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Judicial Deference to the Chief Executive's Interpretation of the Immigration Reform and Control Act of 1986 Antidiscrimination Provision: A Circumvention of Constitutionally Prescribed Legislative Procedure

I. INTRODUCTION

In an effort to remove the lure that attracts illegal aliens into the United States,¹ the Immigration Reform and Control Act of 1986 (IRCA)² imposes sanctions on employers who hire unauthorized aliens.³ Congress also included an antidiscrimination provision in the IRCA out of a concern that "people of 'foreign' appearance might be made more vulnerable by the imposition of [employer] sanctions" due to the fact that "some employers may decide not to hire 'foreign' appearing individuals to avoid sanctions."⁴ This antidiscrimination provision provides a private right of action against employers engaging in unfair immigration-related employment practices involving "knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity" because of an individual's national origin or citizenship status.⁵ The antidiscrimination provision does not clearly state what burden of proof a plaintiff must meet in order to prevail; it is ambiguous as to whether the plaintiff must prove intentional discrimination (disparate treatment) or whether a pattern of discrimination (disparate impact) will suffice.⁶

1. The Immigration Reform and Control Act of 1986 "establishes penalties for employers who knowingly hire undocumented aliens, thereby ending the magnet that lures them into this country This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions." H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 45-46, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649.

2. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (to be codified in scattered sections of 8 U.S.C.) [hereinafter IRCA].

3. IRCA § 101. The employer sanction provisions impose civil money penalties for limited instances of employment of unauthorized aliens and criminal penalties and injunctions for a pattern or practice of employment of unauthorized aliens. *Id.*

4. H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. 87, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840.

5. IRCA § 102.

6. For a discussion of the origins, ramifications, and propriety of these standards under

When President Reagan signed the IRCA into law, he concurrently signed a statement in which he gave his own interpretation of various portions of the Act.⁷ The President has interpreted the antidiscrimination provision to require a disparate treatment, or discriminatory intent, standard of proof.⁸ This standard requires the plaintiff to carry the burden of proof by showing intentional discrimination.⁹ President Reagan's view, however, is not the only possible interpretation of the antidiscrimination provision. Congress apparently intended to require the disparate impact burden of proof,¹⁰

the IRCA, see Comment, *The Unfair Immigration-Related Employment Practices Provision: A Modicum of Protection Against National Origin and Citizenship Status Discrimination*, 41 U. MIAMI L. REV. 1025 (1987) [hereinafter *Antidiscrimination Provision*].

7. President's Statement on Signing S. 1200 into Law, 22 WEEKLY COMP. PRES. DOC. 1534, 1534-37 (Nov. 6, 1986) [hereinafter President's Signing Statement].

8. In his statement accompanying the IRCA, President Reagan stated that he understood section 102 "to require a 'discriminatory intent' standard of proof: the party bringing the action must show that in the decision-making process the defendant's [employer's] action was motivated by one of the prohibited criteria." *Id.* at 1535. The President continued that it would, therefore, be improper to use the "disparate impact" burden of proof. *Id.* In conclusion, the President stated:

[A] facially neutral employee selection practice that is employed without discriminatory intent will be permissible under the provisions of [section 102]. For example, the section does not preclude a requirement of English language skill or a minimum score on an aptitude test even if the employer cannot show a "manifest relationship" to the job in question or that the requirement is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," so long as the practice is not a guise used to discriminate on account of national origin or citizenship status. Indeed, unless the plaintiff presents evidence that the employer has intentionally discriminated on proscribed grounds, the employer need not offer *any* explanation for his employee selection procedures."

Id.

9. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Court held:

The complainant in a Title VII action must carry the initial burden of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

10. The drafters of the antidiscrimination provision proposed amendments allowing private actions for intentional or repeated violations. Modifications to the Frank Amendment Proposed by Mr. Mazzoli and/or Mr. Frank (n.d.) (available through Rep. Barney Frank's office, Washington, D.C.). During formulation of the IRCA, the drafters made it known that the antidiscrimination provision contemplated an action for both types of discriminatory employment practices. Memorandum to Sen. Simpson from the Assistant to Rep. Barney Frank (n.d.) (available through Rep. Barney Frank's office, Washington, D.C.). The disparate impact burden developed in connection with Title VII of the Civil Rights Act of 1964. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). When Congress considered the antidiscrimination provision in the IRCA, it intended to broaden Title VII protections against

which merely requires that the plaintiff prove an adverse impact from discriminatory employment practices.¹¹

Because it is more difficult to prove discriminatory intent,¹² an employer charged with discrimination under the IRCA would clearly prefer President Reagan's interpretation of the burden of proof. The employer would argue that the standard in the IRCA is disparate treatment, buttressing his claim with legislative intent, expressed as "executive intent," gleaned from the President's signing statement. Because the success of the antidiscrimination provision may depend on the burden of proof that a plaintiff is required to satisfy, it is important to determine the propriety of judicial deference to presidential interpretations in determining legislative intent.

Chief executives have historically used signing statements to evidence their interpretations of bills. In 1830, President Andrew Jackson was concerned that a road appropriation measure would be construed as authorizing funding for the construction of a road beyond the Michigan territory. In his signing statement, the President stated that he was signing the bill with the understanding that the authorized road would not exceed the boundaries of the Michigan territory.¹³ President Ulysses S. Grant signed a similar statement approving a river and harbor improvement appropriations bill. He noted that his approval was conditioned on the expenditures under the bill being for works of a national interest rather than of a purely private or local interest.¹⁴

discrimination based on national origin while not broadening other protections afforded under the Civil Rights Act of 1964. H.R. CONF. REP. NO. 1000, *supra* note 4, at 87. Thus, there is ample legislative history by which a court could reasonably infer that Congress intended that the antidiscrimination provision provides an action based on disparate impact as well as discriminatory intent. Subsequent to the President's signing statement, individual members of Congress voiced strong disagreement with the President's interpretation of the required burden of proof, thereby expressing their understanding that the provisions do not require the plaintiff to prove discriminatory intent. One congressman stated that he was "appalled at the President's interpretation of the anti-discrimination provisions." Pear, *Immigration Law Sets Off Dispute Over Job Rights for Legal Aliens*, N.Y. Times, Nov. 23, 1986, at 1, col. 1. Representative Barney Frank, drafter of the antidiscrimination provision, characterized the President's interpretation as "'intellectually dishonest, mean-spirited' and incorrect. . . . 'A pattern or practice of discriminatory activity would violate the law even if you cannot prove an intent to discriminate.'" *Id.* at 34, col. 1.

11. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-33 (1971) (finding that discriminatory preference for any minority or majority is precisely what Congress proscribed, as it required the removal of "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification"). *Id.*

12. See *Antidiscrimination Provision*, *supra* pp. 1039-45.

13. 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1046 (J. Richardson ed. 1897).

14. 9 *id.* at 4331.

Although in the past presidents have issued statements in order to evidence their understanding of statutes, the Reagan Administration has attempted, for the first time, to make such presidential statements part of the materials that courts look to in determining the legislative intent behind ambiguous laws. Attorney General Edwin Meese III recently announced that the Justice Department was undertaking a campaign to "improve statutory interpretation by making clear the President's understanding of legislation at the time he signs a bill."¹⁵ The Justice Department made arrangements to publish presidential signing statements in the *U.S. Code Congressional and Administrative News*¹⁶ in an attempt to facilitate judges' use of these documents in determining legislative intent.¹⁷

Judicial attention to such signing statements is assertedly proper because the President is an integral part of the legislative process.¹⁸ The President often takes a stand on bills considered in Congress, and the constitutional requirement of presentment¹⁹ ensures the President a role in the legislative process so that legislation is a product of both Congress and the President.²⁰

15. Address by Attorney General Edwin Meese III to the National Press Club, Washington, D.C. (Feb. 25, 1986) (transcript available through the United States Department of Justice, Washington, D.C.).

16. *Id.*

17. Strasser, *Executive Intent*, Nat'l L.J., Mar. 10, 1986, at 2, col. 3. The issue of judicial deference to presidential signing statements in determining legislative intent behind statutes has serious ramifications in light of the nature of today's legal system. During the twentieth century, the United States legal system has developed from a largely common law creature into an entity dominated by statutes. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U.L. REV. 737 (1984). As Justice Frankfurter has noted, "almost every Supreme Court case has a statute at its heart or close to it." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947). In today's legal system, statutes are becoming increasingly important.

When courts have investigated legislative intent behind statutes, they have traditionally determined what Congress meant in passing a law. Toobin, *The Last Word*, NEW REPUBLIC, Nov. 3, 1986, at 13, 14. The Court has stated that in construing a statute, the judicial objective is to "ascertain the congressional intent and give effect to the legislative will." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (emphasis added). For example, in determining the scope of the tax exemption afforded by section 501(c)(3) of the Internal Revenue Code, the Supreme Court analyzed that section "against the background of the congressional purposes" and concluded that Congress intended to provide tax benefits to organizations serving charitable purposes and not to those that had racially discriminatory policies. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586-88 (1983). Thus, judicial deference to presidential intent when courts construe legislative intent would elevate the President's role in an increasingly important area of the law.

18. Toobin, *supra* note 17, at 13, 14.

19. U.S. CONST. art. I, § 7.

20. Kmiec, *Judges Should Pay Attention to Statements by President*, Nat'l L.J., Nov. 10, 1986, at 13, col. 2. The author, Douglas W. Kmiec, is the Deputy Assistant Attorney General in the Office of Legal Counsel of the United States Department of Justice.

Presidential signing statements can often be used as "directive[s] to subordinate executive officers in their implementation of statutes."²¹ The "take care clause"²² of the United States Constitution imposes an affirmative duty on the President to direct his subordinate officers in the faithful execution of the laws. The President, as chief administrator, may guide executive officers "in their construction of the statutes under which they act in order to secure . . . unitary execution of the laws."²³ The President's understanding of legislation is significant because, as chief executive officer, he oversees subordinates who must yield to his paramount understanding of vaguely-worded statutory authority.²⁴

One argument in favor of judicial deference to executive intent is efficiency. Deference to "executive intent" is arguably a useful device for clearing up confusion about the meaning of ambiguously drafted statutes or those provisions that are objectionable to the President.²⁵ The Justice Department also supports judicial deference to executive intent because such intent is more readily ascertainable than congressional intent: the former avoids the fallacy of collective intent inherent in the latter.²⁶ According to this view, the legislative intent²⁷

21. Strasser, *supra* note 17, at 13, col. 1. In this respect, presidential signing statements are analogous to executive orders, "directives of the president which are directed to, and govern the actions of, governmental officials." Note, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME LAW. 44, 44 (1963).

22. Article II, section 3 of the Constitution states that the President shall "take Care that the Laws be faithfully executed."

23. *Myers v. United States*, 272 U.S. 52, 135 (1926). In *Myers*, the Court held that the President had the unrestricted power to remove the Postmaster General, a subordinate executive officer charged with duties that are related to executive functions (rather than related to legislative or judicial functions). *Id.* at 176. The Reagan Administration cites *Myers* as standing for the proposition that the President has the authority to direct the action of subordinate officers but concedes that it is unclear to what extent Congress may insulate subordinates from presidential supervision. The assertion is that the President, as head of the executive branch, is authorized by the "take care clause" of the Constitution (the President has the power to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3) to guide subordinate executive officers in the construction of statutes. Memorandum to David Stockman, Director of the Office of Management and Budget from Assistant Attorney General in the Office of Legal Counsel (Feb. 12, 1981) (available through the Office of Legal Counsel, Washington, D.C.).

