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PRESIDENTIAL SIGNING STATEMENTS UNDER THE BUSH ADMINISTRATION: A THREAT TO CHECKS AND BALANCES AND THE RULE OF LAW?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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PRESIDENTIAL SIGNING STATEMENTS UNDER THE BUSH ADMINISTRATION: A THREAT TO CHECKS AND BALANCES AND THE RULE OF LAW?

WEDNESDAY, JANUARY 31, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:22 p.m., in Room 2142, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Mr. CONYERS. Good morning. The Committee will come to order.

Before we begin our hearing, many have heard that our former colleague and friend, Father Robert Drinan, passed on Sunday, January 28th, here in Washington. Father Drinan served with us as a Member of the House and on this Judiciary Committee from 1970 to 1981, later becoming a professor at Georgetown University Law Center, and he was known as a tireless advocate for civil rights and social justice in this country and in the world. He was a passionate opponent of what he believed was an immoral war we were fighting in Vietnam. His principled stands earned him widespread admiration as well as a prominent place on President Nixon's enemies' list. He was the first and last Roman Catholic priest to hold a seat in Congress while he wore the cloth, and although he enjoyed strong support in his district and would undoubtedly have been reelected, he resigned with "regret and pain," in his words, after Pope John Paul II issued a decree forbidding priests from holding legislative offices.

His departure was a great loss to this body and to the American people and as a friend and colleague who lived true to his values, who answered the highest calling of government service to direct its resources to improving people's lives and correcting social wrongs. In honor of his distinguished career and service, I ask unanimous consent that we hold a moment of silence for Father Drinan.

[Moment of silence.]

Mr. CONYERS. Thank you.

We are holding our first oversight hearing in the Judiciary Committee of the 110th Congress. Many have joined me in expressing concern about the growing abuse of power within the executive branch. This President has tried to take unto himself what has been termed absolute authority on issues such as surveillance, privacy, torture, enemy combatants, and rendition.

Today we are taking up the very important item of Presidential signing statements, which supposedly give him the power to ignore duly enacted laws he has negotiated with the Congress and signed into law. All too often, the Administration has engaged in these practices under a veil of secrecy. This is a constitutional issue that no self-respecting Federal legislature should tolerate, and so today we announce that, out of this oversight hearing, we will begin an investigation of the specific use and abuse of Presidential signing statements.

In particular, I intend to ask the Administration to identify each statutory provision that they have not agreed with in signing statements and to specify precisely what they have done as a result.

Now, an example. If the President claims he is exempt from the McCain amendment ban on torture, we need to know whether and where he has permitted it. We want to know what he has done to carry out his claims to be exempt from many other laws such as oversight and reporting requirements under the PATRIOT Act, numerous affirmative action obligations and the requirement that the Government obtain a search warrant before opening the mail of American citizens.

So I am going to ask my staff, along with that of my friend the Ranking Member Lamar Smith's, staff—those two staffs—to meet with the Department of Justice and the White House so we can get to the bottom of this matter. And we will and we must do this, and we are not going to take "no" for an answer. We are a coequal branch of Government, and if our system of checks and balances is going to operate, it is imperative that we understand how the executive branch is enforcing or ignoring the bills that are signed into law.

Last summer the American Bar Association appointed a distinguished task force which carefully studied the problem. They found out as of last year President Bush had challenged no fewer than 800 legal provisions, far more than all previous Presidents combined. This is in a total of 148 signing statements that we have here for our Members' examination.

Republicans and Democrats alike have reached a unanimous conclusion which was endorsed by the entire American Bar Association House of Delegates: this use of signing statements is "contrary to the rule of law and our constitutional system of separation of powers."

Today, in an oversight hearing, we are here to explore that conclusion and then to take action. We are talking about a systematic extra-constitutional mode of conduct by the White House. The conduct threatens to deprive the American people of one of the basic rights of any democracy, the right to elect Representatives who determine what the law is, subject only to the President's veto. That does not mean having a President sign those laws but then say that he is free to carry them out or not as only he sees fit.

That concludes my opening statement. I am pleased now to recognize the distinguished Ranking Member from Texas, Lamar Smith, for his opening remarks.

You are recognized sir.

Mr. SMITH. Thank you, Mr. Chairman.

Members of Congress have a right to say what they think of a particular piece of legislation, and the President, too, has the right to say what he thinks about a particular piece of legislation. Whenever the views of a Member of Congress or the President conflict with how a Federal court interprets a piece of legislation, the courts will have the final say on what the law means. The fact is that courts have rarely mentioned Presidential signing statements, and when they have mentioned them, they cite them only when such statements support the interpretive view of the statute the court has already embraced.

The Supreme Court explicitly agreed with the Presidential signing statement for the first time in *United States v. Lovett.* In that case, the courts held that a provision of the Urgent Deficiency Appropriation Act of 1943 was unconstitutional, and noted that President Roosevelt had earlier reached the same conclusion in a signing statement.

Recently, lower courts have occasionally cited signing statements, but only as affirmations of their own interpretations of the statutes.

Presidential signing statements are a non-issue. Critics have launched a massive fishing expedition, but they have caught only the reddest of red herrings. To see why, one need look no further than the Supreme Court's decision just last year in *Hamdan v. Rumsfeld.* At the end of June 2006, that much-awaited Supreme Court decision completely ignored a Bush administration signing statement, asserting that the court lacked jurisdiction over the case.

So this hearing only consists of a critique of a sideshow that the courts themselves have barely glanced at. When a Presidential signing statement does not support what courts understand legislation to mean, the courts ignore the signing statement altogether as the Supreme Court did last year.

A Congressional Research Service report to Congress issued September 20th, 2006 concluded that, "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." The same report concluded that, "ultimately, it does not appear that the courts have relied on signing statements in any appreciably substantive fashion."

Opponents of the use of signing statements claim the President should veto bills if they contain any sections the President thinks are unconstitutional, and that if the President signs a bill, he has to implement the whole bill until a court decides he does not have to. But that would mean, for example, that the President would have to veto an entire bill that funds the military, and thereby deny the troops the support they deserve if the bill contained a single unconstitutional provision. In such instances, there is no reason the President should have to veto the whole bill rather than simply state the constitutional objections to one small portion of it.

If the President acts on his signing statement in an unconstitutional way, his position can be challenged in court, but the fact remains that this hearing is based entirely on a hypothetical, since

no one can cite a single instance in which President Bush has ever failed to implement a law.

This hearing apparently is motivated by the alarm some feel when a duly elected President says what he thinks a statute means through a Presidential signing statement, even when courts routinely ignore such statements or simply cite them when they agree with their own statutory interpretation. Yet the same critics have never expressed any alarm when the courts on their own cite foreign law to interpret domestic statutes in ways that are not supported by American voters and their duly elected Representatives.

Yet, this hearing focuses not on courts and judges, but rather on the President's simple opinion about the legislation he is deciding to sign. One has the distinct feeling that this is really a policy debate. If critics of signing statements agreed with the President on policy, we simply would not be here today.

Mr. Chairman, we have distinguished witnesses this morning, and I look forward to hearing from them and yield back the balance of my time.

Mr. CONYERS. Thank you, Mr. Smith.

I now recognize the Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Mr. Jerry Nadler of New York, for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, I think today's hearing is an important milestone. For too long, this Administration has gotten a pass when it comes to congressional oversight. Those days are over. I want to commend you, Mr. Chairman, for taking this early opportunity to resume the exercise of Congress' constitutional duty to act as a check on the executive branch.

It is a core function established by the framers of our Constitution to ensure that no President can exercise unfettered power. The question of signing statements is an important one. Article I, Section 7 of the Constitution provides the President with the following options when presented with a bill passed by Congress.

"If he approves, he shall sign it, but if not, he shall return it with its objections to that house at which it shall have originated." That strikes me as pretty clear.

The more critical concern I have about this President's signing statements is their actual content. His broad and often unfounded assertions of Presidential power and his repeated attempts to reinterpret laws passed by Congress against the obvious intent are the real dangers. The President gets a yea or nay. He does not get to rewrite the bill or to try to establish his own legislative history. Only the legislative branch makes legislative history; hence, the name.

I would hope that the courts would not be tempted to look to these statements as anything more than oratory. They have no significance in terms of understanding and interpreting the legislation. At most, some of these signing statements could be considered due warning from the President that he intends to violate a law he has just signed. That is something we and the American people should take very seriously.

Of course, we have more than just signing statements to demonstrate this Administration's contempt for the rule of law. It is

when the President acts on his declaration that the law means something other than what Congress intended that he goes from arrogance to lawlessness. In many cases, he has not even been forthright enough to let us know that he intends to violate the law. We have found out by reading the newspapers.

The President is not shy about publicly declaring that he is not bound by the rule of law. His repeated assertions, for example, that he does not need to obtain a warrant for the Foreign Intelligence Surveillance Court, despite the fact that the law specifically requires one, is just one outrageous example. The fact that the President authorized warrantless surveillance in violation of the law threatens our democracy.

I would also remind people that FISA is a criminal act and says that it is a felony for anyone under the color of law, meaning Government officials, to wiretap Americans in the United States except under the provisions of that law. And I would again remind people that the statute of limitations of that law runs considerably beyond the lifetime of this Administration.

I look forward to the testimony today, but I again want to thank Chairman Conyers for beginning his chairmanship with this important inquiry. It is an auspicious beginning to what I am confident will be a productive Congress.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you very much.

Finally, I recognize the Ranking Minority Member of the Subcommittee, Trent Franks of Arizona, for his opening remarks.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman and Members, given today's hearing focuses on the proper function of the Executive under the U.S. Constitution, it is appropriate that we look to the Constitution itself to be our guide.

Article II, Section 1 mandates that the President take a very specific oath of office, just as do Members of Congress and Federal judges, and the oath is as follows: "I do solemnly swear 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."

The constitutional system of checks and balances among the three branches of Government is fundamental to the American system of Government, and most of us learned how it works in basic high school civics class. So let us consider, if the Congress passes an unconstitutional law, as it has sometimes done in the past, according to even the Supreme Court jurisprudence, then what is the President to do? Can anyone seriously contend that the President has no choice but to enforce the unconstitutional law upon the people? Could that possibly be what the framers intended? And what of checks and balances? Are the people to be oppressed by an unconstitutional law unless it can be processed through the court system, or does the President have the ability to exercise his judgment as to the constitutionality of an act of Congress?

An honest reading of the Presidential oath allows us only one conclusion: that the President has a duty to the people to execute only that law which is constitutional. Conversely, he has a duty to protect the people from the enforcement of an unconstitutional law.

Indeed, in the Marbury decision, Chief Justice Marshall proclaimed, "A legislative act contrary to the Constitution is not law."

Presidential signing statements are valuable tools used since the early days of the Republic to explain the Executive's understanding of a statute and, at times, to enable the President to renounce his refusal to enforce a clearly unconstitutional statute. According to the Office of Legal Counsel under the Clinton administration, this practice is consistent with the views of the framers, and Presidential signing statements have been common in both the Bush and Clinton administrations, with Mr. Clinton issuing approximately 391 signing statements. And for obvious reasons, Presidential signing statements tend to be more common in times of war when the President must exercise his role as Commander in Chief in addition to his other roles.

Now, the Majority has stated in their preparatory memorandum the signing statements may be used to invite judicial review and to attempt to influence what a court sees when examining the legislative history. However, this statement is not proven out by our history. And I echo the thoughts of Ranking Member Lamar Smith when he makes clear that the courts have not substantively relied on Presidential signing statements to inform their decisions. Even Laurence Tribe has dismissed this supposed, "threat" of signing statements as nothing more than a flourish on the part of the Chief Executive.

Therefore, there seems to be no merit in the opposition's arguments, and one must beg the question of why we are devoting a hearing to this issue. If we are truly concerned about the courts' relying upon sources of law other than U.S. statutes, then we would immediately move our examination to a more genuine threat to the Constitution today, and that is the U.S. courts' increasing reliance upon foreign law, made by foreign rulers who are not elected for the people or by the people of the United States and who do not share our basic values.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you very much.

I invite the rest of our Members to submit their statements for the record.

Mr. ISSA. Mr. Chairman?

Mr. CONYERS. Who seeks recognition? Yes, Mr. Issa.

Mr. ISSA. A parliamentary inquiry.

Don't the rules allow us to make oral opening statements unless granted by unanimous consent?

Mr. CONYERS. No, sir. I am afraid——

Mr. ISSA. So you are cutting off the opportunity for opening statements to be on the record here in public hearing?

Mr. CONYERS. Well, I am not cutting them off. I am following the tradition for the last 40 years that I have been on the Committee.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. CONYERS. We have a distinguished panel of witnesses, and I am grateful that they are here this morning to help us consider this important subject.

The first witness is the Deputy Assistant Attorney General with the Office of Legal Counsel at the United States Department of Justice, Mr. John Elwood. He has previously held positions in the

Solicitor General's Office, the Criminal Division and the U.S. Attorney's Office in Virginia. He clerked for the late Judge Daniel Mahoney of the U.S. Courts of Appeal for the Second Circuit and for Associate Justice Anthony M. Kennedy.

Welcome, sir.

Then we have our former colleague, the Honorable Mickey Edwards, a former Member of Congress from Oklahoma, who now lectures at Princeton University's Woodrow Wilson School of Public and International Affairs and directs a program on political leadership for the Aspen Institute. He was a founding trustee of the Heritage Foundation as well as chairman of the American Conservative Union. Recently, he has served as a member of the American Bar Association's task force on signing statements.

Welcome, sir. Glad that you are back.

Following him, we have Ms. Karen Mathis, a partner in the Denver office of McElroy, Deutsch, Mulvaney & Carpenter, and the current president of the American Bar Association, one of the many leadership roles that she has held in the ABA during her professional career.

Welcome to the hearing.

Our fourth witness this morning will be Nicholas Rosenkranz, Associate Professor of Law at Georgetown University. Professor Rosenkranz clerked for Justice Anthony Kennedy and was Attorney Advisor in the Justice Department's Office of Legal Counsel. He also serves on the Council on Foreign Relations.

Welcome, sir.

Finally, we have Charles Ogletree of Harvard Law School, where he holds the Jesse Climenko Professorship. He is the founding executive director of the school's Charles Hamilton Houston Institute for Race and Justice. Professor Ogletree began his legal career here in the District of Columbia in the Public Defender Service.

Members of the panel, each of your written statements will be made part of the record in its entirety. I ask that you summarize your testimony in the usual 5 minutes or less. We have a timing light that will assist you in that endeavor.

Let us begin with Mr. Elwood.

Welcome.

TESTIMONY OF JOHN P. ELWOOD, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, UNITED STATES DEPARTMENT OF JUSTICE

Mr. ELWOOD. Thank you, Chairman Conyers, Ranking Member Smith and Members of the Committee. I appreciate the opportunity to appear today to discuss the use and legality of Presidential signing statements.

The subtitle of today's hearing asks whether the President's use of such statements poses a threat to checks and balances and the rule of law. The answer to that question, I think, is clearly "no" for three reasons.

First, such signing statements are traditional, dating back at least to 1821. Second, they are both lawful and appropriate. And third, far from being a threat to checks and balances, they are an essential part of a respectful constitutional dialogue——

Mr. NADLER. Mr. Chairman, would you ask the witness to speak a little closer to the microphone, please?

Mr. ELWOOD. I would be happy to. I am sorry about that. Certainly.

Third, far from being a threat to checks and balances, they are an essential part of a respectful constitutional dialogue among coequal branches of Government.

Let me be clear from the outset. Article I of the Constitution gives Congress exclusive legislative power, a clear and unequivocal mandate. These statements do not subvert the authority of Congress nor do they arrogate to the executive branch any authority with which it is not constitutionally entrusted.

Beginning in the early days of the Republic under Presidents Monroe and Jackson and continuing under Presidents Lincoln and Wilson, Presidents have long used signing statements to note constitutional issues raised by the law. The use of such constitutional signing statements has greatly increased in recent decades, and such statements have been issued by every President since Franklin Roosevelt. Traditionally, Presidents have used them to provide guidance to executive branch employees about new laws they must implement and to communicate the President's constitutional views to Members of Congress and to the public.

As this long tradition reflects, signing statements are not acts of Executive defiance of Congress, nor are they an indication that the President will adhere to the laws selectively as he wishes. While signing statements often seek to preserve the Executive's role in our system of checks and balances, the mere description of constitutional concerns about a provision does not imply that the law will not be enforced as written.

President Bush's signing statements are consistent with those of his predecessors and give voice to views expressed by Presidents of both parties, including Presidents Truman, Eisenhower, Carter, and Clinton. In fact, after a detailed study, the Congressional Research Service concluded that, "It is important to note that the substance of President Bush's signing statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton."

Professors Curtis Bradley of Duke Law School and Eric Posner of the University of Chicago noted that they were, "almost identical in wording," to President Clinton's statements.

Contrary to recent claims, the number of constitutional signing statements the President has issued is comparable to every President in a generation.

Second, this longstanding practice is clearly lawful, an exercise of the President's obligation under Article II to take care that the laws be faithfully executed and to preserve, protect and defend the Constitution. In executing new laws, the President must interpret their meaning both standing alone and in light of supreme law, the Constitution. As the Supreme Court held in *Boucher v. Synar,* "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of execution of the law." Moreover, the Congressional Research Service recently concluded that, "No constitutional or legal deficiencies adhere to the issuance of such statements."

During the Clinton administration, Assistant Attorney General Walter Dellinger noted that such statements were, "legitimate and defensible." And Harvard Law School Professor Laurence Tribe recently said that such statements are, "constitutionally unobjectionable," a judgment shared by Professors Bradley and Posner.

Third, far from being a threat to the rule of law, these statements promote comity by publicly informing coequal branches of Government of the President's constitutional views on the execution of new laws. Such statements do not seek to alter the constitutional balance among the branches nor could they under the Constitution. The legislative process and indeed Government as a whole would suffer if the President withheld his views about constitutional concerns until the moment of enforcement or if his only option to express those views were to veto needed legislation reflecting months or years of work because of what are sometimes minor and redressable issues.

Signing statements seek to promote a dialogue between the branches of Government to ensure that the President faithfully executes the law while respecting Congress' exclusive authority to make it.

I thank the Committee for allowing me to testify, and I would be happy to answer any questions you may have.

Mr. CONYERS. Thank you, sir.

[The prepared statement of Mr. Elwood follows:]

PREPARED STATEMENT OF JOHN P. ELWOOD

Department of Justice

STATEMENT

OF

JOHN P. ELWOOD
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

PRESIDENTIAL SIGNING STATEMENTS

PRESENTED ON

JANUARY 31, 2007

STATEMENT OF
JOHN P. ELWOOD
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
ON
PRESIDENTIAL SIGNING STATEMENTS

January 31, 2007

Mr. Chairman, Ranking Member Smith, 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)." *Id.* at 132.

President Bush, like many of his predecessors dating back to 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 below.) As such, President Bush's signing statements are indistinguishable from those issued by past

Presidents. As the Congressional Research Service concluded in its recent comprehensive study, "it is important to note that the substance of [President Bush's] signing 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, at CRS-12 (Sept. 20, 2006); *accord* Curtis A. Bradley & Eric A. 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."). 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.

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 coordinate Branches of Government, 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 problematic provision without deviating from the text of a statute or failing to abide by its provisions. In the Appointments Clause context discussed below, Congress sometimes attempts to place undue restrictions on the pool from which the President may select appointment candidates. As a mandatory directive to the President, such restrictions violate the Appointments Clause, U.S. Const., art. II, § 2, as each of the past four Presidents has noted in 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 abide by them as a matter of policy. And it is commonly the case that Presidents do abide by such appointment provisions.

Similarly, a surprising number of newly enacted statutes seek 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. 1, § 7. *See INS v. Chadha*, 462 U.S. 919, 958 (1983). More than 20 years after that clearly controlling Supreme Court decision, unconstitutional legislative veto provisions remain so common that President Bush has had to raise the issue in approximately 55 of his 126 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 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*.").

When constitutionally problematic provisions such as these are placed in otherwise constitutional bills, signing statements serve the appropriate function of reminding Congress and members of the Executive Branch of the deficiency. Again, however, President Bush and past Presidents to our knowledge have not ignored these provisions, but have instead done their utmost 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.

The charge that constitutional signing statements are a "power grab" and encroach on Congress's power to write the law is fundamentally flawed. Signing statements do not alter the constitutional balance between the President and Congress. That is established by the Constitution itself, and neither the President nor Congress can alter it through their actions. Signing statements do not expand the President's authority: The President cannot adopt the provisions he prefers and ignore those he does not; he must execute the law as the Constitution requires. Nor do signing statements diminish congressional power. Congress has no power to enact unconstitutional laws, and that is true whether the President issues a constitutional signing statement or not.

I.

Signing statements have been an integral part of the constitutional dialogue between the Branches of Government since the early days of the Republic. 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* 698 (James D. Richardson ed.,1897). 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. By our count, President Reagan issued constitutional signing statements with respect to 80 laws; George H.W. Bush, 114; Clinton, 80. The numbers in the academic literature are comparable or even higher. By our count, President Bush has issued constitutional signing statements with respect to 126 bills as of January 25 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, 23 in 2006, and 1 thus far this year, totaling only approximately 9 percent of the 498 public laws passed by the 108th Congress and the 482 public laws passed by the 109th Congress.

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 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 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 . . . .").

In the past year alone, many prominent commentators, including respected scholars and former officials of the Clinton Administration's Justice Department, have said that the use of signing statements is a legitimate presidential power. For example, Professors Tribe, Bradley, and Posner have acknowledged the appropriateness of constitutional signing statements. *See* Laurence H. Tribe, "'Signing statements' are a phantom target," *Boston Globe* (Aug. 9, 2006); Curtis A. Bradley & Eric A. Posner, "Signing Statements: It's a President's Right," *Boston Globe* (Aug. 3, 2006); Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, Const. Commentary (forthcoming). Professor Dellinger has done the same, reiterating the views that he expressed as Assistant Attorney General during the Clinton Administration (and that I have quoted above). Walter Dellinger, "A Slip of the Pen," *N.Y. Times*, July 31, 2006. And the Congressional Research Service concluded that "in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves." *Presidential Signing Statements* at CRS-1. These analyses by commentators who span the ideological spectrum represent the mainstream opinion among informed constitutional scholars.

I am aware that the American Bar Association issued a report last year that reached a contrary conclusion. *See* American Bar Association, *Report of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine* (Aug. 2006). We respectfully disagree with the analysis in that report, which suggests that a President has no choice but to enforce a clearly unconstitutional provision of law until the provision is struck down by a court, and that a President has no choice but to veto a bill if even a minor provision of an omnibus bill violates the Constitution in some applications. As noted, scholars of many different viewpoints share our disagreement with the report's constitutional analysis.

To be sure, people may fairly disagree with the language in particular signing statements, because there is honest disagreement in many instances about what the Constitution requires. But 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 ("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 certain unconstitutional applications. It is more sensible, however, to sign 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 a candid 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 such 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 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. Three additional important areas that have elicited comment from Presidents are the protection of confidential national security information, the preservation of the Executive's foreign affairs power and position as Commander in Chief, and the preservation of the President's status as head of a unitary Executive Branch.

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 in approximately 67 of his 126 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) ("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) ("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) ("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." 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 in 55 of his 126 constitutional signing statements. Again, President Bush followed in the footsteps of prior Presidents, including President Clinton, in raising this concern in 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) ("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 those specified in the Constitution with the power to appoint officers. By our count, President Bush raised this concern in 25 of his 126 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 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 in approximately 63 of his 126 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) ("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 Congress did not have the authority to direct the President on the conduct of foreign affairs) (citation omitted); *Statement on Signing the 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 many 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) ("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."); *Statement on Signing the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 1 Pub. Papers of William J. Clinton 433, 434 (Mar. 12, 1996) ("Consistent with the Constitution, I interpret the Act as not derogating from the President's authority to conduct foreign policy. . . . While I support the underlying intent of these sections, the President's constitutional authority over foreign policy necessarily entails discretion over these matters. Accordingly, I will construe these provisions to [b]e precatory.").

Unitary Executive. Some critics have focused in particular on signing statements that make reference to the President's authority to supervise the "unitary executive." Although the phrase has been used by critics to mean many things in recent months, at bottom, the core idea of a "unitary executive" is that, because "[t]he executive power shall be vested in [the] President" under the Constitution, U.S. Const., art. II, § 1, the President has broad authority to direct the exercise of discretion by officials within the Executive Branch. 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." Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 Iowa L. Rev. 601, 608, 730 (2005).

President Bush's statements that he intends to construe particular statutory provisions consistent with his constitutional obligation to "supervise the unitary Executive Branch" are indistinguishable from similar statements made by past Presidents of both parties. 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 (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 (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).

Similarly, during the Carter Administration, the Justice Department published a legal opinion stating that "[t]he ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their 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." *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). The specific phrasing used in these signing statements is not unique, and indeed employs language that was already well settled by the mid-Nineteenth Century. For example, Attorney General Cushing wrote in an 1854 opinion that the "settled constitutional theory" was that "executive discretion exists, and that judgment is continually to be exercised, yet required unity of executive action, and, of course, unity of executive decision." *Offices and Duties of Attorney General*, 6 Op. Att'y Gen. 326 (1854). These statements explaining the President's authority 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 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). More recently, the Court has explained 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).

III.

Until recently, every scholarly discussion of signing statements of which we are aware simply counted the number of bills about which a President had made constitutional signing statements. Under that traditional measure, the number of signing statements President Bush has issued is, as I have just explained, comparable to the number issued by Presidents Reagan, George H.W. Bush, and Clinton.

Recently, persons critical of the President's use of signing statements have adopted the novel measure of counting the number of *individual provisions* referenced in signing statements. We believe that is a misleading statistic, because President Bush's signing statements tend to be more specific in identifying provisions than his predecessors' signing statements. President Clinton, for example, routinely referred in signing statements to "several provisions" or "a number of provisions" that raised constitutional concerns without enumerating the particular provisions in question. *See, e.g.*, *Statement on Signing the Consolidated Appropriations Act, FY 2001*, 3 Pub. Papers of William J. Clinton 2770, 2776-77 (Dec. 21, 2000) ("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*." "*Several provisions* of the Act also raise concerns under the Recommendations Clause. These provisions purport to require a Cabinet Secretary or other Administration official to make recommendations to Congress on changes in law. To the extent that *those provisions* would require Administration officials to provide Congress with policy recommendations or draft legislation, I direct these officials to treat any such requirements as precatory.") (emphasis added); *Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000*, 2 Pub. Papers of William J. Clinton 2156, 2160 (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 would be inconsistent with my constitutional authority"; "This legislation includes *a number of provisions* in the various Acts incorporated in it 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.") (emphasis added). If, as the CRS and many scholars have indicated, the substance of the President's signing statements is unobjectionable, it is no fault that those statements specifically identify the provisions at issue. Indeed, doing so tends to promote the constitutional dialogue between the branches.

* * * * *

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.

Mr. CONYERS. The Honorable Mickey Edwards, welcome back here.

TESTIMONY OF THE HONORABLE MICKEY EDWARDS, FORMER MEMBER OF CONGRESS FROM THE STATE OF OKLAHOMA, ASPEN INSTITUTE

Mr. EDWARDS. Thank you, Mr. Chairman, Mr. Smith, Members of the Committee. Thank you for having me back. It is a pleasure to see so many old friends here.

I think it is important to establish one thing at the outset. This is not about signing statements as we have known them in the past. Presidents typically accompany their signing of legislation with some comments expressing an opinion about the bills they have just signed into law. The issue is not whether or not Presidents have an equal right to be heard. It is not about whether or not the courts should take a Presidential opinion into account when considering the intent of a law.

The question is far more fundamental and goes to the heart of what the Congress of the United States is all about. The question is whether or not the President of the United States is above the law, because the moment he signs the legislation that you have presented to him, it is not merely a proposal, not a bill, not a statute; it is the law, and it is binding upon every citizen of the United States, whether a street sweeper or the President.

The powers of the President are clearly delineated in the Constitution. No President is required to approve of an act of Congress. No President is required to sign an act of Congress into law. He may sign it, making it law, but he may refuse to sign it. He may veto it. He may refuse, to have nothing to do with that at all. But those are his only choices.

Under Article I, Section 7, a President who finds a piece of a law unconstitutional has the authority, the right, the obligation under the Constitution to veto it, and then the Congress can reconsider what it wants to do about it at that point. Presidents, like the rest of us, are free to say whatever they want, whenever they want, but he may not choose whether or not to be bound by the law.

Further, there is a view of the Presidency articulated by the current President which considers the executive branch to be a single unit under the sole direction of the President, and according to this theory of the unitary Executive, the legislative branch of Government may not instruct executive branch agencies in the performance of their duties. So that when a President declares that he is not bound by the bills he signs into law, he is saying in effect that none of the Executive agencies are bound either.

The Congress, you all, may require a Federal agency to report on some matter, but at best that requirement simply becomes a suggestion and probably one that will not be taken too seriously.

It has been argued that some of the concerns that a few of us have expressed are exaggerated. Defenders of these Presidential assertions claim they know of no instance in which the President, having declared himself not bound by a law, has nonetheless refused to comply with it. There are two answers to that.

First, if agencies refuse to inform the Congress, as the Attorney General just did in regard to the Administration's agreements with

the FISA Court on Electronic Surveillance, how can the Congress or the public know whether or not the law is being complied with?

