Understanding Vague Signing Statements

Michael J. McCarthy
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Abstract

This paper identifies and assesses vagueness as a reoccurring feature of modern signing statements. It analyzes how vagueness affects a signing statement’s ability to achieve a variety of objectives, from preserving executive prerogatives to shaping how the judiciary construes statutory language. While vagueness consistently decreases a signing statement’s effectiveness, specificity may unintentionally frustrate the signing statement’s purpose. The interplay between the risks of specificity and the inefficiency of vagueness may suggest that the signing statement is not as powerful a presidential tool as is commonly thought.

Signing statements have resurfaced as a controversial executive tool. Despite campaign promises to exercise restraint in using signing statements, President Obama has issued seven in his first nine months in office.¹ Like those of his predecessor, Obama’s signing statements assert the president’s authority to disregard dozens of statutory provisions that have been signed into law.² For the American Bar Association and others that opposed the use of signing statements during the George W. Bush presidency, the resilience of this practice has been disappointing.³ Obama’s signing statements have also provoked a bipartisan congressional response. In July, the House of Representatives voted nearly unanimously to forbid the use of federal money to

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³ Id.
disregard statutory provisions that were challenged in a signing statement. Leading Democratic and Republican lawmakers have also publicly challenged Obama’s use of signing statements.

Although presidents have often used the occasion of a bill signing to comment on legislation, signing statements became controversial after a series of newspaper articles in the Boston Globe highlighted their use during the George W. Bush (“Bush II”) administration. Despite much attention over the past several years, scholars continue to debate whether the Bush II signing statements differ substantially from those of either prior or subsequent administrations.

One reason why this question is difficult to answer is because modern signing statements are often unclear. The emergence of vagueness as a reoccurring feature of signing statements has been increasingly recognized by both Congress and academics. Vague signing statements often make general objections that do not fully explain why a statutory provision is problematic or how the provision is going to be implemented. Whether intentional or not, vagueness makes the nature and significance of these presidential communications difficult to determine.

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4 Id.
8 See, e.g., Congressional Research Service, Presidential Signing Statements: Constitutional and Institutional Implications, CRS REPORTS, CRS-14 (Sept. 20, 2006) (“[T]he large bulk of signing statements the Bush II Administration has issued to date do not apply particularized constitutional rationales to specific scenarios, nor do they contain explicit, measurable refusals to enforce a law. Instead, the statements make broad and largely hortatory assertions of executive authority that make it effectively impossible to ascertain what factors, if any, might lead to substantive constitutional or interpretive conflict in the implementation of an act.”). However, this vagueness has not yet been examined analytically.
This paper considers how vagueness affects a signing statement’s ability to achieve a variety of possible objectives. Although many signing statements can be characterized as vague, this term is not meant pejoratively. Vagueness is not a defect, nor is it an indication that an objection, if fully described, would be substantively weak. A vague signing statement is merely one of several presidential responses to troublesome legislation. Part I of this paper provides the historical background and development of signing statements. It explains the context and motives behind the formalization of signing statements during the Reagan administration, and compares Bush II’s signing statements to those of his recent predecessors. Part II distinguishes the various ways in which signing statement vagueness can arise and identifies some of the questions that result. Part III assesses the impact of vagueness and specificity in signing statements, utilizing the three main analytical frameworks that are most often used to evaluate these executive tools. Finally, this paper concludes that because vague signing statements appear most effective from a separation of powers framework, and because constitutional objections frequently do not result in statutory non-compliance, the concern that vague signing reflects an attempt to circumvent the law seems unfounded. By comparing the strengths and weaknesses of both vague and specific signing statements, this paper proposes that signing statements may be a more limited tool for advancing the president’s interests than is often assumed.

I. HISTORICAL BACKGROUND

A. Early Uses of Signing Statements

1. An Infrequent Presidential Communication: 1776-1899

Signing statements have a long, but intermittent, history. Since the mid-nineteenth century, presidents have used bill-signing ceremonies as occasions to comment on new federal statutes. If the term “signing statement” is read broadly enough to include letters that were issued shortly after a bill has been enacted, then the earliest occurrences can be traced as far back as the
Monroe administration. In March 1821, James Monroe signed a bill that reduced the size of the army and specified new officer selection procedures. In April of the following year, he sent a detailed letter to the Senate that defended his implementation of that statute. In Monroe’s words, because “the reasons that led to the construction which I gave to the act . . . have not been well understood, I consider it my duty to explain more fully the view which I took of that act and of the principles on which I executed [it].” Confident that his appointments were “in every instance strictly conformable to the law,” Monroe argued that “Congress could not under the Constitution restrain the free selection of the president . . . . If the law imposed such restraint, it would in that case be void. But according to my judgment, the law imposed none.” In other words, Monroe defended his implementation of arguably vague legislation on the grounds that an alternate explanation would unconstitutionally interfere with presidential authority. Although his statutory construction was challenged by Congress, Monroe believed it constitutional, and he implemented the statute in good faith.

If signing statements are limited to communications that are strictly contemporaneous with bill signings, then the earliest instance occurred during the Jackson administration. On May 30, 1830, Andrew Jackson signed a bill and simultaneously sent a statement to Congress that purported to restrict the statute’s scope. The bill would have extended a federal road project between Chicago and Detroit—then the capital of the federally-administered Michigan Territory. Jackson objected to what he perceived as an unconstitutional federal intervention into an area of sole state responsibility, and his signing statement indicated that he “approved this bill

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10 Id. at 116.
12 Id. at 133.
13 Id., supra note 9, at 116.
15 Id.
with the understanding that that the road authorized by this section is not to be extended beyond
the limits of said Territory.” 17 Because Congress was in recess at the time of Jackson’s
communication, it was unable to respond. A subsequent House report interpreted Jackson’s action
as effectively constituting an unconstitutional line-item veto.18

Perhaps as a result of these congressional responses, subsequent signing statements were
controversial in the 19th century and presidents were reluctant to use them. In 1842, President
John Tyler issued a signing statement on a bill that apportioned congressional districts in order to
give, “an exposition of my reasons for giving it my sanction.” 19 In order to prevent his bill-
signing as being construed as agreement, Tyler wrote, “I have not proceeded so much upon a
clear and decided opinion of my own respecting the constitutionality or policy of the entire act as
from respect to the declared will of the two Houses of Congress.” 20 [emphasis in the original]

Tyler explained, somewhat remarkably,

“When I was a member of either House of Congress I acted under the conviction
that to doubt as to the constitutionality of a law was sufficient to induce me to
give my vote against it; but I have not been able to bring myself to believe that a
doubtful opinion of the Chief Magistrate ought to outweigh the solemnly
pronounced opinion of the representatives of the people and of the state.” 21

[emphasis in the original]

Despite this Milquetoast tribute to legislative authority, Congress objected vociferously,
denouncing it as “a defacement of the public record and archives” and an “evil example of the
future.” 22

17 2 Richardson, supra note 11, at 483.
18 Fisher, supra note 14, at 123.
19 4 Richardson, supra note 11, at 159.
20 Id.
21 Id.
22 May, supra note 9, at 73.
Other nineteenth century presidents adopted Tyler’s deferential posture. In an August, 1848 signing statement, James Polk noted that presidents more usually indicate their approval of a bill “by an oral message delivered by his private secretary.”23 Likewise, Franklin Pierce acknowledged he was “deviat[ing] from the ordinary course of announcing the approval of bills by an oral statement only” in a signing statement from July, 1854.24 Finally, Ulysses S. Grant described his January, 1875 signing statement as “an unusual method of conveying the notice of approval.”25 None of these signing statements were used to convey a constitutional challenge to the newly-signed statutes.

Altogether, only six signing statements were issued between 1789 and the Civil War, and only 5 were issued between 1877 and 1900.26 The reluctance to use signing statements may be attributable to strong congressional disapproval on separation of powers grounds and an absence of early historical precedent. However, courts apparently did not disapprove of signing statements. The Supreme Court first acknowledged the practice in 1899. In *La Abra Silver Mining Co. v. United States*, the Court noted, “It has properly been the practice of the President to inform Congress by message of his approval of bills so that the facts may be recorded.”27 As such, the opinion appears to legitimate signing statements—although it envisions their use for the narrow purpose of notifying Congress when a bill has been enacted.

2. *Momentum Towards Increased Use: 1900-1980*

Despite a lull in the beginning of the twentieth century, signing statements reappeared during the Hoover administration and multiplied thereafter. Franklin Delano Roosevelt issued 51;
Harry S. Truman issued 118; Dwight Eisenhower issued 145; and Lyndon Johnson issued 302.\(^{28}\) Subsequent presidents have issued an average of 35 to 60 signing statements each year.\(^{29}\) Generally speaking, early twentieth century signing statements were brief, neither raising constitutional issues nor discussing new statutes in detail.

The use of signing statements to challenge or identify particular provisions in a newly-signed bill resumed in the Roosevelt administration, and may be attributable to wartime exigency and an unwillingness to veto budgetary or otherwise critical legislation.\(^{30}\) For example, Roosevelt’s signing statement on the Emergency Price Control Act of 1942 stated that his approval was based on the assurance of congressional leaders that the new legislation would not interfere with the ability of government agencies to trade in commodities in order to produce war goods.\(^{31}\) Similarly, Roosevelt disregarded the advice of his secretaries of war and the Navy to veto a bill relating to an investigation of the Pearl Harbor attack, based on the expressed belief that Congress did not intend to interfere with the war effort.\(^{32}\) Roosevelt also signed the Surplus Property Act of 1944 despite serious misgivings about the effectiveness of its provisions, since “we must be in a position to get on with the organization of our plans for the disposition of surplus war property.”\(^{33}\) His signing statement expressed hope that, once the newly created Surplus Property Board gained experience, it would be able to advise Congress on drafting more effective legislation.\(^{34}\)

Roosevelt’s signing statement on the Urgent Deficiency Appropriations Act, 1943 is a striking example of a signing statement issued as a result of wartime exigency. An amendment to the bill refused salary payments to three specific government employees after November 15,

\(^{28}\) May, supra note 9, at 73-74.
\(^{29}\) Id.
\(^{30}\) See id.
\(^{32}\) Statement on Approving the Joint Resolution on the Pearl Harbor Trial and Investigation. (January 13, 1944).
\(^{33}\) Statement on Signing the Surplus Property Act of 1944.
\(^{34}\) Id.
1943, unless the civil servants were reappointed to positions requiring the advice and consent of the Senate.\textsuperscript{35} In his signing statement, Roosevelt rejected the accusation that the employees were subversive and stated that he wished to continue their employment. However, he wrote,

\begin{quote}
I have been forced to yield[] to avoid delaying our conduct of the war. But I cannot so yield without placing on the record my view that this provision is not only unwise and discriminatory, but unconstitutional.\textsuperscript{36}
\end{quote}

Roosevelt indicated that he would enforce the law by stopping salary payments, but not by discontinuing employment. Furthermore, he indicated that, if it were challenged in court, he would instruct the Attorney General to attack the statute rather than defend it. When the civil servants brought suit to recover their compensation, Congress was forced to hire a special counsel to defend the statute’s constitutionality. Ruling that the statute was unconstitutional, the Supreme Court noted the signing statement and acknowledged that Roosevelt “had to [sign the bill] since the appropriated funds were imperatively needed to carry on the war.”\textsuperscript{37} In doing so, the Court’s dicta implicitly approved of the presidential practice of signing legislation that includes provisions that the president considers unconstitutional.

