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Judicial Use of Presidential Legislative History: A Critique

WILLIAM D. POPKIN*

INTRODUCTION

Judicial use of legislative history to interpret statutes is under renewed attack. First, critics contend that the "law" consists of the statute's text as voted on by the legislature and signed by the President. Legislative history, they assert, is a rival text created by a group other than the legislature that should not be used to determine statutory meaning. Second, critics argue that the political process by which legislative history is created is fundamentally flawed.

This first broad "formalist" argument is unlikely to have much impact in the United States. The courts are too committed to reconstructing legislative intent, or at least worrying about what that intent might be, to abandon examining legislative history. Moreover, courts can resolve the textualist's "horror"—an unambiguous text conflicting with legislative history—in favor of the statutory language without adopting the more general position that legislative history is never relevant in interpreting ambiguous text. In any event, the constitutional primacy of the text is doubtful, given the well-known exception that plain meaning will not be implemented if it will produce an "absurd" result.

The second argument—that the political process is fundamentally flawed—raises several legitimate concerns. Unelected congressional staff play a major role in drafting legislative history. Legislative history often poses a serious risk of political manipulation because its authors might manipulate its content to undermine the statutory structure or to achieve political results not attainable directly through the text.

These legitimate criticisms, however, do not support an across-the-board rejection of legislative history. Congressional staff are often very knowledgeable and are able to flesh out the underlying statutory structure in

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legislative history without being politically manipulative.\(^3\) Legislators' use of legislative history may even protect the political process from special interest amendments by allowing political agreements to be recorded in legislative history without unravelling the compromises embodied in a previously agreed upon statutory text.

Notwithstanding whether judicial use of such legislative history from legislative sources can be justified, judicial reliance on presidential legislative history—the material found in presidential statements accompanying the signing of legislation—poses additional problems. This Article examines judicial reliance on presidential legislative history and concludes that judicial reliance on presidential signing statements has almost nothing to recommend it. Part I reviews the history of presidential use of signing statements to create legislative history and focuses on President Reagan's dramatic expansion of this practice.\(^4\) Part II provides a critique of presidential legislative history, arguing that the President is not a legislator and that signing statements containing specific statements about statutory meaning are often politically manipulative attempts to undermine statutory structure or achieve results too controversial to be adopted in the text.

I. PRESIDENTIAL USE OF LEGISLATIVE HISTORY

The vast majority of presidential signing statements contain general comments about the statute's good and bad features, rather than specific

\(^3\) This is often true in tax law. See Ferguson, Hickman & Lubick, Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process, 67 Taxes 804, 810-12 (1989).

\(^4\) There are difficult research hurdles that prevented a complete survey of presidential legislative history. Easy access to presidential signing statements is a recent phenomenon, beginning with government publication of the Weekly Compilation of Presidential Documents in 1965. Before then, presidential signing statements were published in three places: (1) the Public Papers of the Presidents; see, e.g., Public Papers and Addresses of President Franklin D. Roosevelt 1944-1945 (1950), cited in Group Life & Health Ins. v. Royal Drug Co., 440 U.S. 205, 223-24 (1979); (2) miscellaneous compilations of legislative history; see, e.g., Attorney General's Memo on the Public Information Section of the Administrative Procedure Act II, at IV (1967) (referring to statement by President Johnson), cited in Berry v. Department of Justice, 733 F.2d 1343, 1349-50 (9th Cir. 1984)); and (3) the "Presidential Messages" section of the United States Code Congressional and Administrative News (USCCAN). The predecessor of USCCAN, the United States Congressional Service, also published signing statements in the "Presidential Messages" section.


The following description of presidential practice through the end of the Reagan administration is based on an examination of the entire Weekly Compilation of Presidential Documents series, secondary sources discussing presidential action and a Lexis and Westlaw search of cases referring to signing statements.
interpretations. Occasionally, these general comments are cited in judicial opinions as evidence of statutory context. Signing statements also contain observations about a statute's constitutionality. An Appendix to this Article cites more than one hundred such observations, which appear in the Weekly Compilation of Presidential Documents. Most of these observations concern power clashes between the President and Congress over traditional battle-grounds, such as the legislative veto, appointments power, foreign relations and execution of the laws. When the President offers an interpretation of a statute, the interpretation often attempts to address an alleged constitutional defect, such as construing a legislative veto as a "report-and-wait" provision or explaining that an appointee with federal administrative responsibility, who is not appointed by the President, performs only advisory functions.


