HOW THE US PRESIDENCY SHAPES LEGISLATION AND REFORM – SOME EARLY OBSERVATIONS ON THE OBAMA ADMINISTRATION

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The President of the United States, exclusively vested with the executive power under the US Constitution, has no "legislative authority", constitutionally speaking, in contrast with some of the newer democracies that have emerged in Central and Eastern Europe. Thus he has no constitutional ability to introduce a bill (draft law). However, the President has historically played a pivotal and ever-increasing role in shaping the legislation which is adopted by the U.S. Congress both as to its content, scope and interpretation. This paper seeks to provide a general overview of the constitutional "tools" developed over time by the Presidency such as the threat to veto legislation and the extra-constitutional methods developed over time such as, inter alia, the refusal to implement aspects of Congressional legislation which he deems violative of the Constitution, the issuance of Executive Orders, Proclamations, Presidential Memoranda, and controlling constitutional interpretation by selective appointment of the judiciary, along with some of the well-known examples of each. Some initial observations as to how President Barack Obama's administration has to date made use of such measures will also be included.

I. INTRODUCTION[1]

Several months prior to the 2008 U.S. Presidential elections, Constitutional scholar Cass Sunstein ventured a prediction as to the kind of President that Candidate Obama would make. [2] Distinguishing between presidential "minimalists", meaning Presidents who are not inclined to rejecting the societal views of their fellow citizens and who seek to work by consensus, and "visionaries", meaning Presidents who seek to transform the nation's self-conception and future direction, his prediction was that Mr. Obama's approach will show him to be the first "visionary minimalist,"[3] i.e., one who would seek to reconcile existing political divisions on a broader playing

[1] Because the intended readers are a foreign audience, I have attempted to cite the most readily accessible sources online rather than official citations.

[2] Cass R. Sunstein, *Obama the visionary minimalist*, The Colorado Independent (Nov. 11, 2008), http://coloradoindependent.com/14788/obama-the-visionary-minimalist. Professor Sunstein recently joined the Obama administration in the Office of Management and Budget, discussed below.

[3] Id.

field which alters the country's understanding of itself on both the national and global scale going forward. It would now seem that the Norwegian Nobel Committee this year shares at a not dissimilar perception and in fact, "attached special importance to Obama's vision of and work for a world without nuclear weapons".

It must be kept in mind that within the context of the U.S. Constitution's separation of powers, however, the President, as the sole executive power, has virtually no legislative authority[4] (in contrast with some of the newer democracies that have emerged in Central and Eastern Europe) and is, for example, technically unable to introduce a bill (draft law) for Congress to consider. Yet, in modern times, the President's Administration is not only a prime locus for churning out proposed bills; it operates to actively push its "legislative agenda."[5]

This derives from the well-established jurisprudence that, in addition to the "enumerated" powers set forth in Article II of the Constitution, the President is vested certain express, implied and inherent powers, the extent of which is still the subject of evolution and debate[6]. From its inception, the U.S. Presidency has developed well-honed mechanisms for driving the national agenda and shaping policy as well as legislation, from its adoption to its application and interpretation. Tomes and treatises have been dedicated to the phenomenon of the historical expansion of the executive power. [7]

This paper seeks to provide a very general overview of how the Presidents and their staffs have exercised the principal "tools" expressly granted by the Constitution (such as the veto power, the "faithful execution" of the laws power, the power of Commander-in-Chief) and makes mention "extra-textual" mechanisms which have been refined over time (such as the Presidential Directive, Executive Orders, Signing Statements and Presidential Memoranda) and which continue to be tested, as well as some initial observations as to President Barack Obama's administration has to date made use of them.

II. THE EXECUTIVE BRANCH – THE PEOPLE BEHIND THE POWER

A. THE EXECUTIVE DEPARTMENTS

The national controversy over interrogation techniques used by U.S. government officials on detainees in Guantanamo during President George W. Bush's tenure, which arose while he was still in the White House,[8] may serve here as a snapshot look at some of the principal structures of what is known as the President's "Administration". Although the Framers of the Constitution did provide for existence of "executive departments" to advise the President as he may require regarding their

[4] "[A]ll legislative powers" lie with the Congress. U.S. CONST. art. _, § _

[5] The President's items of "Legislative agenda" are reported in the *Weekly Compilation of Presidential Documents.*

[6] For several excellent analyses and citations to leading authorities, see Saikrishna Bangalore Prakash, *A Taxonomy of Presidential Powers*, 88 BOSTON U. L. REV. 327 (2008) http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/PRAKASH.pdf; *Imperial and Imperiled: The Curious State of the Executive*, 50 WM. & MARY L. REV.1022 (200_), http://wmlawreview.org/files/Prakash_Final.pdfhttp://wmlawreview.org/files/Prakash_Final.pdf

[7] For example, Christopher S. Yoo, Steven G. Calabresi and Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L, REV. 602 (2005) at http://ssrn.com/abstract=690822.