Second, and more important, any Presidential assertion of the right to ignore the law must be challenged or it will become precedent. Future Presidents may—Mr. Smith, I agree with most of this President's policies. I may not agree with the policies of the next President. And future Presidents can rely on that unchallenged assertion to disobey future laws; and if that happens, the Congress of the United States will become irrelevant and the basic structure of American Government will have been fundamentally changed. The voice of the people, as expressed by their Representatives in Congress, will have been considerably diminished.

One final point. There is much discussion about the authority that is vested in the Congress or the powers vested in Congress or the rights of the Congress, but this is not a question of authority or powers or rights. It is a question of duty and responsibility. Every Member of Congress took an oath, and I stood beside some of you when you took that oath and I took that oath. Every Member of Congress takes an oath to fulfill very specific constitutional obligations. Under that Constitution, it is the obligation of the Congress to determine what shall be law and what shall not be law. It is the obligation of Congress to act as a completely separate, a completely independent, and a completely equal branch of Government regardless of whether the President is of your party or another party. It is your job to determine the law and to ensure that the law is obeyed.

This Congress must block any attempt by any President of any party to treat the people's Representatives with contempt. This Congress must use its considerable powers to withhold appropriations, to conduct hearings, to compel testimony under oath, to grant itself standing before the courts to ensure that the United States does not devolve into a system the founders feared and worked so hard and so long to avoid.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you, Mr. Edwards. You have become the first person under my chairmanship to have exceeded your time, by 7 seconds.

Mr. EDWARDS. Ah. Well, I am sorry, Mr. Chairman.

[The prepared statement of Mr. Edwards follows:]

PREPARED STATEMENT OF THE HONORABLE MICKEY EDWARDS, FORMER MEMBER OF CONGRESS

Mr. Chairman, Mr. Smith, Members of the Committee:

Thank you for inviting me. It is good to see so many old friends here.

I think it's important to establish one very important point at the outset. This is not really about presidential "signing statements" as most of us have known them. Presidents typically accompany their signing of legislation with some comments, written or spoken, expressing an opinion about the bills they've just signed into law. The issue here is not whether or not Presidents have an equal right to be heard, and it's not really about whether or not the Courts should take a presidential opinion into account when considering the intent of a law, although I would think that to be a very iffy proposition and would hope the Courts would continue to think so, too.

The question here is much more fundamental than those. The question is whether or not the President of the United States is above the law. Because the moment he signs the legislation that is presented to him, it is not merely a proposal; it is the law, and it is binding upon every citizen, whether a taxi driver, a street sweeper,

or the President of the United States, because when it comes to the law, we are all equal and we are all equally bound.

The powers of the President are clearly delineated in the Constitution. No President is required to approve of an act of Congress. No President is required to sign an act of Congress into law. He may sign it, making it law, but he may also refuse to sign it, to veto it, to refuse to have anything to do with making it the law. But those are his *only* choices, sign it (and be bound by it) or veto it, and hope his veto will not be overridden. The objection I would put before you is not to the use of presidential "signing statements"—Presidents, like the rest of us, are free to say whatever they want whenever they want—but to assertions that the President may choose whether or not to abide by the law.

Further, there is a view of the presidency, articulated by the current holder of that office, which considers the entirety of the Executive Branch of Government to be a single unit under the sole direction of the President. According to this theory of the "unitary executive", the legislative branch of government may not instruct executive branch agencies in the performance of their duties. Thus, when a President declares that he is not bound by the bills he signs into law, he is saying, in effect, that none of the executive agencies are bound, either. The Congress may require a federal agency to report on some matter, but at best that requirement would become simply a suggestion, and probably one that is not taken too seriously.

It has been argued that the concerns some of us have expressed are exaggerated. Defenders of these presidential assertions claim that they know of no instance in which the President, having declared himself not bound by a law, has nonetheless refused to comply with it. To this there are two responses.

The first is simple enough: if agencies refuse to inform the Congress—as, indeed, the Attorney General has recently refused to do in regard to the Administration's purported agreements with the FISA court on the electronic surveillance of American citizens—how can the Congress or the public know whether or not the law is being complied with?

But the second is even more important: a presidential assertion of the right to ignore the law must be challenged, and challenged forcefully, or it will become precedent. If the current President asserts that extra-constitutional authority, even though he may not himself fail to comply with the law, future Presidents may rely on that unchallenged assertion to disobey future laws. If that happens, the Congress of the United States will become irrelevant and the basic structure of American government will have been fundamentally changed. The voice of the people, as expressed by their representatives in Congress, will have been considerably diminished.

One final point: there is much discussion about the authority vested in the Congress or the powers vested in the Congress or the rights of the Congress. But this is not a question of authority or powers or rights: it is a question of duty and of responsibility. Every member of Congress took an oath to fulfill very specific constitutional obligations. Under that Constitution, it is the obligation of the Congress to determine what shall be law and what shall not. It is the obligation of the Congress to act as a completely separate, completely independent, and completely equal branch of government, determining the law and ensuring that the law is obeyed.

This Congress must—*must*—block any attempt by any President to treat the peoples' representatives with contempt. This Congress must use its considerable powers—to withhold appropriations, to conduct hearings and compel testimony under oath, to grant itself standing before the Courts—to ensure that the United States does not devolve into the system the Founders feared and worked so hard and so long to avoid. Presidential signing statements may not sound like such a big deal, but they are declarations of the right of a President to be above the law, and that is a path that, once taken, will prove ultimately fatal to our democracy.

Mr. CONYERS. Ms. Mathis.

TESTIMONY OF KAREN J. MATHIS, PRESIDENT, AMERICAN BAR ASSOCIATION

Ms. MATHIS. Good morning, Mr. Chairman, Ranking Member Smith, and Members of the Committee.

My name, as you know, is Karen Mathis. I am the president of the American Bar Association. I practice law in Denver, Colorado. It is a great honor to be here with you today and to represent the policy of our 413,000 members.

The ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine was appointed last year to examine the changing role of Presidential signing statements in which United States Presidents articulate their views of provisions in newly enacted laws and to consider such statements in light of the Constitution and the law of the land.

Members of the task force were composed of both conservatives and liberals—Republicans and Democrats—individuals who have had experience in Government in the legislative and executive branch, the judiciary and in constitutional law. A list of those committee members is appended to my written testimony.

At the ABA's August 2006 meeting, our House of Delegates adopted the unanimous recommendations of that task force as a comprehensive policy reflecting the views of the ABA on the use and potential misuse of Presidential signing statements. Specifically, the policy, "opposes as contrary to the rule of law and our constitutional system of separation of powers the misuse of Presidential signing statements," that claim in those signing statements the authority or, I should say, an intention to disregard or decline to enforce all or part of a law the President has signed or to interpret such law in a manner inconsistent with the clear intent of the Congress.

In reaching this conclusion, the task force expressed concern that the practice of issuing Presidential signing statements that raise challenges to provisions of law has grown more and more common over the course of the last 25 years. The potential for misuse in the issuance of Presidential signing statements has reached a point where it poses a real threat to our systems of checks and balances and the rule of law. The Founding Fathers set forth in the Constitution a thoughtful process for the enactment of laws as part of the delicate system of checks and balances. The framers required that the President either sign or veto a bill enacted by Congress in its entirety. Presidential signing statements that express an intent to disregard or that effectively rewrite laws are inconsistent with this single, finely wrought, and exhaustively considered process.

Any attempt to refuse to enforce provisions of duly enacted laws or to reinterpret them contrary to their clear meaning can be viewed as an attempt to achieve a line item veto by other means. If Presidential signing statements nullify a provision of the law without following constitutionally prescribed procedures, that President is usurping the power of the legislative branch by denying Congress the right to override a veto of that law. In some instances, a signing statement that declines enforcement of a provision on constitutional grounds would also abrogate the power of the judicial branch to make its own determination of constitutionality.

ABA policy goes beyond raising concerns about Presidential signing statements, and it presents practical recommendations designed to improve transparency in the process and to resolve any separation of powers issues that may accompany the use of Presidential signing statements in the manner I have discussed.

These recommendations are directed to the practices of various Presidents, and they represent a call to all Presidents to fully respect our constitutional system of separation of powers. These rec-

ommendations urge the President to, number one, communicate concerns about the constitutionality of any pending bills in Congress before their passage and, number two, to confine the content of signing statements to views regarding the meaning, the purpose, and the significance of bills and to veto a bill that he believes is unconstitutional.

Our four recommendations also urge Congress to enact legislation that, number one, requires the President to submit a report to Congress upon the issuance of signing statements that express the intent to disregard or decline to enforce a law that the President has signed, including an explanation of those reasons for taking such a position, which report will be made available in a database available to the public.

The last is to enable the Congress, the President, or other individuals to seek appropriate judicial review when a President has discussed and signed a signing statement disregarding or declining to observe a law.

We hope these recommendations are of use to you, Mr. Chair, and to your Committee as well as to Congress and the Executive both. Thank you.

Mr. CONYERS. Thank you so much.

[The prepared statement of Ms. Mathis follows:]

PREPARED STATEMENT OF KAREN J. MATHIS

STATEMENT OF

KAREN J. MATHIS

PRESIDENT OF THE AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY

of the

U.S. HOUSE OF REPRESENTATIVES

concerning

PRESIDENTIAL SIGNING STATEMENTS

JANUARY 31, 2007

Good morning, Mr. Chairman, Ranking Member Smith and Members of the Committee.

My name is Karen J. Mathis, I am the President of the American Bar Association and a practicing attorney in Denver, Colorado. Thank you for the opportunity to testify before you today on behalf of the ABA and its more than 413,000 members.

The ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine was appointed in June 2006 to examine the changing role of presidential signing statements, in which U.S. presidents articulate their views of provisions in newly enacted laws and to consider such statements in light of the Constitution and the law of the land. The Task Force consists of individuals with diverse ideological backgrounds including both conservatives and liberals, Republicans and Democrats, all of whom have substantial experience in government, the judiciary, and constitutional law. A list of the committee's members is appended to my testimony.

At the ABA's Annual Meeting last year, the House of Delegates adopted the unanimous recommendations of the Task Force as a comprehensive policy reflecting the views of the ABA on the use and potential misuse of presidential signing statements.

Specifically, the policy "opposes, as contrary to the rule of law and our constitutional system of separation of powers, the misuse of presidential signing statements" that claim the authority or state an "intention to disregard or decline to enforce all or part of a law the president has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress." In reaching this conclusion, the Task Force expressed concern that the practice of issuing presidential signing

statements that raise challenges to provisions of law has grown more and more serious over the course of the last 25 years.

Historically, presidents have used signings statements since President Monroe was in office. But what was once a rare and occasional use of signing statements to state objections to laws a president believed to be unconstitutional has, in recent years, become a more frequent occurrence and has expanded in scope. Recently, a controversial presidential signing statement was attached by the current administration to the Detainee Treatment Act, which cited the President's Commander in Chief authority to waive the requirements of the McCain amendment forbidding any U.S. officials to use torture or cruel, inhuman, or degrading treatment on prisoners if necessary to prevent terrorist attacks.

Another example of the expanded use of presidential signing statements is when President Clinton took aim at the Government Printing Office's attempts to control Executive Branch printing through a provision that "no funds appropriated may be expended for procurement of any printing of government publications unless through the GPO" in a 1995 appropriations bill. President Clinton instructed his subordinates to disregard the provision, but his position was never put to the test.

President George H.W. Bush also expanded the scope of signing statements by first arranging to have colloquies inserted into the congressional debates and then in signing statements relied on those colloquies to interpret statutory provisions despite stronger legislative evidence in favor of contrary interpretation. The first case involved a foreign affairs appropriations bill in which the Congress had forbidden sale of arms to a foreign government to further a foreign policy objective of the United States which the United States could not advance directly. Stating first that he intended to construe "any constitutionally doubtful provisions in accordance with the requirements of the Constitution," President Bush Senior said he would restrict the scope of the ban to the kind of "*quid pro quo*" exchange discussed in a specific colloquy his administration had arranged with congressional allies rather

than credit the broader range of transactions clearly contemplated by the textual definition which included deals for arms "in exchange for" furthering of a U.S. objective. "My decision to sign this bill," he said in the statement, "is predicated on these understandings" of the relevant section, referring to the colloquy.

The potential for misuse in the issuance of presidential signing statements has reached the point where it poses a real threat to our system of checks and balances and the rule of law.

The Founding Fathers set forth in the Constitution a thoughtful process for the enactment of laws as part of the delicate system of checks and balances. The Framers required a president to either sign or veto a bill enacted by Congress in its entirety. Presidential signing statements that express the intent to disregard or effectively rewrite laws are inconsistent with this single, finely wrought, and exhaustively considered procedure.

Any attempt to refuse to enforce provisions of duly-enacted laws or to reinterpret them contrary to their clear meaning can be viewed as an attempt to achieve a line-item veto by other means. As you know, the U.S. Supreme Court held the line-item veto unconstitutional in *Clinton v. New York*, 524 U.S.C. 417(1998).

If a president issues a signing statement that nullifies a provision of a law without following constitutionally-proscribed procedures, he or she is usurping the power of the Legislative Branch by denying Congress the opportunity to override a veto of that law. Additionally, in some instances, a signing statement that declines enforcement of a provision on constitutional grounds could abrogate the power of the Judicial Branch to make its own determination of constitutionality.

The ABA's policy goes beyond raising concerns about presidential signing statements and presents practical recommendations designed to improve transparency in the process and resolve any separation of powers issues that may accompany the use of presidential signing statements. The recommendations are

directed to the practices of various presidents and they represent a call not only to this President but to all his successors to fully respect the rule of law and our constitutional system of separation of powers.

These recommendations urge a president to:

- **Communicate concerns about the constitutionality of any pending bills to Congress before passage, and to**

- **Confine the content of signing statements to views regarding the meaning, purpose and significance of bills, and to veto a bill that he or she believes is unconstitutional.**

The recommendations also urge the Congress to enact legislation that:

- **Requires a president to submit a report to Congress upon the issuance of statements that express the intent to disregard or decline to enforce a law the president has signed including an explanation of the reasons for taking that position, which report shall be made available on a database accessible to the public.**

Furthermore, the ABA recommendations urge the Congress to enact legislation that:

- **Enables the President, Congress and other entities or individuals to seek appropriate judicial review when a president expresses the intent in a signing statement to disregard or decline to enforce a law he or she has signed.**

Such legislation may be necessary to overcome the barriers to judicial review such as standing and ripeness issues that have historically arisen in this context.

Today, national security issues dominate the agenda; and, because of the shared anti-terrorism responsibilities of the Executive and Legislative branches

under the Constitution, it is essential that our system of checks and balances be preserved. The involvement of an independent judiciary to resolve any disputes between the branches is a critical part of this process.

We must work together to resolve the unanswered questions surrounding the purpose and use of presidential signing statements to safeguard the separation of powers among the three branches of government. James Madison said it best: "The preservation of liberty requires the three great departments of power should be separate and distinct."

We hope that the recommendations adopted by the ABA provide thoughtful guidance for the Congress and for all future presidents on how to achieve this goal.

Thank you for the opportunity to appear before the Committee and present the ABA's views on this important subject. I look forward to your questions.

APPENDIX
ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine
Biographies

Chair

Neal R. Sonnett
Mr. Sonnett is a former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida. He heads his own Miami law firm concentrating on the defense of corporate, white collar and complex criminal cases throughout the United States. He has been profiled by the National Law Journal as one of the "Nation's Top White Collar Criminal Defense Lawyers," was selected three times by that publication as one of the "100 Most Influential Lawyers In America," and has been included in all 20 editions of The Best Lawyers in America.

Mr. Sonnett is a former Chair of the ABA Criminal Justice Section, which he now represents in the ABA House of Delegates, and a former President of the National Association of Criminal Defense Lawyers. He is the incoming President of the American Judicature Society and Vice-Chair of the ABA Section of Individual Rights and Responsibilities. He serves as Chair of the ABA Task Force on Treatment of Enemy Combatants, Chair of the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism, and serves as the ABA's official Observer for the Guantanamo military commission trials. He is also a member of the ABA Task Force on the Attorney-Client Privilege, the Task Force on Gatekeeper Regulation and the Profession, and he served on the ABA Justice Kennedy Commission. He is a Life Fellow of the American Bar Foundation and serves on the ALI-ABA Advisory Panel on Criminal Law and on the Editorial Advisory Boards of The National Law Journal and Money Laundering Alert.

Mr. Sonnett has received the ADL Jurisprudence Award and the Florida Bar Foundation Medal Of Honor for his "dedicated service in improving the administration of the criminal justice system and in protecting individual rights precious to our American Constitutional form of government." He has also received the highest awards of the ABA Criminal Justice Section, the National Association of Criminal Defense Lawyers, The Florida Bar Criminal Law Section, the Florida Association of Criminal Defense Lawyers (Miami), and the ACLU of Miami.

Members

Mark D. Agrast
Mark Agrast is a Senior Fellow at the Center for American Progress in Washington, D.C., here he oversees programs related to the Constitution, the rule of law, and the history of American progressive thought.

Before joining the Center for American Progress, Mr. Agrast was Counsel and Legislative Director to Congressman William D. Delahunt of Massachusetts (1997-2003). He previously served as a top aide to Massachusetts Congressman Gerry E. Studds (1992-97) and practiced international law with the Washington office of Jones, Day, Reavis & Pogue (1985-91). During his years on Capitol Hill, Mr. Agrast played a prominent role in shaping laws on civil and constitutional rights, terrorism and civil liberties, criminal justice, patent and copyright law, antitrust, and other matters within the jurisdiction of the House Committee on the Judiciary. He was also responsible for legal issues within the jurisdiction of the House International Relations Committee, including the implementation of international agreements on human rights, intercountry adoption, and the protection of intellectual property rights.

Mr. Agrast is a member of the Board of Governors of the American Bar Association and a Fellow of the American Bar Foundation. A past Chair of the ABA Section of Individual Rights and Responsibilities, he currently chairs the ABA's Commission on the Renaissance of Idealism in the Legal Profession.

Hon. Mickey Edwards
Mickey Edwards is a lecturer at Princeton University's Woodrow Wilson School of public and International Affairs and the Executive Director of the Aspen Institute-Rodel Fellowships in Public Leadership. He was a Republican member of Congress from Oklahoma for 16 years (1977-92), during which time he was a member of the House Republican leadership and served on the House Budget and Appropriations committees.

He 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. He has taught at Harvard, Georgetown, and Princeton universities and has chaired various task forces for the Constitution Project, the Brookings Institution, and the Council on Foreign Relations. In addition, he is currently an advisor to the US Department of State and a member of the Princeton Project on National Security.

Bruce Fein
Bruce Fein graduated from Harvard Law School with honors in 1972. After a coveted federal judicial clerkship, he joined the U.S. Department of Justice where he served as assistant director of the Office of Legal Policy, legal adviser to the assistant attorney general for antitrust, and the associate deputy attorney general. Mr. Fein then was appointed general counsel of the Federal Communications Commission, followed by an appointment as research director for the Joint Congressional Committee on Covert Arms Sales to Iran.

He has authored several volumes on the United States Supreme Court, the United States Constitution, and international law, and has assisted two dozen countries in constitutional revision. He has been an adjunct scholar with the American Enterprise Institute, a resident scholar at the Heritage Foundation, a lecturer at the Brookings Institute, and an adjunct professor at George Washington University.

Mr. Fein has been executive editor of World Intelligence Review, a periodical devoted to national security and intelligence issues. At present, he writes a weekly column for The Washington Times devoted to legal and international affairs, guest columns for numerous other newspapers, and articles for professional and lay journals. He is invited to testify frequently before Congress and administrative agencies by both Democrats and Republicans. He appears regularly on national broadcast, cable, and radio programs as an expert in foreign affairs, international and constitutional law, telecommunications, terrorism, national security, and related subjects.

Harold Hongju Koh
Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, is one of the country's leading experts on international law, international human rights, national security law and international economic law. He has received more than twenty awards for his human rights work.

A former Assistant Secretary of State, Dean Koh advised former Secretary Albright on U.S. policy on democracy, human rights, labor, the rule of law, and religious freedom. Harold clerked for both Judge Malcolm Richard Wilkey of the U.S. Court of Appeals for the D.C. Circuit and Justice Harry A. Blackmun of the United States Supreme Court. He worked in private practice in Washington, D.C. and as an attorney at the Office of Legal Counsel at the U.S. Department of Justice.

Dean Koh earned a B.A. from Harvard University in 1975, an Honours B.A. from Magdalen College, Oxford University in 1977, and a J.D. from Harvard Law School in 1980. He has been a Visiting Fellow and Lecturer at Magdalen and All Souls Colleges, Oxford University, and has taught at The Hague Academy of International Law, the University of Toronto, and the George Washington University National Law Center.

Charles J. Ogletree
Charles J. Ogletree is the Jesse Climenko Professor of Law at Harvard Law School and Founding and Executive Director of Harvard's Charles Hamilton Houston Institute for Race & Justice. He 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.

Stephen A. Saltzburg
Professor Saltzburg joined the faculty of the George Washington University Law School in 1990. Before that, he had taught at the University of Virginia School of Law since 1972, and was named the first incumbent of the Class of 1962 Endowed Chair there. In

1996, he founded and began directing the master's program in Litigation and Dispute Resolution at GW.

Professor Saltzburg served as Reporter for and then as a member of the Advisory Committee on the Federal Rules of Criminal Procedure and as a member of the Advisory Committee on the Federal Rules of Evidence. He has mediated a wide variety of disputes involving public agencies as well as private litigants; has served as a sole arbitrator, panel Chair, and panel member in domestic arbitrations; and has served as an arbitrator for the International Chamber of Commerce.

Professor Saltzburg's public service includes positions as Associate Independent Counsel in the Iran-Contra investigation, Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice, the Attorney General's ex-officio representative on the U.S. Sentencing Commission, and as director of the Tax Refund Fraud Task Force, appointed by the Secretary of the Treasury. He currently serves on the Council of the ABA Criminal Justice Section and as its Vice Chair for Planning. He was appointed to the ABA Task Force on Terrorism and the Law and to the Task Force on Gatekeeper Regulation and the Profession in 2001 and to the ABA Task Force on Treatment of Enemy Combatants in 2002.

Hon. William S. Sessions
William S. Sessions has had a distinguished career in public service, as Chief of the Government Operations Section of the Department of Justice, United States Attorney for the Western District of Texas, United States District Judge for the Western District of Texas, Chief Judge of that court, and as the Director of the Federal Bureau of Investigation. He received the 2002 Price Daniel Distinguished Public Service Award and has been honored by Baylor University Law School as the 1988 Lawyer of the Year.

Judge Sessions joined Holland & Knight LLP in 2000 and is a partner engaged primarily in Alternative Dispute Resolution procedures. He holds the highest rating assigned by Martindale-Hubbell and is listed in The Best Lawyers In America for 2005 & 2006 for Alternative Dispute Resolution. He serves as an arbitrator and mediator for the American Arbitration Association, the International Center for Dispute Resolution and for the CPR Institute of Dispute Resolution.

Since June 2002, Judge Sessions has served on The Governor's Anti-Crime Commission and as the Vice Chair of the Governor's Task Force on Homeland Security for the State of Texas. He is a past President of the Waco-McLennan County Bar Association, the Federal Bar Association of San Antonio, the District Judges Association of the Fifth Circuit, and he was a member of the Board of Directors of the Federal Judicial Center. He served as the initial Chair of the ABA Committee on Independence of the Judiciary, honorary co-Chair of the ABA Commission on the 21st Century Judiciary, and as a member of the ABA Commission on Civic Education and the Separation of Powers. He was a member of the Martin Luther King, Jr. Federal Holiday Commission and he serves on the George W. Bush Presidential Library Steering Committee for Baylor University.

Kathleen M. Sullivan
Kathleen M. Sullivan is the Stanley Morrison Professor of Law and the head of Stanford's new Constitutional Law Center. She previously served for five years as Dean of Stanford Law School, having raised over $100 million in gifts to the School. She has taught at Harvard and USC Law Schools, and is a Visiting Scholar at the National Constitution Center. A nationally known constitutional law expert, she is co-author of the nation's leading casebook in Constitutional Law.

Ms. Sullivan has 25 years of experience in appellate advocacy, having litigated over 30 appeals in federal court and argued three cases in the US Supreme Court. She has represented the broadcasting, wine, and pharmaceutical industries as well as state and city governments including Boston, Honolulu, San Francisco, Berkeley, Puerto Rico and Hawaii. Ms. Sullivan has special expertise in first amendment and constitutional issues as well as experience in a variety of constitutional issues involved in white-collar criminal defense.

She has been named by the National Law Journal as one of the 100 Most Influential Lawyers in America and one of the 50 Most Influential Women Lawyers in America, and by the Daily Journal as one of the top 100 Most Influential Lawyers in California.

Thomas M. Susman
Tom Susman is a partner in the Washington Office of Ropes & Gray, LLP, where he conducts a diverse legislative and regulatory practice. Before joining Ropes & Gray he was general counsel to the U.S. Senate Committee on the Judiciary and various Judiciary subcommittees, and prior to that he served in the Office of Legal Counsel of the Department of Justice.

Presently serving as Delegate to the ABA House of Delegates, Mr. Susman has been on the Board of Governors and chaired the Section on Administrative Law and Regulatory Practice. He is on the Council of the Council on Legal Education Opportunity, on the Board of Trustees of the National Judicial College, and a member of the ABA Committee on the Law Library of Congress. He is also a member of the American Law Institute, chair of the Ethics Committee of the American League of Lobbyists, President of the D.C. Public Library Foundation, and Adjunct Professor at the Washington College of Law of the American University.

Mr. Susman frequently testifies before Congress and lectures in the U.S. and abroad on legislative process and lobbying, freedom of information, and administrative law. He received the U.S. Court of Federal Claims Golden Eagle Award for Outstanding Service to the Court and has been inducted into the Freedom of Information Hall of Fame. He earned his B.A. from Yale University and his J.D. from the University of Texas, and following law school he clerked for Fifth Circuit Judge John Minor Wisdom.

Hon. Patricia M. Wald
Patricia M. Wald served as a judge on the U.S. Court of Appeals for the D.C. Circuit from 1979-1999 and as its Chief Judge from 1986-1991. She then was appointed to the

International Criminal Tribunal for the former Yugoslavia where she served on the trial and appellate benches from 1999-2001. Prior to her judicial service, she was an Assistant Attorney General for Legislative Affairs in the Carter Administration.

Judge Wald most recently served as a member of the President's commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. Judge Wald is currently a consultant on international justice, the Co- Chair of New Perimeter, a Board member of OSI-Justice Initiative and the American Constitution society. She is the recipient of the ABA Margaret Brant Award for Women Lawyers of Achievement and the American Lawyer Lifetime Achievement Award. She was recently named by the National Law Journal as one of the "100 Most Influential Lawyers in America."

Special Adviser
Alan Rothstein
Alan Rothstein serves as General Counsel to the Association of the Bar of the City of New York, where he coordinates the extensive law reform and public policy work of this 22,000-member Association. Founded in1870, the Association has been influential on a local, state, national and international level.

Prior to his 20 years with the Association, Rothstein was the Associate Director of Citizens Union, a long-standing civic association in New York City. Rothstein started his legal career with the firm of Weil, Gotshal & Manges. He earned his B.A. degree from City College of New York and an M.A. in Economics

Mr. CONYERS. Professor Rosenkranz.

TESTIMONY OF NICHOLAS QUINN ROSENKRANZ, ASSOCIATE PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. ROSENKRANZ. Mr. Chairman, Mr. Smith, Members of the Committee, I thank the Committee for the opportunity to express my views about Presidential signing statements.

I largely agree with the position put forth by Principal Deputy Assistant Attorney General John Elwood earlier this morning. Rather than reiterate his 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, the most important, the most uncontroversial function of Presidential signing statements is to announce the President's interpretation of the law. 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," and the President interprets statutes in much the same way that courts do, with the same panoply of interpretive tools.

One such tool is of particular interest today: the canon of constitutional avoidance. This is the canon 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." 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 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 laws as so interpreted.

Now, as you know, Representative Jackson Lee has introduced a bill on this topic which is pending before the House Committee on Oversight and Government Reform, and I gather that other legislative proposals are under consideration. I shall, therefore, address the balance of my testimony to the constitutionality and the wisdom of such proposals.

Section 3(a) of the pending bill would forbid the President to spend any money on signing statements. This provision is arguably unconstitutional. Congress possesses broad power over appropriations, of course, 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 with a cunningly crafted spending restriction.

And while Section 3(b) would limit the force of this provision to statements that are inconsistent with the intent of Congress, this limitation actually creates more problems than it solves. Even if Congress could refuse to fund a core Executive function altogether, which is doubtful in itself, it hardly follows that Congress may manipulate the President's use of his discretion with conditional appropriation. If Congress may not forbid the President from communicating his will to the executive branch, still less may it forbid him for communicating some thoughts but not others.

Section 4 of the bill is also constitutionally problematic. It provides that Government entities shall not consider Presidential signing statements when construing Federal statutes. To the extent that this provision applies to executive branch officials, it is almost certainly unconstitutional for the simple reason that it is inconsistent with the President's duty to take care that the laws be faithfully executed because it would close the ears of the executive branch to his interpretation of the law. For that reason alone, it would be unconstitutional.

