

AN “AUTHORITATIVE” STATEMENT OF ADMINISTRATIVE ACTION: A USEFUL POLITICAL INVENTION OR A VIOLATION OF THE SEPARATION OF POWERS DOCTRINE?

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I.

INTRODUCTION³

Our constitutional system of government provides Congress with broad legislative powers. However, the Constitution also places limits on how Congress exercises these powers. One of the most important limitations is the requirement that when Congress acts with the force of law it does so through the procedures outlined in Article I, Section 7 of the Constitution, i.e., bicameralism and presentment.⁴ This article elucidates how this constitutional requirement, more than any other, helps to ensure that Congress’s actions are politically accountable. Political accountability is most important for Congress, as compared

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4. U.S. CONST. art. I, § 7, cl. 2.

with other branches of government, because the most meaningful check on Congress is the will of the people.

Much of the recent scholarly debate related to congressional power and the importance of bicameralism and presentment centers on the separation of powers doctrine.⁵ The separation of powers doctrine considers whether a branch of government is exercising power in a manner inconsistent with the structure of the government outlined in the Constitution. In recent years, this debate has questioned whether it is a violation of separation of powers for Congress to create statutory regimes that mandate how a court should interpret statutes. Despite the voluminous legal scholarship relating to such regimes, there is a dearth of concrete examples. This article discusses a concrete example of this type of statutory regime by analyzing the Uruguay Round Agreements Act (URAA),⁶ the federal statute that implements the World Trade Organization (WTO) Agreements into U.S. law.

This article argues that this statutory regime violates the constitutional separation of powers doctrine because, *inter alia*, this statutory regime allows Congress to act with the force of law without meeting the constitutional requirements of bicameralism and presentment. Thus, the article concludes that this regime allows Congress to act in a politically insulated manner and that the courts should strike down this regime as unconstitutional.

Congress created the statutory regime at issue when it enacted the URAA in 1994 to implement the new WTO Agreements resulting from the Uruguay Round of trade negotiations. It also approved an accompanying Statement of Administrative Action (SAA).⁷ Contained within the URAA is the unique and legally significant mandate that the SAA is to serve as “an authoritative expression by the United States concerning the interpretation and application of the [URAA] . . . in any judicial proceeding in which a question arises concerning such interpretation or application.”⁸ By creating this mandate, Congress attempted to elevate the SAA above all other extrinsic sources to which a court might turn to ascertain the meaning of the URAA.

5. See *infra* Part IV.B.3.

6. 19 U.S.C. §§ 3501- (2003).

7. 19 U.S.C. § 3511(a)(2) (2003) (“Congress approves . . . the statement of administrative action proposed to implement the agreements . . .”). The SAA is a document that was initially drafted by the Executive branch to explain to Congress the changes in the law that would be necessitated by the WTO agreements. See *infra* Part II.C.

8. 19 U.S.C. § 3512(d) (2003).

Under a traditional separation of powers analysis, this elevation of the SAA and the resulting limitation on the judiciary's interpretation of the URAA represent an unconstitutional encroachment by the Legislature into the Judicial branch of government; Congress is telling the courts how to go about the business of determining what the law means.⁹ In addition, the elevation of the SAA constitutes a congressional encroachment on the Executive branch because Congress is attempting to limit how the Executive implements the URAA through a mechanism other than the law. Finally, and most importantly, under the more modern separation of powers analysis, the elevation of the SAA violates the separation of powers doctrine because it represents a congressional attempt to exercise its power in a politically insulated manner.¹⁰ More specifically, the SAA demonstrates a congressional attempt to create a two tier law.¹¹ However, the Constitution demands, through bicameralism and presentment, a singular status for congressional actions with the force of law. That singular status ensures that Congress assumes political accountability for undertaking such actions. Accordingly, courts should invalidate that portion of the URAA that elevates the SAA and should enter into an exacting analysis of what role, if any, the SAA should play in a statutory interpretation analysis.¹²

This article is organized into six parts including Part I, this introduction. Part II provides a brief history of the fast track procedure that led to the URAA and the SAA. It examines why the SAA was considered a necessary part of fast track, how the SAA was created, and how it was intended to operate. Part III examines the language of the SAA itself, how it is reinforced by the URAA, and what Congress may have meant when it gave its official "approval" to the SAA.

Part IV first describes a traditional separation of powers analysis whereby the constitutionality of congressional action is based upon the nature of that action (i.e., legislative, judicial, or executive). It next proposes a more modern separation of powers analysis that focuses on the constitutional concern that congressional action be, first and foremost, politically accountable. Part IV then analyzes the SAA under both the modern and traditional separation of powers analyses, and concludes that the SAA is unconstitutional under either analysis.

9. See *infra* Part IV.B.1.

10. See *infra* Part IV.B.2.

11. In this case, the law is the URAA, except when an ambiguity in the statute is identified. Then, the law becomes the URAA plus the SAA.

12. See *infra* Part VI.

Part V begins with the recognition that, despite its constitutional infirmities, the SAA might be very useful because it may represent the views of both the Legislative and Executive branches at the time of the enactment of the URAA and the United States' accession into the WTO. On the other hand, the SAA must be approached cautiously because it may represent only the views of a vocal minority within the Legislative and Executive branches and interest groups. Part VI suggests how the courts should use the SAA in the future. Irrespective of whose view the SAA represents, the ultimate conclusion of the article is that it is the courts' role to evaluate the importance of the SAA and decide how the SAA should be used in a statutory interpretation analysis.

II.

THE BACKGROUND OF THE URAA AND THE SAA

A. *A Brief History of Trade Promotion Authority for International Trade Agreements*

The URAA and its accompanying SAA were adopted through what was commonly known as the fast track procedure (now referred to as trade promotion authority or TPA). The following discussion provides a brief history of the development of trade promotion authority with respect to multilateral trade agreements.

The Constitution divides authority over foreign commerce and foreign affairs between the Legislature and the Executive, respectively. While Congress has the power "[t]o regulate Commerce with foreign Nations . . .,"¹³ the President has the power "to make Treaties," by and with the advice and consent of the Senate.¹⁴ The President also has the authority to interpret treaties as the Executor of the laws.¹⁵

13. U.S. CONST. art. I, § 8, cl. 3. Congress also has a constitutionally-derived role in international affairs by virtue of its authority to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," to declare war, to raise and support the armed forces, and to make all laws "necessary and proper for carrying into Execution the foregoing Powers" U.S. CONST. art. I, § 8, cl. 10–18.

14. U.S. CONST. art. II, § 2, cl. 3. The President's constitutional power over foreign affairs is also derived from his general Executive power, his role as Commander-in-Chief of the Armed Forces, and his ability to nominate and appoint ambassadors and other public ministers and consuls (the last of which is also, of course, subject to the advice and consent of the Senate). *See id.* at cl. 1–3.

15. U.S. CONST. art. II, § 1; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(1) (1986) [hereinafter RESTATEMENT OF THE FOREIGN RELATIONS LAW]. The Executive branch's interpretation is, of course, subject to review by the courts. *See id.* § 326(2).

Historically, in its regulation of foreign commerce, Congress experienced difficulties in developing a comprehensive tariff in the national interest that was not unduly affected by special interests.¹⁶ As a result, Congress passed the Reciprocal Trade Agreements Act of 1934, which delegated to the President the authority to negotiate and implement international trade agreements for the reciprocal reduction of tariffs.¹⁷ Since the inception of this grant of power from Congress to the President, Congress has struggled to create an appropriate balance between placing limits on the Executive branch's authority to negotiate trade agreements and giving the Executive branch sufficient authority to project credibility at the negotiating table.

In 1974, Congress created the first version of the so-called fast track procedure, which was intended to address these competing needs.¹⁸ Fast track procedures continued to be used for most major international trade legislation for the next twenty years and expired in 1994.¹⁹ On August 6, 2002, Congress passed legislation giving the President trade promotion authority for the first time since 1994.²⁰ Fast track or TPA procedures differ from procedures for the passage of other federal legislation in several important respects. Briefly, in

16. JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 79 (4th ed. 2002) ("Trading between groups and sections is inevitable. Log-rolling is inevitable, and in its most pernicious form. We do not write a national tariff law.") (quoting 78 CONG. REC. 10,379 (1934) (remarks of Sen. Cooper)). Non-tariff barriers have presented even greater difficulties.

17. *Id.*

18. *Id.* at 80–82 (suggesting that Congress's willingness to adopt new procedures for approving trade agreements implicitly acknowledged that earlier procedures had been inadequate). For a more detailed history of the fast track procedure, see Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687 (1996).

19. President Clinton was unable to convince Congress to renew fast track authority after 1994, largely because Congress was wary of delegating too much power to the Executive. In the absence of fast track, international trade agreements were subject to the normal legislative process, although no major trade agreements were concluded during this time period. *See, e.g.*, Steve Charnovitz, Editorial, *The Trade-Blind Congress of '95*, J. OF COM., Dec. 29, 1995, at 6A (noting expiration of fast track authority and the subsequent ramifications).

20. Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, §§ 2101–2113, 116 Stat. 933 [hereinafter Trade Act of 2002]. In light of this recent renewal of trade promotion authority and continued reliance on statements of administrative action, the constitutional issues raised by this article should receive immediate attention. The U.S. Trade Representative (USTR) concluded, and the Congress approved, new free trade agreements with Chile and Singapore in 2003 under TPA procedures authorized by the Trade Act of 2002. The accompanying statements of administrative action are not publicly available at the time of this writing and are likely still in the drafting stages. A Free Trade Agreement of the Americas (FTAA) and a Central American Free Trade Agreement (CAFTA) are under negotiation. The USTR has indicated its goal of concluding FTAA negotiations by 2005.

the case of international trade agreements, TPA essentially commits the President to notify, consult with, and subsequently submit the final product of trade negotiations to Congress in exchange for final accelerated approval by Congress.²¹ Congress commits to discharge automatically the proposed legislation from committee within a certain number of days, to bar amendments to the proposal, and to limit floor debate.²²

For a trade agreement to be eligible for the fast track procedure, the President must give Congress and its two “gatekeeper” committees, the House Ways and Means Committee and the Senate Finance Committee, notice prior to negotiating and ultimately signing the trade agreement.²³ If neither gatekeeper committee disapproves of the negotiations during the designated period, any subsequently negotiated agreement will receive fast track legislative consideration.²⁴

After entering into the trade agreement, the President must submit to Congress: (1) a copy of the final text of the agreement; (2) “a draft of an implementing bill[; (3)] *a statement of any administrative action* proposed to implement such agreement[; and (4)] supporting information as described” in the statute.²⁵ Congress then has a rela-

21. 19 U.S.C. § 2112 (2000). The Trade Act of 2002 made the provisions of the Trade Act of 1974 applicable to future qualifying trade agreements. § 2103(b)(3) at 1006. For further explanation of the past operation of the fast track process, see Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT’L L. 143 (1992).

22. 19 U.S.C. § 2191(d)–(f). *See also* Koh, *supra* note 21, at 143–44. While these rules appear to be quite rigid, they only govern congressional procedure and, as such, are subject to modification by Congress at any time. *See* Carrier, *supra* note 18, at 705; Koh, *supra* note 21, at 151–52 (“[T]he statutory Fast Track procedures that modify internal house rules in no way legally ‘bind’ Congress.”). Congress made its authority to change these rules explicit in the Trade Act of 2002. Trade Act of 2002 § 2105(c) at 1016 (expressing approval “with the full recognition of the constitutional right of either House to change the rules (so far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as any other rule of that House”).

23. *See* Trade Act of 2002 §§ 2104(a), (d), at 1008–10. *See also* Koh, *supra* note 22, at 148–49 (describing process under pre-1994 fast track procedures).

