TESTIMONY

The Legal Significance of Presidential Signing Statements

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A quiet revolution in the scope of the President's constitutionally prescribed "lawmaking" powers took place during the administrations of Presidents Ronald Reagan and George Bush.[2] Nowhere was this more evident than in the successful campaign the two Presidents launched to make far more aggressive use of presidential signing statements[3] than had their predecessors. The presidential signing statement initiative was developed and spearheaded by former Attorney General Edwin Meese III[4] and was then continued during the Bush years by former White House Counsel C. Boyden Gray. The initiative quickly drew fire from both academics and legislators who denounced it as a usurpation of Congress's constitutionally exclusive power over lawmaking.[5]

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[2] See **U.S. Const. art. I, sect. 7, cl. 2** (the presentment clause). See also INS v. Chadha, 462 U.S. 919 (1983). For a discussion and explanation of the seemingly oxymoronic concept of presidential "lawmaking" powers see Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority, 68 **Wash. U.L.Q.** 485, 533-560 (Fall 1990) (reprinting a Federalist Society symposium on "The Presidency and Congress: Constitutionally Separated and Shared Powers").

[3] Presidential signing statements are brief statements made by the President when he he signs into law a bill presented to him by Congress pursuant to Article I, Section 7 of the Constitution. They are generally prepared in writing before the bill is signed into law and are issued at the time of signing much the way a judicial opinion is issued contemporaneously with the entry of an order disposing of a case.

[4] I was the staffer to Attorney General Meese who originally came up with the idea of the signing statement initiative, and I drafted Mr. Meese's letter to the West Publishing Company on this issue.

[5] Marc N. Garber & Kurt A. Wimmer, Presidential Signing

Subsequently, both Presidents Bill Clinton and George W. Bush made extensive use of signing statements. Walter Dellinger, President Clinton's Assistant Attorney General for the Office of Legal Counsel, wrote a memorandum entitled "Presidential Authority to Decline to Execute Unconstitutional Statutes" (November 2, 1994)that defended the use of signing statements in some circumstances. President George W. Bush has made the most extensive use of signing statements of any president so far, and he has come under strong but unjustified public criticism for doing so.

The critics complaints fail and the signing statement initiative has succeeded for three reasons. First, presidential signing statements are relevant "legislative" history and should be given as much (or as little) weight by courts and inferior executive officials as any other form of legislative history.

Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power, 24 **Harv. J. on Legis.** 363 (1987); Brad Waites, Note, Let Me Tell you What you Mean: An Analysis of Presidential Signing Statements, 21 **Ga. L. Rev.** 755 (1987); William D. Popkin, Judicial Use of Presidential Legislatyive History: A Critique, 66 **Ind. L.J.** 699 (1991). But see Cross, The Constitutional Legitimacy and Significance of Presidential "Signing Statements," 40 **Admin. L. Rev.** 209 (1988) (arguing that signing statements sometimes deserve to be given legal significance); Daniel B. Rodriguez, Presidential Signing Statements, Paper delivered at the 1989 Annual Meeting of the Western Political Science Association, Salt Lake City, Utah, March 30-April 1, 1989 (same). Legislative and journalistic criticism of the signing statement initiative is quoted in the academic literature cited above.

Second, presidential signing statements are legally significant as administrative interpretations of statutes entitled to deference under Chevron U.S.A. v. Natural Resources Defense Council.[6] And, third, presidential signing statements may in some circumstances be legally significant as binding directives to subordinate officials in the Executive Department of the government pursuant to the theory of the Unitary Executive. After briefly describing the history and nature of the Reagan-Bush signing statement initiative in Part I below, I will explain and defend each of these three grounds for giving legal weight to presidential signing statements in Parts II, III, and IV.

I. The Reagan-Bush Signing Statement Initiative

[6] 467 U.S. 837 (1984).

Presidential signing statements are not a new development. Presidents Jackson, Tyler, Grant, Truman, Eisenhower, Nixon, Ford, and Carter all exercised their constitutional power to issue written interpretive statements when they signed controversial bills into law.[7] Nevertheless, it is probably fair to say that "[m}ost of the pre-Reagan presidential interpretations ... have not involved politically contentious issues."[8] As Garber & Wimmer both stalwart critics of the signing statement initiative have noted, "the statements currently being produced by the administration are both qualitatively and quantitatively different from the traditional presidential statement."[9]

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[7] Cross, supra note __, at ___; Pokin supra note ___, at 700-704; Garber & Wimmer, supra note ___, at 366-370; Rodriguez, supra note ___, at 4.

