

DISAPPROVING SIGNING STATEMENTS AND THE PRESENTMENT CLAUSE:  
*WHEN WORDS SHOULD SPEAK LOUDER THAN ACTIONS*  
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## I. INTRODUCTION

Actions speak louder than words. This paper challenges that axiom as it relates to a President's role in enacting laws under the Presentment Clause of the United States Constitution.

Consider for a moment that you are ten years old and asking your mother if you can attend the movie at your local small-town theater. The theater is the only one in town and it is featuring a film having an NC-171 rating. Your mother tells you that it would violate movie theater rules for you to attend the movie and that she will not let you go to the movie ... yet she hands you \$10 and drives you to the theater in time for the movie. Do you have your mother's approval to attend the movie? Uncertainty arises because your mother's words expressed disapproval, yet her actions expressed approval. To some the uncertainty may be *de minimis*, even unapparent. But to others the uncertainty is paralyzing even though the stakes may only involve getting grounded for a week.

What if the penalty for disobedience is imprisonment or worse? Precisely such a dilemma arises when a President of the United States signs a bill<sup>2</sup> with a concomitant disapproving<sup>3</sup> signing statement<sup>4</sup>.

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<sup>1</sup> An NC-17 rating means that participating theatres are not to allow anyone under the age of 17 to view the film. The Motion Picture Association of America voluntarily provides movie ratings to guide parents in discerning the age-appropriateness of movies and requires that participating theaters adhere to rating regulations.

<sup>2</sup> Unless otherwise noted, reference to a "bill" makes reference to a bill that both Houses of Congress have approved and that they have presented to the President to consider enacting into law in accordance with the U.S. Constitution (U.S. CONST. art. I, § 7, cl. 2 and cl. 3.).

<sup>3</sup> A disapproving signing statement is more than a non-approving signing statement (*e.g.*, ambivalent comments), but must be sufficient evidence of disapproval to rebut the President's signature as *prima facie* evidence of approval. This paper defines "Approval" and "Disapproval" in Section II. C. It should suffice to say here that there this paper acknowledges two types of disapproval sufficient to constitute disapproving signing statements: "Interpretive Disapproval" and "Substantive Disapproval." A statement of Interpretive

Consider, for example, a situation where Congress passes a bill in order to inhibit terrorist attacks that forbids operation of a “vehicle” within a one hundred yards buffer zone of any government building without a special operating permit. Further assume that the Congressional record reveals discussion in committee and in each House wherein “vehicle” was clearly articulated to mean motorized and non-motorized vehicles. Yet, upon signing the bill the President declares that the bill forbids only motorized and not non-motorized vehicles from entering the buffer zone. The words of the President express disapproval<sup>5</sup> of the definition of “vehicle” that Congress set before him, yet his signature expresses approval. Can you, as a law abiding citizen, ride a bicycle within one hundred yards of a government building or not?

Consider yet another example where a President announces that he believes a bill before him is unconstitutional and that he will not enforce it – nonetheless, he signs the bill. Again, the words of the President express disapproval of the bill while his action of signing expresses approval. Do you need to obey the bill that was just signed as though it was law?

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Disapproval expresses an understanding of a bill’s text different from a clearly expressed textual meaning of Congress. For example, a signing statement declaring that the word “vehicle” in a bill means only non-motorized devices while a clear Congressional record indicates that Congress meant “vehicle” to mean both motorized and non-motorized devices. A statement of Substantive Disapproval does not conflict with a textual understanding of Congress, but rather conflicts with a clear purposeful intent of Congress in passing the bill. For example, expression by a President that a bill or portion thereof is unconstitutional since it is contrary to the purpose of Congress to pass an unconstitutional bill.

<sup>4</sup> A signing statement is a public statement made by a President concerning a bill that the President makes concurrent with signing the bill.

<sup>5</sup> The conflict in this example is more apparent upon realizing that a President only has authority to approve or disapprove of a bill, but not amend a bill. This point is brought out more authoritatively later in this paper. (See, notes 25 and 26 and associated text, *infra*). In the example, the President is attempting to amend the bill with a different interpretation of “vehicle.” As such, the statement is a form of interpretive disapproval (see note 3, *supra*).

The Presentment Clause<sup>6</sup> of the United States Constitution provides specific guidelines for and obligations on the President as to how he may enact a bill into law. The Presentment Clause requires that Congress present a President with a bill after both Houses have passed it and that “if he approve he shall sign it” thereby enacting the bill into law.<sup>7</sup> A President must both approve and sign a bill to enact it into law. Does a President approve of a bill and thereby enact it into law simply by signing it? Or does his disapproving signing statement, as in each of the above examples, serve as evidence of his disapproval? The Presentment Clause further obligates the President to return the bill with his objections to the House in which it originated if he does not approve.<sup>8</sup> Does his failure to return the bill, particularly in combination with his signature, rebut his disapproving statements concerning the bill?

Disapproving signing statements leave people and courts to contemplate these very questions – has the President actually enacted a bill into law or not when he orally expresses disapproval yet signs the bill? On the balance of such uncertainty lie personal liberties – people should not have to sacrifice personal liberties to a law that was not legitimately enacted. The balance is influenced by what carries more weight regarding approval under the Presentment Clause – a signature as evidence of approval or a disapproving signing statement as evidence of disapproval. In other words, do the President’s actions of signing speak louder than his concomitant words of disapproval?

This paper addresses the issue of whether a President enacts a bill by signing it despite offering a concurrent signing statement that conflicts and, thereby, disapproves of

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<sup>6</sup> For this paper, the Presentment Clause refers to both Clauses 2 and 3 of Article I, Section 7 of the United States Constitution. Some commentators distinguish Clause 3 as the Second Presentment Clause or Residual Presentment clause because it was added after Clause 2 for the purpose of providing a broad definition to “bill”.

<sup>7</sup> U.S. CONST. art. I, § 7, cl. 2, first sentence.

at least a portion of the bill (a disapproving signing statement). At the core of this issue is whether a President should be held accountable for a disapproving signing statement by acknowledging it for what it is – a public expression of disapproval of a bill.

The current and conventional approach of the federal judiciary is to view a President’s signature sufficient to enact a bill into law.<sup>9</sup> This conventional approach necessarily concludes that a President’s signature is sufficient and irrefutable evidence of approval. Consequently, the federal courts find that a President’s action of signing speaks louder than his words of disapproval. This conventional approach provides judicial efficiency in determining whether a President has enacted a bill into law by only requiring concrete evidence of a signature to reach a conclusion. However, the conventional approach has historically provided a controversial loophole through which Presidents have attempted to use signing statements to effectively veto a portion or portions of a bill by introducing an interpretation of a bill different from Congress<sup>10</sup> or negating a portion of a bill by interpreting it as unconstitutional<sup>11</sup> while precluding Congressional review of the President’s interpretation. Use of the controversial loophole has been less apparent during the recent presidential administration, possibly because the President has not had a need to bypass Congressional review since the same political

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<sup>8</sup> *Id.*

<sup>9</sup> See sections III.A. and III.B.i., *infra*.

<sup>10</sup> Presidential signing statements have been controversial since President Jackson attempted what “amounted to an item veto” by asserting his own interpretation of a bill with his signing statement in 1830 (See Roy E. Brownell II, Comment, *The unnecessary Demise of the Line Item Veto Act: The Clinton Administration’s Costly Failure to Seek Acknowledgment of National Security Rescission*, 47 AM. U.L. REV. 1273, 1351 n.350 (1998)). Shortly later President Tyler similarly attempted to assert his interpretation of a bill through a signing statement, resulting in a House of Representatives report severely criticizing Jackson and Tyler’s actions as being an objection in substance and an approval in form. (See Charles J. Zinn, *The Veto Power of the President*, 12 F.R.D. 207, 231 (1952)).

<sup>11</sup> See Walter Dellinger, *Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva*, 48 ARK. L. REV. 313, 317 (1995). The reference includes an appendix listing examples of presidential signing statements from each president from Eisenhower through the first Bush in which the President states a refusal to execute portions of a bill he is signing.

party has controlled both the Presidency and Congress. Nonetheless, the loophole still lies sleeping for use at any time and, hence, remains a sleeping controversy.<sup>12</sup>

This paper offers an alternative to the conventional approach, an approach that aligns better with the text, intent and purpose of the Presentment Clause than the conventional approach and that holds a President accountable for disapproving signing statements. This alternative approach recognizes a disapproving signing statement as rebutting a President's signature as *prima facie* evidence of approval. Under this alternative approach the words of a President's disapproving signing speak louder than his action of signing.

Importantly, the alternate theory proposed in this paper does not necessarily conclude that a disapproving signing statement precludes a bill from becoming a valid law. Rather, a bill signed by a President with a concomitant signing statement would be treated as subject to the "Pocket Veto" clause<sup>13</sup> of the Constitution. The bill was neither approved (as evidenced by the disapproving signing statement) nor returned to Congress<sup>14</sup> with objections within ten days of presentment<sup>15</sup>. As such, the bill would become law if congress was in session ten days after presentment or die without becoming law if congress is out of session ten days after presentment. Therefore, Congress could rely on standard pocket veto safeguards in timing their presentment of a

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<sup>12</sup> Or perhaps not so sleeping of a controversy. Judge Samuel Alito (now Justice Alito) was questioned repeatedly as to just what his position was regarding the impact that a President's signing statement should have in interpreting legislation during his recent (January 10-12, 2006) Senate hearings as a nominee for the Supreme Court.

<sup>13</sup> U.S. CONST. art. I, § 7, cl. 2, fourth sentence. Under this provision a President can accomplish a "pocket veto" by inaction rather than by having to state reasons for objecting to the bill and returning it to Congress. Consequently, he can veto a bill by keeping the bill in his "pocket."

<sup>14</sup> Presumably, a President assumes the bill becomes law upon his signature. As such, he must submit the signed bill to the Archivist of the United States (*see*, 1 U.S.C.A. 106a (2005)).

<sup>15</sup> For a standard veto, a President must return a bill to the House of Congress where it originated along with his reasons for objection. U.S. CONST. art. I, § 7, cl. 2, first sentence.

bill to the President when there is any question of whether the President would either act on it with a disapproving signing statement or not act on it at all.

The objective of this paper is to provide seed for a careful and thorough consideration of what role a President's disapproving signing statement should play in enacting and interpreting federal statutes. This paper offers as "seed" an alternative approach to dealing with disapproving presidential signing statements; an approach that aligns more closely with the text, purpose and intent of the Presentment Clause than the present conventional approach. The motivation behind this paper is to encourage consideration of how to address disapproving signing statements while the associated controversial loophole in enacting legislation sleeps in order to identify a well-reasoned way to resolve the controversy by the time the controversy again awakes.

The first section of this paper establishes an authoritative foundation through an analysis of the text, intent and purpose of the Presentment Clause. This foundation identifies a President's obligations and power in the legislative process and serves as a basis of reasoning for the rest of the paper.

The second section begins by examining how the federal court system views key Presentment Clause principles, revealing that the courts have increasingly been looking to a President's signature as sufficient evidence of Presidential enactment of a bill.

