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Presidential Signing Statements Under the Bush Administration: A Threat to Checks and Balances and the Rule of Law?: Hearing Before the H. Comm. on the Judiciary, 110th Cong., Jan. 31, 2007 (Statement of Nicholas Quinn Rosenkranz, Prof. of Law, Geo. U. L. Center)

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

**Presidential Signing Statements**

**January 31, 2007**

**Prepared Statement of**

**NICHOLAS QUINN ROSENKRANZ  
ASSOCIATE PROFESSOR OF LAW  
GEORGETOWN UNIVERSITY LAW CENTER  
WASHINGTON, DC**

**U.S. House of Representatives Committee on the Judiciary Hearing:  
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Mr. Chairman, Representative Smith, Members of the Committee: I thank you for the opportunity to express my views about presidential signing statements.

I will use my time in an attempt to separate out the various structural constitutional issues raised by signing statements. As you know, there has been significant confusion on this topic in the popular press; I hope that by disaggregating the various issues and discussing them dispassionately, we may at a minimum dispel some of the more hysterical assertions that have found their way into print.<sup>1</sup>

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<sup>1</sup> For example, this topic has been plagued with false statistics, beginning with the *Boston Globe's* repeated claim that the President "has quietly claimed the authority to disobey *more than 750 laws* enacted since he took office." Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1 (emphasis added). *The New York Times* picked up this erroneous claim, but rendered it even more wrong, citing the *Boston Globe* for the claim that "Mr. Bush had issued *more than 750 'presidential signing statements'* declaring he wouldn't do what the laws required." Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22 (emphasis added). And from the *Globe* to the *Times* to the House of Representatives, this factoid has now found its way into a bill pending before the House Committee on Oversight and Government Reform. See H.R. 264, 110th Cong. § 2(a)(5) (2007) ("According to a May 5, 2006, editorial in the New York Times, the . . . President . . . has issued more than 750 'presidential signing statements' declaring he would not do what the laws required."). *But this statistic is patently false.* President Bush has issued approximately 140 signing statements to date, less than one fifth of the number claimed by *The New York Times* as quoted in H.R. 264. See THE AMERICAN PRESIDENCY PROJECT, *Presidential Signing Statements*, available at <http://www.presidency.ucsb.edu/signingstatements.php?year=2006&Submit=DISPLAY>; see also *Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Michelle Boardman, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice) [hereinafter *Boardman Senate Testimony*], available at [http://judiciary.senate.gov/testimony.cfm?id=1969&wit\\_id=5479](http://judiciary.senate.gov/testimony.cfm?id=1969&wit_id=5479) (noting that President Bush issued 73 signing statements between January 2003 and June 2006). The *Globe* issued a statement, which was widely ignored, to correct the misunderstanding. See Correction, *For the Record*, BOSTON GLOBE, May 4, 2006, at A2 (clarifying that 125 signing statements had been issued by President Bush at the time of the original article's publication). The *Boston Globe's* original error, which has so multiplied and transmogrified, apparently began with confusion about the word "law," which it seemingly meant to signify something like "provision" or "section" or perhaps "subsection." Needless to say, this is not what the U.S. Constitution means by the word "law." See U.S. CONST. art. I, § 7 (setting forth the mechanism by which a bill may become "a law") (emphasis added). Even sources that understand the truth have chosen to trade on the error. Compare American Bar Association, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, Report [hereinafter *ABA Report*], [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf), at 1 (quoting the

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

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

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

## I. Executive Interpretation

The most important and most common function of presidential signing statements is to announce—to the Executive Branch and to the public—the President's interpretation of the law.<sup>8</sup> The propriety of such an announcement should be obvious.<sup>9</sup> There is an oft-

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

<sup>2</sup> H.R. 264, 110th Cong. (2007).

<sup>3</sup> S. 3731, 109th Cong. (2006).

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

<sup>5</sup> *See Boardman Senate Testimony*, *supra* note 1.

<sup>6</sup> *See id.*

<sup>7</sup> U.S. CONST. art. II, § 3.

