

DUTY TO DEFEND – DEPARTMENT OF JUSTICE
OVERSIGHT

Letter from Richard A. Hertling to Patrick J. Leahy

January 18, 2007



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 18, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

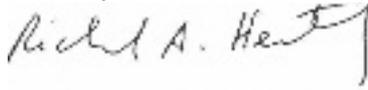
Enclosed please find responses to questions for the record, which were posed to Attorney General Alberto Gonzales following his appearance before the Committee on July 18, 2006. The hearing concerned Department of Justice Oversight.

Several of the questions relate to the Terrorist Surveillance Program described by the President. Please consider each answer to those questions to be supplemented by the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to submission of this letter.

HERTLING TO LEAHY, JAN. 18, 2007

Sincerely,



Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

* * * *

[*100]

Presidential Signing Statements and Executive Nonenforcement

103. On June 27th, 2006, Deputy Assistant Attorney General Michelle Boardman testified before this committee on the disturbing frequency with which President Bush has disregarded portions of duly enacted laws through his use of signing statements. The American Bar Association convened a special Task Force on Presidential Signing Statements and the Separation of Powers Doctrine made up of respected legal scholars and professionals from across the ideological spectrum. The Task Force recently issued its report, indicating that the President's use of signing statements fundamentally flaunts the basic constitutional structure of our government. The President of the ABA, Michael Greco, has said that the report "raises serious concerns crucial to the survival of our democracy."

In light of the ABA report, do you still maintain that there are no differences between this President's practice with regard to signing statements and the practices of prior Presidents in this area? If so, please indicate the flaws in the ABA's methodology that led it to an erroneous conclusion.

ANSWER: The ABA Report did not accurately report either the history of signing statements or the signing statement practice of the current President. To give but one example, the Task Force sug-

gests that the Clinton Administration's position was that the President could decline to enforce an unconstitutional provision only in cases in which "there is a judgment that the Supreme Court has resolved the issue." ABA Task Force Report at 13-14 (quoting from February 1996 White House press briefing). But President Clinton consistently issued signing statements even when there was not a Supreme Court decision that had clearly resolved the issue. *See, e.g., Statement on Signing the Global AIDS and Tuberculosis Relief Act of 2000* (Aug. 19, 2000) ("While I strongly support this legislation, certain provisions seem to direct the Administration on how to proceed in negotiations related to the development of the World Bank AIDS Trust Fund. Because these provisions appear to require the Administration to take certain positions in the international arena, they raise constitutional concerns. As such, I will treat them as precatory."). Indeed, Assistant Attorney General Dellinger made clear early in the Clinton Administration that if "the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994).

The conclusions of the ABA Task Force Report have been publicly rejected by legal scholars across the political spectrum, including Dellinger, the former Assistant Attorney General for the Office of Legal Counsel during the Clinton Administration, and Professor Laurence Tribe of Harvard University. In addition, the Congressional Research Service ("CRS") recently reviewed the ABA Report and concluded that "in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or [*101] legal deficiencies adhere to the issuance of such statements in and of themselves." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-1 (Sept. 20, 2006). Moreover, the CRS found that while there is controversy over the number of statements, "it is important to note that the substance of [President George W. Bush's] statements do not appear to differ substantively from those issued by either

Presidents Reagan or Clinton.” *Id.* at CRS-9; accord Prof. Curtis Bradley and Prof. Eric Posner, “Signing statements: It’s a president’s right,” *The Boston Globe*, Aug. 3, 2006 (“The constitutional arguments made in President Bush’s signing statements are similar—indeed, often almost identical in wording—to those made in Bill Clinton’s statements.”).