The second section then identifies two options for resolving conflict between signing a bill and a disapproving signing statement. One option, ignoring the disapproving signing statement, is in line with the conventional trend of the federal courts. This option is the "Louder Action Option" because the action of signing a bill speaks louder regarding approval than the words of the disapproving signing statement. The other option, recognizing that the disapproving signing statement rebuts the signature

as evidence of approval, is more in line with the Presentment Clause. This option is the “Louder Words Option” because the words of disapproval speak louder than the act of signing a bill. The Louder words Option provides the core of the presently proposed non-conventional approach.

Finally, the paper considers the role of disapproving signing statements in interpreting statutes. This final section introduces the controversial practice of using signing statements in statutory interpretation and then concludes that regardless of whether a disapproving signing statement influences the enacting of a statute such signing statements should not be used to interpret statutes.

## II. THE PRESENTMENT CLAUSE

*Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.<sup>16</sup>*

*If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.<sup>17</sup>*

*But in all such Cases, the Votes of both Houses shall be determined by yeas and nays, and the names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively.<sup>18</sup>*

*If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.<sup>19</sup>*

*Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representative may be necessary (except on a question of adjournment) shall be presented to the President of the United*

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<sup>16</sup> U.S. CONST. art. I, § 7, cl. 2, first sentence.

<sup>17</sup> U.S. CONST. art. I, § 7, cl. 2, second sentence.

<sup>18</sup> U.S. CONST. art. I, § 7, cl. 2, third sentence.

<sup>19</sup> U.S. CONST. art. I, § 7, cl. 2, fourth sentence.

*States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representative, according to the rules and Limitations prescribed in the Case of a Bill.*<sup>20</sup>

### **A. Intent and Purpose**

The Framers' intent behind the Presentment Clause was to give a President a qualified negative on legislation proposed by Congress.<sup>21</sup> Delegates were largely of like mind at the Constitutional Convention in regards to wanting a President to have a negative power in the legislative process.<sup>22</sup> The negative power, however, was intentionally established as a "qualified" negative power as opposed to an absolute negative power.<sup>23</sup> A President's negative power is "qualified" in the sense that Congress may still enact the bill into law despite a President's disapproval.<sup>24</sup> The intent of the framers was to enable a President to ensure well reasoned decision making on the part of Congress for questionable legislation, but not act as censor of legislation.

Along those same lines, the drafters specifically granted a "negative" power and not a "modify" power.<sup>25</sup> That is, the negative power of the Presentment Clause is an all

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<sup>20</sup> U.S. CONST. art. I, § 7, cl. 3.

<sup>21</sup> For further analysis on this subject *see, e.g.*, *INS v. Chadha*, 462 U.S. 919, 946-48 (1983). Section III B of *INS v. Chadha* provides a thorough analysis of the intent and purpose behind the Presentment Clause.

<sup>22</sup> "In the convention there does not seem to have been much diversity of opinion on the subject of the propriety of giving to the president a negative on the laws." *INS v. Chadha*, 462 U.S. at 946 n.14, quoting from 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 611 (3d ed. 1858).

<sup>23</sup> The framers made a very conscious decision to grant a President only a qualified negative as opposed to an absolute negative. At the time of the Constitutional Congress in 1786, 13 states had served as constitution testing laboratories and had drafted at least 20 state constitutions in all. (*see*, Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 543 (1989)). By in large, the framers were very leery of granting an executive branch power after struggling against such power in England and with prior magistrates. (*See* Gordon S. Wood, *Forward: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 914-16 (1993)). Granting governors absolute veto power was a scary proposition. South Carolina granted absolute veto power, but only from 1776-1778. (*see.*, Williams, *supra* at 547). As a result, most of the framers were keeping executive power to a minimum while trying to give enough power to provide a checks and balances opportunity in the government. (*See id.*).

<sup>24</sup> U.S. CONST. art. I, § 7, cl. 2, second and third sentences.

<sup>25</sup> The Federalist papers clearly indicate that the drafters sought to provide a "negative" power and not a "modifying" power. The four Federalist Papers addressing the legislative power (Nos. 51, 66, 69 and 73)

or nothing power. The Presentment Clause grants the President power to approve or disapprove a bill in its entirety, not the power to modify a bill by enacting portions and disapproving portions. George Washington recognized this distinction by summarizing his Constitutional obligation under the Presentment Clause as follows: “From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto.”<sup>26</sup>

There were two purposes motivating the drafters to provide presidential negative power in legislation.<sup>27</sup> The first purpose is to grant a President power to protect himself from Congressional efforts to limit presidential power. Alexander Hamilton expressed a need for a President to be able to protect himself in this way:

If even no propensity had ever discovered itself in the legislative body, to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that one ought not to be left to the other, but ought to possess a constitutional and effectual power of self defense.<sup>28</sup>

The second purpose for creating a Presidential negative power over legislation was actually to ensure there was a national perspective in the legislative process in order to establish a well rounded form of checks and balances in the legislative process. The President, who is elected by and accountable to the nation as a whole, provides this national perspective.<sup>29</sup> The legislative process grants negating power to three

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specifically refer to the “negative” of the President, indicating that the intent was to give the President negating power, not modifying power. See, Michael B. Rappaport, *The President’s Veto and the Constitution*, 87 NW. U.L. REV. 736, 761 (1993).

<sup>26</sup> 33 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799 96 (John C. Fitzpatrick ed., 1940); see, also Zinn, *supra* note 10, at 239.

<sup>27</sup> Alexander Hamilton cited the purpose of the Presentment Clause this way: “The primary inducement to conferring the power [of a negative] upon the Executive is, to enable him to defend himself; the second one is to increase the chances in favor of the community against the passing of bad laws, through hast, inadvertence, or design.” THE FEDERALIST NO. 73 at 217 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981).

<sup>28</sup> THE FEDERALIST NO. 73 at 372 (Alexander Hamilton) (Gary Wills ed., 1982).

<sup>29</sup> “The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not country wide; and, as the President is elected for four years, with the mandate of the people to

representative groups: local representative populations through the House of Representatives, each state as a whole through the Senate, and the nation as a whole through the President. “Each political actor can thus insist that laws advance the interest of its constituency.”<sup>30</sup> Alexander Hamilton viewed the presidential negative power as “establish[ing] a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.”<sup>31</sup> The framers felt the President was in the best position to provide a national perspective and serve the national good by protecting the interests of the nation as a whole in exercising his negative power over proposed legislation.

The drafter’s desire for a presidential negative power in legislation was so strong that they added what is now Clause 3 to Article I, Section 7 of the Constitution in response to James Madison’s concern that Congress may get around the presentment requirement of Clause 2 simply by calling their proposed law a “resolution” or “vote” instead of a “bill.”<sup>32</sup> Clause 3 was meant to capture all forms of proposed laws under the presentment requirements of Clause 2.

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exercise his executive power under the Constitution, there would seem to be no reasons for construing that instrument in such a way as to limit and hamper that power beyond the limitation of it, expressed or fairly implied.” *Myers v. United States*, 272 U.S. 52, 123 (1926); “The opportunity for presidential veto would also guard against oppressive, improvident, or ill-considered legislative measures and would assure that a national perspective was part of the legislative process.” Robert L. Glicksman, *Severability and the Realignment of the Balance of Power over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1, 19 (1984).

<sup>30</sup> Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2106 (2002).

<sup>31</sup> THE FEDERALIST NO. 73 at 372-73 (Alexander Hamilton) (Garry Wills, 1982).

<sup>32</sup> See, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 301-02, 304-05 (Max Farrand ed., Yale University Press 1966) and *INS v. Chadha*, 462 U.S. 919, 946-47 (1983). See also, Jonathan B. Fellows, *Congressional Oversight Thought Legislative Veto After INS v. Chadha*, 69 CORNELL L. REV. 1244, 1248 (1984) (stating, with reference to *INS v. Chadha*: “The next day the convention added the second presentment clause -- the present clause 3 -- in an attempt to ensure that Congress could not circumvent the possibility of the President’s veto merely by relabeling its actions.”); John O. McGinnis and Michael B. Rappaport, *Essay: The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L. J. 327, n.68 (1997) (“The Clause was

In summary, the *intent* of the Presentment Clause is to provide a President with a qualified negative power over legislation for the *purpose* of protecting his own interests and those of the nation as a whole from unwise legislation. The qualified negative was meant to be applied to a bill in its entirety or not at all; it is not a modify power to negate only portions of a bill. Finally, all forms of proposed laws are intended to be subject to the Presentment Clause.

## **B. Textual Analysis**

The Presentment Clause defines a President's role in the legislative process by empowering a President to enact into law a bill that has been passed by Congress with his approval and signature or to exercise a qualified negative that forces Congress to approve the bill by a supermajority<sup>33</sup> to enact the bill into law. This section analyses the text of the Presentment Clause to discern how we can tell whether a bill has become law or not.

### ***i. Article I, Section 7, Clause 2, First Sentence***

*Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.<sup>34</sup>*

The Presentment Clause begins by identifying what type of bill it concerns – a bill that has passed both Houses of Congress and that has been presented to the President.

The first sentence further sets forth a requirement that for such a bill to become a law it must be presented to the President and then proceeds to establish obligations on the President as to what he should do with such a bill after presentment.

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inserted to ensure that Congress could not circumvent the presentment requirement by calling proposed legislation by a name other than "bill."); Rappaport, *supra* note 25 at 752 (“The clause was added to protect against congressional attempts to evade presentment by styling proposed legislation as something other than a bill, such as a resolution or order.”).

<sup>33</sup> To present a bill to the President for consideration of enacting into law the bill must merely pass by simple majority (greater than fifty-percent) of the votes in each house. However, if a President disapproves of the bill he can return it to Congress with his objections. (U.S. CONST. art. I, § 7, cl. 2, first sentence). This is a veto action. Congress can enact the bill into law despite a veto only by achieving a two-thirds majority approval (“supermajority”) of the bill. (U.S. CONST. art. I, § 7, cl. 2, second sentence).

<sup>34</sup> U.S. CONST. art. I, § 7, cl. 2, first sentence.

The paramount phrase at issue in this entire paper is the second clause of this first sentence: “If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated.” This phrase actually comprises two if-then logic statements:

(1) “If he approve [then] he shall sign;” and

(2) “if not [then] he shall return it ....”

If-then logic statements have a form of “If P, then Q,” wherein P is a hypothesis (or antecedent) and Q is a conclusion (or consequence). When interpreting an if-then logic statement Q is obliged to be true (an obligation) when P is true. However, it is important to realize that the opposite is not true – P is not obliged to be true just because Q is true.<sup>35</sup> In other words, the domain where Q is true can be larger than the domain where P is true. The only logic link between P and Q is that when P is true, Q becomes an obligation.

Turning to the first if-then phrase “if he approves [then] he shall sign it,” the only logical textual requirement is that if a President approve a bill he has an obligation to sign the bill.<sup>36</sup> Recognize that it is not a logical necessity from this phrase that a President has approved of a bill that he signs. The domain of those instances where a President signs a bill may logically be larger than the domain of those instances where a President approves of a bill. Therefore, a President’s signature on a bill does not serve as conclusive evidence of approval.

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<sup>35</sup> Two common misinterpretations of “If P, then Q” are: (1) if Q is true then P is true; and (2) if P is false then Q is false.

<sup>36</sup> The Supreme Court recognized this fact early on and stated: “The only duty required of the President by the Constitution in regard to a bill which he approves is, that he shall sign it. Nothing more.” (Gardner v. The Collector, 73 U.S. 499, 506 (1867)).

