Testimony of

# Professor Nicholas Quinn Rosenkranz

Professor
Georgetown Law Center
June 27, 2006

Senate Judiciary Committee Hearing:
Presidential Signing Statements

June 27, 2006

Prepared Statement of

NICHOLAS QUINN ROSENKRANZ
ASSOCIATE PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER
WASHINGTON, DC

Mr. Chairman, Senator Leahy, Members of the Committee: I thank you for the opportunity to express my views about presidential signing statements.

I should say at the outset that I largely agree with the position put forth by Deputy Assistant Attorney General Michelle Boardman earlier this morning. As Ms. Boardman explained, Presidential signing statements are an appropriate means by which the President fulfills his constitutional duty to "take Care that the Laws be faithfully executed,"1 and this President's signing statements have not differed significantly from those of his recent predecessors.

Rather than reiterate Ms. Boardman's trenchant analysis, I will use my time in an attempt to separate out the various structural constitutional issues raised by signing statements. As you know, there has been significant confusion on this topic in the popular press; I hope that by disaggregating the various issues and discussing them dispassionately, we may at a minimum dispel some of the more hysterical assertions that have found their way into print.2

In addition, the Committee may be interested in possible legislative responses to the President's use of signing statements. While no proposals have, as yet, been introduced in the Senate, two Resolutions3 and a bill4 have been introduced in the House. Therefore, I will also address the constitutionality and the structural desirability of such measures.

## I. Executive Interpretation

The most important and most common function of presidential signing statements is to announce--to the Executive Branch and to the public--the President's interpretation of the law.5 The propriety of such an announcement should be obvious. There is an oft-repeated canard that the President has no business interpreting federal statutes--his job is to execute the laws, and interpretation should be left to the courts.6 A moment's reflection reveals that this view is unsound. It is simply impossible, as a matter of logic, to execute a law without determining what it means.

### A. Informing the Executive Branch of the President's Interpretation

Imagine, for example, a statute that imposes a tariff on the importation of "vegetables." Comes an eighteen-wheeler full of tomatoes. Is a tomato a vegetable? At the end of the day, maybe the Supreme Court will decide,7 but long

before then, the executive branch is put to a choice: stop the truck at the border or let it through. There is no ducking the question; either choice implies an interpretation of the statute, an interpretation of the word "vegetable." And the President cannot simply flip a coin. He has a constitutional duty to "take Care that the Laws be faithfully executed,"8 and this faithfulness inherently and inevitably includes a good faith effort to determine what "the Laws" mean. In short, as the Supreme Court has explained, "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."9

Nor is the President obliged to leave the choice to individual Border Patrol agents. The Supreme Court has rightly said that the President can and should "supervise and guide [executive officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."10 And as Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel under President Clinton, has explained, this is a "generally uncontroversial . . . function of presidential signing statements"--"to guide and direct executive officials in interpreting or administering a statute."11

B. Informing the Public of the President's Interpretation

Of course, the President need not make his interpretations public; he could quietly instruct the U.S. Border Patrol that a tomato is a vegetable and have done with it. But there are many good reasons why, in most circumstances, a public statement of interpretation is desirable. First, if the President's interpretation is public, then those who believe that his interpretation is erroneous can better and more quickly structure a challenge in court. Second, a public statement of interpretation reduces legal uncertainty. If people know the President's interpretation, they are better able to organize their affairs accordingly. Third, and perhaps most important, a public statement informs Congress of the President's interpretation, and if Congress disagrees, it may pass a bill clarifying the matter.