The ABA Report was also mistaken in suggesting that the President has issued significantly more constitutional signing statements than his predecessors. Indeed, the ABA Report claimed that the President had “produced signing statements containing . . . challenges” to more provisions than all other Presidents in history combined. See ABA Task Force Report at 14-15 & n. 52. That was done by separately counting each provision mentioned in a signing statement rather than by counting only the number of bills on which the President had commented. We believe that the number of individual provisions referenced in signing statements is a misleading statistic, because President Bush’s signing statements tend to be more specific in identifying provisions than those of his predecessors. As noted in response to question 78 above, President Clinton, for example, routinely referred in signing statements to “several provisions” that raised constitutional concerns without enumerating the particular provisions in question. See, e.g., *Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000* (Nov. 29, 1999) (“to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority”; “This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration’s

objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities.” “Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS vs. Chadha*.” (emphases added). Accordingly, we think the only accurate comparison is to count the number of bills concerning which the President has issued constitutional signing statements. As of September 20, 2006, the Congressional Research Service calculated that the President “has issued 128 signing statements, 110 (86%) [of which] contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration.” *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of bills for which President Bush has issued signing statements is comparable to the number issued by Presidents Reagan and [*102] Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office.

Because the ABA report did not present any new factual information or constitutional analysis, the oral and written testimony of Deputy Assistant Attorney General Michelle Boardman continues to represent the position of the Administration on signing statements.

104. In 2002, Congress passed a law that requires the Attorney General to “submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice” either formally or informally refrains from “enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional.” 28 U.S.C. § 530D. This law requires

the Attorney General to inform Congress both in the case of a signing statement for a new law and in situations where the President declines to enforce existing laws.

At the hearing before the Senate Judiciary Committee on June 27, 2006, Ms. Boardman committed to providing the Committee with a full accounting of the Justice Department's compliance with this provision over the last four years. We have yet to receive a follow-up from Ms. Boardman consistent with that commitment, and have not received any response to our written questions highlighting and restating this request. As the Attorney General, you are specifically charged with fulfilling statutory reporting requirements outlined in 28 U.S.C. § 530D.

Please provide a full and complete list of any existing statutes, rules, regulations, programs, policies or other laws that the President has declined to enforce on constitutional grounds since January 20, 2001.

ANSWER: For a full accounting, please see our response to question 79. As set forth in our response to question 106, below, we disagree that section 530D "requires the Attorney General to inform Congress . . . in the case of a signing statement for a new law."

105. As the Attorney General, have you complied with the reporting requirements of 28 U.S.C. § 530D? Please provide a full accounting of all of the times that you have complied with this statute, along with copies of any transmittals to Congress that have been issued thus far.

ANSWER: Section 530D comprises three basic reporting provisions for the Department: a provision stating that the Attorney General or any officer of the Department shall report any formal or informal policy to refrain from enforcing or applying any Federal statute, rule, regulation, program, policy or other law within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional, or a policy to refrain from adhering to, enforcing, applying, or complying with a binding rule of decision of a jurisdiction respecting the interpretation, construction, or application of the Constitution, any statute, rule, regu-

lation, [*103] program, policy, or other law, *see* 28 U.S.C. § 530D(a)(1)(A); shall report determinations to contest affirmatively in a judicial proceeding the constitutionality of any provision of any Federal statute, rule, regulation, program, policy, or other law, or a decision to refrain on the grounds that the provision is unconstitutional from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of such a provision of law, *see id.* § 530D(a)(1)(B); and shall report certain settlements against the United States involving more than \$2 million or injunctive or nonmonetary relief that exceeds 3 years in duration, *id.* § 530D(a)(1)(C).

The Department takes the reporting provisions of section 530D very seriously. It is the practice of the Department to provide Congress with quarterly reports under 28 U.S.C. § 530D(a)(1)(C). Copies of those reports are attached; note that we have not yet located a copy of the report for the first quarter of 2004, but will provide a copy of that report when we do. The original of that report is in the possession of several Members of Congress, the Senate Legal Counsel, and the General Counsel of the House of Representatives.

To ensure compliance with the reporting provisions of section 530D(a)(1)(A), the Department periodically sends to components a reminder of the reporting provisions of section 530D(a)(1)(A) and a solicitation of relevant information. We are not aware of any Department policy adopted since January 20, 2001, that implicates section 530D(a)(1)(A)(I). See our response to question 79. We do not understand your question to ask us to identify such policies adopted by previous Administrations that were the subject of formal congressional notice or public notice at the time of adoption and that this Administration has continued to implement.

