that the President's signing statement respecting the Detainee Treatment Act (the "McCain Amendment") is not an indication that the President views the provision to be unconstitutional or that the Government will not abide by it. On the contrary, as the President clearly stated in January 2006, "No American will be allowed to torture another human being anywhere in the world. And I signed the appropriations bill with the McCain amendment attached on because that's the way it is. . . . [M]ake no mistake about it, the McCain amendment is an amendment we strongly support and will make sure it's fully effective." *See* http://www.whitehouse.gov/news/releases/2006/01/20060126.html.

The President's signing statement regarding sections 106A and 119 of the USA PATRIOT Improvement and Reauthorization Act, involving audits on the use of Section 215 authorities to access certain records and on the use of national security letters ("NSLs"), is not an indication that the Government will fail to abide by those provisions. Inspector General Glenn A. Fine confirmed in his testimony before this Committee that "the FBI and the Department cooperated fully with our review" under the Act and even "agreed to declassify important aspects of the report to permit a full airing of the issues we describe in the report." Statement of Glenn A. Fine before the Senate Judiciary Committee, "The FBI's Use of National Security Letters and Section 215 Requests for Business Records" at 12 (Mar. 21, 2007), *available at* http://www.usdoj.gov/oig/testimony/0703a/final.pdf. Ms. Boardman also stated during her testimony before the Committee in June 2006 that the Department of Justice cooperated fully with the Inspector General's audits that were then ongoing. The first two audits, which cover 2002-2005 for Section 215 authorities and 2003-2005 for NSLs, were completed in March of this year. Both classified and unclassified versions of the audits have been provided to Congress; the unclassified versions are available at http://www.justice.gov/

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oig/special/s0703b/final.pdf and http://www.justice.gov/ oig/special/s0703a/final.pdf. The audits for 2006 are ongoing, and the Department is again cooperating. The IG's audit reports on 2006 use of these authorities are due December 31, 2007.

Nor is the President's signing statement with respect to section 756(e)(2) of the Act, which states that the President shall submit recommendations for legislation to Congress, an indication that he will fail to do so. It is simply an indication that the Constitution provides that the President shall "recommend to [Congress's] Consideration such Measures as *he shall judge necessary and expedient.*" U.S. Const., art. II, § 3 (emphasis added).

2) Why didn't the President ask Congress to put the language that he wrote in his Patriot Act signing statement into the text of the Patriot Act?

ANSWER: Where an enrolled bill is constitutional on its face, there is no call for a President to ask Congress to change the bill before he signs it into law. It can be beneficial, however, for the President to use signing statements to remind the Executive Branch, the public, and Congress that information-sharing requirements do not alter the President's constitutional duty to oversee the appropriate disclosure of sensitive information.

The President's signing statement closely followed signing statements issued by previous Presidents involving similar provisions. When Congress passes a bill requiring the Executive Branch to produce information, Presidents routinely observe in signing statements that Congress has done so against the backdrop of what President Clinton, in a signing statement, called the "President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch." *Statement on Signing the National Defense Authorization Act for Fiscal Year 2000*, 2 Pub. Papers of William J. Clinton 1685, 1688 (Oct. 5, 1999); *see also Statement by the President upon Approval of Bill Amending the Mutual Security Act of 1954*, Pub. Papers of Dwight D. Eisenhower 549 (July 24, 1959) ("I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine.").

3) The FISA Court has proven adept at maintaining the secrecy with which it was charged and it possesses the requisite expertise and discretion for adjudicating sensitive issues of national security. Given the FISA Court's expertise at safeguarding confidential information, can you please explain the President's opposition to submitting the NSA Program to the FISA Court for the FISA Court to determine the NSA Program's constitutionality?

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ANSWER: As you are aware, on January 10, 2007, a judge of the Foreign Intelligence Surveillance Court ("FISC") issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of those orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program is now being conducted subject to the approval of the FISC.

Senator Charles E. Schumer
Questions for the Record
for
Michelle Boardman
Deputy Assistant Attorney General
"Signing Statements"
June 27, 2006

1. **The *Boston Globe* has reported that President Bush has "claimed the authority to disobey more than 750 laws enacted since he took office," and that this is more than all previous presidents combined. You noted in your testimony that "Congress has no power to enact unconstitutional laws," and when they do, "the President is bound to defer to the Constitution." Do you believe that the Republican Congress routinely passes unconstitutional laws? Please identify all those portions of any enacted law that the Administration believes are unconstitutional.**

ANSWER: The issuance of a signing statement does not indicate that the law will not be enforced as written. Nor does it even necessarily indicate that the President believes that a bill is unconstitutional, and Ms. Boardman's testimony should not be read to suggest otherwise. The testimony of Ms. Boardman's that you quote simply noted the undeniable fact, recognized by the Supreme Court since at least *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that a statute that is inconsistent with the Constitution must yield to it. Finally, it is not practicable to survey the 120 volumes of United States Statutes at Large (and the many volumes of the Revised Statutes of the United States) to identify "all those portions of any enacted law" that may be unconstitutional.

In addition, please note that on May 3, 2006, the *Boston Globe* issued a correction, a copy of which is attached, that reads: "Because of an editing error, the story misstated the number of bills in which Bush has challenged provisions. He has claimed the authority to bypass more than 750 statutes, which were provisions contained in about 125 bills." Although inartfully stated, this correction reveals that the Globe intends in these articles to refer to *750 individual provisions* included in about 125 bills, and does not intend to refer to 750 individual bills or "laws enacted since he took office." Many presidents, including President Clinton, have issued signing statements with respect to a comparable number of bills. *See* Christopher Kelley, A Comparative Look at the Constitutional Signing Statement 18 (2003) (available at http://mpsa.indiana.edu/conf2003papers/1031858822.pdf).

Counting the number of *individual provisions* referenced in signing statements is a misleading statistic, because President Bush's signing statements tend to be more specific in identifying individual provisions than his predecessors' signing statements. President Clinton, for example, routinely referred in signing statements to "several provisions" that raised constitutional concerns without enumerating the particular provisions in question. *See, e.g.*, *Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000*, 2 Pub. Papers of William J. Clinton 2156, 2160-62 (Nov. 29, 1999) ("to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it

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would be inconsistent with my constitutional authority."; "This legislation includes *a number of provisions* . . . regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration's objections to *most of these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities."; "Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS* vs. *Chadha.*) (emphasis added). It is noteworthy that for many years, academic literature on signing statements focused on the number of bills about which Presidents issued signing statements, rather than the number of provisions referenced by such statements, suggesting that that is the more relevant consideration. We are not aware of any commentator focusing on the number of *provisions* referenced in signing statements until just last year. The greater specificity of the President's signing statements promotes their utility as a "useful device for transparent and open government." *Signing Off*, Wash. Post, July 28, 2006, at A24.

2. **One of Attorney General Meese's main goals when he expanded the use of the signing statement under President Reagan was to influence future court decisions. However, it has been reported that courts rarely factor signing statements into their decisions. To what extent are signing statements issued to influence, or aid, courts in interpreting laws?**

ANSWER: Signing statements are not binding on courts and courts have rarely referred to signing statements in their opinions. The President principally issues signing statements to communicate with Congress, persons within the Executive Branch, and the American people, although courts sometimes choose to consider such statements in construing a provision. In 1993, the Assistant Attorney General for the Office of Legal Counsel, Walter Dellinger, wrote a memorandum that identified three uses of signing statements: (1) "explaining to the public, and particularly to constituencies interested in the bill, what the President believes to be the likely effects of its adoption"; (2) "directing subordinate officers within the Executive Branch how to interpret or administer the enactment"; and (3) "informing Congress and the public" of the President's views of constitutional issues raised by the legislation. *See The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131 (1993), *available at* http://www.usdoj.gov/olc/ signing.htm. In that memorandum, Assistant Attorney General Dellinger also considered the arguments for and against consideration of presidential signing statements as a form of legislative history. The memorandum does not express a view about the appropriateness of that use of signing statements. But Assistant Attorney General Dellinger's

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memorandum does identify instances where courts cited and relied on signing statements when construing a law.

3. **When Samuel Alito served in the Justice Department, he wrote a strategy memorandum on presidential signing statements, calling for President Reagan to "concentrate on points of true ambiguity, rather than issuing interpretations that may seem to conflict with those of Congress." Do you agree that the President ought to limit his use of signing statements to the clarification of true ambiguities?**

ANSWER: We do not understand the memorandum of then-Deputy Assistant Attorney General Alito to call on the President to "limit his use of signing statements" to the clarification of ambiguities. That memorandum exclusively addressed what was then considered the "novel[]" idea "that Presidential signing statements be used to address questions of [statutory] interpretation." Memorandum for the Litigation Strategy Working Group from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Using Presidential Signing Statements to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law*, at 1 (Feb. 5, 1986). The statement quoted in your question was a measure that Deputy Assistant Attorney General Alito recommended only "*as an introductory step*," not as a permanent measure. *Id.* at 4. Moreover, the memorandum noted that "[i]n the past, Presidents have issued signing statements when presented with bills raising constitutional problems," and clearly stated that "the present proposal would not substantively alter that process." *Id.* at 1.

As Assistant Attorney General Dellinger concluded, signing statements perform many legitimate functions besides simply clarifying ambiguities. *See* Answer to Question 2, *supra*.

4. **Would you say that the President's signing statements have been limited to the interpretation of ambiguities? It seems that many of President Bush's signing statements go well beyond that limited purpose:**

   - **Last year, Congress passed an energy package that strengthened whistle-blower protections for federal employees at the Department of Energy and Nuclear Regulatory Commission. President Bush issued a signing statement claiming he could ignore those protections even though the intent of Congress was clear.**

   - **In 2004, Congress passed an intelligence bill that required the Justice Department to give oversight committees copies of memorandums outlining any new interpretations of domestic-spying laws. President Bush issued a signing statement saying that he could withhold that information despite clear congressional intent to the contrary.**

   - **In establishing the Department of Homeland Security in 2002, Congress required the department to provide oversight committees information about vulnerabilities at chemical plants and luggage screening at airports. President**

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Bush issued a signing statement asserting the right to withhold the information despite clear congressional intent to the contrary.

Are these uses of the signing statement appropriate? If the President had such strong objections to these bills, why did he not just veto them?

ANSWER: We disagree with the characterizations of the signing statements above, particularly that the *Statement on Signing the Energy Policy Act of 2005*, 41 Weekly Comp. Pres. Doc. 1267, 1267 (Aug. 8, 2005), "claim[ed] [the President] could ignore th[e] protections" of the Act. Each of the signing statements referenced closely follows the practice of other recent Presidents. The Congressional Research Service recently issued a report in which it wrote that "it is important to note that the substance of [President George W. Bush's] statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-1, CRS-9 (Sept. 20, 2006) ("*Presidential Signing Statements*"); *accord* Prof. Curtis Bradley & Prof. Eric Posner, *Signing statements: It's a president's right*, Boston Globe, Aug. 3, 2006 ("The constitutional arguments made in President Bush's signing statements are similar—indeed, often almost identical in wording—to those made in Bill Clinton's statements.").

A veto is very different from a signing statement. The fact that a President issues a signing statement about a bill does not mean he considers the measure to be unconstitutional or that he will fail to abide by it as written. A signing statement provides guidance for members of the Executive Branch, and any binding effect it has is limited to the Executive Branch during the term of the President who issued the statement. Thus, "a bill that is signed by the President retains its legal effect and character, irrespective of any pronouncements made in a signing statement, and remains available for interpretation and application by the courts (if the provision is justiciable) and monitoring by Congress." *Presidential Signing Statements* at CRS-24. By contrast, a veto immediately would render the law a legal nullity to be given no effect by courts, Congress, private litigants, and future Presidents. In addition, a President can exercise his veto power for any reason (including disagreement on policy grounds), or for no reason at all. By contrast, constitutional signing statements typically are made solely when newly enacted legislation raises an issue under the Constitution. Thus, as the Congressional Research Service explained, "[a] signing statement does not have the effect of a veto." *Id.*

In any event, as Assistant Attorney General Dellinger explained early during the Clinton Administration, "[i]n light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision." 17 Op. O.L.C. at 135; *accord Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202-03 (1994) (opinion of Assistant Attorney General Dellinger).

5. **Most of President Bush's signing statements assert that a law "will be interpreted in a manner consistent with the constitutional authority of the President" but provide no details of what that interpretation is. If one goal of the issuance of signing statements is to clarify ambiguities, why does the Administration not make more clear what its interpretation actually is?**

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ANSWER: Based on our review of the President's signing statements, we disagree that "[m]ost of President Bush's signing statements assert that a law 'will be interpreted in a manner consistent with the constitutional authority of the President'" without providing further details regarding that interpretation. When the President has used the phrase "consistent with the constitutional authority of the President," typically he has explicitly identified the relevant constitutional provision or doctrine. *E.g.*, *Statement on Signing Communications Legislation*, 40 Weekly Comp. Pres. Doc. 3013, 3013 (Dec. 23, 2004) ("The executive branch shall construe the provision in a manner consistent with the constitutional authority of the President to *recommend for the consideration of the Congress such measures, including proposals for appropriations, as he judges necessary and expedient.*") (emphasis added) (quoting U.S. Const., art. II, § 3); *Statement on Signing the Department of Homeland Security Appropriations Act, 2007*, 42 Weekly Comp. Pres. Doc. 1742, 1743 (Oct. 4, 2006) ("The executive branch shall construe section 503(c)(4) in a manner consistent with the constitutional authority of the President *to require the opinions of heads of departments*") (emphasis added) (paraphrasing U.S. Const., art. II, § 2). The President thereby notifies Congress, his subordinates within the Executive Branch, and the public of the relevant constitutional provision or doctrine that must be considered in executing the law. As noted in response to question 4 above, the CRS and scholars have noted that the President's signing statements are quite similar to those of his predecessors, specifically including President Clinton. *Presidential Signing Statements* at CRS-1, CRS-9; *accord* Bradley & Posner, *supra*. Indeed, as noted in our response to question 1 above, the President's statements are more specific in that they identify the individual provisions at issue.

6. **Almost all of President Bush's signing statements are used to interpret a statute *narrowly*, rather than *broadly*. Why was there no contemporaneous statement from the President indicating how broadly the Administration would interpret, for example, the Authorization to Use Military Force, which it has subsequently used to justify the NSA warrantless wiretapping program, among other things?**

ANSWER: The President *did* issue a signing statement on signing the Authorization for Use of Military Force, *see Statement on Signing the Authorization for Use of Military Force*, 2 Pub. Papers of George W. Bush 1124 (Sept. 18, 2001). In signing the resolution, the President did note the breadth of his war powers, noting that "[i]n signing this resolution, I maintain the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution." *Id.* at 1125.

Having carefully reviewed the President's signing statements, we do not agree that those statements are "used to interpret a statute narrowly, rather than broadly." Like the signing statements of the Presidents before him, President Bush's constitutional signing statements do not assert that he will interpret a provision "narrowly" or "broadly," but rather that he will do so consistent with the Constitution. And as both the Congressional Research Service and scholars have noted, the President's signing statements are quite similar to those of his predecessors, *see* Answer to Question 4, *supra*, reflecting the fact that they embody traditional views of the Constitution that were held by his predecessors.

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7. **There has been much focus on the use of presidential signing statements relating to torture and other national security issues, but a major pattern of President Bush's statements is that they deny Congress's authority to demand oversight and fulfill its responsibility to provide a check on the President. Are you aware of any Presidential signing statement that includes an interpretation that *limits* Presidential power?**

ANSWER: We do not agree that the President's signing statements "deny Congress's authority to demand oversight and fulfill its responsibility to provide a check on the President." As noted by the Congressional Research Service and scholars, the President's signing statements closely follow those of his predecessors. One area in which presidential signing statements historically have embodied interpretations that reflect limits on presidential power involve individual rights and civil liberties. In some instances where an Act of Congress might be capable of being construed to authorize the President to deny persons their individual rights or civil liberties, Presidents have issued signing statements indicating that they would not construe the statute in that manner.

8. **What administration officials are involved in the decision whether to issue a presidential signing statement and how precisely is the decision made in any particular case?**

ANSWER: The Office of Management and Budget coordinates the process by which the Executive Branch reviews legislation. Legislation is initially reviewed to analyze the potential legal and policy consequences of a bill, and the comments of the Executive Branch are embodied in views letters and Statements of Administration Policy that are submitted to Congress before enactment. As part of that process, the Department of Justice reviews legislation to determine its constitutionality, but anyone in the Executive Branch who participates in the legislative review process may comment on the constitutionality of a provision. Any analysis of pending or enrolled legislation is reviewed by the relevant agencies, as well as the White House staff and other staff within the Executive Office of the President and the Office of the Vice President. The President has the final authority to determine whether a signing statement is warranted and the content of any such statement.

9. **The *Boston Globe* has referred to the President's use of signing statements as a "concerted effort to expand his power at the expense of Congress." Do you agree with this characterization?**

ANSWER: No. As noted above, both the Congressional Research Service and scholars have "note[d] that the substance of [President Bush's] statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton." *Presidential Signing Statements* at CRS-9; *accord* Bradley & Posner, *Signing statements: It's a president's right*, Boston Globe ("The constitutional arguments made in President Bush's signing statements are similar—indeed,

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often almost identical in wording—to those made in Bill Clinton's statements."). As we have previously explained, the President's signing statements are entirely consistent with those of past Presidents. We are not aware that critics of the President's use of signing statements have identified any signing statements that depart from the practice of his predecessors. Moreover, signing statements have no binding effect on the courts.

Signing statements do not and cannot expand Executive Branch authority with respect to Congress, because they do not alter the obligation of Executive Branch personnel to apply statutes in a manner consistent with the Constitution. Rather, signing statements merely inform Executive Branch personnel of the authoritative legal position on the proper and constitutional application of the law and remind them of their duty to apply statutes consistent with that position (and thus the Constitution). In this manner, signing statements promote transparency in the enforcement of federal law by informing Congress and the American public of the President's position. If the President did not issue a signing statement in the face of a law that does not violate the Constitution in all instances but could raise the specter of unconstitutionality in some instances, Executive Branch personnel would nonetheless be bound to apply the statute in a manner consistent with the Constitution. The alternative to signing statements, then, is to have many Executive Branch personnel each having to do his or her own analysis of which applications of the statute might offend Constitutional mandates—undermining important interests in consistency in law enforcement and in transparency to Congress and the public.

10. Have President Bush's signing statements been part of a deliberate strategy spearheaded by the Office of the Vice President to expand executive power, as has been reported?

11. Has either Lewis "Scooter" Libby or David Addington internally advocated expanding the President's use of signing statements?

12. Is it standard procedure for the Office of the Vice President to review legislation for constitutionality?

13. Are you aware of any internal debate over whether the President's use of signing statements has been appropriate? If so, what was the nature of that debate?

ANSWER for Questions 10-13: The Office of the Vice President ("OVP"), along with offices in the Executive Office of the President and the various Executive Branch agencies, participates in the routine process coordinated by the Office of Management and Budget for reviewing and commenting on legislation and for proposing signing statements. Like all entities participating in that process, OVP may offer constitutional comments. Although internal deliberative discussions during that process are confidential, as noted above, this Administration's approach to signing statements does not represent an attempt to expand executive power, but rather is a continuation of the practice of prior Administrations. *See generally Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131.

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14. Do you think the President should have the final word on deciding whether an act of Congress is constitutional?

ANSWER: Signing statements do not give the President "the final word on deciding whether an act of Congress is constitutional." Signing statements are part of a respectful dialogue between co-equal Branches on statutory and constitutional matters, and Congress can respond to such statements in the passage of subsequent legislation and through numerous other mechanisms, formal and informal. That dialogue is a part of the system of checks and balances that the Founders provided under the Constitution. In addition, enforcement decisions implementing a signing statement may be subject to court challenge under appropriate circumstances, and under such circumstances, courts may address the legal issues involved.

15. The design of most of President Bush's signing statements makes it very hard for anyone to challenge them in court because of standing and other procedural barriers. Are you aware of whether the Administration has deliberately designed its statements to prevent judicial review?

ANSWER: Signing statements are not themselves subject to challenge in court. That reflects the nature of signing statements rather than "the design of . . . President Bush's signing statements." As the Congressional Research Service concluded, "there is little evident support for the notion that signing statements have legal force and effect in and of themselves. If an action taken by a President in fact contravenes legal or constitutional provisions, that illegality is not augmented or assuaged merely by the issuance of a signing statement." *Presidential Signing Statements* at CRS-14.

16. Do you believe a citizen adversely affected by a president's decision not to follow an act of Congress ought to be able to challenge that decision in a court of law? How might a citizen do so?

ANSWER: Whenever the Government takes an action, either through legislation or executive action, the ability of a citizen to seek redress through the courts turns on whether the citizen can meet the constitutional requirements of standing and on whether the law allows for personal redress. Neither of those factors is affected by whether a President issues a statement upon signing a law.

17. What is to stop one President from declaring a law Constitutional, the next President to decide it is unconstitutional, and so on? Is not the possibility that Presidents will go back and forth on Constitutional interpretations – without the stabilizing force of *stare decisis* that binds the courts – asking for trouble?

ANSWER: It is precisely because Presidents hold the executive power in trust for the people and future Presidents that the Constitution requires each President to swear to "preserve, protect, and defend the Constitution," U.S. Const., art. II, § 1, cl. 8. Presidents are responsible for ensuring that the manner in which they enforce acts of Congress is consistent with America's

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founding document. *See, e.g.*, 18 Op. O.L.C. at 200 ("[T]he President can and should exercise his independent judgment to determine whether the statute is constitutional."). In fact, presidential signing statements tend to act as a "stabilizing force" by showing future Presidents how a prior President viewed a particular statutory provision in light of the Constitution. Indeed, it is noteworthy how consistently Presidents have employed signing statements for at least the past quarter-century.

18. If the founders wanted to promote the type of activity engaged in by this President – i.e., repeatedly issuing signing statements but choosing not to veto a bill when he believes a subpart of it is unconstitutional – why did they not provide for a line item veto in the Constitution?

ANSWER: In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court stated that the President's power under the Line Item Veto Act to "change the text of duly enacted statutes" and to "amend . . . Acts of Congress by repealing a portion of each" violated the Presentment Clause of the Constitution. *Id.* at 438, 447. A signing statement neither changes the text of a statute nor amends a statute by repeal or otherwise.

As noted above, a signing statement does not *ipso facto* mean that the President considers a provision to be unconstitutional or that the law will not be enforced as written. A signing statement provides guidance for members of the Executive Branch, and any binding effect is limited to the Executive Branch. Thus, "a bill that is signed by the President retains its legal effect and character, irrespective of any pronouncements made in a signing statement, and remains available for interpretation and application by the courts (if the provision is justiciable) and monitoring by Congress." *Presidential Signing Statements* at CRS-24. By contrast, a line-item veto immediately would render the provision in question a legal nullity to be given no effect by courts, Congress, private litigants, and future Presidents. In addition, a President can exercise his veto power for any reason (including disagreement on policy grounds), or for no reason at all. By contrast, constitutional signing statements typically are made solely when newly enacted legislation raises issues under the Constitution. Thus, as the Congressional Research Service explained, "[a] signing statement does not have the effect of a veto." *Id.*

As Assistant Attorney General Dellinger concluded after an extensive review of the caselaw and historic practice, "[i]n light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision." 17 Op. O.L.C. at 135. It has never been the case that the President's only option when confronting a bill containing a provision that is constitutionally problematic is to veto the bill. Presidents Jefferson, Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Lyndon Johnson, Ford, Carter, George H.W. Bush and Clinton have signed legislation rather than vetoing it despite concerns that particular aspects of the legislation posed constitutional concerns. *See* 17 Op. O.L.C. at 132 nn.3 & 5, 134, 138; *see also INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) ("it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds"). Compared to vetoing a bill, giving constitutionally infirm provisions a "saving" interpretation through a signing statement gives fuller effect to the wishes of Congress by giving complete effect to the vast

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majority of a law's provisions and the fullest possible effect to even constitutionally problematic provisions. This approach is not an affront to Congress. Instead, it gives effect to the established legal presumption that Congress did not choose to enact an unconstitutional provision. As Assistant Attorney General Dellinger explained, this practice is "analogous to the Supreme Court's practice of construing statutes, where possible, to avoid holding them unconstitutional." 17 Op. O.L.C. at 133. A veto, by comparison, would render all of Congress's work a nullity, even if, as is often the case, the constitutional concerns involve relatively minor provisions of major legislation. The value of this ability to preserve legislation has grown in step with the use of large omnibus bills in the last few decades.

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Senator Arlen Spector
Chairman
Committee on the Judiciary
Washington, DC 20510

RE: Hearing on Signing Statements

Dear Chairman Specter:

Please find my answers to the Committee's questions regarding my testimony below.

Question (of Senator Kennedy):

The administration has been particularly bold in claiming an absolute right to nullify any parts of laws that intrude on what the president seems to view as his absolute right to control all aspects of the military. This position is plainly at odds with the Constitution, which grants Congress the power to declare war, the right to raise and support armies, the power to control funding for the military, and the right "[t]o make rules for the government and regulation of the land and naval forces".

Despite the Constitution's plain provisions about governing and regulating the military, the President rejected the ban on torture which Congress passed with overwhelming support. The President rejected the ban on using U.S. troops in combat operations in Colombia, despite at least four statements saying he can't.

President Bush didn't invent interpretive signing statements, but is it fair to say that he is applying them in a way that's unprecedented in its scope? When such statements expand executive power and blatantly trample on the plainly worded powers of Congress, what can Congress do to protect its constitutional responsibilities?

Answer:

President George W. Bush has employed signing statements to exercise the equivalent of unconstitutional line-item vetoes much more frequently and boldly than did his predecessors. For example, he negotiated intensely with Congress over the Detainee Treatment Act of 2005, signed the bill into law, and concurrently in a signing statement declared his intent to commit torture nonetheless in contravention of the Act as an inherent constitutional power if he unilaterally concluded that the crime might yield

useful foreign or military intelligence.

On the other hand, presidential signing statements suffer the same constitutional infirmities irrespective of the frequency of their use. Article I, section 7 and the presidential oath in Article II requires a president to veto bills he believes are unconstitutional in whole or in part. That was the original intent of the Founding Fathers and the practice of President George Washington, who presided over the constitutional convention. In Clinton v. New York (1998), the United States Supreme Court was emphatic that a line-item veto is unconstitutional. It results in the President's enforcement of a law that Congress did not enact. A signing statement declaring that the President will not enforce provisions of a bill he has signed into law that he believes are unconstitutional is indistinguishable. Moreover, a signing statement in lieu of a veto denies Congress the opportunity to override the President as contemplated by the Presentment Clause. And it blurs the President's political accountability by clouding public knowledge that he intends to sabotage part of what he ostensibly approved.

Congress enjoys at least two avenues to protect against signing statement usurpations. First, it might enact a law conferring standing on itself to seek a declaratory judgment to challenge the President's claimed constitutional power to nullify provisions of bills he has signed into law if he unilaterally declares them unconstitutional. The law of standing if foggy, but I believe the chances are better than 50 percent that the Supreme Court would sustain congressional standing because of the clear textual prohibition of line-item vetoes. Only one case in the Supreme Court would be needed to definitively resolve the signing statement issue.

Congress might also enact a statute employing the power of the purse to prevent

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the President from enforcing a law that Congress did not pass. The statute would stipulate that no monies of the United States could be expended to enforce any law that the President in a signing statement declared contained unconstitutional provisions that he would not obey. This remedy would require the President to either enforce all of the provisions of a bill he has signed or none at all, as the Presentment Clause intended. It has the disadvantage, however, of denying Congress the opportunity to override a veto. That opportunity would arise if the President honored his constitutional obligation to veto any bill that he believes is unconstitutional in whole or in part.

Sincerely,

Bruce Fein

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August 15, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

Thank you again for the opportunity to express my views about presidential signing statements at the Judiciary Committee hearing on June 27, 2006. And thank you, too, for the opportunity to contribute to the development of sections 1-4 of S. 3731, "The Presidential Signing Statements Act of 2006," which you introduced on the floor of the Senate three weeks ago.[1] Quite apart from the substantive provisions of the bill, I entirely agree with its conclusion that Congress has power to enact federal rules of statutory interpretation[2] and that it "can and should exercise this power over the interpretation of federal statutes in a systematic and comprehensive manner."[3] If I can be of any assistance in that momentous undertaking, please let me know.

As you requested in your letter of July 7, I write to respond to the written follow-up questions of Senator Feinstein and Senator Kennedy. I have reproduced the Senators' questions below, and after each question I have written my answer.

SENATOR FEINSTEIN'S QUESTIONS

SENATOR FEINSTEIN: In your written testimony you argue that the President's job is to execute and interpret the law because "it is simply impossible, as a matter of logic, to execute a law without determining what it means." You use the example of a statute that requires the interpretation of whether a tomato is a vegetable.

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[1] S. 3731, 109th Cong. (as introduced by Sen. Specter, July 26, 2006).
[2] *See id.* § 2(8).
[3] *Id.* § 2(9). *See also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

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In this line of argument, however, you gloss over the concept of plainly interpreting the law in order to understand its meaning, versus making a constitutional evaluation about the soundness of a law combined with making a unilateral decision about whether to enforce the law.

- **QUESTION:** *Are you arguing that in addition to understanding the plain language of a statute, and therefore "interpreting" a law, the President also has the authority to determine whether a law is constitutional? Whether he is bound by the law? Whether it should be enforced?*

  ANSWER: In my testimony, I said nothing whatsoever about whether the President has power to determine that a statute is unconstitutional and whether he may or must decline to enforce it under such circumstances. I did not address these questions because they are not implicated at all by the vast majority of presidential signing statements. Virtually every signing statement issued by President Bush says only how he will "construe"[4]—that is, *interpret*[5]—the statute, and strongly implies that *the President will faithfully execute the statute as so interpreted.*

  In rare circumstances, the President may conclude that a statute is thoroughly unconstitutional on its face, such that no constitutional interpretation is possible. In such circumstances, the President's oath to "preserve, protect and defend the Constitution of the United States"[6] and his duty to "take Care that the Laws,"[7] including the Constitution,[8] "be faithfully executed,"[9] entail that the President may (and perhaps must) decline to enforce such statutes. While some scholars disagree with that proposition,[10] the executive branch has consistently endorsed

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[4] *See, e.g.*, Statement on Signing the Deficit Reduction Act of 2005, 42 WEEKLY COMP. PRES. DOC. 215 (Feb. 8, 2006) ("The executive branch shall *construe* such provisions in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch . . . .") (emphasis added); Statement on Signing the Trafficking Victims Protection Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 39 (Jan. 10, 2006) ("The executive branch shall *construe* this reporting requirement in a manner consistent with the President's constitutional authority as Commander in Chief and the President's constitutional authority to conduct the Nation's foreign affairs.") (emphasis added); Statement on Signing the Enhanced Border Security and Visa Entry Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 822 (May 14, 2002) ("Section 2(4)(G) of the Act defines as a Federal law enforcement agency the 'Coastal Security Service.' Because no such agency exists, and the principal agency with coastal security functions is the U.S. Coast Guard, the executive branch shall *construe* this provision as referring to the Coast Guard.") (emphasis added).

[5] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 489 (1986) (defining "construe" as "to construct"; defining "construct" as "to construe or interpret (as a document, statement, expression)"). *See also* BLACK'S LAW DICTIONARY 333 (8th ed. 2004) (defining "construe" as "[t]o analyze and explain the meaning of (a sentence or passage)").

[6] U.S. CONST. art. II, § 1, cl. 8.

[7] U.S. CONST. art. II, § 3.

[8] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land . . . .").

[9] U.S. CONST. art. II, § 3.

[10] *See* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7, 14-22 (describing the debate).

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it,[11] as have four Justices of the Supreme Court.[12] The most thorough and scholarly account of this power and duty may be found in the persuasive opinion of Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel under President Clinton.[13]

But, again, this power is not implicated at all by the vast majority of presidential signing statements, in which the President merely explains that he will "construe" statutes to be consistent with the U.S. Constitution. As Senator Kennedy ably put the point: "I'm sure we'd all agree that some interpretation is necessary for enforcement. It's part of the President's responsibility to read ambiguous provisions to avoid constitutional problems."[14]

- **QUESTION:** *If so, is there any check on this authority?*

  ANSWER: If the President determines that a statute is unconstitutional and declines to enforce it on those grounds, then, depending on the circumstances, the courts may have an opportunity to review that decision. Indeed, according to the Office of Legal Counsel, "the President may base his decision to comply (or decline to comply) [with a statute that he believes is unconstitutional] in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch."[15]

  More generally, the constitutional judgments of the President—like those of Congress—are subject to the ultimate check of election. If the People disagree

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[11] *See* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199, 199 (1994) ("[Executive branch o]pinions dating to at least 1860 assert the President's authority to decline to effectuate enactments that the President views as unconstitutional."); *id.* at 202 ("[E]very President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions.").

[12] *See* Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 906 (Scalia, J., concurring in part and concurring in the judgment, joined by O'Connor, J., Kennedy, J., & Souter, J.) ("[I]t was not enough simply to repose the power to execute the laws . . . in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including . . . [the power] to disregard [laws] when they are unconstitutional."). *See also* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788 304-305 (John Bach McMaster & Frederick D. Stone eds. 1888) (quoting James Wilson saying, "it is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass in the usual *mode* notwithstanding that transgression; but when it comes to be discussed before the judges, when they consider its principles, and find it to be incompatible with the superior powers of the constitution, it is their duty to pronounce it void . . . . In the same manner the *President of the United States could shield himself and refuse to carry into effect an act that violates the constitution*.") (emphasis added).

[13] *See* Presidential Authority to Decline to Execute Unconstitutional Statutes, *supra* note 11. *See also* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919-22 (1990).

[14] Letter from Hon. Arlen Specter, Chairman, United States Senate Committee on the Judiciary, to Nicholas Rosenkranz, Associate Professor of Law, Georgetown University Law Center (July 7, 2006) (enclosure: Senator Edward M. Kennedy, Questions for the Record for Nicholas Q. Rosenkranz). *Accord* Easterbrook, *supra* note 9, at 905 ("No one would take seriously an assertion that the President may not interpret federal law.").

[15] Presidential Authority to Decline to Execute Unconstitutional Statutes, *supra* note 11, at 201.

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with the constitutional judgments of a President (or a member of Congress), that may be an excellent reason for electing someone else.

Finally, if Congress disagrees with the constitutional judgment of the President and believes that the matter is too grave to wait for the next election, it may institute impeachment proceedings.[16] This has happened only once in our nation's history,[17] and in that case, the Senate acquitted the President[18]—and the Supreme Court ultimately vindicated the President's constitutional judgment.[19] In the view of many scholars, this historical precedent suggests that Congress should not resort to impeachment in cases of reasonable, good faith disagreement over the meaning of the Constitution.[20] Nothing in this President's constitutional signing statements suggests any unreasonableness or bad faith.

- **QUESTION:** *In your opinion, is there a difference between the "interpretation" of is a tomato a vegetable, and can I direct the military or intelligence personnel to use torture in direct contradiction to the ban on torture contained in the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006?*

  ANSWER: Obviously, there are dramatic differences between the interpretation of the word "vegetables" in the Tariff Act of March 3, 1883,[21] and the interpretation of the ban on torture in the Department of Defense Supplemental

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[16] *See* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."); U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

[17] *See* Articles of Impeachment Against Andrew Johnson, CONG. GLOBE, 40th Cong., 2d Sess. 1616-18 (1868). *See also* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 150 (1992).

[18] *See* CONG. GLOBE, 40th Cong., 2d Sess. 2497 (1868) (vote to acquit President Johnson). *See also* REHNQUIST, *supra* note 17, at 233-35.

[19] *See* Myers v. United States, 272 U.S. 52, 176 (1926) (holding the Tenure of Office Act unconstitutional).

[20] *See, e.g.*, Tom Campbell, *Responsibility and War: Constitutional Separation of Powers Concerns*, 57 STAN. L. REV. 779, 782 (2004) ("[I]t would be inappropriate to impeach and remove a President who was in good faith exercising powers he thought he had as commander in chief."); John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 659 (1999) ("[T]he distinction between violation of settled law and a disagreement over the content or constitutionality of a law is the very reason for the consensus that the impeachment of President Richard Nixon was the correct course of action, but impeachment of President Andrew Johnson was not. . . . President Johnson simply refused to follow the Tenure of Office Act, a law that he believed in good faith was unconstitutional."). *See also* Charles L. Black, Jr., IMPEACHMENT: A HANDBOOK 30 (1974) ("[C]ertainly the phrase 'high Crimes and Misdemeanors,' whatever its vagueness at the edges, seems absolutely to forbid the removal of a president on the grounds that Congress does not on the whole think his administration of public affairs is good."); REHNQUIST, *supra* note 17, at 271 (The acquittal of President Johnson established that "as to the policies [the President] sought to pursue, he would be answerable only to the country as a whole in the quadrennial presidential elections, and not to Congress through the process of impeachment.").

[21] *See* Nix v. Hedden, 149 U.S. 304 (1893) (interpreting the word "vegetables" in the Tariff Act of March 3, 1883 to include tomatoes).

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Appropriations Act. The latter, of course, is incomparably more important than the former. But in momentous cases as well as trivial ones, the President's duty to execute the law inevitably requires that he interpret it first.[22] In the statement to which you refer, as in the vast majority of this President's signing statements, the President merely stated how he would "construe" the statute—and he strongly implied that he would fully comply with the statute so construed.[23]

- **QUESTION:** *Interestingly, in your example about the tomato you also outline a role for Congress and the courts. However, what about these signing statements where it is so ambiguous Congress does not know if the law is being followed, and there is no one who can satisfy the standing requirement? That is the issue, not a perfect theoretical example, but rather a messy real life situation where Congress has no idea if the President is executing the law, and even if we were to pass another law saying "we really mean it" whether he would execute that law. What then? Is that still an "uncontroversial" use of signing statements?*

  ANSWER: Again, presidential signing statements generally do not raise any doubt that "the law is being followed" or that "the President is executing the law." These statements generally do nothing more than explain how the President *interprets* the law[24]—what he believes the law *means*—and they strongly imply that he will faithfully execute the law as so interpreted.

  If the President does decide that he will not enforce a statute because he determines that it is unconstitutional, you are quite right that the Congress and the People have a right to know.[25] But this President's signing statements almost never suggest that he has made any such decision or any such determination.

- **QUESTION:** *Do you really equate defining a tomato with a statement that reads the President "shall construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch"?*

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[22] *See Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *Signing Statement Hearing*] (statement of Nicholas Quinn Rosenkranz, Associate Professor of Law, Georgetown University Law Center). *Accord* Easterbrook, *supra* note 9, at 905 ("No one would take seriously an assertion that the President may not interpret federal law.").

[23] *See* Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005) ("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 . . . .").

[24] *See supra* notes 4-5 and accompanying text.

[25] *See* 28 U.S.C. § 530D(a)(1) (Supp. II 2002) ("The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice . . . establishes or implements a formal or informal policy to refrain . . . from enforcing, applying, or administering any provision of any Federal statute . . . whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional . . . .").

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ANSWER: There seems to be widespread confusion about the meaning of the phrase "unitary executive branch." This phrase signifies nothing more than a basic constitutional truth: Article II, section 1, of the Constitution provides that "the Executive Power shall be vested in *a* President"[26]—that is, *one* President. The word "unitary" means "one,"[27] and the executive branch is "unitary" in the sense that the Constitution vests the Executive Power in one, single person.[28] As a general matter, therefore, the President has the power and the duty to supervise and control the exercise of executive power and the operations of the executive branch.[29] This principle has been clear from the beginning,[30] and President Clinton understood it just as well as President Bush; though President Clinton did not use the phrase "unitary executive," his signing statements on this point were substantially the same.[31]

Of course, Congress knows this constitutional principle too—and presumably has no desire to violate it. So if a statute is ambiguous, and one possible reading of it would violate this constitutional principle, the President presumes that Congress intended some other, constitutional meaning. In other words, he "construe[s]" such a statute to be "consistent with [his] constitutional authority to supervise the

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[26] U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

[27] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2500, 2501 (1986) (defining "unitary" as "of, relating to, based upon, or characterized by unity"; defining "unity" as "the quality or state of being or consisting of one").

[28] *See* 12 Op. Off. Legal Counsel 47, 48 (1988) ("As head of a unitary executive, the President controls all subordinate officers within the executive branch. The Constitution vests in the President of the United States 'The executive Power,' which means the whole executive power.").

[29] *See id.* ("[The President] is solely responsible for supervising and directing the activities of his subordinates in carrying out executive functions. Any attempt by Congress to constrain the President's authority to supervise and direct his subordinates in this respect, violates the Constitution."). *See also* Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 607 (2005) ("[T]hree devices are generally viewed as necessary to any theory of the unitary executive: the president's power to remove subordinate policy-making officials at will, the president's power to direct the manner in which subordinate officials exercise discretionary executive power, and the president's power to veto or nullify such officials' exercises of discretionary executive power.").

[30] *See* 1 ANNALS OF CONG. 463 (Joseph Gales ed., 1834) (statement of James Madison, June 16, 1789) ("The Constitution affirms, that the Executive power shall be vested in the President. . . . If the Constitution has invested all Executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his Executive authority."). *See also* Stephen G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1460 (1997) ("[T]he historical practice over the last 208 years tends to confirm the textual, structural, originalist, and normative arguments in favor of a presidential power to control the execution of the laws.").

[31] *See, e.g.*, Statement on Signing the Balanced Budget Act of 1997, 33 WEEKLY COMP. PRES. DOC. 1190 (Aug. 5, 1997) ("I will construe this provision in light of my constitutional duty and authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and *to supervise and guide my subordinates*, including the review of their proposed communications to the Congress.") (emphasis added); Statement on Signing the Treasury and General Government Appropriations Act, 1998, 33 WEEKLY COMP. PRES. DOC. 1544 (Oct. 10, 1997) ("Any broader interpretation of the provision . . . would raise substantial constitutional concerns in depriving the President and his department and agency heads of their ability *to supervise and control the operations and communications of the executive branch.*") (emphasis added).

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unitary executive branch."[32] This is nothing more than a specific application of a well-established canon of statutory interpretation, born of respect for Congress:[33] a statute should, if at all possible, be given a constitutional interpretation.[34]

SENATOR FEINSTEIN: In your written testimony you also argue that the constitutional interpretations as used by this President in his signing statements are no more than the assertion of a traditional canon of statutory interpretation—"the rule is settled that as between two possible interpretations of a statute, one of which it would be unconstitutional" and the other valid then the Courts and Presidents interpret the law so as to be constitutional.

- **QUESTION:** *However, my concern is when there are conflicting constitutional provisions; such as the President's Article II authority as Commander in Chief and the Congress's Article I authority "to declare war... to raise and support armies... to make rules for the government and regulation of the land and naval forces..." etc. In such a case as that, who decides?*

  ANSWER: Statutes that implicate two or more constitutional provisions may require more sophisticated analysis than statutes implicating only one, but the principle remains the same. Each branch of government has an independent obligation to interpret the Constitution[35]—the Congress, when deciding whether to pass a law;[36] the President, when deciding whether to veto a bill, how to interpret a law, or whether he must enforce it;[37] and the Court in deciding whether to apply a law in a properly presented case or controversy.[38] Which branch will get the final word depends on the type of constitutional question presented and on the constitutional answer given.[39]

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[32] *E.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, 42 WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006).

[33] *See* Rust v. Sullivan, 500 U.S. 173, 191 (1991) ("[The canon of constitutional avoidance] is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.").

[34] *See* Hooper v. California, 155 U.S. 648, 657 (1895) ("[E]very reasonable construction must be resorted to in order to save a statute from unconstitutionality.").

[35] *See* Unpublished Memorandum of James Madison, *quoted in* Easterbrook, *supra* note 9, at 921 ("[E]ach [department] must in the exercise of its functions be guided by the text of the Constitution according to his own interpretation of it . . . ."); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 222 (1994) ("[T]he power to interpret the law, including the Constitution, is like any other power too important to vest in a single set of hands. As a matter of first principles of constitutional structure and the political theory underlying that structure, we should be strongly disinclined to find the meta-power to interpret the Constitution . . . centralized in a single institution (like the Supreme Court)."); Rosenkranz, *supra* note 3, at 2088 n.7 ("Each branch has an independent obligation to read the Constitution in the best way it knows how.").

[36] *See, e.g.*, 2 ANNALS OF CONGRESS 1896-1902 (1791) (Madison's speech in the House of Representatives arguing against the proposed Bank of the United States on constitutional grounds).

[37] *See* Easterbrook, *supra* note 9, at 919-20.

[38] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[39] *See* Unpublished Memorandum of James Madison, *quoted in* Easterbrook, *supra* note 9, at 921 ("[I]n the event of irreconcilable [constitutional] interpretations [by the separate branches], the prevalence of one or the other department must depend on the nature of the case, as receiving its final decision from one or the other, and passing from that decision into effect, without involving the functions of any other.").

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- **QUESTION:** *In addition, in many of the signing statements issued by this President his statement does not merely follow what the constitution requires. For instance, many of his signing statements include language such as: the President "shall construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch." Now the theory of the unitary executive is nowhere in the constitution, nor was it in place when Justice Holmes came up with the canon of statutory interpretation that you referenced. So, I'm wondering under what do you make of this type of a statement?*

  ANSWER: Please see my answer to the question above, regarding the phrase "unitary executive."[40]

- **QUESTION:** *In your written statement you defend the constitutionality of Presidential signing statements in a "coin-flip" situation. Is a Presidential signing statement constitutional if it contravenes the clear language of the statute?*

  ANSWER: A presidential signing statement should not "contravene" the clear language of a (constitutional) statute. If a statute is clear, and constitutional, the President must take care that it be faithfully executed.[41] And if it is clear, and unconstitutional, the President should declare it unconstitutional and act accordingly.[42]

  But in a great many cases, the language is not so clear. As I explained in my written statement,[43] the canon of constitutional avoidance does *not* merely apply in "coin-flip situations," in which two readings of a statute are equally plausible. Rather, as the Supreme Court stated more than a century ago, "*every reasonable construction* must be resorted to in order to save a statute from unconstitutionality."[44] In other words, the canon is not merely a tie-breaker; it may apply even when other traditional tools of statutory construction seem to point to a different—and unconstitutional—interpretation.[45] Once again, the

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See also infra notes 48-55 and accompanying text (answering Senator Kennedy's question about which branch gets the final word on constitutional questions).

[40] *See supra* text accompanying notes 26-34.

[41] *See* U.S. CONST. art. II, § 3.

[42] *See supra* note 25 and accompanying text.

[43] *See Signing Statement Hearing, supra* note 22 (statement of Nicholas Quinn Rosenkranz).

[44] Hooper v. California, 155 U.S. 648, 657 (1895) (emphasis added).

[45] *But see Signing Statement Hearing, supra* note 22 (statement of Nicholas Quinn Rosenkranz) ("[I]t may be argued that [the canon of constitutional avoidance] has grown too strong."). *See also* Marozsan v. United States, 852 F.2d 1469, 1495 (7th Cir. 1988) (Easterbrook, J., dissenting) ("Construing statutes to avoid all constitutional questions treats the penumbra around the Constitution as if it has independent force, and thereby denies effect to real laws on the basis of insubstantial 'concerns'."); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) ("The practical effect of interpreting statutes to avoid raising constitutional questions is . . . to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of

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rationale is a deep respect for the constitutional judgment of Congress: the presumption is very strong that Congress does not intend to pass unconstitutional statutes.

SENATOR KENNEDY'S QUESTIONS

SENATOR KENNEDY: Your testimony characterizes presidential signing statements as modest attempts by the President to clarify statutory ambiguities. I'm sure we'd all agree that some interpretation is necessary for enforcement. It's part of the President's responsibility to read ambiguous provisions to avoid constitutional problems.

Unfortunately, your characterization does not accurately reflect the practice that we are concerned about. The President is substituting his own interpretation for the settled interpretations of Congress, the Courts, and other Presidents on major issues.

One obvious example is affirmative action. The Administration believes that affirmative action provisions are unconstitutional under the Equal Protection Clause. Congress disagrees. The Supreme Court disagrees, and has rejected the administration's arguments.

Now, after losing in Congress and losing in the Courts, the President continues to issue signing statements like the one on the "Intelligence Reform and Terrorism Prevention Act", in which he directed the Executive Branch to "construe provisions of the Act that relate to race, ethnicity, or gender in a manner consistent with" the Administration's failed Equal Protection view of these programs. That's not construction of an ambiguous statute. That's the President construing a statute out of existence. The President is hardly respecting the legislature and the courts by construing these statutes this way.

- **QUESTION:** *Is there anything the President can't do as long as he pays lip-service to protecting the Constitution? If the President interprets the Constitution as invalidating provisions that Congress, the courts, and previous presidents all believe are constitutional, is there anything that Congress or the courts can do to stop him? Will the president always have the final word?*

  ANSWER: Article II, section 1, of the Constitution provides that "Before [the President-elect] enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"[46] The Framers of the Constitution emphatically did not believe that this oath was mere "lip-service."[47] The President is entitled to a strong presumption that his constitutional judgments are made in good faith.

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the Constitution . . . . And we do not need that."); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 89.

[46] U.S. CONST. art. II, § 1, cl. 8.

[47] *See generally* MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH 91-118 (1999) (discussing the importance of oaths in early American political theory and practice).

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It is true that the President may, on occasion, disagree with the Supreme Court about the meaning of the Constitution.[48] Likewise, the President may, on occasion, disagree with Congress about the meaning of the Constitution.[49] Constitutional disagreements among the three branches are a natural and inevitable aspect of our separation of powers.[50] If such disagreements are in good faith—that is, if all branches are faithful to their constitutional oaths as best they know how—then these disagreements do not portend a constitutional crisis.

Which branch will have the final word on a question of constitutional law depends on the nature and the posture of the question.[51] Sometimes Congress has the final word, as when it declines to pass a statute on constitutional grounds.[52] Sometimes the President has the final word, as when he vetoes a bill that he believes is unconstitutional.[53] Sometimes the Supreme Court has the final word, in a properly presented case or controversy.[54] And ultimately, the constitutional judgment of all three is subject, directly or indirectly, to the constitutional vision of the People.[55]

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[48] For example, President Lincoln famously disagreed with the Supreme Court's infamous *Dred Scott* case. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); Abraham Lincoln, Speech at Springfield (July 17, 1858), *in* ABRAHAM LINCOLN'S SPEECHES AND LETTERS 1832-1865 at 91-92 (Paul M. Angle ed., rev. ed. 1957). History has, of course, sided with President Lincoln.

[49] For example, President Johnson disagreed with Congress about the constitutionality of the Tenure of Office Act. The House of Representatives voted to impeach President Johnson over this disagreement. *See* Articles of Impeachment Against Andrew Johnson, CONG. GLOBE, 40th Cong., 2d Sess. 1616-18 (1868). *See also* REHNQUIST, *supra* note 17, at 217-18. But the Senate refused to convict. *See* CONG. GLOBE, 40th Cong., 2d Sess. 2497 (1868) (vote to acquit President Johnson). *See also* REHNQUIST, *supra* note 17, at 233-35. Once again, history has vindicated the President. *See* Myers v. United States, 272 U.S. 52, 176 (1926) (holding the Tenure of Office Act unconstitutional). *See also supra* note 20 and accompanying text.

[50] *See supra* note 35.

[51] *See supra* note 39.

[52] *See* Easterbrook, *supra* note 9, at 911 ("Any legislator may vote against a bill on constitutional grounds, including grounds that the Supreme Court has rejected."); *cf. id.* at 912 ("Congress may impeach and remove from office all who violate the Constitution, as Congress understands it.").

[53] For example, Andrew Jackson vetoed an act to create a national bank because he believed it was unconstitutional, despite the Supreme Court's earlier contrary opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See* Andrew Jackson, Veto Message, July 10, 1832, 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1144-54 (Richardson ed., 1897). Likewise, President Jefferson pardoned—on constitutional grounds—those convicted under the Sedition Act of 1798. *See* Easterbrook, *supra* note 9, at 907.

[54] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[55] *See* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . . ."); U.S. CONST. art. II, § 1, cl. 2-3 (establishing the system of Electors for choosing the President). *See also* U.S. CONST. art. V (establishing the procedure for amending the Constitution); U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

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I hope that you find these answers responsive and useful. Please let me know if the Committee has any additional questions.