[8] Senate Armed Services Committee Hearing: The Origins of Aggressive Interrogation Techniques, (June 17, 2008) : http://levin.senate.gov/newsroom/release.cfm?id=299242; Press Release, Levin, McCain Release Executive Summary and Conclusions of Report on Treatment of Detainees in U.S. Custody, at http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf . That President Bush was being investigated while holding office is nothing unusual in itself. Clinton (Whitewate0 and Reagan (Iran-contra), Nixon (Watergate).

respective areas of expertise,[9] they likely did not envision today's array 15 Executive Departments (the Cabinet)[10] employing millions of people,[11] and which are empowered to issue regulations implementing laws of Congress pursuant to Congressional delegations of authority to each Department in order to "reasonably" interpret the law.[12]

One of the most important in the context of these remarks is the Department of Justice (DOJ)[13] which, in turn, houses an office which has long existed, but only recently become the focus of significant public and legal scrutiny: the Office of Legal Counsel (OLC). Its lawyers are tasked with reviewing the constitutionality of pending legislation, advising the executive branch on all constitutional questions, and reviewing all matters that require executive approval for form and legality. As explained, *inter alia*, by Professor Dawn Johnsen, well before their full extent was made public, [14]a number of the OLC opinions represented "flawed legal reasoning" as the basis for permitting certain interrogation practices such as "water-boarding".[15] Under the Obama administration, the OLC has affirmatively disavowed some five earlier OLC opinions as "no longer represent[ing]" its views.[16] President Obama is currently confronted with the issue of whether to criminally prosecute certain former Bush administration officials[17] who acted in reliance on OLC legal advice. His own Administration's public pronouncements have been less than crystal clear as to future intent.[18]

Nonetheless, the OLC, viewed from an overall perspective, has been central to a number of administrations since the mid-1930s in formulating the constitutional interpretation of the independent powers of the President.[19] The OLC has long adhered to a construction of the Constitution that vests an

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[9] U.S. CONST. art. 2, § 2.

[10] Cabinet members, who are appointed by the President with the consent of two-thirds of the Senate, serve as the heads of the Executive Departments. U.S. CONST. art. 2, § 2.

[11] For a detailed description, see http://www.whitehouse.gov/our_government/executive_branch/; Declan McCullagh, *It's a good time to work for Uncle Sam,* (May 12, 2009) ECONWATCH, at http://www.cbsnews.com/blogs/2009/05/12/business/econwatch/entry5007862.shtml.

[12] Under what is known as the "Chevron Doctrine," there is a presumption that rules adopted by agencies pursuant to a statute are valid. For a discussion of the doctrine and legal issues that have arisen under it, see Jacob E. Gersen & Adrian Vermeule, Chevron *As A Voting Rule,* 116 YALE L.J. 676 (2007).

[13] The Department's web site is at http://www.usdoj.gov/.

[14] See Senator John D. Rockefeller IV, *Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on the CIA's Detention And Interrogation Program* (April 22, 2009), http://intelligence.senate.gov/pdfs/olcopinion.pdf.

[15] Dawn E. Johnson, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV.1559, (2007). Ms. Johnson has since been nominated to the OLC by President Obama, but is not yet confirmed, at http://www.whitehouse.gov/briefing_room/nominations_and_appointments/.

[16] Among the first official actions by President Obama was the signing of Executive Order 13491 on Ensuring Lawful Interrogations (Jan. 22, 2009), http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations. Pursuant thereto the Attorney General later issued a Memorandum on the Withdrawal of Office of Legal Counsel Opinion, June 11, 2009, US OJ, OLC, http://www.usdoj.gov/olc/2009/memo-barron2009.pdf..

[17] Jonathan Weisman, *Probes of Bush Officials Loom. Obama Opens Door to Prosecuting Interrogation Architects; Republicans Rip Comments*, WALL STREET J. (April 22, 2009), at http://online.wsj.com/article/SB124033320765839635.html; Jess Bravin, *Interrogation Views Spread With Help of Bush Aides*, WALL STREET J. (April 22, 2009), at: http://online.wsj.com/article_email/SB124036199017441673-lMyQjAxMDI5NDIwMDMyNjAxWj.html.

