Note

From Deference to Restraint: Using the *Chevron* Framework to Evaluate Presidential Signing Statements

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In April 2004, the national media published pictures of U.S. troops mistreating Iraqi prisoners alongside reports that White House lawyers had crafted legal opinions defending such degrading practices.[1] In response, Senator John McCain fashioned legislation that would specifically prevent U.S. troops from mistreating terrorism suspects.[2] His efforts produced the Detainee Treatment Act of 2005, which specifically prohibited cruel, inhumane, or degrading treatment of prisoners.[3] The bill appeared to have the support of the President[4] who signed it into law on December 30, 2005.[5] The President, however,

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1. *See, e.g.*, Editorial, *Rewarding Mr. Gonzalez*, N.Y. TIMES, Jan. 5, 2005, at A22; Andrew Rosenthal, *Legal Breach: The Government's Attorneys and Abu Ghraib*, N.Y. TIMES, Dec. 30, 2004, at A22; *see also* Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *in* THE TORTURE PAPERS 172, 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (concluding that acts "specifically intended to inflict, severe pain or suffering . . . . must be of an extreme nature to rise to the level of torture" under 28 U.S.C. § 2340A).

2. S. Amend. 1977 to H.R. 2863, 109th Cong., 151 CONG. REC. S11,061 (daily ed. Oct. 5, 2005) (enacted); *see* Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, WASH. POST, Oct. 6, 2005, at A1.

3. 42 U.S.C.A. § 2000dd (West 2006).

4. *See* Eric Schmitt, *President Backs McCain on Abuse*, N.Y. TIMES, Dec. 16, 2005, at A1.

5. Statement on Signing the Department of Defense, Emergency Sup-

issued a statement, concurrent with the signing of the bill, claiming that the executive branch would "construe" the provision in a manner that would respect the role of the President as the commander in chief and the leader of the unitary executive branch.[6] The President further stated that the law would be interpreted to recognize the "constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks."[7]

Reports of the President's controversial interpretation of the bill sparked a number of questions in the minds of the American public. What did this mean? Was the President indicating approval of the bill while simultaneously interpreting the new law not to apply to the war on terror? Could the President do this? Why didn't he veto the bill if he didn't agree with it? For many, this was their first introduction to the presidential signing statement, a policy tool with a controversial history dating back to early part of the nineteenth century.[8]

This Note argues that because judicial consideration of signing statements creates serious separation of powers concerns, courts should use the *Chevron* framework to limit and guide the reach of these policy statements.[9] Signing statements have a proper place in the judicial interpretive scheme, but that place is at step two of the *Chevron* analysis. In other words, in order to give any interpretive weight to a signing statement, a court would first need to find a statutory ambiguity representing an implied congressional delegation to the executive, and then conclude that the executive interpretation contained in the signing statement is reasonable in light of that delegation. Applying the framework to signing statements will effectively

plemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005).

6. *Id.*

7. *Id.* at 1919.

8. Kristy L. Carroll, Comment, *Whose Statute Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U. L. REV. 475, 476 (1997) (describing an 1842 signing statement by President Tyler which generated a rebuke from a specifically convened House committee); Jennifer Van Bergen, *The Unitary Executive: Is the Doctrine Behind the Bush Presidency Consistent with a Democratic State?*, FINDLAW.COM, Jan. 9, 2006, http://writ.news.findlaw.com/commentary/20060109_bergen.html (noting signing statements dating as far back as 1817).

9. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984).

limit their use as evaluative tools. The President's interpretation of a law in a signing statement may well be a useful guide to understanding a statute, or the President's interpretation may actually be contrary to congressional intent in passing the statute. The *Chevron* framework operates to distinguish between these two situations, sanctioning the use of signing statements on the one hand and prohibiting such use on the other.

Part I provides a summary of the history and use of signing statements, presents commonly raised separation of powers concerns implicated by signing statements, and describes proposed legislative remedies to address these concerns. Part II provides an overview of the two-step *Chevron* analysis and outlines the rationales supporting the *Chevron* doctrine. Part III contends that signing statements are fundamentally different from legislative history, analogizes signing statements to agency interpretations in the context of *Chevron*, and describes how application of the *Chevron* framework to signing statements would address separation of powers concerns regarding the use and potential abuse of signing statements. This Note concludes that framing judicial consideration of signing statements within the *Chevron* analysis is consistent with the character of signing statements and the rationale of *Chevron*.

I. PRESIDENTIAL SIGNING STATEMENTS

A. A HISTORY OF USE

After Presidents sign bills into law, they sometimes issue messages akin to press releases known as signing statements.[10] These pronouncements may provide general commentary on a bill, identify portions of the law about which the President has concerns, indicate the way the President plans to interpret the law, or give instructions to the executive actors charged with implementation.[11] Presidents also use signing statements "to thank supporters, chide opponents, score political points with particular constituencies, or leverage the Congress into devel-

10. Carroll, *supra* note 8, at 476; Van Bergen, *supra* note 8.

11. Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 516–17 (2005).

oping new legislation or amending the bill presently being signed but constrained by the president."[12]

The practice of issuing signing statements is not new; it can be traced back at least as far as President Monroe's administration in 1817.[13] In 1830, President Jackson issued a signing statement in which he manifested his interpretation of a road-construction bill to limit the extension of a road to the Michigan Territory.[14] In 1842, President Tyler issued a signing statement construing a law about which he had constitutional and policy doubts.[15] Responding to President Tyler's construction of the law, the House issued a report which characterized the signing statement as an attempted line-item veto, called it "pernicious" and "imminently dangerous," and resolved that Representatives had a duty to "place upon their journal an earnest remonstrance against its ever being again repeated."[16] In response to legislation which required the closing of certain consular offices, President Grant, in 1876, issued a signing statement construing the law as unconstitutional and resolving this problem by limiting the law's breadth to the disposition of government funds.[17]

While the practice of issuing signing statements is not unheard of in the nation's history,[18] neither is it common.

12. *Id.* at 518. One professor has called these "rhetorical signing statements" or "political signing statements," distinguishing them from "constitutional signing statements," which contain constitutional objections or claims of authority. Christopher S. Kelley, Dep't of Political Sci., Miami Univ., A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton, Presentation at the 61st Annual Meeting of the Midwest Political Science Association (April 3, 2003) (on file with author).

13. Van Bergen, *supra* note 8.

14. Brad Waites, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755, 763 n.35 (1987).

15. Carroll, *supra* note 8, at 476.

16. Waites, *supra* note 14, at 763 n.35 (quoting H.R. REP. NO. 27-909, at 11 (1842) (internal quotation marks omitted)). The House report also recommended that such signing statements "'be regarded in no other light than a defacement of the public records and archives.'" J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 453 (1990) (quoting H.R. REP. NO. 27-909, at 2).

17. Memorandum from Walter Dellinger, Assistant Att'y Gen., to Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994), *available at* http://www.usdoj.gov/olc/nonexcut.htm.