Except for presidential statements addressing alleged constitutional infirmities, presidential statements regarding the specific meaning of statutes have been rare. Before President Reagan, only a few presidents issued such statements. In 1830, President Jackson sent a communication to Congress that interpreted a statute concerning the location of road construction in a manner that conflicted with congressional intent. Twelve years later, President Tyler stated he was signing a bill that he thought was both unconstitutional and bad policy. Although this statement was not an interpretation, it evoked strong congressional objection to presidential statements accompanying the signing of legislation, in part because such statements could contradict legislative intent. In modern times, President Truman twice engaged in the "probably unprecedented course" of construing a statute he signed in a partisan fashion.

Most of the pre-Reagan presidential interpretations, however, have not involved politically contentious issues. A search of the *Weekly Compilation of Presidential Documents* uncovered ten other specific pre-Reagan interpretations, all of which appeared to be politically uncontroversial. Four (all by President Carter) referred to presidential "understandings" and six (three by President Carter) referred to legislative history with which the President agreed.


11. Id. at 6-7.

12. Id. at 7-8.


President Truman’s comments on signing the Portal-to-Portal Act, dealing with the employer “good faith” provision, were cited in Cole v. Farm Fresh Poultry, Inc., 824 F.2d 923, 928 (11th Cir. 1987); EEOC v. Home Ins. Co., 672 F.2d 252, 264-65 (2d Cir. 1982); and Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 661-62 (4th Cir. 1969).

15. Statement Accompanying Signing of Pub. L. No. 96-324, 16 WEEKLY COMP. PRES. Doc. 1521 (Aug. 8, 1980) (Carter) (the line between the high seas and inland waters does not determine territorial jurisdiction under international law); Statement Accompanying Signing of Pub. L. No. 96-205, 16 WEEKLY COMP. PRES. Doc. 466 (Mar. 12, 1980) (Carter) (the United States will continue to be reimbursed for costs from collecting duties and fees attributable to importing petroleum products into the Virgin Islands); Statement Accompanying Signing of Pub. L. No. 96-61, 15 WEEKLY COMP. PRES. Doc. 1435 (Aug. 15, 1979) (Carter) (the Act was not intended to affect foreign fishing under other laws or agreements, or preclude the use of foreign-built vessels by certain fishermen); Statement Accompanying Signing of Pub. L. No. 95-473, 14 WEEKLY COMP. PRES. Doc. 1794 (Oct. 18, 1978) (Carter) (the codifying Act does not change law, resolve issues of agency authority or influence pending litigation).

pre-Reagan cases citing presidential legislative history that contained specific interpretations of uncertain political import. In sum, presidential interpretations were infrequent and usually politically uncontroversial.

Judicial use of legislative history from legislative sources has become so common, however, that it was probably inevitable that a president would attempt to create his own legislative history. President Reagan inserted more interpretations of statutes in signing statements than any of his predecessors. Many of President Reagan's signing statements dealing with specific
doc. 2231 (Oct. 14, 1980) (Carter) (the legislative history and bill language agree that the Act codifies rather than changes law); Statement Accompanying Signing of Pub. L. No. 96-324, 16 WEEKLY COMP. PRES. Doc. 1521 (Aug. 8, 1980) (Carter) (the legislative report is clear that the high seas/inland water line was drawn for safety purposes only); Statement Accompanying Signing of Pub. L. No. 96-308, 16 WEEKLY COMP. PRES. Doc. 1334 (July 10, 1980) (Carter) (the committee explains that the law eliminates uncertainty by reinstating prior Supreme Court decision); Statement Accompanying Signing of Pub. L. No. 94-158, 11 WEEKLY COMP. PRES. Doc. 1391 (Dec. 20, 1975) (Ford) (the legislative history defines "national interest" for purposes of indemnifying the loss of artwork); Statement Accompanying Signing of Pub. L. No. 93-645, 11 WEEKLY COMP. PRES. Doc. 20 (Jan. 4, 1975) (Ford) (the committee states that Congress must take further steps before federal funds are committed); Statement Accompanying Signing of Pub. L. No. 89-339, 1 WEEKLY COMP. PRES. Doc. 483 (Nov. 8, 1965) (Johnson) (the legislative history is clear that assistance is provided only to hurricane victims for whom no insurance is available).

