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THE INTERPRETIVE WORTH OF PRESIDENTIAL SIGNING STATEMENTS: A NEW FORM OF LEGISLATIVE HISTORY

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I. INTRODUCTION

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[1] This unwavering maxim written over 200 years ago by Justice John Marshall continues to resonate in federal courtrooms today. Yet, judges often face difficulties when attempting to heed Marshall's words, especially when tasked with interpreting an ambiguous statute. Furthermore, disagreement over what device the court should grab out of its interpretive toolbox to provide clarity may impede a judge's ability to effectively "say what the law is."[2] One common interpretive practice looks to traditional legislative history,[3] including committee re-

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1. Marbury v. Madison, 5 U.S. 137, 177 (1803).

2. *Id.*

3. *See, e.g.,* Holy Trinity Church v. United States, 143 U.S. 457 (1892). In *Holy Trinity Church*, the court looked beyond the plain meaning of the text and consulted both the House and Senate Committee Reports when interpreting the Alien Contract Labor Laws of 1885. *Id.* at 464-65; *see also* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1010 (1992) [hereinafter Note, *Learned*

ports, sponsor statements, and floor debates. Others seek to clarify ambiguities with dictionary definitions.[4] However, under recent administrations, a new tool has found its way into the judiciary's assortment of interpretive aides—presidential signing statements. Presidents continue to issue more signing statements each year, often times asserting their own interpretation of a statute.[5] Utilization of this executive tool presents the question: should these statements be characterized as a new form of legislative history on which federal courts should rely when engaging in statutory construction?

While signing a bill into enactment, the President will often issue what is termed a signing statement—a written, official pronouncement relating to the legislation.[6] Though these statements have various applications, they have predominately served four specific functions.[7] The pronouncements may explain the President's understanding as to the effects of a bill's adoption, advise members of the Executive Branch of how to interpret or administer a bill, and state whether the President thinks certain provisions of a bill, if applied, might violate the Constitution.[8] However, this Note focuses on the use of signing statements that "create legislative history to which the courts are expected to give some weight when construing the enactment," a function considered exceedingly controversial.[9]

Part of the controversy stems from the absence of a definitive answer on how interpreting courts should treat presidential signing statements. Courts have not ultimately decided whether signing statements should be treated as an authoritative source of legislative history.[10] Furthermore, judicial reliance on signing statements has been "sporadic and unpredictable."[11] Scholarly debate also reflects a sense of unpredictability, as opinions concerning the statements' appropriate place in statutory construction vary drastically. Some scholars argue that these statements hold no interpretive weight and

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Hand] (stating that *Holy Trinity Church* "marked the beginning of an accelerating shift toward the use of legislative history").

4. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 228 (2000).

5. *See infra* Part II.

6. T.J. HALSTEAD, CONG. RESEARCH SERV., PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 1 (2007), http://www.fas.org/sgp/crs/natsec/RL33667.pdf.

7. 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, 488-90 (1997).

8. The Legal Significance of Presidential Signing Statements, 17 Op. Off. Legal Counsel 131, 131 (1993) [hereinafter Legal Significance]. Discussion of these particular uses of signing statements is beyond the scope of this Note.

9. *Id.*

10. Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 600 (2006) [hereinafter Note, *Context-Sensitive Deference*].

11. S. 3731, 109th Cong. § 2(6) (2006).

should not be defined as legislative history,[12] while some claim they should at least be considered "species of statutory interpretation," but should not be included among traditional legislative sources.[13] Others contend that the statements are more comparable to "executive implementation of a statute"; therefore, they should be provided the same level of deference courts typically assign agency interpretations.[14] To further complicate the matter, Presidents have not formally declared how much weight an interpreting court should give their statements.

Evidence of the judiciary's conflicting opinions was recently showcased in *Hamdan v. Rumsfeld,*[15] a 2006 case presented to the United States Supreme Court. The Court was asked to determine whether the Detainee Treatment Act of 2005, which truncated the ability of Guantánamo Bay detainees to bring lawsuits,[16] applied retroactively to cases currently pending or whether it was only applicable to lawsuits filed after the legislation was enacted.[17] The majority opinion, relying on legislative history, reached the conclusion that the Act only applied to future lawsuits and not those currently pending.[18] In dissent, Justice Scalia, joined by Justices Thomas and Alito, condemned the majority's reliance on legislative history.[19] While Scalia noted the Court should not have deferred to legislative history because the language of the Act was "unambiguous," he nevertheless criticized the Court for ignoring President Bush's signing statement which "explicitly set forth *his* understanding that the DTA [Detainee Treatment Act] ousted jurisdiction over pending cases."[20] While this case demonstrates the Court's awareness of the debate, the division among the Court regarding the proper treatment of presidential signing statements in statutory interpretation only affirms that the issue remains unresolved.

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12. *See, e.g.,* 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, 363 (1987).

13. Note, *Context-Sensitive Deference, supra* note 10, at 598.

14. *Id.* at 608. The standard of deference for agency interpretations is stated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, the Court looked to the Administrator's opinions when interpreting the Fair Labor Standards Act and determined the weight of such opinions "will depend upon 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." *Id.* at 140.

15. 548 U.S. 557 (2006).

16. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2742 (2005).

17. *Hamdan,* 548 U.S. at 574.

18. *Id.* at 576-84.

19. *Id.* at 665 (Scalia, J., dissenting).

20. *Id.* at 665-66.

This Note attempts to provide a solution. Although signing statements are not without their problems, courts should not completely discount them when interpreting federal statutes. This Note argues instead that presidential signing statements should be added to courts' interpretive toolbox as a new form of legislative history. However, because of the potential pitfalls, judicial reliance should be constrained. Thus, this Note contends that the statements are not dispositive and should be given minimal interpretive weight as a component in the overall context that judges consider. Deference should also be conditioned on two factors: (1) evidence that the President and Executive Branch were involved in drafting the legislation under judicial scrutiny and (2) that the statement should serve only as collateral support to a conclusion the court reaches with other interpretive tools. To provide some context to the debate, Part II of this Note includes a brief analysis of the historical background surrounding presidential signing statements. Next, Part III discusses the types of legislative history traditionally consulted by courts. While there is significant debate over the legitimacy of legislative history, the foundation of this Note rests on the assumption that it can provide helpful insight to an interpreting court. Based on a comparative analysis between presidential signing statements and legislative history, this Note concludes that signing statements are similar to nonlegislator statements and subsequent legislative history and should be treated as such by courts for interpretive purposes. Part IV expands upon this comparative analysis by examining the practical and institutional implications that would result if signing statements were provided the proposed level of deference.

II. A HISTORICAL LOOK AT THE USE OF PRESIDENTIAL SIGNING STATEMENTS

A. The Early Years

Early forms of presidential signing statements were predominately "ceremonial."[21] The President generally issued the pronouncements to congratulate Congress for the passage of a new bill[22] or to express "appreciation to those who have provided support through the legislative process."[23] Yet, in the nineteenth century, the Monroe Administration issued statements that were more than ceremonial; namely, they described the President's personal insights on legislation.[24] In regards to a bill that dictated the method for se-

21. Carroll, *supra* note 7, at 476.

22. *Id.*; *see also* Garber & Wimmer, *supra* note 12, at 363.

23. PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 213 (2002).

24. ABA TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, RECOMMENDATION 7 (2006),

lecting military officers, President Monroe attached a statement declaring "the President, not Congress, bore the constitutional responsibility for appointing military officers."[25]

Presidents Andrew Jackson and John Tyler also composed statements that did more than just praise congressional efforts.[26] However, these early statements were accompanied by early forms of criticism. In 1830, President Jackson issued a statement expressing his understanding that a road authorized by an appropriations bill was to be limited to the territory of Michigan.[27] Shortly thereafter, the House issued a report stating that Jackson's declaration amounted to a line-item veto.[28] Similarly, President Tyler issued a statement in 1840 disagreeing with certain provisions in a bill that apportioned congressional districts.[29] John Quincy Adams, a spokesman for the House of Representatives at the time, questioned the very issuance of the document and "advised that the signing statement should 'be regarded in no other light than a defacement of the public records and archives.' "[30] Despite the criticism, Presidents continued to issue statements that asserted their opinions of newly enacted legislation,[31] and by the 1950s, signing statements became a common presidential tool.[32]

B. The Reagan Administration: Establishing the Legitimacy of Presidential Signing Statements

Before Ronald Reagan took office in 1981, it is estimated that only ten signing statements included presidential interpretations of federal statutes.[33] While previous Presidents began to expand this largely ceremonial practice, the Reagan Administration solidified it as a political one. Fueled by media opposition towards the Executive Branch, as well as the "skepticism and even open hostility from"

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http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf [hereinafter ABA TASK FORCE REPORT] (discussing a statement issued by Monroe that was not congratulatory but, instead, stated his opinion on how a specific law was to be enforced).

25. *Id.*

26. *See* Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements",* 40 ADMIN. L. REV. 209, 210 (1988).

27. *Id.*

28. HALSTEAD, *supra* note 6, at 2.

29. ABA TASK FORCE REPORT, *supra* note 24, at 7.

30. *Id.* (quoting Christopher S. Kelley, A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton 5 (April 2003) (presented at the 61st Annual Meeting of the Midwest Political Science Association)).

31. *See, e.g.,* Legal Significance, *supra* note 8, at 139-41 (discussing the use of signing statements by various Presidents including President Johnson through President Carter).

32. HALSTEAD, *supra* note 6, at 2.

33. *See* William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 702 (1991).

Congress,[34] President Reagan and his administration envisioned the statements as a means of asserting executive power in the face of a "post-Watergate Congress they viewed as having grown too powerful."[35]

With this sort of political maneuvering in mind, President Reagan sought to characterize presidential signing statements as legislative history so they would be used by courts as a legitimate, interpretive device. The idea was first presented to Edwin Meese, the Attorney General at the time, by two young attorneys, Steven Calabresi and John Harrison.[36] Calabresi and Harrison composed a memorandum to Meese maintaining that statements attached to legislation which offer the President's interpretation of unclear statutes could increase the President's influence over the law.[37] Concerned with reinstating political authority to the Executive Branch, Meese applauded the proposition and wrote to West Publishing Company requesting that the President's statements be included with traditional legislative history in the *United States Code Congressional and Administrative News*.[38] Further support for legitimizing signing statements also came from the future Supreme Court Justice Samuel A. Alito. Alito, a member of the Litigation Strategy Working Group at the time, wrote a memorandum suggesting a plan to implement presidential statements as interpretive aides,[39] noting that "signing statements [should] assume their rightful place in the interpretation of legislation."[40]

The aggressive measures employed by the Reagan Administration seemed to have led to the desired result. During his time in office, President Reagan issued approximately 250 statements,[41] some of which explicitly stated his understanding of a statute's meaning. For example, when signing the Supplemental Appropriations Act of 1987, President Reagan attached a statement explaining his understanding that the bill did not apply retroactively.[42] Furthermore, the Executive Branch started to gain influence over the law as courts began to give some legal effect to signing statements.[43] In the 1986 case *Bowsher v. Synar*, the Court cited to a presidential signing statement ex-

34. *See* COOPER, *supra* note 23, at 202.

35. Sofia E. Biller, *Flooded by the Lowest Ebb: Congressional Responses to Presidential Signing Statements and Executive Hostility to the Operation of Checks and Balances*, 93 IOWA L. REV. 1067, 1069 (2008).

36. CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 232 (2007).

37. *Id.*

38. *Id.*

39. *Id.* at 233.

40. Memorandum from Samuel A. Alito, Jr., Deputy Assistant Att'y Gen., Office of Legal Counsel 1 (Feb. 5, 1986), http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf.

41. HALSTEAD, *supra* note 6, at 3.

42. Statement Accompanying Signing of Pub. L. No. 100-71, 23 WEEKLY COMP. PRES. DOC. 800 (July 11, 1987).

43. *Id.*

pressing the President's view concerning the act under scrutiny.[44] However, courts rarely relied on the statements in an authoritative manner.[45] And, as can be expected, the increased use of signing statements during this time sparked debate concerning the appropriate application of signing statements.[46]

C. Modern Use and Critiques of Presidential Signing Statements

Although the Reagan Administration ended in 1989, the expansive use of presidential signing statements did not. President Reagan's successor, George H.W. Bush, issued 228 statements.[47] President Bush, like his predecessor, attempted to protect executive power but did so with a more "hostile tone."[48] President Clinton also followed suit and issued 381 signing statements.[49] However, one scholar argues that President Clinton's statements represented more of a dialogue between the Executive Branch and Congress.[50] While the amount of statements issued after the Reagan Administration steadily increased without inciting much criticism, use of the statements by George W. Bush prompted much trepidation over the practice.

Challenging almost 1,200 separate provisions of legislation,[51] George W. Bush has been critiqued as making the "most aggressive use of the device."[52] Such aggression was fueled by an ideal the Bush Administration referred to as the unitary executive.[53] President Bush attempted to protect the executive power, yet on a much more extreme level than the presidents that came before him. Particularly, Bush's signing statements often contained boilerplate language requiring the Executive Branch to construe provisions "in a manner consistent with the President's constitutional authority to supervise the unitary [E]xecutive [B]ranch and to withhold information that

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

45. *See, e.g.,* HALSTEAD, *supra* note 6, at 4.

46. *See generally* Brad Waites, Note, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755, 774-75 (1987) (discussing the Justice Department's and Reagan's publication of signing statements as creating the possibility of the Executive Branch exerting undue influence over the judiciary); Garber & Wimmer, *supra* note 12, at 363 (arguing that judicial reliance on presidential signing statements "would violate the Constitution's separation of powers doctrine").

47. HALSTEAD, *supra* note 6, at 5.

48. Biller, *supra* note 35, at 1082.

49. HALSTEAD, *supra* note 6, at 6.

50. Biller, *supra* note 35, at 1084-85.

51. Charlie Savage, *Obama's Embrace of Bush Tactic Criticized by Lawmakers From Both Parties*, N.Y. TIMES, Aug. 9, 2009, at A16. Most of President Bush's signing statements noted that certain provisions of the proposed legislation were unconstitutional and would not be enforced by the executive branch. Thus, a majority of his signing statements did not attempt to offer interpretive insight of federal statutes. SAVAGE, *supra* note 36, at 237.

52. SAVAGE, *supra* note 36, at 230.

53. Statement Accompanying Signing of H.R. 4548, 40 WEEKLY COMP. PRES. DOCS. 3012 (Dec. 23, 2004).

could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."[54]

The sheer volume of challenges Bush made to legislation generated numerous attacks against presidential signing statements. First, the American Bar Association instructed a task force to investigate the use of these pronouncements.[55] While the report stated it was not a direct attack against President Bush,[56] the contents and critiques contained therein seemed to indicate otherwise. Ultimately, the task force did not address whether the statements carry interpretive weight but did recommend opposing any signing statements that refused to enforce all or parts of a law.[57] Additionally, Bush's alleged abuse led to the proposal of the Presidential Signing Statements Act of 2006.[58] Introduced by Senator Arlen Specter, this bill sought to prohibit judges from relying on presidential signing statements when interpreting federal statutes.[59] However, this bill has not been enacted, and because of a desire to protect executive power, it is unlikely any President would sign such legislation into law. Lastly, President Bush's use of signing statements was considered so egregious the United States Senate Committee on the Judiciary held a hearing on the matter.[60] The hearing involved testimony from several scholars on a variety of topics. Some offered opinions on the constitutionality of signing statements, while others discussed their role in statutory interpretation.[61]

Aware of the heavy criticism against his predecessor, President Barack Obama vowed to take a more modest approach.[62] However,

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54. *Id.*; *see also* Statement Accompanying Signing of Pub. L. No. 107-296, 38 WEEKLY COMP. PRES. DOCS. 2092-93 (Nov. 25, 2002).

