Office of the Attorney General
Washington, D. C. 20530

7 January 1986

MEMORANDUM FOR CHUCK COOPER

FROM: STEVE GALEBACH

SUBJECT: General Management Meeting, 8 January 1986

The Attorney General has asked that you speak briefly on the subject of Presidential Signing Statements at tomorrow's General Management Meeting. I expect the Attorney General to read or describe the letter from Opperman of West Publishing Company agreeing to publish the signing statements in U.S.C.C.A.N. You can then elaborate for a few minutes on the significance of this step and any aspects you want to emphasize.

I have attached a copy of Opperman's letter and other general materials on the subject for your convenience (I expect you already have them).

Thanks for handling this on short notice.

Attachments

Office of the Attorney General
Washington, D. C. 20530

3 January 1986

MEMORANDUM FOR SAM ALITO
JAY BYBEE
MICHAEL CARVIN
ROGER CLEGG
CHARLES COOPER
T. KENNETH CRIBB, JR.
STEPHEN GALEBACH
CAROLYN KUHL
STEPHEN MARKMAN
ROGER MARZULLA
ROGER OLSEN
CHARLES RULE
JAMES SPEARS
JAY STEPHENS
VICTORIA TOENSING

FROM: STEVEN G. CALABRESI SC

SUBJECT: Litigation Strategy Working Group

As we discussed yesterday, I am circulating for your review some background documents on the use of Presidential Signing Statements. I have included a recent letter received by the Attorney General from the West Publishing Company agreeing to our request that Presidential Signing Statements be published along with congressional reports in U.S. Code Cong. & Admin. News.

Attachments

DEPARTMENT OF JUSTICE
ODAG EXECUTIVE SECRETARIAT CONTROL DATA SHEET

From: OPPERMAN, DWIGHT D., WEST PUBLISHING CO., ST. PAUL, MN
To: AG.
Date Received: 01-02-86 Date Due: [redacted] Control #: 6010200014
Subject & Date
12-26-85 LETTER THANKING THE AG FOR HIS LETTER OF 12-13-85 REQUESTING THAT THE WEST PUBLISHING CO. INCLUDE THE TEXT OF PRESIDENTIAL SIGNING STATEMENTS IN "U.S.C. CONGRESSIONAL AND ADMINISTRATIVE NEWS" AS PART OF THE LEGISLATIVE HISTORY OF THE ACTS OF CONGRESS.

[redacted]

	Referred To:	Date:		Referred To:	Date:	
(1)	[redacted]	01-02-86	(5)			FILE:
(2)			(6)			
(3)			(7)			PRTY
(4)			(8)			1Z
	INTERIM BY:			DATE:		OPR:
	Sig. For: NONE			Date Released:		CYN

Remarks
CC: OLP/MARKMAN, DAG.

Other Remarks:

West Publishing Company • 50 W. Kellogg Blvd., P.O. Box 64526, St. Paul, MN 55164-0526 Tel: 612/228-2500

DWIGHT D. OPPERMAN
President & Chief Executive Officer

December 26, 1985

Hon. Edwin Meese III
Attorney General
Office of the Attorney General
Washington, D.C. 20530

Dear Mr. Attorney General:

Thank you for your letter of December 13 which did not arrive here until December 23.

We appreciate your suggestion. I think the President's signing statement on major bills will be of interest and of help to the legal profession. I am surprised nobody thought of it before. I have told our editorial people to start including them in U.S.C.C.A.N.

With esteem, I remain

Very truly yours,

Dwight D. Opperman
President & Chief Executive Officer

DDO:pz

DEPARTMENT OF JUSTICE
ODAG EXECUTIVE SECRETARIAT CONTROL DATA SHEET

From: MARKMAN. STEPHEN J.. AAG. OLP
To: AG.
Date Received: 11-27-85 Date Due: 12-10-85 Control #: 5112715091
Subject & Date
11-26-85 MEMO CONCERN PRESIDENTIAL SIGNING STATEMENTS. ATTACHES MEMORANDA OUTLINING THE LEGAL SIGNIFICANCE OF PRESIDENTIAL SIGNING STATEMENTS IN QUESTIONS OF STATUTORY INTERPRETATION. AND THE LEGISLATIVE HISTORY OF THE EQUAL ACCESS TO JUSTICE ACT. W/LETTER TO WEST PUBLISHING CO. FOR THE AG'S SIGNATURE. REQUESTING THAT PRESIDENTIAL SIGNING STATEMENTS BE INCLUDED IN USC CONGRESSIONAL & ADMINISTRATIVE NEWS.

	Referred To:	Date:		Referred To:	Date:	
(1)	OLC;COOPER	11-27-85	(5)			FILE:
(2)	DAG;JENSEN	12-02-85	(6)			
(3)	OAG;GALEBACH	12-03-85	(7)			PRTY
(4)			(8)			1
	INTERIM BY:			DATE:		OPR:
	Sig. For: AG.			Date Released:	12-16-85	HED

Remarks
(1) FOR CONCURRENCE. RETURN TO EXEC. SEC., ROOM 4410.
(2)FOR CONCURRENCE - CONCURRED BY OLC ON 11-30-85.
(3)CONCURRED BY DAG ON 12-02-85 & FORWARDED TO OAG FOR AG SIG.
12-16-85 AG REPLIED BY LETTER WHICH WAS DATED 12-13-85.

Other Remarks:

12/2 DLJ CONCURRED--TO E.S.

FILE: AG CHRON, AG CHRON (H), OLP

Office of the Attorney General
Washington, D. C. 20530

13 December 1985

Mr. Dwight D. Opperman
President and Chief Executive
Officer
West Publishing Company
50 W. Kellogg Boulevard
St. Paul, Minnesota 55102

Dear Mr. Opperman:

The purpose of this letter is to request that the West Publishing Company include the text of presidential signing statements in United States Code Congressional and Administrative News as part of the legislative history of the Acts of Congress.

Currently, it appears that the legislative history section of the U.S.C.C.A.N. includes a cross-reference to the Weekly Compilation of Presidential Documents for the President's signing statement on major bills. However, the text of presidential signing statements regularly appears only in the Weekly Compilation and in the bound volumes of the Official Papers of the President. Though available in most large legal research libraries and law school libraries, these references cannot be considered readily available to most attorneys. In view of the importance of presidential signing statements in resolving statutory interpretation questions, I would like to see them made more readily available to the legal community.

Article I, § 7, cl. 2 of the Constitution, which provides that no bill shall become law until it has been presented to the President for his approval or disapproval, gives the President an important and formal role in the legislative process. See United States v. Lovett, 328 U.S. 303, 324-25 (1946) (Frankfurter, J., concurring) ("the legislation upon which we now pass judgment is the product of both Houses of Congress and the President"). Indeed, in INS v. Chadha, 462 U.S. 919 (1983), the Supreme Court, in holding a single-house legislative veto provision unconstitutional, recently reaffirmed the vital role of the President and declared it "beyond doubt that lawmaking [is] a power to be shared by both Houses and the President." Id. at 947.