[8] Popkin, supra note ___, at 702. The Jackson and Truman sigining statements discussed by Professor Pokin were at least somewhat controversial.

[9] Garber & Wimmer, supra note ___, at 366.

President Reagan's use of the signing statement built on the good work of his predecessors "in both scope and style."[10] In publicly announcing the initiative, Attorney General Meese explained that he had arranged for the publication of presidential signing statements, along with congressional legislative history, in the West Publishing Company's widely read and widely disseminated periodical, **U.S. Code Congressional and Administrative News** ("USCCAN"). Prior to that time, presidential signing statements were only available in less readily accessible sources and were less likely to be perceived as being relevant legislative history.[11]

Attorney General Meese explained that the purpose of the Reagan signing statement initiative was to make sure that the President's understanding of the meaning of legislative language

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[10] Rodriguez, supra note ___, at 4.

[11] It has long been recognized that the widespread public availability of legal source materials is critical if those materials are to have any real-world impact. **Grant Gilmore, The Ages of American Law** (19) (" "). See also **Mary Ann Glendon, Michael Wallace Gordon, & Christopher Osakwe, Comparative Legal Traditions** 565-570 (1985) (discussing differences in case reporting systems).

Professor Popkin explains that "Easy access to presidential legislative history is a recent phenomenon, beginning with government publication of the Weekly Compilation of Presidential Documents in 1965." Popkin, supra note ___, at 700 n.4. Prior to that time, presidential signing statements could only be found by the general public, or by interested judges and inferior executive officials, in: 1) the published public papers of various presidents; 2) occasional miscellaneous compilations of all the legislative history associated with particular bills; and 3) in the "Presidential Messages" section of the USCCAN and its predecessor, the United States Congressional Service. Id.

was given its due weight (along with Congress's understanding) by all statutory interpreters. As General Meese elaborated:

> To make sure that the President' 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 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.[12]

[12] Address by Attorney General Edwin Meese III, National Press Club, Washington, D.C. (Feb. 25, 1986).

This new publication policy, and the Attorney General's emphasis on the importance of President Reagan's signing statement initiative, predictably attracted significant press coverage.[13] This coverage must itself have been quite useful in alerting lawyers, judges, and inferior executive officials to the existence of presidential signing statements as a possible source of law.

[13] Toobin, The Last Word, **New Republic**, Nov. 3, 1986, at 13; Kmiec, Judges Should Pay Attention to Statements by President, **Nat'l L.J.**, Nov. 10, 1986, at 13; Strasser, Executive Intent, **Nat'l L.J.**, Mar. 10, 1986, at 2. [cite Garber & Wimmer journ article and Neil Lewis article].

There followed thereafter the issuance of a flurry of published presidential signing statements. One scholar, Professor Daniel B. Rodriguez, has counted over 100 presidential signing statements, some of great significance, that were issued between 1986 and 1989.[14] During the Clinton Administration, Walter Dellinger, the Assistant Attorney General in charge of the Office of Legal Counsel, specifically considered whether the President was faced with a choice between vetoing unconstitutional legislation or signing it and accepting it as being constitutional unless the courts ruled otherwise. Dellinger concluded that "the President has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision" presumably in a signing statement. The Clinton Administration thus clearly contemplated and approved the use of signing statements as directives to subordinates in the executive branch not to enforce constitutionally dubious provisions of federal statutes.

Since January 20, 2001, the Administration of President George W. Bush has made the most aggressive use to date of presidential signing statements issuing more than 700 of them according to some estimates. This policy is consistent with President Bush's philosophical commitment to the theory of the unitary executive, as I will argue below. With roots going back

[14] Rodriguez, supra note ___, at 3.

to Presidents Jackson, Tyler, and Grant, and with a deeply established modern usage beginning in the seminal presidency of Ronald Reagan, signing statements are today an established feature of the legal landscape. Getting rid of signing statements would upset a decades long understanding of the scope of presidential power that has roots that run far deeper than the roots of the much heralded right to privacy which all now agree is protected by precedent. Justice Felix Frankfurter argued in his famous concurrence in the Youngstown Steel Seizure case that sometimes the gloss of history adds meaning to the bare bones constitutional text of Article II. That argument applies to the use of presidential signing statements. Any technique which dates back to Jackson, Tyler, and Grant, and which was famously advocated by a president as great as Ronald Reagan should be deemed to be a part of the gloss which history has written on the bare bones text of Article II.

