UNCONSTITUTIONAL COMMENTARY

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I. INTRODUCTION

Whether presidential signing statements should be considered legislative history, and therefore play a limited role in statutory interpretation, is a question that has yet to reach the Supreme Court. But most recently, in June of 2006, in *Hamdan v. Rumsfeld*, the Court signaled its divided position on the matter.[1] The majority, in its analysis of the Detainee Treatment Act's[2] legislative history, ignored a Bush Administration signing statement[3] asserting that the Court lacked jurisdiction to hear the case. Justice Scalia, joined in dissent by Justices Thomas and Alito, scolded the majority for "[o]f course . . . wholly ignor[ing]" the President's signing statement in its discussion of legislative history.[4]

This exchange over the proper role, if any, for presidential signing statements in statutory interpretation, coupled with increased media attention on the current Bush Administration's controversial use of such statements,[5] have reignited a debate[6] that has been raging since the late 1980s. It was then that a young Deputy Assistant Attorney General by the name of Samuel Alito, Jr. wrote an influential memorandum suggesting, for the first

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[1] 548 U.S. 557 (2006).

[2] 42 U.S.C.A. § 2000dd–2000dd-1 (2005).

[3] President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," *available at* http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html (last visited Mar. 1, 2008).

[4] *Hamdan*, 548 U.S. at 666.

[5] *See* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND SUBVERSION OF AMERICAN DEMOCRACY 230 (2007) ("By the seventh year of the Bush-Cheney presidency, Bush had attached signing statements to about 150 bills enacted since he took office, challenging the constitutionality of well over 1,100 separate sections in the legislation. By contrast, all previous presidents in American history *combined* had used signing statements to challenge the constitutionality of about 600 sections of bills, according to historical data compiled by Christopher Kelley, a Miami University of Ohio political science professor who was one of the first to study signing statements."); *see also* Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1 (Pulitzer Prize-winning investigation into the Bush Administration's unprecedented use of presidential signing statements).

[6] For recent treatment of the debate, see Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 604-07 (2006) [hereinafter Harvard Note] (summarizing arguments for and against granting deference to signing statements in statutory interpretation).

time, that presidential signing statements "be used to address questions of interpretation."[7]

The current literature on signing statements has failed to recognize that the *Hamdan* Court, when presented with a presidential signing statement to the Detainee Treatment Act, ignored a signing statement different in kind. That signing statement, unlike others treated in the literature, was attached to legislation implementing a non-self-executing[8] human rights treaty.[9] Such signing statements, because of the peculiar process by which non-self-executing treaties take domestic effect,[10] introduce interpretive problems not shared by signing statements appended to free standing[11] pieces of domestic legislation.

Furthermore, the complications arising from signing statements attached to legislation implementing non-self-executing treaties are of particular importance to one small yet critical subset of non-self-executing treaties: human rights treaties. There are two reasons for this. First, the problems raised by these

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[7] Memorandum from Samuel A. Alito, Jr., Deputy Assistant Att'y Gen., Office of Legal Counsel, to The Litigation Strategy Working Group 1 (Feb. 5, 1986) [hereinafter Alito Memorandum], *available at* http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf.

[8] Treaties may be self-executing or non-self-executing. The former take domestic effect upon ratification, the latter require separate implementing legislation. Human rights treaties, for reasons this Article explores, are traditionally interpreted as non-self-executing. *See infra* Part II.

[9] The Detainee Treatment Act of 2005 implemented the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987; ratified by the United States Oct. 21, 1994), *available at* http://www1.umn.edu/humanrts/instree/h2catoc.htm [hereinafter Torture Convention]; *see also* Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 122 (2007) (noting that the Detainee Treatment Act implemented Article 16 of the Torture Convention).

[10] There are five critical steps in the process. First, the President or his representatives negotiate and draft treaty terms with the other treaty participant(s). Second, the President submits the treaty for approval by two-thirds of the Senate. Third, upon approval by the Senate, the President signs the treaty. Fourth, both Houses of Congress pass legislation implementing the treaty. Fifth, the President signs the implementing legislation, thereby "executing" the non-self-executing treaty. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 198-206 (1996).

[11] For the purposes of this Article, "free standing legislation" denotes all legislation other than legislation implementing a non-self-executing treaty.

complications disproportionately affect human rights treaties. All seven current, multilateral human rights agreements to which the United States is a party have been concluded as non-self-executing treaties.[12] This choice of format is no coincidence: non-self-executing treaties, more than any other form of international agreement, offer parties the best opportunity for reconciling certain conflicting political pressures.[13] These interpretive problems, therefore, potentially apply to each and every human rights treaty, including those not yet concluded.

Second, the possibility of unchecked presidential amendment of treaty obligations is especially alarming in the field of human rights, where a President's duties as commander in chief may conflict with the execution of human rights commitments. The exigencies of waging the international War on Terror, for example, put particular stress on our nation's human rights commitments. In such circumstances, the Commander-in-Chief necessarily feels pressure to limit or reinterpret human rights obligations that might appear to frustrate military objectives. Signing statements, if recognized as legitimate by courts, would concentrate interpretive authority in the hands of a single person whose responsibilities as Commander-in-Chief threaten to undermine the coordinate branches' commitment to human rights.

This Article explores the way in which the current debate over signing statements might be extended to treat signing statements attached to legislation implementing non-self-executing treaties, especially human rights treaties. Part II, on signing statements, looks first at their nature, history, and purposes; turns next to the contemporary debate over their use; and concludes by highlighting the complications that arise when signing statements are attached to legislation implementing non-self-executing treaties. Part III, on non-self-executing human rights treaties, first discusses their form, mechanics, and use relative to other types of international agreements; looks next at the way they have been interpreted by courts; and ends by presenting five hypotheticals designed to illustrate a range of interpretive scenarios involving signing statements. Part IV

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[12] *See infra* note 81 and accompanying text.

[13] *See infra* notes 82-83 and accompanying text.

presents solutions to these five hypotheticals that, except in the case of one exceedingly narrow exception, ultimately subject this special subcategory of signing statements to the same overpowering criticisms as those facing signing statements attached to free standing legislation.

II. PRESIDENTIAL SIGNING STATEMENTS

A. Nature, Brief History,[14] and Purposes

Presidential signing statements are declarations made by the President upon the signing of legislation. They are issued for a number of reasons.[15] First, and least controversial, a signing statement allows the President to explain to the public what the law is, what he expects to accomplish from its passage, and why he chose to ratify it.[16] A second function of signing statements is to guide executive officials in their interpretation, administration, or execution of the law.[17] Third, and more controversial, a President may issue a signing statement to assert his belief that a portion, or portions, of the law run afoul of the Constitution and, therefore, will not be enforced by executive branch officials.[18] Whether a President should be permitted to use signing statements for this purpose is both a hotly contested issue[19] and beyond the scope of

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[14] For a more detailed history of the use of presidential signing statements, see Harvard Note, *supra* note 6, at 599-600.

[15] *See* Memorandum from Walter Dellinger, Assistant Att'y Gen., to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993), *in Recent Legal Opinions Concerning Presidential Powers*, 48 ARK. L. REV. 311, 333 (1995) [hereinafter Dellinger Memorandum]; *see also* Harvard Note, *supra* note 6, at 601-02 (similar classification of purposes, largely tracking Dellinger Memorandum); Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308 (2006) ("Presidents use signing statements to describe a bill in general terms; to explain its purpose; to praise the bill's sponsors or supporters; to criticize Congress for going too far or not far enough in addressing the problem the bill is supposed to solve; to advance particular interpretations of specific provisions of the bill; to explain how officials in the executive branch will implement the bill; to explain how the bill will interact with existing statutes; and to remind Congress of the president's constitutional powers.").

[16] Dellinger Memorandum, *supra* note 15, at 333.

[17] *Id.*

[18] *Id.*

[19] *Compare* ABA Task Force on Presidential Signing Statements & the Separation of Powers Doctrine, Recommendation (2006), *available at* http://www.abanet.org/

this Article.

This Article addresses the fourth and most controversial purpose of signing statements—namely, "to create legislative history to which the courts are expected to give some weight when construing the enactment."[20] Though signing statements have been in use, in one form or another, since as early as the 1830s,[21] the Reagan Administration was the first to systematically employ signing statements for the purpose of supplementing a statute's legislative history.[22]

Then-Deputy Assistant Attorney General Samuel Alito, Jr.'s influential memorandum suggesting that the President include executive interpretations of legislation in signing statements, with the intent of affecting judicial outcomes,[23] gained a degree of legitimacy after then-Attorney General Edwin Meese successfully lobbied to publish the statements in the "Legislative History" section of the *United States Congressional Code and Administrative News*.[24] Since President Reagan, every President has continued the practice. President George W. Bush, however, has issued these and other forms of signing statements to challenge more laws than any other President.[25]

Signing statements come in all shapes and sizes. They may be brief and entirely uncontroversial, falling squarely into the first of the four camps. Take George W. Bush's five sentence signing statement, issued six days before Christmas, to the Combating

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op/signingstatments/aba_final_signing_statements_recommendation-report_7-24-06.pdf (arguing that signing statements claiming the authority to disregard allegedly unconstitutional legislation are "contrary to the rule of law and our constitutional system of separated powers") *with* Dellinger Memorandum, *supra* note 15, at 336-38 (asserting that the Constitution provides the President "with the authority to decline to enforce a clearly unconstitutional law").

