
Kristy L. Carroll
COMMENT

WHOSE STATUTE IS IT ANYWAY?: WHY AND HOW COURTS SHOULD USE PRESIDENTIAL SIGNING STATEMENTS WHEN INTERPRETING FEDERAL STATUTES

Fifty years ago, Justice Felix Frankfurter asserted confidently that “no one will gainsay that the function [of a court] in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.” ¹ This classic formulation of “legislative supremacy,” as the touchstone for statutory interpretation, has a long tradition in American law.² Over the past fifty years, however, the relationship between Congress and the President in developing legislation has become more complex.³ Consequently, Congress has relied increasingly on administrative agencies to formulate national policy.⁴ While the Supreme Court has announced that courts should defer to reasonable interpretations of statutes


². “Legislative supremacy” embodies the concept that in interpreting a statute, a court merely gives effect to the supreme will of the democratically elected legislature. See Edward O. Correia, A Legislative Conception of Legislative Supremacy, 42 CASE W. RES. L. REV. 1129, 1132 (1992); Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 GEO. L.J. 281, 283 (1989) (indicating that legislative supremacy is grounded in the notion that courts must defer to legislatures except when exercising judicial review); see also William N. Eskridge, Jr., Spinning Legislative Supremacy, 78 GEO. L.J. 319, 319-20 (1989) (inquiring as to “how much, if any, policymaking discretion [the legislative supremacy model] leaves for those interpreting and implementing the legislature’s statutes”).

³. See William S. Blatt, The History of Statutory Interpretation: A Study in Form and Substance, 6 CARDOZO L. REV. 799, 802-43 (1985); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405, 415 (1989) (noting that the most prevalent understanding of statutory construction is that “judges are the agents or servants of the legislature”). Indeed, Professor Sunstein notes that this formulation was expressed by Chief Justice Marshall in The Schooner Paulina's Cargo v. United States, 11 U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.) (“In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature.”).

⁴. See infra Part II.B.1.

⁵. See infra Part I.A.2.
by administrative agencies,⁶ which are under presidential control, an unresolved question has arisen with regard to what, if any, deference courts should afford to interpretations of statutes made by the President himself.

Since 1990, the question has been presented to courts more frequently⁷ because Presidents Ronald Reagan, George Bush, and William Clinton have all issued statements interpreting bills they have signed into law.⁸ This practice of aggressively issuing interpretive signing statements departs from what was traditionally a largely ceremonial use of signing statements to congratulate members of Congress for passing legislation of which the President approved or to instruct the executive branch on the legislation's execution.⁹

Prior to the 1980s, Presidents interpreted a law at its signing only in isolated cases.¹⁰ In 1830, in conjunction with a bill appropriating revenue for road building, President Andrew Jackson sent a message to the House of Representatives interpreting the authorization as limited to roadbuilding within the Michigan territory.¹¹ Similarly, in 1842, when President John Tyler signed a bill about which he had constitutional and policy misgivings, he issued a statement expressing his understanding under which the law would be constitutional.¹² To accompany his signing of an 1876 river and harbor appropriations bill, President Ulysses Grant issued a statement declaring that he would not allow expenditures on projects that

---

⁷ See infra Part I.E.2 (discussing cases using presidential signing statements).
⁸ See infra Part I.D (describing and discussing the signing statements of Presidents Reagan, Bush, and Clinton).
⁹ See Frank B. Cross, The Constitutional Legitimacy and Significance of Presidential "Signing Statements," 40 ADMIN. L. REV. 209, 209 (1988) (discussing President Reagan's use of signing statements as being more substantive than the typical "photo session" at the signing of a bill). Signing statements are distinguished from Presidential documents regarding a bill prior to enactment. See Kathryn Marie Dessayer, Note, The First Word: The President's Place in "Legislative History," 89 MICH. L. REV. 399, 403-13 (1990) (arguing that Presidential documents, including messages, proposals, and legislative drafts, are relevant to statutory interpretation because of the President's legislative role).
¹⁰ See Walter Dellinger, Memorandum for Bernard N. Nussbaum, Counsel to the President, 48 ARK. L. REV. 333, 339, 342 (1995) [hereinafter Presidential Signing Statements] (noting that there are isolated examples of interpretive signing statements if one understands an interpretive signing statement to be one that addresses the legal and constitutional questions presented by the legislation).
¹¹ See Cross, supra note 9, at 210. When the House reconvened, it issued a report asserting that Jackson's statement had in effect constituted an item veto. See Louis Fisher, Constitutional Conflicts Between Congress and the President 128 (3rd ed. 1991) [hereinafter Constitutional Conflicts].
¹² See Cross, supra note 9, at 210. In response, the House convened a select committee which issued a report protesting the President's actions. See Fisher, Constitutional Conflicts, supra note 11, at 128.
were not in the national interest, despite the bill's appropriations for local interests. Finally, President Harry Truman, in signing anti-racketeering legislation, defined a term which had not been defined in the legislation.

The Reagan administration transformed this largely ceremonial practice into an overtly political maneuver by using signing statements to present the administration's interpretation of ambiguous or controversial laws. The Bush administration, and thus far the Clinton administration, have continued this practice. In the 1980s, the Reagan administration instituted a policy of routinely issuing interpretive signing statements. Members of that administration defended the use of interpretive signing statements by asserting a need to strengthen presidential control over the vast administrative bureaucracy. In effect, however, signing statements containing agency instructions have at least two audi-

---

13. See Fisher, Constitutional Conflicts, supra note 11, at 129.
14. See Cross, supra note 9, at 211 (quoting 1947 Pub. Papers 243). President Truman insisted that the meaning of "compensable labor" in the act should be "construed liberally," an interpretation arguably in furtherance of President Truman's policy of protecting labor interests. Id. This signing statement was later used by the United States Court of Appeals for the Fourth Circuit in Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658 (4th Cir. 1969), to support its construction of an undefined statutory term. See Wirtz, 413 F.2d at 661; see also infra notes 202-05 and accompanying text (discussing the court's use of President Truman's signing statement).
15. See Jeffrey Toobin, The Last Word: Meese Pickpockets Congress, New Republic, Nov. 3, 1986, at 13-14 (arguing that the courts "ought to reject any notion of giving interpretive weight to presidential signing statements as a flagrant interference in congressional prerogatives"); see also William D. Popkin, Judicial Use of Presidential Legislative History: A Critique, 66 Ind. L.J. 699, 704 (1991) (arguing that President Reagan used "signing statements to resolve politically sensitive issues and to undermine the statutory structure"); infra Part I.D.1 (discussing the Reagan Administration's use of signing statements).
16. See infra Part I.D.2 (discussing the Bush Administration's use of signing statements).
17. See infra Part I.D.3 (discussing the Clinton Administration's use of signing statements).
19. See Michael Herz, Imposing Unified Executive Branch Statutory Interpretation, 15 Cardozo L. Rev. 219, 229 (1993). Professor Herz identifies signing statements as the fourth mechanism Presidents can use to control or influence executive agency statutory interpretation. See id. He identifies three other mechanisms. See id. at 220-29. First are Executive Orders requiring Office of Management and Budget (OMB) review of proposed rules and policy documents. See id. at 221-22. President Reagan's Executive Order 12,291 requiring OMB review was adopted nearly verbatim by President Clinton as Executive Order 12,866. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601 (1994). The second mechanism Professor Herz identifies is the President's Council on Competitiveness, which under Presidents Reagan and Bush was the final executive regulatory review, and succeeded in derailing agency policies inconsistent with those administrations. See Herz, supra, at 223. President Clinton subsequently abolished the Council. See id. at 223 n.23. Finally, Professor Herz points out that Presidents can ensure consistent legal interpretations among agencies by requiring agencies to consult with and be bound by
ences: the agency receiving the instructions, and the courts interpreting the intent of Congress and reviewing administrative agency action.\textsuperscript{20} A number of courts have given interpretive weight to presidential signing statements to assist them in determining the meaning of federal statutes.\textsuperscript{21} Presidential intent, therefore, has emerged as a species of legislative history. If the court's role in construing statutes is to determine the intent behind the legislation, the question then becomes the status of the President's intent. The answer depends upon the court's view of the President's role in enacting legislation, and upon whether his intent matters.

This Comment argues that the President's intent is, in some circumstances, relevant to determining the intent of the legislation. In Part I, this Comment discusses the separation of powers principles relevant to the making and administering of federal statutes, including historical changes in the making, administering, and interpreting of federal statutes. Next, this Comment examines the validity of using legislative history to interpret statutes. This Comment describes the kinds of signing statements Presidents Reagan, Bush, and Clinton have issued and discusses the critical response to the notion of an interpretive value to presidential intent. This Comment then describes how courts use signing statements. In Part III, this Comment suggests what principles should guide the courts' use of presidential signing statements in interpreting federal statutes. Finally, this Comment applies the proposed model to critique existing court use of signing statements.

I. THE THEORETICAL AND HISTORICAL BACKGROUND OF INTERPRETIVE PRESIDENTIAL SIGNING STATEMENTS

A. Separation of Powers Models


To determine how a court should treat a presidential interpretation of a statute, it is first necessary to adopt an understanding of separation of powers.\textsuperscript{22} The Constitution divides the delegated governing powers

\textsuperscript{20}See Herz, supra note 19, at 229. Professor Herz notes that although the Presidential practice of using signing statements to put a particular "'spin' on legislation . . . is usually perceived (and criticized) as an effort to plant legislative history for later judicial discovery, it might be aimed at agencies rather than courts." \textit{Id.}; see also infra Part I.D.1 (discussing the Reagan administration's rationale for its signing statement strategy).

\textsuperscript{21}See infra Part I.E.2. (quantifying and discussing the courts' use of Presidential signing statements to construe legislation).

\textsuperscript{22}This is necessary because "[a]ny theory of statutory interpretation is at base a theory about constitutional law. It must at the very least assume a set of legitimate institu-
among three separate branches of the federal government.\textsuperscript{23} Separation-of-powers disputes revolve around the constitutional dividing lines between the powers of each branch.\textsuperscript{24} Throughout much of the nation's history, the Supreme Court has embraced a formalistic\textsuperscript{25} separation of powers model prohibiting each branch from exercising any power of another branch.\textsuperscript{26} Recently, however, the Court has adopted a more fun-

\textsuperscript{23} Jerry Mashaw, \textit{As If Republican Interpretation}, 97 \textit{Yale L.J.} 1685, 1686 (1988).

\textsuperscript{24} See Peter M. Shane & Harold H. Bruff, \textit{Separation of Powers Law} 110 (1996) ("[S]eparation of powers doctrine has long struggled with the problem of limits to Congress' discretion to structure and empower the other two branches."); see also Cass R. Sunstein, \textit{Constitutionalism After the New Deal}, 101 \textit{Harv. L. Rev.} 421, 430-52 (1987) (analyzing the rationale behind the Constitution's creation of three branches of government, each charged with overlapping duties and aimed at achieving a balance between governmental efficiency, and the need to confine authority within each branch). It is generally accepted that we no longer have a clear theoretical understanding of the separation of powers. See Victoria Nourse, \textit{Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative}, 74 \textit{Texas L. Rev.} 447, 454 (1996). Professor Nourse suggests that our contradictory understanding of separation of powers in which "[w]e are quite satisfied to say that governmental powers are separate and shared, departments distinct and overlapping, functions autonomous and interdependent" is a result of a basic misunderstanding of separation of powers. \textit{Id.} at 447. She argues that separation of powers intends to safeguard our government against tyranny by separating political power rather than legal authority. \textit{See id.} at 449.


\textsuperscript{26} See Myers v. United States, 272 U.S. 52, 176 (1926) (invalidating, on separation of powers grounds, a statute which constrained the power of the President to remove executive officials). In \textit{Myers}, a statute required Senate approval for the appointment and removal of first, second, and third class postmasters. \textit{See id.} at 107. The Court reasoned that no branch has implied powers to exercise a function which the Constitution assigns to another branch because "the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires." \textit{Id.} at 116. Thus, because the Constitution vested the executive power in the President, and because the Constitution did not constrain the President's power to remove administrative officers, Congress could not constrain the President's power. \textit{See id.} at 128. Justice Brandeis in dissent argued for a more functional approach: "The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left each power to exercise, in some respects, functions in their nature executive, legislative and judicial." \textit{Id.} at 291 (Brandeis, J., dissenting).
tionalist\textsuperscript{27} model which acknowledges some sharing of constitutional powers between the branches of government.\textsuperscript{28}

At present, the Court's analysis of separation of powers issues considers whether sharing powers undermines the constitutional powers of each branch, and whether there are encroachment or aggrandizement concerns.\textsuperscript{29} This change first appeared in \textit{Buckley v. Valeo,}\textsuperscript{30} where the Court recognized that a total separation of powers would prevent the nation from being able to govern itself.\textsuperscript{31} Similarly, in \textit{Morrison v. Olson,}\textsuperscript{32} the Court focused on whether the legislation in issue impermissibly undermined executive branch power.\textsuperscript{33} Further, in \textit{Mistretta v. United

\begin{itemize}
\item \textsuperscript{27} See Brown, \textit{supra} note 25, at 1522, 1527-29 (discussing "functionalist" approaches to separation of powers questions).
\item \textsuperscript{28} See infra notes 29-35 and accompanying text (describing the Court's recent separation of powers jurisprudence). \textit{But see INS v. Chadha,} 462 U.S. 919, 959 (1983) (holding that a one-house legislative veto provision was unconstitutional). In \textit{Chadha,} the Court found that the statutory provision which enabled either House of Congress to veto a deportation decision made by the Attorney General violated the Constitution's "single, finely wrought and exhaustively considered, procedure" for exercising the legislative power because it circumvented the Constitution's bicameralism and presentment requirements. \textit{Id.} at 951. The Court viewed the Constitution's division of powers as a command that each branch, "as nearly as possible . . . confine itself to its assigned responsibility." \textit{Id.}
\item \textsuperscript{29} See \textit{supra} notes 22-35 and accompanying text (discussing the Court's recent approaches to separation of powers issues).
\item \textsuperscript{30} 424 U.S. 1, 143 (1976) (holding unconstitutional that portion of a statute which delegated tasks of an executive nature to a non-executive officer).
\item \textsuperscript{31} See \textit{id.} at 120-21. The Court argued that:
\begin{quote}
Our inquiry . . . start[s] on the common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another.
\end{quote}

