Essay

Deference to Presidential Signing Statements in Administrative Law

Paul T. Stepnowsky*

Introduction

After President Obama questioned both the use of and frequency with which President Bush relied on signing statements to challenge the constitutionality or vagueness of statutes, he has continued this trend to further his own Administration's policy objectives.[1] Both Presidents have used signing statements not only to interpret constitutional or vague provisions of statutes, but also to direct members of the executive branch to act in order to fulfill presidential prerogatives.[2] As the prevalence of and focus on signing statements continue in the Obama Administration,[3] this Essay maintains that at least some objections to presidential direction to the executive branch, including

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1 Charlie Savage, *Obama's Embrace of Bush Tactic Criticized by Lawmakers from Both Parties*, N.Y. TIMES, Aug. 9, 2009, at A16.

2 *See id.*

3 *Id.* ("After Mr. Bush transformed signing statements from an obscure tool into a commonplace term, Mr. Obama's willingness to use them has disappointed some who had hoped he would roll back the practice, not entrench it.").

the use of signing statements, are misplaced. Instead, this Essay discusses what role signing statements might play in directing an agency to interpret an ambiguous statute.[4]

This Essay argues that presidential signing statements should be given deference under *Mead*'s[5] framework, on a case-by-case basis, provided that the signing statement directs an agency how to interpret an ambiguous statute[6] and meets the *Skidmore*[7] criteria. Judicial deference will also clarify what role signing statements should have in the administrative law context, promote presidential leadership over agency decisionmaking, and provide transparency in administrative law.

This Essay proceeds in three parts. Part I discusses the history of signing statements and their role in the political system. Part II investigates *Skidmore* and its progeny to analyze under what circumstances and to what degree courts defer to agency decisions. Part III applies the policies of judicial deference to agency findings to signing statements. This Part proposes that courts should defer to signing statements on a case-by-case basis, when the President directs an agency to interpret an ambiguous statute, so long as the requirements of *Skidmore* are met.

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4 The idea that the President should interpret vague statutory provisions is not entirely new. Justice Samuel Alito wrote a memorandum when he worked for the Office of Legal Counsel suggesting that President Reagan issue signing statements to interpret ambiguous statutory terms, but proposed that the executive branch avoid any direct conflict with Congress. *See* Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., Office of Legal Counsel, on Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law to The Litig. Strategy Working Group 4 (Feb. 5, 1986), *available at* http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf. Attorney General Edwin Meese also suggested that a court should look to a presidential signing statement when attempting to interpret a vague statute. *See* Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, 16 Wm. & Mary Bill Rts. J. 307, 307 (2007) ("Attorney General Meese's position was fairly straightforward: the President is a significant actor in the legislative process. The Constitution authorizes the President to recommend to Congress 'such Measures as he shall judge necessary and expedient.' Moreover, a bill may not become a law unless it has been presented to the President and has been either approved by him or passed by Congress over the President's veto." (citations omitted)). This Essay seeks to build on these initial proposals in the administrative law context by suggesting a role for signing statements in the rulemaking process.

5 United States v. Mead Corp., 533 U.S. 218 (2001).

6 This Essay maintains that a court should not view presidential signing statements as legislative history. *Cf.* Philip J. Cooper, By Order of the President: The Use and Abuse of Executive Direct Action 202–03 (2002); Kinkopf, *supra* note 4, at 309. Rather, it argues that the use of signing statements to direct agencies on how they should interpret vague language in statutes should be granted some type of judicial deference. *See infra* note 69.

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

I. Signing Statements

This Part discusses the preparation of signing statements by members of the executive branch and the history of signing statements.[8] A President uses signing statements to voice his "understanding" of congressional legislation and to instruct executive branch members as to how to interpret certain provisions.[9] Despite consistent use of signing statements throughout history,[10] political outcry has surfaced recently regarding the prevalence[11] and function of signing statements.[12] Both Congress and the press have addressed signing statements because of the perception of presidential encroachment on congressional power.[13] The controversy is not that the President issues signing statements, but that the President directs members of the executive branch to act (or not to act) based on his interpretation of the law.[14] In reality, however, signing statements have a long history in the American Republic.[15]

Signing statements are "formal documents issued by the President, after wide consultation within the executive branch, when he signs an enacted bill into law."[16] "They are connected to an assigned

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8 There are three types of signing statements that a President might issue in response to a congressional action: (1) political, (2) constitutional, and (3) interpretative. *See* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 316 (2006) (suggesting that there are "three overlapping categories" of signing statements). This Essay focuses on interpretative signing statements.