[18] See, for example, the transcript of the White Press Briefing of April 21, 2009, at http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-4-21-09/.

[19] For a detailed treatment of the OLC's historical interpretations, see generally Walter Dellinger, *Appendix: The Constitutional Separation of Powers Between the President and Congress*, 63 DUKE J.L. & CONTEMP. PROBS. 513 (2000).

independent power to interpret the law in the Executive. It has played a key role in developing legal bases for various Presidential actions[20] and advising Presidents as to those documents and deliberations between the President and his advisors which can be claimed as exempt from public disclosure under various formulations of the executive or presidential privilege of confidentiality.[21] It is no accident that a number of U.S. Supreme Court Justices spent formative years of their earlier careers in the OLC (Justices Scalia, Justice Alito, and late Chief Justice Rehnquist).[22] The OLC's opinions have not infrequently represented the harbinger of later jurisprudence.

B. THE EXECUTIVE OFFICE OF THE PRESIDENT

The Constitution refers to "the President" as a single individual and is silent on the issue of any White House personnel or staff. In fact, it was not until 1939 that Congress first provided President Franklin D. Roosevelt (1933–1945) with a cadre of six persons to aid him in the performance of his Executive duties.[23] Today, the "Executive Office of the President" (EOP) comprises a number of entities totaling some 2,000 persons who comprise the institution of the U.S. Presidency,[24] including the National Security Council and the Office of Management and Budget.

Encompassed within the EOP is the "White House Office" which, in turn, also includes a group of "lawyers to the presidency" known as "White House Counsel" whose job duties involve providing both political and legal counsel and who are the President's formal interface with the OLC.[25] The current Chief Justice of the Supreme Court, John Roberts, worked in the White House as Associate Counsel to President Reagan, and also held several positions in the DOJ.

Media focus and coverage of the individual lawyers who serve in the White House Counsel's office has been intense at least as far back as John Dean in the Nixon Administration's Watergate scandal.[26] One might conclude that that they have not infrequently served as easier prey for the press than the Presidents they have served. The late Vince Foster's name became nearly synonymous with the Whitewater investigation of President Clinton.[27] President George W. Bush failed famously in his effort to place White House Counsel Harriet Myers on the Supreme Court. And, as of this writing, press attention is riveted on whether the current White Counsel, Gregory Craig, will be relieved of his

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[20] The criteria to be applied in the issuance of OLC opinions are described in a 2005 internal memorandum which to date remains on the DOJ web site: *Best Practices for OLC Opinions*, at http://www.usdoj.gov/olc/best-practices-memo.pdf.

[21] For a detailed analysis of the privileges invoked against disclosure, see Gia B. Lee, *The President's Secrets*, 76 George Washington L. Rev. 197 (20), : http://docs.law.gwu.edu/stdg/gwlr/issues/pdf/76_2_Lee.pdf .

[22] For a lively discussion of the OLC as the crucible of current constitutional theory, see Jeffrey Rosen, *Bush's Leviathan State: The Power of One*, THE NEW REPUBLIC ARCHIVES (July 18, 2006), at http://www.tnr.com/doc.mhtml?i=20060724&s=rosen072406.

[23] STEVEN A. SHULL & NORMAN C. THOMAS, PRESIDENTIAL POLICYMAKING: AN END-OF-CENTURY ASSESSMENT (1999), at 131–35.

[24] The current composition of the Executive Office and of the White House Office may be viewed at http://www.whitehouse.gov/government/eop.html. For a detailed history of the Executive Office, see HAROLD C. RELYEA, *CRS REPORT FOR CONGRESS: The Executive Office of the President: An Historical Overview Presidential Directives: Background and Overview* (updated 2008).

[25] A detailed description of the duties of the White House Counsel is found in Maryanne Borrelli, Karen Hult, Nancy Kassop, *The White House Counsel's Office*, 31 PRESID'L STUDIES Q. 561 (2001), at http://www3.interscience.wiley.com/journal/120799400/issue.

[26] For his own re-telling of Watergate, see John W. Dean, BLIND AMBITION: THE WHITE HOUSE YEARS (1976), recently re-issued as BLIND AMBITION: THE END OF THE STORY (2009).