The use of signing statements also accelerated during the Johnson administration, as the conflict in Vietnam escalated. Johnson issued 11 signing statements in 1964, 34 signing statements in 1965, and 57 signing statements in 1966. Johnson challenged certain provisions in key legislation, such as the Military Construction Authorization Act, 1968, on constitutional grounds and in light of military efficiency.\textsuperscript{38} Several of these signing statements—on bills with purposes as diverse as the sale of surplus minerals or the settling a railroad strike—also point out

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\textsuperscript{35} \textit{United States v. Lovett}, 328 U.S. 303 (U.S. 1946) \\
\textsuperscript{36} Statement on Signing the Urgent Deficiency Appropriations Act, 1943. \\
\textsuperscript{37} \textit{Lovett}, 328 U.S. at 307. \\
\end{flushright}
the new legislation’s positive contribution to the military effort. Although most signing statements did not directly reference constitutional issues or wartime necessity, their propagation appears logical during periods of unusual challenge or change. Subsequent presidents have also found signing statements to be effective tools during peacetime for communicating approval or disapproval on new legislation.

B. Modern Uses of Signing Statements


Although signing statements became increasingly prevalent in the second half of the twentieth century, it was not until the Reagan presidency that a concerted effort to elevate the standing of this executive tool occurred. The context for this initiative was not a war, but the administration’s frustrated attempts to accomplish its priorities in the face of increasingly entrenched congressional opposition.40

Ronald Reagan was elected in 1980 with a landslide electoral victory and an ambitious agenda.41 Although the new administration had many legislative successes in its first year, Congressional support eroded in the following years—not only due to electoral losses by Republicans and conservative Democrats, but also in response to constitutional sparring between the two democratically-elected branches.42 In its first two years, the Reagan administration was twice forced to step back from claims of executive privilege in response to congressional hearings.43 Similarly, when Congress called for an independent counsel to investigate Theodore

39 May, supra note 9, at 74; Statement on Signing Bills Authorizing Sale of Surplus Bismuth, Molybdenum, and Rare Earths (November 24, 1967); Statement on Signing the Joint Resolution to Provide for Settlement of the Railroad Strike (July 17, 1967).
41 Id. at 292.
42 Id. at 293-94.
43 Id.
Olson, then head of the Justice Department’s Office of Legal Counsel (the “OLC”), the administration argued that the independent counsel fell under the control of the Attorney General. Seeking to bolster its position, the administration sued for clarification—and lost.44

The Reagan administration’s frustration with the legislative and judicial branches was also fueled over a controversy involving the Competition in Contracting Act of 1984.45 Reagan signed this bill but objected to its grant of executive authority to the comptroller general, a legislative officer.46 As a result, the Office of Management and Budget instructed all executive branch agencies to disregard the provision.47 When challenged by Congress, administration officials stated that they would treat the provisions as unenforceable until a court ruled otherwise.48 Several months later, a federal court rejected their argument that the OMB could defy laws that the president determines are unconstitutional.49 Nonetheless, the administration continued to block enforcement while it appealed the ruling, arguing that the U.S. District Court was “not a court of competent jurisdiction” to decide constitutional questions.50 In response, Congress voted to withhold funding for the Justice Department and the Office of Management and Budget for two years, compelling the administration to comply with the District Court’s ruling until the outcome of the appeal.51

Despite these legislative and judicial setbacks, two contemporary Supreme Court cases illustrated to the Reagan administration how signing statements could assist the presidency. In INS v. Chadha, the Supreme Court struck down the legislative veto—the ability of a chamber of Congress to reject an executive branch determination that is made under a legislative delegation.52

48 Id.
49 Lear Siegler, Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1120 (9th Cir. 1988).
51 A Matter of Direction, supra note 40, at 297.
The Court held that the legislative veto was unconstitutional because it violated the bicameral and presentment requirements of the Constitution. In doing so, the majority opinion by Chief Justice Burger pointed to a line of signing statements, starting with Woodrow Wilson, that objected to the practice.

Bowsher v. Synar, another significant Supreme Court case, made a more direct reference to signing statements. When Reagan signed the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman Act, he singled out two defective provisions in his signing statement. The first provision granted the comptroller general executive Powers. The second provisions involved the use of a legislative veto, which had been declared unconstitutional by Chadha two years earlier. Striking down the Gramm-Rudman Act, the majority opinion by Chief Justice Burger cited Reagan’s signing statement and relied on its reasoning. Taken together, Chadha and Bowsher demonstrated that signing statements could influence court decisions that adjudicate disputes between Congress and the president.

2. The Process of Elevating Signing Statements: 1985-86

Shortly after his confirmation as attorney general in 1985, Edwin Meese III moved quickly in order to “convene early morning ‘brainstorming sessions . . . [in which] all division heads would gather to discuss’” elevating signing statements. According to Douglas Kmeic, another participant in these meetings, the emphasis was on making the signing statement “a crucial vehicle for the President to give his subordinate officers direction . . . ‘rather than relying

53 Chadha, 462 U.S. at 919.
54 Id. at 943 n.13.
58 See Bowsher, 478 U.S. at 719 n.1.
59 A Matter of Direction, supra note 40, at 301.
solely upon the far less transparent judgment of someone in an executive agency applying the law for the first time.\textsuperscript{60}

The Justice Department began the process of promoting signing statements by communicate their importance to White House personnel. In a 1985 letter to Fred Fielding, counselor to the president, a Justice Department official argued that “signing statements perform important functions by placing an interpretation on a statute and by giving instructions to the agency charged with the administration of the statute.”\textsuperscript{61} By August of that year, Steven Calabresi and John Harrison, two OLC lawyers, prepared a memo for the new attorney general that described signing statements as “a potentially powerful, if underused, tool” and that identified four methods to elevate its use.\textsuperscript{62} The first step was to write to the West Publishing Company to see if the statements could be included in the legislative history of bills, or alternatively, to have the Government Printing Office publish them.\textsuperscript{63} The second step was to organize a series of speeches to assembled judges in order to draw attention to signing statements.\textsuperscript{64} The third step was to ensure that Justice Department officials cited them in their briefs and opinions.\textsuperscript{65} Finally, the fourth step was to have the OLC draft a law review article defending the practice of issuing signing statements.\textsuperscript{66} The attorney general approved this new project and charged OLC with the responsibility of identifying both potential issues regarding signing statement use and the means in which they could be used more effectively.\textsuperscript{67}

\textsuperscript{60} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} A Matter of Direction, supra note 40, at 301-02.
Three potential uses for signing statements was described by a letter by Ralph Tarr, then
acting assistant attorney general in the OLC. The first use was to influence how agencies
interpret a statute; the second use was to inform Congress of a problematic provision of a bill for
future correction; and the third was to influence judges—though he noted that courts only cited
them intermittently. Tarr argued that effective signing statement use would encourage Congress
to be more willing to compromise on legislation, lest it be short-circuited by subsequent
presidential action through the signing statement.

A memorandum from Samuel Alito, then a deputy assistant attorney general, also
explains some of the objectives behind “making fuller use of Presidential signing statements.”
Dated February 5, 1986, it argues,

“Our primary objective is to ensure that Presidential signing statements assume
their rightful place in the interpretation of legislation . . . . The novelty of the
proposal previously discussed by this Group is the suggestion that Presidential
signing statements be used to address questions of legislation. Under the
Constitution, a bill becomes law only when passed by both houses of Congress
and signed by the President (or enacted over his veto). Since the President’s
approval is just as important as that of the House or Senate, it seems to follow
that the Presidents’ understanding of the bill should be just as important as that of
Congress. . . .

From the perspective of the Executive Branch, the issuance of
interpretative signing statements would have two chief advantages. First, it would

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68 Memorandum from Ralph W. Tarr, Acting Assistant Attorney General, to T. Kenneth Cribb,
69 Id.
70 Id.
71 Letter from Samuel Alito, Deputy Assistant Attorney General, to the Litigation Strategy Group
269-box6-SG-LSWG-AlitotoLSWG-Feb1986pdf.
increase the power of the Executive to shape the law. Second, by forcing some
rethinking by courts, scholars, and litigants, it may help to curb some of the
prevalent abuses of legislative history.”

All of this work by Justice Department lawyers culminated in a speech by the Attorney
General Meese to the National Press Club on February 25, 1986. During that occasion, Meese
announced that signing statements would henceforth be included in the “Legislative History”
associating signing statements with the record of Congress’s deliberations, Meese intended to
ensure that “all can be available to the court for future construction of what the statute really
means.”


Presidents after Reagan have also aggressively used signing statements, in new and
unconventional ways. One technique introduced during the George H. W. Bush (“Bush I”)
administration was to use signing statements to point to alternative, quasi-fictitious legislative
histories in the Congressional Record. In the aftermath of the Iran-Contra controversy,
Congress passed a bill that prohibited aid or arms sales “to any foreign Government . . . in
exchange for that foreign government . . . undertaking any action which is, if carried out by the
U.S. Government . . ., expressly prohibited by a provision of United States law.” Bush I
opposed this provision, viewing it as an unconstitutional interference with the president’s power

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72 Id.
73 A Matter of Direction, supra note 40, at 286-87.
74 Id.
75 Christopher S. Kelley, The Significance of the Presidential Signing Statement, in EXECUTING
THE CONSTITUTION: PUTTING THE PRESIDENT BACK INTO THE CONSTITUTION 81 (Christopher S. Kelley ed.,
2006). [hereinafter, EXECUTING]
76 CHARLES TIEFER, THE SEMI-SOVEREIGN PRESIDENCY: THE BUSH ADMINISTRATION’S STRATEGY
FOR GOVERNING WITHOUT CONGRESS 38 (1991)
over foreign policy and his ability to control executive branch deliberations.77 His signing statement indicated the intent to construe the section narrowly to prohibit only “quid pro quo” transactions, in which “U.S. funds are provided to a foreign nation on the express condition that the foreign nation provide specific assistance to a third country, which assistance U.S. officials are expressly prohibited from providing by U.S. law.”78 Bush I continued:

As reflected both in Congressman Edwards’ statements and in the explanatory colloquy between Senators Kasten and Rudman, a “quid pro quo” arrangement requires both countries understand and agree that U.S. aid will not be provided if the foreign government does not provide the specific assistance. The Senate record also makes clear that neither the criminal conspiracy statute, nor any other criminal penalty, will apply to any violation of this section. My decision to sign this bill is predicated on these understandings of Section 582.79

The signing statement neglected to mention that the colloquy between Senators Warren Rudman (R-N.H.) and Robert Kasten (R-Wis.) concerned Kasten’s proposed amendment, which was subsequently withdrawn in the face of congressional rejection.80 In fact, both the plain language of the provision and a conventional reading of the legislative record suggest that the provision was meant to cover all funds provided “in exchange” for taking prohibited actions, not just “quid pro quo” arrangements.81

The Bush I administration also used a signing statement to express disagreement with a civil rights bill (on policy, not constitutional, grounds) in 1991.82 During the legislative process, the administration negotiated with Congress through Senator John Danforth and agreed to insert

77 EXECUTING, supra note 75, at 81.
79 Id.
80 TIEFER, supra note 76, at 40.
81 Id.
particular definitions into the *Congressional Record*. However, Bush I’s signing statement instead pointed to the entries of Senator John Dole (R-KA) as the “authoritative interpretative guidance by all officials in the executive branch . . . .” In doing so, the signing statement attempted to convert a “losing view” during the signing statement into the definitive legislative history of the bill, and thus “harvest . . . an entire law that supplants congressional legislating on a central and hotly contested issue.”