55. ABA TASK FORCE REPORT, *supra* note 24, at 3.

56. *Id.* at 5.

57. *Id.*

58. *See* S. 3731, 109th Cong. (2006).

59. *Id.* § 4. A year later, Representative Carol Shea-Porter presented an almost identical bill to the House of Representatives called the Presidential Signing Statements Act of 2007. H.R. 3045, 110th Cong. (2007).

60. *See The Use of Presidential Signing Statements*: *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=1969&wit_id=2629.

61. *See generally The Use of Presidential Signing Statements*: *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=1969.

62. Savage, *supra* note 51. President Obama even issued a memorandum on presidential signing statements discussing the criticism the statements previously received. Obama noted that the statements represent "the President's constitutional obligation to take care that the laws be faithfully executed" and promised to take careful steps when issuing the statements. Memorandum on Presidential Signing Statements: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 10669 (Mar. 9, 2009), http://www.gpo.gov/fdsys/pkg/FR-2009-03-11/pdf/E9-5442.pdf.

because Obama has already challenged "dozens of provisions of bills" through the use of signing statements,[63] some critics have expressed fear that he is following in Bush's steps. President Obama has received several letters from State Representatives expressing their disappointment with his "willingness" to issue the statements as many "hoped he would roll back the practice, not entrench it."[64] At this time, it is difficult to determine the ultimate path President Obama will take. But, as seen with past Presidents, even minimal use of the statements is likely to prompt maximum criticism.

Despite the plethora of signing statements issued by past Presidents, few actually contained interpretive declarations.[65] Further, federal courts have rarely turned to the statements for interpretive guidance. In 2007, a search conducted by the United States Government Accountability Office discovered that less than 140 federal cases since 1945 cited to presidential signing statements.[66] Moreover, when courts do cite to signing statements it is normally to decide issues like the date the President signed the legislation or to explain the statute's purpose.[67] Although the Reagan Administration tried to legitimize signing statements, courts have been reluctant to use the statements as interpretive aides. But courts do not always need to be apprehensive. Instead, judges should heed President Reagan's efforts because, as explored in the next part of this Note, signing statements can provide helpful insight to statutory interpretation.

III. A COMPARATIVE ANALYSIS OF PRESIDENTIAL SIGNING STATEMENTS AND TRADITIONAL LEGISLATIVE HISTORY

The increasing prevalence of presidential signing statements requires courts to determine their appropriate place in statutory interpretation. First, courts must decide whether or not signing statements should be classified as a new form of legislative history. To answer this question, Part III compares traditional legislative history to presidential signing statements. Second, if signing statements possess qualities similar to legislative materials, how much deference should courts apply to the statements in matters of statutory con-

63. Savage, *supra* note 51.

64. *Id.*

65. Curtis Bradley and Eric Posner compiled a chart of the signing statements issued by President Carter through President George W. Bush. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006). In this chart, they divide the amount of signing statements issued into rhetorical, constitutional, and legislative history. *Id.* at 323. According to their research, the average amount of legislative history signing statements issued per year is generally five or fewer. *See id.*

66. U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACT 11 (2007), http://www.gao.gov/decisions/appro/308603.pdf.

67. *See id.*

struction? Once more, by turning to the traditional sources of legislative history that courts have relied on for years, this Note attempts to establish a unified standard of judicial deference.

A. Traditional Legislative History

1. The Courts' Original Interpretive Toolbox

A longstanding witticism states that "examination of statutory text is permissible only when legislative history is ambiguous."[68] Although intended as a joke, this saying alludes to the realities of judicial practice as courts frequently use legislative history to clarify ambiguous statutes. Regarded as the "record of deliberations" pertaining to a law's enactment,[69] legislative history represents the compromise reached between the House and the Senate when considering proposed legislation. These sources typically include committee reports, committee hearings, sponsor statements, floor debates, and conference reports.[70]

During the latter half of the twentieth century, judicial reliance on legislative history increased substantially. One scholar observed that "[t]he increased availability and accessibility of congressional documents . . . contributed to growth in citations to legislative history."[71] Yet, an ongoing debate over the proper interpretive function the sources serve has persisted within court opinions and law review articles for years.[72] Those in favor of using legislative history claim that it allows the judiciary to discern legislative intent.[73] Justice Breyer believes legislative materials are particularly useful for many functions like:

> (1) avoiding an absurd result; (2) preventing the law from turning on a drafting error; (3) understanding the meaning of specialized terms; (4) understanding the "reasonable purpose" a provision

68. George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 39 (1990).

69. ESKRIDGE, JR. ET AL., *supra* note 4.

70. *Id.*

71. Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 372 (1999).

72. The debate concerning the legitimacy of legislative history is quite extensive. While this Note offers a glimpse into some common arguments, the full debate is beyond the scope of this Note.

73. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 327 (1900) ("Statements made in committee reports and floor statements by sponsors or floor managers of legislation presumably represent the legislature's views on specific issues.").

> might serve; and (5) choosing among several possible "reasonable purposes" for language in a politically controversial law.[74]

Conversely, those against granting legislative history authoritative weight rely on three core arguments. The first rests on the notion that no single unified intent can be attributed to the large, multimember Congress.[75] Thus, legislative history is not indicative of what Congress, as a whole, intended. The second critique argues that judicial reliance on legislative history violates the Constitution, specifically the Bicameralism and Presentment Clause.[76] Opponents contend that giving interpretive weight to legislative history treats it as law and therefore violates the Constitution because it has been neither passed through both houses of Congress nor presented for presidential approval.[77] Lastly, some argue these sources allow legislators to exert manipulation over the courts. Particularly, "once legislators learn that the Court will use legislative history in interpretation, they have a great incentive to introduce comments into the record to produce desired interpretive outcomes."[78]

Opposition to legislative history has not been solely limited to the scholarly realm. In fact, many judges have actively voiced their feelings against the practice. Distinctively, Justice Scalia is known as an adamant opponent to judicial reliance on legislative history. An advocate of what is commonly referred to as new textualism, Scalia defends the traditional practice of staying within the confines of the statutory text when discerning its meaning.[79] Scalia has openly shared his views with fellow members of the Court in countless opinions,[80] but his criticism of the practice has had only minor implications on the judicial use of legislative history. Federal courts, includ-

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74. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861 (1992).

75. Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 592 (1994); *see also* Eskridge & Frickey, *supra* note 73, at 327 ("Committee members and bill sponsors are not necessarily representative of the entire Congress, and so it is not necessarily accurate to attribute their statements to the whole body.").

76. Eskridge & Frickey, *supra* note 73, at 327. The Bicameralism and Presentment Clause is located in article 1, section 7, clause 2 of the United States Constitution. It states that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." U.S. CONST. art. 1, § 7, cl. 2.

77. Koby, *supra* note 71, at 377.

78. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 732 (1997).

79. *See* Spence, *supra* note 75, at 586, 587.