To the extent that facial ambiguities require that one look beyond the language of a statute to determine its meaning, the views of each of the bodies that have jointly created it should be considered. Courts have repeatedly recognized the importance of presidential signing statements in statutory construction. See Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 661-62 (4th Cir. 1969), (relying upon President Truman's signing statement as well as a statement by one of the bill's floor managers in construing the Portal-to-Portal Act, 29 U.S.C. § 259); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976) (relying on signing statement as an indication of the possible breadth of the trade secrets exemption from the Freedom of Information Act, 5 U.S.C. § 552(b)(4)). Cf. United States v. Lovett, 328 U.S. 303, 313 (1946) (citing presidential signing statement in finding congressional bar on payment of salaries to employees unless they were appointed by President and confirmed by Senate to be unconstitutional bill of attainder). Similarly, in the legislative veto cases, presidential signing statements have been used to rebut suggestions of presidential acquiescence in the devices, see Chadha, 462 U.S. at 942 n.13, and of the absence of a stalemate between the political branches, see Consumer Energy Council v. FERC, 673 F.2d 425, 453-54 (D.C. Cir. 1981) aff'd mem., 463 U.S. 1216 (1983).

In view of the importance of presidential signing statements as an aid to statutory interpretation, I recommend that those statements be reproduced in full in U.S.C.C.A.N., rather than merely cross-referenced. By doing so, lawyers and courts engaged in statutory interpretation would have more readily available to them in one location both the procedural history of any given statute and its interpretation by the Chief Executive upon enactment.

With best wishes,

Sincerely,

Edwin Meese III

EDWIN MEESE III
Attorney General

Office of the Attorney General
Washington, D. C. 20530

23 August 1985

MEMORANDUM FOR THE ATTORNEY GENERAL

FROM: STEVE CALABRESI SC
JOHN HARRISON JH

SUBJECT: Presidential Signing Statements

The abuse of legislative history is a major way in which legislative power is usurped by activist courts, idealogically motivated congressional staffers and lobbying groups. If statutes are to be taken seriously as law, legislative history should be a guide to the interpretation of statutory language, not a substitute for it. Nevertheless, courts bent on reading statutes their own way routinely take advantage of legislative history deliberately created without the full awareness of Congress.

At some time, it would be good for the Department to review the whole question of legislative reports. Even without such a review, however, we have available a potentially powerful, if so far unused, tool: Presidential signing statements. The President's signing statement represents the basis on which a necessary participant gave his consent to legislation. It is even better than a committee report because it represents an entire branch's view of the matter.

OBSTACLES: The President's interpretation of legislation now is generally reflected in a brief signing statement. These statements often are prepared by the Office of Legal Counsel here in the Justice Department. Unlike House and Senate reports, Presidential signing statements have not been used by courts as a source of legislative history. This is the case for the following reasons:

- The West Publishing Company does not publish and distribute signing statements in the high visibility ways in which it publishes and distributes Congressional reports.

- Very few lawyers and judges are even aware of either the existence of signing statements or of the argument that they are good legislative history.

- Department of Justice lawyers rarely cite signing statements in their briefs but regularly rely on Congressional legislative history. Judges thus are more aware of Hill reports than of Presidential views.

- o Signing statements now generally are too short and too incomplete. They seldom are prepared with an eye toward harmful inferences in House and Senate reports.

- o Even when fully staffed the Office of Legal Counsel and the White House Counsel's Office are badly outgunned by the hundreds of Congressional staffers who write Congressional Committee Reports.

RECOMMENDATIONS: There are many steps we can take to remedy this problem and protect the institutional prerogatives of the Executive Branch. Indeed, the Justice Department can probably revolutionize this area of law simply by acting on our own initiative. We recommend that you or Ken take the following steps to make sure that in the future the President's views will be taken into account by courts that look at legislative history.

- o Write the West Publishing Company and ask them to publish Presidential signing statements in the same fashion as they publish Congressional Reports. In the unlikely event that West refuses, we should get wider publication and distribution through the Government Printing Office.

- o Give a speech to the Judicial Conference or any other assembly of judges on this topic. Such a speech would spread awareness of our position and would be both scholarly and of practical assistance to judges.

- o Ask the Litigation Strategy Working Group headed by Charles Fried to develop methods for distributing the Presidential signing statements in existence to our staff attorneys. Department of Justice lawyers must cite these statements in our briefs so judges get used to relying on them.

- o The Office of Legal Counsel currently is virtually the only place where signing statements are referred to. They should be encouraged to extend this practice.

- o Have the Office of Legal Counsel draft a law review article for your signature on why signing statements are good legislative history. This would be a good way to promote our idea, and we think it would be helpful from a public relations standpoint for you to submit a scholarly law review article on an innovative and somewhat academic proposal.

Office of the Attorney General
Washington, D. C. 20530

3 September 1985

MEMORANDUM TO: Charles Fried
Acting Solicitor General

FROM: T. Kenneth Cribb TKC
Counselor to the Attorney General

SUBJECT: Presidential Signing Statements

The Attorney General recently considered the question of presidential signing statements as legislative history and came to the conclusion that they are an underused tool of the Executive, especially as a counter to the abuse of legislative reports by staff, lobbyists and courts. He wants to clarify the conceptual issues associated with the use of signing statements as guides to legislative interpretation and increase their use, by both the Department as well as lawyers, judges and commentators.

Pursuant to this, I have asked OLP to undertake preliminary work to identify (a) the issues associated with the use of signing statements as legislative history and (b) steps that could be taken to encourage their use. Once this is done, I think it would be a good idea to use the OLP report as a talking paper in the Litigation Strategy Working Group, which is admirably suited to discuss both the theoretical and practical issues. I am also very interested in getting your views on this project; perhaps we can use it as the springboard for a general review of the use and misuse of legislative history.

Office of the Attorney General
Washington, D. C. 20530

3 September 1985

MEMORANDUM TO: James M. Spears
Acting Assistant Attorney General
Office of Legal Policy

FROM: T. Kenneth Cribb TKC
Counselor to the Attorney General

SUBJECT: Presidential Signing Statements

I have recently discussed with the Attorney General the importance of presidential signing statements as guides to the interpretation of laws to which the President has given his consent. He is concerned that signing statements, a useful counter to the abuse of congressional reports by staff, lobbyists and courts, are infrequently referred to, even by the Department's lawyers (only OLC seems to have a systematic policy of relying on signing statements).

Accordingly, the Attorney General wants to take steps to clarify the issues associated with signing statements and to encourage their wider use. As part of this effort, I would appreciate it if OLP would take the following steps:

(1) Draft a letter from the Attorney General to the West Publishing Company, asking them to publish signing statements as they do congressional reports. As part of this, please find out where they are now published (if anywhere) and what the best concrete proposal to West would be.