It is further paramount to note that implicit in the first if-then phrase is a requirement that a President must both approve and sign a bill to enact it into law. This conclusion is consistent with the statutory provision for promulgating federal statutes.<sup>37</sup> This conclusion is also necessary in view of the need to acknowledge the word “approve” under the constitutional interpretation principles that “every word in the document has independent meaning”<sup>38</sup> and “that no word was unnecessarily used, or needlessly added”<sup>39</sup>. Consequently, a President’s signature cannot enact a bill into law unless it actually evidences the President’s approval of the bill.

Turning to the second if-then phrase “if not [then] he shall return it, with his objections to that House in which it shall have originated,” the antecedent of this logic statement (“if not”) logically refers in the negative back to the antecedent of the prior logic statement (if he approve). Therefore, if a President “does not approve” of a bill he has an obligation to return it to “that House in which it shall have originated” with his objections. Logically, in this context “does not approve” means “disapproves” rather than being merely indifferent.<sup>40</sup> A President that disapproves of a bill presented to him by Congress has a constitutional obligation to return it to Congress with his objections.<sup>41</sup>

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<sup>37</sup> A statutory provision describing promulgation of laws refers to a bill that “becomes a law or takes effect” upon “having been *approved* by the President.” 1 U.S.C. § 106(a) (2005) (emphasis added).

<sup>38</sup> *Kelo v. City of New London, Connecticut*, 125 S.Ct. 2655, 2672 (2005) (O’Connor, J., dissenting).

<sup>39</sup> *Wright v. United States*, 302 U.S. 583, 588 (1938).

<sup>40</sup> “Not approving” may seem to encompass both being indifferent as well as disapproving. However, the obligation of providing objections implies that the President has objections and is not indifferent to the bill. The fourth sentence provides for when the President is indifferent and does not act on a bill. This conclusion is further supported by Clause 3 which specifically articulates the same situation with the term having been “disapproved” by the President. Therefore, the obligation to return a bill with objections in the first sentence most logically applies to when a President “disapproves” of a bill and is not merely indifferent to it.

<sup>41</sup> The Supreme Court has recognized this precise obligation, as well as the obligation for a President to sign a bill he approves: “The Constitution in giving the President a qualified negative over legislation -- commonly called a veto -- entrusts him with an authority and imposes upon [a President] an obligation that are of the highest importance, in the execution of which it is made his duty not only to sign bills that he **approves** in order that they may become law, but to return bills that he disapproves, with his objections, in order that they may be reconsidered by Congress.” *The Pocket Veto Case*, 279 U.S. 655, 677 (1929).

Subsequent sentences in the Clause define how a bill may become law upon disapproval and return to Congress.

Four key conclusions soundly stem from the first sentence of the Presentment Clause: (1) the Constitution obligates a President to sign a bill that he approves; (2) a President must *both* sign and approve of a bill in order to enact it into law; (3) a President's signature on a bill is not conclusive evidence that the President approves of the bill; and (4) if a President disapproves of a bill he has an obligation to return it to its originating House in Congress, who shall then reconsider the bill.

***ii. Article I, Section 7, Clause 2, Second and Third Sentences***

*If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.<sup>42</sup>*

*But in all such Cases, the Votes of both Houses shall be determined by yeas and nays, and the names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively.<sup>43</sup>*

The second and third sentences define obligations on Congress for bills that the President has returned with his objections. If both Houses of Congress approve of the bill by a two-thirds supermajority upon return and reconsideration, the bill becomes law despite the President's disapproval. Further discussion of this portion of the Presentment Clause is unnecessary since it has little effect on the issue of this paper.

***iii. Article I, Section 7, Clause 2, Fourth Sentence***

*If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress*

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<sup>42</sup> U.S. CONST. art. I, § 7, cl. 2, second sentence.

<sup>43</sup> U.S. CONST. art. I, § 7, cl. 2, third sentence.

*by their Adjournment prevent its Return, in which Case it shall not be a Law.*<sup>44</sup>

This sentence constitutes the “Pocket Veto” clause of the Presentment Clause and addresses the fate of a bill presented to a President who fails to satisfy either option to approve and sign or disapprove and return the bill.

The fourth sentence is in the form of an if-then logic statement with a primary antecedent (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him”) followed by alternative conclusions or consequences in the form of secondary if-then statements: “[If Congress has not adjourned, then] the Same shall be a Law in like manner as if he had signed it”; and [if] Congress by their Adjournment prevent[s] its Return, [then] it shall not be a law.”

The primary antecedent indicates that the fourth sentence of Article I, Section 7, Clause 2 applies to bills that the President has failed to return to Congress within ten days of presentment. Antecedents for the secondary if-then statements distinguish consequences of a truthful primary antecedent: if Congress is in session ten days after presenting the President with the bill, then the bill becomes law; but if Congress has adjourned within ten day of presenting the President with the bill the bill dies without becoming law.<sup>45</sup>

A strict textural interpretation finds the fourth sentence in conflict with the first sentence in two ways. First, the fourth sentence makes an unqualified statement that a bill fails to become law if Congress is adjourned ten days after presenting the President

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<sup>44</sup> U.S. CONST. art. I, § 7, cl. 2, fourth sentence.

<sup>45</sup> The Supreme Court held in *The Pocket Veto Case* that bills not signed or returned because Congress has adjourned die without becoming law otherwise they create long delay and public uncertainty concerning their enactment. Adjournment must be sufficiently long to create long delay and “uncertainty” however. A three-day adjournment is insufficiently long (*see*, *Wright v. United States*, 302 U.S. 583, 592 (1938)). Interestingly, the D.C. Circuit ruled that a nine week recess did not qualify as an adjournment sufficient to trigger a pocket veto. (*See Barnes v. Kline*, 759 F.2d 21, 36 (D.C. Cir. 1984)).

the bill if the bill was not be returned to Congress – there is no exception stated for those bills that the President approves and signs. Therefore, a bill approved and signed by a President should fail to become a law if Congress adjourns within ten days of presentment since a President must provide such a bill to the Archivist of the United States and not Congress.<sup>46</sup> Nonetheless, it is understood from the context of the Presentment Clause that those bills approved and signed by a President are exempt from the fourth sentence provisions even though the text of the fourth sentence does not specifically provide as much.

Second, the phrase “the Same shall be a Law, in like manner as if he had signed it” appears to indicate only a President’s signature is necessary to enact a bill into law. However, the first sentence states that Presidential approval is necessary *in combination with* the President’s signature. The requirement of Presidential “approval” is also evident in Article I, Section 7, Clause 3 (see discussion *infra*) as well as in federal statute.<sup>47</sup> Therefore, it is proper to understand “as if he had signed it” to also require approval in the fourth sentence of Article I, Section 7, Clause 2.

Interpretation of the fourth sentence must be consistent with the entire Section of the Constitution.<sup>48</sup> Therefore, the fourth sentence must imply: (1) that the primary antecedent limits application of the fourth sentence to those bills that have not been approved and signed into law by a President; and (2) that reference to “signed” means “approved and signed”. Consequently, the fourth sentence of Article I, Section 7, Clause 2 provides that a bill that the President has not approved and signed and has not returned

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<sup>46</sup> See 1 USC §106(a) (2005).

<sup>47</sup> *Id.*

<sup>48</sup> Whole Code Doctrine of interpretation applies since the Constitution is the highest Code in the United States.

to Congress becomes law in ten days after presentment if Congress is not adjourned and the bill dies without becoming a law if Congress is adjourned.

***iv. Article I, Section 7, Clause 3***

*Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representative may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representative, according to the rules and Limitations prescribed in the Case of a Bill.<sup>49</sup>*

Clause 3 restates Clause 2 in greater breadth.<sup>50</sup> Clause 3 applies Clause 2 to all actions which require approval of both Houses of Congress, except actions to adjourn. Clause 3 encompasses Clause 2 since a “bill” falls within the scope of “order, resolution, [and] vote.”<sup>51</sup>

As mentioned earlier, Clause 3 requires Presidential “approval” before a law can be enacted, which serves to reinforce that approval and signature are necessary for a President to enact a bill into law.

***v. Summary of the Textual Analysis***

Three key points pertinent to this paper arise from a textual analysis of the Presentment Clause:

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<sup>49</sup> U.S. CONST. art. I, § 7, cl. 3.

<sup>50</sup> *See*, note 32 and associated text. Clause 3 is also referred to as the “Residual Presentment Clause” (*see*, e.g., McGinnis and Rappaport, *supra* note 32, at n.68; Glicksman, *supra* note 29, at 37; Rappaport, *supra* note 25, at 752-786), presumably because it captures any “residual” actions by Congress other than voting on bills within the Presentment Clause. Clause 3 is also known as the “Second Presentment Clause” (*see*, e.g., Fellows, *supra* note 32, at 1248-1266 and W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, n.111 (1992)), because it is a second statement of the Presentment Process.

- (1) A President may only enact a bill into law by both approving and signing the bill upon presentment to him by Congress;
- (2) If a President disapproves of a bill presented to him he has an obligation to return the bill to Congress with his objections; and
- (3) If a President, upon presentment with a bill from Congress, does not:
  - (a) approve of and sign a bill; or
  - (b) return the bill to Congress within ten days of presentment,then the bill becomes law if Congress is in session and dies without becoming law if Congress is adjourned.

### C. “Approve” versus “Disapprove”

The Presentment Clause integrates a President into the legislative process.<sup>52</sup> A President can enact a bill into law with his approval and signature if both Houses of Congress have approved the bill. Alternatively, a President can impede the enactment process if he disapproves of a bill by returning it to Congress with his objections. Since a President’s role in the legislative process hinges largely on whether he approves or disapproves of a bill it is important to discern what these two terms mean in order to understand how the President participates in the legislative process.

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<sup>51</sup> A bill requires a majority vote of approval from each House, therefore constitutes a “vote.” A bill may also qualify as a “resolution” that requires the concurrence of both Houses since a bill is a resolution to enact a law. Similarly, a bill is an “order” to enact a law that is subject to Presidential review.

<sup>52</sup> A President’s role in the legislative process was clearly identified by the Supreme Court: “It is beyond a doubt that lawmaking was a power to be shared by both Houses and the President.” (INS v. Chadha, 462 U.S. 919, 947 (1983)). There has been little debate on whether the President is constitutionally appointed a legislative role. *But see* Mark Johnson Boulris, Comment, *Judicial Deference to the Chief Executive’s Interpretation of the Immigration Reform and Control Act of 1986 Antidiscrimination Provision: A Circumvention of Constitutionally Prescribed Legislative Procedure*, 41 U. MIAMI L. REV. 1057, 1065 (1987) (“[T]he constitutional framework ‘refutes the idea that [the President] is to be a lawmaker,’ the majority stated that in addition to limiting the President’s role in the lawmaking process to recommending

The first sentence of the Presentment Clause declares that a necessary step for a President to enact a bill into law is that he “approve” the bill. The rest of the Presentment Clause provides insight into the meaning of “approve. The second sentence of Article I, Section 7, Clause 2 indicates that a bill which a President disapproves and returns to Congress can become law if two thirds of the House to which the President returns the disapproved bill “*agree to pass the [b]ill*” and if “*approved*” by two thirds of the other House. Clause 3 summarizes this procedure by indicating an Order, Resolution or Vote disapproved by the President shall take effect upon being “*passed*” by two thirds of both Houses of Congress. The context of these sentences, evident in the interchangeable use of the pertinent terms, suggests that framers sought to have “approve” mean the same as “agree to pass” and “pass.”<sup>53</sup> All three of these terms embody an intent that the bill becomes a law.