\ldots

Yet it is also clear . . . that the Constitution by no means contemplates total separation of each of these three essential branches of Government. The President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress. The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President. The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.
\textit{Id.}
\item \textsuperscript{32} 487 U.S. 654, 696-97 (1988) (holding that the special court's appointment of an independent counsel exercising executive functions court did not interfere with the President's executive power).
\item \textsuperscript{33} See \textit{id.} at 694-95; \textit{see also} Nourse, \textit{supra} note 24, at 515 (noting that the Court conducted a "classically 'functional' analysis" in reaching its conclusion in \textit{Morrison}).
\end{itemize}
the Court noted it would uphold statutory provisions that com-
mingle each branches' functions as long as such provisions do not en-
croach on the powers of one branch, or aggrandize one branch at the
expense of another.\textsuperscript{35}

The Constitution establishes the process by which federal law is
made.\textsuperscript{36} Under this scheme, the President's role in setting national policy
is to recommend legislation to Congress,\textsuperscript{37} and then either to sign bills
into law\textsuperscript{38} or to veto them.\textsuperscript{39} In some contexts, the Supreme Court has

\begin{quote}
\textsuperscript{34} 488 U.S. 361, 412 (1989) (holding that the inclusion of federal judges on the Fed-
eral Sentencing Guidelines Commission, charged with formulating sentencing guidelines
that would have the force of law, did not violate the doctrine of separation of powers).
\textsuperscript{35} See id.
\textsuperscript{36} U.S. Const. art. I, \S 7. The Constitution provides:

\begin{quote}
Every Bill which shall have passed the House of Representatives and the Sen-
ate, shall, before it become a Law, be presented to the President of the United
States; If he approve he shall sign it, but if not he shall return it, with his Objec-
tions to that House in which it shall have originated, who shall . . . proceed to
reconsider it. If after such Reconsideration two thirds of that House shall agree
to pass the Bill, it shall be sent . . . to the other House, by which it shall likewise
be reconsidered, and if approved by two thirds of that House, it shall become a
Law.
\end{quote}

\textsuperscript{37} See U.S. Const. art. II, \S 3, cl. 3. Under the original formulation of the clause, the
President had the option to recommend legislation. See J. Gregory Sidak, \textit{The Recommen-
dation Clause}, 77 Geo. L.J. 2079, 2081 (1989). But when the wording was changed from
"may" to "shall" at the Constitutional convention, the Recommendation Clause became a
Presidential duty. See id. at 2085. However, unlike the Senate's duty to ratify or not ratify
treaties that the President presents to it, the Congress is under no obligation to do anything
about the President's recommendations. See id. at 2082. Professor Sidak concludes that
President George Washington and the first Congress interpreted the Constitution to re-
quire the President to have an active role in legislation. See id. at 2085. Presidents have
fulfilled their responsibility to recommend legislation from the beginning of the Republic.
Thus, during President Washington's administration, Congress directed Secretary of the
Treasury Alexander Hamilton to essentially draft legislation establishing a national bank.

The judiciary has also drafted legislation. For example, Justice Story prepared the bill
which reorganized the federal courts in 1816. See id. Although executive officials are no
longer given access to the floor of either House, they do testify before legislative commit-
tees. See id. at 53. Today that responsibility has grown so that between 50\% and 80\% of
all laws originate in the executive branch. See id. at 54.
\textsuperscript{38} See U.S. Const., art. I, \S 7.
\textsuperscript{39} See id. By threatening a veto, the President can influence legislation. See Cross,
\textit{supra} note 9, at 216 \& n.48. Statistics confirm that the veto is a powerful statutory weapon.
See \textit{Louis Fisher, The Politics of Shared Power: Congress and the Executive} 21
(3d ed. 1993) [hereinafter \textit{Shared Power}]. Between 1789 and 1992, Presidents vetoed a
total of 2497 bills (1442 regular vetoes and 1055 pocket vetoes). See id. at 22. One hun-
dred and three of those vetoes were overridden. See id. Since pocket vetoes are absolute,
the percentage of bills overridden is 7.1\%. See id. Mr. Fisher notes, however, that these
statistics can be misleading because if the focus is on "nationally significant legislation . . .
 asserted that this is the limit on the President's legislative role.\textsuperscript{40} The President's legislative role has expanded, however, as a result of congressional delegation of legislative power,\textsuperscript{41} an implied power to issue regulations,\textsuperscript{42} proclamations,\textsuperscript{43} and executive orders,\textsuperscript{44} as well as the President's ability to lobby for legislation.\textsuperscript{45} Thus, this active, albeit limited, legisla-

\textsuperscript{40} See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (noting that the President's legislative role is limited to "the recommending of laws he thinks wise and the vetoing of laws he thinks bad"). See generally Bruff, supra note 39, at 220 ("The President's participation in the legislative process, both in proposing and supporting legislation and in exercising the veto power, dampens faction and increases the stability of legislation.").

\textsuperscript{41} See infra Part I.A.2. (discussing separation of powers principles in the administration of statutes).

\textsuperscript{42} See Fisher, Shared Power, supra note 39, at 24. Executive officials issue rules and regulations that are binding on the executive branch to implement Congressional delegations of authority. See id. For these rules and regulations to be valid, they must be consistent with the statutory authority upon which they are based. See Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936) (noting that a regulation which cannot be reconciled with the statute upon which it was based "is a mere nullity"). In practice, the political discretion the President assumes through this power varies with the specificity of the statute. See Fisher, Shared Power, supra note 39, at 24-25.

\textsuperscript{43} Although Presidential proclamations are generally not legislative in character, they have been used substantively on occasion. See Fisher, Shared Power, supra note 39, at 25. For example, President Carter used a Presidential Proclamation to impose import quotas on television parts. See Proclamation No. 4759, 3 C.F.R. 62-63 (1980). The courts have used the same analysis in this context as they have in determining whether an executive branch rule or regulation is valid. See United States v. Yoshida Int'l, 526 F.2d 560, 584 (C.C.P.A. 1975) (holding that President Nixon's proclamation imposing a 10% surcharge on imported articles as consistent with statutory authority).

\textsuperscript{44} Executive orders are customarily directed towards the President's subordinates, as opposed to proclamations, which are generally directed towards the public. See William D. Neighbors, Comment, Presidential Legislation By Executive Order, 37 U. Colo. L. Rev. 105, 106 (1964). Executive orders must be based on constitutional or statutory authority. See Youngstown, 343 U.S. at 585; see also Joel L. Fleishman & Arthur H. Auftses, Law and Orders: The Problem of Presidential Legislation, 40 Law & Contemp. Probs. 1, 5 (1976) (arguing that courts generally uphold executive orders despite their occasional questionable constitutionality). The signing statement has emerged as another mechanism through which the President can assert this power. See Herz, supra note 19, at 229.

\textsuperscript{45} See Fisher, Shared Power, supra note 39, at 38. Mr. Fisher notes that the President's power in this regard depends upon both the institutional strength of the presidency as well as the personal strength of the particular President. See id. at 38-45. He argues that the institutional strengthening of the presidency began with the establishment of congres-
tive role may render the President's views, as evidenced in signing statements, relevant to judicial interpretation.  

2. Separation of Powers Principles in the Administration of Statutes

Although the Constitution vests the legislative power in the Congress, Congress may delegate some portion of its legislative power through lawmaking as long as it does so pursuant to a valid standard and the power is delegated only to government officials. Many laws delegate authority to executive administrative agencies, whose role is to implement the statute. These executive agencies are under the control of the President. In general, the President asserts his power over executive agencies through executive orders directed towards his subordinates. For the President to execute the law and for the agencies to administer the law, they must interpret the law. When a court reviews

---

46. See infra Part I.E.1 (discussing criticism of interpretive use of signing statements).
47. See U.S. Const. art. 1, § 1.
48. See Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222-24 (1989) (holding that a statute authorizing the Secretary of Transportation to establish user fees to recover the costs of administering pipeline safety programs was not an unconstitutional delegation of Congress's power to tax, because Congress often legislates taxes "with remarkable specificity" and because the delegation was to a government official); see also FISHER, CONSTITUTIONAL CONFLICTS, supra note 11, at 114 (noting that the executive and the legislative branches of government now exercise much of Congress's original legislative power).
50. See id. at 435.
51. The generally accepted constitutional authority for the President's supervision over the administrative bureaucracy is the Take Care Clause. See id. at 562. The Take Care Clause provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Pursuant to this power, the President has the power to instruct his officers as to how the law is to be executed. See AMAN & MAYTON, supra note 49, at 562; see also Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1165 (1992) (noting that under the unitary executive theory, the Take Care Clause together with the Vesting Clause of Article II "create[s] a hierarchical, unified executive department under the direct control of the President"). Unitary executive theorists conclude that since the President himself has all of the executive power, he has full authority to direct, control, and supervise inferior officers and the agencies in their exercise of discretionary executive power. See id. The Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1.
52. See AMAN & MAYTON, supra note 49, at 562; see also supra note 51 and accompanying text (discussing the constitutional sources of the President's authority to issue executive orders).
53. See Bowsher v. Synar, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.").
an agency interpretation of a law that is ambiguous as to the issue presented, the principle announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* requires the court to defer to a reasonable agency interpretation when congressional intent is unclear. The *Chevron* analysis therefore requires the court to first determine whether there is any ambiguity that would require the court to consult the agency's interpretation. The ramification of this principle is that where a statute is ambiguous, the court may defer to Presidential intent as expressed in an executive order or signing statement.

---

55. See id. at 842-43. *Chevron* requires the court to engage in a two-step analysis. See id. First, the court must ask whether Congress specifically addressed the issue. See id. at 842. If Congress did, then the court should interpret the statute without reference to the agency's statutory construction. See id. at 842-43. Second, if Congress did not directly address the issue, the court must determine whether the agency's interpretation "is based on a permissible construction of the statute," rather than construe the statute itself. Id. at 843. To decide whether the agency's interpretation is permissible, the court does not need to "conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question had initially arisen in a judicial proceeding." Id. at 843 n.11.
56. See Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 Duke L.J. 371, 373. Judge Starr notes that the "overlooked side to *Chevron* [is] its call for a return to traditional principles of statutory interpretation. After *Chevron*, the courts are not to begin by examining the agency's interpretation; instead, the courts are to look to the statute itself to ascertain what Congress intended." Id.
57. See *Chevron*, 476 U.S. at 865-66 (depicting one of the rationales for the Court's holding as the President's electoral accountability to the people). Justice Stevens wrote: [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices. Id. at 865; see also Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 Am. U. L. Rev. 277, 308 (1990) (indicating that under the *Chevron* principle, "the executive's interpretation trumps that of the court").
B. Separation of Powers Principles in the Interpretation of Federal Statutes

1. Statutory Interpretation Over Time

This is an "age of statutes."\(^{58}\) As the size of the federal government has grown, so has the number of federal statutes.\(^{59}\) As the scope of federal statutes has broadened, such statutes have become increasingly complex and specialized.\(^{60}\) The majority of these statutes delegate authority to administrative agencies, which "enjoy an interpretive role by the very nature of their creation."\(^{61}\) Indeed, during this century, the role of federal courts increasingly has been to interpret federal statutes.\(^{62}\) As a result of the complexity of federal statutes and the interpretive role of

---

58. ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 3 (1995). Today, legislatures are the primary force determining public policy through the enactment of statutes that accomplish a variety of goals. See id. Foremost among of these goals are the redistribution of wealth through society and the regulation of the market. See id.

59. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982) (noting that today the primary source of law in America are statutes enacted by legislatures); GRANT GILMORE, AGES OF AMERICAN LAW 95 (1977) (noting that between 1900 and 1950, an "orgy of statute making" resulted in more substantive law being made through statutes than through common law principles).

60. See Starr, supra note 56, at 372 (describing "labyrinthine statutes that govern highly technical matters beyond the expertise of a generalist judiciary"). Judge Starr notes that statutes apply to the regulation of technologies that did not exist when the statute was enacted. See id. According to Judge Wald, judges may not always understand the complexities and technicalities of statutes. See Wald, supra note 57, at 301; see also Frank P. Grad, The Ascendancy of Legislation: Legal Problem Solving in Our Time, 9 DALHOUSIE L.J. 228, 251 (1985) (suggesting that "programmatic legislation," which was first enacted during the New Deal, is the dominant form of legislation today). Professor Grad defines programmatic legislation as that which creates a governmental program, usually by establishing an agency and assigning it a task, or by assigning a task to an already existing agency. See id. at 251-52. Often the delegation to the agency is broad, thereby requiring the agency to fill in the details of the mandate. See id. at 252. Professor Grad notes that when a legislature regulates an entire field, the legislation will be especially detailed and complex. See id.

61. Starr, supra note 56, at 372. Judge Starr argues that agencies in fact decide questions of law in the process of carrying out the tasks they have been assigned. See id.

