

August 15, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

Thank you again for the opportunity to express my views about presidential signing statements at the Judiciary Committee hearing on June 27, 2006. And thank you, too, for the opportunity to contribute to the development of sections 1-4 of S. 3731, "The Presidential Signing Statements Act of 2006," which you introduced on the floor of the Senate three weeks ago.¹ Quite apart from the substantive provisions of the bill, I entirely agree with its conclusion that Congress has power to enact federal rules of statutory interpretation² and that it "can and should exercise this power over the interpretation of federal statutes in a systematic and comprehensive manner."³ If I can be of any assistance in that momentous undertaking, please let me know.

As you requested in your letter of July 7, I write to respond to the written follow-up questions of Senator Feinstein and Senator Kennedy. I have reproduced the Senators' questions below, and after each question I have written my answer.

SENATOR FEINSTEIN'S QUESTIONS

SENATOR FEINSTEIN: In your written testimony you argue that the President's job is to execute and interpret the law because "it is simply impossible, as a matter of logic, to execute a law without determining what it means." You use the example of a statute that requires the interpretation of whether a tomato is a vegetable.

¹ S. 3731, 109th Cong. (as introduced by Sen. Specter, July 26, 2006).

² See *id.* § 2(8).

³ *Id.* § 2(9). See also Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

In this line of argument, however, you gloss over the concept of plainly interpreting the law in order to understand its meaning, versus making a constitutional evaluation about the soundness of a law combined with making a unilateral decision about whether to enforce the law.

- **QUESTION:** *Are you arguing that in addition to understanding the plain language of a statute, and therefore “interpreting” a law, the President also has the authority to determine whether a law is constitutional? Whether he is bound by the law? Whether it should be enforced?*

ANSWER: In my testimony, I said nothing whatsoever about whether the President has power to determine that a statute is unconstitutional and whether he may or must decline to enforce it under such circumstances. I did not address these questions because they are not implicated at all by the vast majority of presidential signing statements. Virtually every signing statement issued by President Bush says only how he will “construe”⁴—that is, *interpret*⁵—the statute, and strongly implies that *the President will faithfully execute the statute as so interpreted*.

In rare circumstances, the President may conclude that a statute is thoroughly unconstitutional on its face, such that no constitutional interpretation is possible. In such circumstances, the President’s oath to “preserve, protect and defend the Constitution of the United States”⁶ and his duty to “take Care that the Laws,”⁷ including the Constitution,⁸ “be faithfully executed,”⁹ entail that the President may (and perhaps must) decline to enforce such statutes. While some scholars disagree with that proposition,¹⁰ the executive branch has consistently endorsed

⁴ See, e.g., Statement on Signing the Deficit Reduction Act of 2005, 42 WEEKLY COMP. PRES. DOC. 215 (Feb. 8, 2006) (“The executive branch shall *construe* such provisions in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch . . .”) (emphasis added); Statement on Signing the Trafficking Victims Protection Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 39 (Jan. 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); Statement on Signing the Enhanced Border Security and Visa Entry Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 822 (May 14, 2002) (“Section 2(4)(G) of the Act defines as a Federal law enforcement agency the ‘Coastal Security Service.’ Because no such agency exists, and the principal agency with coastal security functions is the U.S. Coast Guard, the executive branch shall *construe* this provision as referring to the Coast Guard.”) (emphasis added).

⁵ See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 489 (1986) (defining “construe” as “to construct”; defining “construct” as “to construe or interpret (as a document, statement, expression)”). See also BLACK’S LAW DICTIONARY 333 (8th ed. 2004) (defining “construe” as “[t]o analyze and explain the meaning of (a sentence or passage)”).

⁶ U.S. CONST. art. II, § 1, cl. 8.

⁷ U.S. CONST. art. II, § 3.

⁸ See U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land . . .”).

⁹ U.S. CONST. art. II, § 3.