Another route to discerning the meaning of “approve” that is valued by Originalist analysts is to look at its common usage of the day.<sup>54</sup> A dictionary dating to 1755, the era when the drafters wrote the Constitution, provides five definitions for “approve”: (1) to like; to be please with; (2) to express liking; (3) to prove; to show; to justify; (4) to experience; (5) to make worthy of approbation.<sup>55</sup> The same dictionary defines “disapprove” as “to dislike, to censure, to find fault with.” Therefore, common usage of the day suggests that a President must take pleasure with and like a bill – and not find

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laws he thinks wise and vetoing laws he thinks bad.” interpreting and quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 587 (1952)).

<sup>53</sup> Interpretation must be contextually consistent with the rest of the Constitution, particularly within sections of an article dealing with the same subject. This rule of interpretation is akin to the Whole Act doctrine of statutory interpretation. To interpret otherwise would produce Constitutional conflicts and absurd results, both of which are counter to accepted doctrines of interpretation.

<sup>54</sup> Originalist analysts seek to understand the meaning of terms as the drafters understood them when writing the Constitution.

<sup>55</sup> A DICTIONARY OF THE ENGLISH LANGUAGE BY SAMUEL JOHNSON; AMS Press, Inc., New York, 1967, 1755.

fault (*i.e.*, not “disapprove”) of a bill to enact it into law. Notably, the definitions of “approve” and “disapprove” have not changed significantly in modern day usage.<sup>56</sup> Therefore, the meaning from common usage of the day is equivalent to the meaning of common usage of today, which is important to non-Originalist analysts.<sup>57</sup>

The context of “approve” in the Presentment Clause and its common day meaning indicates that for a President to “approve” a bill means that he must like the bill in some manner, intend for it to take effect as law and not find fault with it. This is consistent with an early (1880) Supreme Court analysis that indicated a President must “assent” to a bill in order to enact it into law.<sup>58</sup> The President must agree, though not necessarily on a personal level,<sup>59</sup> with what Congress is proposing in the bill in order to enact the bill into law.

Disapproval is more than mere ambivalence or lack of approval. “Disapprove” is the opposite of “approve”. Therefore, for a President to “disapprove” of a bill, he must dislike the bill on more than a personal level, intend that it not take effect as law and find fault with it. When a President expresses fault with a bill or an intent that it not take effect as law, the President is expressing disapproval of that bill.

A President can express disapproval of a bill in two ways. First, he may express “interpretive disapproval” by expressing an interpretation of a bill’s text that contradicts a clear interpretation of a material portion of the text set forth by Congress in passing the

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<sup>56</sup> MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1997) provides the following definitions – **Approve:** 1) prove, attest. 2) to have or express a favorable opinion of. 3) (a) to accept as satisfactory. (b) to give formal or official sanction to; to take a favorable view. **Disapprove:** 1) to pass unfavorable judgment on. 2) to refuse approval to; reject.

<sup>57</sup> Non-originalist analysts are less concerned about the meaning constitutional terms had at the time the Constitution was drafted and are more concerned with the meaning terms have currently. In this case, the originalist and non-originalist interpretation coincide.

<sup>58</sup> See *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880).

bill. For example, consider again the situation where Congress passes a bill regulating vehicle use within one hundred yards of a government building and legislative history makes clear that the undisputed meaning of “vehicle” includes both motorized and non-motorized devices. If a President declares that the bill is limited to only motorized vehicles as he signs the bill, the President is expressing an intent that the full text of a bill as presented to him by Congress not take effect as law – therefore, he is expressing disapproval (interpretive disapproval). Second, a President may express “substantive disapproval” by accepting Congress’s textual interpretation but denying Congress’s clear intent and purpose for the bill. For example, a President’s declaration that a portion of a bill unconstitutional and that he intends not to enforce that portion of the bill conflicts with Congress’s intent to enact a law they believe is constitutional. Such a statement expresses fault with the bill on a constitutional level and an intent that the bill not take effect as law – therefore, the statement is one of disapproval (substantive disapproval).

What if a President disapproves of only a portion of a bill? The result is the same since a President cannot parse bills set before him by enacting some portions and rejecting other portions. Allowing a President to approve of (and enact) portions of a bill and disapprove of (and reject) other portions of a bill allows him power to *modify* the bill – yet the Constitution only grants him power to *approve* or *negate* the bill in toto.<sup>60</sup> To allow a President to enact a bill into law while disapproving of portions of the bill violates the intent and text of the Presentment Clause in two ways: (1) it effectively serves as an absolute negative power instead of a qualified negative power for the

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<sup>59</sup> “The fact that the President signs a bill into law, and thereafter defends it, without more, does not mean, of course, that the policy embodied in the legislation is that of the President, nor does it even mean that the President personally approves of the measure.” (Nixon v. Adm’r of Gen. Servs., 433 US 525, 522 (1977)).

<sup>60</sup> See notes 25 and 26, *supra*, and associated text discussing the intent and purpose of the Presentment Clause.

President since Congress was not given a chance to review and possibly override the President's objections; and (2) it allows a President to bypass his constitutional obligation to return a bill to Congress with his objections if he disapproves of it.<sup>61</sup> Hence, a President's express disapproval of any portion of a bill must constitute disapproval of the entire bill.

### **III. DISAPPROVING SIGNING STATEMENTS IN ENACTING STATUTES**

Having laid a constitutional foundation with an analysis of the Presentment Clause, we now turn to the problem set forth at the outset of this paper – what happens when a President's words and acts conflict in regards to enacting legislation? In particular, has a President enacted a bill into law with his signature when accompanied by a disapproving signing statement? To address this issue, one must harmonize two incomplete and opposing positions:

- (a) In one sense, the President appeared to enact the bill into law through his act of signing the bill. A President enacts a bill into law by approving of it and signing it as evidence of his approval. However, the President's words indicate that he does not approve of the bill so he has not fulfilled the necessary element to enact the bill into law.
- (b) In another sense, the President appeared to disapprove of the bill by his statement of disapproval. When a President disapproves of a bill he is obligated to return it to Congress with his objections.<sup>62</sup> However, the President has failed to fulfill his constitutional obligation to return the bill to Congress with his objections if he does not approve of the bill.

This section first explores how the federal courts have sought to resolve this apparent conflict by looking at the weight the federal courts afford presidential "approval" apart from presidential "signature" in the context of the Presentment Clause. The federal courts have established a convention of relying on the signature as self-sufficient and virtually irrefutable evidence of approval.

Next, this section looks back to the analysis of the Presentment Clause and identifies two options for resolving the conflict that are constitutional: (1) ignore the signing statement and recognize the signature as inherently including approval (Louder Action Option); or (2) recognize the disapproving signing statement as evidence of disapproval which rebuts the signature as evidence of approval (Louder Words Option). The first of the two options is consistent with the trend of the federal courts. However, this paper argues that the second option offers an alternative to the conventional approach of the federal courts that is more constitutionally sound.

#### **A. Federal Courts on Disapproving Signing Statements and Approval**

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<sup>61</sup> "If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated." U.S. CONST. art. I, § 7, cl. 2, first sentence.

<sup>62</sup> U.S. CONST. art. I, § 7, cl. 2, first sentence.

In federal courts, the President's action of signing a bill has been getting louder over the years and now drowns out a President's words in a disapproving signing statement. This section explores how the federal court views the Presentment Clause's requirement of presidential approval relative to the requirement of presidential signature.

*i. Early Supreme Court– Signature is Evidence of Approval*

The Supreme Court first had to wrestle with the concept of presidential approval under the Presentment during the case of *Gardner v. The Collector*, 73 U.S. 499 (1867). At issue in *Gardner* was whether the President must date a bill he signs in order to enact the bill into law.<sup>63</sup> The Court found that (emphasis added):

The only duty required of the President by the Constitution in regard to a bill which he *approves* is, that he shall *sign* it. Nothing more. The simple signing his name at the appropriate place is the one act which the Constitution requires of him as the *evidence of his approval*, and upon his performance of this act the bill becomes a law.<sup>64</sup>

There are two messages in the holding of *Gardner*. A popular message taken from *Gardner* is that the only act that the Constitution requires of a President to enact a bill into law is that he sign the bill.<sup>65</sup> Equally important, however, is the role the act of signing plays – evidence of approval. A signature cannot serve as evidence of approval if there is no approval. Therefore, the Court's reasoning indicates that both approval and signature are necessary for a President to enact a bill into law.

Interestingly, the Defendant in *Gardner* argued that the Constitution does not require approval but only a signature, stating that “[t]he word ‘approved’ is

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<sup>63</sup> The plaintiff, Gardner, sought to recover taxes on tea that he was forced to pay in 1964. The tax was required under a statute signed by President Lincoln and dated: “December 24.” The President signed the bill in 1961, but did not indicate the year with the date. Gardner argued that ambiguity in the date of signing caused the approval by the President to provide improper notice as to when the law allegedly went into affect. Gardner further argued that use of parol evidence to establish the year was inappropriate. The Court ultimately disagreed with Gardner and found the bill had become law in 1961 when the President approved it and signed it.

<sup>64</sup> *Gardner v. The Collector*, 73 U.S. 499, 506 (1867).

<sup>65</sup> See Daniel A. Klein, Annotation, *Supreme Court's Construction and Application of Federal Constitution's Art. I, § 7, cl 2 and 3, Concerning Presentment of Congressional Bills, Orders, Resolutions, and Votes to President and Their Approval or Disapproval (Veto) by President*, 141 L.ED. 2D 825, chapter III, section 7 (Copyright 2005 LEXIS Law Publishing).

surplusage.”<sup>66</sup> The Court ruled for the Defendant yet conspicuously declined to adopt the Defendant’s position that “approval” is surplusage within the Presentment Clause. The *Gardner* Court did not, however, articulate what “approval” means beyond a signature. Subsequent Supreme Courts have generally followed suit.<sup>67</sup>

*ii. Recent Trend – Not Much Left to Approval Beyond Signature*

The Supreme Court has avoided the difficult task of clearly defining what constitutes “approval” under the Presentment Clause. Nonetheless, individual justices have been more transparent. Some Justices interpret the Presentment Clause with a focus on a need for a President’s approval in addition to the President’s signature<sup>68</sup> while other Justices focus solely on a need for a President’s signature and minimize, or even deny any difference between the President’s approval and signature for enacting a bill into law.<sup>69</sup> Such tension between Justices has likely hindered the Court as a whole from clearly articulating what constitutes Presidential approval. While the Court has avoided defining “approval”, it has narrowed the scope on what can serve as evidence of disapproval sufficient to rebut a President’s signature of a bill – to a point where it is questionable whether approval requires anything beyond mere signature.

A presidential signing statement expressing that the President finds a portion of a bill unconstitutional and that he does not intend to enforce it qualifies as an expression of

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<sup>66</sup> *Gardner v. The Collector*, 73 U.S. at 503.

<sup>67</sup> In 1880 the Court did venture to state that the Presentment Clause requires the President’s “assent” to enact a bill into law. (*Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881)).