17. First, in Thomas Paper Stock Co. v. Porter, 328 U.S. 50, 54 (1946), the Court cited a statement by President Roosevelt to support its view that the Price Administrator's authority was limited. Second, in Pottharst v. Small Business Admin., 329 F. Supp. 1142, 1144-45 (D. La. 1971), a presidential signing statement was cited but rejected, as was legislative history from a bill sponsor and a committee report. The statute dealt with relief for borrowers under the Small Business Act in connection with hurricane losses. See also United States v. Lovett, 328 U.S. 303, 324-25 (1946) (Frankfurter, J., concurring) (Justice Frankfurter cited a presidential signing statement to support the view that the statute was not a bill of attainder, because there was no intent to punish individuals. The Senate's intent was unclear, and the President's statement demonstrated that he had no such intent.).

There are also occasional references to a state governor's intent in determining what a state statute means, but usually for the purpose of confirming legislative intent. In State v. Brasel, 28 Wash. App. 303, 308, 623 P.2d 696, 699 (Wash. Ct. App. 1981), a mistake was made in the language of a bill passed by the legislature, which defeated legislative intent. The court cited the Governor's statement to support an interpretation that achieved what the legislature intended, rather than what the statute said. In two other cases, the statute passed by the legislature was transmitted to the Governor with different language from what the legislature adopted. The Governor's statement was cited to support an interpretation supporting the bill as passed by the legislature, not as signed by the Governor. State ex rel. Brassey v. Hanson, 81 Idaho 403, 342 P.2d 706, 713 (1959); State ex rel. Board of Comm'rs of Laramie County v. Wright, 62 Wyo. 112, 163 P.2d 190, 190-92 (1945); see also State v. Strong Oil Co., 105 Misc. 2d 803, 809-10, 433 N.Y.S.2d 345, 350 (the Governor's intent confirmed what the legislative history asserted).

interpretations of statutes were politically uncontroversial. Four signing statements announced understandings of statutory meaning, and three asserted presidential agreement with interpretations by members of Congress. One signing statement articulated an understanding of a statute that was "clearly supported" by cited material from a conference committee report.

Unlike most of his predecessors, however, President Reagan attempted to use signing statements to resolve politically sensitive issues and to undermine the statutory structure. Use of these interpretations was carefully orchestrated to enhance presidential influence on statutory interpretation. Attorney General Meese, for example, persuaded the publishers of the United States
Code Congressional and Administrative News (USCCAN) to include presidential signing statements in its widely read “Legislative History” section, beginning on March 3, 1986.\(^2\)

In a little over two years, President Reagan signed four statements with specific interpretations that were politically manipulative. These interpretations either adopted positions on issues that were unresolved in the political debate accompanying the legislation’s passage or attempted to undermine the statutory structure. First, a 1985 signing statement accompanying the Equal Access to Justice Act\(^3\) announced a presidential “understanding” regarding the statutory standard for determining whether the government must pay attorneys’ fees to prevailing parties. President Reagan argued that the statutory text, which required that the government have “substantial justification” for a litigating position, was more lenient than a “substantial evidence” standard. The President was apparently reacting to a House Committee Report, which reached a less pro-government interpretation.\(^4\)

Some legislators recorded legislative history disagreeing with the House Report,\(^5\) and one decision suggested that the House Report may have been a “rogue elephant” which did not embody a political consensus.\(^6\) Although courts have differed about the weight to be accorded this presidential legislative history,\(^7\) it is clear that President Reagan attempted to resolve an unresolved, contentious political debate.

Second, President Reagan suggested that the mandatory enforcement language of the Safe Drinking Water Act Amendments of 1986\(^8\)
unconstitutionally limited executive discretion. The specific provision dealt with federal enforcement of rules applicable to public water systems. The President's interpretation, which permitted executive discretion, directly contradicted a Senate Committee report and disregarded the fact that the statute replaced the prior discretionary "may" language with a mandatory "shall." This interpretation not only attempted to resolve an unresolved, contentious political debate, but also undermined the statutory structure mandating federal enforcement, as evidenced by the fact that "shall" replaced "may" in the statutory text. This presidential foray into creating legislative history evoked a critical response in the New Republic and a defense in the National Law Journal from a Deputy Assistant Attorney General.

