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A MATTER OF DIRECTION: THE REAGAN ADMINISTRATION, THE SIGNING STATEMENT, AND THE 1986 WESTLAW DECISION

Christopher S. Kelley*

The presidential signing statement has received a great deal of attention since an April 30, 2006, *Boston Globe* story told of President George W. Bush using it to challenge the constitutionality of over 750 provisions of law.¹ As a result, the Senate² and House³ Judiciary Committees held a hearing on the signing statement, four separate bills were introduced in an attempt to blunt its effect,⁴ and various outside interest groups released statements condemning its use.⁵

Despite all of the heated attention directed towards the current administration and its use of the signing statement, it was not the first to use the signing statement. In fact, the signing statement has roots nearly as deep as the Republic.

The signing statement was first utilized in the Monroe administration to protect the President's Commander-in-Chief prerogative.⁶ The device did not come into regular use, however, until the period following Watergate, when it was used routinely by the Ford and Carter administrations to nullify legislative vetoes⁷ and drew its first reaction from Congress. In 1978, Congressman Elliot Levitas (D-GA) added language

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¹ Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1.

² *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006).

³ *Presidential Signing Statements Under the Bush Administration: A Threat to Checks and Balances and the Rule of Law?: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007).

⁴ S. 3731, 109th Cong. (2006); H.R.J. Res. 89, 109th Cong. (2006); H.R.J. Res. 87, 109th Cong. (2006); H.R. 5486, 109th Cong. (2006).

⁵ See AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), available at http://www.abanet.org/op/signing-statements/aba_final_signing_statements_recommendation-report_7-24-06.pdf; The Constitution Project, Statement on Presidential Signing Statements by the Coalition to Defend Checks and Balances (July 27, 2006) http://www.constitutionproject.org/pdf/Statement_on_Presidential_Signing_Statements.pdf.

⁶ Christopher S. Kelley, *The Unitary Executive and the Presidential Signing Statement* 57 (2003) (unpublished Ph.D. dissertation, Miami University), available at <http://www.ohiolink.edu/etd/view.cgi?miami1057716977>.

⁷ *Id.* at 73-77.

to an appropriations bill that required the Attorney General to inform Congress whenever he refused to defend a challenge to a legislative veto.⁸

But it was the Reagan administration that developed the signing statement into a strategic weapon, part of a set of “power tools” the President could rely upon when needed.⁹ Thus, the purpose of this Article is to provide a complete and detailed understanding of the decision by the Reagan administration to add the signing statement to the legislative history of bills signed into law. While many believe that the Reagan administration’s purpose for the signing statement was to affect judicial decisionmaking,¹⁰ I will demonstrate that the decision was designed to influence the administrative agencies as much, if not more, than to influence judges.

I. WHAT IS A SIGNING STATEMENT?

Before telling the story of the Westlaw decision, it is important to understand precisely what a signing statement is in order to understand its importance to the President. The signing statement is a document the President appends to a bill he has signed into law. The signing statement may be both written and spoken, as when the President calls together members of Congress or other important individuals who have helped pass the legislation he has signed. Mostly, signing statements are informal and only written, akin to a press release. The actual document that is the signing statement does not hold much interest to scholars studying the presidency. It is what is contained in the document—the “devil in the details”—that is important.

There are four different uses for the presidential signing statement—either non-constitutional or constitutional. The first use, and the only one not justified by interpreting the Constitution, is the rhetorical signing statement.¹¹ The rhetorical signing statement, by far the most common use of a signing statement, is used to garner the attention of the press, important political constituencies, Congress, and/or the public.

⁸ 2 U.S.C. § 288(e) (2000).

⁹ Professor Phillip Cooper classified such devices as the signing statement, executive order, and executive agreements because of their utility to respond to a variety of problems or issues that a President faced. See Phillip Cooper, *Power Tools for an Effective and Responsible Presidency*, 29 ADMIN. & SOC’Y. 529, 531–56 (1997).

¹⁰ See, e.g., Mark Johnson Boulris, *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 (1987); 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 (1987); 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 (1997).

¹¹ For further discussion of this device, see SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* (1997); JEFFREY TULIS, *THE RHETORICAL PRESIDENCY* (1998).

For instance, the President will thank particular members of Congress for help on a bill, or he will use it to scorn Congress for sloppy or irresponsible work.¹² One study has found that the number of signing statements responds positively to the presence of a federal election, going up during a presidential or midterm election and falling during off-year elections.¹³

The second, third, and fourth uses for the signing statement involve interpreting the Constitution. They either rely upon the Oath Clause or the Take Care Clause in Article II.¹⁴

The second use for the signing statement, and one that stems from the President's oath to protect and defend the Office of the Presidency as well as the Constitution, involves the President challenging provisions of a bill he deems unconstitutional.¹⁵ In this type of signing statement, the President can simply urge Congress to fix the defective provision(s) before the law takes effect, or he will inform Congress that he will not defend the provision if challenged. For instance, in a 1943 appropriations bill, Congress added language that punished three State Department employees¹⁶ who Congress determined were "irresponsible, unrepresentative, crackpot, radical bureaucrats."¹⁷ When President Roosevelt signed the bill, he argued that the provision represented a bill of attainder, was an "unwarranted encroachment upon the authority of both the executive and the judicial branches under our Constitution," and was not binding.¹⁸ Because the bill funded important wartime programs, Roosevelt was boxed into a corner and thus could not veto the bill. The employees challenged their termination, and when the suit went before the courts, the Roosevelt administration refused to defend the provision, requiring Congress to hire counsel in order to defend the statute.¹⁹ In *United States v. Lovett*, the Supreme Court sided with Roosevelt's challenge that the provision was unconstitutional.²⁰

¹² See, e.g., Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239, 273–74 (1995).

¹³ Kelley, *supra* note 6, at 68.

¹⁴ U.S. CONST. art. II, § 1, cl. 7; *id.* art. II, § 3.

¹⁵ Under the constitutional theory of departmentalism, the argument is that the Constitution empowers each branch to determine the meaning of the Constitution for itself, thus negating the commonly held belief that the judiciary gets to settle questions of constitutional meaning. For an extended discussion, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

¹⁶ See Urgency Deficit Appropriations Act of 1943, Pub. L. No. 78-132, § 304 57 Stat. 431, 450 (1943).

¹⁷ *United States v. Lovett*, 328 U.S. 303, 308–09 (1943).

¹⁸ Statement of the President Condemning Rider Prohibiting Federal Employment of Three Named Individuals (Sept. 14, 1943), *reprinted in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 386 (Samuel I. Rosenman ed., 1943).

¹⁹ See *Lovett*, 328 U.S. at 306 (1946).

²⁰ *Id.* at 315.

The President can also refuse to execute provisions he determines are unconstitutional. This is what President Bush has done nearly 1150 times since taking office in 2001.²¹ In 1994, Assistant Attorney General Walter Dellinger defended the President's prerogative to resist enforcement of unconstitutional provisions of law this way:

The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment. If the President does not challenge such provisions (i.e., by refusing to execute them), there often will be no occasion for judicial consideration of their constitutionality; a policy of consistent Presidential enforcement of statutes limiting his power thus would deny the Supreme Court the opportunity to review the limitations and thereby would allow for unconstitutional restrictions on the President's authority.²²

The third and fourth uses for the signing statement are the subject of this Article. They involve using the legislative history of a bill to instruct certain actors on how provisions of law should be interpreted. The legislative history of a bill contains a diverse and voluminous set of information from floor statements, amendments, and committee reports. Both are designed to help judges or bureaucrats interpret the legislative intent of various provisions of law in the present or in the future. And it is on the subject of legislative history that I will turn to next.

