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SIGNED, SEALED, RECONSIDERED: AN EXAMINATION OF FORMER PRESIDENT TRUMP’S SIGNING STATEMENTS BETWEEN 2019 AND 2020

ISABELLE CANAAN*

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I. INTRODUCTION

Concerns abound regarding the extent of executive power and the contours of presidential character. Since George Washington’s initial stewardship, two things have evolved: the presidency, as an institution, and the President, as a public figure and party leader. Today, executive power manifests in countless ways beyond Article II of the U.S. Constitution delineated derivative power to simply execute the law.¹ Today’s modern presidents² wield their executive power by using, in part, persuasive politics, their rhetorical capacity, and their role as party leader and chief of the executive branch.³

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1. The President’s power to simply execute the law is sometimes referred to as the “thin authority [to do] no more than authorize the implementation of instructions from some other source.” Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1339 (2020); see also U.S. CONST. art. II.

2. Scholars consider President Franklin D. Roosevelt’s presidency, from 1933 to 1945, as the rise of the modern presidency, which was institutionalized during President Harry S. Truman’s terms between 1945 and 1953. Fred I. Greenstein, *Change and Continuity in the Modern Presidency*, in NEW AM. POL. SYS. 45, 47-61 (Am. Enter. Inst. Pub. Pol’y Rsch., Washington D.C., 1978).

3. See generally Jeffrey K. Tulis, THE TWO CONSTITUTIONAL PRESIDENCIES in Michael Nelson, THE PRESIDENCY AND THE POLITICAL SYSTEM 3, 18 (12th ed. Washington, D.C., Congressional Quarterly Press, 2021) (detailing how Woodrow Wilson transformed the presidency by personalizing and publicizing the office); Keith A. Whittington & Daniel P. Carpenter, *Executive Power in American Institutional Development*, 1 PERSPECTIVES ON POL. 495 (2003) (noting how traditional theories about congressional dominance neither account for the president’s power as party leader, nor the ability of the executive branch to engage in autonomous policy innovation and shape the national agenda).

The Framers of the U.S. Constitution⁴ approached the project of distributing power amongst the three branches of government with consternation. They drew from their experiences of being, both, members of a former colony under royal prerogative and a fledging newborn state governed by weak Articles of Confederation.⁵ Particularly, the Framers disagreed on how to structure a federal government that could resist domination by either a vigorous executive or an ambitious legislative body.⁶ This led to the separation of powers; the framework intended to balance authority by assigning the branches distinct tasks.⁷ The specific allocation of power between the branches of government evolved, given the nation's expansion and developing political arena

Today, the President no longer simply plays the role of "an invaluable clerk."⁸ With the rise of the modern presidency,⁹ the role has expanded to increasingly "wrest[] power and authority away from Congress."¹⁰ The executive branch has forcefully asserted its authority into the legislative process to frustrate and force legislative action.¹¹ In doing so, the President and the executive branch have taken a more active role in determining the government's direction.¹²

The President has an arsenal of procedural, rhetorical, and substantive tools at their disposal.¹³ To assess the modern presidency and

4. The Framers include John Adams, Benjamin Franklin, Alexander Hamilton, John Jay, Thomas Jefferson, James Madison, and George Washington. *See generally Meet the Framers of the Constitution*, NAT'L ARCHIVES, www.archives.gov/founding-docs/founding-fathers [perma.cc/VTC7-ZCV8] (last visited Jan. 5, 2023) (providing a biographical index of the Framers of the U.S. Constitution).

5. The Articles of Confederation were the predecessors of the Constitution. *See* Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 254 (1997). The Articles established a weak federal system that "was unable to exert supremacy and control over the state governments." *Id.*

6. *Id.*

7. The Constitution vests all legislative powers in Congress, which consists of a Senate (the upper house) and the House of Representatives (the lower house). U.S. CONST. art. I, §§ 1-3. Congress has the budgetary power to raise revenue and impose and collect taxes. U.S. CONST. art. I, §§ 7-8. Executive power is vested in the President. U.S. CONST. art. II, § 1. The President is the Commander in Chief of the nation's military branches. U.S. CONST. art. II, § 2. With the advice and consent of the Senate, the President can make treaties with other nations, appoint ministers, judges, and other officers of the United States. U.S. CONST. art. II, § 2. Finally, the judiciary has the power to interpret the Constitution and determine the legality of various statutes. U.S. CONST. art. III, § 1; *see also* *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (establishing judicial review).

8. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 7 (1991).

9. *See generally* Greenstein, *supra* note 2 (chronicling the change in the presidency commencing with President Franklin D. Roosevelt's term).

10. Whittington & Carpenter, *supra* note 3, at 497.

11. *Id.*

12. Tulis, *supra* note 3, at 4.

13. Christopher S. Kelley & Bryan W. Marshall, *The Last Word: Presidential Power and the Role of Signing Statements*, 38 PRES. STUD. Q. 248, 250 (2008) (stating that the signing statement is the least understood of presidential instruments, which include

its larger role in legislating, this article focuses on one of those tools: presidential signing statements. Signing statements are “official pronouncements by the President made contemporaneously to the signing of a bill to forward the President’s interpretation of the statutory language; assert constitutional objections; [or] announce how provisions will be administered.”¹⁴ Although the Constitution does not provide for signing statements, presidents have used them, since the early twentieth century, as devices of presidential power. This trend became increasingly popular during and following Former President Reagan’s (“Reagan”) post-Watergate Administration.¹⁵

Signing statements are broadly categorized as being either rhetorical or constitutional.¹⁶ In rhetorical signing statements, presidents praise supporters, criticize opponents, and celebrate a bill’s passage.¹⁷ Whereas in constitutional signing statements, presidents challenge or offer their own interpretation of statutory provisions.¹⁸ In such challenges, presidents often proclaim that the bill they are signing into law includes sections that infringe upon their constitutionally-derived executive prerogative power.¹⁹ Constitutional signing statements assert that a president will understand the challenged provisions in ways that, according to their own assessment, will not violate their Article II powers.²⁰

This article examines the usage of constitutional signing statements by Former President Donald Trump (“Trump”) during the second half of his presidential term.²¹ While the analysis herein follows Dr. Christopher Kelley’s evaluation of Trump’s signing statements for the period between

executive orders, presidential memos, and proclamations).

14. Todd Garvey, *Presidential Signing Statements: Constitutional and Institutional Implications*, CONG. RSCH. SERV. (Jan. 4, 2012), sgp.fas.org/crs/natsec/RL33667.pdf [perma.cc/E2JV-JXAX].

15. Michael T. Crabb, “*The Executive Branch Shall Construe*”: *The Canon of Constitutional Avoidance and the Presidential Signing Statement*, 56 U. KAN. L. REV. 711, 716 (2008). In 1972, there was a break-in at the Democratic National Committee headquarters at the Watergate Building in Washington D.C. by men linked back to the Nixon administration. John W. Dean, III, *Watergate: What Was It?*, HASTINGS L.J. 51, 609, 609-611 (1999-2000). The scandal led to multiple congressional hearings, indictments, and, eventually, Nixon’s resignation. *Id.*

16. While this Article uses the term “constitutional signing statements,” signing statements that declare constitutional challenges are also referred to as “interpretive signing statements.”

17. See Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 25 PRES. STUD. Q., 515, 518 (2005) (analyzing Former President George W. Bush’s use of signing statements in his first term).

18. Christopher S. Kelley, *President Trump and the Presidential Signing Statement: A First Look*, 1 AM. POL. SCI. ASS’N 1, 7 (2019).

19. Kelley & Marshall, *supra* note 13, at 258.

20. Charlie Savage, *The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 1, 1 (2017).

21. Trump served as the 45th U.S. President from 2017 to 2021. See *Donald Trump*, THE WHITE HOUSE, www.whitehouse.gov/about-the-white-house/presidents/donald-j-trump/ [perma.cc/EDS3-BJBM] (last accessed Feb. 11, 2023).

2017 to 2018,²² the 2019 to 2020 period is independently interesting for three principal reasons: (1) Trump's first impeachment trial ran from December 2019 to February 2020;²³ (2) William Barr, a known proponent of the unitary executive theory, assumed the role of Attorney General in February 2019;²⁴ and (3) the COVID-19 pandemic became the salient political issue demanding government attention in March 2020.²⁵ Against the larger socio-political arc towards the personalization and consolidation of presidential power, an examination of signing statements provides additional context for the predictions on the future of presidential power. Setting this analysis in a period marked by simultaneous executive-legislative hostility and immense public pressure to legislate further illuminates the dynamic interactions between the branches of government.

Part II of this article provides a short history of signing statements, their use by recent presidents, and their purpose(s)/impact. Part III presents descriptive statistics about Trump's usage of signing statements during 2019 and 2020, comparing the data to his predecessors. This Part also examines Trump's signing statement that accompanied the Coronavirus Aid, Relief, and Economic Security (CARES) Act as an example of how Trump invoked executive privilege against congressional oversight, even in a time of emergency. This article demonstrates that Trump perpetuated the trend established by his Republican predecessors - notably Reagan, Bush I, and Bush II - of aggressively weaponizing signing statements, especially against congressional oversight provisions. Part IV discusses the implications of this behavior, focusing both on the consequences that have already manifested and those to come. Additionally, this Part underscores how Trump's remaking of the federal judiciary renders his usage of signing statements especially dangerous.

"The opportunities for presidential imperialism are too numerous to count."²⁶ Often disregarded and beyond the focus of public scrutiny, signing statements present an opportunity for presidents to gain political advantage over their coordinate branches and to expand executive power. Signing statements also extend the reach of a President's influence

22. See Kelley, *supra* note 18, at 1 (providing full findings).

23. Tom McCarthy & Miranda Bryant, *Trump Impeachment: A Timeline of Key Events So Far*, THE GUARDIAN (Jan. 15, 2020), www.theguardian.com/us-news/2019/oct/31/trump-impeachment-inquiry-timeline-key-events [perma.cc/65FK-S9D6]; see also *Impeachment of Donald Trump, 2019-2020*, www.ballotpedia.org/Impeachment_of_Donald_Trump_2019-2020 [perma.cc/49P3-5ZEV] (last visited Jan. 18, 2023).

24. See Philip Ewing, *Attorney General William Barr Swears Oath of Office After Senate Confirmation*, NPR (Feb. 14, 2019), www.npr.org/2019/02/14/694751343/senate-confirms-william-barr-as-next-attorney-general [perma.cc/3NAK-8J9H] (stating "Senators voted 54-45 to confirm Barr to resume the post he first occupied in the administration of President George H.W. Bush.").

25. The federal government declared a national emergency via proclamation on March 13, 2020. Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337, 15,338 (Mar. 13, 2020).

26. See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 138 (1999).

into successive terms. Given that they are tools of presidential power that survive the temporal boundaries of a presidential term, signing statements demand further attention.