A third, and even more politically controversial signing statement, accompanied the Immigration Reform and Control Act of 1986. This statement contained the President's "understanding" that the Act's anti-discrimination provisions (considered necessary because of new sanctions on hiring illegal aliens) required a showing of discriminatory intent, not just disparate impact. Representative Frank, the legislative sponsor of the anti-discrimination amendment, charged the President with "intellectual dishonest[ly]." The legislative history is, in fact, murkier than either President Reagan or Representative Frank suggested. The legislative history, however, does

31. Pub. L. No. 99-339, § 102(b)(2), 100 Stat. 647 (1986) ("shall issue an order") (amending 42 U.S.C. § 300g-3(a)(1)(B) ("may commence a civil action"); Pub. L. No. 99-339, § 102(b)(2), 100 Stat. 647, amending 42 U.S.C. § 300g-3(a)(2)(B). The claim of unconstitutionality technically places this signing statement outside the category of statutory interpretations uninfluenced by constitutional considerations. This was the statement that first attracted national press attention, however (see supra note 22), and it was viewed in the press as a straightforward presidential effort to contradict legislative intent. The public perception was accurate because the constitutional claim of presidential discretion was fanciful. It was reminiscent of the President's claim of spending discretion to justify impoundment, which the Supreme Court treats as a straightforward question of statutory interpretation. See Train v. City of New York, 420 U.S. 35 (1975).
33. Kmeic, supra note 22.
35. N.Y. Times, Nov. 7, 1986, at 8, col. 1; see also 44 CONG. Q. WEEKLY REP 2990 (1986).
36. (1) Relevance of prior 1984 Frank amendment. The 1986 House Report (H.R. REP No. 682(I), 99th Cong., 2d Sess. 69, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5673), indicates that the anti-discrimination provision was based on the Frank amendment, as reflected in the discussions and compromises on that amendment in 1984 conference committee deliberations. Disagreement on another issue pre-
indicate that Congress was unable to resolve the contentious debate regarding what constitutes illegal discrimination and that the President tried to use a signing statement to influence judicial interpretation. The signing statement also announced a presidential “understanding” of a provision allowing an alien some leeway to be absent from the country. The President had opposed this provision, and the signing statement may have been an effort to mitigate the results of a political battle lost in Congress.

vented passage of the bill with the Frank amendment. 42 CONG. Q. WEEKLY REP. 2623 (1984). The 1984 version of the Frank amendment, passed by the House, stated that it would be “an unfair immigration-related employment practice to discriminate against any individual,” (H.R. 1510, 98th Cong., 2d Sess., § 274A(h)(1)(A), 130 CONG. REC. H5640 (daily ed. June 12, 1984)), without indicating whether the discrimination must be intentional. A later provision in the Frank amendment, see id. § 274A(i)(1)(D), however, indicates that special consequences follow from a finding that the discriminatory practice was intentional. The implication is that the general definition of discrimination included more than discriminatory intent. The Immigration Act which passed in 1986 did not, however, adopt the Frank amendment in toto. It deleted the language providing for special consequences from a finding of discriminatory intent, weakening the inference that discriminatory intent is not required. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 102(a) (amending Immigration and Nationality Act, § 274B(g)(2)(B), 100 Stat. 3359, 3377-78 (1986)).

(2) Relation to Title VII.

The legislative history indicates that the Act extends Title VII protections to aliens. H.R. REP. No. 682(I), 99th Cong., 2d Sess. 69; H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. 87, 88, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5842-43. Title VII has been interpreted by the Supreme Court to apply to discriminatory impact. Griggs v. Duke Power Co., 401 U.S. 424 (1971). This supports the inference that discriminatory impact is sufficient to establish discrimination.

The President’s response to this contention is that the Immigration Act only tracks § 703(a)(1) of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 255 (1964), which in his view requires proof of discriminatory intent. It is true that the Immigration Act language is similar to § 703(a)(1) in applying to “discrimination against an individual,” but it is not clear that § 703(a)(1) of Title VII is inapplicable to disparate impact cases. The courts have split on this issue, concerning the interpretation of both the statute and the Supreme Court cases. Compare Seville v. Martin Marietta Corp., 638 F. Supp. 590, 594 (D. Md. 1986) (disparate impact analysis does not apply) with Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984) (disparate impact analysis does apply).

(3) Pattern or practice.

