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The First Word: The President's Place in "Legislative History"

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NOTE

The First Word: The President's Place in "Legislative History"

> Legislative history, in its broadest sense, includes all relevant events occurring before final enactment. In its narrower, more usual, and legally most controversial sense, it refers to the "relevant events comprising the enactment process."[1]

Courts have identified certain sources outside the text of statutes as particularly relevant pieces of legislative history for statutory interpretation purposes.[2] Courts interpreting statutes use these "extrinsic aids" to provide background information about the circumstances that led to the enactment of the statute, to highlight the mischief at which the statute was aimed, or to signal the goal of the legislation.[3] Suc-

1. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 137 (1975) (footnote omitted).

2. 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.01, at 277 (4th ed. 1984) [hereinafter SUTHERLAND].

3. *Id.* at § 48.03, at 290. The regular appeal to extrinsic sources originally appeared, in the context of constitutional interpretation, in the Court's early years when, expounding upon the Constitution, it referred frequently to the Federalist Papers. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821) ("The opinion of the *Federalist* has always been considered as of great authority. . . . Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed."). The Court then expanded the use of extrinsic aids to help in defining the scope of certain federal statutes. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (The Court reasoned that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."). A period followed during which courts were reluctant to use any extrinsic sources; they subscribed generally to the "plain meaning" rule. *See, e.g.*, United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 318 (1896) ("There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body."); Red C. Oil Mfg. Co. v. Board of Agric., 172 F. 695, 711 (E.D.N.C. 1909) ("The law as it passed is the will of the majority of both Houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language [ ] used . . . .") (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845)); Nelson v. Southern Ry. Co., 172 F. 478, 485 (N.D. Ga. 1909) ("The colloquy between Senators . . . cannot be properly considered in construing this statute."). A trend toward a more liberal use of such aids gradually developed, causing the courts to use legislative history almost as a matter of routine. *See, e.g.*, Harrison v. Northern Trust Co., 317 U.S. 476 (1943) (holding that the court below erred in refusing to consider legislative history of a revenue act); United States v. Dickerson, 310 U.S. 554, 562 (1940) ("It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials . . . can scarcely be deemed to be incompetent or irrelevant."); United States v. American Trucking Assns., 310 U.S. 534, 543-44 (1940) (Expressly disregarding the plain meaning rule, the Court stated that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use . . . .").

Indeed, the recent trend has been toward an ever-greater reliance on legislative materials. During the ten-year period ending in 1979, the Supreme Court cited three times as many legislative historical documents as in the ten-year period ending in 1947. Carro & Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis,* 22 JURIMETRICS J.

cinctly stated, the rationale behind using extrinsic aids is to discern Congress' intent:[4] to find what the legislature meant to accomplish by enacting the particular statute.[5]

The search for relevant extrinsic aids has traditionally been confined to a few classes of mandarin materials. For example, courts frequently rely on committee reports as documents that encapsulate legislative intent.[6] Courts routinely use committee reports because the reports "represent[ ] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation."[7] Typically including a section-by-section analysis of the particular provisions of a bill, committee reports identify the problems that gave rise to the need for new legislation; the reports then outline the

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294, 304 (1982). Moreover, the greatest increase in legislative materials cited occurred in the ten-year period ending in 1979. *Id.* This may well signal a further increase in the use of legislative historical materials since 1979, and foreshadow growth in the future. *But see* Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 656 (1990) ("In the last two Terms, the Court has been somewhat more willing to find a statutory 'plain meaning' and less willing to consult legislative history . . . ."); UNITED STATES DEPT. OF JUSTICE OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989).

4. *See* 2A SUTHERLAND, *supra* note 2, at § 45.05; Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943) (asking in "what sense" Congress used a word in the statute); *see also* Commissioner v. Engle, 464 U.S. 206, 214 (1984) (The "sole task" of the Court in the statutory interpretation problem of the case at bar is to determine legislative intent.); Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 9-10 (1976) (citing cases which use legislative history to discern Congress' intent). *But see* FAIC Securities, Inc. v. United States, 768 F.2d 352, 362 (D.C. Cir. 1985) (The party whose intent the court is seeking includes "all the voting members of both Houses of Congress and . . . the President.").

5. *See generally* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

6. *See* Garcia v. United States, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill . . . ."); Carro & Brann, *supra* note 3, at 304 (Over a 40-year period, over 60% of the Supreme Court's citations to legislative history were references to committee reports.); Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1130-32 (1983). *But see* Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) ("I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill. And I think it time for courts to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription." (footnote omitted)); Rothfeld, *Read Congress's Words, Not Its Mind, Judges Say*, N.Y. Times, Apr. 14, 1989, at B5, col. 3 ("Senator Daniel Patrick Moynihan of New York publicly disavowed a portion of a conference committee report that indicated a change in the tax laws was intended to affect authors. In a letter to *The New York Times*, he wrote: 'I do not ever recall the subject's having been raised, nor does any Senator or Representative with whom I've talked. My best guess is that staff members wrote it into the report.' ").

7. Zuber v. Allen, 396 U.S. 168, 186 (1969). *See* W. ESKRIDGE & P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 709 (1988) ("Most legislation is essentially written in committee or subcommittee, and any collective statement by the members of that subgroup will represent the best-informed thought about what the proposed legislation is doing.").

general solutions proposed by the bill.[8] The fact that committee reports are relatively accessible for legislators to read and review bolsters the legitimacy of using committee reports for statutory interpretation.[9] Transcripts of congressional hearings are less useful for discerning legislative intent because they are often one-sided:[10] the majority of the witnesses testifying at a given hearing are likely to be proponents of that particular bill.[11] Furthermore, it is unclear whether transcripts of committee hearings are reasonably available for review by the legislative audience.[12]

In any event, the set of legitimate "extrinsic aids" has been primarily limited to materials that originate in Congress.[13] Courts need to

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8. W. ESKRIDGE & P. FRICKEY, *supra* note 7, at 709. Conference committee reports usually contain the version of the bill passed by each chamber and the actions taken by the conference committee. *Id.*

9. W. ESKRIDGE & P. FRICKEY, *supra* note 7, at 709.

10. Dickerson, *supra* note 6, at 1131. *See generally* G. FOLSOM, LEGISLATIVE HISTORY: RESEARCH FOR THE INTERPRETATION OF LAWS 37 (1979).

11. *See* Pacific Ins. Co. v. United States, 188 F.2d 571, 572 (9th Cir. 1951), *cert. dismissed*, 342 U.S. 857 (1951) ("The . . . legislative history referred to is an isolated excerpt from a statement made by a witness before the congressional committee considering the legislation. As such, in our opinion, it is not entitled to consideration in determining legislative intent."); R. DICKERSON, *supra* note 1, at 174-75. Testimony given by opponents to the legislation at hearings is viewed as equally unhelpful. *See* Eskridge, *supra* note 3, at 639 ("[T]he views of those unsupportive of the proposed legislation 'are no authoritative guide to the construction of the legislation. It is the sponsors that we look to when the meaning of the statutory word is in doubt.' ") (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951)); *see also* Austasia Intermodal Lines, Ltd. v. Federal Maritime Commn., 580 F.2d 642, 645 (D.C. Cir. 1978) (In interpreting a statute, courts should not accord undue weight to testimony given at congressional hearings because "views expressed by witnesses at congressional hearings are not necessarily the same as those of the legislators ultimately voting on the bill."). *But see* Shapiro v. United States, 335 U.S. 1, 12 n.13 (1948) (When administrators participate in drafting and actively sponsor the particular provision being interpreted, courts accord some weight to their hearing presentations.).

12. Dickerson, *supra* note 6, at 1131. For a general evaluation of the reliability of committee reports as opposed to hearings and floor debates, see Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 41-60.

13. In Eskridge & Frickey's leading casebook on statutory interpretation, the authors devote 16 pages of their "Extrinsic Sources of Statutory Interpretation" section to a discussion of committee reports, yet do not discuss the role of presidential documents in statutory interpretation. *See* W. ESKRIDGE & P. FRICKEY, *supra* note 7, at 709-17. Moreover, in a recent article by Eskridge, presidential messages are mentioned in a section entitled "Statements by Nonlegislators," but are not listed on the "Hierarchy of Legislative History Sources." *See* Eskridge, *supra* note 3, at 632-33, 636.

The Supreme Court makes only sparse use of presidential materials. A Lexis search for "executive" or words with the root "president-" reveals that in opinions from October 1989 to July 1990, the Supreme Court used presidential legislative materials for statutory interpretation purposes on only three occasions, and then applied them only perfunctorily. *See* California v. American Stores Co., 110 S. Ct. 1853, 1861-66 (1990) (reviewing the history of the Clayton Act and citing President Wilson's 1914 address to Congress, which called for the strengthening of antitrust laws); Ngiraingas v. Sanchez, 110 S. Ct. 1737, 1740-41 & n.7 (1990) (reviewing the history of § 1983 and citing President Grant's message urging the enactment of the Klu Klux Klan Act); Crandon v. United States, 110 S. Ct. 997, 1005-06 (1990) (citing President Kennedy's message to Congress calling for a wholesale revision of the conflict of interest laws). On the other hand, a Lexis search for "S. Rep." or "H. Rep." indicates that the Court considered committee reports in

consider, however, the entire legislative background of statutes, and not limit their investigations into legislative history to certain, ready extrinsic aids.[14] As Justice Frankfurter remarked: "If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded."[15] Statutes are "organisms which exist in their environment."[16] Therefore, when interpreting a statute, courts should attempt to understand the full legislative background of that statute, not just the prepackaged scenario.

