Abstract:

The presidential signing statement is one of the more misunderstood and understudied tools that presidents use. In this paper, I will discuss what the signing statement is and through the theory of the Unitary Executive, I will show how they have become important. I will provide a complete picture of how the signing statement has manifest itself over time and how it has become an important political weapon of the executive branch. My approach to the study of presidential power is firmly grounded in the constitution, with the Unitary Executive and the use of the signing statement flowing from the “Oath” clause and the “Take Care” clause of the constitution.
When Governor George W. Bush was campaigning for the presidency, he appeared on the ABC Sunday morning talk show, “This Week with Sam Donaldson and Cokie Roberts.” This was in early January 2000, and he was being asked a number of questions about how a President George W. Bush would govern. One question, from George Will, was aimed at campaign finance reform.

After asking Governor Bush whether he thought the president had a constitutional duty to independently interpret the Constitution, which Governor Bush agreed he could, Will asked him if he would veto McCain-Feingold or Shays-Meehan, the two campaign finance reform bills in Congress because they unconstitutionally infringed upon free speech. Governor Bush did not hesitate in telling Will that he would veto the bill due to its infringement upon free speech.¹

Flash forward to March 27, 2002, and President George W. Bush is fixing his signature onto the “Bipartisan Campaign Finance Reform Bill of 2002,”² and noting that, while not perfect, it will “improve the current system for financing federal campaigns.”³ George Will noted the “stealthy” manner in which he signed the bill, and then noted with bitter disdain that “…[It] is his job to defend the Constitution…” and to those who filed suit to block it, Will noted that “…someone has to do his [President’s] job when he will not.”⁴ Byron York, writing for the “National Review,” noted that Bush could have used “something called the signing statement, which presidents have used in the past to take public positions on bills about which they have reservations, but have chosen to sign.” York argued when President Reagan signed Gramm-Rudman deficit reduction legislation, he publicly disapproved of unconstitutional provisions which the Supreme Court later agreed with in the decision, Bowsher v Synar.⁵ By scurrying out of town without a public statement, the president in effect cut himself off from that avenue.⁶

The president did issue a signing statement, only one that was not done in a formal bill signing ceremony which York referred to. When President Bush issued his signing statement, he noted that there were significant constitutional problems with the bill. Bush argued:
Certain provisions present serious constitutional concerns. In particular, H.R. 2356 goes farther than I originally proposed by preventing all individuals, not just unions and corporations, from making donations to political parties in connection with Federal elections. I believe individual freedom to participate in elections should be expanded, not diminished; and when individual freedoms are restricted, questions arise under the First Amendment. I also have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election. I expect that the courts will resolve these legitimate legal questions as appropriate under the law.7

The fact that President Bush gave lukewarm support to the bill (he did not contact McCain personally upon signing it) and his past statements on the matter clearly suggested that the president was not in favor of the bill. The language of the signing statement may help the president rectify his signature on the bill with his public statements on the matter. True, he did sign it—president’s are often confronted with bills, whether it be appropriations bills or those with tremendous public support (as was the case with the bill he signed) that they reluctantly sign. However, this does not render the president without options. In this case, President Bush could instruct the Justice Department to not defend the law against court challenges, as suggested by Constitutional Law Scholars Akhil Reed Amar and Vikram David Amar.8 This would enable President Bush to both support the popular campaign finance reform legislation and hold true to his earlier promise of not infringing upon First Amendment free speech rights. Whether the President does this remains to be seen.

What is important, and for the most part unexplored, is this power the president exerts through use of a bill signing statement. This paper will explain what a signing statement is, and through the lens of the Unitary Executive, it will explain why it is important. Third, it will explain how and why the Unitary Executive came to be centralized in the Reagan administration. Fourth, it
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will show how, once the process was centralized, the Reagan administration strategically used the signing statement.

**The Bill Signing Statement**

The signing statement is one of the more misunderstood powers that presidents use. It is largely overshadowed by such things as the executive order or the proclamation. What one finds when they learn about the signing statement goes something like this: Andrew Jackson was the first to use a signing statement when he “sparked a controversy” over his resistance to an internal improvement measure.

John Tyler received a public rebuke from the House of Representatives when he issued a signing statement over an apportionment bill. And then the Reagan administration created quite a stir when Attorney General Ed Meese announced at a National Press Club conference in 1986 that the Reagan administration planned on having the signing statement included in the “Legislative History” section of the *United States Code Congressional and Administrative News* (USCCAN).

Absent from the discussion is any sense of context—how many signing statements have been issued to date, for example? Who issued the first signing statement? Have they been used steadily from president to president, or do they vary? And why was the move by the Reagan administration significant (discussed below)?

At the surface, signing statements are quite simple to understand. They are nothing more than a statement issued by the president, mostly in written form but also as times “announced” during a bill signing ceremony. These statements are generally meant as a way for the president to communicate, in a “public” way, his understanding of the bill he is signing into law. The audience for the signing statement can vary. There are instances in which the president will issue two signing statements—one done in written form and one done in a public ceremony in the Rose Garden at the White House. For example, in signing the “Railroad Retirement Solvency Act of 1983,” President Reagan released two different bill signing statements. The written statement,
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which was three paragraphs long, was specifically meant to explain to the Congress and the executive branch agencies the constitutional problems of having the Railroad Retirement Board submit reports concurrently to the President and the Congress. However, in the formal bill signing ceremony on the same day, which constituted seven paragraphs, there was no mention of the constitutional defects of the bill. Instead, President Reagan took time to single out members of Congress, many of whom were fellow partisans, for the good work that was done on the bill.

I have identified three categories in which signing statements “fit.” The first category I refer to as “Constitutional.” The second category I refer to as “Political.” And the third category I refer to as “Rhetorical.”

**Constitutional Signing Statements**

Constitutional signing statements are those statements that address constitutional defects in a section or sections of legislation. The president outlines what the defect is and what he or she intends to do about it. This can range from urging Congress to pass legislation that corrects the defect to directing the Department of Justice not to defend the section to treating the section as a “nullity.” Usually the threat by the president is sufficient to have corrective action taken by the Congress. However, when the threat fails, the president must make good on it.

For example, one of the first actions that President Carter took upon assuming the presidency was to pardon the Vietnam War draft resisters. While the prerogative of the president to pardon was deemed to be absolute, several members of Congress who disagreed with the president’s actions found a way to get around the pardon problem. In an appropriations bill for the “Departments of State, Justice, and Commerce, the Judiciary, and related agencies for fiscal year 1978,” an amendment was added that prohibited “the use of funds under this Act to carry out the President's amnesty program.” When President Carter signed the law, he noted his objection to the amendment as it interfered with his pardon power, was an unconstitutional bill of attainder, and denied due process of the law.
To carry out the pardon, President Carter would have to process all of the re-entry applications for those draft resisters that left the country. Even though the Justice Department announced that the restriction would prevent the re-entry of many of the draft resisters, in the end the Carter administration ignored the amendment and processed all of the applications.21 As Christopher May notes,

By refusing to comply with this spending limitation, Carter effectively precluded judicial review of the limitation and of his action ignoring it. A suit to enjoin implementation of the pardon was dismissed for lack of standing. None of the plaintiffs—who included present and former military personnel, two military wives, the child of a prisoner of war, and two members of Congress—was found to have suffered an injury sufficient to confer standing.22

Nearly all constitutional signing statements involve a perceived encroachment upon executive branch prerogatives, but some also include issues of federalism and violations of individual rights. The constitutional signing statement originates in the Office of Legal Counsel (OLC), located within the Department of Justice. Since the 1950s, the OLC has been charged with carefully monitoring legislation for constitutional violations and telling the Congress prior to the passage of the bill so that the defect can be corrected, or if not before, issuing its opinion in a signing statement regarding the infraction and what the appropriate course of action should be.