18. *See id.* ("[E]very President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions.").

Through the Carter administration, Presidents issued signing statements a total of seventy-five times.[19] During the Reagan presidency, signing statements took on a more important role as tools by which the President could document his interpretation of a law, instruct executive agencies regarding enforcement (or non-enforcement), and create a record to protect the President from claims that he approved unconstitutional laws.[20]

During the Reagan administration executive branch lawyers first conceived of signing statements as a means by which the President could create a type of "alternative legislative history" which courts could look to in interpreting statutes.[21] This development was part of a Justice Department "campaign to 'improve statutory interpretation by making clear the President's understanding of legislation at the time he signs a bill.'"[22] Attorney General Edwin Meese III praised the new policy as an "end to 'confusion' surrounding the interpretation of federal statutes."[23] The source of this confusion was ostensibly the inclusion of "provisions the President never wished to pass" in omnibus legislation.[24] To clarify this confusion, Meese arranged to have the signing statements published by West Publishing Company with the rest of a statute's legislative history

19. Van Bergen, *supra* note 8.

20. Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 43–44.

21. TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS & THE SEPARATION OF POWERS DOCTRINE, ABA, RECOMMENDATION 10 (2006), *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf [hereinafter ABA RECOMMENDATION] (noting that during the Reagan administration, "[f]or the first time, signing statements were viewed as a strategic weapon in a campaign to influence the way legislation was interpreted by the courts and Executive agencies as well as their more traditional use to preserve Presidential prerogatives"); Mark Johnson Boulris, Comment, *Judicial Deference to the Chief Executive's Interpretation of the Immigration Reform and Control Act of 1986 Antidiscrimination Provision: A Circumvention of Constitutionally Prescribed Legislative Procedure*, 41 U. MIAMI L. REV. 1057, 1060 (1987); Memorandum from Walter Dellinger, Assistant Att'y Gen., to Bernard N. Nussbaum, Counsel to the President, The Legal Significance of Presidential Signing Statements (Nov. 3, 1993), *available at* http://www.usdoj.gov/olc/signing.htm; Van Bergen, *supra* note 8.

22. Boulris, *supra* note 21, at 1060 (quoting Edwin Meese III, U.S. Att'y Gen., Address to the National Press Club (Feb. 25, 1986) (transcript available from the U.S. Dep't of Justice)).

23. Waites, *supra* note 14, at 757 (quoting Fred Strasser, *Executive Intent*, NAT'L L.J., Mar. 10, 1986, at 2, 2).

24. *Id.*

"so that all can be available to the court for future construction of what the statute really means."[25] It was also during the Reagan administration that future Presidents were taught an important lesson concerning the specificity of signing statements: the broader the language, the less likely any party will have standing to sue.[26]

In *AMERON, Inc. v. U.S. Army Corps of Engineers*, the President and Congress clashed over the meaning of the Competition in Contracting Act (CICA).[27] The CICA was designed to eliminate government waste and improve the efficiency of the review process for addressing complaints by contactors.[28] One of the central provisions of the CICA was an automatic stay mechanism, which immediately froze the contract award process when a complaint was received.[29] The President, however, issued a signing statement claiming that the automatic stay provision was unconstitutional, and gave specific directives to agency heads to implement the law as if it did not contain the automatic stay provision.[30] The specific nature of the signing statement and directive to the agencies made it easy for contractors to obtain standing to challenge the executive interpretation.[31] Later Presidents have chosen vague constitutional objectives over specific directives, since "[signing statements] are, in most cases, extremely difficult to challenge unless an administration deliberately makes clear specifically how and in what circumstances it will invoke the terms of the signing statement."[32]

President George H.W. Bush continued the trend of increasingly frequent use of signing statements,[33] although one

25. Van Bergen, *supra* note 8. Presidential signing statements are currently published in the Weekly Compilation of Presidential Documents and in the U.S. Code Congressional and Administrative News. ABA RECOMMENDATION, *supra* note 21, at 24.

26. Cooper, *supra* note 11, at 519.

27. 787 F.2d 875, 879–89 (3d Cir. 1986).

28. *Id.*

29. *See id.* at 879.

30. *Id.*

31. Cooper, *supra* note 11, at 518.

32. *Id.* at 518–19.

33. For an account of several instances in which the Reagan administration arranged with members of Congress "to have colloquies inserted into the congressional debates and then in signing statements relied on those colloquies to interpret statutory provisions despite stronger legislative evidence in favor of contrary interpretation[s]," see ABA RECOMMENDATION, *supra* note 21, at 12–13.

commentator speculated that his use of signing statements would fade into history: "[I]t remains quite possible that the Bush administration's strategy amounted to little more than a kind of gesturing . . . . [I]t is difficult to see how Bush's veto messages and signing statements could have any real or lasting importance."[34] The frequency with which Presidents issued signing statements did, however, increase throughout President George H.W. Bush's term and thereafter. By the end of President Clinton's second term, the cumulative number of signing statements issued by Presidents in the history of the country had risen to 322.[35] Of course, this number pales in comparison to the George W. Bush administration, which issued more than 435 signing statements in its first term of office.[36]

The current practice of issuing signing statements is not only exceptional because of the number of statements that are being issued, but also because of the broad substantive claims the statements routinely contain.[37] The current Bush administration routinely interprets congressional mandates as "advisory."[38] Indeed, commentators have called the formulaic breadth of President George W. Bush's signing statements concerning Article I and Article II powers "breathtaking," and have characterized his substantive claims as "dramatic declaratory judgments."[39]

34. Lund, *supra* note 20, at 46.

35. Van Bergen, *supra* note 8.

36. *Id.*; *cf.* ABA RECOMMENDATION, *supra* note 21, at 14 ("From the inception of the Republic until 2000, Presidents produced signing statements containing fewer than 600 *challenges* to the bills they signed. According to the most recent update, in his one-and-a-half terms so far, President George W. Bush (Bush II) has produced more than 800." (emphasis added)); Cooper, *supra* note 11, at 521 (counting 108 signing statements and 505 constitutional objections through the end of President George W. Bush's first term).

37. *See* Cooper, *supra* note 11, at 521, 527 (describing the administration's practice of stringing together broad, unsupported constitutional objections).

38. For example, President George W. Bush has purported to use a signing statement to limit Congress's constitutionally prescribed appropriations power. Statement on Signing the Consolidated Appropriations Resolution, 2003, 39 WEEKLY COMP. PRES. DOC. 225 (Feb. 20, 2003); *see also* U.S. CONST. art. I, § 9, cl. 2; Cooper, *supra* note 11, at 528; Waites, *supra* note 14, at 783 (calling the power of the purse "Congress' ultimate power").