A more difficult question is whether Section 4 of the bill, which again forbids governmental entities from relying on Presidential signing statements, may constitutionally apply to courts. 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 5 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 would be wise. I have written that Congress should exercise this power, but a crucial aspect of my thesis is that it should be approached comprehensively. For this reason, I think that any rule on the 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 of Federal rules of statutory interpretation.

Thank you.

Mr. CONYERS. Thank you very much.

[The prepared statement of Mr. Rosenkranz follows:]

U.S. House of Representatives
Committee on the Judiciary
Hearing:

Presidential Signing Statements

January 31, 2007

Prepared Statement of

NICHOLAS QUINN ROSENKRANZ
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U.S. House of Representatives Committee on the Judiciary Hearing: Presidential Signing Statements

January 31, 2007

Prepared Statement of

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Mr. Chairman, Representative Smith, Members of the Committee: I thank you for the opportunity to express my views about presidential signing statements.

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.[1]

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[1] For example, this topic has been plagued with false statistics, beginning with the *Boston Globe's* repeated claim that the President "has quietly claimed the authority to disobey *more than 750 laws* enacted since he took office." Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1 (emphasis added). *The New York Times* picked up this erroneous claim, but rendered it even more wrong, citing the *Boston Globe* for the claim that "Mr. Bush had issued *more than 750 'presidential signing statements'* declaring he wouldn't do what the laws required." Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22 (emphasis added). And from the *Globe* to the *Times* to the House of Representatives, this factoid has now found its way into a bill pending before the House Committee on Oversight and Government Reform. See H.R. 264, 110th Cong. § 2(a)(5) (2007) ("According to a May 5, 2006, editorial in the New York Times, the . . . President . . . has issued more than 750 'presidential signing statements' declaring he would not do what the laws required."). *But this statistic is patently false.* President Bush has issued approximately 140 signing statements to date, less than one fifth of the number claimed by *The New York Times* as quoted in H.R. 264. *See* THE AMERICAN PRESIDENCY PROJECT, *Presidential Signing Statements*, *available at* http://www.presidency.ucsb.edu/signingstatements.php ?year=2006&Submit=DISPLAY; *see also Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Michelle Boardman, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice) [hereinafter *Boardman Senate Testimony*], *available at* http://judiciary.senate.gov/testimony.cfm?id=1969&wit_id=5479 (noting that President Bush issued 73 signing statements between January 2003 and June 2006). The *Globe* issued a statement, which was widely ignored, to correct the misunderstanding. *See* Correction, *For the Record*, BOSTON GLOBE, May 4, 2006, at A2 (clarifying that 125 signing statements had been issued by President Bush at the time of the original article's publication). The *Boston Globe's* original error, which has so multiplied and transmogrified, apparently began with confusion about the word "law," which it seemingly meant to signify something like "provision" or "section" or perhaps "subsection." Needless to say, this is not what the U.S. Constitution means by the word "law." *See* U.S. CONST. art. I, § 7 (setting forth the mechanism by which a bill may become "*a* law") (emphasis added). Even sources that understand the truth have chosen to trade on the error. *Compare* American Bar Association, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, Report [hereinafter *ABA Report*], http://www.abanet.org/op/ signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf, at 1 (quoting the

In addition, the Committee may be interested in possible legislative responses to the President's use of signing statements. As you know, Representative Jackson Lee has already introduced a bill to regulate the creation and use of signing statements.[2] Likewise, Senator Specter introduced a somewhat similar bill last summer,[3] which may also be of interest to the Committee. Therefore, I will address the constitutionality and the structural desirability of these and other possible legislative measures.

I should mention that I testified before the Senate Judiciary Committee on this same topic last summer,[4] and I will be drawing substantially from that prior testimony today (in Parts I-III). I should also say that I largely agree with the position put forth by Deputy Assistant Attorney General Michelle Boardman at that hearing,[5] and I commend her testimony to this Committee.

As Ms. Boardman explained, this President's signing statements have not differed significantly from those of his recent predecessors.[6] And in any event, as I shall explain, presidential signing statements are an entirely appropriate means by which the President fulfills his constitutional duty to "take Care that the Laws be faithfully executed."[7]

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 of the law.[8] The propriety of such an announcement should be obvious.[9] There is an oft-

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Boston Globe in the first sentence of its report and relying on its reporting for the entire first page), *with id.* at 14 n.52 (noting, in a footnote on page 14, that "these numbers refer to the number of challenges to provisions of laws rather than the number of signing statements"). Finally, quite apart from the erroneous numbers, none, or almost none, of the President's signing statements "claim the authority to disobey" any laws, as I shall explain. *See infra* Part II.

[2] H.R. 264, 110th Cong. (2007).

[3] S. 3731, 109th Cong. (2006).

[4] *See Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Nicholas Quinn Rosenkranz, Associate Professor of Law, Georgetown University Law Center) [hereinafter *Rosenkranz Senate Testimony*], *available at* http://judiciary.senate.gov/testimony.cfm?id=1969&wit_id=5483; *see also* Letter from Nicholas Quinn Rosenkranz, Associate Professor of Law, Georgetown University Law Center, to Senator Arlen Specter, Chairman, Senate Committee on the Judiciary (Aug. 15, 2006) (on file with author).

[5] *See Boardman Senate Testimony*, *supra* note 1.

[6] *See id.*

[7] U.S. CONST. art. II, § 3.

[8] 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

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.[10] 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,[11] 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,"[12] 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."[13]

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 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

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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).

[9] *See, e.g.*, Curtis A. Bradley & Eric Posner, *Presidential Signing Statements and Executive Power* 24 (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 133, 2006), *available at* http://www.law.uchicago.edu/academics/publiclaw/133.pdf (noting that if the President misinterprets statutes in signing statements, the problem is "the underlying views expressed in the statements, not the statements themselves"); Posting of Marty Lederman et al. to the Georgetown Law Faculty Blog, *Untangling the Debate on Signing Statements*, http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html (July 31, 2006) ("There is nothing inherently wrong with signing statements as such—including those that contain constitutional objections.").

[10] *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.").

[11] *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).

[12] U.S. CONST. art. II, § 3.

[13] Bowsher v. Synar, 478 U.S. 714, 733 (1986).

evidently contemplated in vesting general executive power in the President alone."[14] 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."[15]

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.[16] 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.[17] 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."[18]

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,[19] aided perhaps by dictionaries, linguistic treatises, and other tools of

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[14] Myers v. United States, 272 U.S. 52, 135 (1926).

[15] The Legal Significance of Presidential Signing Statements, 17 U.S. Op. Off. Legal Counsel 131, 132 (1993) [hereinafter OLC Signing Statements Memorandum].

[16] *See* Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements"*, 40 ADMIN. L. REV. 209, 227-28 (1988) (arguing that the President's decision to announce his interpretation of a statute in a signing statement beneficially increases the transparency of executive branch decision-making); Lederman et al., *supra* note 9 ("The signing statement is a *good* thing: a manifestation of the Executive's intentions that helps us to understand the heart of the problem. . . . [I]t is much *better* that [the President] tell Congress and the public of his intentions, rather than keep it secret . . . ."); *see also* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984) (analyzing the types of costs arising from uncertainty about legal rules); Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 822-36 (2002) (analyzing the costs that arise from uncertainty when new statutes are enacted and the importance of interpretive rules for reducing that uncertainty).

[17] *Cf.* Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam) ("Sunlight is said to be the best of disinfectants . . . .") (quoting LOUIS DEMBITZ BRANDEIS, OTHER PEOPLE'S MONEY (1933)).

[18] OLC Signing Statements Memorandum, *supra* note 15, at 132.

[19] *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

statutory interpretation. In addition, just like courts, they also apply well-established maxims of statutory interpretation, called canons.[20]

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."[21] This is known as the canon of constitutional avoidance,[22] and it "is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."[23]

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.[24] Many of the presidential signing statements that have most exercised the press have taken this form,[25] so it is crucial to understand what these

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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 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 (2001) ("[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).

[20] For example, 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.").

[21] Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.).

[22] *See, e.g.*, Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 730 (9th Cir. 2003).

[23] 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.).

[24] *See* Bradley & Posner, *supra* note 9, at 27 ("When presidents have constitutional concerns, it is rare for them to announce in a signing statement that they will decline to enforce a statutory provision. Instead, they frequently state that they will interpret the provision in a way that will avoid the purported constitutional problem."). Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1217-20 (2006) (describing executive branch use of the avoidance canon).

[25] *See, e.g.*, Statement on Signing the Postal Accountability and Enhancement Act, 42 WEEKLY COMP. PRES. DOC. 2196 (December 20, 2006) ("The executive branch shall *construe* subsection 404(c) of title 30, . . . which provides for opening of an item of a class of mail otherwise sealed against inspection, in a manner consistent, to the maximum extent permissible, with the need to conduct searches in exigent circumstances . . . .") (emphasis added); 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

statements do and do not say. These statements emphatically do not "reserve the right to disobey"[26] the law. They do not "amount to partial vetoes."[27] They do not "declare[the President's] intention not to enforce anything he dislikes."[28] 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 . . . ."[29] 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.*[30]

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,[31] a canon that finds its entire rationale in "a just respect for the legislature"[32] and the faithfulness of Representatives and Senators to their constitutional oaths.[33] If a statute is ambiguous, we—the President, the Court, the People—presume that Congress intended it to be constitutional.[34]

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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).

[26] Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1.

[27] Bob Egelko, *How Bush Sidesteps the Intent of Congress*, S.F. CHRON. May 7, 2006, at A1.

[28] Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22.

[29] OLC Signing Statements Memorandum, *supra* note 15, at 133 (emphasis added).

[30] *See* Bradley & Posner, *supra* note 9, at 28 ("Many of the statements appear simply to be placeholders to preserve an executive viewpoint about the Constitution, not an indication that the Executive will decline to fully enforce a statute.").

[31] *See* Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.).

[32] *Ex parte* Randolph, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).

[33] 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. § 3331 (2000) (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.").

[34] *See* Rust v. Sullivan, 500 U.S. 173, 190-91 (1991).

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 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,"[35] and reasonable people may differ on what constitutes a reasonable construction.[36] 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*."[37] This aspect of the doctrine is of more recent vintage[38] and has been subject to quite compelling critique.[39]

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.[40] 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[41] (though this practice has been subject to withering criticism[42]).

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

[36] *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.").

[37] United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (emphasis added).

[38] *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).

[39] *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 (discussing problems raised by the modern avoidance doctrine).

[40] *Cf.* Morrison, *supra* note 24, at 1227 (pointing out that if judicial use of the avoidance canon helps to ensure that legislation is consistent with the Constitution, executive use of the avoidance canon has the same virtue).

[41] *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).

[42] *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

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"[43] 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 even though the veto power appears in Article I, it is not legislative power. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"[44] not a Congress and a President. And it is "[t]he Congress," not the Congress plus the President, who "shall have Power . . . To make all Laws."[45]

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.[46] 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;[47] and second, it is arguably

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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 (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).

[43] U.S. CONST. art. I, § 7.

[44] U.S. CONST. art. I, § 1.

[45] 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 . . .").

[46] *See generally* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

[47] *Cf.* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (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.").

incoherent to attempt to aggregate those individual intentions into a collective intent.[48] 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."[49] 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,[50] courts should rely on both equally—for the strength of their reasoning and nothing more.

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 a bill on this topic, H.R. 264,[51] has been introduced by Representative Jackson Lee and is now pending before the Committee on Oversight and Government Reform, I shall address the balance of my testimony to the constitutionality and the wisdom of such proposals. I shall begin with the pending bill, and I will conclude by discussing some other options, including the bill that Senator Specter introduced last summer.

A. Limiting Funds for Signing Statements

Section 3(a) of H.R. 264 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."[52] This provision is probably unconstitutional.

As discussed above, interpreting federal statutes—and ensuring uniform interpretation throughout the executive branch—is at the very core of the President's duty to "take Care that the Laws be faithfully executed."[53] And presidential signing statements are an essential tool in the performance of that duty. Congress cannot require Executive

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[48] 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, *supra* note 42, at 68 ("Intent is elusive for a natural person, fictive for a collective body.").
[49] ANTONIN SCALIA, A MATTER OF INTERPRETATION, *supra* note 42, at 38.
[50] *See ifra* Part IV-D; *see also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2147-51 (2002).
[51] H.R. 264, 110th Cong. (2007).
[52] H.R. 264, § 3.
[53] U.S. CONST. art. II, § 3.

officers to close their ears to presidential signing statements.[54] And *a fortiori* it cannot forbid the President from making such statements in the first place.

Admittedly, the bill does not purport to forbid signing statements *simpliciter*; rather, it forbids using funds to produce, publish, or disseminate them. And of course Congress does possess broad power over appropriations.[55] But for Congress to use its power of the purse to impede a core executive function would raise serious constitutional concerns.[56] If Congress lacks the power to forbid the President from issuing signing statements altogether (as it almost certainly does),[57] then it arguably lacks the power to achieve the same result indirectly with a cunningly crafted spending restriction.[58]

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[54] *See infra* Part IV-B-1.

[55] *See* U.S. Const. art. I, § 9 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

[56] *See, e.g.*, Geoffrey Miller, *The Appropriations Power and the Necessary and Proper Clause*, 68 WASH. U. L.Q. 640, 640 (1990) ("Congress has no more authority to control the executive branch by means of the appropriations power than it would have to control the executive branch under other provisions of the Constitution."); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999) ("A condition on the appropriation or expenditure of funds is invalid if it is properly analyzed as an attempt either to exercise an autonomous executive power or to compel the President to employ such a power in accordance with congressional policy."). *See also* Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 255 (2005) (book review) (noting that early congressional practice was to appropriate funds in general terms without restrictions that would regulate President's exercise of his executive powers); *see also* Kate Stith, *The Appropriations Power and the Necessary and Proper Clause*, 68 WASH. U. L.Q. 644, 646 (1990) ("[T]he legislative veto violates separation of powers principles, whether the veto is explicit as in [*INS v. Chadha*, 462 U.S. 919 (1983)] or is accomplished indirectly, by conditioning appropriations.").

[57] *See, e.g.*, Prakash, *supra* note 56, at 254 ("While Congress *might* be able to refrain from funding the exercise of presidential powers, Congress cannot go further and statutorily forbid the President's personal exercise of his constitutional powers.") (emphasis added).

[58] While the Supreme 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 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

True, section 3(b) of H.R. 264 would limit the force of the general restriction on funding presidential signing statements, providing that it "shall apply only to statements made by the President regarding the bill or joint resolution presented for signing that contradict, or are inconsistent with, the intent of Congress in enacting the bill or joint resolution or that otherwise encroach upon the Congressional prerogative to make laws." But though this section purports to limit the force of section 3(a), it actually makes the provision even more constitutionally problematic.

Even if Congress could refuse to fund a core executive function altogether, which is doubtful in itself,[59] it does not follow that Congress may control the discretion inherent in a core executive function with a conditional appropriation.[60] So for example, it is not at all clear that Congress could forbid the President from spending money on a pen and ink to issue pardons.[61] But even if Congress could do that, it hardly follows that Congress could provide a pen and ink for pardons while forbidding that they be used to pardon particular individuals.[62] Inherent in the President's pardon power is unfettered discretion to choose whom to pardon. Just as Congress cannot forbid the pardoning of certain people outright, it cannot achieve the same result with a spending restriction. Likewise, instructing the executive branch in his interpretation of the law is at the very heart of the President's duty to "take Care that the Laws be faithfully executed."[63] If Congress may not forbid the President from communicating his will to the executive

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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.").

[59] *Compare* J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1188 (1989) ("[A] president who acts to discharge his article II duties when Congress has failed or refused to provide him appropriations for that purpose does not violate the appropriations clause."), *with* Prakash, *supra* note 56, at 254 ("Congress might be able to refrain from funding the exercise of presidential powers . . . ."); *see also* Kate Stith, *supra* note 56, at 644 (characterizing the view that the appropriations power gives Congress control over all presidential actions as far outside the mainstream).

[60] *See id.* at 645 ("[W]hen the Constitution confers [sic] the President exclusive, enumerated authority, Congress may not assume that authority as its own by the simple expedient of cutting off or conditioning appropriations.").

[61] *See* Sidak, *supra* note 59, at 1187 (arguing that "the President has the power, implicit in the delegation of duties and prerogatives to him by the people under article II, to spend funds to perform his constitutional responsibilities").

[62] *See* Miller, *supra* note 56, at 643 (arguing that an appropriations bill barring the use of funds to pardon anyone for crimes committed in connection with the Iran-Contra affair would be "an unconstitutional intrusion on the pardon power," because the Constitution gives the President complete discretion over the decision of whom to pardon); Stith, *supra* note 56, at 646-47 ("Congress [may not] use funding legislation to deny or direct the pardon power or any other exclusive constitutional power of the President.").

[63] U.S. CONST. art. II, § 3; *see also supra* Part I.

branch—whether through a substantive restriction or a spending restriction[64]—still less may it forbid him from communicating some thoughts but not others.[65]

In any event, even setting these constitutional issues aside, section 3(b) is essentially self-defeating, because it reduces the scope of section 3 to almost nothing. As explained above, the vast majority of constitutional signing statements are simple applications of the canon of constitutional avoidance, which requires the President to construe statutes, if at all possible, to be consistent with the Constitution. As the Court has explained, this canon "is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."[66] In other words, the premise of the canon is *never* to "contradict, or [be] inconsistent with, the intent of Congress."[67] To the contrary, the point of this canon is to choose a constitutional interpretation of ambiguous statutes—*precisely because Congress presumptively intended such interpretations*. Thus, virtually all the President's signing statements—including almost all of the most controversial ones[68]—would be exempt from the spending restriction. In short, this provision would have very few applications at all, and even fewer constitutional ones.

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 hardly justifies such a constitutionally contentious response.

B. Limiting the Interpretive Force of Signing Statements

Section 4 of H.R. 264 is also problematic. It provides: "For purposes of construing or applying any Act enacted by the Congress, a governmental 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."[69] The term

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[64] *Cf.* J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2104-06 (1989) (arguing that Congress cannot use its appropriations power to forbid the President from issuing recommendations that have zero marginal cost to produce).

[65] *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("[C]ontent-based restrictions [on speech] are presumptively invalid").

[66] 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.).

[67] H.R. 264, 110th Cong. § 3(b) (2007).

[68] *See, e.g.*, Statement on Signing the Postal Accountability and Enhancement Act, 42 WEEKLY COMP. PRES. DOC. 2196 (December 20, 2006) ("The executive branch shall construe subsection 404(c) of title 30, . . . which provides for opening of an item of a class of mail otherwise sealed against inspection, in a manner consistent, to the maximum extent permissible, with the need to conduct searches in exigent circumstances . . . ."); 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).

[69] H.R. 264, § 4.

"governmental entity" appears to include executive officers, agencies, and courts.[70] Each of these applications raises distinct constitutional issues.

1. Limiting Federal Official Use of Signing Statements

It follows from the discussion above[71] that, insofar as it relates to executive officers and agencies, this provision is almost certainly unconstitutional. The provision purports to forbid executive officers and agencies from taking into account the President's signing statements when interpreting federal law. Such a rule conflicts with the President's constitutional duty to "take Care that the Laws be faithfully executed."[72] 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,"[73] and the President "may properly 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."[74] The bill would run afoul of this principle, by closing the ears of the executive branch to the President's contemporaneous[75] interpretation of the law. For that reason alone, it would be unconstitutional.

2. Limiting Judicial Use of Presidential Signing Statements

Once again, the bill provides: "For purposes of construing or applying any Act enacted by the Congress, a governmental 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."[76] As discussed above, this provision is almost certainly unconstitutional to the extent that it applies to executive agencies and officers.[77] But federal and state courts are also "governmental entit[ies]," 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* five years ago,[78] 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

[70] On its face, the phrase "governmental entity" would appear to apply to state officials as well as federal officials. If so, the provision would raise distinct federalism issues that I do not address today.
[71] *See supra* Part I-A.
[72] U.S. CONST. art. II, § 3.
[73] Bowsher v. Synar, 478 U.S. 714, 733 (1986).
[74] Myers v. United States, 272 U.S. 52, 135 (1926).
[75] 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.
[76] H.R. 264, 110th Cong. § 4 (2007).
[77] *See supra* Part IV-B-1.
[78] *See* Rosenkranz, *supra* note 50.

explained, "whatever judicial power exists over interpretive methodology must be common lawmaking power, which may be trumped by Congress."[79] 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."[80] 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,[81] the President's executive power inherently includes the power to interpret federal law in the first instance.[82] Moreover, the President also has power to give interpretive instructions to executive officers.[83] 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,[84] and the President himself may be entitled to at least as much deference,[85] but this is so only as long as Congress wishes to acquiesce in this rule.[86] 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.

Last summer, Senator Specter introduced just such a bill. That bill provided: "In determining the meaning of any Act of Congress, no State or Federal court shall rely on or defer to a presidential signing statement as a source of authority."[87] By restricting its application to courts rather than executive officials, this provision would avoid the constitutional problems addressed above.[88]

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[79] *Id.* at 2103. *But cf.* Lockhart v. United States, 126 S. Ct. 699, 702-04 (2005) (Scalia, J., concurring.).
[80] Rosenkranz, *supra* note 50, at 2103 (2002).
[81] *See supra* Part I.
[82] *See* Bowsher v. Synar, 478 U.S. 714, 733 (1986).
[83] *See* Myers v. United States, 272 U.S. 52, 135 (1926).
[84] *See* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).
[85] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2372-80 (2001).
[86] *See* Rosenkranz, *supra* note 50, 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 85, at 2379 (calling the *Chevron* rule a "default rule of deference").
[87] S. 3731, 109th Cong., § 4 (2006).
[88] I refer in the text only to sections 1 through 4 of Senator Specter's bill. Unfortunately, sections 5 and 6 of the bill introduced by Senator Specter raise other constitutional questions. Section 5 would have

The only question remaining is whether such a measure is 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.[89] But a crucial aspect of my thesis is that Congress should approach this project comprehensively. As I explained:

> 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.[90]

Indeed, the bill introduced by Senator Specter made much the same point, finding that "Congress can and should exercise [its] power over the interpretation of Federal statutes in a systematic and comprehensive manner."[91] This is absolutely right, and I urge the House to undertake precisely this project. 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.

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authorized the federal courts to "declare the legality of any presidential signing statement, whether or not further relief is or could be sought," on the application of counsel for the United States Senate or House of Representatives. *See* S. 3731, § 5. The scope of Congress's power to grant itself standing to challenge executive actions remains in doubt. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 149-55 (5th ed. 2003) (discussing Congress's ability to create standing); Raines v. Byrd, 521 U.S. 811, 829 (1997) (denying standing to several members of Congress to challenge the Line Item Veto Act, in part because Congress had not authorized them to sue on behalf of the legislative branch); *see also* Barnes v. Kline, 759 F.2d 21, 41-71 (Bork, J., dissenting) (arguing that separation-of-powers principles prevent the courts from adjudicating disputes raised by Congress in response to presidential action). And if Section 5 is constitutionally questionable, then section 6 may suffer from a derivative constitutional infirmity. Section 6 would have allowed the Senate or House of Representatives to intervene in any suit implicating a presidential signing statement. It is an unsettled question whether the Constitution requires intervenors to have independent Article III standing. *See* Diamond v. Charles, 476 U.S. 54, 68-69 (1986) ("We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III."); Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 531 (7th Cir. 1988) (noting that questions of intervenor standing have not been settled and pointing out problems inherent in granting intervenor standing to parties who do not have Article III standing); *see also* David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 726-28 (1968) (arguing that parties should sometimes be granted permission to intervene despite not meeting Article III standing requirements because intervenors need not be given all the rights of a party in the case).

[89] Rosenkranz, *supra* note 50.

[90] *See id.* at 2143.

[91] S. 3731, 109th Cong. § 2 (2006).

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."[92] 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."[93]

I do not believe that any legislative response to the President's use of signing statements is necessarily called for. And I believe that the bill pending before the House Committee on Oversight and Government Reform has deep constitutional flaws. If some legislative response is thought necessary, I would recommend something akin to sections 1 through 4 of the bill introduced last summer by Senator Specter,[94] which would forbid state and federal courts, but not executive officials, from relying on presidential signing statements as a source of authority in the interpretation of federal statutes.[95] Better still, I would urge Congress to follow Senator Specter's exhortation to "exercise th[e] power over the interpretation of Federal statutes in a systematic and comprehensive manner,"[96] by incorporating any such provision into coherent and codified federal rules of statutory interpretation.

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[92] U.S. CONST. art. II, § 3.
[93] *Ex parte* Randolph, 20 F.Cas. 242, 254 (C.C.D.Va. 1883) (No. 11.558) (Marshall, C.J.).
[94] *See* S. 3731, § 1-4.
[95] As a complementary measure, Congress might also consider requiring the President to notify Congress of any decision to decline to enforce a statutory provision. *See, e.g.*, H.J. Res. 89, 109th Cong. (2006). *See also Rosenkranz Senate Testimony*, *supra* note 4 at Part IV-A.
[96] S. 3731, § 2.

Mr. CONYERS. Professor Charles Ogletree.

TESTIMONY OF CHARLES J. OGLETREE, JR., JESSE CLIMENKO PROFESSOR OF LAW, HARVARD LAW SCHOOL

Mr. OGLETREE. Good morning, Congressman Conyers, and thank you for inviting me to appear before the House Judiciary Committee today.

Let me say at the beginning, and to start where you did in expressing my condolences for Father Drinan. I actually have a very fond memory of Thanksgiving, this past November, that he arrived in Boston and I introduced him to my two granddaughters, and it was amazing to see how their eyes lit up watching this great man in his great service. He was still teaching at Georgetown at the time, and was still a great warrior. So I too share the loss of this great Massachusetts legislator and this great scholar and member of the faith.

I wanted to first say that I think it is very important and useful for this Committee to look very carefully at the bill proposed by Congresswoman Sheila Jackson Lee and a comparable bill in the Senate by Senator Arlen Specter. I think it shows for the first time that Congress is taking very seriously the exercise of executive power in using signing statements, and it requires a much more careful analysis than I think has ever happened before.

Presidential signing statements reflect an important and necessary line of authority given to the executive branch to clarify and address matters of constitutional magnitude. They can promote transparency by signaling how the President plans to enforce or to interpret the law. They can also allow the President to more clearly define his perspective or understanding of the law's parameters.

One of the reasons it is important to pursue this topic of Presidential signing statements, however, is the unusual high number of both challenges of laws that have been passed by Congress and the exercise of signing statements. I think if you would put the five of us in a room for a half an hour we could give you accurate numbers, because the numbers that you have heard are widely disproportionate and often misreported.

It is clear that President Bush has signed over 1,100 provisions challenging laws. At the same time, it is clear that he has issued a total of 150 signing statements, even though the number has often suggested that it is higher, but I think our consensus, if we had the opportunity to give you the real numbers, would be helpful.

Why is this important, and why should this Congress be concerned about it? One of the important things is that there is no question that every modern President—Reagan, Bush, and Clinton—have used signing statements for the last 25 years, but what is remarkable is when you put that in context of those signing statements. According to several reports, President Reagan used, in order to challenge Congress' authority, the veto 78 times, 39 times the actual veto laws, and 39 times they were pocket vetoes. President George H.W. Bush vetoed 44 bills, with 15 of them being pocket vetoes. President Clinton in his two terms vetoed 37 bills, including one pocket veto. President Bush in the 6 years that he has been in the White House only vetoed a single bill.

So 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 process. In other words, is he using the signing statement as a way to declare a law nonbinding without having to face the public scrutiny that comes with the veto or the possibility of a legislative override?

And the essential issue is three quick examples that I want to point out in the time I have left. I will take your attention to one law passed in 2006, the Defense Appropriations bill, where the signing statement by one scholar, "reads like a unilateral alteration of a legislative bargain." you may recall that Senator John McCain made it clear that torture should not be part of this, and yet, President Bush's signing statement made it clear that he was not going to be bound by what the law said in that provision.

One final example before my time runs out. This Congress passed just this past year the Henry Hyde United States-India Peaceful Atomic Energy Cooperation Act, a very important piece of legislation, and, according to published reports in Indian newspapers, the Indian Government considered the signing statement that accompanied the law, announcing that the Administration would treat certain sections as merely advisory, as an indication of how the United States plans to interpret these sections.

You have passed a law; it is the law. And we saw that great ceremony here some months ago, but after that ceremony, President Bush made it clear by pointing to provisions of this law that they are merely advisory, what you had passed and submitted to him for signature. What does that mean? It means not only that will the Indian Government and other countries be confused by what we mean by the law, but they will have to fear that if someone else replaces President Bush in the White House, that that new President with a new signing statement can come up with a totally independent and unique interpretation of what the law means.

One final area that has generated an enormous amount of publicity is the issue of whether there is mail surveillance. And I hope during the questions we will have a chance to talk about how the President has interpreted that law to the detriment of Congress' intent.

Thank you very much.

[The prepared statement of Mr. Ogletree follows:]

PREPARED STATEMENT OF PROFESSOR CHARLES J. OGLETREE, JR.

Dear Congressman John Conyers and members of the United States House 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.

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 last year by Michael Greco, immediate past President of the American Bar Association. The ABA Task Force, a bipartisan group of lawyers and jurists, released a report in July that was adopted by the American Bar Association at its annual meeting in August 2006. ABA President Karen Mathis has already discussed the Report and its approval.