<sup>68</sup> *See, e.g.*, *Gardner v. The Collector*, 73 U.S. at 506 (Justice Miller articulates that a President must sign a bill only as evidence the evidence of his approval, implying that signature is in addition to approval); *The Pocket Veto Case*, 279 U.S. 655, 677 (1929)(Justice Sanford articulated that a President has an obligation to sign a bill of which he approves).

<sup>69</sup> *See, e.g.*, *United States v. Munoz-Flores*, 495 U.S. 385, 403 (1990) (Justices Steven and O’Connor, concurring in judgment) (“I [] interpret § 7 to provide that even an improperly originated bill becomes law if it meets the procedural requirements [of signing] specified later in that section.”); *Wright v. United States*, 302 U.S. 583, 598, 599 (1938)(Justice Stone, concurring, articulates the President’s options under

substantive disapproval of the bill.<sup>70</sup> Nonetheless, “every President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions.”<sup>71</sup> Moreover, the Supreme Court has “implicitly endorsed”<sup>72</sup> a President enacting a bill into law despite a signing statement articulating an intent not to enforce a portion of the bill on constitutional grounds.<sup>73</sup> The Court has only commented on a presidential signing statement declaring a portion of a bill is unconstitutional. However, at least one author would not limit the Court’s position so strictly and asserts that a President can properly express in a signing statement that he finds a bill unconstitutional on its face and that he does not intend to enforce it, yet still sign the bill into law.<sup>74</sup> The authority offers in support Department of Justice advisory statements from the Reagan, Bush and Clinton administrations affirm that a President has a constitutional right not to enforce an unconstitutional law<sup>75</sup> and argues such a position is consistent with the Framers view of the Constitution.<sup>76</sup>

If a President can declare a bill unconstitutional and refuse to enforce it, yet can enact the bill into law by signing it, is there any meaning to “approve” apart from “sign” under the Presentment Clause? The Supreme Court has avoided directly answering this question, but the District Court in the District of Columbia has been less timid.

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the Presentment Clause are to sign or disapprove of a bill); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423,455 (Justice Harlan refers to the President’s approval action as “approving it by his signature”).

<sup>70</sup> Recall from the discussion of approval and disapproval, *supra*, that a substantive disapproval is a statement in that is consistent with Congress’s textual meaning of a bill but conflict with Congress’s intent and purpose for a bill.

<sup>71</sup> Dellinger, *supra* note 11, at 317. The reference includes an appendix listing examples of presidential signing statements from each president from Eisenhower through the first Bush in which the President in which the President states a refusal to execute portions of a bill he is signing.

<sup>72</sup> *Id.* at 314.

<sup>73</sup> The Court acknowledges that “it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds.” *INS v. Chadha*, 462 U.S. 919, n.13 (1983).

<sup>74</sup> Walter Dellinger, *Memorandum for Bernard N. Nussbaum Counsel to the President*, 48 ARK. L. REV. 333, 335 (1995).

<sup>75</sup> *Id.* at 336, n.7.

<sup>76</sup> *Id.* at n.8.

***iii. District Court in District of Columbia – Signature is Approval***

The District Court in the District of Columbia has articulated that which the Supreme Court has been approaching, but has avoided declaring: “The President's judgment of approval coincides with his decision to sign a bill; it has no independent operative significance.”<sup>77</sup> The District Court in the District of Columbia has merged the meaning of approve and sign from the Presentment Clause into a single requirement of signing. The same court explained their conclusion by stating (emphasis in original):

Whether a bill is or is not a law of the United States cannot depend on the President's state of mind when he affixes his signature. He may object to various appropriations and limited tax benefits – that is he may *disapprove* of them – but nevertheless sign a bill and thereby remain in full compliance with the Presentment Clause.<sup>78</sup>

The District Court in the District of Columbia eliminated any distinction between a President's need to approve a bill and need to sign the bill under the Presentment Clause. To that court, a President's signature on a bill is conclusive evidence of approval and enacts the bill into law.

***iv. Summary of the Federal Court Position***

The federal court system has evolved from distinguishing a President's approval from his signature under the Presentment Clause to a position where approval means little or nothing beyond a signature. The Supreme Court took an early stand in interpreting the

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<sup>77</sup> Byrd v. Raines, 956 F. Supp. 25, 34 (D.D.C. 1997) (vacated and remanded for lack of standing, see Byrd v. Raines, 521 U.S. 81). In *Byrd*, Plaintiff congressmen brought action challenging the constitutionality of a Line Item Veto Act. The court ultimately found the Act unconstitutional under the Presentment Clause for empowering a President to modify a bill after signing the bill into law. According to the Byrd court “The President's contribution to the [legislative] process is his approval of (or objection to) legislation as Congress presents it to him. His is merely a qualified check on the will of the legislature.” *Id.* at 35. After enacting a bill into law, a President only has authority to enforce the law and exceeds his power if he tries to amend the law after enacting it. *Id.*

<sup>78</sup> *Id.* at 34.

Presentment Clause as requiring a President to both approve and sign a bill in order to enact that bill into law. The Court has not attempted to succinctly define approval, or what might serve as sufficient evidence of disapproval to rebut a signature. However, the Court has dramatically limited what may amount to sufficient evidence of disapproval to rebut a signature. For example, the Court has indicated that a presidential signing statement articulating that a provision of a bill is unconstitutional and that the President will not enforce that portion of the bill does not preclude the bill from becoming a statute in view of the President's concomitant signature on the bill. The District Court in the District of Columbia has gone so far as to indicate a President's signature enacts a bill into law under the Presentment Clause – regardless of the President's actual disapproval of a portion of the bill. The convention in the federal courts seems to be that signature is all that is necessary for a President to enact a bill into law under the Presentment Clause – the act of signing is louder than even concurrent words of disapproval.

## **B. Options Under the Presentment Clause**

The Constitution is the supreme law of the land. Therefore, any resolution to the apparent conflict between a President's act of signing a bill and his concomitant words of disapproval of the bill must be consistent with the Constitution. The Presentment Clause provides the guidelines for such a constitutional resolution. There are two options for resolving the conflict within the scope of the Presentment Clause text, intent and purpose. First, the disapproving signing statement can be ignored and his signature recognized as evidence of his approval. Under this first option, the action of signing "speaks louder" than the disapproving words of the signing statement. Hence, the first option is the "Louder Action Option". Alternatively, the disapproving signing statement can be recognized as evidence that the President does not approve of the bill despite his signature on the bill. Under this second option, the words of disapproval speak louder than the act of signing the bill. Hence, the second option is the "Louder Words Option." This section discusses each of these two options in turn.

### *i. The Louder Action Option: The Conventional Approach*

One may argue that by signing a bill, a President approves of enacting the bill into law, despite any words of disapproval accompanying his signature. By signing the bill

the President satisfies his obligation for approving the bill.<sup>79</sup> Furthermore, by not returning the bill to Congress with his objections he fails to satisfy his obligations for disapproving of the bill.<sup>80</sup> Together, the President's actions action of signing and inaction of failing to return the bill to Congress suggest that he approves of the bill. Despite any disapproving statements regarding the bill, he ultimately signed the bill – which evidences that his motivation to approve exceeds his motivation to disapprove. Besides, the President's state of mind when he signed the bill is arguably inconsequential to whether he has enacted the bill or not.<sup>81</sup> In essence, a President's signature is non-rebuttable material evidence of approval.

The federal courts appear to be ruling in accordance with this Louder Action Option. The Supreme Court has been minimizing the significance of any difference between the constitutional requirements of approving a bill and signing the bill. The D.C. District court has gone so far as to say the Constitution only requires that a President sign a bill to enact the bill into law.<sup>82</sup> A President may even enact a bill into law by signing it despite presenting a concurrent disapproving signing statement that he finds at least a portion of a bill unconstitutional and will not to enforce it.<sup>83</sup>

The Louder Action Option is attractive to courts since it offers expedience in establishing whether a President has enacted a bill into law. There tends to be little debate over whether or not a President has signed a bill – there is either a material signature on the bill or not. The courts also do not need to approach legal questions that may approach limits of justiciability by questioning whether the President has actually enacted a bill or not despite his signature on the bill.<sup>84</sup>

However, the Louder Action Option can raise a public policy concern by presenting conflicting meanings of a law interpretively, substantively or both. Under the Louder Action Option Congress may present a President with a bill having carefully selected text with well documented meaning through legislative debate, yet the President may declare in a signing statement a meaning of the text that conflicts with that of Congress (a textually disapproving signing statement). A President may also declare that a portion of the bill is unconstitutional (a substantively disapproving signing statement) yet sign the bill and enact it into law. Under either of these situations, the public is left with uncertainty as to whether to rely on Congress' interpretation of the law or the President's.

Public uncertainty arising under the Louder Action Option is different in principle, if not affect, than that arising under a President's exercise of enforcement

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<sup>79</sup> "If he approves he shall sign it." U.S. CONST. art. I, § 7, cl. 2, first sentence.

<sup>80</sup> "[I]f not he shall return it, with his objections to that House in which it shall have originated." *Id.*

<sup>81</sup> *Byrd v. Raines*, 956 F. Supp. at 34 ("Whether a bill is or is not a law of the United States cannot depend on the President's state of mind when he affixes his signature").

<sup>82</sup> *Id.* at 33. ("The President's judgment of approval coincides with his decision to sign a bill; it has no independent operative significance.").

<sup>83</sup> A signing statement declaring a bill or any portion of the bill is unconstitutional and will not be enforced is a statement of disapproval, as established *supra*. Nonetheless, the Supreme Court indicates such a statement does not preclude the bill from being enacted into law by the President's signature, as implied by the Court in *INS v. Chadha*. (See *Dellinger*, *supra* note 11, at 314).

<sup>84</sup> We will explore the issue of justiciability further in the next subsection. Suffice to say here that courts are hesitant to challenge the authority or acts of another branch of the government in a manner that may cause the other branch embarrassment under the political question doctrine. (See *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

discretion<sup>85</sup> of a law. When a President exercises enforcement discretion there is no question but what the law is – a law-abiding citizen can know what the law is and how to abide by it. The only question that arises by allowing presidential discretion in enforcement is whether an actual law will be enforced to its full scope. In contrast, a law-abiding citizen has no way of knowing what is valid law and how to abide by it when a bill is signed by a president with a concomitant signing statement that interpretively or substantively contradicts Congress’s interpretation, intent or purpose of the bill. The difference in principle is that a citizen can know what a law requires of him regardless of whether a President enforces it entirely or not, but the citizen necessarily is uncertain as to what a law requires of him when a President signs it with a disapproving signing statement. The difference in affect is that a citizen can know how to obey a law if a President merely uses discretion as to how stringently to enforce it, but the citizen cannot know how to obey a bill that has been signed with a disapproving signing statement because it is unclear just what the law requires or means.