Finally, the Solicitor General has sent reports to Congress pursuant to section 530D(a)(1)(B) with respect to the following provisions of law.

11 U.S.C. § 106. In *In re: Robert J. Gosselin*, No. 00-2255 (1st Cir.), the Solicitor General declined to intervene to defend the constitutionality of this provision, and notified Congress about it in a letter dated October 25, 2001. A copy of that letter is at-

tached. Section 106 abrogates state sovereign immunity in certain bankruptcy matters, and, at the time of the Solicitor General's letter, the Third, Fourth, and Fifth Circuits each had held that section 106(a) violated the Eleventh Amendment because Congress lacked the power validly to abrogate state sovereign immunity under the Bankruptcy Clause of the Constitution, U.S. Const., art. I, § 8, cl. 4. *See generally Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings*, 527 U.S. 627, 636 (1999) ("*Seminole Tribe v. Florida*, 517 U.S. 44 (1996)] makes clear that Congress may not abrogate state sovereign immunity pursuant to Article I powers."). In the letter, the Solicitor General noted that in 1997 and 1998, his predecessor had declined to file a petition for certiorari in the Fourth and Fifth Circuit cases and notified Congress of that decision.

In *Tennessee Student Assistance Corp. v. Hood*, No. 02-1606, the Supreme Court granted certiorari in a case presenting the question whether 11 U.S.C. § 106 violated the Eleventh Amendment of the Constitution. In a letter dated November 26, 2003, the Solicitor General notified Congress that he had decided against [*104] intervening to defend the challenged provision, on the ground that no valid basis existed on which the provision could legitimately be defended. We are seeking to obtain a copy of that letter. The Court did not reach the question in *Hood* because it concluded that the facts of that case did not implicate the State's Eleventh Amendment immunity. *See Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). The Court again granted certiorari to address that question in *Central Virginia Community College v. Katz*, No. 04-885 (S. Ct.). In a letter dated August 3, 2005, the Solicitor General again notified Congress that he had decided against intervening in the case to defend the constitutionality of 11 U.S.C. § 106(c). A copy of that letter is attached. *See also Central Virginia Community College v. Katz*, 126 S. Ct. 990 (2006).

18 U.S.C. 2257. In *Free Speech Coalition v. Gonzales*, 406 F. Supp. 2d 1196 (D. Colo. 2005), the district court largely declined to

enjoin a federal record-keeping statute (18 U.S.C. § 2257) and implementing regulations requiring the producers of sexually explicit material to keep records showing that depicted sexual performers are adults. The court, however, preliminarily enjoined a particular regulatory provision, 28 C.F.R. § 75.2(a)(1), requiring producers to keep a copy of the depictions of live Internet “chat rooms,” reasoning that such a requirement would likely be unduly burdensome in light of applicable First Amendment considerations. The Solicitor General notified Congress of his determination not to appeal the adverse portion of the district court’s ruling. We are seeking to obtain a copy of that letter. Note that after the decision of the district court, Congress amended the law in the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. v, and the Department is preparing a proposed revision to the regulation to reflect the amendments made to the statute.

29 U.S.C. § 2612(a)(1)(D). Following the Supreme Court’s 2001 decision in *Bd. of Trustees of Univ. of Alabama v. Garrett*, and a series of adverse decisions from the courts of appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, the Solicitor General notified Congress on December 20, 2001, in connection with *Bates v. Indiana Department of Corrections*, No. IP01-1159-C-H/G (S.D. Ind.), that he would no longer intervene in cases to defend the abrogation of Eleventh Amendment immunity effected by the individual medical leave provision of the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2612(a)(1)(D), as “appropriate legislation” within the meaning of section 5 of the Fourteenth Amendment. The letter noted that “[t]he Supreme Court’s analysis and holding in *Garrett* have left the Department with no sound basis to continue defending the abrogation of Eleventh Amendment Immunity” in cases of this sort. At the same time, the Solicitor General stated that the Department would continue to defend the constitutionality of the *substantive* medical leave provision, and that “no corresponding decision has been made to discontinue defense of the abrogation of Eleventh Amendment immunity for cases arising

under the parental and family leave provisions of the Act.” Indeed, the Department later successfully defended the abrogation of Eleventh Amendment immunity in the family care provisions of the FMLA. See *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003). A copy of that letter is attached. [*105]