¹⁰ See Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7, 14-22 (describing the debate).

it,¹¹ as have four Justices of the Supreme Court.¹² The most thorough and scholarly account of this power and duty may be found in the persuasive opinion of Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel under President Clinton.¹³

But, again, this power is not implicated at all by the vast majority of presidential signing statements, in which the President merely explains that he will “construe” statutes to be consistent with the U.S. Constitution. As Senator Kennedy ably put the point: “I’m sure we’d all agree that some interpretation is necessary for enforcement. It’s part of the President’s responsibility to read ambiguous provisions to avoid constitutional problems.”¹⁴

- **QUESTION:** *If so, is there any check on this authority?*

ANSWER: If the President determines that a statute is unconstitutional and declines to enforce it on those grounds, then, depending on the circumstances, the courts may have an opportunity to review that decision. Indeed, according to the Office of Legal Counsel, “the President may base his decision to comply (or decline to comply) [with a statute that he believes is unconstitutional] in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.”¹⁵

More generally, the constitutional judgments of the President—like those of Congress—are subject to the ultimate check of election. If the People disagree

¹¹ See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199, 199 (1994) (“[Executive branch o]pinions dating to at least 1860 assert the President’s authority to decline to effectuate enactments that the President views as unconstitutional.”); *id.* at 202 (“[E]very President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions.”).

¹² See *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 906 (Scalia, J., concurring in part and concurring in the judgment, joined by O’Connor, J., Kennedy, J., & Souter, J.) (“[I]t was not enough simply to repose the power to execute the laws . . . in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including . . . [the power] to disregard [laws] when they are unconstitutional.”). See also PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788 304-305 (John Bach McMaster & Frederick D. Stone eds. 1888) (quoting James Wilson saying, “it is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass in the usual *mode* notwithstanding that transgression; but when it comes to be discussed before the judges, when they consider its principles, and find it to be incompatible with the superior powers of the constitution, it is their duty to pronounce it void In the same manner the President of the United States could shield himself and refuse to carry into effect an act that violates the constitution.”) (emphasis added).

¹³ See Presidential Authority to Decline to Execute Unconstitutional Statutes, *supra* note 11. See also Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919-22 (1990).

¹⁴ Letter from Hon. Arlen Specter, Chairman, United States Senate Committee on the Judiciary, to Nicholas Rosenkranz, Associate Professor of Law, Georgetown University Law Center (July 7, 2006) (enclosure: Senator Edward M. Kennedy, Questions for the Record for Nicholas Q. Rosenkranz). Accord Easterbrook, *supra* note 9, at 905 (“No one would take seriously an assertion that the President may not interpret federal law.”).

¹⁵ Presidential Authority to Decline to Execute Unconstitutional Statutes, *supra* note 11, at 201.

with the constitutional judgments of a President (or a member of Congress), that may be an excellent reason for electing someone else.

Finally, if Congress disagrees with the constitutional judgment of the President and believes that the matter is too grave to wait for the next election, it may institute impeachment proceedings.¹⁶ This has happened only once in our nation's history,¹⁷ and in that case, the Senate acquitted the President¹⁸—and the Supreme Court ultimately vindicated the President's constitutional judgment.¹⁹ In the view of many scholars, this historical precedent suggests that Congress should not resort to impeachment in cases of reasonable, good faith disagreement over the meaning of the Constitution.²⁰ Nothing in this President's constitutional signing statements suggests any unreasonableness or bad faith.

- **QUESTION:** *In your opinion, is there a difference between the “interpretation” of is a tomato a vegetable, and can I direct the military or intelligence personnel to use torture in direct contradiction to the ban on torture contained in the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006?*

ANSWER: Obviously, there are dramatic differences between the interpretation of the word “vegetables” in the Tariff Act of March 3, 1883,²¹ and the interpretation of the ban on torture in the Department of Defense Supplemental

¹⁶ See U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”); U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

¹⁷ See Articles of Impeachment Against Andrew Johnson, CONG. GLOBE, 40th Cong., 2d Sess. 1616-18 (1868). See also WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 150 (1992).

¹⁸ See CONG. GLOBE, 40th Cong., 2d Sess. 2497 (1868) (vote to acquit President Johnson). See also REHNQUIST, *supra* note 17, at 233-35.

¹⁹ See *Myers v. United States*, 272 U.S. 52, 176 (1926) (holding the Tenure of Office Act unconstitutional).