20 Dellinger Memorandum, *supra* note 15, at 333.

21 PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 203 (2002) ("Some of the earliest signing statements concerned efforts to alter spending legislation, such as Andrew Jackson's modification in 1830 of an appropriation for roads.").

22 Dellinger Memorandum, *supra* note 15, at 339.

23 Alito Memorandum, *supra* note 7.

24 *See* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 367 (1987) (noting Attorney General Meese's "concerted effort to present such statements as part of the legislative history of the act").

25 SAVAGE, *supra* note 5, at 230.

Autism Act of 2006.[26] Or they may be more complicated, like the signing statement to the National Defense Authorization Act for Fiscal Year 2007, which has a foot in all four camps.[27] That signing statement outlines for the public the content of the law (first purpose),[28] guides executive officials in their administration of the law (second),[29] asserts that certain portions of the law, as written, will not be enforced due to perceived constitutional conflict (third),[30] and offers an executive branch interpretation of terms in the statute (fourth).[31]

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[26] The signing statement reads in its entirety:

> For the millions of Americans whose lives are affected by autism, today is a day of hope. The Combating Autism Act of 2006 will increase public awareness about this disorder and provide enhanced Federal support for autism research and treatment. By creating a national education program for doctors and the public about autism, this legislation will help more people recognize the symptoms of autism. This will lead to early identification and intervention, which is critical for children with autism. I am proud to sign this bill into law and confident that it will serve as an important foundation for our Nation's efforts to find a cure for autism.

President's Statement on Signing of S.843, the "Combating Autism Act of 2006."

[27] President's Statement on Signing of H.R. 5122, the "John Warner National Defense Authorization Act for Fiscal Year 2007," *available at* http://www.coherentbabble.com/ss2006.htm#a200616.

[28] *Id.* ("The Act authorizes funding for the defense of the United States and its interests abroad, for military construction, for national security-related energy programs, and for maritime security-related transportation programs.").

[29] *Id.*

> A number of provisions in the Act call for the executive branch to furnish information to the Congress or other entities on various subjects. These provisions include sections 219, 313 . . . The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority 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.

Id.

[30] *Id.*

> The executive branch shall construe section 1211, which purports to require the executive branch to undertake certain consultations with foreign governments and follow certain steps in formulating and executing U.S. foreign policy, in a manner consistent with the President's constitutional authorities to conduct the Nation's foreign affairs and to supervise the unitary executive branch.

Id.

[31] *Id.*

> The executive branch shall construe sections 914 and 1512 of the Act, which purport to make consultation with specified Members of Congress

The signing statements of interest to this Article are those that attempt to enter executive interpretations of law into the legislative history. When faced with ambiguous statutory language, courts customarily look to traditional indicators of legislative intent, such as committee reports, transcripts of congressional floor debates, and hearing testimony, in order to determine what Congress's words really mean.[32] The interpretive fight, then, is over whether executive interpretations of law, in the form of presidential signing statements, ought to be included alongside these traditional manifestations of legislative intent as a source of legislative history.

B. Debate over Signing Statements

Commentators have been debating the legitimacy of the use of signing statements as a means of influencing statutory interpretation ever since the Reagan administration introduced the practice.[33] Support for the use of signing statements in this capacity, as well as the rejection of such use, both oftentimes admit of degrees,[34] can generally be categorized as falling into one of two camps: advocates or critics.

1. Advocates

Advocates for the incorporation of presidential signing statements into legislative history offer two principal arguments—one structural, one practical.[35] First, they argue that the President,

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> a precondition to the execution of the law, *as calling for but not mandating 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.

Id. (emphasis added).

[32] For the definitive defense of the use of legislative history in statutory interpretation, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

[33] *See* Alito Memorandum, *supra* note 7 and accompanying text.

[34] *See, e.g.*, Harvard Note, *supra* note 6, at 618 (roundly criticizing the use of signing statements but conceding that on rare occasions they "may determine court interpretations of ambiguous statutory provisions when other materials are in equipoise.").

[35] *See, e.g.*, Dellinger Memorandum, *supra* note 15 (presenting major arguments for the incorporation of presidential signing statements into legislative history); Harvard Note, *supra* note 6, at 604-05 (relying on Dellinger Memorandum in finding

under the Presentment Clause of the Constitution,[36] plays a considerable role in the legislative process. Since a bill becomes law only when passed by both houses of Congress, and then is either signed by the President or enacted over his veto, the President's interpretation of the bill, so this argument goes, is critical to an understanding of the bill's intended meaning. The Presentment Clause, on this reading, establishes the President as a key figure in the legislative process—a figure whose interpretation should therefore be included in a statute's legislative history.[37]

Second, the President, as a practical matter, is so closely involved with today's complicated legislative process that he is, in effect, a "legislator." And as a "legislator," so the argument goes, the President's interpretation of a statute should be included in the legislative history. On one account, the President is a member of the "enacting coalition," that is, "those parties whose approval was necessary for the enactment of the statute."[38] To put it another way, the members of the enacting coalition "play the role that contract parties do in the economic analysis of contract law."[39] Just as courts look to the intentions of contracting parties when filling gaps in a contract, so too should courts look to the intentions of the enacting coalition when filling gaps in legislation.[40]

Proponents of this position have little trouble situating the President in this enacting coalition.[41] And at least one court has

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two primary arguments for incorporation).

[36] U.S. CONST. art. I, § 7, cl. 2

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

Id.

[37] *See* Alito Memorandum, *supra* note 7 (presenting a structural argument for incorporation of signing statements into legislative history).

[38] Bradley & Posner, *supra* note 15, at 348.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 351.

> [T]he president's influence is pervasive. The veto power is significant; also the [P]resident can sometimes set the agenda by proposing

used a presidential signing statement in its interpretation of an ambiguous statute by explicitly referencing the executive branch's active participation in the passage of the bill.[42]

2. Critics

Critics launch two categories of criticism—one structural, one temporal.[43] The structural claims include an argument involving the separation of powers doctrine and an argument likening signing statements to the constitutionally prohibited line item veto.

The first separation of powers argument appeals to the Presentment Clause as evidence of the Framers' conception of a carefully circumscribed role for the President in the legislative process. The President may propose legislation he thinks fit, approve legislation presented by Congress, or, if he disapproves of Congress's legislation, issue a veto, but that is all.[44]

Nowhere in the Constitution, critics maintain, is the President granted a role in the legislative process that would warrant the treatment of executive interpretations as "legislative"

> legislation and using his political and institutional resources (including his leadership of one of the political parties in Congress) to focus Congress's attention on his proposal. Therefore, it seems appropriate to assume that the [P]resident is always a member of the enacting coalition except when his veto is overridden.

Id.; *see also* Mark R. Killenbeck, *A Matter of Mere Approval?: The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239, 286 (1994).

> But the [p]resident's role as an important—indeed, I construe it to be essential—source of information in the legislative process speaks directly to the question at issue here, the formulation of legislative *history*. There is little doubt that the framers considered it essential for the [p]resident to provide a critical mass of information that would serve as an important element of the legislative process.

Killenbeck, *supra*, at 286.

[42] United States v. Story, 891 F.2d 988, 994 (2d Cir. 1989) (deferring to a presidential signing statement on the grounds that "the Executive Branch participated in the negotiation of the compromise legislation").

[43] *See, e.g.*, Garber & Wimmer, *supra* note 24, at 363 (criticizing executive branch's attempts at entering signing statements into legislative history); Harvard Note, *supra* note 6, at 599 (same); William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 700 (1991) (same).

[44] *See* Garber & Wimmer, *supra* note 24, at 372; *see also* Popkin, *supra* note 43, at 709 ("The [p]resident's [A]rticle I power to approve or veto bills is a negative power only and cannot therefore justify judicial reliance on presidential legislative history.").

history.[45] Furthermore, to allow the President, in a signing statement, to "shade the meaning of the language voted upon by Congress," would effectively result in an absolute veto power, the very evil the Framers sought to combat with the Presentment Clause.[46]

The second separation of powers argument addresses the threat presidential signing statements pose to judicial, rather than congressional, independence.[47] The basic claim is that signing statements issued with the intent of influencing judicial interpretation of the law violate the separation of powers between Article II and Article III. Courts, not the President, "say what the law is."[48] And signing statements simply go too far in telling the judiciary how to do their jobs, which is to say, how to interpret the law.

Defenders of signing statements justify this alleged encroachment on judicial activity by appealing to the President's duty to "take Care that the Laws be faithfully executed."[49] But taking care that the laws be faithfully executed, critics fire back,

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[45] *See* Killenbeck, *supra* note 41, at 277 ("The single most important argument against an executive role in crafting legislative history is that it risks breaching the carefully crafted separation between matters legislative, executive, and judicial."); Garber & Wimmer, *supra* note 24, at 363 ("To rely on the [signing] statements, the authors argue, would violate the Constitution's separation of powers doctrine by both giving the President the power to make law and by allowing the President to usurp the judiciary's role of interpreting statutory meaning.").