In short, in the United States, we have a strong preference for sunlight in government. Once it is clear that interpreting the law is essential to executing it, there can be no independent objection to the President making his interpretations public. This is the primary function of presidential signing statements, and President Clinton's Office of Legal Counsel was quite right to call this function "uncontroversial."12

II. The Canon of Constitutional Avoidance

The President interprets statutes in much the same way that courts do, with the same panoply of tools and strategies. His lawyers carefully study the text and structure of Acts of Congress,13 aided perhaps by dictionaries, linguistic treatises, and other tools of statutory interpretation. In addition, just like courts, they also apply well-established maxims of statutory interpretation, called canons.14

One canon in particular is of interest today. As Justice Holmes explained in 1927, "[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."15 This is known as the canon of constitutional avoidance,16 and it "is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."17

This is the canon that the President is applying when he says, in signing statements, that he will construe a particular provision to be consistent with a particular constitutional command. Many of the presidential signing statements that have most exercised the press have taken this form,18 so it is crucial to understand what these statements do and do not say. These statements emphatically do not "reserve the right to disobey"19 the law. They do not "amount to partial vetoes."20 They do not "declare[ the President's] intention not to enforce anything he dislikes."21 And they do not declare that the statutes enacted by Congress are unconstitutional.

In fact, they declare exactly the opposite. As President Clinton's Office of Legal Counsel has explained, these sorts of signing statements are "analogous to the Supreme Court's practice of construing statutes, if possible, to avoid holding them unconstitutional . . . ."22 What these signing statements say, in effect, is that if an ambiguity appears on the face of the statute or becomes apparent in the course of execution, and if one possible meaning of the statute would render it unconstitutional, then the President will presume that Congress intended the other, constitutional meaning--and he will faithfully enforce the statute so understood.

Again, this amounts to nothing more than a straightforward application of a canon of statutory construction that was already well established when Justice Holmes elaborated it in 1927,23 a canon that finds its entire rationale in "a just respect for the legislature"24 and the faithfulness of Representatives and Senators to their constitutional oaths.25 If a statute is ambiguous, we--the President, the Court, the People--presume that Congress intended it to be constitutional.26

Now, it may be argued that this canon has grown too strong. After all, it is not used merely as a tie-breaker for ambiguous statutes. Even if dictionaries or other canons may point in the opposite direction, the canon of constitutional avoidance sometimes wins the day. As the Supreme Court explained in 1895, "every reasonable construction must be resorted to in order to save a statute from unconstitutionality,"27 and reasonable people may differ on what constitutes a reasonable construction.28 Moreover, the Supreme Court has held that "[a] statute must be construed, if possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."29 This aspect of the doctrine is of more recent vintage30 and has been subject to quite compelling critique.31

For present purposes, though, it suffices to note that the President's application of this canon has been consistent with the interpretive doctrine espoused by the Court. If there is any plausible interpretation of a statute that would avoid a serious constitutional question, the President--like the Court--gives Congress the benefit of the doubt and adopts the constitutional interpretation.

III. Presidential Signing Statements in Court

An entirely separate issue is whether presidential signing statements are relevant to judicial interpretation of statutes. Courts sometimes use legislative history to resolve ambiguities in statutes32 (though this practice has been subject to withering criticism).33 The issue here is whether courts can and should put presidential signing statements to analogous use.

There are strong arguments on both sides of this question. On the one hand, one might say that judicial interpretation of statutes should seek to discover legislative intent, and the President is not a legislator. The President's power over bills is the power to "approve"34 or disapprove legislation; it is a simple, binary, up-or-down decision, subsequent to, and distinct from, the legislative process. Indeed, the Constitution makes clear that the veto power is not legislative power. It provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"35 not a Congress and a President; and it is "[t]he Congress," not the Congress plus the President, who "shall have Power . . . To make all Laws."36

On the other hand, one might say that this is an unduly formalistic view of the legislative process. In reality, the administration often drafts legislation, and even when it does not, the entire legislative machinery operates in the shadow of the President's veto power. On this view, the President's understanding of a bill as reflected in a signing statement is at least as important as the understanding of Congress reflected in legislative history. Moreover, any effort to glean the intent of Congress from legislative history is arguably quixotic: first, it is difficult to know how many Representatives and Senators agreed with any given portion of legislative history;37 and second, it is arguably incoherent to attempt to aggregate those individual intentions into a collective intent.38 By contrast, the President is just a single person, so his interpretive statement poses none of those problems. For this reason, the argument runs, presidential signing statements are more valuable because they are inherently reliable as an indication of presidential intent, whereas legislative history is less valuable because it is inherently unreliable as an indication of congressional intent.