39. Cooper, *supra* note 11, at 530.

B. PERCEIVED SEPARATION OF POWERS VIOLATIONS

The role of the President in the legislative process is defined in Article I of the Constitution.[40] On its face, the Constitution appears to confer upon the President a simple binary choice when presented with a bill: he may sign it if he approves of it, or he may veto it if he does not.[41] In reality, the President has more than two choices. He may use the pocket veto, for example, or he may delay and thereby enact a law without his signature.[42] The line-item veto is one tool that is not at the President's disposal,[43] but the President is not altogether removed from the work of crafting and interpreting legislation.

Presidential signing statements appear problematic because they seem to function like line-item vetoes, excising portions of bills without giving Congress the chance to respond with an overruling vote or change in the legislation.[44] The framers carefully considered and debated the so-called veto power granted to the President by the Constitution in Article I, Section 7, Clause 2.[45] As the American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine (ABA Task Force) has noted, the Presentment Clause does not even hint at the possibility that a President "could sign or veto part of a bill and elect to enforce a law that differed from the one passed by Congress."[46] This understanding is reinforced by the discussions of the Constitutional Convention and state ratifying debates, as well as by the

40. U.S. CONST. art. I, § 7, cl. 2.

41. *Id.* ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . . .").

42. *Id.* ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it . . . .").

43. *See* Clinton v. City of New York, 524 U.S. 417, 421 (1998) (finding the Line Item Veto Act to violate the Presentment Clause).

44. Sidak & Smith, *supra* note 16, at 454 (noting the line-item veto effect of signing statements); Kelley, *supra* note 12 (same).

45. *See* INS v. Chadha, 462 U.S. 919, 950–51 (1983) (describing the Great Compromise and the Presentment Clause as carefully considered safeguards against the abuse of power).

46. ABA RECOMMENDATION, *supra* note 21, at 18. *But cf.* Sidak & Smith, *supra* note 16, at 442–43 (positing that the phraseology of the Presentment Clause may indicate that the framers intended the President to have a power of revision over legislation).

nation's first President, who "declared that a bill must either be approved in all of its parts or rejected in toto."[47]

The framers unanimously rejected a proposal for an absolute veto; James Madison called such a power "obnoxious to the temper of the country," while Benjamin Franklin cautioned that with an absolute veto, a "private bargain" would be required with the President to pass every law.[48] By 1890, legislators had proposed a line-item veto power twenty-four times and had rejected it every time.[49] A line-item veto would upset the delicate balance of power that allows hostile political parties in coordinate branches of the government to cooperate in the interest of the country.[50] The danger is that "[i]f the President can object to an individual provision attached to an appropriations bill, Congress' ultimate power—the power of the purse—will be undermined."[51] Most of the responses to signing statements have come in the form of defensive reactions to a perceived veto-like power.

C. RESPONSES TO INCREASED USE AND ALLEGED ABUSE OF SIGNING STATEMENTS

Remedies proposed to resolve the controversy surrounding signing statements reflect misunderstandings about the potential problems posed by the abuse of signing statements. The proposed remedies would restrict the President's ability to issue signing statements or would provide for judicial review of signing statements in the courts. The report of the ABA Task Force commissioned to study the ramifications of presidential signing statements urged Congress to enact legislation that would enable the legislature, either directly or through *qui tam*

47. ABA RECOMMENDATION, *supra* note 21, at 18 (citing *Clinton v. City of New York*, 524 U.S. at 439–40).

48. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 62, 63 (Adrienne Koch ed., Ohio Univ. Press 1966) (1840) (recording the events of June 4, 1787); *see also* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 372–73 (1987) (relaying the Framer's discussions concerning the presidential veto at the Constitutional Convention).

49. Waites, *supra* note 14, at 783 n.119.

50. *Chadha*, 462 U.S. at 951 ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

51. Waites, *supra* note 14, at 783.

actions, to obtain judicial review in any instance in which the President "claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress."[52]

Some members of Congress apparently attempted to pick up where the ABA Task Force left off. House Bill 5486 would have prohibited the President from using funds to "produce, publish, or disseminate" signing statements and would have enjoined the judiciary from considering signing statements when "construing or applying any Act enacted by the Congress."[53] Another set of proposed bills would have required the President to inform Congress if he signs a bill but intends not to carry out any portion of it, and would have established procedures by which the House could make expedited responses.[54] Senate Bill 3731[55] would have conferred standing upon both houses of Congress to challenge a signing statement in court, where judges would ultimately "rule on the legality" of the statement.[56] In addition, the resolution would have barred courts from "relying on, or granting deference to, a presidential signing statement."[57] Not only are these proposed remedies contrary to judicial policies that the courts should not review executive action or inaction in the absence of standards of review,[58] but they also mischaracterize the fundamental separation of powers problem.

D. THE MISDIRECTION, OR PRESIDENTIAL NON-EXECUTION OF DULY ENACTED STATUTES

In reality, signing statements are comparable to neither line-item nor absolute vetoes. Unlike a veto, a signing statement does not affect the force of law behind a particular provision in a statute. If the President objects to a part of a bill he

52. ABA RECOMMENDATION, *supra* note 21, at 24.

53. H.R. 5486, 109th Cong. (2006); T.J. HALSTEAD, CONG. RESEARCH SERV., PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 25 (2006).

54. HALSTEAD, *supra* note 53, at 25.

55. S. 3731, 109th Cong. (2006).

56. HALSTEAD, *supra* note 53, at 26.

57. *Id.*

58. *Cf.* Heckler v. Chaney, 470 U.S. 821, 830 (1985) ("[E]ven where Congress has not affirmatively precluded review [of agency action], review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.").

has signed, the objectionable portion of the bill "remains on the books," enforceable by future Presidents.[59] Nevertheless, it is perceived—especially in the popular media—that the President is somehow not obeying or even effectively vetoing a law by issuing a signing statement.[60] In fact, most of the excitement over the veto-like nature of some signing statements can be traced to presidential non-execution of statutes, a broad and fundamental constitutional issue only tangentially related to signing statements and beyond the scope of this Note.[61]

Signing statements are also inappropriately analogized to laws; unlike laws, which are capable of legal challenge, signing statements have no binding legal effect of their own. Signing statements are not like laws or vetoes, and there can be no restrictions on the President's ability to issue signing statements. Rather, signing statements are rightfully understood as interpretations of statutes and directions to agencies. The real separation of powers concern with signing statements is that judges, by using the statements as a basis for decision, can give post-enactment interpretations by the President the force of law, even when those interpretations are contrary to the expressed will of Congress.

E. JUDICIAL CONSIDERATION OF SIGNING STATEMENTS

Strictly speaking, Congress is the only branch authorized to make law.[62] Judicial reliance on post-enactment statements

59. Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7, 32 (citing Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 774 (1993)).

60. *See, e.g.*, Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1 (stating that "President Bush has quietly claimed the authority to disobey more than 750 laws" by failing to veto laws, then eviscerating the laws through signing statements); Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22 ("President Bush doesn't bother with vetoes; he simply declares his intention not to enforce anything he dislikes.").

