

Statement of
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the Constitution”

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This statement, prepared at the Committee's request, presents my views concerning legal and policy issues associated with the practice of affixing a facsimile of the President's signature to documents that the President has not signed manually, including with the device known as the autopen.

I believe that Congress has power to regulate the process by which the President's signature is affixed to an official document other than by the President's manual signature. Congress can regulate that process in order to provide a documentary record showing that the President manifested his assent to that action on his behalf. I first describe the current practice as I understand it and issues that the practice raises, then discuss Congress's relevant constitutional power, then outline a way in which Congress could exercise that power.

The Constitution and statutes confer many powers on the President, including for example the power to pardon offenses against the United States. Those powers are often exercised through documents on which the President's signature signifies that the President has made the choice that is authorized by law. One very important power is explicitly required to be exercised by signing a document. Article I, section 7 of the Constitution provides that bills that have passed both houses of Congress are to be presented to the President, and that if the President approves a bill that is presented to him after passing both houses of Congress, "he shall sign it." The clause conferring the pardon power does not provide that pardons are to take the form of signed documents, but pardons have long taken that form.

When the President is authorized to take an official action by signing a document, the central example of that process is manual signature by the President personally. Because manual signature is the central example of signing, a question arises whether signing a document can be accomplished in any other way. In 2005, the Office of Legal Counsel of the Department of Justice issued an opinion concluding that the President can sign a document other than by personally affixing his signature.¹ If the President signifies his wish that a facsimile of his signature be applied to a document, for example by an autopen, affixing that facsimile pursuant

¹ Office of Legal Counsel, United States Department of Justice, *Whether the President May Sign a Bill by Directing That His Signature Be Affixed to It*, 29 Op. OLC 97 (2005).

to the President's direction constitutes signing the document by the President. For example, as the opinion explains, the President might wish to sign a bill while he is away from the capital city, so that the bill can go into effect immediately. In order to sign a document that is not physically before him, the President can direct that a facsimile of his signature be affixed to the document. I agree with that conclusion and find the opinion's reasoning persuasive. For ease of exposition, I will refer to the process by which a facsimile of the President's signature is affixed to a document as signature by autopen.

Signature by autopen is one way for the President to sign a document, and presents a distinctive version of a question that arises with respect to all forms of presidential signature: how to create an official record confirming that the President signed a document. When the President signs a document manually, an individual with knowledge that the President took that action can attest that the President did so. Today, commissions the President issues to officers of the United States generally bear the President's signature and an attestation by the Secretary of State.

When the President directs that his signature be affixed to a document, the process of signing involves two steps, rather than the one step of the President signing manually. First, the President indicates that his signature is to be affixed to a document, then someone implements that directive, for example by using an autopen. A question can arise whether the President took the first step. If that step is absent but the President's signature is affixed to a document nevertheless, the document does not reflect the President's assent. The legal consequences of the document under those circumstances depend on the rules governing documents that appear to be, but are not, genuine; I will not discuss those rules. The danger is that a document that does not reflect the President's assent will be treated as if it did, either because legal rules make some actually inauthentic documents legally effective, or because the defect is not detected.

Because of that danger, Congress has good reason to take steps to ensure that a facsimile of the President's signature is affixed to a document only when the President has directed this his signature be so affixed. The next question concerns Congress's power to take steps of that kind.

I think that Congress's power in this connection is substantial, though not unlimited. Under the last clause of Article I, section 8 of the Constitution, the Necessary and Proper Clause, Congress has power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers [listed in the preceding clauses of Article I, section 8], and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof." The last part of that provision, called the Horizontal Necessary and Proper Clause, enables Congress to make laws necessary and proper for carrying into execution the powers of the President and of the federal courts.²

Congress's horizontal power is an important component of the constitutional system, because it enables the national legislature to give the other two branches the kind of support that only legislation can give. For example, that power enables Congress to provide criminal punishment for the falsification of federal judicial records.³ The federal courts can better perform their functions with laws of that kind in place. Only Congress can create a federal crime, so only legislative power can provide that kind of support.

On the other hand, the power to carry another branch's power into execution is not the power to exercise discretion the Constitution confides to the other branch. The horizontal power does not enable Congress to decide whom to pardon, or which bills the President shall approve.⁴

² The fundamental scholarly work on the horizontal necessary and proper power is William van Alstyne, *The Role of Congress In Determining Incidental Powers of the President and the Federal Courts: A Comment on the Horizontal Effect of the "Sweeping Clause,"* 36 OHIO STATE L. J. 788 (1975).