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duties for failing to timely and successfully close Guantanamo, as promised by President Obama, upon taking office.[28]

C. PRESIDENTIAL CONTROL OF THE INDEPENDENT AGENCIES

There is also a vast number of "independent" federal agencies[29] which were created by acts of Congress, and intended to operate independently of the Office of the President, which exercise rule-making and other "quasi-legislative" powers by delegation from Congress[30] The historical progression since the 1970s wherein virtually each Administration acted to increase Presidential control over rule-making, at times in reliance on OLC Opinions, is well documented.[31]

III. PRINCIPAL PRESIDENTIAL TOOLS

A. The Veto Power: " bargains" and " threats" and "pockets"

The Constitution's "veto clause" empowers the President to block a bill by returning it unsigned;[32] his only other option is to sign it into law and "faithfully execute" it.[33] Vetoing a law adopted by Congress is a radical and confrontational tool that can only be used against a proposed in its entirety,[34] and it may be impractical for a President to veto appropriations bills that provide vital funding but also include "riders" added on during the legislative process that the Administration deems objectionable. Congress has occasionally overplayed its hand by attaching riders that are so numerous and so unpalatable to a particular President that he exercises the veto notwithstanding the appropriations, as was the case with President Clinton in late 1999, involving appropriations for various Executive departments. [35] The nature and frequency and circumstances under which the veto has been exercised have been the subject of many analyses and studies.[36] The bill then "dies" unless Congressional leaders believe that they have

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[28] Peter Baker, *Fate of White House Counsel Is in Doubt*, (Oct. 21, 1999), at http://www.nytimes.com/2009/10/22/us/politics/22craig.html?ref=us

[29] An informative diagram of the federal government, including a listing of such agencies, may be viewed at http://bensguide.gpo.gov/files/gov_chart.pdf.

[30] LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d Ed., 1990), at 128.

[31] JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULE MAKING (2007). Professor Lubbers lists the actions taken in each administration, citing OLC Opinion *Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12, 291 and 12, 498*, at 24, note 108. Under what is known as the "Chevron Doctrine," there is a presumption that rules adopted by agencies pursuant to a statute are valid. For a discussion of the doctrine and legal issues that have arisen under it, see Jacob E. Gersen & Adrian Vermeule, Chevron *As A Voting Rule*, 116 YALE L.J. 676 (2007).

[32] U.S. CONST. art. I, § 7.

[33] U.S. CONST. art. II, § 3.

[34] DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS, Vol. 1 (4th ed., 2000), at 367.

[35] 35 WEEKLY COMP. PRES. DOC. 2125-2198, 2154 (Oct. 25, 1999); Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations.

[36] *See e.g.*, KEITH KREHBIEL, PIVOTAL POLITICS. A THEORY OF U.S. LAWMAKING (1998); Richard S. Conley, *President Clinton and the Republican Congress, 1995-2000: Political and Policy Dimensions of Veto Politics in Divided Government*, a paper delivered at the Annual Meeting of the American Political Science Association, Aug. 30-Sept. 2, 2001, in San Francisco, CA, USA.

enough votes to ensure that each house will vote by a two-thirds majority in favor of "overriding" the presidential veto.[37] To date, President Obama has not exercised the veto power.

Certain constitutional experts point to the carefully designed sequence whereby the "veto clause" ensures that the President's "Objections" are granted close consideration by Congress,[38] and that the presidential veto message is best understood as a mechanism for setting forth the Administration's legislative requirements[39] not only to members of Congress but to the general public as well. Vetoes invariably generate media coverage, which can operate as an additional pressure point on Congress to amend the proposal so as to ensure its passage.[40]

Successive Administrations have refined a strategy of leveraging the veto power well before any final Congressional action with what has been dubbed "veto bargaining": i.e., issuing a series of "carefully calibrated" messages to Congress, Statements of Administration Policy, and remarks to the media in the time period that a proposed law is wending its way through Congress.[41] In its more acute phases, it is known as a "veto threat."[42] The presidential weekly radio address is a frequent forum for dissemination of an Administration's views and in President Obama's case, the "town hall" meetings and rallies directly with citizens on health care reform. Typically, presidential statements exhort Congress to ensure that the final version of a bill presented must look like something he "can sign".[43] This approach is increasingly being deployed by the current administration as it encounters serious obstacles in obtaining a satisfactory result with the President's Health Reform proposals: "I will not sign a plan that adds one dime to our deficits – either now or in the future", stated the 44th President in an address to the Congress, sounding very much like the 43rd, the 42d, and prior incumbents.

