

CONTEXT-SENSITIVE DEFERENCE TO PRESIDENTIAL SIGNING STATEMENTS

Presidential signing statements have made headlines over the past year, beginning when a 1986 statement penned by then–Deputy Assistant Attorney General Samuel A. Alito, Jr. was published and scrutinized during the 2006 Senate hearings on his nomination to the Supreme Court.¹ At the end of June 2006, the much awaited Supreme Court decision in *Hamdan v. Rumsfeld*² ignored a Bush Administration signing statement asserting that the Court lacked jurisdiction over the case. The conflict escalated in late July 2006, when the American Bar Association (ABA) released a report declaring that some of President George W. Bush’s signing statements threaten the rule of law and urging Congress to act to curb such abuses.³ Senator Arlen Specter responded by introducing a bill, currently pending before the Senate Judiciary Committee, that would prohibit any state or federal court from relying on a presidential signing statement “as a source of authority”⁴ and would grant Congress standing to seek declaratory judgments on the legality of specific signing statements.⁵ A similar bill is pending before the Committee on Government Reform in the House of Representatives.⁶

The arguments in favor of judicial reliance on signing statements in statutory interpretation have not changed greatly since now-Justice Alito wrote his memorandum twenty years ago. The original and primary justification offered by proponents for their use is that these statements are part of “legislative” history because a bill must be signed by the President before it can become law.⁷ By this logic, “the President’s understanding of [a] bill should be just as important as that

¹ See, e.g., Adam Liptak, *Presidential Signing Statements, and Alito’s Role in Them, Are Questioned*, N.Y. TIMES, Jan. 14, 2006, at A11; see also Jeffrey Rosen, *Uncle Sam*, NEW REPUBLIC, Jan. 30, 2006, at 20, 21; *A Sober Judge*, NAT’L REV., Jan. 30, 2006, at 16, 17.

² 126 S. Ct. 2749 (2006).

³ AM. BAR ASS’N TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS & THE SEPARATION OF POWERS DOCTRINE, RECOMMENDATION (2006) [hereinafter ABA REPORT], available at http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

⁴ Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. § 4 (2006).

⁵ *Id.* § 5. The bill would also give Congress the right to intervene in any litigation in which a presidential signing statement might be used to interpret a federal statute. *Id.* § 6.

⁶ H.R. 5486, 109th Cong. (2006). The House’s version of the bill prohibits any “[f]ederal entity,” including executive agencies, from considering presidential signing statements, and it prohibits the Executive Office of the President from using congressionally allocated funds to publish signing statements. *Id.*

⁷ U.S. CONST. art. I, § 7. There is one limited exception to this principle: if the President fails to sign or veto a bill within ten days of its passage, it becomes law by default so long as Congress is still in session. *See id.*

of Congress.”⁸ This justification has been the subject of ongoing scholarly debate, with each administration drawing fire from politically opposed commentators for its use of signing statements.⁹ The second justification for the use of signing statements in statutory interpretation was portended by Alito: “Is [a signing statement] entitled to the deference comparable to that customarily given to administrative interpretations?”¹⁰ This question of deference to signing statements has increased in relevance with the rise of the administrative state over the past two decades and with the increasing importance of the *Chevron*¹¹ doctrine in modern statutory interpretation.¹²

This Note takes a step back from both the endorsement of signing statements offered in Alito’s memorandum and the ABA’s condemnation of such statements. This Note argues instead that presidential signing statements should be examined as simply another species of statutory interpretation. Courts should adopt a flexible approach to the amount of deference accorded signing statements by applying doctrinal tools developed in the areas of statutory interpretation and administrative law and by extending such deference only to the extent that these statements promote deliberation, transparency, and comparative institutional competency.

Specifically, this Note argues that the two most common rationales for judicial reliance on statutory interpretation in signing statements are incorrect: a signing statement offering the President’s interpretation of a statute should not be considered part of the legislative history of that statute, and it should not receive *Chevron* deference as though

⁸ Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., Office of Legal Counsel, to The Litig. Strategy Working Group 1 (Feb. 5, 1986) [hereinafter Alito Memorandum], available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acco60-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>. The memorandum is entitled “Using Presidential Signing Statements To Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law.” *Id.*

⁹ See TODD GAZIANO, THE HERITAGE FOUND., THE USE AND ABUSE OF EXECUTIVE ORDERS AND OTHER PRESIDENTIAL DIRECTIVES (2001), reprinted in 5 TEX. REV. L. & POL. 267, 269 (2001) (calling President Clinton’s executive orders “[a] driving force” behind “a renewed interest in the proper use and possible abuse of executive orders and other presidential directives”); Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 516 (2005) (“Th[e] tour d’force [of Bush Administration signing statements] has been carried out in such a systematic and careful fashion that few in Congress, the media, or the scholarly community are aware that anything has happened at all.”); Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential “Signing Statements,”* 40 ADMIN. L. REV. 209, 211 (1988) (“The occurrence of interpretive presidential signing statements has now become somewhat more controversial, perhaps because President Reagan has made more frequent use of the practice.” (footnote omitted)).

¹⁰ Alito Memorandum, *supra* note 8, at 3.

¹¹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1983).

¹² See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006) (“[*Chevron*] has become foundational, even a quasi-constitutional text — the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies.”).

it were an administrative interpretation. Part I discusses the history of presidential signing statements, including their uses, justifications, and consideration by the judiciary. Part II challenges the assertion that a signing statement is part of a bill's legislative history, arguing that because a signing statement is issued after the opportunity for meaningful dialogue and debate about the statute's meaning has passed, it is instead comparable to post-enactment legislative history and should receive little deference from the judiciary. Part III analogizes signing statements to agency enforcement guidelines and policy statements, which were specifically prohibited from receiving *Chevron* deference in *United States v. Mead Corp.*¹³ and *Christensen v. Harris County*.¹⁴ Pursuant to this *Chevron* carve-out, signing statements ought, at most, to receive the more limited *Skidmore*¹⁵ deference according to their persuasiveness. Further, applying *Skidmore* deference, the persuasiveness of a signing statement would frequently be outweighed by another reasonable interpretation. Part IV concludes that the judiciary is the only branch suited to resolve the presidential signing statement debate and calls for judicial clarification of the proper deference owed to such statements.

I. HISTORY AND PURPOSES OF PRESIDENTIAL SIGNING STATEMENTS

In his 1986 memorandum, Alito argued that including statutory interpretation in statements issued in conjunction with the President's signing of legislation would better enable courts to consider the President's interpretation: "Our primary objective is to ensure that Presidential signing statements assume their rightful place in the interpretation of legislation."¹⁶ President Reagan thereafter pioneered the pervasive use of signing statements, reinforced by Attorney General Edwin Meese's decision to publish the statements in the *United States Congressional Code and Administrative News*.¹⁷ President Reagan increasingly used signing statements to offer statutory interpretation af-

¹³ 533 U.S. 218 (2001).