(2) Prepare a memo that (a) sets forth the issues associated with the use of signing statements as aids to interpretation and (b) suggests measures that can be taken to raise the legal community's awareness. The first part of that memo should be designed to serve as the basis for speeches and articles.

This project, I think, has great potential for seeing that proper weight is given to the Executive's interpretation of bills signed into law by the President. I look forward to discussing this in greater detail; please feel free to call me with any thoughts or ideas.

File

Office of the Attorney General
Washington, D. C. 20530

3 September 1985

MEMORANDUM TO: Ralph Tarr
Acting Assistant Attorney General
Office of Legal Counsel

FROM: T. Kenneth Cribb TKC
Counselor to the Attorney General

SUBJECT: Presidential Signing Statements

The Attorney General and I recently discussed the importance of presidential signing statements as legislative history. I know that OLC is a major participant in the drafting of signing statements, and perhaps their only champion as good legislative history. Accordingly, I would very much appreciate it if you could take a moment to provide a brief description of the existing system for the drafting of signing statements, explaining our role and that of the White House Counsel. It also would be useful if you could give us any thoughts on steps that might be taken to improve the process: should we devote more resources to it, for example, and should we take measures to make sure that signing statements respond to unfavorable material in congressional reports?

Also, do you know of anyone other than OLC who ever relies on signing statements? Are they accessible through any of the normal tools of legal research?

I appreciate your finding time for this in what I know to be a very busy schedule.

5:35
12/28

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

OCT 28 1985

MEMORANDUM FOR T. KENNETH CRIBB

COUNSELOR TO THE ATTORNEY GENERAL

Re: Presidential Signing Statements

This responds to your request of September 3, 1985 for information on the statements issued by the President when he signs a bill into law and for suggestions on how to increase the influence these statements have. We believe that the present system of drafting such signing statements is not systematic and that improvements could be introduced, both in the drafting of the statements and the uses to which they are put.

I. Drafting and Publication of Signing Statements

It is our understanding that at present, the decision to draft a signing statement is usually made when an agency alerts the Office of Management and Budget (OMB) to a problem with an enrolled bill that is being circulated for comment before presentation to the President for signature.[1] For example, this Office is often asked to review, within twenty-four hours, enrolled bills that raise constitutional problems. It is often the first time that this Office has seen the proposed legislation. Within the time given, the Office must decide, in consultation with other units in the Department, OMB and the Office of the Counsel to the President, whether to recommend a veto of the entire bill, a signing statement or some other more informal response to the problem. Problems often arise because of the difficulty, within such a relatively short time, of obtaining necessary policy guidance from within the Department, convincing OMB and the White House of the importance of the issue, and then negotiating language that is acceptable to all

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[1] Signing statements, while most frequently drafted by the agencies, are also prepared by OMB and the White House.

those concerned.[2] We understand that this procedure is typical across the agencies for the drafting of signing statements.

We believe that it would be worthwhile exploring with OMB whether it would be possible to set up a more structured method for drafting statements. For example, when agencies are reviewing a bill prior to its passage, they could identify those provisions that raise such serious problems -- either as a matter of policy or law -- that they think the President should comment on the particular provision if the bill is in fact enacted.[3] Once alerted to the potential problem, OMB could decide whether this was an issue it wished to confront Congress with, and if so, direct the agency to prepare a proposed signing statement and to begin collection of any congressional legislative history that the President might wish to comment on in his statement. The signing statement could be circulated to other interested agencies for their suggestions.[4] At a minimum, this procedure would allow the Executive Branch to prepare the President's response, including any rebuttal to congressional comments, in a considered fashion. It might also give OMB an additional tool -- the threat of a potential signing statement -- with which to negotiate concessions from Congress. Obviously this procedure would not always work, because bills are often radically amended before enactment. Nevertheless, such a system might well introduce a measure of coherence into the process.

It might also be worthwhile exploring with the Federal Register whether signing statements should be printed in title 3 of the Code of Federal Regulations (CFR). The signing statements are presently printed in the Weekly Compilation of Presidential Documents and, eventually, in the bound volumes of Presidential Papers. Nevertheless, the Weekly Compilation, although available at most major law libraries, is not as readily available or familiar to the average practitioner or federal judge as is the

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[2] Moreover, because of the short time involved, there is a serious danger, occasionally realized, that someone at OMB or the White House may, at the last minute and without fully appreciating its significance, alter the statement or fail to use it. Memorandum for Fred F. Fielding, Counsel to the President from D. Lowell Jensen, Deputy Attorney General, April 2, 1985 (copy attached).

[3] The agencies' legislative affairs offices could easily instruct their components to undertake this review as a routine matter.

[4] We would note that when OMB circulates draft Executive orders to the agencies for comment, it often includes draft signing statements as well. Similarly, draft reports by agencies on particular bills pending in Congress are often circulated for comment to the other agencies.

CFR. Most judges usually have the CFR in their own chambers and can readily consult it. As title 3 of the CFR provides an annual compilation of Executive orders, Proclamations, Presidential Determinations, Memoranda and Notices,[5] it would seem logical to include the signing statements there.

It might also be possible to have the statements printed in the United States Code Annotated in the note after the appropriate statute, as is often done with connected Executive orders. See e.g., 50 U.S.C. § 1701 note. Still a third possibility might be to have them printed in the United States Code Congressional & Administrative News, which provides selected legislative histories.

Finally, it might be useful to issue a memorandum or other directive on signing statements to the litigating units in the Department and to the other agencies with litigating authority reminding their attorneys to check to see whether there is a Presidential signing statement relevant to any statute they may be litigating. The more often that the government's lawyers cite the signing statements, the more often the courts will refer to them in decisions and the more familiar they will become to other lawyers and courts as legitimate tools of interpretation.

II. Use of Signing Statements

You have also asked whether any one besides this Office relies on signing statements in interpreting legislation. First, agencies rely on the statements when the President uses a signing statement to direct agencies on how to interpret a statute.[6] Agencies have also used the President's directions to bolster their interpretation of a statute by, for example, citing them in their regulations. See, e.g., 29 C.F.R. § 70.24(e)(1984).

Second, Congress sometimes relies on them when the President has used the statement to alert Congress to his understanding of a provision. For example, when the President issued a signing statement in 1983 outlining his understanding of the limitations imposed on the Department by the so-called Rudman Amendment, Sen. Rudman wrote to the President expressing his concurrence in that

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[5] Signing statements are fairly short and there are not that many of them in any one year. Adding them to title 3 would not make that volume unduly long.