The Clinton administration did not continue Bush I’s use of signing statements to point to alternate legislative histories, but it did approve of using signing statements in three other circumstances: (1) to inform the public and specific constituencies of the president’s view of a bill; (2) to direct executive branch officers on how to implement the statute; and (3) to identify particular provisions that are unconstitutional, either facially or in certain circumstances. All three functions were present in a signing statement issued for the National Defense Authorization Act for Fiscal Year 1996, which included a provision mandating the discharge of military personnel living with the Human Immunodeficiency Virus (HIV). Clinton’s signing statement argued that provision was both unconstitutional and unwise military policy. Citing Roosevelt’s signing statement to the Urgent Deficiency Act, he indicated that the attorney general would not defend the provision; he also instructed agency officials, “in carrying out the provisions of this Act, to take all steps necessary to ensure that these service members receive the full benefits to which they are entitled—including, among other things, disability retirement pay, health care coverage for their families and transition benefits such as vocational education.”

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83 EXECUTING, *supra* note 75, at 83.
84 Statement on Signing the Civil Rights Act of 1991.
85 TIEFER, *supra* note 76, at 40.
89 *Id.*
The Clinton administration also used a signing statement to disapprove of a provision in a military budget bill that established a semi-independent agency within the Department of Energy.\(^{90}\) Clinton’s signing statement indicated that “Until further notice, the Secretary of Energy shall perform all the duties and functions of the [new agency’s director].”\(^{91}\) Furthermore, he instructed the secretary to fill positions within the new agencies by appointing existing department personnel to concurrent positions.\(^{92}\) Although Clinton ultimately appointed a director for the new agency, he used this and subsequent signing statements to undermine the independence granted to this agency by legislation.\(^{93}\) Despite the confrontational language used by this and other Clinton signing statements, these executive communications remained uncontroversial throughout his presidency.

4. \textit{The Bush II Period: 2000-08}

George W. Bush has continued his predecessor’s assertive use of signing statements. Some commentators have argued that his administration “expanded the scope and character of signing statements.”\(^{94}\) Whether or not this is true, the recent controversy over Bush II signing statements has resulted in a higher level of scrutiny and a more thorough assessment of the signing statements issued during his administration than those issued by prior presidents.

Bush II raised constitutional challenges to statutory provisions more often than his predecessors, even though he issued fewer signing statements overall.\(^{95}\) A total of 174 signing statements were issued during the Bush II administration, compared to 381 during the Clinton administration, 228 during the four years of the Bush I administration, and 250 during the Reagan administration.

\(^{92}\) Id.
\(^{93}\) EXECUTING, supra note 75, at 86.
\(^{95}\) Bradley & Posner, supra note 7, at 324.
administration. However, Bush II rarely issued signing statements for purely rhetorical purposes. As a result, the average number of Bush II signing statements per year that raised issues of either constitutionalism or statutory construction (25 per year) was higher than that of Clinton (10 per year), Reagan (12 per year), and Carter (8 per year)—but not Bush I (29 per year). In other words, the overall number of signing statements during the Bush II presidency differed from earlier administrations, but not significantly.

Where Bush II departs from his predecessors is in the practice of raising objections to multiple provisions within a single signing statement. By mid-July of 2006, Bush II had objected to over 800 statutory provisions, more than any other president. On average, Bush II challenged 162 provisions per year. In contrast, Clinton challenged 18 annually, Bush I challenged 42, Reagan challenged 16, and Carter challenged 10. Bush II was also twice as likely to challenge an undefined number of provisions in a statute than other presidents, with the exception of Bush I.

A recent survey of signing statements from Bush I’s first term identified the presidential powers that most commonly served as the basis for constitutional objections. These were: the power to supervise the unitary executive; the power over foreign affairs; the power to control recommendations made to Congress; the power to classify and withhold information; and the power to execute constitutional duties. These presidential powers have often served as the bases for objections in the signing statements of prior administrations. Thus, although no prior administration used the term “unitary executive,” signing statements from the Clinton

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96 Id. at 323.
97 See id.
98 Id.
99 Id.
100 Id.
101 Id.
102 Cooper, supra note 94, at 522.
administration appear to express the same complaint through different words.103 Earlier signing statements have also been used to direct executive branch officers and to provide a particular interpretation to a statute. As the Congressional Research Service concluded in one of its reports, “it is important to note that the substance of [President Bush’s] signing statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton.”104

The reason for the numerical increase in these objections during the Bush II administration is not clear. It does not appear likely that there were simply more constitutionally problematic bills passed during this period.105 Exigencies arising from the September 11 attack, and the government’s response to it, may have contributed to the increase. The possibility that the Bush II administration held a more expansive view on executive power than the Clinton administration is one hypothesis, but it has not been established; OLC memoranda produced during the Clinton administration also tested the boundaries of presidential authority.106 Furthermore, it is difficult to apply this hypothesis without a comprehensive study of the legislative processes that resulted in each objection. The increase in signing statement objections may also be a tactical decision, since signing statements are only one of several tools in an administration’s arsenal.107 Finally, it is possible that the Bush II administration acted similarly to the Clinton administration, but merely in a more systematic or uniform manner.108 This proposition is supported by reports that, during the Bush II administration, the Office of the Vice

103 Bradley & Posner, supra note 7, at 328.
106 See Memorandum from Walter Dellinger, supra note 86; see also Memorandum from Walter Dellinger, Assistant Attorney General, to Abner J. Mikva, Counsel to the President (Nov. 2, 1994), available at: http://www.usdoj.gov/olc/nonexecut.htm (defending a Presidential prerogative to refuse to enforce laws that the President unilaterally considers to be unconstitutional); Bradley & Posner, supra note 7, at 328.
107 See Cooper, supra note 94, at 518.
108 See Bradley & Posner, supra note 7, at 331.
President would routinely review all legislation for provisions deemed to infringe on presidential power.\textsuperscript{109}

\section*{II. Emergence of the Vague Signing Statement}

The use of signing statements to comment on specific provisions in a statute has increased significantly in recent years.\textsuperscript{110} As a result, the format of these communications has changed significantly. A mid-twentieth century signing statement usually specified how a particular provision violated a constitutional principle and how the president would resolve that conflict.\textsuperscript{111} In contrast, modern signing statements often rely on a general reference to constitutional principles, followed by a nonexclusive list of provisions that may possible implicate those principles.\textsuperscript{112} Whether or not there is a specific legal question at issue is not always clear.

\subsection*{A. Sources of Vagueness in Signing Statements}

Generally speaking, there are four generally sources of vagueness in modern signing statements. First, a signing statement may include open-ended objections to an unspecified number of provisions in a bill. Second, the objection’s basis may be controversial or unclearly delineated. This includes the use of standardized objections and doubtful claims of presidential authority. Third, the signing statements may not fully explain the potential conflict between a legislative provision and a constitutional principle. Fourth, vagueness may arise from the practice

\begin{footnotesize}
\textsuperscript{110} See Bradley & Posner, supra note 7, at 331 tbl.1.
\textsuperscript{111} See, e.g., Statement on Signing the Urgent Deficiency Act, 1943.
\textsuperscript{112} Although it is commonly believed that only Bush II issued vague signing statements, members of his administration have argued that Clinton’s signing statements were more vague. See \textit{Presidential Signing Statements Under the Bush Administration: Hearing Before the H. Comm. on the Judiciary}, 110th Cong. 13 (2007) (statement of John P. Elwood, Deputy Assistant Attorney General) (arguing that the Bush II’s signing statements “tend to be more specific in identifying provisions than his predecessor’s signing statements.”)
\end{footnotesize}
of combining several constitutional principles and many statutory provisions in the same objection. Each is examined in turn.


One source of vagueness is an open-ended objection to an unspecified number of provisions in a bill. Modern signing statements often will identify specific examples of potentially problematic provisions, but indicate that the list is non-exclusive. For example, the Statement on Signing the Homeland Security Act of 2002 identifies two provisions that purportedly implicate the President’s authority to protect classified information. But it extends this objection to “other provisions of the Act, including those in title II.” Title II comprises 37 sections, taking up 18 pages in the U.S. Statutes at Law. Through the objection’s use of open-ended language (i.e., “other provisions . . . including”), this objection potentially applies to the entire statute.

Similarly, the Statement on Signing the Consolidated Appropriations Act, 2004 indicates that provisions that raise certain constitutional issues will not be enforced. Although specific provisions follow each objection, the use of open-ended language (i.e., “such as” or “including”) effectively extends the numerous objections to the entire 455-page act (as published in the U.S. Statutes of Law).

2. Controversial or Unclearly Delineated Claims of Authority

Often, the basis of a signing statement’s objection is self-evident, such as the prohibition of legislative vetoes after Chadha. At other times, an objection’s basis may be controversial or

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117 Id.
unclearly delineated.\textsuperscript{118} For example, although the president’s authority to direct the executive branch (as chief executive) or the military (as commander in chief) is widely accepted, the limits of this authority are ill-defined.\textsuperscript{119} Furthermore, presidential powers are constrained by federalism and the enumerated powers of Congress. Hence, mere reference to a constitutional principle may be insufficient to fully explain the basis for an objection. Vagueness may result when the breadth of a principle is unexplained or unsupported (e.g. by judicial holdings or historical precedent).\textsuperscript{120}

\begin{itemize}
\item[a.] General Claims of Presidential Authority
\end{itemize}

A signing statement may also base an objection on a claim of authority that is controversial or very broadly defined. In these cases, the scope of the presidential power is often unclearly delineated. For example, The Detainee Treatment Act of 2005, as embodied in Title X of a larger appropriations bill, prohibited the cruel or degrading treatment of detainees by the Department of Defense.\textsuperscript{121} Its corresponding signing statement indicated,

The executive branch shall construe Title X . . ., relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.\textsuperscript{122}

This objection raises three distinct constitutional issues, which will be examined in turn.

\textsuperscript{118} See Neil Kinkopf, \textit{Signing Statements and Statutory Interpretation in the Bush Administration}, 16 WM. & MARY BILL RTS. J. 307, 313 (2007) (“The conclusory assertions of President Bush’s signing statements are not problematic when the for the objection is clear and uncontroversial.”)

\textsuperscript{119} \textit{See} \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (“These cryptic words [of the Commander in Chief Clause] have given rise to some of the most persistent controversies in our constitutional history.”).

\textsuperscript{120} \textit{Id.} at 312 (“[T]he signing statements offer no elaboration of the various theories of presidential power, so there is no basis on which to determine whether the asserted presidential power is a serious one or is based on an unfounded theory of constitutional law.”).