The common use of legislative history in statutory interpretation[17] makes the determination of the appropriate set of extrinsic aids extremely important. In particular, courts should pay attention to relevant presidential materials since the President plays an active role in proposing and propelling the development of particular legislation.[18] The near-exclusive focus on congressional materials, however, seems to presume that all statutes originate in Congress, that bills are actually conceived out of the independent thought and judgment of individual members of Congress.[19] This profoundly misrepresents the legislative process.[20]

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twenty-nine cases. *See* Metro Broadcasting, Inc. v. FCC, 58 U.S.L.W. 5053 (1990); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990); Portland Golf Club v. Commissioner, 110 S. Ct. 2780 (1990); Wilder v. Virginia Hosp. Assn., 110 S. Ct. 2510 (1990); Sullivan v. Stroop, 110 S. Ct. 2499 (1990); Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990); English v. General Elec. Co., 110 S. Ct. 2270 (1990); INS v. Jean, 110 S. Ct. 2316 (1990); Begier v. IRS, 110 S. Ct. 2258 (1990); Taylor v. United States, 110 S. Ct. 2143 (1990); Pennsylvania Dept. of Pub. Welfare v. Davenport, 110 S. Ct. 2126 (1990); United States v. Montalvo-Murillo, 110 S. Ct. 2072 (1990); Fort Stewart Schools v. Federal Labor Relations Auth., 110 S. Ct. 2043 (1990); Davis v. United States, 110 S. Ct. 2014 (1990); North Dakota v. United States, 110 S. Ct. 1986 (1990); United States v. Munoz-Flores, 110 S. Ct. 1964 (1990); United States v. Rios, 58 U.S.L.W. 4525 (1990); Ngiraingas v. Sanchez, 110 S. Ct. 1737 (1990); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 110 S. Ct. 1570 (1990); Crandon v. United States, 110 S. Ct. 997 (1990); Reves v. Ernst & Young, 110 S. Ct. 945 (1990); Dole v. United Steelworkers of Am., 110 S. Ct. 929 (1990); Preseault v. ICC, 110 S. Ct. 914 (1990); Sullivan v. Zebley, 110 S. Ct. 885 (1990); John Doe Agency v. John Doe Corp., 110 S. Ct. 471 (1989); United States v. Goodyear Tire & Rubber Co., 110 S. Ct. 462 (1989); Breininger v. Sheet Metal Workers Local Union No. 6, 110 S. Ct. 424 (1989); Hallstrom v. Tillamook County, 110 S. Ct. 304 (1989); Northbrook Natl. Ins. Co. v. Brewer, 110 S. Ct. 297 (1989).

14. *See* Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371, 374 (1987) ("The neutral, dispassionate judge will . . . seek to understand the environment whence the statute came.").

15. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 541 (1947); *see also* Population Institute v. McPherson, 797 F.2d 1062, 1069 (D.C. Cir. 1986) (The purpose and function of looking at legislative history of statute is to find out what Congress meant by enactment, and although many elements of legislative history represent pieces of the puzzle of discerning legislative intent, no one piece, no matter how clear and unequivocal, is alone dispositive.).

16. Frankfurter, *supra* note 15, at 541.

17. *See supra* note 3.

18. *See infra* Part I.

19. *See* R. EGGER & J. HARRIS, THE PRESIDENT AND CONGRESS 82 (1963) ("Few of the fifteen thousand bills introduced in each Congress are the brain-children of its members.").

20. *See infra* Part I.A.2.

Although some courts have used presidential materials to interpret statutes, they have done so sporadically — citing specific reasons for reliance on such materials, such as the lack of better indications of legislative intent, or unusually intense executive branch involvement in the development of the legislation.[21] Due to the regular influence the President has in the legislative process, it is curious that courts give presidential materials such limited attention and sparse application.

This Note examines the extent to which courts interpreting statutes should consider presidential participation in the legislative process. Part I concludes that courts should afford presidential input greater weight in statutory interpretation given the constitutional foundations and the empirical reality of the President's involvement in the lawmaking process. This conclusion follows from an examination of the President's authority to propose legislation and his power to review legislation via the presentment clause. To demonstrate the advantages of using presidential documents, Part II considers a series of cases in which courts used executive documents in the statutory interpretation process. Although federal courts have used presidential documents only sporadically, state courts have found many successful ways to use executive materials in statutory interpretation. Part III addresses the practical problems and constitutional concerns associated with using presidential documents for statutory interpretation purposes, and determines that they are illusory. This Note concludes that in many cases, although not all, presidential participation comprises a large part of the legislative process and, therefore, consideration of presidential documents and messages should constitute a regular part of courts' statutory interpretive analysis.

I. THE PRESIDENT'S ROLE IN THE LEGISLATIVE PROCESS

The point of using legislative history is to discern Congress' intent. Therefore, it might, at first inspection, seem strange to suggest that presidential documents could contain any indicia of legislative intent. After all, *Congress* manifests its final intentions by voting for a particular statute. What the legislators are thinking, however, and, by logical extension, what they have read, constitutes "legislative history." The materials individual legislators consider when voting for a particular piece of legislation, therefore, are of critical importance. Due to the pervasive influence of the President in initiating certain federal legislation and in the presentment phase of lawmaking, such materials may well include presidential documents. In many cases, presidential documents present most of the issues Congress considers in its lawmaking deliberations.

21. *See generally infra* section II.A.

A. *The President as the Originator of Legislation*

From George Washington, who "wrote down his ideas for a bill on the national militia,"[22] to George Bush, who recently sent Congress a draft of the Clean Air Act Amendments,[23] Presidents have initiated innumerable pieces of national legislation.[24] Section I.A.1 reviews the President's constitutional power to propose federal legislation. Section I.A.2 explores the increasing use of this power and examines the scope of the President's role in proposing new legislation.

1. *The Constitutional Prescription*

The United States Constitution specifically vests "All legislative Powers herein granted" in the two Houses of Congress.[25] Despite this clear constitutional assignment of legislative power to Congress, the President retains a role in the development of legislation. Presidential participation in the initiation stage of the legislative process finds its constitutional warrant in article II: "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . . ."[26] The compulsory language in the Constitution makes presidential proposals of legislation a duty.[27] James Madison's notes from the Constitutional Convention reveal that the Framers specifically designed the recommendation clause to place an affirmative obligation on the President: "On motion of Mr Govr Morris, 'he may'

22. L. FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 33 (1981).

23. President's Message to Congress Transmitting The Clean Air Act Amendments of 1989, 25 WEEKLY COMP. PRES. DOC. 1136 (July 24, 1989).

24. *See, e.g.*, All States Freight, Inc. v. New York, New Haven & Hartford R.R. Co., 379 U.S. 343, 349-50 (1964) (stating that immediate genesis of certain provisions in the Interstate Commerce Act seem to have stemmed from a special message to Congress by President Taft); Benanti v. United States, 355 U.S. 96, 104 n.14 (1957) ("The Federal Communications Act was the response to a Presidential message calling to the attention of Congress the disjointed exercise of federal authority over the forms of communication."); Shapiro v. United States, 335 U.S. 1, 8 (1948) ("On July 30, 1941, the President of the United States, in a message to Congress, requested price-control legislation conferring effective authority to curb evasion and bootlegging." This request served as the genesis for the Emergency Price Control Act.); United States v. Silk, 331 U.S. 704, 710 (1947) ("The Social Security Act of 1935 was the result of long consideration by the President and Congress of the evil burdens . . . of the insecurities of modern life, particularly old age and unemployment."); Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 492 (1945) (presidential message encouraged Congress to create legislation to abolish the existence of child labor); New York Cent. R.R. Co. v. Winfield, 244 U.S. 147, 149-50 (1917) ("[The Federal Employers' Liability Act] was drafted and passed shortly following a message from the President advocating an adequate national law covering all such injuries . . . .").

25. U.S. CONST. art. I, § 1.

26. U.S. CONST. art. II, § 3. The President's power, shared with the Senate, to make treaties, U.S. CONST. art. II, § 2, cl. 2, is another instance of executive influence on the legislative process. And as one additional source of influence, which has been exercised on rare occasions in the past, the President has the power to convene both Houses of Congress on extraordinary occasions and adjourn them in cases of disagreement between them. U.S. CONST. art. II, § 3.

27. *See* Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2081-98 (1989).

was struck out, & 'and' inserted before 'recommend' in the clause 2d. sect. 2d art: X. in order to make it the *duty* of the President to recommend . . . ."[28] Although the recommendation of measures constitutes a mandatory presidential function, the frequency and scope of such proposals vary according to the motivations of different Presidents. Nevertheless, Presidents have faithfully presented messages since President Washington's first term.[29]

As important as what the Constitution contains on the subject of proposing legislation,[30] however, is what it does not contain. Specifically, nothing in the text of the Constitution forbids the President from actively participating in the legislative arena. The nonexistence of such a constitutional provision has attracted attention for generations:

> In the United States the failure openly to give to the President constitutional powers by the exercise of which he can influence the passage of legislation, and the adoption of policies, has naturally led to the development of somewhat secret and indirect, if not underhand, methods. The President cannot introduce a bill into Congress. But there is nothing to prevent him from having a bill drawn and inducing one of his supporters in Congress to introduce it. The President has no power to send a representative of the administration to participate in the debates in Congress. But members of the administration are often heard by the committees of Congress to which bills are referred, and the President may easily persuade some member of the legislature to be his spokesman on the floor of either of the houses.[31]

Of course the lack of constitutional restraint on the President's ability to influence the legislature does not translate directly into substantial presidential participation in the lawmaking process. Rather, such a dearth of constitutional restrictions merely creates the potential for presidential leadership;[32] thus the expansion of the presidential role in the legislative process has depended largely on how individual Presidents have chosen to use their influence.[33] For all practical purposes, however, the constitutional duty to propose legislation, coupled with the lack of constitutional restraints on the President's ability to influence the legislative process, has left the President in an excellent posi-

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28. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 405 (M. Farrand ed. 1937) (emphasis in original).