9 *See* Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11, 14 (2007).

10 *Id.* at 11; *see also* David C. Jenson, Note, *From Deference to Restraint: Using the* Chevron *Framework to Evaluate Presidential Signing Statements*, 91 MINN. L. REV. 1908, 1911 (2007) (describing a signing statement issued by President Monroe in 1817).

11 The attention given to signing statements may be due in part to the fact that one can access them more easily since Reagan's Presidency. *See* Cass & Strauss, *supra* note 9, at 14.

12 Another reason for the attention to signing statements centers on the disagreement regarding the nature of the statement. For example, some scholars have described signing statements as mere press releases. *See* John F. Cooney, *Signing Statements: A Practical Analysis of the ABA Task Force Report*, 59 ADMIN. L. REV. 647, 651 (2007). Others, however, maintain that signing statements are "formal documents" that are created "after wide consultation within the executive branch." Cass & Strauss, *supra* note 9, at 14. Although the statements may not reach the level of expertise associated with agency findings after notice and comment, equating the formation of a signing statement to a mere press release undermines the expertise of various members of the executive branch and the thoroughness and rigor involved in creating the statements.

13 *See, e.g.*, Savage, *supra* note 1, at A16.

14 *See* Cass & Strauss, *supra* note 9, at 18–23.

15 *See* sources cited *supra* note 10 and accompanying text.

16 Cass & Strauss, *supra* note 9, at 14.

presidential role in the constitutional order."[17] The Office of Legal Counsel ("OLC"), in the Department of Justice, prepares signing statements if they relate to constitutional issues and typically reviews all other statements before they are issued. The signing statements are citable and become "precedents of a sort."[18] Courts have not made clear, however, what deference, if any, should be given to signing statements.[19]

Additionally, signing statements are in a special category of presidential tools available to direct the executive branch. Other methods include "executive orders, memoranda, proclamations, agency rules, and internal guidelines."[20] Of course, if signing statements are no different than these other tools, the recent attention given to both Presidents Bush and Obama would be unnecessary. But signing statements are unique because they attach to a statute and "may continue to have force after the termination of the administration, even if future presidents disavow it."[21] They offer stability and consistency to executive branch interpretations, which a future administration cannot overturn easily.[22] Although previous signing statements would not bind a future administration entirely, a future agency interpretation that conflicted directly with a prior signing statement would need to contain a reasonable analysis of the changed circumstances and a recognition that it represented an alteration in policy in order for a court to defer to the agency's decision.[23]

The pervasive use of signing statements arises from the post–New Deal administrative state and the use of complex omnibus legislation. First, since the New Deal, Congress has increasingly delegated broad swaths of regulatory power to administrative agencies directly or indirectly overseen by the President.[24] As Congress has delegated author-

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17 PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 141 (2009).

18 *Id.*

19 Cass & Strauss, *supra* note 9, at 16–17.

20 Bradley & Posner, *supra* note 8, at 361.

21 *Id.* at 361–62.

22 Some might argue that a President could just as easily disavow a signing statement by a previous administration through Executive order. *Id.* at 362. Bradley and Posner find that argument unpersuasive because "[j]ust as courts rely on the enacting Congress's intention, not the intention of the Congress in session at the time of litigation, they should rely on the 'enacting president's' intention, not the intention of the president in office at the time of litigation." *Id.* Similarly, this Essay argues that a President would not be able to *reinterpret* a vague statutory phrase made by a previous administration when he seeks to direct agency action. *See infra* Part III.B.

23 *See infra* Part III.B.

