



July 28, 2006

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

Dear Chairman Specter:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- *How is this consistent with the Constitution?*

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

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

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

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

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

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

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

Sincerely,

Christopher S. Yoo
Professor of Law