Testimony of Charles J. Ogletree, Jr.

Before the United States House Committee on the Judiciary
Representative John Conyers, Chairman

Presidential Signing Statements

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*For identification purposes only

Dear Congressman John Conyers and members of the

United States House Committee on the Judiciary:

My name is Charles J. Ogletree, Jr., and I am honored to have this opportunity to discuss the topic of presidential signing statements. I serve as the Jesse Climenko Professor of Law, and Executive Director of the Charles Hamilton Houston Institute of Race and Justice, at Harvard Law School. I have been a member of the Harvard Law School faculty for over twenty years. Additionally, I have had the honor and privilege of handling cases here in the District of Columbia during the early stages of my career, having represented clients in adult and juvenile proceedings in the local superior court and federal courts, as well as the courts of appeals. I have also had the honor of arguing cases before various state supreme courts and circuit courts, as well as the United States Supreme Court. At Harvard Law School, I teach the subjects of Criminal Law and Procedure, Professional Responsibility, and a host of clinical courses involving trial practice. Moreover, I have had the honor of providing testimony, writing articles and books, and addressing matters of constitutional significance on a variety of occasions.[1]

I am also honored to be a member of the American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, a committee that was convened last year by Michael Greco, immediate past President of the American Bar Association. The ABA Task Force, a bipartisan group of lawyers and jurists, released a report in July that was adopted by the American Bar Association at its annual meeting in August 2006. ABA President Karen Mathis has already discussed the Report and its approval .

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

[1] A copy of my abbreviated biographical statement is attached.

Presidential signing statements reflect an important and necessary line of authority given to the executive branch to clarify and address matters of constitutional significance. They can promote transparency by signaling how the president plans to enforce or interpret the law. They can also allow the president to more clearly define his perspective or understanding of the law's parameters.[2] Official reports indicate that many former presidents have used signing statements in a wide range of legislative areas, and have generally done so without much objection or controversy.

One of the reasons that it is important to examine this topic, however, is the unusually high number of signing statements that have been issued by President George W. Bush during his tenure in office. To be sure, the use of signing statements has been a staple of many presidents and reflects the Executive exercise of authority across ideological lines. At the same time there is a discernable pattern being employed by the current Administration and this pattern has resulted in unusual, and bipartisan concern. While it is true that former Presidents Reagan, Bush and Clinton relied upon presidential signing statements during the course of the past 25 years, the nature and extent of their use has been demonstrably greater under President Bush..

At the same time, President Bush has declined to use the traditional method employed when the president believes legislation is unconstitutional, the veto. According to several estimates, President Ronald Reagan vetoed 78 bills, including 39 actual vetoes and another 39 pocket vetoes. President George H. W. Bush vetoed 44 bills, with 15 of them being pocket vetoes. During his two terms, President Bill Clinton vetoed 37 bills, including one pocket veto. In contrast, during his six years in office, President George W. Bush, to date, has only vetoed a single bill. The unprecedented juxtaposition of President Bush's failure to exercise a single veto,

[2] For a thorough discussion of the history of presidential signing statements, see Phillip J. Cooper's *By Order of The President: The Use and Abuse of Executive Direct Action* (2002).

yet issuing a substantial number of signing statements, has created considerable concern, and explains the broad and bipartisan response to his actions.

One of the fundamental questions posed by these actions is whether the president is using the signing statement in order to expand the authority of the executive branch at the expense of the legislative branch. In other words, is he using the signing statement as a way to declare a law non-binding, without having to face the public scrutiny that comes with a veto, or the possibility of a legislative override? In order to get a clearer sense of whether this is the case, it is necessary to examine very carefully how the signing statements have been used. On the other hand, there are numerous signing statements, particularly in the past few years, which raise serious questions about the exercise of executive authority, and serious issues of constitutional magnitude.