24. *See* Trade Act of 2002 § 2104(d)(3)(C)(i) at 1011. If Congress objects to a trade agreement under TPA, the President is free to resubmit the proposal under normal legislative procedures, but passage is less certain and likely to be delayed. *See* Koh, *supra* note 21, at 149.

25. *See* Trade Act of 2002 § 2105(a)(1)(C) at 1013 (emphasis added). For comparison to the fast track requirements in effect when the URAA was passed, *see* 19 U.S.C. § 2112(e) (1994). *See also* Carrier, *supra* note 18, at 704–05 (describing fast track requirements in place in 1994). The supporting information required by section 2105(a)(2) of the Trade Act of 2002 includes: “(A) an explanation as to how the implementing bill and proposed administrative action will change or affect existing law; and (B) a statement . . . asserting that the agreement makes progress in achieving

tively short time frame in which to consider and vote upon the final agreement.²⁶

Fast track has been described as promoting several goals. First, the fast track procedure allows Congress to reduce the influence of special interest groups on trade legislation, thereby largely preventing controversial trade bills from becoming stalled in Congress.²⁷ Second, fast track increases the Executive branch's credibility at the negotiating table because the United States' trading partners are assured that any negotiated trade agreement will receive swift and unintrusive consideration from the Legislative branch.²⁸ Third, fast track gives Congress veto power over any negotiated trade agreement.²⁹

Proponents of fast track argue that it has been successful in fostering inter-branch harmony and effectiveness.³⁰ It benefits the President by increasing his negotiating credibility with foreign countries and benefits Congress by increasing meaningful consultations with the President on trade negotiations, which results in trade agreements that enjoy wider support.³¹ Opponents of fast track have argued that it is undemocratic because it permits no amendments to the negotiated pro-

the applicable purposes, policies, priorities and objectives" set forth in the Act and how it does so. Trade Act of 2002 § 2105(a)(2) at 1013.

26. The relevant Congressional committees have forty-five days in which to consider the proposed agreement. If the committees do not report the proposal to the House within that time, the committees are automatically discharged from further consideration. The full Congress then has fifteen days to bring the proposal to the floor for a vote. 19 U.S.C. § 2191(e)(1) (1994). *See also* Carrier, *supra* note 18, at 704 (describing fast track requirements in place in 1994).

27. Koh, *supra* note 21, at 148.

28. *Id.*

29. *Id.*

30. *See* Carrier, *supra* note 18, at 695. The House Report accompanying the URAA states:

The purpose of the [Congressional] approval process is to preserve the constitutional role and fulfill the legislative responsibility of the Congress with respect to agreements which generally involve substantial changes in domestic laws. The consultation and notification requirements provide the opportunity for congressional views and recommendations with respect to provisions of the proposed agreement and possible changes in U.S. law or administrative practice to be fully taken into account and any implementing problems resolved prior to entry into the agreement and introduction of the implementing bill. At the same time, the process ensures the Executive branch and foreign countries of expeditious action on the final agreement and implementing bill without amendments.

H.R. REP. NO. 103-826(I), at 19 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3791.

31. *See* Carrier, *supra* note 18, at 695. *See also* Edmund W. Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471, 472, 521 (1990) (describing political forces that led to creation of fast track authority).

posals;³² when a legislator has serious concerns about one minor piece of the total package, he or she is forced to accept the entire package despite those concerns, or else undermine years of negotiations by voting down the whole package because of opposition to one minor piece. Opponents also have argued that Congress has abdicated its responsibility under fast track by delegating negotiating authority to the President without reserving any effective means of exercising control over the negotiating process.³³ Despite these concerns, legislation such as the North American Free Trade Agreement (NAFTA), which was enacted under the fast track procedure, has withstood constitutional challenge in the courts.³⁴

*B. The Fast Track Requirement for a Statement
of Administrative Action*

As outlined above, the fast track or TPA procedures require that the President submit to Congress a statement of administrative action proposed to implement the trade bill. The requirement for a statement of administrative action was contained in the Trade Act of 1974³⁵ and continued unchanged through 1994. It was renewed again in the Trade Act of 2002.³⁶ In connection with the 1988 Omnibus Trade and Competitiveness Act renewing fast track authority,³⁷ the Senate Committee on Finance stated that the purpose of the statement of administrative action is to describe regulatory and other changes that are being made to implement the underlying trade agreement.³⁸ However, the SAA accompanying the URAA goes quite a bit further in its scope and application.

32. See Koh, *supra* note 21, at 161 (recognizing the “no amendment objection” as the “more serious . . . challenge [to] the Fast Track procedure . . .”).

33. See *id.* at 166–68 (arguing that both objections boil down to concern that fast track gives President greater control over United States trade agenda and decreases Congress’ ability to regulate foreign commerce). Koh responds that this concern ignores the many procedural avenues whereby Congress and the public can shape a trade agreement before its final form. *Id.* at 170–71.

34. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319–20 (11th Cir. 2001) (holding that “in the context of international commercial agreements such as NAFTA . . . the issue of what kinds of agreements require Senate ratification pursuant to Art. II, § 2 procedures presents a nonjusticiable political question”).

35. 19 U.S.C. § 2112(d), (e)(2)(A) (1994).

36. Trade Act of 2002, Pub. L. No. 107-210, § 2105(a)(1)(C)(ii), 116 Stat. 933, 1013.

37. 19 U.S.C. § 2903(a)(1)(B)(ii) (1988).

38. S. REP. NO. 103-412, at 5 (1994).

C. Enactment of the URAA and Its Accompanying SAA

The enactment of the URAA implementing the WTO Agreements under the fast track process began with negotiations on the WTO Agreements. These negotiations “formally began in September 1986, when Trade Ministers from [the] Contracting Parties to the General Agreement on Tariffs and Trade (GATT) agreed in a meeting in Punta del Este, Uruguay to launch [a new] round of multilateral trade negotiations.”³⁹ Negotiations continued for several years and were largely concluded in December 1993.⁴⁰

Several congressional hearings were held on the Uruguay Round negotiations during this time period. The Senate Committee on Finance held twenty-five hearings between 1986 and 1994, during which time it received testimony from the United States Trade Representative (USTR), other officials from the Executive branch, representatives of business, labor, agriculture, environment, and consumer groups, and academics concerning the proposed WTO agreements.⁴¹ Furthermore, “the Committee held numerous executive sessions with the USTR and other Executive branch officials, in which the Committee was briefed extensively on specific provisions [of the agreements].”⁴² At the same time, the House Committee on Ways and Means and its Subcommittee on Trade held several public hearings, received written submissions, and engaged in oversight activities, including attending negotiating sessions in Geneva, with respect to the Uruguay Round negotiations.⁴³ According to the House Committee Report, many of the concerns raised by these various interest groups were addressed either in negotiations, in the implementing bill, or in the SAA.⁴⁴ In fact, during this process the House Committee made several proposals for amendments and additions to the SAA being prepared by the Administration.⁴⁵ Thus, although the SAA was primarily drafted by the Executive branch, interested members of Congress and

39. *Id.* at 2.

40. *Id.*

41. *Id.* at 4.

42. *Id.*

43. H.R. REP. NO. 103-826, pt. 1, at 19–21 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3791–92. A “round” of negotiations is often named after the city where the negotiations are first launched. Hence, the negotiations on the Agreement establishing the WTO are known as the Uruguay Round negotiations. However, subsequent negotiations that are part of that “round” may occur in other locales, such as Geneva, Switzerland.

44. *Id.* at 20–21.

45. *Id.*

special interest groups had a significant ability to affect the text of the SAA.

At the conclusion of the Uruguay Round negotiations on December 15, 1993, President Clinton notified Congress of his intent to enter into the WTO Agreements, as required by section 1102 of the Omnibus and Trade Competitiveness Act of 1988.⁴⁶ The United States signed the Final Act of the Uruguay Round at a ministerial meeting in Marrakesh on April 15, 1994.⁴⁷ The President's notification to Congress began a period of consultations between the Executive branch and congressional committees, as described above. Those consultations culminated in the production of a bill to implement the WTO agreements.⁴⁸ The bill was transmitted to the President on September 23, 1994 by the Majority Leader of the Senate and the Speaker of the House.⁴⁹ Three days later, on September 27, 1994, the President transmitted to Congress the final text of the WTO agreements, the draft implementing language for the agreements, the SAA, and other supporting information required by law.⁵⁰ The House passed the bill on November 29, 1994 and the Senate followed suit on December 1, 1994.⁵¹

The URAA contains a provision officially "approving" the SAA submitted to Congress on September 27, 1994.⁵² In addition, the URAA contains a provision that makes this SAA truly unique. The

46. S. REP. NO. 103-412, at 2 (1994).

47. *Id.* at 5.

48. S. 2467, 103rd Cong. (1994).

49. *Id.*

50. *Id.* It becomes evident from this tight timeline that the SAA had already been negotiated, drafted, and informally approved by Congress prior to its formal submission to Congress on September 27, 1994.

51. Uruguay Round Agreements Act, Pub. L. No. 103-465, 1994 U.S.C.C.A.N. 3773.

52. 19 U.S.C. § 3511(d) (2000). Congress has also approved other statements of administrative actions accompanying past trade agreements. For example, in section 2 of the Trade Agreements Act of 1979, Congress states that it "approves the trade agreements . . . submitted to the Congress on June 19, 1979, and the statements of administrative action proposed to implement such trade agreements submitted to the Congress on that date." Trade Agreements Act of 1979, Pub. L. No. 96-39, § 2(a), 93 Stat. 147 (codified as amended at 19 U.S.C. § 2503 (2000)). Likewise, in section 3 of the United States-Israel Free Trade Area Implementation Act, Congress "approved" the statement of administrative action that was submitted to Congress on April 29, 1985 along with the implementing bill for the United States-Israel Free Trade Area agreement. United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, § 3, 99 Stat. 82 (codified as amended at 19 U.S.C. § 2112 (1994)). *See* North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3311(a)(2) (2000) (approving statement of administrative action).

provision elevates in importance the accompanying SAA above all other extrinsic sources:

The statement of administrative action approved by the Congress under [19 U.S.C. § 3511(a)] shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.⁵³

In no other instance has Congress so explicitly mandated that courts follow a statement of administrative action.⁵⁴ This combination of “approving” the SAA in the statute and elevating it above other sources to which a court or an administrative agency might turn in interpreting and applying the statute presents serious constitutional questions about Congress’s ability to act outside the procedures enumerated in the Constitution (i.e., bicameralism and presentment).⁵⁵ It also raises the issue of whether Congress can limit the Executive and Judicial branches through something other than the law. For reasons explored in more detail below, any congressional attempt to elevate a statement of administrative action above all other extrinsic sources is unconstitutional and should be invalidated by the courts.⁵⁶

53. 19 U.S.C. § 3512(d) (2000). Interestingly, in connection with the approval of the statement of administrative action accompanying the 1979 Trade Agreements Act, the Senate Committee on Finance made it clear that “[t]he statements of proposed administrative action are not part of the bill and will not become part of U.S. statutes upon enactment of the bill. They will not provide any new, independent legal authority for executive action.” H.R. REP. NO. 96-249, at 33 (1979), *reprinted in* 1979 U.S.C.C.A.N. 387, 419. The Finance Committee went on to say that “[i]n recommending approval of the statements of proposed administrative action, the committee indicates its conclusion that the statements of proposed action are consistent with the trade agreements as implemented by the bill. The committee does not necessarily approve or disapprove any particular element of the statements, except as noted in this report.” *Id.* Thus, contrary to its treatment of the SAA accompanying the URAA, Congress expressly declined to give elevated status to the statement of administrative action accompanying the 1979 Trade Agreements Act.

54. The closest example the authors could find of Congress attempting to influence statutory interpretation by courts through a statutory direction to certain legislative history is the 1991 Civil Rights Act, in which Congress stated that only a particular interpretive memorandum could be relied on as legislative history in construing the statute. A discussion of how the URAA’s elevation of the SAA differs from the 1991 Civil Rights Act is set out in more detail, *infra*, Part V.B.