61. *See, e.g.*, Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 867–904 (1994); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 397–98 (1987). In fact, signing statements actually increase the transparency of the executive by notifying Congress when a President intends not to execute a portion of a law. *See* Posting of David Barron et al. to American Constitution Society for Law and Policy Blog, http://www.acsblog.org/separation-of-powers.html (July 31, 2006, 15:58 EST).

62. U.S. CONST. art. 1, § 1 ("*All* legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (emphasis added)).

of a non-legislative actor confers upon the President unconstitutional law-making power.[63] It is important to note that the consideration of signing statements does not always result in a separation of powers dilemma. To the extent that signing statements reflect interpretations of statutes that are either consistent with the expressed will of Congress or representative of permissible policy choices within a legislative gap, signing statements can be useful interpretive and evaluative tools. The problem arises when the President's interpretation of a statute becomes superior or co-equal to the expressed will of Congress, allowing the executive to absorb some of the legislative function. Despite the possibility for this unconstitutional mingling of powers, for more than two decades Presidents have purposely attempted to influence the judicial review of legislation by issuing signing statements.[64]

Before 1986, courts cited presidential signing statements a total of six times.[65] By 1997, that number had risen to at least forty-two.[66] Although it is clear that signing statements are finding their way into judicial opinions with increasing frequency, it is difficult to ascertain an overall trend in substantive reliance on signing statements by the courts.[67] It is, however, highly likely that with the proliferation and increased

63. *See* Sidak & Smith, *supra* note 16, at 453 (citing E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1948, at 343–44 (3d ed. 1948)). Justice Scalia, who opposes the consideration of legislative history, has argued that if legislative history is to be considered at all, then it should not be limited in its scope to pre-enactment statements, but should also include post-enactment statements made by members of Congress and presidential signing statements. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2815–17 (2006) (Scalia, J., dissenting) (criticizing the "selectivity" of the majority's use of legislative history, "discount[ing] numerous floor statements by the DTA's sponsors" and "wholly ignore[ing] the President's signing statement"). *But see* Continental Can Co. v. Chi. Truck Drivers, 916 F.2d 1154, 1157 (7th Cir. 1990) ("[S]tatements after enactment do not count; the legislative history of a bill is valuable only to the extent it shows genesis and evolution, making 'subsequent legislative history' an oxymoron.").

64. *See* ABA RECOMMENDATION, *supra* note 21, at 8–11 (describing the Reagan initiative to make signing statements more readily available for consideration by courts); Van Bergen, *supra* note 8 (noting that the Reagan White House arranged to have the signing statements published along with a bill's legislative history).

65. Carroll, *supra* note 8, at 503.

66. *Id.* at 503–04.

67. *Compare* HALSTEAD, *supra* note 53, at 21–23 (concluding that "there is no indication" that judges have relied on signing statements in any significant way), *with* Van Bergen, *supra* note 8 (noting cases in which the Supreme Court relied in part on signing statements).

availability of signing statements,[68] the practice will continue to become more common.[69]

Some uses of signing statements by courts are uncontroversial and constitutionally benign. For example, signing statements are sometimes used to confirm a bill's date of passage.[70] More often, courts consider signing statements when they are evaluating legislative history, without making a distinction between the two.[71] Signing statements have even been explicitly characterized as "legislative history," in both the civil[72] and the criminal contexts.[73] Courts have used signing statements to support legitimate governmental interests in rational basis analysis[74] and have even employed them in the first step of the *Chevron* analysis.[75]

II. THE *CHEVRON* DOCTRINE

A. THE *CHEVRON* TWO-STEP

The *Chevron* doctrine was born in a 1984 Supreme Court decision examining the permissibility of the Environmental Protection Agency's "bubble" concept interpretation of the term "stationary source" in the Clean Air Act Amendments.[76] The Court reasoned that since Congress had not decided on a definitive meaning for the term "stationary source," it would be improper for the Court to settle on a "static judicial defini-

68. Before President Reagan took office, Presidents had issued a total of seventy-five signing statements. Van Bergen, *supra* note 8. Through the Reagan, George H.W. Bush, and Clinton administrations, that total number rose to 322. *Id.* President George W. Bush issued 435 signing statements in his first term. *Id.*

69. Waites, *supra* note 14, at 776 n.91 (citing Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 865 (1930)).

70. *See* James v. Am. Int'l Recovery, Inc., 799 F. Supp. 1156, 1170 (N.D. Ga. 1992).

71. *See, e.g.*, Second Generation Props., L.P. v. Town of Pelham, 313 F.3d 620, 631 (1st Cir. 2002).

72. *See* Comes Flying v. United States, 830 F. Supp. 529, 531 n.2 (D.S.D. 1993).

73. *See, e.g.*, United States v. Ventre, 338 F.3d 1047, 1053–54 (9th Cir. 2003).

74. *See, e.g.*, Banner v. United States, 303 F. Supp. 2d 1, 22 (D.D.C. 2004).

75. *See* Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1177–78 (11th Cir. 2003).

76. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984) (internal quotation marks omitted).

tion."[77] The Court thus adopted a now familiar two-step approach for resolving questions of agency interpretations, consisting of an inquiry into congressional intent using the traditional tools of statutory interpretation at step one, and, absent a finding of such intent, deference to reasonable agency interpretations at step two.[78] Step one is concerned with ascertaining a statute's meaning, and legislative history may be an aid; step two is concerned with an analysis of the reasonableness of an executive interpretation if the meaning cannot be revealed at step one.[79]

B. THE *MEAD* DOCTRINE, OR *CHEVRON* STEP ZERO

The logical tidiness of the two-step *Chevron* analysis is somewhat misleading;[80] some of the thorniest questions center on whether *Chevron* should apply to a particular situation in the first place.[81] Just how clear must the finding of congressional delegation be? How much power must be delegated? In 2001, the Supreme Court attempted to clarify these issues in *United States v. Mead Corp.*, indicating that *Chevron* should only apply when Congress has delegated interpretive authority to the agency.[82] The preliminary inquiry described by the Court in *Mead*, sometimes termed *Chevron* step zero,[83] itself consists of two smaller steps. First, courts ask whether Congress gave the agency in question (or in this case, the President) the power to bind regulated parties with the force of law.[84] Second, courts explore whether the agency has actually exercised that delegated authority in adopting the litigated interpretation.[85] If the

77. *Id.* at 842, 845.

78. *Id.* at 842–44.

79. *Id. But see* Ellen P. Aprill, *Muffled* Chevron*: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51, 55 (1996) (describing the use of a modified *Chevron* doctrine for tax regulations that uses legislative history at step two to assess reasonableness).

80. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 976 (1992) ("[T]he two-step formula . . . offers a beguiling promise of an orderly method for resolving a wide variety of controversies.").

81. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191–92 (2006) ("[T]he most important and confusing questions have involved neither [*Chevron*] step. Instead they involve . . . the initial inquiry into whether the *Chevron* framework applies at all.").

82. 533 U.S. 218 (2001).