¹⁴ 529 U.S. 579 (1999).

¹⁵ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹⁶ Alito Memorandum, *supra* note 8, at 1.

¹⁷ See 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, 367 (1987); see also Christopher S. Kelley, A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton 3 (Apr. 3, 2003), available at <http://mpsa.indiana.edu/conf2003papers/1031858822.pdf> (noting that the statements are published in the "Legislative History" section of the *United States Congressional Code and Administrative News*).

ter the Republican Party lost majority control of the Senate in 1986.¹⁸ Presidents since Reagan have continued the practice.¹⁹

Nonetheless, courts have rarely relied on signing statements and have ruled on neither their constitutionality (as executive interpretations that directly contradict legislative mandates) nor the amount of judicial deference they should receive. The Supreme Court first acknowledged the use of signing statements in *La Abra Silver Mining Co. v. United States*,²⁰ observing that “[i]t has properly been the practice of the President to inform Congress by message of his approval of bills, so that the fact may be recorded.”²¹ The Court explicitly agreed with a presidential signing statement for the first time in *United States v. Lovett*²²: in holding that a particular provision of the Urgent Deficiency Appropriation Act of 1943²³ was unconstitutional,²⁴ the Court noted that President Roosevelt had earlier reached the same conclusion in a signing statement.²⁵ More recently, lower courts have occasionally cited signing statements either as justifications for or affirmations of their own statutory interpretations.²⁶

Although the Supreme Court has never addressed the constitutionality of signing statements or the deference they are due, at least four justifications for their use have been advanced over the last twenty years. In 1993, Assistant Attorney General Walter Dellinger wrote a memorandum about the legal significance of presidential signing statements.²⁷ The following description, largely tracking Dellinger’s

¹⁸ See Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239, 271 (1995) (“[P]residential signing statements [during the Reagan presidency] became one very suggestive means by which a conservative cast could be imposed on measures enacted by an increasingly hostile and unresponsive Congress.”).

¹⁹ See Kelley, *supra* note 17, at 11, 18–19 (discussing the use of presidential signing statements by Presidents George H.W. Bush and Clinton); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 722–25 (2005) (cataloguing signing statements issued by President George W. Bush).

²⁰ 175 U.S. 423 (1899).

²¹ *Id.* at 454, cited in Kelley, *supra* note 17, at 26 n.18.

²² 328 U.S. 303 (1946).

²³ Pub. L. No. 78-132, 57 Stat. 431.

²⁴ *Lovett*, 328 U.S. at 318.

²⁵ *Id.* at 313 (“I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.” (quoting H.R. DOC. NO. 78-264 (1943) (statement of President Franklin Roosevelt)) (internal quotation mark omitted)). President Roosevelt signed the bill only to ensure the continuance of funding for the war effort. *Id.* at 305 n.1.

²⁶ See, e.g., *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824–25 (D.C. Cir. 1993); see also 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, 503–06 nn.165–69 (1997) (collecting cases).

²⁷ Memorandum from Walter Dellinger, Assistant Attorney Gen., to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993), in *Recent Legal Opinions Concerning Presidential Powers*, 48 ARK. L. REV. 311, 333 (1995) [hereinafter Dellinger Memorandum].

memorandum, outlines the four generally acknowledged (though in some cases controversial) functions of such statements.

The first and most uncontroversial purpose of presidential signing statements is to “explain[] to the public, and particularly to constituencies interested in the bill, what the President believes to be the likely effects of its adoption.”²⁸ Such a statement might also laud the bill’s sponsors or members of the public who pushed the bill through Congress, extol the policy behind the bill’s passage, or criticize congressional practices “such as attaching riders to omnibus bills.”²⁹ In its July 2006 report, the ABA endorsed the use of signing statements as a means for the President to “praise a bill as a landmark in civil rights or environmental law and applaud its legislative sponsors, or to provide his views as to how the enactment of the law will affect the welfare of the nation.”³⁰

A similarly pervasive but more controversial purpose of signing statements is to express the President’s position that a particular provision or application of a bill is unconstitutional and therefore will not be enforced by the executive branch.³¹ Alternatively, a signing statement may offer a “saving” construction of a bill to avoid constitutional infringement.³² The refusal-to-enforce approach has sparked vigorous debate in the academic literature, with some commentators defending it as a responsibility of the unitary executive and others decrying it as akin to the unconstitutional line item veto.³³ The question whether the President has the right (or even the duty) in an interpretive signing statement to invoke the canon of constitutional avoidance is beyond the scope of this Note, however.³⁴

²⁸ *Id.*

²⁹ *Id.* at 333 n.1.

³⁰ ABA REPORT, *supra* note 3, at 21.

³¹ See Dellinger Memorandum, *supra* note 27, at 333.

³² See *id.* at 335.

³³ Compare ABA REPORT, *supra* note 3, at 23–24 (“[T]he Task Force opposes the use of presidential signing statements to effect a line-item veto or to usurp judicial authority as the final arbiter of the constitutionality of congressional acts. Definitive constitutional interpretations are entrusted to an independent and impartial Supreme Court, not a partisan and interested President. . . . The Constitution is not what[ever] the President says it is.”), with Posting of David Barron et al. to Georgetown Law Faculty Blog, http://gulcfac.typepad.com/georgetown_university_law (July 31, 2006) (arguing, in a piece by several law professors including Walter Dellinger, that the ABA’s report conflates substantive criticisms of President Bush’s constitutional interpretations with constitutional concerns about signing statements generally), and Posting of Laurence Tribe to Balkanization, <http://balkin.blogspot.com> (Aug. 6, 2006, 20:00 EST) (same). The ABA report argues that if the President deems it necessary to sign a bill containing a potentially unconstitutional provision, he should then “seek [the help of] or cooperate with others in obtaining timely judicial review regarding the provision in dispute.” See ABA REPORT, *supra* note 3, at 23.

³⁴ The canon of constitutional avoidance is properly invoked by the Court only when interpreting ambiguous statutory provisions; yet presidential signing statements tend to invoke the canon not only much more pervasively than the Court, but also when interpreting statutes that

The third purpose of signing statements, described by Dellinger as “much more controversial,” is “to create legislative history to which the courts are expected to give some weight when construing the enactment.”³⁵ Dellinger notes several constitutional and political problems with such use, including the potential usurpation of Congress’s legislative powers,³⁶ the parallel between a presidential reinterpretation and a line item veto, and the argument that congressional passage closes the legislative record, rendering the Executive’s subsequent interpretation similar to “post-passage legislative history.”³⁷ Part II of this Note explores this last argument, concluding that signing statements must be analogized to post-enactment legislative history because there is no opportunity to alter a bill based on dialogue or debate about its interpretation after Congress has sent the bill to the President.