²⁰ See, e.g., Tom Campbell, *Responsibility and War: Constitutional Separation of Powers Concerns*, 57 STAN. L. REV. 779, 782 (2004) (“[I]t would be inappropriate to impeach and remove a President who was in good faith exercising powers he thought he had as commander in chief.”); John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 659 (1999) (“[T]he distinction between violation of settled law and a disagreement over the content or constitutionality of a law is the very reason for the consensus that the impeachment of President Richard Nixon was the correct course of action, but impeachment of President Andrew Johnson was not. . . . President Johnson simply refused to follow the Tenure of Office Act, a law that he believed in good faith was unconstitutional.”). See also Charles L. Black, Jr., *IMPEACHMENT: A HANDBOOK* 30 (1974) (“[C]ertainly the phrase ‘high Crimes and Misdemeanors,’ whatever its vagueness at the edges, seems absolutely to forbid the removal of a president on the grounds that Congress does not on the whole think his administration of public affairs is good.”); REHNQUIST, *supra* note 17, at 271 (The acquittal of President Johnson established that “as to the policies [the President] sought to pursue, he would be answerable only to the country as a whole in the quadrennial presidential elections, and not to Congress through the process of impeachment.”).

²¹ See *Nix v. Hedden*, 149 U.S. 304 (1893) (interpreting the word “vegetables” in the Tariff Act of March 3, 1883 to include tomatoes).

Appropriations Act. The latter, of course, is incomparably more important than the former. But in momentous cases as well as trivial ones, the President's duty to execute the law inevitably requires that he interpret it first.²² In the statement to which you refer, as in the vast majority of this President's signing statements, the President merely stated how he would "construe" the statute—and he strongly implied that he would fully comply with the statute so construed.²³

- **QUESTION:** *Interestingly, in your example about the tomato you also outline a role for Congress and the courts. However, what about these signing statements where it is so ambiguous Congress does not know if the law is being followed, and there is no one who can satisfy the standing requirement? That is the issue, not a perfect theoretical example, but rather a messy real life situation where Congress has no idea if the President is executing the law, and even if we were to pass another law saying "we really mean it" whether he would execute that law. What then? Is that still an "uncontroversial" use of signing statements?*

ANSWER: Again, presidential signing statements generally do not raise any doubt that "the law is being followed" or that "the President is executing the law." These statements generally do nothing more than explain how the President *interprets* the law²⁴—what he believes the law *means*—and they strongly imply that he will faithfully execute the law as so interpreted.

If the President does decide that he will not enforce a statute because he determines that it is unconstitutional, you are quite right that the Congress and the People have a right to know.²⁵ But this President's signing statements almost never suggest that he has made any such decision or any such determination.

- **QUESTION:** *Do you really equate defining a tomato with a statement that reads the President "shall construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch"?*

²² See *Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *Signing Statement Hearing*] (statement of Nicholas Quinn Rosenkranz, Associate Professor of Law, Georgetown University Law Center). Accord Easterbrook, *supra* note 9, at 905 ("No one would take seriously an assertion that the President may not interpret federal law.").

²³ See 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 (Dec. 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 . . .").

²⁴ See *supra* notes 4-5 and accompanying text.

²⁵ See 28 U.S.C. § 530D(a)(1) (Supp. II 2002) ("The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice . . . establishes or implements a formal or informal policy to refrain . . . from enforcing, applying, or administering any provision of any Federal statute . . . whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional . . .").

ANSWER: There seems to be widespread confusion about the meaning of the phrase “unitary executive branch.” This phrase signifies nothing more than a basic constitutional truth: Article II, section 1, of the Constitution provides that “the Executive Power shall be vested in a President”²⁶—that is, *one* President. The word “unitary” means “one,”²⁷ and the executive branch is “unitary” in the sense that the Constitution vests the Executive Power in one, single person.²⁸ As a general matter, therefore, the President has the power and the duty to supervise and control the exercise of executive power and the operations of the executive branch.²⁹ This principle has been clear from the beginning,³⁰ and President Clinton understood it just as well as President Bush; though President Clinton did not use the phrase “unitary executive,” his signing statements on this point were substantially the same.³¹

Of course, Congress knows this constitutional principle too—and presumably has no desire to violate it. So if a statute is ambiguous, and one possible reading of it would violate this constitutional principle, the President presumes that Congress intended some other, constitutional meaning. In other words, he “construe[s]” such a statute to be “consistent with [his] constitutional authority to supervise the

²⁶ U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

²⁷ See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2500, 2501 (1986) (defining “unitary” as “of, relating to, based upon, or characterized by unity”; defining “unity” as “the quality or state of being or consisting of one”).

