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Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary, 109th Cong., June 27, 2006 (Statement of Nicholas Quinn Rosenkranz, Prof. of Law, Geo. U. L. Center)

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Hearing: Presidential Signing Statements Under the Bush Administration

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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.

In addition, the Committee may be interested in possible legislative responses to the President's use of signing statements. As you know, Representative Jackson Lee has already introduced a bill to regulate the creation and use of signing statements.2 Likewise, Senator Specter introduced a somewhat similar bill last summer,3 which may also be of interest to the Committee. Therefore, I will address the constitutionality and the structural desirability of these and other possible legislative measures. I should mention that I testified before the Senate Judiciary Committee on this same topic last summer,4 and I will be drawing substantially from that prior testimony today (in Parts I-III). I should also say that I largely agree with the position put forth by Deputy Assistant Attorney General Michelle Boardman at that hearing,5 and I commend her testimony to this Committee.

As Ms. Boardman explained, this President's signing statements have not differed significantly from those of his recent predecessors. 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."

I. Executive Interpretation

The most important and most common function of presidential signing statements is to announce to the Executive Branch and to the public the President's interpretation of the

law.8 The propriety of such an announcement should be obvious. There is an oft-repeated canard that the President has no business interpreting federal statutes his job is to execute the laws, and interpretation should be left to the courts.10 A moment's reflection reveals that this view is unsound. It is simply impossible, as a matter of logic, to execute a law without determining what it means.

A. Informing the Executive Branch of the President's Interpretation

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

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 3 14 Myers v. United States, 272 U.S. 52, 135 (1926). 15 The Legal Significance of Presidential Signing Statements, 17 U.S. Op. Off. Legal Counsel 131, 132 (1993) [hereinafter OLC Signing Statements Memorandum]. 16 See Frank B. Cross, The Constitutional Legitimacy and Significance of Presidential "Signing Statements", 40 ADMIN. L. REV. 209, 227-28 (1988) (arguing that the President's decision to announce his interpretation of a statute in a signing statement beneficially increases the transparency of executive branch decision-making); Lederman et al., supra note 9 ("The signing statement is a good thing: a manifestation of the Executive's intentions that helps

us to understand the heart of the problem. . . . [I]t is much better that [the President] tell Congress and the public of his intentions, rather than keep it secret . . . ."); see also John E. Calfee & Richard Craswell, Some Effects of Uncertainty on Compliance with Legal Standards, 70 VA. L. REV. 965 (1984) (analyzing the types of costs arising from uncertainty about legal rules); Michael P. Van Alstine, The Costs of Legal Change, 49 UCLA L. REV. 789, 822-36 (2002) (analyzing the costs that arise from uncertainty when new statutes are enacted and the importance of interpretive rules for reducing that uncertainty). 17 Cf. Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam) ("Sunlight is said to be the best of disinfectants . . . .") (quoting LOUIS DEMBITZ BRANDEIS, OTHER PEOPLE'S MONEY (1933)). 18 OLC Signing Statements Memorandum, supra note 15, at 132. 19 See, e.g., Statement on Signing the Veterans Health Programs Improvement Act of 2004, 40 WEEKLY COMP. PRES. DOC. 2886 (November 30, 2004) ("The executive branch shall construe the repeal, in section evidently contemplated in vesting general executive power in the President alone."14 And as Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel under President Clinton, has explained, this is a "generally uncontroversial . . . function of presidential signing statements" "to guide and direct executive officials in interpreting or administering a statute."15

B. Informing the Public of the President's Interpretation

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

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

II. The Canon of Constitutional Avoidance

The President interprets statutes in much the same way that courts do, with the same panoply of tools and strategies. His lawyers carefully study the text and structure of Acts of Congress,19 aided perhaps by dictionaries, linguistic treatises, and other tools of . . . 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 statutory interpretation. In addition, just like courts, they also apply well-established maxims of statutory interpretation, called canons.