42 U.S.C. § 14011(b). Section 14011(b), which was enacted as part of the Violence Against Women Act (“VAWA”), states that a victim of a sexual assault that was criminally prosecuted in state court may apply to a federal court for an order requiring the criminal defendant to undergo a test for HIV infection. In *In re Jane Doe*, 02-Misc.-168 (E.D.N.Y), the victim of an alleged sexual assault sought an order under section 14011 requiring the criminal defendant to be tested for HIV infection. In light of *United States v. Lopez*, 514 U.S. 549 (1995), and the Supreme Court’s more recent decision in *United States v. Morrison*, 529 U.S. 598 (2000), which held that Congress lacked authority under the Commerce Clause to enact another provision of VAWA that provided a federal civil remedy for victims of gender-motivated violence, 42 U.S.C. § 13981, the Solicitor General determined not to defend the provision. We are seeking to obtain a copy of the letter notifying Congress.

Pub. L. No. 108-199, div. F, tit. II, § 177, 118 Stat. 3 (2004). In *ACLU v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004), the Solicitor General determined not to appeal, in light of First Amendment and Spending Clause concerns, a decision holding unconstitutional a congressional appropriations provision placing a condition on transportation grants that precluded local transport authorities from permitting display of advertising or other messages advocating the legalization or medical use of marijuana. By a letter dated December 23, 2004, a copy of which is attached, the Solicitor General notified Congress of that decision.

Regulations implementing 42 U.S.C. § 6971(a). *State of Florida v. United States*, No. 01-12380-HH (11th Cir.), involved Department of Labor regulations used to resolve certain whistle-

blower complaints. In that case, a state employee filed an administrative complaint alleging prohibited retaliation in employment. The State of Florida then filed suit in federal district court seeking an injunction against the administrative proceedings. The district court enjoined the administrative proceedings on the ground that the claimant's claims were barred by the Eleventh Amendment. The government filed an appeal and the Eleventh Circuit affirmed, relying on *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), which held that "state sovereign immunity bars [the federal agency involved in that case] from adjudicating complaints filed by a private party against a nonconsenting State." Similarly, *Ohio EPA v. United States*, No. 01-3237 (6th Cir.), involved a former employee of the Ohio EPA who claimed he had been retaliated against. The district court there granted the state partial relief from administrative proceedings, and held that future proceedings could go forward "only if" the federal Government itself joined the action, apparently to overcome Eleventh Amendment concerns. In light of the Supreme Court's decision in *South Carolina State Ports Authority*, the Solicitor General notified Congress in an August 21, 2002 letter that he had decided not to file a petition for a writ of certiorari in *State of Florida*, and to dismiss the Government's appeal in *Ohio EPA*. A copy of that letter is attached. [*106]

Other: Notification letters also were sent to Congress in the following instances, although the intervention and review decisions at issue did not reflect any judgment by the Department that provisions were constitutionally infirm.

2 U.S.C. § 441b. In *Federal Election Commission v. National Rifle Ass'n*, 254 F.3d 173 (D.C. Cir. 2001), the court of appeals held that, in light of *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), section 441b could not be constitutionally applied to the National Rifle Association with respect to payments made during one of the years in question. In a letter dated December 21, 2001, the Solicitor General notified Congress that he had decided against seeking certiorari in that case "primarily because I

do not believe that it meets the principal criteria that the Supreme Court applies in deciding whether to grant certiorari,” because the decision “does not squarely conflict with the decision of other courts of appeals on an issue on which the FEC lost.” The letter also detailed several other considerations counseling against seeking certiorari. The letter explicitly noted that the decision “[wa]s not based on any determination that Section 441b is constitutionally infirm.”