My own view is the same as Justice Scalia's. I believe that the project of statutory interpretation is to discern "the original meaning of the text, not what the original draftsmen intended."39 And I believe that presidential signing statements--like legislative history--are of very little use in that project. In my view, absent instruction on this question from Congress,40 courts should rely on both equally--for the strength of their reasoning and nothing more.

IV. Legislative Responses

It follows from the analysis above that a general legislative response to the President's use of signing statements is probably unnecessary. Nevertheless, because at least three legislative proposals on this topic are pending in the House of Representatives, I shall address the balance of my testimony to the constitutionality and the wisdom of such proposals.

A. Requiring Congressional Notification

A Resolution that has been introduced in the House would provide:

If the President makes a determination not to carry out any duly enacted provision of a law (as indicated in a statement made by the President at the time of the enactment of the law or otherwise), not later than 10 days after the enactment of the law, the President shall submit a report to Congress informing Congress of the determination and including the President's reasons for making the determination, except that to the extent that the determination is based upon classified material, the President shall submit the report only to the congressional intelligence committees.41

Under this Resolution, legislation introduced in response to such a report would receive expedited consideration by the House of Representatives,42 and any Representative could require the General Counsel of the House to prepare "a report describing any legal action which may be brought to challenge the refusal by the President to carry out any duly enacted provision of the law."43

This Resolution is sensible. On very rare occasions, the President may determine that a statute is thoroughly unconstitutional, and that no saving construction is possible. Text, history, structure, and longstanding executive practice all demonstrate that in such circumstances, "the Constitution provides [the President] with the authority to decline to enforce" the law.44 This is, however, one of the President's most momentous powers, and when he exercises it, basic separation-of-powers principles suggest that the other branches should have notice and an opportunity to respond.45 The Resolution provides for notice to Congress, a fast-track legislative response, and the possible prospect of judicial review. All of this is commendable.

However, it must be noted that this Resolution would apply to only a tiny fraction of the President's "constitutional signing statements." As explained above, the canon of constitutional avoidance requires the President to construe statutes, if at all possible, to be consistent with the constitution. In the vast majority of cases--and in all the most controversial signing statements46 --the President implicitly declares his intention to apply the canon, choose the constitutional interpretation of the statute, and then faithfully execute the statute so interpreted. In none of these cases does the signing statement constitute "a determination not to carry out any duly enacted provision of a law,"47 and so in none of these cases would the House Resolution require him to file a report.

This is probably as it should be. In the vast run of cases in which a presidential signing statement is merely interpreting an Act of Congress, it is appropriate that no report should be required. Only in the very rare case in which the President expressly declines to enforce an Act of Congress should a report be necessary. In this sense, the House Resolution strikes the correct balance, and it may well be a worthy legislative initiative.

B. Limiting the Intra-Executive Branch Force of Signing Statements

Another bill that has been introduced in the House is far more problematic. It provides: "For purposes of construing or applying any Act enacted by the Congress, a Federal entity shall not take into consideration any statement made by the President contemporaneously with the President's signing of the bill or joint resolution that becomes such Act."48 It follows from the discussion above49 that this provision is almost certainly unconstitutional.

The term "Federal entity" includes executive officers and agencies, and the provision purports to forbid them from taking into account the President's signing statements when interpreting federal law. This the resolution cannot do, for the simple reason that it is the President's constitutional duty to "take Care that the Laws be faithfully executed."50 As the Supreme Court has explained, "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law,"51 and the President "may properly supervise and guide [executive officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the

laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."52 The House Resolution would run afoul of this principle, by closing the ears of the Executive Branch to the President's contemporaneous53 interpretation of the law. For that reason alone, it would be unconstitutional.