The fourth purpose of signing statements, described by Dellinger as “generally uncontroversial,” is “to guide and direct Executive officials in interpreting or administering a statute.”³⁸ Although he notes that this purpose may have limits,³⁹ Dellinger quotes approvingly the Supreme Court’s observation that “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”⁴⁰ A more controversial assertion, however, not acknowledged by Dellinger but espoused by other commentators,⁴¹ is that the President’s statutory interpretation is therefore entitled to judicial deference as an agency directive. Part III of this Note challenges this argument as contrary to the spirit of *United States v. Mead Corp.*, which held that strong administrative deference can be afforded only to those agency interpretations adopted after deliberation and fair process.

are quite clear. To date, President George W. Bush has issued 139 signing statements challenging over 830 federal laws, see Presidential Signing Statements, Frequently Asked Questions, <http://www.coherentbabble.com/signingstatements/FAQs.htm> (last visited Nov. 9, 2006), many objecting to potential constitutional conflicts with the “unitary executive,” see, e.g., *Examples of the President’s Signing Statements*, BOSTON GLOBE, Apr. 30, 2006, at A19.

³⁵ Dellinger Memorandum, *supra* note 27, at 333.

³⁶ *Id.* at 340–41 (citing U.S. CONST. art. I, § 1, cl. 1).

³⁷ *Id.* at 341.

³⁸ *Id.* at 334. The ABA’s report, in contrast, equated this purpose with that of manufacturing legislative history: “Presidential signing statements that express an intent to disregard or effectively rewrite enacted legislation are similarly inconsistent with the ‘single, finely wrought and exhaustively considered[] procedure’ provided for by the Framers.” ABA REPORT, *supra* note 3, at 21 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

³⁹ Dellinger Memorandum, *supra* note 27, at 334 n.4.

⁴⁰ *Id.* at 334 (quoting *Bowsher v. Synar*, 478 U.S. 714, 733 (1986)).

⁴¹ See *infra* section III.A, pp. 609–11.

II. PRESIDENTIAL SIGNING STATEMENTS AS POST-ENACTMENT LEGISLATIVE HISTORY

A court interpreting a statute will often look to legislative history, though the level of deference this history merits is not always clear. Even less clear is how much weight the court should give to a presidential signing statement — or whether the signing statement should even be differentiated from other components of legislative history. This Part examines the relationship between presidential signing statements and legislative history. Section A provides a brief overview of the use of legislative history in statutory interpretation generally and the increasing contentiousness among judges and commentators surrounding that use. Section B sets forth the traditional arguments for and against considering signing statements as part of legislative history and notes the typical challenges to such categorization. Section C argues that signing statements should not be considered part of legislative history proper, but rather should be analogized to post-enactment legislative history and thus accorded a lesser degree of judicial deference.

A. The Use of Legislative History in Statutory Interpretation

Although the practice of looking to legislative history dates back well over one hundred years,⁴² courts continue to struggle to identify its proper role in statutory interpretation. Proponents argue that “[l]egislative history helps a court [both to] understand the context and purpose of a statute . . . [and] to clarify ambiguity.”⁴³ Within the last two decades, though, this practice has been subject to intense scholarly and judicial debate. In 1992, then-Judge Breyer argued that careful use of “legislative history helps appellate courts reach interpretations that tend to make the law itself more coherent, workable or fair.”⁴⁴ But “new textualists”⁴⁵ like Justice Scalia reject the use of legislative history, arguing that legislative intent itself is fictional and that reliance on legislative history facilitates its very contrivance in the law-making process.⁴⁶ More fundamentally, they allege that reference to

⁴² See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 612 n.4 (1991) (“Our precedents demonstrate that the Court’s practice of utilizing legislative history reaches well into its past.” (citing *Wallace v. Parker*, 31 U.S. (6 Pet.) 680, 687–90 (1832))).

⁴³ Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992).

⁴⁴ *Id.* at 847.

⁴⁵ See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

⁴⁶ See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRET-

legislative history violates the Presentment Clause because unlike the text of a statute, legislative history is not presented to the President for signature.⁴⁷ New textualists appear to be making an impact: the Supreme Court's use of legislative history was in decline as early as 1990,⁴⁸ and today legislative history is typically used only to confirm an interpretation rather than to provide it in the first instance.⁴⁹

Notwithstanding this new textualist challenge, however, signing statements do not possess the virtues of legislative history championed by Justice Breyer and other supporters. As argued in section C, whereas traditional legislative history enhances transparency and deliberation, statutory interpretation in presidential signing statements, like post-enactment legislative history, circumvents the opportunity for meaningful debate and ratification.

B. The Case for Signing Statements as Legislative History and the Traditional Challenges

There are two primary arguments in favor of treating a presidential signing statement as part of a statute's legislative history.⁵⁰ The first is the Constitution's emphasis on the President's participation in the legislative process, including the authority to veto a bill and return it to Congress with specific objections.⁵¹ As Alito argued, "[s]ince the President's approval is just as important as that of the House or Senate, it seems to follow that the President's understanding of the bill should be just as important as that of Congress."⁵² An even broader approach to the legislative process, adopted by some scholars, embraces a definition of legislative history that "includes all relevant events occurring before final enactment."⁵³

ATION 3, 29–30 (Amy Gutmann ed., 1997) ("[L]egislative history should not be used as an authoritative indication of a statute's meaning.").

⁴⁷ See *id.* at 35.

⁴⁸ Breyer, *supra* note 43, at 846 (citing Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 288, 298 (1990)); see also *id.* at 846 n.6 (collecting statistics from the 1990 Term).

⁴⁹ For recent examples, see *Small v. United States*, 125 S. Ct. 1752, 1757 (2005), and *Smith v. City of Jackson*, 125 S. Ct. 1536, 1552 (2005).

⁵⁰ For a cogent presentation of both arguments, see generally Dellinger Memorandum, *supra* note 27.

⁵¹ See U.S. CONST. art. I, § 7, cl. 2 ("Every Bill . . . shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated.").

⁵² Alito Memorandum, *supra* note 8, at 1.

⁵³ REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 137 (1975); see also Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1133–34 (1983) (arguing that "[w]hen made, [official executive pronouncements] cannot be brushed aside as post-enactment commentary . . . because the chief executive officer is himself part of the enactment process," but noting reliability and availability

The second argument for considering signing statements as legislative history is based on practical political realities: the White House often initiates major legislation and works closely with Congress to craft a bill and orchestrate its passage.⁵⁴ In part, this participation is dictated by the Constitution, which contemplates that “from time to time” the President will “recommend to [Congress’s] Consideration such Measures as he shall judge necessary and expedient.”⁵⁵ In the modern scheme of political parties, this interbranch cooperation extends far beyond that required by the Constitution. At least one lower court that used a signing statement in interpreting a statute explicitly cited the Administration’s participation in the passage of the bill.⁵⁶ One commentator has argued that the President’s views may even be in a “superior position” to those of Congress, given that the President has a nationwide electoral base.⁵⁷

Most scholarly challenges to the treatment of signing statements as legislative history focus on the potential constitutional problems. Primarily, commentators argue that reliance on the President’s interpretation of a statute would violate the separation of powers principle.⁵⁸ Undoubtedly, such reliance “would increase the power of the Executive to shape the law”;⁵⁹ indeed, this is the very reason the Office of Legal Counsel began offering statutory interpretation in signing statements.⁶⁰ Other criticisms focus on potential violations of the veto requirements in the Presentment Clause⁶¹ or on comparisons between a refusal to enforce a statutory provision and an unconstitutional line item veto.⁶² Rather than add to the debate over signing statements’ constitutionality, however, this Part focuses on the invalidity of signing

problems with deferring to such statements); Kathryn Marie Dessayer, Note, *The First Word: The President’s Place in “Legislative History,”* 89 MICH. L. REV. 399, 399 (1990) (citing DICKERSON, *supra*, at 137).