24 Bradley & Posner, *supra* note 8, at 315.

ity to agencies overseen by the President, the Executive has increasingly issued signing statements to clarify ambiguities or address constitutional issues that infringe on the prerogatives of the White House.[25]

Second, the size and complexity of omnibus legislation has incentivized the use of signing statements when the Executive seeks to challenge a narrow portion of a statute without using his veto authority. As the size of the national government continues to increase, Congress passes more statutes, and more complex statutes.[26] Professors Bradley and Posner argue that "[w]ith more statutes, there would be more opportunities for conflict between Congress's and the president's constitutional powers, and more sources of legislative ambiguity."[27] As a result, they contend that signing statements are a tool by which Presidents defend their prerogatives by interpreting the Constitution or ambiguous statutes to meet political goals.[28]

Regardless of the type of statement, signing statements have been generally accepted as political tools on which the President can rely to meet political objectives.[29] This Essay embraces the ubiquity of signing statements in the political community. Rather than focusing on signing statements that are viewed as contentious because of the directions given to members of the executive branch either to enforce laws a certain way or to avoid their enforcement altogether, this Essay seeks to address signing statements used in the administrative law context. Presidents routinely direct agencies to take certain actions during the rulemaking process.[30] To that end, this Essay addresses the

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25 *Id.* ("[T]he increasingly frequent use of signing statements since FDR can be attributed to the gradual transfer of authority from Congress to the president as well as the growth of the national government itself.").

26 *See id.*

27 *Id.*

28 *See id.*

29 *See, e.g.*, Cass & Strauss, *supra* note 9, at 15 ("The President takes an oath to support the Constitution and the laws of the United States and has clear authority to explain how he views the legislation he is signing or deciding not to sign, just as congressional committees have authority to explain their views on the legislation they send forward." (citation omitted)). *But see* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 370–86 (1987) (arguing that a presidential signing statement is unconstitutional because it (1) violates the veto requirement of the Presentment Clause of the Constitution, (2) enables the President to speak for Congress, and (3) is not part of the President's duty to ensure that the law is faithfully executed).

30 Professor Pierce and similar critics would maintain that any reliance on signing statements or, for that matter, any other materials in which the President memorializes direction to agency heads, is irrational because the President, or someone within the White House, can sim-

deference that courts should give to interpretative signing statements issued to clarify or interpret an ambiguous statutory term in new statutes or to modify a previous agency interpretation.

II. Agency Deference

This Part addresses the jurisprudence of deference to agency interpretations of ambiguous statutes. It traces the evolution of agency deference and draws from recurring themes on which the Supreme Court has relied when it grants deference to agencies. These factors include: expertise, political accountability, and the proper role of the judiciary.

A. Skidmore *Deference*

In *Skidmore v. Swift & Co.*,[31] the Supreme Court addressed (1) whether the Fair Labor Standards Act required overtime pay for members of a firehouse who remained on call but left the firehouse and (2) whether the Administrator's finding that overtime pay was not warranted should be given any weight by the Court.[32]

The Court began by investigating three policy considerations weighing against deference to the Administrator. First, the Administrator reached his conclusions in the absence of "adversary proceedings."[33] Second, his findings were conclusive neither for the firefighters at issue nor in other similar situations that might have arisen.[34] Finally, his findings did not "constitute an interpretation" of the law that would bind the judiciary.[35]

The Court nevertheless deferred to the findings of the Administrator because his "policies [were] made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular

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ply call the head of an agency to tell her what action she should take. *See* Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 507–13 (1985). This view fails to recognize that the President is limited, to some degree, in his ability to direct agency action. Generally, if the President were unhappy with an agency decision, he would have to fire the agency head. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587–91 (1984). A President will rarely fire the head of an agency, however, and interpretations that run counter to the Administration's policy objectives will usually be challenged in court.

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

32 *Id.* at 136–39.

33 *Id.* at 139.

34 *Id.*

35 *Id.*

case."[36] The Court also suggested the following factors upon which courts should rely when determining whether they should defer to an agency finding: "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[37]

The Court's approach in *Skidmore* is not highly deferential because a reviewing court must still investigate the steps that the agency took to reach its determination in order to decide if the reasoning and outcome are reasonable. In *Chevron*,[38] the Court established a more deferential regime, in which courts overturn agency decisions only if they are unreasonable.