Another concern with the Louder Action Option is that it strains the text, intent and purpose of the Presentment Clause. The text<sup>86</sup> of the Presentment Clause is strained by allowing a president to approve of a bill in form (in enacting it) but disapproving in effect (changing meaning, intent or purpose relative to Congress’s). The Presentment Clause requires approval or disapproval and does not allow for both to coexist. If the President disapproves of the bill sufficiently to affect enforcement of the enacted law, the courts should also recognize his disapproval in the formalities of enactment to avoid inconsistency. The intent<sup>87</sup> of the Presentment Clause is strained by effectually affording a President an absolute negative over legislation – that which he disapproves of by signing statement and refuses to enforce either by employing a different textual or substantive interpretation is never given an opportunity for review and possible remedy by Congress. Therefore, the intent of a qualified negative is violated by affording a President an absolute negative power. The purpose<sup>88</sup> of the Presentment Clause is strained when the public reads the text of a law that formally looks legitimate but effectually is not – at least under the present administration. Such an inconsistency creates confusion and uncertainty which is contrary to the national good and, therefore, contrary to the purpose of the Presentment Clause.

The Louder Action Option may be attractive to courts for its efficiency but public policy and constitutional concerns raise questions as to whether it is the best option

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<sup>85</sup> This paper will avoid delving into an existing debate on whether a president has discretionary power to select and choose how extensively to enforce federal statutes under the “Take Care” clause of the U.S. Constitution (U.S. CONST. art. II, § 3). The confusion at issue in this paper is readily distinguishable from the issues of such a debate. For the interested reader, one side of the discretionary power debate argues that a “President has the power to act as a steward of the people” by reading the “Take Care” clause broadly enough to allow a President broad discretion in making decisions about which laws to enforce. (*see*, Kim Rennard Tulsy, *Judicial Review of Presidential Initiatives*, 46 U. Pitt. L. Rev. 421, 431, n.63 (1985)). On the other side, there is strong evidence that the framers of the U.S. Constitution sought to preclude a President from suspending or dispensing with law by including the Take Care Clause (*see*, e.g., Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 KAN. L. REV. 383, 388, n.40 (2001)).

<sup>86</sup> The text at issue here requires that a President both approve and sign a bill in order to enact it into law. U.S. CONST. art. I, § 7, cl. 2, first sentence.

<sup>87</sup> The intent at issue here is to provide a President a qualified negative over proposed legislation.

<sup>88</sup> The purpose at issue here is to grant the President power to protect the interests of the nation as a whole.

available. Courts must take care that requirements of the Presentment Clause are not “set aside merely to promote efficiency or convenience.”<sup>89</sup>

*ii. Louder Words Option: An Alternative Approach*

One may assert that a President’s disapproving signing statement is evidence of disapproval of a bill and, hence, the President’s signature on the bill *cannot* evidence of his approval. A President must both approve of a bill and sign it in order to enact it into law; his signature alone is insufficient.<sup>90</sup> His signature may serve as *prima facie* evidence of approval, but that evidence of approval remains subject to rebuttal by a disapproving signing statement.<sup>91</sup> Under this assertion, the President’s words (disapproving signing statement) speak louder than his action (of signing). Hence, this proposal is the “Louder Words Option” and serves as an alternative to the conventional Louder Action Option.

One may argue that a President has not disapproved of the bill since he did not return it to the House of Congress where it originated. The President has a constitutional obligation to return a bill to the House of Congress where it originated along with his objections if he does not approve of the bill.<sup>92</sup> Recall that the first sentence of the Clause 2 in the Presentment Clause is an if-then logic statement. In an if-then logic statement the antecedent (*e.g.*, does not approve of the bill) obligates the consequence (*e.g.*, returning a bill to congress). Recall, however, that the consequence does not obligate the antecedent<sup>93</sup> – in other words, a failure to return the bill to Congress does not impact the truthfulness of whether the President approved of the bill. Therefore, the President’s failure to return the bill does not constitute lack of disapproval, rather a violation of a constitutional obligation arising from his disapproval.

Under the Louder Words Option, a bill that a President signs but disapproves through a disapproving signing statement falls subject to the “pocket veto” portion of the Presentment Clause in Article I, Section 7, Clause 2, fourth sentence of the Constitution since the President neither approved the bill nor returned the bill to Congress.<sup>94</sup> The bill

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<sup>89</sup> Misty Ventura, comment, *the Legislative Veto: A Move Away From Separation of Powers or a Tool to Ensure Nondelegation?*, 49 SMU L. REV. 401, 421 (1996), interpreting *INS v. Chadha*, 462 U.S. 919, 944-46. The Court has stated that “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” (*INS v. Chadha* 462 U.S. 919, 944 (1983)).

<sup>90</sup> Notably, the Presentment Clause does not preclude a President from signing the bill even though he disapproves of it – but without approval the signature does not enact the bill into law.

<sup>91</sup> When considering whether the procedure enacting a bill into law is constitutional it is proper to initially presume that the law is valid (*INS v. Chadha* 462 U.S. at 944). In the present situation, a President is unlikely to sign a bill by accident and a signature is necessary to enact a bill into law with approval. In an absence of any other evidence, it is reasonable under the Presentment Clause to assume a signature evidences approval. However, when there is evidence that there is not approval accompanying the signing – *i.e.*, a disapproving signing statement – then the signature cannot evidence approval and the *prima facie* evidence is rebutted and the enactment, without Presidential approval, is unconstitutional and must fail.

<sup>92</sup> U.S. CONST. art. I, § 7, cl. 2, first sentence.

<sup>93</sup> Recall from note 35, *supra*, that assuming that P is true when Q is true is a common error with “If P, then Q” statements.

<sup>94</sup> U.S. CONST. art. I, § 7, cl. 2, fourth sentence applies to bills that the President has failed to enact and failed to return to Congress within 10 days of presentment. Without having approved of the bill at issue, a President has not enacted it into law. If he further fails to return it to the House in which it originated within 10 days of presentment, the fate of the bill depends on whether Congress is adjourned.

should become law 10 days after presentment if Congress is in session and should die 10 days after presentment if Congress is adjourned. Notably, if the bill becomes law, it is not as a result of the President's enactment – the President did not participate in the legislative process whereby the bill became law. On the contrary, he violated his constitutional obligation as part of the legislative process by not returning the bill to Congress.

The Louder Words Option is better aligned with the text, intent and purpose of the Presentment Clause and better serves the public than the Louder Action Option.

In contrast to the Louder Action Option, the Louder Words Option strictly embraces the full text of the Presentment Clause by respecting the approval requirement as distinct from the signature requirement. A President's signature does not necessitate his approval within the text of the Presentment Clause. The Louder Words Option recognizes that a signature is only rebuttable evidence of approval and allows evidence of concomitant disapproval to rebut the signature. In contrast, the Louder Action Option essentially reads the approval requirement out of the text by either ignoring the approval requirement or merging it with its distinct consequence of signing.

The Louder Words Option complies with the intent of the Presentment Clause by limiting a President's negative power to that qualified by Congressional review. Any legitimate exercise of negative (veto) power by a President under the Louder Words Option remains subject to Congressional review by requiring return of the bill to Congress with grounds for objection.<sup>95</sup> In contrast to the Louder Action Option, an attempt by a President to exercise an unqualified negative power through a disapproving signing statement fails by triggering the pocket veto procedure<sup>96</sup> of the Presentment Clause. As a result, the Louder Words Option allows Congress to rely on safeguards provided by the pocket veto procedure by presenting controversial bills to a President more than ten days prior to adjourning.

The Louder Words Option also makes it more difficult for a President to infringe the purpose of the Presentment Clause by confusing the nation as to the meaning of a law. Recall that the two purposes of the Presentment Clause are to provide a President a qualified negative over proposed legislation in order to: (1) protect the President from legislation that infringes his power; and (2) inhibit legislation that may not be in the best interest of the nation as a whole. The Louder Words Option precludes a President from enacting a bill into law while attributing a meaning to the law that conflicts with that of Congress – an action that would not be in the best interest of the nation as a whole because it causes confusion. Meanwhile, the Louder Words Option retains the Framers' intended method for accomplishing the purpose of a qualified negative through the veto process.<sup>97</sup> In contrast, the Louder Action Option allows a President to confuse the nation

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<sup>95</sup> If a President does not approve of a bill he is to “return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law.” (U.S. CONST. art. I, § 7, cl. 2, first and second sentences).

<sup>96</sup> U.S. CONST. art. I, § 7, cl. 2, fourth sentence.

<sup>97</sup> U.S. CONST. art. I, § 7, cl. 2, first sentence empowers a President to return a bill with his objections to the House of Congress in which it originated with his reasons for objection. Congress can then amend the bill to resolve the reasons for objection or attempt a difficult two-thirds supermajority vote of both houses to pass the bill into law without presidential approval.

by introducing conflicting meanings to a federal law or, worse yet, enacting an unconstitutional bill into law through the use of a disapproving signing statement.

Finally, the Louder Words Option better serves public interests than the Louder Action Option. In addition to precluding a President from introducing contradictory meaning to a law or enacting a law that he finds unconstitutional, the Louder Words Option holds a President accountable for his signing statements. Under the Louder Words Option a President would have to decide whether to approve the bill or not – but would not be allowed to “walk the fence” by approving in form and disapproving in statement and effect. Such legislative fence walking creates national uncertainty in our federal legislative process and should not be allowed. The Louder Words Option mitigates this type of uncertainty by preventing a President from making signing statements in conflict with approval when enacting laws.

### *iii. Challenges to the Louder Words Option*

The Louder Words Option is subject to challenges including whether it raises justiciability issues in the form of a political question and whether it actually increases uncertainty in statutory validity. This section examines these challenges and concludes that they are not persuasive concerns.

#### *Justiciability and the Political Question Doctrine*

The Constitution provides federal courts authority to hear certain cases and controversies.<sup>98</sup> The Supreme Court has interpreted this power as a limitation on what types of matters a federal court may hear, limitations known as justiciability doctrines.<sup>99</sup> There are five major justiciability doctrines, one of which is the political question doctrine.<sup>100</sup> The political question doctrine “refers to allegations of constitutional violations that federal courts will not adjudicate” but will rather leave “to the political branches of government to interpret and enforce.”<sup>101</sup> One purpose for the political question doctrine is to maintain respect for the separate branches of government by minimizing judicial intrusion into the legislative and executive branches.<sup>102</sup> “[T]he

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<sup>98</sup> U.S. CONST. art. III, § 2.

<sup>99</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 28 (Richard A. Epstein et al. eds., Aspen 2001).

<sup>100</sup> *Id.* The five justiciability doctrines are: (1) the prohibition against advisory opinion; (2) standing; (3) ripeness; (4) mootness; and (5) the political question doctrine.

<sup>101</sup> *Id.* at 76.

<sup>102</sup> *Id.* at 77.

nonjusticiability of a political question is primarily a function of the separation of powers.”<sup>103</sup>

The Supreme Court has identified the following six factors as possibly indicating a controversy is non-justiciable under the political question doctrine:<sup>104</sup>

- (1) A textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- (2) A lack of judicially discoverable and manageable standards for resolving it; or
- (3) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- (4) The impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
- (5) An unusual need for unquestioning adherence to a political decision already made; or
- (6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The political question doctrine is relevant because the Louder Words Option allows someone to challenge the legitimacy of a President’s apparent enactment of a law. Such a challenge would pit the judicial branch against the executive branch, possibly implicating any of factors (4), (5) and (6) listed above. The challenge may be viewed as disrespectful questioning of a political decision made by the President to enact a bill into law and such a challenge may be embarrassing for the Executive branch.