Political Signing Statements

Political signing statements differ from constitutional signing statements in that the focus is not legal, although the statement may be structured that way. One target audience for the president in the political signing statement is a preferred constituent. The impact can range from signaling support for the target constituent to interpreting vague or undefined sections of a bill so that policy actually benefits that constituency.

For example, President Bush often objected to the requirement of set-asides in government contracts based on affirmative action requirements. President Bush would often direct executive
branch officials to implement those sections in a “constitutional manner” even though the
Supreme Court, at that time, had upheld the constitutionality of set-asides. President Bush, long
regarded as not conservative enough by the right-wing of the Republican Party, was using the
signing statement as an opportunity to pitch his “rightness” to the conservatives within the GOP.
Or, in a signing statement to the Portal to Portal Act, President Truman interpreted an undefined
term so that it benefited a preferred constituency—organized labor.

A second target audience for the political signing statement is the executive branch agencies.
As presidents began to see the utility in directing bureaucratic agencies on how to implement
policy, the political signing statement is meant to put agency heads on to the same page as the
president.

Unlike the constitutional signing statement, which originates in the OLC, the origins of the
political signing statement vary. It can come from any of the executive branch agencies or from
the White House staff.

The constitutional and political signing statements have also taken on added significance, and
attention by scholars, following the Reagan administration’s 1986 move to have them added to
the USCCAN. In addition to serving as executive branch guidance, many legal scholars have
also noted that signing statements have been meant to serve as guides to judicial interpretation of
statutes. Judges often time will look to other political documents when it is unclear what the
Congress intended the meaning of a statute to be.

There are occasions in which a tug of war breaks out over whether a statement will be attached
to a bill the president is signing. More often than not, the battle is between the Office of Legal
Counsel and the policy wonks in the White House. For example, in signing the “Immigration
Reform and Control Act of 1986,” President Reagan made a number of statements that were
highly political and drew a great amount of criticism from members of Congress and the press.
Douglas Kmiec, who worked in the Office of Legal Counsel during this period of time, argued that the bill was

“hijacked” by a few people in other divisions within DOJ and at the [White House] who wanted, somewhat imprudently in my judgment, to express political rather than legal concerns that did not fairly reflect, at least in part, either legislative intent or a constitutional evaluation that necessarily must qualify that intent.”

In another instance, Douglas Kmiec recounts the reauthorization of the Whistleblower Protection Act, which had originally been passed as part of the “Civil Service Reform Act of 1978.” Kmiec notes that during the original debate over whether to sign the act, John Harmon, then-head of the OLC, protested that the provisions for a special counsel was an unconstitutional infringement upon the president’s removal power as well as a violation of the separation of powers doctrine. In 1986, the House moved to authorize additional powers to the special to give it the authority to sue executive branch agency officials independent of the wishes of the attorney general or the president. The OLC argued that this would “place the President in an untenable position of speaking with two conflicting voices in federal courts.” Further, the OLC objected to a provision by the House that allowed the special counsel to transmit materials to the Congress without review of the executive branch. Kmiec notes that OLC’s objections were never brought to the attention of the Congress because a few late-in-the-term Reagan OMB appointees apparently wanted to make the transition to the Bush administration. Thinking that a “kinder gentler” Bush would be more tolerant of legislative usurpation, these individuals informally signaled Congress that OLC’s constitutional concerns need not control the legislative outcome.

Kmiec notes that when the Whistleblower Protection Act of 1988 passed and was sent to the White House, he and others in the OLC were shocked to see the offending provisions still in the bill and recommended that President Reagan veto the bill. Worried that this could create an election year issue, those on the Bush campaign team argued vigorously for the president to sign
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the law. In the end, Reagan pocket vetoed the bill and OMB had to admit to Congressional leaders that it had been less than forthcoming.\(^{36}\)

**Rhetorical Signing Statements**

The rhetorical\(^{37}\) signing statement is often very similar to both the constitutional and political signing statements. Yet a key difference warrants their inclusion into a separate category. Unlike the first two categories, the rhetorical signing statement is not making a blunt claim over constitutional issues or issues of policy. What it involves is the president’s “attempt to mobilize political support by means of public comments.”\(^{38}\)

In this type of statement, which constitutes the majority of all signing statements made, the president attempts to draw the public’s attention to something positive or negative largely to benefit his office, favored constituents, or fellow partisans. As Mark Killenbeck found in his analysis of presidential signing statements, that it is

… difficult to believe that anything other than sheer politics motivates pronouncements like President Reagan’s statements regarding “overzealous and unnecessary regulation” of the steel industry, President Bush’s pronouncement that “the chief highlight” of the Energy Policy Act of 1992 is that “Government will serve as the partner of private enterprise, not as its master,” or President Clinton’s declaration that “it was America’s families who have beaten the gridlock in Washington to pass” the Family and Medical Leave Act of 1993.”\(^{39}\)

President Clinton was known for using the rhetorical signing statement largely for “hortatory” means.\(^{40}\) One example is the use of the signing statement to appease a favored constituency, the environmental lobby. Environmentalists waged a fierce battle during the 104\(^{th}\) Congress to defeat a rider to the “Omnibus Consolidated Appropriations Act, 1997”\(^{41}\) that amended the Endangered Species Act and the National Environmental Policy Act. When they failed to win in the Congress, they were pleased\(^{42}\) to have obtained a paragraph in the bill signing statement by the President.
The Unitary Executive

After President Bush left office, a group of legal scholars who mostly worked in the administrations of Presidents Reagan and Bush, came to be known as “Unitarians” for advancing a theory of presidential power that was emphatically presidential-centered. This theory, known as the Unitary Executive, suggests that the executive, as a coordinate branch of government, may independently interpret the Constitution. Further, the president is the only nationally elected official, which makes him accountable for how the laws are executed. Therefore, the president is best situated to coordinate agency activities and by virtue of his accountability and central position, he can bring energy to the administrative process that agency officials cannot muster by themselves.43

Two key principles provide meaning to the Unitary Executive. Those principles are coordinancy and accountability. Coordinancy is often traced back to James Madison’s argument in Federalist 49: “The several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”44 In our system of government, each branch of government is given constitutional powers that cannot be delegated to or infringed upon by the other branches. By “independently interpreting the Constitution, presidents need not adhere to ‘unconstitutional’ acts of Congress or to Supreme Court decisions.”45

Critics of coordinate power contend that it disrupts the balance of powers laid out in the Constitution, specifically ignoring the well-established edict of Marbury v Madison (1803) that the courts have the final say in defining “what the law is.” In response to this, coordinate power means just that—all three branches have independent powers to interpret the Constitution and the mechanisms to check inappropriate behavior of the other branches. As Michael Stokes Paulsen noted:
…the President legitimately may nullify statutes and court judgements by refusing to enforce them, acting on the basis of his independent legal judgment. But Congress legitimately may seek to enforce its contrary view by declining to appropriate (or affirmatively cutting off) funds for programs desired by the President or for entire executive branch agencies, by refusing to confirm appointees (or simply abolishing their offices), or by pursuing a legislative agenda the President despises until the President capitulates or compromises. In a bare-knuckled brawl, Congress can reduce the President to little more than a bureaucrat drawing a fixed salary, vetoing bills, granting pardons, and receiving foreign ambassadors—but without funds for hosting a state dinner (or even taking the ambassador to McDonald’s).46

Indeed, this is exactly what happened when the Reagan administration ignored a statutory mandate and a court order regarding the “Competition in Contracting Act of 1984 (CICA).”47 The Reagan administration determined that the Comptroller General was not an executive body and therefore did not have a constitutional right to stay the awarding of any contract. The Justice Department and the Office of Management and Budget (OMB) ordered the executive branch agencies to ignore that particular provision of the CICA. A lower court ruled against the administration, and newly appointed Attorney General Edwin Meese informed Congress that the Reagan administration would appeal the ruling and until the appeals were exhausted, it would continue to ignore the provision of the law. This action drew a strong outcry by the press, members of Congress, and legal scholars. In response, the House Judiciary Committee threatened to cut-off Justice Department funding, at which point Meese and the Reagan administration capitulated and agreed to enforce the provision in question.