B. The Chevron *Doctrine*

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Court created a two-part test to determine when courts should defer to an agency's interpretation of a vague statutory text.[39] First, a court should investigate whether Congress directly addressed "the precise question at issue."[40] If congressional intent is clear, the court and the agency "must give effect to the unambiguously expressed intent of Congress."[41]

If, however, "the statute is silent or ambiguous with respect to the specific issue," the court proceeds to step two, where it asks "whether the agency's answer is based on a permissible construction of the statute."[42] The Court stated that the judiciary should defer to reasonable agency constructions.[43] When describing the type of deference a court should grant, the Court announced that it has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" and has followed "the principle of deference to administrative interpretations."[44]

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36 *Id.*

37 *Id.* at 140.

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

39 *See, e.g.*, Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2225–26 (1997); Kenneth W. Starr, 3 YALE J. ON REG. 283, 287–88 (1986).

40 *Chevron*, 467 U.S. at 842.

41 *Id.* at 842–43.

42 *Id.* at 843.

43 *Id.* at 844.

44 *Id.* (citation omitted).

Justice Stevens, writing for the Court, offered three prevailing policy reasons for *Chevron* deference: (1) agency expertise, (2) political accountability, and (3) the proper role of the judiciary.[45] First, the agency has expertise that the judiciary lacks.[46] Generally, agencies interpret complex regulatory schemes that require them to decide between conflicting policies.[47] This familiarity with intricate factual and legal details makes the agencies superior decisionmakers vis-à-vis generalist courts.

Next, the Court maintained that although agencies "are not directly accountable to the people," the President is, which makes the executive branch the appropriate branch to engage in policy decisions.[48] The Court insisted that when Congress delegates policymaking to an agency, the agency may "properly rely upon the incumbent administration's views of wise policy to inform its judgments."[49] Because the agency would be directed by the executive branch, the Court implied that the public could demonstrate its displeasure with certain policies by voting the President from office.

Finally, Justice Stevens reasoned that courts should defer to agency interpretations to preserve the proper role of the judiciary. Federal judges are unelected and do not have a constituency to which they have to answer; therefore, they "have a duty to respect legitimate policy choices" made by those branches that have to answer to the will of the public.[50] Judges also lack the expertise typical of agencies and, consequently, should not attempt to replace their judgments for a policy preference with which they might disagree.[51]

After the Court's ruling in *Chevron*, courts were uncertain whether the new two-part test or the less deferential *Skidmore* standard would be applicable in most administrative law cases. In *United States v. Mead Corp.*,[52] however, the Court established a framework in

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45 *See* Pierce, *supra* note 39, at 2229–30 (discussing *Chevron* as creating a "new institutional hierarchy" where the Court (1) recognized that resolving an ambiguous statute is a policy decision, (2) "attributed to the President the policy decisions of agencies and implicitly invited the electorate to hold the President politically accountable for all such decisions," and (3) found that the new "hierarchy followed logically from the dramatically different characteristics of the competing institutions").

46 *Chevron*, 467 U.S. at 865.

47 *Id.*

48 *Id.* at 865–66.

49 *Id.* at 865; *see infra* Part III.

50 *Chevron*, 467 U.S. at 865–66; *see id.* at 865 ("Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences.").

51 *Id.* at 865–66.

52 United States v. Mead Corp., 533 U.S. 218 (2001).

which it generally would grant deference to agency interpretations of ambiguous statutory language under *Chevron* or, in the alternative, under the less deferential *Skidmore* standard if the agency findings failed to meet the *Chevron* criteria.[53]

C. United States v. Mead Corp.

In *Mead*, the Court announced that *Chevron* did not eliminate the Court's holding in *Skidmore* and maintained that congressional and agency action determine which level of deference is appropriate.[54]

