Testimony of

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Mr. Chairman and Members of the Committee, my name is Christopher Yoo, and I am a Professor at Vanderbilt University Law School and a Visiting Professor at the University of Pennsylvania Law School. As the coauthor of a forthcoming book on the history of Presidential power and a scholar who has spent a significant amount of time over the past decade researching the proper role of the President in our system of government, I am grateful for the opportunity to testify today on the use of Presidential signing statements as legislative history.

I would like to make three basic points today: First, I believe that the use of Presidential signing statements as legislative history is inherent in the system of checks and balances embodied in our Constitution. Second, I believe that Presidential statutory interpretation is also inherent in the President's role as Chief Executive. Third, I suggest that recognizing Presidential signing statements as legislative history would better promote the democratic process.

I.
The argument usually advanced against the use of Presidential signing statements as legislative history draws on the principle that legislation is the exclusive province of Congress and that any attempt to inject the Presidency into the legislative process would violate the separation of powers.

I believe that this argument reflects a fundamental misapprehension about the nature of our system of government. Our Framers rejected the "hermetic sealing off of the three branches of Government from one another" envisioned by Montesquieu in favor of a system of checks and balances in which "[t]he President is a participant in the legislative process." As a result, the Constitution crated a "single, finely wrought and exhaustively considered, procedure" for enacting legislation.

For example, the Constitution specifically gives Presidents the authority to convene sessions of Congress as well as the duty to propose legislation that they believe to be "necessary and expedient." The Framers also envisioned that Presidents would use means outside of the formal legislative process to influence the enactment of legislation by lobbying Members of Congress. Presidents have been quite active in proposing and promoting legislation since the beginning of George Washington's first term. To the extent that the President is one of a bill's primary proponents, the reasons usually given for giving greater weight to views of a bill's sponsors and floor managers would also support giving weight to the President's views.

Even more importantly, in order for a bill to become law, the same statutory language must be approved by both Houses of Congress (known as the "bicameralism" requirement), after which point, the language that has been approved by both Houses is enshrined into a document known as an "enrolled bill," which is signed by both the Speaker of the House and the President of the Senate to verify that the language has been approved by his respective legislative body. The enrolled bill then must be submitted to the President (known as the "presentment" requirement). The President may either sign the legislation into law; wait ten days and allow the bill to become law without signing it; veto it; or, if the bill is presented within ten days of the adjournment of Congress, pocket veto by refusing to sign it.

The Constitution thus assigns essential roles in the legislative process to both Congress and the President. Except in the case of a Congressional override of a Presidential veto, a bill cannot become law without the mutual assent of the House of Representatives, the Senate, and the President. The Supreme Court has held repeatedly invalidated attempts to enact legislation that had not been specifically approved by all three of these constitutional actors. For example, in INS v. Chadha, the Supreme Court invalidated the legislative veto because it purported to allow Congress to change the force of a statutory enactment without the presenting the proposed change to the President. Similarly, in Clinton v. City of New York, the Court invalidated the line item veto, which would have allowed the President to revise the language of an enrolled bill without resubmitting the revised language to Congress for approval.
Together these decisions underscore the extent to which the House, the Senate, and the President each represent an essential part of the lawmaking process. Any attempt to enact legislation without giving each of these actors a coequal role would be unconstitutional.
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he following thought experiment illustrates this principle nicely. Suppose that the Senate were to propose legislation that would require courts to give controlling weight to the legislative history generated by the Senate and to ignore the legislative history generated by the House of Representatives. Suppose further that the House of Representatives lacked the political will and political support to oppose the provision, that the President signed it into law, and that the statute eventually ended up being challenged in court. Would such a statute be constitutional? The simple answer is that that the Constitution gives the House of Representatives a role in the lawmaking process that is coequal with the role that it accords to the Senate. As a result, any attempt to privilege the views expressed in the Senate's legislative history over the views expressed in the House's legislative history would represent the same type of denigration of one of the three actors that the Constitution deems essential to the legislative process that led the Court to invalidate the legislative and the line-item vetoes.

The same reasoning would appear to apply to Presidential legislative history. Because (again, in the absence of a veto override) the assent of the President is as essential a part of the legislative process as the assent of the House of Representatives and the Senate, the President's understanding of the meaning of the statutory language is entitled to no less respect than the House's or the Senate's. Any attempt to privilege the views of one legislative actor over another would be unconstitutional.