8 U.S.C. § 1226(c). Section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c), prohibits the Attorney General, except in limited circumstances, from releasing aliens who have committed specified offenses and are removable from the United States. Two courts of appeals, and district courts in various circuits, held in habeas corpus proceedings that this provision violated due process because it does not provide for individualized bond hearings. See *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002). The Department appealed some of the adverse district court decisions in cases that became moot for various reasons. In those mooted appeals, the Department requested that the appellate court vacate the adverse district court judgment and remand the case to the district court with instructions to dismiss the case as moot. The Department succeeded in obtaining such a vacatur and remand order in only a few cases; in the majority of cases, the courts of appeals simply dismissed the appeal. Because the filing of such appeals involved a significant expenditure of government resources and because the individual district court cases had no binding effect on other cases, the Solicitor General determined not to file a motion for vacatur and remand routinely in all section 1226(c) appeals that became moot. In a letter dated January 23, 2002, a copy of which is attached, the Solicitor General notified Congress of that decision, and of his decision not to pursue an appeal in two related district cases, one of which he determined was an unsuitable vehicle for appellate consideration of the constitutionality of section 1226(c) and the other of which had no continuing effect. The Solicitor General continued to de-

find the constitutionality of the statute, and succeeded in persuading the Supreme Court that the statute was constitutional in *Demore v. Kim*, 538 U.S. 510 (2003).

8 U.S.C. § 1229b(b)(1)(A). The Solicitor General decided not to file a petition for a writ of certiorari in *Ramirez-Landeros v. Gonzales*, 148 Fed. Appx. 573 (9th Cir. 2005), in which the Ninth Circuit held, in an unpublished decision, that the [*107] Board of Immigration Appeals' denial of eligibility for cancellation of removal to an alien violated her constitutional right to equal protection. The Ninth Circuit's decision did not state that it was holding a provision of the statute unconstitutional, but rather that the BIA's application of its own adjudicatory precedent to the petitioner violated the alien's right to equal protection. The Solicitor General determined that the decision did not merit filing a petition for a writ of certiorari, because it was unpublished and did not create a conflict with any other court of appeals, and because the court had remanded to the BIA for further proceedings. Noting that "it is unclear whether the court's ruling is of the sort for which a report to Congress is contemplated by 28 U.S.C. 530D," the Solicitor General nevertheless submitted a letter informing Congress of his action on December 23, 2005, because he "thought it would be appropriate to bring this matter to [Congress's] attention." A copy of the letter is attached.

Pub. L. No. 108-21, § 401(I), 117 Stat. 650 (2003). The Solicitor General decided not to appeal the district court's opinion in *United States v. Robert Mendoza*, No. CR 03-730 DT, 2004 WL 1191118 (C.D. Cal. Jan. 12, 2004), holding that section 401(I) of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 unconstitutionally interfered with judicial independence and violated the constitutional separation of powers. In a letter dated May 11, 2004, the Solicitor General indicated that his decision was based on the unusual facts of that case: section 401(I) had never gone into effect (because the Department had implemented a statutory al-

ternative procedure instead), the district court had sentenced the defendant within the Sentencing Guideline range, and other cases appeared to be better vehicles for defending the constitutionality of section 401(I). The letter noted that the decision not to appeal “does not reflect a determination on the part of the Executive Branch that Section 401(I) is unconstitutional,” and observed that “the government has vigorously defended the provision’s constitutionality.” A copy of the letter is attached.

- 106. At a minimum, this statute requires the submission of a report to Congress every time a signing statement is issued. If there have been no transmittals, please indicate why you believe you can ignore the plain meaning of duly enacted provisions of law.**

ANSWER: Signing statements are publicly issued documents published in the *Federal Register*, but the statute, 28 U.S.C. § 530D, does not require a separate submission to Congress when the President issues a signing statement. The President’s signing statements that raise points of constitutional law generally do not “establish[] or implement[] a formal or informal policy to refrain” from enforcing a statute on constitutional grounds. 28 U.S.C. § 530D(a)(1)(A). Instead, they typically state in general terms that a particular provision will be construed consistent with the President’s duties under the Constitution. In addition, a signing statement is a statement of the President, not an Executive Order or a memorandum that might fall under 28 U.S.C. § 530D(e). Therefore, not until the Department of Justice or the Attorney General has occasion to make an enforcement decision would the requirements of 28 U.S.C. § 530D apply. If the time comes when a potential constitutional violation would be realized by a statute’s enforcement, Congress then would receive a report under the statute. [*108]