The veto clause of the Constitution provides an alternative path to exercise the veto power commonly known as the "Pocket Veto" and which is dependent upon the timing in the Congressional session that a bill is presented to him. If the bill is not returned by the President within ten days after it is presented to him, it "shall be a law" unless its return is actually not possible because Congress may have adjourned.[44] Pocket vetoes applied during intra-session Congressional adjournments and recesses, have "long been a controversial issue between the legislative and executive branches". [45]A

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[37] Richard S. Conley, *George Bush and the 102d Congress: The Impact of Public and "Private" Veto Threats on Policy Outcomes*, 33 PRESID'L STUDIES Q. (2003). President George H. Bush, for example, sustained 28 of 29 regular vetoes cast between 1989 and 1992, and President Clinton similarly sustained 35 of 36 vetoes, President George W. Bush exercised the veto power sparingly, casting no vetoes during his first term and twelve during the second, of which five were sustained. See, for example, http://www.senate.gov/reference/Legislation/Vetoes/BushGW.htm

[38] Vasan Kesavan & and J. Gregory Sidak, *The Legislator-In-Chief*, 44 WM. & MARY L. REV. 1, at 38-40.

[39] CRAIG ALLEN SMITH, THE WHITE HOUSE SPEAKS: PRESIDENTIAL LEADERSHIP AS PERSUASION (1994), at 23.

[40] For example, President Bush's statement, available at 43 WEEKLY COMP. PRES. DOC. 687 (May 25, 2007).

[41] C. Lawrence Evans & Stephen Ng, *The Institutional Impact of Veto Bargaining*, Annual Meeting of the Midwest Political Science Association, Chicago, Il. (2003).

[42] Yoo, Calabresi, and Colangelo, *supra*, at 702-704. For example, President Clinton on funds for education: "If this bill were to come to me in its current form, I would have to veto it. I believe, however, that we can avoid this course.", 39 WEEKLY COMP. PRES. DOC. 1845 (September 28, 1999), available at http://frwebgate1.access.gpo.gov/cgibin/TEXTgate.cgi?WAISdocID=326283373661+156+1+0&WAISaction=retrieve.

[43] President Bush, *Statement on Senate Action on Jobs and Growth Tax Relief Legislation*, 39 WEEKLY COMP. PRES. DOC. 615 (May 16, 2003), http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=326996375394+103+1+0&WAISaction=retrieve

[44] U.S. Const., art. I, § 7

[45] Gregory Harness, *Presidential Vetoes, 1789-1988*, at iv, S. Pub. 102-12, available at http://www.senate.gov/reference/resources/pdf/presvetoes17891988.pdf.

valid exercise of the pocket veto has the effect of forcing Congress to introduce a new bill, passing it in both Houses, and presenting it to the President.[46]

B. The "post-scriptum" power of the presidential "Signing Statement"

It became customary, when signing a bill, for the President to issue an accompanying statement, which would often serve to and instruct the responsible Executive branch agencies on how the law should be administered. [47] Although many Presidents have signed laws to which they had serious objections where it had been neither practical nor politically expedient to exercise the veto power,[48] the phenomenon now known as a "Signing Statement", was developed by the legal architects of the OLC, *inter alia* by Justice Samuel Alito, [49] as a vehicle for a President to lodge an objection to a specific portion of the law's constitutionality.[50] Commencing with the Reagan presidency, the Signing Statement was prolifically used by all of the succeeding Presidents until it increasingly became a *cause celebre* in 2005 -2006 as a previously overlooked source of executive power[51] when reporter Charles Savage *Boston Globe* claimed that President Bush had quietly asserted his ability to disregard the more than 750 laws enacted during his term -- if they conflicted with his interpretation of the Constitution.[52] Legal commentators increasingly expressed concern that Signing Statements represent an "outright reflection of the President's plan to disregard, or to not enforce, or treat certain provisions as merely advisory in nature", [53] and that such selective enforcement undermines the presumption of validity of Congressional acts as articulated by the U.S. Supreme Court.[54] Congressional sentiment of the need to limit the device led to hearings in both the Senate and the House.[55]

Shortly after taking office, President Obama issued a memorandum stating that a Signing Statement is a potential vehicle for abuse, and he committed to use it "only when it is appropriate to do so as a means of discharging my constitutional responsibilities.[56] Notwithstanding, Obama's own first Signing Statement, issued several days later in connection with the Omnibus Appropriations Act of 2009,

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[46] Kosar, *supra* note 125,at 2. Presidential vetoes may be viewed on the Senate's web site. For example, at http://www.senate.gov/reference/Legislation/Vetoes/Presidents/ClintonW.pdf.

[47] THE AMERICAN PRESIDENCY PROJECT, *Presidential Signing Statements: Hoover–G.W. Bush, at* http://www.presidency.ucsb.edu/signingstatements.php (last visited June 24, 2007).