\textsuperscript{122} Statement on Signing the Department of Defense Appropriations Act, 2006.
“Constitutional Limits on Judicial Power” was previously used by Bush I in a signing statement to the Clean Air Act in 1990. In that signing statement, Bush I clarified the term by stating a specific constitutional standing requirement and referencing a contemporary Supreme Court case.\footnote{Statement on Signing the Clean Air Act, 1990. (“[I]n providing for citizen suits for civil penalties, the Congress has codified the Supreme Court’s interpretation of such provisions in the \textit{Gwaltney} case [\textit{Gwaltney v. Chesapeake Bay Found.}, 484 U.S. 49 (1987)]. As the Constitution requires, litigants must show, at a minimum, intermittent, rather than purely past, violations of the statute in order to bring suit. This requirement respects with constitutional limitations on the judicial power and avoids an intrusion into the law-enforcement responsibilities of the executive branch.”).} In contrast, the Bush II signing statement does not specify which limitation(s) on judicial power are consistent with his construal of the statute.

Commander in chief authority has been referenced in nearly 60 signing statements since 1980.\footnote{Search performed using the term “Commander in Chief” and HEADLINE (‘Statement on Signing’) and not HEADLINE (proclamation)” with date restrictions between 1/1/1980 and 1/1/2007 in the LexisNexis database “Public Papers of the President.”} However, most signing statements issued between 1980 and 2000 have cited this authority in the “conventional” contexts of intelligence classification, foreign affairs, and military deployment.\footnote{Citation forthcoming.} In comparison, the scope of the president’s authority to control the treatment of detainees is a debated subject. While the Bush II administration’s views may not differ substantially from that of prior administrations, the claim of commander in chief authority in this new context is vague because it is asserted without fuller elaboration or support.\footnote{For fuller analysis of whether the understanding of Commander in Chief authority is different between Clinton and Bush II, see Bradley & Posner, supra note 7, at 321-34.}

Signing statements often refer to the president’s power to supervise the executive branch. The unitary executive theory argues that “all of what now counts as administrative activity is controllable by the President.”\footnote{Elena Kagan, \textit{Presidential Administration}, 114 HARV. L. REV. 2245, 2247 (2001).} Whether the treatment of detainees falls under the president’s controllable power, particularly in the face of express statutory prohibitions, is unclear. Although prior administrations have claimed similar authority, they have not done so in a manner that can
arguably be construed as trumping Congress’s enumerated power “[t]o make rules for the government and regulation of land and naval forces.”

b. Standardized Objections

Because they often identify defects that regularly reoccur in bills, signing statements frequently rely on uniform language. However, this uniformity may mask significant differences among the statutory provisions that are subject to objection. That is, standardized objections may be clear in one circumstance but vague in another.

There are numerous examples of signing statements that use uniform language in a significantly different circumstances. For example, Presidents often invoke Chadha to object to a legislative veto provision in a statute. However, a 2002 signing statement also invoked Chadha to object to a provision requiring the National Center for Agency Statistics to “furnish such special statistical compilations and surveys as the relevant congressional committees may request.” However, Chadha objections are not usually used to oppose the disclosure of educational statistics to Congress.

3. No Explanation of How A Provision and a Constitutional Principle Conflict

Signing statements usually indicate how a provision potentially conflicts with a constitutional principle. However, some signing statements do not fully explain the potential conflict between a provision and a constitutional principle. The modern trend of stating that a provision will be construed “in light of” a constitutional concern often leads to vagueness regarding the shape, risk, and magnitude of a potential conflict.

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129 See Chadha, 462 U.S. at 919.
131 See, e.g., Andrew Jackson’s 1830 signing statement, supra page 3. More recently, the Statement on Signing the Energy Policy Act of 2005 identified several provisions that implicated the president’s authority to conduct foreign relations, because they purported to direct the conduct of international negotiations.
For example, the Statement on Signing the Export-Import Bank Reauthorization Act of 2002 raised this issue: “The executive branch shall carry out section 7(b) of the bill, which relates to certain small businesses, in a manner consistent with the requirements of equal protection under the Due Process Clause of the Fifth Amendment to the Constitution.”\textsuperscript{132} There is no indication from the signing statement how this provision would implicate the Equal Protection or Due Process Clauses, although some argue that it reflects the suspicion that affirmative action programs are constitutionally suspect.\textsuperscript{133}

Similarly, the Statement on Signing the Consolidated Appropriations Act, 2003 does not explain how the Andean Counterdrug Initiative, which provides funding to anti-narcotics programs in South America, limits commander in chief authority.\textsuperscript{134} Nor does it specify how the president’s authority to supervise the unitary executive is restricted by the Agricultural Appropriations Act, which prohibits the use of appropriated funds to transmit information resulting from the appropriations process to non-Department of Agriculture employees.\textsuperscript{135} Although these objections may be entirely legitimate, the fact that they do not fully explain how the referenced provisions unlawfully restrict presidential authority deprives the signing statement of specificity and makes it difficult for readers to understand its overall significance.

4. \textit{The Aggregation of Several Constitutional Principles and Statutory Provisions}

Probably the greatest source of vagueness in signing statements comes from the practice of combining several constitutional principles and many statutory provisions in the same

\textsuperscript{132} Statement on Signing the Export-Import Bank Reauthorization Act of 2002.\textsuperscript{133} See Cooper, supra note 94, at 525. Almost exactly one year later, the Supreme Court upheld the use of affirmative action by a law school in order to further the school’s compelling interest in obtaining the educational benefits that flow from diversity. \textit{Grutter v. Bollinger}, 539 U.S. 306 (2003).\textsuperscript{134} See Foreign Operations Appropriations Act, 2003, Pub. L. No. 108-7. \textit{See also} Statement on Signing the Consolidated Appropriations Act, 2003. (‘‘[T]he executive branch shall construe as advisory the provisions of the bill that purport to . . . limit the President's authority as Commander in Chief, such as language under the heading ‘Andean Counterdrug Initiative’ in the Foreign Operations Appropriations Act, . . . or limit the President's authority to supervise the unitary executive branch, such as section 718 of the Agriculture Appropriations Act . . . .’’).\textsuperscript{135} See Agriculture Appropriations Act, 2003, Pub. L. No. 108-7 § 718.
objection. This has been a natural outgrowth of the modern practice of raising a growing list of issues in the context of fewer signing statements overall. It may also reflect the longer statutes, often reflecting a combination of different subject matters, that are a feature of the modern state. Aggregation can take a variety of forms.

a. Aggregation of Provisions

The practice of grouping several provisions together as jointly implicating a constitutional issue means that signing statements no longer give an individualized evaluation of any particular provision. For example, the Statement on Signing the Consolidated Appropriations Act, 2003, is quoted above, characterized four provisions as “purporting to [ ]direct or burden the Executive’s conduct of international negotiations.”

b. Aggregation of Principles

Vagueness also can arise when constitutional issues are combined. For example, a 2001 signing statement combined five distinct sources of authority into a single objection to information disclosure. Because this objection has been used frequently in recent years, it is difficult to determine on what basis information a particular disclosure requirement is being opposed.

Likewise, a portion of the Statement on Signing the Export-Import Bank Reauthorization Act of 2002 identified two provisions that interfere with “the President’s constitutional authority to conduct the Nation’s foreign affairs, supervise the unitary executive branch, and withhold information the disclosure of which could impair foreign relations, national security, the deliberative process of the executive, or the performance of the executive’s constitutional

duties.” Providing no less than six separate constitutional principles, this objection provides little information as to which specific constitutional issues are raised by this provision.

c. Aggregation of Both Provisions and Principles

The greatest vagueness arises when both a number of statutory provisions and a list of constitutional issues are joined. Modern signing statements often begin with an introductory paragraph describing broad constitutional principles, followed by nonexclusive lists of statutory provisions that potentially conflict with those principles. In these circumstances, it is seemingly impossible to disentangle which principle is raised by which provision. For example, the Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004, in addressing the issue of information sharing with Congress, lists fifteen different statutes and five different bases for withholding information. Furthermore, it combines sixteen provisions with two bases for authority on the issue of legislative recommendations to Congress by executive branch officials.138

In summary, signing statement vagueness can usually be traced to the four sources identified in this section. However, that is not meant to imply that any of these categories occur exclusively or independently. In fact, a signing statement may exhibit vagueness arising from all four sources simultaneously. For example, a signing statement in response to an appropriations bill passed in November 2001 concluded by noting, “several other provisions of the bill unconstitutionally constrain my authority regarding the conduct of diplomacy and my authority as Commander in Chief. I will apply these provisions consistent with my constitutional responsibilities.139 The particular provisions that raise constitutional issues, the scope of the

138 Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004.
139 Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002.
authority that underlies these objections, how these two elements actually conflict—none of these are explained.

B. Inherent Challenges of Vague Signing Statements

1. The intent and significance of vague signing statements are unclear.

Vague signing statements are not necessarily problematic, but they raise unique issues. To begin with, the intent and purpose motivating their use is often difficult to assess. Partly as a result of the recent political controversy, a common public perception is that these tools are attempts by the president to circumvent the law.\(^{140}\) However, research demonstrates that the majority of prior administrations’ signing statements did not have this result: either the president complied with the statute’s requirements, or the potential conflict between the statute and the constitutional principle never arose.\(^{141}\) Because vaguely described objections may suggest a lower magnitude of conflict than particularly described objections, vague signing statements may actually be less likely to result in noncompliance.\(^{142}\)

The practical significance of vague signing statements is also untested. Because signing statements have no official force of law, they might be regarded as more of an indication of policy or intent than an executive action.\(^{143}\) Courts rarely respond to signing statements, and no court appears to have paid attention to a particularly vague signing statement.\(^{144}\) In addition, recent administrations have not clearly described what they mean or what they hope to achieve by

\(^{140}\) See Savage, supra note 6 (“Far more than any predecessor, Bush has been aggressive about declaring his right to ignore vast swaths of laws—many of which he says infringe on power he believes the Constitution assigns to him alone as the head of the executive branch or the commander in chief of the military.”). But see Neil Kinkopf, Signing Statements and Statutory Interpretation in the Bush Administration, 16 WM. & MARY BILL OF RIGHTS L. J. 307, 308 n.7 (“A careful reading of President Bush’s signing statements reveals that, in fact, he has never openly declared that he will not enforce or be bound by a law because that law is unconstitutional.”)

\(^{141}\) See May, supra note 9, at 81.5


\(^{143}\) See Bradley & Posner, supra note 7, at 363.

\(^{144}\) See id. at 310.
these communications.\textsuperscript{145} As such, it is not immediately clear whether a vague objection reflects an issue that the administration feels strongly about, or whether it is merely rhetorical or a "placeholder objection" that is used when ever any type of action, such as information disclosure, is addressed.

2. \textit{Several unanswered questions remain.}

a. Who is the intended audience?

Signing statements can serve different purposes, and can therefore be drafted with specific audiences in mind. Practitioners and scholars have typically focused on government entities—Congress, the judiciary, and federal agencies—as the targeted recipients of signing statement.\textsuperscript{146} Others have observed that signing statements can be used to influence the constituency groups, fellow partisans, and the general public.\textsuperscript{147} The ability to identify the intended audience is important, because it facilitates understanding the signing statement’s rationale and purpose.

In many cases, the intended audience of a signing statement is transparent.\textsuperscript{148} Non-specific signing statements, on the other hand, make it difficult to identify the intended audience and the what it is the signing statement seeks to achieve. Because vagueness presumably affects the effectiveness of signing statements in different ways, an assessment of potential audiences goes far in determining the significance of this presidential tool.

b. What is the intended objective?