24. Kmiec, *supra* note 20, at 13, col. 1. In the exercise of the power to execute the laws, "Article II of the Constitution evidently contemplated . . . vesting general executive power in the President alone." *Myers v. United States*, 272 U.S. 52, 135 (1926). The President may not, however, alter the statutory language of legislation or interpret legislation so as to do violence to its statutory terms. For instance, he may not direct an officer to file reports every forty-five days if the officer is statutorily required to do so every thirty days. The Reagan Administration recognizes this principle. Kmiec, *supra* note 20, at 13, col. 2.

25. Strasser, *supra* note 17, at 2, col. 3.

26. Kmiec, *supra* note 20, at 32, col. 2. "To some, distilling legislative 'intent' from the words and history of a statute is nothing short of twentieth-century alchemy. Indeed, any

expressed by individual members of Congress or even committees is not necessarily representative of the intent espoused by that legislative body as a whole, whereas the President's intent, derived from one source, is easier to determine.

This Comment addresses the propriety of deference to presidential intent in determining legislative intent by analyzing the President's role in the legislative process. Part II of the Comment asserts that the President's statement is legislative in character and effect. Part III argues that the President has no legislative power under a strict reading of the Constitution. Part IV explores the legislative process and, more particularly, the President's limited role in that process. Part V recognizes the President's power to direct actions of subordinate executive officers and examines the President's statement in light of this power. Finally, Part VI concludes that judicial defer-

member of Congress probably had his or her own particular reason for voting for or against any given piece of legislation." *United States v. Fulkerson*, 631 F. Supp. 319, 323 n.6 (D. Haw. 1986). Despite concern for complete accuracy behind a determination of the collective intent of Congress, the district court in *Fulkerson* was, nevertheless, willing to utilize collective intent in interpreting a statute. *Id.* at 323-24.

27. The judicial "plain-meaning rule" states that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *United States v. Missouri Pac. Ry.*, 278 U.S. 269, 278 (1929). The Supreme Court has employed this rule to preclude the use, as aids to statutory interpretation, of committee reports and records of legislative history behind an act. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2, 5 (1939). The rule, however, was never as widely practiced as pronounced and courts avoided it by classifying statutory words as "ambiguous," by finding that the plain meaning led to absurd results, or by using legislative history to confirm the plain meaning of words. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1301 (1975).

The plain-meaning rule has since been used less frequently, as modern courts have turned to legislative history in construing statutes. In fact, during its 1980-81 Term, the Supreme Court decided more than one-third of its cases based on legislative history. Oaks & Smith, *Legislative Librarians Decode the Ways of Congress*, Legal Times, June 14, 1982, at 15, col. 1. As was expressed in one Supreme Court majority opinion: "When 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, however clear the words may appear on 'superficial examination.'" *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543-44 (1940) (citing *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928); *Helvering v. New York Trust Co.*, 292 U.S. 455, 465 (1934)). Indeed, the Supreme Court appears to resort to the use of legislative history in statutory construction even when language is not patently ambiguous. The Court has recognized that when words of a statute are plain, it is oversimplification to assert that the meaning of the statute is plain; therefore, the Court seeks to find the interpretation of the statute that is most harmonious with congressionally manifested purposes. *FBI v. Abramson*, 456 U.S. 615, 625 n.7 (1982); see also *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) ("It is a familiar rule, 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."). Thus, it is apparent that the Court has come full circle and relies on legislative history to determine congressional intent behind statutory provisions.

ence to the President's understanding of the IRCA antidiscrimination provision is unconstitutional as violative of the separation of powers doctrine.

II. LEGISLATIVE EFFECT OF THE PRESIDENT'S SIGNING STATEMENT

By asserting the requisite burden of proof under the IRCA, the President's signing statement²⁸ is arguably legislative. Four years ago, the Supreme Court visited the issue of legislative actions. In *INS v. Chadha*,²⁹ the Court considered the constitutionality of a one-house veto of the Attorney General's determination that an alien should not be deported. The majority found the veto to be "essentially legislative" because it had the purpose and effect of altering the legal rights, duties, and relations of persons outside the legislative branch, including those of Chadha, a lawfully admitted alien.³⁰ The Court held that the one-house veto violated bicameral passage of legislation as required by the Constitution.³¹ In reaching its conclusion, the Court stated that whether actions are exercises of legislative power depends not on their form, but on whether they are legislative in character and effect.³²

Although the Court has recognized that "interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law,"³³ the President's statement declaring the required standard of proof can be properly construed as legislative under the *Chadha* definition because of its effect on the right to work. The President's statement, if incorporated into the antidiscrimination provision, would have a substantial effect on the right to seek and hold employment. Under the President's construction of the antidiscrimination provision, a plaintiff bringing a cause of action under the provision would have to meet a higher burden of proof than under the standard asserted by members of Congress.³⁴ Assuming the more stringent discriminatory intent (disparate treatment) burden is required, an employer would necessarily have greater latitude in hir-

28. For a discussion of the disparate treatment standard of proof asserted by the President, see *supra* notes 7-9 and accompanying text. See also *Antidiscrimination Provision*, *supra* pp. 1045-46.

29. 462 U.S. 919 (1983).

30. *Id.* at 952.

31. *Id.* at 946-59.

32. *Id.* at 952.

33. *Bowsher v. Synar*, 106 S. Ct. 3181, 3192 (1986).

34. For a discussion of the disparate impact standard of proof asserted by some members of Congress, see *supra* notes 5, 6, 10-12 and accompanying text. See also *Antidiscrimination Provision*, *supra* pp. 1046-50.

ing or firing employees because employment requirements would need less justification to survive under the IRCA.³⁵ The resulting effect of the increased evidentiary burden could be a reduction of the plaintiff-employee's ability to find work and/or remain employed.