29. R. EGGER & J. HARRIS, *supra* note 19, at 49.

30. In addition to the constitutional provision requiring the President to propose measures to Congress, certain federal statutes specifically direct the President to submit recommendations to the legislature. The two principal documents which the President sends to Congress each year are the budget message, required by the Budget and Accounting Act of 1921, and the economic report, prescribed by the Employment Act of 1946. L. FISHER, *supra* note 22, at 23.

31. F. GOODNOW, PRINCIPLES OF CONSTITUTIONAL GOVERNMENT 121 (1916).

32. *See infra* section I.A.2.

33. The Constitution does not, of course, require Congress to consider or adopt the President's recommendations. Congress thus retains the power to decide how to act, or not to act, on the proposals of the President.

tion to participate actively in the lawmaking process on a regular and fairly uninhibited basis.

2. *The Presidential Practice*

Although the Constitution prescribes presidential performance of a few enumerated legislative duties,[34] designing an annual legislative program and exerting influence to further its adoption were not originally part of the President's responsibilities. Nonetheless, these functions have developed over time, largely as a consequence of presidential initiative on many crucial policy issues.[35] Today, they have become expectations of the modern office and part of the criteria by which administrations are evaluated.[36] Consequently, many measures introduced in Congress each year are actually the original ideas of the President or of executive departments, simply sponsored by a selected member of Congress.[37] As one commentator observed of the 1961-1966 period:

> [T]he major legislative impulses . . . came from a single source — the White House. Members of Congress could retard, accelerate, or deflect those impulses, and they could expand, limit or modify the specific proposals initiated from the White House. But they could not set in motion the legislative stream itself. Constitutionally, they had every right to do

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34. *See supra* note 26 and accompanying text and *infra* note 59 and accompanying text.

35. President Theodore Roosevelt introduced the now-common practice of using messages to Congress to initiate a broad spectrum of legislative proposals. M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 252 (3d ed. 1977); R. EGGER & J. HARRIS, *supra* note 19, at 49 ("The contribution of Theodore Roosevelt . . . was two-fold: first, he used the address on the State of the Union to present his legislative demands to the Congress with a vigor and insistency new to the traditions of presidential communication; second, and much more important, he brought into public view and legitimized the practice of sending bills from the White House to the Capitol as avowed administration measures."). President Wilson emphasized his legislative proposals by appearing in person before Congress. *Id.* at 50; M. JEWELL & S. PATTERSON, *supra*, at 252. President Harry Truman, however, was the true inventor of the comprehensive legislative program. S. WAYNE, THE LEGISLATIVE PRESIDENCY 102 (1978). In 1948, President Truman used his three required messages to Congress, the State of the Union Address, budget message, and economic report, to convey his legislative platform. *Id.*

36. *See* S. WAYNE, *supra* note 35, at 102 ("[A]nnual programming [has become] an expectation of the modern presidency. Today, Congress anticipates it, the public assumes it, departments and agencies demand it, and presidents have provided it, usually announcing parts of their program even before taking office.").

The first 100 days of an Administration are viewed as particularly crucial for the President. *See* Meisler, *Catching Public Fancy Early Is Key Bush Task*, L.A. Times, Dec. 26, 1988, at 1, col. 5 ("To ensure a place in history and in the hearts of Americans, according to a modern political axiom, a new President must catch the fancy of the public with new and imaginative ideas that he swiftly implements, preferably in the first 100 days.").

37. *See supra* note 19. Interest groups and private lobby groups also commonly propose legislation to Congress. *See, e.g.*, Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 221 (1979) (noting that the bill eventually enacted was based largely on one introduced by a private interest group); *cf.* Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166, 2176 n.12 (1989) (The court acknowledged that publishers' and artists' groups were instrumental to the development of the Copyright Act, and used a joint memorandum to interpret the Act.).

so. Theoretically, perhaps, they had the opportunity. Practically, they did not.[38]

During every session of Congress, the President sends to Capitol Hill hundreds of reports, messages, communications, and suggestions for legislation.[39] Major policy innovations often require presidential initiative.[40] Waiting for the President to propose legislation has become so common in modern times[41] that members of Congress have actually begun to expect the administration to present a bill as a starting point for consideration of new policies and governmental actions.[42]

Legislative leadership exhibited by the President has been the subject of a substantial volume of recent political science literature.[43]

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38. J. SUNDQUIST, POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS 489 (1968); *cf.* G. GALLOWAY, THE LEGISLATIVE PROCESS IN CONGRESS 38 (1953) ("For most measures introduced [legislators] are merely conduits for the executive departments, private organizations, and individual constituents.").

39. L. FISHER, *supra* note 22, at 23.

40. In 1975, Representative Alan Steelman admitted:

> The legislative body can never be depended on to be the initiator. . . . There are just too many of us in the House. . . . Our role is to properly air options and to come up with some response. We are reduced to a reaction role to presidential policy initiatives, which can be a good working of checks and balances.

A. MAASS, CONGRESS AND THE COMMON GOOD 15 (1983).

41. Representative Orval Hansen once remarked that

> The president has become a principal legislator. The Congress does expect and often awaits the presidential initiatives in major areas. The congressional activity is usually one of response. It is significant that you hear a lot of criticism of the president from time to time that he hasn't sent up the program so we can't really do anything. I think this is a trend that is now irreversible.

S. WAYNE, *supra* note 35, at 139 (quoting Representative Hansen on an unspecified occasion). *See also* Barnes, *Leaders to Follow,* THE NEW REPUBLIC, May 14, 1990, at 18, 20 ("Today's Democrats have settled into a comfortable partnership that the president, because he gets more press coverage, is bound to dominate. 'It's much harder for us to be on the offense,' laments [House Majority Leader Richard] Gephardt. 'The Congress is not meant to be the leading force in the country. It's set up to be a check on presidential power. It can put an imprint on things. From time to time, it can set policy, but that's rare.' ").

42. *See* R. EGGER & J. HARRIS, *supra* note 19, at 83 ("Congress increasingly looks to the President to submit a legislative program and devotes most of its attention to his proposals. Formerly protocol limited the President to general recommendations of policy, leaving the drafting of bills to members of Congress. Jealous of its prerogatives, Congress once returned a petty bill submitted by President Lincoln with a request that it be passed, declining even to consider it. Formerly bills to carry out the President's recommendations were bootlegged to friendly members of Congress to be introduced as their own, without indicating the source, but today Congress expects the President . . . to submit draft bills to carry out his recommendations."); M. MEZEY, CONGRESS, THE PRESIDENT & PUBLIC POLICY 64 (1984) ("[T]oday Congress often refuses to move in a policy area until it has a specific proposal from the White House."); Neustadt, *Presidency and Legislation: Planning the President's Program,* 49 AM. POL. SCI. REV. 980, 1015 (1955) (quoting one committee chairman advising an executive branch official: "[D]on't expect us to start from scratch on what you people want. That's not the way we do things here — *you* draft the bills and *we* work them over.") (emphasis in original).

43. *See, e.g.,* BOTH ENDS OF THE AVENUE (A. King ed. 1983); N. BOWLES, THE WHITE HOUSE AND CAPITOL HILL (1987); G. EDWARDS, AT THE MARGINS: PRESIDENTIAL LEADERSHIP OF CONGRESS (1989) [hereinafter G. EDWARDS, AT THE MARGINS]; G. EDWARDS, PRESIDENTIAL INFLUENCE IN CONGRESS (1980) [hereinafter G. EDWARDS, PRESIDENTIAL INFLUENCE]; A. MAASS, *supra* note 40; J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS (1981); *cf.* M. MEZEY, *supra* note 42.

Political scientist Arthur Maass concluded:

> The legislature is not the dominant influence in the legislative process. The President is more influential. He leads and Congress controls. Leadership in this context means two things: to initiate the legislative process, that is, to perform its early stages, and to impel it, or to continuously drive the process forward.[44]

Maass articulates four main reasons for the strength of the President's leadership in the legislative process. First, the legislative process normally involves recognizing a problem and asking whether new legislation is a desirable solution.[45] A President's personal leadership is likely to be particularly useful for this task because the office requires national popular election and commands extensive press coverage.[46] Second, once an issue is raised, the beginning stages of the legislative process are mostly devoted to soliciting and identifying possible solutions to the particular problem and to focusing on the more promising alternatives.[47] This part of the process entails gathering a tremendous amount of information. Although the legislature may be able to attain the necessary expertise on a particular issue through the use of committees, the executive branch, with its massive professional establishment, is generally better suited to provide this type of data.[48] Third, in the early stages of the legislative process, policy proposals need to be coordinated and consistent.[49] According to Maass, the hierarchical executive branch, led by the President, is better able to perform this type of central coordination than the legislature, which is decentralized due to its committee-based organization.[50] Finally, having initiated a legislative proposal, the President is in the position "to push politely but relentlessly"[51] for enactment of a proposal, by clearing it

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44. A. MAASS, *supra* note 40, at 10.

45. *Id.*

46. *Id.; cf.* N. MASTERS & M. BALUSS, THE GROWING POWERS OF THE PRESIDENCY 17 (1968) ("One factor in the growth of presidential power is the development of radio, television, and the press as dominant facts of modern American life, as the Presidency becomes more and more the center of an incredibly extensive mass-media attention."); N. BOWLES, *supra* note 43, at 8 ("Presidents' decisions to make legislative initiatives are affected by public circumstances and calculations of opportunity and interest . . . ."); Barnes, *supra* note 41, at 20.

47. A. MAASS, *supra* note 40, at 10.

48. *Id.*

49. *Id.; see also* G. EDWARDS, AT THE MARGINS, *supra* note 43, at 1 (explaining that "[e]xtraconstitutional processes, such as the preparation of an elaborate legislative program in the White House, have evolved in response to the system's need for centralization").

50. A. MAASS, *supra* note 40, at 10. *Cf.* Cohen, *Presidential Responsibility and American Democracy,* in THE PROSPECT FOR PRESIDENTIAL-CONGRESSIONAL GOVERNMENT 23 (1977) ("[T]he President's constituency is the nation, not a district, not a state, not a party. He bears a continuing responsibility to the nation; he can speak with one voice; the members of Congress cannot. Congressional power is diffused among its members, whose constituencies are states or districts. Leadership in the Congress is also diffused among competing centers of power; leaders must share their authority with the chairmen and ranking members of the important committees.").