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.[2] 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 his tenure in office. To be sure, the use of signing statements has been a staple of many presidents and reflects the Executive exercise of authority across ideological lines. At the same time there is a discernable pattern being employed by the current Administration and this pattern has resulted in unusual, and bipartisan concern. While it is true that former Presidents Reagan, Bush and Clinton relied upon presidential signing statements during the course of the past 25 years, the nature and extent of their use has been demonstrably greater under President Bush.

At the same time, President Bush has declined to use the traditional method employed when the president believes legislation is unconstitutional, the veto. 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 only vetoed a single bill. The unprecedented juxtaposition of President Bush's failure to exercise a single veto, yet issuing a substantial number of 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. 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 House Judiciary Committee will closely examine these matters and examine these issues carefully. 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

[1] A copy of my abbreviated biographical statement is attached.

[2] 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).

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.

One scholar who has written in this area has noted that President Bush's attachment of a signing statement to the 2006 Defense Appropriations Bill "reads like a unilateral alteration of the legislative bargain." The signing statement announced that the executive branch would construe provisions 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," and thus read an "implicit exception" in the McCain Amendment's prohibition on "cruel, inhuman or degrading treatment or punishnment." Trevor Morrison, an assistant professor of law at Cornell, observed that the Administration had understood the aim of the Amendment and had threatened to veto it, but had changed course and decided to support the Amendment, "partly because there were clearly enough votes for Congress to overcome a veto, and partly because the Administration had obtained a number of concessions on related matters, including a set of provisions severely restricting the federal courts' jurisdiction to review the detention of enemy combatants at Guantanamo Bay."

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 example of the potential dangers in the use of Presidential signing statements is the recent passage of the *"Henry Hyde United States-India Peaceful Atomic Energy Cooperation Act. According to reports published in Indian newspapers, the Indian government considers the signing statement that accompanied the law, which announced that the Administration would treat certain sections law as merely advisory, as an indication of how the United States plans to interpret those sections. Thus, even if signing statements are not enforceable, this raises the concern that foreign countries might have expectations that we will interpret laws as signing statements announces. Additionally, there is a real concern that a country like India would worry that a future president could choose to interpret the law differently.*

There are important lessons to be learned from these efforts and, at the same time a need for transparency, in the relationship between the complimentary branches of government. 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 to challenge the constitutionality of more than 1,000 provisions of bills adopted by Congress. On hundreds of occasions he has object on the grounds that provisions have interfered 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."[3] Such examples require further probing by the Senate Committee on the Judiciary, and more detailed and persuasive explanations from the executive branch.

What is clear, in going forward, is the reaction of large segments of the media, across the country, to the suggestion that the Bush administration has sought authority to examine the mail of America's citizens. While the White House has declared their efforts as simply to "clarify existing law", the media have found this argument unpersuasive. Among a sampling of the responses are the following:

Several major newspapers have published editorials opposing the signing statement and any new it might grant the administration to review mail without a warrant. Many of these editorials argue that if, as the Bush administration contends, the signing statement only restates current law, the administration need not have issued it. These editorials reflect a growing public wariness of any signing statement issued by the administration as an attempt to expand executive power. *See, e.g.,* "Mail Privacy; Bush Signing Statement Raises Questions," SUN SENTINEL, (Ft.

[3] Christopher Kelley, *The Unitary Executive and the Presidential Signing Statement* 8 (June 1, 2006), *available at http://www.users.muohio.edu/kelleycs/conproject.pdf. See also* Kelley, *Do You Wish to Keep Tabs on the Bush Administration's Use of the Bill Signing Statement?* (January 12, 2007), *available at http://www.users.muohio.edu/kelleycs/*

Lauderdale, Fl), January 24, 2007 ("The Constitution and the law are very clear: except in an emergency, a warrant is required before any government agent can open first-class mail. Such clarity requires nothing further from the president, and the president shouldn't have to be told to respect the law."); "Don't Open Personal Mail," HARTFORD COURANT, January 19, 2007 ("Congress should move quickly to remove any potential for overreaching on the part of the White House. If the administration's intentions were pure, there would have been no need to issue a signing statement."); "Privacy and National Security," DENVER POST, January 16, 2007 ("Remember, this is the same reasoning that saw no problem with warrantless wiretapping of domestic phone lines. And President Bush just last month issued one of his notorious signing statements, attempting to nullify the intent of legislation by saying federal officials could open U.S. mail without a warrant. Once you've issued a signing statement to undermine anti-torture legislation, as the president did last summer, the next ones come too easy); "Signing Statements: Pushing the Envelope," MILWALKIE JOURNAL SENTINAL, January 16, 2007 (The Constitution requires a warrant for a reason: to provide a judicial check against despotism, in which the authorities can search your belongings willy-nilly. Congress must stop Bush's apparent attempt to erode this check); "Postal Inspector Bush?," CLEVELAND PLAIN DEALER, January 16, 2007 (If President Bush really means nothing new by his signing statement, he should withdraw it—and provide Congress credible assurances that he was merely asserting a right to open mail, not already exercising it").

While it may be that the public concern in that area may be premature, it is also true that Congress should exercise its legislative function and at a minimum, consider devising a arrangement that requires the administration to issue annual reports on how often it opens mail without a warrant. This process has been suggested in recent public discussions and seems like a modest, but important, step forward.

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 House Judiciary Committee has decided to examine these matters, and to exercise its legislative mandate to review the use of this important and often invisible exercise of Executive authority.

Ultimately, it is an important moment in history for Congress to not only review the use and application of presidential signing authority, but to as well determine its own role and responsibility in carrying out the legislation mandate as authorized by the Constitution.

Mr. CONYERS. I thank all of the witnesses for an excellent discussion, and I yield myself 5 minutes.

Mr. Elwood, in the signing statement on last year's PATRIOT Act reauthorization, the President claimed he could withhold information from Congress that the Justice Department is required to provide by the law if he decides that the disclosure would impair foreign relations or the deliberative process of the Executive.

Has the Administration withheld any information based on this signing statement?

Mr. ELWOOD. Chairman Conyers, the answer is no, it has not. I think this is an excellent example of how signing statements are not an indication that the law will not be enforced fully. The Administration has complied fully, or the Department of Justice has been cooperating fully with the Inspector General's investigation there of the use of national security letters.

The purpose of this signing statement was—it was a traditional one that has been made by Presidents Eisenhower and Clinton. It is just simply to note, as the Supreme Court held in the *Department of the Navy v. Egan,* that the President has authority over the classification of national security information, and he has a responsibility to make sure that it is safeguarded, and it is simply his way of saying, "Look, I anticipate that this is not going to be implicated here, and I understand you are legislating in light of that."

Mr. CONYERS. Thank you very much.

Now, we are not having hearings on any of the bills that deal with signing statements today. This is merely an oversight hearing.

Professor Ogletree, what really are the fundamental dangers, as you see them, posed by this more aggressive use of signing statements by the current Bush administration?

Mr. OGLETREE. Well, there are a number.

First, it makes the idea of a veto, the normal legislative process, null and void when the President does not really bring to Congress' attention specific substantial objections to laws that are approved by Congress.

Number two, right now, no Member of this Congress has any idea where, when, and to what extent the President modifies a law that you have passed. There is not a ceremony. There is not a report back to you. If you look on the White House database of laws passed or anywhere else, you will have the version that you passed, but you will not necessarily have the signing statement—you have to search for it—and the idea that there is no reporting authority that requires the executive branch to let you know where there is some modification, expansion or substantive change. To make a law advisory is a monumental change, and it has a public and, now we see, an international impact. Those are two areas where it is of grave concern.

The third, the final area, I would say is that it really frustrates Congress' intent—and I think Senator McCain in particular, being a prisoner of war, being someone very concerned about war, someone who is even supporting the idea of more troops in Iraq, has still said torture should not be countenanced. And yet if you look at the signing statement and the reaction to the law passed by this Congress, President Bush's signing statement undermines that intent which was clearly expressed by Senator McCain and, I assume, supported by the Members of Congress.

It is those three areas where I think there are grave concerns that require Congress as a nonpartisan body to examine whether or not its legislative authority is being respected or undermined.

Mr. CONYERS. Thank you.

My final question to you and Ms. Mathis and Mr. Edwards is any recommendations that you have for the House Judiciary Committee to proceed on this.

I have talked with Mr. Smith about our staffs going over to try to pull together the 148 signing statements that have already issued and the hundreds of laws that have been impacted, but where do we go from here? Quickly.

Ms. MATHIS. Mr. Chairman, the Task Force of the ABA adopted their recommendations and suggested that Congress do two things: that it enact legislation that requires the President to submit a report to Congress, upon the issuance of statements that express the intent to disregard a law or decline to enforce, that includes an explanation for the reasons, and that come to Congress so that Congress knows, as Professor Ogletree has just said, what those objections are.

The second thing that we have suggested is that there be legislation that would allow both the President and Congress and perhaps third-party entities to have an expedited judicial review in the event that you have signing statements.

Mr. CONYERS. Any final comment?

Mr. OGLETREE. Yes, Congressman Conyers. I served on the ABA Task Force and was happy to do so. There is a slippery slope even in our recommendations that you have to consider very carefully. We did say, and it was adopted by the ABA, that to require the President to submit a report to Congress upon the issuance of statements that expressed the intent to disregard or decline to enforce a law.

Now, the President can say and will say, "I intend to enforce the law, but under my terms." So my sense is that there needs to be a sense of transparency that goes beyond the literal language, because even our language, which was broad in nature, the President can in good faith say, "I am following the law, but I am doing it as I have interpreted it, given my executive authority."

I would ask that you be a little bit more exacting, if that is the process that you decide to pursue.

Mr. CONYERS. Thank you so much.

Ranking Member Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Professor Rosenkranz, let me address my first question to you. Have signing statements ever had any impact in court? Are they ever given any weight in law, or are we really just spending time on much to do about nothing?

Mr. ROSENKRANZ. To this point, Presidential signing statements have been cited in a very small number of cases, a few Supreme Court cases, a few ninth circuit cases, and there is no indication that the signing statements changed the result in any of those cases. So, thus far, it is quite a limited phenomenon in Federal court.

Mr. SMITH. Thank you.

Professor Ogletree, first of all, let me thank you for your written statement. I thought it was restrained, reasoned, nuanced and not strident, and for those reasons I appreciated it.

Mr. OGLETREE. Thank you.

Mr. SMITH. For example, you used a couple of phrases in your statement that I thought were revealing. One was you said, "Even if signing statements are not enforceable," and later on you said, "While it may be that the public concern in that case may be premature." so I am hoping that you see both sides of the question.

A colleague of yours, who, like you, is well-respected and well-known, is Professor Tribe. He had this to say about Presidential signing statements, including President Bush's. "it has never been the case that anyone has taken a signing statement as anything more than a flourish on the part of the Chief Executive's rhetoric. It is a symbolic rhetorical announcement of the view the President intends to take."

Do you think that Professor Tribe is wrong, or is it possible he may be right?

Mr. OGLETREE. Well, I disagree with Professor Tribe, and we have discussed this extensively. In fact, I think when he learned that I was on the ABA Task Force, that generated the tremendous interest in his later positions. But at the same time, if you look at the complete record of what Professor Tribe has said, he has drawn

a distinction between what he saw going on with prior Presidents and his concern of the exercise of authority by President Bush.

So he has been critical in other areas and thinks that these are serious transgressions, even though the idea of signing statements as a matter of law he does not find objectionable, and he certainly has disagreed publicly with the ABA report.

Mr. SMITH. Maybe like a lot of good lawyers, he can argue both sides as well.

Mr. OGLETREE. He has done that well.

Mr. SMITH. Thank you.

Ms. Mathis, let me ask you a question, and this is in regard to the ABA Task Force on Presidential signing statements. The task force did not find any cases in which a court relied on a Presidential signing statement.

Do you have any evidence that you can tell us about to today that a Presidential signing statement has affected judicial decisions?

Ms. MATHIS. Congressman Smith, the task force was not charged with looking at that specific issue that you have just raised.

Mr. SMITH. Do you have any evidence that Presidential signing statements have affected any judicial decisions yourself or as a result of the task force or as a result of any source whatsoever?

Ms. MATHIS. No, I don't personally. The task force did not look at it.

Mr. SMITH. The Congressional Research Service report said that a bill that is signed by the President retains its legal effect and character, irrespective of any pronouncements made in a signing statement.

Do you agree or disagree with that Congressional Research Service report?

Ms. MATHIS. Again, the task force gave its reports prior to that report. Our task force did not look at this. However, I would say——

Mr. SMITH. Well, I didn't ask whether you looked at it. I asked you whether you agreed with it.

Ms. MATHIS. I am here, as I understand, in a representative capacity. Let me make that clear, if I may, that I am testifying regarding our task force and the policy of the ABA. So the policy of the ABA does not deal with that particular point.

Mr. SMITH. And you do not have an opinion on whether you agree or disagree with that report?

Ms. MATHIS. I do not have a representative opinion, no.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. CONYERS. Mr. Jerry Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

I must say this is a very troubling topic, and it is not just the signing statements, it is what is behind them.

Professor Ogletree, you said 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 public policy, but also creates unilateral and unchecked exercise of authority in one branch of Government without the interaction and consideration of the others.

Signing statements aside, with or without a signing statement, doesn't the President have an oath under the Constitution, and if there is a law he feels unconstitutional, how can he possibly enforce it?

Mr. OGLETREE. Well, you are right, he does take an oath and has an obligation. I think this President, and I would say more so than recent Presidents, has determined what he believes the law allows him to do. I think, as you can see from my statement, it is not clouded. The exercise of Presidential signing statements in the last several years, I would say, is impacted by the events of September 11, 2001.

Mr. NADLER. And by secrecy.

Mr. OGLETREE. Exactly. That explains it, but it doesn't justify the idea of not having a bipartisan effort between Congress and the executive branch to decide what the law will be.

The biggest concern I have is since there really is no transparency, you don't know. You don't know if you pass a law today and it is signed, you don't know what the ultimate law will be—you know what the law will be, what it says, but you don't know how it will be interpreted in ways that will have an impact.

Mr. NADLER. But that is true regardless of signing statements. We pass a law today, President Smith 10 years from now could decide in some circumstance that we cannot foresee that his enforcement of that law would be unconstitutional, and it would be his duty, I think, not to enforce that law. What could we do to make that not just unilateral?

Mr. OGLETREE. I think you have to have a reporting requirement so that each signing statement is available in a prompt and responsible, comprehensive way to Congress.

Mr. NADLER. Thank you.

Now, Ms. Mathis, you said in your testimony that the ABA recommends that the Congress enact legislation that enables the President and Congress and other entities or individuals to seek appropriate judicial review when the President expresses the intent in a signing statement to disregard or decline to enforce a law.

How do you square that with the case in controversy requirement of the Constitution? In other words, is that asking the Supreme Court for an advisory opinion?

Ms. MATHIS. Two things, Congressman. The first thing we are suggesting is that under Article I, Section 7, the proper use of Presidential authority is to veto an unconstitutional bill. Secondly, if he chooses not to do that and allow the Congress to decide whether to override or not that veto, then we believe that there does have to be some type of expedited hearing.

Certainly Congress needs to work with the executive branch to determine that it is not an unconstitutional review. The case in controversy issue raised, as well as standing, as well as ripeness, are all issues which would require careful thought and review to craft legislation which would allow such a review.

Mr. NADLER. I agree with you on that. Congress could deal legislatively to some extent with the ripeness and standing provisions, but I am not sure that we could deal, short of constitutional amendment, with the case in controversy requirement.

Ms. MATHIS. I think that the issue would become whether or not there is, in fact, de facto a case in controversy once there had been a signing statement as opposed to a veto.

Mr. NADLER. Very good.

Let me ask you one other question. Several people have said there ought to be reports on these. The United States Code, Section 28 U.S.C 530D says 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, rule," et cetera, et cetera, "on the grounds that such provision is unconstitutional."

Mr. Elwood, has the Attorney General been issuing such statements with regard to every Presidential signing statement, saying we have used this and have, in fact, not enforced this law or this provision because it is unconstitutional? Have we been getting those reports?

Mr. ELWOOD. Congressman, two things. First of all, the Department of Justice recently reported to the Senate Judiciary Committee that it had complied fully with the terms of 530D. It hasn't issued anything with respect to signing statements because, as I said earlier, a signing statement is not a policy of nonenforcement.

Mr. NADLER. Okay. Let me ask my last question, because I see I have the yellow light.

In view of this Administration's penchant for secrecy, how can Congress and the American people challenge violations of law when they occur? If the President declines to enforce a provision of law on the grounds it is unconstitutional, but nobody knows about it, how is this other than untrammeled executive power that is unreviewable and unchallengeable, and that would be completely contrary to separation of powers and our general situation with limited government?

In other words, how do you square the President's ability or asserted ability not to enforce certain provisions of the law on the grounds that it is unconstitutional with the secrecy?

Let me ask you, let me be more specific: Should the President, if he thinks that something is unconstitutional, be mandated to tell Congress that before he declines to enforce it, despite whatever he thinks about the classification of secrecy or national security? And if the answer is no, how do we prevent tyranny?

Mr. ELWOOD. Congressman, I think that 28 U.S.C 530D provides sort of an effective notification mechanism, because anytime whatever agency would implement it, they would have an obligation under that provision.

Mr. NADLER. Well, given what the President has just done, or the Attorney General rather——

Mr. CONYERS. Excuse me, the gentleman's time has expired.

Mr. NADLER. May I have 1 additional second?

Mr. CONYERS. No, sir.

Jim Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. I will stay within the 5 minutes.

First of all, let me say that I don't think Presidential signing statements are any big deal. They are extraconstitutional, but so

are Committee reports that a majority of Committees in Congress submit on behalf of legislation trying to further clarify it. Those Committee reports are not voted on by the House of Representatives. They are not presented to the President, should a bill be enacted into law for his approval or veto. It is simply an opinion. And I think the President is entitled to his opinion just as much as every one of us are and every United States Senator is as well.

I also noted with great interest the op-ed piece that appeared in the *Boston Globe* on August 9th from Professor Lawrence Tribe, whom we all know is no conservative and definitely no strict constructionist of the Constitution, that says that the ABA Task Force report opposing the signing statements barks up a constitutionally barren tree.

I would like to ask unanimous consent to include this article in the record at this point.

Mr. CONYERS. Without objection, so ordered.

[The information referred to can be found in the Appendix.]

Mr. SENSENBRENNER. Now, Ms. Mathis, in the very first sentence of the ABA report on this issue, it approvingly quotes an article from the *Boston Globe* that states, "President Bush has quietly claimed authority to disobey more than 750 laws enacted since he took office."

But that statement by the *Boston Globe* reporter is false. In fact, on May 4, 2006, a full 3 months prior to the ABA's issuing the report, the *Boston Globe* itself issued a correction in which it stated, "Due to an editing error, the story misstated the number of bills in which Bush has challenged provisions."

Now, can you explain why in the editorial judgment of the ABA it was deemed appropriate to lead in its report with an approving quotation of a statement in the *Boston Globe* which the *Globe* itself had admitted was in error 3 months earlier?

Ms. MATHIS. Let me address your question, Congressman, by using the words of Professor Ogletree. Many of us would disagree about how you calculate the number of signing statements and also the provisions of law. The most recent data that I have is that there have been a total of 150 signing statements issued, and that the total number of provisions are over 1,100. I cannot specifically state to you, because I was not on the task force, why we lead with that.

Mr. SENSENBRENNER. Well, let me observe, in the words of law professors that I heard, when you use a quotation that has been retracted by the author, that is unlawyerlike, and I think that the American Bar Association was unlawyerlike because the retraction by the *Boston Globe* of the number in its article occurred 3 months before the task force issued its report.

I would hope that the next time the ABA comes before this Committee, they would be more accurate in the sources that they use to quote in support of their positions.

I yield the balance of my time to the Ranking Member from Texas Mr. Smith.

Mr. SMITH. Thank you for yielding time.

Ms. Mathis, let me follow up on a couple of questions here. First of all, going back to the task force, while you mentioned that it was bipartisan, Republicans, Democrats, conservatives, liberals, there

doesn't seem to be much diversity when it comes to philosophy, and, as I understand it, every member or almost every member of the task force had previously expressed disapproval of President Bush's signing statements.

You are welcome to counter that if you want to, but more specifically, Walter Dellinger, who was President Clinton's legal advisor and who is considered an expert on such subjects, was he invited to join the task force?

Ms. MATHIS. I can't tell you, Congressman, if he was or not. I did not appoint the task force. I do note that one of the task force members is with us today, and that is the Honorable Mickey Edwards, who, as you will recall, served in this Congress as a Republican, and he stated himself that he agrees with this.

Mr. SMITH. My point was the membership of the task force seemed to all be opposed to the President's signing statements, and, therefore, you only heard perhaps one side of the issue. Do you have any evidence that members of the task force—or can you name any individuals of the task force who did not already oppose publicly the President's signing statements?

Ms. MATHIS. I am not prepared to do that today. What I can tell you, Congressman, is there was open, free and significant discussion. There were no decisions made before the task force went through that process.

Mr. SMITH. Perhaps later on you can get back to me with the names of anyone who hadn't already showed a bias.

Mr. OGLETREE. I can tell you that I didn't, because I had not made any judgments or written anything about signing statements when I was appointed to the Committee, and I can tell you as well even though our deliberations were confidential or private, they were intensely debated across theological points of view.

Let me just finish my point. The concern was not just President Bush, but President Clinton, President Reagan. It was across ideological points of view, and it included members who had served in those Administrations and wanted to defend it. But I think there was a very different range of perspectives offered.

Mr. SMITH. Maybe you were the exception, but maybe you didn't become the exception on the basis of your testimony today. But my time is up.

Mr. CONYERS. Mr. Robert Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I want to thank all of our witnesses. Let me just go through a couple of questions to see where we are.

If a bill is presented to the President, it is a large bill and has a small provision in it that is unconstitutional, and the President wants to sign the bill, but says that provision is unconstitutional, and everybody knows it, should he be expected to enforce that provision because it is technically in the code?

If everybody knows it is unconstitutional and, it is in fact unconstitutional, should he enforce it, or should he not enforce that position?

Ms. MATHIS. Representative Scott, the report of the American Bar Association would say in that instance the system will work appropriately if, number one, the President expresses his views that a portion of a bill is unconstitutional, sends it to Congress,

and asks Congress to remedy that before the bill is sent to the White House for signing. In the event Congress fails to do that, Article I, Section 7 says the President has the right and certainly perhaps he would feel the duty to veto that bill.

Mr. SCOTT. He signs it and says it is unconstitutional. Should he enforce that unconstitutional provision of the law?

Ms. MATHIS. He shouldn't sign it. He should veto it.

Mr. SCOTT. Well, if he signs it. Sometimes you don't have that option. If it is a big, huge omnibus bill, sometimes just the politics of it is such, Congress has adjourned and gone home, he can sign it or veto it, and he signs it, and it includes the welfare reform and a little charitable choice provision that President Clinton talked about. That was just almost an afterthought in terms of the overall bill.

Should he enforce that part? He signed it. Should he enforce that unconstitutional part of the law? The better practice is to veto the bill, but he signed it. Now what? Does anybody think he ought to enforce an unconstitutional provision in the law?

Mr. EDWARDS. May I address that?

Mr. Scott, he will have violated his oath of office if he signs it believing it to be unconstitutional. I served in this body a long time, and the practice is, the reality is that if a President finds a part of the bill to be unconstitutional, he may tell the Congress in advance that if you pass this bill in its present form, I will veto it, and most of the time that will result in the offending provision being removed.

Mr. SCOTT. You have been a legislator long enough to know what a poison pill is. You can stick some very popular unconstitutional stuff in a bill and expect the President is not going to veto it because you stuck something in there.

Does anybody think if he does sign it, whether he violated his oath or not, he signed it, now, should he do something that everybody knows is unconstitutional?

Mr. EDWARDS. Mr. Scott, he will have violated his oath, and he will be violating the law—he will violate his oath if he signs it. If he signs it and does not enforce it, he will be violating the law.

There is no bill that is going to come before this Congress that is so urgent that it cannot wait a couple of days, whether it is water projects or veterans benefits, if it cannot wait long enough for the process of reconsideration to take place.

Mr. SCOTT. We must be doing things different around here than they were doing when you were here.

Mr. EDWARDS. That is obviously true.

Mr. SCOTT. So everybody expects if he has signed the bill, he is expected to enforce unconstitutional provisions of that bill?

Ms. MATHIS. I will say the next point that we made in our task force, Congressman, let's say the President or someone missed something that was clearly unconstitutional, then under our recommendation that should have the right to go to an immediate judicial review, and it should not be enforced.

Mr. SCOTT. If it is constitutional, but he just didn't like it, does his declaration in a signing statement have any impact on the ascertainment of whether or not the provision is constitutional?

Ms. MATHIS. Well, there are two issues there. The first is whether or not the unitary executive is going to enforce an allegedly unconstitutional provision or perhaps he won't and then the executive branch will not.

The second issue is the transparency, and that is whether the coequal parts of our Government, namely this Congress, have the right to have a report, and, secondly, whether our judiciary branch has the right to ultimately determine constitutionality. So you have a number of issues.

Mr. SCOTT. But if the President's statement does not help ascertain whether or not the provision is constitutional, the courts have not put any weight on the President's declaration that in his opinion it is unconstitutional?

Ms. MATHIS. We don't see it being that issue, we see it being the issue of the coequal branch of Government, the legislative branch, not knowing what the executive is not enforcing. It is very difficult to prove something which is not happening.

Mr. SCOTT. Well, that is the next step.

Let me just ask a follow-up, since I just have a couple of seconds. Ms. Mathis said that the case in controversy would exist at the signing statement. Does anybody disagree with that, in terms of getting judicial review?

Mr. ROSENKRANZ. Yes, sir. I think it would be very difficult for Congress to create a case or controversy surrounding just the legality of a signing statement. I think a case or controversy wouldn't exist until the President acted in some way.

Mr. CONYERS. The gentleman's time has expired.

Members of the Committee, we have four votes, one 15-minute, three 5-minute. So the Committee will stand in recess until 12:30 p.m.

[Recess.]

Mr. CONYERS. I thank the Committee and the witnesses for their patience. We were called back on an unscheduled vote.

The Committee will come to order. The Chair recognizes Mr. Coble of North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

It is good to have you all with us today.

Folks, what I am about to say is subject to personal interpretation, but it is my belief that courts either ignore or rely upon signing statements in a very unsubstantial way, and therefore it is my further belief that signing statements probably do not alter the law's legal effect.

Now, Professor Rosenkranz, let me ask you this: What legal value—strike that. First of all, do you agree with my interpretation?

Mr. ROSENKRANZ. I agree with you, sir, that courts have thus far relied on signing statements very little.

Mr. COBLE. What legal value then, Professor, do Presidential signing statements provide?

Mr. ROSENKRANZ. Well, one function of Presidential signing statements is to instruct the executive branch in the President's interpretation of the law, and that can be a valuable and important function of the signing statement.

Mr. COBLE. I thank you.

Mr. Edwards, I want to ask you a question, but I want to first say to Ms. Mathis, I want to associate with Mr. Sensenbrenner's remarks about the inaccurate article that appeared under the title of the ABA Task Force. I think, Ms. Mathis, the ABA could and should have done better. I think there is no substitute for accuracy and truth, for what that is worth.

Ms. MATHIS. Congressman, thank you for bringing that up, because I hoped to put on the record the fact that I did some research during the recess, and, in fact, the April 30th language that we quoted is accurate, sir.

It was actually a later article in which an editor at the *Boston Globe* changed the term from "laws" to "bills," and it was that later article, not the April 30th, which was clarified and corrected on May 4th.

So the ABA does, in fact, sir, stand by the quote. It was accurate. It never did change.

Mr. COBLE. Thank you.

Mr. Edwards, good to have you back on the Hill, by the way, and the rest of you as well.

In your criticism of the President's use of signing statements, Mr. Edwards, you argued that Congress has a constitutional duty and responsibility to ensure what shall be law and shall not.

Do you agree and argue that the judiciary also has a similar constitutional duty and responsibility?

Mr. EDWARDS. Certainly. Certainly. However, the judiciary—the justice—well, may I first go back to a point you made just an a moment ago, and then I will answer your question. It is true that a signing statement does not alter——

Mr. COBLE. Unlike the Professor, you are not going to agree with me, right, Mickey? But go ahead.

Mr. EDWARDS. A signing statement does not change whether or not what was enacted into law is, in fact, law. The signing statement doesn't change it. The signing statement only goes to the point of whether or not the President intends to comply with the law. That is what the issue is.

The questions keep coming back to the issue of how the courts are going to interpret this. This isn't a matter of the courts, it is a matter of whether or not the Congress of the United States decides, after deliberation, debate, discussion, hearings, to make something the law, and whether or not the President is then bound to comply with that.

Mr. COBLE. With that, Mr. Chairman, I yield the balance of my time to the distinguished Ranking Member, if he wants to take the time.

Mr. SMITH. I thank the gentleman for yielding. Mr. Chairman, I have more questions I would like to squeeze in before I know we have to go vote.

Professor Rosenkranz, I wanted to follow up on some points that other witnesses have made earlier this morning. There has been a lot of talk about numbers. President Bush has had, I think, 150 signing statements. President Clinton had 107 or thereabouts. When you look at the percentage of overall bills, they are about the same.

But are numbers really relevant to the point, to the larger point, which is to say they are not binding; it doesn't matter what number, how many there are; it doesn't matter what they say; they still have no legally binding effect? Would you want to comment on the question of numbers and whether they are significant or not?