The right to work is a paramount liberty³⁶ protected by the due process clause of the fifth amendment.³⁷ Deprivation of liberty accompanies "ineligibility for employment in a major sector of society or the economy."³⁸ The IRCA antidiscrimination provision was expressly drafted to guard against employment-related discrimination aimed at citizens and residents intending to become citizens: the IRCA applies to citizens, nationals of the United States, or lawfully admitted resident aliens evidencing an intent to become citizens.³⁹ Because the fifth amendment extends its protections to resident aliens as well as citizens,⁴⁰ the interest protected under the antidiscrimination provision is the constitutionally protected right to work.

A plaintiff-employee's right to pursue an occupation is altered by yielding to the President's interpretation of the burden of proof required under the IRCA antidiscrimination provision. This alteration of a right, therefore, characterizes the President's statement as substantively legislative.

35. For a discussion of the application of the President's asserted standard of proof and the contrary assertion of members of Congress, see *supra* notes 5-12 and accompanying text. For a more detailed analysis, see *Antidiscrimination Provision, supra* pp. 1045-54.

36. Over 60 years ago, the Supreme Court recognized that liberty, without doubt, "denotes . . . the right . . . to engage in any of the occupations of life." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Court reaffirmed the *Meyer* decision in *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (fourteenth amendment does not require opportunity for a hearing before the nonrenewal of a nontenured state teacher's contract absent a showing of deprivation of liberty or property interest resulting from the nonrenewal). Justice Douglas has noted:

The right to work . . . [is] the most precious liberty that man possesses. Man has indeed as much right to work as he has to live It does many men little good to stay alive and free . . . if they cannot work. To work means to eat. It also means to live The great values of freedom are the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

37. *Kwong Hai Chen v. Colding*, 344 U.S. 590, 596 (1953).

38. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976). The right to work is also a personal freedom protected by the fourteenth amendment. The Supreme Court has stated that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure." *Traux v. Raich*, 239 U.S. 33, 41 (1915), cited with approval in *Mow Sun Wong*, 426 U.S. at 102 n.23.

39. IRCA § 102.

40. *Kwong Hai Chen*, 344 U.S. at 596.

III. THE PRESIDENT DOES NOT HAVE LEGISLATIVE POWER UNDER THE CONSTITUTION

In *Youngstown Sheet & Tube Co. v. Sawyer*,⁴¹ the Supreme Court rejected the argument that the President has unlimited inherent legislative power as a result of his position as chief executive. Holding that the constitutional framework "refutes the idea that [the President] is to be a lawmaker," the majority stated that in addition to limiting the President's role in the lawmaking process to recommending laws he thinks wise and vetoing laws he thinks bad:⁴²

[T]he Constitution is neither silent nor equivocal about who shall make laws The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States" After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof"⁴³

The constitutional assignment of legislative power strictly forbids the President to exercise legislative power by promulgating signing statements to be used by courts to determine legislative intent.

IV. ARTICLE I BICAMERAL PASSAGE AND PRESENTMENT REQUIREMENTS

The Constitution mandates that a bill be passed by both houses of Congress and presented to the President for approval or veto before it can become law.⁴⁴ In *Chadha*,⁴⁵ the Supreme Court held that actions which alter legal rights are legislative in effect and involve determinations of policy that can only be implemented by bicameral passage followed by presentment to the President.⁴⁶ The President's

41. 343 U.S. 579 (1952).

42. *Id.* at 587.

43. *Id.* at 587-88. Concurring in *Youngstown*, Justice Douglas also observed that while some nations entrusted legislative power to the executive branch as a matter of course, the United States chose another path in deciding to place the legislative function in Congress. He further noted that the constitutional language assigning *all* legislative power to Congress is not ambiguous or qualified. *Id.* at 630 (Douglas, J., concurring).

44. U.S. CONST. art. I, § 7.

45. 462 U.S. 919 (1983).

46. *Id.* at 952-55. Justice Stevens has stated, in the context of the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act, that where a resolution is "intended to make policy that will bind the nation and thus is 'legislative in character and effect,' " the full article I requirements must be observed. *Bowsher v. Synar*, 106 S. Ct. 3181, 3204 (1986) (Stevens, J., concurring). In *Bowsher*, the Court considered the constitutionality of the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act that

signing statement, because of its legislative effect,⁴⁷ must also meet these Article I requirements.⁴⁸

Judicial deference to the President's signing statement essentially allows the President to have the last word⁴⁹ as to the meaning of the antidiscrimination provision and the concomitant standard of proof required. With respect to the IRCA, the burdens of proof urged by Congress and the President may conflict, as the President asserts that discriminatory intent is the *exclusive* burden of proof while members of Congress state that proof of discriminatory intent is not necessary.⁵⁰ Because these two interpretations cannot be harmonized, the courts must choose between the two: Because of their conflicting natures, the different interpretations cannot be given equal effect. If the courts give deference to the President's construction, his interpretation will necessarily be superior to that of Congress and will be interjected into the IRCA. Such deference creates a single legislative house as it enables the President alone to control the meaning of legislation.⁵¹ In essence this deference vests the legislative power in the Oval Office. This single legislative house would violate the bicameral passage requirement, circumventing the constitutional framework for representative legislation⁵² and protections of freedom.⁵³

The President's role in the lawmaking process is limited to the

permitted Congress to retain control over the Comptroller General's actions in the execution of the law. The Court held that this active role of Congress in the execution of law was unconstitutional as a violation of the doctrine of separation of powers because Congress had usurped executive branch functions. *Id.* at 3189.

47. For a characterization of the President's statement as legislative, see *supra* notes 28-40 and accompanying text.

48. The President's signing statement may not seem to be legislative until its operational effect is considered. As Justice Stevens noted, however, in considering whether an action is required to meet the article I stipulations, " 'the nature and substance [of the action], and not its form, controls the question of its disposition.' " *Bowsher v. Synar*, 106 S. Ct. 3181, 3204 (1986) (Stevens, J., concurring) (citing S. REP. NO. 1335, 54th Cong., 2d Sess. 8 (1897)). The executive branch may claim the signing statement to be an executive action, yet because the President's interpretation of the required burden of proof affects the right to work, it is legislative in character and should, therefore, be analyzed as such.