51. C. ROSSITER, THE AMERICAN PRESIDENCY 110 (2d ed. 1960).

with interested parties who may not have been involved in choosing the preferred solution, by recommending it, and by working for its adoption.[52]

Maass's theory has two implications for statutory interpretation. First, if the "legislature is not the dominant influence in the legislative process,"[53] the concentrated and often exclusive use of legislative history in the form of committee reports, committee hearings, and floor debates may be neither effective nor wise. A focus limited to congressional materials is thus underinclusive.

Second, to the extent that the President plays a sweeping role in the development of federal legislation, Congress' legislative role is confined to "critici[sm] and control."[54] If Congress is relegated to the task of responding reactively to the presidential legislative proposals, then Congress must work from White House documents, messages, and drafts, retaining some of the President's proposed measures while rejecting others. Overlooking these presidential proposals in an analysis of legislative history thus seems irrational, especially when a stronger expression of congressional intent can be found in a pointed congressional rejection of a certain presidential proposal.[55] In the same respect, if the legislature fails to reject a proposition ingrained in a legislative draft that originates in the White House, then it implicitly adopts the President's original intent.[56]

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52. A. MAASS, *supra* note 40, at 10; *see* G. EDWARDS, PRESIDENTIAL INFLUENCE, *supra* note 43, at 202 ("Certainly presidents have successfully intervened [in the legislative process] with a phone call, bargain, threat, or amenity, occasionally winning a crucial vote because of such an effort.").

Different Presidents have pursued the enactment of specific legislation to varying degrees. For instance, President Lyndon Johnson believed that "[t]here is but one way for a President to deal with the Congress, and that is continuously, incessantly, and without interruption." D. KEARNS, LYNDON JOHNSON AND THE AMERICAN DREAM 226 (1976) (quoting President Johnson's remarks in a personal interview with the author). "Merely placing a program before Congress," President Johnson wrote separately, "is not enough. Without constant attention from the administration, most legislation moves through the congressional process at the speed of a glacier." L. JOHNSON, THE VANTAGE POINT 448 (1971). President Kennedy similarly felt that he would have to take an "active, aggressive role with Congress" in order to ensure the passage of his programs. L. O'BRIEN, NO FINAL VICTORIES 109 (1974). In contrast, President Nixon apparently knew little about the workings of Congress and cared even less. R. EVANS & R. NOVAK, NIXON IN THE WHITE HOUSE: THE FRUSTRATION OF POWER 106 (1971).

53. *See supra* note 44 and accompanying text.

54. A. MAASS, *supra* note 40, at 11.

55. The rejection of proposed language by Congress is probative because it is direct evidence that Congress considered the issue and decided not to adopt the specific policy. *See, e.g.*, Tanner v. United States, 483 U.S. 107, 123-25 (1987); Burlington N. R.R. v. Brotherhood of Maintenance of Way Employes, 481 U.S. 429, 439 (1987); Dames & Moore v. Regan, 419 U.S. 186, 200 (1974); *cf.* INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).

56. *See* R. DICKERSON, *supra* note 1, at 145 n.19 ("*Nonlegislative* intent becomes *legislative* intent so far as the legislature impliedly adopts the intent of the outsider.").

Many bills introduced in Congress stem from presidential recommendations,[57] and many of them are accompanied by presidential messages or executive branch memoranda. These documents describe the purpose of the proposed legislation and reveal the intent of its initiators. Insofar as Congress considers such documents, they are relevant to legislative history. Thus, courts should pay attention to documents which record the President's significant role in proposing legislation.[58]

B. *Presentment and the President*

A key step in the legislative process occurs when a bill is presented to the President for approval. Section I.B.1 reviews the constitutional requirement to present pending federal legislation to the President for final approval or rejection. Section I.B.2 explores the practical uses, for statutory interpretation purposes, of presidential documents from the presentment stage of the lawmaking process.

1. *The Constitutional Prescription*

Article I of the Constitution includes the President in the legislative process by giving him the power to review all federal legislation via the presentment clause: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . . ."[59] The requirement of presentment confers upon the President a formal and official role in the legislative process.[60] Indeed, the Supreme Court has recognized that "[t]he President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress."[61]

If at the presentment stage the President vetoes the legislation,[62]

57. *See supra* note 24. It is difficult to ascertain exactly how many bills currently proposed by the President are passed by Congress. However, the following statistics, compiled from the *Congressional Quarterly*, shed some light on the matter: President Eisenhower submitted 1,515 proposals between 1954 and 1960, of which Congress approved 684; President Kennedy submitted 1,054 proposals between 1961 and 1963, of which Congress approved 414; and President Johnson submitted 1,902 proposals between 1964 and 1968, of which Congress approved 1,091. 2 CONGRESS AND THE NATION 625 (1969).

58. *Cf.* Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements,"* 40 ADMIN. L. REV. 209, 212 (1988) ("If the President is considered an actor in the passage of legislation, his statements presumably should be accorded some weight in interpreting such laws.").

59. U.S. CONST. art. I, § 7, cl. 2.

60. Of course, the President's signature is not an absolute requirement for a bill to become a law. A bill can become law by a congressional override of a President's veto. U.S. CONST. art. I, § 7, cl. 2.

61. Buckley v. Valeo, 424 U.S. 1, 121 (1976).

62. If, by contrast, the President signs the bill, the bill automatically becomes law. It is a common practice for the President to present a signing statement at such time. Whether presidential signing statements should be included as part of the legislative history is beyond the scope

the Constitution requires that the bill be returned to the House where it originated "who shall enter the Objections at large on their Journal, and proceed to reconsider it."[63] The Constitution thus requires that the veto message be taken into consideration. Logging veto messages as part of the official legislative record ensures accessibility of the messages for review by legislators and reinforces the President's place in legislative history.

2. *The Presidential Practice*

The constitutional requirement of presentment forces legislators to bear in mind the President's views on potential legislation in order to avoid a veto.[64] As one scholar of congressional-executive relations noted: "The mere existence of the possibility of a presidential veto is sufficient normally to produce reasonably careful consultation of the President's views on the form and substance of pending legislation. . . ."[65] The Framers appreciated the power contained in the President's veto when they included the presentment clause in the Constitution. Alexander Hamilton wrote of the veto power:

> A power of this nature in the executive will often have a silent and unperceived, though forcible, operation. When men, engaged in unjustifiable pursuits, are aware that obstructions may come from a quarter which they cannot control, they will often be restrained by the bare apprehension of opposition from doing what they would with eagerness rush into if no such external impediments were to be feared.[66]

Practical application of presentment thus means that legislation passed by both Houses of Congress, but substantially inconsistent with a President's views, is unlikely to be approved by the President. Congress therefore must tailor its legislative product to prevent a presiden-

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of this Note. For information regarding the efficacy of using presidential signing statements in statutory interpretation, see Cross, *supra* note 58, at 222-24; Garber & Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. LEGIS. 363, 367 (1987); Note, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GEO. L. REV. 755 (1987); Greenhouse, *In Signing Bills, Reagan Tries to Write History*, N.Y. Times, Dec. 9, 1986, at B14, col. 3.

63. U.S. CONST. art. I, § 7, cl. 2.

64. *See* M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 310 (1966) ("The threat to veto a bill can frequently lead legislators to improve the bill in order to make it acceptable."); M. MEZEY, *supra* note 42, at 103 ("[B]y threatening to veto proposals he dislikes, the president can encourage Congress to make changes that would render the bill more acceptable to him."). Political scientist Richard Neustadt recognized Congress' precarious position with respect to understanding the President's legislative wishes:

> With hardly an exception, [those] who share in governing this country are aware that at some time, in some degree, the doing of *their* jobs, the furthering of *their* ambitions, may depend upon the President of the United States. Their need for presidential action, or their fear of it, is bound to be recurrent if not actually continuous. Their need or fear is [the President's] advantage.

R. NEUSTADT, PRESIDENTIAL POWER 35 (1960) (emphasis in original).

65. R. EGGER & J. HARRIS, *supra* note 19, at 51.

66. THE FEDERALIST NO. 73, at 446 (A. Hamilton) (C. Rossiter ed. 1961).

tial veto.[67] The presentment requirement is even more rigorous for Congress if the President initially proposed the legislation, thereby having previously articulated his views on the legislation. In these instances, it may be additionally difficult to avoid a presidential veto if the legislation has been significantly altered.[68]

On a practical level, a presidential veto message may prove helpful for statutory interpretation purposes in two particular instances. First, a presidential veto message can aid statutory interpretation if Congress successfully overrides the veto. Since a veto message ordinarily concentrates on the provisions of the rejected bill,[69] and since it seems reasonable to assume that the legislature considers the criticisms the President offers,[70] the veto message and Congress' response stand as important parts of legislative history. On the one hand, if the President gives his interpretation of the bill and Congress responds vehemently by rejecting that interpretation and emphasizing an alternative interpretation, then the courts have a great insight into legislative intent.[71] On the other hand, if the President interprets the bill and Congress overrides the veto without rejecting the President's interpretation, then the courts can rationally use the President's view to support their interpretation.[72] In such a case, Congress can be said to have agreed with the President's interpretation and enacted the bill anyway.

The second way in which the presentment stage is applicable to the statutory interpretation process occurs when the President successfully vetoes a bill. Although a successful veto means that the original bill never becomes law, a similar bill may well be passed later in its stead. If the President signs the subsequent bill, courts should be able to use the President's veto message from the original bill to infer that the later bill takes into account the objections and policy preferences of the President.[73] In this capacity, the President's veto message

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67. Although there exists the possibility of a legislative override of the President's veto, the prospect of obtaining the required two-thirds majority is slim. Congress was able to override only 94 of the 1,380 regular vetoes by Presidents Washington through Carter. L. FISHER, *supra* note 22, at 25. *See* M. MEZEY, *supra* note 42, at 61-62.