[48] J. Richard Broughton, *Rethinking the Presidential Veto,* 42 HARV. J. ON LEGIS. 91, 112-115 (2005).

[49] Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney General, to the Litigation Strategy Working Group, U.S. Department of Justice, *Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law* (1986) at http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf._

[50] Another well-known memorandum on this subject is the one from Walter Dellinger, Assistant Attorney General, Memorandum to Abner Mikva, Counsel to the President, *Presidential Authority to Decline to Execute Unconstitutional Statutes* (Nov. 2, 1994), *at* http://www.usdoj.gov/olc/nonexcut.htm.

[51] Christopher S. Kelley, and Bryan W. Marshall, *The Last Word: Presidential Power and the Role of Signing Statements*," 38 PRESID'L STUDIES Q. (2008).

[52] Louis Fisher, *Signing Statements: Constitutional and Practical Limits,* 16 WILLIAM & MARY BILL OF RIGHTS J. 184 (2007).

[53] J. Richard Broughton, *Rethinking the Presidential Veto,* 42 HARV. J. ON LEGIS. 91, 113-115 (2005).

[54] John W. Dean *The Problem with Presidential Signing Statements: Their Use and Misuse by the Bush Administration*, **Fin**dLaw's Writ (Jan. 13, 2006), *available at* http://writ.news.findlaw.com/dean/20060113.html; *Cf.* Curties A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, DUKE LAW SCHOOL LEGAL STUDIES PAPER NO. 121 (2006)*;* Walter Dellinger, *A Slip of the Pen*, N. Y. TIMES, Op. Ed., July 31, 2006.

[55] The Library of Congress web site provides a listing of the hearings held and links to other Signing Statement materials at http://www.loc.gov/law/help/statements.php.

[56] http://www.whitehouse.gov/the_press_office/Memorandum-on-Presidential-Signing-Statements/March 9, 2009.

expressly signaled the President's concern as to the constitutionality of a number of the bill's provisions[57], thus demonstrating that the Executive branch does not lightly forego terrain that has been carved out, and thus further ensuring that controversy will continue unabated.[58]

C. Variations on the veto theme

At times, the President and the Congress as well, have attempted to carve out alternative constitutional paths that have less drastic results, with varying degrees of success, such as the "legislative veto" [59] and the "line item veto" mechanisms[60] , only to be later struck down as constitutionally invalid by the U.S. Supreme Court.[61] The theme of line item veto authority in a constitutionally-acceptable format[62] was reprised by President Bush commencing in 2004[63] but Congress failed to act on his suggestions.[64] It then became President Obama's turn to cajole Congress into granting him this tool[65] although again, the end result is far from certain.

D. Other Presidential Tools

The President's extensive treaty-making authority, taken in conjunction with his role as Commander-in-Chief [66] (which in theory is constitutionally offset, under the separation of powers, by Congress's exclusive power to actually declare wars and appropriate the monies to fund them) are the source of constitutionally distinct powers. The modern President issues literally hundreds "Presidential Directives" which are not expressly provided for under the Constitution. When issuing a directive, the President is not required to specify which constitutional power he is relying on: he stands simultaneously on the totality of his constitutional powers as well as any powers delegated to him by

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[57] Statement by the President, March 11, 2009, available at:,http://www.whitehouse.gov/the_press_office/Statement-from-the-President-on-the-signing-of-HR-1105/

[58] The Brennan Center for Justice, for example, described the action as "a strike against transparency" in its analysis entitled *Transparency in the First 100 Days | Accountability*, available at: http://www.brennancenter.org/content/resource/report_card_accountability.

[59] The "legislative veto" was a process under which Congress would authorize executive rule-making, but provide that the rules drafted by an agency could not take effect if either the House or the Senate enacted a "veto resolution" expressing its disapproval. RICHARD. H. FALLON, JR., THE DYNAMIC CONSTITUTION (1994), at 180.

[60] Congress, in 1996, passed the Line Item Veto Act, (PUB. L. NO. 104-130) effectively delegating to the President the authority, after signing a bill into law, to determine that a particular expenditure was "wasteful" and empowered him to refuse to make it. For a detailed history and analysis of the Act of 1996, see LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE (1998). The Act authorized the President to cancel certain appropriations and direct spending programs. Congress would have to pass a resolution of disapproval within 30 days. The President could veto that resolution and force an override vote in each House.

[61] The legislative veto was invalidated by the U.S. Supreme Court in *INS v. Chadha*, 462 U.S. 919 (1983), on the grounds that a veto resolution passed by a single House of Congress violated the express language of Constitution's Presentment Clause which requires bicameral action.