The District Court in the District of Columbia has ruled that the political question doctrine precludes challenging a statute’s validity in an arguably related situation.<sup>105</sup> The issue in *Hershey Foods* was whether the President had sufficient time to review a bill and formulate an approval before signing it and the court ruled that a determination as to whether a President was able to sufficiently formulate a sense of approval or not was a non-justiciable political question.<sup>106</sup> Unlike in *Hershey Foods*, however, challenges to the validity of a statute under the Louder Words Option address actually formulated expressions of disapproval and do not question whether enough time was allowed to formulate a sense of approval or disapproval.

At the heart of challenging a statute under the Louder Words Option is the meaning of the Presentment Clause of the Constitution, specifically whether a President has enacted the statute under the Presentment Clause. The Supreme Court has declared that “on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States.”<sup>107</sup> It is the responsibility of the

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<sup>103</sup> *Baker v. Carr*, 369 U.S. 186, 210 (1962).

<sup>104</sup> *Id.* at 217.

<sup>105</sup> *Hershey Foods Corp. v. U.S. Dep’t of Agric.*, 158 F. Supp. 2d 37 (D.D.C., 2001).

<sup>106</sup> *Id.* at 41 (D.D.C., 2001).

<sup>107</sup> *In re Duncan*, 139 U.S. 449, 498 (1891).

Supreme Court to both interpret the Constitution and to determine whether one branch of the government exceeds their authority under the Constitution.<sup>108</sup> Moreover, even if the Court must interpret the Constitution in conflict with another branch of the government the Court still has an obligation to embrace their role as final authority in interpreting the Constitution.<sup>109</sup>

Numerous federal circuit courts have specifically limited application of the political question doctrine in challenges to statute validity to issues of whether the statute was enacted properly under internal legislative rules, but exclude from the political question doctrine challenges to statutory validity in regards to constitutional or statutory requirements.<sup>110</sup> Questioning whether a President enacted a bill into law according to the Presentment Clause falls squarely as a constitutional requirements issue – and, therefore, outside the scope of the political question doctrine.

Challenges to whether a President has constitutionally enacted a bill into law by signing and simultaneously expressing disapproval of the bill are challenges to the validity of the statute on constitutional grounds. The federal court system assumes responsibility for just such questions and has expressed policy not to avoid them under the political question doctrine. Accordingly, the courts should not avoid addressing whether a statute has been constitutionally enacted under the Louder Words Option by employing the political question doctrine.

*The Louder Words Option Creates More Uncertainty*

Opening a statute’s constitutionality up to litigation based on a “disapproving” signing statement arguably creates uncertainty regarding statutory legitimacy, uncertainty which is contrary to public policy. Under such a system, courts would have to articulate the boundaries of what constitutes “disapproving” signing statements and until such time as the boundaries became clear there would be uncertainty whenever a President said anything disparaging about a bill he was signing.

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<sup>108</sup> See Baker v. Carr, 369 U.S. at 210. (“Deciding whether a matter has in any measure been committed by the Constitution to another branch of the government, or *whether the action of that branch exceeds whatever authority has been committed*, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.” (emphasis added)).

<sup>109</sup> U.S. v. Munoz-Flores, 495 U.S. 385, 3915 (1990) (quoting from Powell v. McCormack, 395 U.S. 486, 549 (1969): “Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the court’ avoiding their constitutional responsibility.”)

<sup>110</sup> See 15 LOUIS R. FUMER, MOORE’S FEDERAL PRACTICE – CIVIL §101.117, Chapter 101 E.7.a. (cites holdings from 3<sup>rd</sup> Circuit, 5<sup>th</sup> Circuit, 9<sup>th</sup> Circuit and D.C. Circuit and concludes: “In determining whether to review challenges to the validity of legislative enactments, the lower federal courts have distinguished between claims of violation of external constitutional or statutory requirements from claims of violation of internal legislative rules. Although the decisions have not been entirely consistent, generally the courts have *agreed to review the former on merits*, and have declined to review the latter on grounds of the political question doctrine.”).

The boundaries of “disapproval”, however, should not be difficult to ascertain. Since the President has signed any bill in question there is a presumption of approval. Such a presumption should only be overcome with clear evidence of disapproval. Courts should interpret Presidential signing statements as consistent with the meaning and intent Congress attributed to a bill prior to presentment if at all possible. Just as courts try to interpret legislation consistent with the Constitution in order to avoid constitutional difficulties, courts should also interpret presidential signing statements consistent with Congressional meaning and intent as much as possible to avoid constitutional difficulties. Only when a presidential signing statement cannot reasonably be construed as consistent with the Congressional meaning and intent should the signing statement qualify as a “disapproving” signing statement.

An allegation that the Louder Words Option would “create more” statutory uncertainty is illusory, it should actually reduce uncertainty. Uncertainty already exists when a President verbally disapproves of a bill as he signs it. Opening the constitutionality of such statutes up to litigation actually provides a means for resolving an existing uncertainty rather than creates additional uncertainty. Furthermore, enabling people to hold a President accountable for his signing statements will likely reduce the extent to which he expresses disapproving signing statements – which will reduce uncertainty overall. Even if statutory uncertainty is not reduced under the Louder Words Option, the Option’s closer adherence to the text, intent and purpose of the Constitution justifies its incorporation.

#### **IV. DISAPPROVING SIGNING STATEMENTS IN INTERPRETING STATUTES**

Signing statements can be a powerful legislative tool for a President. As one author summarizes, Presidents can use signing statements in three principal ways:

[B]y interpreting ambiguous statutory language in a manner that the president hopes will be treated by the courts as a legitimate form of legislative history;

by instructing the president's subordinates in the executive agencies to resolve statutory ambiguities in a way favored by the president; and

by creating a record that can be used later to refute claims that the president has approved of constitutionally dubious provision in bills that the president has chosen to sign because of his desire to see other provision of the legislation become law. 111

These purposes have a common objective – to strategically place a President's interpretation on a statute without subjecting the President to accountability to Congress or the nation as a whole for that interpretation.

This paper does not venture to join a general debate as to the virtue of including presidential signing statements in a bill's legislative history. Instead, the first subsection will provide a general background into the existing debate and rapidly focus onto disapproving signing statements and their role in statutory interpretation – the subject of the second subsection. This paper concludes that denying interpretive authority to disapproving signing statements, regardless whether one subscribes to the Louder Actions Option or Louder Words Option, would promote important constitutional norms.

### **A. Signing Statements and Statutory Interpretation**

Courts have looked to presidential signing statements when interpreting statutes.<sup>112</sup> Yet, the issue of whether a president's signing statement is properly

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<sup>111</sup> Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 B.Y.U.L. REV. 17, 43-44 (1995).

<sup>112</sup> *See, e.g.*, *Ft. Sill Apache Tribe v. United States*, 477 F.2d 1360, 1376 (U.S. Ct. Cl. 1973) (court observed that limitations of Indian Claims Commission Act had been limited to land and property rights as a result of President Truman's signing statement upon signing the Act); *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F.Supp. 972, 976 (D. Ariz. 1996) (court used President Bush's signing statement to determine the minimum showings required of a litigant to bring a suit for violating the amended Clean Air Act); *United States v. Gonzalez*, 311 F.3d 440, 443 (1st Cir. 2002) (court looks to presidential signing statement to find the purpose of statutory amendments).

included in the legislative history for use in interpreting a resulting statute has been a subject of debate between proponents<sup>113</sup> and opponents<sup>114</sup> for years<sup>115</sup>. The debate has taken greatest form since the Reagan administration, during which “serious efforts to use [signing statements] as a tool for advancing a coherent legal strategy began.”<sup>116</sup> As one author put it: “President Reagan inserted more interpretations of statutes into signing statements than any of his predecessors.”<sup>117</sup> The “use of these interpretations was carefully orchestrated to enhance presidential influence on statutory interpretation.”<sup>118</sup>

Proponents of incorporating presidential signing statements into legislative history focus on the legislative process as a whole and seek to include all information relevant to the process in legislative history in order to provide the most detailed view of the reasoning behind a statute’s enactment. “Legislative history, in its broadest sense, includes all relevant events occurring before final enactment. In its narrower, more usual, and legally more controversial sense, it refers to the ‘relevant events comprising the enactment process.’”<sup>119</sup> Proponents see a President as a member of the legislative process that enacted a statute so his comments must be relevant in determining the statute’s meaning.

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<sup>113</sup> See, e.g., Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239 (1995); Kristy L. Carroll, Comment, *Whose Statute is it Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U. L. REV. 475 (1997); Kathryn Marie Dessayer, Note, *The First Word: The President’s Place in “Legislative History”*, 89 MICH. L. REV. 399 (1990). Justice Scalia also includes presidential signing statements in legislative history when a President signs a bill in one of the few times he embarks into legislative history analysis (see, *Conroy v. Aniskoff*, 507 U.S. 511, n.2 (1993)).

<sup>114</sup> See, e.g., Boulris, *supra* note 52; William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991); Brad Waltes, Note, *Let me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755 (1987).

<sup>115</sup> Presidential signing statements have been controversial since President Jackson attempted what “amounted to an item veto” with his signing statement in 1830 (Brownell, *supra* note 10, at 1351).

<sup>116</sup> Lund, *supra* note 111, at 43.

<sup>117</sup> Popkin, *supra* note 114, at 703.

<sup>118</sup> *Id.* at 704.

<sup>119</sup> Dessayer, *supra* note 113, at 399 (HIGHLIGHTS section).

Opponents often point to an apparent separation of powers violation by allowing the President's comments to affect statutory meaning when he is not formally a legislator<sup>120</sup> but rather a check-gate vested solely with the power of approval or disapproval after the legislative action is complete<sup>121</sup>. As one opponent states: "The imposition of presidential opinion [into statutory interpretation] allows the President to create and execute legislation unchecked by another branch of government. As a result, the separation of powers doctrine is violated."<sup>122</sup> Of particular concern is Presidential manipulation of statutory meaning that goes unchecked by any other branch of government: "the President is not a legislator and [] signing statements containing specific statements about statutory meaning are often politically manipulative attempts to undermine statutory structure or achieve results too controversial to be adopted in the text."<sup>123</sup> In sum, opponents tend to be of the position that "[t]here is no specific provision [in the Constitution] authorizing [a President] to change any provision of [a] bill or to assign any interpretation of its meaning"<sup>124</sup> so his signing statements should carry no interpretive weight.

The Constitution does not have a specific provision authorizing a President "to change any provision of a bill or to assign any interpretation of its meaning."<sup>125</sup> However, there is also "no constitutional basis for objecting to his expounding his views with respect to the bill" – provided he adds no new matter to the bill itself.<sup>126</sup> "New

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<sup>120</sup> See, Carroll, *supra* note 113, at 501 ("court use of signing statements violates the principle of separation of powers because the President is not a legislator."). See also references in *id.* at n.141.

<sup>121</sup> "It is then important to recognize that a signing statement is ... a commentary rendered after legislative action is completed and the resulting measure presented to the President for approval." Killenbeck, *supra* note 113, at 276.

<sup>122</sup> Waltes, *supra* note 114, at 761.

<sup>123</sup> Popkin, *supra* note 114, at 700.