[6] See II Public Papers of Ronald Reagan 1312 (1982) (directing Sec. of Education to ignore legislative veto provision); id. at 1313 (directing Secretaries of Agriculture and Interior to obtain fair market value for certain land).

analysis.[7] Similarly, Presidents have repeatedly used signing statements to alert Congress to the fact that provisions in a statute are unconstitutional.[8]

Finally, the courts have occasionally cited signing statements in discussions of statutory authority. Courts have referred to them in describing the underlying intent of a statute. For example, President Johnson's description of the goals of the Freedom of Information Act, issued when he signed the bill in 1966, has been cited at least three times,[9] and his statement when signing the Civil Rights Act of 1964 has been quoted to illustrate that law's policy.[10] The Second and Fourth Circuits have explicitly relied on Pres. Truman's signing statement as part of the legislative history of the Portal-to-Portal Act. See EEOC v. Home Ins. Co., 672 F.2d 252, 265 (2d Cir. 1982); Clinton D. Mayhew Inc. v. Wirtz, 413 F.2d 658, 661 (4th Cir. 1969). See also Schultz v. First Victorian Nat'l Bank, 420 F.2d 648, 657 n.20 (5th Cir. 1969). The most important use that we have identified, however, came in the cases involving the constitutionality of the legislative veto. Opponents of the Government's position repeatedly argued that the Executive Branch was precluded from arguing the unconstitutionality of the

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[7] Letter to the President from Sen. Rudman, Nov. 29, 1983, quoted in Memorandum for William F. Baxter, Assistant Attorney General, Antitrust Division from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, at 3 n.4, December 2, 1983.

[8] Public Papers of Dwight D. Eisenhower 688 (1955) (legislative veto); 20 Weekly Comp. Pres. Docs. 1818 (1984)(violation of the Appointments Clause).

[9] See Berry v. Dept. of Justice, 733 F.2d 1343, 1349-50 (9th Cir. 1984); Evans v. Dept. of Transportation, 446 F.2d 821, 824 n.1 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972); Church of Scientology v. Dept. of Justice, 410 F. Supp. 1297, 1300 (C.D. Ca. 1976). Likewise, Pres. Kennedy's summary of the reasons for enactment of the Equal Pay Act has been cited. See Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1261 (5th Cir. 1969)(Brown, C.J., dissenting), vacated, 400 U.S. 542 (1971).

[10] United States v. Jefferson County Bd. of Education, 372 F.2d 836, 850 & n.21 (5th Cir. 1966), aff'd, 380 F.2d 385 (5th Cir.), cert. denied, 389 U.S. 840 (1967). Another court used a signing statement to highlight an issue it was not deciding. See Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976)(quoting Pres. Johnson's statement that the bill in question "in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires.").

legislative veto because Presidents had signed and enforced laws containing such devices. In rejecting this argument, the Supreme Court noted that the Executive Branch had repeatedly stated its hostility to the provisions. INS v. Chadha, 462 U.S. 919 (1983). "In any event, 11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional." Id. at 942 n.13 (citations omitted). See also Consumer Energy Council v. FERC, 673 F.2d 425, 453-54, 458-59 (D.C. Cir. 1981), aff'd, 463 U.S. 1216 (1983)(citing many of the presidential statements opposing the veto and rejecting argument that use of reorganization authority meant provision was constitutional "where the Executive has strongly opposed the one-house disapproval device"). Thus, courts have used signing statements to bolster their conclusions, albeit so far only in a handful of cases.

We believe that it should be possible to have signing statements join the material other than congressional debates and reports that courts use to determine the meaning of a statute. In addition to the familiar deference which is given to agency interpretation, courts have given Attorney Generals' opinions, written on behalf of the President, "respectful consideration", see State of Vermont v. Brinegar, 379 F. Supp. 606 (D. Vt. 1974). Signing statements issued with Executive orders have been used to determine whether a statute or an Executive order governed. See Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323, 1337 (S.D.N.Y. 1976). And, statements issued when treaties have been signed have been determined to be "forceful evidence" and "convincing rebuttal" on the issue of whether the treaty is self-executing. See Frolova v. Union of Socialist Soviet Republics, 761 F.2d 370, 376 (7th Cir. 1985).[11] There is no reason that the same rules of statutory construction that make these materials legitimate tools for courts confronted by ambiguous statutes should not also apply to Presidential signing

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[11] Given the President's central role under the Constitution in the area of foreign affairs, perhaps efforts could be made to insure that the Department's litigating divisions, especially those that frequently handle international matters, make adequate use of statements made by the President either when a treaty or executive agreement is signed or when a treaty is transmitted to the Senate for ratification. Because there are relatively few such statements, it might be useful to have a list of them prepared and to distribute it for quick reference.

statements. [12]

III. Conclusion

We believe that there are at least three uses for signing statements. First, they can be used to tell agencies how to interpret a statute. The President can direct agencies to ignore unconstitutional provisions or to read provisions in a way that eliminates constitutional or policy problems. This direction permits the President to seize the initiative in creating what will eventually be the agency's interpretation -- an interpretation that the courts have traditionally given great deference. Second, statements can be used as a means of alerting Congress to problems with a statute. They can serve as an informational device, informing Congress of the President's position and preserving the President's position on issues that are important to him but for which he is unwilling to veto a bill. Third, the statements can provide an additional source of information for the courts on how to interpret a statute. Although this third use is fairly limited at present, we believe that it could be expanded. We have attached a copy of a recent memorandum of this Office urging this third use in interpreting a specific statute.[13]

Although we do not expect signing statements to become major Presidential instruments, we do believe that they are presently underutilized and could become far more important as a tool of Presidential management of the agencies, a device for preserving issues of importance in the ongoing struggle for power with

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[12] For example, courts often refer to the deference that should be given to the interpretation of those charged with a statute's administration. Udall v. Tallman, 380 U.S. 1, 16 (1965). Because the President is head of the Executive Branch, surely some deference should be given to the interpretation of the individual who is charged under the Constitution with executing the law. Another basic rule of statutory construction is that contemporaneous construction by administrators who participated in drafting statutes is entitled to great weight in interpreting a statute. Zuber v. Allen, 396 U.S. 168, 192 (1969). When the Administration has been an active participant in the drafting of a statute, the President's contemporaneous comments should be as useful to a court as the implementing agency's interpretation.

[13] Memorandum for James M. Spears, Acting Assistant Attorney General, Office of Legal Policy from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, October 23, 1985.

Congress, and an aid to statutory interpretation for the courts.

Please let us know if we can be of further assistance.

Ralph W. Tarr
Acting Assistant Attorney General
Office of Legal Counsel

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

April 2, 1985

Honorable Fred F. Fielding
Counsel to the President
The White House
Washington, D. C. 20500

Dear Mr. Fielding:

I am writing to you in connection with the problem we encountered recently in connection with Presidential approval of the Pacific Salmon Treaty Act (H.R. 1093). In the comments of the Department of Justice on the enrolled bill, we pointed out that the bill presented two problems connected with the Appointments Clause of the Constitution (Art. II, § 2, cl. 2) and attached to the comments a proposed signing statement through which the President would have expressed his understanding of the bill in a manner that would have obviated those constitutional issues. The proposed signing statement was similar, if not identical, to a number of statements previously made by President Reagan.