⁵⁴ See Killenbeck, *supra* note 18, at 276 (“[T]he current fixation on signing statements ignores the myriad ways in which presidents can and do play an active role in the legislative dialogue.”).

⁵⁵ U.S. CONST. art. II, § 3, cl. 1.

⁵⁶ See *United States v. Story*, 891 F.2d 988, 994 (2d Cir. 1989) (“President Reagan’s views are significant here because the Executive Branch participated in the negotiation of the compromise legislation.”).

⁵⁷ Killenbeck, *supra* note 18, at 287; see also *id.* at 299, 306.

⁵⁸ See, e.g., Garber & Wimmer, *supra* note 17, at 370–83; see also PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 223–25 (2002) (describing some signing statements as attempts “to issue what amount to declaratory judgments intruding upon the Article 3 powers of the courts”).

⁵⁹ Alito Memorandum, *supra* note 8, at 2.

⁶⁰ See *id.*

⁶¹ See, e.g., Garber & Wimmer, *supra* note 17, at 371–72; Brad Waites, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755 (1987).

⁶² See, e.g., Dellinger Memorandum, *supra* note 27, at 341; William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 710 n.55 (1991).

statements as legislative history and argues that they are more comparable to post-enactment legislative history.

*C. Post-Enactment Legislative History
and the Analogy to Signing Statements*

In 1980, the Supreme Court disclaimed reliance on post-enactment legislative history, asserting that “even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.”⁶³ Since that time, the Court has become increasingly skeptical about the use of such history, due in part to the influence of new textualism.⁶⁴

In his 1986 memorandum, Alito identified the premise for analogizing presidential signing statements to post-enactment legislative history: “Congress has the opportunity to shape the bills that are presented to the President, and the President’s role at that point is limited to approving or disapproving.”⁶⁵ Similarly, Professor William Popkin notes that typically it is the date Congress passes a bill, rather than the date the President signs it, that determines the ordering of legislative enactments when applying the rule “that the last-passed law prevails over prior laws.”⁶⁶

To illustrate why a signing statement should not be considered a contemporaneous comment on the draft of a bill, it is instructive to contrast it with a veto message, wherein a President becomes part of the discussion with Congress about a bill’s provisions. If Congress overrides the President’s veto, the President’s veto message could provide a useful benchmark for a court in determining what the President wanted the statute to do but did not believe the statute as then written would accomplish. If Congress passed a revised version of the statute in response to the objections of the President as expressed in a veto

⁶³ *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980).

⁶⁴ See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 1018–19 (3d ed. 2001). New textualism has also decreased the Court’s tendency to rely on legislative history in general. Professor John Manning has suggested that all legislative history should receive less deference, advocating a standard comparable to *Skidmore* deference for administrative interpretations. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 732–33 (1997). Regardless of the deference the Court grants legislative history overall, however, interpretations contained in signing statements should in any event receive less deference than pre-enactment interpretations offered by the legislators themselves.

⁶⁵ Alito Memorandum, *supra* note 8, at 3 (including this observation in a list of “[t]heoretical problems” with the memorandum’s proposed use of signing statements); see also Linda Greenhouse, *In Signing Bills, Reagan Tries To Write History*, N.Y. TIMES, Dec. 9, 1986, at B14 (quoting Steven R. Ross, Counsel to the House of Representatives, as stating that once a bill reaches the President, “his role is [constitutionally] limited to thumbs up or thumbs down, with no shades of gray” (internal quotation marks omitted)).

⁶⁶ Popkin, *supra* note 62, at 710.

message, that message could also be useful to a court in interpreting the eventual compromise bill. But when a President signs the bill instead of vetoing it,⁶⁷ there is no opportunity for Congress either to ratify or to respond by amendment to the President's interpretation.

In addition, the typical process by which Congress adopts a piece of legislation permits each chamber to ratify or respond to the accumulated legislative history; the portions of that history that receive the most legislative attention during this process also are assigned the greatest weight in statutory interpretation by the judiciary.⁶⁸ For example, a controversial piece of legislation often must go to a conference committee so that the House and Senate versions of the bill can be reconciled. The report issued by a conference carries a great deal of weight in later court considerations of ambiguous provisions;⁶⁹ reflecting the compromise that has emerged from bicameral discussions, the report represents the last word of interpretation before each chamber votes again on the final version of the bill. Similarly, even when the same bill is passed sequentially in the two chambers, concurring legislators have the opportunity to disagree publicly with a committee report via floor statements before casting a favorable vote.

Within the legislative branch, the most relied-upon forms of legislative history — reports, drafts and amendments, and floor statements — are therefore generated through a deliberative process that facilitates meaningful dialogue and debate among legislators. Statutory interpretation in a presidential signing statement, in contrast, precludes both dialogue between the executive and legislative branches and Congress's ratification of the interpretation as legislative history.⁷⁰ Accordingly, courts should consider signing statements as post-enactment legislative history, not subject to interpretive deference.

Of course, the President is far from excluded from the deliberative process; indeed, if courts refused to give deference to signing statement interpretations, the President would be incentivized to participate in the process in a more transparent manner. A President intent on lending weight to his interpretation for purposes of later court decisions

⁶⁷ Several observers have drawn a connection between the large number of signing statements issued by President George W. Bush, *see supra* note 34, and the fact that he has vetoed only one bill during his six years in office. *See, e.g.,* Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22 ("President Bush doesn't bother with vetoes; he simply declares his intention not to enforce anything he dislikes."); *see also* Charles Babington, *Stem Cell Bill Gets Bush's First Veto*, WASH. POST, July 20, 2006, at A04.

⁶⁸ For a rough hierarchy of the weight accorded to each type of legislative history, *see* Eskridge, *supra* note 45, at 636, which demonstrates that committee reports (and conference reports, which carry similar importance) receive the most deference from courts.

⁶⁹ *See* Cross, *supra* note 9, at 223.