68. For an example, see *infra* note 73.

69. *See, e.g.*, Presidential Veto Message, 133 CONG. REC. H10054 (daily ed. Nov. 17, 1987) (vetoing H.R. 8617, a bill that would have essentially repealed the Hatch Act); Presidential Veto Message, 133 CONG. REC. S8438 (daily ed. June 23, 1987) (vetoing S. 742, the "Fairness in Broadcasting Act of 1987"); Presidential Veto Message, 133 CONG. REC. H504-05 (daily ed. Feb. 2, 1987) (vetoing H.R. 1, the "Water Quality Act of 1987").

70. *See supra* note 63 and accompanying text.

71. For an example, see *infra* notes 100-06 and accompanying text.

72. *See* United States v. CIO, 335 U.S. 106, 139 (1948) (Rutledge, J., concurring in the result) ("In the debate preliminary to the overriding of the veto, none of the legislators in charge of the measure gave any indication that they differed with the President's interpretation.").

73. For example, on April 16, 1956, President Eisenhower vetoed a farm price support bill. *See* Veto of the Farm Bill, PUB. PAPERS ¶ 82 (Apr. 16, 1956). Three months earlier, on January 9, 1956, in a special message to Congress, President Eisenhower had recommended an expansive

serves, for statutory interpretation purposes, as a statement of what the later bill does not mean.[74]

The combination of the power to propose legislation and the power to veto means that the President may, in some circumstances, exercise the first and last say in the enactment of federal legislation.[75] Presidential documents may shed light on a statute's meaning by revealing what Congress was told a bill meant — and therefore what Congress probably thought the bill meant. These documents may also provide a chance for Congress to say for itself what a bill meant, by endorsing or rejecting the President's interpretation. Courts should therefore consider, when exploring the "legislative history" of a given statute, the President's role in developing that statute. Until now, however, courts have generally ignored this aspect of the legislative process; they have therefore neglected to explore the whole legislative history of some statutes.

II. LIMITED PAST APPLICATION

Historically, there have been a few instances in which the Supreme Court, recognizing the important role the President plays in the lawmaking process, has used executive documents to interpret statutes.[76] Although this Part highlights a series of cases in which courts did use executive documents, the discussion should not obscure the point that courts too rarely consider presidential materials.[77] This short survey of cases merely serves to show how executive materials can be used effectively when courts face difficult statutory interpretation questions.

A. *In Federal Court*

A classic example of the Court's use of a presidential message to

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new nine-point Farm Program. *See* Special Message to Congress on Agriculture, PUB. PAPERS ¶ 6 (Jan. 9, 1956). Unsatisfied with the ensuing farm legislation passed by Congress, President Eisenhower, in his veto message, not only identified the provisions of the legislation that he found inadequate and unworkable, but he suggested compromise measures that he would approve. *See* Veto of the Farm Bill, *supra*. Congress eventually passed a bill containing provisions acceptable to President Eisenhower, *see* H.R 10875, 84th Cong., 2d Sess. (1956), and therefore he signed the subsequent bill. *See* Statement by the President upon Signing the Agricultural Act of 1956, PUB. PAPERS ¶ 115 (May 28, 1956).

An examination of the political climate may be necessary to determine why the President approved the subsequent similar legislation. Perhaps the President changed his mind, or perhaps the President did not want to be overridden by Congress for other political reasons.

74. *See, e.g.*, Amalgamated Assn. of St., Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383, 392 n. 15 (1947) (using an earlier bill's veto message to show Congress's rejection of a similar position in a later bill).

75. *See supra* section I.A.

76. *See, e.g.*, NLRB v. Local 103, Intl. Assn. of Bridge Workers, 434 U.S. 335, 347 n.9 (1978) (citing, among other things, a presidential transmittal letter that recommended adopting a draft of labor reform legislation); Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 629 n.8 (1975) (citing a presidential message calling for labor reform legislation).

77. *See supra* note 13.

assist in its interpretation of a statute is *Johnson v. Southern Pacific Co.*[78] In *Johnson,* the Court examined an act of Congress which provided that a railroad employee "injured by any locomotive, car, or train in use contrary to the provision of this act" would not be deemed to have assumed the risk of injury.[79] The issue was whether operating a locomotive without automatic couplers violated section 2 of the Act, which required automatic couplers on "cars."[80]

The court of appeals had held that the Act's coupler restrictions applied only to "cars" and not to "locomotives."[81] Because another section of the statute specifically addressed locomotives, requiring them to be equipped with particular safety equipment (but not automatic couplers), the court of appeals inferred that if Congress had wanted to include locomotives in section 2, it would have referred to *both* cars and locomotives.[82]

The Supreme Court, however, found that Congress had used the word "car" in its generic sense in section 2, and that the Act "plainly forbade . . . the use of cars which could not be coupled together automatically by impact . . . ."[83] The Court felt that this interpretation of the scope of the statute was supported "by the circumstances surrounding its enactment . . . ."[84] The Court specifically noted that President Harrison, in his annual messages of 1889, 1890, 1891, and 1892, had urged Congress to enact legislation to "obviate and reduce the loss of life and the injuries due to the prevailing method of coupling and braking."[85] In his first message to Congress, President Harrison stated:

> It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. . . . It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as

78. 196 U.S. 1, 19-20 (1904).

79. Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 (1893).

80. Section 2 provided in pertinent part:

> [I]t shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 (1893).

81. Johnson v. Southern Pac. Co., 117 F. 462, 466 (8th Cir. 1902). The lower court had refused to test the meaning of the provision in question against the broad purpose of the statute. *See Johnson,* 117 F. at 465.

82. *Johnson,* 117 F. at 466.

83. *Johnson,* 196 U.S. at 15-16. The locomotive and the other car in question were in fact equipped with automatic couplers, but the couplers on each were of different types and could not be coupled with each other automatically. Workers therefore had to go between the cars to couple and uncouple.

84. *Johnson,* 196 U.S. at 19.

85. *Johnson,* 196 U.S. at 19.

great as that of a soldier in time of war.[86]

President Harrison reiterated his recommendation in a subsequent message to Congress:

> Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employés killed and 26,140 injured. Nearly 16 per cent of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin.[87]

The Court reasoned that, given the persistence of reports such as these, Congress clearly had in mind that the couplers would eliminate the need for railroad workers to go between any two cars; whether or not one of the cars happened to be a locomotive was not particularly relevant.[88]

The impetus for the Act in *Johnson* came from the White House; quite naturally, therefore, presidential documents prove helpful in interpreting the Act. The *Johnson* case thus serves as a prime example of how courts can practically and productively use presidential messages as an aid in statutory interpretation.

In a more recent case, *United States v. Reitano,*[89] the Second Circuit analyzed a presidential message to resolve a difficult interpretive question. In *Reitano,* the defendant was charged with conducting an illegal gambling business under the Organized Crime Control Act of 1970;[90] specifically, he facilitated the playing of "rough-and-tumble" blackjack at his nightclub.[91] The game of rough-and-tumble blackjack requires players to compete against each other: the gambling establishment collects the bets placed on each deal of the cards, retains a percentage, and then pays the winner from the bets collected.[92]

The Act defines an "illegal gambling business" as one that, among other things, "has a gross revenue of $2,000 in a single day."[93] In appealing his conviction, the defendant argued that since rough-and-tumble blackjack involves no bets against the house, the amounts wagered did not constitute "revenue" within the meaning of the Act.[94] Unfortunately, Congress did not define "gross revenue" in the Act. The court reasoned, however, that "the language used in the legislative history suggests that [Congress] meant that term to encompass all of the moneys coming into the possession of the gambling establish-

86. *Johnson,* 196 U.S. at 19.
87. *Johnson,* 196 U.S. at 19-20.
88. *Johnson,* 196 U.S. at 20.
89. 862 F.2d 982 (2d Cir. 1988).
90. 18 U.S.C. § 1955(a) (1988).
91. *Reitano,* 862 F.2d at 984.
92. *Reitano,* 862 F.2d at 984.
93. 18 U.S.C. § 1955(b)(1)(iii) (1988).
94. *Reitano,* 862 F.2d at 985.

ment."[95] Specifically, the court noted that a message from the President "had urged Congress to adopt legislation making it a federal crime to engage in an illicit gambling operation from which the daily 'take' was more than $2,000 . . . ."[96] In common usage, the court reasoned that the term "take" referred to "the money received."[97] The court therefore concluded that "take" meant all the money collected, despite the fact that some of the moneys the establishment collected were paid to the winning bettors.[98] The *Reitano* case again illustrates the usefulness of presidential messages for statutory interpretation purposes.

Veto messages also can assist in statutory interpretation.[99] A quintessential example of the Supreme Court's use of a President's veto message and the corresponding congressional response is *NLRB v. Robbins Tire & Rubber Co.*[100] In this Freedom of Information Act case, the Court sought guidance from President Ford's veto message. The message expressed concern that exemption 7(A) of the Act "would require the Government to 'prove . . . separately for each paragraph of each document — that disclosure "would" cause' a specific harm"[101] in order to exempt that document from disclosure under the Act. Representative Moorehead, a key supporter of the bill, called the President's view "ludicrous."[102] Senator Hart similarly remarked that "the 'burden is substantially less than we would be led to believe by the President's message.' "[103] These exchanges, garnered through the presentment stage of the legislative process, helped the Court to determine that the President's interpretation was far from the intent of Congress. Since Congress rejected the President's "ludicrous" view,[104] the Court deduced that Congress intended a more moderate interpretation of the ability of the government agencies to conceal documents under exemption 7(A).[105] A presidential veto message can be used to

95. *Reitano*, 862 F.2d at 985.