55. Article I, Section 7, clause 2 of the United States Constitution requires that most bills pass both the House and Senate (bicameralism) and be presented to the President for signature (presentment) before becoming law. For exceptions to this requirement, see *infra* note 86.

56. See *infra* Part VI.

III.

WHAT IS THE SAA?

In analyzing the proper role for the SAA in the legislative scheme, it is necessary to determine whether Congress intended it to have the force of law. The SAA describes itself as follows:

This Statement of Administrative Action is submitted to Congress in compliance with section 1103 of the Omnibus Trade and Competitiveness Act of 1988 (1988 Act) and accompanies the implementing bill for the Agreement Establishing the World Trade Agreement and the agreements annexed to that Agreement (the [WTO] agreements).

. . .

This Statement describes significant administrative actions proposed to implement the [WTO] agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the [WTO] agreements.

As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track trade bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the [WTO] agreements, both for purposes of U.S. international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the [WTO] agreements, the interpretations of those agreements included in this Statement carry particular authority.⁵⁷

On its face, then, the SAA appears to have several purposes: it serves to assist in the implementation of the WTO agreements; it explains how the law will change as a result of those agreements; and it explains why such change is necessary. As such, it is a statement of how the Executive plans to implement the URAA. Next, it is a state-

57. The Uruguay Round Agreements Act Statement of Administrative Action, attached to H.R. REP. NO. 103-826(I) (1994), *reprinted in* 1994 U.S.C.A.N. 3773, 4040. Although the SAA states that its status as an "authoritative expression by the Administration" is in keeping with earlier statements of administrative action, the URAA represents the first time that this concept was included in the statutory text itself and purportedly made binding on the judiciary.

ment through which the Executive explains the relationship between the United States' international obligations (i.e., the WTO agreements) and U.S. domestic law (i.e., the URAA). Finally, the SAA is a recognition that Congress intends that future administrations will use the same interpretation and application of the URAA as that which is detailed in the SAA.

The SAA concludes with a statement that it carries particular authority because it "will be approved by Congress."⁵⁸ This, in fact, happened. Section 3511 of the URAA states:

[T]he Congress approves—

(1) the trade agreements described in subsection (d) resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade, entered into on April 15, 1994, and submitted to the Congress on September 27, 1994; and

(2) *the statement of administrative action* proposed to implement the agreements that was submitted to the Congress on September 27, 1994.⁵⁹

What does it mean for Congress to express its "approval" of the SAA in the statute? One possibility is that Congress was simply recognizing that the President had fulfilled the fast track statutory requirement that he submit to Congress a statement of administrative action proposed to implement the new trade agreements.⁶⁰ A second possibility is that Congress was expressing its favorable opinion of the substance of the SAA.⁶¹ A third possibility is that Congress wished to bring this particular document to the attention of courts in light of the new textualism movement among scholars and courts and the increasing reluctance of courts to rely on legislative history.⁶² A fourth possibility is that Congress intended the SAA to have the force of law equal to that of the statute itself whenever an ambiguity in the text of the statute was identified. A fifth possibility is that Congress intended the SAA to be the statutory equivalent of the URAA.

Most likely, the actual answer is a combination of the first four of these possibilities, but not the fifth. This answer is suggested by the

58. *Id.*

59. 19 U.S.C. § 3511(a) (2000) (emphasis added).

60. *See* 19 U.S.C. § 2112(e) (2000) (requiring that President provide Congress with statement of administrative action).

61. Such a conclusion is supported by the dictionary definition of the word "approve," which means, *inter alia*, "1. to give one's consent to; sanction; confirm 2. to be favorable toward; think or declare to be good, satisfactory, etc. . . .". WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 68 (3d ed. 1982).

62. *See* New Textualism discussion *infra* Part V.A.

above-quoted language of the SAA itself,⁶³ as well as by the next section in the URAA, in which Congress states that the SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the [WTO] Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application.”⁶⁴ Thus, Congress not only expressed its general satisfaction with the SAA in the statute, but also attempted to give the SAA some sort of elevated status in statutory interpretation by the courts.

This combination of Congressional approval and elevated status in statutory interpretation does not, however, indicate that Congress intended the SAA to be the equivalent of the statute itself. This conclusion is suggested by several facts. First, Congress did not enact the SAA into the statute; it does not appear anywhere in the official U.S. Code.⁶⁵ Second, Congress asks a court to look to the SAA only when a question of interpretation of application arises under the law, indicating that the statute is superior to the SAA.⁶⁶ Third, in the same section of the statute in which Congress “approves” the SAA, it also “approves” the WTO Agreements.⁶⁷ Does this mean that the WTO Agreements should also be given the force of law? Clearly, Congress has said that the WTO Agreements are not part of U.S. law.⁶⁸ We are

63. The SAA’s statement that it will be “approved by Congress” and therefore will “carry particular authority” suggests that the drafters of the SAA viewed it as more than just fulfilling a procedural requirement for fast track legislation.

64. 19 U.S.C. § 3512(d) (2000). It may be argued that Congress’s use of the word “an” in the above-quoted phrase suggests that the SAA is simply one extrinsic source among many to which a court could turn for interpretive guidance. However, Congress did not mention any other extrinsic sources and certainly did not state that any other extrinsic sources could be considered an “authoritative expression.” Thus, the SAA’s position is truly unique.

65. Congress may have been attempting to incorporate the SAA into the statute by reference in the same way that it might incorporate by reference a dictionary definition to assist in understanding the meaning of a statutory term. The SAA is clearly not statutory incorporation by reference, however, because the SAA only becomes relevant when an ambiguity in the statute is identified.

66. There can be no question that the SAA was not presented to the President to be signed into law. The SAA was presented to the President only as an expression of how Congress intended the URAA to be interpreted when a question arose under the law but not as the law, *per se*. See 19 U.S.C. § 3512(d) (providing that SAA be considered authoritative expression applied only when question arose). This suggests that the unconstitutionality of the SAA may be grounded in the Presentment Clause.

67. 19 U.S.C. § 3511(a) (2000).

68. 19 U.S.C. § 3512(a)(1) states that “[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.” It is generally accepted that Congress has the authority to declare that international agreements, such as the WTO Agreements, are not self-executing and that such agreements require

left with the conclusion that although Congress did not intend the SAA to have the effect of law, it did intend for the SAA to have an elevated status among other extrinsic sources of statutory interpretation.

For the reasons discussed below, Congress's dictation to courts to treat the SAA as an authoritative guide is unconstitutional and should be invalidated by the courts.⁶⁹

IV.

THE INTERPRETATIONS FOUND IN THE SAA CANNOT BIND THE JUDICIAL OR EXECUTIVE BRANCHES

In recent years, scholars have debated the constitutionality of Congress creating statutory regimes that stipulate how a court should interpret statutes.⁷⁰ However, real life examples of such statutory schemes have been scarce, if not entirely absent. Together, the URAA and the SAA represent a concrete example of such a regime and provide an opportunity for application of the scholarly debate. An analysis of the statutory regime created by the URAA and the SAA demonstrates that it violates the separation of powers doctrine and raises serious questions about the constitutionality of other such regimes.⁷¹

The statutory scheme at issue is one in which the SAA, created primarily by the Executive and then negotiated with and approved by Congress, limits how both the Judiciary and the Executive interpret and apply the URAA in the future. This statutory scheme violates the Constitution because it represents Congress's attempt to flout the separation of powers doctrine by exercising politically insulated, unchecked power with the force of law.

A. *Constitutional System of Checks and Balances: Separation of Powers*

1. *Traditional Separation of Powers Analysis*

One of the most fundamental principles found in the United States Constitution is that the power of the government should be limited in order to prevent tyranny.⁷² To accomplish this goal the Consti-

implementing legislation. See RESTATEMENT OF THE FOREIGN RELATIONS LAW, *supra* note 15, § 111 ("An international agreement of the United States is 'non-self-executing' . . . [if] Congress by resolution[] requires implementing legislation . . .").

69. See *infra* Part VI.

70. See *infra* Part IV.B.3.

71. See *infra* Part IV.B.

72. The Supreme Court has held that

tution sets up a series of checks and balances. Power is shared between the federal and state governments and within the federal government among the Legislative, Executive, and Judicial branches.⁷³ These competing levels and branches of government help to ensure that no one branch of government becomes too powerful.

Throughout the jurisprudential history of the United States the courts have struggled to ensure, consistent with the Constitution, that the powers of government remain checked.⁷⁴ Most often the courts have discussed this concept of checked powers within the context of the separation of powers doctrine.⁷⁵ Originally, this doctrine focused on ensuring that each branch of government exercised the type of power that the Constitution assigned to it.⁷⁶ The Legislative branch was to create the law,⁷⁷ the Executive branch was to administer it,⁷⁸

[t]he Constitution sought to divide the delegated powers of the Federal Government into three defined categories, Legislative, Executive, and Judicial. The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.' Justice Jackson's words echo the famous warning of Montesquieu, quoted by James Madison in the Federalist No. 47, that 'there can be no liberty where the legislative and executive powers are united in the same person, or body of the magistrates'

Bowsher v. Synar, 478 U.S. 714, 722–23 (1986) (internal citations omitted); *see also* *United States v. Brown*, 381 U.S. 437, 443 (1965) (discussing separation of powers as "bulwark against tyranny").

73. U.S. CONST. art. I–III; U.S. CONST. amend. X.

74. *See, e.g., Bowsher*, 478 U.S. at 723 ("The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."); *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) ("[E]ven useful 'political inventions' are subject to the demands of the Constitution"); *Brown*, 381 U.S. at 443 ("The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches, while others say that a given task is *not* to be performed by a given branch."); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) ("When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation."); *Myers v. United States*, 272 U.S. 52 (1926) (holding that Congress could not require President to seek Senate approval prior to removing appointee from office, even if appointment required advice and consent of Senate).

75. *See, e.g., Panama Refining* 293 U.S. at 425–26 (noting that Congress cannot delegate its legislative power to President); *Myers*, 272 U.S. at 116 ("[T]he reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended").

76. *See, e.g., Myers*, 272 U.S. at 117–18 (asking if "appointments and removals [of executive branch officers] were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power").

77. U.S. CONST. art. I, § 1.

78. U.S. CONST. art. II, § 1, cl. 1, 8.

and the Judicial branch was to interpret it.⁷⁹ In the last century, however, the federal government has tackled increasingly broad and complex issues. This necessitated the creation of the administrative state and resulted in the blurring of these substantive lines.⁸⁰ Executive branch agencies now administer intricate programs that require the promulgation of regulations to implement the broad legislative programs enacted by Congress. Thus, the Executive branch exercises powers that are both legislative and judicial in nature.⁸¹ Accordingly, the Supreme Court's separation of powers analysis, by necessity, has evolved.

2. *A Modern Separation of Powers Analysis*

Today's Supreme Court gives great latitude to broad grants of power from the Legislative to the Executive branch.⁸² The Court, however, is much more strict with congressional attempts to aggrandize its own power.⁸³ A modern separation of powers analysis recognizes, fundamentally, that the Constitution enumerates those powers Congress may exercise. Most often, this analysis focuses on congressional attempts to act with the force of law.⁸⁴ When Congress acts

79. U.S. CONST. art. III, §§ 1–2. The Supreme Court announced early in the jurisprudential history of the United States that under our constitutional structure it is the function of the courts to say what the laws mean. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

80. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 380–81 (1989) (“[T]he Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.”); *Myers*, 272 U.S. at 85 (Brandeis, J., dissenting) (arguing that silence of Constitution on matter of removing inferior executive officers does not necessarily vest such power solely in Executive, and thus some blending of functions is permissible).