The President overstates his case against disparate impact by relying on the language of the Immigration Act requiring “knowing and intentional discrimination” or “a pattern or practice of discriminatory activity.” It is not clear that “pattern or practice” means discriminatory intent. The government believes that it does and cases brought by the government have adopted this view. International Bhd. of Teamsters v. United States, 431 U.S. 324, 334-45 (1977). Representative Frank, however, thought that “pattern or practice” meant something other than intent. N.Y. Times, Dec. 9, 1986, at 14, col. 3.

37. See 22 WEEKLY COMP. PRES. Doc. 1534 (Nov. 6, 1986) (discussing the Immigration Reform and Control Act of 1986, § 201(a)); id. at 1536, adding Immigration and Nationality Act, § 245A(a)(3) (the statute requires “continuous physical presence” but permits “brief, casual, and innocent absence”).

38. The opposition to the provision for “brief, casual, and innocent” absence is recorded in H.R. REP. No. 99-682(I), 99th Cong., 2d Sess. 124.

39. The same signing statement also states “understandings” about two other matters of statutory detail whose political significance is unclear. See 22 WEEKLY COMP. PRES. Doc. 1534
In a fourth signing statement, accompanying the Sentencing Act of 1987, President Reagan expressed his "understanding" about the Act's meaning. President Reagan's understanding comported with the Senate's view in a contentious but unresolved political dispute with the House regarding whether the Act covered crimes initiated before the Act's effective date and whether courts possessed the discretion to depart from the Sentencing Commission's guidelines. In the signing statement, President Reagan opted for greater retroactive impact and lesser judicial discretion. President Reagan also aggressively employed signing statements in attempts to interpret away potentially unconstitutional provisions. He construed four statutes in a fashion that avoided alleged constitutional problems in affirmative action programs and interpreted another statute to avoid interference with presidential power to control spending. Two interpretations were based on a claimed constitutional power to protect the national security. In these interpretations, the President exceeded the traditional areas of constitutional concern, such as the legislative veto, the appointments power, foreign relations and execution of the laws.

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47. The President's interpretations may also undermine the statutory structure when stating whether an unconstitutional provision is severable. Compare Statement Accompanying Signing
In short, President Reagan attempted to use signing statements to resolve politically sensitive issues and to undermine statutory structure to a degree not attempted by former presidents.

II. CRITIQUE OF JUDICIAL USE OF PRESIDENTIAL LEGISLATIVE HISTORY

Judicial reliance on presidential legislative history encounters two problems. First, the President is not a legislator. The authority of traditional legislative history depends on its origin within the legislative branch. Second, many recent efforts to create presidential legislative history have been politically manipulative. Politically manipulative legislative history possesses no claim to judicial deference.

A. The President Is Not a Legislator

Legislators derive their authority to create legislative history from article I of the Constitution of the United States. The President, however, is not a legislator and therefore cannot create authoritative legislative history.

The Constitution explicitly gives the President three limited legislative roles. First, the President has the power to approve or veto a bill.47 This is the President's only legislative power granted by article I of the Constitution, which otherwise vests "[a]ll legislative Powers . . . in a Congress of the United States . . . ."48 Second, article II vests the executive power in the President, including the obligation to "take care that the laws be faithfully executed . . . ."49 To the extent that execution requires interpretation, the President arguably possesses an implied legislative power to interpret. Third, article II grants the President the power to propose legislation.50 None of these express or implied powers, however, justifies a presidential role in creating authoritative legislative history.

1. The Power to Approve or Veto Bills

The President's article I power to approve or veto bills is a negative power only and cannot therefore justify judicial reliance on presidential legislative history.51 The Constitution generally does not require the President

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47. U.S. Const. art. I, § 7, cl. 2.
49. U.S. Const. art. II, § 3.
50. Id.
to sign a bill for it to become law. The only instance in which the President's signature is required for legislation is when the signature is necessary to avoid a pocket veto. 52

The President's signature on a bill is also irrelevant when applying the rule that the last-passed law prevails over prior laws. Either congressional intent or the date the legislature passes a law determines which law has priority, not the date of the President's signature. 53

In rejecting arguments predicated on legislative history from legislative sources, some courts have described the President's legislative role in affirmative terms. 54 These courts have asserted that the President assents only to the statute, not the legislative history. More is required, however, to justify judicial reliance on presidential legislative history. Simply put, an argument used to reject legislative history from legislative sources cannot justify judicial reliance on presidential legislative history without providing some independent justification for an affirmative presidential role in creating legislative history 55