96. *Reitano*, 862 F.2d at 985 (citation omitted).

97. *Reitano*, 862 F.2d at 985.

98. *Reitano*, 862 F.2d at 985.

99. *See supra* section II.B.2.

100. 437 U.S. 214 (1978).

101. *Robbins*, 437 U.S. at 235, quoting Presidential Veto Message, STAFF OF THE SUBCOMM. ON GOVT. INFORMATION AND INDIVIDUAL RIGHTS OF THE HOUSE COMM. ON GOVT. OPERATIONS, AND STAFF OF THE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION SOURCE BOOK 483, 484 (Joint Comm. Print 1975) [hereinafter 1975 SOURCE BOOK].

102. 120 CONG. REC. 36,623 (1974) (statement of Rep. Moorehead), *reprinted in* 1975 SOURCE BOOK 406, *quoted in Robbins*, 437 U.S. at 235.

103. 120 CONG. REC. 36,871 (1974) (statement of Sen. Hart), *reprinted in* 1975 SOURCE BOOK 450, *quoted in Robbins*, 437 U.S. at 235.

104. Congress overrode the President's veto. *See* Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974).

105. *Robbins*, 437 U.S. at 235-36.

eliminate competing interpretations and reach an interpretation close to the legislature's true intention.[106] The *Robbins* decision highlights the applicability of veto messages in statutory interpretation. Ignoring such a blatant indication of legislative intent garnered through the use of presidential documents seems "ludicrous."

Despite the three previously mentioned cases, the federal courts' use of presidential materials in statutory interpretation has been very sporadic. Usually the courts mention presidential materials only when there are no other indicia of legislative intent.[107] Presidential documents should, however, be used on a regular basis for effective statutory interpretation.

B. *In State Court*

The President's role in the legislative process finds parallels in most state systems because state executives are usually vested with the power to propose new state legislation.[108] Interestingly, state courts commonly use gubernatorial statements and veto messages to discern legislative intent.[109]

An illustrative example is found in *Division of Agriculture v. Fowler.*[110] The interpretive question before the court was whether ar-

106. For another example of the Court using a presidential veto message, see McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). The question before the Court was whether Title VII prohibits racial discrimination in private employment against whites as well as blacks. The Court cited President Johnson's veto message recognizing that the bill attempted to fix "a perfect equality of the white and black races." *McDonald,* 427 U.S. at 295 n.26 (quoting Presidential Veto Message, CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866)).

107. *See, e.g.,* Kosak v. United States, 465 U.S. 848, 857 n.13 (1984) ("[I]n the absence of any direct evidence regarding how Members of Congress understood the provision . . . it seems to us senseless to ignore entirely the views of its [executive branch] draftsman.").

108. With the exceptions of Massachusetts, Minnesota, New Hampshire, New Mexico, and Rhode Island, every state constitution contains a provision for the executive to propose legislation. *See* ALA. CONST. art. V, § 123; ALASKA CONST. art. III, § 18; ARIZ. CONST. art. V, § 4; ARK. CONST. art. 6, § 8; CAL. CONST. art. V, § 3; COLO. CONST. art. IV, § 8; CONN. CONST. art. IV, § 11; DEL. CONST. art. III, § 15; FLA. CONST. art. IV, § 1(e); GA. CONST. art. V, § II, ¶ VI; HAW. CONST. art. V, § 5; IDAHO CONST. art. IV, § 8; ILL. CONST. art. V, § 13; IND. CONST. art. V, § 13; IOWA CONST. art. IV, § 12; KAN. CONST. art. 1, § 5; KY. CONST. § 79; LA. CONST. art. IV, § 5(B); ME. CONST. art. V, Pt. 1, § 9; MD. CONST. art. II, § 19; MICH. CONST. art. V, § 17; MISS. CONST. art. 5, § 122; MO. CONST. art. IV, § 9; MONT. CONST. art. VI, § 9; NEB. CONST. art. IV, § 7; NEV. CONST. art 5, § 10; N.J. CONST. art. V, § I, ¶ 12; N.Y. CONST. art. IV, § 3; N.C. CONST. art. III, § 5, cl. 2; N.D. CONST. art. V, § 5; OHIO CONST. art. III, § 7; OKLA. CONST. art. VI, § 9; OR. CONST. art. V, § 11; PA. CONST. art. IV, § 11; S.C. CONST. art. IV, § 18; S.D. CONST. art. IV, § 3; TENN. CONST. art. III, § 11; TEX. CONST. art. IV, § 9; UTAH CONST. art. VII, § 5; VT. CONST. ch. II, § 20; VA. CONST. art. V; § 5; WASH. CONST. art. III, § 6; W.VA. CONST. art. VII, § 6; WIS. CONST. art. V, § 4; WYO. CONST. art. IV, § 4.

109. *See, e.g.,* Hammond v. Hickel, 588 P.2d 256, 271-72 & n.33 (Alaska 1978) (considering governor's veto of bill in determining legislative intent); Taplin v. Town of Chatham, 390 Mass. 1, 4-5, 453 N.E.2d 421, 423 (1983) (including, as part of legislative history, governor's communications to the legislature in returning bills); Fields v. Hoffman, 105 N.J. 262, 269-70, 520 A.2d 751, 755 (1987) (considering press release from governor's office as part of legislative history); *cf.* State v. Patterson, 740 P.2d 944, 947 (Alaska 1987) (using attorney general's response to a question in order to interpret law originally proposed by executive).

110. 611 P.2d 58 (Alaska 1980).

ticle 9 of Alaska's version of the Uniform Commercial Code[111] applied to a security agreement between the state and a borrower.[112] The Alaska legislature had expanded upon U.C.C. § 9-104, which defines the scope of article 9, by stating that article 9 does not apply "to a security interest created by or on behalf of the state."[113] The appellees, seeking to find the transaction outside of article 9, argued that in the Alaska version of the statute "by" refers to the state as a debtor, and "on behalf of" is synonymous with "in favor of" and refers to the state as a creditor.[114] The court, however, reasoned that the phrase "on behalf of" conveyed the notion of an official acting for the state, and thus interpreted Alaska's amendment as inapplicable to the state as a creditor.[115] To arrive at this interpretation, the court considered a letter the governor had written to the legislature transmitting the proposed amendment:

> It is difficult to believe that the provisions of the Uniform Commercial Code were intended to apply to the sale of public securities, yet through apparent inadvertency said transactions were omitted from the list of those transactions not governed by the Uniform Commercial Code. It is impractical to expect public entities such as the state and its subdivisions to comply with the provisions of the Uniform Commercial Code when obtaining debt financing. Therefore, this bill is designed to clarify the true intent of the Uniform Commercial Code so that its scope cannot be misinterpreted.[116]

The court reasoned that this letter clearly supported an interpretation limiting Alaska's amendment to situations in which the state is a borrower.[117] Such a letter from the executive, particularly one addressed to the state legislature, proved very useful in the statutory interpretation process.

In another case, *County of Milwaukee v. State Labor & Industry Review Commission,*[118] the state court's interpretation of a statutory provision relied upon a governor's message attached as an appendix to a budget bill presented to the legislature for approval. The question before the court was whether section 111.36(1) of the Wisconsin Fair Employment Act was a statute of limitations subject to waiver or a statute concerning subject matter jurisdiction.[119] The gubernatorial

111. ALASKA STAT. § 45.05.754 (1980) (current version at ALASKA STAT. § 45.09.312 (1986)) (U.C.C. § 9-312). Under this statute, a perfected security interest will prevail over a prior unperfected interest, even if the perfecting party had notice of the prior interest at the time of perfection.

112. *Fowler,* 611 P.2d at 59.

113. ALASKA STAT. § 45.05.696(12) (1980).

114. *Fowler,* 611 P.2d at 60.

115. *Fowler,* 611 P.2d at 60.

116. *Fowler,* 611 P.2d at 60.

117. *Fowler,* 611 P.2d at 60.

118. 113 Wis. 2d 199, 204-05, 335 N.W.2d 412, 415-16 (Ct. App. 1983).

119. *Milwaukee,* 113 Wis. 2d at 201-01, 335 N.W.2d at 414.

message outlined the governor's view as to the effect of a budget bill section. In particular, the governor's message stated that "Sections 1007, 1010, *1053* and 1054 of the statutes, relates to placing a *statute of limitations* on equal rights cases . . . ."[120] The court noted that the legislature had adopted the governor's proposed bill without amendment and then reasoned that "a court can ascertain that the legislature adopted the executive's intent behind a section contained in the budget bill if it goes through legislative scrutiny without amendment."[121] The court found that the executive intent behind section 1053 of the budget bill was the creation of a statute of limitations.[122] It reasoned that, due to the lack of explicit congressional response to the governor's message, the legislative intent behind section 111.36(1) was to make a statute of limitations and not a statute concerning subject matter jurisdiction.[123] Recognizing that executive documents might shed light on a difficult interpretive question, the state court made use of an executive statement to discern legislative intent.

Similarly, state courts have found gubernatorial veto messages probative for the statutory interpretation process.[124] *MacCuish v. Volkswagenwerk*[125] raised the interpretive question of whether the Massachusetts wrongful death statute allowed recovery for "grief, anguish and bereavement of the survivors."[126] When the legislature originally passed the bill, it contained three paragraphs regarding compensatory damages. The first allowed recovery of the "fair monetary value" of the decedent,[127] the second allowed recovery of funeral expenses,[128] and the third allowed damages for "grief, anguish and

120. *Milwaukee,* 113 Wis. 2d at 204, 335 N.W.2d at 415.

121. *Milwaukee,* 113 Wis. 2d at 205, 335 N.W.2d at 416. *See supra* note 56 and accompanying text.

122. *Milwaukee,* 113 Wis. 2d at 205, 335 N.W.2d at 416.

123. *Milwaukee,* 113 Wis. 2d at 205, 335 N.W.2d at 416.