II. Signing Statements as Legislative History

The first argument as to why presidential signing statements have legal significance is that they are a form of legislative history. Article I, Section 7 specifically sets out the process by which a bill can become law saying that this will happen either when a bill is passed by both Houses of Congress and is signed by the President or when a bill is vetoed and is repassed by both Houses of Congress by a two-thirds majority of each house. What this means is that the president is ordinarily a

necessary player in the American legislative process. The president's understanding of what a bill means when he signs it is just as legally important as is Congress's understanding when it passes either the House or the Senate.

It has long been thought that the most weighty indicia of legislative history are to be found in House and Senate Committee reports, since these documents represent the view of one of the three parties to the contract that becomes a law. Committee reports are thus more probative of legislative intent than are isolated floor statements of particular members or debates or colloquies. Presidential signing statements are precisely analogous to Senate and House Committee reports. They represent the view of one of the three actors (the House, the Senate, and the President) which is constitutionally indispensable to the making of a law. In fact, presidential signing statements are even better indicia of legislative intent than are committee reports because with committee reports there is always a doubt as to whether everyone who has voted for a bill agrees with the statements in a committee report. With presidential signing statements on the other hand, there is no question but that the President knows and endorses the assertions made in his solely authored signing statement. Signing statements are thus reliable indicators of the original intention of the President when he signs a bills into law. Since the president is an indispensable party to the enactment of any law that is not passed over his

veto, signing statements are a valuable form of legislative history which should be consulted by the president's subordinates in the executive branch and by the courts.

There is one important criticism that can be made of the use of presidential signing statements as legislative history and that is the critique associated with Justice Scalia of ALL uses of legislative history. Justice Scalia has argued that courts ought never to consult ANY legislative history because it is the text of laws which are voted on and enacted and it is only the text that must be agreed to by both houses of Congress and the President pursuant to Article I, Section7. For this reason, Justice Scalia argues against any reliance on any legislative history including committee reports. Scalia claims courts should focus exclusively on the original public meaning of statutory language as illuminated by dictionaries and grammar books. Only if a committee report or signing statement sheds light on the original public meaning of language can it be used by judges in interpreting a law.

I agree with the Scalia critique of all uses of legislative history, and I therefore think the use of presidential signing statements as legislative history is more subject to doubt than I thought when I first argued for the idea in the Reagan Justice Department twenty years ago. Nonetheless, there are two important caveats to the Scalia critique which deserve to be noted. The first is that Justice Scalia's rejection of ALL uses

of legislative history has never carried the day on the Supreme Court. Since his colleagues continue to use congressional legislative history to decide cases, I think they ought to use presidential legislative history in the form of signing statements to the same degree – no more and no less – than they use committee reports. What this means is that unless and until Justice Scalia carries the day in his battle against all uses of legislative history the use of presidential signing statements as legislative history ought to be treated as valid.

Second, even under the Scalia approach to legislative history, the meaning of a statutory term ascribed by a committee report or signing statement might be useful evidence of the original public meaning of that term. Committee reports and signing statements are written in English and are addressed to an audience of English speaking Americans so they could well help shed light on the ordinary public meaning of statutory terms. When this happens, even Justice Scalia might agree that a signing statement is relevant to the recovery of the original public meaning of the text. For this reason as well, presidential signing statements are relevant as sources of legislative history.

III. Signing Statments are Entitled to Deference Under Chevron

U.S.A. v. Natural Resources Defense Council.[15]

There is a second argument as to why signing statements ought to be treated as having legal significance and that is that they are entitled to Chevron deference as agency interpretations of ambiguous statutory language. In its landmark administrative law case Chevron, the Supreme Court announced a new rule to the effect that agency interpretations of ambiguous statutory language ought to be entitled to deference by the article III federal courts if the agency interpretation is a reasonable one. Pursuant to Chevron, the federal courts have deferred to scores of agency interpretations of ambiguous language in recent years.