The signing statement, however, was not issued, apparently as the result of objections made to it by the Departments of State and Commerce. We understand from the responsible White House policy office that no effort was made by them to determine the substance of or the basis for those objections. At the same time, the Department of Justice did not receive timely advice of those objections and did not have an opportunity to refute them or to modify the proposed signing statement to accommodate them to the extent that they were valid. The Department of Justice is deeply concerned about the rejection of a proposed signing statement involving important constitutional issues without the Department having been given an adequate opportunity to be heard further.

As you know, signing statements perform important functions by placing an interpretation on a statute and by giving instructions to the agency charged with the administration of a statute. Here the proposed signing statement would have advised the Secretaries of Commerce and the Interior that they had the ultimate responsibility to appoint panel members and, consequently,

had the power to refuse to appoint any person nominated on lists submitted to them and to request the submission of additional lists if none of the nominated persons appeared to them suitable for appointment. Similarly, the proposed signing statement would have advised the panels established under the Act that they could perform only advisory functions.

It is our view that a decision not to use a signing statement dealing with one or more constitutional issues is a significant matter which may create problems for the Executive Branch in implementing an act signed into law by the President. It, therefore, appears important to develop a procedure that will provide timely notice to the Department of Justice of any objections to a signing statement proposed by us and an opportunity for the Department to work with other agencies, even on short notice, to resolve any difficulties they might have with the proposed signing statement. In fact, many objections are based on misunderstandings that can be cured easily and rapidly by a rephrasing of the proposed signing statement language.

Therefore, we would appreciate your attention to developing such a procedure within the White House to avoid a repetition of our recent experience with the Pacific Salmon Treaty Act.

Sincerely,

D. Lowell Jensen
Acting Deputy Attorney General

Memorandum

Subject	Date
Equal Access to Justice Act Policy Guide	OCT 23 1985

To	From
James M. Spears Acting Assistant Attorney General Office of Legal Policy	Ralph W. Tarr Acting Assistant Attorney General Office of Legal Counsel

This responds to the October 10, 1985 request for comments on the intra-departmental Equal Access to Justice Act task force's revision of the policy guide, "The Award of Attorneys' Fees and Other Expenses in Judicial Proceedings Under the Equal Access to Justice Act." This office has one major recommendation and several technical suggestions regarding the draft.

Our principal concern is with Section V(B)(3), pages 47-50, discussing the relationship between the EAJA fee standard -- which provides that the government can avoid liability for fees by demonstrating that its position was "substantially justified" -- and the "substantial evidence" and "arbitrary or capricious" tests for review of agency action. The House Report on the 1985 amendments to the EAJA suggests, contrary to case law under the prior statute, that a finding that agency action was arbitrary, capricious, or unsupported by substantial evidence is "virtually certain" to preclude a showing of substantial justification. H.R. Rep. No. 120, 99th Cong., 1st Sess. 10 (1985) The draft rejects this construction of the new statute because of comments made on the House and Senate floors and in the President's signing statement. Although we fully agree with the conclusion, we have two difficulties with the argument: (1) the floor statements by Sens. Grassley and Thurmond disavowing the House Report's construction are more equivocal than one would like, and indeed could be taken by courts as support for a (rebuttable) presumption that arbitrary or capricious action is not substantially justified, and (2), more significantly, the draft places insufficient emphasis on the Presidential signing statement. It should be the policy of this Department, and of the Executive Branch generally, to encourage courts to view signing statements as authoritative statutory history. As they unambiguously represent the view of one of the three participants in the lawmaking process, such documents at least should be treated as on a par with congressional reports, and are clearly better indicators of statutory intent than floor statements of individual legislators. We suggest that section V(B)(3) be replaced by the following

language, which can readily be incorporated by government attorneys into their briefs:

> As was provided for by the original EAJA, the government can avoid liability for fees under the 1985 amendments by showing that its position was "substantially justified." Under the old statute, courts consistently construed this term in light of the legislative history and refused to presume absence of substantial justification merely from a finding that agency action was arbitrary, capricious, or unsupported by substantial evidence. See, e.g., Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1481 (9th Cir. 1983), cert. denied, 105 S. Ct. 446 (1984); Gava v. United States, 699 F.2d 1367, 1369-71 (Fed. Cir. 1983); Wyandotte Savings Bank v. NLRB, 682 F.2d 119, 120 (6th Cir. 1982); S & H Riggers & Erectors, Inc. v. OSHRC, 672 F.2d 426, 430-31 (5th Cir. 1982). But cf. Spencer v. NLRB, 712 F.2d 539, 557 & n.47 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 1908 (1984). The 1985 amendments simply reenacted the same language -- with full knowledge of the well-settled case law -- which should abrubtly end the search for the appropriate fee standard.
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> Even if one thinks it necessary to examine the legislative history of the new fee provision, it remains clear that "substantially justified" has the same meaning under the newly enacted EAJA that it previously had. Although, as noted above, the 1985 amendments left the "substantially justified" standard unchanged, the House Report purported to reject the established construction:
>
> > Especially puzzling, however, have been statements by some courts that an administrative decision may be substantially justified under the Act even if it must be reversed because it was arbitrary and capricious or was not supported by substantial evidence. Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act. Only the most extraordinary special circumstances could permit such an action to be found to be substantially justified under the Act.
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> H.R. Rep. No. 120, supra, at 9-10 (footnote omitted). Whatever force this report might have in the face of Congress' reenactment of the old language is more than

counterbalanced by the President's expression of intent in his signing statement.

In signing the bill containing the 1985 amendments, President Reagan made clear that he was enacting the new EAJA into law on the understanding that the "substantially justified" standard was unchanged from prior law:

> In addition, it is my understanding in signing this bill that the Congress recognized the important distinction between the substantial justification standard in the fee proceeding and a court's finding on the merits that an agency action was arbitrary and capricious or not supported by substantial evidence. The substantial justification standard is a different standard, and an easier one to meet, than either the arbitrary and capricious or substantial evidence standard. A separate inquiry is required to determine whether, notwithstanding the fact that the Government did not prevail, the Government's position or action was substantially justified.

Extension of the Equal Access to Justice Act, 21 Weekly Comp. Pres. Doc. 966, 967 (Aug. 5, 1985) (emphasis added). The President's signing statement is at least as persuasive an indicator of statutory intent as the House Report, and in the absence of a consensus between the executive and legislative branches that the meaning of "substantially justified" has changed, courts ought to read the statute as a continuation of the previously operative standard.