The second part of the foundation to the Unitary Executive is the principle of accountability. Since the president is the only nationally elected official, allowing him or her to exercise control over discretionary decisions by bureaucratic agencies (the major theme of the “administrative presidency”) enhances political accountability. As Elena Kagan argues, “When Congress delegates discretionary authority to an agency official, because that official is a subordinate of the
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President, it is so granting discretionary authority (unless otherwise specified) to the President.\\(^48\) Congress, when it passes a bill on to the president, does not have the means to monitor how the bill is carried out. The president has the resources to ensure that a bill is “faithfully executed.” Further, by giving the president centralized control, it relieves “the individual agencies from the political pressures brought by specialized constituencies.”\\(^49\) And since the president has electoral concerns, and giving that he or she is nationally elected, he or she has “incentive(s) to steer national resources toward the 51% of the nation that last supported him [sic] (and that might support him [sic] again), thereby mitigating the bad distributional incentives faced by members of Congress.”\\(^50\)

The theory of the Unitary Executive has been especially contentious, and part of that contention is focused on just how “unitary” the Founding Father’s expected the executive to be. I purposefully do not address this issue. It is my belief that, although important, the argument over the genesis of the executive branch at the Philadelphia Convention does not do much to shed light on the type of powers the president is currently wielding.

I argue that the Unitary Executive is really a product of the political hydraulics of the last thirty to thirty-five years. Two notable events gave birth to the Unitary Executive. The first is the rise of and the attention given to the vast administrative state, beginning with President Nixon and then with every subsequent president. The second is the effect that Vietnam and then Watergate\\(^51\) had on the political system—a popular desire to muzzle the power of the presidency, and the persistence of highly partisan, divided government that created within the presidency a perceptual barrier in interacting with the external political environment.\\(^52\) President’s found it very difficult to move policy, and since presidents were judged on policy achievements, they had to look to other means to advance their policy preferences.

My argument of the Unitary Executive firmly grounds presidential power in the Constitution. While most studies of the presidency over the last half century have been written to Richard
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Neustadt’s “modern presidency” thesis, I am more inclined to side with Professor Richard Pious when he writes that “[The] fundamental and irreducible core of presidential power rests not on influence, persuasion, public opinion, elections or party, but rather on the successful assertion of constitutional authority to resolve crises and significant domestic issues.” Hence, if coordinanc and accountability give meaning to the Unitary Executive, then the constitutional underpinnings of the Unitary Executive flow from the “Oath” Clause and the “Take Care” Clause of the United States Constitution. The “Oath” Clause allows the president to defend encroachments upon executive prerogatives as well as to protect the constitutional rights of individuals. The “Take Care” Clause allows the president to “interpret” legislation in a manner that maximizes executive branch policy preferences.

The “Oath” Clause—First Leg of the Unitary Executive

The constitutional signing statement largely flows from the Justice Department’s interpretation of the “Oath” Clause. The Justice Department, in particular the OLC, has carved out two caveats to the president’s constitutional obligation to defend and enforce statutes: The first is to not defend or enforce those statutes that are “clearly unconstitutional” and the second is to not defend and enforce those that encroach upon the prerogatives of the executive branch. The first caveat “accommodates the conflict between the constitutional mandate that the President execute the laws and his oath to support and to defend the Constitution” while the second caveat “accommodates the occasional conflict between the roles of the President as the chief law enforcement officer of the United States and the role of the Attorney General as the advocate of the executive branch.”

Michael Stokes Paulsen perhaps better clarifies the point of the “Oath” clause acting as a shield for the executive branch:

It is plain from the context that the President’s power to “shield himself” does not mean that the power of constitutional review is limited to the President’s exercise of his veto in order to protect
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his own constitutional prerogatives (though it certainly means at least that). Rather, this check extends to “refus[ing] to carry into effect” (that is, refusing to execute) any that the President concludes transgresses constitutional limits. The power to “shield” oneself is the power (and duty) to refuse to act in complicity with unconstitutional conduct.59 (emphasis mine)

To illustrate just how crucial the OLC regards the constitutional signing statement to the president’s oath to protect the office, in 1993 Walter Dellinger, head of the OLC in the Clinton administration, issued an opinion to White House Counselor Bernard Nussbaum outlining the importance of the presidential signing statement. In part, Dellinger argued:

If the President may properly decline to enforce a law, at least when it unconstitutionally encroaches on his powers, then it arguably follows that he may properly announce to Congress and to the public that he will not enforce a provision of an enactment he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority.60

The “Take Care” Clause—The Second Leg of the Unitary Executive

The political signing statement originates from the president’s obligation to “…take care that the laws are faithfully executed.” The “Take Care” Clause, along with the Article II, Section II allowance for the president to solicit the opinions of the principle officers of the various executive branch agencies to help him carry the laws into execution have been used as a way to implement unified interpretation of the laws that the president is signing. As Michael Herz argues:

The Take Care Clause is backed up by the President’s specific, and unique, oath to “faithfully execute” his office. The use of the passive voice in the Take Care Clause indicates that the President will not necessarily be executing the laws directly, but only overseeing others to ensure their “faithful” execution. [Further], the Take Care Clause uses the active voice to impose a direct responsibility on the President to “take care.” Interpreting statutes to ensure that what the agencies are doing is consistent with the statute, as opposed to some independent policy goal, seems an inescapable part of “taking care” that the agency is faithful to the statute.61
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Further, as the Supreme Court has noted: “Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”

The use of the political signing statement, then, gets at the very root of the “Take Care” power. It is meant to put the executive branch agencies, more than any other actor in government, on the same page as the president when it is time to interpret the meaning of a particular statute. David Rivkin sees the political signing statement as “crucial to the executive branch to put its own house in order and to run it by issuing binding policy directions to its subordinates.”

To insure centralization of executive branch interpretation, the Office of Management and Budget (OMB) has been the key agency that recent presidents have used to place executive branch agencies in line with presidential preferences. As I will discuss below, as presidents turned to administrative control as a way to get around the “gridlock” of divided partisan government, the president, with the strong arm support of the OMB, used the political signing statement as a way to advance the president’s policy preferences.

The Centralization of the Unitary Executive

The Unitary Executive jelled during the Reagan administration. OMB administrative control coupled with aggressive defense of executive prerogatives by the Department of Justice led many scholars of the presidency to conclude an end to the “imperiled” presidency that followed Watergate and the resignation of President Nixon.

At the apex of this process was the 1986 recognition by the Reagan administration regarding the constitutional and political importance of the signing statement. What I will discuss next is how the recognition of that importance led to the decision by the Reagan administration to attach the signing statement to the “Legislative History” section of the USCCAN. This decision did not come out of a vacuum, but was carefully formulated in the Ford and Carter administrations, to which the Reagan administration simply capitalized upon.
In February 1986, Attorney General Edwin Meese gave a speech to the National Press Club that caused a stir. The stir was less about the subject of the speech (gun control) than what Attorney General Meese said at the end, almost as an afterthought. Meese took the opportunity to announce to his audience a recent decision by the administration to have the signing statement included into the “Legislative History” section of the USCCAN. Meese explained the decision was meant:

To make sure that the President’s own understanding of what’s in a bill is the same… or is given consideration at the time of statutory construction later on by a court, we have now arranged with West Publishing Company that the presidential statement on the signing of a bill will accompany the legislative history from Congress so that all can be available to the court for future construction of what that statute really means.66

While this decision drew a great deal of criticism and has since been a staple in the discussion of the signing statement, what has remained unexplored is why did the Reagan administration take the action they did?

To answer this, I will explain the culmination of policies from the Ford and the Carter administrations, as well as a sympathetic nod from the courts, led to the centralization of the Unitary Executive in the Reagan administration.