80. *See e.g.,* Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 280 (1996) (Scalia, J., concurring) (noting that "[l]egislative history that does not represent the intent of the whole Congress is nonprobative; and legislative history that does represent the intent of the whole Congress is fanciful"); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.").

ing the United States Supreme Court, continue to rely on these interpretive sources as some judges are "too committed to reconstructing legislative intent . . . to abandon examining legislative history."[81]

2. The Hierarchy of Legislative History

Putting the validity of legislative history aside, selecting which type of legislative document to rely on adds another level to the debate. Within the traditional forms of legislative history, courts have developed an implicit hierarchy, assigning differing degrees of significance to the various sources.[82] Consistently favoring some forms of legislative history over others, courts typically turn to "such materials for 'decisive' or 'authoritative' evidence of congressional intent."[83] Thus, the amount of deference assigned generally depends on the speaker's involvement in drafting legislation and how available the speaker's views are to the congressional membership.[84]

Committee reports and sponsor statements claim the top position in the hierarchy.[85] They are regarded as the most reliable forms of legislative history because they embody "the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation."[86] Additionally, other members of Congress are likely to acquiesce to a sponsor's understanding of a bill because the sponsor is presumed to possess considerable knowledge regarding the legislation.[87] The remaining legislative sources encompassed in the hierarchy are regarded as substantially less reliable.[88] These materials distort the legislative record because they fail to sufficiently reflect the views of the enacting Congress.[89] For example, courts seldom rely on statements issued by opponents of legislation because the opponents have "every incentive to misstate the bill's effect."[90]

At the bottom of the hierarchy sit nonlegislator statements followed by subsequent legislative history, or post-enactment statements.[91] It may seem unusual that people outside of Congress produce documents that comprise legislative history, but the realities of

81. Popkin, *supra* note 33, at 699.

82. Costello, *supra* note 68, at 41; *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990) (discussing how courts may "consider certain evidence to be more significant than other evidence").

83. Manning, *supra* note 78, at 680.

84. Cross, *supra* note 26, at 222.

85. ESKRIDGE, JR. ET AL., *supra* note 4, at 302-03.

86. Eskridge, *supra* note 82, at 637 (internal quotation marks omitted) (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)).

87. *Id.* at 638.

88. ESKRIDGE, JR. ET AL., *supra* note 4, at 304.

89. *Id.*

90. *Id.*

91. *See id.* at 307.

today's law-making process sometimes require nonlegislators to draft statutes. Typical nonlegislators include lobbyists, private interest groups, other private organizations, and legislative study commissions.[92] However, courts will only defer to nonlegislator statements if they offer further support to a decision reached through alternative, more reliable materials.[93] Arguably, these statements lack sufficient reliability because they fail to reflect the views of the enacting legislature.[94] Furthermore, there is an incentive for misrepresentation. Some claim that nonlegislator statements try to "smuggle private deals into public law through the back door."[95] Despite these problems, courts consider them to possess some interpretive significance, though they rely on them with caution.[96] Acknowledging that statutes frequently "reflect carefully crafted compromises among the various groups,"[97] such statements and commentaries may provide interpreting courts with a meaningful source of explanation.[98]

Subsequent legislative history, on the other hand, consists of statements made after the statute has been enacted. Courts often avoid reliance on post-enactment materials for several reasons. Notably, they are usually too vague to clarify an ambiguous statute.[99] Some scholars also argue that they do not represent the intent of the enacting legislators, making them unreliable.[100] Additionally, the fact that such statements are offered into the legislative record after the bill is enacted deprives the Legislative and Executive Branch of the opportunity to comment on or amend the record. This procedural lapse invites "insincerity"[101] and often leads to comments in the record that are only indicative of a single legislator's opinion.

Nevertheless, courts have not completely abandoned subsequent legislative history.[102] The general standard of judicial deference is to invoke the statements when the exact congressional intent is incomprehensible;[103] however, courts have relied on them in other limited situations. For example, in *Montana Wilderness Association v. United*

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92. *See id.* at 305; Eskridge, *supra* note 82, at 633.

93. Eskridge, *supra* note 82, at 640.

94. ESKRIDGE, JR. ET AL., *supra* note 4, at 305.

95. *Id.*

96. *See id.* (discussing the case of Kosak v. United States, 465 U.S. 848 (1984), when the Court relied on nonlegislator statements for interpretive guidance).

97. Eskridge, *supra* note 82, at 633-34.

98. *See id.* at 634.

99. *Id.* at 640.

100. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 205 (1983).

101. ESKRIDGE, JR. ET AL., *supra* note 4, at 306.

102. *See id.* (discussing the case of Montana Wilderness Ass'n v. United States Forest Serv., 655 F.2d 951 (9th Cir. 1981) as an example of judicial reliance on post-enactment sources).

103. Eskridge, *supra* note 82, at 640 (citing Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980)).

States Forest Service, the court assigned a subsequently issued conference report "significant weight . . . where it [was] clear that the conferees had carefully considered the issue."[104] Subsequent legislative history can provide context by shedding light on current societal norms and is capable of imparting understanding of congressional intent.[105]

This Note barely skims the surface of the ongoing debate over the proper application of legislative history. However, the argument made in subsequent parts of this Note depends on the assumption that legislative history is a helpful source of statutory interpretation. Following that assumption, traditional forms of legislative history can serve as a guide in answering the question of whether presidential signing statements could be defined as a new form of legislative history with interpretive worth.

B. Introduction to the Modern Presidential Signing Statement Debate

While opinions differ as to the interpretive value of presidential signing statements, scholarship tends to favor rejecting this executive tool as an authoritative guide in statutory construction.[106] Some of the critiques are similar to those employed by opponents of legislative history. For example, critics suggest judicial reliance on signing statements violates the Bicameralism and Presentment Clause.[107] Assigning them interpretive weight arguably treats them as law. This offends the constitutionally mandated requirements of enacting legislation because the statements have not been reviewed by both houses of Congress.[108] However, courts acknowledge that signing statements are not equivalent to binding law. They recognize the statements only serve an assistive role in the overall interpretive process, much like other extrinsic sources used to interpret statutes. Presidential statements of interpretation are no more law than are dictionaries or treatises, and courts are not bound to accept them as authoritative. Signing statements are commonly used to "provid[e]

104. 655 F.2d 951, 957 (9th Cir. 1981).

105. *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 467-68 (1988).

106. *See* Waites, *supra* note 46, at 761 (citing arguments for the complete cessation of publication of signing statements); *see also* Garber & Wimmer, *supra* note 12, at 363 (arguing that courts should not refer to presidential signing statements).

107. Bradley & Posner, *supra* note 65, at 344 (stating that judicial reliance on presidential signing statements will "allow the [P]resident to legislate without following the process for legislation set forth in Article I of the Constitution.").

108. *Id.*; *see also* Chad Thompson, *Presidential Signing Statements: The Big Impact of a Little Known Presidential Tool*, 39 U. TOL. L. REV. 185, 204 (2007); *see also* Bradley & Posner, *supra* note 65, at 344 (stating that judicial reliance on presidential signing statements will "allow the president to legislate without following the process for legislation set forth in Article I of the Constitution").

context and a basis of understanding the duly enacted law in question."[109] Contextual considerations do not violate the Constitution.

Critics also contend that signing statements intrude on the judiciary's ultimate responsibility to "say what the law is."[110] The statements may hinder the court's ability to make impartial decisions or, alternatively, direct the court's decision to an outcome the President desires.[111] Presidential appointment of judges exacerbates the problem even further. If the judges were appointed by the President who issued the signing statement, they may feel a sense of loyalty and obligation to apply the President's interpretation.[112] Submission to presidential influence may discredit the judiciary's role as an independent body, making the courts nothing more than "a mouthpiece of presidential policy."[113]

However, this argument places little faith in the judicial system. The judiciary is no doubt competent enough to determine if the President is overstepping his authority. Courts can sensibly determine how much deference the signing statement should receive.[114] Moreover, from the perspective of the courts, employing signing statements in this circumstance is no different than using other legislative statements of intent which do not considerably infringe on the judiciary's role to interpret the law.[115] The President's statements do not encroach on judicial power so long as courts have the final say in matters of interpretation.[116]

C. Signing Statements as a New Form of Legislative History

Apart from the aforementioned debate, two additional critiques provide a basis for classifying signing statements as a new form of legislative history. Many caution against the statements because (1) the President is not a legislator and (2) the statements are issued after the bill is enacted.[117] Yet, these characteristics resemble qualities found in other legislative materials to which courts give minimal deference—specifically, subsequent legislative history and nonlegislator statements. Thus, presidential statements of interpretation should be

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109. Thompson, *supra* note 108, at 205.