[46] Garber & Wimmer, *supra* note 24, at 375. To illustrate this threat of the potential for absolute veto power, consider the following hypothetical. Congress passes the wildly popular Puppies for Children Act, which entitles every "child" in America to a complimentary puppy. Committee reports and floor debates clearly indicate that Congress intended for "child" to capture all Americans 12 years of age or under. If the President approves the bill, but appends a signing statement in which he declares that, for the purposes of this law, "child" captures only those Americans 9 years of age and under, he has, in effect, vetoed the bill. Congress is not afforded the opportunity, as in a standard veto, to collect the two thirds majority needed to overcome the president's interpretation. Provided the statutory language is ambiguous, and the court chooses to include the presidential signing statement in its examination of legislative history, 10-12 year-olds throughout the country may be in for a big disappointment.

[47] *See id.* at 383-85 (arguing that signing statements violate separation of powers doctrine by inappropriately injecting executive branch interpretations into the judicial process).

[48] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[49] U.S. CONST. art. II, § 3.

does not include attempts at manipulating legislative intent.[50]

In addition to these separation of powers arguments, critics present another structural argument—namely, signing statements allow the President to exercise an unconstitutional line item veto. A line item veto would permit the President to accept portions of a law as written and reject others. The Court in *Clinton v. New York* invalidated the Line Item Veto Act of 1996, which provided the President with a form of line item veto authority, on the grounds that it disrupted the "finely wrought" procedure for enacting legislation articulated by the Presentment Clause.[51]

This "finely wrought" procedure does not grant the President the authority to interpret laws; the President is presented with laws for his approval or disapproval, not for his interpretive commentary.[52] Critics argue that signing statements, which allow the President to approve portions of a bill as written and modify those portions with which he disagrees, enable him to wield unconstitutional line item veto authority.[53]

Critics of signing statements also launch a second, temporal argument. It is the timing of the signing statement—*after* Congress has concluded its debate—that strikes critics as politically manipulative.[54] Using a signing statement to insert into the legislative history an executive interpretation of a key term in

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[50] Garber & Wimmer, *supra* note 24, at 386.

> There is a vast difference between the Executive's constitutional function of putting Congress' will into effect through administrative action and the attempt, by use of signing statements, to affect a court's interpretation of that legislative intent. Execution of the law, as constitutionally mandated, does not include transformation of the meaning of the law.

Id.

[51] Clinton v. New York, 524 U.S. 417, 447 (1998) (quoting I.N.S. v. Chadha, 462 U.S. 919, 951 (1983)).

[52] Article II, Section 3 does grant the President the authority to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." Even so, Congress, and not the president, is ultimately responsible for the drafting of the legislation. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.").

[53] *See, e.g.*, Garber & Wimmer, *supra* note 24, at 376 ("By employing the device of signing statements to interpret the intent of Congress, however, surreptitious piecemeal approval of legislation will result. Thus, by reinterpreting those parts of congressionally enacted legislation of which he disapproves, the President exercises unconstitutional line-item veto power.").

[54] Popkin, *supra* note 43, at 713-14.

the statute—an interpretation to which Congress may not have assented—is an impermissible end run around the legislative process.[55]

Since signing statements are penned after Congressional debate has closed, some critics analogize them to post-enactment legislative history.[56] And courts, including the Supreme Court,[57] have not looked favorably upon the role of post-enactment legislative history in statutory interpretation.[58]

C. *A New Interpretive Landscape*

In the current debate over the use of signing statements in statutory interpretation, outlined above, the critics have the better of the arguments. First, their reading of the Presentment Clause is more persuasive. That clause is best read as limiting the President's role in the legislative process to one of approval or veto of bills. Pronouncing on how a bill ought to be interpreted plainly contravenes the narrowly circumscribed limits on executive power that the Presentment Clause establishes.

Second, the advocates' practical argument, that the President's *de facto* involvement in the legislative process warrants inclusion of presidential interpretations in the legislative history, conflicts with the Presentment Clause and temporal

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[55] *See* Garber & Wimmer, *supra* note 24, at 392-93.

> The chronological placement in the legislative process of sources of legislative history is critical. . . . Congress is denied the opportunity to respond to, or even consider, the content and implications of a presidential signing statement. . . . The views of the President expressed in signing statements have never been tested in the cauldron of congressional debate . . . .

Id.; Harvard Note, *supra* note 6, at 607 ("But when a President signs the bill instead of vetoing it, there is no opportunity for Congress either to ratify or to respond by amendment to the President's interpretation.").

[56] *See, e.g.*, Harvard Note, *supra* note 6, at 606-08 (comparing presidential signing statements to post-enactment legislative history).

[57] *See, e.g.*, Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980) ("[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.").

[58] *See, e.g.*, Cobell v. Norton, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight.") (citing United States ex rel. Long v. SCS Bus. & Technical Inst., Inc., 173 F.3d 870, 878-79 (D.C. Cir. 1999)).

considerations. Conceding that the President oftentimes plays an active role in all stages of the legislative process does not justify violating the Presentment Clause's purpose of preventing absolute veto power. The President may introduce legislation to Congress. He may lobby members of Congress to endorse a certain interpretation of that legislation. But once Congress has debated and voted on the merits of a bill, the time for interpretive commentary has passed. The "cauldron of congressional debate" is no longer boiling.[59]

This Article explores the possibility that the conventional analysis of signing statements may need to change to accommodate the complications raised by signing statements attached to legislation implementing non-self-executing treaties. There are two closely related reasons that signing statements to implementing legislation may possibly warrant different treatment; both of these reasons seem to give advocates of signing statements more of a constitutional foothold than they enjoy in the context of standard, free standing legislation.

First, the constitutional seat of power appears to shift from Article I legislative power[60] to Article II treaty making power.[61] The current debate surrounding signing statements only considers the typical process by which a President issues a signing statement—namely, as attached to free standing legislation. In this standard scenario, Article I and its grant of legislative authority to Congress is the constitutional framework around which both advocates and critics construct their arguments.[62]

But when signing statements are appended to legislation implementing a non-self-executing treaty—legislation designed to

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59 Garber & Wimmer, *supra* note 24, at 393.

60 U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

61 U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

62 In short, critics of signing statements claim that the President violates the Presentment Clause and infringes upon Congress's legislative authority when issuing signing statements. Advocates, of course, concede Congress's Article I legislative power, but they argue that the President plays a considerable role in today's complex legislative process. As such, the president's interpretive views ought to be considered as part of the legislative history. *See supra* Part II.B.

execute the terms of a non-self-executing treaty that was negotiated, drafted, and signed by the executive branch—Article II's grant of treaty making authority to the President seems to complicate the analysis. If Article II treaty making authority is implicated, deference to presidential interpretations may be warranted.

Second, the current debate only considers the standard process by which domestic legislation is enacted: a bill is drafted by Congress and sent to the President for approval. In the case of legislation implementing a non-self-executing treaty, however, the process is considerably more complicated. Though the implementing legislation itself originates in Congress and is sent to the President for approval, such implementing legislation is executing a non-self-executing treaty that was negotiated, drafted, and signed by the President.

Additionally, since the overarching goal of treaty interpretation is to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties,"[63] a court faced with a signing statement to legislation implementing a non-self-executing treaty must determine which organ or organs of government in the process of treaty ratification and implementation express the shared expectations of the contracting parties. Is it the President, who negotiated, drafted, and signed the treaty to which the foreign treaty partner or partners assented, and on which the implementing legislation is based? Is it the Senate, which both ratified the treaty and took part in passing the implementing legislation? Or is it the full Congress, which, though not a party to treaty ratification,[64] drafted and passed the implementing legislation?

Deciding whether these complicating factors should tip the scales in favor of the advocates' position requires two steps. First, we must determine the proper interpretive relationship between non-self-executing treaty text and implementing legislation. If the treaty text is paramount in, or perhaps relevant to, the interpretation of obligations arising out of non-self-executing treaties, then advocates of signing statements may score a victory.

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[63] Air France v. Saks, 470 U.S. 392, 399 (1985).

[64] The Treaty Clause, U.S. CONST. art. II, § 2, cl. 2, grants no role in the treaty making process to the House of Representatives.

A signing statement that rearticulates an interpretation of treaty obligations that is shared by the treaty text, or its negotiating or drafting history would seem deserving of deference under these circumstances.

Second, signing statements will have to endure the very same structural and temporal criticisms launched against them in the context of free standing legislation. The complicated process by which signing statements are attached to legislation implementing non-self-executing treaties, however, may somehow undercut either or both of these forms of criticism. The changed interpretive landscape, to put it another way, may threaten to tilt the playing field in favor of the advocates. But first, more preliminaries.