124. Every state constitution, with the exception of North Carolina, provides for executive review of legislation: ALA. CONST. art. V, § 125; ALASKA CONST. art. II, § 15; ARIZ. CONST. art. V, § 7; ARK. CONST. art. 6, § 15; CAL. CONST. art. IV, § 10; COLO. CONST. art. IV, § 11; CONN. CONST. art. IV, § 15; DEL. CONST. art. III, § 18; FLA. CONST. art. III, § 8; GA. CONST. art. V, § II, ¶ IV; HAW. CONST. art. III, § 16; IDAHO CONST. art. IV, § 10; ILL. CONST. art. IV, § 9; IND. CONST. art. V, § 14; IOWA CONST. art. III, § 16; KAN. CONST. art. 2, § 14; KY. CONST. § 88; LA. CONST. art. III, §§ 17-18; ME. CONST. art. IV, § 2; MD. CONST. art. II, § 17; MASS. CONST. pt. 2, ch. I, § I, art. II; MICH. CONST. art. IV, § 33; MINN. CONST. art. IV, § 23; MISS. CONST. art. 4, § 72; MO. CONST. art. III, §§ 30-32; MONT. CONST. art. VI, § 10; NEB. CONST. art. IV, § 15; NEV. CONST. art. 4, § 35; N.H. CONST. art. 2, pt. 2, § 44; N.J. CONST. art. V, § I, ¶ 14; N.M. CONST. art. IV, § 22; N.Y. CONST. art. IV, § 7; N.D. CONST. art. V, § 9; OHIO CONST. art. II, § 16; OKLA. CONST. art. VI, § 12; OR. CONST. art. V, § 15b; PA. CONST. art. IV, § 15; R.I. CONST. art. IX, § 14; S.C. CONST. art. IV, § 21; S.D. CONST. art. IV, § 4; TENN. CONST. art. III, § 18; TEX. CONST. art. IV, §§ 14-15; UTAH CONST. art. VII, § 8; VT. CONST. art. II, § 11; VA. CONST. art. V; § 6; WASH. CONST. art. III, § 12; W. VA. CONST. art. VII, § 14; WIS. CONST. art. V, § 10; WYO. CONST. art. 4, § 8.

125. 22 Mass. App. Ct. 380, 494 N.E.2d 390 (1986).

126. *MacCuish,* 22 Mass. App. Ct. at 394, 494 N.E.2d at 398.

127. MASS. GEN. L. ch. 229, § 2 (1988).

128. MASS. GEN. L. ch. 229, § 2 (1988).

bereavement of the survivors."[129] After presentment,[130] the governor deleted paragraph three before returning the bill to the legislature.[131] The governor explained the deletion, stating that he was not convinced that the statute "should also authorize . . . compensation for [the items in paragraph 3]."[132] The court reasoned that the legislature, in approving the governor's deletions, indicated that it did not intend to compensate for the excluded items.[133] As a result of this interpretation, the court held that jury instructions excluding damages for bereavement would have been proper and advisable.[134] This case serves as a straightforward illustration of the usefulness of executive veto messages.[135]

State courts have used many different kinds of executive materials to assist them in discerning legislative intent.[136] As Justice Brandeis aptly observed, it is one of the "happy incidents of the federal system" that state courts can function as the little laboratories of the federal court system.[137] State courts' successes with using executive documents to interpret statutes justifies increasing the federal courts' use of presidential documents.

III. The President's Place in Legislative History

Because the President has become a major player in the legislative process, it seems reasonable to consider presidential materials when exploring the "legislative history" of a given statute. Some courts have occasionally recognized the President's role in the lawmaking process and have taken the next logical step: using presidential documents as an aid to statutory interpretation.[138] In general, however, courts remain unconvinced and rarely consider presidential documents. Section III.A focuses on the skepticism surrounding the legislators' actual awareness of presidential documents, a key argument against using these documents. Section III.B analyzes the constitu-

129. *MacCuish*, 22 Mass. App. Ct. at 394, 494 N.E.2d at 398.

130. Under the Massachusetts constitution:

> No bill or resolve of the senate or the house of representatives shall become a law, and have force as such, until it shall have been laid before the governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same.

MASS. CONST. pt. 2, ch. I, § I, art. II.

131. *MacCuish*, 22 Mass. App. Ct. at 394, 494 N.E.2d at 398-99.

132. *MacCuish*, 22 Mass. App. Ct. at 394 n.19, 494 N.E.2d at 399 n.19.

133. *MacCuish*, 22 Mass. App. Ct. at 394, 494 N.E.2d at 399.

134. *MacCuish*, 22 Mass. App. Ct. at 397, 494 N.E.2d at 401.

135. Although the U.S. President, unlike Massachusetts' governor, is not equipped with the line item veto, presidential veto messages can still identify the portions of the bill with which the President disagrees.

136. For a collection of articles regarding state courts' uses of extrinsic evidence in statutory interpretation, see W. ESKRIDGE & P. FRICKEY, *supra* note 7, at 697 n.j.

137. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

138. *See supra* section II.A.

tional challenges associated with using presidential documents for statutory interpretation. Finally, section III.C addresses concerns about expanding the relevant domain of legislative history sources.

A. *Legislators' Consideration of Presidential Documents*

In a recent case in which the Supreme Court used an executive branch document for statutory interpretation, *Kosak v. United States,*[139] Justice Stevens warned that nonlegislators' intent should not be attributed to Congress "without positive evidence that elected legislators were aware of and shared the lobbyist's intent."[140] This reflects one pragmatic reason for disregarding the President's role in the legislative process: presidential documents may not be accessible to the legislative audience and therefore provide no indication of legislative intent.[141] This argument mirrors the rationale behind the limited use of committee hearing transcripts:[142] legislators may not have had ready access to them and therefore it would be unreasonable to assume that legislators had read them.[143]

Many sources publish executive documents, however, which are readily available for legislators to read and review. The most comprehensive source for current presidential documents is the *Weekly Com-*

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139. 465 U.S. 848 (1984).

140. Kosak v. United States, 465 U.S. 848, 863 (1984) (Stevens, J., dissenting). In *Kosak,* Justice Marshall, writing for the majority, used a report written by Judge Alexander Holtzoff, who was then serving in the executive branch as Special Assistant to the Attorney General, to aid in statutory interpretation. *Kosak,* 465 U.S. at 855-57. The question before the Court was whether a provision of the Federal Tort Claims Act, which exempts from its coverage "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs," precluded recovery against the United States for injury to private property sustained when the Customs Service temporarily detained the property. *Kosak,* 465 U.S. at 849. Judge Holtzoff's report stated that the Act's exemption covered injury to detained property caused by the negligence of customs officials: it "include[s] immunity from liability in respect of loss in connection with the detention of goods or merchandise by any officer of customs or excise." A. HOLTZOFF, REPORT ON PROPOSED FEDERAL TORT CLAIMS BILL 16 (1931), *quoted in Kosak,* 465 U.S. at 856.

In interpreting the Act, the Court conceded that it was unsure whether Congress relied on this report when it enacted the legislation. *Kosak,* 465 U.S. at 856. The Court reasoned, however, that insofar as the "report embodied the views of the Executive Department at the stage of the debates over the tort claims bill, it is likely that, at some point, the report was brought to the attention of the Congressmen considering the bill." *Kosak,* 465 U.S. at 857 n.13.

141. *See, e.g.,* Forbes v. Maddox, 339 F.2d 387, 388 (9th Cir. 1964) (Lower court should not have relied on messages from the executive concerning a bill pending in the legislature because the legislature may not have been aware of them.).

142. *See supra* note 12 and accompanying text.

143. Committee *reports,* by contrast, are viewed as credible because they are so accessible to legislators. *See supra* note 9 and accompanying text. *But see* Blanchard v. Bergeron, 109 S. Ct. 939, 947 (1989) (Scalia, J., concurring in part, concurring in judgment) (noting that few members of Congress actually read committee reports).

Justice Scalia frequently raises the argument that legislators are not aware of most of what presently composes "legislative history." *See, e.g.,* Hirschey v. FERC, 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring) (Details of legislative history do not come to the attention of members of Congress.).

pilation of Presidential Documents. Since 1965, this weekly publication has printed executive documents, including transcripts of presidential addresses and fact sheets regarding pending legislation.[144] Both Houses of Congress publish official journals, the *Journal of the House of Representatives of the United States* and the *Journal of the Senate of the United States of America,* which briefly describe their proceedings, and often include messages from the President. *U.S. Code Congressional and Administrative News* occasionally prints presidential signing statements[145] as well as other executive messages and memoranda, but usually in a selective manner.

The *Congressional Record,* however, stands as the best source for presidential messages. The *Congressional Record* has been published since 1873,[146] and is printed every day while either House of Congress is in session. The *Congressional Record* publishes communications to Congress by the President in the form of presidential messages. These messages include proposals of legislation, explanations of vetoes, transmissions of reports and other presidential documents. Thus, the *Congressional Record* is a fairly complete compilation of executive documents that is certainly available to every member of Congress.

Despite the availability of information regarding the President's legislative proposals, whether legislators are ever actually aware of them is unclear. Most of the legislative information that individual members of Congress receive is synthesized from the massive literature that arrives in their offices and is channeled to them by their staff.[147] Most likely, congressional staffs gain information about the President's position on particular legislation from the sources mentioned above and pass it on to the members of Congress.[148] In this way, the President's views on pending legislation do, in some form, reach the legislators.[149]

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144. *The Public Papers of the Presidents* is an annual collection of the same type of materials, but it is arranged and bound in a final format. The bound *Public Papers* do not usually appear until several years after the original appearance of the materials. Therefore, they do not lend much assistance since legislators cannot consider them before voting on statutes.