Chevron deference is appropriate, according to the Court, when Congress expressly delegates "specific interpretive authority"[55] to an agency or when "the legislative delegation to an agency on a particular question is implicit."[56] In these instances, a court generally should defer to the agency's interpretation of a vague statute as long as the agency's determination is reasonable.[57] The Court also recognized that *Chevron* did not eliminate its holding in *Skidmore*.[58] To that end, a court can grant some type of lesser deference to agency interpreta-

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53 Professors Merrill and Hickman maintain that having two deference doctrines is beneficial. They argue that "[d]eclaring *Chevron* the exclusive basis for deference would impoverish the process of statutory interpretation by preventing courts from considering these sources of authority, with no good justification." Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 859 (2001). Instead,

> [i]nterpreters in a variety of contexts draw upon the views of other interpretative bodies, especially when these views are well reasoned, reflect some type of comparative advantage (such as technical expertise or greater familiarity with the legal background), have been relied upon, or have been implicitly ratified by the legislature.

Id. at 858–59. These factors are those on which the Court in *Skidmore* relied to defer to the Administrator. *See id.* at 859.

54 *Mead Corp.*, 533 U.S. at 237–38. Professor O'Connell suggests that "courts recently seem to be switching back and forth between political accountability and expertise theories to justify deference to agency actions." Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 981 (2009). On the one hand, under a political accountability approach based on *Chevron*, "courts defer to agency interpretations of ambiguous statutes because agencies are more accountable . . . than the courts." *Id.* Under the expertise theory based on *Skidmore*, "courts defer to agency interpretations because agencies have more expertise than courts." *Id.* Finally, O'Connell argues that in *Mead*, the Court "emphasized political accountability, at least for particular types of agency decisions." *Id.*

55 *Mead Corp.*, 533 U.S. at 229.

56 *Id.* (citation omitted) (internal quotation marks omitted).

57 *Id.*

58 *Id.* at 234 ("*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency and given the value of uniformity in its administrative and judicial understandings of what a national law requires." (citations omitted) (internal quotation marks omitted)).

tions in situations where the agency's interpretation fails to qualify for *Chevron* deference.[59] The Court vacated the lower court's ruling and suggested that *Skidmore* deference could be appropriate.

This Essay maintains that the *Mead* analysis should be extended to presidential signing statements.[60] In other words, if the signing statements have the power to persuade and also meet the other traditional *Skidmore* criteria, a court should grant the statement *Skidmore* deference.

III. Judicial Deference to Presidential Signing Statements

Scholars have suggested three rationales for deferring to presidential involvement in agency decisionmaking. Some argue that presidential involvement should lead to *Chevron* deference,[61] while opponents suggest that a court should ignore presidential involvement by not deferring to the agency.[62] A middle-ground approach suggests

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59 *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007). Professors Hickman and Krueger discuss a three-level sliding scale of *Skidmore* deference in which courts defer to agencies: "strong deference, no deference, or intermediate deference." *See id.* at 1251–59, 1291–99. Generally, they find that

> [in] common scenarios, where an administering agency either possesses expertise but not the power to bind or enjoys *Chevron*-requisite authority but chooses to act more informally, *Mead*'s two prongs apply neatly to deny *Chevron* deference. Such cases thus fall in the heartland of *Skidmore*'s domain and represent the majority of *Skidmore* applications.

Id. at 1301. The authors, however, find that courts are not always clear on where *Skidmore* should apply. *See id.* at 1301–09.

60 The *Chevron*/*Skidmore* dichotomy as applied in *Mead* is not entirely reflective of the Court's jurisprudence regarding deference to agencies. Instead, "the Court's deference practice functions along a *continuum*, ranging from an anti-deference regime reflected in the rule of lenity to the super-strong deference the Court sometimes announces in cases related to foreign affairs." William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098 (2008). The extent of deference that a court should grant to an agency under *Skidmore* is beyond the scope of this Essay. Instead, this Essay maintains that a court should rely on the *Skidmore* factors to determine if it should defer to a signing statement.