\textsuperscript{145} Testimony at congressional hearings by lawyers at OLC or the White House have defended signing statements, but have not addressed the issue of vagueness or specificity. \textit{See} Statement by John L. Elwood, \textit{supra} note 112

\textsuperscript{146} Section III of this paper provides examples of scholarship focusing on each of these audiences.

\textsuperscript{147} \textit{See}, e.g., Christopher S. Kelley, \textit{The Law: Contextualizing the Signing Statement, 37 PRESID. ST. Q.} 737, 738 ("[The signing statement] can be used as a rhetorical tool to signal gratitude to supporters or to admonish opponents.") [hereinafter, \textit{Contextualizing}]; Posner & Bradley, \textit{supra} note 7, at 316-17 ("Bush has often used signing statements at least partially for political or public relations purposes.").

\textsuperscript{148} \textit{See} Statement on Signing Legislation Conferring Honorary Veteran Status on Bob Hope.
As demonstrated earlier, signing statements can serve a variety of purposes, from setting presidential priorities to providing a constitutional construction to a statutory provision. This paper presumes that raising a vague objection to a statute is done purposefully, with a different objective than a specific objection. What this objective is, however, is not clear. For example, vague signing statements may be intended to have primarily political, legal, constitutional, or public policy effects. Furthermore, they may see to accomplish their objective either directly or indirectly. For example, a vague reservation against information sharing may not have the direct purpose of actually discouraging disclosure, but may instead be used as an opportunity to reassert presidential prerogatives.

c. How predictive is it of executive action?

Signing statements do not occur in a vacuum; they are one of several tools that the administration may use to achieve its objectives.\(^{149}\) On one hand, a non-specific signing statements may serve as the public manifestation of nonpublic actions—such as confidential communications to Congress or to executive agency officials. Alternatively, vagueness may indicate that the administration does not consider the issue to be particularly important. Because it is unclear whether presidents follow through on vague objections, it is difficult to determine whether these statements are more or less predictive of executive action than other ways in which the president can object to legislation.\(^{150}\) Furthermore, it is not clear that vague signing statements indicate whether the president intends to treat this particular provision differently than other provisions that were not subject to a signing statement’s objection.

d. How responsive is a vague objection to the actual bill?

\(^{149}\) See M. Elizabeth Magill, *The First Word*, 16 WM. & MARY BILL OF RIGHTS L. J. 27 (2007) (analyzing the various presidential tools that can be used to influence the executive branch).

\(^{150}\) See Louis Fisher, *supra* note 142, at 209-10 (“Objections in a signing statement may be pure bluster and represent some sort of theoretical, impractical protest created by imaginative attorneys in the Justice Department or the White House.”)
Because many objections do not specify how a statutory provision implicates a constitutional issue, it’s not clear whether a vague objection is important or not. In light of the uniform language used in many signing statements, as well as the modern tendency to aggregate similar provisions together, it is possible that certain objections get applied to every bill raising certain issues, such as foreign policy. As a result, the presence of vague objections may not necessarily indicate that an identified or unidentified provision actually creates a potential conflict with a constitutional issue.

3. **Vagueness may suggest that there are drawbacks to specificity.**

Modern signing statements fall within a wide range of specificity: some are vague, while others are quite detailed. Although this variance may be accidental, it more likely suggests that vagueness and specificity serve different purposes. A specific signing statement may be effective in certain circumstances, while in other circumstances, a vague signing statement may be more useful. Furthermore, the use of either vague or specific signing statements in a particular circumstance may indicate different things about the nature of the objection, the context in which it is made, and the signing statement’s utility as an indication of executive interest and intent.

The increasing reliance of vagueness in signing statements may also provide general insights into the use and utility of signing statements as a whole. Early signing statements were rarely vague; furthermore, modern vagueness appears incongruent with the Reagan-era intention to elevate signing statements as important executive tools. If anything, vagueness appears to counteract the purposes for which signing statements were intended to be used. If signing statements are increasingly effective primarily when they lack specificity, then this may suggest

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151 Section II.A. of this paper provides examples of uniform signing statement objections.
152 Section I of this paper provides greater detail on this point.
153 This observation is examined in further detail later in this section.
that signing statements may have drawbacks or otherwise are not as successful at furthering the president’s agenda as its proponents had hoped.

III. UNDERSTANDING VAGUE SIGNING STATEMENTS

The previous section identified the emergence of vagueness in modern signing statements and the questions and issues that are associated with it. This section will attempt answers to those questions—specifically, the purpose, utility, and significance of vague signing statements—by evaluating how vagueness affects a signing statement’s ability to carry out the variety of objectives for which they are used.

In doing so, this section situates vague signing statements within the body of existing scholarship on presidential action. While it is widely recognized that signing statements can serve a variety of purposes, scholars usually focus on one of three primary frameworks for understanding signing statements. The first is a separation of powers approach, which focuses primarily on the relationship between the two political branches. The second is a legislative interpretation approach, which focuses on the president’s interaction with the judiciary. The third is a unitary executive approach, which focuses on the president’s guidance of federal agencies. The impact of both specificity and vagueness will be assessed within each framework.

A. Congress as Audience: The Separation of Powers Framework

1. Framework Overview: Defending Presidential Authority

Separation of powers is perhaps the most common framework for analyzing recent signing statements. When the Boston Globe sparked the recent controversy of Bush II signing

statements, it described them as “a concerted effort to expand [the president’s] power at the expense of Congress, upsetting the balance between the branches of Government.”

Both Republican and Democratic Members of Congress have criticized signing statements that pose, in Senator Leahy’s view, “a grave threat to our constitutional system of checks and balances.”

The American Bar Association (the “ABA”) adopted this framework when it created the “Task Force on Presidential Signing Statements and The Separation of Powers Doctrine,” with the purpose of providing “an independent, non-partisan and scholarly analysis of the utility of presidential signing statements and how they comport with the Constitution and enacted law.”

The ABA subsequently accepted the Task Force’s recommendation to “oppose . . . , as contrary to the rule of law and our constitutional system of separation of powers, the issuance of presidential signing statements that claim the authority . . . to disregard or decline to enforce all or part of a law that the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress.”

Under the separation of powers framework, the primary function of signing statements is to defend presidential authority in the face of Congressional intrusion. They serve to identify areas where Congress oversteps its enumerated powers or otherwise interferes with presidential devices that contemporary presidents have developed for use against a recalcitrant Congress’);

See Savage, supra note 6.


157 See AMERICAN BAR ASSOCIATION, supra note 7, at 4.


159 See, e.g., Neal Devins, Signing Statements and Divided Government, 16 WM. & MARY BILL RTS. J. 55 (2007) (arguing that signing statement use makes most sense when the executive and legislative branches are controlled by different parties);
In areas where both Congress and the president have concurrent authority—and particularly where the distribution of authority between them is uncertain—signing statements permit the president to “push back” on Congress’s assertion of authority with the president’s own claim. Signing statements can also be used to avow particular elements of presidential power—such as the claim that the Take Care Clause grants the president the power to refuse to enforce legislation that he unilaterally concludes is unconstitutional.

By their very nature, objections in signing statements indicate areas in which the president and Congress are divided. But if presidential powers “fluctuate, depending on the disjunction or conjunction with those of Congress,” as Justice Jackson argued in *Youngstown Sheet & Tube Co. v. Sawyer*, then Congressional powers likewise fluctuates in light of presidential action. Legislation can overstep Congress’s enumerated powers if the president acquiesces. As such, signing statements serve both protective and assertive purposes: they defend presidential prerogatives and challenge the boundaries of Congress’s claim of authority.

Congress, in turn, can respond to signing statements through further legislation, through its control over appropriations, or through other powerful political tools. This interplay between the political branches strengthens, not weakens, the federal system of checks and balances.

Signing statements play a legitimate role in determining the balance of power between Congress and the president; they are a part of the “negotiations” that occur between political branches in areas of shared responsibility. First, they attempt to encourage Congress to concede on issues that affect the president’s responsibilities. Second, they attempt to discourage Congress from fully exercising its power in areas of shared authority, by making broad assertions of

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161 See Posner & Bradley, *supra* note 7, at 317 (noting frequent objects of signing statement challenges, within which areas of concurrent authority, such as foreign affairs and war powers, dominate).

162 See *Contextualizing*, *supra* note 147, at 742.


164 See Statement by John L. Elwood, *supra* note 112, at 2 (describing signing statements as “an essential part of the constitutional dialogue between the Branches that has been a part of the etiquette of government since the early days of the Republic.”)
presidential power. Finally, they signal when congressional power is “at its lowest ebb” by objecting when Congress tests the limits of its authority.

Of course, because they are released when the president signs a bill with an objectionable provision, signing statements often indicate areas in which the president has been least successful in negotiating with Congress. Most objections fall within a limited category of “routine separation of powers” issues that arise year after year, despite repeated executive branch objection. Clearly, Congress prefers certain types of provisions notwithstanding of the president’s argument that the provision is unconstitutional. Although these disputes are often nonjusticiable, Congress has effective tools at its disposal to compel executive cooperation. For example:

- **Appointments**: Statutes occasionally list mandatory qualifications for certain federal agency positions. These provisions are frequently subject to objection, since the president’s Appointment Power cannot be made subject to qualification by legislation. At the same time, the Senate can simply refuse to confirm a nominee that does not meet its desired standards.

- **Legislative Recommendations**: Statutes frequently require a federal agency to periodically report to congressional committees and to make recommendations for future legislation. Signing statements frequently argue the president’s constitutional authority to recommend to Congress “such measures as he shall judge necessary and expedient” cannot be mandated by statute and precludes independent agency recommendations. Nonetheless, presidents often do

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165 See Harold J. Krent, *Fee Shifting as a Congressional Response to Adventurous Presidential Signing Statements*, 16 Wm. & MARY BILL OF RIGHTS L. J. 211, 211-12 (2007) (“Given justiciability concerns, . . . [t]here is little way currently, therefore, for courts to step in to resolve the ongoing disputes between the President and Congress generated by presidential assertions of prerogative in the signing statements.”)

166 See id. (noting that a signing statement’s objection to a purported limitation on the Appointment Power is “not a declaration that the President will not follow the appointments provision, but that he remains free to abide by them as a matter of policy. And it’s commonly the case that Presidents do abide by such appointment provisions.”).
make the requested recommendations in order to ensure that the president’s interests are represented in the legislative process.

- **Legislative Vetoes**: Although legislative vetoes were held to be unconstitutional in *Chadha*, that has not stopped Congress from inserting them in subsequent legislation. Presidents have frequently cited *Chadha* in signing statements in order to object to this practice. Although legislative vetoes are not legally enforceable, they remain politically enforceable. Congress can effectively discipline a federal agency through aggressive oversight, a reduction in appropriations, a refusal to confirm nominees, or several other methods.167

- **Direct Submission of Agency Reports**: As will be discussed further below, statutes occasionally require federal agencies to issue reports directly to congressional committees without comment or amendment by the administration. In response, presidents have argued that these provision interfere with the president’s authority to supervise the executive branch. Because the original report will likely be “leaked” or otherwise received by Congress, it’s unlikely that the administration will succeed in disguising its amendments or changes.

- **Disclosure of Information**: As discussed in the prior section, presidents have several bases upon which to object to statutory provision that mandates the disclosure of information to the Congress or the general public. Once again, Congress has several effective political tools that can be used to compel disclosure, including aggressive oversight and control over appropriations.