<sup>8</sup> Virtually every paragraph of every signing statement by this President uses the word "construe," emphasizing that the purpose of the statement is to interpret the statute. *See, e.g.*, Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425 (March 9, 2006) ("The executive branch shall *construe* the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch . . . in a manner consistent with the President's constitutional authority to . . . withhold information the disclosure of which would impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. . . . The executive branch shall *construe* section 756(e)(2) of H.R. 3199 . . . in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and

repeated canard that the President has no business interpreting federal statutes—his job is to *execute* the laws, and *interpretation* should be left to the courts.<sup>10</sup> A moment’s reflection reveals that this view is unsound. It is simply impossible, as a matter of logic, to execute a law without determining what it means.

### A. Informing the Executive Branch of the President’s Interpretation

Imagine, for example, a statute that imposes a tariff on the importation of “vegetables.” Comes an eighteen-wheeler full of tomatoes. Is a tomato a vegetable? At the end of the day, maybe the Supreme Court will decide,<sup>11</sup> but long before then, the executive branch is put to a choice: stop the truck at the border or let it through. There is no ducking the question; either choice implies an interpretation of the statute, an interpretation of the word “vegetable.” And the President cannot simply flip a coin. He has a constitutional duty to “take Care that the Laws be faithfully executed,”<sup>12</sup> and this faithfulness inherently and inevitably includes a good faith effort to determine what “the Laws” *mean*. In short, as the Supreme Court has explained, “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”<sup>13</sup>

Nor is the President obliged to leave the choice to individual Border Patrol agents. The Supreme Court has rightly said that the President can and should “supervise and guide [executive officers’] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution

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expedient.”) (emphasis added); Remarks on Signing the Deficit Reduction Act of 2005, 42 WEEKLY COMP. PRES. DOC. 215 (February 8, 2006) (“The executive branch shall *construe* section 1936(d)(2) of the Social Security Act . . . , which purports to make consultation with a legislative agent a precondition to execution of the law, to call for but not mandate such consultation, as is consistent with the Constitution’s provisions concerning the separate powers of the Congress to legislate and the President to execute the laws.”) (emphasis added); Statement on Signing the Trafficking Victims Protection Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 39 (January 10, 2006) (“The executive branch shall *construe* this reporting requirement in a manner consistent with the President’s constitutional authority as Commander in Chief and the President’s constitutional authority to conduct the Nation’s foreign affairs.”) (emphasis added).

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

<sup>10</sup> See, e.g., Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22 (“[No former presidents] have used [signing statements] so clearly to make the president the interpreter of a law’s intent, instead of Congress, and the arbiter of constitutionality, instead of the courts.”); Bob Egelko, *How Bush Sidesteps Intent of Congress*, S.F. CHRON., May 7, 2006, at A1 (“The civics-book answer is clear: Congress passes the laws, the president carries them out, and the courts decide whether they’re constitutional.”).

<sup>11</sup> See *Nix v. Hedden*, 149 U.S. 304 (1893) (holding that the tomato, though botanically a fruit, is commonly used as a vegetable and therefore should be treated as such for tax purposes).

<sup>12</sup> U.S. CONST. art. II, § 3.

<sup>13</sup> *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

evidently contemplated in vesting general executive power in the President alone.”<sup>14</sup> And as Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel under President Clinton, has explained, this is a “generally uncontroversial . . . function of presidential signing statements”—“to guide and direct executive officials in interpreting or administering a statute.”<sup>15</sup>

## **B. Informing the Public of the President’s Interpretation**

Of course, the President need not make his interpretations public; he could quietly instruct the U.S. Border Patrol that a tomato is a vegetable and have done with it. But there are many good reasons why, in most circumstances, a public statement of interpretation is desirable. First, if the President’s interpretation is public, then those who believe that his interpretation is erroneous can better and more quickly structure a challenge in court. Second, a public statement of interpretation reduces legal uncertainty; if people know the President’s interpretation, they are better able to organize their affairs accordingly.<sup>16</sup> Third, and perhaps most important, a public statement informs Congress of the President’s interpretation, and if Congress disagrees, it may pass a bill clarifying the matter.

In short, in the United States, we have a strong preference for sunlight in government.<sup>17</sup> Once it is clear that interpreting the law is essential to executing it, there can be no independent objection to the President making his interpretations public. This is the primary function of presidential signing statements, and President Clinton’s Office of Legal Counsel was quite right to call this function “uncontroversial.”<sup>18</sup>

## **II. The Canon of Constitutional Avoidance**

The President interprets statutes in much the same way that courts do, with the same panoply of tools and strategies. His lawyers carefully study the text and structure of Acts of Congress,<sup>19</sup> aided perhaps by dictionaries, linguistic treatises, and other tools of

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<sup>14</sup> *Myers v. United States*, 272 U.S. 52, 135 (1926).