62. See id. at 371. In comparison with the number of statutes it passes today, Congress was relatively inactive for the most part of the nineteenth century. JAMES WILLARD HURST, DEALING WITH STATUTES 10 (1982). Professor Hurst notes that during that period, Congress enacted few statutes implementing bold programming to attain broad policy objectives. See id. Rather, most statutes addressed highly particularized matters. See id. As a result, common law judges generally engaged in judicial lawmaking rather than statutory construction. See GILMORE, supra note 59, at 35-36. However, when resolving federal issues, federal courts have largely dealt with statutory issues because of limited federal common law. See Grad, supra note 60, at 246.
agencies through their rulemaking powers, federal courts have given deference to agency interpretations of law.63

2. Separation of Powers Theory

Once a statute is enacted, it is the judiciary's role to interpret and apply it.64 Language itself can be ambiguous, and statutes, because they often are the result of compromise, are particularly prone to ambiguity.65 Because it is not the judiciary's role to set national policy,66 legislative history serves as a limit guiding the judiciary's interpretation of statutes.67 Although American courts traditionally followed the English practice of not using legislative history to interpret ambiguous statutes, this practice has changed during the twentieth century.68 As a result, most courts ex-
amine legislative intent or purpose when interpreting ambiguous statutory provisions. It is generally accepted that legislative history is a valid source of intent or purpose. Thus, when ambiguity permits more than one reasonable reading of a statute, courts may depart from the statutory language and consider its legislative history. Legislative history encompasses the reasons the bill was introduced, the legislative consideration of the bill, and what happened after the enacted bill was initially applied and

history because there were not as many statutes as there are today, because the statutes were less complex, and because statutory interpretation comprised a smaller part of the federal court workload); Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 196-97 (1983) (arguing that early American judges, while paying lip service to the English tradition, would look at legislative history whenever it was available).

69. See MIKVA & LANE, supra note 58, at 764. Judge Mikva and Professor Lane note that courts generally ignore the academic distinction between legislative intent and purpose, using them “unanalytically and interchangeably” when looking for meaning from sources beyond the text of the statute. See id.; cf. HURST, supra note 62, at 32-33 (noting that while the notion of “the intention of the legislature” is a legal fiction insofar as the legislature does not have “one mind,” its usefulness lies in the limit it places on those rendering judgments).

70. See Breyer, supra note 68, at 848 (stating that using legislative history to determine the meaning of unclear statutory language is logical because it helps the court understand the goals of the statute and the context in which it was enacted). If the statute is unambiguous, courts generally apply the Plain Meaning Rule, which dictates that “[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.” Caminetti v. United States, 242 U.S. 470, 485 (1917) (citing Hamilton v. Rathbone, 175 U.S. 414, 421 (1899); cf. Grad, supra note 60, at 257 (implying that examining legislative purpose should not be confined to ambiguous provisions). Prof. Grad argues that the phenomenon of “programmatic legislation” means that old rules of statutory construction are irrelevant, and that courts should engage in “purpose interpretation” by which they should “give full recognition to the statutory scheme” rather than apply restrictive rules. Id.

71. See 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.05 (5th ed. 1992); Breyer, supra note 68, at 845 (noting that until the recent controversy over using legislative history in statutory construction, courts thought it both natural and helpful to refer to the legislative history).

72. See SINGER, supra note 71, § 48.01. Courts are not, however, required to find an ambiguity before considering legislative history. See id.; see also Burlington Northern R.R. Co. v. Oklahoma Tax Comm’n, 481 U.S. 454, 461 (1987) (noting that judicial inquiry into the meaning of a statute is complete once the court finds that the terms of the statute are unambiguous “unless exceptional circumstances dictate otherwise” (citing Rubin v. United States, 449 U.S. 424, 430 (1981))); Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 444 (1955) (noting that ambiguity is not always a prerequisite to using extrinsic aids); NAACP v. Patty, 159 F. Supp. 503, 515 n.6 (E.D. Va. 1958) (noting that while a court typically considers the legislative history to clarify a statutory ambiguity, ambiguity is not the sine qua non for such consideration), vacated, Harrison v. NAACP, 360 U.S. 167 (1959); Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 VA. L. REV. 1295, 1296 (1990) (arguing that the Supreme Court lacks a unifying theory of statutory interpretation, and noting that the Court either binds itself to statutory text, or considers statutory purpose, legislative history, or a variety of other nontextual sources).
interpreted. Although many jurists and scholars have criticized the interpretive value of legislative history in statutory construction, for the purposes of this Comment, legislative history is a valuable and important aid in statutory interpretation.

C. Evidence of Presidential Intent

Presidential intent, which may be implicit in legislation and legislative history, is explicit in signing statements. Presidents generally issue signing statements when they sign a bill into law, and unlike veto messages, these statements are discretionary; there is no constitutional provision requiring a President to issue a statement when he signs a bill. Signing statements serve four broad purposes. First, they explain what the President believes will be the effect of the statute. Second, they instruct officers of the executive branch how to interpret or administer

73. See Singer, supra note 71, § 48.01.
74. See infra Part II.A (discussing recent criticism and defense of the use of legislative history to interpret statutes).
75. See Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 612 n.4 (1991) (noting that the Court has traditionally utilized legislative history, and expecting that the practice will continue); Breyer, supra note 68, at 871 (arguing that discontinuing the use of legislative history would be unfair in part because legislators, attorneys, courts, and the public affected by legislation expect courts to use legislative history).
76. See infra Part II.
77. See, e.g., Statement on Signing the Federal Workforce Restructuring Act of 1994, 1 PUB. PAPERS 561 (Mar. 30, 1994) (William Clinton) ("Consistent with the clear intent of the Act, I will interpret the term "full-time equivalent positions," used in the legislation to define annual employment ceilings, to mean "full-time equivalent employment."); Statement on Signing the Civil Rights Act of 1991, 2 PUB. PAPERS 1504, 1504 (Nov. 21, 1991) (George Bush) (noting that "[i]t is extremely important that the statute be properly interpreted—by executive branch officials, by the courts, and by America's employers" and that certain documents introduced by Senator Robert Dole will "be treated as authoritative interpretive guidance by all officials in the executive branch"); Statement on Signing the Sentencing Reform Act of 1987, 2 PUB. PAPERS 1450 (Dec. 7, 1987) (Ronald Reagan) ("I understand section 2 of S. 1822 to mean that the Sentencing Reform Act applies to offenses completed after it took effect. Offenses begun prior to, but not completed until on or after November 1, 1987, will be subject to the Sentencing Reform Act.").
78. See Cross, supra note 9, at 209 (noting that a signing statement is usually a short statement made when the bill is signed).
79. See U.S. Const. art. I, § 7, cl. 2. The Constitution provides that if the President does not approve of the bill presented to him, "he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal." Id.
80. See Dellinger, Presidential Signing Statements, supra note 10, at 333 & n.1 (outlining these purposes).
81. See id. at 333; see also infra Part I.D (describing and discussing the signing statements made by Presidents Reagan, Bush, and Clinton).
the statute. Third, signing statements may state the President's belief that there is a constitutional defect in the statute and that the President will not enforce the unconstitutional provision. Fourth, and the topic of

---

82. See Dellinger, Presidential Signing Statements, supra note 10, at 333; see also infra Part I.D (describing and discussing the signing statements of Presidents Reagan, Bush, and Clinton).

83. See Dellinger, Presidential Signing Statements, supra note 10, at 333. The corollary of this use is to "create[e] a record that can be used later to refute claims that the president has approved of constitutionally dubious provisions in bills that the president has chosen to sign because of his desire to see other provisions of the legislation become law." Nelson Lund, Lawyers and the Defense of the Presidency, 1995 BYU L. Rev. 17, 44. Courts and commentators are split on whether the President has the constitutional authority to refuse to enforce a law, or a portion thereof, he thinks is unconstitutional. For example, in Freytag v. Commissioner, Justice Scalia stated in a concurring opinion that the President may resist legislative encroachment upon his power by disregarding unconstitutional laws. 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part and concurring in the judgment). Furthermore, the Department of Justice's Office of Legal Counsel advised Presidents Reagan, Bush, and Clinton that they may constitutionally refuse to enforce a "clearly unconstitutional law." See Dellinger, Presidential Signing Statements, supra note 10, at 336. President Bush's Attorney General William Barr explained that a President may choose to sign a law and refuse to enforce an unconstitutional provision rather than veto the entire bill when a veto would be politically damaging. See William P. Barr, Attorney General's Remarks, Benjamin N. Cardozo School of Law, November 15, 1992, 15 Cardozo L. Rev. 31, 39 (1993). An example of this situation is when Congress passes a large appropriations bill and then adjourns, leaving the President in the position of choosing between shutting down a part of the government, or signing the bill, noting his exception to the offending provision. See id. Because of the provocative nature of this practice, Barr notes that the position of the Office of Legal Counsel under the Bush administration was that signing statements could be used in this way only "where the law encroached on executive authority." Id.; see also Walter Dellinger, Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva, 48 Ark. L. Rev. 313, 313 (1995) (arguing that "there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional"); Kmiec, Balkanized Empires, supra note 65, at 81-82 ("Because of the increasing impracticality of a veto, presidents have placed renewed emphasis upon presidential signing statements to articulate their constitutional concerns.").

At the other end of the spectrum, in Ameron, Inc. v. U.S. Army Corps of Engineers, the court found "dubious" the President's claim that he could unilaterally declare that a statute was unconstitutional and refuse to execute it. 787 F.2d 875, 889 (3d Cir. 1986). The court distinguished this from the President's authority to veto, criticize, or refuse to defend in court statutes about which he has constitutional qualms. See id. In support of its conclusion, the court cited Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952), as well as Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). See id. at 889 n.11. Professor May argues that the intent of the framers supports the view that the President may not refuse to enforce a law he thinks is unconstitutional. See Christopher N. May, Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative, 21 Hastings Const. L.Q. 865, 893-94 (1994). But see Dellinger, supra, at 336 & n.8 (arguing that the President's authority to refuse to enforce an unconstitutional law is consistent with the Framers based upon a statement by Framers and later Supreme Court Justice James Wilson and upon President Jefferson's pardon of all persons convicted under the Sedition Law because he thought it unconstitutional). Professor May argues, however, that in the rare circumstance where the President is faced with executing a "patently invalid" law where refusing to comply with the law is the only way to bring the law before the court, presidential
this Comment, signing statements are used in an attempt to create legislative history in the expectation that courts will give the statement some weight when construing the statute.\textsuperscript{84}

These categories sometimes overlap. For example, in giving directions to an executive agency, the President can instruct subordinates to resolve statutory ambiguities in a way that he favors.\textsuperscript{85} Under the \textit{Chevron} principle, this practice results in the President's interpretation receiving judicial deference.\textsuperscript{86} As a relatively new phenomenon, interpretive presidential signing statements present a new challenge to the courts.

\textbf{D. The Emergence of Interpretive Presidential Signing Statements}

The Reagan administration was the first to use signing statements "as a tool for advancing a coherent legal strategy,"\textsuperscript{87} strengthening presidential supervision over the executive branch.\textsuperscript{88} In drafting signing statements for enrolled bills, the administration's self-proclaimed goal was to interpret vague language to be consistent with administration policy "so long as it did not defy the legislative language or clear intent."\textsuperscript{89}

\begin{itemize}
  \item Refusal to execute is justified. See May, \textit{supra}, at 1101; see also Christine E. Burgess, Note, \textit{When May a President Refuse to Enforce the Law?}, 72 \textit{TEX. L. REV.} 631, 633 (1994) (arguing that the President can refuse to enforce a law he believes in good faith to be unconstitutional when he is protecting executive branch power, and when the Supreme Court has previously held that the law, or a provision thereof, is unconstitutional).
  \item See Dellinger, \textit{Presidential Signing Statements}, \textit{supra} note 10, at 333. Signing statements are but one example of a nonlegislator's contribution to legislative history that courts use. See generally Allison C. Giles, Comment, \textit{The Value of Nonlegislators' Contributions to Legislative History}, 79 \textit{GEO. L.J.} 359 (1990). The Supreme Court uses executive branch views most often, the views of nonlegislators who were involved in drafting a statute second, and the views of nonlegislators who had no drafting role third. See id. at 363-69. The executive branch views include presidential veto statements, signing statements, messages to Congress which accompany executive legislative proposals, as well as statements by the federal agencies that will implement the legislation. See id. at 363-64.
  \item See Lund, \textit{supra} note 83, at 43-44.
  \item See \textit{supra} notes 54-57 and accompanying text (discussing the \textit{Chevron} principle as applied to executive interpretations).
  \item Lund, \textit{supra} note 83, at 43; see also Cross, \textit{supra} note 9, at 209 (noting that President Reagan "transformed the customary 'photo session' of bill signing into a somewhat more substantive episode" by his pervasive interpretation of new laws).
  \item See \textit{Douglas W. Kmiec, The Attorney General's Lawyer: Inside the Meese Justice Department} 52-53 (1992) [hereinafter \textit{ATTORNEY GENERAL'S LAWYER}]. Professor Kmiec served in the Office of Legal Counsel from 1985-89. See id. at 1. According to Professor Kmiec, vague language in many of the statutes delegating authority to executive agencies created room for interpretation and discretion. See id. at 52. The Reagan administration decided that it would initiate a strategy that would ensure that the President, rather than "a less accountable and visible federal bureaucrat," exercise that discretion. \textit{Id.}
  \item Id. Professor Kmiec seems quite serious about not promoting an interpretation that undermines or distorts congressional intent. See \textit{id.} at 57. He argues that in the case
\end{itemize}
In 1986, then Attorney General Edwin Meese arranged with West Publishing Company to have signing statements published in the *U.S. Code Congressional and Administrative News.*\(^{90}\) As a result, signing statements became generally available for the first time.\(^{91}\) In announcing the agreement, former Attorney General Meese noted that there is often confusion regarding what a law means because the President signs bills to which he objects in part.\(^{92}\) Former Attorney General Meese further commented that making the signing statement available to judges would "improve statutory interpretation."\(^{93}\)

1. The Reagan Practice

From 1980 to 1988, President Reagan issued approximately 1046 signing statements accompanying the bills he signed into law.\(^{94}\) Some statements were noncontroversial: in them the President described the bill,\(^{95}\) of the signing statement for the 1986 Immigration Reform Act "the sheer length of the statement suggested that too much was being read into, or out of, the statutory language."\(^{96}\) *Id.; see also* Kmiec, *Balkanized Empires, supra* note 65, at 82 ("Any attempt by a President to supply additional terms or adopt an interpretation that would do violence to the terms provided by the Legislature would be unwarranted and antagonistic to legislative powers."). The partisan use of signing statements, however, is reflected in Professor Kmiec's statement that aggressive use of signing statements was necessitated by the congressional "practice of lumping together numerous unrelated provisions in omnibus bills," which Kmiec regards as "congressional chicanery" because it "effectively denie[es] the President his constitutionally provided veto authority." *Kmiec, ATTORNEY GENERAL'S LAWYER,* supra note 88, at 53. *But see* Mikva & LANE, *supra* note 58, at 739 (arguing that this "chicanery" is the only way that Congress can do its work).