110. *See* Cross, *supra* note 26, at 228 & n.113 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

111. *Id.* at 228.

112. *See* Waites, *supra* note 46, at 775 (noting President Reagan's "potential influence on the judiciary" as he "appointed over 300 of the 761-member judiciary" within his first term).

113. *Id.* at 777.

114. *See* Cross, *supra* note 26, at 220.

115. *Id.* at 213 n.27.

116. *Id.*

117. *See, e.g.* Popkin, *supra* note 33, at 709; Note, *Context-Sensitive Deference, supra* note 10, at 607; ESKRIDGE, JR. ET AL., *supra* note 4, at 306.

placed alongside those sources in the legislative history hierarchy, receiving interpretive credence equivalent to their legislative history counterparts. Ultimately, courts should look to signing statements if they further support a decision reached with the assistance of other interpretive tools or if the intent of the enacting coalition is overwhelmingly unclear. However, signing statements must meet some contingencies before judges can place appropriate reliance on them when interpreting statutes.

1. The President as a Nonlegislator

The notion that the President is not a member of Congress is, of course, a truism. Indeed, the President may be characterized as the quintessential nonlegislator.[118] Accordingly, many are hesitant to extend the definition of legislative history because the President's nonlegislator status forbids him from producing legislative materials.[119] The Ninth Circuit Court of Appeals adhered to this justification in *Estate of Reynolds v. Martin* when it wholly ignored a presidential signing statement.[120] The court explained that "[i]t is not the President's place to write federal statutes."[121] Instead, the Constitution clearly vests the power to make law in the Legislative Branch and bestows limited legislative responsibilities to the President. According to Professor William Popkin, the Constitution restricts the President's legislative actions to approving or vetoing bills, executing laws under Article II, and proposing statutes.[122] Professor Popkin argues that utilizing signing statements for statutory interpretation exceeds these constitutionally proscribed roles.[123] Others argue that signing statements fail as effective forms of legislative history because statements from nonlegislators, such as the President, are "unreliable indicators of Congress'[s] will."[124]

Nonetheless, these arguments do not justify excluding signing statements as a new breed of legislative history. The President is not a legislator, but as previously discussed, interpreting courts have looked to other nonlegislator statements for context in statutory construction cases.[125] Still, in order to receive judicial deference, courts require that nonlegislators be closely involved in the law-making

118. *See* ESKRIDGE, JR. ET AL., *supra* note 4, at 306.

119. *See* Popkin, *supra* note 33, at 709; *see also* Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, 16 WM. & MARY BILL RTS. J. 307, 309 (2007) (noting that "the President is not part of the legislature").

120. 985 F.2d 470, 477 n.8 (1993).

121. *Id.*

122. Popkin, *supra* note 33, at 709-13.

123. *See id.* at 709-10.

124. *See* Garber & Wimmer, *supra* note 12, at 381.

125. Eskridge, *supra* note 82, at 633-34; *see also supra* notes 91-98 and accompanying text.

process.[126] Thus, the President's understanding of a statute should be given some interpretive weight if he proposed or initiated legislation, or was involved in other steps during the course of the enactment.

Courts should not ignore the practicalities of today's political process. Judges need to recognize the President is often a pervasive force in enacting legislation. Presidents have been involved with creating bills since George Washington.[127] President Jefferson was also known to occasionally "draft[] bills and control[] their progress through Congress."[128] Additionally, an early Supreme Court decision accepted the President's ability to influence legislation. In an 1899 case, the Court observed that "the approval by the President of a bill passed by Congress is not strictly an executive function, but is legislative in nature."[129] Currently, it is exceedingly common for Presidents to "work[] closely with Congress to craft a bill and orchestrate its passage."[130] To offer a practical example, President Obama recently proposed the hotly debated health care reform bill. In March of 2010, the bill was passed and signed into law.[131] If President Obama had concurrently issued a statement with the legislation, courts should have acknowledged the statement's interpretive value because of Obama's intimate involvement and special knowledge of the bill.

The President is able to influence legislation through his veto power.[132] Once a bill is presented to the President, if he declines to sign it into law, he may send the bill back to Congress with his objections.[133] In order to obtain presidential approval, Congress would need to reform the bill to meet presidential desires.[134] Moreover, the mere threat of a presidential veto significantly affects the way Congress shapes legislation.[135] For example, during the Nixon Administration, Congress "cleaned up" approximately thirty bills because of the looming threat of a potential veto.[136] The law-making process is time-consuming and expensive. In most instances, members of Congress, particularly those within the enacting coalition, have spent

126. *See* Eskridge, *supra* note 82, at 633 (stating that "[o]ccasionally, law professors' testimony is important evidence, especially if they originated or drafted the legislation").

127. Kinkopf, *supra* note 119, at 309; *see also* Cross, *supra* note 26, at 214-15.

128. Cross, *supra* note 26, at 215.

129. La Abra Silver Mining Co. v. United States, 175 U.S. 423, 453 (1899).

130. Note, *Context-Sensitive Deference, supra* note 10, at 605.

131. Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2010).

132. *See* Buckley v. Valeo, 424 U.S. 119, 121 (1975) ("The President is a participant in the law-making process by virtue of his authority to veto bills enacted by Congress.").

133. U.S. CONST. art. I, § 7, cl. 2.

134. *See id.*

135. Cross, *supra* note 26, at 216; *see also* Kathryn Marie Dessayer, *The First Word: The President's Place in "Legislative History"*, 89 MICH. L. REV. 399, 411 (1990) ("The constitutional requirement of presentment forces legislators to bear in mind the President's views on potential legislation in order to avoid a veto.").

136. Cross, *supra* note 26, at 216 (quoting STEPHEN J. WAYNE, THE LEGISLATIVE PRESIDENCY 159 (1978)).

extensive hours initiating a bill, drafting the statutory language, debating its merits, and carrying it to the point of presentment to the President. While Congress has the power to override a presidential veto, it would prefer to avoid a veto completely.[137] Thus, the proposed bill will normally "reflect the [P]resident's preference."[138]

The Constitution embraces the President's significant presence in the law-making process. The same constitutional provisions that Professor Popkin argues constrain the President in fact support the concept that the President plays a pivotal part in creating the law.[139] Under the scope of the Bicameralism and Presentment Clause, Congress cannot successfully enact legislation without presidential approval.[140] This constitutional requirement makes the President and Congress partners in the legislative process.[141] Thus, the President's understanding of a statute should be given weight in a similar manner as Congress's.[142] The President also obtains legislative influence from his Article II powers to recommend to Congress "such [m]easures as he shall judge necessary and expedient" and to "take [c]are that the [l]aws be faithfully executed."[143] Proposing legislation places the President within the enacting coalition.[144] If the President proposes a bill, he presumably has special understanding of the legislation that should be acknowledged by an interpreting court.[145] Additionally, faithful execution of the law requires some interpretive power. After all, the President must ascertain the meaning of the law to know how to properly execute that law.[146]

Given that signing statements encompass the President's understanding of legislation, some opponents claim the statements lack the congressional intent that courts generally seek when interpreting statutes.[147] Likewise, others also claim that the President's views are irrelevant since he only possesses the ability to accept or reject the

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137. *See* Dessayer, *supra* note 135, at 410-11.

138. Bradley & Posner, *supra* note 65, at 350.

139. *See* Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239, 286 (1995) (arguing that the President has a constitutionally-provided role in legislation through his obligation to recommend legislation, the Presentment Clause, veto power, "and the duty to take care that the laws be faithfully executed"); *see also* Waites, *supra* note 46, at 768-70.