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

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

<sup>17</sup> *Cf.* *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (“Sunlight is said to be the best of disinfectants . . . .”) (quoting LOUIS DEMBITZ BRANDEIS, *OTHER PEOPLE’S MONEY* (1933)).

<sup>18</sup> *OLC Signing Statements Memorandum*, *supra* note 15, at 132.

<sup>19</sup> *See, e.g.*, Statement on Signing the Veterans Health Programs Improvement Act of 2004, 40 WEEKLY COMP. PRES. DOC. 2886 (November 30, 2004) (“The executive branch shall construe the repeal, in section

statutory interpretation. In addition, just like courts, they also apply well-established maxims of statutory interpretation, called canons.<sup>20</sup>

One canon in particular is of interest today. As Justice Holmes explained in 1927, “[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.”<sup>21</sup> This is known as the canon of constitutional avoidance,<sup>22</sup> and it “is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.”<sup>23</sup>

This is the canon that the President is applying when he says, in signing statements, that he will construe a particular provision to be consistent with a particular constitutional command.<sup>24</sup> Many of the presidential signing statements that have most exercised the press have taken this form,<sup>25</sup> so it is crucial to understand what these

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1561(c) of the Act, of section 127 of the Treasury and General Government Appropriations Act, 2003, as contained in the Consolidated Appropriations Act, 2003 (Public Law 108-7) as repealing the amendments that were made to title 19 of the United States Code by section 127. Such a construction of section 1561(c) is *consistent with the text and structure* of amendments to title 19 made by section 1561.”) (emphasis added); Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (December 30, 2005) (“[N]oting that the text and structure of Title X do not create a private right of action to enforce Title X, the executive branch shall construe Title X not to create a private right of action.”) (emphasis added); Statement on Signing the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 41 WEEKLY COMP. PRES. DOC. 1273 (August 10, 2005) (“The executive branch shall construe section 5305(g)(3) of the Act to be a statute to which section 552(b)(3)(A) of title 5, United States Code, refers, *as the text and structure of section 5305(g) indicate.*”) (emphasis added). See also *Alexander v. Sandoval*, 532 U.S. 275, 289 n.7 (2001) (“[O]ur methodology is not novel, but well established in earlier decisions . . . , which explain that *the interpretive inquiry begins with the text and structure* of the statute . . . .”) (emphasis added).

<sup>20</sup> For example, compare Statement on Signing Communications Legislation, 40 WEEKLY COMP. PRES. DOC. 3013 (December 23, 2004) (applying “the principle of statutory construction of giving effect to each of two statutes addressing the same subject whenever they can co-exist”) with *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”).

<sup>21</sup> *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.).

<sup>22</sup> See, e.g., *Artichoke Joe’s California Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003).

<sup>23</sup> *Rust v. Sullivan*, 500 U.S. 173, 190-191 (1991). See also *Ex parte Randolph*, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).

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

<sup>25</sup> See, e.g., Statement on Signing the Postal Accountability and Enhancement Act, 42 WEEKLY COMP. PRES. DOC. 2196 (December 20, 2006) (“The executive branch shall *construe* subsection 404(c) of title 30, . . . which provides for opening of an item of a class of mail otherwise sealed against inspection, in a manner consistent, to the maximum extent permissible, with the need to conduct searches in exigent circumstances . . . .”) (emphasis added); Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425 (March 9, 2006) (“The executive branch shall *construe* the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch . . . in a manner consistent with the President’s constitutional authority to . . . withhold information the disclosure of which would impair foreign relations, national security, the deliberative

statements do and do not say. These statements emphatically do not “reserve the right to disobey”<sup>26</sup> the law. They do not “amount to partial vetoes.”<sup>27</sup> They do not “declare[ the President’s] intention not to enforce anything he dislikes.”<sup>28</sup> And they do not declare that the statutes enacted by Congress are unconstitutional.