II. MEESE ELEVATES THE SIGNING STATEMENT

In a February 1986 speech that Attorney General Meese gave to the National Press Club regarding gun control, Meese took the opportunity at the conclusion to tell his audience of a recent decision by the administration to have the signing statement included in the "Legislative History" section of the *United States Code, Congressional and Administrative News* (USCCAN).²³ Meese stated:

To make sure that the President's own understanding of what's in a bill is the same . . . or is given consideration at the time of statutory construction later on by a court, we have now arranged

²¹ The number of challenges stems from my own database of presidential signing statements, Monroe through Bush.

²² Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199, 201 (1994).

²³ Garber & Wimmer, *supra* note 10, at 367.

with West Publishing Company that the presidential statement on the signing of a bill will accompany the legislative history from Congress so that all can be available to the court for future construction of what that statute really means.²⁴

The reactions to Meese's announcement did not come until November 1986, when Reagan used the signing statement to accompany the Immigration Reform and Control Act of 1986 (IRCA).²⁵ Reagan's signing statement contained eight separate challenges to provisions in the bill, and one challenge, regarding the interpretation of an unclear term, caused enormous outrage both for his interpretation and the use of the signing statement.²⁶

The controversy stemmed from President Reagan's interpretation of a provision authored by Congressman Barney Frank (D-MA), also known as the Frank Amendment.²⁷ Congressman Frank had been working on this particular provision for a number of years prior to its passage in 1986. The provision was designed to build protections into the immigration bill for lawful workers fired because of discrimination.²⁸ The legal standard Frank intended for a discriminatory firing was *disparate treatment*—which placed the burden of proof upon the employer to prove the firing was for reasons other than discrimination.²⁹ When the bill went to conference, however, the language defining discrimination was stripped away, leaving the term intact. When Reagan signed the bill, he filled the undefined provision with a meaning that was in clear contradiction to that of Frank's.³⁰ Reagan wrote:

I understand section 274B to require a “discriminatory intent” standard of proof: The party bringing the action must show that in the decisionmaking process the defendant's action was motivated by one of the prohibited criteria. Thus, it would be improper to use the “disparate impact” theory of recovery, which was developed under paragraph (2) of section 703(a) of title VII, in a line of Supreme Court cases over the last 15 years.³¹

²⁴ *Id.* (quoting Attorney General Edwin Meese III, Address at the National Press Club (Feb. 25, 1986)).

²⁵ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. § 1101 (2000)).

²⁶ Statement on Signing the Immigration Reform and Control Act of 1986, 22 WEEKLY COMP. PRES. DOC. 1534-37 (Nov. 6, 1986).

²⁷ 8 U.S.C. § 1324b (2000).

²⁸ Linda Greenhouse, *In Signing Bills, Reagan Tries to Write History*, N.Y. TIMES, Dec. 9, 1986, at B14.

²⁹ H.R. 3080, 99th Cong. (1st Sess. 1985).

³⁰ Statement on Signing the Immigration Reform and Control Act of 1986, 22 WEEKLY COMP. PRES. DOC. 1534, 1535 (Nov. 6, 1986).

³¹ *Id.*

Reagan's intent was clear. By changing the burden of proof from *disparate treatment* to *discriminatory intent*, the proof was on the employee to prove that discrimination was at the heart of the termination, a position favored by an important political constituency—business. Frank immediately objected, telling Linda Greenhouse of *The New York Times* that this interpretation was “incorrect” and “intellectually dishonest”: “To say you have to prove intent is to tell the bigots how to be smart and evade the law”³²

The larger question was also addressed by Greenhouse and others: did the Reagan administration really believe that the signing statement's inclusion in the legislative history would influence the decisionmaking process of federal judges?³³

In an influential article on the signing statement and its inclusion in the USCCAN, which appeared in the *Harvard Journal on Legislation*, two authors explored the meaning of Reagan's action both in announcing the appendage to the legislative history and interpreting the Frank Amendment to IRCA.³⁴ In response to the announcement to add the signing statement to the legislative history, the authors noted:

[T]hese “executive history” statements purport to ascertain the intent of the Legislature in passing the bill. The danger inherent in such a document is that its author will graft ambiguities and exceptions onto an act that was not so encumbered during the legislative process, thus making law in violation of Article I of the Constitution. Moreover, such statements raise the specter of an executive interpreting law, thereby encroaching on the exclusive authority of the federal courts under Article III.³⁵

By employing a formalistic view of separation of powers,³⁶ the authors argue that the President's legislative powers are strictly limited to signing or vetoing a bill, and his judicial powers involve the appointment of judges and little else.³⁷ With the signing statement, the Reagan administration attempted to divine the intent of Congress for judges wrestling with the meaning of the law. They wrote that “through the use of presidential signing statements as a tool of statutory interpretation, the current administration is engaged in an overt attempt to usurp power reserved for the Legislature and the Judiciary.”³⁸

³² Greenhouse, *supra* note 28, at B14.

³³ See, e.g., *id.*; Howard Kurtz, *Ed Meese's Blind Spot*, WASH. POST, July 19, 1987, at C1.

³⁴ Garber & Wimmer, *supra* note 10.

³⁵ *Id.* at 367 (citations omitted).

³⁶ For a discussion of the formal versus the functional interpretation of separation of powers, see Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

³⁷ Garber & Wimmer, *supra* note 10, at 365 n.9.

³⁸ *Id.* at 366.

Most of the focus of the article was on the Reagan administration's attempt to influence judicial decisionmaking, and it influenced the focus of later discussion of the purpose of the signing statement and the action taken by the Meese Justice Department.³⁹ Absent from much of the scholarly literature is whether the Reagan administration's motivation may have been designed to influence bureaucratic administrators. In the remaining portion of this Article, I argue that the primary motivation behind the Westlaw decision was to influence executive branch administration of the law, and only secondarily to influence judicial decisionmaking.

III. EXECUTIVE BRANCH IMPLICATIONS: EVIDENCE

With all of the attention that the Westlaw decision has received, it is surprising that there has been little to no attention paid to why the decision was made. Most of the discussion on the presidential signing statement tends to have a similar overview. Nearly all claim that Jackson was the first to use the signing statement (wrong), and all note that it was not until the Reagan administration and its decision to add the signing statement to USCCAN that the signing statement became a strategically important presidential device.⁴⁰ Oddly enough, given such an unusual move, none have taken the time to examine the deliberative process inside the Justice Department that led to the unusual decision.

The Reagan administration recognized the value of the signing statement when it took office in 1981. It was Reagan who understood that, when combined with other devices, it could enhance presidential power. The question: Why did they wait until 1986 to add it to the legislative history?

The answer to that question is multifaceted. It involves three parts: (1) a combination of an administrative strategy to governing; (2) an increasingly hostile external political environment; and (3) Supreme Court cases that cited the signing statement in the majority opinion. I will address each of these points separately below.

A. *The Administrative Presidency*

It is the Nixon administration that gets credited with developing a strategy to centralize administrative control inside the White House and away from the bureaucratic agencies and departments.⁴¹ When Nixon came to office in 1969, he faced an entrenched bureaucracy of "New Deal" Democrats who could resist any of his

³⁹ See, e.g., Carroll, *supra* note 10; Killenbeck, *supra* note 12.