140. *See* U.S. CONST. art. I, § 7, cl. 2.

141. Bradley & Posner, *supra* note 65, at 346.

142. *See* Carroll, *supra* note 7, at 515.

143. U.S. CONST. art. II, § 3.

144. Bradley & Posner, *supra* note 65, at 351.

145. *The Use of Presidential Signing Statements*: *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Nicholas Quinn Rosenkranz, Associate Professor of Law, Georgetown University Law Center), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=1969&wit_id=5483.

146. *See id.*

147. *See* Garber & Wimmer, *supra* note 12, at 392 (arguing that signing statements "lack the characteristics necessary to constitute a reliable source of information as to the will of the Legislature").

statute.[148] But, as previously discussed, it is not uncommon for a President to propose or draft his own legislation. Nevertheless, to successfully effectuate legislative intent, courts should be wary in giving deference to presidential signing statements unless the statements themselves "give effect to congressional intent."[149] Ideally, courts should apply a method similar to the one employed by Justice Stevens in his dissent in *Kosak v. United States*.[150] When questioning the function of traditional nonlegislator statements, Justice Stevens suggested that nonlegislator intent should not be ascribed to Congress unless there is "positive evidence that elected legislators were aware of and shared the [nonlegislator's] intent."[151] Such reciprocal understanding makes signing statements more reliable.[152] If a signing statement includes "congressional testimony . . . before Congress," or if the interpretation was presented during congressional debates, the President's interpretation of the statute will contain some "indicia of reliability."[153] However, this can only be achieved if the Executive and Legislative Branches truly act as partners in the law-making process.

When discerning legislative intent, it is also important to consider the President's ability to control the information on which legislators rely to form their decisions.[154] Specifically, Presidents help "set the agenda for congressional debate, . . . develop[] proposals from inside and outside the [E]xecutive [B]ranch, . . . [and] monitor[] congressional deliberations and influence[] congressional judgments."[155] Presidential influence over legislative procedure establishes the possibility that signing statements may reflect legislative intent.[156]

Recognizing the practicalities of the President's legislative involvement often invokes claims concerning the separation of powers doctrine. Allowing the head of the Executive Branch to cross over constitutionally established lines of separation not only encroaches on the "duty of the [l]egislature to make law," but also leads to the aggrandizement of the President's power.[157] According to those who believe one branch of government should not exercise the powers of

148. *See, e.g.,* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1526 (2000).

149. Carroll, *supra* note 7, at 518.

150. 465 U.S. 848, 862-69 (1983) (Stevens, J., dissenting).

151. *Id.* at 863.

152. Carroll, *supra* note 7, at 518-19.

153. Kinkopf, *supra* note 119, at 310.

154. *Id.* at 307.

155. Cross, *supra* note 26, at 217 (quoting STEPHEN J. WAYNE, THE LEGISLATIVE PRESIDENCY 20-21 (1978)).

156. Kinkopf, *supra* note 119, at 307.

157. Garber & Wimmer, *supra* note 12, at 383, 394.

another, judicial reliance on signing statements is an "unconstitutional exercise of authority" that violates the separation of powers.[158]

Courts traditionally viewed the government branches as strictly separated from one another, hindering the President's ability to traverse into the legislative realm.[159] Presently, courts are using a "functionalist model" whereby the lines previously drawn between the branches are now somewhat blurred.[160] The Supreme Court has come to embrace this approach. In a 1976 case, the Court condemned strict separation because the "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."[161] The separation of powers doctrine no longer requires the complete seclusion of the individual branches,[162] laying to rest what was formerly viewed as constitutional restraints on the President's ability to create legislation.

Based on the President's vast role in the legislative process, courts should not be dissuaded from characterizing signing statements as a new form of legislative history. The President's status as a nonlegislator is an insufficient basis to ignore the interpretive worth these statements possess. However, this does not mean every statement the President signs upon enacting a bill should be deemed legislative history. Courts must be circumspect in extending the definition and should only consider signing statements that are accompanied by considerable evidence that the President was a "critical partner"[163] in enacting the law. Moreover, the legislation proposed or modified by the President must not have been extensively altered by Congress.[164]

Admittedly, requiring judges to determine presidential participation with a particular piece of legislation would be an extremely difficult task. The courts will not always know whether the statute they seek to interpret is a result of the President's volition. A President's role may not be as publicized as President Obama's was with the recent heath-care-reform bill.[165] However, to avoid abuse of this execu-

158. *See id.* at 372-73.

159. *See* Carroll, *supra* note 7, at 479 (discussing the "formalistic" approach traditionally used by the Supreme Court").

160. *See id* at 479-80.

161. Buckley v. Valeo, 424 U.S. 119, 121 (1976); *see also* Myers v. United States, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting) ("The separation of the powers of government did not make each branch completely autonomous. It left . . . to each power to exercise, in some respects, functions in their nature executive, legislative and judicial.").

162. Cross, *supra* note 26, at 213.

163. *Id.* at 218-19.

164. Killenbeck, *supra* note 139, at 276.

165. *See, e.g.,* David. M. Herszenhorn & Robert Pear, *Obama to Offer Health Bill to Ease Impasse as Bipartisan Meeting Approaches*, N.Y. TIMES (Feb. 18, 2010), http://www.nytimes.com/2010/02/19/health/policy/19health.html; Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES (Mar. 23, 2010), http://www.nytimes.com/2010/03/24/health/policy/24health.html.

tive tool, it is important that courts require a showing of presidential involvement before deferring to signing statements. Thus, courts should not presume legislative involvement. Instead, courts should institute a sort of evidentiary standard: if information about the President's role in drafting legislation is not easily ascertainable by the judges, the proponent who wishes the court to rely on the signing statement should bear the responsibility of showing that the President was involved in the law-making process. The proponent can meet this burden by offering evidence that the President drafted the legislation, personally proposed the legislation, or worked closely with members of Congress throughout the course of enactment.

2. Presidential Signing Statements as Subsequent Legislative History

The interpretive worth of signing statements can also be evaluated by comparing them to subsequent legislative history. Signing statements are similar to these traditional legislative sources because the President issues his interpretations after the bill is passed by Congress.[166] This characteristic, many argue, makes the statements unreliable because they deprive Congress of the opportunity to comment on the President's remarks.[167] In contrast, legislative history regarded as especially authoritative, such as committee reports or sponsor statements, reflects a compromise resulting from congressional process that allows "each chamber to ratify or respond to . . . legislative history."[168] Signing statements are considered problematic because they lack indications of congressional deliberations and of dialogue between the President and Congress.[169]

Some argue that signing statements, like their legislative history counterparts, create an opportunity for manipulation.[170] The temporal characteristic of signing statements precludes Congress from responding to the President's statement.[171] This may incentivize the President to issue interpretations that would oppose congressional intent and alter the meaning of the bill into something that Congress would have rejected.[172] Assumedly, the President may try to shape legislative history in hopes of achieving a "desired interpretive outcome[]."[173]

This theory, however, reaches beyond assumptions and extends to reality. Some of President Reagan's signing statements took con-

166. *See* Note, *Context-Sensitive Deference, supra* note 10, at 607.
167. *Id.*
168. *Id.*
169. *See id.*
170. ESKRIDGE, JR. ET AL., *supra* note 4, at 306.
171. Kinkopf, *supra* note 119, at 310.
172. Cross, *supra* note 26, at 223.
173. Manning, *supra* note 78, at 732.

tested political positions in controversial debates.[174] President George H.W. Bush was also accused of exercising manipulative behavior through signing statements.[175] In 1992, a case was brought before the United States District Court in Massachusetts to determine whether the Civil Rights Act of 1991 applied retroactively.[176] The legislative history surrounding the Act was deemed ambiguous.[177] However, President Bush's signing statement declared his understanding that the Act did not expressly apply retroactively but provided some exemptions, a stance that contradicted other forms of legislative history.[178] Acknowledging the potential for manipulation, the court rejected the President's understanding by noting that there was "no reason to treat this judgment as anything other than a similar statement of intent that was unable to be stated explicitly in the legislation."[179]

Yet, problems of presidential "post-enactment opportunism" can be easily "constrained by [the] courts."[180] Judges can evaluate the credibility of the signing statements presented to them and determine their true interpretive value. Still, reliance on presidential statements of interpretation should be predicated on their consistency with other legislative materials and presidential pronouncements.[181] By examining presidential signing statements alongside more reliable forms of legislative history, the courts can square the President's understanding with Congress's, eliminating the ability for the President to slip in statements that contradict the outcome of congressional deliberations. Additionally, by constraining reliance on signing statements, the "incentives to introduce comments in the record solely to influence future interpretations"[182] decreases significantly. Under the proposed rubric, the President's statements should be discredited if they do not support an interpretation reached by other sources considered to be indicative of congressional intent. This eliminates the President's ability to influence the judiciary's decisions regarding statutory construction.