In fact, they declare exactly the opposite. As President Clinton’s Office of Legal Counsel has explained, these sorts of signing statements are “analogous to the Supreme Court’s practice of *construing* statutes, if possible, to *avoid* holding them unconstitutional . . . .”<sup>29</sup> What these signing statements say, in effect, is that if an ambiguity appears on the face of the statute or becomes apparent in the course of execution, and if one possible meaning of the statute would render it unconstitutional, then the President will presume that Congress intended the other, constitutional meaning—and *he will faithfully enforce the statute so understood*.<sup>30</sup>

Again, this amounts to nothing more than a straightforward application of a canon of statutory construction that was already well established when Justice Holmes elaborated it in 1927,<sup>31</sup> a canon that finds its entire rationale in “a just respect for the legislature”<sup>32</sup> and the faithfulness of Representatives and Senators to their constitutional oaths.<sup>33</sup> If a statute is ambiguous, we—the President, the Court, the People—presume that Congress intended it to be constitutional.<sup>34</sup>

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processes of the Executive, or the performance of the Executive’s constitutional duties. . . . The executive branch shall *construe* section 756(e)(2) of H.R. 3199 . . . in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and expedient.”) (emphasis added); Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (December 30, 2005) (“The executive branch shall *construe* Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power . . . .”) (emphasis added).

<sup>26</sup> Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1.

<sup>27</sup> Bob Egelko, *How Bush Sidesteps the Intent of Congress*, S.F. CHRON. May 7, 2006, at A1.

<sup>28</sup> Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22.

<sup>29</sup> OLC Signing Statements Memorandum, *supra* note 15, at 133 (emphasis added).

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

<sup>31</sup> See *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.).

<sup>32</sup> *Ex parte Randolph*, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).

<sup>33</sup> See U.S. Const. art. VI (“The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution.”); 5 U.S.C. § 3331 (2000) (establishing the oath for all elected and appointed officials: “I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990) (“The Members of the . . . Legislative Branch[] are sworn to uphold the Constitution, and they presumably desire to follow its commands.”).

<sup>34</sup> See *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991).



Now, it may be argued that this canon has grown too strong. After all, it is not used merely as a tie-breaker for ambiguous statutes. Even if dictionaries or other canons point in the opposite direction, the canon of constitutional avoidance sometimes wins the day. As the Supreme Court explained in 1895, “*every reasonable construction* must be resorted to in order to save a statute from unconstitutionality,”<sup>35</sup> and reasonable people may differ on what constitutes a reasonable construction.<sup>36</sup> Moreover, the Supreme Court has held that “[a] statute must be construed, if possible, so as to avoid not only the *conclusion* that it is unconstitutional *but also grave doubts upon that score.*”<sup>37</sup> This aspect of the doctrine is of more recent vintage<sup>38</sup> and has been subject to quite compelling critique.<sup>39</sup>

For present purposes, though, it suffices to note that the President’s application of this canon has been consistent with the interpretive doctrine espoused by the Court.<sup>40</sup> If there is any plausible interpretation of a statute that would avoid a serious constitutional question, the President—like the Court—gives Congress the benefit of the doubt and adopts the constitutional interpretation.

### III. Presidential Signing Statements in Court

An entirely separate issue is whether presidential signing statements are relevant to *judicial* interpretation of statutes. Courts sometimes use legislative history to resolve ambiguities in statutes<sup>41</sup> (though this practice has been subject to withering criticism<sup>42</sup>).

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<sup>35</sup> *Hooper v. California*, 155 U.S. 648, 657 (1895) (emphasis added).

<sup>36</sup> *Compare* *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (“The statute’s use of ‘knowingly’ could be read only to modify ‘uses, transfers, acquires, alters, or possesses’ or it could be read also to modify ‘in any manner not authorized by [the statute].’), *with id.* at 81 (Scalia, J., dissenting) (“If one were to rack his brains for a way to express the thought that the knowledge requirement in subsection (a)(1) applied *only* to the transportation or shipment . . . *it would be impossible* to construct a sentence structure that more clearly conveys that thought, and that thought alone.”).

<sup>37</sup> *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (emphasis added).

<sup>38</sup> *See* *Clark v. Martinez*, 543 U.S. 371, 391 (2005) (Thomas, J., dissenting); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 840-42 (2001).

<sup>39</sup> *See* *Marozsan v. United States*, 852 F.2d 1469, 1495 (7th Cir. 1988) (Easterbrook, J., dissenting) (“Construing statutes to avoid all constitutional questions treats the penumbra around the Constitution as if it has independent force, and thereby denies effect to real laws on the basis of insubstantial ‘concerns.’”); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (“The practical effect of interpreting statutes to avoid raising constitutional questions is . . . to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution . . . . And we do not need that.”); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 89 (discussing problems raised by the modern avoidance doctrine).