Sincerely,

Nicholas Quinn Rosenkranz

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VANDERBILT Law School

July 28, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Chairman Specter:

Thank you again for the opportunity to testify before the United States Senate Judiciary Committee regarding "The Use of Presidential Signing Statements."

I also appreciate the opportunity to respond to the follow-up questions posed by the Committee in your letter of July 7, 2006. I have attached both the questions and my responses.

Background: In your written testimony, you argue that "the Framers also envisioned that Presidents would use means outside of the formal legislative process to influence the enactment of legislation." You go on to say that of course the courts and the Congress should take the President's "views" into consideration.

If the debate was only about the President's role in influencing legislation and his views, I suspect there would not be any controversy. However, my concern is not the use of signing statements to "influence" legislation, but their use to justify not enforcing legislation.

- *Is your justification for Presidential signing statements meant to only apply to influencing legislation?*

  The justification for Presidential signing statements advanced in my testimony is not meant to apply only to influencing legislation. I believe that statutory interpretation is an inevitable and appropriate part of the executive function that arises whenever the executive applies general commands of a statute to specific facts. This point is well illustrated by the classic example offered by H.L.A. Hart to which I referred in my oral testimony. Suppose that a statute provides, "No vehicles in the park." The executive officer charged with enforcing this relatively clear statute would have to decide whether it would require that he arrest a person in a motorized wheelchair attempting to enter the park, an ambulance driver attempting to respond to a medical emergency, and a whole host of other factual situations. Thus, any executive official attempt to determine how a statute applies to a particular case must necessarily interpret the statute. This is why the Supreme Court ruled that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

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This conclusion draws further support from the reasoning of *Marbury v. Madison*, 1 U.S. (1 Cranch) 137, 177 (1803). *Marbury* pointed out that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." The fact that courts must apply law to facts made it "emphatically the province and duty of the judicial department to say what the law is." Executive officers charged with an enforcing a statute must confront precisely the same question about how the statute applies to particular facts that courts must confront. (Indeed, because an enforcement action must typically be brought before a matter can get into court, the executive must necessarily confront the same questions that the courts will confront before the courts do.) The reasoning of *Marbury* thus suggests that the interpretation of the statute is a proper and inevitable role for the executive as well as the judiciary.

The propriety of the President's role in interpreting (rather than just influencing) legislation is further reinforced by the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984). The Supreme Court cited the accountability of agencies to the President as one of the reasons for deferring to agency interpretations of statutes. Supreme Court doctrine thus clearly envisions that agencies will play a leading role in the interpretation of statutes and that they will do so subject to the direction of the Chief Executive.

- *What about a situation where the President uses such a statement as a means to avoid his constitutional responsibility to enforce the law?*

It is not appropriate for the President to use a signing statement as a means to avoid his constitutional responsibility to enforce the law. That said, not all uses of presidential signing statements represent attempts to avoid constitutional responsibility. On the contrary, many uses of presidential signing statements actually further, rather than defeat, the President's constitutional obligation to enforce the law.

Consider first the situation posed by a statute that is ambiguous (i.e., is susceptible of more than one possible interpretation). A President confronted with such a statute may be concerned that the executive officials charged with enforcing the statute may follow conflicting interpretations of the statute. The ambiguity may also confuse citizens about precisely what the statute requires of them. In the most extreme case, a President confronted with such a statute may believe that if the statute means "A," he or she would sign it into law, and that if the statute means "B," he or she would veto it. In such a case, it is generally believed appropriate for a President to announce that he or she is signing the legislation on the understanding that the statute means "A." Our nation could adopt a practice of asking the President to veto all ambiguous statutes susceptible of interpretations that would raise concerns, but doing so would slow down the legislative process and would embroil the legislative and executive branch in needless conflict. Announcing the interpretation in a signing statement has the added advantage of putting both Congress and citizens potentially affected by the legislation of what the Administration believes is the proper interpretation of the statute as soon as possible. Indeed, should Congress disagree with the interpretation proffered by the President, having the President indicate the interpretation he or she

believes proper actually facilitates congressional oversight and redress. In this case, the President does not offer his or her interpretation of the law to avoid the constitutional duty to execute the law. On the contrary, offering an interpretation of an ambiguous statute represents a proper exercise of the President's constitutional duty to execute the law.

The President may be under an even higher obligation to offer his views about the proper interpretation of a statute if confronted with a statute susceptible of multiple interpretations, one or more of which would raise constitutional concerns. This may because a statute is impermissibly vague. This may be because while the application of the statute to most facts would be constitutional, application of the statute to certain facts would be unconstitutional (such as if certain applications of the statute might violate the First Amendment). This may also be because a particular term in the statute might be ambiguous and one of the possible constructions of that term would raise constitutional concerns. In such cases, it is generally accepted as appropriate for the President to offer a saving construction that preserves the statute's constitutionality. In each of these cases, the saving construction is used not to avoid the President's duty to execute the law. On the contrary, the saving construction is offered in an attempt to avoid rendering properly enacted legislation from being rendered a nullity. Indeed, the presumption of constitutionality that accompanies all legislation arguably puts the President under the constitutional duty to take steps to render statutes constitutional if at all possible. It is plausible that our nation could adopt a practice requiring Presidents to veto such ambiguous legislation. But as the Opinion authored by Walter Dellinger while serving as Assistant Attorney General for the Office of Legal Counsel during the Clinton Administration properly points out, early proponents of that view (such as Thomas Jefferson and James Madison) ultimately abandoned that view. 17 Op. Off. Legal Counsel 131, 134-35 (1993). The reasons not to force the President to veto all legislation that raises constitutional concerns are quite sound. Any such rule would further burden the legislative calendar, would force Congress to draft statutes with tremendous precision and prescience about all possible contingencies, and would force reconsideration of numerous statutes that are constitutionally unproblematic in the vast majority of its applications.

The most difficult questions arise when the statute is clear, but violates one of the President's core powers. One example arose during the Administration of Andrew Johnson, when Congress included a provision in an appropriations bill forbidding President Johnson from removing Ulysses S. Grant as General of the Army. The urgent need for appropriations for the war effort led President Johnson to sign the bill. In so doing, he issued a signing statement indicating his belief that this provision represented an impermissible interference with his constitutional responsibility as Commander in Chief. A similar situation arose during the Presidencies of Jimmy Carter and Ulysses S. Grant, when Congress included a provision in an appropriations bill prohibiting the President from closing certain consulates. Both Grant and Carter signed the legislation while issuing signing statements declaring that the provision in

question represented an impermissible interference with the President's constitutional authority to appoint consuls. Carter issued a signing statement objecting to a bill that purported to prevent him from using any appropriations to pardon Vietnam-era draft resisters, which he regarded as an impermissible interference with the pardon power.

In each of these cases, the President took the action that he did in order to fulfill (rather than avoid) his duties under the Constitution. Indeed, to the extent that the power being infringed is a uniquely presidential one, disabling the President from raising constitutional objections would deprive him of the ability to obtain a judicial determination of his challenge the infringement on presidential power. Note that in each of these cases, it is the Constitution itself that vitiated the statutes; the signing statement itself had no legal effect. Those who disagree with the President's assessment of the constitutional merits may well the President's actions as lawless. So long as the President has a good-faith basis for the position taken in the signing statement, it seems appropriate to allow him to contest the issue in court, since the contrary rule risks giving Congress final say over a constitutional dispute over the proper distribution of power between the legislative and executive branches.

- *In your opinion, may a President make a unilateral decision that a law is unconstitutional and refuse to follow it?*

Presidents often make unilateral decisions about the constitutionality of particular laws. One of the most celebrated examples arose in the context of *Brown v. Board of Education*, 349 U.S. 294 (1955). Despite the existence of clear Supreme Court precedent upholding the constitutionality of separate, but equal, President Dwight D. Eisenhower decided that segregated schools were unconstitutional. Indeed, he went so far as to draft a portion of the Government's Supreme Court brief.

Another classic example stems from events surrounding the impeachment of Andrew Johnson. Congress enacted the Tenure of Office Act in part to prevent President Johnson from removing any of the members of his Cabinet, most of whom were holdovers from the Lincoln Administration. President Johnson believed this to be an unconstitutional interference with his authority over the executive branch and vetoed it, only to see that veto overridden. Backed by his belief that the statute was unconstitutional, President Johnson proceeded to remove Secretary of War Edwin Stanton without complying with the requirements of the Tenure of Office Act. In so doing, President Johnson unquestionably exercised his unilateral judgment about the constitutionality of the Tenure of Office Act. Indeed, because the statute involved a core presidential function, had he not stood behind his convictions, the statute would have been effectively unreviewable. As it was, President Johnson was impeached for his actions, only to be exonerated by the Senate and later by the Supreme Court in *Myers v. United States*, 272 U.S. 52, 176 (1926).

The issue also arises when the Administration is asked to defend the constitutionality of statutes in court, as discussed in the Opinion by Benjamin Civiletti, Attorney General during the Carter Administration. The Opinion points out that the executive

branch's duty to defend and enforce acts of Congress and its duty to support and defend the Constitution rarely come into conflict. However, cases do exist in which such conflicts do arise. The Opinion gives the hypothetical example of a statute requiring the arrest imprisonment of all members of the opposition party without trial. Surely, the Opinion concludes, the President and the Attorney General would be justified in reusing to enforce such a facially unconstitutional law and refusing to defend its constitutionality in court. *See* 4A Op. Off. Legal Counsel 55, 56 (1980). Lest this example appear fanciful, this is almost precisely what happened when President Thomas Jefferson refused to enforce the Alien and Sedition Acts. Although the threshold for exercising such judgment is extremely high, every reputable constitutional scholar of which I am aware believes it appropriate for the President to exercise judgment about the constitutionality of statutes in precisely this manner.

Background: Another argument you make in your written testimony is that "Any attempt to enact legislation without giving each of these actors a coequal role would be unconstitutional."

- *Isn't a unilateral decision by the President to not follow a law that has been duly enacted, when such a decision is not subject to Congressional action or court review equally unconstitutional since it too is unilateral and denies the other two branches a coequal role? If not, please explain why such a situation is different?*

Executive decisions not to follow a statute or to interpret a statute in a particular way will usually be subject to judicial review. The statute in question invariably confers legal rights on private citizens who, if the executive is not properly enforcing the statute, would be aggrieved by the manner in which it is being enforced. Consider the historical examples of the Tenure of Office Act and the appropriations rider preventing President Johnson from removing Ulysses S. Grant as General of the Army. In each case, the person removed from office would have the legal right to challenge the President's actions in disregard of the statute. Indeed, the Supreme Court has cited this scenario as an example of just how such a dispute should find its way into court. *See Raines v. Byrd*, 521 U.S. 811, 826-28 (1997).

On a broader level, the question reflects a tendency to envision that a dispute between Congress and the President regarding the proper scope of executive power will be resolved in formal judicial proceedings in a court of law. Congress has a wide range of tools with which to influence the manner in which the executive branch enforces the law, including oversight hearings, requests for information, case work, legislative investigations, questioning during confirmation hearings, and the enactment of appropriations riders, just to name a few. As this Committee is well aware, the rank and file of most executive agencies are typically extremely responsive to congressional inquiries.

Indeed, allowing any one branch to have the final say in separation of powers disputes poses particular dangers because each of the branches is by definition an

interested party. It is for this reason that a veritable all-star list of constitutional scholars (including such leading lights as Alexander Bickel, Edward Corwin, Philip Kurland, Gerald Gunther, Henry Monaghan, and Herbert Wechsler) have each endorsed giving all three branches a role in settling separation of powers disputes. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE. W. RES. L. REV. 1451, 1464 & n.36 (1997). As Madison noted in *The Federalist No. 51*, the genius underlying the separation of powers is to rely on each branch to check the other two, so that ambition can counteract ambition. Both Congress and the courts retain sufficient power to ensure that they remain a vibrant part of this interbranch dialogue, such that it would be incorrect to say that the President has the freedom to exercise unilateral power. Conversely, disabling the President from exercising his or her independent judgment about what the Constitution requires would only serve to take one of the three branches out of the dialogue.

- *Interestingly in your example, involving a law that ignores the House of Representatives views, you specifically state that the court would have a role in evaluating the law's constitutionality. However, in the situation of signing statements where we may not know whether the President is enforcing the law, or even if we do there may not be a person who can satisfy the standing requirements, then the court has no role. Isn't that exactly the fatal flaw in this President's use of signing statements?*

  As discussed above and as noted in the Supreme Court's opinion in *Raines v. Byrd*, enforcement or nonenforcement of a statute almost inevitably affects some private citizen's rights to a sufficient degree as to give that citizen standing to challenge the action in court. The only circumstances in which this would not be true is if the interpretation of the statute at issue neither gives nor deprives any citizen of any substantive rights. Such cases are rare and for the most part are trivial.

  The reality is that the executive branch possesses a degree of discretion in how and how vigorously to enforce any law. Every plea bargain necessarily involves some prosecutorial discretion to underenforce some portion of federal law. Furthermore, in a world in which the resources available for law enforcement are inevitably limited, the executive must necessarily set enforcement priorities, such as occurred several years ago when the federal government dedicated additional resources to combat health care fraud. In a world of constrained resources, establishing one area as a priority for law enforcement inevitably means that other areas of the law will be enforced less vigorously. Members of Congress are entitled to obtain information about how the law is being enforced and to use its power of the purse to set spending priorities. But prohibiting the use of signing statements would not enhance Congress's control over how federal law is being enforced. On the contrary, prohibiting signing statements could frustrate legislative oversight by making the President's decisions about how he or she plans to enforce the law less transparent.

- *Also in your example you wrote, "Neither House of Congress has the power to alter a statute without the assent of the other House of Congress and the President." If that*

principle is accurate, then wouldn't it also be true that the President does not have the power to alter a statute without the assent of either House of Congress?

It is unquestionably true that the President does not have the power to alter a statute without the assent of both Houses of Congress. Indeed, this is the core holding of *Clinton v. City of New York*, 524 U.S. 417 (1998), in which the Supreme Court invalidated the line-item veto.

Simply put, signing statements do not have the force of law, any more than do committee reports or floor statements by individual legislators. To the extent that the statute is clear or the legislative history conflicts with the plain language of the statute, it is a nullity.

A different situation arises when a statutory term is ambiguous. In that case, although signing statements may not used to alter the language of a statute, they can be used to construe statutory terms whose meaning is unclear. In such a case, the term being construed is unquestionably part of a duly enacted statute. Looking at a signing statement, a committee report, hearing testimony, a dictionary, or any other extrinsic source is not rewriting a statute. The only alternative would be for Congress to draft legislation in such clear terms that no interpretive ambiguity remains. That solution would require a level of precision not permitted by the English language and would require legislators to anticipate every possible fact pattern to which a statute might be applied.

Background: In your statement you said that "Our Framers rejected the 'hermetic sealing off of the three branches of Government from one another.'" However, in your series of articles co-authored with Steven Calabresi, you endorse the theory of the unitary executive, which states that all executive power resides in the Executive branch.

- *How is it consistent with the theory of the unitary executive consistent with the Framers rejection of the "hermetic sealing off of the three branches of Government from one another"?*

It is true that the Constitution included within its structure some features that deviate from a strict separation of legislative, executive, and judicial functions. To cite just a few examples, the Senate is involved in the execution of the law by virtue of its power to confirm executive appointments. It is involved in the judicial function by virtue of its power to try impeachments. Similarly, the President is given a role in the legislative process by virtue of the power to sign or veto legislation.

The fact that the Constitution included some specific deviations from the strict separation of powers did not render the concept of the separation of powers a nullity. On the contrary, the debates in the Constitutional Convention and in the state ratifying conventions as well as *The Federalist Papers* reveal that the Framers

continued to regard the separation of powers as an important feature of good government. Thus, we should regard the specific checks and balances contained in the Constitution as being enacted in front a background presumption of the separation of powers. We should not regard the fact that the Constitution specifically authorized some deviations from the separation of powers as a license for subsequent generations to create additional deviations as we see fit.

The approach most consistent with the Framers' vision of good government and good political theory would be to limit derogations from the separation of powers to those specifically authorized by the Constitution. In this sense, the presentment provision of Article I, section 7, clearly makes the President a part of the legislative process. Furthermore, the Senate's confirmation authority gives it some role in the execution of the law. In the absence of a specifically authorized derogation, Article I, section 1, dictates that all other legislative power is vested in Congress. The theory of the unitary executive similarly holds that aside from the derogations from executive power specifically enumerated in the Constitution, Article II, section 1, dictates that all other executive power is vested in the President.

- *How is it consistent with our constitutional system of checks and balances for* ***all*** *executive power to reside in the Executive branch, but for the Executive and Legislative branches should share legislative power?*

  The legislative branch possesses a wide range of powers through which it can influence the execution of the law. As mentioned before, the role of the Senate in confirming executive nominations represents part of the system of checks and balances that cuts in the opposite direction, as does the power of impeachment. Equally importantly, the Constitution gives Congress the power of the purse, which means that there is no executive power for the President to wield except by virtue of Congress. Furthermore, as noted earlier, Congress possesses a wide range of informal means (such as oversight hearings, requests for information, etc.) for influencing the manner in which the law is enforced.

You equate Presidential signing statements with Congressional legislative history. However, one key difference between the two is that Congress does not apply legislative history in executing the laws, while the President can apply his own, unchecked, interpretations of law through Presidential signing statements, in executing a statute, giving the President near total control of both the legislative and executive function.

- *How is this consistent with the Constitution?*

  As I noted in my response to the Committee's first question, statutory interpretation is an inexorable part of the executive function. It is impossible to enforce the law without also interpreting it. The truth of this assertion becomes clear once one recognizes that the executive would have no less an inevitable role in statutory

interpretation if the Constitution were amended to bar the use of presidential signing statements altogether. The need for the executive to interpret statutes would remain even if the President were forced to stop issuing signing statements altogether.

The concern raised by this question has less to do with signing statements per se, but rather with the nature of executive power. The practical reality is that once the legislative power has enacted a statute, it falls upon the executive branch to enforce it. In the modern world, enforcement inevitably involves a significant degree of discretion. That discretion cannot be eliminated by barring the use of signing statements or by refusing to regard signing statements as legislative history. In fact, as the *Chevron* case above recognizes, courts accord great deference to agency interpretations of statutes that they administer, and those agency interpretations are expected to be subject to presidential direction. Thus, the President will retain great influence over the interpretation of statutes regardless of how the debate over signing statements is resolved.

This is not to say that the President has the unbridled power to construe statutes in any way he or she chooses. On the contrary, the previous answers have enumerated the many ways that Congress and the courts can restrain the manner in which the President interprets the law. Perhaps most importantly, should the President construe a statute in a manner that Congress does not find congenial, Congress remains free to correct the interpretation by amending the statute in question.

The propriety of this observation becomes clear if the same criticisms offered to presidential interpretations of statutes were applied to courts. Courts remain free to offer their own interpretations of the law no more subject to legislative check than is the executive. Yet no one would suggest that the power of statutory interpretation inherent in the judicial function represents "near total control of both the legislative and executive function." On the contrary, Congress and the courts are involved in a dialogue over the proper interpretation of statutes. To the extent that courts get it wrong (as they inevitably do from time to time), they are subject to legislative correction.

Proper enforcement of federal law is thus best regarded as being guided by dialogue among all three branches. Despite the changes in relative power that have occurred over time, the Constitution has always provided each of the branches with sufficient means to constitute an effect check on the other two branches. I remain confident that the balance struck by the Constitution continues to give each branch sufficient power to remain in dynamic tension with the other two branches, so that ambition can continue to counteract ambition in the way the Framers envisioned.

I hope that these responses will prove helpful to the Committee during its deliberations. Please do not hesitate to contact me again if there is any other way I can be of service.

Sincerely,

Christopher S. Yoo
Professor of Law

SUBMISSIONS FOR THE RECORD

American Bar Association

News Release

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ABA TO EXAMINE CONSTITUTIONAL, LEGAL ISSUES OF PRESIDENTIAL SIGNING STATEMENTS

CHICAGO, June 5, 2006 -- The American Bar Association today announced creation of a Task Force on Presidential Signing Statements and the Separation of Powers Doctrine to examine constitutional and legal issues raised by presidents of the United States attaching legal interpretations to federal legislation they sign.

"The task force will study thoroughly the implications of presidential signing statements for the constitutional doctrine of separation of powers and interpretation of laws," said ABA President Michael S. Greco in announcing the task force. "The task force will prepare a report with policy recommendations to the ABA House of Delegates when it meets in August in Hawaii."

The task force will examine the changing role of presidential signing statements, in which U.S. presidents articulate their views of provisions in newly enacted laws, attaching statements to the new legislation before forwarding it to the Federal Register. The task force will also consider whether such statements conflict with express statutory language or congressional intent.

"The issue to be addressed by this distinguished task force is of great consequence to our constitutional system of government and its delicate system of checks and balances and separation of powers. The task force will provide an independent, non partisan and scholarly analysis of the utility of presidential signing statements and how they comport with the Constitution and enacted law," Greco said.

Greco named **Neal R. Sonnett**, a Miami lawyer, to chair the 10-member task force. Sonnett is a former Assistant U.S. Attorney and Chief of the Criminal Division for the Southern District of Florida. He is past chair of the ABA Criminal Justice Section, which he represents in the ABA House of Delegates; incoming vice-chair of the ABA Section of Individual Rights and Responsibilities; chair of the ABA Task Force on Domestic Surveillance and the ABA Task Force on Treatment of Enemy Combatants; and president-elect of the American Judicature Society.

Members include:

- **William S. Sessions**, now in private practice in Washington, D.C., a former director of the Federal Bureau of Investigation, chief U.S. district court judge for the Western District of Texas, U.S. Attorney for the Western District of Texas, and chief of the Government Operations Section of the U.S. Department of Justice;
- **Patricia M. Wald**, most recently a member of the President's Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, a former chief judge of the U.S. Court of Appeals for the District of Columbia Circuit, and trial and appellate judge on the International Criminal Tribunal for the former Yugoslavia. She was an assistant attorney general for legislative affairs in the Carter Administration;
- Former **Rep. Mickey Edwards**, a lecturer at Princeton University's Woodrow Wilson School of Public and International Affairs and director of the Aspen Institute-Rodel Fellowships in Public Leadership, who served in the House Republican Leadership as a member of Congress from 1977-1992, was a founding trustee of the Heritage Foundation, former national chair of the American Conservative Union, and director of policy advisory task forces for the Reagan presidential campaign;
- **Bruce Fein**, a constitutional lawyer and international consultant with The Lichfield Group, who was associate deputy attorney general and assistant director of the Office of Legal Policy of the Department of Justice under President Reagan. He also served as general counsel of the Federal Communications Commission, an adjunct scholar with the American Enterprise Institute, and a resident scholar at the Heritage Foundation;
- Dean and professor **Harold Hongju Koh** of Yale Law School, one of the country's leading experts on international human rights and national security law. A former assistant secretary of state, Koh advised former Secretary of State Madeleine K. Albright on U.S. policy on democracy, human rights, and the rule of law, and also served as an attorney in the Office of Legal Counsel of the Department of Justice;
- **Charles Ogletree**, the Harvard Law School Jesse Climenko Professor of Law, and Founding and Executive Director of the Charles Hamilton Houston Institute for Race and Justice, is a prominent legal theorist who has made an international reputation by taking a hard look at complex issues of law and by working to secure the rights guaranteed by the Constitution for everyone equally under the law. The Charles Hamilton Houston Institute for Race and Justice (http://www.charleshamiltonhouston.org), named in honor of the visionary lawyer who spearheaded the litigation in *Brown v. Board of Education*, opened in September 2005, and focuses on a variety of issues relating to race and justice, and will sponsor research, hold conferences, and provide policy analysis;
- Professor **Stephen A. Saltzburg** of George Washington University Law School, a former associate independent counsel in the Iran-Contra investigation and deputy assistant attorney general in the Criminal Division of the U. S. Department of Justice. He is the incoming chair elect of the ABA Criminal Justice Section and serves in the association's House of Delegates;

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- Professor **Kathleen M. Sullivan** of Stanford Law School, and former dean of the school for five years. She heads Stanford's Constitutional Law Center, has taught at Harvard and University of Southern California law schools, and is a visiting scholar at the National Constitution Center. A nationally known constitutional law expert, she is co-author of a leading casebook in constitutional law;
- **Mark Agrast**, a senior fellow at the Center for American Progress in Washington, D.C., formerly counsel and legislative director to Rep. William D. Delahunt (D-Mass.) and aide to Rep. Gerry E. Studds (D-Mass.). He is a member of the Board of Governors of the American Bar Association, chairs the ABA Commission on the Renaissance of Idealism in the Legal Profession, and is a past chair of the ABA Section of Individual Rights and Responsibilities;
- **Tom Susman**, a partner in a Washington, D.C., law firm, has served as general counsel to the U.S. Senate Judiciary Committee and several of its subcommittees, and in the Office of Legal Counsel of the U.S. Department of Justice. He is a member of the ABA House of Delegates, past chair of the ABA Section of Administrative Law and Regulatory Practice, and has served on the ABA Board of Governors;
- **Alan Rothstein** will serve as advisor to the task force. He is general counsel to the Association of the Bar of the City of New York and coordinates the extensive law reform and public policy work of that 22,000-member association. He also serves in the New York State Bar Association House of Delegates.

With more than 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law in a democratic society.

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STATEMENT OF
MICHELLE E. BOARDMAN
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
PRESIDENTIAL SIGNING STATEMENTS

June 27, 2006

Mr. Chairman, Senator Leahy, and Members of the Committee, I appreciate the opportunity to appear here today to discuss the purpose and history of presidential signing statements. Like most Presidents before him, President Bush occasionally issues statements on signing legislation into law. Presidents have used these "signing statements" for a variety of purposes. At times Presidents use signing statements to explain to the public why the President endorses a bill and what the President understands to be its likely effect. At other times, Presidents use the statements to guide subordinate officers within the Executive Branch in enforcing or administering a particular provision.

Presidents throughout history also have issued what may be called "constitutional" signing statements, and it is this use of the signing statement that has recently been the subject of public attention. Presidents are sworn to "preserve, protect, and defend the Constitution," and thus are responsible for ensuring that the manner in which they enforce acts of Congress is consistent with America's founding document. Presidents have long used signing statements for the purpose of "informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications," *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 131 (1993), or for stating that the President will interpret or execute provisions of a law in a manner that would avoid possible constitutional infirmities. As Assistant Attorney General Walter Dellinger noted early during the Clinton Administration, "[s]igning statements have frequently expressed the President's intention to construe or administer a statute in a particular manner (often to save the statute from unconstitutionality)." 17 Op. O.L.C. at 132.

President Bush, like many of his predecessors dating back to as early as President James Monroe, has issued constitutional signing statements. The constitutional concerns identified in these statements often pertain to provisions of law that could be read to infringe explicit constitutional provisions (such as the Recommendations Clause, the Presentment Clauses, and the Appointments Clause) or to violate specific constitutional holdings of the Supreme Court. (Common examples are set forth in Part II, *infra*.) As such, President Bush's signing statements are indistinguishable from those issued by past Presidents. In addition, the number of such statements issued by President Bush is in keeping with the number issued by every President during the past quarter century.

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It is important to establish at the outset what presidential signing statements are not: an attempt to "cherry-pick" among the parts of a duly enacted law that the President will choose to follow, or an attempt unilaterally to redefine what the law is after its enactment. Presidential signing statements are, rather, a statement by the President explaining his interpretation of and responsibilities under the law, and they are therefore an essential part of the constitutional dialogue between the branches that has been a part of the etiquette of government since the early days of the Republic. Nor are signing statements an attempt to "override" duly enacted laws, as some critics have suggested. Many constitutional signing statements are an attempt to preserve the enduring balance between co-equal branches, but this preservation does not mean that the President will not enforce the provision as enacted.

One common example illustrates the natural course by which a President may object to a constitutionally difficult provision without deviating at all from the text of a statute. In the Appointments Clause context discussed below, Congress often attempts to place restrictions on the pool from which the President may select appointment candidates. As a mandatory directive to the President, these restrictions violate the Appointments Clause, U.S. Const., art. II, § 2, as each of the past four Presidents has noted in his signing statements. If construed as a recommendation from Congress, however, these appointments provisions are constitutional and are often routinely followed. A constitutional signing statement on this issue, therefore, is not a declaration that the President will not follow the appointments provisions, but that he remains free to as a matter of policy adopt the provisions.

Similarly, to this day a surprising number of statutes enacted by Congress attempt to require the approval of a congressional committee before execution of a law, despite well-settled Supreme Court precedent that such "legislative veto" provisions violate the Presentment and Bicameralism Clauses of the Constitution, art. I, § 7. *See INS v. Chadha*, 462 U.S. 919, 958 (1983). More than 20 years after this unambiguous Supreme Court decision, unconstitutional legislative veto provisions remain so common that President Bush has had to raise the issue approximately 47 times in his 110 constitutional signing statements. *See, e.g., Statement on Signing the Military Quality of Life and Veterans Affairs Appropriations Act, 41 Weekly Comp. Pres. Doc. 1799, 1799* (Nov. 30, 2005) ("The Constitution requires bicameral passage, and presentment to the President, of all congressional actions governing other branches, as the Supreme Court of the United States recognized in INS v. Chadha (1983), and thus prohibits conditioning executive branch action on the approval of congressional committees. Many provisions of the Act conflict with this requirement and therefore shall be construed as calling solely for notification, including the following: 'Department of Defense Base Closure Account 2005,' 'Department of Veterans Affairs, Information Technology Systems,' 'Department of Veterans Affairs, Construction, Major Projects,' and sections 128, 129, 130, 201, 211, 216, 225, 226, 227, and 229."); *Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 41 Weekly Comp. Pres. Doc. 1701, 1701* (Nov. 10, 2005) ("The executive branch shall construe certain provisions of the Act that purport to require congressional committee

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approval for the execution of a law as calling solely for notification, as any other construction would be inconsistent with the principles enunciated by the Supreme Court of the United States in *INS v. Chadha*.").

As long as these provisions are placed in otherwise constitutional bills, signing statements serve the appropriate function of reminding Congress and members of the Executive Branch of their deficiency. Again, however, President Bush and past Presidents to our knowledge have not ignored these provisions, but have instead done their best to apply them in a manner that does not violate the Constitution by ordering Executive Branch officials to notify congressional committees as anticipated by the provisions. *See id.* In short, where a President has no choice but to avoid a constitutional violation, the President's best course is to announce publicly his intention to construe the provision constitutionally. Where the constitutional violation stems not from the substance of a provision but from its mandatory nature, as with the Appointments Clause, the President's best course is to note the deficiency, leaving the President free to act in accordance with the provision as a matter of policy.

In another category of cases, Presidents recognize a statute as constitutional on its face, and anticipate that it will be applied constitutionally, but also foresee that in extreme or unanticipated circumstances it could raise the possibility of an unconstitutional application. An appropriate signing statement may therefore announce that the President fully intends to apply the law as far as possible, consistent with his duty to the Constitution.

To the charge that constitutional signing statements are a "power grab" and encroach on Congress's power to write the law, these examples reveal two flaws. First, the signing statements do not diminish congressional power, because Congress has no power to enact unconstitutional laws. This fact is true whether the President issues a constitutional signing statement or not. Second, the statements do not augment presidential power. Where Congress, perhaps inadvertently, exceeds its own power in violation of the Constitution, the President is *bound* to defer to the Constitution. The President cannot adopt the provisions he prefers and ignore those he does not; he must execute the law as the Constitution requires.

I.

After a thorough study, Assistant Attorney General Dellinger concluded that the use of signing statements "to raise and address the legal or constitutional questions . . . presented by" enrolled bills "can be found as early as the Jackson and Tyler Administrations, and later Presidents, including Lincoln, Andrew Johnson, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Lyndon Johnson, Nixon, Ford and Carter, also engaged in the practice." 17 Op. O.L.C. at 138. Even as early as 1821, President James Monroe issued a signing statement in which he stated that he would construe a statutory provision in a manner that did not conflict with his prerogative to appoint officers. *See* 2 A Compilation of the Messages and Papers of the Presidents

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698 (James D. Richardson ed.,1897). The Congressional Research Service confirms that in 1830, Andrew Jackson "signed a bill and simultaneously sent to Congress a message" setting forth his interpretation "that restricted the reach of the statute." 17 Op. O.L.C. at 138 (quoting Louis Fisher, *Constitutional Conflicts between Congress and the President* 128 (3d ed. 1991)).

The use of the constitutional signing statement has become more common in recent presidencies, beginning with President Reagan. While the task of counting constitutional signing statements is inexact because of the difficulty of characterizing such statements, Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush have apparently issued constitutional signing statements with respect to similar numbers of laws. According to one study, President Reagan issued constitutional signing statements with respect to 71 laws; George H.W. Bush, 146; Clinton, 105. *See* Christopher Kelley, *A Comparative Look at the Constitutional Signing Statement* 18 (2003) (*available at* http://mpsa.indiana.edu/conf2003papers/1031858822.pdf). By our count, President Clinton issued constitutional signing statements for approximately 80 bills, and President Bush has issued constitutional signing statements with respect to 110 bills as of June 20 of this year. Some Presidents have in the past used signing statements simply to praise a piece of legislation, and even including non-constitutional signing statements, the total number of signing statements is only a small fraction of the number of laws passed by Congress. For example, President Bush issued a total of 28 signing statements for both bills and joint resolutions in 2003, 25 in 2004, 14 in 2005, and 6 thus far this year, totaling only approximately 8 percent of the 498 public laws passed by the 108th Congress and the 229 public laws passed by the 109th Congress to date.

This practice of issuing signing statements does not mean that a President has acted contrary to law or the Legislative Branch. The practice is consistent with, and derives from, the President's constitutional obligations, and is an ordinary part of a respectful constitutional dialogue between the branches. When Congress passes legislation containing provisions that could be construed or applied in certain cases in a manner contrary to well-settled constitutional principles, the President can and should take steps to ensure that such laws are interpreted and executed in a manner consistent with the Constitution. The Supreme Court specifically has stated that the President has the power to "supervise and guide [Executive officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone," *Myers v. United States*, 272 U.S. 52, 135 (1926); *see also Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.").

The President takes an oath to "preserve, protect and defend the Constitution of the United States." U.S. Const., art. II, § 1, cl. 8. The President has the responsibility and duty also to faithfully execute the laws of the United States. U.S. Const., art. II. § 3. But these duties are not in conflict: the law the President must execute includes the Constitution—the supreme law of the land. Because the Constitution is supreme over all

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other law, the President must resolve any conflict between statutory law and the Constitution in favor of the Constitution, just as courts must.

This presidential responsibility may arise most sharply when the President is charged with executing a statute, passed by a previous Congress and signed by a prior President, a provision of which is he finds unconstitutional under intervening Supreme Court precedent. A President that places the statutory law over the constitutional law in this instance would fail in his duty faithfully to execute the laws. The principle is equally sound where the Supreme Court has yet to rule on an issue, but the President has determined that a statutory law violates the Constitution. To say that the principle is not equally sound in this context is to deny the President's independent responsibility to interpret and uphold the Constitution. It is to leave the defense of the Constitution only to two, not three, of the branches of our government. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990) ("The Members of the Executive and Legislative Branches are sworn to uphold the Constitution, and they presumably desire to follow its commands."); *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.").

While most will agree with this principle, everyone will disagree with its application some of the time because there is honest disagreement about what the Constitution requires. But whether a particular constitutional objection should be made is a different question from whether constitutional signing statements are an appropriate exercise of every President's power. As this testimony will reveal, President Bush's signing statements are of a piece with prior administrations' signing statements. He is exercising a legitimate power in a legitimate way.

To appreciate the value of signing statements, consider the alternatives. As we understand the argument, some critics of presidential signing statements would prefer that a President either reject the legislation outright through veto or remain silent upon signing the legislation. First, it has never been the case that the President's only option when confronting a bill containing a provision that is constitutionally problematic is to veto the bill. Presidents Jefferson (*e.g.*, the Louisiana Purchase), Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Lyndon Johnson, Ford, Carter, as well as George H.W. Bush and Clinton, have signed legislation rather than vetoing it despite concerns that particular aspects of the legislation posed constitutional difficulties. *See* 17 Op. O.L.C. at 132 nn.3 & 5, 134, 138; *see also Chadha*, 462 U.S. at 942 n.13 (1983) ("it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds"). Assistant Attorney General Dellinger explained early during the Clinton Administration: "In light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision." 17 Op. O.L.C. at 135. To be sure, Presidents have the option of vetoing a bill most of whose provisions are clearly constitutional but that contains a few provisions that may be read to permit

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certain unconstitutional applications. It is more sensible, however, to accept the bill while giving the problematic provisions a "saving" construction.

Respect for the Legislative Branch in this circumstance is not shown by the veto of an otherwise well crafted bill, but by an honest and public signing statement. Compared to vetoing a bill, giving constitutionally infirm provisions a "saving" interpretation through a signing statement gives fuller effect to the wishes of Congress by giving complete effect to the great bulk of a law's provisions and the fullest possible effect to even constitutionally problematic provisions. This approach is not an affront to Congress. Instead, it gives effect to the well-established legal presumption that Congress did not choose to enact an unconstitutional provision. As Assistant Attorney General Dellinger explained, this practice is "analogous to the Supreme Court's practice of construing statutes, where possible, to avoid holding them unconstitutional." 17 Op. O.L.C. at 133. A veto, by comparison, would render all of Congress's work a nullity, even if, as is often the case, the constitutional concerns involve relatively minor provisions of major legislation. The value of this ability to preserve legislation has grown in step with the use of large omnibus bills in the last few decades.

It should also be noted that a veto may only delay, not avoid, the constitutional question. If a President's veto is overridden by Congress, the resulting statute still must be interpreted and executed by that and future Presidents in keeping with the Constitution. To return to the example of a *Chadha* violation, where a provision attempts to condition future executive action on the approval of a congressional committee, the President and the courts, including the Supreme Court, will still be compelled to find that provision unconstitutional, and therefore unenforceable. Moreover, this was true even before the definitive Supreme Court ruling in *Chadha*. *See, e.g., Chadha*, 462 U.S. at 942 n.13 (citations omitted) ("11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional.").

As for the second suggested alternative to signing statements—presidential silence—it is not clear what critics of signing statements hope will be gained by such a course. Signing statements have the virtue of making the President's views public. A statement may notify the Congress and the American people of concerns that the President has about the legislation and how the Executive Branch will construe a particular law. Or it may serve only as a reminder to those in the Executive Branch charged with executing a law that the law must be applied within the confines of the Constitution. Neither Congress nor the public would be better served by either of these statements being restricted to an internal Executive Branch audience. Employing signing statements to advise Congress of constitutional objections is more respectful of Congress's role as an equal branch of government than public silence, and promotes a constitutional dialogue that is healthy in a democracy.

The last possible alternative—for the President to remain publicly silent *and* not to direct subordinate Executive Branch officials to construe the law in a constitutional manner—would flatly contradict the Constitution's requirement that the President "take

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care that the Laws [are] faithfully executed." Recent administrations, including the Reagan, George H.W. Bush, and Clinton Administrations, consistently have taken the position that "the Constitution provides [the President] with the authority to decline to enforce a clearly unconstitutional law." 17 Op. O.LC. at 133 (opinion of Assistant Attorney General Dellinger) (noting that understanding is "consistent with the view of the Framers" and has been endorsed by many members of the Supreme Court). Indeed, "every President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202 (1994) (opinion of Assistant Attorney General Dellinger) (noting that "consistent and substantial executive practice" since "at least 1860 assert[s] the President's authority to decline to effectuate enactments that the President views as unconstitutional" id at 199.); *see also Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 59 (1980) (opinion of Benjamin R. Civiletti, Attorney General to President Carter) ("the President's constitutional duty does not require him to execute unconstitutional statutes"); 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 446 (2d ed. 1836) (noting that just as judges have a duty "to pronounce [an unconstitutional law] *void* . . . In the same manner, the President of the United States could . . . refuse to carry into effect an act that *violates* the Constitution.") (statement of James Wilson, signer of Constitution from Pennsylvania). Rather than tacitly placing limitations on the enforcement of provisions (or declining to enforce them), as has been done in the past, signing statements promote a constitutional dialogue with Congress by openly stating the interpretation that the President will give certain provisions.

Finally, some have raised the concern that courts will use signing statements to interpret statutes in contravention of the legislative goal. Signing statements, of course, are not binding on the courts; they are principally an exercise of the President's responsibility as head of the Executive Branch to determine the correct interpretation of the law for purposes of executing it faithfully. There must be an authoritative interpretation of the law within the Executive Branch, and it is the President's responsibility as Chief Executive to ensure that the law is authoritatively interpreted consistent with the Constitution.

II.

Many of President Bush's constitutional signing statements have sought to preserve three specific constitutional provisions that are sometimes overlooked in the legislative process: the Recommendations Clause, the Presentment Clauses, and the Appointments Clause. Far from using signing statements in "unprecedented fashion," as some critics have contended, this President has employed constitutional signing statements in a way completely consistent with those of his predecessors. Two additional important areas that have elicited comment from Presidents are the protection of confidential national security information, and the preservation of the Executive's foreign affairs power and position as Commander in Chief.

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Recommendations Clause. Presidents commonly have raised concern when Congress purports to *require* the President to submit legislative recommendations, because the Constitution vests the President with discretion to do so when he sees fit, stating that he "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const., art. II, § 3, cl. 1. By our count, President Bush raised this particular concern approximately 60 times in his 110 constitutional signing statements. President Bush's statements on this point, moreover, are indistinguishable from President Clinton's. *Compare, e.g., Statement on Signing the Intelligence Authorization Act for Fiscal Year 2005* 40 Weekly Comp. Pres. Doc. 3012, 3012 (Dec. 23, 2004) (President Bush) ("To the extent that provisions of the Act, such as sections 614 and 615, purport to require or regulate submission by executive branch officials of legislative recommendations to the Congress, the executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to submit for congressional consideration such measures as the President judges necessary and expedient."), *with, e.g., Statement on Signing the Shark Finning Prohibition Act,* 3 Pub. Papers of William J. Clinton 2782, 2782 (2000-2001) (President Clinton) ("Because the Constitution preserves to the President the authority to decide whether and when the executive branch should recommend new legislation, Congress may not require the President or his subordinates to present such recommendations (section 6). I therefore direct executive branch officials to carry out these provisions in a manner that is consistent with the President's constitutional responsibilities."). *See also Statement on Signing the Balanced Budget Act of 1997,* 2 Pub. Papers of William J. Clinton 1053, 1054 (1997) (President Clinton) ("Section 4422 of the bill purports to require the Secretary of Health and Human Services to develop a legislative proposal . . . . I will construe this provision in light of my constitutional duty and authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and *to supervise and guide my subordinates, including the review of their proposed communications to the Congress.*") (emphasis added); *Statement on Signing the Treasury and General Government Appropriations Act, 2 Pub. Papers of William J. Clinton 1339, 1340 (1997)* (President Clinton) ("Any broader interpretation of the provision that would apply to 'nonwhistleblowers' would *raise substantial constitutional concerns in depriving the President and his department and agency heads of their ability to supervise and control the operations and communications of the executive branch.* I do not interpret this provision to detract from my constitutional authority in this way.") (emphasis added).

Presentment Clauses/Bicameralism/*INS v. Chadha*. Presidents commonly raise concern when Congress purports to authorize a single House of Congress to take action on a matter in violation of the well established rule, embodied in the Supreme Court's decision in *INS v. Chadha,* 462 U.S. 919, 958 (1983), that Congress can act only by "passage by a majority of both Houses and presentment to the President." *See* U.S. Const., art. I, § 7 (requiring that bills and resolutions pass both Houses before being presented to the President). By our count, President Bush raised this particular concern 47 times in his 110 constitutional signing statements. Again, President Bush followed in the footsteps of prior Presidents, including President Clinton, in raising this concern in

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various signing statements. *Compare, e.g., Statement on Signing the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 41 Weekly Comp. Pres. Doc. 1920, 1920* (Dec. 30, 2005) (President Bush) ("The executive branch shall construe certain provisions of the Act that purport to require congressional committee approval for the execution of a law as calling solely for notification, as any other construction would be inconsistent with the constitutional principles enunciated by the Supreme Court of the United States in *INS v. Chadha*."), *with, e.g., Statement on Signing the Consolidated Appropriations Act, FY 2001, 3 Pub. Papers of William J. Clinton 2770, 2776 (2000-2001)* (President Clinton) ("There are provisions in the Act that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret such provisions to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*.").

Appointments Clause. The Appointments Clause of the Constitution, U.S. Const., art. II, § 2, provides that the President, with the advice and consent of the Senate, shall appoint principal officers of the United States (heads of agencies, for example); and that "inferior officers" can be appointed *only* by the President, by the heads of "Departments" (agencies), or by the courts. Presidents commonly raise a concern when bills seem to restrict the President's ability to appoint officers, or to vest entities other than the President, agency heads, or courts with the power to appoint officers. By our count, President Bush raised this concern 19 times in his 110 constitutional signing statements. President Bush's signing statements on this point are nearly identical to President Clinton's. *Compare, e.g., Statement on Signing the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 41 Weekly Comp. Pres. Doc. 1273, 1273* (Aug. 10, 2005) (President Bush) ("The executive branch shall construe the described qualifications and lists of nominees under section 4305(b) as recommendations only, consistent with the provisions of the Appointments Clause of the Constitution."), *with, e.g., Statement on Statement on Signing the Gramm-Leach-Bliley Act* (Nov. 12, 1999), 2 Pub. Papers of William J. Clinton 2082, 2084 (1999) ("Under section 332(b)(1) of the bill, the President would be required to make such appointments from lists of candidates recommended by the National Association of Insurance Commissioners. The Appointments Clause, however, does not permit such restrictions to be imposed upon the President's power of appointment. I therefore do not interpret the restrictions of section 332(b)(1) as binding and will regard any such lists of recommended candidates as advisory only.").

Confidentiality of national security information. The Supreme Court has held that the Constitution gives the President authority to control the access of Executive Branch officials to classified information. The Supreme Court has stated that the President's "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant." Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988). Presidents commonly have issued signing statements when newly enacted

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provisions might be construed to involve the disclosure of sensitive information. *See, e.g., Statement by the President Upon Approval of Bill Amending the Naval Security Act of 1954*Pub. Papers of Dwight D. Eisenhower 549, 549 (1959) ("I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine.").

By our count, President Bush raised this concern approximately 62 times in his 110 constitutional signing statements. President Bush's statements regarding this issue are nearly identical to the statements issued by past Presidents, including Presidents Eisenhower and Clinton. *Compare, e.g., Statement on Signing Legislation on Amendments to the Mexico-United States Agreement on the Border Environment Cooperation Commission and the North American Development Bank, 40 Weekly Comp. Pres. Doc. 550, 550-51* (Apr. 5, 2004) (President Bush) ("Sections 2(5) and 2(6) of the Act purport to require the annual report of the Secretary of the Treasury to include a description of discussions between the United States and Mexican governments. In order to avoid intrusion into the President's negotiating authority and ability to maintain the confidentiality of diplomatic negotiations, the executive branch will not interpret this provision to require the disclosure of either the contents of diplomatic communications or specific plans for particular negotiations in the future."), *with, e.g., Statement on Signing the National Defense Authorization Act for Fiscal Year 2000, 2 Pub. Papers of William J. Clinton 1685, 1688 (1999)* (President Clinton) ("A number of other provisions of this bill raise serious constitutional concerns. Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164) . . . . To the extent that these provisions conflict with my constitutional responsibilities in these areas, I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do likewise."); *Statement on Signing the National Defense Authorization Act for Fiscal Year 1998, 2 Pub. Papers of William J. Clinton 1611, 1612 (1997)* (Nov. 18, 1997) (President Clinton) ("Because of the President's constitutional role, the Congress may not prevent the President from controlling the disclosure of classified and other sensitive information by subordinate officials of the executive branch.").

Foreign Affairs and Power as Commander in Chief. President Bush also has used signing statements to safeguard the President's well-established role in the Nation's foreign affairs and the President's wartime power. These signing statements also are in keeping with the practice of his predecessors. *See, e.g.*, Louis Fisher, *Constitutional Conflicts between Congress and the President* 134 (4th ed. rev.1997) (noting that President Wilson expressed an intention not to enforce a provision on the grounds it was unconstitutional because doing so "would amount to nothing less than the breach or violation" of some thirty-two treaties) (citation omitted); *Statement on Signing the*

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General Appropriations Act, Pub. Papers of Harry S. Truman 616 (1950) (*Statement on Signing the General Appropriations Act of 1951*) ("I do not regard this provision [involving loans to Spain] as a directive, which would be unconstitutional, but instead as an authorization, in addition to the authority already in existence under which loans to Spain may be made."); *Statement on Signing the Military Appropriations Authorization Bill* Pub. Papers of Richard M. Nixon 1114, 1114 (1971) (Mansfield Amendment setting a final date for the withdrawal of U.S. Forces from Indochina was "without binding force or effect"); *Statement on Signing the FY 1980-81 Department of State Appropriations Act,* 2 Pub. Papers of Jimmy Carter 1434, 1434 (1979) ("Congress cannot mandate the establishment of consular relations at a time and place unacceptable to the President").

Some have argued that President Bush has increased the use of Presidential signing statements, but any such increase must be viewed in light of current events and the legislative response to those events. While President Bush has issued numerous signing statements involving foreign affairs and his power as Commander in Chief, the significance of legislation affecting national security has increased markedly since the September 11th attacks and Congress's authorization of the use of military force against the terrorists who perpetrated those attacks. Even before the War on Terror, President Clinton issued numerous such statements. *See, e.g., Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 2 Pub. Papers of William J. Clinton 1843, 1847 (1998)* (President Clinton) ("Section 610 of the Commerce/Justice/State appropriations provision prohibits the use of appropriated funds for the participation of U.S. armed forces in a U.N. peacekeeping mission under foreign command unless the President's military advisers have recommended such involvement and the President has submitted such recommendations to the Congress . . . [which] unconstitutionally constrain[s] my diplomatic authority and my authority as Commander in Chief, and I will apply them consistent with my constitutional responsibilities.").

The constitutional signing statements discussed here are a small, but central, sampling of the many statements issued by American Presidents. These statements are an established part of the President's responsibility to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. Members of Congress and the President will occasionally disagree on a constitutional question. This disagreement does not relieve the President of the obligation to interpret and uphold the Constitution, but instead supports the candid public announcement of the President's views.

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SECTION: NATIONAL/FOREIGN; Pg. A1
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HEADLINE: BUSH CHALLENGES HUNDREDS OF LAWS;
PRESIDENT CITES POWERS OF HIS OFFICE

BYLINE: BY CHARLIE SAVAGE, GLOBE STAFF
BODY:
WASHINGTON - President Bush has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution.

Among the laws Bush said he can ignore are military rules and regulations, affirmative-action provisions, requirements that Congress be told about immigration services problems, "whistle-blower" protections for nuclear regulatory officials, and safeguards against political interference in federally funded research.

Legal scholars say the scope and aggression of Bush's assertions that he can bypass laws represent a concerted effort to expand his power at the expense of Congress, upsetting the balance between the branches of government. The Constitution is clear in assigning to Congress the power to write the laws and to the president a duty "to take care that the laws be faithfully executed." Bush, however, has repeatedly declared that he does not need to "execute" a law he believes is unconstitutional.

Former administration officials contend that just because Bush reserves the right to disobey a law does not mean he is not enforcing it: In many cases, he is simply asserting his belief that a certain requirement encroaches on presidential power.

But with the disclosure of Bush's domestic spying program, in which he ignored a law requiring warrants to tap the phones of Americans, many legal specialists say Bush is hardly reluctant to bypass laws he believes he has the constitutional authority to override.

Far more than any predecessor, Bush has been aggressive about declaring his right to ignore vast swaths of laws many of which he says infringe on power he believes the Constitution assigns to him alone as the head of the executive branch or the commander in chief of the military.

Many legal scholars say they believe that Bush's theory about his own powers goes too far and that he is seizing for himself some of the law-making role of Congress and the Constitution-interpreting role of the courts.

Phillip Cooper, a Portland State University law professor who has studied the executive power claims Bush made during his first term, said Bush and his legal team have spent the past five years quietly working to concentrate ever more governmental power into the White House.

"There is no question that this administration has been involved in a very carefully

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thought-out, systematic process of expanding presidential power at the expense of the other branches of government," Cooper said. "This is really big, very expansive, and very significant."