Mr. ROSENKRANZ. Yes, sir. There has been quite a bit of confusion about the numbers, but you are quite right that the broader point is these statements are entirely proper and legitimate. So the President has every right and every obligation to announce his interpretation of the law that he is signing, and that is the central function of a Presidential signing statement, which this President has used, and which prior Presidents have used.

Mr. SMITH. Mr. Elwood, do you have anything to add to that?

Mr. ELWOOD. On the numbers issue, I think part of the confusion stems from the fact that the *Boston Globe* article, the first time it appeared, referred to 750 laws. I think it might be more accurate to say 750 provisions of law, since ERISA—it is one law.

Mr. SMITH. Is the number important or relevant at all anyway?

Mr. ELWOOD. I think the numbers—to begin with, I think they are entirely proper, so I don't think it matters whether there are 105 or 125, and I think that all of them are also close enough within the ballpark so that the current President's practice doesn't depart from the historical practice.

Mr. SMITH. Thank you.

Thank you, Mr. Coble.

Mr. COBLE. I yield back, Mr. Chairman.

Mr. CONYERS. Thank you.

Ladies and gentlemen, yet another vote has been called. We have on our side of the aisle Mr. Schiff, Mr. Davis, Mr. Watt and, of course, Ms. Jackson Lee, and Mr. Feeney. I would leave it to you five to determine whether we can share the rest of the time among you, or would any of you want to come back to get your questions in? What is your pleasure?

Mr. DAVIS. Mr. Chairman, can I ask one question of the Chair? Has the vote actually been called, or is it about to be called?

Mr. CONYERS. I have been told it has been called.

Ms. JACKSON LEE. No, it hasn't been called.

Mr. DAVIS. The bells aren't on. It literally hasn't been called at this point.

Mr. CONYERS. Can someone check to see where we are on the vote?

The next person then is Mr. Mel Watt of North Carolina.

Mr. WATT. Thank you, Mr. Chairman. I will try to be brief.

It should come as no surprise that since Representative Coble and I are both from North Carolina, we probably have been drinking out of the same well. As a legal matter, we might be closer together than people might think. As a legal matter. As a practical matter, though, I have some concerns about the way these signing statements have been employed by this Administration, and it is there that I start to raise questions.

If the President has decided that he is going to be the final arbiter of the constitutionality of an issue, and he is going to act accordingly, two questions arise. Number one, what happens immediately after that? And on that, I would like Mr. Elwood to tell me

what, if anything, the President or the Administration has done. You don't necessarily have to tell me right now, but if you can send this information to us, what did the President do after he signed the signing statement in the aftermath of the Intelligence Reform and Terrorism Prevention Act of 2004, where Congress required the National Intelligence Director to recruit and train women even and minorities in order to diversify the Intelligence Community?

I don't argue with the President's ability to sign a signing statement saying, I am going to interpret this in accordance with the Constitution, or whatever amendment of the Constitution he is relying on. What I want to know is what he did after he signed the signing statement. Has the Administration, in fact, done anything to diversify the Intelligence Community in terms of women and minorities? If you can provide that answer to us, you can do it in writing, and I won't take up any more time.

So, that is kind of the concern I have. It is not so much—and I am not even sure I agree that—I am kind of where Representative Scott was. How does one, once the President takes an action or doesn't take an action that is clearly inconsistent with the intent of Congress, how do we expedite getting that considered by the court so that there can be a resolution of that? That would be the second thing that I would ask maybe the other witnesses to address.

With that, I think I will maybe yield back the balance of my time.

You are here as a legal counsel for the U.S. Department of Justice, so you can speak for the Administration and find out what they did after this signing order, I take it?

Mr. ELWOOD. Yes. I will definitely take a look into that, but if I could address some of the other points?

Mr. WATT. Unless you know the answer to that question, I would rather have a researched answer than a surmise about what they did or did not do.

Mr. ELWOOD. But if I could, just to make a couple of points about other things you said, the President does not mean—we don't attempt through the signing statements——

Mr. WATT. I have heard that, Mr. Elwood. I take you at your word on that. In this particular case, I would like to know did he follow through and start to diversify, or did he use his interpretation of affirmative action and its constitutionality to refuse to do what Congress said? That is really more important to me than some general notion about whether the President does or does not intend to comply with the Constitution. I kind of start with the assumption that all of us have that obligation.

So, I am not trying to cut you off, I am just trying to make it convenient for my other colleagues not to keep you all here until after another vote.

With that, I yield back the balance of my time.

Mr. CONYERS. I thank the gentleman.

Former speaker of the house of Florida, Mr. Feeney.

Mr. FEENEY. I used to be somebody, Mr. Chairman.

I will be brief, because I know we have two or three colleagues that would like to get in.

I would like to ask Ms. Mathis from the ABA, isn't the issue of Presidential signing statements really a bogeyman here? Isn't what you are really concerned about is the President not enforcing part of a law, basically cherry-picking what he or she likes and doesn't like? I know, Mr. Edwards, that is what I understood your point to be. Isn't that your main concern? And even if you did away with signing statements, couldn't Presidents just continue to ignore portions of laws they didn't want to enforce?

Ms. MATHIS. The concern of the task force and also of the ABA by the vote of its 546 members of the House of Delegates is much broader than that. The concern is the constitutional checks and balances because the Constitution clearly calls upon the President to veto a bill that he believes is unconstitutional.

Mr. FEENEY. Let me ask you, because I want to follow up on that right there, suppose a portion of a bill is unconstitutional? Does everybody agree the President has an obligation to veto the entire bill if one portion is unconstitutional?

Ms. MATHIS. First in our report we say the President should send his concerns to Congress and ask Congress to fix it. But if, in fact——

Mr. FEENEY. Well, the President doesn't have the time to deal with——

Ms. MATHIS. But if, in fact, that flawed bill gets to the White House for signature, yes, he should veto it.

Mr. FEENEY. Professor Rosenkranz, do you agree with that? If a small portion of the bill is unconstitutional, does the President have an obligation to veto the entire bill?

Mr. ROSENKRANZ. Well, I think it is a difficult question as a matter of first principles, but it certainly has been the executive branch practice and the executive branch position for many, many years.

Mr. FEENEY. At least since President Jackson, who famously vetoed a bill that the Supreme Court had already said was constitutional on the grounds he thought it was unconstitutional.

Mr. ROSENKRANZ. That is true. But Presidents have, for many, many years, signed omnibus bills while also noting their constitutional objection to small portions of it. That has been long, longstanding executive practice.

Mr. FEENEY. Ms. Mathis, because Mr. Edwards is not concerned about this Presidential signature or statement having any impact on the courts, but the bar is partly concerned about that; is that right?

Ms. MATHIS. The issue that we have is the constitutional separation of checks and balances between the co-equal branches so that if a President signs, number one, a bill into law in which he believes part of it is unconstitutional, then, under the signing statements, we believe that, in fact, he is directing the executive branch to enforce a law in conjunction with his view of it.

Mr. FEENEY. I understand that.

Are you concerned at all on the impact the signing statement has on judicial interpretations?

Ms. MATHIS. Well, it does abrogate the right of a court to look at it quickly, which is the third or fourth point that I made earlier.

Mr. FEENEY. Mr. Edwards?

Mr. EDWARDS. I am concerned about that. The intent of a piece of legislation is determined by the people who passed the legislation. My point earlier is the courts don't seem to be giving much weight to whatever a President's signing statement says.

Mr. FEENEY. I want to ask you real quickly, Mr. Edwards, because we have got three different positions on judicial interpretation. One is represented by, for example, Judge Bork, who agrees with what you said, the intent——

Mr. EDWARDS. That would be the only time that Judge Bork and I have ever agreed on anything.

Mr. FEENEY [continuing]. The intent of the Congress. But then you have Scalia. He is a textualist. He doesn't care what the intent of Congress was. If we said 60 days, but then 90, he doesn't care what we meant. Then you have the other; we have transnationalist judiciary and people citing foreign law, and it is the "other" that concerns me. I can understand the intent faction and the textual faction.

I will finish with this. Mr. Elwood, because we are all concerned, we are Congress, we are jealous of our party, we are the republican branch, small r. We are all concerned with any President cherry-picking what parts of a given piece of legislation he or she wants to enforce. Whether they refuse to enforce it because of a signing statement or they secretly refuse to enforce, the impact is the same. They have undermined our will.

What is the remedy that Congress or a citizen has if a President chooses to enforce certain provisions of a law, but deliberately refuses to enforce other provisions? And after you are done, I will yield back my time.

Mr. ELWOOD. The remedy that a citizen would have is there may be circumstances where a citizen would be able to file suit because of enforcement or non enforcement. But I want to hasten to add that we do not view signing statements as cherry-picking the law. Simply expressing views about the constitutionality of a provision is not an indication that we won't enforce it fully. And that is a point I really want to make sure that everyone appreciates today.

Mr. FEENEY. Don't you have the ability—I mean, in the first place, who asked you, I guess is one question? I know Presidents have been doing this forever, but if there is a real case in controversy, don't you have the ability at all times to file an amicus brief stating your opinion when it really matters?

Mr. ELWOOD. I am not sure I understand the question. I mean, if the constitutionality of a provision of law is before a court, that is true, the President and the executive branch can always file an amicus brief on that behalf.

One other point I wanted to make, though, in response to Ms. Mathis, who has said repeatedly about how we should be providing our views beforehand, I just wanted to point out that that is something that we routinely do. A significant portion of the Office of Legal Counsel is devoted principally to providing views letters on the constitutionality of various provisions of law, which we provide both in the form of views letters and SAPs. So although signing statements are part of the constitutional dialogue between the branches, they are not the only part, and we do plenty before the

law is actually enacted, too, to let Congress know about the views of the executive branch.

Mr. CONYERS. The gentleman's time has expired.

I yield now to the gentlelady from Texas, Ms. Sheila Jackson Lee. I leave to the discretion of my two distinguished colleagues whether we should try to get all of our time in so that we can cast our ballot, or shall we come back. I leave that to your considered judgment, because this is a very important subject.

Mr. SCHIFF. Mr. Chairman, is the panel able to stay?

Mr. CONYERS. We will come back. Let's go with the gentlelady from Texas. We can get those 5 minutes in.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I think this is a very important hearing.

Let me indicate that I think the testimony of the witnesses has been extremely thoughtful; however, I think it is key that we recognize the responsibility of the United States Congress, and as our beloved constituent has just said, has responsibility to protect the Constitution.

I would like to simply say that many of you know I have authored H.R. 264, and I might say to the president of the ABA, I am quite interested in the language that you have utilized in your report, because I think the more thoughtful we can be and the more that we can expand the legislation and make it responsible, the better off the constitutional premise of three branches of Government would be protected.

I will say this, that the Constitution makes no such provision for signing statements. They do protect veto messages. And we are literally blocked from that constitutional act by a signing statement. I want to refresh the memory of the panelists to know that it was then legal advisor Alito who thought creatively under the Reagan administration to make the signing statements a little bit more stronger.

The sense of concern under this present Administration, and it shouldn't be a Republican or Democratic, is that in addition to the signing statements, there have been 800 constitutional challenges. One of the most, I think, serious ones was the provision by McCain regarding torture and the plain statement of the administration by the President that "I am not going to adhere to it." that is a dangerous precedent. So I raise these questions.

I would also like to note that pursuant to my legislation and talks about appropriations, if the Congress has a constitutional authority to cut funds for a war, such as the Vietnam War, and some are contemplating even the Iraq war, then I would argue that there is not anything constitutionally frail in my legislation as it relates to the appropriations process. We might look at it in a different direction, but, frankly, I think it is worth discussing.

What I would raise with the president of the ABA is the fact that you didn't appoint them, but you had a task force, and I assume that scholarly lawyers and practicing lawyers, those that practice before the Supreme Court, those that have a consciousness about the Constitution, thought it was a serious enough concern to organize a task force. Is that my understanding?

Ms. MATHIS. That is correct. The task force was authorized by the Board of Governors of the American Bar Association, about 38

people representing all areas of the United States and certain specialty practices.

Ms. JACKSON LEE. They could have concluded that they would do nothing, meaning that they could have concluded—their report could have said it is not sufficient for us to offer suggestions, but in actuality they have offered recommendations; is that not correct?

Ms. MATHIS. It is, Congresswoman. I think it is important to note also that regardless of the individuals, and you did properly state both conservatives, Republicans and Democrats, liberals and scholars who are on that, that their report went to a 546-person House of Delegates, and there is every political stripe and some who have no stripes in that house. And it was adopted. It is now the official policy of the American Bar Association, not just the task force.

Ms. JACKSON LEE. To be challenged, to suggest there was a bias, what you are saying is ultimately that report was adopted by a very diverse group of lawyers and members of the House of Delegates.

Ms. MATHIS. It was, after vigorous debate.

Ms. JACKSON LEE. Professor, may I have a yes or no answer on this? Would you welcome the suggestions and legislative fix that has been suggested by the president of the ABA? Yes or no?

Mr. ROSENKRANZ. Is that directed to me?

Ms. JACKSON LEE. Yes. Yes or no. Would you welcome the legislative fixes or fix that have been offered by the ABA?

Mr. ROSENKRANZ. No, I don't think that is positive.

Ms. JACKSON LEE. Thank you.

Congressman Edwards, time is short, and I am sort of speeding through this, and I think the professor has been thoughtful, but I think his position is no legislative fix whatsoever, and that is not helpful to us as a Committee.

Would you be able to expand on your agreement or disagreement with the suggested fixes by the ABA, or your parameters, and I think you said them before, of how we should look at this in the next step? Because I don't want this to be, as you represent, another party, but this is not a partisan issue. It is, I think, a constitutional issue.

Mr. EDWARDS. I strongly support the suggestions of the task force and of the entire American Bar Association, which did adopt this.

If there is a dispute between the legislative branch and the executive branch over the constitutionality of a provision, and the President asserts that he will decide whether or not constitutionally it is viable, and the Congress does nothing, we have essentially made the executive the final arbiter of what is and what is not constitutionality, and the Congress might as well go home.

Ms. JACKSON LEE. I look forward to working with these various panelists, Mr. Chairman, and I hope that H.R. 264 can be expanded and revised and that we move forward. I thank the Chairman very much.

I yield back.

Mr. CONYERS. Ladies and gentlemen, we apologize. This is very rarely occurring in the House, where successive roll call votes occur. I don't know if it is because it is this subject matter the

Committee is entertaining here in the Judiciary room or some other reason, but we do have two very distinguished Members, maybe three now, that wish to be heard. So for this last vote, we will have to stand in recess one additional time. I apologize for this inconvenience.

[1:40 p.m.]

Mr. CONYERS. The Committee will come to order.

The Chair recognizes the gentleman from California, Mr. Lungren.

Mr. LUNGREN. Oh, thank you very much, Mr. Chairman. I appreciate that.

In the past couple of years, it has been a privilege for me to work with the ABA and the ACLU on matters where I thought we needed to refine some decisions made by the Administration—the Thompson memo, which was a continuation of something that had begun in an earlier Administration; and decisions, apparently eminent decisions, by the Sentencing Commission with respect to, in both cases, attorney-client privilege and attorney work product, where basically I thought that the actions put a chilling effect on the relationship of attorneys and clients that was not helpful in that regard or, frankly, for the better public policy of encouraging corporations to consult with attorneys to make sure they were doing the proper thing.

But here, I must say that I think we are making more out of it than there is here.

There has been the suggestion—and I have been one of those who has even told the President, himself, that I thought he ought to exercise the veto pen a little more often. But the suggestion has been made that the only option he has is to exercise the veto when confronted with a bill that is presented to him that is multifaceted; and it seems to me that at least in the statements that you make, Ms. Mathis, about the President should just go ahead and veto things—assume something that some States have, which is the Single Subject Rule.

We are not confined to a Single Subject Rule here in the Congress. We often present the President with a bill that is huge and may be 99.9 percent clean, so to speak, with things that are very important to the rest of the Nation and some Committee or Subcommittee of the House or the Senate has put something in which is arguably unconstitutional.

And I have heard it on the floor where Members have said—and I know Mickey has heard this, too—where Members have said, "Gee, there is a problem with this. It may be unconstitutional," and another Member says, "Well, we will let the courts decide that," which I always thought was the easy way out.

And we were probably a little lazy in doing that sort of thing, but I do not think the President compromises his constitutional obligation by signing a bill that he thinks is needed and finding some parts of it that may be unconstitutional and gives us notice that he believes that is the case. This is actually the reverse of some of the comments that I heard early on, which were that somehow this is hidden—well, with all due respect to the Chairman, talking about the continuation of the secrecy of the Administration.

What is secret about stating what your problems are, and isn't it something that you would like to have? I think the ABA recommendation was that somehow it be put on some database. As I understand it, they are immediately available at the White House Web site, which is available to anybody who wants to look at it.

So, from the ABA's perspective, don't you see a problem with the way that the President is confronted with something—if he has something, as I say, which is 99.9 percent pure?

Ms. MATHIS. First, Congressman, let me state how much I appreciate—and I know the legal profession does—all of the work that you have done with our organization and many others on attorney-client privilege, and I want to thank you sincerely.

With regard to your question—I think there were four or five, and I may miss one, so please——

Mr. LUNGREN. I sometimes do that.

Ms. MATHIS. That is quite all right, and we are not in a court of law, so I will try to answer all of them.

The first issue is on the 98 percent good, 2 percent, we are not sure. I would just suggest that the United States Supreme Court held that a line-item veto was unconstitutional in *Clinton v. New York* in 1998, and so the reverse of the comment is that if you have a signing statement which, in fact, purports to state that a certain part of that law—2 percent—is not right and then directs the executive branch not to enforce it, that is the essential equivalent of a line-item veto, and that a cleaner—our suggestion is that a cleaner way to do that is, number one, do what Mr. Elwood earlier suggested, and that is, continue to tell Congress what might be wrong with the proposed legislation; but if it does get to the White House for signature and it is 2 percent wrong, indeed, yes, veto it.

We also had a case in point with the last session where there would be cases that the veto would come back to Congress very quickly with a message, and Congress would, within days, decide if it was going to override or not. So the first——

Mr. LUNGREN. I am just going to interrupt for a second and ask, what about the canon of constitutional avoidance?

Ms. MATHIS. Well, that is a canon that we look at when we have got it at the Judiciary, and I will respectfully suggest to you that there are actually three different places we have to look. And many of the questions today have concentrated on the judicial branch, and in responding to your question right now, I am dealing with the constitutional right and responsibility of the executive branch, and that is to veto.

The second branch, I would suggest honorably to you, is the legislative branch, and then finally, the third is the judicial branch. And everyone could believe that something is constitutional; it does not abrogate the third branch's entitlement to decide that 2 percent of a law is, in fact, unconstitutional.

The issue becomes, if the veto is not used, Congress does not have the right to override; and that is taking away a constitutionally mandated right of Congress.

If, instead, you have a signing statement which then goes out to the executive branch agencies and says, "We believe that this is unconstitutional, and we have no intention of following it because

of the constitutional requirements," it is our suggestion that this is stripping from Congress its rights.

Mr. LUNGREN. Doesn't that set up the case in controversy that you need to——

Mr. CONYERS. The gentleman's time has, unfortunately, expired. The gentleman from California, Mr. Howard Berman.

Mr. BERMAN. Well, it is a fascinating subject.

I do not have any questions. I just have to comment that my friend from California talked about Members of Congress who say, "Ah, let the court decide this constitutional question," and he remarked that it seemed a rather lazy way of doing it.

How would you describe the Congress Member who says, "Let the court decide it," and then when the court decides it, attacks the courts for judicial activism?

Mr. LUNGREN. Would the gentleman yield?

Mr. BERMAN. I would be happy to.

Mr. LUNGREN. I think that is the ultimate in legislative laziness. I think we ought to be sharper than that. I do not like to ascribe motivations to Members, but I do think that is the case.

Would the gentleman yield for a moment?

Mr. BERMAN. Sure.

Mr. LUNGREN. One of the concerns I have in the way that we have looked at this is that, in the case where they were talking about what the proper relationship in enacting a law is, they talked about three parts—they talked about bicameralism, they talked about presentment, and they talked about execution. And here, it seems to me the President has a legitimate role in the execution part, which unless you want to call it not "execution" but "post-presentment," where he makes the decision as to whether or not to sign the bill and it becomes law that way or else he vetoes it, and then you override the veto.

In his decision to sign the bill or not to sign the bill and make it law—I would not call it "quasi-legislative"; let us just call it "post-presentment."

At that point in time, why should not the President have the ability to give his interpretation, for whatever it is worth, as we do when we have both Committee reports accompanying it and engage in colloquies on the floor of the House to give our reading, our sense of it?

I know Justice Scalia has said, Look, if it is not within the four corners of the document we call the law, we ought not to consider it; and frankly, I happen to think he is right on that. But the fact of the matter is, why is this so different from what we do?

Mr. BERMAN. Would the gentleman——

Mr. LUNGREN. I am yielding back my time to you, yes.

Mr. BERMAN. What if through that interpretation that he is giving, that legislators do all the time, he is also signaling to the agencies charged with enforcing the law that his interpretation, rather than the legislative history, the plain reading of the statute, the Committee reports, is the correct interpretation?

Mr. LUNGREN. Well, if the gentleman would yield.

Mr. BERMAN. Sure.

Mr. LUNGREN. My point would be—I mean, if on its face what the President says absolutely contradicts the clear meaning of the

law and/or does not appear to be a constitutional impediment to it, frankly, he would be exposed for that; but my point is, this is out in the open. It is better to have that as part of a signing statement than it is people whispering in the corridors of HUD or someplace else.

I mean, that is what I do not understand. It is either you are worried about secrecy or you are worried about something else. I mean, here he is being up front about how he thinks this is.

Mr. BERMAN. I do not know if I have a minute left, but, Mr. Edwards, would you like to get into this since you have a perspective here?

Mr. EDWARDS. Thank you, Congressman.

You know, when the President—the signing statements, who cares? Who cares about the signing statements? The signing statements, if they are a statement by the President of "here is my opinion about this bill," nobody cares. The President has the right to do that.

If the President is saying, you know, that he and his executive branch—his executive branch, unitary executive—does not intend to comply with this, does not believe it is appropriate, if he uses the veto, he will probably prevail, because he will come back to the Congress, and it would take two-thirds of each House, you know, to override the President's veto.

But otherwise, you are saying—you are not saying both of you have a say in what is constitutional. The Congress says, "We think this is constitutional." the President says, "I think it is not." there is no response. He is the final word. He has trumped the legislative branch. He has trumped the judicial branch. He is the final word if Congress does not do something to enforce its will.

Mr. CONYERS. The gentleman yields back his time.

The gentleman from Virginia, Mr. Forbes.

Mr. FORBES. Thank you, Mr. Chairman.

Mr. DAVIS. Could I ask a question of the Chair before Mr. Forbes proceeds? I have a quick question of the Chair.

Given that there is apparently some possibility that there will be continuing procedural votes in the afternoon, and given that Mr. Schiff and I, I think, have come back four different times to ask questions, could I make a request of the Chair that after Mr. Forbes' questions we suspend seniority and proceed with Mr. Schiff and then myself?

Mr. CONYERS. We will take it under consideration——

Mr. DAVIS. Thank you, Mr. Chairman.

Mr. CONYERS. Mr. Forbes.

Mr. CONYERS [continuing]. If there is no objection, of course.

Mr. FORBES. Thank you, Mr. Chairman.

Mr. Chairman, I want to first congratulate you on this being your first hearing that you are presiding over as Chairman, and it is unfortunate that this hearing really seems to be more about politics than policy because, as I have listened to all of the testimony, there does not seem to be a big quarrel about signing statements. It is just you do not like what the President has to say, and I still cannot see much difference in the President's putting it in a signing statement versus his coming out in a press conference and saying the exact same thing.

But be that as it may, I know Mr. Ogletree is gone now, but I wrote down the quote he made in response to Mr. Nadler's question at 11:25 where he says, "This President, more than others, has interpreted what the law allows him to do."

I think that is what we want the Presidents to do. I do not think we want them to walk around in the dark not knowing what they believe the law allows them to do and does not allow them to do.

Ms. Mathis, as I look at your coming here today as President of the ABA—basically all three witnesses are a product of the ABA—the task force you are representing in coming here, and I know you testified earlier in response to Mr. Sensenbrenner and his concern about basing comments on articles in the newspaper that may be not particularly accurate, but one of the things you also mentioned was that you did not appoint this task force.

But in point of fact, according to one of those articles, which may or may not be accurate, in the Miami Daily Business Review, Michael S. Greco was the President at the time of the American Bar Association, who did the appoint this task force; and within 2 weeks of appointing the task force, he said that he was on a mission and basically equated President Bush to becoming another King George III.

So I think he was prejudiced a little bit at the time that he was appointing this task force as to maybe what his intentions were, especially given the fact in these same articles it points out that for the last 16 years, your members have been the largest contributors to the Democratic Party, and at no time in that period of time were less than 70 percent of your contributions going there.

But my question to you today, as President of the American Bar Association now, would be, President Clinton issued 105 signing statements. Can you give me the dates of any special task forces or committees that were designated to look at any of the signing statements during his term in office?

Ms. MATHIS. Congressman, I believe you were out of the hearing room when I clarified the record, and if I may, sir, that—in fact, the first statement in the task force report is accurate. The April 30th report in the *Globe* was never changed. It was a later article in which a *Globe* editor changed the word "law" to "bills," which was, in fact, corrected on May 4th.

So we do stand by the report. I had the opportunity to check during the recess, sir.

Secondly, I do not disavow in any way, shape or form the task force despite the fact it was my predecessor who appointed them.

I believe you also missed the point that I was able to make a little earlier that that task force went to the full 546-person board of—excuse me—House of Delegates, which is a very broad group of lawyers throughout the United States. It includes Republicans; it includes Democrats; it includes Independents; it includes people who have no political persuasion. It was vigorously debated, and it became the policy of the ABA.

Prior to that action in August of 2006, it was just a task force report. There are many task force reports of the ABA that never become policy. Some do; some do not.

With regard to your earlier statement, let me say that the task force and the ABA have looked at the signing statements as they

have been used in the last 25 years, beginning with President Reagan, and in fact, this report is very specifically not aimed at a particular President. It is aimed at all Presidents.

Mr. FORBES. Ms. Mathis, I would love—and we can chat a little bit later. Can you just answer my question on whether or not any task force was appointed to look at President Clinton's signing statements when he made those?

Ms. MATHIS. Not only was it not done then, but it has been reported in the task force itself, and there are specific examples in the task force of where President Clinton misused signing statements.

Mr. FORBES. But you did not appoint any during his Presidential term——

Ms. MATHIS. I did not appoint any, and I still have not.

Mr. FORBES [continuing]. Nor did any of your predecessors?

Ms. MATHIS. No.

Mr. FORBES. Good.

The last question——

[Disruption in Committee room.]

Mr. CONYERS. Let us have order, please.

Excuse me. Could I ask the officers to please escort our visitor from the Committee room so that we may continue our hearing?

Ms. MATHIS. I apologize, Mr. Forbes. Could you repeat your question?

Mr. FORBES. It would have been difficult for you to hear.

Mr. Chairman, may I follow up with the last question?

Mr. CONYERS. Yes, please.

Mr. FORBES. Mr. Chairman, I just have one question because I know my time is about out.

You know, I hear a lot about this statement, he could make a statement, and nobody can come back, but couldn't he also do that at a press conference? You have not really addressed the difference between his coming out and making a written statement somewhere else.

What is the difference between his doing that or—for example, you know, you heard Mr. Sensenbrenner talk about putting in Committee reports. What about a Member who goes down to the floor and puts in a statement to the Congressional Record?

Can you differentiate those for me, please?

Ms. MATHIS. I will try, and I think I can.

I believe that the task force is very clear on this, that the President has the same first amendment right that you do, Congressman, and I do, and may say whatever he chooses to.

The effect, however, of a specific set of language in a signing statement in a unitary President theory is that, when he says there are certain aspects of this bill which we believe are unconstitutional and we intend not to enforce them and that is then sent or is available for the executive branch, then that is an issue.

It is an issue about which we have some concern, and we think it creates the potential for an unbalancing of the checks and powers. We think that the four recommendations we have made are there to help with transparency. As an earlier Member said, you can go to the White House daily information, and that is true, but

then it gets lost; there is no public database unless you know what the law is you are looking for that has a signing statement.

So the four things we have recommended are: Send your objections to Congress; do it in a timely manner. I understand from our representative from the Office of Legal Counsel that is happening. If a bill gets to you and you find 2 percent of it is unconstitutional——

Mr. FORBES. Ms. Mathis, I would love to hear it, but my time is out.

So, Mr. Chairman, thank you.

Mr. CONYERS. I thank the gentleman.

And I now turn to the gentleman from Georgia, whom we welcome as a new Member to the Committee, and ask if he will yield to Mr. Adam Schiff, the gentleman from California.

Mr. JOHNSON. Well, I am tempted to ask for what purpose. I have got another Committee meeting to get to myself, so I will be brief. How is that?

Mr. CONYERS. The gentleman is recognized.

Mr. JOHNSON. All right. Thank you.

I do not mean to be obstinate in any way, but at any rate, I just simply want to state that, you know, this is my first Committee hearing. I am a new Member of Congress. I believe that one of the reasons I am here is that Americans across the board want their Congress to be more proactive, exercise their authority to provide oversight and investigations when necessary, and I believe that is what we are doing today, Mr. Chairman, is exercising our power to oversee the President's use—and some may say misuse—of the Presidential signing statement.