Rather than indicating noncompliance, signing statement objections may merely preserve the president’s position while Congress’s objectives are being accommodated.168

167 *Id.* (“President Bush and past Presidents to our knowledge have not ignored [legislative veto] provisions, but have instead done their utmost to apply them in a manner that does not violate the Constitution by ordering Executive Branch officials to notify congressional committees as anticipated by the provisions.”)

168 See Statement by John L. Elwood, supra note 112 (“Where the constitutional violation stems not from the substance of a provision but from its mandatory nature, as with the Appointments Clause, the
2. Assessing the Impact Vagueness and Specificity

Specificity permits a signing statement to effectively identify a constitutional weakness or describe an executive power. It also enables the president to make a clear and thorough defense of his constitutional interpretation or his understanding of congressional or presidential authority. However, this does not necessarily mean that specific signing statements will be more effective than vague signing statements at encouraging Congress to accept the president’s perspective of an issue—particularly for issues that frequently reoccur despite executive objection.

When used in the context of political negotiations, signing statements are intended to preserve a formal claim of presidential power, not to provoke a public quarrel with Congress. On particularly contentious issues, specificity may provoke a negative congressional response and undermine the process of political negotiation. For example, the signing statement on the Detainee Treatment Act was probably not intended to provide the political backlash that followed it. That response drew negative public attention to the president’s policies and made it more difficult for him to achieve a political compromise on his own terms.

In contrast, vague signing statements permit the president to simultaneously preserve a constitutional claim and achieve a political compromise. As the legislative veto example makes clear, no amount of specificity in signing statements will be effective at dissuading Congress from indicating its will or exercising (or overstepping) its authority in some contexts. In many

President’s best course is to note the deficiency, leaving the President free to act in accordance with the provision as a matter of policy.”

Defending this signing statement before a congressional hearing, an OLC lawyer described it as merely a “general statement,” arising when foreign affairs or war power issues are raised, that “conducting war is the responsibility of the executive branch, not the legislative branch.” Statement by John L. Elwood, supra note 112. He also described the statement as “another excellent example of how just because the President states his constitutional views does not mean that he is not going to enforce [the statute].” Id.

Statement on Signing the Department of Defense Appropriations Act, 2006. Although this particular signing statement is often held up as the exemplar of signing statement vagueness, it arguably was too specific in raising a presidential power that many thought inappropriate in the context of military regulation. Although the objection was vague with regard to the extent of the President’s claims and his intended future policies, a detailed claim of presidential power to disregard the Detainee Treatment Act—if the president was interested or willing to make such a claim—would not have reduced the controversy.
cases, the goal of a signing statement may be simply to register opposition to congressional encroachments. Vagueness in signing statements permits the president to “dismiss” congressional demands without having to engage in an actual (and possibly losing) defense of the limits of either congressional or presidential power.

Vague objections also frequently arise in areas where both branches share concurrent authority, such as regulation of the military and oversight of federal agencies. Frequently, the apparent impetus in these cases is to respond to Congress’s assertion of authority, not the particulars of the provision per se. In these cases, the objection serves to express a broad claim of presidential power, not specifically to demonstrate that a provision is constitutionally infirmed. As such, vague signing statements may serve as opportunistic “placeholder” objections that arise whenever areas of concomitant authority arise.

Because the separation of powers framework is primarily concerned with defending presidential authority, the practical significance of vague signing statements from this perspective is unclear. Vague objections provide little insight into whether or how the executive plans to enforce the provision. Nor do they indicate whether challenged provisions will be treated differently than unchallenged provisions. In most cases, the executive ultimately complies with the statute. Political resolution of disputes between Congress and the president are necessary because these disputes rarely get adjudicated in court. In the rare occasions where a party has

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171 For a list of the most common bases for Bush II signing statement objections, See Cooper, supra note 94, at 522 tbl.1.
172 See Posner & Bradley, supra note 7, at 331 (analogizing the Bush Administration’s objections to “a lawyer who writes ‘privileged and confidential attorney work product’ on every document he prepares”).
173 See Nelson Lund, Presidential Signing Statements in Perspective, 16 WM. & MARY BILL RTS. L.J. 106 (quoting Bush statements that indicate statutory compliance despite a signing statement’s objection). See also id. at XX (hypothesizing that Bush II was aggressive in claiming presidential power, but reserved in exercising it).
174 See Michele Estrin Gilman, Litigating Presidential Signing Statements, 16 WM. & MARY BILL RTS. L.J. 131, 132 (2007) (arguing that Congress should use political tools to force the president to comply with statutes, because litigation over signing statements would be nonjusticiable); A. Christopher Bryant, Presidential Signing Statements and Congressional Oversight, 16 WM. & MARY BILL RTS. L.J. 169, 171
standing to initiate litigation, courts frequently dismiss on the basis nonjusticiability.\textsuperscript{175} Since courts will rarely intervene in political questions, greater signing statement specificity is unlikely to add value if it fails to sway Congress.

In summary, a strange tension between clarity and utility emerges as one moves along the spectrum from specificity to vagueness. A specific signing statement may present the president’s argument more effectively, but may be ineffective or even counter-productive in furthering the president’s policies. In contrast, vague signing statements may help achieve a political compromise in the president’s favor—even though they are weak tools for conveying the basis underlying the president’s positions. If vague signing statements indicate an area in which the president seeks to negotiate a political solution, then a vague signing statement may not be a significant indication of how a statute will actually be enforced.

\section*{B. Courts As Audience: The Legislative Interpretation Framework}

\subsection*{1. Framework Overview: Shaping How Statutes Are Interpreted}

The legislative interpretation framework focuses on how signing statements may influence the way that courts interpret statutes.\textsuperscript{176} They can do so in many ways. For example,

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\textsuperscript{175} For example, in \textit{Zivotofsky v. Secretary of State}, a U.S. District Court dismissed a case raising a separation of powers question due to a lack of subject matter jurisdiction. 511 F. Supp. 2d 97 (D.DC, 2007). The plaintiff, an American citizen born in Jerusalem, brought suit to enforce a provision in the Foreign Relations Authorization Act for Fiscal Year 2003 that required U.S. passports to list the place of birth of citizens born in Jerusalem as “Israel.” \textit{Id.} at 99. In ruling that the issue was a “political question . . . committed to the political branches to the exclusion of the judiciary,” the Court noted the president’s objection that the provision “impermissibly interferes with the President’s constitutional authority to conduct the Nation’s foreign affairs and to supervise the unitary executive branch” and “impermissibly interfere[s] with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.” \textit{Id} at 100, 102.

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\textsuperscript{176} Examples of scholarship utilizing this approach include Phillip J. Cooper, \textit{Signing Statements as Declaratory Judgment: the President at Judge}, 16 WM. & MARY BILL OF RIGHTS L. J. 253 (2007) (examining signing statements as means for the executive to act “as if it were a court” and to challenge the judiciary); Neil Kinkopf, \textit{Signing Statements and Statutory Interpretation in the Bush Administration}, 16 WM. & MARY BILL OF RIGHTS L. J. 307 (2007); Marc N. Garber & Kurt A. Wimmer, \textit{Presidential Signing
signing statements can be used to correct an apparent omission or mistake in a bill, such as an
erroneous citation. They can also be used to explain the president’s interpretation or opinion on a
statute.\textsuperscript{177} When a statutory provision is vague, presidents sometimes offer a “saving”
construction that avoids vagueness or a constitutional defect.\textsuperscript{178} Objections to constitutional
defects also can assist courts in recognizing or overturning unconstitutional provisions. Most
controversially, signing statements can be used to point to an “post-passage legislative history”
that provides an alternate source for Courts to use in interpreting statutes.\textsuperscript{179}

Although signing statements have long been used to raise constitutional issues in bill,
their use address questions of interpretation first arose during the Reagan administration.\textsuperscript{180} In the
words of Deputy Assistant Attorney General Samuel Alito,

“Our primary objective is to ensure that Presidential signing statements assume
their rightful place in the interpretation of legislation . . . . Since 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. . . . From the perspective of the Executive branch, the issuance of
interpretative signing statements would have two chief advantages. First, it would
increase the power of the Executive to shape the law. Second, by forcing some

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\textit{Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power}, 24 HARV. J. ON
LEGIS. 363 (1987); Frank B. Cross, The Constitutional Legitimacy and Significance of Presidential
“Signing Statements,” 40 ADMIN. L. REV. 209 (1988); Kristy L. Carroll, Note: Whose Statute Is It Anyway?
Why and How Courts Should Use Presidential Signing Statement, 46 CATH. U. L. REV. 475 (1997);
Kathryn Marie Dessayer, The First Word: The President’s Place in ‘Legislative History,’ 89 MICH. L. REV.
399 (1990); Harvard Law Review, Context-Sensitive Deference to Presidential Signing Statements, 120
HARV. L. REV. 597.
\textsuperscript{177} Posner & Bradley, supra note 7, at 308.
\textsuperscript{178} See Trevor Morrison, Constitutional Avoidance in the Executive Branch, 106 COLUM. L. REV.
\textsuperscript{179} Section I.B.3 of this paper elaborates on this Bush I practice.
\textsuperscript{180} A Matter of Direction, supra note 40, at 284.
rethinking of by courts, scholars, and litigants, it may help to curb some of the prevalent abuses of legislative history.”

In other words, the legislative interpretation framework is focused not just on narrowly promoting the president’s interpretation of a particular statute, but on expanding the president’s role in the creation and shaping of legislation.

Whether presidential intent is a valid element of legislative history is hotly contested. Proponents argue that signing statements should constitute a part of legislative history because a bill must be signed by the president in order to become law. As such, proponents argue that the history should include all relevant events that occur before a bill is finally enacted. This view is also defended in light of practical political realities: major pieces of legislation are often initiated by the president, who works closely with Congress to orchestrate its passage. As such, the president exercises significant agenda-setting power, particularly when his party holds a majority in Congress, and as head of the executive branch, controls much of the information that serve as the basis of congressional decisionmaking. The right to express the administration’s views on a proposed statute is also arguably related to the president’s express constitutional privilege to make legislative recommendations to Congress. Finally, some proponents argue that the growth in the scope and number of federal statutes has been accompanied by a growth in the president’s constitutional role in legislation, indicating that the president’s views should receive serious consideration.

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181 See Letter from Samuel Alito, supra note 71.
182 See id.
183 See Cross, supra note 176, at 218 (“So long as the President influences legislation, there is persuasive reason for courts to consider the text of presidential signing statements.”); see also WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUES AND THE CREATION OF PUBLIC POLICY 996 (3d ed. 2001) (“for the same reasons that interpreters are usually interested in the views of the congressional sponsors, they might be interested in the views of the President, who effectively sponsors much major legislation”).
184 Kinkopf, supra note 118, at 307.
185 Id.
186 Kinkopf, supra note 118, at 309-10.
On the other hand, opponents have opposed interpretative signing statements on constitutional grounds. Some respond to Alito’s memorandum by pointing out that the president’s approval is not actually required to enact legislation.187 If the president neither signs nor vetoes the bill after ten days, it becomes law; the same occurs if Congress votes to override the president’s veto.188 Others argue that a court’s use of signing statements raises separation of powers issues, since the president is not a legislator.189 Likewise, some contend that the president’s formal constitutional role is merely to approve or disapprove of the bill.190 At the other side of the political spectrum, opponents of legislative history argue that it is not an appropriate source of statutory meaning at all, since only the bill’s text is a part of what Chadha called the “single, finely wrought and exhaustively considered, procedure” for enacting legislation.191 Interestingly, Bush II signing statements often adopt this view, particularly in denying legal effect to legislative materials that did not comply with constitutional bicameral and presentment requirements.192 If they were considered a part of the legislative history, these signing statements would effectively assert that they should not be used for statutory interpretation.193

In addition to constitutional arguments, policy considerations have been raised to disapprove of interpretative signing statements. Unlike congressional materials, such as reports, draft amendments, and floor statements, signing statements do not arise as part of the deliberative process that fosters meaningful dialogue and compromise. And in contrast to vetoes, signing statements do not give Congress the opportunity to directly respond to the president’s objections.