For the first five years of Bush's presidency, his legal claims attracted little attention in Congress or the media. Then, twice in recent months, Bush drew scrutiny after challenging new laws: a torture ban and a requirement that he give detailed reports to Congress about how he is using the Patriot Act.

Bush administration spokesmen declined to make White House or Justice Department attorneys available to discuss any of Bush's challenges to the laws he has signed.

Instead, they referred a Globe reporter to their response to questions about Bush's position that he could ignore provisions of the Patriot Act. They said at the time that Bush was following a practice that has "been used for several administrations" and that "the president will faithfully execute the law in a manner that is consistent with the Constitution."

But the words "in a manner that is consistent with the Constitution" are the catch, legal scholars say, because Bush is according himself the ultimate interpretation of the Constitution. And he is quietly exercising that authority to a degree that is unprecedented in US history.

Bush is the first president in modern history who has never vetoed a bill, giving Congress no chance to override his judgments. Instead, he has signed every bill that reached his desk, often inviting the legislation's sponsors to signing ceremonies at which he lavishes praise upon their work.

Then, after the media and the lawmakers have left the White House, Bush quietly files "signing statements" official documents in which a president lays out his legal interpretation of a bill for the federal bureaucracy to follow when implementing the new law. The statements are recorded in the federal register.

In his signing statements, Bush has repeatedly asserted that the Constitution gives him the right to ignore numerous sections of the bills sometimes including provisions that were the subject of negotiations with Congress in order to get lawmakers to pass the bill. He has appended such statements to more than one of every 10 bills he has signed.

"He agrees to a compromise with members of Congress, and all of them are there for a public bill-signing ceremony, but then he takes back those compromises and more often than not, without the Congress or the press or the public knowing what has happened," said Christopher Kelley, a Miami University of Ohio political science professor who studies executive power.

Military link

Many of the laws Bush said he can bypass including the torture ban involve the military.

The Constitution grants Congress the power to create armies, to declare war, to make rules for captured enemies, and "to make rules for the government and

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regulation of the land and naval forces." But, citing his role as commander in chief, Bush says he can ignore any act of Congress that seeks to regulate the military.

On at least four occasions while Bush has been president, Congress has passed laws forbidding US troops from engaging in combat in Colombia, where the US military is advising the government in its struggle against narcotics-funded Marxist rebels.

After signing each bill, Bush declared in his signing statement that he did not have to obey any of the Colombia restrictions because he is commander in chief.

Bush has also said he can bypass laws requiring him to tell Congress before diverting money from an authorized program in order to start a secret operation, such as the "black sites" where suspected terrorists are secretly imprisoned.

Congress has also twice passed laws forbidding the military from using intelligence that was not "lawfully collected," including any information on Americans that was gathered in violation of the Fourth Amendment's protections against unreasonable searches.

Congress first passed this provision in August 2004, when Bush's warrantless domestic spying program was still a secret, and passed it again after the program's existence was disclosed in December 2005.

On both occasions, Bush declared in signing statements that only he, as commander in chief, could decide whether such intelligence can be used by the military.

In October 2004, five months after the Abu Ghraib torture scandal in Iraq came to light, Congress passed a series of new rules and regulations for military prisons. Bush signed the provisions into law, then said he could ignore them all. One provision made clear that military lawyers can give their commanders independent advice on such issues as what would constitute torture. But Bush declared that military lawyers could not contradict his administration's lawyers.

Other provisions required the Pentagon to retrain military prison guards on the requirements for humane treatment of detainees under the Geneva Conventions, to perform background checks on civilian contractors in Iraq, and to ban such contractors from performing "security, intelligence, law enforcement, and criminal justice functions." Bush reserved the right to ignore any of the requirements.

The new law also created the position of inspector general for Iraq. But Bush wrote in his signing statement that the inspector "shall refrain" from investigating any intelligence or national security matter, or any crime the Pentagon says it prefers to investigate for itself.

Bush had placed similar limits on an inspector general position created by Congress in November 2003 for the initial stage of the US occupation of Iraq. The earlier law also empowered the inspector to notify Congress if a US official refused to cooperate. Bush said the inspector could not give any information to Congress without permission from the administration.

Oversight questioned

Many laws Bush has asserted he can bypass involve requirements to give information

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about government activity to congressional oversight committees.

In December 2004, Congress passed an intelligence bill requiring the Justice Department to tell them how often, and in what situations, the FBI was using special national security wiretaps on US soil. The law also required the Justice Department to give oversight committees copies of administration memos outlining any new interpretations of domestic-spying laws. And it contained 11 other requirements for reports about such issues as civil liberties, security clearances, border security, and counternarcotics efforts.

After signing the bill, Bush issued a signing statement saying he could withhold all the information sought by Congress.

Likewise, when Congress passed the law creating the Department of Homeland Security in 2002, it said oversight committees must be given information about vulnerabilities at chemical plants and the screening of checked bags at airports.

It also said Congress must be shown unaltered reports about problems with visa services prepared by a new immigration ombudsman. Bush asserted the right to withhold the information and alter the reports.

On several other occasions, Bush contended he could nullify laws creating "whistle-blower" job protections for federal employees that would stop any attempt to fire them as punishment for telling a member of Congress about possible government wrongdoing.

When Congress passed a massive energy package in August, for example, it strengthened whistle-blower protections for employees at the Department of Energy and the Nuclear Regulatory Commission.

The provision was included because lawmakers feared that Bush appointees were intimidating nuclear specialists so they would not testify about safety issues related to a planned nuclear-waste repository at Yucca Mountain in Nevada a facility the administration supported, but both Republicans and Democrats from Nevada opposed.

When Bush signed the energy bill, he issued a signing statement declaring that the executive branch could ignore the whistle-blower protections.

Bush's statement did more than send a threatening message to federal energy specialists inclined to raise concerns with Congress; it also raised the possibility that Bush would not feel bound to obey similar whistle-blower laws that were on the books before he became president. His domestic spying program, for example, violated a surveillance law enacted 23 years before he took office.

David Golove, a New York University law professor who specializes in executive-power issues, said Bush has cast a cloud over "the whole idea that there is a rule of law," because no one can be certain of which laws Bush thinks are valid and which he thinks he can ignore.

"Where you have a president who is willing to declare vast quantities of the legislation that is passed during his term unconstitutional, it implies that he also thinks a very significant amount of the other laws that were already on the books

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before he became president are also unconstitutional," Golove said.

Defying Supreme Court

Bush has also challenged statutes in which Congress gave certain executive branch officials the power to act independently of the president. The Supreme Court has repeatedly endorsed the power of Congress to make such arrangements. For example, the court has upheld laws creating special prosecutors free of Justice Department oversight and insulating the board of the Federal Trade Commission from political interference.

Nonetheless, Bush has said in his signing statements that the Constitution lets him control any executive official, no matter what a statute passed by Congress might say.

In November 2002, for example, Congress, seeking to generate independent statistics about student performance, passed a law setting up an educational research institute to conduct studies and publish reports "without the approval" of the Secretary of Education. Bush, however, decreed that the institute's director would be "subject to the supervision and direction of the secretary of education."

Similarly, the Supreme Court has repeatedly upheld affirmative-action programs, as long as they do not include quotas. Most recently, in 2003, the court upheld a race-conscious university admissions program over the strong objections of Bush, who argued that such programs should be struck down as unconstitutional.

Yet despite the court's rulings, Bush has taken exception at least nine times to provisions that seek to ensure that minorities are represented among recipients of government jobs, contracts, and grants. Each time, he singled out the provisions, declaring that he would construe them "in a manner consistent with" the Constitution's guarantee of "equal protection" to all which some legal scholars say amounts to an argument that the affirmative-action provisions represent reverse discrimination against whites.

Golove said that to the extent Bush is interpreting the Constitution in defiance of the Supreme Court's precedents, he threatens to "overturn the existing structures of constitutional law."

A president who ignores the court, backed by a Congress that is unwilling to challenge him, Golove said, can make the Constitution simply "disappear."

Common practice in '80s

Though Bush has gone further than any previous president, his actions are not unprecedented.

Since the early 19th century, American presidents have occasionally signed a large bill while declaring that they would not enforce a specific provision they believed was unconstitutional. On rare occasions, historians say, presidents also issued signing statements interpreting a law and explaining any concerns about it.

But it was not until the mid-1980s, midway through the tenure of President Reagan, that it became common for the president to issue signing statements. The change

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came about after then-Attorney General Edwin Meese decided that signing statements could be used to increase the power of the president.

When interpreting an ambiguous law, courts often look at the statute's legislative history, debate and testimony, to see what Congress intended it to mean. Meese realized that recording what the president thought the law meant in a signing statement might increase a president's influence over future court rulings.

Under Meese's direction in 1986, a young Justice Department lawyer named Samuel A. Alito Jr. wrote a strategy memo about signing statements. It came to light in late 2005, after Bush named Alito to the Supreme Court.

In the memo, Alito predicted that Congress would resent the president's attempt to grab some of its power by seizing "the last word on questions of interpretation." He suggested that Reagan's legal team should "concentrate on points of true ambiguity, rather than issuing interpretations that may seem to conflict with those of Congress."

Reagan's successors continued this practice. George H.W. Bush challenged 232 statutes over four years in office, and Bill Clinton objected to 140 laws over his eight years, according to Kelley, the Miami University of Ohio professor.

Many of the challenges involved longstanding legal ambiguities and points of conflict between the president and Congress.

Throughout the past two decades, for example, each president including the current one has objected to provisions requiring him to get permission from a congressional committee before taking action. The Supreme Court made clear in 1983 that only the full Congress can direct the executive branch to do things, but lawmakers have continued writing laws giving congressional committees such a role.

Still, Reagan, George H.W. Bush, and Clinton used the presidential veto instead of the signing statement if they had a serious problem with a bill, giving Congress a chance to override their decisions.

But the current President Bush has abandoned the veto entirely, as well as any semblance of the political caution that Alito counseled back in 1986. In just five years, Bush has challenged more than 750 new laws, by far a record for any president, while becoming the first president since Thomas Jefferson to stay so long in office without issuing a veto.

"What we haven't seen until this administration is the sheer number of objections that are being raised on every bill passed through the White House," said Kelley, who has studied presidential signing statements through history. "That is what is staggering. The numbers are well out of the norm from any previous administration."

Exaggerated fears?

Some administration defenders say that concerns about Bush's signing statements are overblown. Bush's signing statements, they say, should be seen as little more than political chest-thumping by administration lawyers who are dedicated to protecting presidential prerogatives.

Defenders say the fact that Bush is reserving the right to disobey the laws does not

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necessarily mean he has gone on to disobey them.

Indeed, in some cases, the administration has ended up following laws that Bush said he could bypass. For example, citing his power to "withhold information" in September 2002, Bush declared that he could ignore a law requiring the State Department to list the number of overseas deaths of US citizens in foreign countries. Nevertheless, the department has still put the list on its website.

Jack Goldsmith, a Harvard Law School professor who until last year oversaw the Justice Department's Office of Legal Counsel for the administration, said the statements do not change the law; they just let people know how the president is interpreting it.

"Nobody reads them," said Goldsmith. "They have no significance. Nothing in the world changes by the publication of a signing statement. The statements merely serve as public notice about how the administration is interpreting the law. Criticism of this practice is surprising, since the usual complaint is that the administration is too secretive in its legal interpretations."

But Cooper, the Portland State University professor who has studied Bush's first-term signing statements, said the documents are being read closely by one key group of people: the bureaucrats who are charged with implementing new laws.

Lower-level officials will follow the president's instructions even when his understanding of a law conflicts with the clear intent of Congress, crafting policies that may endure long after Bush leaves office, Cooper said.

"Years down the road, people will not understand why the policy doesn't look like the legislation," he said.

And in many cases, critics contend, there is no way to know whether the administration is violating laws or merely preserving the right to do so.

Many of the laws Bush has challenged involve national security, where it is almost impossible to verify what the government is doing. And since the disclosure of Bush's domestic spying program, many people have expressed alarm about his sweeping claims of the authority to violate laws.

In January, after the Globe first wrote about Bush's contention that he could disobey the torture ban, three Republicans who were the bill's principal sponsors in the Senate John McCain of Arizona, John W. Warner of Virginia, and Lindsey O. Graham of South Carolina all publicly rebuked the president.

"We believe the president understands Congress's intent in passing, by very large majorities, legislation governing the treatment of detainees," McCain and Warner said in a joint statement. "The Congress declined when asked by administration officials to include a presidential waiver of the restrictions included in our legislation."

Added Graham: "I do not believe that any political figure in the country has the ability to set aside any . . . law of armed conflict that we have adopted or treaties that we have ratified."

And in March, when the Globe first wrote about Bush's contention that he could

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ignore the oversight provisions of the Patriot Act, several Democrats lodged complaints.

Senator Patrick J. Leahy of Vermont, the ranking Democrat on the Senate Judiciary Committee, accused Bush of trying to "cherry-pick the laws he decides he wants to follow."

And Representatives Jane Harman of California and John Conyers Jr. of Michigan the ranking Democrats on the House Intelligence and Judiciary committees, respectively sent a letter to Attorney General Alberto R. Gonzales demanding that Bush rescind his claim and abide by the law.

"Many members who supported the final law did so based upon the guarantee of additional reporting and oversight," they wrote. "The administration cannot, after the fact, unilaterally repeal provisions of the law implementing such oversight. . . . Once the president signs a bill, he and all of us are bound by it."

Lack of court review

Such political fallout from Congress is likely to be the only check on Bush's claims, legal specialists said.

The courts have little chance of reviewing Bush's assertions, especially in the secret realm of national security matters.

"There can't be judicial review if nobody knows about it," said Neil Kinkopf, a Georgia State law professor who was a Justice Department official in the Clinton administration. "And if they avoid judicial review, they avoid having their constitutional theories rebuked."

Without court involvement, only Congress can check a president who goes too far. But Bush's fellow Republicans control both chambers, and they have shown limited interest in launching the kind of oversight that could damage their party.

"The president is daring Congress to act against his positions, and they're not taking action because they don't want to appear to be too critical of the president, given that their own fortunes are tied to his because they are all Republicans," said Jack Beermann, a Boston University law professor. "Oversight gets much reduced in a situation where the president and Congress are controlled by the same party."

Said Golove, the New York University law professor: "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.' "

Bruce Fein, a deputy attorney general in the Reagan administration, said the American system of government relies upon the leaders of each branch "to exercise some self-restraint." But Bush has declared himself the sole judge of his own powers, he said, and then ruled for himself every time.

"This is an attempt by the president to have the final word on his own constitutional powers, which eliminates the checks and balances that keep the country a democracy," Fein said. "There is no way for an independent judiciary to check his assertions of power, and Congress isn't doing it, either. So this is moving us toward

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an unlimited executive power."

SIDEBAR:

EXAMPLES OF THE PRESIDENT'S SIGNING STATEMENT Since taking office in 2001, President Bush has issued signing statements on more than 750 new laws, declaring that he has the power to set aside the laws when they conflict with his legal interpretation. The federal government is instructed to follow the statements when it enforces the laws. Here are 10 examples and the dates Bush signed them:

March 9: Justice Department officials must give reports to Congress by certain dates on how the FBI is using the USA Patriot Act to search homes and secretly seize papers.

Bush's signing statement: 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.

Dec. 30, 2005: US interrogators cannot torture prisoners or otherwise subject them to cruel, inhuman, and degrading treatment.

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

Dec. 30: When requested, scientific information "prepared by government researchers and scientists shall be transmitted [to Congress] uncensored and without delay."

Bush's signing statement: The president can tell researchers to withhold any information from Congress if he decides its disclosure could impair foreign relations, national security, or the workings of the executive branch.

Aug. 8: The Department of Energy, the Nuclear Regulatory Commission and its contractors may not fire or otherwise punish an employee whistle-blower who tells Congress about possible wrongdoing.

Bush's signing statement: The president or his appointees will determine whether employees of the Department of Energy and the Nuclear Regulatory Commission can give information to Congress.

Dec. 23, 2004: Forbids US troops in Colombia from participating in any combat against rebels, except in cases of self-defense. Caps the number of US troops allowed in Colombia at 800.

Bush's signing statement: Only the president, as commander in chief, can place restrictions on the use of US armed forces, so the executive branch will construe the law "as advisory in nature."

Dec. 17: The new national intelligence director shall recruit and train women and minorities to be spies, analysts, and translators in order to ensure diversity in the intelligence community.

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Bush's signing statement: The executive branch shall construe the law in a manner consistent with a constitutional clause guaranteeing "equal protection" for all. (In 2003, the Bush administration argued against race-conscious affirmative-action programs in a Supreme Court case. The court rejected Bush's view.)

Oct. 29: Defense Department personnel are prohibited from interfering with the ability of military lawyers to give independent legal advice to their commanders.

Bush's signing statement: All military attorneys are bound to follow legal conclusions reached by the administration's lawyers in the Justice Department and the Pentagon when giving advice to their commanders.

Aug. 5: The military cannot add to its files any illegally gathered intelligence, including information obtained about Americans in violation of the Fourth Amendment's protection against unreasonable searches.

Bush's signing statement: Only the president, as commander in chief, can tell the military whether or not it can use any specific piece of intelligence.

Nov. 6, 2003: US officials in Iraq cannot prevent an inspector general for the Coalition Provisional Authority from carrying out any investigation. The inspector general must tell Congress if officials refuse to cooperate with his inquiries.

Bush's signing statement: The inspector general "shall refrain" from investigating anything involving sensitive plans, intelligence, national security, or anything already being investigated by the Pentagon. The inspector cannot tell Congress anything if the president decides that disclosing the information would impair foreign relations, national security, or executive branch operations.

Nov. 5, 2002: Creates an Institute of Education Sciences whose director may conduct and publish research "without the approval of the secretary [of education] or any other office of the department."

Bush's signing statement: The president has the power to control the actions of all executive branch officials, so "the director of the Institute of Education Sciences shall [be] subject to the supervision and direction of the secretary of education."

SOURCE: **Charlie Savage**

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Hearing vowed on Bush's powers

Senator questions bypassing of laws

The Boston Globe

By Charlie Savage, Globe Staff | May 3, 2006

(Correction: Because of an editing error, a Page One story yesterday on a possible Senate hearing on President Bush's claims that he can bypass certain laws incorrectly attributed the quote, "How can we know whether the government will comply with the new laws that we passed?" to FBI director Robert Mueller. The quote was from Senator Russ Feingold, Democrat of Wisconsin. Also, because of an editing error, the story misstated the number of bills in which Bush has challenged provisions. He has claimed the authority to bypass more than 750 statutes, which were provisions contained in about 125 bills.)

WASHINGTON -- The chairman of the Senate Judiciary Committee, accusing the White House of a "very blatant encroachment" on congressional authority, said yesterday he will hold an oversight hearing into President Bush's assertion that he has the power to bypass more than 750 laws enacted over the past five years.

"There is some need for some oversight by Congress to assert its authority here," Arlen Specter, Republican of Pennsylvania, said in an interview. "What's the point of having a statute if . . . the president can cherry-pick what he likes and what he doesn't like?"

Specter said he plans to hold the hearing in June. He said he intends to call administration officials to explain and defend the president's claims of authority, as well to invite constitutional scholars to testify on whether Bush has overstepped the boundaries of his power.

The senator emphasized that his goal is "to bring some light on the subject." Legal scholars say that, when confronted by a president encroaching on their power, Congress's options are limited. Lawmakers can call for hearings or cut the funds of a targeted program to apply political pressure, or take the more politically charged steps of censure or impeachment.

Specter's announcement followed a report in the Sunday Globe that Bush has quietly challenged provisions in about 1 in 10 of the bills that he has signed, asserting the authority to ignore more than 750 statutes.

Over the past five years, Bush has stated that he can defy any statute that conflicts with his interpretation of the Constitution. In many instances, Bush cited his role as head of the executive branch or as commander in chief to justify the exemption.

The statutes that Bush has asserted the right to override include numerous rules and regulations for the military, job protections for whistle-blowers who tell Congress about possible government wrongdoing, affirmative action requirements, and safeguards against political interference in federally funded

research.

Bush made the claims in "signing statements," official documents in which a president lays out his interpretation of a bill for the executive branch, creating guidelines to follow when it implements the law. The statements are filed without fanfare in the federal record, often following ceremonies in which the president made no mention of the objections he was about to raise in the bill, even as he signed it into law.

Dana Perino, a White House spokeswoman, said via e-mail that if Specter calls a hearing, "by all means we will ensure he has the information he needs." She pointed out that other presidents dating to the 19th century have "on occasion" issued statements that raise constitutional concerns about provisions in new laws.

But while previous presidents did occasionally challenge provisions in laws while signing them, legal scholars say, the frequency and breadth of Bush's use of that power are unprecedented.

Bush is also the first president in modern history who has never vetoed a bill, an act that gives public notice that he is rejecting a law and can be overridden by Congress. Instead, Bush has used signing statements to declare that he can bypass numerous provisions in new laws.

The statements attracted little attention in Congress or the media until recently, when Bush used them to reserve a right to bypass a new torture ban and new oversight provisions in the Patriot Act.

"The problem is that you have a statute, which Congress has passed, and then the signing statements negate that statute," Specter said. "And there are more and more of them coming. If the president doesn't like something, he puts a signing statement on it."

Specter added: "He put a signing statement on the Patriot Act. He put a signing statement on the torture issue. It's a very blatant encroachment on [Congress's constitutional] powers. If he doesn't like the bill, let him veto it."

It was during a Judiciary Committee oversight hearing on the FBI that Specter yesterday announced his intent to hold a hearing on Bush's legal authority. Another committee member, Senator Russ Feingold, Democrat of Wisconsin, also questioned Bush's assertions that he has the authority to give himself an exemption from certain laws.

"Unfortunately, the president's signing statement on the Patriot Act is hardly the first time that he has shown a disrespect for the rule of law," Feingold said. "The Boston Globe reported on Sunday that the president has used signing statements to reserve the right to break the law more than 750 times."

Feingold is an outspoken critic of Bush's assertion that his wartime powers give him the authority to set aside laws. The senator has proposed censuring Bush over his domestic spying program, in which the president secretly authorized the military to wiretap Americans' phones without a warrant, bypassing a 1978 surveillance law.

At the hearing yesterday, Feingold pressed FBI director Robert Mueller to give assurances that the bureau would comply with provisions in the Patriot Act and to tell Congress how agents are using the law to search homes and secretly seize papers.

Mueller said he saw no reason that the bureau couldn't share that information with Congress. But he also said that he was bound to obey the administration, and declined to promise that he would "go out there and fight" on behalf of Congress if Bush decided to override the Patriot Act's oversight provision and ordered the FBI not to brief Congress.

Feingold also said Bush's legal claims have cast a cloud over a host of rules and restrictions that Congress has passed, using its constitutional authority to regulate the executive branch of government.

"How can we know whether the government will comply with the new laws that we passed?" Feingold said. "I'm not placing the blame on you, obviously, or your agents who work to protect this country every day, but how can we have any assurance that you or your agents have not received a secret directive from above requiring you to violate laws that we all think apply today?"

Mueller replied: "I can assure with you with regard to the FBI that our actions would be taken according to appropriate legal authorities."

Specter said that challenging Bush's contention that he can ignore laws written by Congress should be a matter of institutional pride for lawmakers. He also connected Bush's defiance of laws to several Supreme Court decisions in which the justices ruled that Congress had not done enough research to justify a law.

"We're undergoing a tsunami here with the flood coming from the executive branch on one side and the judicial branch on the other," Specter said. "There may as well soon not be a Congress. . . . And I think that most members don't understand what's happening." ■

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TESTIMONY

The Legal Significance of Presidential Signing Statements

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A quiet revolution in the scope of the President's constitutionally prescribed "lawmaking" powers took place during the administrations of Presidents Ronald Reagan and George Bush.[2] Nowhere was this more evident than in the successful campaign the two Presidents launched to make far more aggressive use of presidential signing statements[3] than had their predecessors. The presidential signing statement initiative was developed and spearheaded by former Attorney General Edwin Meese III[4] and was then continued during the Bush years by former White House Counsel C. Boyden Gray. The initiative quickly drew fire from both academics and legislators who denounced it as a usurpation

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[2] See **U.S. Const. art. I, sect. 7, cl. 2** (the presentment clause). See also INS v. Chadha, 462 U.S. 919 (1983). For a discussion and explanation of the seemingly oxymoronic concept of presidential "lawmaking" powers see Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority, 68 **Wash. U.L.Q.** 485, 533-560 (Fall 1990) (reprinting a Federalist Society symposium on "The Presidency and Congress: Constitutionally Separated and Shared Powers").

[3] Presidential signing statements are brief statements made by the President when he he signs into law a bill presented to him by Congress pursuant to Article I, Section 7 of the Constitution. They are generally prepared in writing before the bill is signed into law and are issued at the time of signing much the way a judicial opinion is issued contemporaneously with the entry of an order disposing of a case.

[4] I was the staffer to Attorney General Meese who originally came up with the idea of the signing statement initiative, and I drafted Mr. Meese's letter to the West Publishing Company on this issue.

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of Congress's constitutionally exclusive power over lawmaking.[5] Subsequently, both Presidents Bill Clinton and George W. Bush made extensive use of signing statements. Walter Dellinger, President Clinton's Assistant Attorney General for the Office of Legal Counsel, wrote a memorandum entitled "Presidential Authority to Decline to Execute Unconstitutional Statutes" (November 2, 1994)that defended the use of signing statements in some circumstances. President George W. Bush has made the most extensive use of signing statements of any president so far, and he has come under strong but unjustified public criticism for doing so.

The critics complaints fail and the signing statement initiative has succeeded for three reasons. First, presidential signing statements are relevant "legislative" history and should

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[5] Marc N. Garber & Kurt A. Wimmer, Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power, 24 **Harv. J. on Legis.** 363 (1987); Brad Waites, Note, Let Me Tell you What you Mean: An Analysis of Presidential Signing Statements, 21 **Ga. L. Rev.** 755 (1987); William D. Popkin, Judicial Use of Presidential Legislatyive History: A Critique, 66 **Ind. L.J.** 699 (1991). But see Cross, The Constitutional Legitimacy and Significance of Presidential "Signing Statements," 40 **Admin. L. Rev.** 209 (1988) (arguing that signing statements sometimes deserve to be given legal significance); Daniel B. Rodriguez, Presidential Signing Statements, Paper delivered at the 1989 Annual Meeting of the Western Political Science Association, Salt Lake City, Utah, March 30-April 1, 1989 (same). Legislative and journalistic criticism of the signing statement initiative is quoted in the academic literature cited above.

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be given as much (or as little) weight by courts and inferior executive officials as any other form of legislative history. Second, presidential signing statements are legally significant as administrative interpretations of statutes entitled to deference under Chevron U.S.A. v. Natural Resources Defense Council.[6] And, third, presidential signing statements may in some circumstances be legally significant as binding directives to subordinate officials in the Executive Department of the government pursuant to the theory of the Unitary Executive. After briefly describing the history and nature of the Reagan-Bush signing statement initiative in Part I below, I will explain and defend each of these three grounds for giving legal weight to presidential signing statements in Parts II, III, and IV.

I. The Reagan-Bush Signing Statement Initiative

[6] 467 U.S. 837 (1984).

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Presidential signing statements are not a new development. Presidents Jackson, Tyler, Grant, Truman, Eisenhower, Nixon, Ford, and Carter all exercised their constitutional power to issue written interpretive statements when they signed controversial bills into law.[7] Nevertheless, it is probably fair to say that "[m]ost of the pre-Reagan presidential interpretations ... have not involved politically contentious issues."[8] As Garber & Wimmer both stalwart critics of the signing statement initiative have noted, "the statements currently being produced by the administration are both qualitatively and quantitatively different from the traditional presidential statement."[9]

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[7] Cross, supra note __, at ___; Pokin supra note ___, at 700-704; Garber & Wimmer, supra note ___, at 366-370; Rodriguez, supra note ___, at 4.

[8] Popkin, supra note ___, at 702. The Jackson and Truman sigining statements discussed by Professor Pokin were at least somewhat controversial.

[9] Garber & Wimmer, supra note ___, at 366.

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President Reagan's use of the signing statement built on the good work of his predecessors "in both scope and style."[10] In publicly announcing the initiative, Attorney General Meese explained that he had arranged for the publication of presidential signing statements, along with congressional legislative history, in the West Publishing Company's widely read and widely disseminated periodical, **U.S. Code Congressional and Administrative News** ("USCCAN"). Prior to that time, presidential signing statements were only available in less readily accessible sources and were less likely to be perceived as being relevant legislative history.[11]

Attorney General Meese explained that the purpose of the Reagan signing statement initiative was to make sure that the

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[10] Rodriguez, supra note ___, at 4.

[11] It has long been recognized that the widespread public availability of legal source materials is critical if those materials are to have any real-world impact. **Grant Gilmore, The Ages of American Law** (19) (" "). See also **Mary Ann Glendon, Michael Wallace Gordon, & Christopher Osakwe, Comparative Legal Traditions** 565-570 (1985) (discussing differences in case reporting systems).

Professor Popkin explains that "Easy access to presidential legislative history is a recent phenomenon, beginning with government publication of the Weekly Compilation of Presidential Documents in 1965." Popkin, supra note ___, at 700 n.4. Prior to that time, presidential signing statements could only be found by the general public, or by interested judges and inferior executive officials, in: 1) the published public papers of various presidents; 2) occasional miscellaneous compilations of all the legislative history associated with particular bills; and 3) in the "Presidential Messages" section of the USCCAN and its predecessor, the United States Congressional Service. Id.

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President's understanding of the meaning of legislative language was given its due weight (along with Congress's understanding) by all statutory interpreters. As General Meese elaborated:

> To make sure that the President' own understanding of what's in a bill is the same ... or is given consideration at the time of statutory construction later on by a court, we have now arranged with West Publishing Company that the presidential statement on the signing of a bill will accompany the legislative history from Congress so that all can be available to the court for future construction of what that statute really means.[12]

[12] Address by Attorney General Edwin Meese III, National Press Club, Washington, D.C. (Feb. 25, 1986).

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This new publication policy, and the Attorney General's emphasis on the importance of President Reagan's signing statement initiative, predictably attracted significant press coverage.[13] This coverage must itself have been quite useful in alerting lawyers, judges, and inferior executive officials to the existence of presidential signing statements as a possible source of law.

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[13] Toobin, The Last Word, **New Republic**, Nov. 3, 1986, at 13; Kmiec, Judges Should Pay Attention to Statements by President, **Nat'l L.J.**, Nov. 10, 1986, at 13; Strasser, Executive Intent, **Nat'l L.J.**, Mar. 10, 1986, at 2. [cite Garber & Wimmer journ article and Neil Lewis article].

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There followed thereafter the issuance of a flurry of published presidential signing statements. One scholar, Professor Daniel B. Rodriguez, has counted over 100 presidential signing statements, some of great significance, that were issued between 1986 and 1989.[14] During the Clinton Administration, Walter Dellinger, the Assistant Attorney General in charge of the Office of Legal Counsel, specifically considered whether the President was faced with a choice between vetoing unconstitutional legislation or signing it and accepting it as being constitutional unless the courts ruled otherwise. Dellinger concluded that "the President has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision" presumably in a signing statement. The Clinton Administration thus clearly contemplated and approved the use of signing statements as directives to subordinates in the executive branch not to enforce constitutionally dubious provisions of federal statutes.

Since January 20, 2001, the Administration of President George W. Bush has made the most aggressive use to date of presidential signing statements issuing more than 700 of them according to some estimates. This policy is consistent with President Bush's philosophical commitment to the theory of the unitary executive, as I will argue below. With roots going back

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[14] Rodriguez, supra note ___, at 3.

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to Presidents Jackson, Tyler, and Grant, and with a deeply established modern usage beginning in the seminal presidency of Ronald Reagan, signing statements are today an established feature of the legal landscape. Getting rid of signing statements would upset a decades long understanding of the scope of presidential power that has roots that run far deeper than the roots of the much heralded right to privacy which all now agree is protected by precedent. Justice Felix Frankfurter argued in his famous concurrence in the Youngstown Steel Seizure case that sometimes the gloss of history adds meaning to the bare bones constitutional text of Article II. That argument applies to the use of presidential signing statements. Any technique which dates back to Jackson, Tyler, and Grant, and which was famously advocated by a president as great as Ronald Reagan should be deemed to be a part of the gloss which history has written on the bare bones text of Article II.

II. Signing Statements as Legislative History

The first argument as to why presidential signing statements have legal significance is that they are a form of legislative history. Article I, Section 7 specifically sets out the process by which a bill can become law saying that this will happen either when a bill is passed by both Houses of Congress and is signed by the President or when a bill is vetoed and is repassed by both Houses of Congress by a two-thirds majority of each

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house. What this means is that the president is ordinarily a necessary player in the American legislative process. The president's understanding of what a bill means when he signs it is just as legally important as is Congress's understanding when it passes either the House or the Senate.

It has long been thought that the most weighty indicia of legislative history are to be found in House and Senate Committee reports, since these documents represent the view of one of the three parties to the contract that becomes a law. Committee reports are thus more probative of legislative intent than are isolated floor statements of particular members or debates or colloquies. Presidential signing statements are precisely analogous to Senate and House Committee reports. They represent the view of one of the three actors (the House, the Senate, and the President) which is constitutionally indispensable to the making of a law. In fact, presidential signing statements are even better indicia of legislative intent than are committee reports because with committee reports there is always a doubt as to whether everyone who has voted for a bill agrees with the statements in a committee report. With presidential signing statements on the other hand, there is no question but that the President knows and endorses the assertions made in his solely authored signing statement. Signing statements are thus reliable indicators of the original intention of the President when he

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signs a bills into law. Since the president is an indispensable party to the enactment of any law that is not passed over his veto, signing statements are a valuable form of legislative history which should be consulted by the president's subordinates in the executive branch and by the courts.

There is one important criticism that can be made of the use of presidential signing statements as legislative history and that is the critique associated with Justice Scalia of ALL uses of legislative history. Justice Scalia has argued that courts ought never to consult ANY legislative history because it is the text of laws which are voted on and enacted and it is only the text that must be agreed to by both houses of Congress and the President pursuant to Article I, Section7. For this reason, Justice Scalia argues against any reliance on any legislative history including committee reports. Scalia claims courts should focus exclusively on the original public meaning of statutory language as illuminated by dictionaries and grammar books. Only if a committee report or signing statement sheds light on the original public meaning of language can it be used by judges in interpreting a law.

I agree with the Scalia critique of all uses of legislative history, and I therefore think the use of presidential signing statements as legislative history is more subject to doubt than I thought when I first argued for the idea in the Reagan Justice

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Department twenty years ago. Nonetheless, there are two important caveats to the Scalia critique which deserve to be noted. The first is that Justice Scalia's rejection of ALL uses of legislative history has never carried the day on the Supreme Court. Since his colleagues continue to use congressional legislative history to decide cases, I think they ought to use presidential legislative history in the form of signing statements to the same degree - no more and no less - than they use committee reports. What this means is that unless and until Justice Scalia carries the day in his battle against all uses of legislative history the use of presidential signing statements as legislative history ought to be treated as valid.

Second, even under the Scalia approach to legislative history, the meaning of a statutory term ascribed by a committee report or signing statement might be useful evidence of the original public meaning of that term. Committee reports and signing statements are written in English and are addressed to an audience of English speaking Americans so they could well help shed light on the ordinary public meaning of statutory terms. When this happens, even Justice Scalia might agree that a signing statement is relevant to the recovery of the original public meaning of the text. For this reason as well, presidential signing statements are relevant as sources of legislative history.

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III. Signing Statments are Entitled to Deference Under Chevron U.S.A. v. Natural Resources Defense Council.[15]

There is a second argument as to why signing statements ought to be treated as having legal significance and that is that they are entitled to Chevron deference as agency interpretations of ambiguous statutory language. In its landmark administrative law case Chevron, the Supreme Court announced a new rule to the effect that agency interpretations of ambiguous statutory language ought to be entitled to deference by the article III federal courts if the agency interpretation is a reasonable one. Pursuant to Chevron, the federal courts have deferred to scores of agency interpretations of ambiguous language in recent years.

The president is the ultimate legal interpreter in the executive branch and indeed all of his subordinates in the various agencies and cabinet departments only have authority to act because of his delegations to them of the executive power. The Constitution vests the executive power exclusively in the president and so it is only by delegation from the president that any other executive branch official can act. If the President construes ambiguous statutory language in a signing statement in

[15] 467 U.S. 837 (1984).

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a way that is reasonable, courts ought to give this presidential construction the same degree of Chevron deference that they would give to such a construction by an agency. The President has more democratic legitimacy than do agency commissioners, since he unlike them is democratically elected, at least indirectly. Moreover, the President is the Constitution's sole repository of executive power. Presidential exercises of the executive power of statutory interpretation are thus even more privileged as a legal matter than are agency exercises of that power. The Constitution makes the President unique in his ability to speak for the executive branch.

There have been many debates about the legitimacy of Chevron deference since that landmark decision was handed down but today Chevron is uncontroversially accepted by scholars from Cass Sunstein on the left to Gary Lawson on the right. A big part of the reason why Chevron is so universally accepted is because it is widely recognized that modern statutes delegate a lot of power to executive branch entities and it is thought that those vague delegations ought to be construed by politically accountable executive branch officials rather than by politically unaccountable judges. Since the President is the most politically accountable official in the executive branch, his signing statements ought to be first and foremost among the executive branch documents to which judges should defer. Chevron

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deference thus suggests that presidential signing statements ought to have legal significance even aside from their being legislative history.

Some courts have justified Chevron deference as being appropriate because of the expertise of the agency commissioners who receive that deference. This expertise argument might seem at first not to apply to the president since the president is not an expert on a highly technical subject in the way a Federal Communications Commissioner might be an expert on some aspect of federal communications law. In fact, however, Article II of the Constitution makes the President the nation's expert on the execution of the laws. A big reason why citizens vote for or against particular presidential candidates is because of their theories of how the law ought to be enforced. For this reason, courts ought to treat the President as the nation's foremost authority on what it means to take care that the laws be faithfully executed. Presidential signing statements ought thus to have legal significance as a matter of Chevron deference.

IV. Signing Statements and the Theory of the Unitary Executive

The third reason why presidential signing statements ought to be treated as having legal significance is because of the theory of the unitary executive. This theory holds that the Vesting Clause of Article II is a grant of all of the executive power in the country to the president. The fact that the Article

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II Vesting Clause must be such a grant of power is confirmed by the Vesting Clause of Article III which is the only clause in Article III which empowers the federal judiciary to act. Because the Article II Vesting Clause vests ALL of the executive power in only one person - the president - all other executive branch officials exercising executive power must do so by the implicit delegation of the President. There is simply no other constitutional basis on which executive branch subordinates could otherwise act.

A principal challenge faced by all presidents is how to control their millions of subordinates to whom the execution of the law is delegated. It is here that presidential signing statements play a vital role in helping our constitutional system to function properly. Signing statements allow the President to provide authoritative guidance to his subordinates in the executive branch as to how they should carry out and execute the law. Signing statements thus can serve as binding directives or order from the President to his millions of delegees in the executive branch as to how a law should be executed. So viewed, signing statements serve a vital function in making the executive branch function in practice the way Article II says it should function in theory. Signing statements recognize and reinforce the constitutional reality that Article II makes the President our Law Enforcement Executive in Chief.

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V. Conclusion

Presidential signing statements have a long and illustrious history dating back to President Jackson, himself a strong proponent of the theory of the unitary executive. Since the Reagan Administration, signing statements have been of central importance to the functioning of the executive branch. Signing statements deserve to be given legal weight because: 1) they are a form of legislative history entitled to as much or as little weight as is given to house committee reports; 2) they are presidential interpretations of ambiguous statutory language entitled to Chevron deference; and 3) because under the theory of the unitary executive, signing statements are a necessary tool by which the President can bind his millions of executive branch subordinates to follow his interpretation of ambiguous federal laws. Signing statements are not only legally significant; they are legally required if the President is to live up to his constitutional oath by which he swears to execute the laws. Far from being criticized for his many signing statements, President George W. Bush ought to be praised for them since they underline his resolution to fully and vigorously carry out his responsibilities under Article II of the Constitution. Presidential signing statements are a good thing and are a sign the President is vigorously and properly doing his job.

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Article

*2085 FEDERAL RULES OF STATUTORY INTERPRETATION

Nicholas Quinn Rosenkranz [FNa1]

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***2086** Introduction: Legislating Interpretive Strategies

Federal statutes do not come with instructions, but maybe they should. For as long as there have been statutes, lawyers and laymen have puzzled over their inevitable ambiguities. Gradually, case by case, courts have developed assorted tools of interpretation. Scholars, meanwhile, have conceived esoteric theories of how best to resolve statutory ambiguity. And the doctrine and the scholarship have become elaborate and sophisticated. But the very richness of this intellectual landscape has resulted in unpredictability and confusion. As theories and judges have multiplied, it has become ever more difficult to predict which judge will apply which theory to which case. After centuries of judicial and scholarly effort, "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." [FN1]

The central, unquestioned premise in this field is that the judiciary is the proper branch to design and implement tools of statutory interpretation. Scholars have unreflectively assumed as much, which is why, almost uniformly, they have implicitly aimed their work at the courts. This Article challenges that assumption. It asks whether Congress can and should help select the tools for interpreting federal statutes. It concludes that Congress has the constitutional power to do so, and that it would be wise to exercise this power.

Before assessing the actual scope of Congress's power, it is important to grasp the potential breadth of the field. The hypothetical statutes at issue are all those that would purport to give interpretive instructions. The class includes prosaic, definitional provisions such as "for purposes of this Act, X shall mean Y," as well as interpretive instructions like "this Act shall be construed broadly." It also includes any codification or abrogation of a canon of interpretation. For example, courts traditionally apply the maxim expressio unius est exclusio ***2087** alterius--expression of one thing is the exclusion of another. [FN2] But Congress might explicitly abrogate the maxim: "for purposes of this Act, the listing of several items shall not imply the exclusion of items not listed." [FN3] Indeed, Congress might codify a whole set of interpretive canons and make them generally applicable--a sort of user's manual for the United States Code.

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These examples only scratch the surface of the possible. The category embraces statutes that endorse or abrogate discrete tools, like canons, but also statutes that endorse or abrogate entire theories of statutory interpretation, like textualism. Any tool that a court has ever brought to bear on a question of statutory interpretation, and any method of interpretation that a scholar or judge has ever expounded, Congress might approve or disapprove explicitly, by statute. "This Act shall be interpreted narrowly, despite its remedial purpose." "The Oxford English Dictionary shall be the official dictionary of the United States Code." "Stare decisis shall not apply in statutory cases." "This Act shall be interpreted in textualist fashion, in accordance with principles set forth in the scholarship of Frank Easterbrook." "Agency interpretation of this Act shall be conclusive and binding on federal courts." "Legislative history shall not be used to resolve ambiguity in any future act of Congress." "Ambiguous criminal statutes shall be construed against defendants." "Ambiguity in this Act shall be resolved by reference to the I Ching." Would any such statutes be both constitutional and constructive?

The constitutional question turns out to be as important as the answer, because it adds a vital and neglected dimension to the debate about statutory interpretation. To ask whether Congress may codify a particular interpretive method is precisely to ask whether the Constitution requires the method that is to be displaced. Many of the great scholars in the field--Laurence Tribe, Jerry Mashaw, and Cass Sunstein, for example--have suggested that some tools of statutory interpretation are "constitutionally inspired" [FN4] or "respectful of diverse aspects of the constitutional order" [FN5] or "traceable to central features of the constitutional structure." [FN6] Scholars who on any other question can be counted on for a definitive judgment--constitutional, unconstitutional--are uncharacteristically wooly in their constitutional claims ***2088** about statutory interpretation. Their answers have been imprecise, because they have not asked the precise constitutional question: could Congress abrogate the canon under consideration? This inquiry proves essential in locating statutory interpretation under the constitutional firmament.

This Article concludes that Congress has constitutional power to codify some tools of statutory interpretation. [FN7] Congress has used this power in the past, but only sporadically and unselfconsciously, at the periphery of the United States Code. The power itself is vast, however, and could transform the landscape of statutory interpretation. Because this power has received minimal systematic analysis, [FN8] there is extraordinary potential for imprudent or unconstitutional overreaching. But used wisely, congressional power to legislate interpretive strategies may improve legislative-judicial communication and thus bring our legal system closer to its democratic ideal.

The interpretive status quo is cacophonous. Every judge and scholar has his own theory of how best to interpret statutes, and this diversity renders the interpretive project unpredictable. Each theory may have its own merits, and some may be better than others, but these differences ultimately may matter less than a central imperative of statutory interpretation: a single, predictable, coherent set of rules. [FN9] The Supreme Court, with its nine competing perspectives and its jurisdictional restriction to cases and controversies, will never be able to achieve this coherence alone.

Statutory interpretation is, in many ways, a field like civil procedure, or criminal procedure, or evidence. Like evidence and procedure, statutory interpretation is an area of judicial expertise. And like evidence and procedure, statutory interpretation was long assumed the ***2089** exclusive province of the judiciary. On the other hand, all three fields demand, above all, internally coherent and consistent codes. These are notoriously hard for judges to develop case by case, and after years of effort, the results have been unsatisfactory.

In the fields of evidence and procedure, an innovative solution has been discovered: the federal rulemaking process. This process combines the expertise of the courts with the democratic legitimacy of Congress. It has harnessed the strengths of both branches and led, through collaboration, to the creation of coherent, unified codes: Federal Rules of Evidence and Procedure. These successes should be replicated, in Federal Rules of Statutory Interpretation.

The idea is not merely theoretical. Many legislatures have taken a far more active role than has Congress in the selection of interpretive methodologies. All fifty states and the District of Columbia, [FN10] as well as several other countries, [FN11] have interpretive codes, many of which give far more detailed instructions on interpretation than anything in the ***2090** United States Code. [FN12] And Congress has just recently glimpsed the potential impact of

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this sort of legislation. The proposed Federalism Accountability Act of 1999, [FN13] on which the Senate Committee on Governmental Affairs reported favorably, [FN14] stood to shift the state-federal balance dramatically using nothing more than an interpretive rule--a stronger presumption against preemption of state law. Though the full Congress never voted on this bill, others like it will no doubt follow. As Congress discovers the potential for accomplishing substantive goals with interpretive rules, it will be essential to have analytical tools at hand to assess the constitutionality and the wisdom of such rules.

Part I of this Article shows how this inquiry adds an important dimension to any theory of statutory interpretation. Part II gives more shape to the category of interpretive statutes and creates a framework for analyzing their constitutionality. It draws distinctions within the broad category--such statutes may be definitional or interpretive, statute-specific or general in scope, static or dynamic--and explores whether these distinctions mark constitutional fault lines. It concludes that Congress does have power to mandate some interpretive strategies. Part III shows why some such mandates should be desirable--both as good public policy and as good politics--to a majority in Congress. It tentatively recommends a few illustrative interpretive statutes, though these specific prescriptions are secondary to the more general point: some interpretive statutes would be constitutional and wise. Part III also argues that the ideal implementation of an interpretive regime would be as a set of federal rules: the Federal Rules of Statutory Interpretation.

I. The Significance of the Inquiry

A. The Audience Question

The inquiry undertaken here introduces a new dimension to the discussion of statutory interpretation. The literature in this area is rich and sophisticated, and abounds with theories of how best to resolve ***2091** ambiguities in statutes. A recent theoretical resurgence stretches from the new textualism [FN15] of Justice Scalia [FN16] and Judge Easterbrook [FN17] to the dynamic statutory interpretation of William Eskridge. [FN18] But almost without exception, scholars in the field assume without discussion that the proper venue for choosing an interpretive strategy is the courtroom. [FN19] The hope and intent of these scholars is that they will persuade judges. Judges are the implicit audience. This assumption is exemplified by the first sentence of a recent Adrian Vermeule article abstract: "How should judges choose doctrines of statutory interpretation?" [FN20]

Vermeule's major premise is important and sophisticated: "[c]ourts must choose interpretive doctrines on largely empirical grounds, under conditions of severe empirical uncertainty, often without the luxury of postponing their decisions" until "new information . . . becomes available or . . . crucial experiments can be conducted." [FN21] The observation that interpretive choices often require empirical analysis is a crucial one, and the insight that courts may be institutionally ill-equipped to perform it is central to the thesis of this Article. But, again, note the unconscious premise of Vermeule's thesis: "[c]ourts must choose interpretive doctrines . . . ." If they are so institutionally ill-suited for the necessary data collection and empirical analysis, then why must courts be left with the choice?

Once Congress is acknowledged to have at least some constitutional power over interpretive methodology, it becomes essential to ask the audience question in an explicit and reflective way. Some proposals regarding statutory interpretation sensibly could be addressed to courts, persuading them to adopt, on their own authority, a particular interpretive technique. But others rightly should be addressed to Congress, and should advocate legislation that implements the proposed theory and binds the judiciary. Indeed, some proposals might urge constitutional ***2092** amendment, and so be addressed to the people. Every article about statutory interpretation should, therefore, make and explain an explicit choice of audience--an explicit choice of who has the power, the institutional wherewithal, and the probable inclination to implement the proposed theory.

This audience inquiry proves inextricably bound up with the proposed theory itself. Scholars must consider whether the nature of their theory is such that it calls for judicial or congressional adoption. The particular theory, in other words, will probably suggest its appropriate audience. Vermeule's argument, for example, which relies on the empirical nature of interpretive choices, seems an obvious candidate for Congress. But at the same time, the choice of audience may have subtle feedback effects on the style and substance of the argument itself. First, as a matter of strategic advocacy, certain types of arguments are most appropriately addressed to judges; others are more effective

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when addressed to Congress. But second, explicit attention to the choice of audience--the choice of which branch could and should implement the theory--will inevitably entail an inquiry into the theory's constitutional status. This inquiry is analytically indispensable, and it is discussed immediately below. For these reasons, statutory interpretation scholars should make an explicit and reasoned choice of audience.

It bears emphasis that this is so whether or not one is convinced that Congress has any comparative advantage in this area. Even if a scholar concludes that Congress has no constructive role to play--either with regard to his particular theory or with regard to statutory interpretation generally--he should nevertheless be explicit about that determination, and make a considered and explicit choice to direct his argument to courts.

B. The Constitutional Dimension of Statutory Interpretation

Scholarship about statutory interpretation usually presents a thesis in the following form: ambiguity in statutes should be resolved by method X. It then advances arguments in favor of method X, and these are almost always policy arguments: X will discern what the legislature intended. X will produce certainty. X will enable statutes to adapt to changing circumstances. X will give appropriate notice to the citizenry. X will be easiest for courts to administer. X will constrain courts. X will provide a clear background rule against which Congress may legislate.

A logically antecedent question is almost always ignored: What is the constitutional status of X? The question is both complicated and crucial. At first pass, there seem to be three possible answers: constitutionally required, constitutionally permitted, constitutionally forbidden. A few scholars might advocate their X even though they believe it constitutionally forbidden; they in effect advocate a constitutional ***2093** amendment. Many perhaps believe that their X is constitutionally required; what they seek is a ruling from the Supreme Court that this is so. Presumably, though, most such scholars would say, if pressed, that their X is constitutionally permitted. Their articles have implicitly assumed as much, they might say. That is why they, like Vermeule, have proceeded directly to their policy arguments and implicitly directed those arguments to judges.

But matters are not nearly so simple. It is clear what it means to say X is constitutionally required or constitutionally forbidden. But what does it mean to say that a technique X of statutory interpretation is constitutionally permitted? By pressing harder on that question, and by asking in particular which actors may implement or abrogate X, one discovers how and to whom to pitch one's argument. One also discovers new and useful categories with which to classify constitutional rules.

Consider two types of constitutionally permissible rules. First, the Constitution might have no position whatsoever on X. Perhaps the basic syntactic canons are of this type. The Constitution may be utterly indifferent to expressio unius est exclusio alterius as a canon of statutory interpretation. Such canons may be described as pure common law, which courts developed and courts can alter. But there is a second possibility. Perhaps, even though X is constitutionally permissible, the Constitution establishes not- X as a starting-point rule--changeable, but only by act of Congress. [FN22]

Take, for example, the rule of lenity, which provides that ambiguous criminal statutes are to be construed in favor of the defendant. [FN23] Imagine a scholar whose thesis X is that this rule should be abandoned; criminal statutes should be construed evenhandedly like any other statute. The scholar has many policy arguments: his rule would ***2094** deter more crime, be more predictable, create a clearer background for congressional action, and so forth. What is the constitutional status of X?