II. PREVIOUS PRESIDENTIAL USE OF SIGNING STATEMENTS

While signing statements have been used by presidents since James Monroe's Administration,²⁷ they remained largely innocuous and inconsequential until the twentieth century.²⁸ The routinization of attaching signing statements began under Former President Herbert Hoover,²⁹ who is often considered the final "traditional president" before President Franklin D. Roosevelt launched the modern presidency.³⁰ Throughout the twentieth century, presidents used signing statements for three main purposes: (1) performatively—to celebrate the passing of legislation;³¹ (2) publicly – to orient attention, power, and credit away from legislators and towards the President;³² and (3) politically – to further policy goals.³³

A. *The Reagan Administration*

The Reagan Administration initiated the use of signing statements as devices of presidential authority and intent. The Watergate scandal led to the demise of the Nixon Administration, ushering in a period of congressional empowerment.³⁴ In response, the Reagan Administration sought to reassert presidential leadership and restore executive power.³⁵ To do so, the Reagan Administration pursued a three-pronged legal strategy of appointing more conservative judges, challenging existing separation of powers constraints, and finding ways for the President to

27. Kelley & Marshall, *supra* note 13, at 253.

28. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308 (2006). "By one count, from Monroe until 1945, presidents raised constitutional objections in signing statements in fewer than twenty instances." Robert J. Spitzer, *Comparing the Constitutional Presidencies of George W. Bush and Barack Obama: War Powers, Signing Statements, Vetoes*, 12 WHITE HOUSE STUD. 125, 132 (2013).

29. Keith Whittington, *Much Ado About Nothing: Signing Statements, Vetoes, and Presidential Constitutional Interpretation*, 58 WM. & MARY L. REV. 1751, 1758 (2017).

30. See Greenstein, *supra* note 2.

31. Whittington, *supra* note 29, at 1757.

32. *Id.*

33. Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 929-30 (1994).

34. See Rick Perlstein, *Watergate scandal*, www.britannica.com/event/Watergate-Scandal [perma.cc/X9HN-7RTC] (last visited Jan. 4, 2023) (noting Nixon was the only president to resign when faced with impeachment, due to the Watergate events).

35. Phillip J. Cooper, *Signing Statements as Declaratory Judgments: The President as Judge*, 16 WM. & MARY BILL RTS. J. 253, 255 (2007); Kelley & Marshall, *supra* note 13, at 254; Bradley & Posner, *supra* note 28, at 316.

more actively participate in the legislative process.³⁶ This agenda was intended to repudiate the constrained post-Watergate vision of the presidency. By leveraging executive power – including the more aggressive usage of constitutional signing statements – the Reagan Administration established new political and presidential expectations and “reset political time.”³⁷

Reagan’s Attorney General Edwin Meese III viewed signing statements as the perfect vehicle through which the President could independently interpret the Constitution, and institutionalize that interpretation as part of legislative history.³⁸ Kenneth Cribb, Counselor to Meese, remarked in a memo to Solicitor General Charles Fried, that the Attorney General had identified signing statements as “an underused tool of the executive.”³⁹ Attorney General Meese also wanted to “clarify the conceptual issues associated with the use of signing statements as guides to legislative interpretation and use, by both the department, as well as lawyers, judges, and commentators.” In 1986, Meese struck a deal with the West Publishing Company to have signing statements published in the *U.S. Code Congressional and Administrative News*, as a part of the legislative record.⁴⁰

The Reagan Administration not only codified signing statements, but also used them more expansively. While serving as Deputy Assistant Attorney General in Reagan’s Office of the Legal Counsel (“OLC”), now-Justice Samuel Alito wrote a letter entitled, “Using Presidential Signing Statements to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law.”⁴¹ Alito’s letter justifies treating presidential signing statements as legislative history, arguing that the Constitution understood the President’s significant role in the

36. Cooper, *supra* note 17, at 517.

37. See Stephen Skowronek, *The Presidency in American Political Development: A Third Look*, 32 PRES. STUD. Q. 743, 17-21 (2002).

38. Whittington, *supra* note 29, at 1759.

39. Memorandum from T. Kenneth Cribb, Couns. to Att’y Gen., to Charles Fried, Acting Solic. Gen. (Sept. 3, 1985), in Memorandum from Steve Galebach to Chuck Cooper (Jan. 7, 1986), available at www.archives.gov/files/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf [perma.cc/AH8Q-B76S]. See also Cooper, *supra* note 17, at 258.

40. Cooper, *supra* note 17, at 517. “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 the 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.” Memorandum from Walter Dellinger, Assistant Att’y Gen. U.S. Off. Legal Couns. to Couns. to Pres., *The Legal Significance of Presidential Signing Statements* (Nov. 3, 1993), available at www.justice.gov/file/20446/download [perma.cc/A872-ZH99] (internal citations omitted) [hereinafter Dellinger].

41. Samuel A. Alito, Jr., *Using Presidential Signing Statements to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law*, OFF. OF LEGAL COUNS. MEMORANDUM (Feb. 5, 1986), www.archives.gov/files/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf [perma.cc/4CYQ-JNW8].

legislative process, evidenced in Article I, Section 7, Clause 2,⁴² of the Constitution— exercising the law, and creating/including presentment and presidential veto power – and in Article II, Section 3, Clause 2⁴³ – President's presidential power to recommend, acting in the legislative process.⁴⁴ According to Alito, “the President's understanding of the bill should be just as important as that of Congress.”⁴⁵ Alito believed that issuing more constitutional signing statements “would increase the power of the Executive to shape the law” and “forc[e] some rethinking by courts,” regarding the current use of legislative history.⁴⁶ Finally, Douglas W. Kmiec, another architect of Reagan's signing statement initiative, emphasized the importance of signing statements to coordinate agency policymaking in the face of attempted congressional control of the administrative state.⁴⁷ Signing statements were “crucial...to give the executive branch direction top-down on inevitable interpretation.”⁴⁸ Driven by Meese and Alito's proposals, Reagan issued 250 signing statements; 34 percent included constitutional objections.⁴⁹

42. “Every 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; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.” U.S. CONST. art. I, § 7, cl. 2.

43. “He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.” U.S. CONST. art. II, § 3, cl. 2.

44. See Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, WM. & MARY BILL RTS. J. 307, 307 (2007).

45. Alito, *supra* note 41, at 1.

46. *Id.* at 2.

47. DOUGLAS W. KMIEC, *THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT* 52-57 (1992).

48. Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63, 69 (2007) (first quoting CHRISTOPHER S. KELLEY & BRYAN W. MARSHALL, *THE LAST MOVER ADVANTAGE: PRESIDENTIAL POWER AND THE ROLE OF SIGNING STATEMENTS* 6 (2006) and then quoting KMIEC, *supra* note 47).

49. Garvey, *supra* note 14.

B. *The George H.W. Bush and Bill Clinton Administrations*

Both Former President George H.W. Bush (“Bush I”), who served as President from 1989 to 1993,⁵⁰ and Former President William J. Clinton (“Clinton”), who served as President from 1993 to 2001,⁵¹ followed in Reagan’s footsteps and issued increasing numbers of signing statements.⁵² Notably, however, there was partisan differentiation in the use of constitutional signing statements for the express purpose of establishing legislative history. Nearly 47 percent of Bush I’s signing statements raised constitutional or legal objections, compared to fewer than 20 percent of Clinton’s.⁵³

Former Attorney General William Barr, while Assistant Attorney General for OLC under Bush I, wrote a memo entitled, “Common Legislative Encroachments on Executive Branch Authority,” which identified the ten most common ways Congress intrudes on executive branch power.⁵⁴ The memo effectively served as a shortlist of the most commonly-invoked challenges in constitutional signing statements.⁵⁵ The memo included congressional interference with the President’s appointment power, legislative attempts to gain access to sensitive executive branch information, and concurrent reporting requirements.⁵⁶ Although Barr did not directly link the list to the issuance of signing statements, his memo does state that “[o]nly by consistently and forcefully resisting such congressional incursions can executive branch prerogatives be preserved[,]” and that “[OLC] is always pleased to assist in reviewing legislation for any possible encroachments on the President’s authority.”⁵⁷ In contrast, in a 1993 memo on the legal significance of signing statements, Walter Dellinger, Clinton’s Assistant Attorney General and Head of the OLC, defended the general use of presidential signing statements, but did not co-sign their function as legislative history.⁵⁸

50. See *George H.W. Bush*, THE WHITE HOUSE, www.whitehouse.gov/about-the-white-house/presidents/george-h-w-bush/ [perma.cc/8HGK-3ZGP] (last accessed Feb. 11, 2023) (providing biography).

51. See *William J. Clinton*, THE WHITE HOUSE, www.whitehouse.gov/about-the-white-house/presidents/william-j-clinton/ [perma.cc/TV7Q-S3Y5] (last accessed Feb. 11, 2023) (providing biography).

52. Bush I issued 228 signing statements. Garvey, *supra* note 14. Clinton issued 381 signing statements. *Id.*

53. Garvey, *supra* note 14.

54. William P. Barr, *Common Legislative Encroachments on Executive Branch Authority*, OFF. OF LEGAL COUNS. MEMORANDUM 248, 248 (July 27, 1989), www.justice.gov/file/24286/download [perma.cc/ADD6-GVJJ].

55. *Id.*

56. *Id.* at 248, 254–55.

57. *Id.* at 248.

58. “Many Presidents have used signing statements to make substantive legal, constitutional or administrative pronouncements on the bill being signed. Dellinger, *supra* note 40. Although the recent practice of issuing signing statements to create “legislative history” remains controversial, the other uses of Presidential signing statements generally serve legitimate and defensible purposes.” *Id.*

C. The George W. Bush Administration

Signing statement usage further evolved under George W. Bush (“Bush II”) during his 2001 – 2009 terms, attracting widespread public condemnation. While Bush II issued a smaller number of individual signing statements than Clinton, nearly 80 percent included constitutional challenges to more than one thousand distinct provisions of law.⁵⁹ The signing statement was Bush II’s tool of choice to assert executive privilege, nullify statutory provisions, and promote unitary presidential power in both the domestic and foreign policy arenas (especially after the September 11, 2001 attacks.)⁶⁰ For example, while Bush II did not issue a single veto during his first term,⁶¹ he issued over one hundred signing statements that included constitutional objections to over five hundred statutory provisions.⁶² Moreover, many of Bush II’s signing statements were boilerplate templates, lacking detailed explanations of the specific challenge or citations to requisite constitutional authorities.⁶³ For instance, the Bush II Administration repeatedly used the phrases “preserve the prerogatives of the President”⁶⁴ and “[t]he executive branch shall construe these sections in a manner consistent with the constitutional authority of the President.”⁶⁵

Public outrage on the use of presidential signing statements hit a fever pitch in 2005 after Bush II issued a signing statement to the Detainee Treatment Act of 2005⁶⁶ and its McCain Anti-Torture Amendment, which made use of enhanced interrogation illegal.⁶⁷ The Bush II Administration, in an effort led predominately by Vice President Dick Cheney, had initially opposed the Anti-Torture Amendment.⁶⁸ Yet,

59. Garvey, *supra* note 14.

60. Bush did not challenge any provisions under Commander-in-Chief grounds prior to 9/11. Bradley & Posner, *supra* note 28, at 332. Following 9/11, he issued thirty-six signing statements that included challenges on Commander-in-Chief grounds, or about five per year. *Id.*

61. Cooper, *supra* note 17, at 515.

62. *Id.* at 521; See also Dahlia Lithwick, *Sign Here: Presidential Signing Statements Are More Than Just Executive Branch Lunacy*, SLATE (Jan. 30, 2006), www.slate.com/news-and-politics/2006/01/sign-here.html [perma.cc/7AU8-SH6N].