81. Trying to identify purely executive or legislative powers in an international context is even more complex because the Constitution delegates to the Executive and Congress respectively power over foreign affairs and foreign commerce. U.S. CONST. art. II, § 2; U.S. CONST. art. I, § 8.

82. *See, e.g., Whitman v. Am. Trucking Ass'ns, Inc.* 531 U.S. 457 (2001) (upholding delegation of policy-making authority to Environmental Protection Agency to set air quality standards); *Mistretta*, 488 U.S. 361 (upholding congressional delegation of power to create sentencing guidelines); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (upholding congressional delegation of power to President to prohibit arms sales).

83. *See, e.g., Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress could not delegate to itself direct role in executing laws it had passed); *see also* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1467 (2000) (explaining difference between Congress delegating power to itself as opposed to delegating power to Executive or to independent agency).

84. Most of the time, to say that Congress is acting with the force of law means that Congress is legislating or creating binding rules of universal application. Sometimes, however, Congress may take action to make or change the law in ways other than

with the force of law, the Constitution requires that this action conform to “[the] single, finely wrought and exhaustively considered, procedure” found in Article I, Section 7.⁸⁵ The only congressional actions excepted from Article I, Section 7 are those explicitly mentioned in the Constitution.⁸⁶ However, these exceptions, too, must conform strictly to the procedures outlined in the Constitution.

For instance, the Constitution prescribes the manner in which Congress may remove Executive officers, namely impeachment by the House of Representatives and trial by the Senate.⁸⁷ Therefore, the Supreme Court in *Bowsher* struck down an attempt by Congress to create a mechanism which allowed it to avoid the impeachment process.⁸⁸ In that case, the Court found that the Comptroller General, an agent of Congress, was executing the law but was subject to removal by Congress through means other than impeachment.⁸⁹ The Court reasoned that any grant of executive power to the Comptroller General violated the Constitution because under the constitutional principle of separation of powers, “Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.”⁹⁰ The Court enforced the constitutional mandate that Congress remove Executive officers only through impeachment and trial.

Most separation of powers cases, however, do not consider the few enumerated powers that Congress may exercise that are not legislative in nature (e.g., impeachment).⁹¹ Instead, such analyses typically center on congressional attempts to legislate; the Court is quick to strike down any such attempts by Congress that fail to conform to the

through the normal legislative processes. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 492 (2002) (discussing Congress’s ability to delegate power to agencies to make rules with force of law).

85. *Immigration and Nationalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983). See *supra* note 55 for an explanation of bicameralism and presentment.

86. Almost all congressional actions must meet the legislative requirements of Article I, Section 7. There are a few narrow exceptions to this principle: “These include at least the power of the House alone to initiate impeachments, Art. I, § 2, cl. 5; the power of the Senate alone to try impeachments, Art. I, § 3 cl. 6; the power of the Senate alone to approve or disapprove Presidential appointments, Art. II, § 2, cl. 2” *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 276 n.21 (1991). Additionally, the Senate alone has the power to consent to treaties. U.S. CONST. art. II, § 2, cl. 2.

87. U.S. CONST. art. I, §§ 2–4.

88. *Bowsher*, 478 U.S. at 736.

89. *Id.* at 728.

90. *Id.* at 726.

91. See *supra* note 86 for discussion of non-legislative powers.

constitutionally mandated procedures found in Article I, Section 7. In short, when Congress acts with the force of law it must conform with the requirements of bicameralism and presentment.

For instance, when Congress attempted to allow *one* of its Houses to overrule Immigration and Naturalization Service (INS) deportation determinations, the Supreme Court ruled such action unconstitutional.⁹² In *Metropolitan Washington Airports Authority*, the Supreme Court invalidated Congress's attempt to act through a subcommittee in order to overrule an airport authority.⁹³ Both of these examples represent congressional attempts to act with the force of law because they were attempts of Congress to override the Executive Branch.⁹⁴ In both instances, the Court found that congressional actions taken by sub-groups of Congress represented congressional attempts to exercise power without meeting the constitutionally mandated process of bicameralism and presentment. Therefore, they constituted a violation of separation of powers.⁹⁵

Some scholars, however, have argued that the Supreme Court's devotion in *Chadha* to Article I, Section 7 is overly simplistic.⁹⁶ They

92. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983).

93. *Metro. Washington*, 501 U.S. at 258–60. In *Metropolitan Washington Airports Authority*, the Court examined a legislative program whereby a review board consisting of nine Members of Congress held ultimate veto power over the decisions of an airport administration.

94. Congressional attempts to act with the force of law are distinguishable from congressional attempts simply to influence the Executive branch. For instance, report and wait provisions, whereby proposed Executive action must be first reported to Congress or a congressional subcommittee and a set period of time must expire before the proposed action is taken, may be constitutional under a modern separation of powers analysis. These provisions provide Congress with time to consider whether it would be appropriate to override Executive action through enactment of a more specific statute. See *City of Alexandria v. United States*, 737 F.2d 1022, 1026 (Fed. Cir. 1984). In *City of Alexandria*, the appellants argued that under the report and wait provision at issue Congress was exercising a veto similar to the one-House veto in *Chadha*, because whenever the subcommittee expressed displeasure, the Executive did not go through with the proposed action. Such expressed displeasure, however, is clearly distinct from congressional acts with the force of law. When Congress acts with the force of law and overrides Executive action, the Executive action becomes illegal. Under a report and wait provision, Congress cannot override the Executive action without turning to the normal legislative process. As discussed above, such an override, as it is achieved through bicameralism and presentment, is clearly permitted in our constitutional system. *City of Alexandria*, 737 F.2d at 1026 (holding “report and wait” provision constitutional because, unlike one-House veto in *Chadha*, congressional committee vote of disapproval did *not* have force of law); see also 19 U.S.C. § 3533(g)(3) (2000) (providing example of report and wait provision in URAA).

95. *Metro. Washington*, 501 U.S. at 276; *Chadha*, 462 U.S. at 959.

96. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575 n.5, 579 (1984) (“The theory

note, for instance, that the rise of the administrative state has led to many delegations of legislative authority to Executive agencies, which promulgate regulations without meeting the requirements of bicameralism and presentment.⁹⁷ These scholars conclude that the Court must have some concern other than ensuring that all legislative acts meet the single, finely wrought, and exhaustively considered procedure found in the Constitution.⁹⁸

The Court's devotion to Article I, Section 7 for congressional action is, however, quite sound. By requiring bicameralism and presentment only for *congressional* legislative acts, the Court is ensuring that government power is checked properly while recognizing the practical necessity of an administrative state.⁹⁹ More specifically, Executive agencies are easily checked because the vast majority of Executive agency acts are subject to the will of Congress. If Congress dislikes how an agency is executing the law (e.g., through a regulation), it is free to re-write the law in a more specific manner, thereby overruling the agency's interpretation.¹⁰⁰

The same cannot be said for actions taken by Congress. The most evident check on Congress is the ability of the Judiciary to declare an act of Congress unconstitutional. However, this check, while powerful, is relatively rarely invoked.¹⁰¹ The much more common

of separation-of-powers breaks down when attempting to locate administrative and regulatory agencies within one of the three branches"); Laurence H. Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 15, 17 (1984) ("[T]reating all legislative vetoes . . . as a threat to the Constitution's choice of a presidential over a parliamentary system seems altogether implausible").

97. See Tribe, *supra* note 96, at 11 ("In a relatively cryptic footnote, the [*Chadha*] majority admits that agencies and executive officers commonly wield 'quasi-legislative' power without the safeguards of bicamerality and presentment."); see also William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 540-41 (1992) ("In the 1930s, at precisely the time when the modern administrative state was aborning, Congress began to attach legislative vetoes to statutes delegating lawmaking functions to agencies.").

98. See Tribe, *supra* note 96, at 17 (suggesting "that *Chadha* represents only a transition to a more thoroughgoing repudiation of the constitutional upheaval that led to the approval . . . of the modern administrative state").

99. See *id.* at 10-11 (discussing constitutional import of Congress delegating power externally versus internally and parliamentary concerns that internal delegation implicates).

100. Congress also can control Executive agency actions through the purse strings. If the Executive is not implementing a program to Congress' liking, Congress can reduce or eliminate funding for that program in the future through the normal legislative process. See Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1360-63 (1988) (describing power Congress can wield over Executive branch through appropriations).

101. A well-settled canon of statutory interpretation is that courts will avoid interpretations that would render a statute unconstitutional. See William N. Eskridge, Jr. and

check on Congress comes not from another branch of government, but instead from political accountability.¹⁰² Thus, one of the most important purposes of Article I, Section 7 is to ensure that Congress' acts are politically accountable.¹⁰³

The requirements of bicameralism and presentment found in Article I, Section 7 ensure Congress' accountability in a very simple manner. This "single, finely wrought and exhaustively considered procedure" ensures that Congress' actions are *easily identifiable*. Forcing Congress to act through only one procedure makes congressional action easily identifiable for two reasons. First, the citizenry need only monitor that single procedure to know when Congress is acting with the force of law. Second, forcing all congressional acts that are intended to have the force of law to conform to the same procedure ensures that all these actions share the same status under the law.¹⁰⁴

When viewed through the lens of political accountability, the Court's separation of powers cases may be understood more easily. For instance, the fundamental problem in *Bowsher* was that Congress had created an arrangement whereby it could have forced spending reductions surreptitiously. More specifically, after focusing on Con-

Philip P. Frickey, *Appendix: The Rehnquist Court's Canons of Statutory Construction*, 108 HARV. L. REV. 97, 101 (1994).

102. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring) ("The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to 'the tyranny of a shifting majority.'").

103. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 707-710 (1997) (discussing structural objectives of bicameralism and presentment including, *inter alia*, deterrence of factions from usurping legislative authority, promoting caution and deliberation in legislative process, and encouraging full and open discussion of matters of public import). Chief Justice Burger recognized the relationship between separation of powers and political accountability in *Bowsher*, where he stated in his majority opinion that

this system of division and separation of powers produces conflict, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.

Bowsher v. Synar, 478 U.S. 714, 722 (1986) (emphasis added).

104. One narrow example of congressional action that carries the force of law but does not have to meet bicameralism and presentment is Senate advice and consent to treaties. However, these treaties must meet the procedures outlined in Article II, Section 2 of the United States Constitution (i.e., obtain a two-thirds vote of the Senate) and share the same status under the law as federal law. See U.S. CONST. art. VI, cl. 2; *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation.").

gress' powers to remove the Comptroller General, the Court expressed concern that Congress would be able to manipulate the Comptroller to its will.¹⁰⁵ Of course, no one doubted Congress' ability to control government spending. The real problem in *Bowsher* was that Congress would be able to control spending by threatening the Comptroller General with removal.¹⁰⁶

Removal is normally not an effective tool of manipulation, because it is subject to the highly visible, unwieldy, and infrequently used impeachment procedures for Executive officers. By vesting the execution of the Balanced Budget and Emergency Deficit Control Act in one of its own agents, rather than in an Executive officer, Congress violated the separation of powers doctrine; the Constitution demands that when Congress acts with the force of law it must do so in a manner that is politically accountable, namely by creating law through the constitutionally mandated procedures.¹⁰⁷

Similarly, the one-House veto in *Chadha* and the power invested in a Congressional subcommittee in *Metropolitan Washington Airports Authority* represented Congress' attempt to exercise power with the force of law (e.g., congressional attempts to overrule Executive action) through politically insulated mechanisms. In fact, anytime Congress delegates its legislative power to a subunit within Congress, it unconstitutionally insulates its action from public scrutiny. There are two reasons for this conclusion.