145. The Department of Justice under Attorney General Edwin Meese was responsible for first persuading the publishers of *U.S. Code Congressional and Administrative News* to include presidential signing statements in their legislative history collection. *See* Natl. L.J., Mar. 10, 1986, at 2; Toobin, *The Last Word,* New Republic, Nov. 3, 1986, at 13; Kmeic, *Judges Should Pay Attention to Statements by President,* Natl. L.J., Nov. 10, 1986, at 13.

146. The precursors to the *Congressional Record* include the *Annals of Congress,* 1789-1824, the *Register of Debates,* 1824-1837, and the *Congressional Globe,* 1833-1873.

147. *See* H. FOX & S. HAMMOND, CONGRESSIONAL STAFFS 124-25 (1977); K. KOFMEHL, PROFESSIONAL STAFFS OF CONGRESS 17-34, 118-19 (3d ed. 1977); *see also* M. MALBIN, UNELECTED REPRESENTATIVES 21, 143 (1979).

148. *Cf.* J. SUNDQUIST, *supra* note 43, at 402-14.

149. The *Congressional Record* is replete with examples of legislators not only being aware of the President's views on legislation, but actually reiterating them. *See, e.g.,* 136 CONG. REC. S8072 (daily ed. June 18, 1990) (statement of Sen. Dole) ("And it happens to be the view of President Bush, who has publicly threatened to veto any bill that contains a rigid spending limits proposal or provision [for campaign financing]."); 136 CONG. REC. S2439 (daily ed. Mar. 8,

B. *Constitutional Concerns*

As previously mentioned, courts employ legislative history in the statutory interpretation process in order to discern congressional intent.[150] This Note argues that presidential documents, as indicators of legislative intent, should be included in the legislative history considered in the statutory interpretation process. Bringing the executive into the lawmaking process, however, seems to raise separation of powers concerns automatically. These concerns generally begin with the reminder that the Constitution vests "All legislative Powers" in Congress.[151] Use of executive documents which purport to encapsulate the intent of the legislature in passing the bill is thus considered an executive intrusion into a legislative function. A complementary argument is that although making legislative history is not itself an exercise of article I lawmaking power, the creation of legislative history derives whatever authority it has from the fact that article I legislators produced it, and in this regard, presidential documents do not contain the requisite legislative labor.

Separation of powers concerns arising from the use of presidential documents in statutory interpretation, however, can be addressed on two levels. First, the Constitution sets the parameters for the legitimate involvement of the President in the lawmaking process; specifically, it grants the President the power to propose and veto legislation.[152] Therefore, in vetoing a bill passed by the legislature, for instance, the President should be perceived as operating in his legislative capacity.[153] Thus there seems to be no intrusion on legislative "turf," and hence no separation of powers violation, because the President is simply acting out his specifically designated legislative function. Second, since the legislature reviews and considers both presidential proposals and veto messages,[154] legislators have the opportunity to accept or reject the President's views expressed in presidential documents. Due to this review by the legislators, presidential documents and messages become part of legislators' understanding of

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1990) (statement of Sen. Dole) ("But I am here, as I have indicated, reflecting the views of President Bush who wants this bill . . . ."); 136 CONG. REC. S812 (daily ed. Feb. 6, 1990) (statement of Sen. McCain) ("This legislation is consistent in my view with President Bush's commitment to U.S. leadership in global change research. As part of his fiscal year 1991 budget, President Bush proposed over $1 billion in funding for global change research, an increase of 57 percent over the 1990 level."); 135 CONG. REC. H7583 (daily ed. Oct. 26, 1989) (statement of Rep. Lagomarsino) (recognizing that President Bush had expressed his views on the status of Puerto Rico one month earlier).

150. *See supra* notes 4-5 and accompanying text.

151. U.S. CONST. art. I, § 1.

152. U.S. CONST. art. II, § 3 and art. I, § 7, cl.2; *see supra* Part I.A.1 and I.B.1.

153. *Cf.* Lynch v. Department of Labor & Indus., 19 Wash. 2d 802, 810, 145 P.2d 265, 269 (1944) ("In approving a bill passed by the legislature, the governor acts in a legislative capacity and as part of the legislative branch of the state government.").

154. *See supra* section III.A.

the legislation — they become part of legislative intent. This Note maintains that presidential documents should be used only as evidence of legislative intent. This use of legislative intent obviates claims of aggrandizement of executive power and prevents circumvention of the legislature in the lawmaking process. Ensuring that legislative powers remain with the legislature, in turn, avoids separation of powers problems.[155]

The consequences of excluding presidential documents from the list of relevant sources of legislative history raises independent constitutional questions. One general criticism of the present near-exclusion of presidential documents from legislative history is that it gives undue weight to one branch of the federal government.[156] In particular, legislative history which does not include presidential materials ignores the role of the Executive. "In carrying out his constitutionally ordained functions, the President passes upon legislation . . . . In this regard, the President's view of the statute may be different from that of Congress . . . ."[157] The Framers specifically included the President in the lawmaking process for a reason: to prevent "the enaction of improper laws."[158] Even Justice Frankfurter acknowledged that when the Court reviews legislation, it is evaluating "the product of both Houses of Congress and the President."[159] To this extent, the President's view should be taken into consideration in statutory interpretation; otherwise the judiciary is ignoring constitutionally prescribed executive functions. On this independent constitutional ground courts should take presidential documents into consideration in the statutory interpretation process.

C. *Too Much Legislative History*

Some argue that courts have ignored the President's role in the legislative process because of the work involved in complete and

155. There might be a separation of powers problem if the courts attempted to use presidential documents under the pretext of "executive intent." That is to say, conceivably courts could use presidential documents as indicators of "executive intent" — a wholly distinct concept from legislative intent. The main problem, however, with giving independent weight under the guise of executive intent to presidential documents is that doing so circumvents the legislature and raises separation of powers concerns. Using executive intent in the statutory interpretation process effectively eliminates the legislature from a role in the lawmaking process. Given that the Constitution on its face reserves "All legislative Powers" to Congress, allowing the President to create and then interpret the law seems to violate the separation of powers.

156. *Cf.* Starr, *supra* note 14, at 375 (arguing that courts should not use legislative history at all: "In terms of democratic theory, the use of legislative history can distort the proper voice of each branch of our constitutional government.").

157. *Id.* at 376.

158. THE FEDERALIST No. 73, at 443 (A. Hamilton) (C. Rossiter ed. 1961).

159. United States v. Lovett, 328 U.S. 303, 324-25 (1946) (Frankfurter, J., concurring). More recently, the Supreme Court as a whole has recognized the President's legislative role. *See* INS v. Chadha, 462 U.S. 919, 947 (1983) ("It is beyond doubt that lawmaking was a power to be shared by both Houses and the President.").

proper investigations of legislative history.[160] Adding presidential documents to the list of materials to be included in legislative history would undoubtedly increase the time courts spend evaluating certain statutory interpretation problems. The tremendous growth in the federal courts' caseloads over the past few decades exacerbates this concern with increasing the obligations of the courts.[161]

To argue, however, that incomplete analyses of legislative histories are acceptable due to increasing workload is merely to suggest expediency over accuracy as a long-term solution.[162] Expansion of the domain of relevant materials would increase the courts' workload in a only few cases; the starting point for interpreting a statute should always be the language of the statute itself, so resort to legislative history is not always necessary.[163] "[T]he Supreme Court has decided almost half of its statutory interpretation cases by reference to a statute's plain meaning in each of the last three Terms."[164] Those few cases truly requiring an examination of legislative history merit a complete investigation,[165] not one unjustifiably proscribed by an avoidance of presidential materials.

CONCLUSION

Relevance is the standard for legislative history; it consists of all "relevant events comprising the enactment process."[166] Presidential materials are relevant in that the Constitution specifically prescribes both proposals and veto messages as parts of the lawmaking process. Moreover, presidential documents may be not only relevant to but highly probative of what Congress actually intended, depending on the

160. A. MAASS, *supra* note 40, at 13-14; *cf.* Starr, *supra* note 14, at 378.

161. *See generally* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 65 (1985) (noting the increase in court of appeals cases from 3,765 in 1960 to 29,580 in 1984, an increase of 686%).

162. Usually, it is lawyers who initially research legislative history. Ordinarily courts will not undertake extensive independent research unless they find the lawyers' research inadequate. Therefore, adding presidential documents to the list of germane pieces of legislative history is unlikely in general to increase the courts' workload.

163. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J., dissenting) (Courts should look to legislative history only when "the face of the Act is inescapably ambiguous."); *cf.* Kozinski, *Hunt for Laws' "True" Meaning Subverts Justice*, L.A. Daily J., Mar. 10, 1989, at 6, col. 3 (arguing against use of legislative history in statutory interpretation; "[Justice Frankfurter] would no doubt be shocked to pick up a legal publication and find advertisement for the legal profession's latest cottage industry - legislative intent services.").

164. Eskridge, *supra* note 3, at 656.

165. The Supreme Court has often articulated the view that legislative history is to be considered in its totality. *Cf.* Allen v. State Bd. of Elections, 393 U.S. 544, 568-69 (1969) ("Indeed, in any case where the legislative hearings and debate are so voluminous, no single statement or excerpt of testimony can be conclusive."); Hust v. Moore-McCormack Lines, 328 U.S. 707, 733 (1946) ("As is true with respect to all [legislative history] materials, it is possible to extract particular segments from the immediate and total context and come out with road signs pointing in opposite directions.").

166. *See supra* note 1 and accompanying text.

particular statute involved and the activity level of the President. Finally, the President increasingly generates such materials and they are clearly available to both Congress and courts.

It is certainly not a novel concept to identify the President as a major force in the creation of federal legislation. Nevertheless, the courts fail to accord the President's active participation in enacting legislation much concrete recognition when they are interpreting statutes. This failure signifies a gap between what actually happens in the legislative process and what the courts are concluding. This Note suggests that, in order to close the fissure, the courts look at all of legislative history, including the President's contribution; bridge the gap by giving the President an appropriate place in legislative history.

— *Kathryn Marie Dessayer*