

Testimony of

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Before the United States Senate Committee on the Judiciary
Senator Arlen Specter, Chairman
Presidential Signing Statements

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Dear Senator Specter and Members of the United States Senate Committee on the Judiciary:

My name is Charles J. Ogletree, Jr., and I am honored to have this opportunity to discuss the topic of presidential signing statements. This is an historic and critically important hearing convened by the Senate Committee on the Judiciary, and I look forward to offering my views on this important topic.

I serve as the Jesse Climenko Professor of Law, and Executive Director of the Charles Hamilton Houston Institute of Race and Justice, at Harvard Law School. I have been a member of the Harvard Law School faculty for over twenty years. Additionally, I have had the honor and privilege of handling cases here in the District of Columbia during the early stages of my career, having represented clients in adult and juvenile proceedings in the local superior court and federal courts, as well as the courts of appeals. I have also had the honor of arguing cases before various state supreme courts and circuit courts, as well as the United States Supreme Court. At Harvard Law School, I teach the subjects of Criminal Law and Procedure, Professional Responsibility, and a host of clinical courses involving trial practice. Moreover, I have had the honor of providing testimony, writing articles and books, and addressing matters of constitutional significance on a variety of occasions.

I am also honored to be a member of the American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, a committee that was convened a month ago by Michael Greco, President of the American Bar Association, and we represent a wide range of talents, experiences and perspectives in forming a bipartisan group of lawyers and jurists who have been asked to examine this most important topic. These individuals are making an earnest attempt to examine these issues objectively and thoroughly, with the hope and expectation that the Task Force report will offer suggestions and guidance that will be relevant to the use of presidential signing statements by any future president. The effort is not designed to focus on one president's exercise, but to conduct an overall analysis of the presidential signing statements, and to make sure that our recommendations are considered prospectively. While there is much honest debate about these issues, it is clear that the Task Force sees its responsibility as one in addressing the issues that go to the separation of powers, and the appropriate exercise of authority in all branches of government. The Task Force expects to complete its work this summer, and submit a report to the American Bar Association during its Annual Meeting in August.

In my written and oral remarks today, I am not speaking on behalf of either the Harvard Law School or the ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine. I am speaking in my individual capacity.

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

perspective or understanding of the law's parameters. Official reports indicate that many former presidents have used signing statements in a wide range of legislative areas, and have generally done so without much objection or controversy.

One of the reasons that it is important to examine this topic, however, is the unusually high number of signing statements that have been issued by President George W. Bush during his tenure in office. As official reports indicate, in less than six years, President Bush has issued over a hundred signing statements that raise significant constitutional questions. That number of presidential signing statements may not seem significant, when considered alone. Indeed, former Presidents Reagan, Bush and Clinton significantly increased the use of presidential signing statements. However, these numbers pale when compared to the number of signing statements issued, and the exercise of executive authority, by President George W. Bush.

Another area of executive authority that is usually balanced with the use of presidential signing statements is the veto, employed when the president believes legislation is unconstitutional. According to several estimates, President Ronald Reagan vetoed 78 bills, including 39 actual vetoes and another 39 pocket vetoes. President George H. W. Bush vetoed 44 bills, with 15 of them being pocket vetoes. During his two terms, President Bill Clinton vetoed 37 bills, including one pocket veto. In contrast, during his six years in office, President George W. Bush, to date, has not vetoed a single bill. The unprecedented juxtaposition of President Bush's failure to exercise a single veto, yet issuing more than a hundred signing statements, has created considerable concern, and explains the broad and bipartisan response to his actions.

One of the fundamental questions posed by these actions is whether the president is using the signing statement in order to expand the authority of the executive branch at the expense of the legislative branch. In other words, is he using the signing statement as a way to declare a law non-binding, without having to face the public scrutiny that comes with a veto, or the possibility of a legislative override? In order to get a clearer sense of whether this is the case, it is necessary to examine very carefully how the signing statements have been used. For example, among President George W. Bush's signing statements are bills addressing the commemoration of the 50th Anniversary of *Brown v. Board of Education*, with a signing statement issued in 2001, and comparable examples where the signing statement does not raise any areas of serious concern. On the other hand, there are numerous signing statements, particularly in the past few years, which raise serious questions about the exercise of executive authority, and serious issues of constitutional magnitude.

The essential issue is whether a president, who objects to a law being enacted by Congress through its constitutionally prescribed procedures, should either veto that law, or find other ways to challenge it. Using signing statements, rather than vetoes, calls into question the President's willingness to enforce duly enacted legislation, and it also denies the legislative branch any clear notice of the executive branch's intent to not enforce the law, or to override laws that could have been the subjects of vetoes.

It is hoped that the Senate Committee on the Judiciary will closely examine these matters and determine whether or not they raise issues of constitutional magnitude. Among the matters to be considered are the following:

A signing statement that suggests that all or part of a law is unconstitutional raises serious legal considerations. It has been exercised more recently in lieu of an actual veto. While the President has considerable powers of constitutional interpretation, those powers must be balanced with the authority granted to other branches of government, including the legislative and judicial branches. When the President refuses to enforce a law on constitutional grounds without interacting with the other branches of government, it is not only bad public policy, but also creates a unilateral and unchecked exercise of authority in one branch of government without the interaction and consideration of the others.

Of course, the deeper objection to the use of presidential signing statements is to what extent any administration is taking a hostile attitude with respect to how statutes should be interpreted. This excessive exercise of executive power, coupled with the failure to use the authorized veto power, creates serious issues of constitutional magnitude, and requires a legislative response.

One of the critical issues that this committee must consider is whether and to what extent the President's exercise of signing statements is influenced by the war on terrorism or other matters of national security. That certainly seems to

be the case when one examines the application of signing statements on issues like the USA Patriot Act, or other provisions having to do with the detention of suspected terrorists for long periods of time without any form of judicial review. In fact, according to one analysis, the President has used signing statements on 207 occasions to object to a bill's constitutionality on the grounds that it interferes with his "power to supervise the unitary executive," or with his "exclusive power over foreign affairs," or with his "authority to determine and impose national security classifications and withhold information."⁴ Such examples require further probing by the Senate Committee on the Judiciary, and more detailed and persuasive explanations from the executive branch.

Given the seriousness of these endeavors, the controversy that they have created, and the need for clarity and direction going forward, I am pleased that the Senate Committee on the Judiciary has decided to examine these matters, but expect Congress to exercise its legislative mandate to enforce the law, and to not allow it to be undermined by the use of presidential signing statements.

Moreover, in that the federal courts have the exclusive role to apply and interpret the Constitution, it may be necessary that these matters be brought before the courts at the earliest possible convenience. I look forward to questions during the course of this hearing.

Sincerely,
Charles J. Ogletree, Jr.