Without characterizing it either way, I will say that certainly these witnesses who have appeared here today particularly, or in particular, the ABA should not be accused of any bad motives in making their appearance. I assume everyone here today is here for the protection of our Government, the protection of the three branches of Government and the balance of power amongst them, and so I want to laud everyone for coming.

I will say that the ABA recommendations as to some kind of statement by the executive branch when it uses this signing statement to instruct its branches as to how to interpret statutory law, I think are eminently reasonable, that the President report in detail to the Congress whenever he so instructs his departments; and also, I believe that there should be some judicial avenue of preclearance, if you will, for any presidential construction of statutes.

With that having been said, I will yield the balance of my time.

Mr. CONYERS. Mr. Franks, the gentleman from Arizona.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, we live in an era when 60 days before an election some of our campaign laws say that we cannot even mention a candidate's name in a political advertisement, and it seems like we are doing a great deal to thwart political speech as it is.

I wonder if it is wise for us to begin then to thwart the political free speech of the one person who is elected by all of the people in this country, and I certainly think that that is one of the issues that is here today.

The second issue is that just by a cursory glance at history, we find that at some point one of the major branches of Government has been wrong, obviously. You know, the Supreme Court at one time in their Dred Scott decision rendered an entire race of people outside the scope of humanity.

And that was a wrong decision, and if it had not been for the fact that the other branches pulled against that, then the Constitution itself could have been abrogated in the most serious way. And of course, because they did, our country ended what was the practice of slavery for 6,000 years in human existence.

And so, as we really begin to look at our three branches of Government here, we have to necessarily realize that there is going to be some overlap and some gray areas, and the tendons that hold those three branches together are sometimes going to be pulled and stressed. And it occurs to me that that is precisely where we are here today, where we are doing everything that we can to allow the different branches of Government to express their commitment to the Constitution. And if, indeed, the President is held by the Constitution to faithfully execute the laws of the land, it should be remembered that the Constitution is the ultimate law of the land, and when he looks at one particular statute and says, "Well, you know, this is against the Constitution," isn't he, as a matter of constitutional principle, required to subordinate himself to the higher authority, which is the Constitution itself?

I will let the gentleman that raised his hand here answer the question.

Mr. EDWARDS. Congressman, thank you.

Unfortunately, because—you have to have shorthand. If you are saying that you are having a hearing about something, you have to put a label on it, and so this hearing is about, "Signing Statements," but that is not what this hearing is about. That is a label.

This hearing is about Presidential assertions of the right not to comply with the law. That is what the hearing is about, a President asserting—whether it is in a signing statement or in a speech or anywhere else that as the President, he will be the final determiner of whether something is constitutional, not the Congress; you know, he will decide whether it is constitutional, and he will decide whether or not to comply with it. That is the problem.

To go to the point you are making, the problem you have here is that there is no recourse. If there is a veto, there is recourse. If the President says, "I do not believe we should comply with this, the unitary executive branch does not have to comply with this," you know, there is no veto. That is it. He is the final word. So what do you do?

Mr. FRANKS. I appreciate the gentleman's point.

The challenge is that the President many times is dealing with laws that come into place not necessarily by his veto or lack thereof, or perhaps even by someone overriding his veto. Sometimes those things happen outside his scope, and as a matter of just common reality, sometimes a President is forced to make a decision between which law to obey, and sometimes he is forced to look at the Constitution as the higher law. And I know——

Mr. EDWARDS. Is he the final word?

Mr. FRANKS [continuing]. It is a challenging situation, but regarding the recourse, if I could ask any member of the panel, do you not think that there is some recourse in the courts and otherwise if, indeed, the President—if it is believed that he has overstepped his bounds?

Yes, sir.

Mr. ROSENKRANZ. I think there often is some recourse. Many of these questions will find their way into court ultimately.

I would just like to say, in response to this characterization of the President's signing statements as declarations that parts of statutes are unconstitutional, I think it is a serious mischaracterization of what the huge majority of this President's signing statements actually say.

Mr. FRANKS. No doubt.

Mr. ROSENKRANZ. The huge bulk of this President's signing statements, the huge bulk of every President's signing statements, are about interpretation of the law, interpretation of the statute. Not "I think this provision is unconstitutional," but rather, "I am giving you my understanding of what these words mean; and given that understanding, I am going to enforce that understanding of those words."

Mr. FRANKS. Mr. Chairman, I would just want to, in closing here, emphasize this gentleman's point that the President oftentimes is doing what he truly believes is right under the Constitution, to enforce and interpret the Constitution the way he sees fit. Anything else would be malfeasance on his part.

Mr. CONYERS. I thank the gentleman.

Mr. FRANKS. Thank you.

Mr. CONYERS. I recognize now Mr. Adam Schiff, the gentleman from California.

Mr. SCHIFF. I thank the Chairman. I thank you for your efforts to get us in earlier as well.

I want to ask Mr. Elwood a question, actually one specific and one more general, and it has to do with the PATRIOT bill.

We recently, I guess last year, had the reauthorization of the PATRIOT bill signed into law. Many of us worked on that and felt that it made important improvements both in security and in oversight. It was not a perfect bill, and there is more that could be done, but many of us on this Committee pushed for oversight provisions that would give us greater confidence that we were not intruding on people's civil liberties with a measurable improvement to public safety and that we were doing so well within constitutional guidelines.

A couple of the sections in that bill, 106(a) and 119, were part of the bill months before the negotiations began or remained unchanged throughout the negotiations over the reauthorization. I am not aware of any objection that was made to those provisions, and in fact, the Attorney General testified ad nauseam how important oversight was in terms of the reauthorization of the PATRIOT bill.

Nonetheless, we get the signing statement in which the President states that the executive branch will construe the provisions of this bill calling for furnishing information to entities outside of the executive branch such as these Sections 106(a) and 119 in a manner consistent with the President's constitutional authority to

supervise the unitary executive branch and to withhold information, the disclosure of which—blah, blah, blah.

The President also dismissed section 756(e)(2), which requires the Attorney General to submit to Congress recommendations for further legislation, using similar language, the President essentially stating that he will withhold the information requested by Congress when he decides unilaterally that he will do so, regardless of the express requirements of the law that he was signing.

My two questions are this, and if you cannot answer it today—and I do not expect that you will—I will ask that we have you submit to the Committee an answer to the question.

Has the President, has the executive branch, withheld the information called for by Congress under the PATRIOT bill under a claim of this signing statement that, under his unitary authority, he is not required to submit fully the information Congress required? That is my first question.

Second, how is Congress to know? How are we to uphold our constitutional responsibility if the executive unilaterally decides the scope of the laws that we pass? How are we to know if you are not providing us the information that we called for under the PATRIOT bill? How are we to know if you are getting that call wrong?

Mr. Davis and I were both part of the Justice Department. We both recognized that the attorneys there are hardworking and diligent and doing the best they can, but we also recognized they are not infallible, because we were there, and Mr. Davis knows he was not infallible when he was there. I was the only infallible attorney there, and I am no longer there.

So how are we to do our job if you arrogate yourself the power to decide when the scope of what we have asked you intrudes upon your authority?

Mr. ELWOOD. I think that this is an excellent example of something I have been trying to illustrate today, which is, simply because the President states sort of constitutional views on an area of the law, it does not mean that we are not going to comply fully. And it is my understanding, I specifically inquired——

Mr. SCHIFF. It does not necessarily mean that, but it could mean that.

Mr. ELWOOD. No. But the point I want to make is that the President—simply because he is announcing his views, it does not mean that he is not going to comply fully.

As it happens, I have inquired, and the Department of Justice is complying with those provisions; it is cooperating in the Inspector General's investigation.

Mr. SCHIFF. Can you tell us then that there is no part of the information Congress has sought under this provision of the PATRIOT bill that the executive has withheld because it believes that it would compromise national security, that it would violate principles of unitary executive branching?

Mr. ELWOOD. That is my understanding, and I want to make a point here, which is that President Eisenhower and President Clinton made precisely identical signing statements, which is not to say we are not going to comply. We are saying that we are——

Mr. SCHIFF. I just want to pin this down though.

So you can say here with confidence that the executive branch has withheld nothing that is within the plain language of that statute under claim of this signing statement?

Mr. ELWOOD. My understanding is that the Government, the Department of Justice, is cooperating fully with those provisions. That is correct.

Mr. SCHIFF. That does not answer my question.

Mr. ELWOOD. That is my understanding, yes, Congressman.

Mr. SCHIFF. Has the Administration withheld anything under that provision? Under that signing statement language, have they withheld anything?

Mr. ELWOOD. It is my understanding that they have not, Congressman.

Mr. SCHIFF. And how would the Congress find out if they were?

Mr. ELWOOD. I think through oversight. I think that in a case like that, when the President says that he is going to——

Mr. SCHIFF. Does the Administration feel any obligation to notify Congress that we are making a claim of executive privilege, of national security, and we are not turning over information called for under this legislation?

Mr. ELWOOD. Yes, I think that they would notify you if they were not going to share it with everyone; and I think they would say that there are certain things we are holding back. And I also do not know that they would say, we are not withholding it at all; I think they would just put special procedures on any information that was subject to—that it was classified and subject to additional sorts of constraints in its handling.

Mr. CONYERS. The gentleman's time has expired, and I recognize the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Mr. Chairman, thank you very much. I appreciate your holding this hearing. I am pleased that you are engaged in oversight, but I am, quite frankly, surprised that this was the topic of the first hearing as well.

This is an interesting academic discussion. I listened intently this morning to the testimony of all of the witnesses, and it was not until we got to Professor Ogletree, who mentioned two signing statements where he called into question whether the actions of the President were appropriate. Until then, I had heard nothing that contradicted the long history of the use of signing statements for very appropriate purposes, as Professor Rosenkranz has aptly stated, "to elucidate the President's understanding of the law that has been passed by the Congress."

We have seen an increase in the number of signing statements over the years. I would say that is entirely because the amount and complexity of legislation passed by the Congress has increased over the years, and signing statements by Republican and Democratic Presidents have increased correspondingly.

In a moment, I will give Professor Rosenkranz an opportunity—oh, actually, Mr. Elwood an opportunity to talk about those two issues—the torture legislation and the legislation regarding nuclear controls, the nuclear agreement with India.

But, first, I would like to call your attention to what former Assistant Attorney General Dellinger in the Clinton administration noted about signing statements. He said, "One of the most con-

troversial purposes of Presidential signing statements is to create legislative history in an attempt to guide the courts when they interpret the legislative intent behind statutes." however, as Congressman Smith has pointed out, the courts have rarely, if ever, given any credence to these signing statements, and increasingly, they give less and less credence to our own version of signing statements, which Mr. Sensenbrenner correctly pointed out are our own legislative histories. Instead, they have looked to the actual statutes and interpreted those, as they appropriately should.

Much more troubling to me is the inclination of the courts to cite foreign law and trends when interpreting statutes. Foreign laws were passed by foreign officials who were never elected by U.S. citizens. At least the President is elected by the American citizens and is examining these laws in the framework of the U.S. Constitution.

I find it troubling that the new majority would prioritize oversight on Presidential signing statements above examining the practice of the courts, including the Supreme Court's increasingly citing foreign laws and regulations when interpreting statutes enacted by the Congress.

So I would like to ask Professor Rosenkranz if you find this prioritization troubling as well. Do you believe that the Supreme Court's citation of foreign precedence is at least, if not more, detrimental to U.S. sovereignty than Presidential signing statements?

Mr. ROSENKRANZ. I do agree with you, sir.

I think that that issue—I think the citation to foreign law and foreign judgments raises an issue of democratic self-governance that this issue really does not. So the American people are, of course, quite interested in the distribution of powers between the three branches of this Government, but far more so, they are interested in being governed by one of these three branches rather than by foreign governments.

Mr. GOODLATTE. And increasingly the courts, including the Supreme Court, have turned to foreign judicial precedence in interpreting the meaning of our own Constitution, which I and Justice Scalia and a number of other members of the bench have found to be a very disturbing practice.

Let me ask Mr. Elwood if he wants to add anything to that and also if he would care to comment on the two points that Professor Ogletree raised about the nuclear agreement with India and about the torture issue.

Mr. ELWOOD. I agree with Professor Rosenkranz. This is something the Attorney General has spoken about and feels very strongly about.

On the McCain amendment and the Hyde Act, I wanted to say about the McCain amendment that I think this is another excellent example of how just because the President states his constitutional views does not mean he is not going to enforce it.

He said both before and after signing the McCain Act that he agreed with it, that it was good legislation and that he intended to implement it fully. In fact, he said, shortly after making the signing statement, the McCain amendment is an amendment we strongly support, and we will make sure it is fully effective. They asked him, well, why did you make the signing statement then, and he said that the reason I make signing statements like that

in the foreign affairs area and the war powers area is just to say that conducting war is the responsibility of the executive branch, not of the legislative branch.

So it is just a general statement. Look, these are matters that are very important to the executive. So, you know, keep that in mind. These are areas where we have special importance, special prerogatives.

I also wanted to point out that President Clinton in the Cuban Liberty and Democratic Solidarity Act, even though he supported that legislation, issued a very similar signing statement there saying that the President's authority also in foreign affairs was very powerful.

As for the Hyde Act, if I might be allowed, it is a very, very technical point. The legislation adopted by Congress said that any transfers of nuclear material had to be consistent with guidelines of this nuclear producer's group.

The Government consistently has complied with these guidelines throughout history, and the basic point was a technical one, which is that if you make the legality of the transfer turn on what these guidelines say, at some point in the future it is ceding legislative power to foreign bodies, and that was it. It was just a technical point, but the Government consistently has only transferred in compliance with those guidelines throughout history, and we are a member of that group, in fact.

Mr. CONYERS. The gentleman's time has expired.

The Chair recognizes the gentleman from Alabama, Mr. Artur Davis.

Mr. DAVIS. Thank you, Mr. Chairman.

Ms. Mathis, you made the correct point several times that the broad focus of this hearing is obviously not whether or not the President can make an oral statement. He can make any oral statement he wants and any written statement he wants. The broad question is the scope of the President's interpretive power, his power to interpret the Constitution, and I want to direct my questions along that angle.

Mr. Elwood, you made an assertion that I think is somewhat remarkable, and I want to go back to it. When my colleague from California was asking you his line of questions, he was making the point that sometimes the President's interpretation of the Constitution or his interpretation of a statute could lead him to shield information or to withhold information from Congress or from the public domain that could prevent a case of controversy from ever being generated. So I want to go back to that line of questions.

In the context of the authorization that this Congress provided after 9/11, the use-of-force authorization against Afghanistan, we know that several times the President has said—and I do not know if he has done it in the context of a signing, statement, but several times he has said orally, and members of your administration have made the representation in an *amicus* brief—that that was a broad delegation of authority to the President; and among the instances of that broad delegation would be FISA, or not necessarily following certain provisions of FISA, among—another instance of the broad delegation the President claims has to do with the detention of individuals at Guantanamo.

The point that I think Mr. Schiff was making is that if the President interprets a statute, or even the Constitution, in a manner that leads him to act and leads him to prevent the information from being released into the public domain, that itself is problematic. The only reason that we know and now have the potential for a case in controversy around the FISA statute is because of the New York Times, frankly, not because someone could go out and file a lawsuit, and not because Congress exercises oversight authority.

You referred to the oversight authority. It is darned near impossible to exercise it when the President does not share with us when he is exceeding the scope of the statute. So that is the point he was making.

The second observation—Mr. Elwood, this is a question to you. Is it your position, is it your administration's position that if the President of the United States believes that a statute is unconstitutional that he is within his constitutional prerogative not to follow it? Is that your position?

Mr. ELWOOD. You have made two points.

Mr. DAVIS. Well, I would like you to respond to that one, though, first.

Mr. ELWOOD. Okay. It is the position of the Administration and it is the position consistently of executive branches as long as I can remember that if an act of Congress is—the first thing you do is, if it is capable——

Mr. DAVIS. Be quick because our time is running.

Mr. ELWOOD. If there is any construction you can give it to make it constitutional, you do that first.

Mr. DAVIS. But if, for whatever reason, the President finds it unconstitutional and cannot find a save in construction, is it your position the President is not following the statute?

Mr. ELWOOD. Yes. The Attorney General——

Mr. DAVIS. Now let me ask you—it is my time. You have said, "yes"; let me follow up on that.

We had a governor of Alabama named George Wallace back in the 1960's. Perhaps you have heard of him. This Congress passed a Voting Rights Act and passed a Civil Rights Act, and the governor of my State stated that he felt that both were unconstitutional, and he informed the people of Alabama that he would not enforce provisions of the Civil Rights Act and the Voting Rights Act, that Alabama was a separate sovereign State, and as the sovereign of Alabama, that he was not going to follow an unconstitutional law or provision.

Tell me how that is different from the President's position.

Mr. ELWOOD. I think that the position is—I mean, for one thing, I want to emphasize that any time when the President or a member of the executive branch decides not to enforce a law because they think it is unconstitutional they have to report that to Congress under 28 U.S.C. 530D, and I think that, as a matter of principle, it is different.

To begin with, this President has made every effort, whenever there is any sort of construction you can give it that is constitutional, to fully implement it.

Mr. DAVIS. That is not my question.

As a matter of constitutional doctrine, what is the difference—and forget Alabama. Any State.

What if the governor of Arizona decides she does not like a new immigration bill that Congress may pass and decides, "I think it is not constitutional. I am not going to follow it"?

Mr. ELWOOD. I would say that the one difference is that the governor of any State is subject, under the supremacy of the law, to Federal law; and it is——

Mr. DAVIS. Is the executive branch not subject to the notion of a law having a certain supremacy that would control executive interpretation? I thought the Judiciary was the interpretive body in our tripartite structure.

Mr. ELWOOD. Every branch of Government is responsible for interpreting. Congress interprets the Constitution when it passes laws, and that is the reason why——

Mr. DAVIS. If the Supreme Court makes an interpretation, can the President challenge that interpretation?

Mr. ELWOOD. If the Supreme Court has interpreted a law or has interpreted the Constitution, then that is binding on Congress and the President in both of those instances. And I would just simply say that that is the—the difference is that the Constitution specifically charges every branch of Government.

Mr. DAVIS. Why would a President's interpretive power exceed the legislative branch's interpretive power?

Mr. ELWOOD. It does not. Every branch of Government is expected to adhere to the Constitution. All of the members of the three branches take an oath of office, and all of them are expected to, independently, if the court has——

Mr. DAVIS. Ms. Mathis, would you like to comment on any of that?

Mr. CONYERS. The gentleman is advised that his time has expired.

Mr. DAVIS. I apologize, Mr. Chairman.

Mr. CONYERS. That is quite all right.

The gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. I very much appreciate the time.

These signing statements, from the testimony, from what I am reading, seem to indicate that you have an executive branch that says what they believe a law means how it will be carried out, and of course, one of the alternatives is if we allow unelected, unaccountable bureaucrats sitting in some office somewhere to come up with regulations of their own interpretation without guidance from the President. So I can see how it might have merit.

Now, we do know some Administrations enforce some laws. Some ignore them. I know Chuck Colson—for example, I understand he went to prison back in 1970's for having one FBI file in the White House. And yet, during the Clinton administration, there were 1,000 or so files, FBI files, in the White House; and that Department of Justice under President Clinton chose not to enforce those laws.

So, instead of someone going to prison or people going to prison for thousands of years, nobody had anything happen to them for those gross violations of the law.

But anyway, in my remaining time, there are some signing statements signed by the President that have disturbed me, and I wanted to just read some of them into the record.

"Several provisions in the act, specifically Section 603 and 605 and 302(b) could be taken to direct how the Nation's foreign affairs should be conducted. The Constitution, however, vests the President with special authority to conduct the Nation's foreign affairs.

"My constitutional authority over foreign affairs necessarily entails discretion over these matters. Accordingly, I shall construe these provisions to be advisory and direct all executive branch officials to do likewise."

Oh, well, that was President Clinton.

"Section 1104 of this bill raises a constitutional concern insofar as it could be read to interfere with my constitutional authority to determine when and whether to recommend legislation to Congress. I will, therefore, treat it as precatory, which, as I understand the meaning, just means 'wishful thinking."

Oh, that was President Clinton.

"Section 313 of the Legislative Branch Appropriations Act will establish in the legislative branch a Center For Russian Leadership Development. The Department of Justice advises me, however, that, because the program is not administered by the executive branch, it is unconstitutional."

The President just called it "unconstitutional." oh, that was President Clinton.

"I would interpret this provision consistent with my constitutional authority to conduct the foreign relations of the United States and my responsibilities as commander in chief."

Gee, that was President Clinton also on a different—each of these is a different signing statement.

Here is one.

"to the extent that this provision can be read to direct the Secretary of State to take certain positions in communications with foreign governments, it interferes with my sole constitutional authority over the conduct of diplomatic negotiations. Therefore, the provision will be treated as precatory, or wishful thinking."

Oh, that was President Clinton, too. Here is another one.

"there are a number of provisions in the act that may raise constitutional issues. These provisions will be treated in a manner that is consistent with the Constitution."

That was President Clinton, too.

This, unlike the others, is in the same signing statement. "this provision unconstitutionally constrains the President's authority with respect to the conduct of diplomacy, and I will apply this provision consistent with my constitutional responsibilities."

That President said it was just unconstitutional. Can you believe that? Isn't that something? That was a rhetorical question.

"I shall interpret and implement Section 8115 consistent with my constitutional authority to conduct the foreign relations of the United States and as commander in chief and chief executive and not in a manner that would encumber my constitutional authority."

That was President Clinton.

Another: "So that this provision cannot be construed to detract from my constitutional authority and responsibility to protect na-

tional security and other privileged information as I determine necessary, and so"—the arrogance from this President, for goodness sakes—". . . and so that the provision does not require the release of information that is properly classified, I direct it be interpreted consistent with my constitutional authority."

That was President Clinton, too.

Another: "I am also concerned that Section 8117 of the act contains certain reporting requirements that could interfere materially 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, I will interpret this——"

Mr. CONYERS. The gentleman's time has expired.

Mr. GOHMERT. Okay. Thank you, Mr. Chairman.

I do have a stack of these, and I appreciate the opportunity to read those into the record. Thank you.

Mr. CONYERS. You are welcome.

I recognize now the gentlelady from Florida, Ms. Wasserman Schultz.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman.

You know, Mr. Chairman, I note that it is not surprising, given the Republican leadership when they ran this institution and given their total abdication of our constitutional role of oversight and exercising our constitutional right on the system of checks and balances in that oversight, that while President Clinton was in office, the Judiciary Committee did not have any hearings on signing statements or ask the Administration at the time why they were exceeding their authority. And I think it is important to note, as former Congressman Edwards pointed out, that this is not a partisan issue.

I would take as much issue with President Clinton's signing statements as I do with President Bush's, and I think that to a person on this Committee that has concern over it that that would be the case.

My question for Mr. Elwood is, I am one of the non-attorneys of the Committee, and sometimes—although I generally understand what goes on in our proceedings, I think the general public sometimes, you know, feels like we are speaking in the clouds, so I want to bring it underneath the clouds for a second and speak about a particular signing statement that maybe is less esoteric, but no less dire in terms of comparing it to the PATRIOT Act, but the one that related to the Homeland Security Appropriations Act of 2007.

Section 503(c)(2) was a provision that dealt with the issue of qualifications of the FEMA Administrator, and if you will recall, the FEMA Administrator during Hurricane Katrina was Secretary Brown, and if you will recall, his prior experience was being the head of the Arabian Horse Association, and there was some significant concern about his qualifications, and they were generally going forward about the qualifications of the FEMA Administrator, of what the FEMA Secretary's should be, and also the reporting and a lot of the other issues.

But in that section of the bill, Congress included a provision that required the President to adhere to certain qualifications in the individual who was being considered for that post. When that law

passed, the relevant section of the signing statement that the President issued said as follows:

"Section 503(c) of the Homeland Security Act of 2002, as amended by Section 611 of the act, provides for the employment and certain duties as the Administrator of the Federal Emergency Management Agency.

"Section 503(c)(2) vests in the President authority to appoint the Administrator by and with the advice and consent to the Senate, but purports to limit the qualifications of the pool of persons from whom the President may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office."

He goes on to say, "The executive branch shall construe—" not may construe, might necessarily construe, but "shall construe. . . Section 503(c)(2) in a manner consistent with the appointment clause of the Constitution."

Now, if you review that section of the law, that is not what Congress instructed the President to do, and I am wondering why it would be in the President's authority to just decide to differently implement—not interpret, but differently implement—Congress' direct instructions as to the qualifications of the FEMA Administrator henceforth, after the passage of that law.

Mr. ELWOOD. Two points.

First of all, whenever the President is implementing the law, he must first interpret it, and when he interprets it, he must interpret it in light of the Constitution. And all three branches have to do that.

Ms. WASSERMAN SCHULTZ. Mr. Elwood, I know you have repeatedly said that, but that is not the President's role. That is the judicial branch's role. It is the President's job to implement the words in the law as Congress has passed them, and if he does not agree—or she, hopefully, one day—does not agree with the words in the law, then it is his responsibility to veto them, as Mr. Edwards has said.

Mr. ELWOOD. I would disagree with you.

It is the long-held position of the executive branch—and the Supreme Court has indicated in *Myers v. United States* where they upheld the President's ability to not abide by the Tenure of Office Act there, which was another restriction on the President's removal power, not appointment. But it held there that the President could—despite a law saying that he could not—remove people in his Cabinet without Senate approval, the Court held that that was unconstitutional; and not one of the nine members of the Court said that the President was at fault for not enforcing that.

Ms. WASSERMAN SCHULZ. That deals with tenure in office. That doesn't deal with the qualifications. Congress does have the right to specifically determine the qualifications OF an individual the President is considering. We can constrain the President in that regard. Do you disagree? Then you can go to court.

Mr. ELWOOD. There are limits on what the Congress can do in that regard. There is another school of thought that just as people have been saying the only thing the Constitution says, it says you can only veto or sign it, those are your only choices, but similarly, some people interpret the Constitution to say that because the Sen-

ate can confirm or deny confirmation to a person that that is the only role for Congress in determining the qualifications of a person. There is a body of law that says Congress can set qualifications, but it can't set so many qualifications that it limits the President's ability to appoint essentially someone of his choosing.

Now, finally, I do want to note the President continues to apply the law as written. I will note that R. David Paulison, the person who was appointed, was somebody who oversatisfied the conditions. He has 30 years in law enforcement.

Ms. WASSERMAN SCHULZ. Let me just interrupt you there. He is a constituent of mine. He lives in my district. He lives down the street from me. So I am fully aware of his qualifications and fully support him, and I am glad to see he is heading up the Federal Emergency Management Agency.

That is not my point. My point is that the President in this instance may not have decided to go with someone outside of Congress' instruction, but it was inappropriate for him to indicate in his signing statement that he could have.

Mr. CONYERS. The gentlelady's time has expired.

Ms. WASSERMAN SCHULZ. Thank you, Mr. Chairman.

Mr. CONYERS. I recognize our final Member for the day, Mr. Ellison of Minnesota.

Mr. ELLISON. Thank you, Mr. Chairman. One of the advantages of being last is you get to hear everything that has gone on before. So I would like to just ask this question.

It appears to me that as we have listened to the testifiers, and thank you very much for your testimony, that signing statements at worst, from the perspective of at least Mr. Rosenkranz, are just basically the opinion of the President and don't have the effect of law, and then on the other side may have the effect of law, but we don't really know.

So my question is this: Why don't we just get rid of signing statements? What is the real value of signing statements? Why do we need them, if they are really no more than I guess a flourish, as Professor Tribe said? Mr. Rosenkranz, could you address that?

Mr. ROSENKRANZ. Again, I think that presidential signing statements can serve an important function, which is, again, to instruct the executive branch in the President's interpretation of the law.

I just want to comment on the characterization of a moment ago. It is simply not the case that the President's job does not include interpretation of the law.

Mr. ELLISON. Excuse me, sir, did I ask you that? I don't believe that was my question, was it?

Mr. ROSENKRANZ. No, sir.

Mr. ELLISON. Was that the question? Are you addressing my question?

Mr. ROSENKRANZ. I am trying to address your question, yes, sir.

Mr. ELLISON. Please continue then.

Mr. ROSENKRANZ. The President—an important function of the President in executing law, he is interpreting it, and therefore instructing the executive branch in his interpretation of it.

Mr. ELLISON. So, in other words, in your view, does the signing statement actually in any way alter or modify the statute as passed by Congress?

Mr. ROSENKRANZ. No, it does not.

Mr. ELLISON. So if it does not change what Congress has done, why can't the President simply issue a press release or hold a press conference on his view on what Congress passed?

Mr. ROSENKRANZ. He could do that.

Mr. ELLISON. And in that case, we wouldn't have to worry about whether or not the signing statement has changed the law that Congress has passed? Would you agree?

Mr. ROSENKRANZ. Well, we would then be having a hearing about press releases, I guess.

Mr. ELLISON. Maybe not. We don't really have hearings about press conferences, not to my knowledge. But in that case, we at least would not have to worry about whether or not the President was executing the law as passed by Congress. Is that right?

Mr. ROSENKRANZ. In a presidential signing statement or in a press release, the President may express his view about what a statute means and the executive branch is duty bound to follow the President's interpretation of the law, whether expressed in a signing statement or a press release or anything else.