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52. Although U.S. Const. art. I, § 7, cl. 2, states that the President shall sign a bill of which he approves, failure to sign prevents legislation only if Congress has adjourned within ten days of presenting the bill to the President (producing a pocket veto). See, e.g., Statement Accompanying Signing of Pub. L. No. 93-190, 9 Weekly Comp. Pres. Doc. 1470 (Dec. 17, 1973) (allowing a bill to become law without a signature). The President can avoid a pocket veto by signing the law. Edwards v. United States, 286 U.S. 482, 490 (1932); see also La Abra Silver Mining Co. v. United States, 175 U.S. 423, 454 (1899) (the President "participates in the enactment of laws" and can therefore sign a bill during a congressional recess).

53. See Pallottini v. Commissioner, 90 T.C. 498, 503 (1988) (holding that congressional intent prevailed). A concurring opinion gave priority to the bill which passed Congress last. No judge relied on the date of the presidential signature. Id. at 504.

The President apparently recognizes that congressional intent determines which of two bills takes priority. H.J. Res. 395 was passed by Congress on December 22, 1987, after H.R. 1777 had been adopted. H.J. Res. 395 explicitly modified a provision in the prior bill. Judging from the Public Law numbers, the President signed the earlier-passed bill last, but he stated his understanding of legislative intent that the second-passed bill prevailed. Statement Accompanying Signing of Pub. L. No. 100-204, 23 Weekly Comp. Pres. Doc. 1547 (Dec. 22, 1987). But cf. Statement Accompanying Signing of Pub. L. No. 100-696, 24 Weekly Comp. Pres. Doc. 1548 (Nov. 18, 1988) (the last signed bill prevailed to cure an unconstitutional legislative veto, when two bills were passed by Congress on the same date).

54. See Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 396 (1951); FAIC Securities, Inc. v. United States, 768 F.2d 352, 361-62 (D.C. Cir. 1985). Notably, in Waterman S.S. Corp. v. United States, 381 U.S. 252, 268-69 (1965), the Court was asked to rely on a vetoed bill interpreting a prior law as evidence of the prior law's meaning. The Court refused, in part because the President who vetoed the bill had also signed the earlier law, implying that the President's interpretation counts for something. Cf. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 684 (1981) (Brennan, J., concurring) (the Governor's veto message was cited as evidence that a state law unconstitutionally discriminated against interstate commerce when the state legislature overrode the veto).

55. The absence of a presidential item veto is also significant in denying the President the
2. Presidential Power to Execute the Laws

The President lacks an independent article II power to interpret the laws. Article II gives the President only the power to execute the laws. Although the execution of law sometimes includes the power to interpret law, the President's power to execute the laws does not include an independent interpretive power. Any contrary conclusion overstates the significance of the President's executive power to "interpret" the laws.

An article II executive power to interpret the laws would circumvent both the powers of the federal officials charged with administering the laws and the procedures by which these officials adopt rules. Admittedly, the President plays a role in influencing interpretations by federal officials. The suggestion by some courts that presidential rulemaking depends exclusively on an explicit congressional grant of power takes too narrow a view of presidential authority. Article II grants the President some rulemaking power beyond what Congress has explicitly granted, including a role in statutory interpretation. This role is best characterized, however, as a supervisory

power to create legislative history. One use of an interpretive power is to convert mandatory into discretionary spending authority, which is the functional substitute for an item veto. Cf. Lear Siegler, Inc. v. Lehan, 842 F.2d 1102, 1124 (9th Cir. 1988) (the President's erroneous interpretation that a portion of a statute is unconstitutional does not prevent an award against the government for attorneys' fees for "bad faith" because article I only permits veto of an entire bill, not an item veto). For a recent argument that the President might possess an item veto in some situations, see Sidak & Smith, Four Faces of the Item Veto: A Reply to Tribe and Kurland, 84 NW. U.L. REV. 437 (1990).

56. Bowsher v. Synar, 478 U.S. 714, 733 (1986) (the power to execute is a power to interpret the laws). Kmeic, supra note 22, argues that the President's power to "take care that the laws be faithfully executed" (U.S. Const. art. II, § 3) supports the President's interpretive power. Cf. Myers v. United States, 272 U.S. 52, 117 (1926) (the removal power inferred from the power to execute the laws).