61 *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2377 (2001) (suggesting that *Chevron* deference would be appropriate where there is "actual evidence of presidential involvement in a given administrative decision"). *Mead* was not decided until 2001; it is unclear how this case would change Kagan's argument. *See* Jenson, *supra* note 10, at 1926–35 (suggesting that signing statements should be evaluated under the *Chevron* two-step analysis); Daniel P. Rathbun, Note, *Irrelevant Oversight: "Presidential Administration" from the Standpoint of Arbitrary and Capricious Review*, 107 MICH. L. REV. 643, 664 (2009) (suggesting that "[a]rbitrary and capricious review provides courts with a straightforward system for reviewing agency decisions that are subject to presidential involvement").

62 *See, e.g.*, Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 307 (2006) ("[T]he set of statutes under which the President's directions are eligible for *Chevron* deference can be no larger than those statutes under which the Presi-

that courts should view presidential involvement with some skepticism, but allow for deference if certain prerequisites are met.[63] This Essay falls within this third category. Namely, a court should rely on *Mead* and *Skidmore* and grant deference to a signing statement based on "its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight."[64]

This Part discusses how granting *Skidmore* deference not only accords with the Court's precedent, but also clarifies the judicial role for signing statements and promotes transparency and vertical consistency in the administrative law context.

A. Judiciary's View of Presidential Signing Statements

Courts have not decided what role signing statements should take in judicial opinions and infrequently have cited signing statements that interpret ambiguous statutory provisions.[65] Some scholars argue that the statements should be viewed as some type of legislative history,[66] while others counter that courts should ignore signing statements because they fail to satisfy the bicameralism and presentment requirements of the Constitution.[67] Courts appear to treat signing statements

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dent has such authority. Interpretive deference under *Chevron* requires a grant of directive authority."); Nicholas J. Leddy, Comment, *Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN L. REV. 869, 886 (2007) ("When an agency substitutes the non-expert opinion of the President in the place of the opinion of its own experts, the agency risks a court overturning its subsequent action for failing to meet the expertise rationale underlying the *Chevron* and *Skidmore* common law standards of deference.").

63 *See, e.g.*, Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements,"* 40 ADMIN. L. REV. 209, 234–38 (1988) (describing three standards in which some deference could be given to signing statements); Kristy L. Carroll, Comment, *Whose Statute Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements when Interpreting Federal Statutes*, 46 CATH. U. L. REV. 475, 521 (1997) ("Judicial use of signing statements . . . should be limited to situations in which the signing statement is a reliable indicator of congressional intent."); Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 618 (2006) (rejecting *Skidmore* deference by suggesting that "courts can and should grant context-sensitive weight to signing statement interpretations" by reviewing the "Executive's self-interest").

64 United States v. Mead Corp., 533 U.S. 218, 235 (2001).

65 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, OP. B-308603, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS 11 (2007), *available at* http://www.gao.gov/decisions/appro/308603.pdf ("A search of all federal case law since 1945 found fewer than 140 cases that cited presidential signing statements.").

66 *See, e.g.*, Cross, *supra* note 63, at 234–35; Carroll, *supra* note 63, at 521.

67 *See, e.g.*, William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991) (arguing that courts should not rely on signing statements as a type of legislative history because the President is not a legislator and because signing statements can be politically manipulative); Sofía E. Biller, Note, *Flooded by the Lowest Ebb: Congressional Re-*

as something akin to legislative history, although this Essay does not embrace that approach. For example, in *Hamdan v. Rumsfeld*,[68] Justice Scalia chided the majority for failing at least to consider the President's signing statement when it investigated legislative history.[69] Also, in *Bowsher v. Synar*,[70] the Court addressed President Reagan's signing statement, expressing his view that the Balanced Budget and Emergency Deficit Control Act was constitutionally suspect on separation-of-powers grounds,[71] when it held the Act unconstitutional.[72] Courts, however, have used signing statements infrequently in judicial opinions, and their value to courts' opinions is somewhat unclear.