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

This is the canon that the President is applying when he says, in signing statements, that

he will construe a particular provision to be consistent with a particular constitutional command.24 Many of the presidential signing statements that have most exercised the press have taken this form,25 so it is crucial to understand what these 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).

They do not "amount to partial vetoes."27 They do not "declare[the President's] intention not to enforce anything he dislikes."28 And they do not declare that the statutes enacted by Congress are unconstitutional. In fact, they declare exactly the opposite. As President Clinton's Office of Legal Counsel has explained, these sorts of signing statements are "analogous to the Supreme Court's practice of construing statutes, if possible, to avoid holding them unconstitutional . . . ."29 What these signing statements say, in effect, is that if an ambiguity appears on the face of the statute or becomes apparent in the course of execution, and if one possible meaning of the statute would render it unconstitutional, then the President will presume that Congress intended the other, constitutional meaning and he will faithfully enforce the statute so understood.

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

intended it to be constitutional.

Now, it may be argued that this canon has grown too strong. After all, it is not used merely as a tie-breaker for ambiguous statutes. Even if dictionaries or other canons point in the opposite direction, the canon of constitutional avoidance sometimes wins the day. As the Supreme Court explained in 1895, "every reasonable construction must be resorted to in order to save a statute from unconstitutionality,"35 and reasonable people may differ on what constitutes a reasonable construction. 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." This aspect of the doctrine is of more recent vintage38 and has been subject to quite compelling critique.

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

III. Presidential Signing Statements in Court

An entirely separate issue is whether presidential signing statements are relevant to judicial interpretation of statutes. Courts sometimes use legislative history to resolve ambiguities in statutes41 (though this practice has been subject to withering criticism).

The issue here is whether courts can and should put presidential signing statements to analogous use. There are strong arguments on both sides of this question. On the one hand, one might say that judicial interpretation of statutes should seek to discover legislative intent, and the President is not a legislator. The President's power over bills is the power to "approve"43 or disapprove legislation; it is a simple, binary, up-or-down decision, subsequent to, and distinct from, the legislative process. Indeed, the

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

On the other hand, one might say that this is an unduly formalistic view of the legislative process. In reality, the administration often drafts legislation, and even when it does not, the entire legislative machinery operates in the shadow of the President's veto power.46 On this view, the President's understanding of a bill as reflected in a signing statement is at least as important as the understanding of Congress reflected in legislative history. Moreover, any effort to glean the intent of Congress from legislative history is arguably quixotic: first, it is difficult to know how many Representatives and Senators agreed with any given portion of legislative history;47 and second, it is arguably incoherent to attempt to aggregate those individual intentions into a collective intent.48 By contrast, the President is just a single person, so his interpretive statement poses none of those problems. For this reason, the argument runs, presidential signing statements are more valuable because they are inherently reliable as an indication of presidential intent, whereas legislative history is less valuable because it is inherently unreliable as an indication of congressional intent.

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

IV. Legislative Responses

It follows from the analysis above that a general legislative response to the President's

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

A. Limiting Funds for Signing Statements

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

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

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

Even if Congress could refuse to fund a core executive function altogether, which is doubtful in itself,59 it does not follow that Congress may control the discretion inherent in a core executive function with a conditional appropriation.60 So for example, it is not at all clear that Congress could forbid the President from spending money on a pen and ink to issue pardons.61 But even if Congress could do that, it hardly follows that Congress could provide a pen and ink for pardons while forbidding that they be used to pardon particular individuals.62 Inherent in the President's pardon power is unfettered discretion to choose whom to pardon. Just as Congress cannot forbid the pardoning of certain people outright, it cannot achieve the same result with a spending restriction. Likewise, instructing the executive branch in his interpretation of the law is at the very heart of the President's duty to "take Care that the Laws be faithfully executed."63 If Congress may not forbid the President from communicating his will to the executive branch whether through a substantive restriction or a spending restriction64 still less may it forbid him from communicating some thoughts but not others.