Precursor to the Unitary Executive—Ford and Carter

The 1970s forced the executive to look to extraordinary powers to advance its policy preferences as well as to protect its prerogatives. Beginning with the Ford administration and then continuing through the Carter administration, the Office of Legal Counsel aggressively asserted the president’s constitutional right not to enforce legislation it deemed to be unconstitutional, even though the president signed the legislation into law.

The Ford administration was emboldened by a number of decisions by the Supreme Court finding sex-based distinctions in the Social Security Act to be unconstitutional. After the
Supreme Court made its decision, the Justice Department scoured through other portions of the bill, looking for those the Court found unconstitutional, and then declined to enforce them.\textsuperscript{67}

During the Nixon administration, the Congress had passed the “Federal Advisory Committee Act” (FACA),\textsuperscript{68} which was meant to open up the presidential advisory process to public scrutiny. An organization that was effected by the act was the American Bar Association’s Standing Committee on the Federal Judiciary. The Committee, since 1946, had been instrumental in assisting the president on judicial selections to the federal bench.\textsuperscript{69} After the passage of the Act, the Nixon Justice Department informed the Chairman of the American Bar Association’s Standing Committee on the Federal Judiciary that, in the view of the Department of Justice, the FACA applied to the ABA Committee, and that at best, it might be able to approach the Congress for an exemption, which was not taken kindly by the ABA.\textsuperscript{70} The ABA threatened to stop its participation in the judicial selection process, forcing the Department of Justice to look at the “possible unconstitutionality of the legislation as it applied to this particular Presidential function.”\textsuperscript{71} The Department of Justice then advised the ABA that “it would proceed on the assumption that FACA did not apply to the Standing Committee.”\textsuperscript{72}

During the Ford administration, the Department of Justice aggressively interpreted the Act to exclude the ABA, with Attorney General Edward Levi issuing an opinion to President Ford that the requirement that the ABA submit to an open meeting violated the separation of powers doctrine.\textsuperscript{73} Every subsequent administration refused to extend the FACA to the Standing Committee on the Federal Judiciary, and during the Reagan administration, the Supreme Court heard the matter of \textit{Washington Legal Foundation v. U.S. Department of Justice and Public Citizen v Justice Department} \textsuperscript{74} challenging the executive’s interpretation of the Act. In a brief filed with the Court, Solicitor General Charles Fried argued that “since 1974, the Justice Department has taken the position that the law does not apply to the ABA.”\textsuperscript{75} The Supreme Court agreed with the executive branch and upheld its interpretation.\textsuperscript{76}
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The single most important thing that tied the presidencies of Gerald Ford and Jimmy Carter together, and was the important catalyst to institutionalizing the signing statement, was the refusal of both presidencies to recognize the legitimacy and constitutionality of the legislative veto.

The legislative veto is used when Congress is delegating power to the executive branch to make decisions in a broad program area. The legislation provides that whenever the power is used in a specific instance, such as passing regulations or shifting funds among appropriation accounts, that Congress (or one house or a committee) be notified of the specific action and have the chance to disapprove that one application of the general delegated power.77

The use of the legislative veto had dated back to the early part of the twentieth century, but in the late 1960s and particularly the 1970s, the Congress began to use more of them as the administrative state grew beyond the oversight ability of the Congress. As Barbara Hinkson Craig observed:

One of the major reasons for Congress’s love affair with the veto in the late 1970s was the discovery of its utility in the regulatory arena. During the late 1960s and early 1970s Congress passed dozens of broad, often vague laws calling for clean air, clean water, safe workplaces, safe products, equal opportunities, and the like. By the mid-1970s executive branch and independent agencies responsible for implementing those laws were publishing new regulations by the hundreds to accomplish the laws’ goals.78

When constituents began to pressure Congress for regulatory relief, Congress began to use the legislative veto to control how the broad laws were being carried out. David Mathews, the Secretary of Health, Education, and Welfare (HEW) in the Ford administration notes that the department’s most serious clashes with the Congress came about as a result of the passage of legislation with broad language and then the subsequent micromanaging of how the legislation was carried out.79

From 1975 to 1980, President’s Ford and Carter objected to the use of the legislative veto a total of seventeen times through the use of the signing statement. Some of the objections were
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meekly worded. For example, when President Ford signed a bill that dealt with child welfare support,\textsuperscript{80} he objected to an amendment that required the Secretary of HEW to submit all proposed standards to the Congress for approval or disapproval.\textsuperscript{81} Ford instructed the Secretary to treat the legislative veto as a "request for information."\textsuperscript{82} However, most of the legislative veto objections were more severe in that the president simply stated that the provision was unenforceable or a "nullity."

The Carter administration was almost singularly focused on the unconstitutionality of the legislative veto. For example, John Harmon, head of the OLC under President Carter told me that

\begin{quote}
…we took the position with regard to the so-called legislative veto devices that the Department of Justice had no obligation to defend the constitutionality of a statute that infringed on the constitutionality dictated separation of powers between the legislative and the executive branch. As the legislative veto effectively gave to one house of congress the power to overturn an executive act, it undermined the constitutional requirement that congress should act only by legislation enacted by vote of both houses subject to the veto of the president. As such it infringed on the President’s veto power. The Executive Branch had the obligation, we reasoned, to defend the powers conferred by the constitution on the institution of the presidency. Therefore, in the Chadha litigation (discussed below) we notified Congress that the Department [of Justice] would not defend the legislative veto device contained in the statute in question and would instead argue that it was unconstitutional.\textsuperscript{83}
\end{quote}

In an example of the Carter administration’s objection to the legislative veto, in 1980, Attorney General Benjamin Civiletti instructed the Secretary of Education, who was faced with a forty-five day wait and report provision in the General Education Provisions Act\textsuperscript{84} to ignore it because it was unconstitutional. Civiletti argued that

\begin{quote}
[O]nce a function has been delegated to the executive branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation.\textsuperscript{85}
\end{quote}

To respond to the number of instances in which the executive branch failed to defend or enforce the legislative veto, Congress was forced to create its own offices to defend statutes not
defended by the Attorney General and then, at the insistence of Representative Elliot Levitas, codified an order that demanded the Justice Department to inform the Congress in every instance in which the executive either nullified a provision in a statute or refused to defend a statute in court.\footnote{86}

While the Justice Departments in both the Ford and Carter administration were busy using the signing statement to void provisions of legislation deemed to be unconstitutional, administrators within the executive branch were busy looking for ways to control policy that the president preferred, but was unable to get passed in the volatile political environment.

The Nixon administration, and its distrust of the bureaucracy, was credited as the first to attempt to strategically organize the executive branch in such a way to insure that the president’s policy preferences were written into the implementation of law. The strategy was coined the “administrative presidency” by Richard Nathan\footnote{87} and involved bypassing the Congress in an effort to “effect domestic policy directly through control of agency discretion.”\footnote{88} For President Nixon, Watergate effectively ended the chance to put the administrative presidency into practice, but the idea did not end with the resignation of the president. In essence, it was perfected by the Reagan administration, which normally gets the credit for making the administrative presidency work. However, as I will discuss below, the pieces of the administrative presidency were put in place by the Ford and Carter administrations, and with that a key piece of the Unitary Executive—centralization of policy within the executive branch as a means to administrative control.

Marissa Martino Golden writes that the

\begin{quote}
The administrative presidency is a management strategy designed to ensure bureaucratic responsiveness to the president. It is intended to help presidents achieve their policy goals administratively through the bureaucracy rather than legislatively through Congress, and to bring the bureaucracy to heel. It consists of a set of tools whose purpose is to reign in the bureaucracy, overcome bureaucratic advantages, and enable
\end{quote}
presidents to achieve their policy objectives without requiring congressional consent.89

A key element of the administrative presidency that is also a key piece of the political signing statement is the centralization of policy by the Office of Management and Budget. Not only does the OMB make final budgetary decisions, but also, and important to the Unitary Executive, it manages personnel in such a way to insure that when they exercise discretion, it is done with an eye to the president’s policy preferences.