C. Limiting Funds for Signing Statements

A different section of the same bill provides: "None of the funds made available to the Executive Office of the President, or to any Executive agency . . . from any source may be used to produce, publish, or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution presented for signing by the President."54 This provision, too, is probably unconstitutional.

As discussed above, interpreting federal statutes--and ensuring uniform interpretation throughout the executive branch--is the very core of the President's duty to "take Care that the Laws be faithfully executed."55 And presidential signing statements are an essential tool in the performance of that duty. If Congress cannot require Executive officers to close their ears to presidential signing statements, then a fortiori it cannot forbid the President from making such statements in the first place.

Admittedly, the House Resolution does not purport to forbid signing statements simpliciter; it forbids only that any funds be used to produce, publish or disseminate them. And of course Congress does possess broad power over appropriations.56 But for Congress to use its power of the purse to impede a core executive function would raise serious constitutional concerns. If Congress lacks the power to forbid the President from issuing signing statements altogether (as it almost certainly does), then it arguably lacks the power to achieve the same result indirectly with a cunningly crafted spending restriction.57

At any rate, even if Congress concludes that it does have power to limit appropriations in this manner, the separation-of-powers implications are sufficiently serious that it would probably be wise to avoid a constitutional confrontation on this point unless absolutely necessary. This President's use of signing statements does not justify such a constitutionally contentious response.

D. Limiting the Judicial Use of Presidential Signing Statements

Once again, the House resolution provides: "For purposes of construing or applying any Act enacted by the Congress, a Federal entity shall not take into consideration any statement made by the President contemporaneously with the President's signing of the bill or joint resolution that becomes such Act."58 As discussed above, this provision is almost certainly unconstitutional to the extent that it applies to executive agencies and officers.59 But a federal court is also a "Federal entity," and to the extent that the provision applies to judicial interpretation, different constitutional issues arise. Can Congress forbid courts from using presidential signing statements as an aid in the interpretation of federal statutes?

This is a rich and difficult question, and to answer it, one must begin with the more general question: Can Congress tell courts what tools and methods to use when interpreting federal statutes? I considered this question at length in the Harvard Law Review four years ago,60 and I concluded that the answer is generally yes: Congress does have power to tell courts what methods to use when interpreting federal statutes. As I explained, "whatever judicial power exists over interpretive methodology must be common lawmaking power, which may be trumped by Congress."61 As a general matter, then, Congress has power to promulgate general rules of statutory interpretation, which would be binding on state and federal courts in the interpretation of federal law.

This is not the end of the analysis, however. Even if Congress generally has power over the interpretive methodology employed by courts, "[p]articular interpretive statutes . . . may raise more potent separation-of-powers objections."62 In other words, there is no general objection that mandating interpretive rules invades the judicial power, but the question remains whether this specific interpretive rule--courts shall not rely on presidential signing statements in interpreting acts of Congress--would impinge on the executive power.

I conclude that it probably would not. As explained above,63 the President's executive power inherently includes the power to interpret federal law in the first instance.64 Moreover, the President also has power to give interpretive

instructions to executive officers.65 But it hardly follows that he has inherent and inalienable power to give such instructions to the courts. To be sure, courts often defer to executive agencies in their interpretations of federal statutes,66 and the President himself may be entitled to at least as much deference,67 but this is so only as long as Congress wishes to acquiesce in this rule.68 If Congress wished to forbid judicial deference to agency interpretations--or even presidential interpretations--of federal statutes, it could probably do so. A fortiori, Congress could forbid judicial reliance on one manifestation of presidential interpretation--the presidential signing statement.