One can deduce from *Clinton v. City of New York*[73] and *INS v. Chadha*[74] that a court is unlikely to give a signing statement the same weight that it gives to legislative history. Legislative history usually consists of statements or reports from legislators who participated in the deal that they struck during the legislative process. By contrast, the President issues signing statements after Congress has finalized the bill, which allows the Executive to have the last interpretative word. In *Clinton*, the Court held that the line item veto was unconstitutional because it violated the Presentment Clause of the Constitution by giving the President the ability to amend and repeal sections of statutes that Congress passed and the President already signed.[75] Sim-

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sponses to Presidential Signing Statements and Executive Hostility to the Operation of Checks and Balances, 93 IOWA L. REV. 1067 (2008) (arguing that the Presidential Signing Statements Act of 2006 is an inadequate response to President George W. Bush's use of signing statements because the Act fails to address how signing statements are used to disrupt the rule of law, circumvent checks and balances, and remove Congress's oversight function).

68 Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

69 *Id.* at 666 (Scalia, J., dissenting) ("Of course in its discussion of legislative history the Court wholly ignores the President's signing statement, which explicitly set forth *his* understanding that the [Detainee Treatment Act] ousted jurisdiction over pending cases."). Although it is likely doubtful that Justice Scalia actually would embrace signing statements as a source from which a court can understand the intent behind legislation, his dissent demonstrates that the executive branch is involved in the political process of lawmaking to an extent that cannot be gleaned from an individual congressperson's floor statement. The executive branch is surely a party to the lawmaking process, and a signing statement offers insight into the President's thoughts regarding a law. A problem with legislative history, and using signing statements as legislative history, however, is that they are easy to manipulate. In the context of the President directing an agency to interpret a statute, though, the President's interpretation does not involve congressional intent, but rather direction for an agency to act.

70 Bowsher v. Synar, 478 U.S. 714 (1986).

71 Statement on Signing H.J. Res. 372 into Law, 21 WEEKLY COMP. PRES. DOC. 1490, 1491 (Dec. 12, 1985).

72 *Bowsher*, 478 U.S. at 719 n.1.

73 Clinton v. City of New York, 524 U.S. 417 (1998).

74 INS v. Chadha, 462 U.S. 919 (1983).

75 *Clinton*, 524 U.S. at 436–41.

ilarly, in *Chadha*, the Court found the legislative veto unconstitutional because it violated bicameralism and presentment requirements by allowing one house of Congress to determine statutory enactment or repeal after both houses of Congress and the President had enacted legislation.[76] In other words, a court will likely find that a signing statement is not a valid interpretative tool—at least in the context of legislative history—because it was not part of the deal struck by Congress and the President.

This Essay instead proposes that courts can rely on signing statements when the President directs an agency to interpret the meaning of a statute under *Mead*'s framework. As discussed previously, signing statements are "formal documents issued by the President, after wide consultation within the executive branch"[77] and are formulated and reviewed by the OLC. A signing statement, like the ruling letter in *Mead*, illustrates "its writer's thoroughness, logic, and expertness" and meets the requirements for *Skidmore* deference, as the Court ruled in *Mead*.[78] Of course, not every signing statement would be granted deference, especially if the executive branch oversteps clear legislative or constitutional authority. A court would review the statement and its direction to the agency for its "power to persuade."[79]

B. Transparency and Vertical Consistency in Administrative Law

By allowing courts to lend some credence to presidential signing statements, courts would promote transparency and vertical consistency in administrative law by somewhat limiting policy stances that administrations could take in light of *Mead*'s requirements.

Granting *Skidmore* deference to signing statements would allow for greater transparency of presidential communications in the rulemaking process. Courts and commentators have noted concern about presidential influence in agency decisionmaking already, especially ex parte communications that may take place between the President and his staff, between executive branch departments, or between rulemakers and the President.[80] Although there are instances where the docketing of ex parte communications is "necessary to ensure due process," courts recognize that "[t]he purposes of full-record review which underlie the need for disclosing ex parte conversations in some

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76 *Chadha*, 462 U.S. at 945–51.

77 Cass & Strauss, *supra* note 9, at 14.

78 United States v. Mead Corp., 533 U.S. 218, 235 (2001).

79 *Id.* (citation omitted) (internal quotation marks omitted).