91. Signing statements had also been available in the *Weekly Compilation of Presidential Documents* since 1965, and annually in the *Public Papers of the Presidents.* Today, signing statements are readily accessible on LEXIS and Westlaw.


93. See *id.*

94. See 2 PUB. PAPERS C6-C7 (1988-89) (listing 32 bill signings); 1 PUB. PAPERS C6 (1988) (listing 13 bill signings); 2 PUB. PAPERS C10 (1987) (listing 28 bill signings); 1 PUB. PAPERS C6 (1987) (listing 7 bill signings); 2 PUB. PAPERS C9-C10 (1986) (listing 55 bill signings); 1 PUB. PAPERS C6 (1986) (listing 8 bill signings); 2 PUB. PAPERS 1555-63 (1985) (listing 91 bills signed by the President); 1 PUB. PAPERS 881-83 (1985) (listing 15 bills approved by the President); 2 PUB. PAPERS 1947-60 (1984) (listing 218 bills approved by the President); 1 PUB. PAPERS 977-82 (1984) (listing 66 bills approved by the President); 2 PUB. PAPERS 1801-08 (1983) (listing 121 bills approved by the President); 1 PUB. PAPERS 1006-08 (1983) (listing 80 bills approved by the President); 2 PUB. PAPERS 1699-1708 (1982) (listing 156 bills approved by the President); 1 PUB. PAPERS 887-90 (1982) (listing 36 bills approved by the President); PUB. PAPERS 1321-1328 (1981) (listing 120 bills approved by the President).

95. See, e.g., Statement on Signing the Temporary Emergency Wildfire Suppression Act, 2 PUB. PAPERS 1151 (Sept. 9, 1988) (noting that the legislation would "facilitate assistance from Canada in fighting the current wildfires in the western United States"); Statement on Signing the Education of the Deaf Act of 1986, 2 PUB. PAPERS 1050 (Aug. 4, 1986) (noting that the act "reestablishes Gallaudet College as Gallaudet University and autho-
congratulated Congress on passing the bill,\textsuperscript{96} or criticized differences in policy.\textsuperscript{97} In many statements, however, the President asserted that certain provisions violated the Constitution and interpreted them so as to be constitutionally consistent by giving instructions to the affected agency.\textsuperscript{98} Specifically, President Reagan identified constitutional violations that encroached upon the President's power to recommend legislation,\textsuperscript{99} the

\textsuperscript{96} See, e.g., Statement on Signing the Energy and Water Development Appropriations Act, 1989, 2 PUB. PAPERS 969, 969 (July 19, 1988) (commending Congress for quickly passing the legislation and for its fiscal restraint); Statement on Signing the Omnibus Budget Reconciliation Act of 1986, 2 PUB. PAPERS 1441 (Oct. 21, 1986) (noting the President's "pleas[ure] that the Congress, in passing reconciliation, has addressed many of the concerns raised by the Administration"); Statement on Signing the Federal Employees Benefits Improvement Act of 1986, 1 PUB. PAPERS 278 (Feb. 27, 1986) (congratulating Congress for "enacting acceptable legislation . . . so quickly after my [prior] veto").

\textsuperscript{97} See, e.g., Statement on Signing the Prescription Drug Marketing Act of 1987, 1 PUB. PAPERS 505, 506 (Apr. 22, 1988) (noting that "the bill's provision that would require States to adhere to Federal standards when licensing wholesale drug distributors . . . represents a substantial intrusion into traditional State responsibilities and prerogatives"); Statement on Signing the Columbia River Gorge National Scenic Area Act, 2 PUB. PAPERS 1560 (Nov. 17, 1986) ("While I am strongly opposed to Federal regulation of private land use planning, I am signing this bill because of the far-reaching support in both States for a solution to the longstanding problems related to management of the Columbia River Gorge."); Statement on Signing the National Defense Authorization Act for Fiscal Year 1987, 2 PUB. PAPERS 1557, 1557 (Nov. 14, 1986) (noting the President's "disappoint[ment] that the Congress saw the need to legislate the reorganization of the Special Operations Forces").

\textsuperscript{98} See infra notes 99-104 and accompanying text (discussing the specific constitutional violations President Reagan identified).

\textsuperscript{99} See, e.g., Statement on Signing Veterans Benefits Bill, 2 PUB. PAPERS 1558 (Nov. 18, 1988) (noting that a provision requiring that the Court of Veterans' Appeals budget be included in the President's budget "without review within the Executive branch' unconstitutionally interferes with the President's power to recommend to Congress "such Measures as he shall judge necessary and expedient"); Statement on Signing the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, 2 PUB. PAPERS 1469, 1469 (Nov. 7, 1988) (noting that the requirement in the Act that heads of departments and agencies submit legislation to Congress will be implemented by the President consistent with the power of the Recommendations Clause); Statement on Signing the Bill Authorizing Contracts for Federal Debt Collection, 2 PUB. PAPERS 1454 (Oct. 28, 1986) (noting that the bill presented constitutional problems regarding the exercise of executive authority by officers of the United States, and regarding the implementation of an affirmative action program). The President directed the agencies involved in debt collection to implement the statutory provisions so as to be consistent with the Constitution. See id.
President's appointment power, the President's Take Care power, the President's foreign affairs power, the President's Commander-in-Chief power, and the President's power to receive ambassadors. In

100. See, e.g., Statement on Signing the Public Buildings Amendments of 1988, 2 PUB. PAPERS 1525 (Nov. 17, 1988) (interpreting a provision under which the Administrator of General Services can assign to a State the authority of the United States under certain conditions as "merely permitting the waiving of exclusive Federal jurisdiction in circumstances when it would be useful to permit State administration of State law"); Statement on Signing the Bill Prohibiting the Licensing or Construction of Facilities on the Salmon and Snake Rivers in Idaho, 2 PUB. PAPERS 1525 (Nov. 17, 1988) (stating that the provision of the bill which requires the approval of a local governing body before the relevant federal agency can issue a license is unconstitutional because it violates the Appointments Clause of Article II, Section 2, Clause 2, of the Constitution, and interpreting the provision as an all out prohibition on the federal agency issuing a license); Statement on Signing the Appalachia States Low-Level Radioactive Waste Consent Act, 1 PUB. PAPERS 617, 618 (May 19, 1988) (noting that since the Act did not require that the Commission it established be appointed consistent with the Appointments Clause, the Commission would not have the power to enforce Federal regulations).

101. See, e.g., Statement on Signing the Inspector General Act Amendments of 1988, 2 PUB. PAPERS 1344, 1345 (Oct. 18, 1988) (noting that some of the act's reporting "requirements would conflict with the constitutional protection afforded the integrity and confidentiality of the internal deliberations of the Executive branch and the President's authority as head of the Executive branch to 'take care that the laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)); Statement on Signing the Independent Counsel Reauthorization Act of 1987, 2 PUB. PAPERS 1524 (Dec. 15, 1987) (noting that in passing this legislation, Congress has shown that it is "apparently convinced that it is empowered to divest the President of his fundamental constitutional authority to enforce our nation's laws"); Statement on Signing the Supplemental Appropriations Act of 1987, 2 PUB. PAPERS 818-19 (July 11, 1987) (interpreting a spending provision consistent with the President's Take Care power).

102. See, e.g., Statement on Signing the Intelligence Authorization Act, Fiscal Year 1989, 2 PUB. PAPERS 1249, 1250 (Sept. 29, 1988) (noting that a provision in the act prohibiting the use of funds to assist the Nicaraguan Democratic Resistance does not apply insofar as it conflicts with the President's foreign affairs powers); Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, 2 PUB. PAPERS 1541, 1542 (Dec. 22, 1987) (noting that the provision of the Act which forbids closing consulates interferes with the President's foreign affairs power); Statement on Signing the RMS Titanic Maritime Memorial Act of 1986, 2 PUB. PAPERS 1411, 1412 (Oct. 21, 1986) (noting that if certain provisions were interpreted literally, they would conflict with the President's power to conduct foreign relations).

103. See Statement on Signing the Military Construction Appropriations Act, Fiscal Year 1989, 2 PUB. PAPERS 1230 (Sept. 27, 1988) (noting that the provision of the act requiring the Secretary of Defense to "inform specified congressional committees of the plans and scope for any proposed military exercise involving United States personnel 30 days prior to its occurring, if amounts expended . . . are anticipated to exceed $100,000" would be interpreted consistent with the President's authority "to protect the national security"); Statement on Signing the National Defense Authorization Act for Fiscal Year 1987, 2 PUB. PAPERS 1557, 1558 (Nov. 14, 1986) (noting that a provision requiring the Secretary of Defense to make available certain information to the Congress conflicts with the President's control over sensitive national security information).

104. See Statement on Signing the Intelligence Authorization Act, Fiscal Year 1988, 2 PUB. PAPERS 1419 (Dec. 2, 1987) (noting that the section of the bill purporting to "require
some statements, the President himself severed provisions from laws that he said were unconstitutional. In other statements, the President interpreted certain provisions. In at least one statement, the President asserted that his signing statement constituted legislative history.

2. The Bush Practice

The Bush administration continued the Reagan practice of using signing statements to strengthen presidential control. As former Attorney
General William Barr stated, President Bush's signing statements "set forth the President's understanding of how a particular provision in the bill [was] to be interpreted [by the agency], his understanding of what it meant[,] or his directive as to how the executive branch [was] going to interpret it." Nevertheless, a critic from within the Bush administration argued that in practice, President Bush's use of signing statements was more of a resistance to what he regarded as congressional encroachments on executive power than it was an assertion of presidential control over the executive branch. Furthermore, it has been suggested that President Bush's signing statements, in contrast to President Reagan's, often "interpreted objectionable provisions . . . inconsistent[ly] with the statutory language."

109. Barr, supra note 83, at 40; see also infra notes 112-126 and accompanying text (setting forth examples of President Bush's signing statements giving instructions to executive agencies).

110. See Lund, supra note 83, at 46. Professor Lund explains that President Bush's signing statements focused on issues regarding presidential authority. See id. "It should come as no surprise that President Bush was most aggressive in his defense of the authority of his office in the field of foreign relations, where his expertise and interest were greatest." Id. at 51; see also Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 1 PUB. PAPERS 239, 240-41 (Feb. 16, 1990) (detailing objections to at least ten provisions in one bill on foreign affairs power grounds). Professor Lund notes that: [President] Bush's signing statements are pervaded by an amazing scrupulosity about the separation of powers that becomes at times almost comical. Even a cursory review of the record suggests that the administration tried to identify and deal with every issue, no matter how small, in every bill that was presented to the President.

Lund, supra note 83, at 44. Professor Lund concludes that Bush's defensive strategy was somewhat insignificant because it amounted to no more than "a kind of gesturing" in which he signalled to Congress that he would defend the presidency against what in his estimation were encroachments on his power. Id. at 46. But see Kmiec, Attorney General's Lawyer, supra note 88, at 52 (arguing that President Reagan's use of signing statements emphasized strengthening presidential control over the agencies).

111. Lund, supra note 83, at 44.
From 1988 to 1992, President Bush issued approximately 239 signing statements accompanying the bills he signed into law. Some statements were noncontroversial: in them the President merely described the various provisions of the bill, took credit for the policy being enacted, or criticized a certain aspect of the bill. In many of the statements, however, President Bush noted that because certain provisions attempted to encroach upon executive power, he would interpret them so as to be consistent with the Constitution. Specifically, he identified encroachment upon the appointments power, the foreign relations
power,118 the Commander-in-Chief power,119 the President's authority over executive agencies,120 and the President's power to recommend legislation.121 Sometimes these "constitutional defects" led President Bush to refuse to give legal force to a provision he thought violated the Constitution,122 or to refuse to expend any appropriated funds until Congress enacted legislation to cure the constitutional defects.123 Some signing

---

118. See Statement on Signing the High Seas Driftnet Fisheries Enforcement Act, 2 PUB. PAPERS 2150, 2151 (Nov. 2, 1992) (noting that since some provisions could encroach upon the President's foreign relations power, the President would construe those provisions to be advisory rather than mandatory); Statement on Signing the Indian Health Amendments of 1992, 2 PUB. PAPERS 2074 (Oct. 29, 1992) (refusing to apply a "Buy American" provision to the extent that the President "determine[s] it would violate the Nation's international obligations under the General Agreement on Tariffs and Trade or any other international agreement to which this country is a party").