III. SIGNING STATEMENTS AND HUMAN RIGHTS TREATIES

A. What are Non-Self-Executing Treaties and Why are Human Rights Treaties Typically Non-Self-Executing?

A treaty is an agreement between two states or international organizations that is intended to be legally binding.[65] The Constitution vests treaty making authority in the President and the Senate, providing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."[66]

Though there is no basis for this distinction in the Constitution, constitutional jurisprudence and common practice distinguish between those treaties that are self-executing and those that are non-self-executing.[67] Self-executing treaties, as the name suggests, take domestic effect of their own accord.[68] No

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[65] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 (1987).

[66] U.S. CONST. art. II, § 2, cl. 2.

[67] The first Supreme Court decision to recognize such a distinction was Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) (Marshall, C.J.). Courts continue to recognize the distinction. *See, e.g.*, Igartúa-De la Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (Some treaties "may comprise international commitments, but they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms. The law to this effect is longstanding." (citing *Foster*, 27 U.S. (2 Pet.) at 314)).

[68] The Supremacy Clause, U.S. CONST. art. VI, cl. 2, provides:

further action is required. Once two-thirds of the Senate offers its approval, and the President signs, the provisions of a self-executing treaty become the supreme law of the land.[69]

But early in our nation's history the Supreme Court distinguished between those treaties intended to take direct domestic effect (self-executing treaties) and those more provisional treaties calling for additional, implementing legislation (non-self-executing).[70] This implementing legislation, like all legislation, must pass both houses of Congress and be signed by the President before becoming law.[71]

Self-executing and non-self-executing treaties are not the only means by which the United States enters international agreements. In fact, the vast majority of international agreements

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This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[69] HENKIN, *supra* note 10, at 199 (A self-executing treaty, to put it another way, "automatically has the quality of law: the Executive and the courts are to give effect to the treaty undertaking without awaiting any act by Congress.").

[70] *Foster*, 27 U.S. (2 Pet.) at 314 ("But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."); *see also* HENKIN, *supra* note 10, at 199-200. Though the ramifications of the distinction between self-executing and non-self executing treaties is rather straightforward (the former requires no implementing legislation to take domestic effect, while the latter does), knowing whether a treaty is meant to be treated as self-executing or non-self-executing is not so clear. For a discussion of this problem of identification, see Carlos Manuel Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995). And even if there were a principled means of determining whether a treaty was intended to be self-executing or non-self-executing, the president, at times at the behest of the Senate, "has sometimes purported to declare non-self-executing treaties that by their terms and by their character are (or could well be) self-executing." HENKIN, *supra* note 10, at 201-02. This is a particularly common practice in relation to United States adherence to human rights treaties. *See* Lori Fisler Damrosch, *The Role of the United States Senate Concerning 'Self-Executing' and 'Non-Self-Executing' Treaties*, 67 CHI.-KENT L. REV. 515 (1991). The debate over how to distinguish self-executing from non-self-executing treaties, and whether a mere declaration that a treaty is non-self-executing effectively makes it so, is well beyond the scope of this Article.

[71] Such implementing legislation may also, in theory, be enacted over a presidential veto, so long as two thirds of both houses approve. U.S. CONST. art I, § 7, cl. 2.

are not concluded as treaties. They are executive agreements.[72]

There are two types of executive agreements. The first, the sole executive agreement, is an international agreement struck without the consent of either house of Congress; the President acts alone. Presidents over the years have concluded thousands of these agreements "on matters running the gamut of U.S. foreign relations."[73] And such agreements, at least in principle, are not limited, as one might imagine, to insignificant matters. President Roosevelt used a sole executive agreement at the Yalta Conference in February of 1945 to bind the United States to a whole host of weighty international commitments.[74]

The second form of executive agreement is the Congressional-Executive agreement. This form of agreement, which calls for majority approval from both houses of Congress, gained legitimacy after World War II, when several postwar international agreements—the U.N. Charter, the International Monetary Fund ("IMF") Agreement, and the General Agreement on Tariffs and Trade ("GATT")—were thought to have been unlikely to receive the two-thirds Senate approval mandated by the Treaty Clause, Article II, section 2.[75] They were all ratified, instead, as Congressional-Executive agreements.

Congressional-executive agreements, like the sole executive agreement, have no sure footing in the text of the Constitution. The Constitution expressly grants authority to make international agreements other than treaties.[76] But "[w]hatever their theoretical

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[72] From 1939 to 1996, for example, more than 90% of the nation's international agreements were executive agreements rather than treaties. Henkin, *supra* note 10, at 492 n.149.

[73] *Id.* at 219.

[74] *A Decade of American Foreign Policy, Basic Documents 1941-1949*, S. Doc. No. 123, 81st Congress, 1st Sess. (1950), pt. 1. Some other notable examples of sole executive agreements include: "the *de facto* U.S. protectorate over the Dominican Republic in 1905, the agreements leading to the diplomatic recognition of the Soviet Union in 1933, the 'destroyers-for-bases' arrangement with Great Britain in 1940, . . . and the U.S. undertakings relating to the peace settlement between Egypt and Israel [in 1979]." Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 135-36 (1998).

[75] *Id.* at 142-43; *see also* John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. 5, 11 (2002) (noting that use of the congressional-executive agreement saw a "rise in prominence after World War II").

[76] HENKIN, *supra* note 10, at 215.

merits, it is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty."[77]

If there is nothing in the Constitution explicitly limiting a President's ability to conclude international agreements by executive agreement rather than by treaty;[78] and if executive agreements, especially sole executive agreements, are considerably easier to pass than a treaty; then there must be an explanation as to why treaties, though heavily outnumbered by executive agreements, are nonetheless still in use.

There are at least two principle reasons for a President to choose a treaty over an executive agreement. First, by choosing an executive agreement, especially on matters of great national importance, the President risks antagonizing the Senate. Senators may believe that their constitutionally mandated role in treaty formation is being denied, and they may respond in kind to what they perceive to be the President's power grab.[79]

Second, other parties to an agreement may insist that an agreement be made in the form of a treaty because they believe that a treaty manifests a more constitutionally grounded commitment.[80] Other parties believe, and U.S. Presidents recognize, that treaties are less likely to be violated and less likely to be undermined by congressional underfunding than executive agreements.

Even so, this does not completely explain why all seven major multilateral human rights agreements to which the United States is a party are *non-self-executing* treaties.[81] That the President fears

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77 *Id.* at 217.

78 *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding president's authority to resolve the Iran Hostage crisis by sole executive agreement, noting that the agreement was well within the president's extensive powers in foreign affairs).

79 HENKIN, *supra* note 10, at 224 (recognizing that the President "has to get along with Congress, and with the Senate in particular").

80 *Id.*

81 These treaties are:

(1) Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* http://www1.umn.edu/ humanrts/instree/k2crc.htm (entered into force Sept. 2, 1990; signed by the United States Feb. 16, 1995, but not yet ratified).

(2) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85,

stepping on the Senate's toes, and a desire to express a constitutionally grounded commitment to the terms of the agreement, are both convincing reasons why Presidents have chosen treaties over executive agreements when ratifying human rights conventions. But why in each case a *non-self-executing* treaty?

The most promising explanation seems to be that by concluding a human rights agreement as a non-self-executing treaty, the United States is best able to strike a political balance between two competing objectives: (1) an internationalist objective of signaling to the international community the United States' serious commitment to human rights, and (2) an isolationist objective of preserving the United States' sovereignty

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available at http://www1.umn. edu/humanrts/instree/ h2catoc.htm [hereinafter Torture Convention] (entered into force June 26, 1987; ratified by the United States Oct. 21, 1994). Ratification was subject to a non-self-execution declaration. Congress has implemented various aspects of the Torture Convention on three separate occasions—in the Torture Statute, 18 U.S.C. §§ 2340-2340A (1994), in the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(b), 1999 U.S.C.C.A.N. (112 Stat. 2681) 871, and in the Detainee Treatment Act of 2005, 42 U.S.C.A. § 2000dd – 2000dd-1 (2006). *See infra* note 84.

(3) Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13, *available at* http:// www1.umn. edu/humanrts/instree/e1cedaw.htm (entered into force Sept. 3, 1981; signed by the United States July 17, 1980, but not yet ratified).

(4) International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, *available at* http://www1.umn.edu/humanrts/instree/ d1cerd.htm (entered into force Jan. 4, 1969; ratified by the United States Oct. 21, 1994). Ratification was subject to a non-self-execution declaration. Congress has yet to enact implementing legislation.

(5) International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. TREATY DOC. No. 95-2, 999 U.N.T.S. 171, *available at* http:// www1.umn.edu/humanrts/instree/b3ccpr.htm (entered into force March 23, 1976; ratified by the United States June 8, 1992). Ratification was subject to a non-self-execution declaration. Congress has yet to enact implementing legislation;

(6) International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16. 1966, 993 U.N.T.S. 3, *available at* http://www1.umn. edu/humanrts/instree/b2esc.htm (entered into force Jan. 3, 1976; signed by the United States Oct. 5, 1977, but not yet ratified).