63. Am. Bar Ass’n (“ABA”), *Task Force on Presidential Signing Statements and the Separation of Powers Doctrine*, REP. WITH RECOMMENDATIONS 1, 17 (2006), www.supremecourt.gov/opinions/URLs_Cited/OT2009/08-861/ABA_Task_Force_%20Pres_Signing_Statements.PDF [perma.cc/8DG5-RJNB].

64. Cooper, *supra* note 17, at 526.

65. Whittington, *supra* note 29, at 1755.

66. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06 (2005) (as included in the Department of Defense Appropriations Act, 2006).

67. Bradley & Posner, *supra* note 28, at 308-09.

68. Eric Schmitt, *Cheney Working to Block Legislation on Detainees*, N.Y. TIMES (July 24, 2005), www.nytimes.com/2005/07/24/politics/cheney-working-to-block-legislation-on-detainees.html [perma.cc/JK2T-YWSQ] (detailing how “Mr. Cheney warned three senior Republicans on the Armed Services Committee that their legislation would interfere with the president’s authority and his ability to protect Americans against terrorist attacks.”).

eventually, the administration publicly stated it was dropping its opposition to the bill, which passed with broad bipartisan and public support.⁶⁹ However, in a signing statement released after the official signing ceremony, Bush II quietly circumvented this provision, declaring that “[t]he executive branch shall construe [the law] in a manner consistent with the constitutional authority of the President . . . as Commander in Chief.”⁷⁰ In doing so, the President effectively announced that his administration would follow his own interpretation of the law, regardless of Congress’s clear intentions.

A torrent of public, political, and legal outcry followed. Congress held multiple hearings about the danger of signing statements and how Bush II’s aggressive usage was unconstitutional.⁷¹ Critics argued that Bush II was effectively weaponizing the signing statement as a line-item veto,⁷² disturbing the separation of powers framework and violating the Supreme Court’s ruling in *Clinton v. New York*, which stated that legislation must either be passed or vetoed in its entirety.⁷³ The American Bar Association initiated a “Task Force on Presidential Signing

69. See Lithwick, *supra* note 62. See also Charlie Savage, *Bush Could Bypass New Torture Ban: Waiver Right Is Reserved*, BOS. GLOBE (Jan. 4, 2006), archive.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/ [perma.cc/6GJV-5VNP] (noting that legal specialists “raise[d] serious questions about whether [Bush] intends to follow the law.”).

70. Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Pub. L. No. 109-148, 119 Stat. 2680. See also *President’s Statement on Signing of H.R. 2863, the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006,”* THE WHITE HOUSE (Dec. 30, 2005), georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051230-8.html [perma.cc/3ER2-URB7].

71. See *Presidential Signing Statements: Hearing Before the S. Judiciary Comm.*, 109th Cong. 6-22 (2006) (in which various law professors gave statements about the constitutional and legal implications of signing statement overuse); Erin Louise Palmer, *Reinterpreting Torture: Presidential Signing Statements and the Circumvention of U.S. and International Law*, 14(1) HUM. RTS. BRIEF 21, 24 (2006) (arguing that signing statements threaten compliance with domestic and international prohibitions against torture and cruel and inhuman treatment); *Bush and the Presidential Signing Statement*, NPR ALL THINGS CONSIDERED (Jan. 8, 2006), www.npr.org/templates/story/story.php?storyId=5135077 [perma.cc/N4P9-KB5A] (describing Bush’s use of signing statements as “part of a broader trend towards presidential unilateralism.”).

72. A line-item veto “gives the President the power ‘cancel in whole’ three types of provisions that have been signed into law: ‘(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.’” *Clinton v. City of New York*, 524 U.S. 417, 436 (1998) (quoting 2 U.S.C. § 691(a) (1994 ed., Supp. II)). In short, a line-item veto allows the President to cancel specific parts or provisions of a bill while signing the rest of the bill into law. *Id.* It is considered “lawmaking without Congress’s participation.” Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801, 1821 (2016).

73. *Clinton*, 524 U.S. at 419 (quoting *INS v. Chadha*, 462 U.S. 919, 921 (1983)) (elaborating that “[f]amiliar historical materials provide abundant support for the conclusion that the power to enact statutes may only ‘be exercised in accord with a single finely wrought and exhaustively considered, procedure.’”). “Our first President understood the text of the Presentment Clause as requiring that he either ‘approve all the parts of a Bill or reject it in toto.’” *Id.* at 439-40 (internal citation omitted).

Statements.”⁷⁴ The House and Senate introduced bills intended to limit the influence of signing statements.⁷⁵ The House bills were particularly aggressive. They included proposed language that “none of the funds” available to the executive branch could be used in the production of signing statements.⁷⁶ Recognizing the danger of judicial interpretation, the bills would have prohibited “government entit[ies], including federal courts, from ‘taking into consideration any statement made by the President contemporaneously with the President’s signing of the bill or joint resolution that becomes such Act.’”⁷⁷ Republican Senator Arlen Specter also proposed the “Presidential Signing Statements Act of 2006.” This bill aimed to curb presidential usage of constitutional signing statements by “forbid[ding] judicial reliance on presidential signing statements as a source of authority in the interpretation of Acts of Congress.”⁷⁸ Eventually, Congress enacted legislation to constrain the scope of signing statements, which Bush II signed into law, albeit alongside a signing statement limiting the provision that sought to curtail his power.⁷⁹

D. The Barack Obama Administration

In response to Bush II’s controversial signing statement practices, then-presidential candidate Barack Obama (“Obama”) pledged not to use signing statements “to nullify or undermine congressional instructions as enacted into law.”⁸⁰ He reaffirmed his commitment to “restor[ing] the Constitution and the rule of law”⁸¹ and criticized his predecessor’s use of “dubious legal theories as justifications for deciding which laws he was free to bypass.”⁸²

Although Obama eventually reneged on this campaign promise, his

74. ABA, *supra* note 63; Savage, *The Last Word?*, *supra* note 20, at 3.

75. See generally H.R. 264, 110th Cong. (1st Sess. 2007); S. 3731, 109th Cong. (2d Sess. 2006); and S. Res. 22, 110th Cong. (2007).

76. H.R. 264, 110th Cong. (1st Sess. 2007).

77. *Id.*

78. See S. 3731 § 2(10), 109th Cong. (2d Sess. 2006); John Stanton, *Specter Pushes Bill to Rein in Presidential Signing Statements*, ROLL CALL (July 3, 2007), www.rollcall.com/2007/07/03/specter-pushes-bill-to-rein-in-presidential-signing-statements/ [perma.cc/9929-NBVH] (describing how Sen. Specter’s bill would “give Congress significant new standing in any case involving an interpretation of federal law laid out in an existing signing statement.”).

79. Louis Fisher, *Signing Statements: Constitutional*, 16 WM. & MARY BILL RTS. J. 183, 208 (2007).

80. Andrew Rudalevige, *Old Laws, New Meanings: Obama’s Brand of Presidential Imperialism*, 66 SYRACUSE L. REV. 1, 12 (2016).

81. See Karen Tumulty, *Obama Circumvents Laws With ‘Signing Statements,’ A Tool He Promised to Use Lightly*, WASH. POST (June 2, 2014), www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a_story.html [perma.cc/TJ2F-93D2]; Charlie Savage, *Presidential Power: Barack Obama and the Bush-Cheney Legacy*, 46 INT’L SOC’Y BARRISTERS Q. 1, 1 (2011).

82. Savage, *Presidential Power*, *supra* note 81, at 16.

frequency of usage paled in comparison to his predecessors.⁸³ Within the first 100 days of taking office, Obama released a memoranda to the heads of his executive departments and agencies on his philosophy and intended use of signing statements.⁸⁴ Acknowledging that signing statements can be “abused,” Obama justified his impending use of constitutional signing statements as a component of his constitutionally-allocated executive power.⁸⁵ He committed to issuing constitutional signing statements “in appropriately limited circumstances” and “with caution and restraint.”⁸⁶ He also emphasized that his administration would strive to highlight potential constitutional concerns to its congressional partners on legislation *prior* to its passage to avoid the need for a signing statement altogether.⁸⁷

Two days after releasing the memo, Obama signed the 2009 Omnibus Appropriations Act with a signing statement attached.⁸⁸ He cited to his recent announcement on the legitimacy of signing statements as justification for its issuance before identifying five areas of executive concern with the bill, including the familiar charge of “legislative aggrandizement.”⁸⁹

Obama ultimately issued 41 signing statements, which were relatively evenly distributed over his two presidential terms.⁹⁰ Of the 41, about two-thirds included specific determinations of executive interpretations and constitutional perspective.⁹¹ Yet, unlike those of his predecessors, none of Obama’s signing statements explicitly asserted the President’s power as a “unitary executive.”⁹² Nor did Obama’s administration release memoranda, guidance, or policies stating its belief in unitary executive power and the role of signing statements in achieving that goal.⁹³

83. Kelley, *supra* note 18, at 39-40.

84. Memorandum from Barack H. Obama, Pres., to Heads of Exec. Agencies and Dep’t (Mar. 9, 2009), available at www.govinfo.gov/content/pkg/DCPD-200900138/pdf/DCPD-200900138.pdf [perma.cc/82BZ-TFX4].

85. *Id.*

86. *Id.*

87. *Id.*

88. Presidential Statement on Signing the Omnibus Appropriations Act, 2009, DAILY COMP. PRES. DOC. (Mar. 11, 2009).

89. *Id.*

90. Spitzer, *supra* note 28, at 132. Through his first three years, Obama signed 19 signing statements. *Id.*

91. See *The American Presidency Project*, U.C. SANTA BARBARA, www.presidency.ucsb.edu/advanced-search?field-keywords=&field-keywords2=&field-www.presidency.ucsb.edu/advanced-search?field-keywords=&field-keywords2=&field-keywords3=&from%5Bdate%5D=&to%5Bdate%5D=&person2=200300&category2%5B%5D=69&items_per_page=100 [perma.cc/68PC-W2WA] (providing a searchable database of Obama’s signing statements and access other presidential records).

92. *Presidential Signing Statements: Constitutional and Institutional Implications*, CONG. RSCH. SERV. 1, 12 (2012).

93. Yet, this did not stop critics on the right from decrying Obama as a tyrannical and “lawless” president stepping beyond his constitutionally prescribed powers. Ted Cruz, *The Obama Administration’s Unprecedented Lawlessness*, 38 HARV. J.L. & PUB.

In many of his signing statements, Obama objected to the continuation of the Guantánamo Bay detention camp.⁹⁴ These signing statements functioned as tools of continued protest for a thwarted presidential ambition. On January 22, 2009, in one of his first acts as president and in alignment with his campaign trail commitments, Obama signed Executive Order 13492. He ordered the prompt closure of Guantánamo Bay, as well as the larger shadowy network of overseas prisons.⁹⁵ Obama was never able to—or never chose to—effectuate this goal, inciting outrage on both sides of the aisle and the body politic at-large.⁹⁶ Despite this failure, he continued to release closure plans and

POL'Y. 64, 64 (2015).