[62] For an analysis of post –*Clinton .v New York* legislative proposals, *see* Aaron-Andrew P. Bruhl, *The New Line Item Veto Proposal: This Time It's Constitutional (Mostly)*, 116 YALE L.J. POCKET PART 84 (2006).

[63] "I urge Congress to pass the line-item veto, so we can work together to control Federal spending". 43 WEEKLY COMP. PRES. DOC. 91 (Feb. 3, 2007).

[64] A proposed Line Item Veto Act of 2006 was passed by the House in mid-2006, but was not acted upon by the Senate prior to the conclusion of the 109th Congress.

[65] *Line-Item Veto: Obama Administration Would "Love to Take That For a Test Drive"*, The Huffington Post, (Feb. 25, 2009), at http://www.huffingtonpost.com/2009/02/25/line-item-veto-obama-admi_n_169908.html . A number of bills have been sponsored in the current Congress, but to date, non has been adopted.

[66] Spelled out in Article I of the Constitution

Congress.[67] Presidential Directives mostly commonly take the form of "Executive Orders", "Proclamations", and "Military Orders". [68] The nomenclature used in connection with Presidential Directives has been as historically varied as their various permutations.[69] One mechanism worth mentioning here, and which is discussed below in the context of U.S. Supreme Court rulings, is the relatively recent evolution of "Presidential Memoranda", which differ from Executive Orders in that they do not typically cite the underlying legal authority for their issuance and may, at the discretion of the President, but are not required to be published in the Federal Register.[70] Legal commentators have pointed to the first President Bush's occasional reliance on memoranda to accomplish certain policy objectives in a less overt fashion.[71]

IV. EVOLVING DELIMITATION OF EXECUTIVE POWERS BY THE U.S. SUPREME COURT

The U.S. Supreme Court has the role of scrutinizing the actions of both the Legislative and Executive branches for potential encroachments of their respective constitutional spheres, and is empowered to invalidate them under the Constitution. Historically, the Court had issued relatively few rulings invalidating Executive action. Until recently, the leading case discussing the inherent powers of the President was Youngstown v. Sawyer,[72] involving an Executive Order issued by President Truman during the Korean conflict directing that American steel production mills to be seized and operated by the government following a labor strike, because steel production was vital to the war effort. The Court found that the President's authority as Commander-in-Chief and Executive powers to "faithfully execute" the law[73] neither individually nor collectively had so broad a reach as to empower the President to take over the steel mills.

In recent years, the Court has taken "a relatively aggressive and nondeferential stance"[74] and has invalidated several of Executive actions taken pursuant to a Military Order issued by President Bush concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."[75] In Hamdi v. Rumsfeld,[76] the Court rejected the Administration's argument that a Military Order could operate to treat a U.S. citizen as an "enemy combatant" who is accordingly deprived of traditional constitutional protections. The Supreme Court's opinion underscored that "We have long since made clear that a state of war is not a blank check for the President when it comes to

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[67] HENKIN, *supra* note 30, at 36.

[68] For a detailed listing and analysis, *see generally* HAROLD C. RELYEA, *CRS REPORT FOR CONGRESS: PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW* ((UPDATED NOV. 26, 2008)), available at: http://www.fas.org/sgp/crs/misc/98-611.pdf.

[69] *Id.* Also issued routinely are "letters of trade instruments" and "national security instruments," although the latter are frequently classified as "secret information" and not published.

[70] See, for example, Presidential Memorandum on Transparency and Open Government (Jan. 21, 2009), available at: http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government

[71] *Id.*,

[72] 343 U.S. 579 (1952).

[73] *See, generally,* FALLON *supra* note 59, at 174–77.

[74] Dawn E. Johnson, *FAITHFULLY EXECUTING THE LAWS: INTERNAL LEGAL CONSTRAINTS ON EXECUTIVE POWER*, 54 UCLA L. REV.1559, 1561 (2007).

[75] *Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 C.F.R. 918 (2002). This Order established military commissions to conduct trials of the prisoners detained as possible terrorists in the Guantanamo prison in Cuba.