(7) Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, S. TREATY DOC. No. 81-1, 78 U.N.T.S. 277 , *available at* http://www1.umn.edu/humanrts/instree/x1cppcg.htm [hereinafter Genocide Convention] (entered into force Jan. 12, 1951; ratified by the United States Nov. 25, 1988). Ratification was subject to a non-self-execution declaration. Congress passed implementing legislation that same year. *See* 18 U.S.C. §§1091-1093 (1988), *amended by* Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821–1822 (2007).

in the field of enacting legislation protecting human rights.[82]

Executive agreements do not satisfy the first objective; self-executing treaties, which by definition give direct domestic effect to treaty provisions, do not satisfy the second. Non-self-executing treaties offer governments the flexibility to reconcile, each to their own liking, these competing internationalist and isolationist tensions.[83]

B. How (if at all) Are Human Rights Treaties Interpreted?

Having clarified what a non-self-executing treaty is, and why all major human rights agreements are ratified by the United States not only as treaties, but as non-self-executing treaties, this Article now turns to the problem of interpreting non-self-executing human rights treaties. But first, a considerable caveat is in order.

An overwhelming majority of human rights treaty violation claims brought in United States courts never reach the merits. There are two reasons for this. First, claims based on treaties that have yet to be ratified are bound to fail.[84] Unratified treaties are not the "supreme Law of the Land"[85] and, therefore, are not

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[82] *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 412 (2000); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 172 (1999).

[83] The normative question as to whether the United States *should* be treating its human rights treaty obligations as non-self-executing is beyond the scope of this Article, which only treats the matter descriptively. For the view that ratifying human rights treaties as non-self-executing undermines U.S. commitments to international law, see David N. Cinotti, Note, *The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land*, 91 GEO. L.J. 1277, 1301 (2003) (lamenting that "the United States continues to feign participation in the international effort to advance the human condition through international law without making any meaningful changes in its domestic law."); *see also* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 349 (1995) (arguing that the current ratification process "threatens to undermine a half-century of effort to establish international human rights standards as international law.").

[84] The United States has yet to ratify three of the seven major multilateral human rights treaties: the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. *See supra* note 81.

[85] *See* U.S. CONST. art. VI, § 2.

binding authority for United States' courts.[86] Second, claims based on non-self-executing human rights treaties that have been ratified but have not been executed by means of implementing legislation[87] overwhelmingly fail.[88]

Of the seven major multilateral human rights treaties,[89] only the Genocide Convention and the Torture Convention have been executed by means of implementing legislation.[90] Courts have had

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[86] *See, e.g.*, Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1010 (9th Cir. 2005) (noting that since the United States has not ratified the Convention on the Rights of the Child, the Convention is not the "supreme Law of the Land" under the Constitution's Treaty Clause).

[87] The United States has yet to enact implementing legislation for two of the seven major multilateral human rights treaties that it has ratified: the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. *See supra* note 81.

[88] *See, e.g.*, Roach v. Quarterman, 220 F. App'x 270, 275 (5th Cir. 2007) (rejecting ICCPR claim for lack of implementing legislation); Igartúa-De La Rosa v. United States, 417 F.3d 145, 174-75 (1st Cir. 2005) (*en banc*) (Torruella, J dissenting) (same); Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001) (same); Kyler v. Montezuma County, 2000 WL 93996, at *1 (10th Cir. 2000) (same). Though attempts at direct application of non-self-executing human rights treaties without implementing legislation overwhelmingly fail, some courts have made use of such treaties indirectly, as providing international support for decisions based on other grounds. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 576 (2005) (citing ICCPR and Convention on the Rights of the Child as evidence of international support for a ban on the execution of minors). The validity of such indirect use of human rights treaties is beyond the scope of this Article. For a thorough discussion of the increasing use of international human rights treaties in interpreting domestic law, see Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007).

[89] *See supra* note 81.

[90] For legislation implementing the Genocide Convention, see 18 U.S.C. §§ 1091-1093 (2006). The purposes of the legislation are "to implement the International Convention on the Prevention and Punishment of the Crime of Genocide; to create a new Federal offense that prohibits the commission of acts with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group; and to provide adequate penalties for such acts." S. REP. NO. 100-333, at 1-2 (1988). As for the Torture Convention, three separate pieces of legislation have implemented its terms. The Torture Statute, 18 U.S.C. § 2340-2340A (2006), passed the same year as the U.S. ratification of the Torture Convention, criminalizes torture committed by U.S. nationals or by non-nationals present in the United States. The Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(b), 1999 U.S.C.C.A.N. (112 Stat. 2681) 822, implements Article 3 of the Torture Convention, which forbids the extradition of a person to a state where there are substantial grounds for believing that that person would be in danger of being subjected to torture. And most recently, the Detainee Treatment Act of 2005, 42 U.S.C.A. § 2000dd–2000dd-1 (2006), criminalizes the subjection of any individual in the custody or under the physical control of the United States to

the occasion to see several claims brought under these Conventions.[91] At the same time, the Supreme Court has never directly addressed the interpretive problem of this Article—namely, how to determine obligations under a non-self-executing human rights treaty in which a presidential signing statement attached to the treaty's implementing legislation asserts the President's interpretation of the treaty obligations with the intent of entering such a signing statement into the legislative history.

The first step in solving this interpretive problem is determining the proper relationship between the non-self-executing treaty and the implementing legislation. Which text governs when a court adjudicates a claim based on a non-self-executing treaty: that of the treaty or that of the treaty's implementing legislation? If that of the treaty, then a signing statement appended to the implementing legislation, asserting a presidential interpretation more in keeping with the treaty text rather than the text of the implementing legislation, may warrant judicial deference.

One promising possibility is formalistic: the implementing legislation, and not the non-self-executing treaty, always governs. A concurring opinion in *Fund for Animals, Inc. v. Kempthorne*,[92] establishes this dominance of implementing legislation over treaty text.

The relevant background in that case is as follows. In 1916, the United States entered into a treaty with Great Britain for the protection of migratory birds.[93] The United States entered into a similar treaty, in 1936, with Mexico.[94] In 1918, Congress passed the Migratory Bird Treaty Act implementing these treaty

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"Cruel, Inhuman, or Degrading Treatment or Punishment," as those terms were limited in their meaning by reservations, declarations, and understandings to the Torture Convention.

91 *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 241–42 (2d Cir. 1995) (finding allegations sufficient to state claims based on Convention on the Prevention and Punishment of the Crime of Genocide); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 274–75 (E.D.N.Y. 2007) (same).

92 472 F.3d 872 (D.C. Cir. 2006).

93 Convention for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702 (protecting migratory birds in the United States and Canada).

94 Convention for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311.

conventions.[95]

After a citizen challenged the Secretary of the Interior's decision not to include the mute swan as a protected species under the Migratory Bird Treaty Act in *Hill v. Norton*,[96] and won, Congress passed the Migratory Bird Treaty Reform Act ("Reform Act") in 2004.[97] The Reform Act amended the Migratory Bird Treaty Act's prohibition on the hunting or killing of migratory birds by limiting the statute's application only to migratory bird species that are native to the United States or its territories.[98] The mute swan is a non-native species. Therefore, under the plain terms of the Reform Act, the mute swan is not protected.

Petitioners, undeterred by such clear statutory language, relied instead upon a portion of the Reform Act that declares that its terms are consistent with the terms of the 1916 and 1936 conventions on which the original Migratory Bird Treaty Act of 1918 was based. The relevant passage reads: "It is the sense of Congress that the language of this section is consistent with the intent and language of the 4 bilateral treaties implemented by this section."[99]

Petitioners found an ambiguity by comparing two apparently conflicting positions. First, they relied on Congress's belief, as expressed in the above passage, that the amended statute, which does not protect mute swans, is consistent with the language and intent of the original migratory bird conventions.

Second, petitioners referred to the *Hill* decision's assertion that the treaty language *does* protect the mute swan. Because of this apparent ambiguity, petitioners argued, the court must apply the canon of construction that ambiguous statutes should be interpreted so as not to abrogate a treaty.[100]

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95 16 U.S.C. § 703. Prior to the 1936 ratification of the convention with Mexico, the Migratory Bird Treaty Act only implemented the 1916 convention with Great Britain. After the 1936 ratification, however, the Act has served as implementing legislation for both conventions.

96 275 F.3d 98, 107 (D.C. Cir. 2001).

97 *See* Consolidated Appropriations Act, Pub. L. No. 108-447, Div. E, Title I, § 143, 118 Stat. 2809, 3071-72 (2004) (codified at 16 U.S.C. § 703).

98 16 U.S.C. § 703(b)(1) (2006).

99 Consolidated Appropriations Act, Div. E, Title I, § 143(d).

100 *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) (noting that "absent explicit statutory language . . . [the Court has] been extremely reluctant to find congressional abrogation of treaty

In *Fund for Animals*, the United States Court of Appeals for the District of Columbia Circuit rejected this "creative attempt to weave ambiguity out of clarity."[101] In a concurring opinion, Judge Kavanaugh discussed whether the familiar canon of construction on which petitioners rely—that ambiguous statutes should be interpreted so as not to abrogate a treaty—should be applied to non-self-executing as well as to self-executing treaties. This discussion bears directly on the issue at hand: the nature of the relationship between non-self-executing treaties and their implementing legislation.