119. See Statement on Signing the National Defense Authorization Act for Fiscal Year 1991, 2 PUB. PAPERS 1556, 1557 (Nov. 5, 1990) (construing provisions which purport to set limits on the number of military personnel stationed in certain foreign countries as consistent with the President's constitutional authority).

120. See Statement on Signing the National Oceanic and Atmospheric Administration Authorization Act of 1992, 2 PUB. PAPERS 2072, 2073 (Oct. 29, 1992) (noting that the President signed the bill with the understanding that "[p]rovisions requiring an executive agency to consult with another executive agency or private group concerning executive policy do not dictate the decisionmaking structure or chain of command of the executive branch deliberative process"); Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1991, 2 PUB. PAPERS 1555, 1556 (Nov. 5, 1990) (noting that provisions which prohibit expenditure of funds for reviewing agency orders and regulations impair the President's ability "to supervise the executive branch").

121. See Statement on Signing the Veterans Home Loan Program Amendments of 1992, 2 PUB. PAPERS 2056, 2057 (Oct. 28, 1992) (interpreting as advisory rather than mandatory a provision of the bill that "purports to require the Secretary of Veterans Affairs to recommend future legislation regarding a pilot program for housing loans to Native American Veterans"); Statement on Signing the Intermodal Safe Container Transportation Act of 1992, 2 PUB. PAPERS 2057 (Oct. 28, 1992) (interpreting as advisory rather than mandatory a provision of the bill that "purports to require the Secretary of Transportation to submit . . . legislative and other recommendations for improving the collection of certain transportation data").

122. See Statement on Signing the Omnibus Budget Reconciliation Act of 1990, 2 PUB. PAPERS 1553, 1555 (Nov. 5, 1990) (instructing the Secretary of Health and Human Services that a provision in the bill which requires the Secretary to base a substantive decision upon the statements of persons not appointed by the President "is without legal force"); Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 1991, 2 PUB. PAPERS 1558, 1559 (Nov. 5, 1990) (treating provisions which purport to condition the use of funds by the President and executive branch officials upon congressional approval as without legal force).

123. See Statement on Signing the Reclamation Projects Authorization and Adjustment Act of 1992, 2 PUB. PAPERS 2101, 2103 (Oct. 30, 1992) ("I direct the Secretary of the Interior, in consultation with the Attorney General, to propose legislation to remedy certain constitutional defects. Such legislation must be effective prior to the expenditure of any appropriated funds.").
statements provided instructions to executive agencies, while others interpreted specific provisions of a bill by defining specific terms therein, or asserted that a bill did not authorize a private right of action.

3. The Clinton Practice

The aggressive use of signing statements appears to be continuing during the Clinton Administration. Since taking office in January 1993, President Clinton has issued approximately 162 signing statements accompanying the bills he has signed into law. Consistent with the traditional practice, some of the statements are non-interpretive and fulfill the ceremonial function of describing the new law or congratulating mem-

124. See id. at 2102 (noting that since some provisions might violate State primacy in Federal Western water policy, "I am directing the Secretary of the Interior, in implementing this legislation, to ensure that its provisions are conducted with due deference to State primacy.").

125. See Statement on Signing the Omnibus Budget Reconciliation Act of 1990, 2 Pуб. Papers 1553, 1554-55 (Nov. 5, 1990) (signing the bill with the understanding that a "sectarian organization" includes religious organizations in general, and that "organization means not only the particular provider but also a broader association with which that provider may be identified"); Statement on Signing the San Carlos Mineral Strip Act of 1990, 2 Pуб. Papers 1439 (Oct. 22, 1990) (adopting the Congressional Committee Report's description of the specific parcel of land affected by the bill).

126. See Statement on Signing the Bill Reauthorizing Native American Higher Education Assistance, 2 Pуб. Papers 1497 (Oct. 30, 1990) (construing a provision prohibiting any restriction on the right of Native Americans to express themselves in their native language during public proceedings as not conferring a private right of action).

127. See infra notes 129-40 (describing President Clinton's signing statements). At this time there is not an official Clinton Administration opinion of the interpretive status of signing statements. One of the sources for this Comment is a memo from the Office of Legal Counsel to the White House Counsel, at that time Bernard Nussbaum, outlining the arguments for and against court use of signing statements without deciding whether such use was legitimate. See Dellinger, Presidential Signing Statements, supra note 10, at 339.

Judge Mikva, who also served as White House counsel, is opposed to the use of signing statements in statutory construction. See MIKVA & LANE, supra note 58, at 784-85 (noting that a signing statement "is not a part of the enactment process . . . [because] [w]hile the President has the power to veto a bill and the legislature has the power to override the veto, the legislature has no power to veto or override" the signing statement); see also infra note 255.


bers of Congress for passing the bill.\textsuperscript{130} Some signing statements list provisions the President opposes but do not go as far as to state that the President will refuse to enforce the law.\textsuperscript{131} However, in at least two statements, President Clinton determined that a provision was unconstitutional and stated that the Attorney General would not defend or enforce it.\textsuperscript{132} Some statements note potential constitutional problems without offering an alternative interpretation,\textsuperscript{133} while others adopt an interpretation that the President asserts is consistent with the Constitution.\textsuperscript{134}

\textsuperscript{130} See, \textit{e.g.}, Statement on Signing the District of Columbia Emergency Highway Relief Act, 31 \textit{Weekly Comp. Pres. Doc.} 1378, 1378 (Aug. 4, 1995) ("Today I am pleased to sign into law H.R. 2017, the District of Columbia Emergency Highway Relief Act, a law to enable our Nation's capital city to advance critically needed highway construction projects.").


\textsuperscript{133} See Statement on Signing the Social Security Independence and Program Improvements Act of 1994, 2 \textit{Pub. Papers} 1471, 1472 (Aug. 15, 1994) (noting that the Department of Justice had advised the President that the removal provision for the Commissioner of the Social Security Administration raised a significant constitutional question); Statement on Signing the Legislative Branch Appropriations Act, 1995, 1 \textit{Pub. Papers} 301, 301 (July 22, 1994) (noting that a law requiring executive branch agencies to receive approval "from the Public Printer before procuring the production of certain Government documents outside of the Government Printing Office" raises serious constitutional questions).

\textsuperscript{134} See Statement on Signing Transportation Legislation, 1 \textit{Pub. Papers} 1198, 1199 (July 5, 1994) (interpreting certain provisions of a law as not binding and directing the Secretary of Transportation to consider any appointment lists submitted by Congress as
Similarly, President Clinton has used signing statements to instruct agencies to avoid constitutional problems, and to interpret statutory terms in a manner that reflects the Administration's policy preferences. Consistent with Presidents Reagan and Bush, President Clinton asserts that he will interpret provisions that present potential or actual conflicts with express executive powers, such as the appointments power and the Commander-in-Chief and foreign affairs powers, consistent with the advisory in order to avoid constitutional problems; see also the following statements all of which interpret a purported legislative veto provision inconsistent with the unconstitutionality of the legislative veto as interpreted in INS v. Chadha, and therefore declaring that the provision will be ignored. Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1995, 2 PUB. PAPERS 1672, 1672 (Sept. 30, 1994); Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 1995, 2 PUB. PAPERS 1674, 1674 (Sept. 30, 1994); Statement on Signing the Treasury, Postal Service, and General Government Appropriations Act, 1994, 2 PUB. PAPERS 1855, 1855-56 (Oct. 28, 1993).

135. See Statement on Signing Legislation To Reauthorize the Merit Systems Protection Board and the Office of Special Counsel, 2 PUB. PAPERS 1906, 1906 (Oct. 29, 1994) (directing “agencies to follow appropriate procedures to protect the constitutional rights of . . . Federal employees” affected by the legislation).

136. See Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, 1 PUB. PAPERS 807, 809 (Apr. 30, 1994) (interpreting a provision as consistent with his Administration’s views until it is “corrected in a manner acceptable to my Administration”).

137. See, e.g., Statement on Signing the Coast Guard Authorization Act of 1996, 32 WEEKLY COMP. PRES. DOC. 2112, 2113 (Oct. 19, 1996) (directing the Secretary of Transportation to treat appointments recommendations from certain state officials as advisory rather than mandatory); Statement on Signing the Sustainable Fisheries Act, 32 WEEKLY COMP. PRES. DOC. 2040, 2041 (Oct. 11, 1996) (directing the Secretary of Commerce to treat a provision raising Appointments Clause issues as advisory rather than mandatory); Statement on Signing the National Defense Authorization Act for Fiscal Year 1997, 32 WEEKLY COMP. PRES. DOC. 1841, 1843 (Sept. 23, 1996) (urging Congress to amend the provision of the bill which violates the Appointments Clause, and directing the National Ocean Leadership Council to not exercise significant government authority).

138. See, e.g., Statement on Signing the Immigration and Nationality Technical Corrections Act of 1994, 2 PUB. PAPERS 1869, 1869-70 (Oct. 25, 1994) (instructing the Secretary of State to “construe” the statute so as to avoid impermissible impingement on the president’s “constitutional authorities concerning receipt of Ambassadors, recognition of governments, and the conduct of foreign policy”); Statement on Signing Legislation Regarding United States Policy Toward Haiti, 2 PUB. PAPERS, 1897, 1897 (Oct. 25, 1994) (interpreting a certain provision as requiring the President to give to the Senate “only information about the rules of engagement that I may supply consistent with my constitutional responsibilities, and not information of a sensitive operational nature”); Statement on Signing the National Defense Authorization Act for Fiscal Year 1995, 2 PUB. PAPERS 1704, 1705 (Oct. 5, 1994) (interpreting provisions regarding national security and defense policies consistent with the President’s Commander-in-Chief authority and constitutional authority for the conduct of foreign affairs); Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, 1 PUB. PAPERS 807, 808 (Apr. 30, 1994) (construing provisions so that they do not infringe on the President’s discretion over foreign affairs or his Commander-in-Chief powers); Statement on Signing the Department of Defense Appropriations Act, 1994, 2 PUB. PAPERS 1958, 1958 (Nov. 11, 1993) (construing a certain section as
Constitution. Two statements appear to present interpretations aimed at the courts. In one statement, President Clinton advised the courts as to what their interpretation of certain provisions should be; in the other, the President made a highly technical interpretation.

E. Response to Interpretive Signing Statements by Commentators and Courts

1. The Critical Response

Formalist critics argue that signing statements have little or no interpretive value under the Constitution. The thrust of these arguments is that court use of signing statements violates the principle of separation of powers because the President is not a legislator. On this view, the President’s role in legislating is strictly limited to the qualified veto, the ten day time period in which the President can sign or veto a bill, and the President’s power to recommend legislation. Judicial use of a signing statement, therefore, aggrandizes the Presidential role by giving him the power of an absolute or line-item veto, because once the President

140. See Statement on Signing the Federal Workforce Restructuring Act of 1994, 1 PUB. PAPERS 561, 561 (Mar. 30, 1994) (stating that “[c]onsistent with the clear intent of the Act, I will interpret the term ‘full-time equivalent positions,’ used in the legislation to define annual employment ceilings, to mean ‘full-time equivalent employment’”).
142. The Constitution gives the President the power to veto any legislation. See U.S. CONST. art. I, § 7, cl. 2. However, the President’s veto is subject to an override by a two-thirds majority of both houses. See id.
143. The Constitution gives the President ten days in which to veto legislation. See id. If the President does not sign the bill within ten days, the bill automatically becomes law unless the President is prevented from returning it to Congress because they have adjourned. See id. This latter event is known as the pocket veto, and the only type of adjournment which can cause a pocket veto is an intersession adjournment. See Kennedy v. Sampson, 511 F.2d 430, 442 (D.C. Cir. 1974).
144. The Constitution requires that the President recommend legislation to Congress. See U.S. CONST. art. II, § 3; Garber & Wimmer, supra note 141, at 374.
145. See Statement on Signing the Indian Self-Determination and Education Assistance Act Amendments of 1988, 2 PUB. PAPERS 1284, 1284 (Oct. 5, 1988). In his signing statement, President Reagan severed from the bill a provision requiring cabinet secretaries to
has signed the bill, Congress will not debate and vote on the Presidential interpretation unless it enacts new legislation.\textsuperscript{146} Similarly, court use of a signing statement would violate the ten-day limit because courts would be using the signing statement after that ten-day period had elapsed.\textsuperscript{147} Finally, because a signing statement is not a recommendation, it is not a source of presidential interpretive power.\textsuperscript{148}

Critics who advance the theory of the unitary executive\textsuperscript{149} argue that court use of signing statements is appropriate in some circumstances.\textsuperscript{150} Thus, Professor Cross distinguishes between signing statements as a species of legislative history and signing statements that provide interpretive directions to the implementing administrative agency.\textsuperscript{151} Professor Cross posits that signing statements as a species of legislative history have little interpretive value, while signing statements which give instructions to the implementing administrative agency should be given some interpretive weight.\textsuperscript{152} Under his argument, signing statements as legislative history have little interpretive value because they do not fit within the framework according legislative history interpretive value.\textsuperscript{153} The interpretive value of a piece of legislative history, therefore, depends upon the legislator’s involvement in preparing and promoting the legislation, and upon whether the legislator’s views were presented to other legislators prior to enactment.\textsuperscript{154} Under this regime, signing statements are classified as a type of post-enactment history having little interpretive value.\textsuperscript{155}

reduce funding to Indian tribes upon the direction of designated members of Congress. See id. In this action, President Reagan arguably vetoed that “line” from the bill. The effect of the recently enacted Line Item Veto Act on this argument is limited. That Act empowers the President to cancel parts of appropriations bills which relate to discretionary spending, new direct spending, or that are tax benefits which affect a limited number of people. Line Item Veto Act, Pub. L. No. 140-130, § 1021(a), 110 Stat. 1200 (1996) (to be codified at 2 U.S.C. § 681).