It may be that the Due Process Clause requires the rule of lenity. [FN24] The Due Process Clause (informed by the Ex Post Facto Clause) requires criminal statutes to manifest a certain clarity and provide a certain sort of notice, and perhaps the rule of lenity is a required and immutable incident of those constitutional provisions. If so, then X--abandoning the rule--would require a constitutional amendment.

But perhaps, instead, the Constitution establishes the rule of lenity, not as an immutable requirement, but rather as a constitutional starting-point rule. In other words, perhaps the Due Process Clause of the Fifth Amendment requires courts to apply the rule of lenity to federal criminal statutes unless and until Congress abrogates it by

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statute. Why might this be so? The rule of lenity ensures that criminal statutes are sufficiently clear to satisfy due-process notice. But perhaps an explicit congressional statement that criminal statutes will be construed like any others, with no thumb on the scale for defendants, would itself satisfy due-process notice. That is, perhaps the citizenry could rightly and constitutionally be charged with knowledge of both the criminal statute and the interpretive rule. [FN25] If this were the constitutional status of the rule of lenity, then even though courts would lack constitutional power to abrogate the rule, [FN26] Congress would have that power.

This notion of constitutional starting-point rules may appear similar to Henry Monaghan's account of "a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or ***2095** even reversal by Congress." [FN27] Monaghan's lead examples of "congressionally reversible constitutional law" [FN28] are Miranda warnings [FN29] and dormant commerce clause doctrine, [FN30] and Monaghan might agree that certain rules of statutory interpretation, like the rule of lenity, are likewise congressionally reversible.

But there is also an important conceptual difference between Monaghan's "constitutional common law" and the account of constitutional starting-point rules sketched here. These rules are not, as Monaghan would have it, "inspir [ed] . . . but not required" by the Constitution. Rather, they are required by the Constitution, but the Constitution requires them only until Congress provides otherwise. Monaghan's phrase implies that judges invent these rules [FN31] and may change them at will on prudential grounds in common law fashion. But these rules are not merely "a species of federal common law." [FN32] When the Court overrules a common law precedent, there is no necessary implication that the first decision was "wrong"; rather, in the modern view, the common law has simply "evolved"--perhaps in light of changed circumstances or experience with the previous rule. [FN33] But if the Court were to overrule Miranda v. Arizona [FN34] or a dormant commerce clause case, it would implicitly hold that the earlier case had misread the Constitution. [FN35]

For this reason, what Monaghan calls "constitutional common law" is better described as constitutional starting-point rules--constitutional commands that the Court has no constitutional common lawmaking ***2096** power to alter, but that may be altered by act of Congress. This account should be more palatable to those who adamantly deny that the Court may "create" constitutional common law: [FN36] the Constitution requires rule X; the Court has no power to change rule X; [FN37] but because X is a starting-point rule rather than an immutable rule, Congress may abrogate it by statute.

The distinction is not purely semantic. It is true, of course, that in one sense constitutional rules are as "made up" as common law. And it is true, too, that when a court contemplates overruling a decision--whether constitutional or common law--its stare decisis calculus is a sort of second-order policy judgment about the settled expectations created by the existing rule. [FN38] But the common law calculus also involves an explicit first-order comparison of the competing rules on their policy merits. By contrast, constitutional decisions, at least in theory, rely primarily on the text, history, and structure of the Constitution, not on the evolving policy merits of the competing rules. For this reason, courts are generally quicker to overrule common law decisions than constitutional ones. Since constitutional starting-point rules are constitutional law rather than "a species of federal common law," [FN39] they should receive the full stare decisis respect of constitutional decisions.

Within the broad realm of the constitutionally permissible, there are other possible nuances as well. The Constitution might, on some questions, permit a range of solutions, and yet mandate immutable parameters within which the solution must fall. In substantive Fifth Amendment law, Miranda might be such a case. Though the Court held that Congress and the states could replace Miranda warnings, a constitutional parameter requires that the replacement be "fully as effective." [FN40] When Congress's attempted replacement overstepped the parameter, the Court struck it down, while explicitly declining to "hold that the Miranda warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements." ***2097**[FN41] Thus, the Constitution establishes a starting point (Miranda warnings) that legislatures can change, as well as an immutable parameter (the requirement that any legislative solution must be "fully as effective").

In statutory interpretation, perhaps the Constitution takes the same approach to lenity. As suggested above, the rule of lenity may be not an immutable constitutional rule, but rather may be a constitutional starting-point rule, which

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Congress may abrogate. But perhaps, too, the Fifth Amendment [FN42] establishes immutable parameters regarding lenity in statutory interpretation. Congress can, of course, ratchet lenity up, freeing defendants on anything but crystalline statutory clarity; and perhaps Congress could ratchet lenity down somewhat, with a provision requiring that courts construe federal criminal statutes evenhandedly. But perhaps it could not require that criminal statutes always be construed against the defendant. Though the Due Process Clause might allow a range of options regarding lenity, it might not permit this last.

There is one final possibility. Perhaps the Constitution establishes some rules that might be called constitutional default rules. Consider, for example, "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" [FN43] Clear-statement rules like this one function as default rules rather than mandatory rules, in the sense that Congress may avoid the effect of such rules and achieve the desired result with an appropriately clear statement. But could Congress, with an extremely clear statement, reverse the default rule itself, wholesale? Could Congress pass a statute providing: "Absent an unmistakably clear statement, the entire United States Code shall apply to state governments, whether or not such application alters the usual constitutional balance between the states and the federal government" ? Or would Tenth and Eleventh Amendment principles of federalism and accountability make such a statute unconstitutional? If they would [FN44]--and this is arguably the correct way to understand cases like Will v. Michigan Department of State Police [FN45]--then the rule requiring a clear statement to interfere with core state functions is ***2098** an immutable constitutional default rule. [FN46] The effect of the rule may be avoided statute by statute, but the default rule itself is required by the Constitution, and may not be avoided wholesale.

Note that this category is distinct from the category of constitutional starting-point rules discussed above. A constitutional starting-point rule may be reversed by act of Congress. A constitutional default rule may not itself be reversed by Congress; the rule qua default is immutable. However, because it is a default rule, Congress may avoid its effect statute by statute with clear statements. Constitutional default rules are also distinct from more familiar, mandatory constitutional rules. Constitutional default rules of interpretation do not foreclose any legislative results; they merely require (unalterably, short of constitutional amendment) certain forms of words to achieve certain types of outcomes.

In short, methods and techniques of interpretation (as well as other types of rules) may usefully be categorized by asking who has power to change the rule, and by how much. The table on the next page summarizes the taxonomy sketched thus far.

The point of this discussion is not merely that scholars of statutory interpretation should routinely address the constitutional status of the particular theory under discussion. Nor is the point exhausted once one realizes that the constitutionality question is far more complex than it first appears. (For every tool or theory of statutory interpretation, the question is not merely whether it is constitutionally required, permitted, or forbidden. Many tools or theories may implicate such esoterica as constitutional starting-point rules, constitutional parameters, and constitutional default rules.) The diamond tip of the point is this: to ask about the constitutional status of a method of interpretation is precisely to ask who has constitutional power to implement or abrogate the method.

A few scholars have noted the yin of this point, while overlooking the yang. In a perceptive article, Jerry Mashaw argues that "although we have no way to decide definitively on the best interpretive methodology, it is always essential to claim, and when contested, to argue about, the constitutional legitimacy of the methodology we utilize." [FN47] This is emphatically so, and it is a point that most scholarship on ***2099** statutory interpretation ignores. But having noted that key point, Mashaw proceeds to demonstrate the type of analysis he advocates, and it is here that his article becomes uncharacteristically imprecise. He takes as his first example the presumption against implied causes of action, [FN48] and argues that it "can be explained in terms of four different ideas, all of which are of constitutional moment." [FN49] Yet ultimately, Mashaw fails to make a definitive claim about the constitutional status of the rule. After making four "constitutionally oriented arguments," he concludes only that the rule is "ground[ed] . . . in constitutional values" and "respectful of diverse aspects of the constitutional order." [FN50]

Rules and How to Change Them

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Why the imprecision? Having realized that it is vital to ask about the constitutional status of a rule of interpretation, why does Mashaw not provide a clean answer? The reason is that, when considering the constitutional status of a rule of interpretation, the rubber does not hit the road until one asks: could Congress implement or abrogate the rule? In Mashaw's example, could Congress pass a statute providing: "Absent ***2100** a clear statement to the contrary, every provision in the United States Code creates a private cause of action" ? If Mashaw would say yes, then he believes the current rule a constitutional starting-point rule; if he would say no, then he believes it a constitutional default rule. And the arguments on this question must demonstrate how and why the Constitution permits or forbids such a statute. Only by addressing this hypothetical statute can one grapple with the import of Mashaw's "constitutionally oriented arguments," "constitutional values," and "diverse aspects of the constitutional order." [FN51]

Cass Sunstein falls into much the same trap. Consider the following paragraph:

Interpretive principles rooted in constitutional provisions help account for a large number of decisions. Consider, for example, the presumption that statutes enacted by Congress should not lightly be taken to preempt state law. In the wake of the New Deal, constitutional limits on federal power have rarely been enforced by the courts, but the ordinary assumption is that state law should remain intact unless Congress expressly decides otherwise. This assumption is traceable to central features of the constitutional structure, and it vindicates a constitutional norm, though one that perhaps coexists awkwardly with New Deal reforms and the rights revolution. Consider as well the rule of lenity in criminal law, which counsels courts narrowly to construe criminal statutes in the event of vagueness or ambiguity. The principle is rooted in notions of due process, which require clear notice before the imposition of criminal liability. [FN52]

There is much to admire in this paragraph: chiefly, the crucial focus on the constitutional status of interpretive methods, and the apt choice of a structural example (preemption) and a rights example (lenity). But why does this paragraph close without a precise claim about the constitutional status of the rules discussed? [FN53] Why must the reader be satisfied with: "traceable to central features of the constitutional structure"; "vindicates a constitutional norm"; "rooted in notions of due process" ? [FN54] The reason is that Sunstein never asks the questions that put a fine point on the constitutional inquiry. Could Congress reverse ***2101** the preemption rule globally and create a new default? Could Congress abrogate the rule of lenity? How much? Are there immutable constitutional parameters?

Sunstein does not ask these questions because he has already dismissed them, too quickly, three pages earlier: "The easiest cases . . . involve express legislative instructions about interpretation. . . . When the legislature has been explicit, there can be no objection to judicial use of the relevant instructions." [FN55] But these cases are not so easy. In light of his discussion of the rule of lenity, quoted above, it seems doubtful that Sunstein himself would have "no objection" to a statute providing that "ambiguous criminal statutes shall be construed against the defendant." Would "notions of due process" permit such a thing? Asking whether there can be an objection in particular cases is precisely the way to know whether constitutional arguments like Sunstein's have any real bite. Only by focusing on Congress's power to abrogate a rule of interpretation can one discern its constitutional status.

The point applies not only to specific canons, but also to entire theories of statutory interpretation. Do Justice Scalia and Judge Easterbrook believe that statutory textualism is constitutionally required? The way to ask them is with hypothetical statutes: "Ambiguities in this Act shall be interpreted by reference to pre-enactment legislative history." [FN56] "Ambiguities throughout the United States Code shall be interpreted by reference to pre-enactment legislative history." [FN57] "Ambiguities in this Act shall be interpreted by reference to subsequent legislative history." "Ambiguities in the United States Code shall be interpreted by reference to subsequent legislative history." If Justice Scalia and Judge Easterbrook would say constitutional, constitutional, unconstitutional, unconstitutional (as is argued below [FN58]), then they believe statutory textualism is a constitutional starting-point rule with certain immutable constitutional parameters. [FN59]

***2102** This Article concludes that Congress would be wise to pass statutes mandating interpretive methods. [FN60] But inquiring whether Congress could pass such statutes is crucial, even if one is not convinced that it should. Whether or not Sunstein believes that Congress should abrogate the rule of lenity, he can only really grapple with

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the constitutional status of the rule by asking whether Congress could. Whether or not Mashaw believes that Congress should mandate a presumption in favor of implied causes of action, the key to his constitutional inquiry is to ask whether it could. Whether or not Justice Scalia and Judge Easterbrook believe Congress should ratify some use of legislative history, a precise claim about the constitutional status of textualism turns on whether and to what extent Congress could. The constitutional status of an interpretive method should always be tested by a hypothetical statute mandating or abrogating the rule.

II. Some Distinctions and Their Potential Constitutional Significance

Congress has power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the [enumerated legislative] Powers, and all other Powers vested by th[e] Constitution in the Government of the United States, or in any Department or Officer thereof." [FN61] Rules mandating tools of statutory interpretation may be necessary and proper for carrying into execution the legislative power, because they may improve the precision with which the legislative power may be exercised. [FN62]

They might be improper, however, if they violate principles of separation of powers. [FN63] The primary objection of this sort is that at least some such statutes encroach on the power of the judiciary. [FN64] If choice and design of interpretive methodology are necessary incidents of the judicial power--if they are inherent in "the province and duty of the ***2103** judicial department to say what the law is" [FN65]--then they would be unsusceptible of congressional regulation. This line of argument proves generally unsound, because whatever judicial power exists over interpretive methodology must be common lawmaking power, which may be trumped by Congress.

Particular interpretive statutes, though, may evoke more potent separation of powers objections. Some may appear to evade the formal lawmaking requirements of Article I, Sections 1 and 7. [FN66] Others might seem to bind future Congresses impermissibly. Still others might violate principles of nondelegation. In some contexts, these objections prove well taken.

This Part distinguishes interpretive statutes based on whether they are (1) definitional or nondefinitional, (2) statute-specific or general in application, and (3) static or dynamic. (These are independent variables, so a statute might be, for example, definitional, statute-specific, and static.) These distinctions may mark boundaries between what is permitted and what is forbidden by the constitutional separation of powers.

A. Definitional Versus Nondefinitional

One type of interpretive statute is so familiar and ostensibly so banal that it is rarely remarked upon at all. These might be called definitional statutes--statutes that define terms. [FN67] Consider a typical example: "For the purposes of this Act . . . 'basic agricultural commodity' shall mean corn, cotton, peanuts, rice, tobacco, and wheat . . . ." [FN68] This provision seems entirely unremarkable and unproblematic. But because it is so simple, it may serve as a jumping-off point for discussion of definitional statutes generally, not all of which are so uncontroversial. These, in turn, provide an analytical baseline from which to evaluate and compare more esoteric interpretive legislation.

To understand how statutory definitions work, it is useful first to consider how statutes work without them. If Congress uses a vague phrase like "basic agricultural commodity" without defining it, then courts must give the phrase content by bringing various tools of statutory interpretation to bear on the ambiguity. Absent a definition, litigation could turn on, for example, whether corn is or is not a "basic ***2104** agricultural commodity." Courts might look the words up in a dictionary. They might look to other uses of the phrase in the same statute or perhaps in other statutes and compare contexts. They might look to committee reports and other forms of legislative history. They might try to discern the purpose of the act, and whether the inclusion of corn would effectuate that purpose.

The absence of a definitional section might prompt twin constitutional objections. In separation of powers terms, statutes with undefined words or phrases might present an unconstitutional delegation to the courts; in rights terms,

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such statutes might be unconstitutionally vague and so violate due process. But these twin objections have purchase only in extreme cases. Phrases far less determinate than "basic agricultural commodity" have survived challenges, whether presented in terms of delegation [FN69] or vagueness. [FN70] It is clear, then, that Congress could have omitted the definition of "basic agricultural commodity," and countless other definitions like it, without running afoul of the Constitution.

Conversely, when Congress inserts a definitional section, courts resort not to their usual grab bags of interpretive tools, but to the statutory definition alone. Congress in effect replaces a complicated and fuzzy algorithm with a simple cut-and-paste function: "Where one sees X, one shall read Y." [FN71] No guesswork is necessary (and no litigation likely) to determine whether corn is a "basic agricultural commodity." It is; Congress said so. Cut and paste. [FN72]

Is it plausible that the agricultural statute above and countless others like it violate separation of powers principles by impinging on the judicial power and offending Article III? As discussed, there would be no constitutional objection had Congress not specified the meaning of "basic agricultural commodity"; Congress may, within a very large range, leave the process of definition to the courts. Does it follow that Congress must not define terms within that range, and so must leave that responsibility to the courts?

***2105** Surely not. It cannot be that Congress is required to legislate at the highest level of generality consistent with due process and nondelegation. True, when Congress defines a term, it takes away a power that would otherwise belong to the courts. But that is equally true whenever Congress abrogates federal common law. [FN73] That the courts would have an additional power absent a particular statutory provision hardly suffices to show that the provision violates Article III.

Moreover, as discussed above, definitional statutes invoke cut-and-paste functions. Where one sees X, one is to read Y. From the nature of this function, it follows that Congress could achieve the same result simply by writing Y in every place where it wrote X. Instead of "basic agricultural commodity," it could have simply reproduced the list--"corn, cotton, peanuts," and so forth--at each point, performing the cut-and-paste function itself. It would require an odd formalistic stubbornness to hold that Congress may not define X to mean Y. [FN74]

The analysis would be no different if Congress were to incorporate a definition by reference. Congress might provide: "For purposes of this section, X bears the meaning given in the second edition of the Oxford English Dictionary." Since Congress could just as easily have copied the dictionary definition into the United States Code itself, there is no general constitutional objection to incorporating the definition by reference. [FN75]

The principle that emerges is that definition of legislative terms must, as an original matter, be an incident of the legislative power. Congress may define as many legislative terms as it wishes. Congress also may decline to exercise that power and leave to the judiciary the task of divining definitions. Defining terms that Congress did not is an inherent incident of the judicial power. As the leading treatise on statutory interpretation puts the point:

To hold that a definition incorporated into an act is an usurpation of the judicial function, is to allow form to dominate over substance. The legislature ***2106** is the primary law-making authority and should be able to declare the law in any form it chooses as long as it is clearly expressed. [FN76] The Supreme Court agrees. [FN77]

This discussion perhaps exceeds what is necessary to establish the constitutionality of definitional statutes; common sense plus citations to the treatise [FN78] and the Supreme Court case [FN79] should suffice. The purpose, though, is to establish a comprehensive analytic baseline against which to compare nondefinitional interpretive statutes.

Consider a statute that explicitly reverses a canon of interpretation. Section 1 provides: "X shall include A, B, and C." Section 2 provides: "The listing of items in a definition shall not be construed to imply the exclusion of other, similar things." Absent section 2, a court would probably apply the canon expressio unius est exclusio alterius to exclude similar-thing D. But section 2 explicitly negates the canon and tells the judiciary not to use one of its own inventions. It purports to trump a rule created by judges to resolve statutory ambiguity. And the instruction is not a purely algebraic cut-and-paste function. One cannot say a priori, as before, that such a statute must be permissible because Congress could simply have listed A, B, C, and D wherever it wrote X. In this case, Congress could not

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have known ex ante what D would turn out to be. [FN80] In this example, Congress is truly instructing courts on interpretation, on how courts should do "their" business. Here, a general objection based on Article III prerogatives might seem to have real bite. Does section 2 impinge on the judicial power?

To say that it does is to claim that either (1) expressio unius is constitutionally required; or (2) though the canon is not constitutionally ***2107** required, it may be changed only by courts in an exercise of judicial power, and not by Congress in an exercise of legislative power. The first claim is implausible. The Constitution may well require some tools of statutory interpretation--some bave been mentioned already; others will be discussed below. But nowhere does the Constitution suggest anything like an immutable code of interpretive canons, and the Court has never implied that expressio unius is a constitutional rule.

But the second claim, from judicial prerogative, is implausible too, for the simple reason that there are no generally applicable rules, in this area or any other, which courts may change but Congress may not. This proposition follows from the accepted hierarchy of federal law: the Constitution always trumps statutes, but statutes always trump the common law. When judges propound rules that the Constitution requires, the rules have the authority of constitutional law. But when judges propound rules of general application that do not derive from a legal text, these rules are common law and may be reversed by statute. [FN81] There is no third possibility. [FN82] It has never been suggested that some types of common law trump statutes; indeed, even Monaghan's "constitutional common law" may be reversed by Congress.

Developing general rules for decisionmaking, like what procedures to use and which inputs are relevant, is quintessential common lawmaking. [FN83] From the beginning, federal courts developed the law of evidence in common law fashion. [FN84] But that history did not foreclose the Federal Rules of Evidence. Methods and canons of statutory interpretation ***2108** are analogous. Like old evidence rules, they are (for the most part) federal common law, developed by the courts to help reach accurate outcomes or promote other policy goals in deciding cases and controversies. Like common law evidence rules, (most) tools of statutory interpretation (those that are not constitutionally required) may be displaced by act of Congress. [FN85]

Moreover, consider that definitional and interpretive statutes are not regulations of the Article III judiciary per se. Rather, they regulate interpretation of federal statutes in any court, whether federal, state, or foreign. A state court could not ignore federal statutory definitions or federal interpretive instructions, any more than it could ignore federal substantive rules. A Louisiana state court could not decide, for example, that corn is not a "basic agricultural commodity" [FN86] in Louisiana. The definition is part and parcel of the substantive federal law. Likewise, it could not ignore a federal instruction that expressio unius does not apply to the construction of a federal statute. Conversely, a federal interpretive statute would not goveru a federal court sitting in diversity and interpreting a state statute. Indeed, one that purported to do so would be unconstitutional. [FN87] Rather, state statutes arrive in federal court with state interpretive methodology--whether common law or statutory--in tow. [FN88] And if the Louisiana legislature can instruct a federal court on interpretive methodology without violating Article III, it is hard to see why Congress cannot do the same. Interpretive rules are substantive law, and they go hand in hand with the substantive statutes of the legislatures that create them. These statutes are "necessary and proper for carrying into Execution" [FN89] the legislative power, not the judicial power. Therefore, there can be no general objection based on Article III.

The only necessary inquiry concerns the constitutional status of the specific interpretive method at issue. If the method is a constitutional mandatory rule, then Congress may not change it. If it is a constitutional default rule, then Congress may not change the rule qua default (though the rule forecloses no legislative outcome). If it is a constitutional starting-point rule, then Congress--and only Congress--may ***2109** alter the rule. If it is bounded by immutable constitutional parameters, then Congress may change it within those parameters. And if the Constitution expresses no demonstrable view about it whatsoever, as is the case with syntactic canons like expressio unius, then the rule is ordinary common law that Congress (or courts) may change at will.

Likewise, consider the Civil Rights Act of 1991, which provides: "No statements other than the interpretive memorandum . . . shall be considered legislative history of, or relied upon in any way as legislative history of . . . [certain provisions] of this Act." [FN90] There is a constitutional objection to this restriction only if the practice it replaces-- courts' usual recourse to legislative history--is constitutionally required. The claim cannot be that, though

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use of legislative history is not constitutionally required, the judicial branch has exclusive power to decide whether to use it or not. Any such power is common lawmaking power and may be trumped by statute. There is no general, Article III objection that developing interpretive methodology is an inalienable judicial prerogative.

Indeed, rather than merely eliminating legislative history from the algorithm of interpretation, Congress might replace the algorithm entirely. There is no general Article III objection to an act of Congress that specifies an interpretive method. And there is likewise no objection to incorporating by reference a method described elsewhere. [FN91] An act might specify, for example, that its ambiguities be resolved "in textualist fashion, as described in the past scholarship of Frank Easterbrook." [FN92] Congress could as easily copy Judge Easterbrook's scholarship into the United States Code, so there is no objection to incorporating it by reference.

The distinction between definitional statutes and nondefinitional interpretive statutes is useful taxonomically, but it is not constitutionally dispositive. Statutes of either type might prove unconstitutional, but the constitutional fault lines must be sought elsewhere.

B. Scope of Application

1. Statute-Specific Versus General.--All the definitional statutes and nondefinitional interpretive instructions discussed above are limited in scope. The agricultural statute provides: "For the purposes of this Act . . . 'basic agricultural commodity' shall mean corn, cotton, peanuts, rice, tobacco, and wheat . . . ." [FN93] The Civil Rights Act of 1991 provides: "No statements other than the interpretive memorandum ***2110** . . . shall be considered legislative history of, or relied upon in any way as legislative history of . . . [certain provisions] of this Act." [FN94] The scope of these interpretive provisions is limited to a single act; they are statute-specific.

Not all interpretive statutes, however, are so limited in scope. The Dictionary Act, [FN95] for example, provides definitions and interpretive instructions for "any Act of Congress." [FN96] Its definitions include commonsensical ones like: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." [FN97] They also include such arcana as: "[T]he words 'insane' and 'insane person' and 'lunatic' shall include every idiot, lunatic, insane person, and person non compos mentis." [FN98] And lest definitional statutes all be thought trivial, one of the most controversial statutes of the last decade, the Defense of Marriage Act, inserted a humble definition at the beginning of the United States Code: "In determining the meaning of any Act of Congress . . . the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." [FN99] Again, these are general definitional provisions. They define terms not merely for the purpose of one statute but throughout the United States Code.

2. General-Retrospective Versus General-Prospective.--There is also an important subdistinction to be drawn among interpretive statutes that are general in scope. General interpretive statutes may be retrospective, prospective, or both. [FN100] The Dictionary Act, for example, is general both retrospectively and prospectively; it governs in both temporal directions. It is retrospective in the sense that its definitions and instructions control the interpretation of all previous acts of Congress. It obliquely amended the entire United States Code. Whatever a previous Congress may have meant by "marriage," and whatever ***2111** subsequent gloss the judiciary might have put on the word, its definition was changed, at one stroke, throughout the United States Code.

The Dictionary Act is also prospective, in the sense that its definitions and instructions also control the interpretation of any subsequent statute passed by Congress. A subsequent Congress can avoid the effect of the Dictionary Act by repealing it altogether or by specifying that it does not apply to a particular piece of legislation. [FN101] But unless a subsequent Congress provides otherwise, the Dictionary Act will control the interpretation of its enactments.

This subdistinction is worth drawing for two reasons. First, though the Dictionary Act is both prospective and retrospective, a general interpretive statute need not be both. One could provide, "In all future acts of Congress, X shall mean Y." Another could provide, "In all past acts of Congress, Z shall be interpreted broadly." Second, though both types of interpretive statute may be criticized on the basis of their general applicability, the nature of the

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criticism depends on whether the statute is prospective or retrospective. (Statutes that are both prospective and retrospective, like the Dictionary Act, may of course be subject to both types of criticism.) These critiques might be pragmatic, or they might be constitutional. The balance of this section will consider and compare these two types of criticism.

(a) General-Retrospective.--Consider, for example, an intriguing recent interpretive bill. The proposed Federalism Accountability Act of 1999 [FN102] began with a finding that "in the past, the lack of clear Congressional intent regarding preemption . . . [has left] the presence or scope of preemption to be litigated and determined by the judiciary and sometimes produc[ed] results contrary to or beyond the intent of Congress." [FN103] Congress, in other words, was not adequately specifying its preemptive intent, and courts were failing to interpret congressional imprecision correctly. What was called for was an interpretive instruction--an act of Congress that would tell courts how to interpret other acts of Congress:

SEC. 6. RULE OF CONSTRUCTION RELATING TO PREEMPTION

(a) Statutes.--No statute enacted after the effective date of this Act shall be construed to preempt, in whole or in part, any State or local government law, ordinance, or regulation, unless --

(1) the statute explicitly states that such preemption is intended; or

***2112** (2) there is a direct conflict between such statute and a State or local law, ordinance, or regulation so that the two cannot be reconciled or consistently stand together. [FN104]

The Senate Committee on Governmental Affairs reported favorably on this bill and recommended it to the Senate. [FN105] And though the Senate never took it up, this bill demonstrates that Congress has begun to glimpse the potential power of interpretive statutes. This one bid fair to alter dramatically the state-federal balance, with nothing more than a rule of construction.

Section 6 of the proposed Federalism Accountability Act may be located within the taxonomy developed thus far. First, it is interpretive, rather than definitional. It provides interpretive instructions to the courts, replacing the complex and indeterminate preemption algorithm developed by the Supreme Court [FN106] with a far simpler one. Second, this section is general in its scope: it applies to all subsequent statutes. [FN107] This feature is striking, because previous Congresses have enacted similar interpretive instructions, but with only statute-specific application: "Nothing in this subchapter shall be construed, interpreted, or applied to preempt, displace, or supplant any other State or Federal law, whether statutory or common." [FN108] The proposed Federalism Accountability Act would have been revolutionary precisely because of its general application. And finally, it is prospective, and not retrospective: it applies only to statutes "enacted after [its] effective date." [FN109]

There is evidence that the Senate Committee on Governmental Affairs actually considered the appropriate scope of the bill's application. Originally, there was a section 6(c), which provided: "Any ambiguities in this Act, or in any other law of the United States, shall be construed in favor of preserving the authority of the States and the people." [FN110] That provision was both prospective and retrospective; its interpretive command would have applied not only to all subsequent acts of Congress, ***2113** but to all prior ones as well. [FN111] And in applying to prior acts, it would have unsettled vast areas of preemption doctrine, shrinking the already-judicially-determined preemptive effect of countless federal statutes and bringing countless formerly preempted state laws suddenly back into effect. It was precisely that facet of the bill--its "potential for far reaching and unanticipated consequences" [FN112]--that most troubled the Department of Justice. The Office of Legal Counsel warned: "The breadth and generality of section 6(c) create a risk that unintentional ambiguities in Federal statutes and regulations, with tenuous connections to the balance between Federal and State power, could be exploited in unforeseen ways to frustrate the intentions of Congress and rulemaking agencies." [FN113] It was the general scope of the bill that caused alarm, while a statute-specific bill would not have: "If . . . Congress's concerns about current preemption doctrine derive from particular cases or classes of cases, any statutory reform should be tailored to correct the results in those cases or classes of cases." [FN114] The committee declined to make the bill statute-specific, but it did remove retrospective section 6(c).

The objection to retrospective interpretive statutes is that they amend the entire United States Code in one fell

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swoop. Congress of course has constitutional power to do so; indeed, Congress could repeal the entire United States Code with one sentence if it so chose. But mandating a new interpretive principle to gloss all previous acts of ***2114** Congress may seem a particularly irresponsible way to amend the United States Code. Perhaps it is implausible that Congress could analyze thoroughly the sudden effects of such a statute. The potential for "far reaching and unanticipated consequences" [FN115] is the heart of the objection to general retrospective interpretive statutes.

On the other hand, such statutes might be a uniquely powerful tool, should Congress wish to shift an animating policy of federal law without picking through the United States Code section by section. Consider, for example, Title 15, which "declares that it is the continuing policy of the Federal Government . . . to stimulate a high rate of productivity growth." [FN116] That policy statement is then given legal effect as an interpretive rule: "The laws . . . of the United States shall be so interpreted as to give full force and effect to this policy." [FN117] With one stroke, this statute added new interpretive instructions for the Sherman Act, the National Labor Relations Act, and the rest of the United States Code. [FN118] The generality and retrospectivity of such a statute might be its most powerful asset, since it is hard to see how Congress could achieve the same result with substantive amendments act by act. [FN119]

But whether or not it is wise for Congress to amend the United States Code with retrospective interpretive instructions, there is no constitutional objection. Congress may repeal the entire United States Code with one sentence; a fortiori, it may amend the Code with a retrospective interpretive rule. To do so might be foolish, but it is surely constitutional.

(b) General-Prospective.--On the other hand, Laurence Tribe has suggested that general interpretive statutes "raise serious constitutional ***2115** questions" to the extent that they are prospective. [FN120] His argument is not based on separation of powers; the claim is not that these interpretive statutes impinge on the judicial power in violation of Article III. [FN121] Rather, Tribe argues that a prospective, interpretive instruction impermissibly binds future Congresses and restricts their legislative power in violation of Article I. [FN122]

This type of constitutional objection is best understood by considering its paradigmatic target: a statute that purports to be unrepealable. If the unrepealability provision were effective, such a statute would subtract from the Article I power of future Congresses. The constitutional arguments against such subtraction are compelling. According to the Constitution's clear plan and basic democratic theory, [FN123] the people are to be governed by current legislative majorities, not past ones. [FN124] As Thomas Cooley puts the point:

To say that the legislature may pass unrepealable laws, is to say that it may alter the very constitution from which it derives its authority; since in so far as one legislature could bind a subsequent one by its enactments, it could in the same degree reduce the legislative power of its successors, and the process might be repeated until, one by one, the subjects of legislation would be excluded altogether from their control, and the constitutional provision, that the legislative power shall be vested in two houses, would be to a greater or less degree rendered ineffectual. [FN125]

The logic is the same for purported supermajority requirements. [FN126] No rule or statute may add to the formal requirements of Article I, Section 7.

***2116** Conversely, however, no constitutional entrenchment has occurred if a future Congress need only adhere to Article I, Section 7, to exercise all legislative power. And that will be the case with almost all unrepealability or supermajority provisions, so long as the provisions themselves may be repealed or suspended pursuant to Article I, Section 7. In other words, even if section B of some act purports to render section A unrepealable, there is no constitutional objection so long as section B may be repealed pursuant to Article I, Section 7. Only an unrepealability provision that purported to render itself unrepealable would be problematic on these grounds; this sort of higher-lawmaking-via-bootstrap would be an unconstitutional evasion of Article V. [FN127] As Tribe explains:

Although the law made by any branch--whether by legislation, executive order, or judicial decision--may extend beyond the tenure of particular officeholders, the Constitution limits trans-temporal commandeering of a branch by its current occupants through the device of generally preventing any branch from making the meta-law necessary to tie the hands of future officeholders of that branch. [FN128]

Tribe makes the point perfectly, but he fails to convince himself. He apparently believes that if section B of an act required a supermajority to repeal section A, the fact that section B could itself be repealed pursuant to Article I,

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Section 7, does not alleviate the constitutional objection because "[a] presidential veto . . . could frustrate such repeal efforts." [FN129] Tribe believes that the prospect of a veto calls into question the constitutionality of all such requirements.

This argument is unsound as a matter of logic. The scenario to which he apparently objects is as follows: section B of some act purports to entrench section A; a majority of Congress wants to repeal section A; it attempts to do so by first (or simultaneously) repealing or suspending the entrenching section B; but the President vetoes the repeal. Therefore, section A remains in force despite the will of a majority of Congress. This outcome is countermajoritarian in a sense, but it depends not at all on the entrenching provision. Even if there were no section B, a bare majority of Congress could not repeal section A without a presidential signature. Section B, therefore, does not deprive a future Congress of any power it would otherwise have, nor does it entrench section A more firmly than any other act.

***2117** But Tribe believes that the prospect of a veto, "along with other concerns," calls into question the constitutionality of entrenching provisions. [FN130] And he proceeds from this premise to argue that the same objection dooms prospective interpretive statutes, because they likewise impermissibly tie the hands of future Congresses. [FN131] He offers as examples two prominent statutes that include prospective rules of interpretation: the McCarran-Ferguson Act [FN132] and the Religious Freedom Restoration Act (RFRA). [FN133] The first provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." [FN134] The second provides the following "[r]ule of construction--Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." [FN135] Says Tribe:

The interpretive rules set forth in the McCarran-Ferguson Act and RFRA purport to require future Congresses to include specific references--to the insurance business or to RFRA itself, respectively--in order for statutes to bear particular meanings. But it would seem to raise serious constitutional questions for a court to rely upon the limiting provisions of the McCarran-Ferguson Act or of RFRA restrictively to construe a statute that other interpretive indicia, taken as a whole, suggest is best read, respectively, as applying to insurance or as being exempt from the standards established in RFRA[.] Automatically to give determinative weight in such circumstances to previously enacted legislative "rules" of construction would in a sense permit an earlier Congress to add to art. I's requirements for the enactment of laws by a later Congress. Although a court interpreting a later statute should certainly bear in mind Congress' familiarity with the provisions of the McCarran-Ferguson Act and RFRA, those statutes' rules of construction should not be seen as automatically trumping all other interpretive considerations. The same would be true in general of other rules of construction contained in the United States Code. See, e.g., [The Dictionary Act]. [FN136]

This paragraph constitutes the most sustained assault to be found on general prospective interpretive statutes, and it is crucial to understand why the argument is unsound. The simple answer to this objection is the one given above: a rule of construction does not "in a sense ***2118** permit an earlier Congress to add to art. I's requirements," [FN137] because the rule itself may be suspended or repealed by an act that comports with Article I, Section 7. Though the President may veto a putative repeal of a rule of construction, he could just as easily veto a putative amendment or repeal of the substantive rule if there were no rule of construction. True, an interpretive rule may change the text that a future Congress must pass to achieve a legislative goal; but so long as there is some ascertainable [FN138] and otherwise unobjectionable [FN139] text that would achieve every legislative goal, and that text need only pass the strictures of Article I, Section 7, then there is no constitutional objection. Even a statute providing that "laws of the United States, including this one, may be repealed only by the words 'Mother, may I?" ' would be unobjectionable, because the door would remain open to exercise the full panoply of legislative power. There would still be a form of words-- "Mother, may I?"--with which Congress could achieve every legislative goal, including the repeal of the "Mother, may I?" provision. [FN140] Indeed, every act of Congress changes the text that a future Congress must pass to achieve its goals, by changing the status quo against which that future Congress legislates. [FN141] Interpretive statutes do not bind future Congresses in any qualitatively different sense.

***2119** But Tribe's argument against general prospective interpretive statutes has a more profound flaw too. It begs precisely the question posed by this Article. The heart of Tribe's claim is that statutory rules of construction should not automatically trump "other interpretive indicia." [FN142] But what are these indicia? Meaning is derived from

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an act of Congress by bringing interpretive rules to bear upon it. The central point of this Article is that these rules are not inevitable. Some, perhaps, are required by the Constitution as mandatory rules or as default rules. Others may be constitutional starting-point rules--changeable, but only by act of Congress. Still others may be simple common law, with no constitutional underpinning whatsoever.

The "interpretive indicia" of a text depend entirely on the interpretive methodology applied to it. That is why it is essential, when asking whether Congress may pass a general prospective interpretive rule, to ask first: what is the constitutional status of the rule that Congress would displace? To claim, as Tribe does, that all "rules of construction contained in the United States Code" [FN143] may be trumped by "other interpretive indicia" [FN144] is in effect to claim that all the interpretive tools currently used by the courts--even mere syntactical canons--are constitutionally required. [FN145] Since it is implausible that the Constitution requires a completely specified interpretive methodology, this view amounts to an untenable endorsement of imperial judging at the expense of democratic legislation. As the leading treatise on statutory interpretation puts the point: "There should be no question that an interpretive clause operating prospectively is within legislative power. Any other result would emasculate legislative authority and in effect confer an unreviewable legislative power on the court." [FN146]

To summarize, there is a distinction between statute-specific interpretive instructions and general interpretive instructions. Further, there is a subdistinction between general interpretive instructions that are retrospective and those that are prospective (and those that are ***2120** both). The objection to retrospective interpretive statutes is that they may constitute particularly reckless amendments of the United States Code. (That was the objection of the Office of Legal Counsel to one provision of the proposed Federalism Accountability Act.) The objection to prospective interpretive statutes is that they may bind future Congresses excessively, forcing them to jump through specific textual hoops to achieve legislative goals. (That was Tribe's objection to the McCarran-Ferguson Act and RFRA.) Note that these objections are in a sense symmetrical. When the current Congress passes a retrospective interpretive statute, it perhaps changes too quickly the work of past Congresses. When it passes a prospective interpretive statute, it perhaps influences too much the work of future Congresses. Both may be potent policy objections, but as a constitutional matter, the formal answer to both is the same: Congress One may prescribe the interpretive method to be applied to acts of Congress Two; but there must be some ascertainable text (even if only "Mother, may I?"), which, if it passes the requirements of Article I, Section 7, will allow Congress Two to exercise any and all legislative power, including the repeal of all acts of Congress One.

3. Generality Specifically Versus Generality Generally.--The discussion in this section thus far has been about generality in general. The question has been whether all general (prospective or retrospective) interpretive statutes are unconstitutional. Tribe's objection to general prospective interpretive statutes applies to them all. The fault he finds with the prospectivity of the McCarran-Ferguson Act and RFRA turns not at all on the specific subject matter of those acts, so he concludes that his constitutional objection would apply "in general [to] other rules of construction contained in the United States Code." [FN147] As explained above, [FN148] Tribe's argument amounts to a claim that there is some fully specified interpretive methodology that is constitutionally required and therefore unalterable by act of Congress.

Though that claim is untenable, some rules of interpretation may have a constitutional status that forbids some forms of congressional alteration. This is the essential inquiry: what is the constitutional status of the specific interpretive rule being displaced?

Part I argues that the possible answers to this question are more numerous and nuanced than generally imagined. Among other possible answers, that Part introduced the concept of constitutional default rules. The effect of such rules may be avoided (for example, with a clear statement) statute by statute, but the rules themselves may not be reversed wholesale. (Recall that constitutional default rules are distinct ***2121** from constitutional starting-point rules, which may be reversed wholesale.) To say that a particular method of statutory interpretation is a constitutional default rule is precisely to say that Congress may not abrogate the rule with a general interpretive statute.

Consider, for example, "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" [FN149] Is this a constitutional starting-point rule, required by

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the Constitution unless and until it is altered by Congress? Or is it a constitutional default rule, whose effect can be avoided statute by statute with a crystal-clear statement, but which cannot be altered wholesale by Congress? The test is the following hypothetical general interpretive statute: "The United States Code shall be interpreted to apply to states, regardless of whether such application alters the usual federal balance, and regardless of whether any particular act makes a clear statement to that effect."

Will v. Michigan Department of State Police [FN150] posed almost precisely this question. It required the Court to decide whether a state is a "person" subject to suit under 42 U.S.C. § 1983. The Court noted that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." [FN151] Moreover, the Court recognized the presumption against altering the "usual constitutional balance between the States and the Federal Government" without a clear statement. [FN152] But Congress had ostensibly reversed this rule wholesale and prospectively in the Dictionary Act, which, when § 1983 was enacted, provided: "[I]n all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." [FN153] If a state is a "body politic," then the cut-and-paste instruction of the Dictionary Act would appear to make states "persons" subject to suit under § 1983. Rather than make the clear statement required by "the ordinary rule of statutory construction" in the text of § 1983, Congress had made a clear general statement at the beginning of the United States Code.

***2122** The Court held that the general statement did not suffice: "[T]he Dictionary Act, like § 1983 itself and its legislative history, fails to evidence a clear congressional intent that States be held liable." [FN154] The holding may be right, but the reasoning is unpersuasive--as Justice Brennan argued in his dissent, a state is a "body politic," [FN155] and the cut-and-paste function required by the Dictionary Act is quite clear. True, the word "person" is ordinarily interpreted not to include the sovereign, and Congress ordinarily will not alter the federal-state balance without a very clear statement. But the Court did not ask the crucial question: what is the constitutional status of these principles?

If the Court had asked this question, one possible analysis might have proceeded as follows: The interpretive principle that a federal statute be presumed not to alter the federal-state balance is a constitutional default rule required by the Tenth Amendment. The constitutional purpose of the rule is to enhance accountability by requiring Congress to take responsibility-- explicitly, each time, act by act--for subjecting the states to its laws. [FN156] Congress may avoid the effect of this rule with an appropriately clear statement, but only statute by statute. It cannot reverse the rule qua default wholesale with a general statement--however clear--that the United States Code applies to states, federalism notwithstanding. That is why the Dictionary Act fails to subject states to liability under § 1983: not because it is insufficiently clear, but because it is general in application. [FN157] If § 1983 had ***2123** itself included a definitional section providing that "for purposes of this section, the word 'person' shall include bodies politic," the result would be different, not because the definition would be any more clear, but because it would be statute-specific. [FN158]

Note also that the version of the Dictionary Act at issue in Will was prospective. It purported to govern subsequent statutes such as § 1983. Would the result differ if a new, general, and retrospective Dictionary Act declared that "person" includes states throughout the United States Code? The rationale for constitutional default rules is to force the Congress that changes the status quo to take explicit responsibility for the change. That rationale dooms a general, prospective reversal of a default rule, because such a reversal lets a future Congress off the hook. If Congress makes an explicit, global, retrospective change, however, such a change should satisfy the demands of accountability and responsibility. This analysis suggests that some accountability-forcing rules of interpretation may be susceptible of retrospective but not prospective change.

There is a crucial difference between this account of Will and Tribe's analysis of generality in general. Tribe insists that the general and prospective character of the Dictionary Act requires that it never automatically trump "other interpretive indicia." [FN159] The Dictionary Act's general, prospective scope thus renders its authority uncertain in every case. This argument is tantamount to a claim that there is a constitutionally required method for determining "other interpretive indicia" in every case, and that this method trumps the Dictionary Act. ***2124** As argued above, [FN160] that claim is untenable. But some canons of statutory interpretation--like those cited in Will--are perhaps constitutional default rules: rules whose effect may be avoided statute by statute, but that cannot be

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reversed wholesale. [FN161] These and only these appropriately trump general interpretive statutes like the Dictionary Act. Note, moreover, that the relevant concern is precisely the opposite of Tribe's. He argues that all general prospective interpretive statutes impermissibly bind future Congresses. In fact, only some interpretive statutes fail on the grounds that they are prospective--and the reason they fail is because they impermissibly free future Congresses. The Constitution requires certain constitutional default rules, which defeat contrary general prospective interpretive statutes, to impose responsibility and accountability on Congress. The current Congress may not liberate a future one from these default rules.

The discussion in this section has focused largely on the Dictionary Act, because it constitutes the most familiar set of general interpretive instructions in the United States Code. It is also--at least at first glance-- the most prosaic. Recall, though, that the potential influence of general interpretive statutes is vast. Indeed, even the humble Dictionary Act addresses one of the most contentious social issues of our time: the definition of "marriage." [FN162] And the definition of "person" in an earlier incarnation of the Dictionary Act had significant federalism implications, as discussed above. [FN163] Some of the other examples above are more significant still, like the interpretive provisions of the McCarran-Ferguson Act and RFRA. And the proposed Federalism Accountability Act, had it passed, would have profoundly altered preemption doctrine and federal-state relations.

But if there is no per se objection to interpretive statutes on grounds of (prospective or retrospective) generality, then these few examples merely scratch the surface. The last section concluded that Congress could require ambiguities in a particular act to be resolved "in textualist fashion, as described in the scholarship of Frank Easterbrook." [FN164] This section has shown that there is no constitutional objection ***2125** to an equivalent general instruction: "The United States Code shall be interpreted in textualist fashion, without reference to legislative history." The converse is equally permissible (with a caveat discussed below): [FN165] "Legislative history shall be admissible to resolve ambiguities in the United States Code." [FN166] The debate on this issue, which has raged in courts and law reviews for decades, might be resolved, once and for all, by act of Congress.

Likewise, Congress could, if it chose, do away with horizontal [FN167] stare decisis in statutory cases: "The United States Code shall be interpreted de novo in each case, with judicial precedent afforded the influence of its inherent persuasiveness but no additional authority." The Court has never suggested that stare decisis is constitutionally required; rather, it has always described the doctrine as a rule of sound judicial policy. [FN168] At most, some form of stare decisis may be a constitutional starting-point rule, binding on the courts until Congress addresses the topic. And though the doctrine has powerful policy justifications, it invites powerful criticism as well. Stare decisis makes a difference only when an issue has--in the best current judgment of the Court--been decided wrongly. Balancing the benefits of legal stability against the costs of sustaining incorrect decisions is a quintessential ***2126** policy judgment. Courts have struck their own balance, but there is no constitutional objection to Congress's displacing it. [FN169]

That could be just the beginning.

C. Static Versus Dynamic (The Delegation Problem)

1. Dynamic (Executive) Interpretation.--This Part began by discussing simple definitional statutes of the form: "For purposes of this Act, X shall mean Y." Since Congress could have written Y in every place where it wrote X, there is no objection to Congress instead providing a cut-and-paste instruction of this sort, and such instructions appear throughout the United States Code. A different sort of definitional instruction appears more rarely. At least one act purports to confer upon the President "the power . . . to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision." [FN170] This example differs from the definitional examples that preceded it, and from every example thus far, in that it explicitly contemplates change over time. Moreover, it contemplates that the change will be determined by another actor's future choices--the definitional choices of the President. It cannot be said, as before, that Congress could have achieved the same result by copying some extant text into the statute itself. Here, Congress prescribes a cut-and-paste function, but the content to be pasted is to be determined "from time to time," in the future and by the President. This example is thus dynamic, whereas every previous example was static.

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***2127** Many dynamic interpretive statutes are conceivable. The Introduction mentions the possibility of codifying a scholar's or judge's methodology: "This Act shall be interpreted in textualist fashion, in accordance with principles set forth in the scholarship of Frank Easterbrook." [FN171] But what if such a statute were dynamic? "This Act shall be interpreted by the method described in the future scholarship of Frank Easterbrook." What of a tax statute that provided: "Internal Revenue Service interpretations of this Act shall be conclusive" ? What of one that required deference to the future interpretations of the Senate Banking Committee?

Dynamic interpretive statutes may raise special constitutional or pragmatic objections. The provision introduced above, which purports to empower the President to define statutory terms, is an appropriate place to begin because of its simplicity. Recall that the variables introduced thus far are independent, so it is possible to locate this statute across each dimension. It is a simple definitional statute, rather than an interpretive instruction. And it is statute-specific, rather than general in scope. It is, therefore, of the least problematic variety across both these dimensions. It serves as an apt jumping-off point for consideration of dynamic interpretive statutes because only its dynamism is novel.

The principle that emerged from the earlier discussion of definitional statutes was that defining terms is, in the first instance, an inherent incident of the legislative power. There is no general constitutional objection to Congress's defining terms, either in the text of the statute or by reference to some extant, exogenous text like a specific dictionary. Nor is there any general constitutional objection to Congress's declining to define terms. Ascribing meaning to words that Congress leaves undefined is an inherent incident of the judicial power. But in the current example, Congress neither defines X nor leaves the definition of X to the judiciary. Rather, Congress delegates the job of defining X to the President. And that is the doctrinal rubric under which one must analyze dynamic interpretive statutes: are they impermissible delegations?

The nondelegation doctrine limits the ability of Congress to delegate legislative power:

[It] is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," and we long have insisted that "the integrity and maintenance of the system of government ordained by the Constitution" mandate that ***2128** Congress generally cannot delegate its legislative power to another Branch. [FN172]

Although the Court has not struck down a statute on nondelegation grounds since 1936, [FN173] neither has it abandoned the doctrine. It continues to inquire whether Congress has "la[id] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." [FN174]

The example above, which confers on the President the power to "prescribe . . . definitions, not inconsistent with this subdivision, for any and all terms," probably fails that test. The power to define legislative terms is nothing shy of the power to write law. This power is qualitatively different from the executive power to promulgate regulations within enacted parameters: the power to define legislative terms is the power to change the parameters. Could President Clinton have used this provision to decree by executive order: "For the purpose of this section, the words 'regulation of transactions in foreign exchange of gold and silver' shall be construed to mean 'ex-Presidents shall be immune from prosecution for perjury, obstruction of justice, and accepting bribes for pardons" '? Such an order could not be characterized as an exercise of executive power. The power to define legislative terms is a core legislative power, inseparable from the power to legislate itself. To delegate the power to define "any or all of the terms" of an act is simply to confer the power to rewrite the act. "[L]egally unfettered freedom to choose a 'meaning' that one is free to abandon and replace with another for avowedly political reasons is the very essence of making, as opposed to genuinely interpreting or discerning, law." [FN175]

Of course, the Court might uphold this statute against a delegation challenge. After all, the statute does require that any presidential definitions be "not inconsistent with the purposes of this section." [FN176] Moreover, the statute in fact concerns wartime foreign relations, a context in which the Court previously has upheld abnormal delegation to the President. [FN177] But the central point to recognize is that dynamic interpretive statutes--those that hinge on the future actions of others to ***2129** be given content--must be analyzed under the rubric of nondelegation.

This discussion implicates Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., [FN178] which ratifies

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a similar, if implicit, delegation to the executive branch. Chevron held that courts must defer to reasonable agency interpretations of statutes that the agency is authorized to administer. [FN179] Courts owe agencies this deference even on pure legal questions of statutory interpretation. [FN180] And "the emerging rule seems to be that an agency's interpretation 'is entitled to deference even if it represents a departure from the [agency's] prior policy.'" [FN181] The Chevron doctrine functions as a dynamic rule of statutory interpretation: it allows the content of an act of Congress to change with the changing policy views of the executive branch.