The only question remaining is whether such a measure would be wise. My tentative answer is that it might be, but only as part of a comprehensive legislative scheme. I have argued at length that Congress has constitutional power69 over the tools and methods that courts use to interpret federal statutes, and that it should exercise this power. But a crucial aspect of my thesis is that Congress should approach this project comprehensively. As I explained:

The . . . most obvious advantage of a statutory interpretive regime is its potential for internal coherence. The Supreme Court is handicapped across this dimension by the Article III jurisdictional requirement of a case or controversy. Because the Court can only develop canons one by one, common law canons will be devised ad hoc, and will inevitably fail to form a coherent set. [By contrast,] [c]ongressionally adopted canons could form a true "regime"--a set of background interpretive principles with internal logical coherence.70

In short, I applaud Congress's interest in a federal rule of statutory interpretation addressing presidential signing statements, but I think such a rule should ideally be adopted as part of a coherent and comprehensive code.

Conclusion

In conclusion, the recent brouhaha over presidential signing statements is largely unwarranted. Presidential signing statements are an appropriate means by which the President fulfills his constitutional duty to "take Care that the Laws be faithfully executed."71 And even the most controversial ones are, in truth, nothing more than the application of the well-settled canon of constitutional avoidance--a canon which, as Chief Justice John Marshall explained, was born of "a just respect for the legislature."72

I do not believe that any legislative response to the President's use of signing statements is necessarily called for. But if one is thought necessary, I would recommend something akin to H.J. Res. 89, which would simply require the President to notify Congress of any decision to decline to enforce a statute. In addition, I applaud Congress's interest in the proper judicial use of presidential signing statements in statutory interpretation, and I hope that this interest will blossom into a more comprehensive and general study of federal rules of statutory interpretation.

---

1- U.S. CONST. Art. II, § 3.
2- For example, the Boston Globe has repeatedly and erroneously claimed that the President "has used signing statements to reserve the right to disobey more than 750 laws," Charlie Savage, Hearing Set on Signing Statements, THE BOSTON GLOBE, June 22, 2006, at A7.
3- H.J. Res. 87, 109th Cong. (2006); H.J. Res. 89, 109th Cong. (2006)
4- H.R. 5486, 109th Cong. (2006).
5- Virtually every paragraph of every signing statement by this President uses the word "construe," emphasizing that the purpose of the statement is to interpret the statute. See, e.g., Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425 (March 9, 2006) ("The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch . . . in a manner consistent with the President's constitutional authority to . . . withhold information the disclosure of which would impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. . . . The executive branch shall construe section 756(e)(2) of H.R. 3199 . . . in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and expedient.") (emphasis added); Remarks on Signing the Deficit Reduction Act of 2005, 42 WEEKLY COMP. PRES.

DOC. 215 (February 8, 2006) ("The executive branch shall construe section 1936(d)(2) of the Social Security Act . . ., which purports to make consultation with a legislative agent a precondition to execution of the law, to call for but not mandate such consultation, as is consistent with the Constitution's provisions concerning the separate powers of the Congress to legislate and the President to execute the laws.") (emphasis added); Statement on Signing the Trafficking Victims Protection Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 39 (January 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).

6- See, e.g., Editorial, Veto? Who Needs a Veto?, N.Y. TIMES, May 5, 2006, at A22 ("[No former presidents] have used [signing statements] so clearly to make the president the interpreter of a law's intent, instead of Congress, and the arbiter of constitutionality, instead of the courts."); Bob Egelko, How Bush sidesteps intent of Congress, S.F. CHRON., May 7, 2006, at A1 ("The civics-book answer is clear: Congress passes the laws, the president carries them out, and the courts decide whether they're constitutional.").

7- See Nix v. Hedden, 149 U.S. 304 (1893) (holding that the tomato, though botanically a fruit, is commonly used as a vegetable and therefore should be treated as such for tax purposes).

8- U.S. CONST. Art. II, § 3.

9- Bowsher v. Synar, 478 U.S. 714, 733 (1986).

10- Myers v. United States, 272 U.S. 52, 135 (1926).

11- The Legal Significance of Presidential Signing Statements, 17 U.S. Op. Off. Legal Counsel 131, 132 (1993).

12- Id.