Deferring to signing statements for interpretive guidance will not deviate from the Supreme Court's opinion on subsequent legislative history. In 1980, the Court declared its aversion for judicial reliance

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174. Popkin, *supra* note 33, at 714.

175. Miranda Lee, Comment, *Reorienting the Debate on Presidential Signing Statements: The Need for Transparency in the President's Constitutional Objections, Reservations and Assertions of Power*, 55 UCLA L. REV. 705, 706 n.1 (2008).

176. Petitti v. New England Tel. & Tel. Co., No. 89-3951, 1992 WL 359643, at *1 (Nov. 16, 1992).

177. *Id.* at *4.

178. *See id.* at *2.

179. *Id.* at *4.

180. Bradley & Posner, *supra* note 65, at 355.

181. *Id.* at 355.

182. *See* Note, *Learned Hand, supra* note 3, at 1017.

on post-enactment statements, "asserting that 'even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.' "[183] Signing statements should never act to override an interpretation reached through more reliable legislative sources. Instead, they should only provide context to the overall interpretation.

Additionally, ignoring the interpretive value of signing statements because of their temporal characteristic is inconsistent with the current practices of administrative law. In two significant cases, *Chevron v. NRDC, Inc.* and *Skidmore v. Swift & Co.,* the United States Supreme Court recognized the permissible practice of delegating interpretive authority to agency opinions.[184] Under this doctrine, courts frequently rely on the interpretations of Executive Branch agencies even though they were issued after the statute's enactment.[185] Courts are comfortable providing deference to post-enactment agency interpretations because of the control the Executive Branch has over the individual agencies. As *Chevron* notes, "agencies are not directly accountable to the people," but the President is.[186] For those who adhere to this model of presidential control, it may serve as an analogue of judicial deference to post-enactment presidential statements. Arguably, it should not make a difference whether post-enactment interpretations of a statute come from an agency or from presidential signing statements.[187] Deferring directly to the President eliminates the middle step and provides some transparency in the political process.[188] Essentially, as those that follow this theory argue, "banning reliance on signing statements . . . would only redirect the interpretive process toward the agency without significantly reducing the President's ability to influence the ways statutes are interpreted."[189] Thus, the post-enactment characteristic of signing statements does not preclude judicial reliance.

One may argue that the practicalities of our government suggest that signing statements are even more reliable and less problematic

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183. Note, *Context-Sensitive Deference, supra* note 10, at 606 (discussing the Supreme Court's opinion in Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980)).

184. Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 843-844 (1984); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

185. Bradley & Posner, *supra* note 65, at 345.

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

187. *The Use of Presidential Signing Statements*: *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Christopher S. Yoo, Professor, Vanderbilt University Law School), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=1969&wit_id=5481 [hereinafter *Use of Presidential Signing Statements*, Statement of Yoo].

188. Note, *Context-Sensitive Deference, supra* note 10, at 609-10.

189. *Use of Presidential Signing Statements*, Statement of Yoo, *supra* note 187.

than post-enactment and nonlegislator statements. The President is often more involved in the legislative process than most interest groups and private organizations. Additionally, while the role of congressional members ceases once a bill is signed into law, the President's involvement continues through the subsequent administration and enforcement of the bill.[190] The incentive to insert opposing views is also greater with legislators than with the President. Because the President is often a pervasive force in the legislative process, he has an incentive to issue statements that truthfully represent the legislative compromise.[191] Failure to do so could not only lead to cynicism from citizens and other political actors, but could also make it difficult to work harmoniously with Congress when enacting future legislation.[192] The President is a more visible character than the congressional membership and, therefore, has more cause to protect his credibility.[193]

Nevertheless, these practicalities do not justify assigning presidential statements more interpretive weight than their legislative history counterparts. It is unlikely that every citizen is able to name all the Senators or Representatives in Congress; however, legislators are visible characters within the communities they are charged to represent. Accordingly, members of Congress may be equally concerned with their credibility and the image they convey to the public, especially if running for reelection. Legislators are also concerned about the reputation they may develop within the political community. If other members of Congress or the President take offense to a legislator's character or actions, it is presumed they would be less willing to support legislation proposed by that individual. Therefore, the judicial treatment that presidential signing statements should receive is minimal deference equivalent to nonlegislator and post-enactment statements.

IV. IMPLICATIONS OF JUDICIAL DEFERENCE TO PRESIDENTIAL SIGNING STATEMENTS

Limiting the function of interpretive signing statements to nothing more than contextual aids will eliminate many of the problems associated with their use. However, applying this minimal standard of deference may impact the realm of statutory interpretation in several ways. The proposed standard of deference is likely to not only affect political actors in the law-making process but also judges themselves.

190. Bradley & Posner, *supra* note 65, at 353.
191. ESKRIDGE, JR. ET AL., *supra* note 4, at 306.
192. Bradley & Posner, *supra* note 65, at 352.
193. *See id.*

A. Practical Implications

Although the proper application of signing statements has not been ultimately decided, several federal courts adhere to the proposed standard of deference, citing to signing statements when they support assertions found in more reliable forms of legislative history. For example, the court in *Burrus v. Vegliante* was tasked with interpreting the Hatch Act, a statute that prohibits federal workers from engaging in on-the-job political activity.[194] The court looked to legislative materials to determine what forms of political activity were prohibited by the Act. The senate report stated a recent amendment to the Act expanded the current law to allow voluntary political activity by federal civilian and postal workers as long as the employees are off the clock.[195] While the senate report alone supported the ultimate conclusion, the court turned to President Clinton's signing statement for further support. Deferring to the President's statement was appropriate because it endorsed the views held by the senate report explaining that employees can "volunteer on their own time for the candidate of their choice."[196]

Other courts have relied on signing statements when they provide collateral support to additional legislative materials. In *Duffield v. Robertson Stephens & Co.,* the Ninth Circuit rationalized its citation to a signing statement on the grounds that it "echoed Congress'[s] understanding" of the act subject to interpretation.[197] Similarly, in a more recent Ninth Circuit case, the court cited to both the House Report and President Clinton's signing statement to determine the purpose and goal of a statute.[198] Thus, the proposed standard will not significantly alter the current approach courts follow when relying on presidential signing statements.