Chevron and its progeny thus can help determine which dynamic interpretive statutes might run afoul of the nondelegation doctrine. Conversely, exploring hypothetical dynamic interpretive statutes may illuminate the constitutional status of the Chevron doctrine. Tribe describes the doctrine as "a default position, a background norm" [FN182]--"not a rule of constitutional law per se, but . . . nonetheless premised on important separation-of-powers principles." [FN183] Again, claims like these about the constitutional status of a rule of statutory interpretation may be sharpened by asking: to what extent can Congress alter the rule?

Clearly, Congress could pass a statute directing that courts give no deference to an agency's interpretation of law. [FN184] But could Congress ratchet the rule in the other direction? Could it provide: "Agency interpretations of statutes shall be conclusive and binding on courts, ***2130** whether or not courts find them reasonable" ? [FN185] In at least some areas--for example, immigration [FN186] and criminal prosecution [FN187]--the answer is probably no. [FN188]

In light of this answer, it is possible to describe more precisely the Court's probable view of Chevron's constitutional status: Chevron deference is a constitutional starting-point rule, bounded by an immutable constitutional parameter, which may be found in Article III and the nondelegation doctrine. The Constitution establishes Chevron deference as a starting-point rule, because agencies are presumptively more democratically responsive and accountable than judges. [FN189] Since Congress may be yet more responsive and accountable than agencies, and since it is the body in which all legislative power is vested, [FN190] Congress could by statute eliminate the Chevron doctrine. But Article III and nondelegation principles form an immutable constitutional barrier, so that Congress could not, with a dynamic interpretive statute, ratchet Chevron deference up. [FN191]

That is an account of the Court's probable view of Chevron. As a matter of first principles, however, there is a deep tension between ***2131** nondelegation principles and Chevron. [FN192] Indeed, Chevron may well be wrongly decided as a matter of constitutional law. Perhaps Chevron deference is not merely wrong as a starting-point rule; perhaps de novo judicial review of federal questions is constitutionally required, so Chevron deference would be impermissible even if Congress explicitly enacted it. If so, then all dynamic interpretive statutes are likewise unconstitutional delegations of lawmaking power. [FN193]

For current purposes, the critical point is that analysis of Chevron and analysis of dynamic interpretive statutes are two sides of the same coin. Pinpointing the constitutional status of the Chevron doctrine requires asking whether, in which direction, and to what extent Congress could ratchet the rule. And to predict whether the Court would strike down a dynamic interpretive statute, the best indication is the potential analogy to Chevron deference.

2. Delegation to Private Parties.--A central aspect of nondelegation analysis is the character of the delegatee, and delegations to private parties arouse special suspicion. [FN194] Recall, again, that Congress may define legislative terms. There is no objection to "X shall mean Y." Nor is there any objection to definition by reference: "X shall bear the meaning ascribed to it in the second edition of the Oxford English Dictionary." But what of a statute that purports to define "mental illness" as "a diagnosable mental, behavioral, or emotional disorder . . . of sufficient duration to meet diagnostic criteria within the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association; and . . . that has resulted in functional impairment that substantially interferes with or limits 1 or more major life activities" ? [FN195] This example, like the last, is dynamic; it authorizes a cut and paste, but the content to be pasted is to be determined after enactment and by a third party, the ***2132** American Psychiatric Association. Again, the correct rubric for analysis is nondelegation. May Congress delegate the power to define legislative terms to the American Psychiatric Association? This example raises an additional wrinkle, for here the delegation is not to the executive branch, but to a private party. [FN196]

Delegation to private parties has not been held per se unconstitutional, [FN197] but it does raise concerns beyond

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those raised by other delegations. "[J]udicial hostility to private lawmaking--pursuant to explicit or implicit delegations of authority by Congress or by the states--. . . represents a persistent theme in American constitutional law." [FN198] And the power to define legislative terms or to mandate interpretive methodologies is an almost limitless one, indistinguishable from the power to write (or rewrite) law. Probably, therefore, Congress may not provide for an interpretive rule whose content is to be determined by a private party at a future time.

This principle resolves a related hypothetical. Section A of this Part concludes that an act could provide for its ambiguities to be resolved "in textualist fashion, as elucidated in the scholarship of Frank Easterbrook." And section B argues that there is no constitutional objection to making such a provision general (and prospective or retrospective) in application. But what of a statute that provided: "The United States Code shall be interpreted using the methodology described in the future scholarship of Frank Easterbrook" ? This interpretive statute is dynamic, and its content would change with the mind and work of Judge Easterbrook. Such a statute would delegate to him the power to determine a binding interpretive method, just as the prior example delegates definitional power to the American Psychiatric Association. For this reason, it would violate principles of nondelegation. [FN199]

3. Delegation to States.--Every state has enacted some sort of interpretive code. [FN200] Could Congress, rather than developing one of its own, instead simply incorporate the various state interpretive codes on ***2133** a dynamic basis? "Federal statutes shall be interpreted in the manner prescribed by the State in which the adjudicating court sits." [FN201] Such a statute, if enforceable, would undercut the national uniformity that is a primary justification of federal law. It would not, however, effect an unconstitutional delegation. Federal law is interstitial by its nature, so it constantly incorporates state law in various ways. [FN202] For this reason, the Court has rightly upheld a broad dynamic incorporation of state criminal law. [FN203] Likewise, the hypothetical statute above, though probably unwise, does not run afoul of nondelegation principles.

On the other hand, what if Congress favored a particular state's interpretive code? "Federal statutes shall be construed in the manner prescribed by New York's interpretive code, as in force at the time of adjudication." Such a statute would in effect delegate to New York the power to mandate an interpretive code for federal law that would apply nationwide. While the Constitution must contemplate dynamic incorporation of local state law, because Congress has only limited, enumerated power to legislate interstitially, the Constitution does not appear to contemplate such a delegation to a single state, because the Union would be untenable if the part could control the whole. [FN204] A statute that purported to incorporate dynamically a single state's interpretive regime would seem to violate the principle of nondelegation.

4. Delegation to Congress or a Subset.--Since the New Deal, the judiciary has permitted broad delegations to the executive, but not to ***2134** Congress itself or to a subset thereof--a single house, a single committee, a single member. The Court continues to heed James Madison's insight that "the tendency of republican governments is to an aggrandizement of the legislat[ure] at the expense of the other departments," [FN205] and so it continues to insist that "once Congress makes its choice in enacting legislation, its participation ends." [FN206] Legislation that violates this principle may be characterized as impermissible self-delegation, "self-aggrandizement," [FN207] or evasion of the "single, finely wrought and exhaustively considered" [FN208] rules of bicameralism and presentment. [FN209] The leading case is INS v. Chadha, [FN210] which struck down a statute that provided for a one-house congressional "veto" of certain administrative action.

The Chadha principle dooms any dynamic interpretive statute that incorporates an interpretation or methodology to be determined in the future by Congress or a subset thereof. Imagine, for example, a statute that provides: "This Act shall be given the meaning ascribed to it from time to time by the Senate." Such an Act would fail under Chadha. A fortiori, the result would be the same if the interpretive statute were general in scope: "The United States Code shall be given the meaning ascribed . . . ." The Act would also fail if the delegatee were a smaller subset, such as the Senate Judiciary Committee, or the Senate Majority Leader, [FN211] or even if it were the entire Congress. [FN212] No better is a statute that delegates power to prescribe an interpretive methodology: "This Act shall be interpreted using canons to be approved from time to time by the Senate Judiciary Committee." Likewise a statute that provides: "This Act shall be interpreted by reference to a report that the Senate Judiciary Committee shall generate tomorrow." All of these violate Article I, Section 7, the Chadha doctrine, and the anti-aggrandizement principle. [FN213]

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***2135** Indeed, the Court's current practice of giving some interpretive authority to subsequent legislative history (authority, that is, beyond that of a law review article--authority beyond its inherent persuasiveness) is suspect for precisely the same reason. If Congress cannot constitutionally instruct the Court by statute to defer to a subsequent committee report, then the Court cannot so defer on its own authority. [FN214] If Congress cannot explicitly delegate to a future committee, then it cannot implicitly do so either.

Note how, by exploring the power of Congress to mandate interpretive strategies, one inevitably confronts, with new precision, the constitutionality of the interpretive status quo. Deferring to subsequent legislative history is an interpretive technique in current [FN215] (though skeptical [FN216]) use, and yet it is clear that Congress could not require the practice without violating Chadha. It follows that deference to subsequent legislative history is constitutionally forbidden.

Similarly, even incorporation of an extant text might violate Chadha, if the text itself mandated a dynamic technique. Consider, for example, Eskridge's theory of dynamic statutory interpretation: "The interpretation of a statutory provision by an interpreter is not necessarily the one which the original legislature would have endorsed, and as the distance between enactment and interpretation increases, a pure originalist inquiry becomes impossible and/or irrelevant." [FN217] Could Congress mandate such a principle? For example, consider the following hypothetical statute: "In interpreting the United States Code, courts shall strive to divine the intention of the current Congress, rather than the enacting Congress." [FN218] This statute would mandate the equivalent of conclusive deference to subsequent legislative history and would likewise run afoul of nondelegation principles. [FN219]

***2136** A recent scholarly exchange illustrates the point. John Manning has made the broader claim that the use of any legislative history ratifies impermissible congressional self-delegation. [FN220] As should be clear from the discussion above, that claim is untenable. It is only deference to subsequent legislative history that ratifies an implicit delegation. Deferring to pre-enactment legislative history is more in the nature of permitting an implicit incorporation by reference--and is no more problematic (on delegation grounds) than incorporation of any other exogenous texts, such as dictionaries, that pre-date the statute. [FN221]

Jonathan Siegel refutes Manning on precisely this point:

For a statute's interpretation to be influenced by texts that existed prior to the statute's adoption cannot violate the rule against self-delegation, because it does not involve a delegation at all. The concept of delegation of power is inherently forward-looking; it involves the granting of power to act in the future. A legislature that adopts an action taken or a text produced by some other body in the past is not delegating power, but is, rather, ratifying or incorporating the other body's action or text. This point is proved by the law concerning statutory incorporation by reference. . . . [T]here is a fundamental difference between incorporating by reference a text that exists prior to a statute's adoption and giving some person or body the power to elaborate a statute after it is adopted. The latter is a delegation of power that may be valid or invalid depending on the applicable rules concerning delegation; the former is not a delegation at all. [FN222]

What is most striking about Siegel's article is the way he chooses to prove his point. The linchpin of his analysis is a hypothetical statute: "Each statute passed by the Congress shall, unless it states otherwise, be deemed to incorporate the statute's legislative history." [FN223] His article, like this one, concludes that there would be no delegation objection to such a statute, because it would be static rather than dynamic. [FN224] It would incorporate extant texts into statutes, and whether ***2137** those texts were originally generated by a congressional committee or by the Oxford English Dictionary editorial board is constitutionally irrelevant. "If Congress amended the postal statutes to provide that 'the Postal Service shall act in conformity with the inscription on the General Post Office building at 8th Avenue and 33rd Street in New York City,' no one could claim that Congress was unconstitutionally delegating power to the inscription's author--the Greek historian Herodotus." [FN225] Congress would simply be adopting his statement as its own.

Note how Siegel makes use of hypothetical interpretive statutes. He emphasizes that he offers them not "as a proposal that Congress should adopt" but simply as a powerful heuristic for analyzing the constitutional status of an interpretive method. [FN226] As Siegel recognizes, hypothetical interpretive statutes can lend new clarity to the perennial debate over the use of legislative history. First, such hypothetical statutes highlight the essentially constitutional nature of the debate. All claims about statutory methodology must locate themselves under the

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constitutional firmament. Second, these hypotheticals elucidate a basic distinction between pre- and post-enactment legislative history. Use of the latter--like a statute that purports to find its definitive interpretation in tomorrow's committee report-- implicates, and indeed violates, principles of nondelegation.

As to the former, though, one question remains. The discussion thus far has established that a statute requiring reference to pre-enactment legislative history would be constitutional. (A statute forbidding***2138** its use would likewise be constitutional.) It does not follow, however, that courts should defer to pre-enactment legislative history absent such a statute. As explained in Part I, concluding that a method of interpretation is constitutionally permissible does not end the constitutional inquiry. Some rules of statutory interpretation are constitutional starting-point rules, which may be altered wholesale by act of Congress. Others are constitutional default rules, which may not be altered by Congress, but whose effect may be avoided statute by statute.

Siegel sees the first half of this point, but not the second:

If we determine that judicial use of [pre-enactment] legislative history leads to the best system of statutory interpretation, the Constitution will not bar that system from being put into place. Exactly who can make the necessary determination--whether the courts can do it on their own, or whether Congress must also act--is not perfectly clear . . . . [FN227] Siegel's first sentence erroneously assumes that once a method of interpretation is found constitutionally permissible, only policy arguments remain and the Constitution has nothing more to say. The second sentence shows a nagging doubt that highlights the error in the first. To ask whether courts may adopt the use of legislative history on their own is precisely to ask whether there is a constitutional starting-point rule on the issue. And that is not a policy question, as Siegel suggests; it is a constitutional one. Moreover, the same constitutional arguments against a statute that explicitly incorporates legislative history, which Siegel decisively refutes, may well demonstrate that textualism is a constitutional starting-point rule or a constitutional default rule. Indeed, though the leading judicial textualists, Justice Scalia and Judge Easterbrook, have claimed or implied a constitutional pedigree for textualism, [FN228] one suspects that they would nevertheless uphold and obey an act of Congress that required deference to pre-enactment legislative history. [FN229] If so, their constitutional arguments are consistent with the analysis above. They mean to prove only that textualism is a constitutional starting-point rule, required by the Constitution absent an act of Congress to the contrary. (Manning, faced with Siegel's critique, shifts ground and argues, in effect, that statutory textualism is a constitutional default rule. He concedes that a single statute could incorporate its own pre-enactment legislative history but contends that ***2139** Congress could not incorporate legislative history generally. [FN230]) But only by contemplating hypothetical statutes (both statute-specific and global) that require deference to pre-enactment legislative history can Justice Scalia, Judge Easterbrook, and Manning identify the true nature of their constitutional claims for textualism.

In short, there is a crucial distinction between static and dynamic interpretive statutes. The latter--statutes that purport to incorporate the future interpretation (or interpretive methodology) of some entity--constitute a delegation of law-interpreting power and must be tested under the nondelegation doctrine. Dynamic interpretive statutes that delegate to Congress or a subset evade Article I, Section 7, and implicate the more rigorous self-aggrandizement prong [FN231] of the nondelegation doctrine. On the other hand, static interpretive statutes--for example, statutes that explicitly incorporate their own legislative history--do not delegate at all, and so are constitutionally permissible. [FN232]

D. Taxonomy and Constitutionality: A Recap

Interpretive statutes may usefully be distinguished across three dimensions: First, some are definitional; others are not. [FN233] Second, some are statute-specific; others are general in application. [FN234] And general interpretive statutes may be prospective, retrospective, or both. [FN235] Third, some are static while others are dynamic. [FN236] Among dynamic interpretive statutes, a subdistinction may be drawn based on who controls changes in meaning--executive agencies, [FN237] private parties, [FN238] states, [FN239] or Congress or subsets thereof. [FN240]

***2140** There is no general Article III objection to interpretive statutes. To the extent that the judicial power includes power to develop interpretive rules, that power is a federal common lawmaking power, which a contrary statute may trump. [FN241] And interpretive statutes are substantive rather than procedural in any event. They do

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not regulate Article III courts per se, but rather regulate interpretation of federal law in any court, state or federal. [FN242]

But more specific constitutional objections remain. Constitutional default rules (perhaps like the clear-statement rule in Will v. Michigan Department of State Police) may trump general prospective interpretive statutes (like the Dictionary Act). [FN243] Dynamic interpretive statutes (like the one that gives the President power to define statutory terms) may run afoul of nondelegation principles. [FN244] Dynamic interpretive statutes that evolve with the future views of Congress or a subset will run afoul of the stricter self-aggrandizement prong of the nondelegation doctrine exemplified in Chadha. [FN245] And of course, any interpretive statute may fail if it transgresses a substantive constitutional provision. [FN246]

These are the exceptions rather than the rule. Most of the interpretive decisions courts make--whether choosing a dictionary, referencing a canon, or spurning pre-enactment legislative history--may be regulated by Congress. This power is an exceptionally potent one. The next Part considers whether and how Congress should use it.

III. Politics and Policy

A. An Interpretive Regime

Part II argues that Congress has at least some constitutional power over interpretive methodology. And Part I emphasizes that inquiring ***2141** into the potential scope of this power is vital, whether or not Congress would be wise to exercise it. This line of inquiry is the surest way to reach precise conclusions about the constitutional status of interpretive tools and methodologies. But the inquiry is valuable not merely as a constitutional riddle and an analytical tool. In fact, Congress would be wise to exercise power over interpretive methodology. This Part shows why and how.

One of the most important modern articles on statutory interpretation is Law as Equilibrium, by William Eskridge and Philip Frickey. [FN247] The article offers several different accounts of interpretive methodologies, and how they appropriately function. In one of these accounts, Eskridge and Frickey introduce the concept of "The Canons of Construction as an Interpretive Regime": [FN248]

> An interpretive regime is a system of background norms and conventions against which the Court will read statutes. An interpretive regime tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to [statutes'] scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities. [FN249]

Eskridge and Frickey describe the theoretical merits of creating a clear regime. They also demonstrate the ways in which the Supreme Court's implementation of this goal has fallen short of the ideal. But in doing so, Eskridge and Frickey leave pivotal questions unasked: Is the Court institutionally competent to fulfill this role? Is the judicial branch best positioned to develop canons of statutory interpretation? This Part argues that Congress is at least as well suited to instigate the design of an interpretive regime.

B. The Current Regime

Children sometimes decide that today is "opposite day." I hate ice cream, they say, and I would particularly hate a banana split. Opposite day is not particularly confusing. Once two children decide that it is opposite day, they are no less likely to understand each other than on any other day. Only a third child--laboring under the misapprehension that today is non-opposite day--will be confused. [FN250] Igpay atinlay likewise. Children quickly realize that meaning is not inherent ***2142** in a string of words; meaning derives from the interaction of a text and an interpretive regime. [FN251] The trick is for both children to agree on the regime.

That is what Eskridge and Frickey mean when they say that "[i]nterpretive regimes serve both rule-of-law and coordination purposes." [FN252] Ideally, the words of a statute would convey the same meaning to legislators, judges, and citizens. Although this ideal can never be achieved, it can be approached from two directions. Just as

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careful legislative drafting can reduce ambiguity, so too can specific articulation of an interpretive regime. In many cases, the existence of a clear background rule is more important than the substance of the rule. It does not much matter whether today is opposite day or not, but it is crucial that both children know and agree. Likewise, it is relatively insignificant whether the expression of one thing in a statute implies exclusion of another (expressio unius est exclusio alterius), so long as all concerned--legislators, judges, and citizens--know what the rule is. [FN253] "What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." [FN254] A statutory interpretive regime may thus provide a rule-of-law boon to the public, while lowering the costs of drafting statutes to the legislature. These theoretical merits are uncontroversial.

But Eskridge and Frickey suggest that the Supreme Court has fallen far short of the theoretical ideal in constructing an interpretive regime. The reasons are twofold. First, the theoretical benefits accrue only to the extent that the interpretive regime is, in fact, predictable. If, as Karl Llewellyn famously suggested, each canon has a countercanon that can be made to sound equally apposite in any given context, [FN255] then the "interpretive regime" is a mere subterfuge for the policy preferences of the Court. Along this same line, when the Court applies a new canon retroactively to an old statute, it imposes a cost rather than a benefit on the unsuspecting legislature that enacted the ***2143** statute. Such retroactive application is what Eskridge describes as a "bait and switch." [FN256]

Second, some elements of an interpretive regime developed by the Court may appear designed to advance its substantive policy preferences. To the extent that these background rules are "sticky"--that is, difficult for Congress to legislate around--the Court may actually be promoting its substantive policy goals on the pretense of creating neutral rules of the interpretive road. [FN257]

In short, the theoretical advantages of a clear interpretive regime may be offset by high barriers to effective judicial implementation. But what if Congress were to enact a comprehensive interpretive regime?

C. A Congressional Regime

The first and most obvious advantage of a statutory interpretive regime is its potential for internal coherence. The Supreme Court is handicapped across this dimension by the Article III jurisdictional requirement of a case or controversy. Because the Court can only develop canons one by one, common law canons will be devised ad hoc, and will inevitably fail to form a coherent set. To whatever extent the current canons are vulnerable to Karl Llewellyn's famous criticism, there is no theoretical reason that canons ratified by Congress should suffer the same flaw. [FN258] Congressionally adopted canons could form a true "regime"--a set of background interpretive principles with internal logical coherence.

Second, the case-or-controversy requirement guarantees that the first application of a new canon will be to a statute that was not written with the canon in mind--the "bait and switch." The Supreme Court may mitigate this effect by foreshadowing a new canon with insinuating dicta. [FN259] But a congressionally enacted interpretive regime ***2144** could be strictly prospective, and so would not suffer the "bait and switch" illegitimacy problem at all. For example, recall that the proposed Federalism Accountability Act was aimed only at statutes that post-dated it. [FN260] Alternatively, as discussed above, [FN261] Congress could make its interpretive regime retrospective. By choosing this route, Congress would, in effect, amend the whole United States Code in light of its new interpretive regime. This route might be unwise, [FN262] but it would not be illegitimate in the same way as a judicial "bait and switch." After all, Congress has the constitutional power to amend the United States Code and is better situated than courts to conduct the cost-benefit analysis necessary for such amendment. Whether retrospective or not, a new interpretive regime would be more legitimate if effected by Congress.

Third, a crucial institutional fact about the Supreme Court is that it comprises nine competing perspectives. To the extent that any given canon persuades some but not all Justices, its value as a component of an interpretive regime is severely diminished. [FN263] For example, textualism, with its aversion to legislative history, offers a potential economic boon: by ruling inadmissible countless reams of hearing transcripts, committee reports, and so forth, [FN264] textualism promises cheaper and more efficient lawyering and judging. [FN265] But, crucially, this benefit can only be achieved when all nine Justices are textualists. So long as at least one can be swayed by legislative

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history, it will be worthwhile for lawyers to research and argue from it.

Indeed, the Justices do not seem to treat methodology as part of the holding of case law. For example, many cases feature clear majorities that explicitly ratify the use of legislative history. [FN266] But Justice Scalia never concedes that he is bound to that methodology by stare decisis. ***2145** [FN267] A congressionally mandated interpretive regime, by contrast, would bind all nine Justices. For example, a statute providing that "The United States Code shall not be interpreted by reference to legislative history" could render legislative history inadmissible once and for all.

Fourth, Congress is best positioned to assess and compare the efficiency of various interpretive rules. Congress might find, for example, that the most efficient interpretive rule is generally the one that it would most often want. [FN268] Such a rule would minimize drafting costs and enable Congress (for good or ill) to pass more statutes. If Congress subscribes to this view, then it should prescribe the interpretive rules, because it is most likely to know the ones that it will most often want. On the other hand, modern contracts scholarship has suggested that, contrary to traditional theory, the most efficient background rule may not be the one that most parties want. [FN269] Sometimes a penalty or information-forcing rule may be more efficient because parties reveal private information by contracting around the rule. [FN270] On this theory, if Congress often forgets to include a statute of limitations, [FN271] perhaps the background rule should be twenty minutes. [FN272] Then the courts would never again have to guess at Congress's secret statute-of-limitations intent, because Congress would never again forget. This rule would be information-forcing in the sense that it would compel ***2146** Congress to articulate a limitations period. [FN273] Although such a rule would seem decidedly inappropriate if adopted by courts and applied to statutes that pre-date it--"bait and switch"--it could legitimately play a role in a prospective interpretive regime affirmatively adopted by Congress itself.

So canons of statutory interpretation, like contract default rules, may be information-forcing. They also, however, may be accountability-forcing in a particular way. As its title reveals, the proposed Federalism Accountability Act was animated by this idea. That measure would not have disabled Congress from preempting state law; it would simply have required Congress to declare explicitly that it was doing so. Champions of states' rights would thus have been given actual notice and an opportunity to marshal opposition. [FN274] In the past, perhaps, [FN275] the Senate was the main locus of "the political safeguards of federalism." [FN276] But as that locus has shifted out of Washington, D.C., [FN277] to governors' offices and state legislatures, preemption "accountability" now arguably requires an explicit clear statement by Congress.

Note that when one applies private law insights (such as Ayres and Gertner's penalty default analysis) to public law contexts (such as the interpretation of statutes), a subtle transformation necessarily occurs. When A and B communicate and embody their commitments in a contract, it is important only that they (and the court) be on the same page. But when Congress communicates to the courts by statute, it is essential that private citizens also get the message. Statutes, in other words, have two audiences: the courts and the public. As discussed above, the "super-strong clear statement rules" that Eskridge and Frickey identify as "quasi-constitutional law" [FN278] are better described as ***2147** constitutional default rules, required by the Constitution to enforce congressional accountability to the people. [FN279] What is information-forcing in private law may be accountability-forcing in public law.

Finally, as Eskridge and Frickey explain, background rules may prove sticky, and so may ultimately influence public policy, rather than serving merely as neutral rules of the interpretive road. [FN280] To the extent that this is so, Congress is the appropriate institution to make these oblique policy choices.

D. Three Proposals

Congressional enactment of interpretive strategies has been rare, tentative, and ad hoc. This hesitance may stem from an inchoate concern about separation of powers. Or perhaps the notion of systematically legislating interpretive strategies simply has not occurred to Congress. (The proposed Federalism Accountability Act of 1999, discussed above, [FN281] was a novel development and perhaps a harbinger of fresh interest.) For whatever reason, the statutes on the books only hint at the potential. This section presents three substantive proposals.

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1. Dictionary.--Congress could provide: "When Courts have recourse to a dictionary in interpreting any federal statute enacted after this one, it shall be the Oxford English Dictionary, second edition, and no other." This provision seems entirely unobjectionable. Since the second edition would pre-date this statute, there could be no constitutional objection. [FN282] And though such a provision would hardly resolve all statutory ambiguity, it would render the United States Code a notch more determinate, at essentially zero cost. Imagine a legislator, uncertain of the meaning and connotation of a word in a bill, looking it up in a dictionary before voting. Today, that legislator has no guarantee that a court, puzzled by the same word, would look it up in the same dictionary. [FN283] If Congress designated an official statutory dictionary, he would have such a guarantee.

Of course, abundant scope would remain for miscommunication. For the legislator, it might be self-evident that the first definition is the relevant one; yet the courts might choose the second. [FN284] Or the courts might eschew the dictionary altogether in interpreting the ambiguous ***2148** term, believing it best understood by reference to common law or common sense. But one source of potential miscommunication would be eliminated. The possible interpretive universe for the United States Code would shrink, a bit. And the margin for misunderstanding among legislators, judges, and citizens would likewise narrow.

2. Canons.--The canons are a familiar staple of statutory interpretation. They are maxims developed, in common law fashion, by the courts. Many are ancient and expressed in Latin, [FN285] while some are relatively new. [FN286] The canons are beloved by textualists as vital tools for rendering statutory interpretation more determinate. [FN287] But others subject canons to a withering critique: they are not determinate at all, but are simply a veneer for judges' policy preferences. [FN288] The classic Llewellyn critique, suggesting that each canon actually has a countercanon, [FN289] implies that choosing interpretive canons is like "entering a crowded cocktail party and looking over the heads of the guests for one's friends." [FN290]

The determinacy of the canons is still very much up for debate. The debate, though, has uniformly been targeted to persuade judges. It has always been assumed that the judiciary should properly decide which canons are useful and which ones not. Absent from the debate has been the suggestion that Congress could codify canons of interpretation. This solution would be the most natural expansion of Congress's effort to legislate interpretive strategies.

The simplest possibility would be as follows. Llewellyn's article includes a two-column chart ("Thrust" /"Parry"), pairing the canons that supposedly conflict. [FN291] To the extent that there is truth to Llewellyn's insight, Congress could simply examine Llewellyn's chart, choose from each pair the canon it preferred, enact it, and forbid its counterpart. [FN292] Congress could also enhance the predictability of this code and ameliorate ***2149** the problem of conflicting canons by enacting priority rules. [FN293] The result would be far more determinate than the current practice for two reasons: first, explicit contradictions would be eliminated, and second, the canons that would remain would bind every judge.

Many canons take the form of presumptions regarding particular legislative outcomes. Some of these are clear-statement rules, which are presumptions that can only be overcome by a clear statement in the statutory text. General presumptions and unelaborated clear-statement rules may be criticized on the grounds that they do nothing to alleviate uncertainty; if anything, they exacerbate it by placing on the scale "a thumb of indeterminate weight." [FN294] On the other hand, clear-statement rules that specify what form of words would constitute a clear statement could eliminate uncertainty altogether. [FN295] If, for example, "Mother, may I?" were required to repeal a statute, there would be no hard cases whatsoever regarding implied repeals. [FN296]

Though the Court in recent years has been prolific in its development of clear-statement rules, [FN297] it has been reticent to develop corresponding safe harbors. Perhaps telling Congress precisely the form of words it must use to achieve a legislative goal strikes the Court as judicial overreaching--although, in fact, unelaborated clear-statement rules leave the Court far more discretion and power than do clear-statement rules plus safe harbors. But when Congress has ventured into the area of interpretive instructions, it has not been so reticent, and rightly not. Recall the provisions of the McCarran-Ferguson Act and RFRA to which Tribe objected. These provisions specify particular words that a future Congress must use to achieve certain legislative goals. [FN298] By doing so, these statutes eliminate a great deal of uncertainty with respect to those goals--and leave all power over them squarely in the hands of Congress, where it belongs.

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***2150** If Congress scrolls down a list of canons and chooses which ones to enact, it should favor clear-statement rules over vague presumptions. And it should always do what the Court has not: provide explicit safe harbors--explicit phrases that will be deemed to constitute clear statements.

3. Legislative History.--The fiercest debate in the field of statutory interpretation involves the proper use of legislative history. Textualists like Justice Scalia insist that legislative history has no proper place in statutory interpretation. [FN299] Other distinguished jurists hold it invaluable. [FN300] Textualists are a minority in the courts and the academy, but a vocal and articulate minority, and an increasingly influential one at that. [FN301] The debate is very much a live one, with Justice Scalia relentlessly pressing the textualist case at the Supreme Court, and at least one of Justices Thomas or Kennedy usually agreeing. [FN302] Judge Easterbrook [FN303] and others [FN304] press the same case at the circuit court level. There is also an abundant and rich academic debate. [FN305]

But the judges and scholars on both sides have a shared, unspoken premise. All of the writing on this topic is intended to influence judges, because it is assumed that the judiciary is the appropriate institution to make this methodological choice. Almost no one, [FN306] it appears, has ***2151** considered that Congress might end this debate with a one-sentence statute: "The United States Code shall [or shall not] be interpreted with deference to pre-enactment legislative history."

E. Implementation

Theoretically, then, Congress could develop an interpretive regime. Thus far, the discussion has assumed that Congress would exercise this role through ordinary enactments in the United States Code. That assumption simplified the exposition. It also underscored the unique potential competence of Congress in designing an interpretive regime--while perhaps understating the competence of the courts. But amending the United States Code is not the only possible way in which Congress could play a role in statutory interpretation. Indeed, it would not even be the best way.

The analysis begins with an analogy. Consider the regimes of procedure and evidence within the federal courts. Like statutory interpretation, procedure and evidence might seem at first glance to be within the inherent province of the judiciary. But rules of procedure and evidence-- like canons of interpretation--must above all form a predictable, coherent set. They are, therefore, particularly ill-suited to common law development. Thus, there is a dilemma: while courts have superior institutional knowledge of these fields, their decisionmaking processes cannot ensure internally logical regimes.

The Rules Enabling Act [FN307] resolves this dilemma. It empowers the Supreme Court to promulgate various regimes: the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence. [FN308] These rules are subject to inquiry and alteration by Congress before ultimate approval, [FN309] which enhances their democratic legitimacy. The rulemaking process harnesses the expertise of the judiciary, but enables a coherence that the judiciary could never achieve on a case-by-case basis. And the Rules of Evidence, in particular, are clothed in the democratic legitimacy of express congressional approval. [FN310]

***2152** This model suggests the optimal congressional role in the promulgation of interpretive canons. What is called for is a "Canons Enabling Act," which would similarly harness the strengths of both Court and Congress to create a coherent interpretive regime: the Federal Rules of Statutory Interpretation.

These Rules would differ from the Federal Rules of Evidence, Civil Procedure, and Criminal Procedure in two important ways: First, the Federal Rules of Evidence and Procedure apply in federal courts even when the underlying substantive law is state law. By contrast, the Federal Rules of Statutory Interpretation would apply only to federal statutes. The Rules of Decision Act [FN311] dictates that substantive state law governs diversity litigation in federal courts, and Erie Railroad v. Tompkins [FN312] extends this principle to state common law as well as to state statutes. [FN313] The principle must also, therefore, embrace state interpretive methodology, whether expounded in statutes or common law. This Article argues that legislating interpretive methodology is, within limits, an incident of the power to legislate. [FN314] If this characterization is correct, then state statutes arrive in

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federal court hand in hand with their own homegrown state interpretive methodology (whether common law or statutory), [FN315] which must govern in federal courts. [FN316] This principle is constitutionally required, and the Federal Rules of Statutory Interpretation would do nothing to repeal it.

Second, and conversely, the Federal Rules of Statutory Interpretation--like federal common law canons--would govern interpretation of federal statutes, even in state courts. A legislature enacts an interpretive methodology as a gloss on its substantive enactments, so the ***2153** methodology too is substantive. [FN317] The substantive enactments and their corresponding interpretive methodology cannot be unmoored from one another. Thus, federal statutes must be read using federal methodology, and state statutes must be read using state methodology, regardless of whether the venue is state or federal court.

In short, the Federal Rules of Evidence and Procedure apply whenever the venue is a federal court, regardless of the underlying substantive law. By contrast, the Federal Rules of Statutory Interpretation would apply whenever the statute at issue is federal, regardless of state or federal venue.

Despite these differences, the current Federal Rules offer an easily accessible model that can serve as a conceptual framework for the proposed Federal Rules of Statutory Interpretation. And the procedural advantages of rulemaking via a Rules Enabling Act are particularly apt for canons, which would be best codified collaboratively by Congress and the Supreme Court. An Acts Interpretation Act, to follow the Dictionary Act in the United States Code, would also be an improvement over the current cacophonous variety of interpretive methods. But the optimal implementation would be Federal Rules of Statutory Interpretation.

F. Political Feasibility

United Steelworkers of America v. Weber [FN318] required the Court to interpret Title VII of the Civil Rights Act of 1964. [FN319] Title VII forbids employers to "discriminate against any individual because of his race . . . in admission to, or employment in, any program established to provide apprenticeship or other training." [FN320] It also forbids employers to "limit, segregate, or classify [their] employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race." [FN321] Weber presented the issue whether these provisions allowed an employer to institute a racial quota in its on-the-job training program, which functioned to exclude white employees. ***2154** [FN322] June 27, 1979, was opposite day; the Court held that they did. [FN323]

Could a Canons Enabling Act or an Acts Interpretation Act ever pass both houses of Congress and be signed by the President? The most compelling reason to believe so is Weber. Many commentators argue that the Weber Court seized on unrepresentative legislative history and dubious interpretive techniques to justify a statutory interpretation manifestly contrary both to plain meaning and to the intention of the legislature. [FN324] If so, then Weber is a cautionary tale for the political branches; Congress and the President should do everything possible to encourage predictable methods of statutory interpretation.

Would Weber have come out differently if Congress had provided that Title VII not be construed by reference to its legislative history? A legal realist might say that the Court was determined to reach its result, regardless of statutory text, legislative history, interpretive methodology, or anything else. [FN325] But surely this hyperrealist account is a caricature. However result-oriented the Court might be on a particular issue, it still must justify its decision with legal arguments. By ruling one class of arguments-- those from legislative history--out of bounds, Congress would have made the Weber result far harder for the Court to justify. Perhaps Justice Brennan, for example, would have voted the same way, even if Title VII had forbidden reference to legislative history; Justice White, however, perhaps would have joined the dissenters. [FN326] Again, a comprehensive and comprehensible interpretive regime would not guarantee that Congress (or citizens) could predict perfectly the decisions of the Court. But at the margin, an interpretive rule could have made the difference in Weber and countless cases like it. The political branches generally should favor any measure that enhances the prospects that their policy preferences will receive faithful implementation in the courts.

***2155** On the other hand, Congress actually may prefer ambiguity. [FN327] Ambiguity serves two politically

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useful functions: First, it enables majorities to form, because their members need not all vote for the "same" bill. That is, ambiguity may allow a coalition to form that could not if all were crystal clear. If one half of a majority believes that a text means X and the other half believes that it means Y, they both may prefer to take their chances in the courts, rather than make the text more explicit and scuttle their majority. [FN328] Second, ambiguity allows Congress to evade accountability. The proposed Federalism Accountability Act was designed to foreclose one such category of evasion, and an accountability-forcing interpretive regime could foreclose others. Constitutional default rules that require clear statements likewise foreclose such evasions, whereas ambiguity allows members of Congress to return to their constituents with the familiar refrain that the laws as written are excellent but that, unfortunately, the courts have messed them up. [FN329] Both of these ideas are variants on the same theme: ambiguity allows Congress to shift the dirty work of legislation to the courts. While undesirable as a matter of democratic theory, it may well be attractive to legislators up for reelection.

The political branches should not reject interpretive legislation on that basis, for it confuses studied ambiguity with accidental ambiguity. A comprehensive interpretive regime would merely make statutory precision possible; it would not make it inevitable. Under any interpretive regime, it will always be possible to achieve ambiguity when desired. But under a comprehensive and coherent interpretive regime, it will also be possible to achieve precision when desired. Congress may well have tacitly agreed to disagree on several points in Title VII, and those points easily could have been rendered ambiguous regardless of the interpretive regime. But, at least on one view, affirmative action was not such a point. [FN330] It is this accidental ambiguity that a comprehensive interpretive regime could alleviate.

A clear, codified interpretive regime would pose no disadvantages to the political branches. It would preserve their ability to produce studied ambiguity when that serves their purposes. But it would also enhance their power to effect good policy in good faith when they are ***2156** so moved. Congress should pass a Canons Enabling Act, and collaborate with the Supreme Court to develop comprehensive and coherent Federal Rules of Statutory Interpretation.

Conclusion

Congress can and should codify rules of statutory interpretation. There is no general Article III objection to this project; the judicial power over this area may, like any other federal common lawmaking power, be trumped by Congress. The constitutional inquiry, rather, turns on the substance of the particular interpretive method that Congress attempts to displace.

This inquiry is worthwhile, quite apart from whether Congress will or should codify interpretive methods. By asking whether Congress could codify various interpretive rules, one is forced to make precise claims about the interpretive rules displaced. Rules of statutory interpretation have often been characterized as "constitutionally inspired" [FN331] or "quasi-constitutional" [FN332] or "rooted in notions of due process." [FN333] When one asks whether Congress could change the rule, and how much, and in which direction, and prospectively or retrospectively, a much more precise and nuanced constitutional taxonomy emerges. [FN334]

Some interpretive techniques are constitutionally required and may not be abrogated by Congress. Others are constitutional default rules; the effect of these may be avoided statute by statute, but the default rules themselves may not be abrogated wholesale. Still others are constitutional starting-point rules, required by the Constitution, unalterable by the judiciary, but changeable by act of Congress. And some of these are bounded by constitutional parameters, so that Congress may change the rule, but only so far, or perhaps only in a certain direction. The rest are pure common law, about which the Constitution is agnostic. The judicial power entitles courts to develop these by the lights of sound policy; but the policy views of courts may always be trumped by act of Congress.

So an interpretive act of Congress is unconstitutional if the rule it purports to displace is constitutionally required. A general interpretive statute is unconstitutional if it purports to displace a constitutional default rule. A dynamic interpretive statute may run afoul of the nondelegation doctrine. And any interpretive statute may be unconstitutional if it transgresses a substantive constitutional guarantee.

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***2157** Countless interpretive statutes would pass all of these tests. The potential power of Congress in this area is vast, and Congress would be wise to exercise it. The most important features of an interpretive regime are that it be clear, predictable, and internally coherent, and that both promulgator and interpreter of text agree on the regime beforehand. In most cases, the particular choice of rule will be less important than that some clear rule be chosen. Congress is better institutionally suited than the courts to develop such a coherent interpretive regime.

Congress would be wise to enact an interpretive regime to accompany the Dictionary Act at the beginning of the United States Code. But it would be wiser still to harness the expertise of the Supreme Court. Congress has institutional experience in the design of elaborate codes, but the Supreme Court has invaluable experience interpreting statutes. These complementary institutional characteristics suggest that the best possible implementation of an interpretive regime would utilize the strengths of both branches. In analogous areas--procedure and evidence--such a structure already exists: the Rules Enabling Act. [FN335] This Article endorses a Canons Enabling Act on the same model and a coherent set of canons to bring order to statutory interpretation, just as the Rules have brought order to procedure and to evidence. This set of canons may be written by the Supreme Court, but should be subject to searching inquiry and disapproval or amendment by Congress. The result of this joint effort--which at long last may render statutory interpretation consistent and predictable--should be called the Federal Rules of Statutory Interpretation.

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[FN1]. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[FN2]. See, e.g., Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 730-31 (1989); Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 133-34 (1989).

[FN3]. Cf. U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

[FN4]. 1 Laurence H. Tribe, American Constitutional Law § 5-9, at 851 (3d ed. 2000).

[FN5]. Jerry L. Mashaw, Textualism, Constitutionalism, and the Interpretation of Federal Statutes, 32 Wm. & Mary L. Rev. 827, 843 (1991).

[FN6]. Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 156 (1990).

[FN7]. This Article does not address statutes that purport to require methods of constitutional interpretation, which are far more problematic. Each branch has an independent obligation to read the Constitution in the best way it knows how. So even if Congress could, for example, forbid reference to legislative history in statutory interpretation, it hardly follows that Congress could forbid reference to The Federalist Papers in constitutional interpretation. Cf. Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey ?, 109 Yale L.J. 1535, 1591 (2000) (arguing that Congress may abrogate stare decisis by statute in constitutional cases, but only to the extent that stare decisis functions as a tool of judicial policy, not to the extent that precedent is used for the persuasiveness of its reasoning).

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[FN8]. See Alan R. Romero, Note, Interpretive Directions in Statutes, 31 Harv. J. on Legis. 211, 212 (1994). The leading casebook devotes only a few pages to this vast topic, and even those pages present more questions than answers. See William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 918-20 (3d ed. 2001).

[FN9]. William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993 Term--Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 67 (1994) ("The usefulness of the canons ...does not depend upon the Court's choosing the 'best' canons for each proposition. Instead, the canons may be understood as conventions, similar to driving a car on the right-hand side of the road; often it is not as important to choose the best convention as it is to choose one convention, and stick to it.").

[FN10]. See Ala. Code § § 1-1-1 to -16 (1999); Alaska Stat. § § 01.10.020-.065 (Michie 2000); Ariz. Rev. Stat. Ann. § § 1-211 to -215 (West 1995 & Supp. 2001); Ark. Code Ann. § § 1-2-101 to -207 (Michie 1996 & Supp. 2001); Cal. Gov't Code § 9603 (West 1992) (pointing to subject-specific rules of construction in subject-specific codes); Colo. Rev. Stat. Ann. § § 2- 4-101 to -402 (West 2000); Conn. Gen. Stat. Ann. § § 1-1 to -3b (West 2000); Del. Code Ann. tit. 1, § § 301-08 (1993); D.C. Code Ann. § § 1- 301.41, .45, .47 (2001); Fla. Stat. chs.1.01, 1.02, 1.04 (2001); Ga. Code Ann. § § 1-3-1 to -3 (2000 & Supp. 2001); Haw. Rev. Stat. § § 1-1 to - 32 (1993); Idaho Code § § 73-101 to -114 (Michie 1999); 5 Ill. Comp. Stat. Ann. 70/0.01-/8 (West 1993 & Supp. 2001); Ind. Code § § 1-1-4-1 to - 6 (1998); Iowa Code Ann. § § 4.1-.13 (West 2001); Kan. Stat. Ann. § § 77-201 to -206 (1997); Ky. Rev. Stat. Ann. § § 446.010-.170 (Michie 1999); La. Rev. Stat. Ann. § § 1:1-:17 (West 1987); Me. Rev. Stat. Ann. tit. 1, § § 71-74 (West 1989 & Supp. 2001); Md. Ann. Code art. 1, § § 1-32 (1996 & Supp. 2001); Mass. Gen. Laws Ann. ch. 4, § § 6-7 (West 1996 & Supp. 2001); Mich. Comp. Laws Ann. § § 8.3-.8 (West 1994); Minn. Stat. Ann. § § 645.001-.49 (West 1947 & Supp. 2002); Miss. Code Ann. § § 1-3-1 to - 79 (1998); Mo. Ann. Stat. § § 1.010-.090 (West 2000); Mont. Code Ann. § § 1-1-101 to -109 (2001); Neb. Rev. Stat. Ann. § § 49-801 to -806 (Michie 1995); Nev. Rev. Stat. Ann. 0.010-.060 (Michie 1998); N.H. Rev. Stat. Ann. § § 21:1-:49 (2001); N.J. Stat. Ann. § § 1:1-1 to -28 (West 1992); N.M. Stat. Ann. § § 12-2A-1 to -20 (Michie 1998); N.Y. Stat. Law § § 71-424 (McKinney 1971 & Supp. 2001-2002); N.C. Gen. Stat. § § 12-3 to - 4 (1999); N.D. Cent. Code § § 1-02-01 to -42 (1987 & Supp. 2001); Ohio Rev. Code Ann. § § 1.11-.62 (West 1994 & Supp. 2000); Okla. Stat. Ann. tit. 25, § § 1-36 (West 1987 & Supp. 2002); Or. Rev. Stat. § § 174.010-.590 (1999); 1 Pa. Cons. Stat. Ann. § § 1921-1952 (West 1995); R.I. Gen. Laws § § 43-3-1 to -32 (2000); S.C. Code Ann. § § 2-7-30 to -35 (Law. Co-op. 1986); S.D. Codified Laws § § 2-14-1 to -32 (Michie 1992 & Supp. 2001); Tenn. Code Ann. § § 1-3-101 to -112 (1994 & Supp. 2001); Tex. Gov't Code Ann. § § 311.021-.032 (Vernon 1998); Utah Code Ann. § § 68-3-1 to -14 (2000 & Supp. 2001); Vt. Stat. Ann. tit. 1, § § 171-177 (1995); Va. Code Ann. § § 1-10 to -17.2 (Michie 2001); Wash. Rev. Code § § 1.12.010-.070 (1985); W. Va. Code Ann. § § 2-2-10 to -12 (Michie 1999); Wis. Stat. Ann. § § 990.001-.08 (West 1998 & Supp. 2001); Wyo. Stat. Ann. § § 8-1-101 to - 108 (Michie 2001). See generally 1A Norman J. Singer, Sutherland Statutory Construction § 27.03 (5th ed. 1993) [hereinafter Sutherland].

[FN11]. See, e.g., Acts Interpretation Act, 1901 (Austl.); Interpretation Act, R.S.C., ch. I-21 (1985) (Can.); Interpretation Act, 1978 (Eng.); Interpretation Act 33 of 1957 (S. Afr.). See generally Interpreting Statutes: A Comparative Study (D. Neil MacCormick & Robert S. Summers eds., 1991).

[FN12]. Moreover, it is common for other legal documents to include instructions for their own interpretation. Interpretive instructions can be found in contracts and even in constitutions. The United States Constitution, for example, was amended twice in its first decade with new rules for its own interpretation. See U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (emphasis added)); U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (emphasis added)).

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[FN13]. S. 1214, 106th Cong. (1999).

[FN14]. See id.

[FN15]. See William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621 (1990).

[FN16]. See Antonin Scalia, Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation 3 (Amy Gutmann ed., 1997).

[FN17]. See Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533 (1983); Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61 (1994); Frank H. Easterbrook, What Does Legislative History Tell Us?, 66 Chi.-Kent L. Rev. 441 (1990).

[FN18]. See William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994).

[FN19]. The rare exceptions include Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the House Comm. on the Judiciary, 101st Cong. 92-93 (1990) (statement of William N. Eskridge, Jr.) [hereinafter Eskridge Testimony]; Alex Kozinski, Should Reading Legislative History Be an Impeachable Offense?, 31 Suffolk U. L. Rev. 807 (1998); Romero, supra note 8; Stephen F. Ross, Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?, 45 Vand. L. Rev. 561 (1992).

[FN20]. Adrian Vermeule, Interpretive Choice, 75 N.Y.U. L. Rev. 74, 74 (2000) (emphasis added).

[FN21]. Id. at 77.

[FN22]. At least some constitutional commands seem to fall into this starting-point category. See 1 Tribe, supra note 4, § 2-8, at 203 n.3 (arguing that courts should be "candid about the indeterminacy of Congress' silence" and should strive to discover "constitutionally correct default rule[s]"); id. § 3- 23, at 493 n.174; Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 464 (1989) ("[T]he language [in Article III] might have been designed to establish neither a minimum nor a maximum [amount of jurisdiction] but simply a starting point--a default rule--from which Congress may depart by statute in either direction."). (Though Amar uses the terms interchangeably, this Article makes a distinction between starting-point rules and default rules, see infra pp. 2094, 2097-98.) Constitutional remedies may have the status of starting-point rules as well. See, e.g., Bush v. Lucas, 462 U.S. 367, 380-90 (1983) (finding no constitutional damages remedy for federal employees who suffer retaliatory demotions in violation of the First Amendment, on the grounds that Congress had provided meaningful remedies); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (recognizing a remedy for a Fourth Amendment violation, but noting that Congress could replace it with an "equally effective" one). But starting-point rules as a category of constitutional law have never received systematic analysis.

[FN23]. See, e.g., McNally v. United States, 483 U.S. 350, 359-60 (1987). See generally Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345.

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[FN24]. Cf. William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 600 (1992) ("[A] lenient interpretation of a criminal statute obviates inquiries into underlying due process concerns.").

[FN25]. On this account, if the other Due Process Clause, U.S. Const. amend. XIV, establishes the rule of lenity as a starting point for interpretation of state criminal statutes, then state legislatures could likewise abrogate that rule. See Ariz. Rev. Stat. Ann. § 1-211(C) (West 1995) ("The rule of the common law that penal statutes shall be strictly construed has no application to these revised statutes. Penal statutes shall be construed according to the fair import of their terms, with a view to effect their object and to promote justice."); Cal. Penal Code § 4 (West 1999) ("The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."); N.Y. Penal Law § 5.00 (McKinney 1998) ("The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law.").

[FN26]. Cf. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that federal courts cannot create common law crimes).

[FN27]. Henry P. Monaghan, The Supreme Court, 1974 Term--Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 2-3 (1975).

[FN28]. Id. at 31.

[FN29]. See id. Compare Miranda v. Arizona, 384 U.S. 436, 490 (1966) ("Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."), with Dickerson v. United States, 530 U.S. 428, 442 (2000) (holding a congressional substitute for Miranda warnings unconstitutional, but declining to hold "that the Miranda warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements").

[FN30]. See Monaghan, supra note 27, at 31. See generally 1 Tribe, supra note 4, § 2-8, at 203-04; id. § 6-2, at 1029-43.

[FN31]. See also 1 Tribe, supra note 4, § 2-8, at 203-04 (referring to "default judge-made constitutional rule[s]" and "background constitutional rule [s] decreed by the Supreme Court").

[FN32]. Monaghan, supra note 27, at 10.

[FN33]. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 466 (1991) ("The common law, unlike a constitution or statute, provides no definitive text; it is to be derived from the interstices of prior opinions and a well-considered judgment of what is best for the community.").

[FN34]. 384 U.S. 436 (1966).

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[FN35]. Cf. Martin H. Redish, Federal Common Law and American Political Theory: A Response to Professor Weinberg, 83 Nw. U. L. Rev. 853, 857 (1989) ("When a court engages in statutory interpretation, it asks, 'What did the legislature intend?' When it creates common law, it asks, 'What is the best policy choice?" '). The conceptual distinction between constitutional interpretation and common lawmaking is the same.

[FN36]. See, e.g., Dickerson v. United States, 530 U.S. 428, 444-47 (2000) (Scalia, J., dissenting); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 615 (1997) (Thomas, J., dissenting).

[FN37]. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they must make it as judges make it, which is to say as though they were 'finding' it--discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be."); Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment) ("To hold a governmental Act to be unconstitutional is not to announce that we forbid it, but that the Constitution forbids it ....").