13- See, e.g., Statement on Signing the Veterans Health Programs Improvement Act of 2004, 40 Weekly Comp. Pres. Doc. 2886 (November 30, 2004) ("The executive branch shall construe the repeal, in section 1561(c) of the Act, of section 127 of the Treasury and General Government Appropriations Act, 2003, as contained in the Consolidated Appropriations Act, 2003 (Public Law 108-7) as repealing the amendments that were made to title 19 of the United States Code by section 127. Such a construction of section 1561(c) is consistent with the text and structure of amendments to title 19 made by section 1561.") (emphasis added); 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 (December 30, 2005) ("[N]oting that the text and structure of Title X do not create a private right of action to enforce Title X, the executive branch shall construe Title X not to create a private right of action.") (emphasis added); Statement on Signing the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 41 WEEKLY COMP. PRES. DOC. 1273 (August 10, 2005) ("The executive branch shall construe section 5305(g)(3) of the Act to be a statute to which section 552(b)(3)(A) of title 5, United States Code, refers, as the text and structure of section 5305(g) indicate.") (emphasis added). See also Alexander v. Sandoval, 532 U.S. 275, 289 n.7 ("[O]ur methodology is not novel, but well established in earlier decisions . . ., which explain that the interpretive inquiry begins with the text and structure of the statute . . . .") (emphasis added).

14- Compare Statement on Signing Communications Legislation, 40 WEEKLY COMP. PRES. DOC. 3013 (December 23, 2004) (applying "the principle of statutory construction of giving effect to each of two statutes addressing the same subject whenever they can co-exist") with Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

15- Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.).

16- See, e.g., Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 730 (9th Cir. 2003).

17- Rust v. Sullivan, 500 U.S. 173, 190-191 (1991). See also Ex parte Randolph, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).

18- See, e.g., Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425 (March 9, 2006) ("The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch . . . in a manner consistent with the President's constitutional authority to . . . withhold information the disclosure of which would impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. . . . The executive branch shall construe section 756(e)(2) of H.R. 3199 . . . in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and expedient.") (emphasis added); 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 (December 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 and consistent with

the constitutional limitations on the judicial power . . . .") (emphasis added).
19- Charlie Savage, Bush Challenges Hundreds of Laws, THE BOSTON GLOBE, April 30, 2006, at A1.
20- Bob Egelko, How Bush Sidesteps the Intent of Congress, S.F. CHRONICLE, May 7, 2006, at A1.
21- Editorial, Veto? Who Needs a Veto?, N.Y. TIMES, May 5, 2006, at A22.
22- The Legal Significance of Presidential Signing Statements, 17 U.S. Op. Off. Legal Counsel 131, 133 (1993) (emphasis added).
23- See Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.).
24- Ex parte Randolph, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).
25- See U.S. Const. Art. VI ("The Senators and Representatives before mentioned ... shall be bound by Oath or Affirmation, to support this Constitution."); 5 U.S.C.A. § 3331 (West 1966) (establishing the oath for all elected and appointed officials: "I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."); United States v. Verdugo-Urquidez, 494 U.S. 259, 274 (1990) ("The Members of the ... Legislative Branch[] are sworn to uphold the Constitution, and they presumably desire to follow its commands.").
26- See Rust v. Sullivan, 500 U.S. 173, 190-191 (1991).
27- Hooper v. California, 155 U.S. 648, 657 (1895) (emphasis added).
28- Compare United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994) ("The statute's use of 'knowingly' could be read only to modify 'uses, transfers, acquires, alters, or possesses' or it could be read also to modify 'in any manner not authorized by [the statute].'), with id. at 81 (Scalia, J., dissenting) ("If one were to rack his brains for a way to express the thought that the knowledge requirement in subsection (a)(1) applied only to the transportation or shipment . . . it would be impossible to construct a sentence structure that more clearly conveys that thought, and that thought alone.").
29- United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (emphasis added).
30- See Clark v. Martinez, 543 U.S. 371, 391 (2005) (Thomas, J., dissenting); William K. Kelley, Avoiding Constitutional Questions as a Three-Branch Problem, 86 CORNELL L. REV. 831, 840-42 (2001).
31- See 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 the Constitution . . . . And we do not need that."); Frederick Schauer, Ashwander Revisited, 1995 SUP. CT. REV. 71, 89.
32- See, e.g., Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) ("As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it."); see also Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845 (1992); Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195 (1983).
33- See, e.g., Conroy v. Aniskoff, 507 U.S. 511, 518-28 (1993) (Scalia, J., concurring); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J., concurring in the judgment) ("[W]e should try to give the text its fair meaning, whatever various committees might have had to say--thereby affirming the proposition that we are a Government of laws, not of committee reports."); ANTONIN SCALIA, A MATTER OF INTERPRETATION, 29-37 (Princeton University Press 1997); Frank. H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Alex Kozinski, Should Reading Legislative History Be an Impeachable Offense?, 31 SUFFOLK U. L. REV. 807 (1998); Kenneth W. Starr, Observations About the Use of Legislative History, 1987 DUKE L.J. 371 (1987).
34- U.S. CONST. art. I, § 7.
35- U.S. CONST. art. I, § 1.
36- U.S. CONST. art. I, § 8. See also id. art IV, § 3 ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."); id. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); id. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."; id. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); id. amend. XIX ("Congress shall have power to enforce this article by appropriate legislation."); id. amend. XX, § 3 ("Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified . . . ."); id. amend. XX, § 4 ("The Congress may by law provide for the case of the death of any of the persons from whom the House of