⁴⁰ See, e.g., Carroll, *supra* note 10, at 476, 490; Brad Waites, Note, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755, 763, 786–87 (1987).

⁴¹ See RICHARD P. NATHAN, *THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY* 7–8 (1975).

policies.⁴² As a means to avoid that barrier, he implemented a number of changes that began to move the administration of policy closer to the President.⁴³ The strategy, however, was short-circuited by Watergate.⁴⁴

Prior to Reagan taking office in 1981, the conservative think-tank the Heritage Foundation put together a blueprint for presidential success titled *Mandate for Leadership*.⁴⁵ *Mandate* allowed the Reagan administration to “hit the ground running” by aggressively moving forward with a number of carefully planned governing strategies before political enemies and bureaucratic resistance had a chance to set in.⁴⁶

Part of this control meant putting political loyalists into key positions. For the particularly important political positions, candidates had to pass an ideological litmus test in which they were asked if they were not just Republican but also conservative Republican.⁴⁷ Reagan was able to take advantage of changes to civil service laws during the Carter administration that expanded the number of political appointees to strategic positions within the bureaucracy.⁴⁸ Reagan’s Attorney General for the second term, Edwin Meese, remarked of this process:

[W]e sought to ensure that all political appointees in the agencies were vetted through the White House personnel process, and to have a series of orientation seminars for all high-ranking officials on the various aspects of the Reagan program. We wanted our appointees to be the President’s ambassadors to the agencies, not the other way around.⁴⁹

A second important component to the administrative strategy involved the use of two key executive orders that would put a political filter at the beginning and end of the rulemaking process.

The first executive order, 12,291, required all the agencies and departments to assess the costs of new regulations to business versus the benefits to society.⁵⁰ If

⁴² *Id.* at 72–73.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ HERITAGE FOUNDATION, *MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION* (Charles L. Heatherly ed., 1981).

⁴⁶ JAMES P. PFIFFNER, *THE STRATEGIC PRESIDENCY: HITTING THE GROUND RUNNING* 13–14 (2d. ed., rev. 1996).

⁴⁷ ROBERT MARANTO, *POLITICS AND BUREAUCRACY IN THE MODERN PRESIDENCY: CAREERISTS AND APPOINTEES IN THE REAGAN ADMINISTRATION* 48–49 (1993).

⁴⁸ The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified at 5 U.S.C. § 1101 (2000)). The change allowed Reagan to appoint 5000 individuals to important agencies or departments in the administration. See PFIFFNER, *supra* note 46, at 56–57.

⁴⁹ EDWIN MEESE III, *WITH REAGAN: THE INSIDE STORY* 77 (1992).

⁵⁰ Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

the agency or department could not defend the costs, the regulation would not move forward.⁵¹ Even more importantly, the order empowered the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) as the centralizing agency to filter new regulations through.⁵² The second important executive order, 12,498, enhanced the value of 12,291.⁵³ It was designed to influence the agency rulemaking process *prior to* any action taken on any rule.⁵⁴ It required all regulators to submit to OMB their proposed regulatory agenda for the coming year.⁵⁵ Taken together, the orders provided the Reagan administration with a "good deal of informal monitoring and communication."⁵⁶ As to their effectiveness? One staff person at the Environmental Protection Agency (EPA) stated that "[y]ou don't spend two years thinking about a regulation without thinking about whether OMB is going to shoot it down."⁵⁷

These two executive orders, coupled with the strategic appointments, went a long way towards making the bureaucracy sensitive to the administration's political needs. Making bureaucratic administrators aware of the President's position on policy would be a key objective of the strategy to add the signing statement to the legislative history. One final component of this strategy would involve the ability to remove bureaucratic interpretation of legislation wherever possible, submitting the interpretation of political appointees instead. This final piece would fall into place in 1984 in the Supreme Court case *Chevron U.S.A. v. Natural Resources Defense Council*,⁵⁸ which involved interpretation of the Clean Air Act Amendments of 1977.⁵⁹

At issue in the case was statutory interpretation by administrators and questions arising from that interpretation.⁶⁰ When judges face cases challenging the interpretation of bureaucrats, they should follow a two-step process.⁶¹ In the first step, the judge should determine whether Congress has spoken on the issue.⁶² If the intent of Congress is clear, then the issue of interpretation ends.⁶³ If the meaning is not clear, then the judge should defer to a reasonable interpretation by the administrator.⁶⁴ As far as the Reagan administration was concerned, when a bureaucrat is faced with

⁵¹ *Id.* at § 2(b).

⁵² *Id.* at § 6.

⁵³ Exec Order No. 12,498, 50 Fed. Reg. 1,036 (Jan. 4, 1985).

⁵⁴ *Id.*

⁵⁵ *Id.* at § 1.

⁵⁶ Joseph Cooper & William West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. POL. 876 (1988).

⁵⁷ *Id.* at 876.

⁵⁸ 467 U.S. 837 (1984).

⁵⁹ Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified at 42 U.S.C. § 7401 (2000)).

⁶⁰ *Chevron*, 467 U.S. at 840.

⁶¹ *Id.* at 842.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 843.

making a judgment call on an unclear provision of a law, he or she should make that call with the President's preferences in mind.⁶⁵

The first part of this section examined the strategy of working through, or working over, the executive branch departments and agencies. This administrative strategy involved politicizing as much of the bureaucracy as possible; it involved the use of executive orders to pull the executive branch departments and agencies towards the President's preferences as much as possible; and it involved an important Supreme Court decision respecting the "expertise" of administrators when interpreting ambiguous or undefined provisions of law, thus creating the potential for the administration to get into the heads of administrators.

The second part will focus on the hostile political environment that the Reagan administration faced from the time it took office until the time it left. The hostile political environment made it difficult for the President to work with Congress, thus frustrating his responsibility to lead. When the legislative option closed, the President was forced to find another way to make good on the promises he made in the course of the 1980 and 1984 presidential campaigns. This other way would involve the development of tools, such as the signing statement, that enable the President to succeed unilaterally.

B. Increased Polarization

When Reagan was elected to the presidency in 1980, the effects of Watergate had ruined two previous presidencies.⁶⁶ His election victory, close in the popular vote, was a wipe-out where it mattered—the Electoral College. Reagan declared a mandate after winning forty-four states, as well as taking control of the Senate, and securing a more conservative House with the help of "Reagan" Democrats—Southern Democrats who supported Reagan and his policies.⁶⁷

Reagan's greatest success came in 1981 when his agenda received eighty-two percent of roll call votes in Congress.⁶⁸ Much of his success came from the thought his aides put into that first year in office. The aides, learning from the mistakes that Carter had made in his first year, kept the legislative agenda short and simple.⁶⁹ Carter came to office with a cluttered first agenda, thus confusing supporters in Congress as to what was immediately important and what was important in the "long term." For Reagan, it was all about speed and focus.⁷⁰ It meant sending a sparse legislative agenda

⁶⁵ *Cf. id.* at 843–44.

⁶⁶ Kelley, *supra* note 6, at 79–81.

⁶⁷ SIDNEY M. MILKIS & MICHAEL NELSON, *THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT, 1776–1993*, at 362 (2d. ed., 1994).

⁶⁸ 44 CONG. Q. ALMANAC 23-B (1988).