Both Presidents Ford and Carter sought to centralize policy by subjecting agency rules to a cost-benefit process. President Ford, who implemented a scaled-down version of the policies that President Nixon put in place, used an “inter-agency review process to encourage greater analytical rigor by agencies, particularly regarding the costs of regulations.”90 President Carter required his agencies to “submit analyses of major proposed rules—including a description of alternatives and a comparative evaluation of their economic consequences—to the Regulatory Analysis Review Group, a new body consisting of decisionmaking authority to rest with the initiating agency.”91

In addition to policy decisions to attempt discretionary centralization within the Oval Office, Presidents Ford and Carter were also aided by a couple of key Supreme Court decisions. In the case “Mathews v Eldridge,”92 the Supreme Court upheld the refusal on the part of the Secretary of Health, Education, and Welfare to give social security recipients a right of a hearing prior to termination of social security benefits. The Court felt that granting such a right was an unreasonable burden on agency resources. More importantly, the Court felt that the Secretary made a reasonable interpretation of the Social Security Act where the law is silent. In the case “Vermont Yankee Nuclear v Natural Resources Defense Council, Inc. et. al.,”93 the Supreme Court ruled that lower courts could not place extra-statutory restraints on agency rulemaking beyond those that were already established in the Administrative Procedure Act (APA). This is
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important in that rulemaking could now come from executive orders that required review by the OMB and not the courts.\(^9^4\)

Neither Ford nor Carter were successful in completing administrative control over the policy process, which would explain how little the political signing statement was used during their terms in office. Ford did not use one political signing statement and Carter issued only eight.\(^9^5\) However, what they were important for was laying the groundwork for the Reagan administration’s unique defense of the prerogatives of the presidency and for the push of Reagan policy preferences through the executive branch.

**The Reagan Administration and the Unitary Executive**

The aggressive use of the signing statement during the Reagan administration that lead to the 1986 decision to attach it to the “Legislative History” section of the USCCAN came about as a result, as I will argue below, of two key factors. First, the hostile relationship the Reagan administration had with the Congress from 1982-1989 and second, the amount of effort the Reagan administration put into administrative control from the moment it took office. Taken together this congealed the Unitary Executive within the presidency, which has lead to a strategic use of the signing statement ever since.

It is incumbent to mention the blueprint that the Reagan administration used to model how to govern. This blueprint outlined the Unitary Executive by calling for a centralization of policy within the executive branch and for a greater policy role for the Justice Department.

The blueprint, which was laid out in the Heritage Foundation’s *Mandate for Leadership*,\(^9^6\) recommended first that the Justice Department take an expanded role in making institutional changes to give it greater control over policymaking within the executive branch and greater leverage to protect the prerogatives of the president. Second, the Heritage report called for greater presidential control over the bureaucracy
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Turning first to the effect that the hostile relationship the Reagan administration had with the Congress, I begin by noting President Reagan really only enjoyed one year of positive relations with the Congress. In 1981, President Reagan received 82% in Congress on roll call votes with those who supported positions the administration took. However, in every subsequent year Reagan lost support within Congress for his policy initiatives, bottoming out in 1987 when he was only able to win 43.5% of the 177 roll call votes on which he took a position. As Roger Davidson observed: “Reagan got his licks in early in 1981. By 1982 he had a hard time selling them cheap lemonade.”

Key in the loss of support in Congress was the loss of the coalition of conservative Democrats and moderate Republicans who had made Reagan’s 1981 successes happen. President Reagan spent a great deal of time in 1981 courting conservatives in Congress to help pass many of his legislative initiatives. For example, by wooing Republicans in the Senate in 1981, President Reagan narrowly won a contentious battle over the sale of aircraft with advanced radar equipment to Saudi Arabia. By 1987, the year in which the President scored the lowest on roll call votes, he vetoed the first two big bills of the year—bills that dealt with water treatment and highway construction. Despite his trip to Congress to meet with wavering Republicans over the issue of overriding the President’s vetoes, he could not get one Republican to switch, resulting in the override of his vetoes. In fact, President Reagan had nine of his vetoes overridden in his eight years in office, a rate matched or exceeded by only three previous presidents in the 20th century, clearly pointing to the extent of the division between the Congress and the administration.

In addition to his loss of support in Congress, President Reagan also suffered electoral defeats in every election in which he was president. While President Reagan won easily in his re-election bid in 1984, members of his party did not. In 1982, the first midterm test of the administration, the Republicans suffered the worst midterm losses for a President since any administration dating
back to 1922. The gains by the Democrats (a net gain of 26 House seats) embolden the
Democrats to challenge the administration’s claim of a “mandate.” This meant that the
Democrats were set to challenge the Reagan Revolution of tax cuts, an increase in defense
spending, and the major cuts in domestic spending. In 1984, despite Reagan’s impressive victory
over Walter Mondale (538 electoral votes with 54% of the popular vote), Republicans running
for Congress did worst than they expected. In the 1984 election, Republicans picked up only 14
House Seats and lost two Senate seats, setting up the 1986 shift in power to the Democrats.

With these losses, the Congress was set to battle the president over policy and to challenge
some of the constitutional issues that the president was raising—particularly those issues that
were raised in the signing statement.

An example of the challenges the administration made involved the successful use of the
signing statement to challenge the legislative veto. In 1983, the Supreme Court ruled on a case
involving the constitutionality of the legislative veto. That case, “INS v Chadha,” was actually
initiated in the Carter administration. In late December 1980, when a federal appeals court ruled
that the legislative veto was unconstitutional, President Carter seized upon the opportunity to
announce that 150 bills containing the legislative veto would be challenged. Governor Ronald
Reagan, who was running as the Republican candidate for President, had endorsed the legislative
veto as a constitutional congressional prerogative. Governor Reagan had endorsed the legislative
veto as an aid to control the administrative state, which fit into the anti-regulation rhetoric of his
campaign.

However, when Governor Reagan became President Reagan, the support for the legislative
veto dropped, and the Reagan Justice Department announced it would support Chadha in his
effort to find the legislative veto unconstitutional. This switch in positions resulted in an angry
backlash from members of Congress. In particular, Elliot Levitas, a champion of the legislative
veto, noted that he and Congressman Trent Lott went to see Vice President Bush, who was the
head of the Task Force on Regulatory Reform, to ask him why the administration was changing its position on the legislative veto. Levitas said:

> Vice President Bush, in a moment of startling tangent, said to us: “You have to understand that when we were supporting the legislative veto, we were running for office. Now the administration is ours, and we don’t want any interference from Congress.”

The Supreme Court decided, in a seven-to-two majority that the legislative veto was an unconstitutional violation of the Presentment Clause. What gave the Reagan administration an added boost to the decision was the attention the Supreme Court gave to the signing statement. In footnote 13 of the decision, the Court wrote that:

> “…11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional. Perhaps the earliest Executive expression on the constitutionality of the congressional veto is found in Attorney General William D. Mitchell's opinion of January 24, 1933, to President Hoover. 37 Op. Atty. Gen. 56. Furthermore, it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds. For example, after President Roosevelt signed the Lend-Lease Act of 1941, Attorney General Jackson released a memorandum explaining the President's view that the provision allowing the Act's authorization to be terminated by concurrent resolution was unconstitutional.”

The Reagan administration did not really intend, as a goal, to get rid of the legislative veto. When the OMB sent a memo telling lower branch agencies to disregard legislative vetoes, Congress responded by “tying the administration’s hands with even stricter, ‘legally binding, restrictions on spending decisions.” OMB Director James Miller promptly rescinded the order, noting that “I believe the congressional leadership is now fully aware of the principle involved. We have made our point…” Jessica Korn adds “White House officials in the Reagan administration knew that there were no gains to be won from Chadha because they were well
aware that Congress’s power to exercise control over administration did not depend on shortcuts through constitutional procedure.”

The larger victory for the administration was the test of the signing statement. The Reagan administration would use the signing statement to curb future encroachments by the Congress, most of which were met with success.