First, when Congress follows the normal legislative process, its actions are at their most public, subject to deliberation and debate, and are easily identifiable.¹⁰⁸ Second, and most importantly, when Congress delegates authority to a subunit, as in the cases discussed

105. See *Bowsher*, 478 U.S. at 722 ("The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.").

106. See *id.* at 726 ("To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress.").

107. In his concurring opinion in *Bowsher*, Justice Stevens concluded that vesting the spending power in the Comptroller General is unconstitutional because it represents Congress' attempt to legislate without meeting the constitutional requirements of bicameralism and presentment. See *id.* at 758–59 (Stevens, J., concurring).

108. A good illustration of the difference in political accountability for actions of congressional subcommittees, as compared with the Senate or House as a whole, can be seen with judicial nominations. Arguably, the political ramifications of filibustering a judicial nomination before the entire Senate are much greater than the ramifications of "bottling up" a nomination in the Senate Judiciary Committee.

above,¹⁰⁹ this delegated power usually does not automatically affect the law. The delegated power is invoked only if the subunit within Congress is displeased with Executive action. When such a situation occurs the congressional subunit takes action that has the force of law because the subunit overrides the Executive action.¹¹⁰

Congressional delegations of power that affect the law at some time after enactment can be viewed as two tier laws. Two tier laws can be defined as congressional attempts to act with the force of law at some time after the enactment of a statute through a mechanism other than bicameralism and presentment. The law is considered two tiered because Congress dictates the law first through the enacted text and then, if some triggering event occurs,¹¹¹ through some mechanism that is not consistent with Article I, Section 7. Two tier laws are politically insulated because they obfuscate congressional action. That is to say, one of the principle reasons for mandating that congressional acts conform with Article I, Section 7 is because conformity with this process ensures that all congressional action will be given the same status under the law. This singular status means that congressional acts are more identifiable with Congress, ensuring greater political accountability.

In conclusion, over the course of the last century, the Supreme Court's separation of powers analysis has undergone significant change as a result of the rise of the administrative state. Instead of focusing on a simply categorical approach (i.e., legislative, executive, judicial), the Court focuses on congressional attempts to aggrandize its own power.¹¹² More specifically, the Court scrutinizes congressional actions with the force of law to evaluate whether they conform with the "single, finely wrought, and exhaustively considered procedures" found in the Constitution. By so doing, the Court ensures that these actions are easily attributed to Congress and that these actions enjoy a singular status under the law. This attribution and singularity act in concert to ensure political accountability.¹¹³ Political accountability,

109. *E.g.*, *Bowsher*, 478 U.S. 714; *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991).

110. *See supra* note 84 for discussion of when Congress does and does not act with the force of law.

111. With respect to the URAA and SAA statutory scheme, for example, the triggering event is the identification of an ambiguity in the URAA.

112. *See Mistretta v. United States*, 488 U.S. 361, 380–81 (1989).

113. As evidenced by *Bowsher* and *Chadha*, a concern for political accountability appears to underlie some of the Supreme Court's more recent jurisprudence with respect to separation of powers. *Bowsher*, 478 U.S. at 722; *Chadha*, 462 U.S. at 966

more than any other Constitutional safeguard, ensures the Framers' vision that all government power, but especially congressional power, is meaningfully checked.

*B. A Constitutional Analysis of the Statement of
Administrative Action*

Under either a traditional or modern separation of powers analysis, it is clear that the URAA's elevation of the SAA—through the mandate that courts use the SAA as an “authoritative” guide in statutory interpretation—is unconstitutional. Under a traditional analysis, the elevated SAA represents an unconstitutional encroachment by Congress on the judiciary.¹¹⁴ And, more importantly, under a modern analysis, the elevated SAA represents a two tier law, which, for the reasons discussed below,¹¹⁵ is unconstitutional.

1. A Traditional Separation of Powers Analysis of the SAA

The elevation of the SAA is a direct attempt by Congress to dictate to the courts how to interpret the law. Under a traditional separation of powers analysis, this congressional mandate to the courts represents Congress' attempt to encroach upon core judicial functions.¹¹⁶ It is fundamentally the role of the courts to say what the law means.¹¹⁷ Once Congress has enacted the law, the courts, and the courts alone, should determine what tools to use in interpreting the law.

Moreover, the SAA may also represent Congress' attempt to control application of the law in specific cases, which is traditionally a judicial function. For instance, the SAA discusses prior cases and states that despite changes to the law found in the URAA, the outcomes of these cases should not be different.¹¹⁸ While it is not com-

(Powell, J., concurring). This article is meant to suggest that political accountability should become a much more central and explicit part of the analysis.

114. See *infra* Part IV.B.1.

115. See *infra* Part IV.B.2.

116. See Alan R. Romero, Note, *Interpretative Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 225 (1994) (discussing how “interpretative directions requiring or forbidding consideration of particular extra-legislative sources probably unconstitutionally infringe on the judicial function”).

117. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 544 (1940) (“The interpretation of the meaning of statutes . . . is exclusively a judicial function.”).

118. For example, after discussing two cases involving the provision of indirect subsidies, the SAA states:

In cases where the government acts through a private party, such as in Certain Softwood Lumber Products from Canada and Leather from Ar-

pletely unheard of for Congress to adopt a particular common law understanding into a later statute,¹¹⁹ in this instance, Congress has been accused of prejudging certain issues or cases, such as the *Canadian Softwood Lumber* case,¹²⁰ that were likely to come before the Executive branch again after the passage of the new law.¹²¹ Much like interpretation of the law, application of the law in particular cases or controversies is clearly a core judicial function.¹²² Therefore, under a traditional separation of powers analysis there are multiple ways in which the URAA/SAA regime represents Congress' attempt to unconstitutionally exercise judicial power.¹²³

Under a traditional separation of powers analysis, the SAA is also unconstitutional because it represents congressional encroachment on

gentina (which involved export restraints that led directly to a discernible lowering of input costs), the Administration intends that the law continue to be administered on a case-by-case basis It is the Administration's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and section 771(5)(B)(iii) encompass indirect subsidy practices like those which Commerce has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable, provided that Commerce is satisfied that the standard under Section 771(5)(B)(iii) has been met.

Administrative Action Statement, H.R. REP. NO. 103-826(I), at 926 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4041, 4239-40.

119. For example, in the Congressional Findings set forth in the Civil Rights Act of 1991, Congress provided that "No statements other than the interpretive memorandum appearing at Vol. 137 CONG. REC. S. 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act" Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071. That interpretive memorandum approves of certain prior Supreme Court jurisprudence.

120. See WTO Report of the Panel, *United States—Measures Treating Export Restraints as Subsidies*, WT/DS194/R, ¶ 2.6 (June 29, 2001), available at <http://www.wto.org> (last visited Oct. 21, 2003) (on file with the *New York University Journal of Legislation and Public Policy*). In that case, Canada asserted that the language quoted in note 118, *supra*, required the U.S. Department of Commerce to treat export restraints as financial contributions, one component of countervailable subsidies.

121. In the interest of full disclosure, one of the authors, Cindy Buys, worked on the *Canadian Softwood Lumber* case and the related *U.S.—Measures Treating Export Restraints as Subsidies* case while an attorney with the U.S. Department of Commerce.

122. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, Receiver, 376 U.S. 398, 458 (1964) (White, J., dissenting) (charging majority with ignoring "the historic role which this Court and other American courts have played in applying and maintaining principles of international law"); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 196 (1963) (declining judicial consideration of economic and policy consequences of specific application of anti-trust laws).

123. Application of law to a particular individual or group of individuals also implicates the Bill of Attainder Doctrine. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 656-663 (2d ed., Foundation Press 1988) (orig. date of publication) (discussing Bills of Attainder may be viewed as implementation of separation of powers).

the Executive branch. Both explicitly¹²⁴ and implicitly¹²⁵ the SAA attempts to determine how future executives will execute the URAA. The Constitution gives Congress only one manner in which to effect the implementation of the law, and that is through the law itself.¹²⁶ Congress cannot legally bind the hands of present or future executives through congressional action outside the parameters of Article I, Section 7. Thus, under a traditional separation of powers analysis the elevation of the SAA represents an unconstitutional encroachment by Congress on the Executive branch.

2. *A Modern Separation of Powers Analysis of the SAA*

As a two tier law, the SAA is unconstitutional under the modern separation of powers analysis.¹²⁷ This modern separation of powers analysis begins with Article I, Section 7 and asks whether Congress is attempting to act with the force of law without meeting the constitutional requirements of bicameralism and presentment.¹²⁸ At first blush, the SAA is not as constitutionally suspect as the one-House veto in *Chadha*, because the SAA was initially written by the Executive and was submitted to and approved by both Houses of Con-

124. The introduction to the SAA states that “the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement [is] approved by Congress . . . the interpretations of the [WTO Agreements] included in this Statement carry particular authority.” H.R. REP. NO. 103-826, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4040. This statement also indicates that the Administration in power at the time of the enactment of the URAA was attempting to bind the hands of future executives charged with implementing the statute, something it cannot do. A detailed discussion of that issue is, however, the subject of another article.

125. The elevation of the SAA has been applied by the courts to mean that the SAA controls interpretation of the URAA. On more than one occasion the courts have invalidated or upheld agency interpretations of the URAA based on language in the SAA rather than the text of the URAA itself. *See e.g.*, *RHP Bearings v. United States*, 288 F.3d 1334, 1345–46 (Fed. Cir. 2002); *SKF USA v. United States*, 263 F.3d 1369, 1373–74 (Fed. Cir. 2001); *Mitsubishi Materials Corp. v. United States*, 820 F. Supp. 608, 615 (Ct. Int’l Trade 1993).

126. Usually this means writing a very specific statute that limits the manner in which the Executive can implement the statute. If, on the other hand, Congress writes a vague or ambiguous piece of legislation, it is in effect delegating authority to the Executive to determine the specifics of the law. This principle was clearly announced in the seminal case *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), where the Court stated, “[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” *Id.* at 843–44.

127. *See supra* Part IV.A.2.

128. *See Manning, supra* note 103 (detailing Article I, Section 7 considerations).

gress.¹²⁹ It appears to have been created in some manner akin to bicameralism and presentment.¹³⁰ One could argue that its elevation to controlling legislative history is proper.

Upon closer inspection, however, the SAA cannot withstand constitutional scrutiny. The elevation of the SAA is a concrete example of an unconstitutional two tier law.¹³¹ The “law” is the URAA. But, when an ambiguity is identified, the law becomes the URAA plus whatever is in the SAA. In other words, unless an ambiguity is identified in the text of the statute, the SAA is irrelevant to a statutory interpretation analysis, even if the SAA directly conflicts with the text of the statute. Thus, Congress has created a mechanism whereby it can dictate the law in two steps. As discussed above,¹³² the elevation of the SAA must be invalidated by the courts because, as a two tier law, it enables Congress to act in a politically less accountable manner.

3. *The SAA and the Legislative History Debate*

Because the SAA does not appear in the U.S. Code as a normal legislative enactment would, Congress is even less accountable for it.¹³³ Most of the SAA was not published anywhere until it appeared in the U.S. Code and Congressional Administrative News, after enactment of the URAA.¹³⁴ Although the language of the SAA was initially drafted by the Clinton Administration, it was not published in the *Federal Register* for notice and comment purposes, as an administrative agency regulation normally would be. As a result, public no-

129. See 19 U.S.C. § 3511(a)(2) (2000).

130. It is unambiguous that the SAA was not presented to the President to be signed into law. The SAA was presented to the President only as an expression of how Congress intended the URAA to be interpreted when a question arose, but not as the law, *per se*. See 19 U.S.C. § 3512(d) (2000). This suggests that the textual basis for the unconstitutionality of two tier laws may be grounded in the Presentment Clause. In other words, the Constitution requires that Congress present all its legislative acts with the force of law to the President for ratification.

131. See *supra* Part IV.A.2.

132. See *id*.

133. The SAA was published as an attachment to the House Report on the URAA in the U.S. Code and Congressional Administrative News, 1994 U.S.C.C.A.N. 3773.