83. *See* Sunstein, *supra* note 81, at 191.

84. *Mead*, 533 U.S. at 226–27; *see also* Sunstein, *supra* note 81, at 213–16.

85. *Mead*, 533 U.S. at 226–27; *see also* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV.

answer to either of these questions is negative, then *Chevron* does not apply.[86]

Although not all signing statements will satisfy the *Mead* requirements, some will. But even in the absence of a strict *Chevron* analysis, agency interpretations may be entitled to considerable, if not explicitly formal, deference from the courts. When *Chevron* does not apply, courts will use another deference doctrine, born in *Skidmore v. Swift & Co.*,[87] as the framework for evaluating agency interpretations.[88] Under *Skidmore*, the court weighs various factors, such as "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[89] When enough of these factors are aligned in favor of the agency, the weight accorded to agency interpretations by the courts will hardly be distinguishable from *Chevron* deference.[90]

Chevron step zero is perhaps less important for signing statements than in the agency context. To the extent that the *Mead* analysis would channel judicial consideration into one of two deference doctrines, it matters more that courts apply some structured framework than which framework they apply.[91] *Chevron* and *Skidmore* can both achieve the desired result: instructing judicial consideration by harnessing signing statements with interpretive value and screening out signing statements without such value. *Chevron* is superior in this sense because of its logical simplicity.[92]

C. UNDERLYING RATIONALES

The *Chevron* doctrine has been regarded as one of the most important judicial constructs of the last half-century.[93] As one

1537, 1550–51 (2006).

86. Hickman, *supra* note 85, at 1551, 1553.

87. 323 U.S. 134 (1944).

88. *See Mead*, 533 U.S. at 227–28.

89. *Skidmore*, 323 U.S. at 140.

90. *See* Hickman, *supra* note 85, at 1552.

91. *See id.* at 1601.

92. *See* Sunstein, *supra* note 81, at 195 (calling the *Mead* analysis "excessively complex" and noting that "greater simplicity would be far preferable").

93. *See* Hickman, *supra* note 85, at 1547 (noting that *Chevron* is "so well-known"); Sunstein, *supra* note 81, at 188 ("*Chevron* . . . shows no signs of losing its influence."). *But see* William R. Anderson, *Against* Chevron*—A Modest Proposal*, 56 ADMIN. L. REV. 957, 961 (2004) (characterizing *Chevron* as a be-

commentator has noted, "the decision has become foundational, even a quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies . . . creat[ing] a kind of counter-*Marbury* for the administrative state."[94] Indeed, *Chevron* trumps even the time-honored doctrine of stare decisis[95] and stands as "one of the most important constitutional law decisions in history."[96] Underlying the *Chevron* doctrine are several powerful policy and separation of powers rationales, each of which will be described in turn. First, *Chevron* checks the courts from encroaching upon the law-making authority of Congress. Second, *Chevron* gives recognition to the special administrative expertise of agencies. Third, *Chevron* avoids the administrative difficulty that would result from case-by-case de novo review of agency interpretations. Fourth, and finally, the *Chevron* doctrine reflects the bedrock democratic principle that policy decisions should be made by those who are politically accountable.

1. Delegation of Legislative Authority

The central thesis of *Chevron* is that when Congress has conferred interpretive authority to an agency, the judiciary may not, consistent with the separation of powers doctrine, ignore that command.[97] This delegation by Congress may come in

wildering doctrine that produces inconsistent results and proposing an amendment to the Administrative Procedure Act that would supersede *Chevron*); Charles F. Mills III, Comment, *Clearing the Air: Use of* Chevron*'s Step One to Invalidate EPA's Equipment Replacement Provision*, 33 FLA. ST. U. L. REV. 259, 288 (2005) (noting scholarly concern over many aspects of the *Chevron* doctrine).

94. Sunstein, *supra* note 81, at 188–89. *See generally* Hickman, *supra* note 85, at 1547 (positing that *Chevron* is perhaps best understood "more as a tool for organizing judicial analysis than as a doctrinal statement").

95. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (holding that a prior judicial interpretation of a statute can only supersede a permissible agency construction "if the prior court decision holds that its construction follows from the unambiguous terms of the statute"); Randolph J. May, *Defining Deference Down: Independent Agencies and* Chevron *Deference*, 58 ADMIN. L. REV. 429, 431 (2006).

96. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 864 (2001) (internal quotation marks omitted) (quoting Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2227 (1997)).

97. *Id.* at 870–71 ("Deference is mandatory because Congress has commanded it. . . . Courts must obey Congress when it speaks in a matter permitted by the Constitution."); *see also* Anderson, *supra* note 93, at 963 ("*Marbury*

the form of an explicit directive to the agency, or it may come in the form of an implicit grant of authority evidenced by a "gap" in the law.[98] More often than not, direct evidence of congressional delegation is lacking; instead, *Chevron* rests on a "convenient fiction" of delegation.[99] In addition to implicit and explicit delegations of interpretive authority, *Chevron* can also be given effect through a finding of "Congressional expectation" of interpretive agency authority by examining the agency's "generally conferred authority and other statutory circumstances."[100]

2. Recognition of Agency Expertise

Those charged with administering a statute are likely to have expertise in the field that especially qualifies them to make interpretive judgments.[101] Agencies enjoy special expertise beyond the ability of the courts because of "several institutional advantages" in the agency system, including their "greater resources," the employment of specialists as opposed to generalists (like judges), and freedom from the fact-finding limitations inherent in the litigation process.[102] Administrative

is thus thought to be satisfied as the courts independently interpret the law, identifying the delegation and marking its outer boundaries.").

98. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984); *see also* Barnhart v. Walton, 535 U.S. 212, 217–18, 221 (2002) (applying *Chevron* deference to an agency interpretation, although arrived "through means less formal than 'notice and comment' rulemaking"); United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (noting that "some other indication of a comparable Congressional intent" could trigger *Chevron* deference).

99. Anderson, *supra* note 93, at 963. "Even *Chevron* itself said that deference should be owing to an agency interpretation even when 'Congress did not actually have an intent.'" *Id.* (quoting *Chevron*, 467 U.S. at 845); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (calling the search for congressional intent "a wild-goose chase" and describing the "fictional, presumed intent" of *Chevron* step one); Oren Eisner, Note, *Extending* Chevron *Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 CORNELL L. REV. 411, 429–30 (2001) (calling the implicit delegation doctrine "somewhat divorced from reality").

100. *Mead*, 533 U.S. at 229; *see also* John H. Reese, *Bursting the* Chevron *Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1169–70 (2004).

101. *See Chevron*, 467 U.S. at 865 (noting that in most cases "[j]udges are not experts in the field").

102. Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & POL. 105,

agencies are likely to have an "intense familiarity" and a "practical knowledge of what will best effectuate [the] purposes" of their governing statutes.[103]

3. Administrative Ease

The reality of the administrative state prevents courts from engaging in detailed consideration of every contested agency interpretation of a statute. Even if congressional delegation of authority to agencies is in many cases a fictional legal construct, "[it] is 'unquestionably better' than case-by-case evaluation."[104] The *Chevron* decision itself recognized the administrative advantages of deferring to agency interpretations.[105] Deference to agency interpretations allows needed flexibility in the law; "[o]ne of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change."[106] Under the *Chevron* doctrine, agencies can modify their interpretations of statutory ambiguities in light of new knowledge and changing political pressures.[107] In addition, the *Chevron* doctrine allows the courts to remain removed from political controversies, promotes uniformity in the law, and ensures "a greater measure of internal coherence in the interpretation of complex statutory regimes."[108] In fact, some advocates argue that the *Chevron* doctrine should apply in more circumstances because of its "dual advantages of simplifying the operation of regulatory law and giving policymaking authority to institutions that are likely to have the virtues of specialized competence and political accountability."[109]

145 (1997).

103. Eisner, *supra* note 99, at 434 (quoting Scalia, *supra* note 99, at 514 (internal quotation marks omitted)).

104. *Id.* at 430 (quoting Scalia, *supra* note 99, at 517).

105. *See Chevron*, 467 U.S. at 865.

106. Scalia, *supra* note 99, at 517; *see also* United States v. Mead Corp., 533 U.S. 218, 243–44 (2001) (Scalia, J., dissenting) (criticizing the *Mead* decision for robbing administrative agencies that choose to make policy on a case-by-case basis of *Chevron* deference and leaving them at the mercy of the permanent interpretations of the courts). Note that the decision in *National Cable Telecommunications Association v. Brand X Internet Services* partly obviates this objection to judicial determination of statutory ambiguities, because only judicial determinations based on the unambiguous terms of a statute will control subsequent agency action. *See* 545 U.S. 967, 982–83 (2005).

107. Scalia, *supra* note 99, at 517.

108. Merrill & Hickman, *supra* note 96, at 862.

109. Sunstein, *supra* note 81, at 194.

4. Safeguarding Policy Decisions in the Hands of the Political Branches

Since judges do not have constituents, it is inappropriate for them to make policy judgments reflecting competing interests and values; after all, "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[110] not to resolve nuanced policy disputes.[111] *Chevron* itself made this point clear by emphasizing that ambiguities in agency statutes represent gaps to be filled by the administering agencies, which are often faced with difficult policy decisions.[112] Presented with such a statutory gap, it is appropriate for the courts to defer to the policy choices of more politically accountable actors.[113]

Although agency heads themselves have no constituents and are not directly politically accountable, they are indirectly politically accountable. After all, "[a]gency heads are generally appointed by the President with the advice and consent of the Senate (or appointed by another member of the executive branch), and many can be terminated by the President at will."[114] This is an important consideration, especially in light of recent research demonstrating that even after *Chevron* personal political and policy preferences continue to play a role in judicial decision making.[115]

III. EVALUATING PRESIDENTIAL SIGNING STATEMENTS THROUGH THE *CHEVRON* FRAMEWORK

In light of the effect that personal politics has on judicial decision making,[116] it is better to have an articulated standard

110. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

111. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (noting that while judges are not permitted to make decisions based on their own political views or policy preferences, "an 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").

112. *Id.* at 866.

113. *Id.*

114. Bell, *supra* note 102, at 145.

115. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 831–65 (2006) (presenting an empirical analysis of policy and political preferences in judicial decision making); Sunstein, *supra* note 81, at 194 n.32 (referring to research showing that the decisions of judges are influenced by the political party of the President who appointed them).

116. *See* Jacob E. Gersen & Adrian Vermuele, Chevron *as a Voting Rule*,

governing the circumstances under which judges may consider presidential signing statements as a basis for their decisions, rather than a case-by-case approach that produces unpredictability and brings subjective preferences to the forefront.[117] This Part begins by arguing that signing statements are fundamentally different from other artifacts of legislative history, which a court may properly consider when analyzing statutes generally and when assessing agency interpretation under the first step of the *Chevron* analysis. Because signing statements are not legislative history, their role in the scheme of statutory interpretation should be limited to a very narrow context: the confines of the *Chevron* framework. Signing statements should, essentially, be considered just another executive agency interpretation, and analyzed as such for their substantive reasonableness in the event of a finding of ambiguity at the first step of the analysis.

Applying the *Chevron* framework to signing statements is consistent with the underlying rationales of congressional delegation, recognition of executive expertise, administrative ease, and the desire to leave policy judgments in the hands of politically accountable officials. Confining consideration of signing statements to the second step of *Chevron* avoids the separation of powers concerns behind the recently proposed legislative measures, which largely misconstrue the problem. At the same time, signing statement validation at the second step of *Chevron* would properly recognize that in some cases the President's role in the formulation of policy and law is not a matter of mere approval,[118] but rather an active and important role. Although it is the province of the judiciary to say what the law is,[119] the President takes an oath to faithfully execute the laws[120] and to "preserve, protect, and defend the Constitution of the United States."[121] In order to fulfill his constitutional duties, the President must engage in some level of statutory interpretation.

116 YALE L.J. 676, 679 (2007) ("*Chevron*'s effect varies markedly with the ideological and political preferences of the judges who apply it.").

117. *Cf.* Sunstein, *supra* note 81, at 194 (arguing that the *Chevron* framework should apply whenever possible).

118. For a detailed discussion of the President's role in the formation of law, 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, 239–310 (1994).

119. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

120. U.S. CONST. art. II, § 3.

121. *Id.* art. II, § 1, cl. 8.

A. SIGNING STATEMENTS ARE NOT VALID ARTIFACTS OF LEGISLATIVE HISTORY

Legislative history is an arguably useful tool of statutory interpretation because it has the potential to show the "genesis and evolution" of a bill as it made its way through Congress, shaped by committee reports and floor debates.[122] If one of the purposes of statutory interpretation is to give effect to the intent of Congress in passing a law, then the statements of the legislators involved in drafting, debating, and passing the bill are highly probative. On the other hand, it is impossible to derive a unified intent from the statements and actions of a collective body of legislators.[123] The difficulty in identifying the intent of Congress from legislative history can lead judges to favor signing statements, which usually present clear, unified interpretations of the bills.[124] But although the President's understanding of a bill may be easier to ascertain than congressional intent, the President's characterization is post hoc; by the time the signing statement is issued, the policy decisions have already been made and the legislative "intent" has already been completely formulated.