⁷⁰ *See id.* at 224 ("These [signing] statements in effect may grant a President the functional power to amend a bill already passed by Congress, without any requirement for congressional approval over such amendments.").

could ask a sympathetic congressperson to insert that interpretation into the actual legislative history, such as a committee report.⁷¹ Other legislators would then be able to respond to the President's interpretation through floor statements or amendments before a vote is taken on the bill. If no member of the congressional committee were willing to assist the President in this way, the lack of support would indicate that the President's interpretation merits little judicial deference.⁷² In fact, most presidential signing statements are issued when Congress is controlled by the party opposite from the President's,⁷³ suggesting that Presidents tend to rely on signing statements chiefly when their interpretations fail to garner support from a majority or plurality in Congress.⁷⁴

III. PRESIDENTIAL SIGNING STATEMENTS AS *CHEVRON* EXCEPTIONS

Even if presidential signing statements should not carry weight as legislative history, as Part II of this Note argues, courts may rely on them under an entirely different theory: they represent executive, not legislative, interpretation and are thereby owed deference comparable to that given to agency interpretations.⁷⁵ This Part argues that although presidential signing statements are not entitled to *Chevron* deference, they may receive *Skidmore* deference according to their persuasiveness. Section A outlines the traditional justification for equating signing statements with agency directives or executive implementation of a statute. Section B analogizes signing statements to the *Chevron* exceptions set forth by the Court in *Mead* and *Christensen*

⁷¹ Cf. Popkin, *supra* note 62, at 716 (recommending that signing statements point out pieces of the legislative history with which the President agrees).

⁷² See Cross, *supra* note 9, at 224 ("Where the President's views are not expressed in congressional sources, that fact in itself suggests that his views may have been rejected by key members of Congress.")

⁷³ President Reagan introduced frequent use of the practice only after Republicans lost the majority in the Senate in the 1986 midterm elections. See *supra* pp. 599–600. This pattern continued under President Clinton. See COOPER, *supra* note 58, at 215 ("While he had a Democratic Congress, Clinton made little serious use of signing statements; but, as it had with other divided governments before him, that changed in early 1995 when the Newt Gingrich–led Republican victory changed the political landscape in Washington."). In contrast, President George W. Bush has issued more signing statements than any other President, see Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1, despite having a Republican-controlled House from 2000 until 2006 and a Republican-controlled Senate from 2002 until 2006.

⁷⁴ Cf. Carroll, *supra* note 26, at 519 ("Signing statements are least helpful when they conflict with the reliable legislative history or when they appear to resolve a conflict on which the Congress either could not agree or agreed to disagree.")

⁷⁵ Unlike the legislative history explanation for signing statements, here the "separation of powers arguments largely disappear. Presidential signing statements become a traditional executive action, not a legislative one." Cross, *supra* note 9, at 225.

and argues that a deliberative process of interpretation is required to move beyond *Chevron* “Step Zero.” Section C examines the application of *Skidmore* deference to statutory interpretation in signing statements, evaluating how much deference two representative statements would receive under the *Skidmore* framework.

*A. The Case for Presidential Signing Statements
as Agency Directives or Executive Implementation*

Directing agency implementation of legislation has been an important goal of signing statements since 1986, when President Reagan began issuing them frequently. As Professor Phillip Cooper notes, “[i]n addition to making the [Reagan] administration’s views clear on the particular policies at issue, this process [of preparing signing statements] would provide directives to executive branch officials governing the implementation of new legislation to support those interpretations.”⁷⁶

Because agency direction is a major justification for signing statements, Professor Frank Cross specifically advocates extending judicial deference to such statements, arguing that “a principle deferring to statutory interpretations by an executive agency, but not those of the President, is contrary to the Constitution, unrealistic, and artificial.”⁷⁷ And the policies underlying deference to agencies may in some cases apply to the President as well. For example, the Supreme Court frequently notes in applying *Chevron* deference that agencies have expertise in adjudicating disputes and applying the law to specific parties.⁷⁸ The President likewise may have expertise in certain areas, such as the regulation of foreign policy.⁷⁹ Moreover, Professor Cross notes a practical reason for offering the President’s interpretations the same degree of deference as that afforded to certain agency interpretations, suggesting that it would encourage executive branch transparency: “Granting

⁷⁶ COOPER, *supra* note 58, at 202 *see also* DOUGLAS W. KMIEC, THE ATTORNEY GENERAL’S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT 56 (1992) (“[T]he use of signing statements by President Reagan allowed him to properly direct the executive branch in matters of statutory interpretation.”). Professor Cooper also explains why these agency directives were effective:

If the president issues such instructions, affected administrators must respond or face the wrath of the White House. Moreover, they must be aware not only of the substantive directive that is being issued in the statement but also that a failure to follow White House policy means either outright opposition from the Justice Department or at least that it will not support the agency that goes off on its own.

COOPER, *supra* note 58, at 212–13.

⁷⁷ Cross, *supra* note 9, at 226.

⁷⁸ *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); *see also, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 844–45 (1986).

⁷⁹ *See Cross, supra* note 9, at 230.

deference to agencies but not the President only encourages the President to ‘launder’ his statutory interpretations through agency heads, while accomplishing the same end.”⁸⁰

Given that the President can constitutionally direct an agency to interpret a statute in a particular way, Professor Cross’s approach simply eliminates the middle step and encourages transparency. In addition, the Supreme Court has validated the President’s direction of agencies, even when policy- or politics-based.⁸¹ Indeed, this is one of the foundations of the *Chevron* doctrine — the notion that it is wiser to defer to an agency, a body with some electoral accountability, than to rely on the unelected judiciary to revise policy-based interpretations.⁸² High-level involvement by the President may also lead to more accountable and disciplined decisionmaking and may enhance executive coherence.⁸³

But although Professor Cross and other commentators argue directly for deference to signing statement interpretations,⁸⁴ the legal basis for such deference — delegation of authority from Congress — is lacking. In *Chevron*, the Court held that deference to agencies is appropriate when either Congress explicitly leaves a gap in the statutory scheme for an agency to fill or “the legislative delegation to an agency on a particular question is implicit.”⁸⁵ In determining whether *Chevron* deference should apply, a court must look for an indication of

⁸⁰ *Id.* at 227. Although Professor Cross cites *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), for the standard of deference owed to signing statements, it is clear that he believes they should receive the equivalent of the highest level of agency deference; indeed, at one point, he calls for signing statement interpretations to be presumptively valid. See Cross, *supra* note 9, at 234. It is likely that Professor Cross actually intends signing statements to receive what is now considered to be the greater-than-*Skidmore* deference level announced in *Chevron*.

⁸¹ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (“A change in administration brought by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”); cf. Killenbeck, *supra* note 18, at 273–75 (admitting that signing statements are political, but arguing that this does not make them improper interpretations, because all statements about ambiguous texts are political). But see Popkin, *supra* note 62, at 714 (“Even if the President does possess an independent interpretive power, judicial reliance on such politically manipulative signing statements cannot be justified.”).

⁸² *Chevron*, 467 U.S. at 865–66.