49. The Administration goes so far as to assert that executive intent should be given greater weight than congressional intent. Steven Calabresi, Special Assistant to Attorney General Meese, stated: " The president explaining what a law means has a lot more value than what a senator or congressman has to say." Toobin, *supra* note 17, at 13, 14. Where, as is the case with the burden of proof required to sustain an action under the IRCA antidiscrimination provision, congressional and executive intent conflict, the Administration's view would require courts to give effect only to the Executive's intent. Such an outcome would seriously impinge on Congress's legislative power.

50. For the President's position and the conflicting views of members of Congress, see *supra* notes 5-12 and accompanying text.

51. For a discussion of the legislative effect of the President's interpretation, see *supra* notes 28-40 and accompanying text.

52. James Madison noted that "[l]egislative power is exercised by an assembly . . . which is

recommendation of laws that he feels are necessary and the veto of laws he thinks unwise.⁵⁴ He does not draft legislation or vote on it. The framers of the Constitution did not intend the Executive to act as a forum for initiation of "executive legislation" separate and distinct from legislation created by Congress.⁵⁵ The President may not, acting under the presentment requirement, sign a bill into law and concurrently declare that Congress's policy and provisions are nullified by his policy and provisions. The presentment clause permits the President to sign a bill if he approves of it; otherwise he is authorized to return it with his objections for reconsideration by Congress.⁵⁶ In such a case, Congress then has the opportunity to consider the Presi-

sufficiently numerous to feel all of the passions which acuate a multitude." *THE FEDERALIST* No. 48, at 334 (J. Madison) (J. Cooke ed. 1961).

53. Bicameral passage by the individual houses of Congress is required to "assure[] that the legislative power would be exercised only after opportunity for full study and debate in separate settings." *INS v. Chadha*, 462 U.S. 919, 951 (1983). Those involved in the Constitutional Convention were concerned about the aggregation of legislative power. James Wilson warned that if legislative power went unrestrained there could be neither liberty nor stability. In a single house there is no check on legislation except the "virtue and good sense of those who compose it." 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 254 (M. Farrand ed. 1937). James Madison asserted that a diversity of representation of the multiple interests in society is the only way to secure against oppression from a centralized government. *THE FEDERALIST* No. 51, at 347-53 (J. Madison) (J. Cooke ed. 1961). Alexander Hamilton stated that accumulation of power in a single congress would "create in reality the very tyranny" that the Constitution was designed to guard against. *THE FEDERALIST* No. 22, at 145 (A. Hamilton) (J. Cooke ed. 1961). The framers were well aware of the dangers to be avoided by dividing the legislative body into two houses. They were aware, as was Joseph Story, that a single legislative body, "like private persons, [is] occasionally under the dominion of strong passions and excitements; impatient, irritable, and impetuous If [legislative power] feels no check but its own will, it rarely has the firmness to insist upon holding a question long enough under its own view, to see and mark it in all its bearings and relations on society." 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 29-30 (1833).

54. *INS v. Chada*, 462 U.S. 919, 947-48 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-88 (1952).

55. Alexander Hamilton described the motivation for allowing the President a role in lawmaking as being a concern that the President should be able to protect himself from single votes of Congress and a need for a check against Congress's passing bad laws. However, there is no mention of permitting the President to have anything more than a negative role. *THE FEDERALIST* No. 73, at 494-95 (A. Hamilton) (J. Cooke ed. 1961). Indeed, James Madison noted, in observing the distribution of power in our government, that "[t]he magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law." *THE FEDERALIST* No. 47, at 326 (J. Madison) (J. Cooke ed. 1961).

56. U.S. CONST. art. I, § 7. The President does not have to sign or object but instead can let the bill lapse. Ten days after presentment, the bill becomes law if the President does not act. *Id.* One possible solution to this restrictive procedure may be to allow the President to exercise a "one-line" veto. The chief executive could then express reservations about ambiguous or unsatisfactory statutory provisions before the law is enacted, thereby affording Congress the opportunity to more clearly express its legislative directive. Under such a practice, there would be less opportunity for presidential/congressional conflict over the meaning of provisions subsequent to the enactment of a law.

dent's objections and to override his veto by a two-thirds vote in each house.⁵⁷ This constitutional procedure does not permit executive policy substitution or the interjection of presidential definitions into the bill's final legal form.⁵⁸

When President Reagan signed the IRCA into law, he accepted the bill and affirmed any policy choices made by Congress. Congress had the ultimate decision whether or not to incorporate provisions into the IRCA. Congress considered the antidiscrimination provision necessary to assure that employers' fears of the IRCA sanctions for hiring illegal aliens⁵⁹ would not precipitate discrimination against foreign-appearing persons.⁶⁰ Congress's choice of the burden of proof necessary to sustain an action under the antidiscrimination provision reflects congressional policy that goes to the heart of the IRCA's operation. Any executive disagreement concerning congressional policy underlying the provision should have been expressed (possibly through lobbying or a sympathetic voice on the floor of Congress) before the President signed the IRCA.⁶¹

In *Wright v. United States*,⁶² the Court noted that the constitutional provisions governing both the presidential veto and the congressional override serve two fundamental functions: (1) to provide the President with an opportunity to consider bills presented to him; and (2) upon executive veto, to provide Congress with an opportunity to consider the President's objections, and if desirable, pass legislation over them.⁶³ The Court has also described these constitutional mandates as explicit terms that define the respective roles of Congress and the President in the legislative process.⁶⁴ Such unambiguous constitutional procedures can only mean that Congress has the final authority to control what provisions and policies become law. After enactment, the President is bound by congressional policy and intent. Post-enactment executive policy and, therefore, executive intent behind the

57. U.S. CONST. art. I, § 7.

58. Constitutional requirements for the operation of the legislative process should be strictly adhered to because, as the Court has noted, the draftsmen of the Constitution "took special pains to assure that these [article I] requirements could not be circumvented." *INS v. Chadha*, 462 U.S. 919, 946-47 (1983). These constitutional protections were designed to ensure "that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure." *Id.* at 951.