²⁸ See 12 Op. Off. Legal Counsel 47, 48 (1988) (“As head of a unitary executive, the President controls all subordinate officers within the executive branch. The Constitution vests in the President of the United States ‘The executive Power,’ which means the whole executive power.”).

²⁹ See *id.* (“[The President] is solely responsible for supervising and directing the activities of his subordinates in carrying out executive functions. Any attempt by Congress to constrain the President’s authority to supervise and direct his subordinates in this respect, violates the Constitution.”). See also Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 607 (2005) (“[T]hree devices are generally viewed as necessary to any theory of the unitary executive: the president’s power to remove subordinate policy-making officials at will, the president’s power to direct the manner in which subordinate officials exercise discretionary executive power, and the president’s power to veto or nullify such officials’ exercises of discretionary executive power.”).

³⁰ See 1 ANNALS OF CONG. 463 (Joseph Gales ed., 1834) (statement of James Madison, June 16, 1789) (“The Constitution affirms, that the Executive power shall be vested in the President. . . . If the Constitution has invested all Executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his Executive authority.”). See also Stephen G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1460 (1997) (“[T]he historical practice over the last 208 years tends to confirm the textual, structural, originalist, and normative arguments in favor of a presidential power to control the execution of the laws.”).

³¹ See, e.g., Statement on Signing the Balanced Budget Act of 1997, 33 WEEKLY COMP. PRES. DOC. 1190 (Aug. 5, 1997) (“I will construe this provision in light of my constitutional duty and authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and to supervise and guide my subordinates, including the review of their proposed communications to the Congress.”) (emphasis added); Statement on Signing the Treasury and General Government Appropriations Act, 1998, 33 WEEKLY COMP. PRES. DOC. 1544 (Oct. 10, 1997) (“Any broader interpretation of the provision . . . would raise substantial constitutional concerns in depriving the President and his department and agency heads of their ability to supervise and control the operations and communications of the executive branch.”) (emphasis added).

unitary executive branch.”³² This is nothing more than a specific application of a well-established canon of statutory interpretation, born of respect for Congress.³³ a statute should, if at all possible, be given a constitutional interpretation.³⁴

SENATOR FEINSTEIN: In your written testimony you also argue that the constitutional interpretations as used by this President in his signing statements are no more than the assertion of a traditional canon of statutory interpretation—“the rule is settled that as between two possible interpretations of a statute, one of which it would be unconstitutional” and the other valid then the Courts and Presidents interpret the law so as to be constitutional.

- **QUESTION:** *However, my concern is when there are conflicting constitutional provisions; such as the President’s Article II authority as Commander in Chief and the Congress’s Article I authority “to declare war... to raise and support armies... to make rules for the government and regulation of the land and naval forces...” etc. In such a case as that, who decides?*

ANSWER: Statutes that implicate two or more constitutional provisions may require more sophisticated analysis than statutes implicating only one, but the principle remains the same. Each branch of government has an independent obligation to interpret the Constitution³⁵—the Congress, when deciding whether to pass a law;³⁶ the President, when deciding whether to veto a bill, how to interpret a law, or whether he must enforce it;³⁷ and the Court in deciding whether to apply a law in a properly presented case or controversy.³⁸ Which branch will get the final word depends on the type of constitutional question presented and on the constitutional answer given.³⁹

³² *E.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, 42 WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006).

³³ *See* *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (“[The canon of constitutional avoidance] is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.”).

³⁴ *See* *Hooper v. California*, 155 U.S. 648, 657 (1895) (“[E]very reasonable construction must be resorted to in order to save a statute from unconstitutionality.”).

³⁵ *See* Unpublished Memorandum of James Madison, *quoted in* Easterbrook, *supra* note 9, at 921 (“[E]ach [department] must in the exercise of its functions be guided by the text of the Constitution according to his own interpretation of it”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 222 (1994) (“[T]he power to interpret the law, including the Constitution, is like any other power too important to vest in a single set of hands. As a matter of first principles of constitutional structure and the political theory underlying that structure, we should be strongly disinclined to find the meta-power to interpret the Constitution . . . centralized in a single institution (like the Supreme Court).”); Rosenkranz, *supra* note 3, at 2088 n.7 (“Each branch has an independent obligation to read the Constitution in the best way it knows how.”).