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187 See id.
188 See U.S. CONST.
189 See, e.g., Garber & Wimmer, supra note 176, at 363 (1987); William D. Popkin, Judicial Use of Presidential Legislative History: A Critique, 66 IND. L.J. 699 (1991). However, other commentators respond that this argument is in tension with modern administrative law, in which courts routinely give deference to post-enactment statutory interpretations by executive agencies. See Bradley & Posner, supra note 7, at 345.
190 See Prakash, supra note XX, at 81.
191 Chadha, 462 U.S. at 951.
192 Kinkopf, supra note 118, at 311; see also Cooper, supra note 94, at XX.
193 Kinkopf, supra note 118, at 311.
Interpretative signing statements can also be used to thwart the will of a bill’s enacting coalition, by giving an interpretation to a statute that the majority of the coalition would not support. On this basis, some commentators have argued that signing statements should be given no weight in statutory interpretation to post-enactment statements by members of Congress, which, according to the Supreme Court, are “an extremely hazardous basis for inferring the meaning of a congressional enactment.” Along the same lines, others have argued that, by not recognizing signing statements, courts would encourage the president to become more involved in the legislative process in a transparent manner.

Both sides of this debate appear to see the judiciary, not Congress, as the primary audience for signing statements. In doing so, they presume that signing statement objections are justiciable and that they will ultimately be resolved by the courts. From this perspective, therefore, the function of signing statements is legal and argumentative. The legislative interpretation model does not foresee other corresponding executive action to disregard the statute, apart from amicus briefs or other forms of communication that are directed at adjudication.

Whether or not signing statements are effective in shaping the judicial interpretation of a statute is unclear. On one hand, there is an established precedent of courts citing to signing statements in their opinions. The least controversial use has been to merely reference the president’s opinion in passing. On other occasions, courts have used signing statements to

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194 See Garber & Wimmer, supra note 176, at 375-76.
197 See Bradley & Posner, supra note 7, at 344.
198 See id. at 344 n.131
confirm their reading of a statute or to provide a fundamental statutory purpose. Courts have also cited signing statements along with elements of legislative history in order to determine the meaning of undefined statutory terms. Finally, on some occasions, courts have used signing statements to help resolve vague statutory language. For example, in construing a provision, the Supreme Court cited a Reagan signing statement because “though in some circumstances there is room for doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent, . . . President Reagan’s views are significant here because the Executive Branch participated in the negotiation of the compromise legislation.” At the same time, the practice of citing signing statements have been inconsistent, and many signing statements (perhaps the majority) are disregarded in court decisions. Courts frequently have refused to acknowledge signing statements when resolving questions of statutory interpretation, particularly when the president’s view conflicts with the Congress. Likewise, it would appear unlikely that an interpretative signing statement would be successful in trumping clear statutory language.

2. Assessing the Impact of Vagueness and Specificity

Vague signing statements appear poorly suited to the legislative interpretation framework, because difficult questions of statutory construction cannot be accomplished without specificity. Because “[t]hey are stated in such a vague and conclusory terms that they offer nothing useful to the enterprise of interpretation,” vague signing statements “contain nothing that an interpreter can use.” In the absence of a persuasive, detailed, and structured argument, it is difficult to imagine how a signing statement will be able to convince a court to adopt a

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199 Id.
200 Id.
202 See Bradley & Posner, supra note 7, at 345.
203 Id.
204 Kinkopf, supra note 118, at 311.
president’s perspective. Short-hand characterizations, such as references to the unitary executive or to the Take Care clause, leave a reader to guess at the actual basis for a president’s objection.\textsuperscript{205} Likewise, a general reference to presidential authority is unlikely to sway a court’s decision, particularly when the president’s construction is inconsistent with the statute’s plain language.

In fact, a review of recent court decisions find few examples where a court has deferred to a general objection in a signing statement.\textsuperscript{206} Although non-specific objections have been referenced in court opinions, this has usually been in dicta, not in an integral part of the Court’s reasoning.\textsuperscript{207} Courts appear willing to acknowledge vague signing statements when the align with the court’s independent opinion, and to ignore signing statements when they do not. For example, Justice Scalia’s dissent in \textit{Hamdan v. Rumsfeld} makes clear that the Court’s majority opinion “wholly ignore[d] the President’s signing statement” in its adjudication.\textsuperscript{208}

If vague signing statements are so ineffective in shaping statutory interpretation, why would they be used for this purpose? One reason may be that greater specificity may have countervailing risks or costs. Indeed, the greatest risk of a specific signing statement is that a court—particularly, the Supreme Court—would expressly reject the president’s construction. From the president’s perspective, it is better for an issue to remain unadjudicated than for it to be resolved against the president’s interests. \textit{Morrison v. Olsen}, discussed earlier in this paper, provides a useful example.\textsuperscript{209}

\begin{enumerate}
\item \textsuperscript{205} Id. at 312-313.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Hamdan v. Rumsfeld, 548 U.S. 557, 666 (2006). In \textit{Hamdan}, the Court held that § 1005(e) of the Detainee Treatment Act of 2005 did not repeal federal jurisdiction over pending habeas corpus. \textit{Id.} at 557. The Act granted the U.S. Court of Appeals for the District of Columbia Circuit “exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.” \textit{Id.} at 573. In response, the signing statement accompanying the Act indicated that “the executive branch shall construe § 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in § 1005.” Statement on Signing the Department of Defense Appropriations Act, 2006.
\item \textsuperscript{209} 487 U.S. at 654 (1988).
\end{enumerate}
over the executive branch included the ability to override the discretion of executive officials.\textsuperscript{210} In 1987, Reagan initiated litigation in order to vacate the independent counsel provisions of the Ethics in Government Act of 1978.\textsuperscript{211} When the Court held that the provision was constitutional, the president’s claim of unitary executive authority was significantly weakened.\textsuperscript{212} In contrast, vagueness in a signing statement ensures that the president does not make an explicit claim of authority that may be expressly rejected by the courts.

Specificity also facilitates the risk of an adverse judgment by separating the president’s proposed interpretation from the litigation in which it is adjudicated. Presidents rarely can predict before a statute is enacted whether or not it will ultimately be the object of judicial scrutiny. Similarly, it is hard for a president to predict the form and circumstances in which litigation may arise. A president may not want to defend a questionable interpretation made years earlier, when the statute was enacted. In contrast, a president can “pick and choose” his battles through the use of an amicus brief, which is drafted at the time of litigation and which can be tailored to suit the president’s interpretation of the statute at that time. That is, vague signing statements provide greater flexibility because they can be “corrected” (that is, bolstered with greater specificity) in pleadings and court argument.

In summary, vagueness decreases a signing statement’s effectiveness in promoting the president’s preferred interpretation of a statute. At the same time, a vague signing statement is also unlikely to unintentionally lead to the statutory construction’s invalidation. While it is not clear that any court has been swayed by a vague objection in a signing statements, these can nonetheless be useful in indicating the president’s view on a particular provision. Since the focus of these signing statements is in statutory construction and adjudication, an interpretative signing

\textsuperscript{210}Christopher S. Kelley, \textit{Rethinking Presidential Power—The Unitary Executive and the George W. Bush Presidency}, Paper prepared for the 63rd Annual Meeting of the Midwest Political Science Association, April 7-10, 2005, Chicago, IL at 4-6. [hereinafter, \textit{Rethinking Presidential Power}]

\textsuperscript{211}A Matter of Direction, \textit{supra} note 40, at 296.

\textsuperscript{212}Id.
statement under this framework is not necessarily indicative of how the executive intends to implement the statute.

C. Federal Agencies As Audience: Unitary Executive Framework

1. Framework Overview: Direction of Executive Agencies

The unitary executive framework focuses on how signing statements “[direct] subordinate officers with in the Executive Branch how to interpret or administer the law.” A Congressional Research Service report adopted this framework when it noted that “signing statements have become an integral part of the Administrations efforts . . . to assert functional and determinative control over all elements of the executive decisionmaking process.” As such, this framework views the target audience for a signing statement to be the federal agencies that must construe and implement statutes. These “administrative” signing statements indicate the president’s understanding of a statute, prioritize the president’s policies, and establish a uniform treatment of issues throughout the executive branch. Signing statements also “assist” agencies in carrying out their statutory discretion—in some instances, by instructing them to implement a provision in a particular way.

The theory of the unitary executive is based upon the Constitution’s vesting of executive power in the president and its instruction that the president “take Care that the Laws be faithfully

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213 Memorandum from Walter Dellinger, supra note 86. For examples of scholarship using this approach, see Rethinking Presidential Power, supra note 210; David C. Jenson, Note: From Deference to Restraint, Using the Chevron Deference..., 91 MINN. L. REV. 1908 (2007); Magill, supra note 149, at 28; Harvard Law Review, Context-Sensitive Deference to Presidential Signing Statements 120 HARV. L. REV. 597;

214 Congressional Research Service, supra note 104, at CRS-XX.

215 See, e.g., Magill, supra note 149, at 28 (describing the signing statement as an instrument to “manage, direct, and supervise subordinate officials”); Philip Heymann, The On/Off Switch, 16 WM. & MARY BILL RTS. J. 55 (2007) (“I am persuaded that a presidential signing statement, an interpretation of a new law, is just one of a number of forms by which the President can direct executive branch activity.”);

216 See, e.g., See Louis Fisher, supra note 142, at 208.

217 See Posner & Bradley, supra note 7, at 315.
executed.”218 It interprets Article II of the Constitution to mean that “[t]he president has the constitutional authority to supervise and control the activity of subordinate officials within the Executive Branch.”219 Although Bush II was the first president to use the term “unitary executive,” the interest in asserting control over the administrative state did not originate during his tenure.220 Elena Kagan has used the term “presidential administration” to describe the modern primacy of the presidency in setting the direction and influencing the outcomes of agency decisions.221 She argues that this presidential administration comports with the law, “not because, as some have claimed, the Constitution commands straight-line control of the administrative state, but because, contrary to prevailing wisdom, Congress generally has declined to preclude the President from controlling administration in this manner.”222 Broadly speaking, presidential administration provides many forms of benefit. It introduces transparency, responsiveness, and political accountability into administrative process. It increases regulatory effectiveness by providing not only centralization, but also the “dynamic charge” that is largely missing from the administrative sphere.223

If Congress implicitly grants authority to the president to direct executive branch officials in the exercise of their delegated discretion, as Elena Kagan argues, then signing statements are a natural tool for presidents to give effect to that authority—particularly since congressional delegation is conveyed via statute.224 Of course, presidents also have other tools at their disposal. Reagan relied on a centralized mechanism for reviewing agency rulemaking.225 In contrast, executive directives to agencies were “Clinton’s primary means, self-consciously undertaken, 

218 See U.S. CONST. art. 3 § 2.
219 See Bradley & Posner, supra note 7, at XX.
220 Id.
221 See Kagan, supra note 127, at XX.
222 Id. at XX.
223 Id. at XX.
224 See id. at XX.
225 Id. at XX.
both of setting an administrative agenda that reflected and advanced his policy and political preferences and of ensuring the execution of this program.”