A second major successful use of the signing statement came when President Reagan signed the high profile “Balanced Budget and Emergency Deficit Control Act, 1985,” or more popularly known as “Gramm-Rudman-Hollings (hereafter GRH).”

GRH was designed to eliminate the budget deficit by the year 1991. In order to accomplish this, the president’s budget and the congressional budget resolution were to meet statutory decreases in spending each fiscal year. “If both the Congress and the president failed to meet these targets and the deficit exceeded the statutory allowance of more than $10 billion, a ‘sequestration process’ is triggered to make across the board cuts to meet the target.” The money was then taken from defense and social spending programs.

The body charged with the sequestration of the funds was the comptroller general, which would review reports issued by the Congressional Budget Office (CBO) and the Office of Management and Budget (OMB), and then decide on what adjustments needed to be made. The comptroller general was an agency within the General Accounting Office (GAO), which is an agent of Congress.

When President Reagan signed the bill into law, he issued two constitutional objections to the bill. First, in a separation of powers objection, he noted that both the directors of the CBO and the comptroller general in the budget process were given executive powers, and as such, were not appointed by the president. Second, he argued that the responsibilities given to the comptroller general to terminate or modify defense contracts for deficit reduction purposes violated Chadha.
President Reagan was not alone in this assessment. Within hours of signing the bill into law, Representative Mike Synar (D-OK), along with eleven other members of Congress as well as the National Treasury Employees Union, filed a suit in federal district court for D.C. challenging the constitutionality of the authority vested in the GAO to make automatic cuts. On July 7, 1986, the Supreme Court issued its’ decision in which it upheld the district court’s ruling that the deficit reduction procedure was unconstitutional.

In the decision, Bowsher v Synar (1986), the Court, in footnote one, relied upon President Reagan’s signing statement issued when he signed GRH into law. The Court validated both objections raised by President Reagan. It held that the powers given to the comptroller general violated the separation of powers doctrine in so far it does not give the president the right to remove officers involved in executive powers. Further, the deficit reduction provisions violate the separation of powers doctrine by giving executive powers to an agent of Congress.

The use of the signing statement to protect presidential prerogatives was not totally successful. When President Reagan signed the “Deficit Reduction Act of 1984,” he had made the same objections to the comptroller general provisions that were successfully made in GRH. However, when the Reagan administration sought to unilaterally enforce its objections, the Congress forced a retreat after threatening to cut-off the appropriations for the Justice Department.

The administration had also lost a number of public fights with the Congress over executive privilege and the constitutionality of the independent counsel. Part of what emboldened the 1986 Westlaw decision was the track record the Justice Department had obtained through use of the signing statement, particularly the attention the courts were giving to the presidential signing statement, but also bitterness and the polarization in the relationship the administration had with the Congress. Not only would the administration lose the Senate, which lurched to the left following the 1986 midterm elections, but also Attorney General Ed Meese got a taste of what
working with the Congress would be like when the Senate held up his confirmation for 13 months, a period in which a number of embarrassing business dealings of Meese were made public. In the end, Ed Meese was confirmed as Attorney General, but not without the realization that it would take all the administration could muster to hold back the Congress from encroaching upon executive prerogatives.

Administrative control became a high priority and would play a critical role in 1986 when the administration was looking for ways to insure control over its agenda. Early on, when the transition team was putting people into place, it was not unusual for those who were to be installed into key positions to be required to pass an ideological litmus test. The individual was asked, for example, whether he was a Reagan supporter? Was he a Republican? And most crucial, was he a conservative? Pendleton James and Lyn Nofziger, two gentlemen charged with being the political headhunters for the administration, had their own set of criteria for choosing the right appointees for the bureaucracy:

1. Are you a Carter appointee? If so, you’re rejected.
2. Are you a Democrat who didn’t work for Ronald Reagan? If so, you’re rejected.
3. Are you a Republican? Are you the best Republican for the job?
4. Are you a Ronald Reagan-George Bush supporter?
5. Did you work in the Reagan-Bush campaign? How early before the convention?
6. Are you the best qualified person for the job? But that’s only number 6.

The Reagan administration had made, as part of the campaign, a run against the bureaucracy. As Bert Rockman stated: “Political appointees make policy; career executives manage it.” Because of civil service reforms enacted in the Carter administration, the Reagan administration was able to appoint 5,000 of “their” people, who were all carefully screened to insure they shared, enthusiastically, the President’s agenda. With respect to the choosing of the “right” people, part of the team who was making these choices was Ed Meese. As Meese notes:

[W]e sought to ensure that all political appointees in the agencies were vetted through the White House personnel process, and to have a series of orientation seminars for all high-ranking officials on the various aspects of the Reagan program. We
wanted our appointees to be the President’s ambassadors to the agencies, not the other way around.\textsuperscript{128}

Strategic personnel was only one aspect to administrative control. The other key component of administrative control, which goes to the heart of the Unitary Executive, is policy centralization within the Office of Management and Budget. As Marissa Martino Golden argues, “When used strategically, the OMB makes all the final budgetary decisions and prevents federal agencies from having recourse to Congress.”\textsuperscript{129}

To effectively centralize OMB control, the Reagan administration relied upon two key executive orders—EO 12291\textsuperscript{130} and EO 12,498.\textsuperscript{131} Executive Orders 12,291 and 12,498 required administrative agencies to obtain OMB cost-benefit analysis and clearance before issuing new rules and regulations.\textsuperscript{132}

EO 12,291, which was issued in February 1981, contained two key elements that led to centralized control. The first, which had to do with “Major” rules (defined as those having a projected economic impact in excess of one hundred million dollars per year) had to be submitted to the OMB’s Office of Information and Regulatory Affairs (OIRA) sixty days before the publication of the notice in the \textit{Federal Register}, and then again thirty days before their publication as a final rule.\textsuperscript{133} The second, which had to do with non-major rules, required their submission to the OMB ten days prior to notice and to final publication. The OMB was empowered “to stay the publication of notice of proposed rulemaking or the promulgation of a final regulation by requiring that agencies respond to its criticisms, and ultimately it may recommend the withdrawal of regulations which cannot be reformulated to meet its objections.”\textsuperscript{134} Joseph Cooper and William West argue that EO 12,291 was important in enhancing presidential control of the federal bureaucracy—something previous administrations had attempted and failed to do. Cooper and West note that:

\textit{Whereas traditional mechanisms, such as budgeting, appointments, and reorganization, often restrict executive}
influence to the contours of administrative policy, the Reagan order allows the president and his agents to monitor and influence the substance of individual regulations. This expansion in presidential power is tied both to doctrine and events. Arguments for a strong presidency became more and more compelling in the 1970s as government continued to expand and allegations of "interest group liberalism" gained currency. Clearly the Reagan order reflects the view that the president, as the prime representative of the public interest and as the official best suited to coordinate executive decision making, should control the administrative process in opposition to the centrifugal forces of subgovernment politics. The power of EO 12,498 is that it allowed “OMB control of the boundaries within which individual rules may be formulated.”

Taken together, these two executive orders have allowed the White House to impact the regulatory process at an early stage and often against the policy wishes of agency heads. Again, Cooper and West suggest that:

[the] requirements of the Reagan order, together with the other sanctions available to OMB and the president, have encouraged a good deal of informal monitoring and communication. As a former staff member of EPA has stated, "You don’t spend two years thinking about a regulation without thinking about whether OMB is going to shoot it down."

The final piece of the puzzle to insuring centralized administrative control and completing the final portion of the Unitary Executive came about as a result of the Supreme Court case *Chevron USA v National Resources Defense Council* (hereafter referred to as *Chevron*).