<sup>124</sup> Zinn, *supra* note 10, at 25-26.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 26-27.

matter” refers to anything “inconsistent with statement in the committee report and other elements of the history” of the bill.<sup>127</sup>

Using a presidential signing statement to interpret statutory meaning is particularly troublesome when the signing statement disapproves of the statute, or any portion of it. That is where the subject of this paper enters the debate and is the subject of the next subsection.

### **B. Disapproving Signing Statements and Statutory Interpretation**

Since President Jackson used a signing statement to assert his interpretation of a bill before him in 1830, Congress has condemned signing statements that project an interpretation of a bill in conflict with Congress’s interpretation as being an objection in substance and an approval in form.<sup>128</sup> This is the very conflict at the core of this paper – a President’s disapproving signing statement and concomitant signature is an objection in substance and an approval in form. To use a President’s disapproving signing statement to interpret a statute utilizes his “objection in substance” to interpret that which he has “approved in form.” Use of a disapproving signing statement for statutory interpretation (a) lacks the legislative character on which proponents of using signing statements for interpretation rely; (b) violates the intent of the Presentment Clause; (c) violates the purpose of the Presentment Clause; and (d) conflicts with public policy.

Whichever option one embraces – Louder Actions Option or Louder Words Option – a president’s disapproving signing statements do not play any role in the

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<sup>127</sup> *Id.* at 27.

<sup>128</sup> President Jackson asserted his own interpretation of a bill he signed into law in 1830, one of the first uses of presidential signing statements (*see* notes 10 and 115, *supra*). Shortly later President Tyler did a similar thing. The House of Representative submitted a report in response that was severely critical of both acts being in substance an *objection* and in form an *approval* of the bill – and that such conflicting response to a bill is unwarranted by the Constitution. *See* Zinn, *supra* note 10, at 26 (citing Begehut, *The English Constitution* 2d Edition (1873) p. 122). *See also* Popkin, *supra* note 114, at 717 (“Presidential legislative

legislative process and, as such, lack the legislative character relied on by proponents of using signing statement for statutory interpretation. Any disapproving signing statement within the Louder Actions Option was necessarily deemed to carry negligible weight and play no role in the enactment process. It is inconsistent to later turn to the disapproving signing statement and grant it interpretive weight as though it was significant in the enactment process. Any disapproving signing statement under the Louder Words Option served as evidence of presidential disapproval of a bill. Since the bill was not approved by the President the President played no affirmative role in enacting the bill.<sup>129</sup> It would be improper to look to the President's comments on the bill to interpret the resulting statute when the President did not participate in the legislative process of enacting the bill into law.<sup>130</sup>

The intent behind the Presentment Clause is to provide the President a qualified negative over legislation.<sup>131</sup> To afford interpretative weight to a disapproving signing statement conflicts with this intent by empowering a President to modify or completely negate legislation through a signing statement without being subject to Congressional review. In other words, a President could effect an unqualified veto power through the use of a disapproving signing statement.<sup>132</sup>

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history should be an interpretive aid only when it records agreement with legislators and cites traditional legislative history, such as committee reports.”).

<sup>129</sup> Recall, under the Louder Words Option a bill subject to a President's disapproving signing statement only becomes law if Congress is in session 10 days after presentment since the President neither approved the bill nor returned it to Congress since it falls subject to the pocket veto clause of the Constitution. (U.S. CONST. art. I, § 7, cl. 2, fourth sentence).

<sup>130</sup> Even proponents of using presidential signing statements point to the President as a legislator in the enactment process in order to give weight to his commentary on the resulting statute. Removing the President from the enactment process dramatically weakens the proponent's argument for then the President is no more a legislator than you or me.

<sup>131</sup> See notes 21-24, *supra*, and associated text.

<sup>132</sup> “[P]residents have in effect exercised ‘line item’ veto power over non-spending bills ... largely through presidential signing statements.” Brownell, *supra* note 10, at 1351. “[T]he President may declare in a signing statement that a provision of the bill before him is flatly unconstitutional, and that he will refuse to

One purpose of the Presentment Clause is to enable a President to protect the national interests of the country as a whole from potentially harmful or unwise legislation.<sup>133</sup> However, allowing disapproving signing statements to affect statutory meaning harms national well being by creating uncertainty in statutory meaning (via interpretive disapproval) or statutory legitimacy (via substantive disapproval). Is a citizen to rely on the meaning of the statute that the President has enacted in form with his signature or on the statute that the President has enacted in substance with his words?<sup>134</sup> Is a corporation to plan their growth development and corporate policies based on an assumption that a portion of a statute is unconstitutional as per a presidential signing statement or more conservatively assume the entire statute is valid?<sup>135</sup> Such conflicts cause citizens to live in uncertainty as to what is actually statutorily forbidden, an uncertainty that is not in the best interest of the nation. Obviating the impact of a signing statement relieves this level of confusion.

Sound public policy discourages the use of disapproving presidential signing statements in statutory interpretation. In addition to creating uncertainty, use of disapproving signing statements fosters lack of accountability for decisions on the part of both the President and Congress. A President can hedge his position by appearing to enact a bill into law by signing it, but then disapproving a bill through a signing statement. He can thereby avoid liability for approving the legislation (he voiced his

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enforce it. ... One reason such signing statement may be controversial is that the refusal to execute a statutory provision has substantially the effect of a line-item veto." Dellinger, *supra* note 75, at 336, n.6.

<sup>133</sup> See notes 30-31, *supra*, and associated text.

<sup>134</sup> Consider the observation that the first President Bush raised constitutional issues in his signing statements with apparent design "mostly to ... [avoid] the appearance that the President approved of objectionable provisions in the legislation he signed" while pursuing a desire to see other provision of the legislation become law. Lund, *supra* note 111, at 44.

<sup>135</sup> Corporate growth plans can involve tremendous investments, investments that may be lost if the corporation relies on a portion of a bill to be unconstitutional only to later find out it is constitutional and being enforced by another administration.

disapproval) or disapproving it (he enacted the bill into law) depending on which position later best suits him. This fosters further public uncertainty not only in statutory meaning but in knowing where the President stands on a legislative issue.

Moreover, precluding disapproving signing statement from influencing statutory interpretation may actually motivate Congress to clearly articulate meaning for their bills prior to presenting them to a President. When Congress clearly establishes meaning for a bill they leave less room for a President to ascribe unqualified meaning of his own with a signing statement, meaning that may conflict with the intent of Congress. If Congress has made their meaning known, such a signing statement becomes a disapproving signing statement and would carry no interpretive weight. Hence, Congress can protect their intent for a bill by clearly articulating its meaning up front – a policy that makes a bill more clear for all – which is good public policy.

For these reasons, disapproving signing statements should play no role in statutory interpretation – regardless of whether a statute was enacted under the concept of the Louder Action Option or Louder Words Option.

## **V. CONCLUSION**

A disapproving signing statement creates uncertainty as to whether a President has constitutionally enacted a bill that he has just signed. The Presentment Clause of the Constitution requires that a President both approve and sign a bill in order to enact that bill into law. A disapproving signing statement brings into question whether the President has “approved” the bill or just signed it. Signing statements can qualify as either interpretively or substantively disapproving. An interpretively disapproving signing statement ascribes a textual meaning to a bill that conflicts with clear meaning set

for by Congress prior to presenting the bill to the President, thereby raising uncertainty as to what the true meaning of the resulting law actually is. A substantively disapproving signing statement accepts Congress's interpretive meaning for the text of a bill but contradicts Congress's substantive understanding of and intent for the bill (*e.g.*, a signing statement declaring a portion of a bill unconstitutional and not to be enforced contradicts Congress's understanding that the bill is constitutional and their intent to enact the bill into law), thereby raising uncertainty as to the legitimacy of a law. Uncertainties created by disapproving signing statements force people to risk their personal liberties as they try to discern just what a law really expects of them.

The Presentment Clause provides constitutional guidelines articulating a President's role in enacting federal statutes. Textually, the Presentment Clause provides the following principles regarding a President: (1) A President may enact a bill into law only by both approving and signing the bill; (2) If a President disapproves of a bill he has an obligation to return the bill to Congress with his objections so they may review the bill in light of the objections; and (3) If a President does not approve and sign a bill or return the bill to Congress with his objections within ten days of the bill's presentment to him the bill becomes law if Congress is in session and dies if Congress is out of session. The intent behind a President's role in legislation under the Presentment Clause is to grant him a qualified negative over legislation proposed by Congress. The negative is "qualified" in that Congress has a right to overrule a presidential negative after subsequent review of the President's objections. The purpose for the qualified negative is to provide a President power to protect his self interests and to protect the interests of the nation as a whole.

Within the constitutional foundation of the Presentment Clause, there are only two options for resolving the conflict between a President's disapproving signing statement and his concomitant signature on a bill when determining whether the President has enacted the bill into law. The signature can prevail as evidence of approval and the bill becomes law with the disapproving signing statement being deemed insignificant in regards to presidential approval. Alternatively, the disapproving signing statement can rebut the signature and evidence the President's disapproval of the bill and preclude the President's from enacting the bill into law.

The federal courts have adopted a conventional approach in line with the former option. The United States Supreme Court has not found any evidence of disapproval that rebuts a President's signature as evidence of approval, even when faced with a signing statement declaring a portion of a bill unconstitutional. The D.C. District Court has gone so far as to conclude that a President's signature serves a dual purpose under the Presentment Clause of indicating approval and serving as the signature (evidence of that approval). In other words, the President's actions speak louder than his words.

Nonetheless, the latter option of allowing a disapproving signing statement to rebut a signature as evidence of approval aligns better with the text, intent and purpose of the Presentment Clause. Textually, the Presentment Clause requires a President to both approve and sign a bill in order to enact it into law. A disapproving signing statement evidences lack of approval. The second option acknowledges the disapproving signing statement as evidence of disapproval yet the first option ignores the statement in form while allowing a President to implement it in effect by not enforcing those portions of a law he disapproves. In regards to intent, a disapproving signing statement grants a President power to negate all or a portion of a bill that he enacts into law without giving

Congress a chance to review his objections with the bill. Such a power affords the President an “absolute” negative rather than a “qualified” negative as the framers of the Constitution intended for him to have. In regard to purpose, a disapproving signing statement causes confusion as to what is the actual law. While the enacting President may not approve of a portion of a bill and not enforce it, yet a subsequent President may approve of that portion and enforce it. The people are left in uncertainty as to what is the law and what is not – a law-abiding citizen cannot know how to obey the law. Hence, the “enacting” President violated the purpose of the Presentment Clause by not acting in the best interest of the nation as a whole. Ultimately, the Presidents words of disapproval should speak louder than his actions of signing.

A disapproving signing statement should have no effect in statutory interpretation regardless of which option one uses to resolve the conflict between a disapproving signing statement and a signature on a bill. To do otherwise would unquestionably empower a President with an absolute negative over legislation – a power clearly not supported in the Presentment Clause. By its very nature, a disapproving signing statement conflicts with a meaning (interpretively or substantively) afforded a bill by Congress. To allow a President to persuade courts to interpret a bill to have a meaning conflicting with Congress’ intended meaning affords the President an absolute negative rather than a qualified negative. Besides, under either option, a disapproving signing statement plays no role in the enacting of a bill. To later grant a statement authority in interpreting a resulting statute after denying that same statement authority in enacting the statute is inconsistent. Whether the disapproving signing statement is ignored or acknowledge in regards to statutory enactment, it should be silent in statutory interpretation.