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

<sup>41</sup> *See, e.g.,* *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991) (“As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it.”); *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

<sup>42</sup> *See, e.g.,* *Conroy v. Aniskoff*, 507 U.S. 511, 518-28 (1993) (Scalia, J., concurring); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 621 (1991) (Scalia, J., concurring in the judgment) (“[W]e should try

The issue here is whether courts can and should put presidential signing statements to analogous use.

There are strong arguments on both sides of this question. On the one hand, one might say that judicial interpretation of statutes should seek to discover *legislative* intent, and the President is not a legislator. The President's power over bills is the power to "approve"<sup>43</sup> or disapprove legislation; it is a simple, binary, up-or-down decision, subsequent to, and distinct from, the legislative process. Indeed, the Constitution makes clear that even though the veto power appears in Article I, it is not legislative power. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"<sup>44</sup> not a Congress and a President. And it is "[t]he Congress," not the Congress plus the President, who "shall have Power . . . To make all Laws."<sup>45</sup>

On the other hand, one might say that this is an unduly formalistic view of the legislative process. In reality, the administration often drafts legislation, and even when it does not, the entire legislative machinery operates in the shadow of the President's veto power.<sup>46</sup> On this view, the President's understanding of a bill as reflected in a signing statement is at least as important as the understanding of Congress reflected in legislative history. Moreover, any effort to glean the intent of Congress from legislative history is arguably quixotic: first, it is difficult to know how many Representatives and Senators agreed with any given portion of legislative history;<sup>47</sup> and second, it is arguably

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to give the text its fair meaning, whatever various committees might have had to say—thereby affirming the proposition that we are a Government of laws, not of committee reports.”); ANTONIN SCALIA, A MATTER OF INTERPRETATION 29-37 (1997); Frank. H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61 (1994); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371 (1987).

<sup>43</sup> U.S. CONST. art. I, § 7.

<sup>44</sup> U.S. CONST. art. I, § 1.

<sup>45</sup> U.S. CONST. art. I, § 8; *see also id.* art IV, § 3 (“The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”); *id.* amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); *id.* amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XIX (“Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XX, § 3 (“Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified . . .”); *id.* amend. XX, § 4 (“The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them . . .”); *id.* amend. XXIII, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XXIV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XXV, § 5 (“or of such other body as Congress may by law provide . . .”); *id.* amend. XXVI, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”). *Cf. id.* amend. I (“Congress shall make no law . . .”).

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

<sup>47</sup> *Cf. Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.”).

incoherent to attempt to aggregate those individual intentions into a collective intent.<sup>48</sup> By contrast, the President is just a single person, so his interpretive statement poses none of those problems. For this reason, the argument runs, presidential signing statements are more valuable because they are inherently reliable as an indication of presidential intent, whereas legislative history is less valuable because it is inherently unreliable as an indication of congressional intent.

My own view is the same as Justice Scalia's. I believe that the project of statutory interpretation is to discern "the original meaning of the text, not what the original draftsmen intended."<sup>49</sup> And I believe that presidential signing statements—like legislative history—are of very little use in that project. In my view, absent instruction on this question from Congress,<sup>50</sup> courts should rely on both equally—for the strength of their reasoning and nothing more.

#### IV. Legislative Responses

It follows from the analysis above that a general legislative response to the President's use of signing statements is probably unnecessary. Nevertheless, because a bill on this topic, H.R. 264,<sup>51</sup> has been introduced by Representative Jackson Lee and is now pending before the Committee on Oversight and Government Reform, I shall address the balance of my testimony to the constitutionality and the wisdom of such proposals. I shall begin with the pending bill, and I will conclude by discussing some other options, including the bill that Senator Specter introduced last summer.

##### A. Limiting Funds for Signing Statements

Section 3(a) of H.R. 264 provides: "None of the funds made available to the Executive Office of the President, or to any Executive agency . . . from any source may be used to produce, publish, or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution presented for signing by the President."<sup>52</sup> This provision is probably unconstitutional.

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

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<sup>48</sup> *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body . . ."); Frank H. Easterbrook, *supra* note 42, at 68 ("Intent is elusive for a natural person, fictive for a collective body.").

<sup>49</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION, *supra* note 42, at 38.