Representatives may choose a President whenever the right of choice shall have devolved upon them . . . ."); id. amend. XXIII, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); id. amend. XXIV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); id. amend. XXV, § 5 ("or of such other body as Congress may by law provide . . ."); id. amend. XXVI, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."). Cf. id. amend. I ("Congress shall make no law . . .").

37- Cf. Conroy v. Aniskoff, 507 U.S. 511, 519 (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.").

38- Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular "motive" of a collective legislative body . . . ."); Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.").

39- ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (Princeton University Press 1997).

40- See Part IV-D, infra; see also Nicholas Quinn Rosenkranz, Federal Rules of Statutory Interpretation, 115 HARV. L. REV. 2085, 2147-51 (2002).

41- H.J. Res 89, 109th Cong. § 1(a). This Resolution is quite similar to H.J. Res. 87, 109th Cong. (2006), which has also been introduced in the House, but H.J. Res. 89 is broader in that it requires the President to notify Congress any time he determines that he will not enforce a provision of a law, while H.J. Res. 87 requires notification only when such determination is made at the time of enactment of the law. Oddly, H.J. Res. 89, like H.J. Res. 87, requires any report to be filed within 10 days of enactment of the law--even though under H.J. Res. 89 the determination that triggers the requirement could theoretically occur much later.

42- H.J. Res. 89. See also H.J. Res. 87.

43- H.J. Res. 89. See also H.J. Res. 87.

44- The Legal Significance of Presidential Signing Statements, 17 U.S. Op. Off. Legal Counsel 131, 133 (1993).

45- Of course, one could argue that the signing statement itself serves precisely this function.

46- See, e.g., Remarks on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 423 (March 9, 2006); 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 (December 30, 2005).

47- H.J. Res. 89; see also H.J. Res. 87.

48- H.R. 5486, 109th Cong. § 2 (2006).

49- See supra, Part I.

50- U.S. CONST. Art. II, § 3.

51- Bowsher v. Synar, 478 U.S. 714, 733 (1986).

52- Myers v. United States, 272 U.S. 52, 135 (1926).

53- The constitutional problem could be mitigated, perhaps, by reading the word "contemporaneously" very narrowly, to mean something like "at the same instant," but only at the cost of rendering the statute trivial.

54- H.R. 5486, § 1.

55- U.S. CONST. Art. II, § 3.