⁶⁹ PFIFFNER, *supra* note 46, at 125.

⁷⁰ *Id.*

with a couple of big items to Congress and lobbying aggressively before coalitions could form to oppose it.⁷¹ The focus was on just one theme—“shrinking the welfare state.”⁷² This theme involved tax cuts as well as cuts to domestic spending, culminating in “more than \$35 billion in domestic program reductions, a multiyear package of nearly \$750 billion in tax cuts, and a three-year, 27 percent increase in defense spending”⁷³ which looked to make good on Reagan’s promise of “peace through strength.”⁷⁴

As the misty-eyed romantics of the Reagan presidency would have you believe, the first year legislative successes were typical for the two terms of Reagan’s presidency. Nothing could be further from the truth. Despite his first year successes, Reagan was never able to replicate them in the seven years that followed.⁷⁵ In every year following 1981, Reagan consistently lost legislative support for his policies, bottoming out in 1987 when he was only able to win on 43.5% of the 192 roll call votes taken on positions that Reagan supported.⁷⁶ As Roger Davidson observed: “Reagan got his licks in early in 1981. By 1982, he had a hard time selling them cheap lemonade.”⁷⁷

What was the cause of the decline in legislative support on Capitol Hill? It seems that most came as a result of the electoral losses suffered by congressional Republicans in every election after 1980.⁷⁸ By 1986, the Republicans had lost the Senate, and the entire Congress had lurched dramatically to the left.⁷⁹ The 1982 midterm election—the first test of the President’s coattails—resulted in the worst midterm loss, at the time, for a President’s party since 1922.⁸⁰ The gains the Democrats made in 1982 emboldened them enough to challenge the administration’s claim of a “mandate.”⁸¹ The Democrats proceeded to challenge all parts of the Reagan Revolution—the tax cuts, the increase in defense spending, and the deep cuts in domestic spending.⁸² In 1984, despite Reagan’s trouncing of his Democratic challenger, Walter Mondale, the Republicans running for Congress did worse than anticipated, picking up only fourteen House seats and losing two Senate seats.⁸³ And as noted above, in the 1986 midterm election, Republicans suffered in both chambers, which led to a flip in control

⁷¹ *Id.*

⁷² MILKIS & NELSON, *supra* note 67, at 365.

⁷³ *Id.* at 365–66.

⁷⁴ 44 CONG. Q. ALMANAC 23-B (1988).

⁷⁵ *Id.*

⁷⁶ *Id.* at 22-B.

⁷⁷ *Id.* at 23-B.

⁷⁸ Patrick A. Hurley, *Partisan Representation, Realignment, and the Senate in the 1980s*, 53 J. POL. 3, 3 (1991).

⁷⁹ *Id.*

⁸⁰ Alan I. Abramowitz, *Economic Conditions, Presidential Popularity, and Voting Behavior in Midterm Congressional Elections*, 47 J. POL. 31, 41 (1985).

⁸¹ *See supra* note 67 and accompanying text.

⁸² Michael Nelson, *Elections and Achievement: Campaigning and Governing in the Reagan Era*, in THE REAGAN PRESIDENCY 5, 15 (Paul Kengor & Peter Schweizer eds., 2005).

⁸³ 40 CONG. Q. ALMANAC 3-B, 7-B, 13-B (1984).

of the Senate from the Republicans to the Democrats, giving the Democrats complete control of Congress.⁸⁴

The losses in Congress were not just because of a loss in support among Republican members, but also represented a loss in conservative Democrats who had made many of Reagan's 1981 successes possible.⁸⁵ For instance, in 1981 Reagan was able to court Republicans and conservative Democrats in order to pass a highly contentious sale of aircraft with advanced radar equipment to Saudi Arabia.⁸⁶ In 1987, the year in which Reagan scored the lowest on roll call votes, he vetoed the first two big bills of the year—one that dealt with water treatment and the other with highway construction.⁸⁷ Despite making personal appearances on Capitol Hill to placate wavering Republicans on veto override votes, Reagan was unable to get anyone to switch, causing both vetoes to be overridden.⁸⁸ Thus, though Reagan could count on a coalition of conservative Democrats and moderate Republicans in the House, as well as Republican control of the Senate, to pass his agenda in the early years, by the end of his first term and certainly in the second term, working with Congress became exceedingly difficult. Thus, to advance the Reagan agenda, it would take more of a strategy than just working with Congress to get it done.

But it was not just the loss of support in Congress that forced the Reagan administration onto a unilateral path. A second major problem involved an increasingly partisan Congress that was much more in tune with the type of Congresses that Presidents Ford and Carter faced as a result of Watergate. Not only was Reagan unable to work with Congress on his legislative agenda, but he was also spending more and more time fending off attempts by Congress to box him—and his exercise of prerogatives—in. What follows next is a discussion of Reagan's failure to defend claims of executive privilege when Congress subpoenaed documents, a loss in constitutional brinkmanship with Congress over the Competition in Contracting Act of 1984, and a bitter confirmation battle with the Senate over Reagan's choice of Meese as his Attorney General in the second term.

1. Executive Privilege Fails

At the end of 1981 and into 1982, an oversight subcommittee in the House Committee on Energy and Commerce subpoenaed documents from the Department of Interior relating to a discriminatory policy by the Canadian government directed towards U.S. oil companies.⁸⁹ The subcommittee wanted to investigate whether there

⁸⁴ See Hurley, *supra* note 78, at 3.

⁸⁵ See generally *id.* (tracking partisan voting patterns in the 1980s).

⁸⁶ 37 CONG. Q. ALMANAC 129–40 (1981).

⁸⁷ 43 CONG. Q. ALMANAC 6 (1987).

⁸⁸ *Id.* at 4-C.

⁸⁹ Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 654–55 (1997).

was sufficient evidence to warrant retaliation by the United States. The subcommittee called Interior Secretary James Watt to testify, only the Reagan administration had directed Watt to assert executive privilege in order to “protect sensitive cabinet level deliberations and avoid premature disclosure of foreign policy deliberations which could compromise ongoing diplomatic relations with Canada.”⁹⁰ After numerous and lengthy negotiations between the House subcommittee and the Reagan administration to release the information without infringing upon presidential prerogatives, it appeared that both were at an impasse.⁹¹ After concluding that the Reagan administration would not budge, the House subcommittee, followed by the full Committee, voted to hold Watt in contempt of Congress.⁹² When it appeared likely that the full House would vote in favor of contempt, the Reagan administration capitulated and agreed to allow the subcommittee (with no staff present) to review and take notes of the documents for a four-hour period.⁹³

Similarly, 1982 also brought a second high profile fight between the House and the White House over the assertion of executive privilege to protect (or conceal) information. This particular battle, which involved the EPA and information pertaining to dumping of hazardous waste is what Mark Rozell referred to as the “most contentious executive privilege debate in the Reagan administration.”⁹⁴ In this particular case, the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce and the Subcommittee on Investigations and Oversight of the House Public Works and Transportation Committee requested information from the EPA that the Reagan administration had either delayed or refused to release.⁹⁵ Caught in the middle was EPA Administrator Anne Gorsuch-Burford. When she was ordered to appear before the two subcommittees, the Reagan administration ordered her to invoke executive privilege under the argument that “disclosure of ‘enforcement-sensitive’ documents would compromise the government’s strategies and advantage defendants.”⁹⁶ After she invoked the privilege, the Public Works Subcommittee cited her with contempt, which was affirmed by the full House, making Gorsuch-Burford the highest ranking public official to be cited for contempt by the full House.⁹⁷

The administration was forced to negotiate a deal with the House to swap information in return for dropping the contempt charge, similar to the case above involving Interior Secretary Watt. Both cases left the Reagan administration’s claims of privilege damaged given that twice it had to capitulate to the House during a period in which

⁹⁰ *Id.* at 655.