94. *See, e.g.*, Presidential Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, DAILY COMP. PRES. DOC. (Jan. 7, 2011) (“Despite my strong objection to [provisions restricting the transfer of Guantánamo detainees], which my Administration has consistently opposed, I have signed this Act..”); Presidential Statement on Signing the Consolidated Appropriations Act, 2012, DAILY COMP. PRES. DOC. (Dec. 23, 2011) (signing bill although the Obama “Administration has repeatedly communicated [its] objections to [provisions barring the use of funds to transfer Guantánamo detainees], including [Obama’s] view that they could, under certain circumstances, violate constitutional separation of powers principles . . .”); President Statement on Signing the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, DAILY COMP. PRES. DOC. (Dec. 19, 2014) (“ . . . the continued operation of [the Guantánamo Bay detention facility] weakens our national security . . . Closing the detention facility is a national imperative.”).

95. *See* Exec. Order No. 13492, 3 C.F.R. § 203 (2009) (“By the authority vested in [him] as President . . . to effect the appropriate disposition of individuals currently detained [at Guantanamo Bay] and promptly to close detention facilities [there], consistent with the national security and foreign policy interests of the United States and the interests of justice” Obama ordered review of those in continued detention and the closure of the facility “no later than 1 year from the date of [the] order.”).

96. *See generally* Jay Sekulow, *Close Gitmo? Obama Puts Our National Security at Risk to Fulfill Campaign Promise*, FOX NEWS (Feb. 23, 2016), www.foxnews.com/opinion/close-gitmo-obama-puts-our-national-security-at-risk-to-fulfill-campaign-promise [perma.cc/NC6W-G8AK] (arguing that Obama’s plan to close the facility “ultimately would call for the transfer of some of the most dangerous terrorists to the United States” and would “place[] America in grave danger . . .”); Jeremy Herb, *Obama Slams Congress for Blocking Efforts to Close Gitmo*, POLITICO (Jan. 19, 2017), www.politico.com/story/2017/01/obama-congress-guantanamo-bay-233859 [perma.cc/6MQY-QW54] (detailing Obama’s frustrations in Congress’ repeated acts to prevent him from moving detainees to maximum security prisons on American soil). *See also* Spencer Ackerman, *No One But Himself to Blame: How Obama’s Guantánamo Plans Fell Through*, THE GUARDIAN (Feb. 24, 2016), www.theguardian.com/us-news/2016/feb/24/obama-guantanamo-bay-closure-republicans [perma.cc/J22G-YBYS] (blaming the Obama administration for failing to close the facility and stating that, while Obama used the rhetoric of human rights organizations, his plans would not “close[] the facility in any substantive fashion” but would merely relocate the “indefinite detentions without charges [and] the military commissions” to US soil); Letter, ACLU Coal., *More Than Four-Month Delay in Meeting Two of Your Key Commitments on Closing Guantanamo and Ending Infinite Detention*, ACLU (Oct. 7, 2013), www.hrw.org/news/2013/10/07/joint-letter-president-obama-regarding-delays-meeting-guantanamo-commitments [perma.cc/B2RW-ZAKF] (“We strongly support you in your commitment to close the Guantanamo prison and end indefinite detention. It is in this effort to support you that we want to make clear our concern that the more than four-month delay in your administration carrying out two

reiterate his strong belief in the moral, political, and strategic imperative of shuttering the detention camp throughout his presidency.⁹⁷

Simultaneously, and paradoxically, Obama continued to sign bills and announce executive orders that acknowledged the clear reality that Guantánamo Bay would remain open. He accompanied many of these bills with signing statements reiterating the Obama administration's belief that it had the executive foreign policy power to close the facility and relocate the detainees. For example, Sections 1032 and 1033 of the 2011 National Defense Authorization Act ("the 2011 NDAA") barred the use of funds to transfer detainees.⁹⁸ Despite his "strong objection to these provisions," Obama signed the 2011 NDAA into law.⁹⁹ In the accompanying signing statement, the President derided the provisions as "dangerous and unprecedented challenge[s] to critical executive branch authority."¹⁰⁰

Obama used signing statements as a vehicle for protest throughout his presidency. Although he signed multiple defense authorization acts into law that explicitly aimed to frustrate his dream of closing Guantánamo Bay, Obama utilized signing statements to create a record of his continued grievances.¹⁰¹ For instance, in a 2013 signing statement accompanying that year's National Defense Authorization Act, ("the 2013 NDAA) Obama reiterated that the "continued operation of the [Guantánamo] facility weakens our national security by draining resources, damaging our relationships with key allies and partners, and emboldening violent extremists."¹⁰² In the signing statement accompanying the final defense authorization act of his tenure, Obama described what his administration had done and what he hoped to see future administrations do.¹⁰³ Critics criticized Obama for failing to uphold his campaign promise, and were dissatisfied with what they perceived as the use of signing statements to effectuate his toothless moral signaling.¹⁰⁴

key steps could jeopardize your ability to close the Guantanamo prison and end indefinite detention during your presidency.”).

97. Obama did successfully transfer, repatriate, or resettle 197 detainees out of Guantánamo Bay. See *Facts About the Transfer of Guantanamo Detainees*, HUM. RTS. FIRST (Oct. 10, 2018), www.humanrightsfirst.org/library/facts-about-the-transfer-of-guantanamo-detainees/ [perma.cc/CFY4-K9GS] (“The vast majority of Guantanamo detainees were transferred or released to other countries before 2009.”).

98. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat 1298, §§ 1032-33 (2011).

99. Presidential Statement on Signing the Consolidated Appropriations Act, 2012, DAILY COMP. PRES. DOC. (Jan. 7, 2011).

100. *Id.*

101. See *supra* text accompanying note 94.

102. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013, DAILY COMP. PRES. DOC. (Jan. 2, 2013).

103. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2016, 2016, DAILY COMP. PRES. DOC. (Dec. 23, 2016) (“The population once held at Guantanamo has now been reduced by over 85 percent. Over the past 24 months alone, we have transferred 57 detainees . . .”).

104. See Connie Bruck, *Why Obama Has Failed to Close Guantánamo*, NEW YORKER

III. THE TRUMP ADMINISTRATION AND SIGNING STATEMENTS

A. General Trends

Emulating Republican presidents before him, Trump actively used constitutional signing statements to challenge and interpret legislation. In the first two years of his term, Trump issued more challenges to statutory provisions than any prior presidential administration, including 100 more than the Bush II Administration.¹⁰⁵ From 2017 to 2018, Trump issued 37 signing statements that included nearly 350 unique statutory challenges.¹⁰⁶

Trump's behavior and approach to executive power from 2019 to 2020 is triply interesting. First, William Barr, former Attorney General under Bush I and noted advocate for wielding signing statements to rebut perceived instances of congressional aggrandizement, was confirmed as Attorney General on February 14, 2019.¹⁰⁷ Barr served until December 23, 2020.¹⁰⁸ Second, on February 5, 2020, the Senate acquitted Trump of abuse of power and obstruction of Congress during his first impeachment trial.¹⁰⁹ Despite the outcome, the impeachment inquiry laid bare both Trump's hostility towards congressional oversight, as well as his belief in his own expansive executive power.¹¹⁰ Finally, on March 13, 2020, Trump

(July 25, 2016), www.newyorker.com/magazine/2016/08/01/why-obama-has-failed-to-close-guantanamo [perma.cc/CUD6-9X57] ("As Obama began trying to empty the prison, it became clear that few people with political power were invested in seeing the detainees moved.").

105. Kelley, *supra* note 18, at 9.

106. *Id.* at 10. See also *The Am. Presidency Project*, U.C. SANTA BARBARA, www.presidency.ucsb.edu/advanced-search?field-keywords=&field-keywords2=&fieldkeywords3=&from%5Bdate%5D=&to%5Bdate%5D=&person2=200301&category2%5B0%5D=69&items_per_page=25&page=2 [perma.cc/ANZ9-29KR] (last accessed Feb. 14, 2023) (providing a searchable database of the full contents of Trump's signing statements and other presidential documents).

107. See Jordain Carney, *Senate Confirms Trump Pick William Barr as New Attorney General*, THE HILL (Feb. 14, 2019), www.thehill.com/homenews/senate/430025-senate-confirms-trump-pick-william-barr-as-new-attorney-general/ [perma.cc/MR8T-7BZ9] (explaining, among other things, how Democrats were concerned with Barr's views on executive power).

108. Kevin Breuninger & Christina Wilkie, *Attorney General William Barr Resigns, Effective Dec. 23*, CNBC (Dec. 14, 2020), www.cnn.com/2020/12/14/attorney-general-william-barr-resigns-effective-dec-23.html [perma.cc/F53Q-TSXT] (including William Barr's resignation letter).

109. Philip Ewing, *'Not Guilty': Trump Acquitted on 2 Articles of Impeachment as Historic Trial Closes*, NPR (Feb. 5, 2020), www.npr.org/2020/02/05/801429948/not-guilty-trump-acquitted-on-2-articles-of-impeachment-as-historic-trial-closes [perma.cc/RCP2-LM74] (explaining what ensued after Senators voted to acquit Trump on two articles of impeachment).

110. Victoria Bassetti & Tim Lau, *Trump's Troubling Rebuke of Congressional Oversight*, THE BRENNAN CTR. (May 7, 2019), www.brennancenter.org/our-work/analysis-opinion/trumps-troubling-rebuke-congressional-oversight [perma.cc/B84Z-GLC8]; Anita Kumar & Andrew Desiderio, *Trump Showdown With House Democrats Ignites Into All-Out War*, POLITICO (March 23, 2019),

declared a national emergency for COVID-19. His declaration authorized expedited federal government action during a period of simultaneous public health and economic crisis when, both, states and the general public were urging the federal government to act.¹¹¹ Additionally, Trump was not operating against a purely hostile Congress as his Republican party retained and extended its majority in the Senate during the 2018 midterm elections.¹¹² Thus, Trump's aggressive use of signing statements cannot be purely dismissed as a tactic to advance his policies in the face of an unwilling and ideologically opposed Congress.¹¹³

This period of crisis and national emergency challenged Trump's executive power. Yet, Trump issued 32 signing statements, the vast majority of which were constitutional signing statements that included nearly three hundred unique statutory challenges.¹¹⁴ Interestingly, Trump's usage of rhetorical signing statements was comparatively limited, perhaps because he preferred to deliver his praise or criticism through "less controlled" communication channels like Twitter, Fox News, or his public rallies.¹¹⁵

Trump's signing statement behavior emulated Bush II's. Although

www.politico.com/story/2019/04/23/trump-investigators-congress-1288795 [perma.cc/5NT2-LPTC] (finding that the Trump administration has refused or delayed the release of information more than thirty times); Keith Whittington, *Trump's Defiance Is Destroying Congress's Power*, THE ATLANTIC (Oct. 14, 2019), www.theatlantic.com/ideas/archive/2019/10/trumps-defiance-destroying-congress/599923/ [perma.cc/K3SA-TL6R].

111. Derek Hawkins, et al., *Trump Declares Coronavirus Outbreak A National Emergency*, WASH. POST (Mar. 13, 2020), www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/ [perma.cc/C3UR-VAYG] (chronicling the day on which Trump declared COVID-19 a national emergency).