56- See U.S. Const. Art. I, § 9 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

57- While the Court has only alluded to this point, see United States v. Lovett, 328 U.S. 303, 313 (1946); South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. . . . [W]e have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds."), the Executive Branch has taken this position clearly and consistently for more than 70 years, see Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill, 2001 WL 34907462 (O.L.C.) ("[I]t is unconstitutional for Congress to place conditions, whether substantive or procedural, on the President's exercise of his constitutional authority."); 20 U.S. Op. Off. Legal Counsel 232 (1996) ("While Congress has broad authority to grant, limit, or withhold appropriations, that power may not be used . . . to circumvent the steps required by the Constitution for Congress to enact a law or regulation binding on persons outside the legislative branch."); 20 U.S. Op. Off. Legal Counsel 189 (1996) ("The past practice of the Executive branch demonstrates its refusal to comply with unconstitutional spending conditions that trench on core Executive powers."); 19 U.S. Op. Off. Legal Counsel 123 (1995) ("[I]t does not matter in this instance that Congress has sought to achieve its objectives through the exercise of its spending power, because the condition it would impose on obligating appropriations is unconstitutional."); 16 U.S. Op. Off. Legal Counsel 18, 28 (1992) ("That section 503 was enacted as a condition on the appropriation of money for the State Department does not save it from constitutional infirmity."); 14 U.S. Op. Off. Legal Counsel 37, 41 n.3 (1990) ("Nor can section 102(c)(2) be viewed as a

legitimate exercise of congressional power over the appropriation of public funds. Congress may not use that power to attach conditions to executive branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs."); 13 U.S. Op. Off. Legal Counsel 258 (1989) ("[T]he fact that Congress appropriates money for the army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces. Nor does it follow from Congress' legislative establishment of executive branch departments and its appropriation of money to pay the salaries of federal officials that Congress can constitutionally condition creation of a department or the funding of an officer's salary on being allowed to appoint the officer."); 4B U.S. Op. Off. Legal Counsel 731, 733 (1980) ("It is well established that Congress cannot use its power to appropriate money to circumvent general constitutional limitations on congressional power."); 41 U.S. Op. Att'y Gen. 507, 508 (1960) ("Congress cannot by direct action compel the President to furnish to it information the disclosure of which he considers contrary to the national interest. It cannot achieve this result indirectly by placing a condition upon the expenditure of appropriated funds."); 37 U.S. Op. Att'y Gen. 56, 61 (1933) ("Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution.").

58- H.R. 5486, § 2.

59- See Part IIIA, supra.

60- See Rosenkranz, supra note 40.

61- Id. at 2103. But cf. Lockhart v. United States, 126 S. Ct. 699, 702-04 (2005) (Scalia, J., concurring.).

62- See Rosenkranz, supra note 40, at 2103 (2002).

63- See supra, Part I.

64- Bowsher v. Synar, 478 U.S. 714, 733 (1986).

65- Myers v. United States, 272 U.S. 52, 135 (1926).

66- See Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

67- See Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2372-80 (2001).

68- See Rosenkranz, supra note 40, at 2129 ("Clearly, Congress could pass a statute directing that courts give no deference to an agency's interpretation of law."); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 515-16 (1989) ("The separation-of-powers justification [for the Chevron doctrine] can be rejected even more painlessly by asking one simple question: If, in the statute at issue in Chevron, Congress had specified that in all suits involving interpretation or application of the Clean Air Act the courts were to give no deference to the agency's views, but were to determine the issue de novo, would the Supreme Court nonetheless have acquiesced in the agency's views? I think the answer is clearly no, which means that it is not any constitutional impediment to 'policy-making' that explains Chevron."); Kagan, supra note 67, at 2379 (calling Chevron a "default rule of deference").

69- Rosenkranz, supra note 40.

70- See id. at 2143.

71- U.S. CONST. Art. II, § 3.

72- Ex parte Randolph, 20 F.Cas. 242, 254 (C.C.D.Va. 1883) (No. 11.558) (Marshall, C.J.).