\textsuperscript{146} See Garber & Wimmer, supra note 141, at 375-76.
\textsuperscript{147} See id. at 377.
\textsuperscript{148} See id. at 379-80.
\textsuperscript{149} See supra note 51 (defining and discussing the unitary theory of the executive).
\textsuperscript{150} Underlying the interpretive value of presidential signing statements is the theory that the President has a constitutionally-permissible active role in legislating. See Mark R. Killenbeck, A Matter of Mere Approval? The Role of the President in the Creation of Legislative History, 48 ARK. L. REV. 239, 240-42 (1994) (arguing that since the President has a constitutional role in the conception and interpretation of the laws, executive statements regarding the meaning of a law have interpretive value).
\textsuperscript{151} Cross, supra note 9, at 222-30.
\textsuperscript{152} Id. at 225.
\textsuperscript{153} See id. at 222.
\textsuperscript{154} See id.
\textsuperscript{155} See id. at 222-23; see also SINGER, supra note 71, §§ 49.01-.03. The interpretive value of post-enactment history varies depending upon what the history is. For example, “[l]ong continued contemporaneous and practical interpretation of a statute by the execu-
Distinct from the signing statement as a species of legislative history is the statement that gives instructions to the implementing agency.\textsuperscript{156} These signing statements are due judicial deference for the same reasons that agency interpretations are given deference: expertise,\textsuperscript{157} consistency,\textsuperscript{158} contemporaneity,\textsuperscript{159} and executive authority.\textsuperscript{160} Thus, the weight given a signing statement will depend upon whether its interpretation as communicated to the agency persists over time, whether the President was in favor of the legislation, and the breadth of the grant of power to the agency.\textsuperscript{161}

Professor Popkin has argued that courts should defer to signing statements in only two situations: when the President has threatened to veto legislation and, as a result, he and the Congress arrive at a compromise;\textsuperscript{162} and when the legislation affects the President’s specifically granted constitutional powers, such as the appointments and foreign relations power.\textsuperscript{163} Professor Popkin specifically attacked some of President Reagan’s signing statements as being politically manipulative and therefore, not warranting judicial deference.\textsuperscript{164}

2. Judicial Use of Signing Statements

Prior to 1986, only six reported cases available on electronic databases cited signing statements.\textsuperscript{165} Since then, at least forty-two cases have cited...

\textsuperscript{156} See supra Part I.D (for examples of signing statements in which Presidents Reagan, Bush, and Clinton gave instructions to the agency regarding the implementation of the statute).

\textsuperscript{157} See Cross, supra note 9, at 229-31 (noting that courts do not assess an agency’s expertise).

\textsuperscript{158} See id. at 231-32 (indicating that the Supreme Court defers to the executive interpretation of statutes because the agencies rely upon the executive interpretation).

\textsuperscript{159} See id. at 232-33 (noting that signing statements are as contemporaneous as is physically possible).

\textsuperscript{160} See id. at 233-34 (noting that courts defer to the agency interpretation because the agency is responsible for implementing the law).

\textsuperscript{161} See id. at 229-34. As to the last consideration, the author elaborates that the greater deference the agency has, the greater the weight the signing statement is given. See id. at 233.

\textsuperscript{162} See Popkin, supra note 15, at 715 (noting that when a legislative compromise is recorded in a signing statement, it should be given weight).

\textsuperscript{163} See id. at 716 (arguing that when legislation infringes on an enumerated presidential power, signing statements could be given interpretive weight).

\textsuperscript{164} See id. at 709. Professor Popkin argues that President Reagan’s interpretations either chose a side on an issue that was unresolved at the congressional level, or “attempted to undermine the statutory structure.” Id. at 705.

\textsuperscript{165} See National Parks & Conservation Ass’n v. Kleppe, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976) (using President Johnson’s signing statement regarding amendments to the Free-
Nearly half of the cases use just three signing statements.\textsuperscript{166} See United States v. Lopez, 115 S. Ct. 1624, 1631 n.3 (1995) (mentioning that President Bush in his signing statement criticized the law as inappropriately overriding state firearm laws); Bowsher v. Synar, 478 U.S. 714, 719 & n.1 (1986) (noting in a footnote that President Reagan asserted in his signing statement that the Balanced Budget and Emergency Deficit Control Act was constitutionally defective); United States v. Lewis, 90 F.3d 302, 304-05 (8th Cir. 1996) (rejecting the defendant's argument that President Clinton's signing statement, which rejected the Federal Sentencing Guidelines proposal to equalize the penalties for crack and powder cocaine, supported the defendant's position that the disparity violated the equal protection clause because President Clinton in the statement recognized the disparity); United States v. Stokes, 66 F.3d 569, 584 n.24 (3d Cir. 1995) (noting "in passing" that President Bush in his signing statement praised the Anti Car Theft Act of 1992 for making carjacking a federal offense); United States v. Yacoubian, 24 F.3d 636, 639 (2d Cir. 1998) (using President Reagan's signing statement regarding technical corrections to the Sentencing Guidelines to define the provision for departing from the guidelines for an aggravating or mitigating circumstance); In re Unimet Corp., 842 F.2d 879, 885 n.6 (6th Cir. 1988) (noting that the district court decision below was in error to the extent that it relied upon President Reagan's signing statement regarding amendments to the Bankruptcy Code); Capital Cities Media v. Chester, 797 F.2d 1164, 1170 n.18 (3d Cir. 1986) (using President Johnson's signing statement regarding the Freedom of Information Act to note that the Act did not impair the President's ability to protect the national interest by ensuring confidentiality); Berry v. Department of Justice, 733 F.2d 1343, 1349-50 (9th Cir. 1984) (using President Johnson's signing statement regarding the Freedom of Information Act to interpret one of the goals of the Act); Consumer Energy Council v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 459 (D.C. Cir. 1982) (citing President Ford's statement on signing the International Security Assistance and Arms Export Control Act of 1976, wherein he stated that he had constitutional reservations about the provi-
Analysis of court use of signing statements reveals that while
sion of the Act which would allow Congress to veto proposed arms sales, to support the
proposition that the Executive has not accepted the constitutionality of congressional
schemes to disapprove Executive action by concurrent resolution; Crowley Marine Servs.
signing statement as support for what the Congress intended to accomplish with the 1982 amend-
ments to the CERCLA); Hechinger v. Metropolitan Wash. Airports Auth., 845 F. Supp.
902, 905-06 (D.D.C. 1994) (noting that President Bush had expressed concern about the
constitutionality of the Metropolitan Washington Airports Act Amendments in his signing
statement); United States v. Glover, 842 F. Supp. 1327, 1332 n.10 (D. Kan. 1994) (noting in
a footnote describing portions of the legislative history of the bill that President Bush in his
signing statement was concerned that portions of the federal Crime Control Act of 1990
encroached on traditional state authority); United States v. Trigg, 842 F. Supp. 450, 451 (D.
Kan. 1994) (noting that another court which considered the constitutionality of a portion of
the Crime Control Act of 1990 had noted that President Bush in his signing statement was
concerned that portions of the federal Crime Control Act of 1990 encroached on traditional
state authority); Comes Flying v. United States, 830 F. Supp. 532, 536 (D.D.C. 1992) (using President Ford's signing statement regarding
the Privacy Act to determine the day upon which the Act was signed into law); Hadden v.
statement regarding the Extension of the Equal Access to Justice Act could not change the
clear intent of Congress in passing the law); Synar v. United States, 626 F. Supp. 1374, 1394
n.22 (D.D.C. 1986) (citing in a footnote President Reagan's signing statement as support
for the proposition that the Balanced Budget and Emergency Deficit Control Act of 1985
was unconstitutional); NRG Co. v. United States, 31 Fed. Cl. 659, 669 (1994) (using Presi-
dent Reagan's signing statement regarding the Takings Act to support the congressional
intent); Monteverdi v. Secretary of the Dep't of Health & Human Servs., 19 Cl. Ct. 409,
429 n.93 (1990) (using President Reagan's signing statement regarding the Equal Access to
Justice Act).

167. Eleven of the cases use President Bush's Statement on Signing the Civil Rights
Amendments of 1991. See Butts v. New York Dep't of Housing Preservation & Dev., 990
F.2d 1397, 1405 (2d Cir. 1993) (using President Bush's signing statement to conclude that
there was no congressional intent as to whether the Amendments should be applied retro-
actively or prospectively); In re Estate of Reynolds, 985 F.2d 470, 477 n.8 (9th Cir. 1993)
(refusing to give weight to President Bush's signing statement regarding the retroactivity
of the amendments); Fray v. Omaha World Herald Co., 960 F.2d 1370, 1376 (8th Cir. 1992)
(using President Bush's signing statement to note the day on which the Amendments were
signed); Cohen v. Georgia-Pacific Corp., 819 F. Supp. 133, 139 (D.N.H. 1993) (using Presi-
dent Bush's signing statement to conclude that there was no congressional intent as to
whether the Amendments should be applied retroactively or prospectively); Beardsley v.
1994); Haynes v. Shoney's, Inc., 803 F. Supp. 393, 397 (N.D. Fla. 1992) (President Bush's
signing statement as support that Congress did not agree on the applicability of the
1992) (using President Bush's signing statement to note the day on which the Amendments
were signed); Crumley v. Delaware State College, 797 F. Supp. 341, 348 n.8 (D. Del. 1992)
(rejecting the defendant's argument that President Bush's signing statement be given sig-
nificant weight); Ribando v. United Airlines, Inc., 787 F. Supp. 827, 832 (N.D. Ill. 1992)
(using President Bush's signing statement as support that Congress intended prospective
enforcement of the Amendments); McCullough v. Consolidated Rail Corp., 785 F. Supp.
signing statements are subject to similar abuses as legislative history, they can also provide the same assistance.\textsuperscript{168} Certainly, a noncontroversial use of signing statements is to confirm the date upon which a bill was enacted by the President's signature.\textsuperscript{169}

\textit{a. When the Court Tips Its Hat to the President}

The least controversial use of signing statements is when courts support their conclusion with a "tip of the hat" to the President's opinion regarding the constitutionality of the statute or certain of its provisions as expressed in the signing statement.\textsuperscript{170} In \textit{Bowsher v. Synar},\textsuperscript{171} the Supreme Court held that the provisions of the Balanced Budget and Emergency Deficit Control Act of 1985, which gave executive power to the Comptroller General, an officer of Congress, were unconstitutional as violative of the doctrine of separation of powers.\textsuperscript{172} In describing the procedural

\begin{enumerate}
\item See infra notes 245-60 and accompanying text (discussing criticisms of the use of legislative history in general). Some signing statements, however, provide no interpretive assistance. For example, in \textit{Comes Flying v. United States}, in determining whether the Indian Self-Determination and Education Assistance Act waived the United States' sovereign immunity as to plaintiffs' tort claim, the court noted that the only legislative history regarding the portion of the Act at issue was President Bush's signing statement wherein he noted his "distaste" for the provision. 830 F. Supp. at 531 n.2. The court found this legislative history little help in construing the statute. \textit{See id.}
\item See \textit{Fisher}, 22 F.3d at 267 (noting that the Florida Keys Act provided that the sanctuary become designated as such on the effective date of the Act and that President Bush's signing statement showed that the President had the same understanding of the Act); \textit{Saleh}, 962 F.2d at 238 n.6 (noting that the current asylum law, as distinguished from the law under which the case was being decided, was enacted on November 29, 1990 by citing President Bush's signing statement); \textit{Cowsen-el}, 826 F. Supp. at 536 (citing President Ford's signing statement in noting that the Privacy Act of 1974 was signed into law on January 1, 1975).
\item See infra Part I.E.1 (discussing the critical response to presidential assertions of interpretive power).
\item 478 U.S. 714 (1986).
\item See \textit{id.} at 736.
history of the case, the Court noted in a footnote that President Reagan, in his signing statement, had expressed his view that the Act was unconstitutional. Similarly, in United States v. Lopez, the Supreme Court held that the Gun-Free School Zones Act of 1990 exceeded Congress's Commerce Clause power. To support the argument that the Act was a criminal statute unrelated to commerce, however broadly defined, the Court in a footnote quoted President Bush's signing statement in which he objected to the act as "inappropriately overriding legitimate state firearms laws with a new and unnecessary Federal law." Subsequently, the Third Circuit reacted to the Supreme Court's use of the signing statement in Lopez by citing to a signing statement in United States v. Bishop. In holding that the Anti-Car Theft Act of 1992 was not an unconstitutional intrusion into the states' powers to define and enforce the criminal law, the court, in a footnote, quoted President Bush's signing statement praising the federalizing of the crime in reaction to the recent epidemic of carjackings. The court noted that it would have found President Bush's statement "of relatively minor significance but for the fact that the Supreme Court in Lopez specifically noted President Bush's concern upon signing the Gun-Free School Zone Act."
b. Use of Signing Statements to Confirm the Reading of Statutory Language

Similarly non-controversial, but unnecessary, is the judicial use of signing statements to confirm its reading of statutory language. In *Aikens v. Banana Republic, Inc.*, the court held that the Americans With Disabilities Act (ADA) did not apply retroactively. In support of its holding, the court first cited the statutory language which specified the effective date of the Act. The court then turned to President Bush's signing statement which noted that the delayed effective date would "permit adequate time for businesses to become acquainted with the ADA's requirements and to take the necessary steps to achieve compliance." The court concluded that a retroactive application of the act would defeat the purpose of the delayed effective date.