59. IRCA § 101.

60. H.R. CONF. REP. NO. 1000, *supra* note 4, at 87.

61. Congressional policy was expressed during drafting of the antidiscrimination provision. *See supra* note 10.

62. 302 U.S. 583 (1938).

63. *Id.* at 596.

64. *INS v. Chadha*, 462 U.S. 919, 945-46 (1983).

IRCA, is irrelevant when discerning the meaning of the antidiscrimination provision.

V. DELEGATION OF QUASI-LEGISLATIVE AUTHORITY TO THE ATTORNEY GENERAL AND PRESIDENTIAL CONTROL OF THAT DELEGATED POWER

The IRCA amends as well as adds provisions to the Immigration and Nationality Act (INA).⁶⁵ Under the INA, the Attorney General is delegated the power to issue regulations necessary for the enforcement of the INA.⁶⁶ The IRCA, as an amendment to the INA, extends such delegated power to promulgate regulations. In other words, Congress has granted the Attorney General legislative power.⁶⁷

In exercising this delegated power, the delegatee must follow Congress's policy choices.⁶⁸ This fundamental administrative law

65. IRCA § 1.

66. 8 U.S.C. § 1103(a) (1982). The Immigration and Naturalization Service (INS) is the final depository of the Attorney General's delegated power to promulgate regulations with legislative effect. *Id.* § 1103(a)-(b). For simplification, analysis herein is confined to the power delegated to the Attorney General. The analysis is not altered by the fact that the Attorney General confers his powers to the INS. As the ultimate delegatee of legislative power, the INS is subject to the same constraints as is the attorney general in exercising this power.

67. This delegation of legislative power is not constitutionally required to meet the article I, § 7 bicameral passage and presentment requirements because, as discussed below, a check is provided by adherence to congressional policy. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *see infra* note 79.

68. When a legislative body delegates legislative power to a regulatory entity, such delegation must contain guidelines to prevent arbitrary action by the delegatee. In *Seattle Title Trust Co. v. Roberge*, a building superintendent denied the plaintiff's application for a building permit under a zoning ordinance that required consent by owners of two-thirds of the property surrounding a proposed philanthropic home for children or elderly people. 278 U.S. 116, 117-19 (1928). The Court held that this delegation of governmental regulatory power to the adjoining land owners was repugnant to the fourteenth amendment due process clause because the delegation was "uncontrolled by any standard or rule prescribed by legislative action." *Id.* at 120-22; *see also* *Eubank v. City of Richmond*, 226 U.S. 137, 141-44 (1912) (striking down a comparable ordinance under the fourteenth amendment because it conferred the power to control and dispose of the property rights of others and "create[d] no standard by which the power thus given [was] to be exercised"). In *Yakus v. United States*, the Court considered the constitutionality of a delegation of legislative power to the Price Administrator to control wartime commodity prices. 321 U.S. 414, 425 (1944). The delegation defined facts and conditions that the delegatee was to use in controlling prices. The Court held the delegation valid because Congress's policy could be inferred from the statutory framework and this policy marked the field in which the delegatee could act. *Id.*

This long-standing delegation principle was more recently recognized in *Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976). In *Eastlake*, the Court stated that "congressional delegation of power to a regulatory entity must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will." *Id.* at 675. The Court recognized *Roberge* and *Eubank*, but noted that in *Eastlake* it was not dealing with power delegated "to a narrow segment of the community" but rather with power

principle assures that Congress alone will make the important policy decisions affecting the nation.⁶⁹ The more recent delegation cases have allowed delegation of legislative power to the executive branch with undetailed expressions of congressional policy,⁷⁰ suggesting that the executive branch is afforded more latitude to formulate policies consistent with the overall goals of the organic statute. A caveat to such an assertion, however, is the fact that the Court still requires detailed delegation, and clearer expressions of congressional policy, when the statute delegates power to regulate a personal right.⁷¹

initially reserved to the people. *Id.* at 677. In considering the validity of a city charter amendment that required public ratification of changes in land use approved by the City Council (the city's legislative body), the Court stated that the issue of adherence to legislative policy was inapplicable because that issue only arises under a delegation of power by a legislative body to a regulatory entity not directly responsible to the people. By distinguishing *Roberge* and *Eubank*, the Court recognized the vitality of the rule that delegation of legislative power requires that the delegatee follow policy choices of the legislative entity. *Accord Silverman v. Barry*, 727 F.2d 1121, 1126 (D.C. Cir. 1984) ("Given the opportunity to overrule . . . *Eubank* and *Roberge*, the [*Eastlake*] Court chose instead to distinguish them. . . . The court majority appeared to accept *Eubank* and *Roberge* as still valid precedent . . .").

69. The Court has recognized:

The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested The Constitution has never been regarded as denying the Congress the necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies . . . while leaving to selected instrumentalities the making of subordinate rules within prescribed limits But the constant recognition of the necessity . . . of such provisions . . . cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935). Justice Rehnquist has noted that an important function of requiring delegates to adhere to congressional policy is ensuring that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring). He also stated that this requirement is compelled by the separation of powers doctrine. *Id.* at 675.

70. "[R]estrictions on the scope of the power that could be delegated diminished and all but disappeared." *INS v. Chadha*, 462 U.S. 919, 985 (1983) (White, J., dissenting); see also B. SCHWARTZ, *ADMINISTRATIVE LAW* § 2.6 (2d ed. 1984) (noting that in *Lichter v. United States*, 334 U.S. 742 (1948), the Court held that Congress's direction to recover "excessive profits" was a sufficient standard to provide guidance and delegate power to administrative officers to renegotiate war contracts).