Because presidential signing statements are issued subsequent to or simultaneously with the signing of the bill into law, "[t]hey offer no guarantee of legislative acceptance or of conformity with legislative intent."[125] In fact, history provides examples of situations in which presidential signing statements were clearly not in conformity with congressional intent. Take,

122. Continental Can Co. v. Chi. Truck Drivers, 916 F.2d 1154, 1157 (7th Cir. 1990).

123. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 287 (1994) (Scalia, J., concurring) (referring to the "soft science of legislative historicizing"); United States v. Thompson/Center Arms Co., 504 U.S. 505, 521 (1992) (Scalia, J., concurring) (calling resort to legislative history the "last hope of lost interpretive causes"); Scalia, *supra* note 99, at 517 (calling the search for true legislative intent "a wild-goose chase"); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1458 (2000) ("Legislative history is the ultimate bugaboo of the textualists—those judges and scholars who assert that in statutory interpretation, '[w]e do not inquire what the legislature meant; we ask only what the statute means.'" (alteration in original) (citation omitted)).

124. *See* Boulris, *supra* note 21, at 1072–73 (noting that the President's understanding of a law "may be more readily ascertainable than congressional intent"); Waites, *supra* note 14, at 766 ("[T]he President's statement clearly identifies his intent, while the statements of individual legislators may not accurately represent the collective intent of all members of Congress . . . .").

125. Waites, *supra* note 14, at 772.

for example, President Reagan's treatment of the Immigration Reform and Control Act of 1986.[126] Despite ample evidence that Congress intended the legislation to create a private right of action for employees based on the "disparate impact" standard, the President, upon signing the bill, prescribed an "intentional discrimination" standard.[127] Members of Congress were "appalled" at the President's interpretation and characterized it as "intellectually dishonest."[128] Similarly, although Congress clearly intended[129] the Civil Rights Act of 1991 to overrule the Supreme Court decision of *Wards Cove Packing Co. v. Atonio*,[130] President George H.W. Bush interpreted the law as *codifying* the *Wards Cove* decision, relying on a lone colloquy which he had arranged to be inserted into the Congressional Record.[131] These are clear cases, but there are doubtless others where the shading of statutory purposes through presidential signing statements is less obvious. Signing statements are not legislative history, and their consideration as artifacts of legislative purpose and intent only creates potential for abuse.

B. COMPARING SIGNING STATEMENTS TO AGENCY INTERPRETATIONS IS CONSISTENT WITH THE *CHEVRON* RATIONALES

1. Delegation of Legislative Authority

There are several ways in which Congress delegates legislative authority, at least indirectly, to the President.[132] As discussed above, though, this delegation to the President need not be explicit. After all, *Chevron* itself rests in large part upon le-

126. Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

127. Boulris, *supra* note 21, at 1057–59.

128. *Id.* at 1058–59 n.10 (internal quotation marks omitted).

129. *See* 137 CONG. REC. S15,273 (1991) ("[T]he decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections . . . ."); Kelley, *supra* note 12, n.78 (noting the insertion of the "Danforth Memorandum" into the Federal Register by Congress, which made clear that Congress intended to overrule the *Wards Cove* decision).

130. 490 U.S. 642 (1989).

131. ABA RECOMMENDATION, *supra* note 21, at 12.

132. *See* Eisner, *supra* note 99, at 411–12 (arguing that ambiguity in foreign affairs statutes should properly be understood as a sign that "Congress left the resolution of the issue to the body it best saw fit to do so—the President").

gal fictions concerning the delegation of power to agencies. Analyzing presidential signing statements through the lens of the *Chevron* doctrine would rest on an arguably more supportable basis. Under a presidential control theory of the administrative state, delegations of legislative power to agencies may be appropriately understood as delegations to the President in his role as the politically accountable actor tasked with guiding those agencies.[133] Recognition of presidential signing statements would also rest on a legal fiction of sorts—the fiction that a delegation to an agency is a delegation to the head of that agency. After all, the executive function encompasses an interpretive role, requiring the President to interpret the laws in order to carry them out. In that sense, any ambiguity in a statute could be characterized as an implied delegation to the executive branch. Moreover, the Administrative Procedure Act, the statute upon which the administrative state is built, includes the Executive Office of the President within its definition of agency.[134]

A fiction of implied delegation to the executive is especially appropriate in light of recent developments in the administrative state. After the September 11, 2001 attacks, the control of agencies became increasingly concentrated in the hands of the executive;[135] these changes in the structure of the federal government were framed by important policy decisions made by the President.[136] In addition, President George W. Bush's view of the unitary executive dictates that increasing numbers of agency directives come from the President himself.[137] In this climate, signing statements have become "an integral part of the Administration's efforts . . . to assert functional and determinative control over all elements of the executive decisionmaking process."[138] In light of the concentration of agency authority in the hands of the executive and the legal fiction of delegation that supports *Chevron* itself, it is appropriate to

133. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001).

134. *See* 5 U.S.C. § 552(f)(1) (2000).

135. For example, the President, acting through the newly created Department of Homeland Security, can exert influence over twenty-two agencies. *See* Dep't of Homeland Sec., DHS History: Who Became a Part of the Department?, http://www.dhs.gov/xabout/history/editorial_0133.shtm (last visited Apr. 22, 2007).

136. *See* Reese, *supra* note 100, at 1105.

137. *See* HALSTEAD, *supra* note 53, at 10–11.

138. *Id.* at 11.

analyze presidential signing statements the same way agency interpretations are analyzed.

2. Recognition of Executive Branch Expertise

The idea that deference to administrative agencies is proper based in part on the increased specific expertise of the agency in a particular area of law fails when applied to the chief executive. Certainly, the President, like the courts, does not have the technical expertise that many administrative agencies enjoy. On the other hand, the President is not completely removed from the work of agencies.[139] In addition, the President has certain constitutionally mandated areas of expertise, such as foreign relations and national security.[140] This expertise is evident in the congressional practice of conferring broad discretion on the President to act in these spheres.[141] Although congressional intent in passing a statute is certainly important to the interpretation and execution of that statute, there are also "extratextual considerations of various kinds, including judgments about how a statute is best or most sensibly implemented."[142] As the nationally elected representative of the people, the President is also properly characterized as an expert in national policy, since his constituency is the entire country. The President's policy choices shape the policy choices in all of the subordinate executive agencies.[143] Thus, although the President may not have the special technical expertise of, say, the Environmental Protection Agency, the President is an expert on national policy. Agency interpretations representing policy choices in legislative gaps are already evaluated through the *Chevron* framework; it is a natural extension of this analysis to subject signing statements to the same review.

139. *See* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 965 (1997) (noting examples of modern Presidents taking initiative to effect changes in regulatory rules in highly public ways); Eisner, *supra* note 99, at 427 n.99 (describing how the President is "heavily involved" in agency rulemaking).

140. Eisner, *supra* note 99, at 434–35.

141. *See id.* at 435 n.133 (providing examples of broad grants of executive discretion in foreign affairs and national security).

142. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2088 (1990).

143. *See* Kagan, *supra* note 133, at 2334–35 (explaining how the President shapes national regulatory policy in the administrative state).