112. See Sabrina Siddiqui & Ben Jacobs, *Democrats Take Control of House but Republicans Tighten Grip on Senate*, THE GUARDIAN (Nov. 7, 2018), www.theguardian.com/us-news/2018/nov/06/midterm-elections-2018-exit-polls-voters [perma.cc/956V-X5HN]. Democrats did retake control of the House and were successful in several gubernatorial races in 2018, victories that allowed them to conduct investigations of the Trump administration. *Id.* However, the strengthened Republican Senate control further facilitated the conservative makeover of the judiciary and acted as a stopgap for any congressional policy challenges. *Id.*

113. Even if this alternate explanatory argument was advanced, its persuasive power remains uncertain. "Because no President has systematically used signing statements to advance his policy agenda, there is little hard evidence to assess differences between policy-based signing statements in periods of unified and divided government." Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63, 72 (2007).

114. See generally, *The Am. Presidency Project*, *supra* note 106 (providing access to Trump's signing statements).

115. For context, in 2019, Trump tweeted over seven thousand times. Brendan Cole, *Donald Trump Sent Record 12,200 Tweets in 2020, Ends Year with Stock Market Boast*, NEWSWEEK (Jan. 1, 2021), www.newsweek.com/donald-trump-record-12200-tweets-2020-stock-market-boast-1558415 [perma.cc/APZ2-6NZZ]. Between 2016 and 2019, Trump appeared on Fox News over 60 times, eight times more than any other network. Alexandra Hutzler, *Donald Trump Has Appeared On Fox News Eight Times More Than Any Other Network*, NEWSWEEK (July 26, 2019), www.newsweek.com/trump-appeared-fox-news-eight-times-more-any-network-1451316 [perma.cc/9BMK-ZYNS].

Trump issued fewer individual signing statements, a larger percentage of the statements were constitutional signing statements, targeting a greater number of statutory provisions.¹¹⁶ In alignment with his predecessors, Trump issued signing statements attached to both domestic and foreign policy-oriented legislation.¹¹⁷ Regarding the latter, he often asserted “the President’s authority as Commander in Chief”¹¹⁸ or “the President’s exclusive constitutional authorities with respect to foreign relations.”¹¹⁹ Domestically, Trump mirrored his Republican predecessors in objecting to hundreds of statutory provisions for infringing on his exclusive power to appoint and remove executive officials, his ability to recommend law, and his “ability to fulfill his constitutional responsibilities, including the responsibility to faithfully execute the laws of the United States.”¹²⁰

However, the Trump Administration was more aggressive in making constitutional challenges, asserting executive prerogative against perceived legislative encroachment that often effectuated through congressional oversight.¹²¹ Trump is the only President to explicitly mention “executive power” in a signing statement.¹²² Additionally, Trump invoked “executive privilege” thirteen times during his administration in a signing statement, including seven times between 2019 and 2020.¹²³ Bush I is the only other president to mention “executive privilege” in a

116. Sharece Thrower, *Presidential Action and the Supreme Court: The Case of Signing Statements*, 31(4) J. THEORETICAL POL., 677, 680 (2019).

117. Kelley, *supra* note 18, at 12; *The Am. Presidency Project*, *supra* note 106.

118. Kelley, *supra* note 18, at 12. See Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2020, 2020, DAILY COMP. PRES. DOC. (Dec. 20, 2019).

119. Kelley, *supra* note 18, at 13. See Presidential Statement on Signing the Secure 5G and Beyond Act, 2020, DAILY COMP. PRES. DOC. (Mar. 23, 2020).

120. Kelley, *supra* note 18, at 14. Presidential Statement on Signing the Consolidated Appropriations Act, 2019, DAILY COMP. PRES. DOC. (Dec. 20, 2019).

121. Kelley, *supra* note 18, at 25.

122. “But a requirement to consult with the Congress regarding executive decision-making, including with respect to the President’s Article II authority to oversee executive branch operations, violates the separation of powers by intruding upon the President’s power and duty to supervise the staffing of the executive branch under Article II, section 1 (vesting the President with the ‘executive Power’) and Article II, section 3 (instructing the President to ‘take Care’ that the laws are faithfully executed). Accordingly, my Administration will treat this provision as hortatory but not mandatory.” Presidential Statement on Signing the Coronavirus Aid, Relief, and Economic Security Act, 2020, DAILY COMP. PRES. DOC. (March 27, 2020).

123. See Presidential Statement on Signing the Civil Rights Cold Case Records Collection Act, 2018, DAILY COMP. PRES. DOC. (Jan. 8, 2019); Presidential Statement on Signing the Consolidated Appropriates Act, 2019, DAILY COMP. PRES. DOC. (Feb. 15, 2019); Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2020, 2020, DAILY COMP. PRES. DOC. (Dec. 20, 2019); Presidential Statement on Signing the Further Consolidated Appropriations Act, 2020, DAILY COMP. PRES. DOC. (Dec. 20, 2019); Presidential Statement on Signing the Rodchenkov Doping Act, 2019, DAILY COMP. PRES. DOC. (Dec. 4, 2020); Presidential Statement on Signing the National Ocean and Atmospheric Administration Commissioned Officer Corps Amendment Act, 2020, DAILY COMP. PRES. DOC. (Dec. 23, 2020).

signing statement.¹²⁴ Similarly, five of Trump's 2019 and 2020 signing statements purported to push back on "congressional aggrandizement."¹²⁵ Finally, since the start of the Reagan Administration, presidents have cited their Article II powers 76 times in signing statements.¹²⁶ Throughout his presidency, Trump invoked Article II 31 times; fourteen of these invocations came between 2019 and 2020.¹²⁷

These descriptive statistics cannot paint a full picture of Trump's approach to executive power and privilege; however, they do indicate that Trump's signing statement behavior was not demonstrably affected by the three conditions identified above as distinguishing the 2019 to 2020 period. The rate, proliferation, and language of Trump's signing statements was relatively stable throughout his four-year term.

B. *The CARES Act*

The Coronavirus Aid, Relief, and Economic Security Act ("the CARES Act" or "the Act") controversy illuminates how, despite the consistency in usage, Trump's utilization of signing statements in his final two years impacted the relationship between the coordinate branches. On March 27, 2020, two weeks after declaring the COVID-19 pandemic a national emergency, Trump signed the CARES Act into law, a \$2 trillion economic stimulus bill.¹²⁸ Amongst its many provisions, the CARES Act (1) authorized one-time direct payments of \$1,200 to individuals, (2) extended unemployment eligibility, and (3) provided \$350 billion in small business relief through the Paycheck Protection Program.¹²⁹

Democratic congresspeople feared that the funds allocated by this economic stimulus bill (the largest in U.S. history) would be

124. See Presidential Statement on Signing the Energy Policy Act, 1992, DAILY COMP. PRES. DOC. (Oct. 24, 1992).

125. See Presidential Statement on Signing the Consolidated Appropriates Act, 2019, DAILY COMP. PRES. DOC. (Feb. 15, 2019); Presidential Statement on Signing the Consolidated Appropriates Act, 2020, DAILY COMP. PRES. DOC. (Dec. 20, 2019); Presidential Statement on Signing the Further Consolidated Appropriations Act, 2020, DAILY COMP. PRES. DOC. (Dec. 20, 2019); Presidential Statement on Signing the Coronavirus Aid, Relief, and Economic Security Act, DAILY COMP. PRES. DOC. (Mar. 27, 2020).

126. *Article II Signing Statements*, AM. PRESIDENCY PROJECT, www.presidency.ucsb.edu/advanced-search [perma.cc/XCX7-VBRN] (search for "Article II" and filter "Document Category" to "Signing Statements") (last accessed Feb. 14, 2023).

127. *Article II Signing Statements for Trump*, AM. PRESIDENCY PROJECT, www.presidency.ucsb.edu/advanced-search [perma.cc/U2PX-Y6Z6] (search for "Article II" term and filter "Document Category" to "Signing Statements," and filter "Presidents" to "Donald J. Trump") (last accessed Feb. 14, 2023).

128. Presidential Statement on Signing the Coronavirus Aid, Relief, and Economic Security Act, 2020, DAILY COMP. OF PRES. DOC. (Mar. 27, 2020).

129. See Leon LaBrecque, *The CARES Act Has Passed: Here Are The Highlights*, FORBES (Mar. 29, 2020), www.forbes.com/sites/leonlabrecque/2020/03/29/the-cares-act-has-passed-here-are-the-highlights/?sh=2c1d1ab668cd [perma.cc/PU7K-KMR3] ("This legislation is aimed at providing relief for individuals and businesses that have been negatively impacted by the coronavirus outbreak.").

misappropriated by a president who had previously said that the Constitution gives him “the right to do whatever [he] want[s]”¹³⁰ and that “[he]’ll be the oversight.”¹³¹ Thus, oversight and supervision were cornerstone components of the legislative debate.¹³² When asked about the possibility of passing legislation absent an oversight mechanism, House Speaker Nancy Pelosi said, “[t]here was this idea that they put forth that there would be a \$500 billion slush fund for the Secretary of the Treasury with no accountability whatsoever. Are you kidding? For all respect in the world for the Treasury Secretary, that was a complete nonstarter.”¹³³

Correspondingly, the final text of the stimulus bill established the Special Inspector General for Pandemic Recovery (“SIGPR”) within the Treasury Department to “conduct, supervise, and coordinate audits and investigations” regarding the distribution of CARES Act funds.¹³⁴ Pursuant to the bill, the SIGPR is also required to issue quarterly reports to Congress, summarizing its activities to ensure legislative oversight.¹³⁵ To fulfill these duties, the SIGPR is empowered to request relevant information from federal agencies, who must comply “to the extent practicable.”¹³⁶ “If a SIGPR request for information is ‘unreasonably refuse[d],’ the Act provides that the SIGPR ‘shall report the circumstances to the appropriate committees of Congress without delay.’”¹³⁷

However, in his CARES Act signing statement, Trump objected to the section of the Act establishing the SIGPR. Trump articulated that he “do[es] not understand, and [his] Administration will not treat” the provision describing SIGPR’s reporting responsibility to Congress “as permitting the SIGPR to issue reports to the Congress without the presidential supervision required by the Take Care Clause, Article II,

130. Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him ‘The Right to Do Whatever I Want,’* WASH. POST (July 13, 2019), www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/ [perma.cc/7SA4-XCXM].

131. Jeff Stein & Devlin Barrett, *Trump Takes Immediate Step to Try to Curb New Inspector General’s Autonomy, as Battle Over Stimulus Oversight Begins*, WASH. POST (Mar. 28, 2020), www.washingtonpost.com/business/2020/03/27/trump-coronavirus-inspector-general/ [perma.cc/P4AE-LJDU].

132. Harper Neidig, *Stimulus Opens New Front in Trump’s Oversight Fight*, THE HILL (Apr. 2, 2020), www.thehill.com/regulation/court-battles/490737-stimulus-opens-new-front-in-trumps-oversight-fight/ [perma.cc/KM4K-C7VC] (noting Trump’s signing statement as an attack on congressional oversight); See also Alana Abramson, *Democrats Pushed for Robust Oversight of the \$2.2 Trillion Coronavirus Aid Package. It Hasn’t Happened Yet.*, TIME (April 17, 2020), www.time.com/5823510/coronavirus-stimulus-oversight/ [perma.cc/VG7N-4NHQ] (explaining how, despite the oversight mechanisms in the bill, the Treasury’s Inspector General post remained vacant).