The case dealt with administrative interpretation of the “Clean Air Act Amendments of 1977.” The case dealt with states that were allowing companies that had several plants spread across a geographical area to operate as one plant, or as the stationary source. The concept,
known as the “bubble” concept, permitted an “existing plant that contains several pollution-emitting devices [to] install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant.”[141]

While the details of the case are not important, what is important is how the Court settled the issue of what to do with a vague or ambiguous concept not clearly defined by the legislative history of the case. The Supreme Court, in deciding the case, adopted a two-part guide to judges in determining “intent.” What the Court said was:

If the reviewing court, “employing traditional tools of statutory construction,” determines that Congress has spoken directly on a precise issue, the court “must give effect to the unambiguously expressed intent of Congress.” If after examining the text and legislative history of the statute, the reviewing court determines that a statute is silent or ambiguous regarding a particular issue, the court must defer to any reasonable interpretation made by the implementing agency.[142]

Chevron then allowed the administrative agency, in the absence of clear, congressional intent and within reasonable statutory interpretation, to interpret the meaning of the law. Taken with the two executive orders, that pushed “interpretation of the meaning” of the law up to political officers within the executive branch—to the OMB and the White House staff. Doug Kmiec noted that Chevron was key to getting the courts to recognize executive branch interpretation of the law, and to recognize the importance of the president’s views in informing that interpretation.[143]

This returns us to the 1986 decision to have the signing statement placed into the “Legislative History” section of the USCCAN. As I noted above, the decision has long been regarded as significant, but why it was significant has gone unexamined. I have argued that the decision was a natural result of the Reagan administration’s attempt to insure unitary executive branch control, both to protect the prerogatives of the Office of the Presidency and to place presidential interpretation into the minds of agency heads when they sought to interpret vague or undefined sections of a law.
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The 1986 Westlaw Decision

Not long after Meese took over as Attorney General, he began to convene early morning “brainstorming” sessions, held in the Attorney General’s conference room, in which all the division heads would gather to discuss important and immediate business. This in particular would focus on how to advance the President’s legislative agenda with a Congress that was less than compliant.

A bonus for the administration was to have on staff some very talented people, particularly working in the Office of Legal Counsel, who would turn to the creative ways in which the president could insure his control over the legislation he was signing into law. Among those people were Douglas Kmiec and Steven Calabresi, both currently constitutional law professors. It was Calabresi who identified the signing statement as a significant tool and that the administration should contact the West Publishing Company to have it included in the “Legislative History” section of the USCCAN. And Kmiec told me that the signing statement would become a crucial vehicle for the president to give his subordinate officers direction. Kmiec stated: “It was crucial for the administration to give executive top-down on inevitable interpretation, rather than relying solely upon the far less transparent judgment of someone in an executive agency applying the law for the first time.” Why was this crucial? As I noted before, and reflected in my discussion with Kmiec, the Chevron decision allowed the president’s interpretation to become important absent a finding of clear legislative intent. So for Calabresi and Kmiec, the signing statement was an important administrative tool, going back to the early days of the Reagan administration, to reign in centralization over the vast administrative agencies. As to whether it was successful in achieving administrative control, Kmiec told me:

I do think the initiative was successful insofar as it conveyed presidential direction to members of the executive branch at the earliest possible point of implementation. In other words it let agencies know that their work product under new law was not only to reflect their considered judgment, but also that of the
President, who unfortunately can sometimes seem like a distant abstraction when one works in a sprawling administrative agency.\textsuperscript{148}

But for Attorney General Meese, the signing statement had an additional advantage beyond administrative clearance and control. For Meese, the importance of attaching them to the “Legislative History” section was to place the president’s understanding of the meaning of a bill along side the congresses understanding. Meese told me that:

[I]t was felt that the president, in signing a bill, should also have a way of expressing his view of the bill, particularly in regard to certain provisions of a bill where he might have questions about his constitutionality and to be indicated that he had those questions and why those provisions of the bill might not be enforced.\textsuperscript{149}

Up to this time, the signing statement had been viewed as “ancillary to the bill,”\textsuperscript{150} and as nothing more than a press release. The only way, according to Meese, to get the president’s views into the statute books was to have it included as part of the legislative history section of each bill.\textsuperscript{151}

The political and the constitutional signing statements were a deliberate outcome of the Unitary Executive, brought about by the Reagan administration’s search to insure maximum centralized control over the protections of the office and of agency interpretation.

It was not long after Meese made the announcement that the administration became engaged in some high profile, and effective, uses of the signing statement. In the three examples discussed below, the Reagan administration was able to take advantage of unresolved debates in Congress to push its interpretation of vague and undefined sections of law.

In the first example, the Reagan administration took advantage of a contentious battle in Congress regarding the “Safe Drinking Water Amendments of 1986.”\textsuperscript{152} In the bill signing statement, President Reagan objected to mandatory enforcement language as a violation of executive discretion.\textsuperscript{153} President Reagan’s interpretation of the language, “which permitted executive discretion, directly contradicted a Senate Committee report and disregarded the fact
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that the statute replaced the prior discretionary "may" language with a mandatory "shall." As William Popkin notes:

This interpretation not only attempted to resolve an unresolved, contentious political debate, but also undermined the statutory structure mandating federal enforcement, as evidenced by the fact that "shall" replaced "may" in the statutory text. This presidential foray into creating legislative history evoked a critical response in the New Republic and a defense in the National Law Journal from a Deputy Assistant Attorney General.

A second, and more high profile example of the strategic use of the signing statement arose after President Reagan signed into law the “Immigration Reform and Control Act, 1986.” Reagan issued eight separate signing statements with the law, three which made constitutional objections and five that made political interpretations. The most contentious interpretation had to do with the “Frank” Amendment to the bill. For two years prior to the passage of IRCA, Congressman Barney Frank had been trying, unsuccessfully, to build into law protections that would benefit workers who were fired from a job due to discrimination. In IRCA, Congressman Frank was successful in getting the House to pass his amendment to the bill. However, when the bill went to conference, the amendment (section 247B) was left intact but the meaning behind “discrimination” was stripped away. When President Reagan signed the bill into law, he defined discrimination as discriminatory intent rather than disparate treatment. The significance is that discriminatory intent shifted the burden of proof from the employer unto the employee. Congressman Frank charged that the Reagan administration was “intellectually dishonest” and the shift in burden “tells the bigots how to be smart and evade the law.”

Even Doug Kmiec, a champion of the signing statement noted that:

I objected internally at the time, but alas, everyone in a political administration does not always play their assigned roles. Every organization has a few mavericks.
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In addition to Congressman Frank, other members of Congress expressed dismay at what the administration had done. Kmiec tells of a tongue lashing he received from Senator Ted Kennedy for attempting to subvert the legislative will. When the final rule was published, the interpretation of the Reagan administration prevailed.

A final example of the effective use of the signing statement following the 1986 Westlaw decision came upon the signing of the “Sentencing Act of 1987.” In it, President Reagan once again took advantage of a contentious debate between the House and the Senate to express his understanding of the legislation. President Reagan issued three separate signing statements that had the effect of having greater retroactive impact and less judicial discretion, which sided with the Senate view over the House’s view. In 1989, the Supreme Court upheld President Reagan’s interpretation in the case “US v Story.” In the Story decision, the Court noted that the Department of Justice participated in the negotiations in Conference and that President Reagan, in his bill signing statement, had agreed with the Senate’s understanding of the definitions and the Court relied upon that interpretation.

**Conclusion**

This paper argued that over the course of the last thirty years or so, the presidency has used the bill signing statement in a way that enhances presidential power. The reason that the presidency has done this is largely in response to external political changes that made it difficult for any president to bargain or persuade. This difficult political environment forced the president back into the constitution, which served as the foundation to the Unitary Executive. This is more in line with the argument of Professor Pious who urged students of the presidency over twenty years ago that presidential power was constitutional power. It also supports Professor Charles O. Jones contention that the presidency is part of a system of “separate institutions competing for shared powers.” Further signing statements, as well as other creative presidential devices, such as administrative clearance, budget control, presidential war-making, highlight the tendency of the
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presidency in the post-modern period\textsuperscript{167} to respond to the Madisonian nature of the system by relying on increasingly Hamiltonian means.