⁸³ This theory relies, however, on the assumption that the courts can effectively treat the President like an executive agency. In many cases, the President is exempt from administrative procedure requirements imposed on agencies, and hence the benefits of accountability are minimal. See, e.g., *Kissinger v. Reporters Comm. for Freedom of the Press*, 455 U.S. 136, 156 (1980) (holding that the President is not an agency under the Freedom of Information Act); *Metzenbaum v. Edwards*, 510 F. Supp. 609, 611 (D.D.C. 1981) (holding that the President need not follow the procedures of the Administrative Procedure Act to lift price and allocation controls).

⁸⁴ See, e.g., Carroll, *supra* note 26.

⁸⁵ *Chevron*, 467 U.S. at 844.

Congress's intention to delegate gap-filling authority to the agency.⁸⁶ When a signing statement interpretation conflicts with legislative history, delegation — implicit or explicit — is clearly lacking. In the absence of this legal foundation for extending *Chevron* deference, the argument for strong deference to presidential interpretations in signing statements must be made by analogy only.

B. The Analogy to the Chevron Exceptions

Whatever its intuitive appeal, the parallel between presidential signing statements and agency interpretations likely cannot survive the Supreme Court's decision in *United States v. Mead Corp.* Qualifying *Chevron*'s holding, which did not delineate limits to the types of agency interpretations that would receive deference, *Mead* held certain types of interpretive statements "beyond the *Chevron* pale."⁸⁷ The *Mead* Court endorsed and instituted a *Chevron* "Step Zero" — a threshold decision to be made by a reviewing court before the application of the two-part *Chevron* test.⁸⁸ Consequently, *Chevron* applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."⁸⁹ The Court noted that a good indicator of Congress's delegation to the agency would be a provision for formal administrative procedure by the agency, because such procedure would "foster the fairness and deliberation that should underlie a pronouncement of such force."⁹⁰ For agency interpretations not meeting the *Mead* stan-

⁸⁶ Rulemaking or adjudication authority serves as optimal evidence of explicit delegation. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (calling rulemaking and adjudication authority "very good indicator[s] of delegation meriting *Chevron* treatment"). If Congress does not speak clearly on a certain statutory matter, either in the text of the statute or in the legislative history, there may be a case that Congress is implicitly permitting the other two branches to fill the gap.

⁸⁷ *Id.* at 234. *Mead* actually reaffirmed the *Chevron* exceptions first announced by the Court in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). To lower courts and commentators, though, the *Mead* decision is the watershed holding because the majority opinion garnered more members of the Court and included the *Skidmore* deference standard in its directions on remand. *See, e.g.*, PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, GELLHORN AND BYSE'S ADMINISTRATIVE LAW 1081 (10th ed. 2003) (calling *Christensen* a "dress-rehearsal" for *Mead*).

⁸⁸ *See* Sunstein, *supra* note 12.

⁸⁹ *Mead*, 533 U.S. at 226–27.

⁹⁰ *Id.* at 230. The *Mead* Court did not indicate a *requirement* that agencies participate in rulemaking in order to receive *Chevron* deference. Instead, the opinion noted that notice-and-comment rulemaking authority would be the primary indicator of such delegation, leaving open the possibility that there could be other indicators. However, very few cases since *Mead* have found such delegation in the absence of notice-and-comment rulemaking, and in his *Mead* dissent, Justice Scalia assailed the *Mead* majority's link between rulemaking authority and *Chevron* deference, *see id.* at 243 (Scalia, J., dissenting) (arguing that there is "no necessary connection" be-

dard, such as “interpretations contained in policy statements, agency manuals, and enforcement guidelines,” the Court prescribed a lower level of deference.⁹¹ Applying this rule, the *Mead* Court found that a tariff classification ruling letter by the United States Customs Service did not qualify for *Chevron* deference.⁹²

The import of the *Mead* decision is much debated. Before *Mead*, “[a]dministrative lawyers [had] come to believe that an agency’s intent in promulgating a rule, not Congress’s intent in delegating power to the agency, determine[d] whether an agency’s action [would have] the force of law.”⁹³ *Mead* appeared to reject this view, focusing instead on Congress’s intent, but the Court “provide[d] incomplete guidance about how courts should undertake” the *Chevron* Step Zero inquiry.⁹⁴ The *Mead* scheme was further muddled by the Court’s subsequent decision in *Barnhart v. Walton*,⁹⁵ which held that an agency’s interpretation may be eligible for *Chevron* deference even in the absence of notice-and-comment rulemaking.⁹⁶ In *Barnhart*, the Court appeared to take a less categorical approach to Step Zero, offering a balancing formulation:

[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.⁹⁷

Regardless of the impact of *Mead* overall, presidential signing statements should fall within the legal category of statutory interpreta-

tween “formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law”).

⁹¹ *Id.* at 234 (majority opinion) (quoting *Christensen*, 529 U.S. at 587) (internal quotation marks omitted).

⁹² *Id.*

⁹³ Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law*, 116 HARV. L. REV. 467, 470 (2002).

⁹⁴ *Id.* Professor David Barron and Dean Elena Kagan have noted that although the Court frames its *Mead* rhetoric as a doctrine of congressional delegation, Congress in fact rarely controls *Chevron* applications through delegation, either explicitly or implicitly. They argue that “[b]ecause Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court’s view of how best to allocate interpretive authority.” David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212.

⁹⁵ 535 U.S. 212 (2002).

⁹⁶ *Id.* at 222.

⁹⁷ *Id.*; see also Sunstein, *supra* note 12, at 217 (calling *Barnhart* “an extraordinary personal triumph for Justice Breyer” and noting that “*Barnhart*’s influence is already substantial”). Justice Breyer further confused the Step Zero test with his concurrence in *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688, 2712 (2005), wherein he indicated his belief that notice-and-comment rulemaking was neither necessary nor sufficient for an agency interpretation to merit *Chevron* deference. See *id.* at 2712–13 (Breyer, J., concurring).

tions (like those in *Mead's* Customs Service tariff letters) that receive a lower level of deference. Even if signing statements do not fit neatly within one of the categories of “policy statements, agency manuals, and enforcement guidelines,”⁹⁸ the *Mead* Court was hesitant to apply *Chevron* deference in the face of doubt about whether Congress intended to delegate interpretive authority.⁹⁹ Moreover, under the standard-like *Barnhart* test,¹⁰⁰ a presidential signing statement neither reflects the careful consideration of an agency over an extended period of time nor offers expertise in managing the complexity of the administration of the statute.