There is little authority squarely analyzing whether those interpretive principles should extend to *non-self-executing* treaties, which have no force as a matter of domestic law. Courts have reason to be cautious about taking that step, however. When the Legislative and Executive Branches have chosen not to incorporate certain provisions of a non-self-executing treaty into domestic law, we must assume that they acted intentionally. Given such a deliberate decision by the Legislative and Executive Branches, basic principles of judicial restraint counsel courts to refrain from bringing the non-self-executing treaty into domestic law through the back door (by using the treaty to resolve questions of American law). In other words, because non-self-executing treaties have no legal status in American courts, there seems to be little justification for a court to put a thumb on the scale in favor of a non-self-executing treaty when interpreting a statute. Doing so would not reflect the appropriate judicial deference to the Legislative and Executive Branches in determining if, when, and how to incorporate treaty obligations into domestic law.[102]

This priority of implementing legislation over non-self-executing treaty is reflected in the Restatement as well: "[S]trictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States. That is true even when a non-self-executing agreement is 'enacted' by, or incorporated in, implementing legislation."[103]

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rights." (citing Menominee Tribe v. United States, 391 U.S. 404 (1968))).

[101] 472 F.3d at 877.

[102] *Id.* at 880 (Kavanaugh, J., concurring).

[103] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §

The Supreme Court has yet to squarely address the precise relationship between non-self-executing treaties and implementing legislation in the context of statutory interpretation. In particular, the Court has not articulated the circumstances, if any, under which the content of non-self-executing treaties or their negotiating or drafting history should be considered when determining obligations arising out of non-self-executing treaties and their implementing legislation.

Fund for Animals and Restatement § 111 make clear that the implementing legislation ought to receive interpretive priority over the non-self-executing treaty. But the implementing legislation and its legislative history are sometimes vague or ambiguous. In such circumstances, courts might be tempted to look beyond these two primary sources of party intent in order to make sense of the obligations arising out of the treaty and its implementing legislation. There are three reasons why indulging such a temptation might possibly seem warranted.

First, courts might accept the priority of implementing legislation over non-self-executing treaty text while nonetheless allowing space for limited deference to presidential interpretations of non-self-executing treaty text. Rather than view deference to treaty text (or presidential signing statements referring to treaty text) as a means of "bringing the non-self-executing treaty into domestic law through the back door," courts might reasonably envision presidential interpretations of the treaty text—the text upon which the implementing legislation is based—as worthy of consideration, but not predominant in statutory interpretation. In other words, a court might reject the apparent formalism of *Fund for Animals*, but nonetheless accept that decision's general position on the priority of implementing legislation.

Second, courts' pattern of deference to the executive branch in treaty interpretation may spill over to the interpretation of legislation implementing treaties. Since courts routinely defer to executive interpretations of treaties,[104] it would be reasonable for

111 cmt. h (1987).

[104] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (1987) ("Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States, but will give great weight to an interpretation made by the Executive Branch."); *see also*

courts to similarly defer—or defer to a lesser degree, but defer nonetheless—to executive interpretations of legislation implementing treaties.

Third, courts might find that constitutional authority is not as firmly rooted in Article I as is the case with signing statements to free standing legislation. It would not be unreasonable for courts to find relevant the President's Article II treaty making authority, and, as a result, defer to an executive interpretation offered in a signing statement.

One of the major reasons critics object to the use of signing statements is because of their apparent violation of the separation of powers doctrine, especially with regard to the separation between Congress's legislative authority and the President's executive authority.[105] But if the interpretation of obligations under a human rights treaty and its implementing legislation is understood as appealing, even in part, to the intent of the treaty makers rather than exclusively to the intent of the drafters of the implementing legislation, then Article II treaty making authority seems to be implicated. And once Article II authority is implicated, presidential interpretations seem increasingly relevant to statutory interpretation.

C. Hypotheticals

The interpretive problem of this Article is whether courts should treat as legislative history presidential signing statements attached to legislation implementing non-self-executing treaties—especially human rights treaties. To better conceptualize this issue, let us entertain the following five hypotheticals.

1. Agreement

In this scenario, the President and Senate agree on the interpretation of treaty terms, perhaps as a result of reservations, understandings, and declarations ("RUDs") upon which the

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Medellin v. Dretke, 544 U.S. 660, 685 (2005) ("When called upon to interpret a treaty in a given case or controversy, we give considerable weight to the Executive Branch's understanding of our treaty obligations." (citing Kolovrat v. Oregon, 366 U.S. 187, 194 (1961))); Charlton v. Kelly, 229 U.S. 447, 468 (1913)).

105 *Supra* Part II.B.

Senate conditions its approval.[106] Congress's implementing legislation, possibly by importing treaty language directly into the domestic statute, unambiguously executes the terms of the treaty. Furthermore, assume that all standard sources of legislative history—from committee reports to floor debates to hearing testimony—indicate that both Houses of Congress meant to express in the implementing legislation exactly what the President and Senate had earlier expressed in the treaty.

2. Disagreement

In this scenario, the President and Senate agree on the interpretation of treaty terms. When it comes time to execute the non-self-executing treaty, however, Congress passes legislation in clear disagreement with the President's and Senate's shared interpretation of the treaty terms. The President then grudgingly signs the bill into law, perhaps recognizing that Congress has the votes to override his veto. But appended to his signature is a signing statement asserting that *his* interpretation of the treaty, and not the conflicting interpretation of the treaty expressed in Congress's implementing legislation, ought to govern.

Consider, for example, the following. The United Nations proposes a new human rights treaty, the Convention on the Rights of the Elderly. It articulates a number of vague commitments ("equal respect to the elderly") and discrete rights that are already protected under U.S. law (e.g. the right to vote, protected by the 26th Amendment's grant of voting rights to all citizens over the age of eighteen). Further imagine that Article 5 of the Elderly Convention makes crimes targeting the elderly hate crimes, deserving of added penalties.

Wary of allowing international law to dictate domestic hate crime legislation, both the President and the Senate are reluctant to accept Article 5. The Senate, therefore, conditions its approval of the Elderly Convention on the reservation that Article 5 will not be recognized as part of the United States' treaty commitment.

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106 The President is effectively bound by these RUDs. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314(2) (1987) ("When the Senate gives its advice and consent to a treaty on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate's understanding.").

Imagine further that the Elderly Convention is a non-self-executing treaty.[107] The President and the Senate ratify in part because of political pressure at home and abroad, in part because of a genuine commitment to the content of the treaty, and in part because of the belief that, having excised Article 5, no new private causes of action are being created.

Compelled by an ever-growing elderly constituency, the House of Representatives resolves to pass legislation implementing the Elderly Convention. Furthermore, the House wishes to defy the reservation lodged against the incorporation of Article 5: it wishes to include in its implementing legislation terms that would amend the current federal hate crimes law[108] to include the elderly. Pressured by its own constituency, the Senate changes course and decides to pass the newly supplemented legislation.

The President, recognizing that Congress has the votes to override his veto and that vetoing such a bill may do him serious political damage, signs the bill into law. But he adds a signing statement, asserting that the United States never intended to bind itself to Article 5 of the Elderly Convention. He also adds that Congress's execution of this non-self-executing treaty defies the interpretation of the treaty terms shared by the President and the Senate at the time of treaty formation. The President and Senate, he reiterates, never intended to amend federal hate crimes legislation by ratifying the Elderly Convention.

3. Vagueness or Ambiguity

This scenario begins just like the previous two, with the President and Senate agreeing on the interpretation of a non-self-executing treaty. However, in this scenario, Congress then passes implementing legislation that is either vague or ambiguous,[109]

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[107] This may be the case either because the terms of the treaty explicitly call for implementing legislation or simply because the President or Senate asserts that the treaty is to be ratified as non-self-executing. *See infra* note 110.

[108] 18 U.S.C. § 245 (2006) (The law currently covers crimes directed against persons because of their race, color, religion, or national origin.).

[109] Vagueness and ambiguity, strictly defined, are two different concepts. A term is vague when its applicability to marginal objects is unclear. A sign reading "No vehicles in the park" is clear with respect to sedans, but vague with respect to motorized wheelchairs. A term is ambiguous when it may have two entirely different connotations. A contract for the sale of "chicken" might be referring only to young chickens, suitable for broiling and frying, or, more generally, to any bird of that

which the President signs into law.

The President appends a signing statement to the legislation, asserting that his interpretation of the implementing legislation coincides with the President and Senate's shared interpretation of the non-self-executing treaty.

Since key terms of the implementing legislation are unclear, a court would likely look to legislative history for guidance. However, congressional legislative history surrounding the drafting and debate over the implementing legislation points in one direction, while the negotiating and drafting history of the non-self-executing treaty and the presidential signing statement point in another direction.

Consider the following illustration. The President and Senate ratify the Elderly Convention, this time including Article 5 and its hate crime provisions. The treaty does not define "elderly," instead choosing to allow each signatory to determine, by means of its own implementing legislation, at what age the term applies. Though United States ratification includes no RUDs specifying a definition of "elderly," drafting and negotiating histories clearly indicate that the President and Senate both considered the term "elderly" to apply only to those sixty-five or older.