[76] 542 U.S. 507 (2004).

the rights of the Nation's citizens."[77] Two years later, in Hamdan v. Rumsfeld, [78] the Court that the President lacked authority to convene Military Commissions by issuing a Military Order. It held that the specific law, as it had been enacted by the Congress, failed to provide sufficient Congressional authorization for the President's action did not in fact "expand the President's authority".[79]

In Medellin v. Texas, [80] a Mexican national who had been sentenced to death for rape and murder by the courts of the State of Texas, sought to stay the execution proceedings by invoking the text of an intra-Administration "Presidential Memorandum", from President George W. Bush, in which the President had directed the head of the DOJ [81] to comply with the decision of the International Court of Justice.[82] This would have entitled the Defendant, Medellin, to a review and reconsideration of his U.S. Texas state-court conviction pursuant the Vienna Convention[83] (to which the U.S. is a signatory). The legal issue considered by the Supreme Court was whether a President, by means of such a "Presidential Memorandum", could in effect nullify the Texas court proceedings and determine that they were inconsistent with a treaty obligation of the United States. The case garnered significant international attention and commentary by international law experts.[84] The U.S. Supreme Court, citing Youngstown, rejected all of the arguments advanced in support of the Presidential Memorandum's effectiveness, and held that the President lacked authority to compel Texas to overturn its decision. The Court reiterated that the "President's authority to act, as with the exercise of any governmental power 'must stem either from an act of Congress or from the Constitution itself".[85]

V. SHAPING CONSTITUTIONAL AND LEGISLATIVE CHANGE THROUGH THE PRESIDENT'S POWER OF JUDICIAL SELECTION

The recent appointment of Justice John Roberts as Chief Justice of the U.S. Supreme Court (by President Bush) and the even more recent appointment of Justice Sonya Sotomayor to the Court (by President Obama),[86] serve to underscore how a President, often successfully, ensures the pre-eminence of a jurisprudential approach that will serve to further his executive and legislative agenda. The history of judicial appointments tending to reinforce the Executive branch's constitutuional and hence, legislative, agenda, was succinctly summarized by Justice Antonin Scalia as follows: "Ever since Nixon, Presidents who are members of the Republican party seek to avoid having an 'activist' Supreme

[77] Id, at _.
[78] 548 U.S. ___ (2006).
[79] *Hamdan* at 29, n. 23.
[80] 552 U.S. _ (2008).
[81] Brief for Petitioner, at 10 (Case No. 06-984).
[82] Mexico v. United States of America (Avena), 2004 ICJ 128 (Mar. 31) (No. 128).
[83] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. I, opened for signature Apr. 24, 1963, 21 U.S.T. 77, 325, 596 U.N.T.S.487
[84] *See, for example*, Willem van Genugten, *Avena as a Challenge to the Federal American Legal System*, The Hague Justice Portal, : http://arno.uvt.nl/show.cgi?fid=88372; USA (Texas): Death penalty / Legal concern: José Ernesto Medellín Rojas, Amnesty Int'l, July 30, 2008, available at: http://www.amnesty.org/en/library/asset/AMR51/081/2008/en/5ce0abd5-54b3-11dd-97dd-3b70214b65db/amr510812008eng.html.
[85] Medellin, *supra*, at 29 (slip op.).
[86] *See, for example*, Richard A. Epstein, *Two Different Approaches To The Sotomayor Nomination*, June 2, 2009, available at: http://www.forbes.com/2009/06/01/sonia-sotomayor-nomination-opinions-columnists-conservatives.html.

Court and appoints Justices who believe in 'judicial restraint', whereas Democratic Presidents appoint Justices who will likely trend towards "judicial activism". [87]

The Reagan Administration may serve as but one example of this phenomenon amongst recent presidencies. Steered by its own specific view of change it would seek to effect, Reagan's staff adopted, in 1988, a far-reaching blueprint entitled *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*, setting forth prospectively a desired agenda for the federal judiciary's handling of Congressional law-making.[88]

VI. CONCLUSION

The means and modalities for exercising Executive power in the United States continue to be a "work in progress". As the Obama Administration has already achieved those legislative and policy objectives which were easily accomplished at the outset, it is now increasingly faced with challenges that are not untypical for a President; to date, the Administration has continued in the steps of its predecessors and appears to be applying the lessons learned from recent judicial setbacks. It will be interesting to see how and if it will expand, modify or pay mere lip service to its own deployment of Executive "tools".

[87] Speech given August. 24, 2009 in Poland: *"Mullahs of the west: judges as moral arbiters"*, available at: http://www.rpo.gov.pl/pliki/12537879280.pdf.

[88] The Regan Administration's efforts are detailed, for example, by Professor Dawn Johnsen, in *Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century*, 1 HARV. L. & POL. REV. 239 (2007), available at http://www.hlpronline.com/vol1no1/johnsen.pdf; *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 Indiana L Rev. 363, 398 (2003).