³⁶ *See, e.g.*, 2 ANNALS OF CONGRESS 1896-1902 (1791) (Madison’s speech in the House of Representatives arguing against the proposed Bank of the United States on constitutional grounds).

³⁷ *See* Easterbrook, *supra* note 9, at 919-20.

³⁸ *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

³⁹ *See* Unpublished Memorandum of James Madison, *quoted in* Easterbrook, *supra* note 9, at 921 (“[I]n the event of irreconcilable [constitutional] interpretations [by the separate branches], the prevalence of one or the other department must depend on the nature of the case, as receiving its final decision from one or the other, and passing from that decision into effect, without involving the functions of any other.”).

- **QUESTION:** *In addition, in many of the signing statements issued by this President his statement does not merely follow what the constitution requires. For instance, many of his signing statements include language such as: the President “shall construe such provisions in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch.” Now the theory of the unitary executive is nowhere in the constitution, nor was it in place when Justice Holmes came up with the canon of statutory interpretation that you referenced. So, I’m wondering under what do you make of this type of a statement?*

ANSWER: Please see my answer to the question above, regarding the phrase “unitary executive.”⁴⁰

- **QUESTION:** *In your written statement you defend the constitutionality of Presidential signing statements in a “coin-flip” situation. Is a Presidential signing statement constitutional if it contravenes the clear language of the statute?*

ANSWER: A presidential signing statement should not “contravene” the clear language of a (constitutional) statute. If a statute is clear, and constitutional, the President must take care that it be faithfully executed.⁴¹ And if it is clear, and unconstitutional, the President should declare it unconstitutional and act accordingly.⁴²

But in a great many cases, the language is not so clear. As I explained in my written statement,⁴³ the canon of constitutional avoidance does *not* merely apply in “coin-flip situations,” in which two readings of a statute are equally plausible. Rather, as the Supreme Court stated more than a century ago, “*every reasonable construction must be resorted to in order to save a statute from unconstitutionality.*”⁴⁴ In other words, the canon is not merely a tie-breaker; it may apply even when other traditional tools of statutory construction seem to point to a different—and unconstitutional—interpretation.⁴⁵ Once again, the

See also infra notes 48-55 and accompanying text (answering Senator Kennedy’s question about which branch gets the final word on constitutional questions).

⁴⁰ *See supra* text accompanying notes 26-34.

⁴¹ *See* U.S. CONST. art. II, § 3.

⁴² *See supra* note 25 and accompanying text.

⁴³ *See Signing Statement Hearing, supra* note 22 (statement of Nicholas Quinn Rosenkranz).

⁴⁴ *Hooper v. California*, 155 U.S. 648, 657 (1895) (emphasis added).

⁴⁵ *But see Signing Statement Hearing, supra* note 22 (statement of Nicholas Quinn Rosenkranz) (“[I]t may be argued that [the canon of constitutional avoidance] has grown too strong.”). *See also* 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

rationale is a deep respect for the constitutional judgment of Congress: the presumption is very strong that Congress does not intend to pass unconstitutional statutes.

SENATOR KENNEDY'S QUESTIONS

SENATOR KENNEDY: Your testimony characterizes presidential signing statements as modest attempts by the President to clarify statutory ambiguities. I'm sure we'd all agree that some interpretation is necessary for enforcement. It's part of the President's responsibility to read ambiguous provisions to avoid constitutional problems.

Unfortunately, your characterization does not accurately reflect the practice that we are concerned about. The President is substituting his own interpretation for the settled interpretations of Congress, the Courts, and other Presidents on major issues.

One obvious example is affirmative action. The Administration believes that affirmative action provisions are unconstitutional under the Equal Protection Clause. Congress disagrees. The Supreme Court disagrees, and has rejected the administration's arguments.

Now, after losing in Congress and losing in the Courts, the President continues to issue signing statements like the one on the "Intelligence Reform and Terrorism Prevention Act", in which he directed the Executive Branch to "construe provisions of the Act that relate to race, ethnicity, or gender in a manner consistent with" the Administration's failed Equal Protection view of these programs. That's not construction of an ambiguous statute. That's the President construing a statute out of existence. The President is hardly respecting the legislature and the courts by construing these statutes this way.