⁹¹ *Id.* at 656.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon’s Shadow*, 83 MINN. L. REV. 1069, 1096 (1999).

⁹⁵ Miller, *supra* note 89, at 657.

⁹⁶ *Id.* at 657–58.

⁹⁷ *Id.* at 658.

Republicans controlled the Senate and the presidency. And the Gorsuch-Burford controversy added one more blow to presidential power. The investigations into dumping of hazardous waste, and the move by the administration to assert executive privilege in order to cover it up, led to the call for and naming of an independent counsel to investigate the actions of then-Office of Legal Counsel (OLC) head Theodore Olson.⁹⁸ A report by the House Judiciary Committee claimed that Olson had given false or misleading information during the course of the investigations and suggested that the Attorney General name an independent counsel to pursue the question of whether Olson lied.⁹⁹ Olson, whose office was designed to protect the constitutional prerogatives of the presidency, argued that the independent counsel fell under the control of the Attorney General.¹⁰⁰ The independent counsel, Alexia Morrison, argued that the position was created to be free from executive control, as a result of the “Saturday Night Massacre” during the Nixon administration.¹⁰¹ The Reagan administration gambled on its position and sued for clarification, which the Supreme Court provided in 1988. The Supreme Court, in *Morrison v. Olson* (with Chief Justice Rehnquist writing for the majority) decided in favor of Morrison,¹⁰² thus diminishing the President’s claim of control over inferior executive officers.

2. Competition in Contract Controversy

In 1984, Reagan signed the Deficit Reduction Act of 1984.¹⁰³ In his signing statement, Reagan objected to the grant of executive authority “to stay a procurement to a legislative officer, the Comptroller General.”¹⁰⁴ Reagan continued, noting the stay “unconstitutionally attempt[s] to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch.”¹⁰⁵ Giving executive functions to a legislative officer violated separation of powers, the administration reasoned.

⁹⁸ *Id.* at 659–60.

⁹⁹ *Id.* at 660.

¹⁰⁰ Howard Kurtz, *Meese Tries to Block Expansion of ‘Superfund’ Investigation*, WASH. POST, Mar. 6, 1987, at A3.

¹⁰¹ Stuart Taylor, Jr., *Justices Are Urged to Nullify Independent Prosecutor Law*, N.Y. TIMES, Apr. 27, 1988, at A1.

¹⁰² 487 U.S. 654 (1988).

¹⁰³ Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (codified at 26 U.S.C. § 1 (2000)).

¹⁰⁴ Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 339 (1993) (discussing Competition in Contracting Act, which was partly enacted through the Deficit Reduction Act).

¹⁰⁵ Statement on Signing the Deficit Reduction Act of 1984, 20 WEEKLY COMP. PRES. DOC. 1037 (July 18, 1984).

On October 17, 1984, the OLC issued an opinion supporting Reagan's position that the Comptroller General provision was unconstitutional,¹⁰⁶ and the Attorney General also notified Congress that the Justice Department would not defend the provision if challenged in court, nor would the administration enforce it.¹⁰⁷ A couple of months later, David Stockton, the Director of the OMB, sent out a notice to all executive branch agencies, just days after the regulations were finalized, instructing agency heads that they were not to act on the invalid provision.¹⁰⁸ When Congress summoned executive officials to explain the administration's position, the officials argued that until the courts ruled on the provisions they were going to proceed as if the provisions were unenforceable.¹⁰⁹ The courts, however, would speak.

Just months after the bill was signed into law, the Navy opened up bids to contract for parts on particular aircraft.¹¹⁰ One of the bidders, Lear Siegler, Inc., protested the awarding of the contract to an Israeli military contractor.¹¹¹ Under the law, Lear Siegler filed the protest with the Comptroller General, who should have then stayed the contract until a hearing could determine who deserved it. Since the administration believed that the process was unconstitutional, it continued with the award to the foreign contractor.¹¹² Lear Siegler filed suit against the Navy, which the Senate, the Comptroller General, and the House of Representatives joined.¹¹³

The administration's assertion of the right to refuse enforcement of a provision of law it independently determined was constitutionally defective failed to persuade the district court.¹¹⁴ The administration appealed the ruling to the Ninth Circuit Court of Appeals and continued to refuse enforcement until a ruling by the circuit.¹¹⁵ The House Government Operations Committee called the new Attorney General, Meese, to testify and explain why the administration would not enforce the decision in light of the district court's ruling. Meese informed the Committee that the administration would not respect the district court's ruling because the court was "not competent" to rule on the law.¹¹⁶ In response, the Committee voted to withhold funding for the

¹⁰⁶ Implementation of the Bid Protest Provisions of the Competition in Contracting Act, 8 Op. Off. Legal Counsel 236 (1984).

¹⁰⁷ Kmiec, *supra* note 104, at 349.

¹⁰⁸ Robert Rothman, *GAO's Authority over Agencies Questioned: Administration, Hill Snarled in Constitutional Confrontation*, CONG. Q. WEEKLY REP., Mar. 9, 1985, at 464; Myron Struck, *GAO Sets Disputed Contract Rules*, WASH. POST, Dec. 21, 1984, at A2.

¹⁰⁹ Rothman, *supra* note 108, at 464.

¹¹⁰ Christine E. Burgess, Note, *When May a President Refuse to Enforce the Law?*, 72 TEX. L. REV. 631, 643 (1994).

¹¹¹ *Id.* at 643.

¹¹² *Id.*

¹¹³ See *Lear Siegler v. Lehman*, 842 F.2d 1102, 1102-06 (9th Cir. 1987) *rev'd in part*, 893 F.2d 205 (9th Cir. 1989).

¹¹⁴ *Id.* at 1105-06.

¹¹⁵ *Id.* at 1104.

¹¹⁶ 41 CONG. Q. ALMANAC 239 (1985).

Justice Department and the OMB for the following two fiscal years unless the administration relented.¹¹⁷ Attorney General Meese circulated a memo to all executive branch agencies ordering them to comply with the district court's rulings until the outcome of the appeal.¹¹⁸

The administration was faced with a Congress that was eager to push back and more than willing to frustrate its political agenda. Not under discussion here, but certainly a part of the contentious relationship with Congress, was the controversial episode of Iran-Contra, which nearly led to impeachment proceedings against the President.¹¹⁹ Iran-Contra involved arms sales to Iranians, with the proceeds of those sales funneled to the contra rebels in Nicaragua.¹²⁰ This was done to skirt federal law that prohibited the administration from using public or private funds for the purpose of intervention in the Nicaragua Civil War.¹²¹ That episode led to an independent counsel investigation at a cost of millions of dollars from the treasury, the indictment and pardon of administration officials, and a loss of public confidence in the Reagan administration.¹²² This episode has been covered more extensively elsewhere¹²³ and space prohibits rehashing the particulars here other than to note that it played a role in the bitter relationship between the Reagan administration and Congress. The third part deals with Meese's confirmation fight to become Attorney General.