<sup>50</sup> See *infra* Part IV-D; see also Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2147-51 (2002).

<sup>51</sup> H.R. 264, 110th Cong. (2007).

<sup>52</sup> H.R. 264, § 3.

<sup>53</sup> U.S. CONST. art. II, § 3.

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

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

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<sup>54</sup> See *infra* Part IV-B-1.

<sup>55</sup> See U.S. Const. art. I, § 9 (“No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

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

<sup>57</sup> See, e.g., Prakash, *supra* note 56, at 254 (“While Congress *might* be able to refrain from funding the exercise of presidential powers, Congress cannot go further and statutorily forbid the President’s personal exercise of his constitutional powers.”) (emphasis added).

<sup>58</sup> While the Supreme Court has only alluded to this point, see *United States v. Lovett*, 328 U.S. 303, 313 (1946); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. . . . [W]e have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.”), the Executive Branch has taken this position clearly and consistently for more than 70 years, see *Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill*, 2001 WL 34907462 (O.L.C.) (“[I]t is unconstitutional for Congress to place conditions, whether substantive or procedural, on the President’s exercise of his constitutional authority.”); 20 U.S. Op. Off. Legal Counsel 232 (1996) (“While Congress has broad authority to grant, limit, or withhold appropriations, that power may not be used . . . to circumvent the steps required by the Constitution for Congress to enact a law or regulation binding on persons outside the legislative branch.”); 20 U.S. Op. Off. Legal Counsel 189 (1996) (“The past practice of the Executive branch demonstrates its refusal to comply with unconstitutional spending conditions that trench on core Executive powers.”); 19 U.S. Op. Off. Legal Counsel 123 (1995) (“[I]t does not matter in this instance that Congress has sought to achieve its objectives through the exercise of its spending power, because the condition it would impose on obligating appropriations is unconstitutional.”); 16 U.S. Op. Off. Legal Counsel 18, 28 (1992) (“That section 503 was enacted as a condition on the appropriation of money for the State Department does not save it from constitutional infirmity.”); 14 U.S. Op. Off. Legal Counsel 37, 41 n.3 (1990) (“Nor can section 102(c)(2) be viewed as a legitimate exercise of congressional power over the appropriation of public funds. Congress may not use that power to attach conditions to executive branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs.”); 13 U.S. Op. Off. Legal Counsel 258 (1989) (“[T]he fact that Congress appropriates money for the army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces. Nor does it follow from Congress’ legislative establishment of executive branch departments and its appropriation of money to pay the salaries of federal

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

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

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officials that Congress can constitutionally condition creation of a department or the funding of an officer’s salary on being allowed to appoint the officer.”); 4B U.S. Op. Off. Legal Counsel 731, 733 (1980) (“It is well established that Congress cannot use its power to appropriate money to circumvent general constitutional limitations on congressional power.”); 41 U.S. Op. Att’y Gen. 507, 508 (1960) (“Congress cannot by direct action compel the President to furnish to it information the disclosure of which he considers contrary to the national interest. It cannot achieve this result indirectly by placing a condition upon the expenditure of appropriated funds.”); 37 U.S. Op. Att’y Gen. 56, 61 (1933) (“Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution.”).

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

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

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

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

<sup>63</sup> U.S. CONST. art. II, § 3; see also *supra* Part I.

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

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

At any rate, even if Congress concludes that it does have power to limit appropriations in this manner, the separation-of-powers implications are sufficiently serious that it would probably be wise to avoid a constitutional confrontation on this point unless absolutely necessary. This President’s use of signing statements hardly justifies such a constitutionally contentious response.

## **B. Limiting the Interpretive Force of Signing Statements**

Section 4 of H.R. 264 is also problematic. It provides: “For purposes of construing or applying any Act enacted by the Congress, a governmental entity shall not take into consideration any statement made by the President contemporaneously with the President’s signing of the bill or joint resolution that becomes such Act.”<sup>69</sup> The term

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

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

<sup>66</sup> *Rust v. Sullivan*, 500 U.S. 173, 190-191 (1991); see also *Ex parte Randolph*, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).

<sup>67</sup> H.R. 264, 110th Cong. § 3(b) (2007).