It should be noted that after the Reagan administration, the trend towards greater protection of presidential prerogatives and administrative control—in essence, the trend toward the Unitary Executive has continued. In the Bush and Clinton administrations, the use of constitutional signing statements by both of these administrations individually exceeded that of the Reagan administration.\textsuperscript{168} Further, President Bush issued more political signing statements than did Reagan while President Clinton issued about the same number as President Reagan.\textsuperscript{169} Finally, and in line with what we know about the Clinton administration, President Clinton issued a number of rhetorical signing statements that far exceeded that of the Reagan and Bush administrations.\textsuperscript{170} The point to make is that those mechanisms that led to the creation of the Unitary Executive have only been further exploited by the presidencies of Bush, Clinton, and now, George W. Bush. It is my hope that recognition of the signing statement and why it is used will help us to better understand the presidency and the nature of presidential power.
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10 I have found that a total of 2175 signing statements have been issued through the end of President Clinton’s term.
11 Here is where most scholars are wrong. President Monroe issued two signing statements, one of which made a constitutional construction of a bill he was signing into law.
12 The largest chunk of signing statements have come during the last thirty years, with a tremendous jump from President Carter to President Reagan.
15 Ibid. pg. 116
20 Ibid.
22 Ibid. pg. 112.
23 Cooper, Phillip J. pg. 206.
24 61 Stat. 84
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F.2d 252, 264-65 (2d Cir. 1982); and Cole v. Farm Fresh Poultry, Inc., 824 F.2d 923, 928 (11th Cir. 1987).


33 Ibid. pg. 340.


35 Ibid. pg. 342.

36 342-43.


40 Phone interview with Jim Yokes, representative in the Legislative Reference Division of the Office of Management and Budget. May 24, 2002.


42 A statement on the Defenders of Wildlife webpage announcing the concession read: “GREEN, Defenders of Wildlife and the Endangered Species Coalition mounted a fierce battle to stop the waiver that failed, but elicited a paragraph in the President’s signing statement regretting that the provision remained in the bill.” http://198.240.72.81/104th.html. Accessed June 19, 2002.


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47 The portion of the CICA under dispute was a section that required that protests over the awarding of government contracts would be referred to the Comptroller General, who would then hold the contract until the dispute was resolved.


50 Calabresi, Steven G. “Some Normative Arguments for the Unitary Executive.” Arkansas Law Review. 48:23, 1995. pg. 35. This does not diminish in his second term. As Peter Shane argues, in the second term the president works to help party members during the mid-term election, he works to help his successor, and finally he works to build a positive legacy. Shane, Peter M. “Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking.” Arkansas Law Review. 48:161, 1995. pg.193.


52 The argument over what effect, if any, the presence of divided government has upon the president’s ability to move policy is well-covered. See, for example, Mayhew, David. Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990. Connecticut: Yale University Press. 1991; Krehbiel, Keith. Pivotal Politics: A Theory of U.S. Lawmaking. Chicago: University of Chicago Press. 1998; Brady, David W., and Craig Volden. Revolving Gridlock. Colorado: Westview Press. 1998. My contention is that presidents, after their initial honeymoon, view a political system that seems almost paralyzing and stifling. Rather than looking at what effect divided government had on the ability to govern, my argument is what effect divided, highly partisan government has at the time the president is attempting to govern.


55 The “Oath” Clause is found in Article II, Section I of the Constitution. It states that the “President will faithfully execute the Office of the Presidency and will preserve, protect, and defend the Constitution of the United States.”

56 The “Take Care” Clause is found in Article II, Section III of the United States Constitution. It obligates the president to “…take care that the laws are faithfully executed.”


59 Paulsen, Michael Stokes. pg. 253.


64 After Watergate and the publication of Arthur Schlesinger’s The Imperial Presidency Boston, Houghton Mifflin, 1973, the public and the Congress sought to reign in presidential power. The presidencies of Ford and Carter caused many to worry that the presidency was hobbled to the extent that the separation of powers was tilted dangerously towards the Congress. See, for example Genovese, Michael A. The Power of the American Presidency: 1789-2000. Oxford. 2001. Chapter 7. The term, “imperiled
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presidency” was highlighted by Gerald Ford, who proclaimed in a 1980 interview for “Time” magazine that “[W]e have not an imperial presidency but an imperiled presidency. Under today’s rules... the presidency does not operate effectively... That is harmful to our overall national interests”.


Public Law No 92-463 (1972).


Ibid. pg. 77.

Ibid. pg. 78.

Ibid. pg. 78.

Ibid. pg. 78.

Easterbrook. pg. 537.


The case was not resolved without a bit of controversy. During the Ford administration, the Assistant Attorney General who worked on the Ford opinion was Antonin Scalia. When the Supreme Court heard the case, Solicitor General Fried had to inform Justice Scalia to recuse himself for conflict of interest. Mauro, Tony. “Well Recuse Me, Just Don’t Ask Why.” Legal Times. December 12, 1988. Pg. 8


Public Law 94-88 (1975)


20 USC Sec. 31, section 1221.


2 USC Sec. 288 (e).

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91 Ibid.  pp. 2276-77.
92 424 U.S. 319 (1976)
93 435 U.S. 519 (1978)
94 Clayton, Cornell W.  pg. 178.
95 “Statement on Signing the 1979 White House Conferences on the Arts and Humanities Bill.”  Public Law 95-272.  
98 Ibid.
99 Ibid.
100 Ibid.  pg. 904.
101 Ibid.  pg. 904.
102 Those Presidents are: Ford (12), Truman (12) and FDR (9).  See “Presidential Vetoes, 1789-1999.”  
106 462 U.S. 919 (1983)
110 Korn, Jessica.  pg.37.
111 Ibid.  pg. 37.
113 PL 99-177
114 Fisher.  pg. 207.
115 Ibid.  pg. 207.
118 478 U.S. 714 (1986)
120 See Reagan, Ronald.  “Statement on Signing the Deficit Reduction Act of 1984.”  Weekly Compilation of 
121 See the discussion of the “Competition in Contracting” Act on pg. 9.
122 Congress handed EPA administrator Anne Gorsuch a contempt of Congress citation after the administration stalled or refused to turn over documents relating to hazardous waste.
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125 Warshaw. pg. 131.
127 Civil Service Reform Act of 1978 (PL 95-454).
129 Golden. pg. 6.
130 46 Federal Register 131937.
131 50 Federal Register 1036.
132 Clayton, Cornell W. pg. 192.
135 Ibid. pg. 871.
136 Ibid. pg. 874.
137 Ibid. pg. 874.
138 Ibid. pg. 876.
139 467 U.S. 837 (1984)
140 P.L. 95-95 (1977)
143 Email interview with Douglas Kmiec, April 23, 2001.
144 Phone interview with Attorney General Edwin Meese, conducted April 12, 2001.
145 Calabresi is professor of constitutional law at Northwestern University and Kmiec is Dean of Catholic University School of Law.
146 Email interview with Calabresi, June 15, 2001.
147 Email interview with Kmiec, April 23, 2001.
148 Ibid.
149 Phone interview with Ed Meese, April 12, 2001.
150 Ibid.
151 Ibid.
155 Ibid. pp. 705-06.
156 Public Law 99-603. (1986).
159 Email interview with Kmiec, April 23, 2001.
160 Ibid.
163 891 F. 2d. 988. (1989).
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166 Ibid. pg. 207.


168 President Reagan issued 71 constitutional signing statements while President Bush issued 146 and President Clinton issued 105.

169 President Reagan issued 23 political signing statements while President Bush issued 30 and President Clinton issued 21.

170 President Reagan issued 94 rhetorical signing statements while President Bush issued 38 and President Clinton issued 265.

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*I would like to thank Professor Christopher May for giving me his dataset, which provided the number of signing statements before FDR.*
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2 USC Sec. 288 (e).
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Executive Order 12,498. 50 Federal Register 1036. (1985)
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**Signing Statements**

**Bush, George W.**

**Carter, James E.**

**Ford, Gerald.**

**Reagan, Ronald.**

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