71. Justice Brennan has qualified the Court's permission of broad delegation, warning that "[t]he area of permissible indefiniteness narrows, however, when the regulation . . . potentially affects fundamental rights [V]ague legislative directives . . . to an executive officer . . . are far more serious when liberty and the exercise of fundamental rights are at stake." *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring). *Robel* involved a statute under which a member of the Communist Party was indicted for unlawfully accepting employment in a shipyard. The Subversive Activities Control Act delegated authority to the Secretary of Defense to designate areas as "defense facilities," and thereby trigger the statute. The defendant claimed that the statute allowed the Secretary too much discretion. The Court held that when first amendment rights are at stake, Congress must adequately impose

Assuming that the Attorney General was to exercise his delegated legislative power and issue regulations concerning the standard of proof required under the IRCA antidiscrimination provision, he would have to follow congressional policy. This policy would need to be clearly expressed because of the effect of the IRCA and corresponding regulations on the constitutionally protected right to work.⁷²

Congressional policy and guidelines for delegation, however, may be inferred from legislative history.⁷³ Arguably, Congress may have intended the disparate impact standard to apply under the antidiscrimination provision.⁷⁴ If so, the Attorney General must defer to this policy in issuing regulations on the required burden of proof. The burden of proof issued under the delegated authority must comport with that intended by Congress.

Although the President may guide subordinate executive officers in their construction of laws,⁷⁵ his control extends only to *purely* executive officers.⁷⁶ In issuing regulations on the required standard of proof, the Attorney General performs a quasi-legislative function⁷⁷

boundaries so that the delegatee does not have wide discretion to diminish those rights. *Id.* at 265-67. In *Kent v. Dulles*, Congress delegated power to the Secretary of State to grant and issue passports. 357 U.S. 116 (1958). The Secretary issued regulations denying passports to members of the Communist Party although a contemporaneous federal statute required passports for travel. The Court noted that denial of the passport was control over exit, which the Court recognized as a personal right within the meaning of liberty protected by the fifth amendment. *Id.* at 129. In holding that a broad delegation was insufficient to deprive a person of a constitutionally protected right, the Court stated that the specificity of delegation comes under narrow scrutiny when liberty is regulated. *Id.*

Delegation of power to restrict first amendment rights was held to be overly broad, however, in *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). The Court recognized that delegations of power to issue regulations restricting constitutionally guaranteed freedoms require more than broad congressional directives to guide the restricting authority and anything else is insufficient under the Constitution. *Id.* at 150-51.

72. See *supra* notes 36-40 and accompanying text.

73. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring).

74. See *supra* note 10. But see *Antidiscrimination Provision*, *supra* pp. 1046-50.

75. *Myers v. United States*, 277 U.S. 52, 135 (1926).

76. Presidential control does not extend to subordinates exercising quasi-judicial power. *Myers*, 277 U.S. at 135. The Supreme Court subsequently amplified this distinction and explicitly limited the President's control as being dependent on the character of the subordinate's office. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935).

77. In *Humphrey's Executor v. United States*, the Court considered the President's ability to remove a commissioner of the Federal Trade Commission. 295 U.S. 602 (1935). The Court held that the commissioner, who functioning as an expert, filled in details about rules and made rulings concerning "unfair methods of competition," acted partly in a quasi-legislative and partly in a quasi-judicial capacity. *Id.* at 628. An officer who carries legislative policies into effect and performs duties as a legislative aide cannot be classified as an extension of the executive branch, but rather performs a quasi-legislative function that is free from executive control. *Id.* Although the Attorney General operates in his article II executive capacity under

and is not acting in a *purely* executive role. Regulations establishing a burden of proof would alter the right to work just as the President's interpretation does. Thus, the Attorney General's actions should be properly characterized as legislative because the regulations alter a legal right.⁷⁸ The Attorney General is not subject to presidential control in exercising his delegated power. He is subject to the policy and will of Congress as his office and the courts may interpret it.⁷⁹ The President, as chief executive, may not determine the Attorney General's "legislative" construction of the anti-discrimination provision in issuing regulations. Therefore, the President's understanding of the provision should be irrelevant in promulgating regulations and hence, is of similarly questionable relevance to the courts in determining legislative intent behind the IRCA. This irrelevance precludes judicial deference to the President's signing statement and directs inquiry toward pure congressional intent.

VI. CONCLUSION

The President's understanding of legislation may be more readily ascertainable than congressional intent and may avoid problems

the Immigration and Nationality Act, his actions under delegated authority from Congress resemble lawmaking and have legislative effect. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983).

78. For a discussion of the legislative characterization of acts that affect rights, see *supra* notes 28-40 and accompanying text; *infra* note 79 and accompanying text.

79. *Chadha*, 462 U.S. at 953-54 n.16. The Attorney General, as well as agencies, may take action resembling lawmaking. This action, however, is not an exercise of "legislative" power. The Attorney General's action is not subject to the bicameral/presentment process because his action may not extend beyond the limits of the statute that created the power; a statute duly enacted under article I, sections 1, 7. The Attorney General thus acts in his article II executive capacity, checked by terms of the legislation that authorized his "legislative action." Actions that are legislative in character and effect, and that are not so checked by congressional policy (such as the one-house veto), must meet the article I, sections 1, 7 enactment requirements. *Id.* This result is consistent with the long-standing decision of *Kendall v. United States*, in which the Court rejected a claim of presidential control over a subordinate officer acting under statutory authority, stating:

It was urged at the bar, that the [subordinate executive officer] was alone subject to the direction and control of the President . . . and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this Court . . . [as it] would be clothing the President with the power entirely to control the legislation of congress.