[FN38]. See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854-55 (1992).

[FN39]. Monaghan, supra note 27, at 10.

[FN40]. Miranda v. Arizona, 384 U.S. 436, 490 (1966).

[FN41]. Dickerson, 530 U.S. at 442.

[FN42]. And, for states, the Fourteenth Amendment. See supra note 25.

[FN43]. Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)).

[FN44]. But cf. Eskridge Testimony, supra note 19, at 92 ("Title 1 might be amended to include a provision that if a federal statute creates substantive rules for the states and includes a private cause of action, it is presumed that the statute abrogates state immunity from lawsuits based upon the statutory duties.").

[FN45]. 491 U.S. 58 (1989); see infra pp. 2121-23.

[FN46]. Cf. The Federalist No. 82, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[I]n every case in which [state courts] were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth." (emphasis added)).

[FN47]. Mashaw, supra note 5, at 839; see also Jerry Mashaw, As If Republican Interpretation, 97 Yale L.J. 1685, 1687 (1988) (noting that assumptions about the constitutional order lie beneath the surface of questions of statutory interpretation).

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[FN48]. See Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979).

[FN49]. Mashaw, supra note 5, at 841.

[FN50]. Id. at 843.

[FN51]. Id.

[FN52]. Sunstein, supra note 6, at 156 (footnote omitted); see also Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 412 (1989) (noting the importance of developing norms of statutory interpretation that comport with the constitutional framework).

[FN53]. Sunstein's most precise answer is the following: "Some of the substantive interpretive principles may be treated as a form of 'constitutional common law,' in which courts, responding to policies having a kind of constitutional status, press statutes in particular directions." Sunstein, supra note 6, at 155 (footnote omitted). But this formulation, borrowed from Monaghan, still lacks specificity.

[FN54]. Id. at 156. Laurence Tribe is similarly imprecise on the constitutional status of federalism-related clear-statement rules. See 1 Tribe, supra note 4, § 5-9, at 851 ("These constraints do not arise out of the Constitution per se, but they are constitutionally inspired ...."); id. § 5-9, at 856 (describing such a rule as "only a principle of construction (even if constitutionally derived)").

[FN55]. Sunstein, supra note 6, at 153. See also Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2107 (1990) ("Interpretive instructions include, least controversially, explicit legislative guidance about statutory interpretation.").

[FN56]. Cf. 42 U.S.C. § 1981 note (1994) ("No statements other than the interpretive memorandum ...shall be considered legislative history of, or relied upon in any way as legislative history [of this Act].").

[FN57]. See Eskridge Testimony, supra note 19, at 92-93 ("A[n] ... intriguing, but also ... controversial, idea would be for Congress to amend Title 1 to set forth a generic provision, that in interpreting federal statutes, courts should consider committee reports.").

[FN58]. See infra pp. 2135, 2138.

[FN59]. By contrast, John Manning apparently would say constitutional, unconstitutional, unconstitutional, unconstitutional; that is, non-use of pre-enactment legislative history is a constitutional default rule, and non-use of subsequent legislative history is a constitutional mandatory rule:

[S]pecific incorporation would make legislators directly responsible for the contents of the legislative history, and it would compel them to decide which parts of the legislative history they wish to incorporate--and which parts they wish to exclude. A [general] statute instructing courts to give such history decisive effect, without insisting upon direct and specific legislative assent, allows legislators to avoid the difficulties associated with that choice.

John F. Manning, Putting Legislative History to a Vote: A Response to Professor Siegel, 53 Vand. L. Rev. 1529,

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1541 (2000).

[FN60]. See infra Part III.

[FN61]. U.S. Const. art. I, § 8, cl. 18.

[FN62]. For a sustained, analogous argument, see Paulsen, supra note 7, at 1567-70, 1582-90.

[FN63]. See generally Gary Lawson, Controlling Precedent: Congressional Regulation of Judicial Decision-Making, 18 Const. Comment. 191 (2001); Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267 (1993).

[FN64]. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

[FN65]. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[FN66]. U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); id. § 7, cls. 2-3 (Bicameralism and Presentment Clauses).

[FN67]. See, e.g., Walling v. Portland Terminal Co., 330 U.S. 148, 150- 51 (1947) (rejecting the use of common law definitions because the relevant act "contain[ed] its own [comprehensive] definitions"). See generally 1A Sutherland, supra note 10, § 27.02.

[FN68]. 7 U.S.C. § 1428 (2000).

[FN69]. See, e.g., Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59-63 (1911) (upholding the Sherman Act, 15 U.S.C. § 1 (2000), which declares "[e]very ... conspiracy, in restraint of trade ...[to be] illegal," against a delegation challenge).

[FN70]. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language.").

[FN71]. Of course, there is no guarantee that definition Y will be less ambiguous than defined term X, and a court may require all its interpretive ingenuity to give content to Y. The point, though, is that no interpretive work will be necessary as to term X except a simple cut and paste.

[FN72]. One definitional statute explicitly emphasizes its cut-and-paste function. See 1 U.S.C. § 5 (2000) ("The word 'company' or 'association', when used in reference to a corporation, shall be deemed to embrace the words 'successors and assigns of such company or association', in like manner as if these last-named words, or words of similar import, were expressed." (emphasis added)).

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[FN73]. See City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (noting that the Court has "always recognized that federal common law is 'subject to the paramount authority of Congress" ' (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931))). See generally 1 Tribe, supra note 4, § 3- 23, at 493-94.

[FN74]. See Lewis Carroll, Symbolic Logic 166 (4th ed. 1896), reprinted in 1 Lewis Carroll, Mathematical Recreations of Lewis Carroll (Dover Pubs. & Berkeley Enters. 1958) ("I maintain that any writer of a book is fully authorised in attaching any meaning he likes to any word or phrase he intends to use. If I find an author saying, at the beginning of his book, 'Let it be understood that by the word "black" I shall always mean "white", and that by the word "white" I shall always mean "black",' I meekly accept his ruling, however injudicious I may think it.").

[FN75]. See, e.g., Franklin v. United States, 216 U.S. 559, 568-70 (1910); see also Jonathan R. Siegel, The Use of Legislative History in a System of Separated Powers, 53 Vand. L. Rev. 1457, 1480-89 (2000).

[FN76]. 1A Sutherland, supra note 10, § 27.02, at 468.

[FN77]. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 22-24 (1976).

[FN78]. See supra note 76.

[FN79]. See supra note 77.

[FN80]. The leading treatise misses this point, suggesting that Congress could always achieve the same goal, whether with an unglossed substantive command, a substantive command plus definitions, or a substantive command plus interpretive instructions:

A rule may be stated in direct operational terms, as for example that where circumstance A is found to exist, legal consequence B shall attach. Or the same substantive rule may be effected by defining terms in another and differently stated rule. If, for example, there is a rule which provides that where circumstance X is found to exist, legal consequence B shall attach, the substance of the rule stated first could be effected by enacting that for this purpose X means A. Or again, in the mode of an interpretational directive instead of a definition, the same legislative effect could be achieved by declaring, not in the idiom of definition or "meaning," that the rule which makes legal consequence B attach to circumstance X shall be interpreted and applied to make the same consequence attach to circumstance A as well.

1A Sutherland, supra note 10, § 27.01, at 465-66. It is correct but trivial to note the equivalence of "X means A" and "X shall be interpreted to mean A." But some interpretive instructions--like "interpret broadly," cf. Administrative Procedure Act, 5 U.S.C. § 592 (2000) ("'[A]dministrative procedure' ... is to be broadly construed to include ....")--are not algebraic equivalencies and so could not be achieved by Congress in another way.

[FN81]. See Dickerson v. United States, 530 U.S. 428, 437 (2000) ("[T]he power to judicially create and enforce nonconstitutional 'rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.' Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution." (citation omitted) (quoting Palermo v. United States, 360 U.S. 343, 353 n.11 (1959))).

[FN82]. Compare Miller v. French, 530 U.S. 327, 349-50 (2000) (leaving open the question whether statutory time

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limits on adjudication may be invalid as unjustified interferences with judicial decisionmaking), with Gray-Bey v. United States, 201 F.3d 866, 871-75 (7th Cir. 2000) (Easterbrook, J., dissenting) (taking issue with several courts' assertion of a common law power to disregard time limits on judicial decisionmaking, and arguing that such time limits, if not unconstitutional, must be obeyed).

[FN83]. Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 669 (4th ed. 1996) [hereinafter Hart & Wechsler] ("The ability of Congress to legislate procedural change for the federal courts has never been seriously doubted ...."); see also Dickerson, 530 U.S. at 437.

[FN84]. 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5002, at 32-33 (1977) ("[Chief Justice] Marshall and [Justice] Story were ruling on points of evidence as a matter of general common law. These opinions, magisterial in tone, sometimes cited no authority at all, sometimes cited authority from England or from the state courts, or both, and in some decisions rejected or distinguished these precedents to adopt for federal courts a more 'modern' rule." (footnotes omitted)).

[FN85]. Cf. Mistretta v. United States, 488 U.S. 361, 363-68, 412 (1989) (upholding the United States Sentencing Guidelines, which trump traditional common law sentencing).

[FN86]. See supra pp. 2103-04.

[FN87]. See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

[FN88]. See, e.g., Gen. Elec. Capital Corp. v. Southeastern Health Care, Inc., 950 F.2d 944, 950 (5th Cir. 1991) ("When this court's jurisdiction is based on diversity and the applicable substantive law is that of Louisiana, we are bound to dispatch our duty of legal interpretation as would a court of Louisiana, relying primarily on Louisiana's Revised Civil Code of 1870 ... and other statutory law, including the rules of interpretation contained therein.").

[FN89]. U.S. Const. art. I, § 8, cl. 18.

[FN90]. 42 U.S.C. § 1981 note (1994).

[FN91]. See supra p. 2105.

[FN92]. See sources cited supra note 17.

[FN93]. 7 U.S.C. § 1428(c) (2000) (emphasis added).

[FN94]. 42 U.S.C. § 1981 note (1994) (emphasis added).

[FN95]. 1 U.S.C. § § 1-7 (2000).

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[FN96]. Id. § 1.

[FN97]. Id. § 3.

[FN98]. Id. § 1.

[FN99]. Id. § 7. Similarly, the controversial Born-Alive Infants Protection Act, H.R. 2175, 107th Cong. (2002), passed by the House of Representatives in March 2002, defines the words "person," "human being," "child," and "individual" to include "every infant member of the species homo sapiens who is born alive at any stage of development." Id. at § 2.

[FN100]. See 1A Sutherland, supra note 10, § 27.03, at 472 ("Many courts have failed to distinguish carefully between general interpretive statutes which apply to all subsequent legislation and special interpretive statutes which frequently are enacted for the purpose of retroactively altering the interpretation of the law."). Note that the Sutherland treatise itself fails to distinguish carefully (1) the distinction between statute-specific and general interpretive statutes, from (2) the subdistinction between general-prospective and general-retrospective interpretive statutes.

[FN101]. Indeed, 1 U.S.C. § 1 only applies "unless the context indicates otherwise." See Rowland v. Cal. Men's Colony, 506 U.S. 194, 199-201 (1993). The rest of the Dictionary Act, however, has no such qualification, suggesting that it applies even if the context suggests otherwise.

[FN102]. S. 1214, 106th Cong. (1999).

[FN103]. Id. § 2(5).

[FN104]. Id. § 6.

[FN105]. S. 1214.

[FN106]. See, e.g., Geier v. Am. Honda Motor Co., 529 U.S. 861, 867 (2000) ("In reaching our conclusion, we consider three subsidiary questions. First, does the Act's express pre-emption provision pre-empt the lawsuit? ... Second, do ordinary pre-emption principles nonetheless apply? ... Third, does this lawsuit actually conflict with ...the Act itself?").

[FN107]. S. 1214 § 6(a).

[FN108]. 15 U.S.C. § 2649(a) (2000) (emphasis added); see also 10 U.S.C. § 2694(d) (2000) ("Nothing in this section shall be construed or interpreted as preempting any otherwise applicable Federal, State, or local law or regulation relating to the management of natural and cultural resources on military installations.").

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[FN109]. S. 1214 § 6(a) (emphasis added).

[FN110]. S. Rep. No. 106-159 § 6(c) (1999).

[FN111]. Interestingly, section 6(c) also purported to govern the interpretation of itself. To that extent, the provision may be paradoxical. Laurence Tribe writes:

[There is a] deep problem of self-referential regress whenever one seeks to validate, from within any text's four corners, a particular method of giving that text meaning. Even if one sought to "prove" a proposition as seemingly straightforward as that the marks on the pages of a given text should be understood as written in English rather than in some other tongue or in some obscure code, one could never hope to do so by quoting from the written page itself, whether or not supplemented by aids to translation to which the written page might refer. Even a sentence saying something like "this text is to be read with the aid of the Oxford English Dictionary" might, after all, mean something quite different from what most of those who read this essay would take such a sentence to mean--unless one assumes the very thing to be demonstrated about the rules of interpretation to be followed in deciphering the document in question.

Laurence H. Tribe, Comment, in A Matter of Interpretation, supra note 16, at 65, 76-77 (footnote omitted). This passage illustrates a neat logical conundrum, but it is not, ultimately, very consequential in this context. True, some judges might insist on using legislative history to interpret a provision requiring: "The United States Code shall not be interpreted by reference to legislative history." But even if those judges read interpretive provisions using whatever tools they prefer, they will probably conclude that the interpretive provisions mean what they seem to mean. Once they do so, and absent some constitutional objection, they will be bound to follow the interpretive provisions in interpreting every other section of the United States Code.

[FN112]. Federalism Accountability Act of 1999: Hearing on S. 1214 Before the Senate Comm. on Governmental Affairs, 106th Cong. 303 (1999) (statement of Randolph D. Moss, Acting Ass't Atty. Gen., Office of Legal Counsel).

[FN113]. Id. at 304.

[FN114]. Id. at 305.

[FN115]. Id. at 303.

[FN116]. National Productivity and Quality of Working Life Act of 1975, 15 U.S.C. § 2403(a) (2000).

[FN117]. Id. § 2403(c).

[FN118]. Inexplicably, this 1975 provision has never been cited in a federal case, although it could, for example, have offered powerful justification for the contemporaneous shift in antitrust doctrine to a focus on economic efficiency. See Thomas D. Morgan, Cases and Materials on Modern Antitrust Law and Its Origins 485 (2d ed. 2001) (describing the influence of "[a]rticulate critics such as Robert Bork, Harold Demsetz and Richard Posner" on antitrust doctrine in the 1970s).

[FN119]. Cf. supra note 80. Daniel Rodriguez writes:

In Section 11 [of the proposed Civil Rights Bill of 1991], Congress has instructed courts to interpret federal civil

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rights law--not just the 1991 legislation, but all civil rights statutes--broadly. In essence, the 102d Congress has, in one moment, appended an implicit amendment to every existing civil rights statute. The court, as an honest agent, must construe civil rights legislation as if each enacting Congress, be it the 89th Congress that enacted the 1964 Civil Rights Act or the 39th Congress that enacted the 1866 Civil Rights Act, instructed courts to construe these statutes broadly.
Daniel B. Rodriguez, Statutory Interpretation and Political Advantage, 12 Int'l Rev. L. & Econ. 217, 225 (1992).

[FN120]. See 1 Tribe, supra note 4, § 2-3, at 125 n.1.

[FN121]. See id. ("[S]eparation of powers [does not] address the ability of the officers of one branch of government to bind their successors within that branch.").

[FN122]. See id. at 125-26 n.1; see also U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

[FN123]. Cf. 1 Bruce Ackerman, We the People: Foundations 16 n.d , 279, 320- 21 (1991) (displaying apparent ambivalence about whether unamendability is consistent with popular sovereignty).

[FN124]. Two important exceptions prove the rule. McGinnis and Rappaport write:
It is true that the text of the Constitution has been interpreted to permit legislatures to enter into binding contracts and to create vested rights in contract and property that a subsequent legislature cannot impair. But this authority specifically derives from the constitutional provisions protecting such rights, such as the Contracts Clause and the Takings Clause. The legislature, however, lacks the authority to prevent subsequent legislatures from changing the law when it passes ordinary statutes or rules of proceedings.
John O. McGinnis & Michael B. Rappaport, The Constitutionality of Legislative Supermajority Requirements: A Defense, 105 Yale L.J. 483, 506 (1995) (footnotes omitted).

[FN125]. Thomas M. Cooley, A Treatise on the Constitutional Limitations 125- 26 (photo. reprint 1972) (1868).

[FN126]. See An Open Letter to Congressman Gingrich, 104 Yale L.J. 1539 (1995) (signed by Bruce Ackerman and sixteen others); see also McGinnis & Rappaport, supra note 124, at 503-07.

[FN127]. See McGinnis & Rappaport, supra note 124, at 504 ("[T]he Constitution does not allow ... an insulated repeal rule to be given effect."). See generally id. at 503-07; An Open Letter to Congressman Gingrich, supra note 126, at 1539.

[FN128]. 1 Tribe, supra note 4, § 2-3, at 125 n.1; see id. ("[T]he power of Congress legislatively to bind subsequent Congresses is limited, for any statute that purported to direct or to forbid subsequent Congresses to do certain things or to follow certain procedures could be repealed, as could any other law, by another duly enacted statute.").

[FN129]. Id.

[FN130]. Id.

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[FN131]. Id. at 125-26 n.1.

[FN132]. Pub. L. No. 15, 59 Stat. 33 (1945).

[FN133]. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

[FN134]. 15 U.S.C. § 1012(b) (2000).

[FN135]. 42 U.S.C. § 2000bb-3(b) (1994). See In re Young, 141 F.3d 854 (8th Cir. 1998) (upholding the constitutionality of the Religious Freedom Restoration Act as applied to federal law).

[FN136]. 1 Tribe, supra note 4, § 2-3, at 125-26 n.1 (citations omitted).

[FN137]. Id. at 125 n.1.

[FN138]. A statute that required repeals to be rendered in ancient Greek might fail this test.

[FN139]. A statute that purported to be repealable only with the phrase "Republicans are evil" might fail this test.

[FN140]. Indeed, the RFRA provision and the "Mother, may I?" provision have one powerful argument to recommend them: They are entirely determinate. They leave no difficult middle cases. Whether a statute repeals or suspends another by implication is one of the most vexing questions of statutory interpretation. There is a presumption against such repeals. See Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Ass'n, 491 U.S. 490, 509-10 (1989) (construing the Railway Labor Act to avoid conflict with the Interstate Commerce Act); Traynor v. Turnage, 485 U.S. 535, 547-48 (1988) (citing various formulations of the presumption against repeals); Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 564-67 (1987) (refusing to interpret the Railway Labor Act as repealing provisions of the Federal Employers' Liability Act); Morton v. Mancari, 417 U.S. 535, 549 (1974) ("[R]epeals by implication are not favored." (quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936)) (internal quotation marks omitted)). But the presumption merely moves the goal line by an indeterminate distance; if anything, it exacerbates the problem of hard cases close to the line. As Justice Scalia argues, "It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight." Scalia, supra note 16, at 28. Scalia's is a significant criticism of presumptions, and even unelaborated clear-statement rules, but it does not apply to provisions that require a specified clear statement, like RFRA or the hypothetical "Mother, may I?" statute. These provisions eliminate all hard cases by telling Congress precisely what to say to achieve a specific legislative goal.

[FN141]. See Siegel, supra note 75, at 1496 ("The import of every statute is determined in part by prior statutes, and Congress may pass a statute creating general rules governing the effect of future statutes.").

[FN142]. 1 Tribe, supra note 4, § 2-3, at 125 n.1.

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[FN143]. Id. at 126 n.1.

[FN144]. Id. at 125 n.1.

[FN145]. Recall that Cass Sunstein takes precisely the opposite view. See Sunstein, supra note 6, at 153 ("The easiest cases ...involve express legislative instructions about interpretation.... When the legislature has been explicit, there can be no objection to judicial use of the relevant instructions."); supra pp. 2100-01. Tribe's implicit claim is that all current interpretive methodology is constitutionally required; Sunstein's implicit claim is that none of it is. The truth is in between.

[FN146]. 1A Sutherland, supra note 10, at § 27.04. See also Eskridge & Frickey, supra note 9, at 68 n.186 ("Of course, Congress may enact certain rules of construction applicable to all federal statutes. See [The Dictionary Act]."); Jefferson B. Fordham & J. Russell Leach, Interpretation of Statutes in Derogation of the Common Law, 3 Vand. L. Rev. 438, 448 (1950) ("Any serious suggestion at this day that since interpretation is a judicial function a general interpretive act, applicable only to future statutes, would be unconstitutional, could hardly be taken seriously.").

[FN147]. 1 Tribe, supra note 4, § 2-3, at 126 n.1.

[FN148]. See supra p. 2119.

[FN149]. Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)).

[FN150]. 491 U.S. 58 (1989).

[FN151]. Id. at 64 (alteration in original) (quoting Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1979) (quoting United States v. Cooper Corp., 312 U.S. 600, 604 (1941))) (internal quotation marks omitted).

[FN152]. Id. at 65 (quoting Atascadero, 473 U.S. at 242) (internal quotation marks omitted).

[FN153]. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

[FN154]. Will, 491 U.S. at 69-70.

[FN155]. See id. at 77-82 (Brennan, J., dissenting).

[FN156]. See EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 262 (1991) (Marshall, J., dissenting) ("Clear-statement rules operate less to reveal actual congressional intent than to shield important values from an insufficiently strong legislative intent to displace them."). Tribe agrees:

[C]ourts should not abrogate state immunity unless they are sure that Congress has considered, and has clearly chosen to override, the federalism interests compromised by federal suits against states. By making a law

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unenforceable in federal courts against the states unless a contrary intent is apparent in the language of the statute, the clear-statement rule would further ensure that attempts to limit state power will be unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interests.

1 Tribe, supra note 4, § 3-26, at 548-49; see also Eskridge & Frickey, supra note 24, at 631 ("The canons, especially the 'tough' ones, can protect important constitutional values against accidental or undeliberated infringement by requiring Congress to address those values specifically and directly."); Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2111-14 (1990) (discussing "[c]onstitutionally [i]nspired" norms requiring explicit legislative statements).

[FN157]. Will tests the notion of constitutional default rules because it pits interpretive canons of unclear constitutional status against a general interpretive statute. But there are many other canons--chiefly related to constitutional structure--whose constitutional status is likewise unclear. See Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (refusing to apply federal antidiscrimination law to interfere with a state's authority to define the qualifications of its judges absent a clear statement by Congress); Atascadero, 473 U.S. at 242 ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16 (1981) (holding that when a statute imposes affirmative obligations on states, courts "should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment"); Eskridge & Frickey, supra note 156 (cataloguing and analyzing such rules). Some cases have professed, implausibly, that these are mere "ordinary rule[s] of statutory construction." E.g., Will, 491 U.S. at 65; Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 205-06 (1991) (quoting Will, 491 U.S. at 65). Eskridge and Frickey hint that at least some such rules may not be reversed wholesale. See Eskridge & Frickey, supra note 156, at 611-12 (defining "'super-strong clear statement rules,' which establish very strong presumptions of statutory meaning that can be rebutted only through unambiguous statutory text targeted at the specific problem" (emphasis added)); id. at 631 (noting that Congress can only abrogate "tough" canons by acting "specifically and directly"). These hints are oblique, however; Eskridge and Frickey could have sharpened greatly their conception of "quasi-constitutional law" by asking explicitly of each example: could Congress reverse this canon wholesale? For the "super-strong clear statement rules" they identify, the answer is probably no. If this is correct, then canons that they describe as "quasi-constitutional law" are more precisely characterized as constitutional default rules. There is nothing "quasi" about them; they are required by the Constitution. But they are in the nature of default rules, so their effect may be avoided statute by statute with an appropriately clear statement.

[FN158]. On this account, the Tenth Amendment requires a default rule. On the other hand, one could argue that federalism-related clear-statement rules are really constitutional starting-point rules. Whichever view is correct, this is the correct way to frame the debate.

[FN159]. See supra pp. 2117-18.

[FN160]. See supra p. 2119.

[FN161]. Cf. Greene v. McElroy, 360 U.S. 474, 507 (1959) ("Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." (emphasis added)).

[FN162]. See 1 U.S.C. § 7 (2000) ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife ...."); cf. Born-Alive Infants Protection Act, H.R. 2175, 107th Cong. § 2 (2002) ("[T]he words 'person', 'human being', 'child', and 'individual', shall include every infant member of the species homo sapiens who is born alive at any stage of development.").

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[FN163]. See supra pp. 2121-22.

[FN164]. See supra section II.A.

[FN165]. See infra section II.C.4.

[FN166]. See Eskridge Testimony, supra note 19, at 92-93 ("A[n] ... intriguing, but also ... controversial, idea would be for Congress to amend Title 1 to set forth a generic provision, that in interpreting federal statutes, courts should consider committee reports. The new textualists would probably consider such a statute unconstitutional, as a legislative usurpation of the judicial power to interpret statutes, but if cautiously worded the statute would very probably pass constitutional muster with a majority of the current Court."). But see Manning, supra note 59, at 1541 (contending, in effect, that statutory textualism is not a constitutional starting-point rule, but rather a constitutional default rule).

[FN167]. Vertical stare decisis is probably required by Article III, Section1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (emphasis added)). See generally Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817 (1994).

[FN168]. See, e.g., Agostini v. Felton, 521 U.S. 203, 235-36 (1997) ("'[S]tare decisis is not an inexorable command,' but instead reflects a policy judgment ...." (citation omitted) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991))); Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) ("We always have treated stare decisis as a 'principle of policy' and not as an 'inexorable command[]'...." (citation omitted) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940))); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854-55 (1992) ("The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit.... [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."); Helvering, 309 U.S. 106 at 119 ("[S]tare decisis is a principle of policy and not a mechanical formulation of adherence to the latest decision ....").

[FN169]. Michael Paulsen has argued persuasively that Congress could abrogate stare decisis in constitutional cases. See Paulsen, supra note 7, at 1591. If he is right, the claim in the text would follow a fortiori. Moreover, consider that stare decisis, like other interpretive rules, is substantive law. Federal stare decisis principles, therefore, apply only to construction of federal law. See supra p. 2108. As the Fifth Circuit explains:

Under Louisiana's system of Civil Law, the primacy of jurisprudence and the binding nature of stare decisis that are the bedrock of the common law are inapposite. Although the courts of Louisiana rely on jurisprudence for instruction, and may virtually be bound by jurisprudence when the number and force of the cases are sufficient to constitute jurisprudence constant, the primary sources of private civil law in Louisiana are the state's Constitution and the codes and statutes enacted by the legislature. When this court's jurisdiction is based on diversity and the applicable substantive law is that of Louisiana, we are bound to dispatch our duty of legal interpretation as would a court of Louisiana, relying primarily on Louisiana's Revised Civil Code of 1870 ... and other statutory law, including the rules of interpretation contained therein.

Gen. Elec. Capital Corp. v. Southeastern Health Care, Inc., 950 F.2d 944, 950 (5th Cir. 1991). It would be odd to say that the Louisiana legislature may require a federal court to eschew stare decisis but Congress may not.

[FN170]. 12 U.S.C. § 95a(3) (2000) (discussing presidential power to regulate foreign exchange transactions in

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wartime); see also 28 U.S.C. § 2072(c) (1994) (delegating authority to the Supreme Court to define "final decision" in id. § 1291).

[FN171]. See supra p. 2087.

[FN172]. Mistretta v. United States, 488 U.S. 361, 371-72 (1989) (citation omitted) (quoting U.S. Const. art. I, § 1; Field v. Clark, 143 U.S. 649, 692 (1892)).

[FN173]. See Carter v. Carter Coal Co., 298 U.S. 238 (1936); see also A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[FN174]. Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903, 912 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) (second alteration in original) (internal quotation marks omitted); see also Loving v. United States, 517 U.S. 748, 771 (1996) (quoting Hampton, 276 U.S. at 409).

[FN175]. 1 Tribe, supra note 4, § 5-19, at 999 n.74 (emphasis omitted).

[FN176]. Although arguably even the ex-presidential-immunity order imagined above is "not inconsistent."

[FN177]. See, e.g., Zemel v. Rusk, 381 U.S. 1, 17 (1965); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[FN178]. 467 U.S. 837 (1984).

[FN179]. Id. at 867.

[FN180]. See NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123-24 (1987); id. at 133-34 (Scalia, J., concurring).

[FN181]. 1 Tribe, supra note 4, § 5-19, at 1002 (quoting NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 787 (1990)). The logic applies to agency rules generally. See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265- 66 (1975) ("The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking.").

[FN182]. 1 Tribe, supra note 4, § 5-19, at 997.

[FN183]. Id. at 994.

[FN184]. See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 515-16 ("The separation-of-powers justification [for the Chevron doctrine] can be rejected even more painlessly by

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asking one simple question: If, in the statute at issue in Chevron, Congress had specified that in all suits involving interpretation or application of the Clean Air Act the courts were to give no deference to the agency's views, but were to determine the issue de novo, would the Supreme Court nonetheless have acquiesced in the agency's views? I think the answer is clearly no, which means that it is not any constitutional impediment to 'policy-making' that explains Chevron.").

[FN185]. This question dovetails with another vexing one: could Congress constitutionally avoid or reverse the "strong presumption in favor of judicial review of administrative action" ? INS v. St. Cyr, 121 S. Ct. 2271, 2278 (2001).

[FN186]. See id. at 2279 ("A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.").

[FN187]. See Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) ("The law in question, a criminal statute, is not administered by any agency but by the courts .... The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."). But see Dan M. Kahan, Is Chevron Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469, 488-506 (1996) (maintaining that the executive branch should gloss as well as enforce federal criminal law).

[FN188]. See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.23 (1982) (plurality opinion) ("When Congress assigns ...[certain] matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review." (emphasis added)); Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915, 933-49 (1988).

[FN189]. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865-66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices--resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."); see also Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991) ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches.").

[FN190]. See U.S. Const. art. I, § 1.

[FN191]. Cf. Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 330-37 (2000) (describing "nondelegation canons," rules of construction that limit the reach of Chevron deference).

[FN192]. As Tribe argues, "reconciling Chevron deference with the nondelegation doctrine would appear to require a particularly heroic degree of self-deception." 1 Tribe, supra note 4, § 5-19, at 997 n.71; see also id. at 999 n.74 ("[W]hen courts treat agencies operating under Chevron delegations as free to pick any meaning they wish within a congressionally specified range (and then to change their minds as the political situation changes), those courts are effectively (even if inadvertently) conceding that what Congress delegates under Chevron is, contra nondelegation theory and the separation of powers, nothing less than the power to legislate."). See generally C. Boyden Gray, The Search for an Intelligible Principle: Cost-Benefit Analysis and the Nondelegation Doctrine, 5 Tex. Rev. L. & Pol. 1 (2000).

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[FN193]. A full argument to that effect is beyond the scope of this Article. But see sources cited supra note 192.

[FN194]. See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); Washington ex rel. Seattle Title & Trust Co. v. Roberge, 278 U.S. 116 (1928); Eubank v. Richmond, 226 U.S. 137, 143 (1912).

[FN195]. America's Law Enforcement Mental Health Project, Pub. L. No. 106-515, § 3(a), 114 Stat. 2399, 2400 (2000) (codified as amended at 42 U.S.C.A. § 3796ii-1(1) (West Supp. 2001)) (emphasis added).

[FN196]. See generally 1 Tribe, supra note 4, § 5-19, at 991-93.

[FN197]. See, e.g., Currin v. Wallace, 306 U.S. 1, 15-18 (1939).

[FN198]. 1 Tribe, supra note 4, § 5-19, at 993; see also Memorandum for the General Counsels of the Federal Government (May 7, 1996), 1996 WL 876050 (O.L.C.) [hereinafter OLC Memo], text at n.135 ("[A] congressional delegation of authority ...to private parties might have a significant impact on the executive branch's ability to fulfill its constitutional functions. If so, the delegation might be invalid under the general separation of powers principle.").

[FN199]. The problem would be slightly altered if a statute required deference to future judicial writings of Judge Easterbrook. Here the delegation would be not to a private party, but to a federal judge. At a minimum, such a provision could not bind the Supreme Court, because it would undermine the Court's constitutional supremacy. Cf. Caminker, supra note 167; Blanchard v. Bergeron, 489 U.S. 87, 91 (1989) (examining past district court opinions that Congress had explicitly approved).

[FN200]. See statutes cited supra note 10.

[FN201]. Such a statute would be the statutory interpretation counterpart to the Conformity Act of 1872, which provided that:

[T]he practice, pleadings, and forms and modes of proceeding, in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: Provided, however, That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197. Cf. 19 U.S.C. § 2606(a) (2000) (dynamically incorporating foreign antiquities export law).

[FN202]. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-41 (1985) (looking to state law to determine whether a civil service position is a constitutionally protected property interest); De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (deferring to the state definition of "children" for purposes of the Copyright Act); Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 210 (1946) (deferring to the state definition of "real property" for purposes of the Reconstruction Finance Act); cf. U.S. Const. amend. XXI, § 2 ("The transportation or importation into any State ... of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

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[FN203]. See Assimilative Crimes Act, 18 U.S.C. § 13 (2000) (adopting state criminal law for areas under federal jurisdiction); United States v. Sharpnack, 355 U.S. 286, 286 (1958) (upholding this statute). But see Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 48-50 (1825) (arguing that state legislatures lack the power to regulate the execution of judgments in federal courts sitting in their state). See generally Hart & Wechsler, supra note 83, at 661-63 (discussing Wayman).

[FN204]. See Wayman, 23 U.S. (10 Wheat.) at 49; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431-34 (1819).

[FN205]. The Federalist No. 49, at 315-16 (James Madison) (Clinton Rossiter ed., 1961), quoted in United States v. Brown, 381 U.S. 437, 444 n.17 (1965).

[FN206]. Bowsher v. Synar, 478 U.S. 714, 733 (1986).

[FN207]. Walter Dellinger, as Assistant Attorney General for the Office of Legal Counsel, wrote:

Although the founders were concerned about the concentration of governmental power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement, and the Supreme Court's decisions call for careful scrutiny of legislation that has the purpose or effect of extending Congress's authority beyond the legislative process.

OLC Memo, supra note 198, text at n.21 (footnote omitted).

[FN208]. INS v. Chadha, 462 U.S. 919, 951 (1983).

[FN209]. U.S. Const. art. I, § 7, cls. 2-3.

[FN210]. 462 U.S. 919 (1983).

[FN211]. See OLC Memo, supra note 198, text after n.40.

[FN212]. See United States Senate v. FTC, 463 U.S. 1216 (1983) (mem.) (summarily invalidating a two-house veto provision).

[FN213]. See OLC Memo, supra note 198, at n.8.

[FN214]. See supra p. 2107.

[FN215]. See, e.g., Sullivan v. Finkelstein, 496 U.S. 617, 628 n.8 (1990); Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980); Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980).

[FN216]. See, e.g., Chickasaw Nation v. United States, 122 S. Ct. 528, 534 (2001); Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 117- 18 & n.13 (1980); see also Sullivan, 496 U.S. at 631-32 (Scalia, J., concurring in part) (arguing that subsequent legislative history, which the majority relied on, Sullivan, 496 U.S. at 628 n.8, is "a

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contradiction in terms" and "should not be taken seriously, not even in a footnote").

[FN217]. Eskridge, supra note 18, at 5-6.

[FN218]. Thanks to Ian Ayres for this hypothetical.

[FN219]. See Sullivan, 496 U.S. at 631 (Scalia, J., concurring in part) (declaring it irrelevant "what committees of the 99th and 95th Congresses thought the 76th Congress intended"); Scalia, supra note 16, at 38 ("[T]he Great Divide with regard to constitutional interpretation ...[is] that between original meaning ...and current meaning."). Judge Easterbrook writes:

Imagine how we would react to a bill that said, "From today forward, the result of any opinion poll among members of Congress shall have the effect of law." We would think the law a joke at best, unconstitutional at worst. This silly "law" comes uncomfortably close, however, to the method by which courts deduce the content of legislation when they look to subjective intent.

Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 65 (1988). Easterbrook is correct because his hypothetical statute would delegate to future opinions of Congress ("from today forward"); there would be no objection to incorporating past opinion polls by statute, just as there is no objection to incorporating pre-enactment legislative history.

[FN220]. See John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673 (1997).

[FN221]. See, e.g., Franklin v. United States, 216 U.S. 559, 569 (1910) (finding no congressional delegation to the States under a federal statute that adopted such punishment as "the laws in the State ...now provide for the like offense," since the statute only incorporated state laws in force when the statute was enacted).

[FN222]. Siegel, supra note 75, at 1479-80.

[FN223]. Id. at 1489.

[FN224]. There might be an objection based on due process or vagueness if the legislative history of a particular statute made it an incomprehensible muddle, but that objection does not derive from the incorporation by reference per se. In other words, that objection would be equally forceful if all the words in the legislative history were rendered and voted upon in the act itself.

[FN225]. Siegel, supra note 75, at 1488.

[FN226]. Id. at 1490-91; see supra Part I. By contrast, Manning largely overlooks hypothetical interpretive statutes, and the one he does offer supports Siegel's point rather than his own. Manning, supra note 220, at 714. Siegel writes:

Manning hypothesizes the wrong statute. As noted earlier, he imagines that Congress, perhaps fed up with court decisions construing the numerous statutes that provide for "reasonable attorney's fees," passes an Act stating, "The House and Senate Judiciary Committees shall, by joint action, issue authoritative interpretations of the phrase 'reasonable attorney's fees." ' Manning is plainly right that this statute would be unconstitutional, but only because the statute would violate the non-aggrandizement principle by empowering congressional committees to take future action that would have legal effect. An entirely different case would be presented if Congress, in 2001, passed a

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statute stating that, "courts shall give authoritative effect to the interpretation of the phrase 'reasonable attorney's fees' that was contained in the Memorandum of Understanding adopted by joint action of the House and Senate Judiciary Committees on December 1, 2000." This statute would not vest any power whatever in congressional committees. It would simply mention them in the course of identifying the particular, pre-existing text that Congress, by the required constitutional procedures, was adopting through incorporation by reference. Provided the text is fixed before Congress adopts the statute incorporating it, it makes no difference whether the text is a law adopted by a state legislature, an inscription on a public building, or the product of a congressional committee. The action is the action of Congress, not the body that produced the incorporated text.
Id. at 1493 (footnote omitted).

[FN227]. Id. at 1519.

[FN228]. See Scalia, supra note 16, at 35; sources cited supra note 17. See also William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 587 (2d ed. 1995) ("The new textualists ...seem to consider other methodologies inconsistent with constitutional norms.").

[FN229]. See Eskridge Testimony, supra note 19, at 92-93.

[FN230]. Manning, supra note 59, at 1541. Manning writes:
[S]pecific incorporation would make legislators directly responsible for the contents of the legislative history, and it would compel them to decide which parts of the legislative history they wish to incorporate--and which parts they wish to exclude. A [general] statute instructing courts to give such history decisive effect, without insisting upon direct and specific legislative assent, allows legislators to avoid the difficulties associated with that choice.
Id.

[FN231]. See INS v. Chadha, 462 U.S. 919, 947 (1983) (noting that the Framers wanted Congress's powers to be "carefully circumscribed"); id. at 951 (describing the "hydraulic pressure" in each branch to exceed its bounds); OLC Memo, supra note 198, text at n.8; id., text at nn.21-27.

[FN232]. See, e.g., 42 U.S.C. § 1981 note (1994).

[FN233]. See supra section II.A.

[FN234]. See supra section II.B.1.

[FN235]. See supra section II.B.2.

[FN236]. See supra section II.C.

[FN237]. See supra section II.C.1.

[FN238]. See supra section II.C.2.

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[FN239]. See supra section II.C.3.

[FN240]. See supra section II.C.4.

[FN241]. See supra p. 2107.

[FN242]. See supra p. 2108.

[FN243]. See supra pp. 2121-23.

[FN244]. See supra pp. 2126-28.

[FN245]. See supra pp. 2133-34.

[FN246]. This is the best way to understand the analogous problem posed by United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). In that case, Congress had passed what was, in effect, an evidentiary rule: a presidential pardon shall be conclusive evidence of disloyalty, and pending suits by pardonholders for the value of property sold by the government during the Civil War shall be dismissed for want of jurisdiction. Though some language in the case suggests that the provision violated Article III, id. at 146, there can be no general Article III objection to congressional alteration of the substantive law applicable in pending cases. See Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). The best reading of Klein is that the statute impermissibly burdened the pardon power. See Klein, 80 U.S. (13 Wall.) at 147. See generally Hart & Wechsler, supra note 83, at 367-70 (discussing Klein).

[FN247]. Eskridge & Frickey, supra note 9.

[FN248]. Id. at 65; see also Eskridge, supra note 18, at 275-306.

[FN249]. Eskridge & Frickey, supra note 9, at 66.

[FN250]. Cf. Lewis Carroll, Through the Looking-Glass and What Alice Found There, in The Annotated Alice: Alice's Adventures in Wonderland & Through the Looking Glass 166, 269 (Martin Gardner ed., 1960) ("'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean--neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master--that's all.' ').

[FN251]. Cf. id. at 269 n.6 ("I maintain that any writer of a book is fully authorised in attaching any meaning to any word or phrase he intends to use. If I find an author saying, at the beginning of his book, 'Let it be understood that by the word "black" I shall always mean "white", and that by the word "white" I shall always mean "black",' I meekly accept his ruling, however injudicious I may think it." (quoting Carroll, Symbolic Logic, supra note 74, at 166)).

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[FN252]. Eskridge & Frickey, supra note 9, at 66.

[FN253]. See Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) (characterizing a canon of statutory interpretation as "part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept").

[FN254]. Finley v. United States, 490 U.S. 545, 556 (1989); see also Eskridge & Frickey, supra note 9, at 67.

[FN255]. See Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand. L. Rev. 395, 401-06 (1950).

[FN256]. See Eskridge, supra note 18, at 283-85.

[FN257]. Cf. Scalia, supra note 16, at 28-29 ("[W]hether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them."); Eskridge & Frickey, supra note 9, at 67.

[FN258]. There may, however, be practical reasons. See infra section III.F.

[FN259]. Compare Cannon v. Univ. of Chicago, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) ("Not only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch." (quoting Cannon, 441 U.S. at 717)), with Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979) (Rehnquist, J.) ("Here, the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful. And ...the legislative history of the ...Act simply does not speak to the issue of private remedies .... At least in such a case as this, the inquiry ends there ...."). See also Michigan v. Long, 463 U.S. 1032, 1042 n.8 (1983) ("[T]he rule [of a presumption against independent and adequate state grounds] that we announce today was foreshadowed by our opinions in Delaware v. Prouse and Zacchini v. Scripps-Howard Broadcasting Co." (citations omitted)).

[FN260]. See supra p. 2112.

[FN261]. See supra section II.B.2(a).

[FN262]. See supra pp. 2112-14.

[FN263]. Cf. Hart & Sacks, supra note 1, at 1169 ("American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.").

[FN264]. See Otto J. Hetzel, Michael E. Libonati & Robert F. Williams, Legislative Law and Process: Cases and Materials 438 (2d ed. 1993).

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[FN265]. See Scalia, supra note 16, at 36 ("The most immediate and tangible change the abandonment of legislative history would effect is this: Judges, lawyers, and clients will be saved an enormous amount of time and expense."); Kenneth W. Starr, Observations About the Use of Legislative History, 1987 Duke L.J. 371, 377 ("Resort to legislative history forces lawyers not only to study the statute, but also to wade through formidable mounds of materials at federal depositories. Counsel can no longer afford to prepare a case without examining the legislative history, and as the search time grows, the transaction costs increase.").

[FN266]. See, e.g., Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 612 n.4 (1991) ("Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into the past. We suspect that the practice will likewise reach well into the future." (citation omitted)).

[FN267]. For instance, Justice Scalia writes:

Of course even if all of the Court's invocations of legislative history were not utterly irrelevant, I would still object to them, since neither the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor), nor Executive statements and letters addressed to congressional committees, nor the nonenactment of other proposed legislation, is a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us.

Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 390 (2000) (Scalia, J., concurring in the judgment). Does this suggest that he views choice of interpretive methodology not merely as an inalienable component of the judicial power but rather as an inalienable prerogative of each individual Article III judge? Or do the policies underlying stare decisis not apply to interpretive methodology?

[FN268]. Cf. Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 22 (1991) ("The gap-filling rule will call on courts to duplicate the terms the parties would have selected, in their joint interest, if they had contracted explicitly.").

[FN269]. See Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 91 (1989) [hereinafter Ayres & Gertner, Default Rules]; Ian Ayres & Robert Gertner, Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules, 101 Yale L.J. 729, 733 (1992).

[FN270]. Ayres & Gertner, Default Rules, supra note 269, at 91.

[FN271]. The common law rule that congressional silence marks an intent to incorporate an analogous state statute of limitations "is not without exception." Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 355 (1991). This regime has spawned copious litigation. See, e.g., id.; DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 159-60 (1983).

[FN272]. But see 28 U.S.C. § 1658 (1994) ("Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.").

[FN273]. Cf. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 170 (1987) (Scalia, J., concurring in the judgment) (arguing that a default rule of no limitations period at all "might even prompt Congress to enact a limitations period that it believes 'appropriate' ").

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[FN274]. Cf. Eskridge, supra note 18, at 153 ("In close cases the legal process interpreter ought to consider, as a tie-breaker, which party or group representing its interests will have effective access to the legislative process if it loses its case, and to decide the case against the party (if any) with significantly more effective access."); Alan Schwartz, Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense, 2 Am. L. & Econ. Rev. 1, 28-29 (2000) ("[C]ourts ... should interpret statutes in ways that facilitate the ability of Congress to correct interpretative errors.").

[FN275]. Perhaps before 1913 and the passage of the Seventeenth Amendment, which provides for the direct election of Senators.

[FN276]. See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 546-48 (1954).

[FN277]. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 565 n.9 (1985) (Powell, J., dissenting) (arguing that Wechsler's assumptions "do not accord with current reality" and that over the previous thirty years, Congress had become "increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies").

[FN278]. Eskridge & Frickey, supra note 156, at 611-12.

[FN279]. See supra section II.B.3.

[FN280]. See supra pp. 2142-43.

[FN281]. See supra Part II.B.2(a).

[FN282]. See supra Part II.C.

[FN283]. Cf. MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225-28 & n.3 (1994) (disparaging Webster's Third New International Dictionary (1981)).

[FN284]. See generally Ellen P. Aprill, The Law of the Word: Dictionary Shopping in the Supreme Court, 30 Ariz. St. L.J. 275 (1998) (criticizing the Supreme Court's use of dictionaries); Note, Looking It Up: Dictionaries and Statutory Interpretation, 107 Harv. L. Rev. 1437 (1994) (suggesting ways that the Supreme Court could more appropriately use dictionaries).

[FN285]. E.g., expressio unius est exclusio alterius (expression of one thing is the exclusion of another); noscitur a sociis (the meaning of a word may be known from the accompanying words).

[FN286]. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (forging a presumption against interpreting statutes enacted under Section 5 of the Fourteenth Amendment in ways that would intrude on state governmental functions).

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[FN287]. See Scalia, supra note 16, at 25-29.

[FN288]. See, e.g., Frank C. Newman & Stanley S. Surrey, Legislation: Cases and Materials 654 (1955) ("[Canons] are useful only as facades, which for an occasional judge may add lustre to an argument persuasive for other reasons.").

[FN289]. See Llewellyn, supra note 255, at 401-06.

[FN290]. The phrase was coined by Judge Harold Leventhal, and he was referring to legislative history. See Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

[FN291]. Llewellyn, supra note 255, at 401-06.

[FN292]. Eskridge and Frickey have assembled a more contemporary and comprehensive list of canons. Eskridge & Frickey, supra note 9, at 97-108. Again, Congress could simply scroll down this list, approve of some, edit others, forbid the rest, and enact the result into law.

[FN293]. Compare Chickasaw Nation v. United States, 122 S. Ct. 528, 535- 36 (2001) (using the canon that tax exemptions must be clearly expressed to trump the canon that statutes are to be construed liberally in favor of Indians), with id. at 538-39 (O'Connor, J., dissenting) (arguing that the canon that statutes are to be construed liberally in favor of Indians should trump the canon that tax exemptions must be clearly expressed).

[FN294]. Scalia, supra note 16, at 28.

[FN295]. Cf. Ian Ayres, Empire or Residue: Competing Visions of the Contractual Canon, 26 Fla. St. U. L. Rev. 897 (1999). Ayres writes:

Even after deciding that a particular legal relationship will be subject to private reordering and after choosing what default provision will govern when the parties have been silent, the law must still establish what constitutes nonsilence; that is, the law must identify the necessary and sufficient conditions for supplanting or contracting around defaults.

Id. at 905 .

[FN296]. See supra note 140.

[FN297]. See Eskridge & Frickey, supra note 24, at 597.

[FN298]. See supra p. 2117.

[FN299]. See, e.g., Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388-91 (2000) (Scalia, J., concurring); Scalia, supra note 16, at 29-37.

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[FN300]. See, e.g., Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1992); Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195 (1983).

[FN301]. See Gregory E. Maggs, The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?, 1994 Pub. Int. L. Rev. 57, 70-73.

[FN302]. See, e.g., Conroy v. Aniskoff, 507 U.S. 511, 518-28 (1993) (Scalia, J., concurring); United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 521 (1992) (Scalia, J., concurring, joined by Kennedy & Thomas, JJ.) (criticizing reliance on legislative history); Tafflin v. Levitt, 493 U.S. 455, 471-72 (1990) (Scalia, J., concurring).

[FN303]. See, e.g., United States v. Marshall, 908 F.2d 1312, 1318-19 (7th Cir. 1990) (en banc) (Easterbrook, J.), aff'd sub nom. Chapman v. United States, 500 U.S. 453 (1991); In re Sinclair, 870 F.2d 1340, 1341-45 (7th Cir. 1989) (Easterbrook, J.).

[FN304]. See, e.g., Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring in the judgment) ("[L]egislative history can be cited to support almost any proposition, and frequently is.").

[FN305]. See Eskridge, Frickey & Garrett, supra note 8, at 956 n.f (collecting articles).

[FN306]. The rare exceptions include Eskridge, who argues:

A[n] ...intriguing, but also ...controversial, idea would be for Congress to amend Title I to set forth a generic provision, that in interpreting federal statutes, courts should consider committee reports. The new textualists would probably consider such a statute unconstitutional, as a legislative usurpation of the judicial power to interpret statutes, but if cautiously worded the statute would very probably pass constitutional muster with a majority of the current Court.

Eskridge Testimony, supra note 19, at 92-93; see also Kozinski, supra note 19, at 807 (suggesting facetiously the following statute: "It shall be unlawful for any federal judge to consult legislative history in interpreting a federal statute. Anyone convicted of violating this section shall be imprisoned for a period not to exceed five years, fined a sum not to exceed $100,000, or both.").

[FN307]. 28 U.S.C. § 2072 (1994).

[FN308]. See Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States ...." (footnote omitted)).

[FN309]. This approval is tacit for the Rules of Procedure, 28 U.S.C. § 2072 (1994), and affirmative for the Rules of Evidence, see Pub. L. No. 93- 12, 87 Stat. 9 (1973) (requiring affirmative congressional approval for the proposed 1972 Federal Rules of Evidence and amendments to the Federal Rules of Civil and Criminal Procedure to be effective); Pub. L. No. 93-595, 88 Stat. 1926 (1975) (enacting the Federal Rules of Evidence).

[FN310]. See 88 Stat. at 1926. But see Jack B. Weinstein, Reform of Court Rule-Making Procedures 71-75 (1977) (critiquing and suggesting reforms to the rulemaking process); Geoffrey C. Hazard, Jr., Undemocratic Legislation,

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87 Yale L.J. 1284, 1292-93 (1978) (reviewing Judge Weinstein's book and noting the shortcomings of congressional approval and amendment of the Rules of Evidence).

[FN311]. 28 U.S.C. § 1652 (1994).

[FN312]. 304 U.S. 64 (1938).

[FN313]. Id. at 78.

[FN314]. See supra p. 2108.

[FN315]. Just as contracts arrive in federal courts hand in hand with state interpretive methodology.