134. The only indication the authors could find that the SAA may have been made public prior to its adoption was a draft version of the SAA that was attached to a House Subcommittee report in June 1994. See Subcomm. on Trade, House Comm. on Ways and Means, 103d Cong., *Draft Statement of Administrative Action for the Agreement Establishing the World Trade Organization, Uruguay Round Trade Agreements Draft Implementing Proposal* (June 29, 1994). However, that draft consisted of approximately thirty pages of text; whereas the final version of the SAA amounted to closer to 400 pages of text. Thus, it does not appear that the vast majority of the provisions of the SAA were made public prior to its approval by Congress.

tice and opportunity for comment were limited.¹³⁵ Despite this lack of publicity, knowledgeable interest groups were able to influence the drafting of the SAA to obtain favorable language that was not present in the text of the WTO Agreements or the URAA.¹³⁶ This legislative process demonstrates the dangers inherent in allowing Congress to act through any procedures other than those set forth in Article I.¹³⁷

In the last few years, an academic debate has raged regarding the constitutionality of relying on legislative history and interpretive directions in statutes. In particular, this debate analyzes the requirements of Article I, Section 7, the separation of powers doctrine and political accountability.¹³⁸ One scholar, John Manning, argues that the courts should not rely on legislative history when interpreting statutes because doing so allows Congress to define the law outside Article I, Section 7.¹³⁹ Manning recognizes that bicameralism and

135. Because the provisions of the SAA were not set forth in the bill itself, it is not at all clear that the members of Congress were familiar with the entirety of the SAA, thus undermining the argument that it was voted on by Congress. While we may hold legislators responsible for the statutes they vote on, given the number and complexity of bills before Congress, it is a fiction to assume they are familiar with every provision of every bill. This fiction deepens when one assumes that members of Congress are familiar with all of the underlying documents. Like many types of legislative history, the SAA was not drafted by and probably was not read by most of Congress. See *Hirschey v. Fed. Energy Regulatory Comm'n*, 777 F.2d 1, 7–8 n.1 (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.”).

136. See *supra* Part II.C. It is ironic that the creation of the fast track process was intended in part to reduce interest group influence, yet interest groups managed to reenter the process through the negotiation and drafting of the SAA. In fact, certain groups specifically requested that Congress insert language in the SAA to clarify ambiguous statutory provisions. See, e.g., *Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Comm. on Finance*, 103d Cong. 207 (1994) (statement of Gordon L. Jones, President, Stone Container International Corp.) (“[T]he U.S. forest products industry believes it is important that the Congress and the Administration limit [a URAA provision’s] applicability by definition in the [SAA] . . .”).

137. See Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261, 277 (1941) (setting forth arguments why statutory incorporation by reference may not be good idea). While the Read article discusses the problems that arise as a result of incorporation of one statute into another by reference, the “evils” he describes are equally applicable to the incorporation of legislative history by reference.

138. See, e.g., Romero, *supra* note 116; Manning, *supra* note 103; Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457 (2000); John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529 (2000); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

139. See Manning, *supra* note 103, at 721–22.

presentment are cumbersome and difficult for Congress because of, *inter alia*, the political accountability that these procedures ensure.¹⁴⁰ However, Manning argues forcefully that the founding fathers chose this Article I, Section 7 process because the cumbersomeness encourages the law to be deliberated fully and political accountability helps to ensure that the law represents the will of the people.¹⁴¹ As Manning explains,

The short of it is that if Congress can convey its meaning through judicially designated forms of legislative history (rather than statutory text), ordinary legislators may be spared a potentially uncomfortable vote on the (unenacted) details of statutory meaning. This possibility creates an opportunity to separate responsibility from result, defeating the principle of accountability that lies at the heart of our representative government.¹⁴²

Manning concludes that it is the courts' responsibility to give effect only to acts of Congress passed through Article I, Section 7 procedures (i.e., the text of the statute duly enacted into law). If Congress is allowed a short-handed, less cumbersome, and less politically accountable manner for legislating (i.e., legislative history), Congress will eschew constitutionally mandated procedures and undermine the constitutional norms that Article I, Section 7 was intended to protect.¹⁴³

Another scholar, Jonathon Siegel, also recognizes the nexus between obfuscation and uncertainty in the law and the separation of powers doctrine.¹⁴⁴ Siegel argues that grants of power that allow a party to elaborate on a statute after enactment represent a delegation of law-making authority from Congress to that party.¹⁴⁵ If the delegation is to Congress itself, Siegel argues that it must conform with the constitutional requirements of bicameralism and presentment.¹⁴⁶ Siegel terms this post-enactment authority "dynamic incorporation by reference." He contrasts dynamic incorporation with incorporation of text already established at the time of enactment, which he terms "static

140. *See id.* at 721.

141. *See id.* at 722–25.

142. *Id.* at 721.

143. *See id.* at 725 ("[L]egislative self-delegation provides too great a temptation to members of a body that, by emphatic constitutional design, is supposed to work slowly and expensively.").

144. *See* Siegel, *supra* note 138, at 1488–89 (arguing that "static incorporation by reference . . . may permit the passage of statutes that could not have garnered majority support if the effects of the incorporated texts were fully understood . . .").

145. *Id.* at 1487.

146. *Id.* at 1489.

incorporation by reference.”¹⁴⁷ While the former implicates non-delegation principles, Siegel argues that the latter does not because, as the extrinsic source is fixed, incorporation by reference represents Congress’ approval of the extrinsic source as fully as if the incorporated text had been written out verbatim in the act finally passed.¹⁴⁸ Thus, for Siegel, one of the principal distinctions between static and dynamic interpretation is that under the former the law is fixed while under the latter the law is uncertain.

Interestingly, despite some agreement with the modern separation of powers analysis described in this article, the theories set forth by Siegel and Manning would likely conclude that the elevation of the SAA is *constitutional*. For instance, because the SAA is fixed before enactment, Siegel would likely find that it does not represent an improper delegation of power and, therefore, does not implicate separation of powers concerns.¹⁴⁹ In short, Siegel would probably consider approval of the SAA identical to Congress simply writing the SAA into the text of the statute.

However, this is exactly what Congress did not do, and herein lies the potential error in Siegel’s theory of the constitutionality of congressional mandates to use legislative history. Approval of legislative history or elevation of the SAA is utterly distinct from Congress adding the text of these extrinsic sources to the law; legislative history and the SAA become relevant only when an ambiguity in the law is identified. In other words, Congress did not create one law, as Siegel suggests¹⁵⁰—Congress created a two tier law, with the second “tier,” the SAA, becoming the law only under certain circumstances.¹⁵¹

Manning, similarly, would likely find the elevated SAA constitutional. Under Manning’s analysis, the constitutionally onerous behav-

147. When considering Siegel’s premise that incorporation of established text is “static” and therefore does not constitute Congressional delegation, it is useful to consider that even seemingly concrete terms can have many different meanings depending on what source you use to define them. See *Johnson v. United States* 529 U.S. 694, 719 (2000) (Scalia, J., dissenting) (arguing over correct dictionary definition to apply when interpreting statute and citing to more than eight dictionaries).

148. See Siegel, *supra* note 138, at 1488 (citing *Santee Mills v. Query*, 115 S.E. 202, 205 (S.C. 1922)) (“[I]n the case of static incorporation, the incorporating legislature adopts the text as its own and no delegation takes place.”); see also, Rosenkranz, *supra* note 138, at 2136–39 (discussing Siegel’s theory).

149. See Siegel *supra* note 138, at 1493 (“So long as the extrastatutory text is fixed before the statute is adopted, Congress is following the procedures that satisfy even the especially stringent rule against congressional self-delegation.”).

150. *Id.* at 1494–95.

151. The SAA becomes law only when an ambiguity in the URAA is identified. For policy arguments that also undermine Siegel’s position, see Read, *supra* note 137, at 277 (discussing two tier laws).

ior is Congress' delegation of law-making power to some subunit within Congress.¹⁵² Because the SAA was approved by both Houses of Congress, Manning might not see the SAA as an easy example of Congress acting in the politically less accountable manner, in violation of Article I, Section 7. Such a conclusion, however, would fail to recognize that Article I, Section 7 ensures political accountability in another key way: it ensures that Congress cannot create a two tier law. By requiring all congressional action to be conducted through the single, finely wrought, and exhaustively considered procedure, Article I, Section 7 ensures that all legislative action by Congress is given the same status.¹⁵³ Thus, the effect of the congressional actions is more certain. The elevation of the SAA is unconstitutional because it interjects the kind of obfuscation in the law that makes Congress less politically accountable.

A third scholar, Rosenkranz, has suggested that it is within Congress' power to select the tools for interpreting federal statutes and that Congress ought to exercise this power by enacting "Federal Rules of Statutory Interpretation" akin to the Federal Rules of Evidence.¹⁵⁴ In Rosenkranz's view, unless the Constitution requires a specific rule of statutory interpretation, Congress is free to mandate rules of statutory interpretation as such rules are necessary and proper for the execution of legislative power.¹⁵⁵ Despite this general conclusion, Rosenkranz admits that such rules may be improper if they violate principles of separation of powers—they may evade the formal law-making requirements of Article I, Sections 1 and 7, they may impermissibly bind future Congresses, or they may violate principles of non-delegation.¹⁵⁶ For example, he argues that "[d]ynamic interpretive statutes that delegate [authority] to Congress or a subset evade Article I, Section 7, and implicate . . . the non-delegation doctrine."¹⁵⁷ On the contrary, he sees no constitutional infirmity with statutes that

152. See Manning, *supra* note 103, at 717 (permitting delegation to subunit "would dangerously undermine the premise, enforced in *Chadha*, that Congress may set policy only through bicameralism and presentment").

153. See *supra* Part IV.A.2.

154. See Rosenkranz, *supra* note 138, at 2089. Although somewhat analogous, the SAA is different from Rosenkranz's proposed Federal Rules of Statutory Interpretation because it is not an example of broadly worded rules of interpretation but instead is an example of a congressional act that dictates to the courts how they must interpret a particular statute, the URAA. The SAA is also much more specific than broad interpretative guidelines in so far as it sets forth the Administration's intentions with respect to the application of the new statute.

155. *Id.* at 2102.

156. *Id.* at 2103.

157. *Id.* at 2139.

explicitly incorporate their own legislative history.¹⁵⁸ Presumably, then, Rosenkranz would find the URAA's elevation of the SAA to be constitutional.

In his constitutional analysis, Rosenkranz fails to consider that mandating the use of legislative history to resolve statutory ambiguities creates a two tier law that allows Congress to avoid political accountability. Thus, while some congressionally-created rules of statutory interpretation that are extremely general in their application, perhaps, may be permissible, we would disagree with Rosenkranz that a statute mandating the use of legislative history in interpreting a particular statute such as the URAA is not.

In conclusion, the separation of powers analysis employed by the courts has necessarily evolved with the rise of the administrative state. The courts no longer focus solely on whether the congressional action at issue is legislative, executive, or judicial in nature. Rather, we suggest that the underlying norm of political accountability should be central to any modern separation of powers analysis. Under this modern analysis, congressional attempts to act without meeting bicameralism and presentment, including two tier laws, must be invalidated because they are by definition less politically accountable. In fact, with the exception of those specific actions enumerated in Article I, Congress must always exercise its power in accordance with the requirements of bicameralism and presentment outlined in Article I, Section 7. Because the elevation of the SAA represents a two tier law, it is an attempt by Congress to act in a politically less accountable manner, which falls outside the procedures outlined in Article I, Section 7. As such, elevation of the SAA must be found unconstitutional.

V.