The Supreme Court has recently reaffirmed the vital role of the President in the lawmaking process. In INS v. Chadha, 462 U.S. 919 (1983), the Court, in holding a single-house legislative veto provision unconstitutional, declared it "beyond doubt that lawmaking [is] a power to be shared by both Houses and the President." Id. at 947. This follows from the Presentment Clause, U.S. Const., Art. I, § 7, cl. 2, which provides that no bill shall become law until it has been signed by the President (or approved by a two-thirds majority of both houses of Congress following a presidential veto). A bill that is signed into law thus acquires legal force through the independent actions of three bodies: the House, the Senate, and the President. See United States v. Lovett, 328 U.S. 303, 324-25 (1946) (Frankfurter, J. concurring) ("the legislation upon which we now pass judgment is the product of both Houses of Congress and the President").

To the extent that one looks beyond the language of a statute for its meaning, the views of each of the bodies that have jointly created it should be considered.

Courts have recognized the importance of presidential signing statements. In Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658 (4th Cir. 1969), the court had to construe the provision of the Portal-to-Portal Act, ch. 52, § 10, 61 Stat. 89 (1947) (codified at 29 U.S.C. § 259 (1982)), establishing good faith reliance on an administrative interpretation as a defense to an action under the Fair Labor Standards Act. In deciding that the statute required an objective rather than subjective test for good faith, the court relied upon President Truman's signing statement as well as a statement by one of the bill's floor managers. See 413 F.2d at 661-62. Cf. United States v. Lovett, 328 U.S. 303, 313 (1946) (citing presidential signing statement in finding congressional bar on payment of salaries to employees unless they were appointed by President and confirmed by Senate to be unconstitutional bill of attainder). In National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976), the court relied on a signing statement as an indication of the possible breadth of the trade secrets exemption from the Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1982), though it did not reach the question. In the legislative veto cases, signing statements were used to rebut suggestions of presidential acquiescence in the devices, see Chadha, 462 U.S. at 942 n.13, and of the absence of a stalemate between the political branches, see Consumer Energy Council v. FERC, 673 F.2d 425, 453-54 (D.C. Cir. 1981), aff'd, 463 U.S. 1216 (1983). Finally, courts have often used signing statements as indicators of statutory policies. See Berry v. Dep't of Justice, 733 F.2d 1343, 1349-50 (9th Cir. 1984) (presidential statement of policy underlying FOIA); Evans v. Department of Transportation, 446 F.2d 821, 824 n.1 (5th Cir. 1971) (citing Senate report and Presidential signing statement in construing law enforcement exception to FOIA), cert. denied, 405 U.S. 918 (1972); Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1261 n.15 (5th Cir. 1969) (Brown, C.J., dissenting) (citing Presidential signing statement, Senate hearings, and House debates as evidence of purposes of Equal Pay Act), vacated, 400 U.S. 542 (1971).

It would be especially appropriate to give weight to the President's views on this issue. The statement in the House Report was specifically contradicted on the House floor by Rep. Kindness, who characterized the Report's comment as a "gratuitously authoritarian

overstatement," 131 Cong. Rec. H4763 (daily ed. June 24, 1985), and cautioned that:

> The committee report statement should not be interpreted to be the position of the committee on the point it seeks to describe and should not be interpreted to suggest that a finding of an agency action that was not supported by substantial evidence would automatically entitle a prevailing party to fees or would establish a presumption of entitlement to fees . . . . Substantial justification is a different and a lesser standard than the substantial evidence standard applied in a review of administrative proceedings.

Id. This statement was joined by Rep. Moorehead, the ranking minority member of the relevant Judiciary Committee Subcommittee, id., and Rep. Kastenmeier, the Subcommittee Chairman, who urged that the report not be taken "to suggest that a finding that an agency action that was not supported by substantial evidence would automatically entitle the prevailing party to fees and expenses or would establish a legal presumption of entitlement to fees." Id. On the Senate floor, Sen. Thurmond, Chairman of the Judiciary Committee, expressed similar views:

> [T]he issues [sic] of "substantial justification" relative to the fee award is a separate and distinct inquiry from whatever standard of review has been applied to the merits of the case. Therefore, there could be cases where an agency loses on the merits because a court has found its action to be arbitrary and capricious, but where no attorney fees would be awarded because the Government was substantially justified in the position it had taken.

131 Cong. Rec. S9993 (daily ed. July 24, 1985).

In view of Congress' failure to amend the statutory language, the rather chilly reception the House Report received on the floor of Congress, and the President's clear expression of intent in his signing statement, there is no basis for concluding that the term "substantially justified" has a different meaning under the new statute than courts gave it under the prior EAJA.

In the same vein, the signing statement should also be mentioned in section V(A), page 44, discussing the EAJA's limitation on the use of discovery in the determination of substantial justification. The President specifically noted that this limitation relieved one of the concerns he had when he vetoed a prior version of the EAJA last year. At the very least, the signing statement should be cited alongside the House Report on page 44.

Less significantly, it might be worthwhile to include mention of another issue that has frequently arisen in EAJA litigation. There has been a split among the circuits as to whether a statutory bar to the award of costs against an agency -- see, e.g., 16 U.S.C. § 825p (1982), barring an award of costs against FERC -- also precludes an EAJA fee award under 28 U.S.C. § 2412(d)(1)(A) (court shall award fees "in addition to any costs awarded"). Four circuits have said no, see Hirschey v. FERC, 760 F.2d 305, 307-09 (D.C. Cir. 1985); United States v. 341.45 Acres of Land, St. Louis County, Minn., 751 F.2d 924, 934 (8th Cir. 1984); Washington Urban League v. FERC, 743 F.2d 166, 167 n.1 (3d Cir. 1984); United States v. 329.73 Acres, Grenada and Yalobusha Counties, 704 F.2d 800, 808 (5th Cir. 1983) (en banc), while one circuit, see Tulalip Tribes of Washington v. FERC, 749 F.2d 1367 (9th Cir. 1984), cert. denied, 54 U.S.L.W. 3252 (U.S. Oct. 15, 1985) (No. 84-1805), and two dissenting opinions, see Hirschey v. FERC, 760 F.2d at 311-12 (Scalia, J., concurring in part and dissenting in part); United States v. 329.73 Acres, 704 F.2d at 813, 817 (Rubin, J., dissenting), have said that the possibilities of fee and cost awards are linked. The House Report, to no one's surprise, endorses the majority view, H.R. Rep. No. 120, supra, at 17, but there is sufficient authority to advance the minority viewpoint in circuits where the matter was not resolved under the old statute.

Recognizing that this is a policy guide, not a treatise, I also point out that the cases cited in section II(A)(1), page 4, bear no relation to the issue discussed therein. The cases pertain to when the 30-day period for filing fee requests begins to run, and they do support the position described in section II(B)(3)(a), page 8 n.8.

U.S. Department of Justice
Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

October 25, 1985

MEMORANDUM

TO: T. Kenneth Cribb, Jr.
Counselor to the Attorney General

FROM: James M. Spears
Acting Assistant Attorney General
Office of Legal Policy

SUBJECT: Presidential Signing Statements

This memorandum is in response to your request for (a) an analysis of the issues associated with the use of Presidential signing statements as aids to the interpretation of legislation and (b) suggestions regarding measures that could taken to raise the legal community's awareness of the use of such statements.