Mr. ELLISON. Mr. Elwood, why do we need to have signing statements if they simply are an expression of an opinion and don't really change the law as passed by Congress?

Mr. ELWOOD. They are an expression, as Professor Rosenkranz indicated, they are an expression of the President to the people in the executive branch of how the law will be administered. Several Presidents in addition have used it to conduct sort of a dialogue with Congress. I suppose that could be done through a press release as well.

Mr. ELLISON. I was going to say, the President has a lot of ways to carry on a dialogue with Congress, including having the Committee chairs come to his office to talk about the law.

I believe you made the point that there is no case in which the President has refused to carry out the statute. It is simply an expression of opinion. So in that case, Mr. Edwards, would you care to comment on why simply eliminating signing statements would not be a good idea?

Mr. EDWARDS. Congressman, it doesn't matter to me whether we have signing statements or don't have signing statements. What matters to me is whether or not a President can declare, can assert, that he does not have to comply with an act of Congress that has been signed into law by himself.

I must say, I have got to say this, Mr. Chairman, it sounds to me like I walked in accidentally to a meeting of the national committees and am shocked by the number of Members of this Committee who can't get beyond their party affiliation.

I was a foreign policy adviser to President Bush's campaign. I worked for President Bush. I supported him and I voted for him. This is not party, this is Constitution, and the Constitution is more important than whether or not we are defending a President of our party. I am really bothered by the tone that I have heard today.

Mr. CONYERS. I would like to advise the gentleman—I will give you the last question. You waited the longest.

Mr. ELLISON. I was simply going to direct a question to Mr. Edwards again. You know, again, as has been pointed out clearly,

President Clinton has used these signing statements, other Presidents have used them in the past. There is a veto which is available which is well within the constitutional structure.

Would Americans not be better served if we simply eliminated these signing statements and therefore we would have a much more straight up and down, clearer delineation of constitutional roles? What is your screw on that?

Mr. EDWARDS. I don't think the President should be muzzled. The President should certainly have the right to express his opinion any way he wants. The Constitution provides him that opportunity through a veto, which then allows the Congress to override it.

The problem with the signing statements serving as instruction about whether we will comply or not means that the Congress does not have the final say and the President has the final say as to what is constitutional, in which case the whole structure of the Constitution has just been undermined for the sake of party unity.

Mr. CONYERS. On behalf of all of the Members of the Judiciary Committee, we are deeply indebted to you, the witnesses, Ms. Mathis, Mr. Elwood, Mickey Edwards, Professor Rosenkranz, for your dedication and your contribution. We deeply appreciate it.

Without objection, the hearing record will be open for a period of 1 week to allow additional materials to be submitted for the record, including Members' opening statements, and written questions for our witnesses, which we will ask them to answer promptly so they can be included in part of the record.

Additionally, I ask unanimous consent to submit all 148 copies of the President President Bush's signing statements into the record.

This is the beginning of our oversight efforts. I look forward to the continued cooperation——

Mr. GOHMERT. Mr. Chairman, reserving the right to object?

Mr. CONYERS. Yes?

Mr. GOHMERT. Could I also ask unanimous consent that we could submit all of the signing statements by President Clinton to show that bipartisanship that former Congressman Edwards was talking about?

Mr. CONYERS. We would be delighted. If you get those up and submit them for the record, we will include them as well.

Mr. GOHMERT. I knew you would be that fair. Thank you.

Mr. CONYERS. They will be an important part of the record.

[Note: Due to the large number of pages of the signing statements of Presidents Bush and Clinton, these documents are not printed in this hearing record, but a copy of these statements has been retained in the official Committee hearing file. These documents are also available at http://www.presidency.ucsb.edu/signingstatements.php.]

Mr. CONYERS. Ladies and gentlemen, we have had a long day, but I think it is an important day, and I think this is a highly appropriate subject for our oversight hearings to begin in the 110th Congress. The Committee stands adjourned.

[Whereupon, at 2:45 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, I move to strike the last word. I thank the Chairman and the Ranking Member and I welcome each of the witnesses comprising this most distinguished panel. I am very much looking forward to their testimony and the opportunity to engage in serious discussion on a most serious subject.

Might I also take this opportunity to congratulate you, Mr. Chairman, on your assuming the gavel of this august committee. You have led our side with grace, wisdom, and good cheer for many years now and I am delighted to know that the full committee will now be benefiting from your boundless energy, seriousness of purpose, and unshakeable commitment to justice.

Judging by the subject chosen for the very first hearing that you have presided over as Chairman, you are living up to expectations. Those of us on this side of the dais know you as person who never takes his eyes off the prize, who always see the big picture, who recognizes what is important where others only see what may be unusual.

Such is the case with presidential signing statements. To some, the topic may seem abstract or esoteric or arcane. But you and I and most members of this Committee understand that what has been going on in this Administration for the past six years regarding the misuse and abuse of signing statements poses, as the American Bar Association's Task Force on Signing Statements has observed, "a real threat to our system of checks and balances and the rule of law."

It is for this reason that in the last Congress I introduced H.R. 5684, the "Congressional Lawmaking Authority Protection Act" or CLAP Act of 2006, which (1) prohibited the expenditure of appropriated funds to distribute, disseminate, or publish presidential signing statements that contradict or are inconsistent with the legislative intent of the Congress in enacting the laws; and (2) bars consideration of any signing statement by any court, administrative agency, or quasi-judicial body when construing or applying any law enacted by Congress. I am proud to say that the Chairman was one of the original co-sponsors of my bill.

I have reintroduced this legislation in substantially the same form in the 110th Congress, except that the new bill, H.R. 264, makes clear that the limitations of the law do not apply to presidential signing statements that are not inconsistent with the congressional intent. This is not a hard test to administer. Like the late Justice Potter Stewart said about obscenity: *"it may be hard to define, but you know it when you see it!"*

As an aside Mr. Chairman, might I say this to those who would question whether the Congress has the power to ban the use of appropriated funds to publish or distribute signing statements: regardless of whether it is wise to do so, if *no one seriously can question Congress' constitutional authority to terminate a president's use of appropriated funds to wage military operations, a fortiori, Congress has the constitutional authority to withhold from the president funds needed to distribute a signing statement that undermines the separation of powers!*

Let me state clearly and for the record my concern with the abuse and misuse of presidential signing statements, especially by the current president.

Presidential signing statements seek to alter Congress' primacy in the legislative process by giving the President's intention in signing the bill equal or greater standing to Congress' intention in enacting it. This would be a radical, indeed revolutionary, change to our system of separated powers and checks and balances.

Bill signing statements eliminate the need for a president ever to exercise the veto since he could just reinterpret the bill he signs so as to make it unobjectionable to him. Such actions deprive Congress of the chance to consider the president's ob-

jections, override his veto, and in the process make it clear that the president's position is rejected by an overwhelming majority of the people's representatives. Since few presidents wish to suffer a humiliation so complete and public they have strong incentive to work closely with the Congress and are amenable to negotiation and compromise. This is precisely the type of competitive cooperation the Constitution contemplates and which bill signing statements threaten!

Although presidents have used signing statements since the Monroe Administration, they really came to prominence during the administration of Ronald Reagan, who issued 276 signing statements, 71 of which (26%) questioned the constitutionality of a statutory provision. *The Reagan Administration's goal, as articulated by then-Office of Legal Counsel lawyer, now Associate Justice Samuel Alito, was to establish the signing statement as part of a statute's legislative history which courts would use in interpretation.* This met with limited success because while the Court referenced signing statements in two major cases, there is no indication that it accorded them any weight.

President George H.W. Bush issued 214 signing statements during his single 4-year term raising 146 constitutional objections. President Bill Clinton issued 391 but raised only 105 constitutional objections. Thus, out of a total of 881 signing statements, 322 constitutional objections were raised to the bills signed by Presidents Reagan, the first Bush, and Clinton during the twenty (20) year span from 1981–2001.

The record of the Bush Administration is dramatically different and confirms our worst fears. In less than six years, the current occupant of the White House issued more than 125 signing statements, *raising more than 800 constitutional objections by himself.* As the ABA Task Force put it:

From the inception of the Republic until 2000, Presidents produced signing statements containing fewer than 600 challenges to the bills they signed. According to the most recent update, in his one and a half terms so far, President George W. Bush (Bush II) has produced more than 800.

Mr. Chairman, according to Professor Christopher Kelley, an expert on presidential signing statements, as of January 12, 2007, President Bush has issued 150 signing statements challenging 1,149 provisions of law.

Not coincidentally, President Bush's signing statements have challenged the constitutionality of extremely high-profile laws such as the reporting provisions under the USA PATRIOT Act of 2005, and the McCain Amendment prohibiting torture. The president's statements have essentially asserted that President Bush does not believe that he is bound by key provisions of the legislation. They seek to further a broad view of executive power and President Bush's view of the "unitary executive," pursuant to which all the powers lodged in the Executive and administrative agencies by Congress is somehow automatically and constitutionally vested in the President himself.

In general, President Bush's signing statements do not contain specific refusals to enforce provisions or analysis of specific legal objections, but instead are broad and conclusory assertions that the president will enforce a particular law or provision consistent with his constitutional authority, making their true intentions and scope unclear and rendering them difficult to challenge.

What makes President Bush's use of presidential signing statements doubly problematic is his demonstrated and documented reluctance to raise his constitutional objections in a veto message to Congress, as contemplated by the Constitution. Indeed, to date, more than half-way through his second term, President Bush has only vetoed a single bill (embryonic stem cell), notwithstanding the more than 1,000 constitutional objections he has raised during this same period of time.

It seems obvious to intelligent observers that the president is trying to game the system and frustrate the system of checks and balances so carefully crafted by the Framers. Rather than risk a showdown with the Congress over some claimed constitutional right he thinks he possesses but cannot articulate or defend in the light of day, President Bush simply signs the law as if he accepts its constitutional validity and then when no one but Vice-President Cheney is watching issues a signing statement saying he will comply with the law only to the extent he feels legally bound to do so, which of course, he doesn't.

This sort of presidential shenanigan would embarrass and anger the Founding Fathers. Embarrass them because the action is cowardly, which was hardly to be expected of the Chief Executive of the United States. It would anger them because it makes a mockery of the system of checks and balances they so carefully crafted.

So thank you again, Mr. Chairman, for convening this timely and important hearing. I am looking forward to hearing from the witnesses and considering their responses to the subcommittee's questions.

Thank you. I yield the balance of my time.

PREPARED STATEMENT OF THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you Chairman Conyers and Ranking Member Smith for holding today's hearing on this extremely important issue. I also thank the distinguished witnesses who have agreed to testify here today.

In addition to creating new laws, Congress has a responsibility to monitor how those laws are being executed. The Framers of the U.S. Constitution were very careful to develop a system of checks and balances and Congress must ensure that that system is not circumvented.

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." Accordingly, the President has the constitutional authority to veto a bill in its entirety or sign it into law.

By repeatedly declaring that he does not need to execute a law, or parts of a law, he believes is unconstitutional, the President is usurping the roles of both the Legislature and the Judiciary.

Congress spends a substantial amount of time negotiating and deliberating legislation before it arrives on the President's desk. For the President to then pick and choose which parts of a bill he would like to enforce is just another way for this Administration to make unilateral decisions that dramatically affect the American people.

The President's signing statement on H.R. 6407, the "Postal Accountability and Enhancement Act" is a perfect example of this. There he used such broad language that it could be interpreted to allow citizens' mail to be opened without a warrant.

Additionally, I do not believe that the practice of selectively picking and choosing which parts of a bill will actually be enforced as law is substantially different from a line item veto, which the Supreme Court has squarely held unconstitutional in *Clinton v. City of New York.*

This President's use of signing statements seems to demonstrate that the Administration believes that the executive branch is superior to the other branches of government, rather than co-equal.

I applaud the American Bar Association for establishing the bi-partisan task force on Presidential Signing Statements, and I hope this hearing will draw even more attention this very important issue.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

The constitutional separation of powers acts as the first line of defense for our liberty. President Bush's abusive use of signing statements to suggest that he would not enforce or comply with duly enacted laws passed by Congress is an affront to this principle. Today's oversight hearing is a long overdue step in confronting just one of the President's arrogant and egregious attempts to undermine the constitutionally mandated balance of power among the branches of government.

PREPARED STATEMENT OF THE HONORABLE LUIS V. GUTIERREZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, I thank you for holding this important hearing to examine the use of presidential signing statements by the Bush Administration. This hearing demonstrates your leadership and commitment to fulfilling our crucial oversight responsibilities.

I also want to thank the witnesses today for being here and adding to this important debate. I am pleased that we have invited both administration officials, as well as legal and constitutional experts to examine this important issue.

Today, we are faced with an ever-increasing amount of signing statements that question the constitutionality of duly enacted laws or statutes therein. President Bush has often used the practice of signing statements to challenge laws he has signed by declaring he will only enforce them in a manner that concurs with his interpretation of the constitution and his vision of the so-called unitary executive branch.

As many of our witnesses have shared in their written testimony, these signing statements pose a grave threat to the separation of powers among the three

branches of government. They endanger the legislative branch's constitutionally granted power to write laws. For example, in his signing statements accompanying the PATRIOT Act and legislation on the treatment of detainees or the ability of the federal government to open our mail, the President has time and again sought to expand the Administration's power under the guise of fighting the War on Terror.

Today, we have the opportunity to further explore whether this is a practice in which Congress needs to intervene. I look forward to my colleagues' questions and again thank the panelists for being here.

RESPONSE TO POST-HEARING QUESTIONS FROM JOHN P. ELWOOD, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, UNITED STATES DEPARTMENT OF JUSTICE [1]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 18, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on Judiciary
United States House of Representatives
Washington, D.C. 20510

Dear Mr. Chairman:

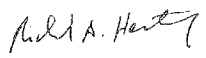
Please find enclosed responses to questions arising from the January 31, 2007, appearance before the Committee of Deputy Assistant Attorney General John Elwood at the hearing entitled "Presidential Signing Statements Under the Bush Administration."

As Deputy Assistant Attorney General Elwood testified at the Committee's January hearing, President Bush's use of signing statements is entirely lawful and appropriate. Every President since Franklin Roosevelt has issued such signing statements, which have been in use since the early days of the Republic. Far from being a threat to checks and balances, they are an essential part of a respectful constitutional dialogue among co-equal branches of government. Presidents traditionally have used them to provide guidance to Executive Branch employees about new laws they must implement, and to communicate the President's constitutional views to members of Congress and to the public. While signing statements often seek to preserve the Executive's role in our system of checks and balances, the mere description of constitutional concerns about a provision does not imply that the law will not be enforced as written. The legislative process, and indeed, government as a whole would suffer if the President withheld his views about constitutional constraints until the moment of enforcement, or if his only option to express those views were to veto needed legislation reflecting months or years of work because of sometimes minor, redressable issues. President Bush's signing statements are in keeping with tradition. As the Congressional Research Service concluded, "it is important to note that the substance of [President Bush's] signing statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton," and the number of constitutional signing statements the President has issued is comparable to every President in a generation.

[1] The letters and reports referenced in Mr. Elwood's responses have been retained in the official Committee hearing file but because of the volume of the information, they are not being inserted in the printed hearing record.

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
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Lamar Smith
Ranking Minority Member

1. What are the remedies available to the legislative branch when the President announces that he intends to violate the law?

To begin with, a constitutional signing statement is not an announcement that the President "intends to violate the law." Presidents have long used constitutional signing statements to provide guidance to Executive Branch employees about new laws they must implement, and to communicate the President's constitutional views to members of Congress and to the public. But the mere issuance of a signing statement with respect to a newly enacted statute does not indicate that the President will not implement it as written.

We therefore understand your question to ask what steps may be available to Congress if the President publicly declines to enforce a statute on the ground that it is unconstitutional. Of course, before taking such a course of action, the President would give deference to the fact that Congress passed the statute and that Congress believed it was enacting constitutional legislation, and the President would construe provisions to avoid constitutional problems wherever possible. Where a President determines that a statute conflicts with the Constitution, however, declining to enforce the statute does not "violate[] the law," but simply recognizes that the Constitution is the "supreme Law of the land," U.S. Const. art. VI, and is controlling notwithstanding a contrary statute. *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (opinion of Assistant Attorney General Walter Dellinger) ("*Dellinger Opinion*") ("[T]he President is required to act in accordance with the laws including the Constitution, which takes precedence over other forms of law."). As Thomas Jefferson observed, "the executive, believing the law to be unconstitutional, [is] bound to remit the execution of it; because that power has been confided to him by the Constitution." 8 Writings of Thomas Jefferson 310 (1897). That proposition is supported by "consistent and substantial executive practice." *Dellinger Opinion*, 18 Op. O.L.C. at 199 ("Opinions dating to at least 1860 assert the President's authority to decline to effectuate enactments that the President views as unconstitutional."); *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 50, 59 (1980) (letter from President Carter's Attorney General, Benjamin R. Civiletti, to the Chairman of the Senate Subcommittee on Limitations Of Contracted and Delegated Authority) ("the President's constitutional duty does not require him to execute unconstitutional statutes"). After a thorough survey of the law, Assistant Attorney General Dellinger stated early during the Clinton Administration that he believed it to be "uncontroversial" that "there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional." *Dellinger Opinion*, 18 Op. O.L.C. at 199 (citing "significant judicial approval of this proposition," including several Supreme Court opinions).

Past Presidents—including, among others, Presidents Wilson, Eisenhower, and Carter—have publicly declined to enforce statutes, and upon signing one bill, President Clinton specifically directed that the "Attorney General will decline to defend this provision." *Statement on Signing the National Defense Authorization Act for Fiscal Year 1996*, 32 Weekly Comp. Pres. Doc. 260, 261 (Feb. 10, 1996). The resulting interactions

between the Congress and the Executive Branch provide valuable guidance and precedents on how each Branch can perform its constitutional functions if the President believes that enforcing a particular statute would violate the Constitution.

A President's determination not to enforce a statute may be challenged in court if it presents a "case or controversy" within the meaning of Article III of the Constitution and is otherwise justiciable. Where the constitutionality of a statute is in dispute, courts traditionally have permitted "an attorney to appear on behalf of Congress, *amicus curiae*, to defend the statute." *Dellinger Opinion*, 18 Op. O.L.C. at 210 (collecting examples, including *United States v. Lovett*, 328 U.S. 303 (1946), and *Morrison v. Olson*, 487 U.S. 654 (1988), in which the Executive Branch "left [the] defense [of a statute] to the Senate Counsel, as *amicus curiae*, and the independent counsel herself"). *Cf. generally* 28 U.S.C. § 530D(b)(2) (providing that when the Department of Justice declines to defend the constitutionality of a statute in a judicial proceeding, it will notify Congress "within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding").

Assistant Attorney General Dellinger observed that "[s]ome legislative encroachments on executive authority . . . will not be justiciable or are for other reasons unlikely to be resolved in court." *Dellinger Opinion*, 18 Op. O.L.C. at 201. In such circumstances, Congress may have several options if it disagrees with the President's actions. These include Congress's ability to control spending and its ability to pass new legislation that addresses the constitutional deficiency of the original legislation. *Cf. Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment indirectly—by passing new legislation."). These and other options provide ample room for both Congress and the President to perform their constitutional roles.

2. Please provide each notice the Attorney General has submitted to Congress, pursuant to 28 U.S.C. 530D, since January 20, 2001. Please provide any other reports, guidance, rules [or] memoranda the administration has prepared concerning the application of 28 U.S.C. 530D.

President Bush signed the 21st Century Department of Justice Appropriations Authorization Act, which contained 28 U.S.C. § 530D, on November 2, 2002. We have attached copies of each of the Department's section 530D notices that have been submitted to Congress that we have located. In addition, we are seeking to obtain copies of the following letters that were transmitted to Congress pursuant to section 530D:

- In *Tennessee Student Assistance Corp. v. Hood*, No. 02-1606, the Supreme Court granted certiorari in a case presenting the question whether 11 U.S.C. § 106 violated the Eleventh Amendment of the Constitution. In a letter dated November 26, 2003, the Solicitor General notified Congress that he had decided against intervening in that case to defend the challenged provision, on the ground that no valid basis existed under the Court's precedents on which the provision

could legitimately be defended. The Court ultimately did not reach the question in *Hood* because it concluded that the facts of that case did not implicate the State's Eleventh Amendment immunity. *See Tennessee Student Assistance Corp v. Hood*, 541 U.S. 440 (2004).

- In *Free Speech Coalition v. Gonzales*, 406 F. Supp. 2d 1196 (D. Colo. 2005), the district court largely declined to enjoin a federal record-keeping statute (18 U.S.C. § 2257) and implementing regulations requiring the producers of sexually explicit material to keep records showing that depicted sexual performers are adults. The court, however, preliminarily enjoined a particular regulatory provision, 28 C.F.R. § 75.2(a)(1), requiring producers to keep a copy of the depictions of live Internet "chat rooms," reasoning that such a requirement would likely be unduly burdensome in light of applicable First Amendment considerations. The Solicitor General notified Congress of his determination not to appeal the adverse portion of the district court's ruling. Note that after the decision of the district court, Congress amended the law in the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, tit. v, and the Department is preparing a proposed revision to the regulation to reflect the amendments made to the statute.

- 42 U.S.C. § 14011(b), which was enacted as part of the Violence Against Women Act ("VAWA"), states that a victim of a sexual assault that was prosecuted in state court may apply to a federal court for an order requiring the criminal defendant to undergo a test for HIV infection. In *In re Jane Doe*, 02-Misc.-168 (E.D.N.Y), the victim of an alleged sexual assault sought an order under section 14011 requiring the criminal defendant to be tested for HIV infection. In light of *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacked authority under the Commerce Clause to enact another provision of VAWA, 42 U.S.C. § 13981, that provided a federal civil remedy for victims of gender-motivated violence), the Solicitor General submitted a letter to Congress notifying it of his decision not to intervene to defend the provision.

Each of those letters was transmitted to the majority leader and minority leader of the Senate; the Speaker, majority leader, and minority leader of the House of Representatives; the Chairman and ranking minority member of the Committee on the Judiciary of the House of Representatives; the Chairman and ranking minority member of the Committee on the Judiciary of the Senate; and the Senate Legal Counsel and the General Counsel of the House of Representatives.

In addition, we have attached copies of letters the Solicitor General sent to Congress during this Administration, but before the enactment of section 530D, providing notice of intent not to appeal, or not to seek certiorari to review, a decision finding a federal statute unconstitutional, or declining to intervene in a case challenging the constitutionality of a federal statute, even if that decision did not reflect a belief in a statute's constitutional infirmity.

We understand your question regarding guidance about section 530D to involve interagency guidance rather than confidential internal Department analyses of the requirements of the provision. Upon signing the 21st Century Department of Justice Appropriations Authorization Act, President Bush issued the following statement:

> The executive branch shall construe section 530D of title 28, and related provisions in section 202 of the Act, in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. To implement section 202(b)(3) of the Act, the Attorney General, on my behalf, shall advise the heads of executive agencies of the enactment of section 202 and of this direction concerning construction of that section and section 530D of title 28.

Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 38 Weekly Comp. Pres. Doc. 1971, 1971 (Nov. 2, 2002).

RESPONSE TO POST-HEARING QUESTIONS FROM THE HONORABLE MICKEY EDWARDS, FORMER MEMBER OF CONGRESS FROM THE STATE OF OKLAHOMA, ASPEN INSTITUTE

Mickey Edwards

Answer to the Written Question Submitted for the Record

Question: What are the remedies available to the legislative branch when the President announces that he intends to violate the law?

Answer: There are several possible responses.

One is the simple threat, or act, of retaliation through the appropriations process – to make clear to the Executive that failure to comply with the law will result in the Congress using its power of the purse to significantly reduce funding for those agencies of the government (including the White House) guilty of non-compliance.

A second possible response flows from the the hearing and subpoena powers of the Congress. It is within the authority of the Legislative Branch to compel both oral and written testimony regarding compliance or non-compliance with federal law. Failure to respond to a congressional subpoena opens the further possibility of citation for contempt of Congress.

A third response is to enact legislation granting to the Congress the "standing" to bring suit against the Executive in federal court for failure to comply with law enacted consequent to statute. In this regard, the Congress may also wish to address the question of what constitutes a "case" or "controversy" sufficient to prompt judicial intervention. While a "case" might require finding a plaintiff personally and substantially negatively affected by Executive non-compliance with the law, it certainly seems feasible to designate such non-compliance, and the resulting stand-off between the Legislature and the Executive, as sufficient "controversy" to require judicial involvement.

A fourth possible response is impeachment of the President for wilfull and repeated violation of federal law.

All of these responses require the Congress to stand up forcefully not for itself but for the United States Constitution, which every member of Congress has sworn to uphold and defend. To fail to do so – to permit the laws the Congress enacts, on behalf of the people and in compliance with the Constitution, to be ignored or disobeyed – is a violation of each legislator's duty and subjects the Congress, rightly, to charges of nonfeasance.

RESPONSE TO POST-HEARING QUESTIONS FROM KAREN J. MATHIS, PRESIDENT, AMERICAN BAR ASSOCIATION

Karen J. Mathis
President

AMERICAN BAR ASSOCIATION

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March 9, 2007

The Honorable John Conyers
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Conyers:

Thank you for following up with me regarding my appearance before the U.S. House Judiciary Committee on January 31, 2007. It was a privilege to present the views of the ABA at the hearing on presidential signing statements.

This letter is in response to the supplemental written question you posed: "What are the remedies available to the legislative branch when the President announces that he intends to violate the law?" As you know, the ABA expressly opposes the misuse of presidential signing statements that claim the authority or state the intent to disregard or decline to enforce all or part of a law the President has signed. In addition to expressing opposition to the misuse of presidential signing statements, the ABA adopted four practical recommendations that provide guidance to the federal government on how to respond to this potential problem.

With regard to the remedies available for the legislative branch, the ABA urges Congress to enact legislation requiring the President promptly to submit to Congress an official copy of all signing statements he issues. The legislation should also require the executive branch to report to Congress the reasons and legal basis for the statement whenever a President states that he intends to decline to enforce all or part of a law he has signed. There currently is no such disclosure requirement in place with regard to notifying the legislative branch of the issuance of such statements. The ABA policy recommends that these reports be made available in a publicly accessible database.

The ABA also urges Congress to enact legislation, to the extent constitutionally permissible, enabling the President, Congress or other entities to seek judicial review when a President states his intent not to enforce a law. Such legislation should confer standing on Congress as an institution or its agents in any instance in which the President uses a signing statement to claim the authority or state his intention to decline to enforce all or part of a law, or to interpret such a law in a manner inconsistent with the clear intent of Congress.

The standing element of the "case or controversy" requirement of Article III of the Constitution frequently frustrates any attempt to obtain judicial review of presidential claims of line-item veto authority. Congress cannot lessen the case or controversy threshold, but it can dismantle barriers above the constitutional floor. If such review were initiated by Congress, it could be argued that the "case or controversy" requirement is met because the concrete injury is the usurpation of the lawmaking powers of Congress by virtue of the provisions of the signing statement and the denial of the opportunity to override a veto if the President believes a law is unconstitutional. Our recommendation contemplates that a President has the authority to initiate such judicial review.

A court could order that the enacted law be fully enforced, since the President would have foregone the opportunity for a veto by signing the bill. Alternatively, it could issue a general declaratory judgment that the President may not use a signing statement in such a manner, and in the future must either enforce a bill which he signs into law or exercise his veto power if he believes the bill is unconstitutional in whole or in part. It is likely that one case before the Supreme Court would settle the constitutionality of all future signing statements that announce a President's intention not to enforce a provision of a law.

Throughout its deliberations, the ABA task force recognized that legislation providing for judicial review of signing statements would have to overcome constitutional and legal hurdles, and the ABA stands ready to work with Congress on these issues. We also recognize that such legislation could be rejected by the Supreme Court. However, it would still be worth the undertaking, since the current concerns regarding the use of presidential signing statements present critically important separation-of-powers issues.

Finally, it is worth mentioning that the ABA task force determined that it was not within the scope of its mandate to address what remedies Congress should employ in the event that the President continues on his present course and judicial review proves impracticable. However, the ABA does acknowledge that Congress is not without constitutional recourse, including the "power of the purse" to withhold appropriations.

Thank you again for you continued leadership regarding consideration of these difficult issues. If you have further questions, please ask your staff to contact Kerry Lawrence, our legislative counsel in Washington, at (202) 662-1766.

Sincerely,

Karen J. Mathis

RESPONSE TO POST-HEARING QUESTIONS FROM NICHOLAS QUINN ROSENKRANZ, ASSOCIATE PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTE

GEORGETOWN UNIVERSITY LAW CENTER

Nicholas Quinn Rosenkranz
Associate Professor of Law

March 16, 2007

The Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Attn: Renata Strause

Dear Mr. Chairman:

Thank you again for the opportunity to express my views about presidential signing statements at the Judiciary Committee hearing on January 31, 2007. I write to respond to the written follow-up question of the Committee, which you enclosed in your letter of February 16. The Committee asked: "What are the remedies available to the legislative branch when the President announces that he intends to violate the law?"[1]

To begin with, it is essential to note that very few, if any, presidential signing statements "announce[] that [the President] intends to violate the law."[2] To the contrary, virtually all signing statements issued by President Bush,[3] including all the most controversial ones,[4]

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[1] Enclosure to Letter from Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary, to author (Feb. 16, 2007) [hereinafter Rep. Conyers Letter].