80 Sierra Club v. Costle, 657 F.2d 298, 406–07 (D.C. Cir. 1981).

settings do not require that courts know the details of every White House contact, including a Presidential one," in rulemaking situations.[81] By issuing a signing statement, the President is directing and disclosing the administration's views on the ambiguous statute. The OLC opinion, or other documentation on which the President relies when issuing his statement, would provide a record that a court can review when an agency's actions are challenged.[82]

Additionally, signing statements would act as a forum through which vertical consistency in agency precedents is maintained. As administrations turn over, policies and regulations likewise transform.[83] Generally, an agency can change its position from prior enacted rules if it provides a "reasoned explanation" for its actions and exhibits an "awareness that it *is* changing position."[84] To satisfy a court, agencies must "show that there are good reasons" for changing the policy and for the new policy, but they do not need to demonstrate "that the reasons for the new policy are *better* than the reasons for the old one."[85] The use of signing statements, which are tied to statutes, offers the executive branch a mode of interpretation and guidance to agencies that cannot be easily upset or overturned by future administrations.[86]

If, for example, a President issues a signing statement that directs an agency to act differently than it has in the past, the agency will be required to provide an explanation for a change in policy and demon-

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81 *Id.*

82 *See supra* Part III.A.

83 John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 547 (2010) ("[R]ulemaking powers give executive agencies the power to change the rules when political forces change." (emphasis omitted)).

84 FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis." (internal quotation marks omitted)). This point is not entirely settled in light of the recent *Fox* decision. Although it is not clear whether there is still a hard-look doctrine or less deference under *State Farm*, Professor Keller argues that the Court abrogated both these methods of judicial review of agency action and that courts should now review agency action under a "rational basis with bite" standard. Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419 (2009). This Essay assumes that some reasonable explanation is needed for an agency to reverse a prior decision, but the standards announced in *State Farm* appear to have been scaled back somewhat.

85 *Fox*, 129 S. Ct. at 1811 ("[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.").

86 *See supra* note 22.

strate a reasonable awareness that it is changing policy. Under the approach in *Motor Vehicle Manufacturers Association, Inc. v. State Farm Mutual Automobile Insurance Co.*,[87] the signing statement puts the agency on notice that it needs to form a "reasoned analysis" about the change in circumstances that led the executive branch to a different interpretation.[88] Similarly, under the deferential approach suggested by the recent holding in *FCC v. Fox Television Stations, Inc.*,[89] a signing statement would aid an agency in demonstrating a "reasoned explanation" for its change in policy.[90]

Skidmore deference would limit how much an administration could direct an agency to change its interpretation from previous signing statements. When determining if an interpretation deserves deference, courts would look to "its writer's thoroughness, logic, and expertness, *its fit with prior interpretations*, and any other sources of weight."[91] Under this approach, a court would promote vertical consistency because *Skidmore* deference would not be available to a signing statement's interpretation of a statute if it did not comport in some way with prior presidential pronouncements. Additionally, as Professors Bradley and Posner describe, signing statements are unique because they attach to a statute and "may continue to have force after the termination of the administration, even if future presidents disavow it."[92] A future administration would not be bound entirely by previous decisions or signing statements, but it would need to provide a reasonable analysis of the changed circumstances and recognition that it was changing policy in order for a court to defer to an agency determination to overturn established statutory interpretations.

Conclusion

The courts have not addressed what role, if any, signing statements should have in the administrative law context; this Essay attempts to fill that void. In response to the media's continued focus on signing statements in the Obama Administration,[93] this Essay posits that presidential signing statements should be given *Skidmore* deference when the President uses signing statements to direct an agency as to how to interpret ambiguous statutes because the statements are

87 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

88 *Id.* at 57.

89 *Fox*, 129 S. Ct. 1800.

90 *Id.* at 1811.

91 United States v. Mead Corp., 533 U.S. 218, 235 (2001) (emphasis added).

92 Bradley & Posner, *supra* note 8, at 361–62.

93 *See* Savage, *supra* note 1, at A16.

well-reasoned documents that comport with the requirements of *Skidmore*. Additionally, judicial deference will clarify what role signing statements should have in the administrative law context, promote presidential leadership over agency decisionmaking, and provide transparency in administrative law.