133. Abramson, *supra* note 132.

134. H.R. 748, 116th Cong. § 4018(c)(1) (1st Sess. 2020); Todd Garvey, *Presidential Objections to Special Inspector General for Pandemic Recovery Reporting Requirements*, CONG. RSCH. SERV., 1, 1 (May 12, 2020) [hereinafter *Presidential Objections*].

135. H.R. 748, 116th Cong. § 4018(f)(1)(A) (1st Sess. 2020).

136. H.R. 748, 116th Cong. § 4018(e)(4)(A) (1st Sess. 2020).

137. H.R. 748, 116th Cong. § 4018(e)(4)(B) (1st Sess. 2020).

Section 3.”¹³⁸

Trump’s signing statement concerning the SIGPR is notable for multiple reasons. While Trump is not the first president to challenge a statutory provision mandating an executive official to report directly to Congress, he did uniquely invoke the Take Care Clause in his objection, rather than executive privilege.¹³⁹ Unusually for Trump, the CARES Act signing statement makes no mention of executive privilege at all.¹⁴⁰ By relying on the Take Care Clause to prevent an executive official from complying with a statutory obligation, Trump’s signing statement opened a new, tenuous claim of expansive executive power.

Also, Trump’s challenge to the oversight provision is unusual when compared to Bush II’s treatment of the 2008 bank bailout in the “Troubled Asset Relief Program” (“TARP”). TARP was previously the largest stimulus bill in the nation’s history and its oversight provisions were the template for the CARES Act, including the establishment of the SIGPR.¹⁴¹ Yet, despite the Bush II Administration’s aggressive use of signing statements as part of a wider unitary executive strategy, Bush II, unlike Trump, signed the bill without issuing a signing statement and without objecting to TARP’s inspector general reporting requirements.¹⁴²

The CARES Act likely would not have passed if it did not have oversight mechanisms, like SIGPR. If the CARES Act did not pass, it would have been catastrophic for the financial health of industries, individuals, and the economy at large.¹⁴³ The failure of the CARES Act – either by way of congressional gridlock or a presidential veto – would have further deepened popular frustration with the government, magnified in a time of crisis. Like all legislation, the CARES Act reflects congressional compromises and bargaining.¹⁴⁴ However, unlike most legislation, the government essentially had no choice, but to swiftly pass COVID-19 legislation. The resulting statute is inseparable from the socio-political necessity to act, as well as Trump’s signing of the bill into law. Lacking the political space to veto the bill and operating on an expedited emergency

138. Presidential Statement on Signing the Coronavirus Aid, Relief, and Economic Security Act, DAILY COMP. PRES. DOC. (March 27, 2020).

139. *Presidential Objections*, *supra* note 134, at 4.

140. Trump has attached signing statements invoking executive privilege to comparable appropriations and fiscal spending-related bills. See Presidential Statement on Signing the Consolidated Appropriations Act, 2019, DAILY COMP. PRES. DOC. (Feb. 15, 2019); Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2020, 2020, DAILY COMP. PRES. DOC. (Dec. 20, 2019).

141. Neidig, *supra* note 132.

142. *Id.*

143. *Id.*

144. See *Republicans, Democrats Reach Compromise Over COVID-19 Stimulus Package*, CNBC (DEC. 20, 2020), www.cnbc.com/2020/12/20/republican-democrats-reach-compromise-over-covid-19-stimulus-package.html [perma.cc/2T2H-32YZ] (explaining how Republicans and Democrats reached a compromise on Federal Reserve pandemic lending); Arwa Mahdawi, *Covid Aid Package: US Congress Set to Vote After Compromise Emerges*, THE GUARDIAN (Dec. 20, 2020), www.theguardian.com/us-news/2020/dec/19/congress-hurries-to-finalize-nearly-1tn-coronavirus-economic-relief-deal [perma.cc/9XQ5-WH3F].

timeline, President Trump had to sign the CARES Act, despite his obvious displeasure to its provisions related to oversight and executive power.¹⁴⁵ This situation is reminiscent of the passage of the 1991 Civil Rights Act.¹⁴⁶ Although the Bush I Administration did not support the description of “disparate impact” in Title VII of the 1991 Civil Rights Act, it knew it would be politically detrimental to veto the bill.¹⁴⁷ Instead, Bush I attached a signing statement that clarified how his administration would implement the “disparate impact” provisions.¹⁴⁸

Trump’s signing statement objection to the SIGPR, a major part of the regime created by the CARES Act and the product of compromise that all but guaranteed its passage, is especially pernicious in the age of large omnibus legislation and polarized politics. Knowing that the President has unilateral power to gut key legislative provisions, even those instrumental to the allocation of funds in a crisis, undermines incentives for Congress to pursue good-faith compromise. A mechanism to dodge spending oversight is particularly harmful in a political climate where the filibuster has forced the governing party to rely heavily on budget reconciliation to achieve policy goals.

IV. IMPLICATIONS

Justice Jackson wrote in his famous *Youngstown* concurrence that a “[p]residential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”¹⁴⁹ What does Trump’s usage of signing statements in his last two years forebode? Especially with the increased use of constitutional signing statements. Does Trump’s reliance on constitutional signing statements to assert his policy preferences, rather than vetoes, actually signal presidential weakness, like some scholars attributed to the increased use of executive orders?¹⁵⁰

Signing statements have a longer lifespan than other unilateral presidential tools. Unlike executive orders, signing statements are attached to the legislation, itself, and cannot be easily repealed or replaced. The impact of a signing statement is more difficult to displace,

145. See also Ellen Nakashima, *Trump Removes Inspector General Who Was to Oversee \$2 Trillion Stimulus Spending*, WASH. POST (Apr. 7, 2020), www.theguardian.com/us-news/2020/dec/19/congress-hurries-to-finalize-nearly-1tn-coronavirus-economic-relief-deal [perma.cc/9XQ5-WH3F].

146. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

147. ABA, *supra* note 63.

148. See Presidential Statement on Signing the Civil Rights Act of 1991, DAILY COMP. PRES. DOC. (Nov. 21, 1991).

149. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (upholding the balance of power between executive and legislative branches in finding the President’s power to seize private property without authorization from Congress or the Constitution was limited).

150. David E. Lewis, *Deconstructing the Administrative State*, 81(3) J. POL. 767, 781(2019).

lasting beyond an administration's termination.¹⁵¹ Presidents can extend their policy preferences and interpretations into successive administrations via signing statements. *Zivotofsky ex rel. Zivotofsky v. Kerry* ("*Zivotofsky II*") demonstrates how signing statements continue to live with the legislation they affect.¹⁵² In 2002, Congress passed legislation entitled the "Foreign Relations Authorization Act," which included a provision declaring Jerusalem as the capital of Israel, and directed the President and the Secretary of State to list it as such on passports.¹⁵³ Bush II signed the bill into law, but attached a signing statement instructing his State Department to ignore the Jerusalem provision, as it "impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch."¹⁵⁴ *Zivotofsky*, born to U.S. citizens in Jerusalem, sued the administration to force the Secretary of State to list Israel as his birthplace on his passport.¹⁵⁵

In 2015, nearly eight years after Bush II's term had ended, the Supreme Court heard *Zivotofsky II*. In oral argument, Donald Verrilli, Obama's Solicitor General, cited Bush II's signing statement as evidence of the President's expansive foreign affairs powers.¹⁵⁶ Prior to *Zivotofsky II*, courts had largely disavowed the influence of signing statements, especially if a signing statement directly contradicted clear statutory language.¹⁵⁷ Yet, although he did not explicitly "rely on President Bush's signing statement as a constitutional authority"¹⁵⁸ in his majority opinion, Justice Kennedy did mention Bush II's signing statement and alluded to

151. Bradley & Posner, *supra* note 28, at 360.

152. *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 576 U.S. 1, 8 (2015).

153. United States Policy with Respect to Jerusalem as the Capital of Israel, 22 U.S.C. 2651, § 214 (2003).

154. Bush II stated, "[m]oreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed." Presidential Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, DAILY COMP. PRES. DOC. (Sept. 30, 2001).

155. *Zivotofsky II*, 576 U.S. at 8.

156. Transcript of Oral Argument, *Zivotofsky II*, 576 U.S. 1 (2015), available at www.c-span.org/video/transcript/?id=53728, [perma.cc/9MFR-KQ2P] (last accessed Jan. 17, 2023). Solicitor General Verrilli said "[t]he Chief Executive issued a signing statement which really was, in effect, a disclaimer, in 2002. President Bush's statement said in 2002, this does not change our official recognition policy and we're going to treat it as advisory...." *Id.*

157. See *Lear Siegler, Inc., Energy Prod. Div. v. Lehman*, 842 F.2d 1102, 1124 (9th Cir. 1988), *opinion withdrawn in part on rehearing*, 893 F.2d 205 (9th Cir. 1989) (rejecting Reagan's attempted use of a signing statement to nullify provisions of the Competition in Contracting Act of 1984, and ruling the attempt qualified as an impermissible line-item veto).

158. John M. de Figueiredo & Edward H. Stiglitz, *Signing Statements and Presidentializing Legislative History*, Working Paper 23951, NAT'L BUREAU OF ECON. RSCH., 1, 33 (2017), www.nber.org/system/files/working_papers/w23951/w23951.pdf [perma.cc/464C-DDLK].

Bush II's theory of constitutional executive power to defy congressional intent.¹⁵⁹ In his dissent, Chief Justice Roberts argued that the Court, in improperly permitting the President to directly defy Congress, violated the separation of powers framework.¹⁶⁰

Despite *Zivotofsky II*, courts have not widely accepted signing statements as evidence of legislative intent or history.¹⁶¹ Typically, courts treat signing statements as "a minor piece of legislative history or...one factor in analyzing a particular statute."¹⁶² Courts rarely consider a constitutional signing statement as the "controlling" interpretation of legislative history and intent.¹⁶³ Because courts so infrequently acknowledge signing statements, courts faced with the instruments have no guidance on the level of deference or the standard of scrutiny to apply.¹⁶⁴ What constitutes the appropriate doctrinal and judicial approach to signing statements is thus murky at best.¹⁶⁵ Major questions remain, and they will likely be answered by a federal judiciary that is

159. When he signed the Act into law, President George W. Bush issued a statement declaring his position that § 214 would "if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, DAILY COMP. PRES. DOC. (Sept. 30, 2002). The President concluded, "U.S. policy regarding Jerusalem has not changed." *Zivotofsky II*, 576 U.S. at 8-9. "Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports." *Id.* at 32.

160. "[T]he Court takes the perilous step—for the first time in our history—of allowing the President to defy an Act of Congress in the field of foreign affairs." *Zivotofsky II*, 576 U.S. at 67.

161. Court's apathy towards signing statements has left Meese's project unfulfilled for now. There remains a danger of "post-enactment opportunism" by the President, but courts also have several interpretive strategies to choose between to constrain the weight of signing statements. See Bradley & Posner, *supra* note 28, at 355.