37 U.S. (12 Pet.) 524, 612 (1838). Clearly, in issuing regulations concerning the required standard of proof, the Attorney General would be taking action that is legislative in effect even though he would be acting in an executive capacity. Such action is not validated by the constitutional requirements of bicameral passage and presentment, but instead is upheld by its character as an instrument of congressional policy. In issuing such regulations, the Attorney General is subject to congressional will, not the direction of the President. For a detailed analysis of congressional intent behind the IRCA antidiscrimination provision, see generally *Antidiscrimination Provision*, *supra* p. 1025.

inherent in determining collective intent;⁸⁰ yet these attributes do not remove judicial deference to presidential statements from constitutional scrutiny.⁸¹ The Constitution's framework for government was designed to provide schematic procedural protections of freedom.⁸² The federal legislative power was entrusted to Congress because of

80. See *supra* note 26 and accompanying text.

81. The Supreme Court has espoused the belief that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *INS v. Chadha*, 462 U.S. 919, 951 (1983). Justice White, in his dissent in *Chadha*, contended that the use of a one-house veto should have been upheld, even in light of constitutional challenges, because it was "efficient, convenient, and useful [and was] an important . . . invention that allow[ed] the President and Congress to resolve major constitutional and policy differences." *Id.* at 972 (White, J., dissenting). In acknowledging but rejecting this argument, the majority countered that "policy arguments supporting even useful political inventions are subject to the demands of the Constitution which defines powers and, with respect to [the legislative process], sets out just how those powers are to be exercised." *Id.* at 945. The Court also warned that "the fact that a given procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Id.* at 944. The Court went on to state:

[I]t is crystal clear from the records of the Convention . . . that the framers ranked other values higher than efficiency. The records of the Convention and debates in the states preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is an unmistakable [sic] expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided . . . by the President. With all of the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of [legislative] power subject to the carefully crafted restraints spelled out in the Constitution.

Id. at 958-59.

82. In noting that there are governments without protections such as those that exist in the United States Constitution, Justice Frankfurter stated, "It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring). The framers of the Constitution were concerned that when legislative and executive powers are united in the same body, the potential for tyrannical government and infringement of liberties is omnipresent. *THE FEDERALIST* NO. 47, at 326 (J. Madison) (J. Cooke ed. 1961); see also *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring) ("[T]he Constitution diffuses power to better secure liberty."). The doctrine of separation of powers was not adopted to yield efficiency but to prevent exercise of arbitrary power through inevitable friction between branches of government. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

that body's particular ability to promulgate laws in response to the needs of the governed constituents, a quality lacking in the chief executive.⁸³ Deference to the President's intent behind the IRCA antidiscrimination provision is inappropriate because of the President's constitutionally limited role in lawmaking. Judicial deference to executive intent elevates the President to a substantive legislative role, circumvents the specifically prescribed constitutional plan for the exercise of legislative power, and contravenes basic constitutional protections afforded by the doctrine of separation of powers; a doctrine that is an integral part of the Constitution.⁸⁴ To abide by the Constitution and preserve the integrity of the lawmaking process, courts should not give deference to the President's purported belief of the intent behind the antidiscrimination provision or to the announced standard of proof evidenced by his signing statement. In the words of Professor Linde, "[i]f this republic is to be remembered in the distant history of law, it is likely to be for its enduring adherence to legitimate institutions and processes, not for its perfection of unique principles of

83. Justice Douglas noted the distinction between the actions and processes involved in presidential and congressional decisions: "All executive power—from the reign of ancient kings to the rule of modern dictators—has the outward appearance of efficiency. Legislative power, by contrast, is slower to exercise. There must be delay while the ponderous machinery of committees, hearings, and debates is put into motion." *Youngstown Sheet & Tube Co.*, 343 U.S. at 629 (Douglas, J., concurring). Out of necessity, Congress acts differently than the President "as issues are debated, compromises made, consensus built, and differences between the two houses reconciled." Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 201 (1981).

Another crucial difference concerns the relative openness of the two branches to public scrutiny. While legislation is subject to an on-the-record public debate, only the final outcome of executive decision-making need be disclosed. Indeed, the Supreme Court has held that the President has a constitutionally protected interest in the confidentiality of communications with his chief advisors [suggesting] that the President is best suited to act in emergency situations, where speed is at a premium, and in foreign affairs, where an open decision-making process might damage the national interest

Id. at 201-02.

84. The framers of the Constitution considered checks and balances the foundation of a structure of government that would protect liberty. *Bowsher v. Synar*, 106 S. Ct. 3181, 3186 (1986); see also *Buckley v. Valeo*, 424 U.S. 1, 124 (1975) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document they drafted in Philadelphia in the summer of 1787."). Constitutional requirements of bicameral passage, presentment for veto, and veto override by Congress are "integral parts of the constitutional design for the separation of powers." *INS v. Chadha*, 462 U.S. 919, 945-46 (1983); cf. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring) (The requirement that a delegatee of legislative power follow congressional will is compelled by the doctrine of separation of powers.). By circumventing these designs, judicial deference to the President's understanding of the burden of proof required by the IRCA antidiscrimination provision permits legislation free from constitutional protections of liberty.

justice and certainly not for the rationality of its laws.”⁸⁵

MARK JOHNSON BOULRIS*

85. Linde, *Due Process in Lawmaking*, 55 NEB. L. REV. 197, 255 (1976). Although addressing the issue of reasonableness behind legislation, these remarks are equally applicable to the situation here, where a proposed practice circumvents constitutionally prescribed procedures for lawmaking.

* I dedicate this Comment to my parents, family, and friends, who have been most supportive throughout my law school endeavors. Particular thanks to Mr. Yao Apasu-Gbotsu, Ms. Elisa L. Fuller, Mr. Adalberto Jordan, and Mr. Steven H. Naturman for their assistance in writing this Comment.