Currently, it appears that the text of Presidential signing statements regularly appears only in the Weekly Compilation of Presidential Documents and in the bound volumes of the Official Papers of the President. These references are available in the Main DOJ Library and in most large legal research libraries and law school libraries. However, these references cannot be considered readily available and are probably unfamiliar even to many attorneys. There is no ready reference source for these materials akin to the widespread availability of Congressional reports through the West Publishing Co.'s United States Code Congressional and Administrative News or statements of legislators in the Congressional Record (though the U.S.C.C.A.N. does include cross-references to presidential signing statements in the Weekly Compilation). We will draft an appropriate letter for the Attorney General to request inclusion of the text of Presidential signing statements in the U.S.C.C.A.N.

With regard to the specific legal issue raised in your memorandum -- the use and weight of Presidential signing statements as aids to legislative interpretation -- we have been unable to find any caselaw, articles, or treatises which discuss this precise issue. Indeed, virtually the only reference to

the use of statements made by the executive in approving legislation is found in Sands, Sutherland Statutory Construction, § 48.05 (4th Ed. 1973):

> [A] governor's action in approving or vetoing a bill constitutes a part of the legislative process, and the action of the governor upon a bill may be considered in determining legislative intent. 1/

Sutherland's position with respect to the state legislative process is clearly applicable to the Constitutional role of the President in the legislative process. Article I, § 7 of the Constitution gives the President a formal role in the legislative process in addition to the largely political influence which he usually wields by virtue of his position as Chief Executive. The Constitution requires as an essential step in the enactment of legislation that bills which have passed both houses of Congress be presented to the President for signature or for veto. Accordingly, one can adopt Sutherland's position that a President's signing statement -- like a veto message for legislation that is subsequently amended -- is, in fact, a part of the legislative history and should be relied upon in assessing legislative intent.

As will be discussed infra, however, there is little precedential support for this position. The remainder of this memorandum will discuss the manner in which one could most convincingly construct a case for the propriety of using Presidential signing statements in the manner you suggest.

By way of background, it is well-accepted that legislation which is clear and unambiguous on its face need not and cannot be interpreted by a court. In Caminetti v. United States, 242 U.S. 470 (1917), the Supreme Court unequivocally stated that

> where the language is plain and admits of not more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion.

1/ A New Jersey case, McGlynn v. New Jersey Public Broadcasting Authority, 439 A.2d 54, 78 (N.J. 1981) (Wilentz, C.J., concurring), in addressing the propoer interpretation to be given a state statute regulating the Public Broadcasting Authority, cited this passage for the proposition that the Governor's statement issued upon approving the bill could be considered in determining legislative intent.

Id. at 485 (citations omitted). See also McCord v. Bailey, 636 F.2d 606, 614-15 (D.C. Cir. 1980). Only when a statute is ambiguous, of doubtful meaning, or open to the more than one construction, can a court engage in statutory interpretation. In Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485 (1947), the Supreme Court declined to engage in statutory interpretation of § 9(b) of the National Labor Relations Act to determine whether foremen, as a class, could constitute an appropriate bargaining unit. Section 9(b) specified that the power to make such a determination was conferred upon the National Labor Relations Board. Accordingly, the Supreme Court declined to consider the issue, holding that

> We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified . . . .

Id. at 492. See also Small v. Britton, 500 F.2d 299 (10th Cir. 1974).

Courts often have expressed divergent positions as to what constitutes the most reliable source (or sources) from which to ascertain legislative intent in interpreting ambiguous statutes. Resource materials for statutory construction are commonly classified into two categories - "intrinsic" and "extrinsic" aids. Intrinsic aids to construction are found in both the internal structure and organization of the text, and in conventional or dictionary interpretation of the terms used therein. Extrinsic aids, on the other hand, consist of information which comprises the background of the text, such as committee reports, statements by legislators, and prior or related statutes. Presidential signing statements clearly would be extrinsic aids to construction.

There is little agreement as to which types of aids to statutory construction are the most reliable indicators of the proper interpretation to be given a statute. In addition to the words and structure of a statute, courts have traditionally looked to a variety of other sources. For example, some courts have emphasized that the words of the legislators should be given great weight, since they were in the best position to articulate what the statute was designed to do, Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976); Gartner v. Soloner, 384 F.2d 348, 353 (3rd Cir. 1976), cert. denied 390 U.S. 1040 (1968); while others have held that the motives and opinions of individual legislators -- even sponsors of the legislation -- are not entitled to controlling weight in statutory construction, because the proper test is not what individual legislators thought but the consensus of the Congress as a whole. Weinberger v. Rossi, 456 U.S. 25, 35 N.15 (1982); Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979).

There is fairly broad agreement, though, that statements made by legislators regarding legislation passed by prior Congresses are to be disregarded for purposes of statutory construction. In addressing the scope and application of the National Firearms Act, the Supreme Court stated unequivocally that "[t]he views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress." Haynes v. United States, 390 U.S. 85, 87 n.4 (1967) (citations omitted). See also United States v. Clark, 445 U.S. 23, 33 n.9 (1980).

Another widely accepted extrinsic aid to construction is the history of the legislation, including reference to prior statutes on the same or related issues. See generally Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737-48, rehearing denied 423 U.S. 884 (1975) United States v. Donruss, 393 U.S. 297, 303 rehearing denied 393 U.S. 1112 (1968); United States v. Wise, 370 U.S. 405, 412-14 (1962). Various courts have examined the reports of standing committees, Housing Authority of City of Omaha, Nebraska v. United States Housing Authority, 468 F.2d 1,6 (8th Cir. 1972), and conference committees, Demby v. Schweiker, 671 F.2d 507, 510 (D.C. Cir. 1981), in determining Congressional intent. Reliance upon these sources appears to be premised upon the belief that they best reflect the intent of the entire Congress, rather than the more subjective views of individual legislators.

Finally, there is widespread judicial reliance upon the interpretations and application of ambiguous statues by administrative agencies, departmental heads, and other executive branch officials charged with the duty of administering and enforcing the legislation, particularly where the agency has participated substantially in drafting the legislation, or when the legislation involves particularly complex or technical issues. For example, in Miller v. Youakim, 440 U.S. 125 (1978), the Supreme Court addressed the definition of a "foster family home" under the Department of Health, Education and Welfare's Aid to Families with Dependent Children - Foster Care program and placed substantial reliance upon the agency's interpretation of the term, stating:

> We noted in vacating the original three-judge District Court decision in this case that "[t]he interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute." Administrative interpretations are especially persuasive where, as here, the agency participated in the developing the provision.

Id. at 144, (Citations omitted). See also Steadman v. SEC, 603 F.2d 1126, 1135 (5th Cir. 1979).