- 107. When you testified before Congress on July 18, 2006, Senator Leahy referred to 750 distinct provisions of law that have been disclaimed by this President through the use of signing statements. At the time, you testified under oath that the statistic of more than 700 was incorrect and had been disclaimed by the Boston Globe. Specifically, you**

said, “[t]hat’s not true. That number is wrong”, and later that “the Boston Globe retracted that number.”

A follow-up article in the Boston Globe on July 19th entitled “Bush Blocked Probe, AG Testifies” disputes your claim, indicating that the Globe stands by its claim that the president has challenged more than 750 laws. Christopher Kelly, one of the foremost scholars on the topic, claims that 807 challenges have been issued to individual provisions of law by this President through July 11, 2006. The ABA Taskforce report indicates that the President has challenged over 800 provisions of law; more than the roughly 600 total challenges issued by every previous president combined. In addition, most estimates are likely to be on the low end since the vague and sweeping language in many of these statements could theoretically touch on a wide range of provisions in a given bill. The statement issued in conjunction with the Consolidated Appropriations Act of 2004 contains 116 specific constitutional challenges. Contrast this with the 95 total constitutional challenges issued by the Reagan Administration, which supposedly accelerated the pace of constitutional challenges in signing statement.

Why did you claim that the Boston Globe retracted its estimate?

ANSWER: On May 4, 2006, the Boston Globe issued a correction of its misleading use of phrases such as “750 laws.” The correction, a copy of which is attached, reads: “Because of an editing error, the story misstated the number of bills in which Bush has challenged provisions. He has claimed the authority to bypass more than 750 statutes, which were provisions contained in about 125 bills.” Although inartfully stated, this correction reveals that the Globe intends in these articles to refer to 750 individual provisions, as included in 125 bills, and does not intend to refer to 750 individual bills or “laws enacted since he took office.” We believe that counting the number of *individual provisions* referenced in signing statements is a misleading statistic, because President Bush’s signing statements tend to be more specific in identifying provisions than those of his

predecessors. As noted in response to questions 78 and 103 above, President Clinton, for example, routinely referred in signing statements to “several provisions” that raised constitutional concerns without enumerating the particular provisions in question.

Accordingly, we think the only accurate comparison is to count the number of bills concerning which the President has issued constitutional signing statements. As of September 20, 2006, the Congressional Research Service calculated that the President “has issued 128 signing statements, 110 (86%) [of which] contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration.” *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of bills for which President Bush has issued signing statements is comparable to the number issued by Presidents Reagan and Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office. [*109]

108. As you know, it is possible to issue multiple challenges to discrete provisions of law in a single signing statement. Aside from the question of how many physical statements have been issued, what is your best estimate of how many discrete provisions of law have been challenged by this President through his use of signing statements? Please also provide the source and methodology you have used to provide us with that number.

ANSWER: The Department has not counted the individual provisions mentioned by the President in his signing statements and it is not sensible to do so. In our extensive review of the statements of this and prior Presidents, it became apparent that this President is much more specific in detailing the provisions that could raise constitutional concern than other Presidents have been. Where other Presidents often referred generally to “several provisions” that raised constitutional concerns, this President specifically lists each provision. As noted in response to question 78 above, President Clinton, for example, routinely referred in signing statements to “several provisions” that raised constitutional concerns. *See, e.g., Statement on*

Signing Consolidated Appropriations Legislation for Fiscal Year 2000 (Nov. 29, 1999) (“to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority”; “This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration’s objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities.” “Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS vs. Chadha*.”) (emphases added). The precision of President Bush’s statements is a benefit, not a detriment, to Congress and the public. Thus, even if one wanted to count the number of specific provisions each President noted and compare them one to another, the statements of prior presidents do not allow for such a comparison, as discussed above.

* * * *