c. Signing Statements as Indicia of the Fundamental Purposes of a Statute

In some instances, courts have used signing statements, both in conjunction with legislative history and standing alone, to understand the fundamental purposes of a statute. For example, in *Creek Nation v. United States*, the court relied upon the legislative history of the Indian Claim's Commission Act and the President's signing statement to conclude that the fundamental purpose of the Act was to provide a special venue for Indian claims and give Indians a "fair deal." Likewise, in...
United States v. Yacoubian,\textsuperscript{190} the court upheld the retroactive applicability of certain provisions of the Immigration and Nationality Act of 1990 against a constitutional challenge.\textsuperscript{191} The court relied upon the congressional conference report and upon President Bush's signing statement to find the rational legislative basis for the statute.\textsuperscript{192}

Courts have also used their understanding of the fundamental purposes of a statute, as described in a signing statement, to ascertain the meaning of undefined statutory terms. In construing various undefined or ambiguous provisions in the Freedom of Information Act (FOIA),\textsuperscript{193} courts have routinely cited President Johnson's signing statement to understand the broad purposes and limitations of the Act. For instance, in Berry v. Department of Justice,\textsuperscript{194} the court examined whether Berry's presentencing report and other documents were "agency records," a term which the FOIA does not define.\textsuperscript{195} Disclosure of documents pursuant to the FOIA depends upon whether the documents are considered agency records.\textsuperscript{196} In determining that the requested documents were agency records,\textsuperscript{197} the court cited President Johnson's signing statement to demonstrate that one of FOIA's purposes is to give the public access to the agency decision-making process.\textsuperscript{198} Similarly, in Church of Scientology of California v. United States Department of Justice,\textsuperscript{199} the court examined whether confidential law enforcement investigatory information fell within one of the

\textsuperscript{586} F. Supp. 1144, 1146 (D.D.C. 1984) (noting that the basic purpose of the Equal Pay Act is "to eliminate all wage discrimination based on sex" according to the statements of various members of Congress and President Kennedy's signing statement).

\textsuperscript{190} 24 F.3d 1 (9th Cir. 1994).

\textsuperscript{191} See id. at 7. Yacoubian, who had been convicted of a variety of criminal firearms offenses in 1982, faced deportation under the 1990 Act. See id. at 2, 6-7.

\textsuperscript{192} See id. at 8.


\textsuperscript{194} 733 F.2d 1343 (9th Cir. 1984). Berry was convicted of conspiracy to transport money received through interstate fraud and sentenced to three years imprisonment. See id. at 1344. He sued to get copies of his presentence investigation report, the Report on the Sentenced Offender, and other documents from the Department of Justice, the Parole Commission, and the Federal Bureau of Prisons. See id. at 1345.

\textsuperscript{195} See id. at 1349 (discussing the court's reliance on caselaw to determine whether the documents were agency records).

\textsuperscript{196} See 5 U.S.C. § 552(a)(3).

\textsuperscript{197} The court held that "court-generated documents are agency records if they are 1) in the possession of an agency and 2) prepared substantially to be relied upon in agency decisionmaking." Berry, 733 F.2d at 1349.

\textsuperscript{198} See id. In support of this conclusion, the court cited a Ninth Circuit case, the Congressional Reports, President Johnson's signing statement, and a law review article. See id. at 1349-50. The court did not comment on its use of the signing statement; rather, it appears in a string cite. See id.

\textsuperscript{199} 410 F. Supp. 1297 (C.D. Cal. 1976).
exceptions to the FOIA. In determining that these records were exempt from disclosure, the court used President Johnson's signing statement to emphasize that the FOIA compels disclosure of all government records that do not fall within the nine FOIA exceptions.

**d. Use of Signing Statements to Define Statutory Terms**

Furthermore, the courts have used signing statements in conjunction with other legislative history to determine the meaning of an undefined statutory term. For example, in *Clifton D. Mayhew, Inc. v. Wirtz*, the court held that the standard for determining the applicability of the Fair Labor Standard Act's good faith exception was objective rather than subjective. The court found that the Act did not specify whether the standard was objective or subjective and that other courts had interpreted it both ways. In support of its holding, the court quoted a statement in the *Congressional Record* of one of the House managers of the bill, and President Truman's message to Congress upon signing the bill, both of which stated that the bill required an objective standard.

Courts also have used signing statements to help interpret ambiguous statutory language in conjunction with other pieces of legislative history. For example, in *United States v. Story*, the court examined whether the defendants should be sentenced under the Federal Sentencing Guidelines (Guidelines), or under pre-Guidelines law. The court found the statute ambiguous as to whether the Guidelines applied to offenses which began...
before the date the Guidelines went into effect and were completed after that date. The court noted that the bill Congress passed was a compromise bill, meaning that it was not the bill that was originally introduced in either house, and that neither house of Congress issued a report regarding the enacted version of the bill. The court further noted that the Department of Justice had participated in the compromise negotiations. When the bill passed the House, the House Manager put a section-by-section analysis into the Congressional Record stating that the Guidelines would not apply to an offense begun before November 1, 1987 and completed after that date. When the Senate adopted the same bill, however, the Senate manager explicitly rejected this understanding, both on behalf of the Senate and on behalf of the Department of Justice. In his signing statement, President Reagan agreed with the Senate’s understanding, and ultimately, the court adopted the understanding of the Senate and the President. The Court noted that the weight accorded a presidential signing statement would vary with the circumstances, but relied upon the Justice Department’s participation in the negotiation process to justify the interpretive weight given to President Reagan’s views.

208. See id. at 992. The Guidelines provided that the Act would apply to those offenses committed after the effective date of the Act. Id. at 991.
209. See id. at 992.
210. See id.
211. See id. at 993 & n.5.
212. See id. at 993.
213. See id.
214. See id. at 994. The court justified its decision on the following grounds. First, during the Senate consideration of the bill, the Senate’s position was explicit, whereas the conflicting view was stated in a footnote to the section-by-section analysis of the bill. See id. Second, both the Senate and the House sought to avoid ex post facto violations, and under current law, there would not have been an ex post facto violation for continuing offenses. See id. Third, “[t]hough in some circumstances there is room for doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent . . . President Reagan’s views are significant here because the Executive Branch participated in the negotiation of the compromise legislation.” Id. Fourth, there was no rule of leniency problem because not all sentences under the guidelines yielded a higher sentence. See id. Finally, the result comported with the underlying congressional purpose of lessening disparity in sentencing. See id. at 994-95.
215. See id. at 994. Several courts have used the same analysis employing legislative history and signing statement. See, e.g., United States v. Pippin, 903 F.2d 1478, 1480 & n.2 (11th Cir. 1990) (including the signing statement in the court’s analysis of the Sentencing Act of 1987’s legislative history); United States v. Tharp, 892 F.2d 691, 695 (8th Cir. 1989) (justifying its similar reliance on the signing statement noting, “The President, after all, has a part in the legislative process, too, except as to bills passed over his veto, and his intent must be considered relevant to determining the meaning of a law in close cases”); United States v. Charleus, 871 F.2d 265, 269 (2d Cir. 1989) (citing the signing statement as support
e. Signing Statements Used to Resolve an Impasse

Most controversially, courts sometimes use signing statements to tip the scale in favor one interpretation over another. In cases construing the retroactivity of various provisions of the Civil Rights Amendments of 1991, some lower courts used President Bush's signing statement, which weighed in on one side of an unresolved controversy, to determine that Congress intended certain provisions to apply prospectively, and not retroactively. The Supreme Court, however, determined that there was no clear congressional intent and resolved the issue without relying on the signing statement.

The issue reached the Supreme Court in Landgraf v. USI Film Products. Ignoring President Bush's signing statement, the Court determined that Congress expressed no intent with regard to the retroactivity except for two sections of the Act. Congressional intent with regard to retroactivity was relevant both to interpret the text and to apply the default rule of statutory retroactivity. The Court held that the provisions at issue were not retroactive.

To some lower courts, however, the legislative history revealed that the intent of Congress was that the Act should be applied only prospectively. For example, in McCullough v. Consolidated Rail Corp., the court concluded that the Act should be applied prospectively even though "the

---

216. See Statement on Signing the Civil Rights Act of 1991, 2 PUB. PAPERS 1504, 1504 (Nov. 21, 1991). President Bush in his signing statement adopted "the analyses of S. 1745 introduced by Senator Dole on behalf of himself and several other Senators and of the Administration" into the Congressional Record. Id. "These documents will be treated as authoritative interpretive guidance by all officials in the executive branch." Id.

217. See infra notes 222-31 and accompanying text.

218. See infra notes 219-22 and accompanying text.


220. See id. at 262. Several sections of the Act specifically stated that they were not retroactive. Id. at 257-63. The court noted that:

The legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement. The history reveals no evidence that Members believed that an agreement had been tacitly struck on the controversial retroactivity issue.... Instead, the history of the 1991 Act conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct.

Id. at 262-63 (footnotes omitted).

221. See id. at 267-69. For the court to find that a statute is retroactive, Congress must "make its intention clear." Id. at 268.

222. See id. at 286.

223. 785 F. Supp. 1309 (N.D. Ill. 1992). The same judge who heard McCullough decided two similar cases under the Civil Rights Act of 1991 applying the same reasoning as
legislative history and commentary [were] not entirely clear."  

The court supported its conclusion by noting that prospective application was supported by some Congresspersons, one of the bill's sponsors, President Bush's signing statement, and the Equal Employment Opportunity Commission's interpretation.  

Other lower courts found the legislative history hopelessly ambiguous, but then claimed to find the congressional intent to be revealed in the legislative procedures surrounding the passage of the bill. For example, in Fray v. Omaha World Herald Co., 226 the court concluded that the procedural history of the bill meant that the bill would not have been enacted if the bill was interpreted to be retroactive.  

The procedural history of the bill revealed that President Bush vetoed a similar civil rights bill in 1990 that specifically provided for retroactivity, citing the bill's "unfair retroactivity rules" among his reasons for the veto, 228 and that in the next Congress, the version of the bill that ultimately was enacted did not contain the retroactivity provision.  

This reading implicitly gave some weight to President Bush's signing statement. A different court rejected the Fray approach, however, in James v. American International Recovery, Inc. 229 Concluding that the Act did not apply retroactively based on statutory retroactivity jurisprudence, the court assumed that there was no congressional intent as to retroactivity.  

f. Signing Statements that Are Inconsistent with Congressional Legislative History

Some courts have refused to use signing statements where they conflict with legislative history. In Taylor v. Heckler, 232 the court refused to consider a signing statement because it found the statement "largely inconsis-

---

225. See id.; see also supra note 216 and accompanying text (discussing President Bush's signing statement and his adoption of Senator Dole's interpretation).
226. 960 F.2d 1370 (8th Cir. 1992).
227. See id. at 1378. The court reasoned that since the earlier version of the bill which mandated full retroactivity did not pass, and that the version which did pass did not provide for full retroactivity, the legislative intent in the passed version of the bill was that it was to be applied prospectively only. See id.
228. See id. at 1375 (citation omitted).
229. See id. at 1375-76. The House version of the bill contained the same retroactivity provisions as the vetoed bill, but they were deleted in the Senate bill, which was the version that ultimately passed both Houses and President Bush signed. See id.
231. See id. at 1197-98.
232. 835 F.2d 1037 (3d Cir. 1988)
tent with the legislative history." At issue in Taylor was the meaning of the phrase "substantially justified" in the Equal Access to Justice Act (EAJA). Under the EAJA, a prevailing party may be reimbursed "reasonable fees and costs incurred in any non-tort civil action against the United States 'unless the court finds that the position of the United States was substantially justified.' In his signing statement, President Reagan had asserted that the substantial justification standard was a relatively low standard. The court held that President Reagan's interpretation was inconsistent with the legislative history. The court specifically refused to consider whether a presidential signing statement deserves to be accorded any weight in its statutory interpretation.

Other courts have simply refused to use signing statements at all. In Caruth v. United States, the court supported its holding regarding an income tax issue with an extensive exposition of the legislative history of a provision of the tax code, beginning with the enactment of the provision in 1918, and tracing the various amendments to the Act. At the end, the court noted that its exposition of the legislative history did not give any weight to the presidential signing statement.

---

233. Id. at 1044 n.17; see also Hadden v. Bowen, 657 F. Supp. 679, 685 (D. Utah 1986) (refusing to give weight to President Reagan's signing statement regarding the meaning of "substantially justified" noting, "The remarks of a few legislators, and even the President, cannot change the clear intent of the entire Congress").


235. Id. (quoting 28 U.S.C. § 2412(d)(1)(A) (Supp. III 1985)). An administrative law judge denied Taylor's request for social security disability benefits. See id. After exhausting her administrative appeals, Taylor appealed to district court and was granted summary judgement. See id.

236. See Statement on Signing the Bill Extending the Equal Access to Justice Act, 2 PUB. PAPERS 977 (Aug. 5, 1985). President Reagan stated:

[I]t is my understanding in signing this bill that the Congress recognized the important distinction between the substantial justification standard in the fee proceeding and a court's finding on the merits that an agency action was arbitrary and capricious or not supported by substantial evidence. The substantial justification standard is a different standard, and an easier one to meet, than either the arbitrary and capricious or substantial evidence standard.

Id.

237. See Taylor, 835 F.2d at 1042-44.

238. See id. at 1044 n.17.


240. Id. at 1142-1146. The court provided this appendix to its opinion which consists of its description of the legislative history of the original Act and the amendments to it. See id.