[FN316]. See, e.g., McNeil v. Time Ins. Co., 205 F.3d 179, 183 (5th Cir. 2000) ("Our analysis of this Texas law begins with statutory construction, a process we approach as a Texas court would."). The Fifth Circuit, applying Louisiana law, has written:

Under Louisiana's system of Civil Law, the primacy of jurisprudence and the binding nature of stare decisis that are the bedrock of the common law are inapposite. Although the courts of Louisiana rely on jurisprudence for instruction, and may virtually be bound by jurisprudence when the number and force of the cases are sufficient to constitute jurisprudence constant, the primary sources of private civil law in Louisiana are the state's Constitution and the codes and statutes enacted by the legislature. When this court's jurisdiction is based on diversity and the applicable substantive law is that of Louisiana, we are bound to dispatch our duty of legal interpretation as would a court of Louisiana, relying primarily on Louisiana's Revised Civil Code of 1870 ... and other statutory law, including the rules of interpretation contained therein.

Gen. Elec. Capital Corp. v. Southeastern Health Care, Inc., 950 F.2d 944, 950 (5th Cir. 1991).

[FN317]. Although rulemaking is traditionally reserved for procedure, delegating substantive lawmaking power to the judiciary is not necessarily impermissible. Criminal sentencing is substantive; the Sentencing Commission is located in the judicial branch; and the guidelines that the Commission promulgates constrain a discretion traditionally exercised by individual judges. Yet the Court has upheld the U.S. Sentencing Guidelines. See Mistretta v. United States, 488 U.S. 361, 393 (1989) ("Our separation-of-powers analysis does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural,' or 'political' as opposed to 'judicial.' ").

[FN318]. 443 U.S. 193 (1979).

[FN319]. 42 U.S.C. § § 2000e to 2000e-17 (1994 & Supp. I 1995).

[FN320]. Id. § 2000e-2(d).

[FN321]. Id. § 2000e-2(a)(2).

[FN322]. Weber, 443 U.S. at 197-200.

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[FN323]. Id. at 209.

[FN324]. See, e.g., Bernard D. Meltzer, The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment, 47 U. Chi. L. Rev. 423, 439-43 (1980).

[FN325]. Indeed, in then-Justice Rehnquist's view:

[T]he legislative history of Title VII is as clear as the [statutory] language ..., and it irrefutably demonstrates that Congress meant precisely what it said ...--that no racial discrimination in employment is permissible under Title VII, not even preferential treatment of minorities to correct racial imbalance.

Weber, 443 U.S. at 230 (Rehnquist, J., dissenting).

[FN326]. Cf. Johnson v. Transp. Agency, 480 U.S. 616, 657 (1987) (White, J., dissenting) (declaring the Court's subsequent interpretation of Weber--an opinion Justice White joined eight years previously--"a perversion of Title VII" that should be overruled).

[FN327]. See generally Joseph A. Grundfest & A.C. Pritchard, Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation, 54 Stan. L. Rev. 627 (2002).

[FN328]. See Richard A. Posner, The Problematics of Moral and Legal Theory 265 (1999) ("[U]nclear wording in a contract or a statute facilitates agreement on the contract or statute as a whole by deferring resolution of the most contentious points.").

[FN329]. Note, however, that the federal rulemaking process also provides a cushion of unaccountability. In approving the Federal Rules of Statutory Interpretation, Congress may partially hide behind the robes of the Justices. See sources cited supra note 310.

[FN330]. See Weber, 443 U.S. at 219-55 (Rehnquist, J., dissenting); Meltzer, supra note 324, at 444-47.

[FN331]. 1 Tribe, supra note 4, § 5-9, at 851.

[FN332]. See Eskridge & Frickey, supra note 156, at 597.

[FN333]. Sunstein, supra note 6, at 156.

[FN334]. See supra p. 2099.

[FN335]. 28 U.S.C. § 2072(a) (1994) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts ...and courts of appeals."). Indeed, the Rules Enabling Act as written may be broad enough to enable rules of statutory interpretation. At least some such rules might be characterized as "general rules of practice and procedure" or "rules of evidence." Legislative history, for example, is simply "evidence" of legislative intent.

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The Constitution Project

STATEMENT ON PRESIDENTIAL SIGNING STATEMENTS BY THE COALITION TO DEFEND CHECKS AND BALANCES

AN INITIATIVE OF THE CONSTITUTION PROJECT

We are members of the Constitution Project's Coalition to Defend Checks and Balances. We are former government officials and judges, scholars, and other Americans who are deeply concerned about the risk of permanent and unchecked presidential power, and the accompanying failure of Congress to exercise its responsibility as a separate and independent branch of government.

We write to express our concerns about certain uses of presidential signing statements that we believe greatly increase this risk. We applaud Senate Judiciary Committee Chairman Arlen Specter for calling a hearing to focus attention on an issue that goes to the very heart of our system of government.

Presidential signing statements - formal expressions of the views of a President regarding legislation that he has just signed into law - are nearly as old as the Republic. There is nothing inherently troubling about them. The question is how they are used.

Throughout history, signing statements have been used to thank supporters, provide reasons for signing a bill, and express satisfaction or, on occasion, displeasure with legislation passed by Congress

More recently, Presidents Ronald Reagan, George H.W. Bush, and Bill Clinton have used signing statements as a tool to express constitutional and other objections to legislation, influence judicial interpretation, and otherwise advance policy goals.

President George W. Bush has further transformed the use of the presidential signing statement, using it on numerous occasions to challenge or deny effect to legislation that he considers unconstitutional. Since 2001, President Bush has objected on constitutional grounds to over 500 provisions in over 100 pieces of legislation, a number approaching the 575 constitutional statements issued by all of his predecessors combined. One scholar has identified eighty-two instances in which President Bush has disputed a bill's constitutionality on the basis that Article II of the Constitution does not allow Congress to interfere with the President's "power to supervise the unitary executive," seventy-seven instances in which he has claimed that, as President, he has "exclusive power over foreign affairs," and forty-eight instances in which he has claimed "authority to determine and impose national security classifications and withhold information."

These bills cover not only the so-called war on terror, but also affirmative action programs, requirements of statistical compilations by executive agencies, and establishing basic qualifications for executive appointees.

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Our government's system of checks and balances is guaranteed by the Constitution's separation of powers among the legislative, executive, and judicial branches. This system has protected the people from tyranny, and the states from federal overreaching, since the earliest days of the Republic.

Article II of the Constitution requires the President to take care that the laws be faithfully executed. The Constitution also gives the President the authority to veto laws that he finds constitutionally suspect. But the fact that such vetoes may be overridden indicates that, in the final analysis, the Constitution gives greater weight to the collective opinion of congressional super-majorities than it does to the judgment of a sole individual. By signing a particular bill into law, but then issuing a signing statement that declares that he will not give effect to it, or to a provision of it, the President is effectively vetoing the law without affording Congress the opportunity to override the veto, as the Constitution requires. He is effectively asserting unilateral power to repeal and amend legislation. He also displaces the judiciary as the final expositor of the Constitution and undermines the principle of judicial review crucial to our system of checks and balances.

In a democracy, executive branch assertions of power, such as signing statements, should be debated in public, but often are not. As our initial statement declared, "The executive branch, which the Constitution requires 'shall take Care that the Laws be faithfully executed,' should not withhold information from Congress, which needs such information to carry out its constitutional responsibility to enact legislation and to conduct oversight, nor from the public, unless legitimate national security concerns require it."

To restore our system of checks and balances, Congress can, and must, exercise its responsibility as a separate and independent branch of government. Congress has a clear constitutional obligation to make the laws, and when it has made such laws, to ensure through oversight that the executive branch is enforcing those laws and is otherwise carrying out its responsibilities in a manner consistent with the laws and the Constitution.

The President and the Congress, as well as the courts, have a solemn constitutional obligation to protect and defend the system of separation of powers our country's founders envisioned. We therefore urge the President to immediately abandon these uses of the presidential signing statement. We also urge Congress to make unmistakably clear the link between a President's inappropriate use of signing statements and the costs of doing so. Congress can use its "power of the purse" to deny the President appropriations that he has requested; it can refuse to advance legislation that the President favors; or it can repeal legislation authorizing programs that the President supports.

We joined the Coalition to Defend Checks and Balances because:

> [W]e agree that we face a constitutional crisis, not about whether the U.S. should do the things this or any other president proposes, but about who is empowered to make these decisions, and how those decisions are made. In an ongoing war against terror that will endure for decades, the answer to this question is even more important.
>
> We are united in our belief that America's greatness is due in no small measure to our system of government in which power and authority are deliberately divided. The separation of powers is not a mere 'technicality.' It is the centerpiece of our Constitution and our freedoms depend upon it.

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No matter what their political affiliation and philosophy, Americans must never forget these lessons or our freedoms will become a thing of the past, impossible to recover.

THE COALITION TO DEFEND CHECKS AND BALANCES
STATEMENT ON PRESIDENTIAL SIGNING STATEMENTS
June 27, 2006
(List in Formation)

Bob Barr, Former Member of Congress (R-GA); CEO, Liberty Strategies, LLC; the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union; Chairman of Patriots to Restore Checks and Balances; practicing attorney; Consultant on Privacy Matters for the ACLU

David Birenbaum, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP; senior scholar, Woodrow Wilson International Center for Scholars; US Ambassador to the UN for UN Management and Reform, 1994-1996

Christopher Bryant, Professor of Law, University of Cincinnati; former Assistant to the Senate Legal Counsel, 1997-99

David Cole, Professor, Georgetown University Law Center

Phillip J. Cooper, Professor, Mark O. Hatfield School of Government, Portland State University, Portland, Oregon

John J. Curtin, Jr., Bingham McCutchen LLP, former President, American Bar Association

John W. Dean, Former counsel to the president, Nixon White House

Mickey Edwards, Lecturer at the Woodrow Wilson School of Public and International Affairs, Princeton University; former Member of Congress (R-OK) and Chairman of the House Republican Policy Committee

Richard Epstein, James Parker Hall Distinguished Service Professor of Law, The University of Chicago; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution

Bruce Fein, Constitutional lawyer and international consultant at Bruce Fein & Associates and The Lichfield Group; associate deputy attorney general, Reagan administration

Melvin A. Goodman, Senior Fellow, Director of the National Security Project, Center for International Policy, Washington, DC

Morton H. Halperin, Director of U.S. Advocacy, Open Society Institute; Senior Vice President, Center for American Progress; Director of the Policy Planning Staff, Department of State, Clinton administration

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Philip Heymann, James Barr Ames Professor of Law, Harvard Law School; Deputy Attorney General, Clinton administration

Robert E. Hunter, U.S. Ambassador to NATO, 1993-1998

David Kay, Former Head of the Iraq Survey Group and Special Adviser on the Search for Iraqi Weapons of Mass Destruction to the Director of Central Intelligence

Robert A. Levy, Constitutional Scholar

Thomas Mann, Senior Fellow and W. Averell Harriman Chair, Governance Studies Program, The Brookings Institution

Norman Ornstein, Resident Scholar, the American Enterprise Institute

Jack Rakove, W. R. Coe Professor of History and American Studies and Professor of Political Science, Stanford University

William S. Sessions, Former Director, Federal Bureau of Investigation; former Chief Judge, United States District Court for the Western District of Texas

Jerome J. Shestack, Partner, Wolf, Block, Schorr and Solis-Cohen LLP; former President, American Bar Association

Suzanne E. Spaulding, Principal, Bingham Consulting Group; former Chief Counsel for Senate and House Intelligence Committees; former Executive Director of National Terrorism Commission; former Assistant General Counsel of CIA

Geoffrey Stone, Harry Kalven, Jr. Distinguished Service Professor of Law, The University of Chicago

Don Wallace, Jr., Professor, Georgetown University Law Center; Chairman, International Law Institute, Washington, DC

John W. Whitehead, President, The Rutherford Institute

Sean Wilentz, George Henry Davis 1888 Professor of American History and Director of the Program in American History, Princeton University

Roger Wilkins, Clarence J. Robinson Professor of History and American Culture, George Mason University; Director of U. S. Community Relations Service, Johnson administration

Affiliations Listed for Identification Purposes Only

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THE LEGAL SIGNIFICANCE OF PRESIDENTIAL SIGNING STATEMENTS

Many Presidents have used signing statements to make substantive legal, constitutional, or administrative pronouncements on the bill being signed. Although the recent practice of issuing signing statements to create "legislative history" remains controversial, the other uses of Presidential signing statements generally serve legitimate and defensible purposes.

November 3, 1993

MEMORANDUM FOR BERNARD N. NUSSBAUM, COUNSEL TO THE PRESIDENT

This memorandum provides you with an analysis of the legal significance of Presidential signing statements. It is addressed to the questions that have been raised about the usefulness or validity of a such statements. We believe that such statements may on appropriate occasions perform useful and legally significant functions. These functions include (1) explaining to the public, and particularly to constituencies interested in the bill, what the President believes to be the likely effects of its adoption, (2) directing subordinate officers within the Executive Branch how to interpret or administer the enactment, and (3) informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications, or that it is unconstitutional on its face, and that the provision will not be given effect by the Executive Branch to the extent that such enforcement would create an unconstitutional condition.[1]

These functions must be carefully distinguished from a much more controversial -- and apparently recent -- use of Presidential signing statements, i.e., to create legislative history to which the courts are expected to give some weight when construing the enactment. In what follows, we outline the rationales for the first three functions, and then consider arguments for and against the fourth function.[2] The Appendix to the memorandum surveys the use of signing statements by earlier Presidents and provides examples of such statements that were intended to have legal significance or effects.

I.

To begin with, it appears to be an uncontroversial use of signing statements to explain to the public, and more particularly to interested constituencies, what the President understands to be the likely effects of the bill, and how it coheres or fails to cohere with the Administration's views or programs.[3]

A second, and also generally uncontroversial, function of Presidential signing statements is to guide and direct Executive officials in interpreting or administering a statute. The President has the constitutional authority to supervise and control the activity of subordinate officials within the Executive Branch. See Franklin v. Massachusetts, 112

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S. Ct. 2767, 2775 (1992). In the exercise of that authority he may direct such officials how to interpret and apply the statutes they administer.[4] Cf. Bowsher v. Synar, 478 U.S. 714, 733 (1986) ("[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."). Signing statements have frequently expressed the President's intention to construe or administer a statute in a particular manner (often to save the statute from unconstitutionality), and such statements have the effect of binding the statutory interpretation of other Executive Branch officials.[5]

A third function, more controversial than either of the two considered above, is the use of signing statements to announce the President's view of the constitutionality of the legislation he is signing. This category embraces at least three species: statements that declare that the legislation (or relevant provisions) would be unconstitutional in certain applications; statements that purport to construe the legislation in a manner that would "save" it from unconstitutionality; and statements that state flatly that the legislation is unconstitutional on its face. Each of these species of statement may include a declaration as to how -- or whether -- the legislation will be enforced.

Thus, the President may use a signing statement to announce that, although the legislation is constitutional on its face, it would be unconstitutional in various applications, and that in such applications he will refuse to execute it. Such a Presidential statement could be analogized to a Supreme Court opinion that upheld legislation against a facial constitutional challenge, but warned at the same time that certain applications of the act would be unconstitutional. Cf. Bowen v. Kendrick, 487 U.S. 589, 622-24 (1987) (O'Connor, J., concurring). Relatedly, a signing statement may put forward a "saving" construction of the bill, explaining that the President will construe it in a certain manner in order to avoid constitutional difficulties. See Federal Election Comm'n v. NRA Political Victory Fund, 1993 U.S. App. LEXIS 27298 (D.C. Cir. 1993), at *11-*12 (Silberman, J., joined by Wald, J.) (citing two Presidential signing statements adopting "saving" construction of legislation limiting appointment power). This, too, is analogous to the Supreme Court's practice of construing statutes, if possible, to avoid holding them unconstitutional, or even to avoid deciding difficult constitutional questions.

More boldly still, the President may declare in a signing statement that a provision of the bill before him is flatly unconstitutional, and that he will refuse to enforce it. This species of statement merits separate discussion.[6]

In each of the last three Administrations, the Department of Justice has advised the President that the Constitution provides him with the authority to decline to enforce a clearly unconstitutional law.[7] This advice is, we believe, consistent with the views of the Framers.[8] Moreover, four sitting Justices of the Supreme Court have joined in the opinion that the President may resist laws that encroach upon his powers by "disregard[ing] them when they are unconstitutional." Freytag v. C.I.R., 111 S. Ct. 2631, 2653 (1991) (Scalia, J., joined by O'Connor, Kennedy and Souter, JJ., concurring in part and concurring in judgment).[9]

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If the President may properly decline to enforce a law, at least when it unconstitutionally encroaches on his powers, then it arguably follows that he may properly announce to Congress and to the public that he will not enforce a provision of an enactment he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority.[10] And indeed, in a recent decision by the United States Court of Appeals for the District of Columbia Circuit, Federal Election Comm'n v. NRA Political Victory Fund, supra, the court cited to and relied upon a Presidential signing statement that had declared that a Congressionally-enacted limitation on the President's constitutional authority to appoint officers of the United States was without legal force or effect. Id. at * 11.

The contrary view -- that it is the President's constitutional duty not to sign legislation that he believes is unconstitutional -- has been advanced on occasion. For example, Secretary of State Thomas Jefferson advised President Washington in 1791 that the veto power "is the shield provided by the constitution to protect against the invasions of the legislature [of] 1. the rights of the Executive 2. of the Judiciary 3. of the states and state legislatures." Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), reprinted in III The Founders' Constitution 247 (Philip B. Kurland & Ralph Lerner eds. 1987). James Madison appears to have held a similar view and as President once vetoed a bill on constitutional grounds even though he supported it as a matter of policy. See Message to the House of Representatives (Mar. 3, 1817), in I James Richardson (ed.), Messages and Papers of the Presidents, 585 (1896) (while praising the bill's "beneficial objects," Madison wrote that he "ha[d] no option but to withhold [his] signature from it" because he thought it unconstitutional). Jefferson and Madison, however, did not in fact always act on this understanding of the President's duties: in 1803 President Jefferson, with Secretary of State Madison's agreement, signed legislation appropriating funds for the Louisiana Purchase even though Jefferson thought the purchase unconstitutional. See I William M. Goldsmith, The Growth of Presidential Power 438-50 (1974). In light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision, although of course it is entirely appropriate for the President to do so.

II.

Separate and distinct from all the preceding categories of signing statement, and apparently even more controversial than any of them, is the use of such statements to create legislative (or "executive") history that is expected to be given weight by the courts in ascertain the meaning of statutory language. See Marc N. Garber and Kurt A. Wimmer, Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power, 24 Harv. J. on Legis. 363, 366 (1987). Although isolated examples can perhaps be found earlier, signing statements of this kind appear to have originated (and were certainly first widely used) in the Reagan Administration.

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In 1986, then-Attorney General Meese entered into an arrangement with the West Publishing Company to have Presidential signing statements published for the first time in the U.S. Code Congressional and Administrative News, the standard collection of legislative history. Mr. Meese explained the purpose of the project as follows:

To make sure that the President's own understanding of what's in a bill is the same . . . or is given consideration at the time of statutory construction later on by a court, we have now arranged with the West Publishing Company that the presidential statement on the signing of a bill will accompany the legislative history from Congress so that all can be available to the court for future construction of what that statute really means.

Address by Attorney General Edwin Meese III, National Press Club, Washington, D.C. (Feb. 25, 1986) (quoted in Garber and Wimmer, supra, at 367).

We do not attempt finally to decide here whether signing statements may legitimately be used in the manner described by Attorney General Meese. We believe it would be useful, however, to outline the main arguments for and against such use.

In support of the view that signing statements can be used to create a species of legislative history, it can be argued that the President as a matter both of constitutional right and of political reality plays a critical role in the legislative process. The Constitution prescribes that the President "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const., art. II, § 3, cl. 1. Moreover, before a bill is enacted into law, it must be presented to the President. "If he approve it he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated." U.S. Const., art. I, § 7, cl. 2.[11] Plainly, the Constitution envisages that the President will be an important actor in the legislative process, whether in originating bills, in signing them into law, or in vetoing them. Furthermore, for much of American history the President has de facto been "a sort of prime minister or 'third House of Congress.' . . . [H]e is now expected to make detailed recommendations in the form of messages and proposed bills, to watch them closely in their tortuous progress on the floor and in committee in each house, and to use every honorable means within his power to persuade . . . Congress to give him what he wanted in the first place." Clinton Rossiter, The American Presidency, 110 (2d ed. 1960). It may therefore be appropriate for the President, when signing legislation, to explain what his (and Congress's) intention was in making the legislation law, particularly if the Administration has played a significant part in moving the legislation through Congress. And in fact several courts of appeals have relied on signing statements when construing legislation. See United States v. Story, 891 F.2d 988, 994 (2d Cir. 1989) (Newman, J.) ("though in some circumstances there is room for doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent, . . . President Reagan's views are significant here because the Executive Branch participated in the negotiation of the compromise legislation."); Berry v. Dep't of Justice, 733 F.2d 1343, 1349-50 (9th Cir. 1984) (citing President Johnson's signing statement on goals of Freedom of Information Act); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 661-62 (4th Cir. 1969) (relying on

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President Truman's description in signing statement of proper legal standard to be used in Portal-to-Portal Act).

On the other side, it can be argued that the President simply cannot speak for Congress, which is an independent constitutional actor and which, moreover, is specifically vested with "[a]ll legislative powers herein granted." U.S. Const., art. I, § 1, cl. 1. Congress makes legislative history in committee reports, floor debates and hearings, and nothing that the President says on the occasion of signing on a bill can reinterpret that record: once an enrolled bill has been attested by the Speaker of the House and the President of the Senate and has been presented to the President, the legislative record is closed. See Field v. Clark, 143 U.S. 649, 672 (1892). A signing statement purporting to explain the intent of the legislation is, therefore, entitled at most to the limited consideration accorded to other kinds of post-passage legislative history, such as later floor statements, testimony or affidavits by legislators, or amicus briefs filed on behalf of members of Congress. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974) ("post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the act's passage . . . . Such statements 'represent only the personal views of these legislators . . .'."). [12] Finally, it is arguable that "by reinterpreting those parts of congressionally enacted legislation of which he disapproves, the President exercises unconstitutional line-item veto power." Garber and Wimmer, supra, at 376. See also Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. 28, 30 (1985) ("under the system of checks and balances established by the Constitution, the President has the right to approve or reject a piece of legislation, but not to rewrite it or change the bargain struck by Congress in adopting a particular bill").

Conclusion

Many Presidents have used signing statements to make substantive legal, constitutional or administrative pronouncements on the bill being signed. Although the recent practice of issuing signing statements to create "legislative history" remains controversial, the other uses of Presidential signing statements generally serve legitimate and defensible purposes.

Walter Dellinger
Assistant Attorney General

APPENDIX

So far as we have been able to determine, Presidential signing statements that purported to create legislative history for the use of the courts was uncommon -- if indeed it existed at all -- before the Reagan and Bush Presidencies. However, earlier Presidents did use signing statements to raise and address the legal or constitutional questions they

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believed were presented by the legislation they were signing. Examples of signing statements of this kind can be found as early as the Jackson and Tyler Administrations, and later Presidents, including Lincoln, Andrew Johnson, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Lyndon Johnson, Nixon, Ford and Carter, also engaged in the practice.

According to Louis Fisher of the Congressional Research Service,

Andrew Jackson sparked a controversy in 1830 when he signed a bill and simultaneously sent to Congress a message that restricted the reach of the statute. The House, which had recessed, was powerless to act on the message. A House report later interpreted his action as constituting, in effect, an item veto of one of the bill's provisions. President Tyler continued the custom by advising the House in 1842 that after signing a bill, he had deposited with the Secretary of State "an exposition of my reasons for giving it my sanction." He expressed misgivings about the constitutionality and policy of the entire act. A select committee of the House issued a spirited protest, claiming that the Constitution gave the President only three options upon receiving a bill: a signature, a veto, or a pocket veto. To sign a bill and add extraneous matter in a separate document could be regarded "in no other light than a defacement of the public records and archives."

Louis Fisher, Constitutional Conflicts between Congress and the President, 128 (3d ed.) (citations omitted).

President Lincoln stated that he was signing the Confiscation Bill on the understanding that the bill and the joint resolution explaining it were "substantially one." He attached to his signing statement the draft veto message he had prepared before the joint resolution was adopted. In that draft, he raised various objections to the bill, some of which appear to be constitutionally-based. Thus, the draft singled out a provision that "assumes to confer discretionary powers on the Executive;" but Lincoln stated that he would have "no hesitation to go as far in the direction indicated" even without such legislative authority. VI James Richardson (ed.), Messages and Papers of the Presidents, 85-86 (1897). See also Norman Small, Some Presidential Interpretations of the Presidency, 183 (1932).

President Andrew Johnson signed but protested against an Army appropriations bill, claiming that one of its sections "in certain cases virtually deprives the President of his constitutional functions as Commander in Chief of the Army." VI James Richardson (ed.), supra, at 472.

In 1876, when signing a river and harbor appropriations bill that included "many appropriations . . . for works of purely private or local interest, in no sense national," President Grant issued a signing statement saying that "[u]nder no circumstances will I allow expenditures upon works not clearly national." VII James Richardson (ed.), Messages and Papers of the Presidents, 377 (1898). On the same day, Grant sent the House another signing statement relating to an appropriation for consular and diplomatic

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services that had in part prescribed the closing of certain consular and diplomatic offices. Grant objected that "[i]n the literal sense of this direction it would be an invasion of the constitutional prerogatives and duty of the Executive," and announced his intention of construing the section as intended merely "to fix a time at which the compensation of certain diplomatic and consular officers shall cease, and not to invade the constitutional rights of the Executive." Id. at 377-78.

President Theodore Roosevelt established several volunteer unpaid commissions to investigate certain factual situations and report back their findings to him. This practice "came to be denounced in Congress as 'unconstitutional,' and an amendment to the Sundry Civil Act of 1909 undertook to forbid the practice. Mr. Roosevelt signed the measure but proclaimed his intention of ignoring the restriction. 'Congress,' he argued, 'cannot prevent the President from seeking advice,' . . .". Edward Corwin, The President: Office and Powers, 85 (3d rev. ed. 1948).

President Wilson signed a merchant marine bill in 1920, but determined not to enforce a provision he found unconstitutional. He stated that executing the provision "would amount to nothing less than the breach or violation" of some thirty-two treaties. See Louis Fisher, supra, at 130.

In 1941, President Franklin Roosevelt confided an unpublished Presidential legal opinion objecting to the "two-House veto" provision in the Lend Lease bill to then-Attorney General Robert Jackson. Roosevelt found the provision "clearly unconstitutional," but signed the bill as a matter of diplomatic and political necessity. Robert H. Jackson, A Presidential Legal Opinion, 66 Harv. L. Rev. 1353, 1357 (1953). President Roosevelt also signed the Urgent Deficiency Appropriations Act of 1943, which included a section prohibiting the payment of a government salary or other compensation to certain named government employees deemed to be subversive. While signing the bill because it appropriated funds urgently needed to carry on the war, Roosevelt "'plac[ed] on record my view that this provision is not only unwise and discriminatory, but unconstitutional.'" United States v. Lovett, 328 U.S. 303, 313 (1946).

President Truman issued a statement on the occasion of signing the General Appropriation Act of 1951 in which he addressed a provision of the bill authorizing loans to Spain. Truman construed the provision in a manner that avoided what he thought would be an unconstitutional outcome, declaring that "I do not regard this provision as a directive, which would be unconstitutional, but instead as an authorization, in addition to the authority already in existence under which loans to Spain may be made." Public Papers of the Presidents: Harry S. Truman, 616 (1950).

President Eisenhower sought to put a "saving" construction on a 1959 bill amending the Mutual Security Act. He stated that "I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic

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Separation of Powers Doctrine." Public Papers of the Presidents: Dwight D. Eisenhower, 549 (1959). And in 1960, on the occasion of signing a bill providing for the admission of refugees, Eisenhower noted that "the Attorney General has advised me that there is a serious question as to whether this [one-House veto] provision is constitutional," but declared that "it would be better to defer a determination of the effect of such possible action [i.e., a legislative veto] until it is taken." Public Papers of the Presidents: Dwight D. Eisenhower, 579 (1960-61).

On the occasion of signing the Omnibus Crime Control and Safe Streets Act of 1968, President Lyndon Johnson criticized as "vague and ambiguous" certain provisions dealing with Federal rules of evidence in criminal cases, but stated that the Attorney General had advised him that those provisions could "be interpreted in harmony with the Constitution, and Federal practices in this field [e.g., the Federal Bureau of Investigation's practice of warning suspects of their constitutional rights] will continue to conform to the Constitution." Public Papers of the Presidents: Lyndon B. Johnson, 727 (1968-69).

President Nixon signed a 1971 military authorization bill, but objected to a provision in it (the Mansfield Amendment, which set a final date for the withdrawal of U.S. Forces from Indochina) as being "without binding force or effect." Public Papers of the Presidents: Richard Nixon, 1114 (1972).

President Ford, upon signing the Defense Appropriation, 1976, objected to a provision of that bill that restricted the Executive's ability to obligate funds for certain purposes until it received approval from several Congressional committees. Ford stated that he could not "concur in this legislative encroachment," and that consequently he would treat the restriction "as a complete nullity." I Public Papers of the Presidents: Gerald R. Ford, 242 (1979).

President Carter issued several signing statements, including statements on the FY 1980-81 Department of State Appropriations Act, the FY 1981 Department of Defense Authorization Act and the International Security and Development Cooperation Act of 1980. The first of these cases was a bill which, like the 1876 bill President Grant had objected to but signed, purported to mandate the closing of certain consular posts. Carter objected that Congress "cannot mandate the establishment of consular relations at a time and place unacceptable to the President," and accordingly stated his determination to construe the provision as merely precatory. II Public Papers of the Presidents: Jimmy Carter, 1434 (1980).

As noted above, the Reagan and Bush Administrations made frequent use of Presidential signing statements, not only to declare their understanding of the constitutional effect of the statutory language, but also to create evidence on which the courts could rely in construing such language. See, e.g., 22 Weekly Comp. Pres. Doc. 1534, 1536 (1986) (interpreting language of Immigration Reform and Control Act); 22 id. 831, 832 (1986) (interpreting language of Safe Drinking Water Act); Issues Raised by Section 102(c)(2) of H.R. 3792, 14 Op. O.L.C. 38 (preliminary print 1990) (provision of

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foreign relations authorization bill unconstitutionally infringed on President's authority to conduct negotiations; if President chose to sign bill, he would be entitled not to enforce provision); Appointments to the Commission on the Bicentennial of the Constitution, 8 Op. O.L.C. 200, 201-02 (1984) (discussing Senator Hatch's objections to constitutional claims made by President Reagan's signing statement on bill).

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[1] In addition, signing statements have frequently been used for purposes of little or no legal or constitutional significance, e.g., to applaud or criticize the policy behind certain provisions, to advise Congress how the President will respond to future legislation, to condemn practices such as attaching riders to omnibus bills, to congratulate members of Congress or the public who have assisted in the bill's passage, and so forth.

[2] We do not in this memorandum attempt to reach a definitive conclusion on the question whether the use of signing statements to create legislative history on which the courts are to rely is or is not legitimate. We would be pleased to provide you with further research and analysis on that question should you so desire.

[3] For example, on signing the Omnibus Crime Control and Safe Streets Act of 1968, President Johnson explained in some detail how the wiretapping and eavesdropping provisions of the bill both agreed with and differed from his Administration's original proposals to Congress, criticized Congress's decision to sanction certain law enforcement eavesdropping and wiretapping, asked Congress to reconsider that decision, served notice that the Department of Justice would continue to follow a narrower policy of confining wiretapping and eavesdropping to national security cases only, and urged caution and restraint on the States in exercising the powers that the bill allowed them. See Public Papers of the Presidents: Lyndon B. Johnson, 726-27 (1968-69). And President Kennedy signed an education bill "with extreme reluctance," objecting to several provisions, including "the continuation of the discriminatory and ineffective non-Communist disclaimer affidavit." Public Papers of the Presidents: John F. Kennedy, 637 (1961).

[4] There are, of course, limits to this Presidential authority. Thus, the President cannot read into the Immigration and Nationality Act protection for a class of asylum seekers whom Congress did not include among those eligible for asylum. See Memorandum for the Attorney General from Walter Dellinger, Acting Assistant Attorney General, at 3 (August 20, 1993).

[5] For example, when signing legislation governing the recruitment of agricultural workers from Mexico, President Kennedy made clear that the Labor Department would administer it so as to protect "the wages and working conditions of domestic agricultural workers." Public Papers of the Presidents: John F. Kennedy, 639, 640 (1961). Similarly, President Truman explained that the National Security Council would make broad use of the powers given to it under a rider to a foreign aid bill restricting trade with the Communist

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bloc to create exceptions from such restrictions. See Public Papers of the Presidents: Harry S. Truman, 319 (1951).

[6] One reason such signing statements may be controversial is that the refusal to execute a statutory provision has substantially the effect of a line-item veto.

[7] See, e.g., The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 59 (1980) (Civiletti, A.G.); Recommendation that the Department of Justice not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 8 Op. O.L.C. 183, 195 (1984). This advice is consistent with that given by Attorneys General to earlier Presidents, including Presidents Buchanan, see Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469-70 (1860), and Wilson, see Income Tax -- Salaries of President and Federal Judges, 31 Op. Att'y Gen. 475, 476 (1919), that the President was not bound by a law that unconstitutionally encroached on his powers.

[8] For example, James Wilson, a prominent Framer, legal theorist, and later Associate Justice of the Supreme Court, told the Pennsylvania ratifiers

that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges . . . it is their duty to pronounce it void . . . . In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.

II Jonathan Elliott (ed.), The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 446 (1836) (emphasis added).

Also relevant (despite the fact that he did not attend the Philadelphia Convention) are the views of Thomas Jefferson. Believing that the Sedition Law was unconstitutional even though it had been upheld by the courts, Jefferson used his power as President to (in his own words) "remit the execution" of the Act by pardoning all offenders. See Norman Small, Some Presidential Interpretations of the Presidency, 21 (1932).

[9] Further, as former Attorney General Civiletti has noted, the President refused to comply with the Act of Congress at issue in Myers v. United States, 272 U.S. 52 (1926), and the Solicitor General argued that that Act was unconstitutional. Yet "the Court ruled that the President's action in defiance of the statute had been lawful. It gave rise to no actionable claim for damages under the Constitution or an Act of Congress in the Court of Claims . . . . Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day they are declared unconstitutional by the courts." The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. at 59.

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[10] Indeed, more broadly, the President may use a signing statement as a vehicle to announce his unwillingness to accept a blatantly unconstitutional statute, even if it does not encroach upon his prerogatives, but otherwise violates a constitutional mandate. The Executive Branch has from time to time challenged Acts of Congress for such reasons: for example, it joined the plaintiffs in United States v. Lovett, 328 U.S. 303 (1946), in attacking an unconstitutional bill of attainder, and it intervened in Simpkins v. Moses H. Cone Memorial Hosp., 211 F. Supp. 628, 640 (M.D.N.C. 1962), rev'd, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964), to contest the constitutionality of an Act of Congress that provided Federal funding for racially segregated hospitals.

[11] Significantly, the President's veto power is placed in Article I, thereby indicating that he has a share of the legislative power, rather than in Article II, which deals with the executive power. See I William Crosskey, Politics and the Constitution, 419 (1953).

[12] But see Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980) (according "significant weight" to post-passage statements, particularly "when the precise intent of the enacting Congress is obscure").

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STATEMENT OF BRUCE FEIN

Dear Mr. Chairman and Members of the Committee:

I am grateful for the opportunity to share my views on presidential signing statements that declare the intent of the President to disregard or ignore duly enacted provisions of statutes that he has signed into law because he believes they encroach on presidential powers or are otherwise unconstitutional. These statements, which have multiplied logarithmically under President George W. Bush, flout the Constitution's checks and balances and separation of powers. They usurp legislative prerogatives and evade accountability. I will not address presidential signing statements that elaborate on the President's understanding of ambiguous legislative language for consideration by the judiciary in deciding cases and controversies, just as statements by congressional committees or individual Members are employed by the courts assist the interpretation of inexact statutory text. The latter seem to me legitimate contributions to legislative history, and do not raise the profound constitutional concerns of the former.

I. The Original Meaning of the Constitution

The Founding Fathers endowed the President with a qualified but not absolute veto, which can be overridden with by two-thirds majorities in the House and Senate. The Founding Fathers withheld line-item veto power from the President. As the United States Supreme Court explained in Clinton v. New York (1998): "Our first President understood the text of the Presentment Clause as requiring that he either 'approve all the parts of a Bill, or reject it in toto.'" The first President, George Washington, had presided over the constitutional convention. And as the Supreme Court underscored in Myers v. United States (1926), the views and practices of the demigods who were present at the creation of the Constitution are entitled to great deference. President William Howard

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Taft, a proponent of a strong presidency, also wrote that the President "has no power to veto part of a bill and let the rest become a law." Accordingly, the High Court held a line-item veto statute unconstitutional in Clinton.

In fashioning the constitutional balance between legislative and executive authority, the Founding Fathers chose not to hobble Congress with a single-subject rule for legislation which would impair its leverage with the President. In contrast, many States impose a single-subject rule on state constitutional amendments, which has proved vexing in application because virtually every bill or referendum arguably addresses more than one issue. For example, the Fair Labor Standards Act regulates minimum wages and maximum hours. Are wages and hours one subject or two? More important, a single-subject rule would remove from Congress a significant tactic to elicit the President's approval of legislation: namely, to confront the White House will a bill that contains provisions that the President covets and provisions that he opposes, and force him to take either all or nothing, and to accept political accountability for the choice. No Founding Father uttered a single syllable insinuating that such a wrenching political choice amounted to duress or coercion which should be counteracted with presidential power to refuse to enforce the parts of the bill he had signed into but which he disliked. As President Taft observed: "A President with the power to veto items in appropriation bills might exercise a good restraining influence in cutting down the total annual expenses of the government. But this is not the right way."

II. Vetoing Unconstitutional Laws

The Founding Fathers intended the veto power of the President to be employed primarily to thwart laws he believed were unconstitutional, whether because they

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encroached on executive branch powers or otherwise. As Alexander Hamilton amplified in Federalist 73, without a veto the President "might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote." Indeed, the presidential oath enshrined in Article II requires the President to veto any law he believes is unconstitutional in whole or in part because it obligates him to defend the Constitution, not participate in its sabotage. The President does not enjoy a constitutional option of unilaterally pronouncing a provision he has signed into law as unconstitutional and refuse to enforce it on that count. The United States Court of Appeals for the Ninth Circuit in Lear Siegler v. Lehman, 842 F.2d 1102 (1988) explained: "Art. I, section 7 is explicit that the President must either sign or veto a bill presented to him. Once signed by the President,...the bill becomes part of the law of the land and the President must 'take care that [it] be faithfully executed.' Art. I, section 7 does not empower the President to employ a so-called 'line item veto' and excise or sever provisions of a bill with which he disagrees. The only constitutionally prescribed means for the President to effectuate his objections to a bill is to veto it and state those objections upon returning the bill to Congress. The 'line item veto' does not exist in the federal Constitution, and the executive branch cannot bring a de facto 'line item veto' into existence by promulgating orders to suspend parts of statutes which the President has signed into law." See also Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F.2d 875 (3d Cir. 1986).

When the President vetoes a bill because of its asserted unconstitutionality, he accepts clear political accountability for his action. Thus, President Andrew Jackson vetoed bills to extend the charter of the Second Bank of the United States because he insisted the Bank was beyond the power of Congress to create. He accepted responsibility

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for scuttling the Band, and gained popular acclaim. A veto also enables Congress to override the President's decision, and to likewise accept responsibility for repudiating the President.

III. Presidential Signing Statements

Presidential signing statements are extra-constitutional and riddled with mischief, as two examples under President Bush highlight. The President Bush was harshly criticized by Members of Congress and others over allegations of torture or cruel, degrading, or inhuman treatment of detainees in the war against Afghanistan and international terrorism. The President's lawyers had fashioned legal theories that would justify torture as an inherent Article II power. But Mr. Bush ultimately capitulated to public opinion and Congress and negotiated the Detainee Treatment Act of 2005 as part of a larger Defense Department Supplemental Appropriations. The Act prohibits the Executive in all its branches and agencies from torture or cruel, inhumane, or degrading interrogations whether to obtain foreign intelligence or otherwise. After taking political credit for signing the bill, President Bush issued a statement declaring in substance that he would ignore it when he saw fit as an unconstitutional encroachment on his power to protect "the American people from further terrorist attacks." According to the signing statement, "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." While to the layman, the language of the

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signing statement may seem both Delphic and innocuous, to the initiated the words referring to a unitary executive and Commander in Chief powers clearly signify that President Bush is asserting that he is constitutionally entitle to commit torture if he believes it would assist the gathering of foreign intelligence. President Bush was nullified a provision of statute that he had signed into law and which he was then obliged to faithfully execute.

The Act did not create any private right to action for enforcement. Thus, the nullification will circumvent judicial review because Supreme Court decisions make dubious the standing of Members of Congress or congressional committees to challenge allegedly unconstitutional non-enforcement by the White House. President Bush's signing statement was tantamount to a constitutionally impermissible line item veto.

The Intelligence Authorization Act of 2005, like its predecessors, restricts the President's employment of military force in Colombia. It is modeled after statutes during the Vietnam War that prohibited expenditures for military force in Cambodia or Laos, and the so-called "Clark Amendment" which prohibited monies for covert operations in Angola. Section 502(c) declares: "No United States Armed Forces personnel or United States civilian contractor employed by the United States Armed Forces will participate in any combat operation in connection with assistance made available under this section, except for the purpose of acting in self-defense or during the course of search and rescue operations for United States citizens." Its objective is to keep the United States military out of Colombia's civil war with narco-terrorists. President Bush, however, issued a signing statement nullifying the law that he had signed. It asserted: "The executive branch shall construe the restrictions in that section as advisory in nature, so that the

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provisions are consistent with the President's constitutional authority as Commander in Chief, including for the conduct of intelligence operations, and to supervise the unitary executive."

If President Bush believed section 502 was unconstitutional, he was obligated to veto the entire Intelligence Authorization Act and to explain his veto to Congress. He could ask Congress to delete the allegedly offensive provisions, or Congress might override the veto. But his nullification of section 502 after signing it into law was without constitutional standing. The precedent is alarming. Suppose Congress were to enact a law forbidding the President to employ military force in Iran aiming to destroy its nuclear facilities. President Bush might sign the law but in a signing statement declare that he would treat it as advisory to preserve his Commander in Chief prerogatives. The ability of Congress to participate in shaping the foreign relations and national security of the United States would be crippled, and the express congressional authority to enact laws to regulate the constitutional powers of the President in Article I, section 8, clause 18 would be a dead letter.

President Bush's nullification of section 502 also evaded judicial review because of the problematic nature of discovering a plaintiff who would enjoy Article III standing.

IV. Remedies

I would recommend that Congress enact a generic law that prohibits the expenditure of any funds of the United States to enforce a bill that the President has signed into law but which he has declared in a signing statement that he will refuse to enforce in whole or in part because of its alleged unconstitutionality. That use of the power of the purse would transform such signing statements into the equivalent of a

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constitutional veto. It would force the President to accept either all of a bill or none, as the Founding Fathers intended.

I would further recommend that Congress enact a statute seeking to confer Article III standing on the House and Senate collectively to sue the President over signing statements that nullify their handiwork, at least in circumstances where there is no other plausible plaintiff who would enjoy standing.

Congress should also pass a resolution deploring signing statements as line item vetoes and urging the President to negotiate with congressional leadership a constitutional and politically accountable means for the White House to express its opposition to laws it believes are unconstitutional in whole or in part. One alternative might be a law allowing the Executive to decline to defend the constitutionality of a law challenged in litigation but authorizing Congress to marshal its defense.

If all other avenues have proved unavailing, Congress should contemplate impeachment for signing statements that systematically flout the separation of powers and legislative prerogatives. The epitome of an impeachable offense, as Alexander Hamilton amplified in the Federalist Papers, is a political crime against the Constitution.

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Statement of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
Hearing on
"The Use of Presidential Signing Statements"
June 27, 2006

Today, the Committee turns its attention to the important issue of presidential signing statements. The evolving use of these statements by the Bush-Cheney Administration has become a serious concern of mine and I commend the Chairman for holding this hearing. We are at a pivotal moment in our Nation's history, where Americans are faced with a President who makes sweeping claims for almost unchecked Executive power.

One of the most troubling aspects of such claims is the President's unprecedented use of signing statements. Historically, these statements have served as public announcements containing comments from the President, on the enactment of laws. But this Administration has taken what was otherwise a press release and transformed it into a proclamation stating which parts of the law the President will follow and which parts he will simply ignore. I have long objected to this President's broad use of signing statements to try to rewrite the laws crafted and passed by the Congress, because I firmly believe that this practice poses a grave threat to our constitutional system of checks and balances.

During his five years in office, President Bush has quietly -- yet consistently -- used his bill signing statements to assign his own interpretations to laws passed by Congress, and signal

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which provisions he intends follow and which ones he does not. As if to say it, makes it so. According to a review of these statements conducted by the *Boston Globe*, President Bush has employed signing statements to ignore or disobey more than 750 laws enacted by the Congress since 2001 - more than all previous presidents in the history of our Nation combined. That is breathtaking.

In 2002, when the President signed the Sarbanes-Oxley law combating corporate fraud, he used his signing statement to attempt to narrow a provision protecting corporate whistle-blowers in a way that would have afforded them very little protection. Senator Grassley and I wrote a letter to the President stating that his narrow interpretation was at odds with the plain language of the statute, and the Administration reluctantly relented on this view but only after much protest.

We also witnessed the President's fondness for signing statements earlier this year, when - after months of debate and negotiations in Congress - the President issued a signing statement for the USA PATRIOT ACT Reauthorization language in which he stated his intentions not to follow the reporting and oversight provisions contained in that bill. I noted this abuse at the time. This President has also used signing statements to challenge laws banning torture, on affirmative action and prohibiting the censorship of scientific data. In fact, time and again, this President has stood before the American people, signed laws enacted by their representatives in Congress, while all along crossing his fingers behind his back. And, while this President proudly boasts being the first modern

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President to have never vetoed a bill, he has cleverly used his signing statements as a *de facto* line-item veto to cherry-pick which laws he will enforce in a manner not contemplated by our Constitution.

Under our constitutional system of government, when Congress passes a bill and the President signs it into law, that should be the end of the story. It is the law of the land unless and until repealed by Congress or invalidated by the courts. For this reason, there are grave and inherent dangers to the extensive and unprecedented use of signing statements. When the President uses signing statements to unilaterally rewrite the laws enacted by the people's representatives in Congress, he creates doubt about what the rule of law means in our Nation.

The excessive use of signing statements also creates a novel, and perhaps, dangerous view of the appropriate role of the President in the legislative process. Signing statements intrude upon the legislative function and also upon the constitutional role of our courts. Under our system of government, the President is to faithfully execute the laws enacted by Congress. He may veto or sign a bill. If he signs it, it is the law. If he vetoes it and his veto is overridden, it is the law. He does not get to act as a super-legislator with a line-item veto. He is not the final word on its constitutionality. These signing statements are a diabolical device and the President will continue to use and abuse them, if Congress lets him. So far, this Congress has done exactly that.

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Whether it is torture, warrantless eavesdropping on American citizens, or the unlawful detention of military prisoners, this Republican-led Congress has been more than happy to turn a blind eye and rubber-stamp the questionable actions of this Administration, regardless of the consequences to our Constitution or civil liberties. But, we in Congress have a constitutional duty to conduct meaningful oversight on behalf of all Americans. Artful deception is no substitute for the rule of law.

I approached this hearing with the hope that it would signal a new beginning. Instead, we see the low regard with which this Administration holds the Congress, the Senate and, in particular, this Committee. Not only does the Vice President intervene to instruct witnesses not to testify and to tell Republican Senators what oversight he will allow, but, we have an Attorney General who will not answer our legitimate questions after having assured us at his confirmation hearing that he would be responsive.

Today, again, the Department of Justice and the Administration have treated our concerns contemptuously. We will not be joined by the Attorney General -- or even the Deputy Attorney General -- who we confirmed in a bipartisan way. We will not hear from a spokesperson for the White House, although they are all too willing to spin to the press or to friendly audiences. We will not even hear from the acting Assistant Attorney General for the Office of Legal Policy, who we were initially told would be attending. Instead, the Administration is, again, seeking to send forward a young deputy to parrot the Administration's line, not answer our questions, witness our frustration and hear our

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criticisms. I wish her well and believe that she is being abused by her superiors in this role and this Committee is being shown utter contempt.

I thank our other witnesses for coming and the American Bar Association for its work and views in connection with these important matters.

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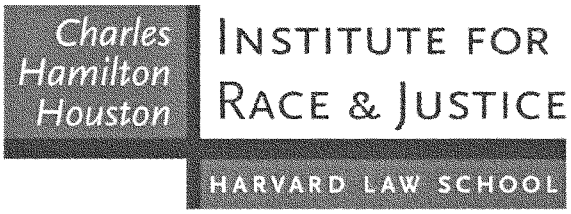

Testimony of Charles J. Ogletree, Jr.

Before the United States Senate Committee on the Judiciary
Senator Arlen Specter, Chairman

Presidential Signing Statements

Charles J. Ogletree, Jr.
Jesse Climenko Professor of Law
Executive Director, Charles Hamilton Houston Institute for Race & Justice
Harvard Law School*

*For identification purposes only

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Dear Senator Specter and Members of the United States Senate Committee on the Judiciary:

My name is Charles J. Ogletree, Jr., and I am honored to have this opportunity to discuss the topic of presidential signing statements. This is an historic and critically important hearing convened by the Senate Committee on the Judiciary, and I look forward to offering my views on this important topic.

I serve as the Jesse Climenko Professor of Law, and Executive Director of the Charles Hamilton Houston Institute of Race and Justice, at Harvard Law School. I have been a member of the Harvard Law School faculty for over twenty years. Additionally, I have had the honor and privilege of handling cases here in the District of Columbia during the early stages of my career, having represented clients in adult and juvenile proceedings in the local superior court and federal courts, as well as the courts of appeals. I have also had the honor of arguing cases before various state supreme courts and circuit courts, as well as the United States Supreme Court. At Harvard Law School, I teach the subjects of Criminal Law and Procedure, Professional Responsibility, and a host of clinical courses involving trial practice. Moreover, I have had the honor of providing testimony, writing articles and books, and addressing matters of constitutional significance on a variety of occasions.[1]

I am also honored to be a member of the American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, a committee that was convened a month ago by Michael Greco, President of the American Bar Association, and we represent a wide range of talents, experiences and perspectives in forming a bipartisan group of lawyers and jurists who have been asked to examine this most important topic.[2] These

[1] A copy of my abbreviated biographical statement is attached.
[2] A list of all of the members of the ABA Task Force is attached.

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individuals are making an earnest attempt to examine these issues objectively and thoroughly, with the hope and expectation that the Task Force report will offer suggestions and guidance that will be relevant to the use of presidential signing statements by any future president. The effort is not designed to focus on one president's exercise, but to conduct an overall analysis of the presidential signing statements, and to make sure that our recommendations are considered prospectively. While there is much honest debate about these issues, it is clear that the Task Force sees its responsibility as one in addressing the issues that go to the separation of powers, and the appropriate exercise of authority in all branches of government. The Task Force expects to complete its work this summer, and submit a report to the American Bar Association during its Annual Meeting in August.

In my written and oral remarks today, I am not speaking on behalf of either the Harvard Law School or the ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine. I am speaking in my individual capacity.

Presidential signing statements reflect an important and necessary line of authority given to the executive branch to clarify and address matters of constitutional significance. They can promote transparency by signaling how the president plans to enforce or interpret the law. They can also allow the president to more clearly define his perspective or understanding of the law's parameters.[3] Official reports indicate that many former presidents have used signing statements in a wide range of legislative areas, and have generally done so without much objection or controversy.

One of the reasons that it is important to examine this topic, however, is the unusually high number of signing statements that have been issued by President George W. Bush during

[3] For a thorough discussion of the history of presidential signing statements, see Phillip J. Cooper's *By Order of The President: The Use and Abuse of Executive Direct Action* (2002).

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his tenure in office. As official reports indicate, in less than six years, President Bush has issued over a hundred signing statements that raise significant constitutional questions. That number of presidential signing statements may not seem significant, when considered alone. Indeed, former Presidents Reagan, Bush and Clinton significantly increased the use of presidential signing statements. However, these numbers pale when compared to the number of signing statements issued, and the exercise of executive authority, by President George W. Bush.