C. Meese's Confirmation Hearings

Attorney General Meese was nominated to succeed William French Smith in January 1984.¹²⁴ Meese had been one of the three men who served initially as the *troika* chief of staff system early in Reagan's first term.¹²⁵ He was serving as Counselor to the President when he was nominated to become the Attorney General of the United States.¹²⁶ Meese was a controversial figure—a conservative force inside the administration.

¹¹⁷ See Paulsen, *supra* note 15, at 328.

¹¹⁸ *Id.*

¹¹⁹ See generally Ryan J. Barilleaux & Christopher Kelley, *Ronald Reagan, Iran-Contra, and Presidential Power*, in *THE REAGAN PRESIDENCY: ASSESSING THE MAN AND HIS LEGACY* 115–16 (Paul Kengor & Peter Schweizer eds., 2005).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 125–26.

¹²³ See *id.* at 115–29.

¹²⁴ Nadine Cohodas, *Party-Line Decision Likely: Panel Set to Vote on Meese After Querying Ethical Fitness*, *CONG. Q. WEEKLY REP.*, Feb. 2, 1985, at 200.

¹²⁵ JOHN PATRICK DIGGINS, *RONALD REAGAN: FATE, FREEDOM, AND THE MAKING OF HISTORY* 170 (2007).

¹²⁶ *Id.* at 166–67.

During his confirmation hearings, there were allegations that Meese had accepted financial assistance in return for helping individuals obtain federal jobs.¹²⁷ Senator Joseph Biden (D-DE) asked for an independent counsel to investigate the charges, which occurred and lasted for five months.¹²⁸ The independent counsel found that some of the allegations “were indictable” but would not be pursued.¹²⁹ In addition to the independent counsel investigation, there were also a total of eleven other charges, which ranged from Meese’s alleged involvement in stealing President Carter’s campaign documents for use in a 1980 debate with Ronald Reagan to money he received in trade for some particular service.¹³⁰ Meese also faced an investigation by the Office of Government Ethics, which provided a background check into the “fitness of presidential nominees.”¹³¹ A version of the Office of Government Ethics report on Meese was leaked to *The Wall Street Journal*, which suggested that Meese was facing two violations of standard conduct.¹³² When the leaked report went public, the head of the investigation, who had communicated with White House Counselor Fred Fielding, reversed the findings of the report, which led to a claim of political coercion.¹³³

Because of the multiple investigations, the ninety-eighth session of Congress ran out of time before the Senate Judiciary Committee could finish its business with Meese’s nomination.¹³⁴ Meese had to suffer the indignity of having his nomination resubmitted to the ninety-ninth session of Congress. Finally, on February 23, 1985, Meese became the Attorney General—a process that took, from inception in the preceding Congress, a total of thirteen months.¹³⁵ Even after his confirmation, he faced investigations by the Senate into his dealings with a military contractor.¹³⁶ There was also an investigation relating to his involvement with an Iraqi oil pipeline.¹³⁷ Both actions led to a second independent counsel investigation.

IV. THE 1986 WESTLAW DECISION

This brings us to the strategy meetings that resulted in the unusual decision to add the signing statement to the legislative history of some bills the President signs into law. The previous sections argued that the decision was not made in a vacuum but

¹²⁷ Cohodas, *supra* note 124, at 200.

¹²⁸ NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789–1990*, at 101 (1992).

¹²⁹ *Id.*

¹³⁰ Cohodas, *supra* note 124, at 201.

¹³¹ *Id.* at 203.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 200.

¹³⁵ Nadine Cohodas, *Waited 13 Months: Meese Is Confirmed by Senate in an Unusual Saturday Session*, CONG. Q. WEEKLY REP., Mar. 2, 1985, at 385.

¹³⁶ BAKER, *supra* note 128, at 101.

¹³⁷ *Id.* at 101–02.

was more a response to an increasingly hostile political environment that the administration faced. Its legislative agenda was shut down by a loss in support of Republicans in each election from 1982 forward. Furthermore, the administration, when going toe-to-toe with the House of Representatives, was forced to back away from two claims of executive privilege and in one high profile claim to refuse to enforce a law that it determined was unconstitutional. And then finally, there was the bitter, thirteen-month confirmation battle, complete with the independent counsel investigations. The process left the administration in general, and the Justice Department in particular, with the belief that in order to protect its prerogatives and its agenda, it would take a bold strategy that involved unilateral action. The decision to add the signing statement to the legislative history was only natural in light of the raised profile of the signing statement prior to the 1986 decision.

There were two instances in which the Supreme Court recognized the presidential signing statement in the course of making its decision. The first decision was *INS v. Chadha*, the case that dealt with the legislative veto.¹³⁸ The legislative veto is a device that Congress uses to track the way in which the administrative agencies carry out the law. Normally it requires the agencies to notify a committee of Congress before proceeding with their legal obligations. The veto comes when a committee (or committees) refuses to allow the agency to proceed. Presidents have long objected to the legislative veto because, on practical grounds, it is overly burdensome and, on constitutional grounds, because it violates the Presentment Clause of the Constitution.¹³⁹ Because the legislative veto does not proceed through the legislative process the way other bills do, and because it is not “presented” to the President for his approval or disapproval, it is unconstitutional.

In the Carter administration, the Justice Department began to refuse enforcement or defense of the legislative veto on constitutional grounds.¹⁴⁰ Late in its first term, the administration decided to side with a challenge to the legislative veto that involved the Immigration and Naturalization Service. The case reached the Supreme Court during the Reagan administration. Despite Reagan’s assurances on the 1980 campaign trail that he would not advance the case to the Supreme Court after he took office, his Justice Department did just that, much to the dismay of members of Congress.¹⁴¹

The Supreme Court ruled that the legislative veto was unconstitutional.¹⁴² In the majority opinion, Justice Burger pointed to the historical practice of past presidents—dating to the Wilson administration—objecting to the legislative veto in their signing

¹³⁸ 462 U.S. 919 (1983).

¹³⁹ See U.S. CONST. art. 1, § 7, cl. 2; *infra* note 143 and accompanying text.

¹⁴⁰ Kelley, *supra* note 6, at 78.

¹⁴¹ Christopher S. Kelley, *The Significance of the Presidential Signing Statement, in EXECUTING THE CONSTITUTION: PUTTING THE PRESIDENT BACK IN THE CONSTITUTION* (Christopher S. Kelley ed., 2006).

¹⁴² *Chadha*, 462 U.S. at 928.

statements.¹⁴³ For the Reagan administration, this was an early signal that judges paid attention to the signing statement.

A second Supreme Court case made the signing statement more central to the decision. When Reagan signed the Balanced Budget and Emergency Deficit Control Act of 1985,¹⁴⁴ more popularly known as Gramm-Rudman, he singled out two defective provisions in a signing statement.¹⁴⁵ The first defective provision involved giving the Comptroller General executive powers.¹⁴⁶ The second defective provision involved the use of a legislative veto, which had been declared unconstitutional in the *Chadha* decision.¹⁴⁷

In the 1986 Supreme Court decision *Bowsher v. Synar*, which challenged Gramm-Rudman, the Supreme Court relied upon the reasoning of Reagan's signing statement in its majority opinion, deciding that the executive powers bestowed upon an agent of Congress violated the separation of powers doctrine.¹⁴⁸

In a separate examination on the use of the signing statement, I conducted elite interviews with a number of individuals in the Meese Justice Department who served at the time of the decision to add the signing statement to USCCAN.¹⁴⁹ The interviews were designed to get a sense of why such an unusual decision was made. Meese reported that once he was confirmed as Attorney General, he moved fast to "convene early morning 'brainstorming' sessions . . . [in which] all the division heads would gather to discuss" ways to make the signing statement a meaningful presidential device.¹⁵⁰ Another individual in the OLC, Douglas Kmiec, recalled that a great deal of emphasis at the meetings was placed on making the signing statement "a crucial vehicle for the President to give his subordinate officers direction . . . 'rather than relying solely upon the far less transparent judgment of someone in an executive agency applying the law for the first time.'"¹⁵¹

Since that time, the confirmation hearings for Justice Samuel Alito in January 2006 revealed a great deal about the internal process that placed the signing statement into the legislative history. In December 2005, the Bush administration agreed to release to the public numerous documents relating to Alito's days in the Justice Department.¹⁵²

¹⁴³ *Id.* at 942 n.13.