Some have suggested that the role played by the President is more limited than the role played by the House and the Senate, in that the President lacks the power to change legislation and can only approve or disapprove it. The problem with this argument is that the same can be said about the House and the Senate. Neither House of Congress has the power to alter a statute without the assent of the other House of Congress and the President. Indeed, the situation faced by Presidents when presented with bill language with which they disagree is little different from the situation confronting the Senate when presented with bill language passed by the House with which it disagrees. Although the procedural details differ, in essence both the President and the Senate face the same choice of either approving or rejecting the proffered language.

The similarity of these roles is demonstrated quite clearly by the "enrolled bill doctrine," which regards the enrolled version of the legislation as conclusive evidence of the language passed by the House and the Senate. Any bill that bears the signatures of the Speaker of the House, the President of the Senate, and the President of the United States is thus conclusively presumed to be a valid statute and forwarded to the Archives for inclusion in the Statutes at Large. The mandate on each actor is the same: each must approve the language contained in the enrolled bill for proposed legislation to become a law. In this respect, the President's authority is coequal with that of Congress: no more and no less.

This conclusion is bolstered by the fact that Presidents have used signing statements to expound their understanding of the meaning of statutes since the days of Andrew Jackson. The validity of Presidential legislative history draws further support from the Supreme Court's willingness to rely on Presidential interpretations when construing statutes. As the Court observed as early as 1801, the "principle that the contemporaneous construction of a statute by the executive officers of the government . . . is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so well embedded in our jurisprudence that no authorities need be cited to support it." In a later case, the Court held, after noting that "the Act has been repeatedly construed by the President to confer such authority," that "[s]uch construction by the Chief Executive, being both contemporaneous and consistent, is entitled to great weight."

This is not to say that the principle of separation of powers is now a dead letter. On the contrary, the Constitution was enacted in front of a background understanding of the virtues of keeping legislative, executive, and judicial authority powers from one another. The Constitution did enact some limited deviations from that principle, but in the absence of a clear Constitutional mandate to the contrary, courts should interpret the Constitution in a manner consistent with the preservation of the fundamental principle of the separation of powers. It is thus possible to give effect to the clear mandate of the bicameralism and presentment requirements mandated by the Constitution without opening the door to other derogations from the separation of powers that lack a similarly clear basis in the Constitutional text.

Finally, some critics have offered more pragmatic criticisms of Presidential legislative history. Some have argued that giving weight to Presidential signing statements opens the door to political manipulation, allowing Presidents to substitute their judgment for those of the other actors in the lawmaking process. Others have argued that Presidential signing statements are not generally available to Members of Congress and the public at large.

These critiques strike me as applying with equal force to all forms of legislative history (including that made by the House and the Senate) and not just to legislative history created by the President. Congressional legislative history has also been criticized for being relatively unavailable to legislators and to the public at large. Indeed, in many cases, Members of Congress are unaware of the contents of the Congressionally created legislative history at the time that they vote on legislation. Furthermore, Committee Reports and floor statements may represent nothing more than the views of a subset of the entire legislative body (or perhaps even just their staff) and may well represent politically motivated attempts to influence future statutory interpretation in directions that may or may not be inconsistent with intent of the entire Congress. Indeed, skepticism about all forms of legislative history has fueled a movement in statutory interpretation toward "textualism," which would only give the force of law to sources that have complied with the bicameralism and presentment requirements mandated by the Constitution.

A debate over the merits textualism would exceed the scope of today's hearing. For now, it suffices to acknowledge that the criticisms of unavailability, nonrepresentativeness, and political motivation that have been leveled at Presidential legislative history apply with equal force to Congressional legislative history as well. Thus, to the extent that the critiques of Presidential legislative history have bite, they would appear to invalidate all uses of legislative history and not those just originating from the White House.

II.

The legitimacy of Presidential statutory interpretation is not only implicit in the President's role in the legislative process. It is also inherent in the President's responsibility to oversee the execution of the law. The truism that the legislature creates the laws and the courts simply apply them as written has long obscured the fact that determining how a particular set of legal prescriptions applies to a particular set of facts requires a degree of lawmaking. It is for this reason that Justice Holmes "recognize[d] without hesitation that judges do and must legislate, but they can do so only interstitially."