162. See Nicholas J. Leddy, *Determining Due Deference Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN. L. REV. 869, 871 (2007). Some scholars dismay at any usage of signing statements as legislative history. See generally William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991) (arguing that signing statements cannot be components of legislative history since the President is not a legislator).

163. Leddy, *supra* note 162, at 872. Outside of *Zivotofsky*, courts have treated signing statements as key in several other cases. See *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 152 (D.D.C. 2002); *Nat'l Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

164. Leddy, *supra* note 162, at 872.

165. *United States v. Ruiz*, No. EP-19-CR-03035(1), 2021 WL 5235545, at *3 (W.D. Tex. Nov. 10, 2021) ("[Signing] statements are rarely used in statutory interpretation, but when used they are often used as confirmatory or supplemental evidence of congressional intent."); See, e.g., *Silva-Trevino v. Holder*, 742 F.3d 197, 202 (5th Cir. 2014) (using presidential signing statement to provide historical context after citing to statute); *United States v. Prado*, 933 F.3d 121, 139-40 (2d Cir. 2019) (noting presidential signing statement confirms conference report); *Taylor v. Heckler*, 835 F.2d 1037, 1044 (3d Cir. 1987) ("[W]e do not determine what weight, if any, a presidential signing statement deserves in the process of statutory interpretation.").

increasingly hostile to the administrative state.¹⁶⁶

Notably, according to Professors De Figueiredo and Stiglitz, “when courts do cite [signing statements], it is usually after the signing President has left office.”¹⁶⁷ De Figueiredo and Stiglitz examined 96 federal appellate and Supreme Court opinions that contained citations to signing statements over a 36-year period.¹⁶⁸ De Figueiredo and Stiglitz observed that Republican-appointed judges are more likely to cite signing statements issued by their own party than Democratic-appointed judges.¹⁶⁹

Thus, the full consequences of Trump’s aggressive use of signing statements are not yet fully known. Like all signing statements, Trump’s will outlive his presidency. Due to Trump and the Republican party’s remaking of the federal judiciary, these signing statements will, for the next twenty years at least, be increasingly received and considered by federal courts – and especially circuit courts of appeal – that are dominated by Trump appointed judges.¹⁷⁰ Additionally, these Trump appointees are unique in their youth and ideological commitments. Trump’s judicial search was “for hard-wired ideologues because they’re reliable policy agents.”¹⁷¹ This strategy has already proven fruitful. A paper by Neal Devins and Allison Orr Larsen examines the impact of partisanship on en banc decisions.¹⁷² They find that, between 2018 and 2020, there was a dramatic surge in the partisan weaponization of en

166. See *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2860 (2022) (displaying the Supreme Court’s attitude towards the administrative state).

167. De Figueiredo & Stiglitz, *supra* note 158, at 29.

168. *Id.*

169. *Id.* at 7.

170. Carrie Johnson, *Wave of Young Judges Pushes By McConnell Will Be ‘Ruling For Decades To Come,’* NPR (July 2, 2020), www.npr.org/2020/07/02/886285772/trump-and-mcconnell-via-swath-of-judges-will-affect-u-s-law-for-decades [perma.cc/7M3N-X82T] (noting that, as of July 2020, Trump had confirmed 200 federal judges); Leigh Ann Caldwell & Sahil Kapur, *McConnell Reaches Milestone On Judges by Filling Final Circuit Court Vacancy*, NBC NEWS (June 24, 2020), www.nbcnews.com/politics/congress/mcconnell-reaches-milestone-judges-filling-final-circuit-court-vacancy-n1232011 [perma.cc/BX9B-WMVP] (describing the conservative shift of the court under Trump and Mitch McConnell’s stewardship); Priyanka Boghani, *How McConnell’s Bid to Reshape the Federal Judiciary Extends Beyond the Supreme Court*, PBS FRONTLINE (Oct. 16, 2020), www.pbs.org/wgbh/frontline/article/how-mcconnell-and-the-senate-helped-trump-set-records-in-appointing-judges/ [perma.cc/22G2-S38Y] (describing Mitch McConnell’s role in holding open judicial vacancies during the Obama administration that Trump then filled); Jacob Finkel, *Trump’s Power Won’t Peak for Another 20 Years*, THE ATLANTIC (Apr. 10, 2021), www.theatlantic.com/ideas/archive/2021/04/trump-circuit-court-judges/618533/ [perma.cc/YH9D-DYDK] (analyzing the outsized impact of Trump’s appointments and the possibility of Trump appointees dominating the Circuit Courts of Appeal until 2049).

171. Rebecca R. Ruiz, et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html [perma.cc/GPF7-XEL9] (describing the profile of Trump appointed judges as mostly ideologically conservative, younger, white, and male).

172. See Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1374-82 (2021).

banc rulings, emphasizing the importance of party control over circuit courts.¹⁷³

The conservative skew of the federal bench coupled with the vast number of constitutional provisions affected by Trump's signing statements points to a worrying future. If courts do choose to fulfill Meese's dream and treat signing statements as legislative history, they will likely do so in compliance with broader Republican ideological commitments to expansive executive power absent oversight. This will also occur in a judicial environment where courts have already embraced the idea of a nationalist president.¹⁷⁴

Even if fears about judicial interpretation have not yet come to fruition, Trump's treatment of signing statements to rebut congressional oversight attempts has already contributed to interbranch conflict, a dynamic that will change future institutions.¹⁷⁵ In his Clinton-era memo, Dellinger noted that signing statements offered direction to executive branch subordinates on how to interpret or administer statutory provisions.¹⁷⁶ Thus, even if they are ignored by courts,¹⁷⁷ signing statements alter the application of the law in more insulated and, often, less transparent ways. The public (often via their representatives) must rely on the goodwill of executive officials to enforce the law as written rather than as presidentially desired. For example, after Trump's CARES Act signing statement, Democrats appealed directly to Secretary of the Treasury Mnuchin, urging him to uphold the statutory mandate.¹⁷⁸ But, depending on congresspeople to exert pressure is naïve, since Congress rarely challenges presidential unilateral action(s).¹⁷⁹

In a political environment defined by hyper-polarization, presidential personalization, and a zero-sum approach to policymaking, relying on executive branch officials to contravene the President's stated

173. *Id.* at 1413-16.

174. Jide Nzebile, *The Fable of the Nationalist President and Parochial Congress*, 53 UCLA L. REV. 1, 13 (2006) (“[C]ourts also seem to have embraced the idea that the President has a stronger claim than Congress to a national mandate.”).

175. Whittington & Carpenter, *supra* note 3, at 496.

176. Dellinger, *supra* note 40.

177. ABA, *supra* note 63, at 25 (“At present, the standing element of the ‘case or controversy’ requirement of Article III of the Constitution frequently frustrates any attempt to obtain judicial review of such presidential claims of line-item veto authority that trespass on the lawmaking powers of Congress.”).

178. Kate Davidson, *Democrats Call on Mnuchin to Uphold Oversight Provisions in Coronavirus Stimulus*, WALL ST. J. (Mar. 31, 2020), www.wsj.com/articles/democrats-call-on-mnuchin-to-uphold-oversight-provisions-in-coronavirus-stimulus-11585699103 [perma.cc/9RLY-8V9V]; Tom Hamburger, et al., *Inspectors General Warn that Trump Administration is Blocking Security of Coronavirus Rescue Programs*, WASH. POST (June 15, 2020), www.washingtonpost.com/business/2020/06/15/inspector-general-oversight-mnuchin-cares-act/ [perma.cc/A6TU-Q9UV] (detailing how the Trump administration has been frustrating government watchdogs and oversight bodies).

179. Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63, 67 (2007). For example, between 1973 and 1998, presidents issued 1,000 executive orders. *Id.* Congress challenged only thirty-seven of these orders and only three of those challenges resulted in litigation. *Id.*

interpretive wishes is a naïve hope. While the Trump Administration was marked by some visible bureaucratic disloyalty, his departments and agencies were largely headed by loyalists who, themselves, shunned regulation and transparency.¹⁸⁰ Like the Reagan Administration, the Trump Administration prioritized confidentiality over accountability.¹⁸¹ Bureaucratic accountability is not just an inconvenient legal duty or social norm. Rather, it is necessary to guarantee that (1) low-level administrative personnel enforce policy, and (2) higher-level officials receive important and complete information.¹⁸² Unfortunately, one would expect future Republican administrations, emboldened by a friendly and pliant judiciary, to continue to emulate this behavior, resulting in increasingly disconcerting and corrosive effects.

On the opposite end of the spectrum, there is a possibility that the importance and utility of signing statements could diminish, at least in the next few years. As explained, constitutional signing statements are usually attached to large omnibus spending bills that Presidents feel obligated to sign, despite not necessarily agreeing with every provision therein. But, large government spending is not without controversy. In particular, small government conservative Republicans have long harbored hostility towards expansive government spending packages.

While Republicans have always been the party of small government, the Tea Party movement injected new fervor into conservative principles. The Tea Party movement was launched in 2009 in response to the Obama Administration's Great Recession spending policies.¹⁸³ It militated for a

180. See Rina Torchinsky, *U.S. investigation finds that former Interior Secretary Ryan Zinke misused position*, NPR (Feb. 16, 2022), www.npr.org/2022/02/16/1081180054/ryan-zinke-interior-investigation-ig-report [perma.cc/S9GE-53UM] (detailing how Ryan Zinke, Trump's Secretary of the Interior, misused his position to advance a development project in his hometown); Coral Davenport, et. al., *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES (July 5, 2018), www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html [perma.cc/9VL5-ZGHY] (listing some of Scott Pruitt's ethics violations, including his lavish spending); Norman Eisen & Richard Painter, *The Ethics Case Against Betsy DeVos*, THE HILL (Feb. 6, 2017), thehill.com/blogs/pundits-blog/the-administration/317975-the-ethics-case-against-betsy-devos/ [perma.cc/9NX8-N4U2] (noting how Trump's Secretary of Education did not provide supplemental information regarding her investments and financial holdings).

181. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2253, 2333 (2001).

182. See Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 78-79 (2017).

183. CHRISTINE TROST & LAWRENCE ROSENTHAL, *STEEP: THE PRECIPITOUS RISE OF THE TEA PARTY* 8, 10, 18 (Lawrence Rosenthal & Christine Trost eds., 2012). The February 16, 2009 "Porkulus Protest" in Seattle is widely considered to be the first Tea Party event. See Kate Zernike, *Unlikely Activist Who Got to the Tea Party Early*, N.Y. TIMES (Feb. 27, 2010), www.nytimes.com/2010/02/28/us/politics/28keli.html [perma.cc/V7CG-23S7]. It was organized by conservative activist Keli Carender in protest of Obama's signing of the 2009 \$787 billion stimulus bill scheduled for the next day. *Id.* The Tea Party then gained momentum after CNBC analyst Rick Santelli ranted about government spending and rising debt from the floor of the Chicago Mercantile Exchange. Chris Cillizza, *The Day The Tea Party Died*, CNN (July 23, 2019), www.cnn.com/2019/07/23/politics/debt-deal-budget-ceiling/index.html

return to what it deemed a constitutionally prescribed limited government.¹⁸⁴ In practice, this meant opposing any and all government spending.