³ For example, 18 U.S.C. § 505 criminalizes forging "the signature of any judge, register, or other officer of any court of the United States, or of any Territory thereof . . . for the purpose of authenticating any proceeding or document."

⁴ Many of the President's powers come from statute, not directly from the Constitution. When Congress confers power on the President by statute, the legislature may have some power to regulate the process through which the President exercises that power that derives, not from the horizontal necessary and proper power, but from the power that Congress exercised in conferring authority on the President. When the President exercises a power conferred by statute, however, the President is also using the Article II executive power, so congressional regulation of the President is a regulation of both a power conferred by statute and regulation of a power conferred by the Constitution. The requirements for a legitimate exercise of the horizontal power are more demanding than for a legitimate exercise of a power that does not regulate the constitutional authority of a coordinate branch of government. A statute that satisfies the requirements of the horizontal power *a fortiori* satisfies the requirements of any other congressional power, so my conclusion that the kind of legislation I discuss would be a permissible use of the horizontal power entails that such legislation also would be a permissible use of Congress's other powers when it confers statutory authority on the President.

Proper exercises of the horizontal power must facilitate the power being carried out without directing the exercise of choices confided to an officer or department other than Congress. Because the Necessary and Proper Clause enables Congress to enact laws that are a means to the end the clause states, those basic features of the horizontal power should be implemented though an inquiry into means and ends. Laws are legitimate exercises of the power when they serve the goal of facilitation, do not serve the goal of exercising or controlling the power being assisted, and do not in practice substantially hinder the exercise of the power being assisted.

With those principles about horizontal necessary and proper legislation in mind, I suggest that Congress can and should provide for an official record of presidential decisions to affix the President's signature to a document through a means other than manual signature (a means such as an autopen). When the President directs that his signature be so affixed, another official should prepare and certify a document recording the certifying official's knowledge that the President gave that instruction. The document should describe the circumstances under which the certifying official obtained that knowledge, for example through a telephone conversation with the President, and should include the certification that the President's decision was with reference to the document to which his signature was affixed. The certifying document should be published; the *Federal Register* and the *Weekly Compilation of Presidential Documents* would be appropriate official publications for certifying documents. In order to ensure that the certifying officials may take a binding, ministerial act on behalf of the government, Congress should enable the President to appoint some individual or individuals who otherwise serve on the White House staff as inferior officers to perform that function.

A law like that would be a legitimate exercise of the horizontal necessary and proper power. Ensuring that documents bearing the President's signature reflect the President's decisions carries into execution the power exercised by signing the document. Inaccurate records of official acts, including forged records, detract from the exercise of the power that operates through the record. Part of the President's power to pardon offenses is the authority to decide which offenses not to pardon. A forged pardon could interfere with the President's choice not to pardon, so steps that prevent forgery facilitate the constitutional authority to make that choice.

The law I have described would impose the same documentation requirements for all presidential decisions to sign by autopen or in a similar way, and so would have no effect on the substance of the President's decisions. Neutrality of that kind is in my view constitutionally mandated, and can readily be achieved. As is often the case, the legislature can achieve neutrality by applying a uniform rule to all situations, leaving variation to result from the President's choices, not Congress's.

One especially delicate point concerning horizontal legislation involves the practical burden that Congress places on the power being facilitated, power Congress does not itself hold and is not allowed to control. A procedural requirement, such as a requirement of documentation, might fail to qualify as carrying another power into execution if the procedure impeded the exercise of the other power. Required procedures frequently impose some burden, however. For example, a requirement that pardons be in writing would make granting pardons slightly more difficult for the President.

A statute requiring documentation of decisions to sign with an autopen (or another substitute for manual signature) would have a minimal burden on the President, if it has any burden at all. Use of an autopen (or a similar means of affixing the President's signature to a document) already involves a procedure by which the President signifies his decision. I am not sufficiently familiar with the details of White House document flow to know how that process now works. I do not know how the White House system currently documents the President's decisions to have his signature affixed to a document other than by manual signature. However the system now operates, building a certification of the President's decision into the existing process will impose at most a trivial additional burden on the President.⁵

This statement, and testimony I present to the committee, address legal and policy questions. I do not attempt to describe current or recent White House practice in affixing the

⁵ It is possible that at the hearing for which this statement is prepared, the Committee will learn more about the existing process for affixing the President's signature. I recommend that if the Committee decides to propose legislation calling for documentation of the President's choice to use a means of signing other than manual signing, that legislation should be designed to integrate any new requirement into the procedures already in use at the White House.

President's signature to documents the President has not signed by hand. The statement was prepared, and my testimony is presented, as a public service. I speak on my own behalf, and not on behalf of any client or of my employer, the University of Virginia.