Refusing to grant *Chevron* deference to presidential signing statements also makes good policy sense. Like the tariff ruling letters at issue in *Mead*, signing statements are issued without deliberation by an expert body and without input from the affected parties. Signing statement interpretations, though delivered by the President, reflect the underlying policy judgments of the Office of Legal Counsel, and though this does not make them unsuitable as agency directives,¹⁰¹ it does make them unsuitable for *Chevron*-strength deference. As Professor Popkin observes, “[b]ecause the signing statement is issued before the law has gone into effect, both public participation and administrative agencies’ expertise are necessarily excluded from the signing statement.”¹⁰²

Professor Cass Sunstein praises the *Mead* decision for its provision of “surrogate safeguards for the protections in the Constitution itself,”¹⁰³ which the *Mead* Court described as “fairness and deliberation”¹⁰⁴ and Professor Sunstein calls “participation and deliberation.”¹⁰⁵ Thus “agencies may proceed expeditiously and informally, in which case they can invoke *Skidmore* but not *Chevron*, or, they may act more formally, in which case *Chevron* applies.”¹⁰⁶ Similarly, if

⁹⁸ *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)) (internal quotation marks omitted). For example, a presidential directive could be compared with an agency compliance manual offering guidelines about how the agency should operate, which the *Mead* Court indicated was “not controlling” for purposes of a court’s interpretation. *See, e.g.*, *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 449 n.9 (2003).

⁹⁹ *Mead*, 533 U.S. at 230 (“[W]here it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is ‘inapplicable.’” (quoting *Christensen*, 529 U.S. at 597 (Breyer, J., dissenting))).

¹⁰⁰ The *Barnhart* factors largely overlap with the *Skidmore* factors that a court must consider when *Chevron* deference does not apply. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

¹⁰¹ *See supra* note 81 and accompanying text.

¹⁰² Popkin, *supra* note 62, at 713.

¹⁰³ Sunstein, *supra* note 12, at 225.

¹⁰⁴ *Mead*, 533 U.S. at 230.

¹⁰⁵ Sunstein, *supra* note 12, at 225.

¹⁰⁶ *Id.* at 225–26.

courts refuse to grant *Chevron* deference to interpretive signing statements, the President will be left with two options. He can issue a quick and informal signing statement, without garnering *Chevron* deference, or he can interpret a bill slowly and formally through direction of agency action, thereby earning *Chevron* deference. If the President chooses the former, the judiciary must examine the President's interpretation to provide what Professor Sunstein calls an "ample check":

In either case, the legal system, considered as a whole, will provide an ample check on agency [or presidential] discretion and the risk that it will be exercised arbitrarily — in one case, through relatively formal procedures and in another, through a relatively careful judicial check on agency [or presidential] interpretations of law.¹⁰⁷

Finally, an agency that intends to implement the President's interpretation must do so only after following the necessary administrative procedures, and in some circumstances its eventual interpretation may differ from that of the President:

Those White House statements that constrain agency action are also not always made with adequate expert opinion from the agencies to complement the legal opinions offered by the Office of Legal Counsel. Thus, the agency is open to the charge that its behavior is arbitrary and capricious, in violation of the Administrative Procedure Act. Given that the agency must begin with what amounts to a dispute over the statute between the White House and [Capitol] Hill, it starts work with a recognition of this legal vulnerability.¹⁰⁸

When an agency conducts rulemaking, the President's role is limited to "a supervisory power, which includes participating in the . . . process, coordinating policy and supplying a broader perspective."¹⁰⁹ Although affording deference to presidential signing statements *might* increase executive branch transparency, as Professor Cross asserts,¹¹⁰ such deference would reduce the more important ability of members of the public to influence statutory interpretation through participation in deliberative agency rulemaking. The law would effectively be ossified as soon as it is signed, before the agency has an opportunity to evaluate potential consequences.¹¹¹ Instead, courts can encourage notice-and-comment rulemaking and thus facilitate greater public transparency and participation by refusing to defer to signing statements.¹¹² Should a reasonable agency interpretation issued after deliberative notice-and-comment rulemaking turn out to be identical to the interpretation of-

¹⁰⁷ *Id.* at 226.

¹⁰⁸ COOPER, *supra* note 58, at 229–30.

¹⁰⁹ Popkin, *supra* note 62, at 711–12 (footnotes omitted).

¹¹⁰ Cross, *supra* note 9, at 227–28.

¹¹¹ *Cf.* *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (criticizing the Court for contributing to ossification).

¹¹² *See* Popkin, *supra* note 62, at 713.

ferred by the President in his signing statement, that agency interpretation would then receive *Chevron* deference from the courts.

C. Skidmore Deference for Chevron Exceptions

The *Mead* Court held that when *Chevron* deference is inappropriate, agency interpretations should be granted *Skidmore* deference. Commonly described as “weak” deference,¹¹³ *Skidmore* deference “basically instructs courts to exercise independent judgment regarding statutory meaning.”¹¹⁴ This lesser deference standard may vary according to “the agency’s care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency’s position.”¹¹⁵ A President’s signing statement interpretation, because of its low level of formality and the potential for inconsistent reinterpretations by future administrations, is better suited to this lower level of deference.

The operation of *Skidmore* deference can best be illustrated by two examples of provisions that Presidents have purported to interpret on purely statutory grounds. In his signing statement on the Civil Rights Act of 1991,¹¹⁶ President George H.W. Bush referenced Senator Robert Dole’s memorandum about the burden of proof of “business necessity” in disparate impact litigation¹¹⁷ and stated that the memorandum would be used as “authoritative interpretive guidance by all officials in the executive branch with respect to the law of disparate impact.”¹¹⁸ This interpretation, drafted by the President’s counsel and inserted into the legislative history by several Republican senators including Senator Dole, was directly contradicted by Congress’s Interpretive Memorandum that accompanied the Act and that was specifically referenced in the Act’s definition of “business necessity.”¹¹⁹

¹¹³ See, e.g., Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1037 (2005) (describing *Chevron* as “strong” and *Skidmore* as “weak”).

¹¹⁴ *Id.* at 1015.

¹¹⁵ *Mead*, 533 U.S. at 228 (footnotes omitted) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944)). In this formulation, “care” seems to refer to “thoroughness.” See *id.* at 228 n.7 (citing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976)).

¹¹⁶ Pub. L. No. 102-166, 105 Stat. 1071.

¹¹⁷ The Civil Rights Act of 1991 was intended, among other things, to overturn the Supreme Court’s decision in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). Civil Rights Act of 1991, §§ 2–3, 105 Stat. at 1071. *Wards Cove* had lessened the burden for employers to show that employing a disproportionately low number of persons in a protected class was due to a business necessity — that is, a practice essential to the employer’s business. *Wards Cove*, 490 U.S. at 659–61. President Bush’s controversial signing statement concluded that the Act instead codified the *Wards Cove* definition of “business necessity.” Remarks on Signing the Civil Rights Act of 1991, 2 PUB. PAPERS 1502, 1503 (Nov. 21, 1991).

¹¹⁸ Statement on Signing the Civil Rights Act of 1991, 27 *Weekly Comp. Pres. Doc.* 1701, 1702 (Nov. 21, 1991).

¹¹⁹ DAVID A. CATHCART ET AL., AM. LAW INST., THE CIVIL RIGHTS ACT OF 1991, at 8 (1993); Editorial, *Thumbing His Nose at Congress; President Bush Signs — and Undermines — the Rights Bill*, N.Y. TIMES, Nov. 22, 1991, at A30.