An interesting issue arises, however, when traditional forms of legislative history are themselves conflicting. What help can presidential signing statements provide in such a situation? One federal court addressed this issue. In *United States v. Story,* the court was to decide whether the Sentencing Reform Act of 1984 applied to "straddle crimes," crimes that began before the Act was effective and continued after the effective date.[199] Determining that the statutory language was ambiguous, the court turned to sponsor statements from both the House and the Senate.[200] The House manager of the bill ex-

194. 336 F.3d 82, 85-86 (2d Cir. 2003).
195. *Id.* at 89.
196. *Id.* (quoting President Clinton's signing statement).
197. 144 F.3d 1182, 1197 (9th Cir. 1998).
198. United States v. Perlaza, 439 F.3d 1149, 1163 (9th Cir. 2006).
199. 891 F.2d 988, 989 (2d Cir. 1989).
200. *Id.* at 992-93.

plained in a footnote that the Act "would not apply to an offense begun before" the effective date.[201] However, the Senate sponsor's statement directly opposed that interpretation and argued that the sentencing guidelines applied to continuing offenses.[202] With these legislative materials in contention, the court relied on a statement issued by President Reagan that agreed with the Senate.[203] Although the signing statement conflicted with the House's understanding, the court correctly determined the statement possessed interpretive weight because the Executive Branch actively participated in the enactment of the Sentencing Reform Act.[204]

Story illustrates how courts should consider the realities of the legislative process. While noting the President's involvement with the Act, the court appropriately relied on the President's statement. Specifically, the court looked at President Reagan's statement as part of the overall context in the interpretive process. Apart from the signing statement, the court in *Story* acknowledged that the decision was in line with previous cases and the conclusion reached "advance[d the] basic congressional purpose underlying the Guidelines system—to lessen disparity in sentencing."[205] Thus, using the President's signing statement to clarify the application of the Act conformed to the proposed minimal level of deference.

B. Institutional Implications

Applying a minimal deferential standard to presidential signing statements may have significant institutional implications. Specifically, it may affect the interpretive methods used by individual judges. A textualist judge may be more inclined to rely on presidential signing statements than on traditional forms of legislative history. Textualists frequently dismiss legislative history as an authoritative basis for statutory interpretation.[206] They claim legislative history does not properly represent the collective intent of Congress because committee reports and sponsor statements only embody the opinions of a small portion of the congressional membership.[207] However, minimal judicial reliance on presidential signing statements avoids some of the problems textualists associate with traditional legislative history.

If the President partners with Congress to draft a bill, and if Congress does not substantially alter the President's views, it is likely

201. *Id.* at 993 & n.5.
202. *Id.* at 993.
203. *Id.* at 993-94.
204. *Id.* at 994.
205. *Id.*
206. *See* Eskridge, *supra* note 82, at 649-51.
207. Manning, *supra* note 78, at 684, 689.

that both Houses of Congress agree or at least acknowledge the President's opinion on the matter. Further, if the President works with the bill from its inception, Congress is likely aware of the President's interpretation. Moreover, Congress has the opportunity to oppose the President's views before the statute is enacted. Signing statements also eliminate the problem of collective intent because the President is one person, as opposed to the 535 congressional members, so his statements fully embody a unitary understanding.

The decisions of Justice Scalia, a widely known textualist, shed some light on this concept. Scalia is known as the most "acerbic critic of legislative history"[208] and is a passionate proponent for the textualist ideals.[209] However, like most textualists, Scalia has not shied away from other extrinsic sources such as treatises and dictionaries.[210] It is possible that presidential signing statements may be one of those extrinsic sources to which textualists may now turn. Before his appointment to the Supreme Court, Scalia relied on an executive signing statement in a 1985 case that came before the District of Columbia Circuit Court of Appeals.[211] Scalia acknowledged the interpretive worth of signing statements again in the 2006 case *Hamdan v. Rumsfeld* where he criticized the majority opinion for ignoring the President's signing statement when interpreting the Detainee Treatment Act.[212] Although opposed to the general use of legislative history, Scalia seems to recognize the importance of the President in the legislative process. His dissent in *Hamdan* suggested "there is no legal difference between the views of Congress and the [P]resident about what a law means."[213]

A recent textualist critique against the use of legislative history has surfaced in the form of a delegation argument. Professor Manning argues that courts should not consider committee reports or sponsor statements as representative of congressional intent because doing so results in legislative self-delegation, which is a constitutionally prohibited practice.[214] Legislative self-delegation occurs when a court grants interpretive weight to legislative history. This effectively permits committee reports or sponsor statements to provide an interpretation of the law on behalf of Congress.[215] Manning contends that judicial re-

208. Koby, *supra* note 71, at 379.

209. *See* Eskridge, *supra* note 82, at 650.

210. *See* Manning, *supra* note 78, at 702-04 & n.135 (discussing instances where Justice Scalia relied on Blackstone's *Commentaries* to determine the definitions of relevant words).

211. Waites, *supra* note 46, at 776.

212. Hamdan v. Rumseld, 548 U.S. 557, 665-66 (Scalia, J., dissenting).

213. Charlie Savage, *Scalia's Dissent Gives 'Signing Statements' More Heft,* THE BOSTON GLOBE, July 15, 2006, at A3.

214. Manning, *supra* note 78, at 675.

215. *Id.* at 706.

liance on legislative history delegates the power to determine statutory meaning to legislative agents, such as congressional staffers.[216]

Presidential signing statements may be seen as a form of delegation because judicial reliance assigns some interpretive power to the Executive Branch. However, this differs drastically from the legislative self-delegation described by Manning. Delegation through signing statements is not offensive to the textualist ideals because the Executive Branch is independent of Congress.[217] The Constitution imposes certain hurdles to enact a bill that are quite costly and burdensome, so it is not surprising that Congress attempts to delegate its law-making authority.[218] And, while delegating to the Executive Branch is more costly than legislative self-delegation,[219] it provides a basis for textualists to rely on signing statements. As Manning notes, "textualists tolerate executory delegation because it is preferable to the alternative—unchanneled judicial application of an assertive nondelegation doctrine."[220] Furthermore, if the President partnered with Congress in creating the law, Congress would feel more comfortable relinquishing some of its authority to the Executive Branch.

While under the purview of the Constitution the President is distinct from the Legislative Branch, he is arguably the 536th member of Congress because of his extensive involvement in the legislative process. Thus, under textualist notions, the argument would follow that deference to signing statements may violate the prohibition against self-delegation. Specifically, judicial reliance on signing statements allows Congress to assign law-making authority to another member involved in drafting bills, the President. It is important to note the President's involvement in legislation. However, under constitutional definitions, the President is not a member of Congress, but the leader of the Executive Branch. While the lines that established the separation of powers are not as definitive as they once were,[221] they still maintain sufficient rigidity to avoid delegation problems between the Legislative and Executive Branches. Moreover, Professor Manning's article explicitly applies to traditional forms of legislation history and may not pertain to the implications of presidential signing statements. Nevertheless, even if the nondelegation argument applies in this circumstance, textualists should not be concerned. If courts adhere to minimal deference, judicial decisions will not be substantially altered. Ultimately, signing statements are help-

216. *See id.*
217. *See id.* at 711.
218. *Id.* at 710.
219. *See id.* at 711 (discussing how delegation to Executive agencies results in diminished control by Congress over legislative meaning and leads to "substantial agency costs" that could be avoided if Congress "resolv[ed] the matter itself").
220. *Id.* at 725.
221. *See supra* Part III(C)(1).

ful within the overall context of statutory interpretation and should not be ignored.

V. CONCLUSION

As one scholar appropriately states, "[w]hatever one's views of presidential power, the [P]resident has the right and perhaps even a constitutional obligation to state his opinion about the meaning of a statute."[222] It is time, however, for courts to affirmatively decide these statements' proper role in statutory interpretation. A decision needs to be made so judges can comfortably apply a unified standard. While one may be quick to dismiss these statements' interpretive worth, the contextual value they offer may outweigh their potential problems. If courts acknowledge the realities of the political process, the President's interpretation of statutory text can offer guidance in clarifying ambiguities. Providing minimal and contingent deference will allow judges to confidently place presidential signing statements in their interpretive toolbox, making it easier for the courts to fulfill their duty to "say what the law is."[223]

222. Bradley & Posner, *supra* note 65, at 363.
223. Marbury v. Madison, 5 U.S. 137, 177 (1803).