Executive functions require the application of the law to particular facts in much the same manner as adjudication. Thus, it should come as no surprise that the execution of the law necessarily involves executive agencies in statutory interpretation. Indeed, the Supreme Court's Chevron doctrine requires courts to accord agency interpretations of the statutes they administer a special dignity: if the language of the statute is ambiguous, courts will not exercise their independent judgment about its proper construction and will instead defer to any the agency's interpretation so long as it is reasonable. Even where Chevron does not apply, courts may still defer to agency interpretations based on the agency's specialized experience and information. Although these doctrines are usually stated in terms of deference to individual agencies, the control that the President exerts over the entire Executive Department places Presidents in the position to ensure any interpretation advanced by an agency accords with their own views of the proper construction of the statute. And to the extent that an agency decides not to undertake an enforcement action, the presumptive immunity of that decision from judicial review essentially renders the statutory interpretation that led to the nonenforcement decision dispositive.

This is not to say that executive discretion over statutory interpretation is unfettered. "Where a law is plain and unambiguous, . . . the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." Thus, just as "longstanding precedents . . . permit resort to legislative history only when necessary to interpret ambiguous statutory text," Chevron deference also only applies when the statute is silent or ambiguous. That said, Congress is unlikely to be able to shut off all avenues for Presidential statutory interpretation completely. Although a legislature might try to leave no ambiguity by specifying every contingency in advance, the

inability to anticipate and address every possible contingency makes some degree of interpretation inevitable.

The role as Chief Executive thus puts the President in a position to exert considerable influence over the manner in which statutes are interpreted. It would thus seem to matter little whether the President's views about the proper interpretation of a statute are expressed through a signing statement or through an agency interpretation proffered some time after enactment. Indeed, banning reliance on signing statements and would only redirect the interpretive process toward the agency without significantly reducing the President's ability to influence the ways statutes are interpreted.

III.

A number of normative justifications also support recognizing Presidential signing statements as a form of legislative history. Part of the genius of our Constitution is the decision to design the various institutions of government in a way that reflected different constituencies and different capabilities. The Great Compromise established the House of Representatives to reflect the interests of the large states by apportioning its membership by population. It was also designed to have "an immediate dependence on, and an intimate sympathy with, the people" by virtue of the direct popular election of its membership to two-year terms. The Senate was designed to represent the interests of the small states, being constituted so that each state would have equal representation. It was also designed to check the "mischievous effects of a mutable government" that flowed inevitably from "a rapid succession of new members" by having a higher minimum age requirement and by having its members initially selected by State Legislatures for six-year terms, in the hopes of making the body more mature and deliberative.

The Presidency, for its part, was designed to reflect national interests. The strong single leader was also necessary to create an executive that would be more proactive and energetic than the plural executive established by the Articles of Confederation and would counterbalance a Congress designed to be more reactive and deliberative. The hope was that the resulting combination would "combin[e] the requisite stability and energy in Government, with the inviolable attention due to liberty, and to the Republican Form." Because the Presidency embodies different institutional capabilities and is accountable to a different constituency than either House of Congress, recognizing Presidential signing statements as a form of legislative history promises to allow the process of statutory interpretation to gain the benefit of a different set of sensibilities.

Finally, accepting Presidential signing statements as a form of legislative history can help conserve valuable legislative resources and reinforce the democratic process. Suppose that a statute was susceptible of two interpretations, one of which would render the statute constitutional, while the other might render the statute unconstitutional. It has been accepted since Justice Brandeis's landmark concurrence in Ashwander that courts faced with such a situation should adopt the interpretation that would render the statute constitutional. This rule minimizes the need for courts to render constitutional opinions that would only serve to heighten tensions among the various branches of government. Many Presidential signing statements arise in the same posture and adopt the same approach. When faced with a legislative proposal that might or might not be construed in a constitutional manner, Presidents often issue signing statements noting the potential constitutional problem and stating their intention to construe the statute to avoid it.

A similar situation arises at a somewhat lower level if the President is confronted with an ambiguous bill language, one interpretation of which would be acceptable and the other interpretation of which would prompt a veto. It would seem to me that permitting the President to clarify the ambiguity would be better, both for private parties affected by the legislation and for Congress. If unable to clarify the ambiguity, the President may have no choice but to send the legislation back to Congress despite the fact that both Houses may well concur with the President's interpretation. To the extent that Congress disagrees with the President's interpretation, Presidential legislative history reinforces the democratic process by providing a clearer and more prompt platform from which Congress can offer a clarifying amendment.

Together these arguments suggest that the use of Presidential signing statements as legislative history is both inherent in the system of checks and balances created by our Constitution as well as the President's role as Chief Executive and may well enhance democracy by promoting better interaction among the branches. I would be happy to answer any questions that you might have.