3. Safeguarding Policy Decisions in the Hands of the President

Agency interpretations deserve deference in some cases because agency decisions often require "reconciling conflicting policies."[144] Policy choices should be made by democratically accountable actors. Agency personnel are not elected; however, *Chevron* recognizes that they share in the political accountability of the President.[145] Agency heads are politically accountable because they are usually appointed and subject to termination by the President.[146] It is entirely appropriate for the executive branch, and thus the chief executive himself, to "resolv[e] the competing interests which Congress itself . . . inadvertently did not resolve" and to make policy decisions "in light of everyday realities."[147] In fact, the so called "presidential control" theory of the administrative state holds that the President is a proper proxy for executive agencies and, "as the only elected official who represents a national constituency, is more majoritarian than even Congress."[148] It is especially important to safeguard policy decisions in the hands of the executive in light of empirical research indicating that judges are influenced by their own policy preferences, with "Republican appointees . . . more sympathetic to interpretations by Republican presidents than to those by Democratic presidents, and Democratic appointees show[ing] the opposite preference."[149] Applying the *Chevron* framework to signing statements recognizes that in some circumstances it is appropriate to consider an executive interpre-

144. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

145. *Id.* at 865–66.

146. Bell, *supra* note 102, at 145.

147. *Chevron*, 467 U.S. at 865–66.

148. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1659, 1675–78 (2004).

149. Sunstein, *supra* note 81, at 194 n.32. Thomas J. Miles and Cass R. Sunstein recently studied eighty-four Supreme Court and 253 circuit courts of appeals decisions and found "a strong relationship between the justices' ideological predispositions and the probability that they will validate agency determinations." Miles & Sunstein, *supra* note 115, at 825–26. Specifically, they found that conservative judges were more likely to invalidate agency interpretations designated as liberal, while the reverse was true with respect to liberal judges and conservative interpretations. *Id.* at 826. Similarly, liberal judges were more likely to approve of agency interpretations during the tenure of liberal Presidents, while the opposite was true for conservative judges during the tenure of conservative Presidents. *Id.*

tation of a law on matters of policy and provides a structure for determining when consideration is appropriate.

4. Administrative Ease

Equating signing statements with agency interpretations instead of legislative history capitalizes on the administrative advantages of the *Chevron* scheme. If signing statements are considered legislative history, they could potentially be considered every time a particular law is interpreted, regardless of the passage of time and the changing of circumstances and the political guard.[150] On the other hand, if signing statements are treated like agency interpretations and limited through a *Chevron* analysis, the flexibility of the law is enhanced, as changing circumstances can seamlessly bring about changes in enforcement regimes.[151]

Signing statements are not a part of enacted law, and characterizing signing statements as executive interpretations rather than legislative history helps to debunk this conception. Signing statements are interpretive directives to the executive branch as a whole, signaling the President's understanding of a law and guiding the agencies in carrying it out. A bill is only enacted once; future Presidents cannot issue new signing statements construing old law. But they could conceivably issue new interpretations or new directives to the executive agencies. A new President, desiring a change in the administration of a law based on changing policy priorities or new information, could issue a new permissible interpretation, via an agency directive, within the legislative gap.[152]

Another administrative consideration concerns the perceived legitimacy of the courts. It will never be more tempting

150. Note that the textualist judges, who generally decry legislative history, would be *less likely* to consider signing statements in their decision making. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2815–16 (2006) (Scalia, J., dissenting) (criticizing the majority's use of legislative history); United States v. Thompson/Center Arms Co., 504 U.S. 505, 521 (1992) (Scalia, J., concurring) (calling resort to legislative history the "last hope of lost interpretive causes").

151. Scalia, *supra* note 99, at 517.

152. This, after all, is the purpose of the *Chevron* doctrine. "In 1981, a new administration took office and initiated a 'Government-wide reexamination of regulatory burdens and complexities.' In the context of that review, the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term 'source' and concluded that the term should be given the same definition in both nonattainment areas and PSD areas." *Chevron*, 467 U.S. at 857–58 (1984) (internal citation omitted).

to accuse judges of letting their personal policy preferences govern their decision making than when judges consider signing statements. Framing this consideration with *Chevron* will greatly reduce the number of times the court enters this treacherous domain. In addition, placing signing statements within the easily recognizable two-step *Chevron* inquiry will reduce the perception that judges are being swayed by personal policy preferences. In sum, analyzing signing statements through the *Chevron* framework will increase flexibility in the policy sphere and improve the perceived legitimacy of the judiciary.

C. ALLAYING SEPARATION OF POWERS CONCERNS

So far, congressional and ABA responses to the increased use of signing statements have focused on the ability of the President to actually issue signing statements[153] and on the practice of refusing to execute laws that have already been signed.[154] But the question of whether the President may refuse to enforce properly enacted laws must be separated from the separation of powers questions raised by judicial consideration of signing statements. The President's right to refuse to execute the law, if he has such a right, exists whether or not he issues signing statements announcing his non-execution. The real problem with signing statements centers on the use of the documents by the courts. Using *Chevron* to provide an analytical framework for judicial consideration of signing statements properly addresses this problem without restricting the President from making policy statements upon signing bills. By providing a structured, objective framework for judicial consideration of presidential signing statements, a *Chevron*-like regime would serve as a check on the expansion of presidential power and safeguard Congress's legislative authority.[155]

CONCLUSION

Signing statements are not going away. Presidents will continue to use these tools to attempt to exert influence over

153. HALSTEAD, *supra* note 53, at 23–26.

154. ABA RECOMMENDATION, *supra* note 21, at 1; HALSTEAD, *supra* note 53, at 23–26.

155. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 654–57 (1985) (explaining how the prospect of judicial review keeps agencies faithful to the intent of Congress and safeguards against the influence of private interests).

the legislative process and the interpretation of the laws. Signing statements in themselves are not problematic; the President's ability to make policy statements cannot be constitutionally restricted. Underlying much of the debate over signing statements is the question of whether the President may constitutionally refuse to execute a statute, a question quite separate from the judicial treatment of signing statements. The real separation of powers threat posed by signing statements comes in the form of judicial use of the documents. Signing statements are often construed by courts as coequal with legislative history, but they are fundamentally different from other artifacts of legislative history. Rather, signing statements are properly analogized to agency interpretations and evaluated through the *Chevron* two-step consideration. Under this view, a court cannot endorse a signing statement as a legitimate interpretation of a statute unless the court first finds that there was an implicit or explicit delegation to an agency (and thus the President by proxy) and that the President's interpretation represents a permissible policy choice within the gap left by Congress. Faced with the situation in which agency action is based on a presidential signing statement presenting a reasonable interpretation of an ambiguous statute, a court might be well-served by using the President's signing statement as a way to understand the meaning of the law. Using the *Chevron* framework in this way screens out potentially constitutionally malignant applications of signing statements and simultaneously provides a structure lending credibility to consideration of signing statements in the appropriate circumstances. Application of the *Chevron* framework to signing statements is consistent with the rationales underlying the *Chevron* doctrine itself and prevents the misuse of signing statements by the judiciary in violation of the separation of powers doctrine.