The president is the ultimate legal interpreter in the executive branch and indeed all of his subordinates in the various agencies and cabinet departments only have authority to act because of his delegations to them of the executive power. The Constitution vests the executive power exclusively in the president and so it is only by delegation from the president that any other executive branch official can act. If the President construes ambiguous statutory language in a signing statement in a way that is reasonable, courts ought to give this presidential construction the same degree of Chevron deference that they would give to such a construction by an agency. The President has more

[15] 467 U.S. 837 (1984).

democratic legitimacy than do agency commissioners, since he unlike them is democratically elected, at least indirectly. Moreover, the President is the Constitution's sole repository of executive power. Presidential exercises of the executive power of statutory interpretation are thus even more privileged as a legal matter than are agency exercises of that power. The Constitution makes the President unique in his ability to speak for the executive branch.

There have been many debates about the legitimacy of Chevron deference since that landmark decision was handed down but today Chevron is uncontroversially accepted by scholars from Cass Sunstein on the left to Gary Lawson on the right. A big part of the reason why Chevron is so universally accepted is because it is widely recognized that modern statutes delegate a lot of power to executive branch entities and it is thought that those vague delegations ought to be construed by politically accountable executive branch officials rather than by politically unaccountable judges. Since the President is the most politically accountable official in the executive branch, his signing statements ought to be first and foremost among the executive branch documents to which judges should defer. Chevron deference thus suggests that presidential signing statements ought to have legal significance even aside from their being legislative history.

Some courts have justified Chevron deference as being

appropriate because of the expertise of the agency commissioners who receive that deference. This expertise argument might seem at first not to apply to the president since the president is not an expert on a highly technical subject in the way a Federal Communications Commissioner might be an expert on some aspect of federal communications law. In fact, however, Article II of the Constitution makes the President the nation's expert on the execution of the laws. A big reason why citizens vote for or against particular presidential candidates is because of their theories of how the law ought to be enforced. For this reason, courts ought to treat the President as the nation's foremost authority on what it means to take care that the laws be faithfully executed. Presidential signing statements ought thus to have legal significance as a matter of Chevron deference.

IV. Signing Statements and the Theory of the Unitary Executive

The third reason why presidential signing statements ought to be treated as having legal significance is because of the theory of the unitary executive. This theory holds that the Vesting Clause of Article II is a grant of all of the executive power in the country to the president. The fact that the Article II Vesting Clause must be such a grant of power is confirmed by the Vesting Clause of Article III which is the only clause in Article III which empowers the federal judiciary to act. Because the Article II Vesting Clause vests ALL of the executive power in only one person – the president – all other executive branch

officials exercising executive power must do so by the implicit delegation of the President. There is simply no other constitutional basis on which executive branch subordinates could otherwise act.

A principal challenge faced by all presidents is how to control their millions of subordinates to whom the execution of the law is delegated. It is here that presidential signing statements play a vital role in helping our constitutional system to function properly. Signing statements allow the President to provide authoritative guidance to his subordinates in the executive branch as to how they should carry out and execute the law. Signing statements thus can serve as binding directives or order from the President to his millions of delegees in the executive branch as to how a law should be executed. So viewed, signing statements serve a vital function in making the executive branch function in practice the way Article II says it should function in theory. Signing statements recognize and reinforce the constitutional reality that Article II makes the President our Law Enforcement Executive in Chief.

V. Conclusion

Presidential signing statements have a long and illustrious history dating back to President Jackson, himself a strong proponent of the theory of the unitary executive. Since the Reagan Administration, signing statements have been of central importance to the functioning of the executive branch. Signing

statements deserve to be given legal weight because: 1) they are a form of legislative history entitled to as much or as little weight as is given to house committee reports; 2) they are presidential interpretations of ambiguous statutory language entitled to Chevron deference; and 3) because under the theory of the unitary executive, signing statements are a necessary tool by which the President can bind his millions of executive branch subordinates to follow his interpretation of ambiguous federal laws. Signing statements are not only legally significant; they are legally required if the President is to live up to his constitutional oath by which he swears to execute the laws. Far from being criticized for his many signing statements, President George W. Bush ought to be praised for them since they underline his resolution to fully and vigorously carry out his responsibilities under Article II of the Constitution. Presidential signing statements are a good thing and are a sign the President is vigorously and properly doing his job.