COURTS' USE OF THE SAA IN STATUTORY INTERPRETATION

Since the creation of the SAA and passage of the URAA into law, courts have often included the SAA in their interpretative analyses of the URAA. By doing so, courts have recognized that, consistent with the URAA, the SAA should be given some weight in their analyses.¹⁵⁹ However, these courts have struggled to comply with the congressional mandate to give the SAA "authoritative" weight. This section discusses how courts have used the SAA in statutory interpretation to date.

158. *Id.*

159. *See* cases cited *infra* in note 174.

A. *How the SAA Fits Into the Debate Over the
Use of Extrinsic Sources*

One way in which a court might approach the SAA is to treat it as an extrinsic source that could be consulted to help define an ambiguous term contained within the URAA. In light of this possibility, it may be helpful to consider how the SAA fits into the debate over the use of extrinsic sources generally.

Extrinsic sources have been defined as any source to which a court might turn in ascertaining the meaning of a statute, apart from the text of the statute itself.¹⁶⁰ Extrinsic sources may include the common law, the legislative background of a statute, dictionaries, and other statutes and their interpretation.¹⁶¹ Of course, under well-established statutory interpretation rules, a court will only turn to extrinsic sources to aid in statutory interpretation when there is some ambiguity in the text of a statute.¹⁶² In such cases, extrinsic sources can assist courts to ascertain the intent of the drafters.¹⁶³

Some scholars argue that some or even all legislative history should *not* be consulted to clarify the meaning of an ambiguous statutory term.¹⁶⁴ These scholars point to several facts that make suspect

160. *E.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* 920 (3d ed. 2001).

161. *Id.* The focus of this section is on legislative history and how the SAA compares with more traditional forms of legislative history.

162. *See, e.g.*, *W. Va. Univ. Hosp. v. Casey*, 499 U.S. 83, 98–99 (1991); *see also* ESKRIDGE ET AL., *supra* note 160, at 920 (“The traditional rule was that extrinsic aids should not be considered if the statute had a ‘plain meaning.’”). This same principle holds true for the interpretation of international agreements such as the WTO agreements. *See Vienna Convention on the Law of Treaties*, U.N. Conference on the Law of Treaties, 1st and 2nd Sess., at 239, U.N. Doc. A/CONF.39/27 (1971) (setting standards for interpretation of treaty language); *see also* *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (reviewing proper method of interpreting treaty language).

163. *United States v. Stuart*, 489 U.S. 353, 366 (1989) (*citing Sumitomo*, 457 U.S. at 185). It has been said that “[i]n the interpretation of statutes, the function of the courts . . . is to construe the language so as to give effect to the intent of Congress.” *United States v. Am. Trucking Ass’n, Inc.*, 310 U.S. 534, 542 (1940). For an excellent discussion of the use of extrinsic sources by courts and the hierarchy accorded to different types of legislative history by courts, see George A. 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 (1990).

164. This scholarly view is often referred to as “new textualism.” One well-known proponent of this view is Justice Scalia. *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519–20 (1993) (Scalia, J., concurring) (“The greatest defect of legislative history is its illegitimacy.”); *Stuart*, 489 U.S. at 373–74 (Scalia, J., concurring) (“Using [legislative history] is rather like determining the meaning of a bilateral contract between two corporations on the basis of what the board of directors of one of them thought it

the use of legislative history as an interpretive guide.¹⁶⁵ First, legislative history can be almost infinitely open-ended.¹⁶⁶ In other words, how far back is it appropriate to look when considering legislative history? Should one consider only records and debates relating to the present version of the bill, or should one include materials relating to previous versions of the current bill or other related bills? Second, it is virtually impossible to discern the “intent” of Congress when there are 535 members of Congress, all of whom have different motivations and goals.¹⁶⁷ Furthermore, legislative history may consist of statements made by one or a few legislators that do not accurately reflect the views of the whole Congress or even of a majority. There also may be conflicting statements in the legislative history, which may render the legislative history useless in fixing a meaning to a vague statutory term.¹⁶⁸ Legislators also may insert statements into the leg-

meant when authorizing the chief executive officer to conclude it.”). Rather than relying on legislative history to illuminate the meaning of an ambiguous statutory term, Justice Scalia would emphasize the context and ordinary usage of the term and its compatibility with other laws. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

165. While this article raises concerns relating to the use of legislative history in statutory interpretation, the constitutional analysis described herein would not necessarily find the use of legislative history unconstitutional in all circumstances. The problem with two tier laws is not that they rely on legislative history *per se* but rather that they allow for the law to be expressed in two steps. Two tier laws are unconstitutional whether or not the second tier is found in legislative history.

166. *See Conroy*, 507 U.S. at 520 (Scalia, J., concurring) (“One of the problems with legislative history is that it is inherently open ended.”).

167. *See id.* at 519, 520 n.2 (defining use of congressional intent); *see also Costello*, *supra* note 163, at 61–62 (describing some problems with using legislative history in statutory interpretation). Committee reports are generally considered more reliable and authoritative than statements by a single legislator because they represent a collective statement by the subgroup that has probably given the most thought to the proposed legislation. *See* ESKRIDGE ET AL., *supra* note 160, at 947; *see also Costello*, *supra* note 163, at 41 (“[C]ommittee report explanations are considered more persuasive and reliable than statements made during floor debates or hearings on a bill.”). However, there are detractors of Committee reports as well. *See, e.g., Wallace v. Christensen*, 802 F.2d 1539, 1559–60 (9th Cir. 1986) (Kozinski, J., concurring) (citing several facts that make Committee reports potentially unreliable); *see also Costello*, *supra* note 163, at 66–68 (“[T]he level of committee staff involvement in committee reports, coupled with the lack of a vote on report language, does counsel caution with respect to detailed report language not closely tied to bill language . . .”).

168. Alternatively, the person attempting to interpret the statute may choose only those statements in the legislative history that are supportive of the interpretation that person wishes to adopt, in which case the use of legislative history becomes biased. *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting late Judge Harold Leventhal, who said that citing legislative history is like “looking over a crowd and picking out your friends”).

islative history with the intent of influencing courts at a later date.¹⁶⁹ As a result of these concerns, courts have shown increasing caution when using legislative history to shed light on the meaning of an ambiguous statutory term.¹⁷⁰

While the SAA is clearly an extrinsic source, whether it may be classified as legislative history depends on how one defines the term. On the one hand, the SAA may not be *legislative* history because it was primarily written by the executive branch, not the legislative branch. In fact, its very name tells us that it is a statement of *administrative* action proposed by the executive to implement changes in the law necessitated by new international trade agreements.¹⁷¹

If, on the other hand, one views legislative history more broadly to include any materials that constitute part of the “institutional progress of a bill to enactment,”¹⁷² analyses of bills by the executive branch may be viewed as part of the legislative history.¹⁷³ With respect to the SAA, while it was primarily drafted within the executive branch, its language was negotiated with Congress and it was submitted to Congress for approval, thus becoming part of the legislative process.¹⁷⁴

169. See *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) (suggesting purpose of legislative history was “to influence judicial construction”).

170. *Id.*; see also *In re Sinclair*, 870 F.2d 1340, 1341–44 (7th Cir. 1989) (describing “skepticism about using legislative history to find legislative intent”); *F.E.C. v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) (“[W]e pause to note that the legislative history in this case both confirms our interpretation and at the same time illustrates why the Supreme Court has [urged caution when going beyond statutory language].”).

171. However, as explored in more detail in Part VI, *infra*, the SAA may actually be more reliable than other types of legislative history, such as the statements of one or a few legislators, because the language of the SAA is negotiated between the Executive and Legislative branches during the drafting process. The final version reflects the views of two branches of government. In addition, the SAA is submitted to the Congress along with the bill and is expressly “approved” by Congress. For these reasons, the SAA is entitled to deference, even if it is not legislative history *per se*.

172. ESKRIDGE ET AL., *supra* note 160, at 937.

173. *Id.* at 632–33. OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND PROCESS 438 (2d ed. 1993) (listing executive branch analyses as sources of legislative history). Even statements by lobbyists contained within the legislative history have been given interpretational weight by some courts. *E.g.*, *Costello*, *supra* note 163, at 59, (citing *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 236 (1980)).

174. Courts have routinely treated the SAA as a type of legislative history and have relied on it to illuminate the meaning of the statute. See, e.g., *RHP Bearings v. United States*, 288 F.3d 1334, 1345–46 n.7 (Fed. Cir. 2002) (noting “importance of the SAA in interpreting the URAA” by virtue of 19 U.S.C. § 3512(d)); *Comm. of Domestic Steel Wire Rope and Specialty Cable Mfrs. v. United States*, 201 F. Supp. 2d 1287, 1301 (Ct. Int’l Trade 2002); *Mitsubishi Materials Corp. v. United States*, 820 F. Supp. 608, 615 (Ct. Int’l Trade 1993). But see *SKF USA, Inc. v. United States*, 263 F.3d 1369, 1373 n.3 (Fed. Cir. 2001) (describing SAA as “more than mere legislative history” as result of 19 U.S.C. § 3512(d)).

B. Courts' Treatment of Two tier Laws

By elevating the authoritative weight of the SAA, section 3512(d) of the URAA attempts to raise the SAA above the myriad tools that a court might employ when interpreting a statute, including basic canons of statutory interpretation. This elevation is extremely rare. The authors are aware of only one other example of a statutory regime that is analogous—the Civil Rights Act of 1991. This section compares and contrasts the United States Third Circuit Court of Appeals' (Third Circuit) treatment of the regime created by the 1991 Civil Rights Act with the United States Court of Appeals for the Federal Circuit's (Federal Circuit) handling of the URAA and SAA. Neither the Third Circuit nor the Federal Circuit directly addressed the separation of powers concerns that these regimes raise. However, at least one court, the Federal Circuit, reached the correct result.

1. The Civil Rights Act of 1991

In the Congressional Findings accompanying the Civil Rights Act of 1991, Congress expressed its dissatisfaction with the decision of the Supreme Court in *Wards Cove Packing*.¹⁷⁵ It found that “[n]o statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S. 15,276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act”¹⁷⁶ That interpretive memorandum expressed Congress's approval of concepts enunciated by the Supreme Court in *Griggs*¹⁷⁷ and other cases prior to *Wards Cove*.¹⁷⁸ In enacting the Civil Rights Act of 1991, Congress prohibited courts from relying on legislative history other than this particular interpretive memorandum. Much like the elevated SAA, Congress attempted to limit how a court interpreting the Civil Rights Act of 1991 could use legislative history.¹⁷⁹

In *Lanning v. Southeastern Pennsylvania Transportation Authority*,¹⁸⁰ the Third Circuit followed the interpretive memorandum with

175. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (dealing with proper application of “business necessity” test for particular job requirement).

176. 42 U.S.C. § 1981 (2002).

177. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

178. See 137 CONG. REC. 28,680 (1991).

179. The Civil Rights Act of 1991 is, however, distinct from the SAA in so far as Congress did not *require* courts to use the interpretive memorandum as an authoritative guide in statutory interpretation. Also the Civil Rights Act of 1991 regime is different from the SAA regime in that the memorandum deals with only one issue—the meaning of “business necessity”—and, thus, is much narrower in scope than the SAA, which deals with hundreds of issues.

180. 181 F.3d 478, 487–88 (3d Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000).

little discussion of the merits of what Congress had done. It is unclear in the decision whether the Third Circuit followed the congressional mandate to use only the interpretive memorandum or whether it also examined other legislative history. If, in fact, the Third Circuit used only the interpretative memorandum because of the regime established in the 1991 Civil Rights Act, the Third Circuit erred. Like the elevated URAA/SAA regime, the 1991 Civil Rights Act regime represents a congressional attempt to create a two tier law; Congress attempted to make the interpretative memorandum binding on courts¹⁸¹ only when an ambiguity in the statute is identified. Two tier laws undermine political accountability and represent congressional attempts to act with the force of law without meeting bicameralism and presentment.¹⁸² The Third Circuit should have made clear that even if it was considering the interpretative memorandum, its analysis was not limited to that legislative history, because to so bind the courts would be unconstitutional.