- **QUESTION:** *Is there anything the President can't do as long as he pays lip-service to protecting the Constitution? If the President interprets the Constitution as invalidating provisions that Congress, the courts, and previous presidents all believe are constitutional, is there anything that Congress or the courts can do to stop him? Will the president always have the final word?*

ANSWER: Article II, section 1, of the Constitution provides that "Before [the President-elect] enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"⁴⁶ The Framers of the Constitution emphatically did not believe that this oath was mere "lip-service."⁴⁷ The President is entitled to a strong presumption that his constitutional judgments are made in good faith.

the Constitution And we do not need that."); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 89.

⁴⁶ U.S. CONST. art. II, § 1, cl. 8.

⁴⁷ See generally MATTHEW A. PAULEY, *I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH* 91-118 (1999) (discussing the importance of oaths in early American political theory and practice).

It is true that the President may, on occasion, disagree with the Supreme Court about the meaning of the Constitution.⁴⁸ Likewise, the President may, on occasion, disagree with Congress about the meaning of the Constitution.⁴⁹ Constitutional disagreements among the three branches are a natural and inevitable aspect of our separation of powers.⁵⁰ If such disagreements are in good faith—that is, if all branches are faithful to their constitutional oaths as best they know how—then these disagreements do not portend a constitutional crisis.

Which branch will have the final word on a question of constitutional law depends on the nature and the posture of the question.⁵¹ Sometimes Congress has the final word, as when it declines to pass a statute on constitutional grounds.⁵² Sometimes the President has the final word, as when he vetoes a bill that he believes is unconstitutional.⁵³ Sometimes the Supreme Court has the final word, in a properly presented case or controversy.⁵⁴ And ultimately, the constitutional judgment of all three is subject, directly or indirectly, to the constitutional vision of the People.⁵⁵

⁴⁸ For example, President Lincoln famously disagreed with the Supreme Court’s infamous *Dred Scott* case. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856); Abraham Lincoln, Speech at Springfield (July 17, 1858), in ABRAHAM LINCOLN’S SPEECHES AND LETTERS 1832-1865 at 91-92 (Paul M. Angle ed., rev. ed. 1957). History has, of course, sided with President Lincoln.

⁴⁹ For example, President Johnson disagreed with Congress about the constitutionality of the Tenure of Office Act. The House of Representatives voted to impeach President Johnson over this disagreement. See Articles of Impeachment Against Andrew Johnson, CONG. GLOBE, 40th Cong., 2d Sess. 1616-18 (1868). See also REHNQUIST, *supra* note 17, at 217-18. But the Senate refused to convict. See CONG. GLOBE, 40th Cong., 2d Sess. 2497 (1868) (vote to acquit President Johnson). See also REHNQUIST, *supra* note 17, at 233-35. Once again, history has vindicated the President. See *Myers v. United States*, 272 U.S. 52, 176 (1926) (holding the Tenure of Office Act unconstitutional). See also *supra* note 20 and accompanying text.

⁵⁰ See *supra* note 35.

⁵¹ See *supra* note 39.

⁵² See Easterbrook, *supra* note 9, at 911 (“Any legislator may vote against a bill on constitutional grounds, including grounds that the Supreme Court has rejected.”); *cf. id.* at 912 (“Congress may impeach and remove from office all who violate the Constitution, as Congress understands it.”).

⁵³ For example, Andrew Jackson vetoed an act to create a national bank because he believed it was unconstitutional, despite the Supreme Court’s earlier contrary opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See Andrew Jackson, Veto Message, July 10, 1832, 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1144-54 (Richardson ed., 1897). Likewise, President Jefferson pardoned—on constitutional grounds—those convicted under the Sedition Act of 1798. See Easterbrook, *supra* note 9, at 907.

⁵⁴ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁵⁵ See U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years”); U.S. CONST. art. II, § 1, cl. 2-3 (establishing the system of Electors for choosing the President). See also U.S. CONST. art. V (establishing the procedure for amending the Constitution); U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

I hope that you find these answers responsive and useful. Please let me know if the Committee has any additional questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "N. Q. Rosenkranz", with a stylized flourish at the end.

Nicholas Quinn Rosenkranz