¹⁴⁴ Pub. L. No. 99-177, 99 Stat. 1038 (1985) (codified at 2 U.S.C. § 901 (2000)).

¹⁴⁵ Statement on Signing H.J. Res. 372 Into Law, 21 WEEKLY COMP. PRES. DOC. 1490, 1490-91 (Dec. 12, 1985).

¹⁴⁶ *Id.* at 1491.

¹⁴⁷ *Id.*

¹⁴⁸ *Bowsher v. Synar*, 478 U.S. 714, 719 n.1 (1986).

¹⁴⁹ See Kelley, *supra* note 6, at 5.

¹⁵⁰ *Id.* at 100.

¹⁵¹ *Id.* at 100-01.

¹⁵² See, e.g., Jesse J. Holland, *A Court in Transition*, HOUSTON CHRON., Dec. 21, 2005, at A7.

Among the many documents released, a number focused on why the decision to add the signing statement to the legislative history was made.¹⁵³

The process actually began early in 1985 when D. Lowell Jensen, a Justice Department official, wrote to Fred Fielding, who was Counselor to President Reagan, complaining about a signing statement that had been removed when it reached the President's desk.¹⁵⁴ When the White House received the Pacific Salmon Treaty Act of 1985,¹⁵⁵ the OLC added a signing statement that contained two challenges to provisions of the bill that it believed violated the separation of powers.¹⁵⁶ At some point, the provisions were stripped away by other officials in the executive branch without telling anyone in the OLC.¹⁵⁷ In a telling passage, Jensen informed Fielding that the "signing statements perform important functions by placing an interpretation on a statute and by giving instructions to the agency charged with the administration of a statute," and he suggested some procedures in elevating the profile of the signing statement.¹⁵⁸

In August 1985, Steven Calabresi and John Harrison, who both worked in the OLC, prepared a memo for the new Attorney General on the subject of the presidential signing statement.¹⁵⁹ In the memo, the two argued that the time was right to consider "a potentially powerful, if so far unused, tool: Presidential signing statements."¹⁶⁰ They outlined four possible ways to make the signing statement more widely used and known: the first was to write to the West Publishing Company to see if the signing statement could be included in the legislative history of bills the same way that committee reports are included, and if not, then to have the Government Printing Office (GPO) publish them; the second involved giving a series of speeches to assembled judges in order to elevate the signing statement's profile; the third was to make sure that attorneys in the Justice Department cited signing statements in their briefs and opinions; and the fourth was to have the OLC draft a law review article defending the signing statement.¹⁶¹ The Attorney General responded that he wanted to move forward on the signing statement and charged the Office of Legal Policy inside the Justice Department with identifying issues surrounding the placement of the

¹⁵³ See, e.g., Charlie Savage, *Alito Backed Immunity in Wiretap Case*, BOSTON GLOBE, Dec. 24, 2005, at A1.

¹⁵⁴ Letter from D. Lowell Jensen, Acting Deputy Att'y Gen. to Fred Fielding, Counselor to the President (Apr. 2, 1985), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>.

¹⁵⁵ Pub. L. No. 99-5, 90 Stat. 7 (1985) (codified at 16 U.S.C. §§ 776, 3631-3644 (2000)).

¹⁵⁶ See Jensen, *supra* note 154.

¹⁵⁷ *Id.* at 1.

¹⁵⁸ *Id.*

¹⁵⁹ Memorandum from Steven Calabresi & John Harrison, OLC Officers, to the Att'y Gen. (Aug. 2, 1985), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>.

¹⁶⁰ *Id.* at 1.

¹⁶¹ *Id.* at 2.

signing statement in the legislative history and ways in which the Justice Department could encourage more widespread use throughout the executive branch.¹⁶²

On September 3, 1985, T. Kenneth Cribb, Counselor to the Attorney General, wrote in a memo to James Spears, the Acting Assistant to the Attorney General, that the signing statement was under-utilized as a resource to advance presidential preferences and to protect presidential prerogatives.¹⁶³ In response, Ralph Tarr, Acting Assistant Attorney General in the OLC outlined the current process (as it stood in 1985) for adding a signing statement to a bill, noting that it was ad hoc and often not thought through, given that there was only a ten-day window in which to work (because the Constitution gives the President ten days to act on a bill).¹⁶⁴ What is especially important are the ways in which Tarr suggested the signing statement may be used. First, he argued that the signing statement, or the threat of a signing statement, could be used to gain added leverage against Congress.¹⁶⁵ The idea was that if the signing statement became the important power envisioned, then Congress, hoping to short-circuit any action taken on legislation after it left Congress, would be willing to compromise with the administration. While the process envisioned by Tarr may not have taken place, Bryan Marshall and I have shown that the signing statement, when used in conjunction with the veto threat, has been especially useful in gaining extra advantages from legislation presented to the President for his signature.¹⁶⁶

In addition, Tarr argued for three immediate uses of the signing statement, which shed light on the primary argument of this Article—that is, the reason to add the signing statement to the legislative history was done for internal, rather than external, reasons. The first use identified by Tarr was to influence how agencies interpret a statute.¹⁶⁷ He argued that the deference given to agency interpretation of defective or undefined provisions of a law should mean that the interpretation is influenced by the President's understanding provided by the signing statement.¹⁶⁸ The second use was to inform Congress of a problematic or defective provision in a bill and how Congress

¹⁶² Memorandum from T. Kenneth Cribb, Counselor to the Att'y Gen., to Charles Fried, Acting Solicitor Gen. (Sept. 3, 1985), at 1, *available at* <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>.

¹⁶³ Memorandum from T. Kenneth Cribb, Counselor to the Att'y Gen., to James M. Spears, Acting Ass't to the Att'y Gen., (Sept. 3, 1985), at 1, *available at* <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>.

¹⁶⁴ Memorandum from Ralph W. Tarr, Acting Ass't Att'y Gen., to T. Kenneth Cribb, Counselor to the Att'y Gen. (Oct. 2, 1985), at 1, *available at* <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>.

¹⁶⁵ *Id.* at 2.

¹⁶⁶ Christopher S. Kelley & Bryan Marshall, *Assessing Presidential Power: Veto Politics and Presidential Signing Statements as Coordinated Strategies* (unpublished manuscript, on file with author), *available at* http://www.allacademic.com/meta/p151834_index.html.

¹⁶⁷ Tarr, *supra* note 164, at 3.