It is unlikely that a court interpreting the term “business necessity” in the bill and granting *Skidmore* deference to the signing statement would have selected the President’s interpretation as the most persuasive.¹²⁰ One factor operating in favor of the Executive’s interpretation was the thoroughness of its approach: the enactment was the result of over two years of hard-fought debate, the President had vetoed an earlier version of the bill, and the Department of Justice had ample time to formulate the Administration’s desired interpretations of the statute’s provisions. And in fact, the President endeavored to insert his interpretation of “business necessity” directly into the legislative history.¹²¹ However, other factors surrounding the signing statement’s interpretation would dilute its credibility before a court. The President has no inherent expertise in employment discrimination matters, unlike the Equal Employment Opportunity Commission or even Congress, which had taken up the bill as a response to several of the Supreme Court’s Title VII interpretations with which it disagreed. Consistency across administrations, as in the case of most presidential signing statements, was unlikely; the interpretation of the statute by a Democratic President would almost certainly differ.¹²² Finally, political forces at the time of enactment¹²³ may have prompted the President to sign a bill with which he did not fundamentally agree, and hence the signing statement might appear to a court as an attempt to interpret away those disagreements.¹²⁴

Fifteen years later, President George W. Bush used a signing statement to interpret the Graham Amendments to the McCain anti-torture statute.¹²⁵ The President interpreted the Amendments, which stripped courts of subject matter jurisdiction to hear habeas corpus petitions

¹²⁰ The definition of “business necessity” was an open question after the bill was enacted, given that the statute itself “omits statutory definitions of terms . . . that had been the subject of extended debate.” CATHCART ET AL., *supra* note 119, at 4.

¹²¹ See Editorial, *supra* note 119. Although Congress acceded to some of the President’s veto demands, the President evidently was still unhappy with the final version. See *id.*

¹²² Two areas in which successive Presidents’ interpretations of statutes may be in accord (though they may still conflict with those of Congress) are foreign policy and executive power.

¹²³ The Republican candidacy of David Duke had made the Party sensitive to charges of racism, particularly because Duke had used language from President Bush’s 1990 veto message “as a justification for a separation of the races.” See Kelley, *supra* note 17, at 15. In addition, the controversy over the nomination of Justice Clarence Thomas to the Supreme Court left the President on the defensive against charges of being opposed to civil rights. See *id.*

¹²⁴ Notwithstanding these reasons that President Bush’s signing statement ought to be accorded little deference, several lower courts have referred to the signing statement — though they were inquiring into the retroactivity or prospectivity of the Act, not the “business necessity” definition — and a few appear to have deferred to his signing statement interpretation that the Act be applied only prospectively. See Carroll, *supra* note 26, at 505 n.167 (collecting cases).

¹²⁵ Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, Pub. L. No. 109-148, 119 Stat. 2680 (2006) (to be codified in scattered sections of 42 U.S.C.).

regarding detention conditions at Guantánamo Bay, Cuba, to apply retroactively to cases then pending in the federal courts, including the case of *Hamdan v. Rumsfeld*.¹²⁶

Compared with the signing statement on the Civil Rights Act of 1991, the Graham Amendments statement might receive more deference under the *Skidmore* framework. Generally, foreign policy is the President's area of expertise,¹²⁷ and the legislative history of the Amendments, though conflicting,¹²⁸ seemed to accord with the President's interpretation. The major factor eroding the credibility of the President's reading would be the Executive's self-interest in such an interpretation, given the cases pending against the Executive before the federal courts. But despite the convergence of the signing statement with some of the legislative history, the Supreme Court in *Hamdan v. Rumsfeld* expressed little interest in the retroactive application of the jurisdiction-stripping statute, instead deciding the case on its merits.¹²⁹

IV. CONCLUSION: CLARIFYING THE PERMISSIBLE PURPOSES OF PRESIDENTIAL SIGNING STATEMENTS

Then-Deputy Assistant Attorney General Alito's 1986 memorandum counseled incremental increases in the use of presidential signing statements;¹³⁰ today, they are issued with the signing of virtually every bill. Given the pervasiveness of interpretive signing statements and

¹²⁶ Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 *Weekly Comp. Pres. Doc.* 1918 (Dec. 30, 2005). The signing statement was more controversial for its declaration that the President would interpret the bill "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch . . . and consistent with the constitutional limitations on the judicial power," which many commentators understood as meaning that the President believed he could ignore or make exceptions to the torture ban itself. See, e.g., Dahlia Lithwick, *Sign Here*, SLATE, Jan. 30, 2006, <http://www.slate.com/id/2134919>.

¹²⁷ The specific statutory provision at issue involves the retroactivity of the availability of the writ of habeas corpus, but the bill is directed at enemy combatants held at Guantánamo Bay, Cuba, who were captured primarily on foreign battlefields.

¹²⁸ Compare *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2767 n.10 (2006), with *id.* at 2816 (Scalia, J., dissenting). The majority opinion noted that the statements of the Amendments' sponsors indicating that the Amendments might apply retroactively appeared to have been inserted into the *Congressional Record* after the bill was passed, and therefore declined to give such statements full credence. See *id.* at 2767 n.10 (majority opinion).

¹²⁹ See *id.* at 2767 n.10 (majority opinion). Only Justice Scalia in dissent mentioned President Bush's signing statement, see *id.* at 2816 (Scalia, J., dissenting), though his primary purpose was to criticize the majority's selective use of legislative history, not necessarily to rely on the substance of the signing statement itself.

¹³⁰ Alito Memorandum, *supra* note 8, at 4 ("[A]s an introductory step, our interpretive statements should be of moderate size and scope. Only relatively important questions should be addressed. We should concentrate on points of true ambiguity, rather than issuing interpretations that may seem to conflict with those of Congress."); see also *id.* at 2 ("It seems likely that our new type of signing statement will not be warmly welcomed by Congress.").

the current debate about their proper role, the judiciary should indicate how much deference such statements will receive.

Courts should make clear that because they are issued after the opportunity for meaningful dialogue about interpretive issues has passed, presidential signing statements are to be accorded the status of post-enactment legislative history. Similarly, courts should indicate that signing statements offering agency direction will not be accorded *Chevron* deference because they lack previous fair process and deliberation, but they may receive *Skidmore* deference according to their persuasiveness. That is, presidential signing statements may determine court interpretations of ambiguous statutory provisions when other materials are in equipoise; typically, however, the Executive's interpretation of a bill, as expressed in a signing statement, will not be persuasive.

Federal courts have an opportunity to move beyond the current entrenched and politicized positions on signing statements to craft a doctrinally grounded approach that can persist across presidential administrations. By looking to existing statutory interpretation and administrative law doctrines that promote transparency and deliberation, courts can and should grant context-sensitive weight to signing statement interpretations.