In any event, even setting these constitutional issues aside, section 3(b) is essentially self-defeating, because it reduces the scope of section 3 to almost nothing. As explained above, the vast majority of constitutional signing statements are simple applications of the canon of constitutional avoidance, which requires the President to construe statutes, if at all possible, to be consistent with the Constitution. As the Court has explained, this canon "is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."66 In other words, the premise of the canon is never to "contradict, or [be] inconsistent with, the intent of Congress."67 To the contrary, the

point of this canon is to choose a constitutional interpretation of ambiguous statutes precisely because Congress presumptively intended such interpretations. Thus, virtually all the President's signing statements including almost all of the most controversial ones68 would be exempt from the spending restriction. In short, this provision would have very few applications at all, and even fewer constitutional ones.

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

B. Limiting the Interpretive Force of Signing Statements

Section 4 of H.R. 264 is also problematic. It provides: "For purposes of construing or applying any Act enacted by the Congress, a governmental entity shall not take into consideration any statement made by the President contemporaneously with the President's signing of the bill or joint resolution that becomes such Act."69 The term "governmental entity" appears to include executive officers, agencies, and courts.70 Each of these applications raises distinct constitutional issues.

1. Limiting Federal Official Use of Signing Statements

It follows from the discussion above71 that, insofar as it relates to executive officers and agencies, this provision is almost certainly unconstitutional. The provision purports to forbid executive officers and agencies from taking into account the President's signing statements when interpreting federal law. Such a rule conflicts with the President's constitutional duty to "take Care that the Laws be faithfully executed."72 As the Supreme Court has explained, "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law," 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." The bill would run afoul of this principle, by closing the ears of the executive branch to the President's contemporaneous interpretation of the law. For that reason alone, it would be unconstitutional.

2. Limiting Judicial Use of Presidential Signing Statements

Once again, the bill provides: "For purposes of construing or applying any Act enacted by the Congress, a governmental entity shall not take into consideration any statement made by the President contemporaneously with the President's signing of the bill or joint resolution that becomes such Act."76 As discussed above, this provision is almost certainly unconstitutional to the extent that it applies to executive agencies and officers.77 But federal and state courts are also "governmental entit[ies]," and to the extent that the provision applies to judicial interpretation, different constitutional issues arise. Can Congress forbid courts from using presidential signing statements as an aid in the interpretation of federal statutes? This is a rich and difficult question, and to answer it, one must begin with the more general question: Can Congress tell courts what tools and methods to use when interpreting federal statutes? I considered this question at length in the Harvard Law Review five years ago,78 and I concluded that the answer is generally yes: Congress does have power to tell courts what methods to use when interpreting federal statutes. As I 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 explained, "whatever judicial power exists over interpretive methodology must be common lawmaking power, which may be trumped by Congress."79 As a general matter, then, Congress has power to promulgate general rules of statutory interpretation, which would be binding on state and federal courts in the interpretation of federal law.

This is not the end of the analysis, however. Even if Congress generally has power over the interpretive methodology employed by courts, "[p]articular interpretive statutes . . .

may raise more potent separation-of-powers objections."80 In other words, there is no general objection that mandating interpretive rules invades the judicial power, but the question remains whether this specific interpretive rule courts shall not rely on presidential signing statements in interpreting acts of Congress would impinge on the executive power.

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

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

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).

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

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

logical coherence.90 Indeed, the bill introduced by Senator Specter made much the same point, finding that "Congress can and should exercise [its] power over the interpretation of Federal statutes in a systematic and comprehensive manner."91 This is absolutely right, and I urge the House to undertake precisely this project. In short, I applaud Congress's interest in a federal rule of statutory interpretation addressing presidential signing statements, but I think such a rule should ideally be adopted as part of a coherent and comprehensive code.

Conclusion

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

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