Again compelled by an influential constituency, the House of Representatives passes implementing legislation. The proposed bill imports the key terms from the treaty itself. And like the treaty, the implementing legislation does not define "elderly." It purports to amend the current hate crimes legislation, 18 U.S.C. 245, which had made crimes based upon race, color, religion, or national origin hate crimes. This new legislation, implementing the Elderly Convention, would add "age" to the list. Though the bill does not define "elderly," congressional legislative history clearly indicates that both the House of Representatives and the Senate[110] understand the term to apply to those *fifty-five* and older.

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type, including older birds suitable for stewing. *See* Frigaliment Importing Co. v. B.N.S. International Sales Corp, 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (Judge Friendly's classic opinion beginning with the line: "The issue is, what is chicken?"). But the distinction is slippery. *See generally* E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 953 (1967) (endorsing the above method for distinguishing ambiguity from vagueness, but nonetheless categorizing *Frigaliment* as an example of vagueness rather than ambiguity).

[110] There are a number of reasons why the Senate might change its interpretation

The Senate passes the bill and the President signs it into law. To the law the President appends a signing statement, rearticulating what was evident in the drafting and negotiating histories (but not in the text) of the treaty: "elderly" is meant to capture only those sixty-five or older.

When a criminal defendant convicted under the new hate crime law of attacking a fifty-nine year-old challenges his conviction, arguing that the treaty and its implementing legislation only apply to victims of violent crimes motivated by age who are at least sixty-five years old, a court, unable to find a definition of "elderly" in either the treaty text or the implementing legislation, would likely look to legislative history to determine what age group "elderly" was intended to capture. The drafting and negotiating histories of the treaty, as well as the signing statement to the implementing legislation, clearly indicate sixty-five, while congressional legislative history surrounding the drafting and debate over the implementing legislation clearly indicates fifty-five.

4. Extreme Vagueness or Ambiguity

Here, unlike in the previous hypotheticals, the treaty text is vague or ambiguous. The implementing legislation is also vague or ambiguous. The ordinary legislative history is indecisive between interpretation A and interpretation B. Only two possible sources of interpretation clearly point in a single direction: the negotiating and drafting history of the treaty as well as the signing statement attached to the implementing legislation; both support interpretation A. No potential source of interpretation unequivocally supports interpretation B.

To return to our Elderly Convention hypothetical, the President and the Senate ratify the Convention, including Article 5 and its hate crime provisions. The treaty does not define "elderly," but the negotiating and drafting history of the treaty clearly indicate that both the President and the Senate intended the hate crime provision to apply only to those victims sixty-five or older.

Congress passes legislation implementing the terms of the

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of "elderly" from sixty-five and older to fifty-five and older, not the least of which being increased political pressure from voters aged fifty-five to sixty-four.

treaty. But the legislation, like the treaty itself, does not specify the age to which the hate crime provision attaches. Congressional legislative history on this matter points in two directions. Congressional debates and other traditional forms of legislative history indicate that roughly half of the members understand "elderly" to apply to fifty-five year-olds, while the others interpret "elderly" more narrowly, as applying only to those sixty-five years of age or older. Upon signing the bill into law, the President attaches a signing statement, rearticulating his view, evident in the negotiating and drafting history of the treaty, that "elderly" only captures those sixty-five years or older.

5. Maximum Vagueness or Ambiguity

In this final, and least probable hypothetical, all standard sources of interpretation are ambiguous or vague, including: the treaty text, the negotiating and drafting history of the treaty, the text of the implementing legislation, and the standard legislative history of the implementing legislation. The only interpretive source that speaks in one voice is the signing statement.

Returning to our Elderly Convention one last time, we find ambiguity or vagueness at virtually every turn. The treaty text does not specify a definition of "elderly." The negotiating and drafting history of the treaty indicate that the President and some members of the Senate understood "elderly" to apply only to those sixty-five and up, while other members of the Senate took fifty-five as the cut-off.

Congress passes implementing legislation that does not define "elderly." Congressional legislative history indicates that roughly half of Congress interprets "elderly" to reach only those sixty-five years-old, while the remaining members of Congress seem to support the broader definition, including those as young as fifty-five. The President then signs the bill into law. Attached is a signing statement pronouncing that the President, in signing the bill into law, understands "elderly" to refer only to those sixty-five years or older.

IV. A FORMALIST SOLUTION (WITH EXCEPTIONS)

This Article accepts, with limited exceptions, the formalism of *Fund for Animals* and Restatement § 111. That is, when

adjudicating the vast majority of claims arising out of non-self-executing treaties, courts should look only to the text of the implementing legislation and its traditional legislative history, and not to the non-self-executg treaty text, nor to its negotiating or drafting history, nor to a signing statement that appeals to an interpretation based either on treaty text or the negotiating or drafting history of a treaty.

Aside from the support such a formalist solution receives from *Fund for Animals*, and especially from Restatement § 111, there are two principal virtues of adopting this approach.

First, this formalist solution is easier for courts to administer. The text of the non-self-executing treaty, on this theory, is not a proper source of interpretation in the vast majority of cases. Other, less formalist theories might concede that the implementing legislation should trump the treaty text, while still allowing room for limited deference to interpretations that draw their support from the treaty text (rather than from the implementing legislation). Interpretations supported by the text and legislative history of the implementing legislation would dominate statutory interpretation, but interpretations supported by the text and legislative history of the non-self-executing treaty would also be considered, though to a lesser degree.

At the same time, articulating when a judge should appeal to the treaty text and its legislative history, and, more problematically, how much deference such appeals should be granted, is difficult, if not impossible, to prescribe. The formalist approach avoids this problem.

Second, the formalist approach encourages Presidents to make human rights commitments in the form of self-executing rather than non-self-executing treaties. A formalist approach, by denying presidential interpretations of treaty obligations a role in statutory interpretation, would pressure Presidents, at the very minimum, into considering the possibility of ratifying human rights treaties as self-executing.[111]

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[111] The Restatement grants presidents considerable authority in determining whether a treaty is self-executing or non-self-executing:

> In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by

If a treaty is self-executing, the treaty itself becomes the law of the land. No implementing legislation is needed. In adjudicating claims based on self-executing treaties, courts interpret the treaty text and its negotiating and drafting history; in doing so they systematically defer to executive branch interpretations.[112] Assuming that Presidents are interested in having their interpretations of treaty obligations deferred to in treaty interpretation, a formalist approach might result in the United States being more likely to conclude its human rights treaties as *self*-executing—something critics of the current regime of international law would presumably welcome with open arms.[113]

A. Five Solutions

Solutions to the first three hypotheticals follow rather straightforwardly from an acceptance of the formalist approach.

1. Agreement

The first scenario, in which the treaty ratifiers (President and Senate) and the drafters of the implementing legislation (Congress) agree as to the interpretation of obligations under the non-self-executing treaty and its implementing legislation, creates no interpretive conflict. But it is still worth considering whether a court would be justified in treating a presidential signing statement appended to implementing legislation as legislative history—in this case, as offering support for the interpretation manifested in the legislative history accompanying Congress's

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> legislation or appropriate executive or administrative action. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987).

[112] *Supra* note 103 and accompanying text.

[113] For criticisms of U.S. ratification practices, see *supra* note 83. But critics may not want such a wish granted. A policy of ratifying human rights treaties as self-executing rather than non-self-executing might have perverse effects. Presidents might refuse to ratify human rights treaties altogether, for fear that U.S. sovereignty would be violated in the process.

drafting, debate over, and passing of the implementing legislation. In other words, may a court turn to a presidential signing statement as further support of an interpretation that has been expressed in other, more conventional, sources of legislative history?

There are two primary categories of reasons to reject presidential signing statements as legislative history, even as in this case where they are in agreement with all other pieces of legislative history. These are the same criticisms launched against the use of signing statements to interpret free standing legislation.[114]

First, there are structural criticisms that charge the President with overstepping constitutional boundaries. Second, a temporal criticism finds the post-debate timing of signing statements to be manipulative.

Having accepted the formalist approach, the full force of the structural criticisms applies. Signing statements appended to implementing legislation should be treated, with respect to structural concerns, just like signing statements to free standing legislation. Both forms of signing statement violate the Presentment Clause,[115] which limits the President's role in the legislative process to offering approval or disapproval but not presenting interpretive commentary.[116] Further, both forms of signing statement also violate the ban on the line item veto.[117]

The timing criticism is similarly applicable. A signing statement appended to implementing legislation, just like a standard signing statement, skirts being "tested in the cauldron of congressional debate."[118] As such, both forms of signing statement should be rejected as politically manipulative.[119]

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114 *Supra* Part II.B.

115 *Supra* notes 44-46 and accompanying text.

116 *Id.*

117 *Supra* notes 51-53 and accompanying text.

118 Garber & Wimmer, *supra* note 24, at 393.

119 Popkin, *supra* note 43, at 713-14. Signing statements appended to implementing legislation might, instead, be considered post-enactment legislative history. But since post-enactment legislative history is highly disfavored, *supra* notes 57-58, this is a distinction with little difference.