2. *The URAA/SAA Regime*

In *AK Steel Corp. v. United States*,¹⁸³ the Federal Circuit grappled for the first time with the SAA regime established in the URAA. In this case the Federal Circuit had to decide whether the United States Department of Commerce (Commerce) was using an appropriate test to determine antidumping duty rates. Prior to the enactment of the URAA, Commerce used a three-part test, known as the PQ Test, also referred to as the Export Price/Constructed Export Price Test or EP/CEP Test, to determine whether a particular sale was properly classified as an export price sale or a constructed export price sale.¹⁸⁴ The statutory definition of those terms changed with the enactment of the URAA.¹⁸⁵ Despite these changes to the statutory language, however, the SAA stated that “[n]otwithstanding this change in terminology, no change is intended in the circumstances under which export

181. One could argue that the Civil Rights Act of 1991 is not as egregious an example of a two tier law as the elevated SAA because, unlike the elevated SAA, the court is not required to turn to the interpretative memorandum. Under the Civil Rights Act of 1991 the only mandate is that if a court turns to legislative history, it must turn only to the interpretative memorandum. It is less clear whether Congress was binding the judiciary and acting with the force of law.

182. See *supra* Part IV.B.3.

183. *AK Steel Corp. v. United States*, 226 F.3d 1361 (Fed. Cir. 2000) [hereinafter *AK Steel I*]. One of the authors, William Isasi, was an attorney assigned to this case as part of his work at Commerce.

184. *Id.* at 1368.

185. *Id.*

price . . . versus constructed export price . . . are used.”¹⁸⁶ The Federal Circuit initially ignored this language in the SAA and found that the three-part EP/CEP Test employed by Commerce was contrary to the statute, whose language had been modified by the URAA.¹⁸⁷ Since the statutory language had changed, the court held that Commerce must change its EP/CEP Test as well.

Upon receiving this ruling, certain parties requested a rehearing and brought to the attention of the panel, for the first time, the provision of the URAA that attempts to make the SAA authoritative.¹⁸⁸ The panel took the unusual step of granting the rehearing specifically because it was grappling with how the SAA should be used to interpret export and constructed export price. In its final decision, the panel of judges stated:

When confronted with a change in statutory language, we would normally assume Congress intended to effect some change in the meaning of the statute. Here, however, the SAA prevents us from making such an assumption and we have revised our opinion primarily to address the authoritative weight given to the SAA in the statute.¹⁸⁹

The panel was faced with a difficult choice. If it chose to allow the SAA to control its interpretation of the URAA, as section 3512(d) of the URAA demanded, the panel would have had to abandon a basic canon of statutory interpretation and rule that the change in statutory language was without significance.

In resolving this conflict, the court first determined that Commerce’s EP/CEP Test violated the new statutory language.¹⁹⁰ The court then considered the language of the SAA that indicated that Congress did not intend for Commerce to change its application of the EP/CEP Test.¹⁹¹ Appellees cited this language as evidence of congressional intent to endorse the long-standing EP/CEP Test as a proper interpretation of the statutory language. They argued that Congress is presumed to know the administrative interpretation of a statute when it adopts a new law incorporating the prior law.¹⁹² The Panel disagreed, stating that the EP/CEP Test was not consistent with the prior statu-

186. H.R. REP. NO. 103-316, vol. 1 at 822–23 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4163.

187. *AK Steel Corp. v. United States*, 203 F.3d 1330, 1337–38 (Fed. Cir. 2000).

188. *AK Steel I*, 226 F.3d at 1368.

189. *Id.* at 1368–69 (citations omitted).

190. *Id.* at 1372. The court indicated that, normally, its inquiry would stop there.

191. H.R. REP. NO. 103-316, vol. 1 at 822 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4163.

192. *See AK Steel I*, 226 F.3d at 1372–74.

tory language and had never been endorsed by the Federal Circuit.¹⁹³ Moreover, the court stated, “Congress is presumed to know the administrative or judicial interpretation given a statute when it adopts a new law incorporating the prior law Here we cannot ignore the fact that Congress indeed changed the language of the statute”¹⁹⁴ Despite the language of the SAA, the court simply could not believe that Congress intended to preserve the former practice in light of the changes to the statutory language itself.¹⁹⁵

The Panel in *AK Steel* correctly decided to interpret the URAA based primarily on the text of the statute rather than the SAA. To do otherwise would have meant abandoning normal rules of statutory interpretation; the court would have had to disregard the plain meaning of the statute as well as the meaning normally associated with a change in statutory language. *AK Steel* illustrates that Congress improperly infringed upon the Judiciary when it mandated that the courts interpret the URAA by means of the SAA. Whether to use an extrinsic source, which source to use, and even whether to use a canon of statutory interpretation are all determinations that a court must make as the interpreter of the law. To the extent that the SAA and section 3512(d) of the URAA are an attempt by Congress to elevate the SAA and limit how and when courts use various tools of statutory construction, they are unconstitutional and should be invalidated by the courts.

VI.

HOW SHOULD STATEMENTS OF ADMINISTRATIVE ACTION BE USED IN A STATUTORY INTERPRETATION ANALYSIS?

Notwithstanding the constitutional infirmities, a statement of administrative action remains a very politically-useful tool. For example, the URAA’s SAA was drafted by the Executive to assist Congress in understanding complex trade agreements that Congress was being asked to implement into U.S. law.¹⁹⁶ A statement of administrative action also can give Congress some comfort, at the time of enactment of the implementing legislation, about how the current administration views the meaning of certain statutory terms. One could argue with great force that the URAA’s SAA represents congressional and Exec-

193. *Id.* at 1373.

194. *Id.* at 1374.

195. The Court of International Trade faced a similar conflict in *Usinor Industeel, S.A. v. United States*, 2002 WL 818240 (Ct. Int’l Trade). The court rightly stated that “[t]he SAA cannot change the words of the statute.” *Id.* at 6. However, the court found a way to reconcile the statute and the SAA to avoid the conflict.

196. *See supra* Part II.C.

utive agreement about the meaning of a particular statutory provision, and, because the two branches of government responsible for foreign commerce and foreign affairs are in accord, that agreement is entitled to great deference from the courts.

A statement of administrative action must also be viewed, however, with great caution. Its political usefulness cannot provide a basis upon which to circumvent the constitutionally mandated procedures of bicameralism and presentment. Like the one-House veto in *Chadha*, the SAA

doubtless has been in many respects a convenient shortcut; the 'sharing' with the Executive by Congress of its authority . . . in this manner is, on its face, an appealing compromise. [B]ut it is crystal clear from the records of the [Constitutional] Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency There is unmistakable expression of a determination that the 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.¹⁹⁷

Moreover, the existence of the SAA begs the question: why did Congress not simply include details of the SAA in the URAA? One reason might be because there are details in the SAA that, despite congressional "approval," would have prevented passage of the URAA into law.¹⁹⁸ It is common knowledge among those who participated in the creation of the SAA that many of the details included in the SAA were designed to appease interest groups.¹⁹⁹ It may have been difficult to insert these details into the URAA due, in part, to the fast track procedures in place at the time. In addition, some of the provisions of the SAA may not have been acceptable to the United States' trading partners. Under the notice requirements of the WTO Agreements,²⁰⁰ the URAA, but not the SAA, was subject to intense

197. *Immigration and Nationalization Serv. v. Chadha*, 462 U.S. 919, 958–59 (1983).

198. If, in fact, this is one reason these details were not included in the URAA, it suggests that despite the seemingly broad "approval" for the SAA, it did not really represent the will of Congress.

199. See *supra* note 136.

200. See, e.g., *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, arts. 18.4 and 18.5; *Agreement on Subsidies and Countervailing Measures*, art. 32.6, available at <http://www.wto.org> (last visited Oct. 21,

scrutiny by the other signatories to the WTO Agreements. Thus, it may be more likely that the SAA contains interpretations of the URAA that conflict with the WTO Agreements. Any of these explanations should dissuade a court from attaching too much weight to the SAA.

In addition, as discussed above, under either a traditional or modern separation of powers analysis, it is clear that the separation of powers doctrine mandates that the courts alone decide whether or not to use the SAA as a tool of statutory interpretation in a particular case or controversy.²⁰¹ Most importantly, under the modern analysis identified in this article, the elevated SAA fails because the provision in the URAA that attempts to elevate the SAA is an example of a two tier law. Congressional attempts to create two tier laws are unconstitutional because they obfuscate congressional action, thereby insulating that action from political accountability.²⁰² As such, the provision in the URAA that attempts to elevate the SAA²⁰³ should be invalidated by the courts.

The SAA regime also fails constitutional scrutiny because the regime may prevent courts from employing their traditional tools of statutory interpretation. Whether those tools are canons of statutory interpretation, the use of legislative history, dictionary definitions, or rules of grammar and syntax, the courts, and the courts alone, should decide how to go about the business of interpreting the law. To allow Congress to control this interpretive exercise is to allow Congress to exercise powers without meeting the constitutionally mandated procedures of bicameralism and presentment. Such an exercise of power is insupportable in our system of separated powers.

Although courts should approach the SAA cautiously, they need not wholly avoid the SAA in statutory interpretation. To the extent that the courts find that the SAA represents Congress's and the Executive's intent concerning implementation of the URAA at a particular moment (i.e., at the time of enactment of the URAA and accession to the WTO), and that intent is useful in interpreting the URAA, courts should employ the SAA.²⁰⁴ The courts must be careful, however, to

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201. See *supra* Part IV.B.

202. See *supra* Part IV.B.2.

203. 19 U.S.C. § 3512(d) (2002).

204. As noted in note 52, *supra*, prior statements of administrative action also were "approved" by Congress and there is no constitutional infirmity with continuing Congressional approval of future statements of administrative action. Under the prior statutory scheme, when confronted with an ambiguous statutory term, courts weighed the

prevent the SAA from binding the hands of present and future executives. With narrow exceptions, the Constitution allows Congress to bind the Executive only through the law itself.²⁰⁵ If Congress wants to limit the implementation of the URAA, it must pass a more detailed statute, instead of placing details in an extrinsic source such as the SAA. In the absence of such detail, the Executive is free to choose any reasonable interpretation of the text of the URAA, even if such interpretation deviates from the SAA.

VII.

CONCLUSION

When Congress created the fast track procedure now known as TPA for international trade agreements, it was attempting to accomplish several goals. Primarily, Congress wanted to give the President the negotiating authority he needed to be a credible partner at the negotiating table while retaining a supervisory role for Congress. Congress also wanted to minimize special interest group influence and to speed up the process of implementation of international trade agreements. Some of those goals were undoubtedly accomplished through the fast track procedures used by Congress and the President in the past. However, with the passage of the URAA, Congress went a step further than it ever had before in attempting to assert legislative control over the executive and judicial processes. It attempted to create something akin to binding legislation through procedures not enumerated in the Constitution. In so doing, Congress attempted to create a two tier law. Such a law represents a serious aggrandizement of congressional power because it allows Congress to exercise power while avoiding political accountability. The courts must invalidate this politically insulated legislative action in order to protect the proper balance of power between the branches of government. In the future, when Congress wishes to limit how the judicial or executive branches interpret a law, it must be careful to express these limitations through the constitutionally mandated procedures of bicameralism and presentment.

statement of administrative action along with other legislative history in attempting to determine Congressional intent. *See, e.g., Texas Crushed Stone Co. v. United States*, 35 F.3d 1535, 1540–41 (Fed. Cir. 1994).

205. As discussed fully at footnote 86, *infra*, Congress may act only through its Article I, Section 7 legislative powers with limited narrow exceptions.