Clinton’s use of directive authority was based on the assumption “that when Congress designates an agency official as a decisionmaker, the President himself may step into that officials shoes.” Although the limits of the president’s control over the administrative state is a legitimate question, concern over the use of signing statements for this purpose appears misplaced. Few commentators challenge the appropriateness of the president to set administrative agendas for agencies; signing statements may be a means of communication to accomplish this goal. Compared to executive directives and memoranda, signing statements are a transparent and indirect form of communication. On the other hand, signing statements, unlike executive directives, can outlast a particular administration, assuming that agencies follow signing statement instructions.

Some have argued that, under the *Chevron* framework, signing statements are not entitled to judicial deference because they do not benefit from an agency’s expertise and experience. But as Kagan points out, such deference is based upon the recognition that the wisdom of policy choices vests in the political branches, not the courts. In other words, deference is based upon political accountability; hence, it is natural for the president to take responsibility for the policymaking gaps that are left by Congress. From this perspective, signing statements may actually make agency rulemaking more deserving of judicial deference, not less so.

The fact that most signing statement objections do not result in non-compliance suggests that, even when they are directed at federal agencies, signing statements are not predictive of

226 *Id.* at XX.
227 *Id.* at XX.
228 However, successive administrations appear able to limit or disregard the signing statements of its predecessors. For example, shortly after taking office, President Obama instructed federal agencies to seek approval from the attorney general before relying on a Bush administration signing statement as a reason to disregard a statute’s provision. Hans Nichols, “Obama Orders Review of Past Signing Statements,” *BLOOMBERG*, March 10, 2009, available at http://www.bloomberg.com/apps/news?pid=20601070&refer=home&sid=a153nO9jLMGs.
229 Kagan, supra note 127, at XX.
executive action. Indeed, a recent Government Accountability Office (the “GAO”) report failed to identify any situations in which agencies changed their implementation of a statute based on a signing statement’s objection.\(^\text{230}\) The report identified 160 specific provisions in fiscal year 2006 appropriation acts that were the subject of signing statement objections. Of 19 provisions examined, the GAO concluded that 10 were executed as written and 6 were not. (Circumstances did not arise to trigger the execution of the remaining three). Of those six unexecuted provisions, three constituted legislative vetoes, two required information disclosures to Congress, and one directed Customs and Border Patrol to relocate its checkpoints every seven days.\(^\text{231}\) In most of these cases, however, federal agencies arguably complied with the substance of these statutory requirements.\(^\text{232}\) In two of the legislative veto provisions, agencies notified Congress of their actions; in the third instance, FEMA did not submit a expenditure plan for housing because it did not normally produce such plans.\(^\text{233}\) In one of the disclosure statutes, the Department of Defense responded to a subcommittee’s inquiry, but in 38 days, not the 21 days that were directed by the statute.\(^\text{234}\) In the other information request, The Department of Defense included costs for contingency operations in the Balkans and Guantanamo Bay, but not in other areas.\(^\text{235}\) Although the Customs and Border Patrol (the “CBP”) adopted the signing statement’s interpretation that the provision was advisory in responding to the GAO, the fact that the CBP shut down checkpoints for short periods of time to comply with the statute demonstrates that the signing statement did not significantly influence the agency’s implementation of the statute.\(^\text{236}\)


\(^{231}\) Id.


\(^{233}\) Id.

\(^{234}\) Id.

\(^{235}\) Id.

\(^{236}\) Id.
2. Assessing the Impact of Vagueness and Specificity

Vagueness limits the effectiveness of signing statements under the unitary executive framework, because it prevents any clear direction to the agency on how to apply the statute. In contrast to executive directives, vague signing statements often provide only an insinuation of the president’s preferred action. These hints may not be sufficient for the agency to promulgate rulemaking or a statutory interpretation that can be defended or implemented effectively. Vagueness would also appear to limit the justification of political accountability that Kagan argues is an appropriate basis for policy decisions. On the other hand, signing statement vagueness does provide an important advantage, insofar as it helps insulate the president’s direction from judicial review. This is because “[signing statements] are, in most cases, extremely difficult to challenge unless the administration deliberately makes clear specifically how and in what circumstances it will invoke the terms of the signing statement.”

In contrast, a specific signing statement may accidentally create liability and embroil the president into litigation that is not of his own choosing. For example, in 1984 Congress passed the Competition in Contract Act, which sought to facilitate effective review of complaints by government contractors. On signing the bill, Reagan objected to a provision that instituted an automatic stay of the contract award process when a complaint was received. Reagan signed but ordered the executive branch to disregard the provision. Accordingly, the Office of Management and Budget instructed agencies to proceed with the procurement process “as though no such [stay] provisions were contained in the act.” The combination of the signing statement and the OMB instruction left it relatively easy for losing contractors to obtain standing to

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237 See Cooper, supra note 94, at 518.
238 AMERON, 787 F.2d at 878-79.
239 Id. at 880.
240 Id.
challenge the president’s actions in court. The result was “a dramatic battle that raged in the lower courts and culminated in a threat by congresspersons of both parties to eliminate funding for parts of the Department of Justice.” In one of those cases, Reagan’s signing statement was quoted in full as an example of “the truly unprecedented nature of the government’s actions underlying this case.”

Since that case, administrations have been careful to avoid over-specificity in signing statements. Hence,

The language of the statement is often vague as in an assertion that a particular provision violates the president’s authority under the Constitution to conduct foreign affairs and frequently does not specify the precise actions to be taken by the responsible administrators beyond requiring that they implement the provision in a manner that accords with the Constitution. In such circumstances, it is extremely difficult for a party to demonstrate at the other end of the policy implementation process that a particular problem can be traced directly to a signing statement.

In other words, the concern that specificity may provide standing to challenge executive direction necessitates some level of vagueness in signing statements. Yet this same vagueness limits the president’s ability to use signing statements to effectively direct subordinate officials on how to implement the law. In contrast, executive directives and some other presidential tools are able to provide direction without public scrutiny. Because they do not share the weaknesses of either vague or specific signing statements, these alternate tools appear much more useful in terms of controlling the executive branch. The primary remaining advantage of signing

241 Cooper, supra note 94, at 518.
242 Id. at 519.
243 Lear Siegler v. Lehman, 842 F.2d 1102, 1119 (9th Cir., 1988).
244 Cooper, supra note 94, at 519.
245 For a comparison of signing statements to other comparative tools, see Magill, supra note 215, at 30-35.
statements is their possibility of influencing agency decisions after a president’s term has ended. As recent events demonstrate, however, this utility is limited by the new administration’s own policy-making and control over the executive branch.\textsuperscript{246}

Vagueness in signing statements also presents other weaknesses under the unitary executive framework. First, it’s already unclear whether or not agencies read signing statements or pay much attention to them, even when they are specific (that is, relatively easy to comply with).\textsuperscript{247} Second, it’s not clear that a vague signing statement’s direction would receive deference by a court if the agency’s actions were litigated.\textsuperscript{248} Finally, agencies recognize that Congress has political tools, including its appropriations and oversight power, to compel some level of compliance regardless of the signing statement’s direction.\textsuperscript{249}

IV. CONCLUSION

This paper has identified and analyzed the use of vagueness in signing statements. In order to do so, it has reviewed the three main frameworks that have been used to understand signing statements and considered how vagueness would affect the efficacy of these presidential tools under each approach. It also has identified the countervailing advantages and disadvantages of specificity, and has considered how the costs and benefits shift as the level of detail moves along the spectrum between vague and specific signing statements.

Although these frameworks envision different objectives and audiences for signing statements, certain commonalities emerge. First, none of the frameworks suggest that vagueness is likely to correlate with an intent to circumvent the law. For both the separation of powers and legislative interpretative frameworks, the manner in which a president actually implements a statute is not integral. And under the unitary executive framework, a vague signing statement is

\textsuperscript{246} Note 228 of this paper elaborates on this point.
\textsuperscript{247} See Cooney, \textit{supra} note 232, at XXX.
\textsuperscript{248} \textit{Compare} Harvard Law Review, \textit{supra} note 213, with Jenson, \textit{supra} note 220.
\textsuperscript{249} Krent, \textit{supra} note 165, at 212.
ineffective at communicating instructions to subordinate officials—especially in contrast to more effective presidential tools, such as executive directives and memoranda. If anything, a vague objection may indicate an issue over which the president has decided not to engage in a spirited fight.

Second, vagueness curtails the president’s ability under all frameworks to effectively communicate his interpretation of the relevant statute or indicate how the statute will be implemented. As such, the vague signing statement is an inefficient medium for presidential communication. In contrast, specificity in signing statements greatly increases the ability of the president to communicate his perspective. However, under all frameworks, specificity may “backfire” and actually frustrate the president’s policies. In constitutional signing statements, specificity may provoke a congressional backlash and hamper attempts to negotiate a political solution to separation of powers disputes. In interpretative signing statements, specificity may invite a court to expressly reject the president’s preferred interpretation of a statutory provision. And in administrative signing statements, specificity may grant standing to permit plaintiffs to challenge the agency’s implementation of a statute (as directed by the president) in court. th

If vagueness decreases efficiency, and specificity potentially frustrates the president’s policies, then signing statements may not be as effective a presidential tool as their Reagan administration proponents envisioned them to be. Despite the theoretical potential for signing statements to serve as a “crucial vehicle” for the president, strategic and political considerations hamper the ability of signing statements to effectively communicate his message or further his policies.250 The alternative, a vague statement, can insinuate, but cannot establish, the president’s desired position. Only under the separation of powers framework can non-specific signing statements be effective—and only insofar as it permits the president to maintain a claim of authority without affecting the president’s negotiations with Congress. As such, vague signing

250 A Matter of Direction, supra note 40, at 302.
statements do not appear to actively promote the president’s policies under any frameworks.\textsuperscript{251} It would appear that, in order to do no harm, a signing statement must be so vague that it cannot do any good, either.

If signing statements are inherently limited in their ability to move forward the president’s policies, then why are they made at all? One reason may be that, for the most part, signing statements represent relatively inexpensive and effortless opportunities to disperse the president’s message. Bill signing have long been recognized as media and legal opportunities for the president to make remarks about the bill being signed. Even if signing statements are not particularly effective, it makes sense for the president to take advantage of the opportunity before him. Additionally, signing statements may serve to echo the positions that are taken in other forms of presidential actions—whether negotiations with Congress, amicus briefs submitted to courts, or executive directives issued to subordinate officials—and help establish a historical record of the those positions for future reference. There are no apparent reason why signing statements should be treated with more suspicion than executive memoranda or other executive tools, which are considerably more influential. If anything, signing statements should be appreciated, insofar as they serve as a public and (relatively) transparent indication of the president’s views.

\textsuperscript{251} See Louis Fisher, \textit{supra} note 142, at 209-210 (noting that some signing statement objections may be “pure bluster [representing] some sort of theoretical, impractical protest”).