When a question arises concerning the proper construction to be given a statute or portion thereof, the overwhelming majority of judicial opinions hold that the statute is to be interpreted so as to effect the "intent of the legislature" or the "intent of the Congress." See Sutherland, supra § 45.05; U.S. v. Agrillo-Ladlad, 675 F.2d 905 (7th Cir. 1982). Implicit in this position is the concept that the principles of separation of powers mandate that statutes be construed so as to carry out the will of the lawmaking branch of government.

Despite the fact that most judicial opinions utilize the phrase "legislative" or "congressional" intent in articulating the proper standard by which an ambiguous statute should be interpreted, in practice many judges actually employ a somewhat different test, focusing their inquiry upon the "meaning of the statute." While these two standards may sound alike at first blush, there actually can be a fairly substantial difference in the result depending upon which test is utilized. As described by Sutherland, supra, at § 45.08,

> Generally, when legislative intent is employed as the criterion for interpretation, the primary emphasis is on what the statute meant to members of the legislature which enacted it. On the other hand, inquiry into the "meaning of the statute" generally manifests greater concern for what members of the public to whom it is addressed, understand.

This distinction becomes particularly important when considering the use of Presidential signing statements as aids to legislative interpretation. Clearly such statements are extrinsic, not intrinsic, aids to construction. Indeed, they are similar to the contemporary statements made by legislators in conference committees in that they are made during, not after the enactment of the legislation. As such, under the Weinberger and Clark rationales, supra, one could convincingly argue that they would be entitled to more weight than subsequent statements by legislators. Additional support for this position can be found in the courts' longstanding practice of treating subsequent construction of statutes by executive branch agencies with deference. See Power Reactor Development Co. v. Electrical Radio and Machine Workers, 367 U.S. 396, 408 (1961); Atlantic Richfield Co. v. Federal Energy Administration, 429 F. Supp. 1052, 1067 (N.D. Cal. 1976.

The usefulness and weight to be given to Presidential signing statements will differ depending upon which approach to statutory construction is adopted by a reviewing court. If the "intent of the legislature" standard is employed, Presidential signing statements would be of relatively little relevance, since they are issued after the legislation has been drafted and therefore have no bearing upon what the legislators intended when preparing the legislation. Indeed, in a purely chronological sequence this result makes sense, since the President's remarks

would be subsequent to the legislators' actions and thus would not possibly form a part of their subjective intent. Even under this rationale, however, the President's signing statement has at least some relevance because the Chief Executive is, by virtue of Article 1, § 7, a part of the legislative process.

If a court adopts the "meaning of the statute" rather than the "intent of Congress" standard in interpreting ambiguous legislation, the relevance of a Presidential signing statement as an aid to legislative interpretation increases dramatically. The critical difference is that, unlike the subjective "congressional intent" standard, the "meaning of the statute" test focuses upon an objective analysis of what other perceive it to mean -- and that public perception would be influenced by the President's interpretation of the statute. As such, the court is really asking what a reasonable person would infer from reading the statute in question. 2/ In this context, the interpretation of legislation by the Chief Executive in a signing statement would be clearly relevant and significant in assessing the objective meaning of the statute, since it represents the first opportunity for construction of the legislation outside the walls of Congress. While it does not appear that one could rely on the interpretation contained in the signing statement to the exclusion of other forms of intrinsic and extrinsic aids to construction, a strong case can be made that is should certainly play an important role in the interpretation process.

It should be emphasized that most courts which have applied the "meaning of the statute" test do so while articulating that what they are looking at is the "intent of the legislature". It is not that courts perceive there to be two different standards or approaches to be utilized; rather, it is that they have differing perceptions of what the phrase "intent of the legislature" means. While one court may view this phrase as requiring a subjective inquiry into what the legislature -- as composed of the expressions of individual legislators -- collectively intended, another will conclude that the legislature's intent is reflected in the "reasonable man's" interpretation of the statute (e.g., that the interpretation given to the statute by a "reasonable man" is precisely what the legislature intended).

Accordingly, when dealing with a case involving statutory interpretation questions which may be resolved favorably by reference to Presidential signing statements, one should carefully articulate to the court that the proper way to

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2/ Indeed, cases such as McGlynn, supra, can then be explained by recognizing that, although the court was articulating the subjective " intent" test, it was actually attempting to ascertain the "meaning of the statute".

determine the meaning of the statute is to engage in objective, not subjective, interpretation. This position can be bolstered by citing to cases such as Weinberger and Chrysler, supra, and arguing that the legislative body meant the statute in question to be interpreted precisely the way that most reasonable people reading it actually interpret it, rather than in accordance with the subjective intent of various legislators or the legislative body as a whole.

The role of Presidential signing statements in interpreting ambiguous legislation can be contrasted with the relevance of other types of Presidential messages to Congress. For example, when the President vetoes or otherwise suggest revisions to proposed legislation and returns the bill to the legislature, that message has been held to be an appropriate tool in construing the revised legislation, under the premise that it formed the basis for the subsequent revisions. Accordingly, a veto message is seen as probative of the intent of the legislature in that regard. Taplin v. Town of Chatham, 453 N.E. 2d 421, 423 (Mass. 1983), see generally Sutherland, supra, § 48.05 n. 7.

Similarly, messages from the executive accompanying proposed legislation may be relied on in construing subsequently enacted legislation if the court can determine that the message formed the basis for the legislation or a portion thereof. In Pepsodent Co. v. Krauss Co., 56 F. Supp 922 (E.D. La. 1944), the district court was asked to determine whether Congress intended the Miller-Tydings Amendment to the Sherman Act to legalize re-sale price maintenance contracts or, alternatively, to allow individual states to legislate on this issue. In accepting the latter interpretation, the court placed substantial importance upon the fact that the Senate version of the Amendment, which was ultimately adopted, was altered after President Roosevelt delivered a message to the President of the Senate on this issue. However, an executive agency's unexpressed purpose in proposing legislation to Congress is not controlling in construing a subsequently-enacted statute. See California Welfare Rights Organizations v. Richardson, 348 F. Supp. 491, 495 (N.D. Cal. 1972).

Finally, you requested suggestions concerning measures that could be taken to increase the legal community's awareness of the use of Presidential signing statements when engaging in statutory construction. As an initial matter, we believe that the Attorney General should request inclusion of the full text of [illegible] in U.S.C.C.A.N, not merely a cross-reference to the Weekly Compilation of Presidential Documents, and we are preparing a letter for his signature. Hopefully, the mere proximity of the statement of the legislation and its procedural history will encourage attorneys to make greater use of these documents. Additionally, the Department itself can promote the use of signing statements by referring to them whenever possible in DOJ briefs and other papers. As lawyers in private practice

see the Department relying on them in statutory interpretation cases, they may themselves begin to utilize this valuable aid. Finally, we could undertake the preparation of an article on the use of presidential signing statements, for publication either as a law review article or in an abbreviated form in a popular forum such as Legal Times or the National Law Journal.