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

It is hoped that the House Judiciary Committee will closely examine these matters and examine these issues carefully. Among the matters to be considered are the following:

A signing statement that suggests that all or part of a law is unconstitutional raises serious legal considerations. It has been exercised more recently in lieu of an actual veto. While the President has considerable powers of constitutional interpretation, those powers must be balanced with the authority granted to other branches of government, including the legislative and judicial branches. When the President refuses to enforce a law on constitutional grounds

without interacting with the other branches of government, it is not only bad public policy, but also creates a unilateral and unchecked exercise of authority in one branch of government without the interaction and consideration of the others.

One scholar who has written in this area has noted that President Bush's attachment of a signing statement to the 2006 Defense Appropriations Bill "reads like a unilateral alteration of the legislative bargain." The signing statement announced that the executive branch would construe provisions 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," and thus read an "implicit exception" in the McCain Amendment's prohibition on "cruel, inhuman or degrading treatment or punishnment." Trevor Morrison, an assistant professor of law at Cornell, observed that the Administration had understood the aim of the Amendment and had threatened to veto it, but had changed course and decided to support the Amendment, "partly because there were clearly enough votes for Congress to overcome a veto, and partly because the Administration had obtained a number of concessions on related matters, including a set of provisions severely restricting the federal courts' jurisdiction to review the detention of enemy combatants at Guantanamo Bay."

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

One example of the potential dangers in the use of Presidential signing statements is the recent passage of the "Henry Hyde United States-India Peaceful Atomic Energy Cooperation Act. According to reports published in Indian newspapers, the Indian government considers the signing statement that accompanied the law, which announced that the Administration would treat certain sections law as merely advisory, as an indication of how the United States plans to interpret those sections. Thus, even if signing statements are not enforceable, this raises the concern that foreign countries might have expectations that we will interpret laws as signing statements announces. Additionally, there is a real concern that a country like India would worry that a future president could choose to interpret the law differently.

There are important lessons to be learned from these efforts and, at the same time a need for transparency, in the relationship between the complimentary branches of government. One of the critical issues that this committee must consider is whether and to what extent the President's exercise of signing statements is influenced by the war on terrorism or other matters of national security. That certainly seems to be the case when one examines the application of signing statements on issues like the USA Patriot Act, or other provisions having to do with the detention of suspected terrorists for long periods of time without any form of judicial review. In fact, according to one analysis, the President has used signing statements to challenge the constitutionality of more than 1,000 provisions of bills adopted by Congress. On hundreds of occasions he has object on the grounds that provisions have interfered with his "power to supervise the unitary executive," or with his "exclusive power over foreign affairs," or with his "authority to determine and impose national security classifications and withhold information."[3]

[3] Christopher Kelley, *The Unitary Executive and the Presidential Signing Statement* 8 (June 1, 2006), *available at* http://www.users.muohio.edu/kelleycs/conproject.pdf. *See also* Kelley, *Do You Wish to Keep Tabs on the*

Such examples require further probing by the Senate Committee on the Judiciary, and more detailed and persuasive explanations from the executive branch.

What is clear, in going forward, is the reaction of large segments of the media, across the country, to the suggestion that the Bush administration has sought authority to examine the mail of America's citizens. While the White House has declared their efforts as simply to "clarify existing law", the media have found this argument unpersuasive. Among a sampling of the responses are the following:

Several major newspapers have published editorials opposing the signing statement and any new it might grant the administration to review mail without a warrant. Many of these editorials argue that if, as the Bush administration contends, the signing statement only restates current law, the administration need not have issued it. These editorials reflect a growing public wariness of any signing statement issued by the administration as an attempt to expand executive power. *See, e.g.,* "Mail Privacy; Bush Signing Statement Raises Questions," SUN SENTINEL, (Ft. Lauderdale, Fl), January 24, 2007 ("The Constitution and the law are very clear: except in an emergency, a warrant is required before any government agent can open first-class mail. Such clarity requires nothing further from the president, and the president shouldn't have to be told to respect the law."); "Don't Open Personal Mail," HARTFORD COURANT, January 19, 2007 ("Congress should move quickly to remove any potential for overreaching on the part of the White House. If the administration's intentions were pure, there would have been no need to issue a signing statement."); "Privacy and National Security," DENVER POST, January 16, 2007 ("Remember, this is the same reasoning that saw no problem with warrantless wiretapping of domestic phone lines. And President Bush just last month issued one of his notorious signing