241. See id. at 1146 n.11.
II. Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes

A. Signing Statements Are Constitutionally Relevant

Signing statements can provide the same assistance and are subject to the same abuses, by both the Presidents who issue them and the courts that rely upon them, as legislative history.\textsuperscript{242} Because the President's constitutional role in legislating has grown along with the scope and number of federal statutes, his view should, under certain circumstances, be accorded significant consideration by the courts.\textsuperscript{243} Signing statements, as much as legislative history, are a constitutionally permissible extrinsic aid to interpreting statutes.\textsuperscript{244}

In advocating the interpretive value of presidential signing statements, it is necessary to confront the fact that the interpretive value of legislative history itself in statutory construction has come under increasing scrutiny.\textsuperscript{245} This criticism has had some effect, as reflected in the Supreme Court's decreased use of legislative history in recent years.\textsuperscript{246} Critics of legislative history make two basic arguments, one theoretical and the other practical. The first criticism is that legislative history is an invalid source for interpretation because it is not subject to the bicameralism and

\textsuperscript{242} See infra notes 245-60 and accompanying text (discussing the recent criticism of the use legislative history in general).

\textsuperscript{243} See supra Parts I.A, I.B (describing the President's legislative role).

\textsuperscript{244} See infra part I.A.2. (adopting a separation of powers model in which presidential signing statements can be accorded interpretive weight).

\textsuperscript{245} There always have been detractors of the use of legislative history. See United States v. Public Utils. Comm'n, 345 U.S. 295 (1953). Justice Jackson, in criticizing the use of legislative history, argued that divining legislative intent through legislative history is "not interpretation of a statute but creation of a statute." \textit{Id.} at 319 (Jackson, J. concurring). Justice Scalia, a vocal modern-day advocate of the irrelevance of extra-textual interpretive aids, argued "that the only legitimate source for interpretive guidance is the statutory text at issue, the structure of the statute as a whole, or other related provisions of statutory law." Zeppos, \textit{supra} note 72, at 1296. \textit{But see} Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring) (distinguishing between the use of legislative history in general and its use to avoid an absurd result); cf. Killenbeck, \textit{supra} note 150, at 247 (arguing that Scalia "presents no textual warrant for refusing to examine legislative history where such material provides essential context for resolving genuine ambiguities or avoiding patently absurd results"). The appointment to the Supreme Court of Justice Breyer, a leading advocate of the careful use of legislative history, may, however, counter this retreat. \textit{See generally} Breyer, \textit{supra} note 68.

\textsuperscript{246} See Breyer, \textit{supra} note 68, at 846. Then-Judge Breyer notes that although in 1981, "the Supreme Court relied on legislative history in almost every statutory case it decided," the Court's use has decreased to 55 out of 65 statutory cases in 1989, and 36 out of 55 statutory cases in 1990. \textit{See id.} (citing Patricia M. Wald, \textit{Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,} 68 \textit{Iowa L. Rev.} 195, 197, 288, 298 (1983)).
presentment requirements of the Constitution. This argument could be applied similarly to signing statements. The answer to both objections is that neither legislative history nor signing statements are equivalent to the law. Rather, when faced with an ambiguity or unanswered question, legislative history and signing statements can express the “will” of Congress and the President.

The second criticism is that as a result of the manner in which legislative history is created, it is not a reliable indicator of legislative intent because legislators as well as aides can “plant” legislative history which is intended to influence judicial interpretation. The corollary of this criticism in the signing statement context is that a President who chooses to sign a measure with which he disagrees can, through his signing statement, attempt to alter the effect of the legislation. The answer to this criticism is that the unreliable nature of some legislative history and some signing statements does not justify a per se rule against using them. Rather, as with legislative history, the reliability of the signing statements must be assessed through an understanding of the different situations in which the President issues them.

Defenders of the use of legislative history argue that judges need to be aware of the ways in which legislative history can be abused, but that they

247. See U.S. CONST. art. I, § 7; MIKVA & LANE, supra note 58, at 776-77 (citing Thompson v. Thompson, 484 U.S. 174, 191 (1987) (Scalia, J., concurring)). Judge Wald argues that what underlies this criticism is that Congress speaks constitutionally only through enacted statutes, “not through any supplementary explanation thereof.” Wald, supra note 57, at 285. But see Starr, supra note 56, at 375. Judge Starr suggests that floor speeches are the only legislative history which is even “minimally probative” of congressional intent, because they are the only pieces of legislative history which more members can be considered to have even heard or read. See id.; cf. Wald, supra note 57, at 306-07. Judge Wald’s response to this criticism is that it “denies legitimacy to all materials, even statutes, that have not been personally read by all the members of a Congress.” Id. at 307. The ramifications of this position are severe, because “few would deny at this late date that the typical representative votes on a complex statutory scheme without reading either the full bill or the legislative history.” Id.

248. See Breyer, supra note 68, at 863 (“No one claims that legislative history is a statute, or even that, in any strong sense, it is law.”).

249. See Wald, supra note 57, at 306.

250. See MIKVA & LANE, supra note 58, at 777; see also Starr, supra note 56, at 376-77. Related to this concern is the cost to litigators and nonlitigators of obtaining and analyzing legislative history. See id. at 377-78. Historically, there was a similar concern that legislative history and signing statements were not generally available. This information, however, is now widely available in print in U.S.C.C.A.N., the Weekly Compilation of Presidential Documents, the Public Papers of the Presidents, as well as on-line on Westlaw and LEXIS.

251. See Cross, supra note 9, at 222-23.

252. See supra notes 165-238 and accompanying text (discussing court decisions that have considered either legislative history or signing statements).
should not disregard it altogether. Indeed, a complete disregard of legislative history might itself raise constitutional questions because "legislative history is the authoritative product of the institutional work of the Congress." Former Chief Judge for the United States Court of Appeals for the District of Columbia Circuit and former White House Counsel Abner Mikva suggests that legislative history be used carefully. Careful use requires courts to resort to legislative history only when the statutory language is unclear, except when apparently clear language would lead to an absurd result. In addition, careful use of legislative history requires "a judicial understanding of the legislative process and a good-faith attempt on the part of the courts to choose legislative history that is most probative of legislative intent, not legislative history that supports their views." Finally, Judge Mikva advocates that courts "leave alone" situations in which the ambiguity in the statute is a result of a genuinely unresolved policy such as was the case in the retroactivity of the 1991 Civil Rights Act.

253. See Breyer, supra note 68, at 847.
254. Wald, supra note 57, at 306. Judge Wald continues:
To disregard committee reports as indicators of congressional understanding because we are suspicious that nefarious staffers have planted certain information for some undisclosed reason, is to second-guess Congress' chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively. It comes perilously close, in my view, to impugning the way a coordinate branch conducts its operations and, in that sense, runs the risk of violating the spirit if not the letter of the separation of powers principle.

Id. at 306-07.


256. See Mikva & Lane, supra note 58, at 780. Judge Mikva suggests the following hierarchy of legislative history as probative of legislative intent: committee and conference reports; markup transcripts; committee debate and hearing transcripts; and transcripts of actual floor debate. See id. at 782. Judge Mikva recommends disregarding the following: floor statements that are not a part of the debate; statements later inserted in the Congressional Record; and amendments that were rejected during the enactment process. See id. at 782-83.

257. See id. at 781.

258. Judge Mikva defines legislative history which reveals legislative intent as history which "bear[s] a significant relationship to the enactment process." Id. at 782.

259. See Mikva, supra note 65, at 382.

260. See supra notes 216-31 and accompanying text (discussing court use of President Bush's signing statement).
B. When and How Courts Should Use Signing Statements

As legislative history in general is useful in some situations and subject to abuse in others, so too are signing statements. There are three principles which should guide judicial use of signing statements. First, signing statements should be considered when the statute is ambiguous. Second, signing statements should be used only when they are reliable. Third, courts should justify their reliance on signing statements.

There are four situations in which a President is likely to issue an interpretive signing statement, all of which may encompass executive instructions to administrative agencies. In the first scenario, the President recommends the legislation but is not actively involved in the legislative process; upon signing the law he makes a statement regarding the meaning of the law. In the second situation, the President recommends the legislation, is actively involved in compromises necessary for the passage of the bill and upon signing the law makes a statement regarding its meaning. The third situation involves a statute that is purposefully ambiguous as a result of an unresolved policy conflict, and the President issues a signing statement in which he interprets the ambiguous provision. Finally, in the fourth situation, the President is opposed to the bill but signs it anyway, issuing a signing statement in which he interprets a provision with which he disagrees.

1. Signing Statements Should Be Used Only When the Statute Is Ambiguous

In Aikens v. Banana Republic, Inc., the court used a signing statement to confirm its reading of statutory language. This was an unnecessary use of a signing statement because the statute named the exact effective date of the act. Although this use could be defended as benign, the careful and therefore restrained use of legislative history counsels against such use.

2. Signing Statements Should Be Reliable Indicators of Congressional Intent

Signing statements are reliable when they give effect to congressional intent. To determine whether a signing statement is reliable, the court should look to the context in which the statement was made. Because a functional understanding of the legislative process reveals that the President has a role in negotiating legislative compromises and suggesting the

---

262. See id. at 1036.
substantive scope of legislation, signing statements are most reliable when Congress adopts the executive purpose as its own. In these situations, signing statements can aid a court in interpreting a statute where the statement clarifies an issue on which the legislative history is silent or augments the existing legislative history. Signing statements are least helpful when they conflict with the reliable legislative history or when they appear to resolve a conflict on which the Congress either could not agree or agreed to disagree.

In United States v. Story,264 the court’s reliance on a signing statement to help interpret an ambiguous provision of the Federal Sentencing Guidelines gave effect to congressional intent, thus demonstrating the proper use of a signing statement. In Story, the available legislative history was not entirely reliable.265 There were no committee reports regarding the bill, and the legislative history consisted of two items: a section-by-section analysis that the House manager of the bill placed in the Congressional Record, and a statement opposing the House manager’s analysis that the Senate manager of the bill placed in the Congressional Record.266 The court relied upon President Reagan’s signing statement, along with other justifications, to support its adoption of the Senate rather than the House version of the bill.267 The court justified its use of the signing statement by noting the executive branch participation in negotiating the compromise bill.268 The court did not use the signing statement to tip the balance of competing congressional interpretations in favor of one interpretation over another. Rather, the court used the signing statement to determine the weight the House manager’s statement should be given. The signing statement thus was a reliable indicator of congressional intent.

Some lower court decisions regarding the Civil Rights Amendments of 1991 provide examples of an improper use of signing statements. In those cases, courts used a signing statement to tip the balance of competing congressional interpretations in favor of one interpretation over another.269 As the Supreme Court noted when it resolved the issue, there was no clear congressional intent.270 Therefore, the signing statement

264. 891 F.2d 988 (2d Cir. 1989).
265. See supra notes 253-60 and accompanying text (discussing which pieces of legislative history are most probative of congressional intent).
266. See Story, 891 F.2d at 993.
267. See id. at 994.
268. See id.
269. See supra notes 216-31 and accompanying text.
270. See Landgraf v. USI Film Prods., 511 U.S 244, 263 (1994).
should not have been used to adopt one competing congressional interpretation over another.

As a corollary, it is proper for courts to refuse to use signing statements that conflict with legislative history. In *Taylor v. Heckler*, the court refused to consider a signing statement it found to be “largely inconsistent with the legislative history.”

3. Courts Should Justify Their Reliance Upon a Signing Statement

In *Clifton D. Mayhew, Inc. v. Wirtz*, the court used the signing statement to determine the meaning of a term that was not defined in the statute. It is impossible to determine from the opinion whether the President's statement is reliable. The opinion does not mention whether the President had any role in the passage of the Portal-to-Portal Act, but it does mention that the author of the legislative history to which the opinion refers was the House manager of the bill and a member of the Conference Committee. Such legislative history is at the pinnacle of the Mikva hierarchy of reliability. Reliable legislative history which agrees with a signing statement supports the reliability of the signing statement, but it would have been preferable for the court to have mentioned its justification for using the signing statement.

In the FOIA cases, courts have routinely cited to President Johnson's signing statement to understand the broad purposes and limitations of the Act to construe undefined and ambiguous terms. Although the courts' use of the signing statement appears to give effect to congressional intent, courts should justify their reliance upon the statement.

For the most part, the courts are choosing the proper course. Courts have used signing statements to interpret ambiguous or unclear statutory provisions without allowing the signing statement to count as a vote in favor of one policy preference over another. Courts have refused to use signing statements that were inconsistent with statutory language or legislative history. In general, courts need to be more explicit as to why they rely on signing statements.

---

271. 835 F.2d 1037, 1044 n.17 (3d Cir. 1987).
272. 413 F.2d 658, 661 (4th Cir. 1969).
273. See id.
274. See supra notes 253-60 and accompanying text (discussing which pieces of legislative history are most probative of congressional intent).
275. But see Cross, supra note 9, at 234-38 (discussing when judicial deference to presidential signing statements is appropriate).
276. See supra notes 182-87 (discussing courts' use of President Johnson's signing statement to construe various undefined or ambiguous provisions in the FOIA).
III. CONCLUSION

What were once ceremonial signing statements have become substantive assertions of the President's legislative role, presenting new challenges and opportunities to the courts. Because Presidents play an integral role in the legislative process, courts should consider signing statements along with legislative history when construing ambiguous statutory language or a statute that does not on its face answer the question presented. Judicial use of signing statements, however, should be limited to situations in which the signing statement is a reliable indicator of congressional intent. Courts can ensure that the signing statement is reliable by justifying their use of it according to the criteria suggested in this Comment.

Kristy L. Carroll