<sup>68</sup> See, e.g., Statement on Signing the Postal Accountability and Enhancement Act, 42 WEEKLY COMP. PRES. DOC. 2196 (December 20, 2006) (“The executive branch shall construe subsection 404(c) of title 30, . . . which provides for opening of an item of a class of mail otherwise sealed against inspection, in a manner consistent, to the maximum extent permissible, with the need to conduct searches in exigent circumstances . . . .”); Remarks on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 423 (March 9, 2006); Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (December 30, 2005).

<sup>69</sup> H.R. 264, § 4.

“governmental entity” appears to include executive officers, agencies, and courts.<sup>70</sup> Each of these applications raises distinct constitutional issues.

## 1. Limiting Federal Official Use of Signing Statements

It follows from the discussion above<sup>71</sup> that, insofar as it relates to executive officers and agencies, this provision is almost certainly unconstitutional. The provision purports to forbid executive officers and agencies from taking into account the President’s signing statements when interpreting federal law. Such a rule conflicts with the President’s constitutional duty to “take Care that the Laws be faithfully executed.”<sup>72</sup> As the Supreme Court has explained, “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law,”<sup>73</sup> and the President “may properly supervise and guide [executive officers’] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.”<sup>74</sup> The bill would run afoul of this principle, by closing the ears of the executive branch to the President’s contemporaneous<sup>75</sup> interpretation of the law. For that reason alone, it would be unconstitutional.

## 2. Limiting Judicial Use of Presidential Signing Statements

Once again, the bill provides: “For purposes of construing or applying any Act enacted by the Congress, a governmental entity shall not take into consideration any statement made by the President contemporaneously with the President’s signing of the bill or joint resolution that becomes such Act.”<sup>76</sup> As discussed above, this provision is almost certainly unconstitutional to the extent that it applies to executive agencies and officers.<sup>77</sup> But federal and state courts are also “governmental entit[ies],” and to the extent that the provision applies to *judicial* interpretation, different constitutional issues arise. Can Congress forbid courts from using presidential signing statements as an aid in the interpretation of federal statutes?

This is a rich and difficult question, and to answer it, one must begin with the more general question: Can Congress tell courts what tools and methods to use when interpreting federal statutes? I considered this question at length in the *Harvard Law Review* five years ago,<sup>78</sup> and I concluded that the answer is generally *yes*: Congress does have power to tell courts what methods to use when interpreting federal statutes. As I

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<sup>70</sup> On its face, the phrase “governmental entity” would appear to apply to state officials as well as federal officials. If so, the provision would raise distinct federalism issues that I do not address today.

<sup>71</sup> See *supra* Part I-A.

<sup>72</sup> U.S. CONST. art. II, § 3.

<sup>73</sup> *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

<sup>74</sup> *Myers v. United States*, 272 U.S. 52, 135 (1926).

<sup>75</sup> The constitutional problem could be mitigated, perhaps, by reading the word “contemporaneously” very narrowly, to mean something like “at the same instant,” but only at the cost of rendering the statute trivial.

<sup>76</sup> H.R. 264, 110th Cong. § 4 (2007).

<sup>77</sup> See *supra* Part IV-B-1.

<sup>78</sup> See *Rosenkranz*, *supra* note 50.

explained, “whatever judicial power exists over interpretive methodology must be common lawmaking power, which may be trumped by Congress.”<sup>79</sup> As a general matter, then, Congress has power to promulgate general rules of statutory interpretation, which would be binding on state and federal courts in the interpretation of federal law.

This is not the end of the analysis, however. Even if Congress *generally* has power over the interpretive methodology employed by courts, “[p]articular interpretive statutes . . . may raise more potent separation-of-powers objections.”<sup>80</sup> In other words, there is no general objection that mandating interpretive rules invades the *judicial* power, but the question remains whether this specific interpretive rule—courts shall not rely on presidential signing statements in interpreting acts of Congress—would impinge on the *executive* power.

I conclude that it probably would not. As explained above,<sup>81</sup> the President’s executive power inherently includes the power to interpret federal law in the first instance.<sup>82</sup> Moreover, the President also has power to give interpretive instructions to executive officers.<sup>83</sup> But it hardly follows that he has inherent and inalienable power to give such instructions to the courts. To be sure, courts often defer to executive agencies in their interpretations of federal statutes,<sup>84</sup> and the President himself may be entitled to at least as much deference,<sup>85</sup> but this is so only as long as Congress wishes to acquiesce in this rule.<sup>86</sup> If Congress wished to forbid judicial deference to agency interpretations—or even presidential interpretations—of federal statutes, it could probably do so. *A fortiori*, Congress could forbid judicial reliance on one manifestation of presidential interpretation—the presidential signing statement.