¹⁶⁸ *Id.* at 5–6.

might correct it in the future.¹⁶⁹ And the third use was to influence judges, though Tarr noted that the courts only occasionally cite them.¹⁷⁰

In December 1985, Meese wrote to the West Publishing Company asking for permission to add the signing statement to the legislative history,¹⁷¹ and in response, the president of the company agreed, adding, "I am surprised nobody thought of it before."¹⁷²

On February 5, 1986, Samuel Alito, then a Deputy Assistant Attorney General in the OLC prepared a memo designed to make the signing statement more indispensable to the President upon enactment of a law.¹⁷³ Within the OLC, a "Litigation Strategy Group" (this is where the "brainstorming sessions" discussed above took place) was formed to discuss the positive and negative aspects of the presidential signing statement.¹⁷⁴ Among the objectives Alito noted, the signing statement *may* be a way to counterbalance the influence of Congress when judges interpret legislative history, but *more importantly*, it can be used to "increase the power of the executive to shape the law."¹⁷⁵ Alito recommended beginning to use the signing statement on a few bills that were below the radar of Congress and those in which the presidential challenge or interpretation was on solid ground.¹⁷⁶ Once those bills were identified, and the President brought on board, the staff inside the Justice Department should follow up with articles defending the signing statement in several high profile law journals.¹⁷⁷ Shortly thereafter, Meese went public with the Westlaw decision in his National Press Club speech discussed above.¹⁷⁸

CONCLUSION

It was my intent at the outset to do two things: first, to provide details to a decision that heretofore has gone unexplained. That is, the extraordinary decision

¹⁶⁹ *Id.* at 3–4.

¹⁷⁰ *Id.* at 4.

¹⁷¹ Letter from Edwin Meese, III, Att’y Gen., to Dwight D. Opperman, Chief Executive Officer, West Publ’g Co. (Dec. 13, 1985), at 1, *available at* <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>.

¹⁷² Letter from Dwight D. Opperman, Chief Executive Officer, West Publ’g Co., to Edwin Meese, III, Att’y Gen. (Dec. 26, 1985), *available at* <http://www.archives.gov/news/samuel-alito/accession-060-89-269/acc060-89-269-box3-SG-ChronologicalFile.pdf>.

¹⁷³ Letter from Samuel Alito, Deputy Ass’t Att’y Gen., to Litigation Strategy Group (Feb. 5, 1986), *available at* <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>.

¹⁷⁴ *See supra* note 150 and accompanying text.

¹⁷⁵ Alito, *supra* note 173, at 2.

¹⁷⁶ *Id.* at 4.

¹⁷⁷ *Id.* at 4–6.

¹⁷⁸ *See supra* note 23 and accompanying text.

by the Reagan administration to announce that it would begin adding the signing statement to the legislative history that appeared in the USCCAN published by the West Publishing Company. This was an important development in the evolution of the signing statement, yet why it was made has largely been taken for granted. Second, I wanted to correct the record on the impetus behind the decision. It has been argued that the primary motivation was to influence the decisions of judges, who look to the legislative history to clarify ambiguous or undefined provisions of law. My argument suggests that the primary motivation was internal, and not external, to the executive branch. The purpose was to influence bureaucratic decisionmaking when it came to interpreting vague or undefined provisions of law, and/or when it came to provisions deemed unconstitutional by the President.

On what basis did I make this claim? I argued that a combination of events pushed the administration in this direction. For instance, an increasingly hostile Congress throughout the 1980s made it difficult for the administration to advance its policy preferences by working in partnership with the legislative branch. In order to succeed, the Reagan administration moved its preferences unilaterally. In addition, the administration needed to protect presidential prerogatives from a hostile Congress—prerogatives such as executive privilege or the obligation to direct inferior executive branch officers. Thus, the signing statement was the best vehicle to communicate the view that a provision was unconstitutional to the appropriate agency, commission, or department.

I also used the words of those involved in the decision to support my argument. Interviews I conducted for my earlier research and the memos released in 2005 by the current Bush administration showed a continuous need to use the signing statement as a way of controlling the administration of law. More recently, Steven Calabresi, who worked in the OLC when the Westlaw decision was made (and claims to be the person behind advancing it), has argued that the purpose of the signing statement is to coordinate the bureaucratic agents with the preferences of the President.¹⁷⁹

My argument under study here is also a practical one. The President has a great deal of influence over the bureaucracy because he is the head of it—the Chief Executive Officer. He does not have that kind of influence over judges because the judiciary is a separate constitutional institution. So for purposes of influencing judicial decision-making, the Reagan administration was simply covering its bases. If judges used legislative history, then the President's position should at least be given as much weight as Congress. If judges deferred to the interpretation of an inferior officer, then the officer should understand the President's particular viewpoint. Furthermore, when the OLC was meeting to discuss this decision, there was evidence at that time that

¹⁷⁹ Steven G. Calabresi & Daniel Lev, *The Legal Significance of Presidential Signing Statements*, FORUM, 2006, <http://www.bepress.com/forum/vol4/iss2/art8/>.

judges were highly inclined to use legislative history.¹⁸⁰ By the end of the 1980s that was no longer true.¹⁸¹

I am also making this argument in the hope that future studies of the signing statement will pay more attention to precisely how, and under what conditions, executive agents are influenced by the President's position. There needs to be more work such as Michael Herz's study of the Clean Air Act Amendments in 1990.¹⁸² In that article, Herz found that President George H. W. Bush's signing statement, reinforced with visits to the EPA by individuals in the OIRA, was highly successful in getting a final rule from the EPA that was friendly to the business community.¹⁸³ And in 2002, President George W. Bush used his signing statement to the Sarbanes-Oxley Act¹⁸⁴ to attempt to narrow protections given to whistleblowers (once again an interpretation that favored the business community)¹⁸⁵—language that showed up in a legal brief written by the Acting Solicitor General in the Department of Labor.¹⁸⁶ It was clear that Bush's interpretation was done in support of an important political constituency, and only after immense pressure from senators and outside interest groups did the administration withdraw the interpretation.¹⁸⁷ It is clear that using the signing statement to pressure bureaucratic agents is immensely useful to any administration because it is difficult for anyone to monitor. We should all work to change that equation.

¹⁸⁰ See Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 294–306 (1982) (concluding that in the ten-year period ending in 1979, the Supreme Court was three times as likely to use legislative history in nearly every case involving U.S. law); see also Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195–216 (1983) (showing that by 1981, the Supreme Court was relying upon legislative history in greater frequency than at any period in the past).

¹⁸¹ Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 846 (1992) (“[B]y 1989, the Court decided a significant number of statutory cases . . . without any reference to legislative history . . .”).

¹⁸² Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 219–71 (1993).

¹⁸³ *Id.*

¹⁸⁴ Pub. L. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 15 U.S.C.).

¹⁸⁵ Statement on Signing the Sarbanes-Oxley Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1286 (July 30, 2002).

¹⁸⁶ Brief for the Assistant Secretary for Occupational Safety and Health as Amicus Curiae, Supporting Respondent, *Sasse v. Office of the U.S. Attorney*, (Sept. 12, 2002) (Nos. 02-077 and 02-078), available at http://www.peer.org/docs/dol/scalia_amicus_brief.pdf.

¹⁸⁷ For more on this episode, see Christopher S. Kelley, *Rethinking Presidential Power—The Unitary Executive and the George W. Bush Presidency* (unpublished paper, on file with author), available at http://www.pegc.us/archive/Unitary%20Executive/kelly_unit_exec_and_bush.pdf.