Another area of executive authority that is usually balanced with the use of presidential signing statements is the veto, employed when the president believes legislation is unconstitutional. According to several estimates, President Ronald Reagan vetoed 78 bills, including 39 actual vetoes and another 39 pocket vetoes. President George H. W. Bush vetoed 44 bills, with 15 of them being pocket vetoes. During his two terms, President Bill Clinton vetoed 37 bills, including one pocket veto. In contrast, during his six years in office, President George W. Bush, to date, has not vetoed a single bill. The unprecedented juxtaposition of President Bush's failure to exercise a single veto, yet issuing more than a hundred signing statements, has created considerable concern, and explains the broad and bipartisan response to his actions.

One of the fundamental questions posed by these actions is whether the president is using the signing statement in order to expand the authority of the executive branch at the expense of the legislative branch. In other words, is he using the signing statement as a way to declare a law non-binding, without having to face the public scrutiny that comes with a veto, or the possibility of a legislative override? In order to get a clearer sense of whether this is the case, it is necessary to examine very carefully how the signing statements have been used. For example, among President George W. Bush's signing statements are bills addressing the commemoration of the

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50th Anniversary of *Brown v. Board of Education*, with a signing statement issued in 2001, and comparable examples where the signing statement does not raise any areas of serious concern. On the other hand, there are numerous signing statements, particularly in the past few years, which raise serious questions about the exercise of executive authority, and serious issues of constitutional magnitude.

The essential issue is whether a president, who objects to a law being enacted by Congress through its constitutionally prescribed procedures, should either veto that law, or find other ways to challenge it. Using signing statements, rather than vetoes, calls into question the President's willingness to enforce duly enacted legislation, and it also denies the legislative branch any clear notice of the executive branch's intent to not enforce the law, or to override laws that could have been the subjects of vetoes.

It is hoped that the Senate Committee on the Judiciary will closely examine these matters and determine whether or not they raise issues of constitutional magnitude. Among the matters to be considered are the following:

A signing statement that suggests that all or part of a law is unconstitutional raises serious legal considerations. It has been exercised more recently in lieu of an actual veto. While the President has considerable powers of constitutional interpretation, those powers must be balanced with the authority granted to other branches of government, including the legislative and judicial branches. When the President refuses to enforce a law on constitutional grounds without interacting with the other branches of government, it is not only bad public policy, but also creates a unilateral and unchecked exercise of authority in one branch of government without the interaction and consideration of the others.

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Of course, the deeper objection to the use of presidential signing statements is to what extent any administration is taking a hostile attitude with respect to how statutes should be interpreted. This excessive exercise of executive power, coupled with the failure to use the authorized veto power, creates serious issues of constitutional magnitude, and requires a legislative response.

One of the critical issues that this committee must consider is whether and to what extent the President's exercise of signing statements is influenced by the war on terrorism or other matters of national security. That certainly seems to be the case when one examines the application of signing statements on issues like the USA Patriot Act, or other provisions having to do with the detention of suspected terrorists for long periods of time without any form of judicial review. In fact, according to one analysis, the President has used signing statements on 207 occasions to object to a bill's constitutionality on the grounds that it interferes with his "power to supervise the unitary executive," or with his "exclusive power over foreign affairs," or with his "authority to determine and impose national security classifications and withhold information."[4] Such examples require further probing by the Senate Committee on the Judiciary, and more detailed and persuasive explanations from the executive branch.

Given the seriousness of these endeavors, the controversy that they have created, and the need for clarity and direction going forward, I am pleased that the Senate Committee on the Judiciary has decided to examine these matters, but expect Congress to exercise its legislative mandate to enforce the law, and to not allow it to be undermined by the use of presidential signing statements.

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[4] Christopher Kelley, *The Unitary Executive and the Presidential Signing Statement* 8 (June 1, 2006), *available at* http://www.users.muohio.edu/kelleycs/conproject.pdf

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Moreover, in that the federal courts have the exclusive role to apply and interpret the Constitution, it may be necessary that these matters be brought before the courts at the earliest possible convenience. I look forward to questions during the course of this hearing.

Sincerely,

Charles J. Ogletree, Jr.

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Senate Judiciary Committee Hearing:
Presidential Signing Statements

June 27, 2006

Prepared Statement of

NICHOLAS QUINN ROSENKRANZ
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GEORGETOWN UNIVERSITY LAW CENTER
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Mr. Chairman, Senator Leahy, Members of the Committee: I thank you for the opportunity to express my views about presidential signing statements.

I should say at the outset that I largely agree with the position put forth by Deputy Assistant Attorney General Michelle Boardman earlier this morning. As Ms. Boardman explained, Presidential signing statements are an appropriate means by which the President fulfills his constitutional duty to "take Care that the Laws be faithfully executed,"[1] and this President's signing statements have not differed significantly from those of his recent predecessors.

Rather than reiterate Ms. Boardman's trenchant analysis, I will use my time in an attempt to separate out the various structural constitutional issues raised by signing statements. As you know, there has been significant confusion on this topic in the popular press; I hope that by disaggregating the various issues and discussing them dispassionately, we may at a minimum dispel some of the more hysterical assertions that have found their way into print.[2]

In addition, the Committee may be interested in possible legislative responses to the President's use of signing statements. While no proposals have, as yet, been introduced in the Senate, two Resolutions[3] and a bill[4] have been introdueed in the House. Therefore, I will also address the constitutionality and the structural desirability of such measures.

I. Executive Interpretation

The most important and most common function of presidential signing statements is to announce—to the Executive Branch and to the public—the President's interpretation

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[1] U.S. CONST. Art. II, § 3.
[2] For example, the Boston Globe has repeatedly and erroneously claimed that the President "has used signing statements to reserve the right to disobey more than 750 laws," Charlie Savage, *Hearing Set on Signing Statements*, THE BOSTON GLOBE, June 22, 2006, at A7.
[3] H.J. Res. 87, 109th Cong. (2006); H.J. Res. 89, 109th Cong. (2006)
[4] H.R. 5486, 109th Cong. (2006).

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of the law.[5] The propriety of such an announcement should be obvious. There is an oft-repeated canard that the President has no business interpreting federal statutes—his job is to *execute* the laws, and *interpretation* should be left to the courts.[6] A moment's reflection reveals that this view is unsound. It is simply impossible, as a matter of logic, to execute a law without determining what it means.

A. Informing the Executive Branch of the President's Interpretation

Imagine, for example, a statute that imposes a tariff on the importation of "vegetables." Comes an eighteen-wheeler full of tomatoes. Is a tomato a vegetable? At the end of the day, maybe the Supreme Court will decide,[7] but long before then, the executive branch is put to a choice: stop the truck at the border or let it through. There is no ducking the question; either choice implies an interpretation of the statute, an interpretation of the word "vegetable." And the President cannot simply flip a coin. He has a constitutional duty to "take Care that the Laws be faithfully executed,"[8] and this faithfulness inherently and inevitably includes a good faith effort to determine what "the Laws" *mean*. In short, as the Supreme Court has explained, "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[9]

Nor is the President obliged to leave the choice to individual Border Patrol agents. The Supreme Court has rightly said that the President can and should "supervise and

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[5] Virtually every paragraph of every signing statement by this President uses the word "construe," emphasizing that the purpose of the statement is to interpret the statute. *See, e.g.*, Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425 (March 9, 2006) ("The executive branch shall *construe* the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch . . . in a manner consistent with the President's constitutional authority to . . . withhold information the disclosure of which would impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. . . . The executive branch shall *construe* section 756(e)(2) of H.R. 3199 . . . in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and expedient.") (emphasis added); Remarks on Signing the Deficit Reduction Act of 2005, 42 WEEKLY COMP. PRES. DOC. 215 (February 8, 2006) ("The executive branch shall *construe* section 1936(d)(2) of the Social Security Act . . ., which purports to make consultation with a legislative agent a precondition to execution of the law, to call for but not mandate such consultation, as is consistent with the Constitution's provisions concerning the separate powers of the Congress to legislate and the President to execute the laws.") (emphasis added); Statement on Signing the Trafficking Victims Protection Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 39 (January 10, 2006) ("The executive branch shall *construe* this reporting requirement in a manner consistent with the President's constitutional authority as Commander in Chief and the President's constitutional authority to conduct the Nation's foreign affairs.") (emphasis added).

[6] *See, e.g.*, Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22 ("[No former presidents] have used [signing statements] so clearly to make the president the interpreter of a law's intent, instead of Congress, and the arbiter of constitutionality, instead of the courts."); Bob Egelko, *How Bush sidesteps intent of Congress*, S.F. CHRON., May 7, 2006, at A1 ("The civics-book answer is clear: Congress passes the laws, the president carries them out, and the courts decide whether they're constitutional.").

[7] *See* Nix v. Hedden, 149 U.S. 304 (1893) (holding that the tomato, though botanically a fruit, is commonly used as a vegetable and therefore should be treated as such for tax purposes).

[8] U.S. CONST. Art. II, § 3.

[9] Bowsher v. Synar, 478 U.S. 714, 733 (1986).

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guide [executive officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."[10] And as Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel under President Clinton, has explained, this is a "generally uncontroversial . . . function of presidential signing statements"—"to guide and direct executive officials in interpreting or administering a statute."[11]

B. Informing the Public of the President's Interpretation

Of course, the President need not make his interpretations public; he could quietly instruct the U.S. Border Patrol that a tomato is a vegetable and have done with it. But there are many good reasons why, in most circumstances, a public statement of interpretation is desirable. First, if the President's interpretation is public, then those who believe that his interpretation is erroneous can better and more quickly structure a challenge in court. Second, a public statement of interpretation reduces legal uncertainty. If people know the President's interpretation, they are better able to organize their affairs accordingly. Third, and perhaps most important, a public statement informs Congress of the President's interpretation, and if Congress disagrees, it may pass a bill clarifying the matter.

In short, in the United States, we have a strong preference for sunlight in government. Once it is clear that interpreting the law is essential to executing it, there can be no independent objection to the President making his interpretations public. This is the primary function of presidential signing statements, and President Clinton's Office of Legal Counsel was quite right to call this function "uncontroversial."[12]

II. The Canon of Constitutional Avoidance

The President interprets statutes in much the same way that courts do, with the same panoply of tools and strategies. His lawyers carefully study the text and structure of Acts of Congress,[13] aided perhaps by dictionaries, linguistic treatises, and other tools of

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[10] Myers v. United States, 272 U.S. 52, 135 (1926).

[11] The Legal Significance of Presidential Signing Statements, 17 U.S. Op. Off. Legal Counsel 131, 132 (1993).

[12] *Id.*

[13] *See, e.g.*, Statement on Signing the Veterans Health Programs Improvement Act of 2004, 40 Weekly Comp. Pres. Doc. 2886 (November 30, 2004) ("The executive branch shall construe the repeal, in section 1561(c) of the Act, of section 127 of the Treasury and General Government Appropriations Act, 2003, as contained in the Consolidated Appropriations Act, 2003 (Public Law 108-7) as repealing the amendments that were made to title 19 of the United States Code by section 127. Such a construction of section 1561(c) is *consistent with the text and structure* of amendments to title 19 made by section 1561.") (emphasis added); Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (December 30, 2005) ("*[N]oting 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.") (emphasis added); Statement on Signing the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 41 WEEKLY COMP. PRES. DOC. 1273 (August 10, 2005) ("The executive

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statutory interpretation. In addition, just like courts, they also apply well-established maxims of statutory interpretation, called canons.[14]

One canon in particular is of interest today. As Justice Holmes explained in 1927, "[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."[15] This is known as the canon of constitutional avoidance,[16] and it "is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."[17]

This is the canon that the President is applying when he says, in signing statements, that he will construe a particular provision to be consistent with a particular constitutional command. Many of the presidential signing statements that have most exercised the press have taken this form,[18] so it is crucial to understand what these statements do and do not say. These statements emphatically do not "reserve the right to disobey"[19] the law. They do not "amount to partial vetoes."[20] They do not "declare[the President's] intention not to enforce anything he dislikes."[21] And they do not declare that the statutes enacted by Congress are unconstitutional.

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branch shall construe section 5305(g)(3) of the Act to be a statute to which section 552(b)(3)(A) of title 5, United States Code, refers, *as the text and structure of section 5305(g) indicate*.") (emphasis added). *See also* Alexander v. Sandoval, 532 U.S. 275, 289 n.7 ("[O]ur methodology is not novel, but well established in earlier decisions . . ., which explain that *the interpretive inquiry begins with the text and structure* of the statute . . . .") (emphasis added).

[14] *Compare* Statement on Signing Communications Legislation, 40 WEEKLY COMP. PRES. DOC. 3013 (December 23, 2004) (applying "the principle of statutory construction of giving effect to each of two statutes addressing the same subject whenever they can co-exist") *with* Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

[15] Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.).

[16] *See, e.g.*, Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 730 (9th Cir. 2003).

[17] Rust v. Sullivan, 500 U.S. 173, 190-191 (1991). *See also* Ex parte Randolph, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).

[18] *See, e.g.*, Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425 (March 9, 2006) ("The executive branch shall *construe* the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch . . . in a manner consistent with the President's constitutional authority to . . . withhold information the disclosure of which would impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. . . . The executive branch shall *construe* section 756(e)(2) of H.R. 3199 . . . in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and expedient.") (emphasis added); Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (December 30, 2005) ("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 . . . .") (emphasis added).

[19] Charlie Savage, *Bush Challenges Hundreds of Laws*, THE BOSTON GLOBE, April 30, 2006, at A1.

[20] Bob Egelko, *How Bush Sidesteps the Intent of Congress*, S.F. CHRONICLE, May 7, 2006, at A1.

[21] Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22.

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In fact, they declare exactly the opposite. As President Clinton's Office of Legal Counsel has explained, these sorts of signing statements are "analogous to the Supreme Court's practice of *construing* statutes, if possible, to *avoid* holding them unconstitutional . . . ."[22] What these signing statements say, in effect, is that if an ambiguity appears on the face of the statute or becomes apparent in the course of execution, and if one possible meaning of the statute would render it unconstitutional, then the President will presume that Congress intended the other, constitutional meaning—*and he will faithfully enforce the statute so understood.*

Again, this amounts to nothing more than a straightforward application of a canon of statutory construction that was already well established when Justice Holmes elaborated it in 1927,[23] a canon that finds its entire rationale in "a just respect for the legislature"[24] and the faithfulness of Representatives and Senators to their constitutional oaths.[25] If a statute is ambiguous, we—the President, the Court, the People—presume that Congress intended it to be constitutional.[26]

Now, it may be argued that this canon has grown too strong. After all, it is not used merely as a tie-breaker for ambiguous statutes. Even if dictionaries or other canons may point in the opposite direction, the canon of constitutional avoidance sometimes wins the day. As the Supreme Court explained in 1895, "*every reasonable construction* must be resorted to in order to save a statute from unconstitutionality,"[27] and reasonable people may differ on what constitutes a reasonable construction.[28] Moreover, the Supreme Court has held that "[a] statute must be construed, if possible, so as to avoid not only the *conclusion* that it is unconstitutional *but also grave doubts upon that score*."[29]

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[22] The Legal Significance of Presidential Signing Statements, 17 U.S. Op. Off. Legal Counsel 131, 133 (1993) (emphasis added).
[23] *See* Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.).
[24] *Ex parte Randolph*, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).
[25] See U.S. Const. Art. VI ("The Senators and Representatives before mentioned ... shall be bound by Oath or Affirmation, to support this Constitution."); 5 U.S.C.A. § 3331 (West 1966) (establishing the oath for all elected and appointed officials: "I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."); United States v. Verdugo-Urquidez, 494 U.S. 259, 274 (1990) ("The Members of the ... Legislative Branch[] are sworn to uphold the Constitution, and they presumably desire to follow its commands.").
[26] *See* Rust v. Sullivan, 500 U.S. 173, 190-191 (1991).
[27] Hooper v. California, 155 U.S. 648, 657 (1895) (emphasis added).
[28] *Compare* United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994) ("The statute's use of 'knowingly' could be read only to modify 'uses, transfers, acquires, alters, or possesses' or it could be read also to modify 'in any manner not authorized by [the statute].'), *with id.* at 81 (Scalia, J., dissenting) ("If one were to rack his brains for a way to express the thought that the knowledge requirement in subsection (a)(1) applied *only* to the transportation or shipment . . . *it would be impossible* to construct a sentence structure that more clearly conveys that thought, and that thought alone.").
[29] United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (emphasis added).

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This aspect of the doctrine is of more recent vintage[30] and has been subject to quite compelling critique.[31]

For present purposes, though, it suffices to note that the President's application of this canon has been consistent with the interpretive doctrine espoused by the Court. If there is any plausible interpretation of a statute that would avoid a serious constitutional question, the President—like the Court—gives Congress the benefit of the doubt and adopts the constitutional interpretation.

III. Presidential Signing Statements in Court

An entirely separate issue is whether presidential signing statements are relevant to *judicial* interpretation of statutes. Courts sometimes use legislative history to resolve ambiguities in statutes[32] (though this practice has been subject to withering criticism).[33] The issue here is whether courts can and should put presidential signing statements to analogous use.

There are strong arguments on both sides of this question. On the one hand, one might say that judicial interpretation of statutes should seek to discover *legislative* intent, and the President is not a legislator. The President's power over bills is the power to "approve"[34] or disapprove legislation; it is a simple, binary, up-or-down decision, subsequent to, and distinct from, the legislative process. Indeed, the Constitution makes clear that the veto power is not legislative power. It provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"[35] not a Congress and a

[30] *See* Clark v. Martinez, 543 U.S. 371, 391 (2005) (Thomas, J., dissenting); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 840-42 (2001).

[31] *See* Marozsan v. United States, 852 F.2d 1469, 1495 (7th Cir. 1988) (Easterbrook, J., dissenting) ("Construing statutes to avoid all constitutional questions treats the penumbra around the Constitution as if it has independent force, and thereby denies effect to real laws on the basis of insubstantial 'concerns'."); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) ("The practical effect of interpreting statutes to avoid raising constitutional questions is . . . to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution . . . . And we do not need that."); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 89.

[32] *See, e.g.*, Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) ("As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it."); *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

[33] *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 518-28 (1993) (Scalia, J., concurring); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J., concurring in the judgment) ("[W]e should try to give the text its fair meaning, whatever various committees might have had to say—thereby affirming the proposition that we are a Government of laws, not of committee reports."); ANTONIN SCALIA, A MATTER OF INTERPRETATION, 29-37 (Princeton University Press 1997); Frank. H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371 (1987).

[34] U.S. CONST. art. I, § 7.

[35] U.S. CONST. art. I, § 1.

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President; and it is "[t]he Congress," not the Congress plus the President, who "shall have Power . . . To make all Laws."[36]

On the other hand, one might say that this is an unduly formalistic view of the legislative process. In reality, the administration often drafts legislation, and even when it does not, the entire legislative machinery operates in the shadow of the President's veto power. On this view, the President's understanding of a bill as reflected in a signing statement is at least as important as the understanding of Congress reflected in legislative history. Moreover, any effort to glean the intent of Congress from legislative history is arguably quixotic: first, it is difficult to know how many Representatives and Senators agreed with any given portion of legislative history;[37] and second, it is arguably incoherent to attempt to aggregate those individual intentions into a collective intent.[38] By contrast, the President is just a single person, so his interpretive statement poses none of those problems. For this reason, the argument runs, presidential signing statements are more valuable because they are inherently reliable as an indication of presidential intent, whereas legislative history is less valuable because it is inherently unreliable as an indication of congressional intent.

My own view is the same as Justice Scalia's. I believe that the project of statutory interpretation is to discern "the original meaning of the text, not what the original draftsmen intended."[39] And I believe that presidential signing statements—like legislative history—are of very little use in that project. In my view, absent instruction on this question from Congress,[40] courts should rely on both equally—for the strength of their reasoning and nothing more.

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[36] U.S. CONST. art. I, § 8. See also *id.* art IV, § 3 ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."); *id.* amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."; *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XIX ("Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XX, § 3 ("Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified . . . ."); *id.* amend. XX, § 4 ("The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them . . . ."); *id.* amend. XXIII, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XXIV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XXV, § 5 ("or of such other body as Congress may by law provide . . ."); *id.* amend. XXVI, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."). *Cf. id.* amend. I ("Congress shall make no law . . .").

[37] *Cf.* Conroy v. Aniskoff, 507 U.S. 511, 519 (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.").

[38] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular "motive" of a collective legislative body . . . ."); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.").

[39] ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (Princeton University Press 1997).

[40] *See* Part IV-D, *infra*; *see also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2147-51 (2002).

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IV. Legislative Responses

It follows from the analysis above that a general legislative response to the President's use of signing statements is probably unnecessary. Nevertheless, because at least three legislative proposals on this topic are pending in the House of Representatives, I shall address the balance of my testimony to the constitutionality and the wisdom of such proposals.

A. Requiring Congressional Notification

A Resolution that has been introduced in the House would provide:

> If the President makes a determination not to carry out any duly enacted provision of a law (as indicated in a statement made by the President at the time of the enactment of the law or otherwise), not later than 10 days after the enactment of the law, the President shall submit a report to Congress informing Congress of the determination and including the President's reasons for making the determination, except that to the extent that the determination is based upon classified material, the President shall submit the report only to the congressional intelligence committees.[41]

Under this Resolution, legislation introduced in response to such a report would receive expedited consideration by the House of Representatives,[42] and any Representative could require the General Counsel of the House to prepare "a report describing any legal action which may be brought to challenge the refusal by the President to carry out any duly enacted provision of the law."[43]

This Resolution is sensible. On very rare occasions, the President may determine that a statute is thoroughly unconstitutional, and that no saving construction is possible. Text, history, structure, and longstanding executive practice all demonstrate that in such circumstances, "the Constitution provides [the President] with the authority to decline to enforce" the law.[44] This is, however, one of the President's most momentous powers, and when he exercises it, basic separation-of-powers principles suggest that the other

[41] H.J. Res 89, 109th Cong. § 1(a). This Resolution is quite similar to H.J. Res. 87, 109th Cong. (2006), which has also been introduced in the House, but H.J. Res. 89 is broader in that it requires the President to notify Congress any time he determines that he will not enforce a provision of a law, while H.J. Res. 87 requires notification only when such determination is made *at the time of enactment* of the law. Oddly, H.J. Res. 89, like H.J. Res. 87, requires any report to be filed within 10 days of enactment of the law—even though under H.J. Res. 89 the determination that triggers the requirement could theoretically occur much later.

[42] H.J. Res. 89. *See also* H.J. Res. 87.

[43] H.J. Res. 89. *See also* H.J. Res. 87.

[44] The Legal Significance of Presidential Signing Statements, 17 U.S. Op. Off. Legal Counsel 131, 133 (1993).

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branches should have notice and an opportunity to respond.[45] The Resolution provides for notice to Congress, a fast-track legislative response, and the possible prospect of judicial review. All of this is commendable.

However, it must be noted that this Resolution would apply to only a tiny fraction of the President's "constitutional signing statements." As explained above, the canon of constitutional avoidance requires the President to construe statutes, if at all possible, to be consistent with the constitution. In the vast majority of cases—and in all the most controversial signing statements[46]—the President implicitly declares his intention to apply the canon, choose the constitutional interpretation of the statute, and then *faithfully execute the statute so interpreted.* In none of these cases does the signing statement constitute "a determination not to carry out any duly enacted provision of a law,"[47] and so in none of these cases would the House Resolution require him to file a report.

This is probably as it should be. In the vast run of cases in which a presidential signing statement is merely *interpreting* an Act of Congress, it is appropriate that no report should be required. Only in the very rare case in which the President expressly *declines to enforce* an Act of Congress should a report be necessary. In this sense, the House Resolution strikes the correct balance, and it may well be a worthy legislative initiative.

B. Limiting the Intra-Executive Branch Force of Signing Statements

Another bill that has been introduced in the House is far more problematic. It provides: "For purposes of construing or applying any Act enacted by the Congress, a Federal entity shall not take into consideration any statement made by the President contemporaneously with the President's signing of the bill or joint resolution that becomes such Act."[48] It follows from the discussion above[49] that this provision is almost certainly unconstitutional.

The term "Federal entity" includes executive officers and agencies, and the provision purports to forbid them from taking into account the President's signing statements when interpreting federal law. This the resolution cannot do, for the simple reason that it is the President's constitutional duty to "take Care that the Laws be faithfully executed."[50] As the Supreme Court has explained, "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law,"[51] and the President "may properly supervise and guide [executive officers']

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[45] Of course, one could argue that the signing statement itself serves precisely this function.
[46] *See, e.g.*, Remarks on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 423 (March 9, 2006); Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (December 30, 2005).
[47] H.J. Res. 89; *see also* H.J. Res. 87.
[48] H.R. 5486, 109th Cong. § 2 (2006).
[49] *See supra*, Part I.
[50] U.S. CONST. Art. II, § 3.
[51] Bowsher v. Synar, 478 U.S. 714, 733 (1986).

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construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."[52] The House Resolution would run afoul of this principle, by closing the ears of the Executive Branch to the President's contemporaneous[53] interpretation of the law. For that reason alone, it would be unconstitutional.

C. Limiting Funds for Signing Statements

A different section of the same bill provides: "None of the funds made available to the Executive Office of the President, or to any Executive agency . . . from any source may be used to produce, publish, or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution presented for signing by the President."[54] This provision, too, is probably unconstitutional.

As discussed above, interpreting federal statutes—and ensuring uniform interpretation throughout the executive branch—is the very core of the President's duty to "take Care that the Laws be faithfully executed."[55] And presidential signing statements are an essential tool in the performance of that duty. If Congress cannot require Executive officers to close their ears to presidential signing statements, then *a fortiori* it cannot forbid the President from making such statements in the first place.

Admittedly, the House Resolution does not purport to forbid signing statements *simpliciter*; it forbids only that any funds be used to produce, publish or disseminate them. And of course Congress does possess broad power over appropriations.[56] But for Congress to use its power of the purse to impede a core executive function would raise serious constitutional concerns. If Congress lacks the power to forbid the President from issuing signing statements altogether (as it almost certainly does), then it arguably lacks the power to achieve the same result indirectly with a cunningly crafted spending restriction.[57]

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[52] Myers v. United States, 272 U.S. 52, 135 (1926).

[53] The constitutional problem could be mitigated, perhaps, by reading the word "contemporaneously" very narrowly, to mean something like "at the same instant," but only at the cost of rendering the statute trivial.

[54] H.R. 5486, § 1.

[55] U.S. CONST. Art. II, § 3.

[56] See U.S. Const. Art. I, § 9 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

[57] While the Court has only alluded to this point, *see* United States v. Lovett, 328 U.S. 303, 313 (1946); South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. . . . [W]e have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds."), the Executive Branch has taken this position clearly and consistently for more than 70 years, *see* Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill, 2001 WL 34907462 (O.L.C.) ("[I]t is unconstitutional for Congress to place conditions, whether substantive or procedural, on the President's exercise of his constitutional authority."); 20 U.S. Op. Off. Legal Counsel 232 (1996) ("While Congress has broad authority to grant, limit, or withhold appropriations, that power may not be used . . . to circumvent the steps required by the Constitution for Congress to enact a law or regulation binding on persons outside the legislative branch."); 20 U.S. Op. Off. Legal Counsel 189 (1996) ("The past practice of the Executive branch demonstrates its refusal to comply with unconstitutional spending conditions that

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At any rate, even if Congress concludes that it does have power to limit appropriations in this manner, the separation-of-powers implications are sufficiently serious that it would probably be wise to avoid a constitutional confrontation on this point unless absolutely necessary. This President's use of signing statements does not justify such a constitutionally contentious response.

D. Limiting the Judicial Use of Presidential Signing Statements

Once again, the House resolution provides: "For purposes of construing or applying any Act enacted by the Congress, a Federal entity shall not take into consideration any statement made by the President contemporaneously with the President's signing of the bill or joint resolution that becomes such Act."[58] As discussed above, this provision is almost certainly unconstitutional to the extent that it applies to executive agencies and officers.[59] But a federal court is also a "Federal entity," and to the extent that the provision applies to *judicial* interpretation, different constitutional issues arise. Can Congress forbid courts from using presidential signing statements as an aid in the interpretation of federal statutes?

This is a rich and difficult question, and to answer it, one must begin with the more general question: Can Congress tell courts what tools and methods to use when interpreting federal statutes? I considered this question at length in the *Harvard Law Review* four years ago,[60] and I concluded that the answer is generally *yes*: Congress does have power to tell courts what methods to use when interpreting federal statutes. As I explained, "whatever judicial power exists over interpretive methodology must be

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trench on core Executive powers."); 19 U.S. Op. Off. Legal Counsel 123 (1995) ("[I]t does not matter in this instance that Congress has sought to achieve its objectives through the exercise of its spending power, because the condition it would impose on obligating appropriations is unconstitutional."); 16 U.S. Op. Off. Legal Counsel 18, 28 (1992) ("That section 503 was enacted as a condition on the appropriation of money for the State Department does not save it from constitutional infirmity."); 14 U.S. Op. Off. Legal Counsel 37, 41 n.3 (1990) ("Nor can section 102(c)(2) be viewed as a legitimate exercise of congressional power over the appropriation of public funds. Congress may not use that power to attach conditions to executive branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs."); 13 U.S. Op. Off. Legal Counsel 258 (1989) ("[T]he fact that Congress appropriates money for the army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces. Nor does it follow from Congress' legislative establishment of executive branch departments and its appropriation of money to pay the salaries of federal officials that Congress can constitutionally condition creation of a department or the funding of an officer's salary on being allowed to appoint the officer."); 4B U.S. Op. Off. Legal Counsel 731, 733 (1980) ("It is well established that Congress cannot use its power to appropriate money to circumvent general constitutional limitations on congressional power."); 41 U.S. Op. Att'y Gen. 507, 508 (1960) ("Congress cannot by direct action compel the President to furnish to it information the disclosure of which he considers contrary to the national interest. It cannot achieve this result indirectly by placing a condition upon the expenditure of appropriated funds."); 37 U.S. Op. Att'y Gen. 56, 61 (1933) ("Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution.").

[58] H.R. 5486, § 2.

[59] *See* Part IIIA, *supra*.

[60] *See* Rosenkranz, *supra* note 40.

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common lawmaking power, which may be trumped by Congress."[61] As a general matter, then, Congress has power to promulgate general rules of statutory interpretation, which would be binding on state and federal courts in the interpretation of federal law.

This is not the end of the analysis, however. Even if Congress *generally* has power over the interpretive methodology employed by courts, "[p]articular interpretive statutes . . . may raise more potent separation-of-powers objections."[62] In other words, there is no general objection that mandating interpretive rules invades the *judicial* power, but the question remains whether this specific interpretive rule—courts shall not rely on presidential signing statements in interpreting acts of Congress—would impinge on the *executive* power.

I conclude that it probably would not. As explained above,[63] the President's executive power inherently includes the power to interpret federal law in the first instance.[64] Moreover, the President also has power to give interpretive instructions to executive officers.[65] But it hardly follows that he has inherent and inalienable power to give such instructions to the courts. To be sure, courts often defer to executive agencies in their interpretations of federal statutes,[66] and the President himself may be entitled to at least as much deference,[67] but this is so only as long as Congress wishes to acquiesce in this rule.[68] If Congress wished to forbid judicial deference to agency interpretations—or even presidential interpretations—of federal statutes, it could probably do so. *A fortiori*, Congress could forbid judicial reliance on one manifestation of presidential interpretation—the presidential signing statement.

The only question remaining is whether such a measure would be wise. My tentative answer is that it might be, but only as part of a comprehensive legislative scheme. I have argued at length that Congress has constitutional power over the tools and methods that courts use to interpret federal statutes, and that it should exercise this power.[69] But a crucial aspect of my thesis is that Congress should approach this project comprehensively. As I explained:

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[61] *Id.* at 2103. *But cf.* Lockhart v. United States, 126 S. Ct. 699, 702-04 (2005) (Scalia, J., concurring.).
[62] *See* Rosenkranz, *supra* note 40, at 2103 (2002).
[63] *See supra*, Part I.
[64] Bowsher v. Synar, 478 U.S. 714, 733 (1986).
[65] Myers v. United States, 272 U.S. 52, 135 (1926).
[66] *See* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).
[67] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2372-80 (2001).
[68] *See* Rosenkranz, *supra* note 40, at 2129 ("Clearly, Congress could pass a statute directing that courts give no deference to an agency's interpretation of law."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515-16 (1989) ("The separation-of-powers justification [for the Chevron doctrine] can be rejected even more painlessly by asking one simple question: If, in the statute at issue in Chevron, Congress had specified that in all suits involving interpretation or application of the Clean Air Act the courts were to give no deference to the agency's views, but were to determine the issue de novo, would the Supreme Court nonetheless have acquiesced in the agency's views? I think the answer is clearly no, which means that it is not any constitutional impediment to 'policy-making' that explains Chevron."); Kagan, *supra* note 67, at 2379 (calling Chevron a "default rule of deference").
[69] Rosenkranz, *supra* note 40.

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> The . . . most obvious advantage of a statutory interpretive regime is its potential for internal coherence. The Supreme Court is handicapped across this dimension by the Article III jurisdictional requirement of a case or controversy. Because the Court can only develop canons one by one, common law canons will be devised ad hoc, and will inevitably fail to form a coherent set. [By contrast,] [c]ongressionally adopted canons could form a true "regime"—a set of background interpretive principles with internal logical coherence.[70]

In short, I applaud Congress's interest in a federal rule of statutory interpretation addressing presidential signing statements, but I think such a rule should ideally be adopted as part of a coherent and comprehensive code.

Conclusion

In conclusion, the recent brouhaha over presidential signing statements is largely unwarranted. Presidential signing statements are an appropriate means by which the President fulfills his constitutional duty to "take Care that the Laws be faithfully executed."[71] And even the most controversial ones are, in truth, nothing more than the application of the well-settled canon of constitutional avoidance—a canon which, as Chief Justice John Marshall explained, was born of "a just respect for the legislature."[72]

I do not believe that any legislative response to the President's use of signing statements is necessarily called for. But if one is thought necessary, I would recommend something akin to H.J. Res. 89, which would simply require the President to notify Congress of any decision to decline to enforce a statute. In addition, I applaud Congress's interest in the proper *judicial* use of presidential signing statements in statutory interpretation, and I hope that this interest will blossom into a more comprehensive and general study of federal rules of statutory interpretation.

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[70] *See id.* at 2143.
[71] U.S. CONST. Art. II, § 3.
[72] Ex parte Randolph, 20 F.Cas. 242, 254 (C.C.D.Va. 1883) (No. 11.558) (Marshall, C.J.).

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Statement of Christopher S. Yoo

Professor, Vanderbilt University Law School
and
Visiting Professor, University of Pennsylvania Law School

Hearing on "Presidential Signing Statements"

United States Senate Committee on the Judiciary

June 27, 2006

Mr. Chairman and Members of the Committee, my name is Christopher Yoo, and I am a Professor at Vanderbilt University Law School and a Visiting Professor at the University of Pennsylvania Law School.[1] As the coauthor of a forthcoming book on the history of Presidential power[2] and a scholar who has spent a significant amount of time over the past decade researching the proper role of the President in our system of government,[3] I am grateful for the opportunity to testify today on the use of Presidential signing statements as legislative history.

I would like to make three basic points today: First, I believe that the use of Presidential signing statements as legislative history is inherent in the system of checks and balances embodied in our Constitution. Second, I believe that Presidential statutory interpretation is also inherent in the President's role as Chief Executive. Third, I suggest that recognizing Presidential signing statements as legislative history would better promote the democratic process.

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[2] *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, A HISTORY OF THE UNITARY EXECUTIVE: EXECUTIVE BRANCH PRACTICE FROM 1789 TO 2005 (Yale University Press, forthcoming 2007).

[3] *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667 (2003); Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1 (2004); Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945-2004*, 91 IOWA L. REV. 601 (2005).

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I.

The argument usually advanced against the use of Presidential signing statements as legislative history draws on the principle that legislation is the exclusive province of Congress and that any attempt to inject the Presidency into the legislative process would violate the separation of powers.

I believe that this argument reflects a fundamental misapprehension about the nature of our system of government. Our Framers rejected the "hermetic sealing off of the three branches of Government from one another" envisioned by Montesquieu in favor of a system of checks and balances in which "[t]he President is a participant in the legislative process."[4] As a result, the Constitution crated a "single, finely wrought and exhaustively considered, procedure" for enacting legislation.[5]

For example, the Constitution specifically gives Presidents the authority to convene sessions of Congress as well as the duty to propose legislation that they believe to be "necessary and expedient."[6] The Framers also envisioned that Presidents would use means outside of the formal legislative process to influence the enactment of legislation by lobbying Members of Congress. Presidents have been quite active in proposing and promoting legislation since the beginning of George Washington's first term.[7] To the extent that the President is one of a bill's

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[4] Buckley v. Valeo, 424 US 1, 121 (1976); *accord* INS v. Chadha, 462 U.S. 919, 947 (1983) ("[I]t is beyond doubt that lawmaking was a power to be shared by both Houses and the President"); United States v. Lovett, 328 U.S. 303, 324-25 (19469 (Frankfurter, J., concurring) (statutes are "the product of both Houses of Congress and the President").

[5] *Chadha*, 462 U.S. at 951.

[6] U.S. CONST. art. II, § 3.

[7] *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 17-18 (Randall W. Bland et al. eds., 1984).

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primary proponents, the reasons usually given for giving greater weight to views of a bill's sponsors and floor managers[8] would also support giving weight to the President's views.[9]

Even more importantly, in order for a bill to become law, the same statutory language must be approved by both Houses of Congress (known as the "bicameralism" requirement), after which point, the language that has been approved by both Houses is enshrined into a document known as an "enrolled bill," which is signed by both the Speaker of the House and the President of the Senate to verify that the language has been approved by his respective legislative body. The enrolled bill then must be submitted to the President (known as the "presentment" requirement).[10] The President may either sign the legislation into law; wait ten days and allow the bill to become law without signing it; veto it; or, if the bill is presented within ten days of the adjournment of Congress, pocket veto by refusing to sign it.

The Constitution thus assigns essential roles in the legislative process to both Congress and the President. Except in the case of a Congressional override of a Presidential veto, a bill cannot become law without the mutual assent of the House of Representatives, the Senate, and the President. The Supreme Court has held repeatedly invalidated attempts to enact legislation that had not been specifically approved by all three of these constitutional actors. For example, in *INS v. Chadha*,[11] the Supreme Court invalidated the legislative veto because it purported to

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[8] *See, e.g.*, Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976); National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 640 (1967); Lewis v. United States, 445 U.S. 55, 63 (1980); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951). *But see* Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."); Chandler v. Roudebush, 425 U.S. 840, 858, n.36 (1976) (declining to give controlling weight to the statements of a sponsor and floor manager when the statement was self-contradictory and inconsistent with the Committee Report).

[9] *See* Shapiro v. United States, 335 U.S. 1, 12 n.13 (1948) (noting that courts are especially apt to defer to an executive interpretation of a statute when "the agency has actively sponsored the particular provisions which it interprets"); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 549 (1940) (noting that the fact that an executive agency's "interpretation gains much persuasiveness from the fact that it . . . suggested the provisions' enactment to Congress").

[10] U.S. CONST. art. I, § 7.

[11] 462 U.S. 919 (1983).

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allow Congress to change the force of a statutory enactment without the presenting the proposed change to the President. Similarly, in *Clinton v. City of New York*,[12] the Court invalidated the line item veto, which would have allowed the President to revise the language of an enrolled bill without resubmitting the revised language to Congress for approval.

Together these decisions underscore the extent to which the House, the Senate, and the President each represent an essential part of the lawmaking process. Any attempt to enact legislation without giving each of these actors a coequal role would be unconstitutional.

The following thought experiment illustrates this principle nicely. Suppose that the Senate were to propose legislation that would require courts to give controlling weight to the legislative history generated by the Senate and to ignore the legislative history generated by the House of Representatives. Suppose further that the House of Representatives lacked the political will and political support to oppose the provision, that the President signed it into law, and that the statute eventually ended up being challenged in court. Would such a statute be constitutional? The simple answer is that that the Constitution gives the House of Representatives a role in the lawmaking process that is coequal with the role that it accords to the Senate.[13] As a result, any attempt to privilege the views expressed in the Senate's legislative history over the views expressed in the House's legislative history would represent the same type of denigration of one of the three actors that the Constitution deems essential to the legislative process that led the Court to invalidate the legislative and the line-item vetoes.

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[12] 524 U.S. 417 (1998).

[13] There are limited circumstances in which the Constitution gives the two Houses of Congress slightly different roles. For example, the Constitution requires that all revenue bills initiate in the House. *See* U.S. CONST. art. I, § 7. The Constitution also accords limits to Congressional role in the ratification of treaties to the Senate and not the House. *See* U.S. CONST. art. II, § 2.

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The same reasoning would appear to apply to Presidential legislative history. Because (again, in the absence of a veto override) the assent of the President is as essential a part of the legislative process as the assent of the House of Representatives and the Senate, the President's understanding of the meaning of the statutory language is entitled to no less respect than the House's or the Senate's. Any attempt to privilege the views of one legislative actor over another would be unconstitutional.

Some have suggested that the role played by the President is more limited than the role played by the House and the Senate, in that the President lacks the power to change legislation and can only approve or disapprove it. The problem with this argument is that the same can be said about the House and the Senate. Neither House of Congress has the power to alter a statute without the assent of the other House of Congress and the President. Indeed, the situation faced by Presidents when presented with bill language with which they disagree is little different from the situation confronting the Senate when presented with bill language passed by the House with which it disagrees. Although the procedural details differ, in essence both the President and the Senate face the same choice of either approving or rejecting the proffered language.

The similarity of these roles is demonstrated quite clearly by the "enrolled bill doctrine," which regards the enrolled version of the legislation as conclusive evidence of the language passed by the House and the Senate.[14] Any bill that bears the signatures of the Speaker of the House, the President of the Senate, and the President of the United States is thus conclusively presumed to be a valid statute and forwarded to the Archives for inclusion in the Statutes at Large. The mandate on each actor is the same: each must approve the language contained in the

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[14] *See* Field v. Clark, 143 U.S. 649 (1892).

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enrolled bill for proposed legislation to become a law. In this respect, the President's authority is coequal with that of Congress: no more and no less.

This conclusion is bolstered by the fact that Presidents have used signing statements to expound their understanding of the meaning of statutes since the days of Andrew Jackson.[15] The validity of Presidential legislative history draws further support from the Supreme Court's willingness to rely on Presidential interpretations when construing statutes.[16] As the Court observed as early as 1801, the "principle that the contemporaneous construction of a statute by the executive officers of the government . . . is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so well embedded in our jurisprudence that no authorities need be cited to support it."[17] In a later case, the Court held, after noting that "the Act has been repeatedly construed by the President to confer such authority," that "[s]uch construction by the Chief Executive, being both contemporaneous and consistent, is entitled to great weight."[18]

This is not to say that the principle of separation of powers is now a dead letter. On the contrary, the Constitution was enacted in front of a background understanding of the virtues of keeping legislative, executive, and judicial authority powers from one another. The Constitution did enact some limited deviations from that principle, but in the absence of a clear Constitutional

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[15] *See* Andrew Jackson, Statement of May 30, 1830, *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1046 (James D. Richardson, ed., 1897)

[16] *See* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (referring to statutory interpretation offered in Presidential signing statement); Bowsher v. Synar, 478 U.S. 714, 719 n.1 (1986) (same); *see also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 424 (1996) (relying on gubernatorial signing statement to construe a state statute); Haig v. Agee, 453 U.S. 280, 296 (1981) (deferring to post-enactment Presidential interpretations of the Passport Act); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 116 (1974) (deferring to Presidential interpretations of the War Powers Act included in executive orders).

[17] Pennoyer v. McConnaughy, 140 U.S. 1, 23 (1801); *accord* Surgett v. Lapice, 49 U.S. (8 How.) 48, 68 (1850) (deferring to contemporaneous statutory interpretation by agency that had also been approved by the Secretary of the Treasury and the President).

[18] *Fleming*, 331 U.S. at 116 (footnote omitted).

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mandate to the contrary, courts should interpret the Constitution in a manner consistent with the preservation of the fundamental principle of the separation of powers. It is thus possible to give effect to the clear mandate of the bicameralism and presentment requirements mandated by the Constitution without opening the door to other derogations from the separation of powers that lack a similarly clear basis in the Constitutional text.

Finally, some critics have offered more pragmatic criticisms of Presidential legislative history. Some have argued that giving weight to Presidential signing statements opens the door to political manipulation, allowing Presidents to substitute their judgment for those of the other actors in the lawmaking process. Others have argued that Presidential signing statements are not generally available to Members of Congress and the public at large.

These critiques strike me as applying with equal force to all forms of legislative history (including that made by the House and the Senate) and not just to legislative history created by the President. Congressional legislative history has also been criticized for being relatively unavailable to legislators and to the public at large.[19] Indeed, in many cases, Members of Congress are unaware of the contents of the Congressionally created legislative history at the time that they vote on legislation.[20] Furthermore, Committee Reports and floor statements may represent nothing more than the views of a subset of the entire legislative body[21] (or perhaps even just their staff[22]) and may well represent politically motivated attempts to influence future statutory interpretation in directions that may or may not be inconsistent with intent of the entire

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19 *See* Conroy v. Aniskoff, 507 U.S. 511, 527-28 (1993) (Scalia, J., concurring).
20 *See* SEC v. Collier, 76 F.2d 939, 941 (2d Cir. 1935) (L. Hand, J.).
21 *See* Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring).
22 *See* Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring).

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Congress.[23] Indeed, skepticism about all forms of legislative history has fueled a movement in statutory interpretation toward "textualism," which would only give the force of law to sources that have complied with the bicameralism and presentment requirements mandated by the Constitution.[24]

A debate over the merits textualism would exceed the scope of today's hearing. For now, it suffices to acknowledge that the criticisms of unavailability, nonrepresentativeness, and political motivation that have been leveled at Presidential legislative history apply with equal force to Congressional legislative history as well. Thus, to the extent that the critiques of Presidential legislative history have bite, they would appear to invalidate all uses of legislative history and not those just originating from the White House.

II.

The legitimacy of Presidential statutory interpretation is not only implicit in the President's role in the legislative process. It is also inherent in the President's responsibility to oversee the execution of the law. The truism that the legislature creates the laws and the courts simply apply them as written has long obscured the fact that determining how a particular set of legal prescriptions applies to a particular set of facts requires a degree of lawmaking. It is for this reason that Justice Holmes "recognize[d] without hesitation that judges do and must legislate, but they can do so only interstitially."[25]

Executive functions require the application of the law to particular facts in much the same manner as adjudication. Thus, it should come as no surprise that the execution of the law

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[23] *See* Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43, 45 (1988).

[24] For a defense of textualism, published along with critical essays authored by a number of distinguished legal scholars, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

[25] Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

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necessarily involves executive agencies in statutory interpretation.[26] Indeed, the Supreme Court's *Chevron* doctrine requires courts to accord agency interpretations of the statutes they administer a special dignity: if the language of the statute is ambiguous, courts will not exercise their independent judgment about its proper construction and will instead defer to any the agency's interpretation so long as it is reasonable.[27] Even where *Chevron* does not apply, courts may still defer to agency interpretations based on the agency's specialized experience and information.[28] Although these doctrines are usually stated in terms of deference to individual agencies, the control that the President exerts over the entire Executive Department places Presidents in the position to ensure any interpretation advanced by an agency accords with their own views of the proper construction of the statute. And to the extent that an agency decides not to undertake an enforcement action, the presumptive immunity of that decision from judicial review essentially renders the statutory interpretation that led to the nonenforcement decision dispositive.[29]

This is not to say that executive discretion over statutory interpretation is unfettered. "Where a law is plain and unambiguous, . . . the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."[30] Thus, just as "longstanding precedents . . . permit resort to legislative history only when necessary to interpret ambiguous statutory text,"[31] *Chevron* deference also only applies when the statute is silent or ambiguous.[32] That said, Congress is unlikely to be able to shut off all avenues for Presidential

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26 *See* Bowsher v. Synar, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.").
27 *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 84-46 (1984).
28 *See* Skidmore v. Swift, 323 U.S. 134, 139 (1944).
29 *See* Heckler v. Chaney, 470 U.S. 821 (1985).
30 United States v. Fisher, 6 U.S. (2 Cranch) 358, 399 (1805) (Marshall, C.J.).
31 Bedroc Ltd., LLC v. United States, 541 U.S. 176, 187 n.8 (2004).
32 *Chevron*, 467 U.S. at 843.

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statutory interpretation completely. Although a legislature might try to leave no ambiguity by specifying every contingency in advance, the inability to anticipate and address every possible contingency makes some degree of interpretation inevitable.

The role as Chief Executive thus puts the President in a position to exert considerable influence over the manner in which statutes are interpreted. It would thus seem to matter little whether the President's views about the proper interpretation of a statute are expressed through a signing statement or through an agency interpretation proffered some time after enactment. Indeed, banning reliance on signing statements and would only redirect the interpretive process toward the agency without significantly reducing the President's ability to influence the ways statutes are interpreted.

III.

A number of normative justifications also support recognizing Presidential signing statements as a form of legislative history. Part of the genius of our Constitution is the decision to design the various institutions of government in a way that reflected different constituencies and different capabilities. The Great Compromise established the House of Representatives to reflect the interests of the large states by apportioning its membership by population. It was also designed to have "an immediate dependence on, and an intimate sympathy with, the people" by virtue of the direct popular election of its membership to two-year terms.[33] The Senate was designed to represent the interests of the small states, being constituted so that each state would have equal representation. It was also designed to check the "mischievous effects of a mutable government" that flowed inevitably from "a rapid succession of new members" by having a

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[33] THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961).

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higher minimum age requirement and by having its members initially selected by State Legislatures for six-year terms, in the hopes of making the body more mature and deliberative.[34]

The Presidency, for its part, was designed to reflect national interests.[35] The strong single leader was also necessary to create an executive that would be more proactive and energetic than the plural executive established by the Articles of Confederation and would counterbalance a Congress designed to be more reactive and deliberative.[36] The hope was that the resulting combination would "combin[e] the requisite stability and energy in Government, with the inviolable attention due to liberty, and to the Republican Form."[37] Because the Presidency embodies different institutional capabilities and is accountable to a different constituency than either House of Congress, recognizing Presidential signing statements as a form of legislative history promises to allow the process of statutory interpretation to gain the benefit of a different set of sensibilities.

Finally, accepting Presidential signing statements as a form of legislative history can help conserve valuable legislative resources and reinforce the democratic process. Suppose that a statute was susceptible of two interpretations, one of which would render the statute constitutional, while the other might render the statute unconstitutional. It has been accepted since Justice Brandeis's landmark concurrence in *Ashwander* that courts faced with such a situation should adopt the interpretation that would render the statute constitutional.[38] This rule minimizes the need for courts to render constitutional opinions that would only serve to heighten tensions among the various branches of government. Many Presidential signing statements arise

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[34] THE FEDERALIST NO. 62, at 377, 380 (James Madison) (Clinton Rossiter ed., 1961).

[35] *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1555 (1833); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, pt. 1, app. 344 (1803).

[36] THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[37] THE FEDERALIST NO. 37, at 226 (James Madison) (Clinton Rossiter ed., 1961).

[38] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

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in the same posture and adopt the same approach. When faced with a legislative proposal that might or might not be construed in a constitutional manner, Presidents often issue signing statements noting the potential constitutional problem and stating their intention to construe the statute to avoid it.

A similar situation arises at a somewhat lower level if the President is confronted with an ambiguous bill language, one interpretation of which would be acceptable and the other interpretation of which would prompt a veto. It would seem to me that permitting the President to clarify the ambiguity would be better, both for private parties affected by the legislation and for Congress. If unable to clarify the ambiguity, the President may have no choice but to send the legislation back to Congress despite the fact that both Houses may well concur with the President's interpretation. To the extent that Congress disagrees with the President's interpretation, Presidential legislative history reinforces the democratic process by providing a clearer and more prompt platform from which Congress can offer a clarifying amendment.[39]

* * *

Together these arguments suggest that the use of Presidential signing statements as legislative history is both inherent in the system of checks and balances created by our Constitution as well as the President's role as Chief Executive and may well enhance democracy by promoting better interaction among the branches. I would be happy to answer any questions that you might have.

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[39] *See* Chisom v. Romer, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring); United States v. Taylor, 487 U.S. 326, 345-46 (1988) (Scalia, J., concurring).

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