[2] *Id.*

[3] *See, e.g.*, Statement on Signing the Deficit Reduction Act of 2005, 42 WEEKLY COMP. PRES. DOC. 215, 216 (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, 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, 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).

[4] *See, e.g.*, Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005,

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say only how he will "construe"—that is, *interpret*[5]—statutes, and strongly imply that *the President will faithfully execute the statutes 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.[10] In such circumstances, the President can and should declare that this is his intention.

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42 WEEKLY COMP. PRES. DOC. 425, 425 (Mar. 9, 2006) ("The executive branch shall *construe* the provisions of H.R. 3199 . . . in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.") (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, 1919 (Dec. 30, 2005) ("The executive branch shall *construe* [the provisions] 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 . . . of protecting the American people from further terrorist attacks.") (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] *Id.* art. II, § 3.

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

[9] *Id.* art. II, § 3.

[10] While some scholars disagree with this proposition, *see* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 14–22 (2000) (describing the debate), the executive branch has consistently endorsed it, *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."), as have four Justices of the Supreme Court, *see* Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 906 (1991) (Scalia, J., joined by O'Connor, J., Kennedy, J., & Souter, J., concurring in part and concurring in the judgment) ("[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, at 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.*") (second emphasis added).

But even in these very rare cases, it is not quite correct to say that the President has "announce[d] that he intends to violate the law."[11] In such cases, the President announces, in effect, that in his judgment the statute at issue was not "made in Pursuance" of the Constitution;[12] that it is not, therefore, "supreme Law of the Land";[13] and, thus, that it is not among the "Laws" that he must "take care . . . be faithfully executed."[14]

Of course, Congress may disagree with the President's constitutional judgment, and so, from its perspective, such a declaration may seem to amount to an "announce[ment] that he intends to violate the law."[15] But even if so, in many such cases, there will be no need for a legislative remedy. Depending on the circumstances, the courts may have an opportunity to resolve the dispute. Indeed, according to President Clinton's 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."[16]

If judicial review is unlikely or if Congress is unsatisfied with that prospect, Congress may contemplate a legislative remedy. In such circumstances, its best remedy is simply to consider whether it might achieve the same policy result with a different, more clearly constitutional statute.[17] In many cases, the Constitution may block one means but not another for achieving the same end. And therefore, oftentimes, Congress and the President will be able to agree on an eminently constitutional solution.

As a general matter, constitutional disagreements among the three branches are a natural and inevitable aspect of our separation of powers.[18] If such disagreements are in good

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[11] Rep. Conyers Letter, *supra* note 1.

[12] U.S. CONST. art. VI, cl. 2.

[13] *Id.*

[14] *Id.* art. II, § 3.

[15] Rep. Conyers Letter, *supra* note 1.

[16] *See* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199, 201 (1994).

[17] *See* Bowsher v. Synar, 478 U.S. 714, 733–34 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment indirectly—by passing new legislation.").

[18] *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 . . . .") (alteration in original); 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)."); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory*

faith—that is, if all branches are faithful to their constitutional oaths as best they know how—then these disagreements should not portend a constitutional crisis.

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

Sincerely,

Nicholas Quinn Rosenkranz

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.").

RESPONSE TO POST-HEARING QUESTIONS FROM CHARLES J. OGLETREE, JR., JESSE CLIMENKO PROFESSOR OF LAW, HARVARD LAW SCHOOL

May 14, 2007

The Honorable John Conyers
Chairman, Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Congressman Conyers:

Let me begin by thanking you for the invitation to participate in the United States House of Representatives Judiciary Committee hearing on presidential signing statements held on January 31, 2007. It was an honor and a privilege to appear before the Committee to address the many questions that were raised about the President's use of authority.

I received a request from the House Judiciary Committee staff to respond to the following question: "What are the remedies available to the legislative branch when the President announces that he intends to violate the law?" I am happy to answer that question and wish you all the best in proceeding with these matters.

First, it is important that the United States House of Representatives Judiciary Committee appreciate the gravity of these matters, and the ensuing challenges created as a result of the recent extensive use of presidential signing statements. While some presidents have used the occasional signing statement in one regard or another, in the last seven years it has become a substitute for the President's authorized use of his veto powers. As you know from the American Bar Association Commission on Presidential Signing Statements, our report listed several recommendations that would guide the federal government in responding to these matters. Most importantly, we suggested that Congress enact legislation requiring the President promptly to submit official copies of all signing statements that are issued. Moreover, the purpose was to ensure that the executive branch report to Congress the reasons and legal arguments in support of the President's intention to decline to enforce all or part of any particular law. We trust that this recommendation will be followed actively and immediately.

Additionally, it is important that the legislative branch of government makes clear that it will pursue other remedies, including judicial review, when it is of the opinion that the executive branch does not intend to follow the law as enacted by Congress. This would allow Congress the authority to ensure that the intent and purpose of these actions are being pursued. Furthermore, it is important that the Legislative Branch understand

that it has essential authority through the appropriation of funds to determine whether or not the President's actions in some way undermine the implementation of laws that have been duly enacted. When the presidential signing statements are used to avert the purpose and intent of the law, Congress should not provide funding for what it views as unauthorized exercises of executive power which effectively thwart the intent of legislation.

It is imperative that Congress take its role as the independent legislative branch of government seriously by closely examining presidential signing statements by any member of the executive branch at any time. Congress must ensure that agencies are aware that without the authority provided by Congress through appropriations, laws will not be able to take effect.

I appreciate having the opportunity to appear before the United States House of Representatives Judiciary Committee and wish you well in pursuing these important matters.

Sincerely,

Charles J. Ogletree, Jr.
Jesse Climenko Professor of Law
Founding & Executive Director,
Charles Hamilton Houston
Institute for Race & Justice

CJO/bld

NEWSPAPER ARTICLE ENTITLED "'SIGNING STATEMENTS' ARE A PHANTOM TARGET," BY LAURENCE H. TRIBE, AUGUST 9, 2006, *THE BOSTON GLOBE,* SUBMITTED BY THE HONORABLE F. JAMES SENSENBRENNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

The Boston Globe

August 09, 2006 Wednesday
THIRD EDITION

`SIGNING STATEMENTS' ARE A PHANTOM TARGET

BYLINE: LAURENCE H. TRIBE

SECTION: OP-ED; Pg. A9

LENGTH: 1626 words

THE FINAL REPORT of the American Bar Association Task Force opposing presidential "signing statements" barks up a constitutionally barren tree. It's not the statements that are the true source of constitutional difficulty. On the contrary, signing statements, which a president can issue to indicate the way he intends to direct his administration to construe ambiguous statutes, are informative and constitutionally unobjectionable. So too are many signing statements signaling a president's intention not to enforce a particular provision that he deems constitutionally offensive in an otherwise unobjectionable omnibus measure that he's not prepared to veto.

Statements of the latter character have been issued by prior presidents of both political parties without protest from critics in Congress or elsewhere, and wisely so, for it seems to me a serious mistake to maintain that a president's only legitimate options are either to veto an entire bill or to sign it and then enforce it in its entirety regardless of his good-faith views as to constitutional infirmities, either of some part of the bill or of some set of possible applications.

A number of US senators, on both sides of the aisle, appear to be interested in knowing what Congress might be able to do legislatively to increase the likelihood that a lawsuit challenging these statements can go forward, so that what they regard as executive lawmaking in defiance of the powers of Congress won't go unchallenged. But these requests for assistance presuppose that issuing signing statements represents "executive lawmaking" in "defiance of the powers of Congress," a premise I cannot share.

To be sure, I believe that President Bush has abused the practice of using signing statements as signals of presidential intentions regarding both ambiguous statutes and ones with embedded unconstitutional provisions. But the fact that the incumbent president has used such statements in ways that expose a certain cynicism in signing rather than vetoing measures that he has no intention of applying and enforcing as Congress intended asserting that he regards Congress as having trespassed on his constitutional prerogatives is objectionable not by virtue of the signing statements themselves but rather by virtue of

the president's failure to face the political music by issuing a veto and subjecting that veto to the possibility of an override in Congress. It is also objectionable on occasion because of the inflated view of executive prerogative that the president has often announced.

Challenging the signing statements themselves, or the general practice of using them, does not represent even a plausible way of contesting this president's manifestly unreviewable decision to sign rather than veto any particular law, however cynical that decision might be and however unconvincing his explanations are. Nor does challenging such statements represent a plausible way of contesting the overblown character of this president's views of his constitutional prerogatives. That is something that can be tested judicially only in a genuine "case or controversy" that arises out of a decision to carry out the threat of non-enforcement made by his signing statement, and by someone with the constitutional standing to press such a challenge against what amounts to an executive omission to act.

Nothing Congress could possibly do seems to me capable of generating a ripe "case or controversy," within the meaning of Article III of the Constitution, out of the president's mere issuance of the underlying threat. Nor is it clear that Congress could endow anyone with the proper legal interest in a matter, without which Article III's standing to press such a challenge would be absent, even if the requisite case or controversy was thought to exist.

None of this is meant to deny that, when presidential defiance of a congressional directive takes the form not simply of an omission to act but of a course of conduct by members of the executive branch that causes injury to others as, for example, by subjecting to inhumane treatment those whom the president deems "unlawful combatants" and whom he refuses to shield in accord with the Geneva Conventions, as in Hamdan v. Rumsfeld the individuals subjected to such treatment may have suitable standing to mount a challenge under Article III. But such a challenge would not be to the signing statement that arguably predicted those individuals' fates, but instead to the conduct that made good on the president's threat.

And Congress may surely confer standing on individuals and groups that it reasonably deems likely to be victims of such practices as warrantless electronic surveillance in violation of the Fourth Amendment or of the Foreign Intelligence Surveillance Act standing to challenge programs of the National Security Agency or others when individuals or groups reasonably believe they are being targeted. Suitable congressional legislation may replace judicial findings with legislative findings of fact regarding the risk that members of a designated group are indeed likely to be so victimized, in circumstances where they might be unable to demonstrate the relevant facts themselves. But no form of legislation that Congress might enact, it seems to me, could manufacture an injury where there is none. And I see no injury but only insult in the signing statements to which both the ABA Task Force and various senators have objected.

On the related matter of presidential signing statements that tout the "unitary executive" theory in particular, what seems crucial to recognize is that the concept that would limit congressional oversight of the president, as it is bandied about both by Bush in his signing statements and by many of his critics, is too amorphous to represent a useful organizing principle for assessing the undoubtedly dangerous and inflated views of unilateral presidential power that have characterized much of what this administration has done with respect to the Guantanamo detention camps, the treatment of detainees in the "war on terror," the NSA's once-secret program of warrantless electronic surveillance in defiance of FISA and in purported reliance on the Authorization to Use Military Force, and much else.

Far more useful would be deflating the concept itself, demonstrating its obfuscatory character, and insisting, in some more focused form than the Task Force report does, that the Necessary and Proper Clause of Article I of the Constitution empowers Congress, not the president, both to structure and to regulate the overall conduct of officials in the executive branch an undertaking entailing an exercise of lawmaking authority that is not part of "the executive power" vested by Article II in the president.

Finally, insofar as President Bush has exercised his powers to engage in surreptitious electronic surveillance without court-issued warrants in violation of FISA, on the basis of an implausibly broad construction of his inherent Article II powers and a reading of the Authorization to Use Military Force that was rightly repudiated in a slightly different context by the Supreme Court's Hamdan decision, the "fix" reportedly negotiated between the White House and Senator Arlen Specter, in which the legality of the NSA program of warrantless surveillance would be submitted for adjudication on the basis of a one-sided presentation to the FISA court by the executive branch, is as transparently phony and futile as is the suggestion of a congressionally enacted vehicle to confer standing on someone to obtain a judicial ruling on the legality of this president's signing statements. The FISA court would be authorized to control the evidence to be considered, the forum for its consideration, whether the proceedings would be public or secret, and whether the result would be published or kept under wraps. And it alone would be authorized to appeal an adverse ruling.

Although Congress has ample authority to identify various groups as likely victims of the contested warrantless wiretapping practice and to authorize such groups to sue in federal court to obtain a definitive ruling on the constitutional and other legal questions presented, Congress has no authority of which I am aware to create a secret, one-sided pseudo-adjudication of those questions on the basis of a non-adversary presentation fully controlled by one side.

Whatever else one might say about the sound of one hand clapping, it is most assuredly not the sound of a genuine court resolving a genuine case or controversy in the way that courts have functioned for centuries, whether with or without special safeguards to

protect national security from the perils of leaky courtrooms.

What the ABA Task Force attack on the phantom of the Bush signing statements, the legislative platform for challenging those statements judicially that its position is inspiring, and the phony Bush-Specter deal for an asymmetrical whitewash of the contested program of NSA surveillance have in common is that all three compound rather than correct the distortions in the separation of powers and the system of checks and balances that the Framers had the farsightedness to design but that latter-day pretenders to the throne of constitutionalism and the crown of original intent routinely flout even as they profess fealty to the ideals they embody.

It's about time to take the Constitution seriously rather than playing it for whatever partisan advantage its symbols appear to offer. Durable though the constitutional system has been, and enduring though I have long believed it to be, there's only so much abuse that even it can take without collapsing under the weight of the garbage being heaped on its sturdy but far from invincible frame.

NEWSPAPER ARTICLE ENTITLED "WHO'S AFRAID OF PRESIDENTIAL SIGNING STATEMENTS?" BY STANLEY FISH, FEBRUARY 4, 2007, *THE NEW YORK TIMES*

The New York Times
February 4, 2007, 9:37 pm
Who's Afraid of Presidential Signing Statements?
By Stanley Fish

Last week John Conyers, chairman of the House Judiciary Committee, announced that he would soon hold hearings on President Bush's use of presidential signing statements. Presidential signing statements, which have been around since the administration of James Monroe, are issued contemporaneously with the signing of a bill into law and come in a variety of flavors.

A signing statement can be a form of cheerleading in which the chief executive congratulates himself and members of Congress for having done something good. It can be an effort to "clarify" ambiguous statutory language in a policy direction favorable to the president's views. It can be a move in the perpetual tug-of-war between the executive and the legislative branches: the president announces his displeasure with certain of the bill's provisions in the hope that next time around Congress will send him something more to his liking. It can be an expression of doubt by the president as to the constitutionality of one or more provisions: he may say I'm signing this, but I don't think this part of it is constitutional and I'm not going to implement it.

It can be a declaration of the president's intention to administer the bill, but with the proviso – and this is a George W. Bush favorite – that it shall be construed "in a manner consistent with the president's constitutional authority." Here the message is, you can pass legislation infringing on my areas of authority (which in the case of the present president means all the areas there are), but I'm going to ignore it, so there! And finally, a signing statement can be a president's specification of what the bill he now signs means; here the claim of authority is not institutional, but interpretive, and it is a claim nicely explicated by the title of an article critical of the practice: "Let Me Tell You What You Mean" (by Bradley Waites in the Georgia Law Review).

President Bush's signing statements have provoked considerable protest, especially since 2005, when he followed the signing of an amendment (sponsored by Senator John McCain) forbidding torture of prisoners with a pledge to always keep in mind the objective "of protecting the American people from further terrorist attacks." In short, we won't torture unless I decide that we have to. Statements like these are what Congressman Conyers has in mind when he complains that the "basic rights of democracy" – the right to elect legislators who have the primary responsibility for making laws – will be undermined by a president who signs laws but then announces "that he is free to carry them out or not, as only he sees fit."

Defenders of the practice reply that it has been around for a very long time, that presidents of both parties have had recourse to it, that its legality has been affirmed in several Supreme Court decisions (others dispute this), and that its use is necessary if the president is to faithfully execute the laws of the land as he is commanded to do in article

II, section 3 of the Constitution. Rather than settling matters, however, invoking this clause provokes arguments about its meaning. One side says, "faithfully execute" means carry out the laws Congress has enacted as the separation of powers require you to do; the other side says, "faithfully execute" means take care that the laws you execute are constitutional and do not encroach upon executive prerogatives. It's a question of what you're being faithful to: a process, or a substantive vision of what it is good to do.

Answers to that question do not fall out along party lines. Bruce Fein, who was associate deputy attorney general under President Reagan, regards presidential signing statements as "great usurpations of the power to legislate." Walter Dellinger, assistant attorney general under President Clinton, wrote two widely cited memos (in 1993 and 1994) defending and elaborating the proposition that "there are circumstances in which the president may appropriately decline to enforce a statute that he views as unconstitutional."

"Circumstances" is the key word, for it marks the difference between what has been called the "Dellinger paradigm" and the theory of presidential signings first put forward in the Reagan administration by Attorney General Edwin Meese, Deputy Assistant Attorney General Samuel Alito (yes, that one), and Steven Calabresi, who was special assistant to the attorney general. Dellinger's brief for presidential signing statements comes with what he has recently described as "cautionary guidelines" (guidelines he thinks the Bush administration has ignored). First, the president should start by presuming that the laws the Congress sends up to him are constitutionally valid. Second, if the president believes that the Supreme Court would uphold the constitutionality of a provision, he should execute the provision even if, in his view, it does not pass constitutional muster. It is only if he believes both that the provision is unconstitutional and that the court would so decide that the president, says Dellinger, should consider declining to execute it; for he would then be giving weight to his own conclusion only because he believes it to be the conclusion the Court will reach.

The importance of these cautions is that they identify the authoritative actors and place limits on their powers. Congress, not the president, makes laws. The courts, not the president, interpret them. The president may be convinced that a piece of legislation is unwise. But his judgment as to its un-wisdom is not a legal reason for his declining to execute it. (It may be a reason to veto it, and one of the objections to signing statements is that they are vetoes not subject to override.) And the president may have a definite view as to what the legislation means, and that view might include conclusions as to its constitutionality, but his is not the view that counts. He may be the commander in chief, but he is not the interpreter in chief. Indeed, with respect to interpretive authority, he is in no better a position than the proverbial man in the street or the baseball fan who prefers his own judgment about balls and strikes to the umpire's; it's just not his call.

This is decidedly not the view of Meese, Alito and Calebresi, who did not hide the fact that they wanted to make presidential signing statements an integral part of the interpretive process. In a 1986 memo ("Using Presidential Signing Statements to Make

Fuller Use of the president's Constitutionally Assigned Role in the Process of Enacting Law"), Alito identified as a "primary objective" to "ensure that presidential signing statements assume their rightful place in the interpretation of legislation." Meese's contribution to this effort was to arrange for the publication of signing statements in the periodical United States Code Congressional and Administrative News. It will now be the case, he explained "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 the statute really means."

But why should what the president says (as opposed to what my dentist says) be part of what the court takes into account when it is trying to determine what a statute "really means"? Or to put the question somewhat more technically, in what way is what the president says evidence of what a statute really means. Calabresi has an answer to that question and it comes in three parts. Part 1: The president is "a necessary player in the American legislative process." Yes, but being necessary to the legislative process is one thing – Congressional aides and White House staffers are necessary players – and having a role in specifying the meaning of legislative words is another. How do you get from one to another? Well, try part 2: Committee reports are considered "probative of legislative intent," and "presidential signing statements are precisely analogous to Senate and House committee reports." No they're not. House and Senate committee reports are probative (count as evidence of meaning) because they are reports on what the drafters of the legislation were thinking and saying; it is what they had in mind that a court will be trying to figure out in the event of an interpretive dispute.

The court has no reason to be interested in what a president has in mind unless – and this sometimes happens – he has collaborated with members of Congress in the framing of the bill; he is then a coauthor, not in a metaphorical, but in a real sense, and therefore his intentions are relevant. Absent that special circumstance, his intentions are not to the point.

But, and this is Calebresi's part 3, at least they are clear. There may be a doubt, he observes, as to whether every member of a committee agrees with what's in the report, but as "solely authored" documents, presidential signing statements are "reliable indicators of the original intention of the president when he signs a bill into law." But the president's original intention is not the original intention of the bill's authors; it is the intention of an interpreter, and given that it is the intention of an interpreter without standing, its clarity is without value. In a chain of non-reasoning, this is the weakest link: here's a clear presidential intention; let's use it to determine what a bill means even if he had nothing to do with writing it. It's like looking for your keys under the street lamp, not because you lost them there, but because it happens to shed light.

The argument for inserting presidential signing statements into the process of statutory construction is hopeless, without any basis in anything except a desire for control and power. Putting the statements into the United States Code Congressional and Administrative News doesn't get them any closer to an interpretive relevance they could

never have, even if the volumes of that periodical were piled as high as the moon.

But no matter. It's all rhetorical anyway and without very much legal effect. In a report for Congress, T.J. Halstead of the Congressional Research Service observes that "it does not appear that the courts have relied on signing statements to any appreciably substantive fashion." What this shows is that despite the theoretical ambitions of a line of conservative ideologues from Edwin Meese to David Addington (often described as the architect of George W. Bush's efforts in this vein), signing statements are more theater than law. But of course, at times, theater can be more politically effective than law, and if it is the theater of the bully pulpit (if I may mix my metaphors), signing statements may indeed be doing a lot of work. And that work may be, as Conyers and others fear, bad.

NEWSPAPER ARTICLE ENTITLED "GUESS WHO IS OPENING, READING YOUR MAIL; OUR OPINION: CONGRESS MUST HOLD HEARINGS ON SIGNING STATEMENTS," JANUARY 9, 2007, *THE MIAMI HERALD*

The Miami Herald
January 9, 2007 Tuesday
Guess who is opening, reading your mail;
OUR OPINION: CONGRESS MUST HOLD HEARINGS ON SIGNING STATEMENTS
SECTION: A; Pg. 14
LENGTH: 448 words

The postal legislation that President Bush signed into law last month seems innocent enough. It gives the government the right to open mail without a warrant if there is suspicion that it may contain a bomb, anthrax or some other threatening substance. President Bush said the law gives the government no power that it doesn't already have. The U.S. Postal Inspection Service agrees. But the law isn't as benign as it seems.

This law is more like the Trojan Horse of Greek mythology, in which the Greeks used a hollowed out giant wooden horse to invade and conquer Troy. President Bush attached a "signing statement" to the law that allows a president to authorize a search of mail in an emergency to "protect human life and safety" and ``for foreign intelligence collection."

750 signing statements

Strictly speaking, the Postal Service is correct in saying that the law seems to authorize what already is permitted under the 1978 Foreign Intelligence Surveillance Act (FISA). But why attach the signing statement if the president already has the authority to open private mail? Therein lies the problem.

In an investigative report last year, The Boston Globe reported that President Bush has issued signing statements more than 750 times during his presidency, more than all other presidents combined. A report by the nonpartisan Congressional Research Service found that the Bush administration is using the practice to assert the primacy of the executive branch and to ignore, change or circumvent laws with which the president disagrees.

Expansive powers?

From the CRS report: The ``broad and persistent nature of the claims of executive authority forwarded by President Bush appears designed to inure Congress, as well as others, to the belief that the president, in fact, possesses expansive and exclusive powers upon which the other branches may not intrude."

President Bush has used signing statements to allow to him to ignore the anti-torture legislation passed by Congress last year, to refuse to disclose information requested by the commission investigating the 9/11 attacks and to prevent an inspector general from conducting audits and oversight of spending by the Coalition Provisional Authority in Iraq, among other things.

The scope of the president's use of signing statements is breathtaking and scary. With a sweep of his pen, the president can intrude into citizens' private affairs, hide financial bungling by the government, negate months of hard work by Congress and commit or cover up a multitude of sins and wrongdoing. Congress has a solemn duty to, at minimum, conduct open hearings on the use of signing statements and demand a full accounting from the president.

NEWSPAPER ARTICLE ENTITLED "ENDING BACK-DOOR VETOES," JULY 25, 2006, *THE BOSTON GLOBE*

The Boston Globe
July 25, 2006 Tuesday
THIRD EDITION
ENDING BACK-DOOR VETOES
SECTION: EDITORIAL; Pg. A10
LENGTH: 453 words

OVER THE LAST five years, congressional leaders have barely squawked as President Bush signed bills and then quietly but explicitly declared his intention to discount key provisions of them. He has attached such statements to more than 800 laws, at last count. Left unchallenged, the president's so-called "signing statements" would represent a unilateral change to the structure of the US government, a change that no one outside the White House played any role in enacting.

Yesterday, a bipartisan task force of the American Bar Association concluded that these statements violate the constitutional separation of powers. And the panel called for federal legislation that would allow for judicial review of any statement in which the president claims the authority to disregard all or part of a law.

The bar association's House of Delegates has yet to vote on the recommendations, but endorsing them should be virtually automatic for a group of lawyers. Whether the White House or congressional leaders will act on the proposal is another story. For decades, presidents asked the bar association, which represents the nation's lawyers, to evaluate the credentials of judicial nominees, but the current President Bush put an end to that practice. His administration treats the bar association as just another interest group, to be humored or ignored as he pleases.

But the task force has a point. Bush has employed signing statements more often and more aggressively than any of his predecessors, as the Globe's Charlie Savage documented in a series of articles this spring. The laws in question touch on fundamental values, such as whether US military interrogators should be allowed to torture detainees.

The administration's defenders say the president is merely objecting to unconstitutional provisions specifically, ones that infringe on the rightful powers of the executive within otherwise desirable legislation. But even if the Bush administration were correct on that point, back-door vetoes only relieve Congress of its obligation to make laws that are constitutional. The task force notes that deciding constitutionality is up to the federal courts. "The Constitution is not what the President says it is," the panel's report declares.

Congress was right to prohibit the use of torture by American interrogators. If the president opposed that ban, he had the right to veto it. That, of course, would have looked bad, both at home and around the world. But while a veto-by-signing-statement might have been more convenient politically, no part of the Constitution gives the president the right to have it both ways to enforce parts of laws that magnify the power of the executive branch and then ignore the rest.
The New York Times

NEWSPAPER ARTICLE ENTITLED "VETO? WHO NEEDS A VETO?" MAY 5, 2006, *THE NEW YORK TIMES*

May 5, 2006 Friday
Correction Appended
Late Edition - Final
Veto? Who Needs a Veto?
SECTION: Section A; Column 1; Editorial Desk; Pg. 22
LENGTH: 785 words

One of the abiding curiosities of the Bush administration is that after more than five years in office, the president has yet to issue a veto. No one since Thomas Jefferson has stayed in the White House this long without rejecting a single act of Congress. Some people attribute this to the Republicans' control of the House and the Senate, and others to Mr. Bush's reluctance to expend political capital on anything but tax cuts for the wealthy and the war in Iraq. Now, thanks to a recent article in The Boston Globe, we have a better answer.

President Bush doesn't bother with vetoes; he simply declares his intention not to enforce anything he dislikes. Charlie Savage at The Globe reported recently that Mr. Bush had issued more than 750 "presidential signing statements" declaring he wouldn't do what the laws required. Perhaps the most infamous was the one in which he stated that he did not really feel bound by the Congressional ban on the torture of prisoners.

In this area, as in so many others, Mr. Bush has decided not to take the open, forthright constitutional path. He signed some of the laws in question with great fanfare, then quietly registered his intention to ignore them. He placed his imperial vision of the presidency over the will of America's elected lawmakers. And as usual, the Republican majority in Congress simply looked the other way.

Many of the signing statements reject efforts to curb Mr. Bush's out-of-control sense of his powers in combating terrorism. In March, after frequent pious declarations of his commitment to protecting civil liberties, Mr. Bush issued a signing statement that said he would not obey a new law requiring the Justice Department to report on how the F.B.I. is using the Patriot Act to search homes and secretly seize papers if he decided that such reporting could impair national security or executive branch operations.

In another case, the president said he would not instruct the military to follow a law barring it from storing illegally obtained intelligence about Americans. Now we know, of course, that Mr. Bush had already authorized the National Security Agency, which is run by the Pentagon, to violate the law by eavesdropping on Americans' conversations and reading Americans' e-mail without getting warrants.

We know from this sort of bitter experience that the president is not simply expressing philosophical reservations about how a particular law may affect the war on terror. The signing statements are not even all about national security. Mr. Bush is not willing to enforce a law protecting employees of nuclear-related agencies if they report misdeeds to Congress. In another case, he said he would not turn over scientific information "uncensored and without delay" when Congress needed it. (Remember the altered

environmental reports?)

Mr. Bush also demurred from following a law forbidding the Defense Department to censor the legal advice of military lawyers. (Remember the ones who objected to the torture-is-legal policy?) Instead, his signing statement said military lawyers are bound to agree with political appointees at the Justice Department and the Pentagon.

The founding fathers never conceived of anything like a signing statement. The idea was cooked up by Edwin Meese III, when he was the attorney general for Ronald Reagan, to expand presidential powers. He was helped by a young lawyer who was a true believer in the unitary presidency, a euphemism for an autocratic executive branch that ignores Congress and the courts. Unhappily, that lawyer, Samuel Alito Jr., is now on the Supreme Court.

Since the Reagan era, other presidents have issued signing statements to explain how they interpreted a law for the purpose of enforcing it, or to register narrow constitutional concerns. But none have done it as profligately as Mr. Bush. (His father issued about 232 in four years, and Bill Clinton 140 in eight years.) And none have used it 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.

Like many of Mr. Bush's other imperial excesses, this one serves no legitimate purpose. Congress is run by a solid and iron-fisted Republican majority. And there is actually a system for the president to object to a law: he vetoes it, and Congress then has a chance to override the veto with a two-thirds majority.

That process was good enough for 42 other presidents. But it has the disadvantage of leaving the chief executive bound by his oath of office to abide by the result. This president seems determined not to play by any rules other than the ones of his own making. And that includes the Constitution.

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