2. Disagreement

In the second scenario, in which the language of the implementing legislation clearly conflicts with the treaty ratifiers' expressed understanding of the treaty obligations, acceptance of the formalist approach prevents the incorporation of signing statements into the legislative history. Where the meaning of the implementing legislation is plain, a court should not look to the text (or to the drafting or negotiating history) of the non-self-executing treaty.

That Congress's interpretation of U.S. treaty obligations, as expressed in the implementing legislation, disagrees with the treaty ratifiers' interpretation of U.S. treaty obligations, as expressed in the RUDs attached to the non-self-executing treaty and the signing statement attached to the implementing legislation, is of no interpretive consequence. The implementing legislation governs. And a President's signing statement appended to such implementing legislation is subject to, and cannot withstand the force of, the same structural and temporal criticisms as is a signing statement appended to a free standing piece of legislation.

3. Vagueness or Ambiguity

The third scenario, though it involves more ambiguity than the second scenario, is not a considerably more difficult case. A theory of judicial interpretation, all things being equal, should encourage transparency. Treaty ratifiers who believe that treaty provisions should be understood in a particular way should have incentives to make this shared understanding known;[120] they should not have incentives to withhold their interpretation in the hopes of entering evidence of it later as legislative history.

It would be a strange theory of interpretation, indeed, that punishes the treaty ratifiers in the second scenario, who made clear their understanding of the treaty obligations by excising Article 5 only to have Congress disagree with that condition in the implementing legislation, but rewards treaty ratifiers who choose

[120] The standard incentive a legislator has for including clear statutory language expressing his legislative intent is, of course, that such language is then more likely later to be interpreted by courts in his favor. The same holds true for drafters of treaties.

to profit from ambiguity.

The President and the Senate in the third scenario could have been more explicit about their understanding of when the term "elderly" applies. They could have, as in the second scenario, conditioned their approval of the treaty on such an understanding. And though such conditional approval is not immune from subsequent undermining by implementing legislation re-defining the term "elderly," at least such a procedure would be transparent. Congress, acting within its powers, would be defining "elderly" in a way that conflicts with the treaty ratifiers' definition.

And here is the transparency: the public would know, roughly,[121] who supports a definition of "elderly" that captures only those over sixty-five (President), and who endorses the more expansive definition, including those as young as fifty-five (Congress). Voters—especially those fifty-five to sixty-four—would presumably be interested in this information.

This point about encouraging transparency is in addition to the now familiar point that, having accepted the formalist approach, the standard structural and temporal criticisms apply to this scenario as well. When a court faces an ambiguously worded piece of implementing legislation, it should not ordinarily resort to an analysis of the non-self-executing treaty text, or to the drafting and negotiating history accompanying such text. The implementing legislation and its legislative history govern.

In this case, though the text of the implementing legislation includes no definition of "elderly," the legislative history clearly indicates that Congress intended for the term to apply to those fifty-five and older. For the same structural and temporal reasons articulated repeatedly above, there is no place in this legislative history for a presidential signing statement.

4. Extreme Vagueness or Ambiguity

The final two hypotheticals present a greater challenge to the formalist approach. A strict rejection of both the treaty text and its

[121] That the Senate switches its vote —from supporting a more limited definition of sixty-five and older to the more expansive definition of fifty-five and older— complicates the matter. But where the President stands, and where Congress as a whole (and the House of Representatives, in particular) stands, would be clear.

negotiating and drafting history as proper sources of interpretation would leave courts, in these rare circumstances, with no clear indication of party intent. Limited exceptions to the formalist approach are required.

In the fourth hypothetical, the implementing legislation, its legislative history, and the treaty text are all indecisive. The only other potential sources of interpretation, the negotiating and drafting history of the treaty and the signing statement, both point in a single direction. In this rare example of extreme ambiguity, courts, out of necessity, should depart from a strict formalist approach. They should turn to the most reliable interpretive source at their disposal.

In this instance, that source is the negotiating and drafting history of the treaty. This source, following the formalist approach, is certainly inferior to implementing legislation and its legislative history. But it is not entirely without merit.

The task of treaty interpretation, after all, is primarily one of determining party intent. Though the formalist approach takes Congress at the time of the passing of the implementing legislation to be the primary indicator of party intent, those who drafted and negotiated the treaty should also be considered indicators of party intent in these particular circumstances—that is, where courts have little else on which to rely.

There are two reasons for this limited exception. First, the representatives of party intent on which courts should ordinarily rely (Congress) partially overlap with the drafters and negotiators of the treaty (President and Senate). In other words, looking to evidence of what Senators meant at the time of treaty ratification is not wholly unrelated to what those very same Senators meant when they later passed that treaty's implementing legislation.

Second, the implementing legislation, which ordinarily governs interpretation, is based on the treaty. Implementing legislation, after all, is intended to implement a non-self-executing treaty. Typically, courts should defer to implementing legislation, even in those instances where the implementing legislation is in disagreement with the treaty it is implementing.[122] But where the implementing legislation and its legislative history are indecisive, a

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[122] *Supra* Part III.C.2.

court may be justified in looking to the treaty text and its negotiating and drafting history.

5. Maximum Vagueness or Ambiguity

In the fifth hypothetical, even the negotiating and drafting history of the treaty is indecisive. The only interpretive source remaining is a signing statement. Should a court look to a signing statement in this exceedingly rare case of maximum ambiguity?

Yes, but cautiously. Absent any other clear indication of meaning, a court may be justified in granting minimal deference to a signing statement. But this should be understood as something of a doomsday exception.

Signing statements attached to free standing legislation are structurally and temporally problematic. Signing statements appended to implementing legislation fare little better, once the formalist approach is adopted. In this exceptionally rare circumstance, however, a court may, out of necessity, treat a signing statement as post-enactment legislative history[123] in order to break an interpretive deadlock.

B. Summary of Interpretive Method

The steps of the interpretive method sketched in the previous five hypotheticals can be summarized as follows. First, a court should look to the text of the implementing legislation and its legislative history, employing whatever method of statutory interpretation it sees fit.[124] If such an inquiry convincingly points toward a single interpretation, the inquiry ends there. It is of no interpretive consequence that every other source of interpretation (the non-self-executing treaty, its negotiating and drafting history, and the signing statement) points in another direction.

Second, assuming treatment of the text of the implementing legislation along with its legislative history does not point

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123 *Supra* notes 57 and 58 and accompanying text.

124 This Article does not argue for a preferred method of statutory interpretation. The interpretive method endorsed is capable of accommodating, for example, both a plain meaning approach to statutory interpretation as well as a purposive approach. What is critical is the order of operations. The text of the implementing legislation and its legislative history (if one chooses to appeal to legislative history) ought to be treated first.

decidedly in one direction, a court should look to the treaty text and its negotiating and drafting history.

Third and finally, in the exceedingly rare case in which every other source of interpretation is indecisive, then, and only then, should a court consider relying upon a presidential signing statement to break the tie.

V. CONCLUSIONS

Presidential signing statements attached to legislation implementing non-self-executing treaties are not part of the legislative history, and therefore, in the vast majority of circumstances,[125] should not be granted deference in statutory interpretation. A formalist approach to the relationship between non-self-executing treaty text and implementing legislation, supported by *Fund for Animals* and Restatement § 111, treats the implementing legislation as the only source of treaty obligations for the purpose of statutory interpretation.

Once the implementing legislation takes precedence over the non-self-executing treaty, the interpretive situation effectively mirrors that of signing statements appended to free standing legislation. Subject to the same structural and temporal criticisms, presidential signing statements appended to implementing legislation prove to be violative of the Constitution's Presentment Clause, tantamount to the unconstitutional line item veto, and politically manipulative—because of their issuance after Congress has concluded its debate.

The implications for non-self-executing *human rights treaties*, in particular, are remarkable for two reasons. First, all current, major, multilateral human rights agreements the United States has entered are in the form of non-self-executing treaties. So, the interpretive problem identified in this Article—a problem threatening all non-self-executing treaties that have signing statements attached to their implementing legislation—potentially affects every existing human rights treaty to which the United States is a party. To put it another way, the problem identified in this Article disproportionately looms over the subset

[125] This Article assumes that hypotheticals 4 and 5, the only exceptions to the strict formalist approach, are exceedingly rare.

of non-self-executing treaties that are human rights treaties.

Second, and relatedly, any future human rights commitment the United States undertakes is likely to fall prey to this same interpretive problem. The United States concludes its human rights agreements as non-self-executing treaties because this form of international agreement offers the best opportunity to reconcile internationalist calls for worldwide humanitarian commitments with protectionist reservations over national sovereignty. In other words, that the interpretive problem of this Article disproportionately affects both present and future human rights treaties is no accident; political realities make it so.

Presidential signing statements, absent circumstances of near complete interpretive inconclusiveness, should enjoy no role in the interpretation of non-self-executing treaties—*especially* human rights treaties. They are, in short, unconstitutional commentaries.


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