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Bush Administration's Use of the Bill Signing Statement? (January 12, 2007), *available at http://www.users.muohio.edu/kelleycs/*

statements, attempting to nullify the intent of legislation by saying federal officials could open U.S. mail without a warrant. Once you've issued a signing statement to undermine anti-torture legislation, as the president did last summer, the next ones come too easy); "Signing Statements: Pushing the Envelope," MILWALKIE JOURNAL SENTINAL, January 16, 2007 (The Constitution requires a warrant for a reason: to provide a judicial check against despotism, in which the authorities can search your belongings willy-nilly. Congress must stop Bush's apparent attempt to erode this check); "Postal Inspector Bush?," CLEVELAND PLAIN DEALER, January 16, 2007 (If President Bush really means nothing new by his signing statement, he should withdraw it – and provide Congress credible assurances that he was merely asserting a right to open mail, not already exercising it").

While it may be that the public concern in that area may be premature, it is also true that Congress should exercise its legislative function and at a minimum, consider devising a arrangement that requires the administration to issue annual reports on how often it opens mail without a warrant. This process has been suggested in recent public discussions and seems like a modest, but important, step forward.

Given the seriousness of these endeavors, the controversy that they have created, and the need for clarity and direction going forward, I am pleased that the House Judiciary Committee has decided to examine these matters, and to exercise its legislative mandate to review the use of this important and often invisible exercise of Executive authority.

Ultimately, it is an important moment in history for Congress to not only review the use and application of presidential signing authority, but to as well determine its own role and responsibility in carrying out the legislation mandate as authorized by the Constitution.

Sincerely,

Charles J. Ogletree, Jr.

CHARLES J. OGLETREE, JR.

Biosketch

Charles Ogletree, the Harvard Law School Jesse Climenko Professor of Law, and Founding and Executive Director of the Charles Hamilton Houston Institute for Race and Justice, is a prominent legal theorist who has made an international reputation by taking a hard look at complex issues of law and by working to secure the rights guaranteed by the Constitution for everyone equally under the law. The Charles Hamilton Houston Institute for Race and Justice (http://www.charleshamiltonhouston.org), named in honor of the visionary lawyer who spearheaded the litigation in *Brown v. Board of Education,* opened in September 2005, and focuses on a variety of issues relating to race and justice, and will sponsor research, hold conferences, and provide policy analysis.

Professor Ogletree's most recent book, co-edited with Professor Austin Sarat of Amherst college is **From Lynch Mobs to the Killing State: Race and the Death Penalty in America**, was published by New York University Press in May 2006. His historical memoir, **All Deliberate Speed: Reflections on the First Half-Century of *Brown v. Board of Education*** (http://www.alldeliberatespeed.com), was published by W.W. Norton & Company in April 2004.

Professor Ogletree is a native of Merced, California, where he attended public schools. Professor Ogletree earned an M.A. and B.A. (with distinction) in Political Science from Stanford University, where he was Phi Beta Kappa. He also holds a J.D. from Harvard Law School, where he served as Special Projects Editor of the **Harvard Civil Rights - Civil Liberties Law Review.**

Earlier this year, Professor Ogletree was named by **Ebony Magazine** as one of the 100+ Most Influential Black Americans. He was presented with the Lifetime Achievement Award when he was inducted into the Hall of Fame for the National Black Law Students Association, where he served as National President from 1977-1978. Professor Ogletree also received the first ever Rosa Parks Civil Rights Award given by the City of Boston, the Hugo A. Bedau Award given by the Massachusetts Anti-Death Penalty Coalition, and Morehouse College's Gandhi, King, Ikeda Community Builders Prize.

Professor Ogletree has been married to his fellow Stanford graduate, Pamela Barnes, since 1975. They are the proud parents of two children, Charles Ogletree III and Rashida Ogletree. The Ogletrees live in Cambridge and are members of St. Paul African Methodist Episcopal Church.

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