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

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<sup>79</sup> *Id.* at 2103. *But cf.* Lockhart v. United States, 126 S. Ct. 699, 702-04 (2005) (Scalia, J., concurring.).

<sup>80</sup> Rosenkranz, *supra* note 50, at 2103 (2002).

<sup>81</sup> *See supra* Part I.

<sup>82</sup> *See* Bowsher v. Synar, 478 U.S. 714, 733 (1986).

<sup>83</sup> *See* Myers v. United States, 272 U.S. 52, 135 (1926).

<sup>84</sup> *See* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

<sup>85</sup> *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2372-80 (2001).

<sup>86</sup> *See* Rosenkranz, *supra* note 50, at 2129 (“Clearly, Congress could pass a statute directing that courts give no deference to an agency’s interpretation of law.”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515-16 (1989) (“The separation-of-powers justification [for the Chevron doctrine] can be rejected even more painlessly by asking one simple question: If, in the statute at issue in Chevron, Congress had specified that in all suits involving interpretation or application of the Clean Air Act the courts were to give no deference to the agency’s views, but were to determine the issue *de novo*, would the Supreme Court nonetheless have acquiesced in the agency’s views? I think the answer is clearly no, which means that it is not any constitutional impediment to ‘policy-making’ that explains Chevron.”); Kagan, *supra* note 85, at 2379 (calling the *Chevron* rule a “default rule of deference”).

<sup>87</sup> S. 3731, 109th Cong., § 4 (2006).

<sup>88</sup> I refer in the text only to sections 1 through 4 of Senator Specter’s bill. Unfortunately, sections 5 and 6 of the bill introduced by Senator Specter raise other constitutional questions. Section 5 would have



The only question remaining is whether such a measure is wise. My tentative answer is that it might be, but only as part of a comprehensive legislative scheme. I have argued at length that Congress has constitutional power over the tools and methods that courts use to interpret federal statutes, and that it should exercise this power.<sup>89</sup> But a crucial aspect of my thesis is that Congress should approach this project comprehensively. As I explained:

The . . . most obvious advantage of a statutory interpretive regime is its potential for internal coherence. The Supreme Court is handicapped across this dimension by the Article III jurisdictional requirement of a case or controversy. Because the Court can only develop canons one by one, common law canons will be devised ad hoc, and will inevitably fail to form a coherent set. [By contrast,] [c]ongressionally adopted canons could form a true “regime”—a set of background interpretive principles with internal logical coherence.<sup>90</sup>

Indeed, the bill introduced by Senator Specter made much the same point, finding that “Congress can and should exercise [its] power over the interpretation of Federal statutes in a systematic and comprehensive manner.”<sup>91</sup> This is absolutely right, and I urge the House to undertake precisely this project. In short, I applaud Congress’s interest in a federal rule of statutory interpretation addressing presidential signing statements, but I think such a rule should ideally be adopted as part of a coherent and comprehensive code.

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

<sup>89</sup> Rosenkranz, *supra* note 50.

<sup>90</sup> See *id.* at 2143.

<sup>91</sup> S. 3731, 109th Cong. § 2 (2006).

## Conclusion

In conclusion, the recent brouhaha over presidential signing statements is largely unwarranted. Presidential signing statements are an appropriate means by which the President fulfills his constitutional duty to “take Care that the Laws be faithfully executed.”<sup>92</sup> And even the most controversial ones are, in truth, nothing more than the application of the well-settled canon of constitutional avoidance—a canon which, as Chief Justice John Marshall explained, was born of “a just respect for the legislature.”<sup>93</sup>

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

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<sup>92</sup> U.S. CONST. art. II, § 3.

<sup>93</sup> *Ex parte Randolph*, 20 F.Cas. 242, 254 (C.C.D.Va. 1883) (No. 11.558) (Marshall, C.J.).

<sup>94</sup> *See* S. 3731, § 1-4.

<sup>95</sup> As a complementary measure, Congress might also consider requiring the President to notify Congress of any decision to decline to enforce a statutory provision. *See, e.g.*, H.J. Res. 89, 109th Cong. (2006). *See also Rosenkranz Senate Testimony, supra* note 4 at Part IV-A.

<sup>96</sup> S. 3731, § 2.