During the 2010 midterm elections, the Tea Party successfully helped elect dozens of legislators, now-members of the Freedom Caucus.¹⁸⁵ Despite early influence, many commentators pronounced that the Tea Party was inactive during the Trump Administration because of increased government spending and debt during the four years.¹⁸⁶ However, remnants of the Tea Party have proved resilient and powerful in the 2023 Republican House of Representatives.¹⁸⁷

In January 2023, twenty House Republicans, including a contingent of Freedom Caucus ideological hardliners held the Republican party and now-Speaker Kevin McCarthy hostage as they exacted demands to curb spending.¹⁸⁸ Ultimately, McCarthy ascended to his desired role, but not without conceding to the holdouts. The details of the backdoor deals remain unknown, but reporting has indicated that certain members of the Freedom Caucus will sit on important committees and the House will cap

[perma.cc/N72L-27DZ]. The Tea Party's rise and popularity was also fueled by racial animus towards Obama and a perception of threat and social downgrading by its largely older, white, and evangelical members. See Robb Willer, Matthew Feinberg, & Rachel Wetts, *Threats to Racial Status Promote Tea Party Support Among White Americans* (Stan. Univ., Working Paper No. 3422, May 4, 2016), www.gsb.stanford.edu/faculty-research/working-papers/threats-racial-status-promote-tea-party-support-among-white [perma.cc/6MJX-CT2E] (exploring the link between racial animosity and the rise of the Tea Party using group position theory and hypothesizing that support by white Americans was, in part, because of perceived racial threat and a loss of social status).

184. Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons From the Tea Party*, 88 DENV. U.L. REV. 523, 526, 533 (2011) (describing the Tea Party platform in support of restrained government spending and against "the idea of the Constitution as a vehicle for the protection of civil rights and social welfare rights.").

185. TROST & ROSENTHAL, *supra* note 183, at 10, 17.

186. Despite his Republican political affiliation, Trump showed disregard for the national debt and government spending. See Brian Riedl, *New Budget Deal Puts Final Nail in the Tea-Party Coffin*, THE NAT'L REV. (July 22, 2019), www.nationalreview.com/2019/07/new-budget-deal-puts-final-nail-in-the-tea-party-coffin/ [perma.cc/VD4A-MAGY] (discussing how a Trump deal to raise the discretionary spending caps by \$320 billion would essentially repeal the 2011 Budget Control Act – a Tea Party victory – and indicated the "shredding of Republican credibility on fiscal responsibility.").

187. These include Representatives Paul Gosar and Andy Biggs from Arizona. Anthony Adragna & Nancy Yu, *Meet the 20 Rebels Bucking McCarthy's Bid*, POLITICO (Jan. 3, 2023), www.politico.com/news/2023/01/03/20-house-republicans-oppose-mccarthy-speaker-00076228 [perma.cc/4MZK-LYFM].

188. Catie Edmondson, *Who Are the Republicans Opposing McCarthy's Speaker Bid?*, N.Y. TIMES (Jan. 3, 2023), www.nytimes.com/2023/01/03/us/politics/kevin-mccarthy-republican-opposition.html [perma.cc/R7KY-JA4Z]. These hardliners were incensed by vast Republican support for a \$1.65 trillion omnibus bill in December 2022. Natalie Andrews, *Omnibus Spending Bill Energizes Kevin McCarthy's GOP Critics in Speaker Race*, WALL ST. J. (Dec. 20, 2022), www.wsj.com/articles/spending-bill-energizes-kevin-mccarthys-gop-critics-in-speaker-race-11671509724 [perma.cc/T37T-TKXC].

federal spending at fiscal 2022 levels.¹⁸⁹ It seems that House Republicans have also determined not to agree to raising the nation's borrowing limit "without budget agreement or commensurate fiscal reforms."¹⁹⁰ The recently passed House Rules enshrined many of these anti-spending initiatives.¹⁹¹ One component – nicknamed "cut-as-you-go" – "requires that increases in mandatory spending be offset with equal or greater decreases in mandatory spending."¹⁹²

It is too soon to know for sure, but the trajectory of House Republicans indicates that they will staunchly oppose any large spending bills. Fewer large bills on the President's desk means fewer opportunities – and less necessity – to use signing statements. If the House Republicans insist on preventing all government spending in large chunks, the absence of the traditional types of bills to which Presidents attach signing statements could diminish their use. A starkly divided government of this type could limit the utility of signing statements. Regardless, the interplay between the branches impacts the efficacy and utility of all presidential tools, including signing statements. Therefore, the future of signing statements is dependent on evolving inter-branch and inter-party relationships.

V. CONCLUSION

Two years into his presidency, President Biden ("Biden") has not replicated Trump's heavy signing statement usage.¹⁹³ However, this does not mean that Biden has forsaken all presidential directive tools. Rather, Biden has most often reached for executive orders to effectuate his

189. Melanie Zanona, Manu Raju, & Annie Grayer, *GOP Leaders and McCarthy Holdouts Defend Deals as Some Republicans Complain They're in the Dark*, CNN (Jan. 10, 2023), www.cnn.com/2023/01/10/politics/house-republican-conference-rules-deal/index.html [perma.cc/5ST8-LFJT].

190. *Id.*; Matt Egan, *US Could See a Fight Over Debt Ceiling That Rocks Markets, Goldman Sachs Warns*, CNN BUS. (Dec. 5, 2022), www.cnn.com/2022/12/05/economy/debt-ceiling-fight-goldman-sachs/index.html [perma.cc/TA9F-FEGW].

191. Lisa Desjardins, *There Are New House Rules Under GOP Leadership. Here's a Short Guide*, PBS NEWS HOUR (Jan. 10, 2023), www.pbs.org/newshour/politics/there-are-new-house-rules-under-gop-leadership-heres-a-short-guide [perma.cc/XMP4-2VB2].

192. *Cut-As-You-Go*, CONG. INST., www.congressionalinstitute.org/115th-congress-floor-procedures-manual/xix-cut-as-you-go-cutgo/ [perma.cc/YQ5Y-8FVY] (last visited Jan. 29, 2023).

193. Biden has only issued five signing statements. See *Am. Presidency Project*, U.C. SANTA BARBARA, www.presidency.ucsb.edu/advanced-search?field-keywords=&field-keywords2=&field-keywords3=&from%5Bdate%5D=&to%5Bdate%5D=&person2=200320&category2%5B%5D=69&items_per_page=25 [perma.cc/RW9N-CLPF] (last accessed Feb. 14, 2023). Only one of the five is a constitutional signing statement, attached to the 2022 National Defense Authorization Act. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2022, DAILY COMP. PRES. DOC. (Dec. 27, 2021). In this statement, Biden interestingly echoed Obama in registering his discontent with the prohibition on using funds to transfer Guantánamo Bay detainees. *Id.*

desired political and policy objectives.¹⁹⁴ While executive orders have the effect of law, they do not have the staying power of signing statements.¹⁹⁵ Successive administrations can – and often do – issue their own executive orders, repealing prior directives.¹⁹⁶ Executive orders are also subject to judicial scrutiny, and can be abrogated or nullified by the courts.¹⁹⁷ Thus, despite Biden's apparent aggressive use of presidential power, his chosen method – announcing executive orders – is inherently vulnerable and time delimited in a way that signing statements are not. If Biden continues to favor executive orders, the agendas set and powers enhanced through

194. See Ben Wilhelm, *Biden Administration's Initial Presidential Directives in Context*, CONG. RSCH. SERV. (Feb. 3, 2021), crsreports.congress.gov/product/pdf/IN/IN11588 [perma.cc/KY8V-KG4T].

195. Some scholars also argue that the excessive use of executive orders are actually a sign of presidential weakness, since it indicates that the president's administration is not properly staffed, does not have strong linkages to Congress, and does not have the full support of the party. See David E. Lewis, *Deconstruction the Administrative State*, 81(3) J. POL. 767, 781 (2019). The character of the executive order is particularly interesting in light of usage by outgoing presidential administrations to reinforce policy preferences and attempt to agenda-set in the new administration. See Ben Wilhelm, *Presidential Transitions: Executive Orders*, CONG. RSCH. SERV. (Nov. 24, 2020), crsreports.congress.gov/product/pdf/IN/IN11540 [perma.cc/9NFV-8S6X].

196. Wilhelm, *Presidential Transitions*, *supra* note 195 (stating that “each President is free to amend, repeal, or replace any executive order, including those of his predecessors. Therefore, policies enacted by executive order may be less likely to persist between Administrations than policies and laws enacted through other means.”). For example, within hours of being sworn in, Trump signed an executive order entitled “Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal,” directing his administration to “minimize the unwarranted economic and regulatory burdens of the act and prepare to afford the states more flexibility and control to create a more free and open health care market.” See Exec. Order No. 13765, 82 C.F.R. § 8351 (Jan. 20, 2017). This order was widely viewed as an evisceration of Obama's seminal legislative achievement. Julie Hirschfeld Davis & Robert Pear, *Trump Issues Executive Order Scaling Back Parts of Obamacare*, N.Y. TIMES (Jan. 20, 2017), www.nytimes.com/2017/01/20/us/politics/trump-executive-order-obamacare.html [perma.cc/83DW-Y38B]. Since coming into office, Biden has revoked several of Trump's executive orders, including issuing his own executive order – Exec Order No. 14009 – in January 28, 2021, that repealed Trump's Exec. Order No. 13765. See Exec. Order No. 14009, 86 C.F.R. § 7793 (published Feb. 2, 2021) (entitled “Strengthening Medicaid and the Affordable Care Act”). Executive orders can be ephemeral and time-delineated - Obama's executive order was repealed by Trump's executive order which was, itself, repealed by Biden's executive order. See also Exec Order No. 13992, 86 C.F.R. § 7049 (Jan. 20, 2021) (entitled “Revocation of Certain Executive Orders Concerning Federal Regulation” and specifically naming several executive orders from 2017 and 2019).

197. When evaluating executive orders, courts often examine whether the order's implementation is consistent with statutory or constitutional requirements and whether the President had the power to act in the specific policy domain. See Jonathan M. Gaffney, *Executive Orders: An Introduction*, CONG. RSCH. SERV. (Mar. 29, 2021), crsreports.congress.gov/product/pdf/R/R46738 [perma.cc/96TL-AHJH]. Increasingly, federal courts have curtailed executive orders by granting nationwide preliminary injunctions. See *Feds for Med. Freedom v. Biden*, No. 22-40043 (5th Cir. 2022) (enjoining Biden's executive order requiring federal workers to receive a COVID-19 vaccine) and *Feds for Med. Freedom v. Biden*, 25 F.4th 354 (5th Cir. 2022) (lifting the nationwide preliminary injunction on the vaccine mandate).

his presidential directives likely will not be resilient to any successive administration's changes.

On the other hand, as Jacob Finkel writes, while "[t]he Trump presidency may be over, [] the Trump era has only just begun."¹⁹⁸ Like presidents before him, Trump's aggressive use of constitutional signing statements extends his policy preferences into successive regimes. The potential for and extent of Trump's impact remains unknown; it depends on whether courts, dominated by Trump appointees, treat his signing statements as indicators of legislative history. Trump's aversion to oversight and invocations of executive privilege will likely resonate decades into the future, further insulating the presidency as a unitary and imperial body.

198. Finkel, *supra* note 170.