57. If an independent presidential interpretive power were inferred from the power to execute the laws, it would extend only to statutes involving federal execution. This might be construed expansively to include cases where federal execution would be affected indirectly by a statutory provision, as when a private cause of action derived from a federal statute might disrupt federal enforcement. In no event, however, would a federal statute implemented solely by private or state enforcement involve execution of the laws by federal officials, absent federal funding. The President's power to remove federal officials, whatever that might be, is also an inadequate basis for inferring a presidential interpretive power. The lesser interpretive power cannot be inferred from the greater removal power, because the "greater" power cannot, as a practical matter, be fully exploited. See Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943, 957 (1980) (the removal power is a doomsday machine).


59. In Justice Jackson's terminology, the rulemaking power is shared concurrently with Congress, where the imperatives of events and contemporary imponderables determine where the line would be drawn. Sawyer, 343 U.S. at 634 (Jackson, J., concurring).
power,\textsuperscript{60} which includes participating in the agency rulemaking process,\textsuperscript{61} coordinating policy and supplying a broader perspective.\textsuperscript{62} This rulemaking power does not authorize the President to use signing statements to circumvent Congress’ grant of rulemaking authority to other federal officials or the procedures for adopting rules that Congress has mandated in the Administrative Procedure Act or that an agency has adopted as part of its normal practice\textsuperscript{63} for interpreting statutes.\textsuperscript{64}

There is, of course, something artificial in referring to the “President” interpreting the statutes he signs. The precise mechanism by which signing

60. Myers, 272 U.S. at 135 (supervise and guide); Environmental Defense Fund v. Thomas, 627 F Supp. 566, 570 (D.D.C. 1986) (a certain degree of deference must be given to the President to control and supervise executive policy); see also Verkull, \textit{supra} note 57, at 988 n.233 (precedent exists for delayed creation of rulemaking record); cf. Marks v. CIA, 590 F.2d 997, 1003 (D.C. Cir. 1978) (an executive order cannot supersede a statute but can raise a question about statutory interpretation).

61. See Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981) (ex parte communications between the President and an agency permitted in informal rulemaking). This participatory role is supported by the little-noticed presidential power to require “opinion[s], in writing, of the principal Officer[s] in each of the executive Departments.” U.S. Const. art. II, § 2, cl. 1.


63. If the legislation vests power in an agency, the President cannot authorize the agency to bypass Administrative Procedure Act requirements applicable to the agency. Texaco, Inc. v. Department of Energy, 604 F Supp. 1493, 1500-01 (D. Del. 1985); see also NRDC v. EPA, 683 F.2d 752, 755-58 (3d Cir. 1982) (compliance with an executive order does not violate the Administrative Procedure Act in this case); cf. Kendall v. United States, 37 U.S. 524, 609-13 (1838) (the President’s article II power does not allow him to countermand specific legislative instructions to an executive official). The President, however, is not subject to the Administrative Procedure Act. Metzenbaum v. Edwards, 510 F. Supp. 609 (D.D.C. 1981) (the President is not an agency).

The President would, of course, have an interpretive power in the unusual case where Congress explicitly grants him that power. See, e.g., Trade Expansion Act, 19 U.S.C. § 1862(c) (the President determines whether an imported article threatens national security); Economic Stabilization Act of 1970, 12 U.S.C. § 1904(a) (the President determines whether credit controls are necessary to fight inflation). However, Congress usually grants administrative rulemaking power to executive officials or an agency.

statement interpretations are formulated has not been publicized. The officials and agencies charged with administering the law probably participate in this process, presumably through the Office of Management and Budget.\footnote{65} Even so, the problem of signing statements circumventing appropriate rulemaking procedures remains. Because the signing statement is issued before the law has gone into effect, both public participation and administrative agencies' expertise are necessarily excluded from the signing statement. In sum, the President's article II power to execute the laws does not include a power to interpret the laws.

3. The President as Proposer of Statutes

There is arguably a third constitutional basis for the President's interpretive power. The Constitution authorizes the President to propose legislation.\footnote{66} If the President, as a proposer of a statute, issues statements regarding the meaning of a statute, these statements could create useful legislative history on the theory that the originator of the statute is a reliable source of its meaning.

This theory, however, cannot support a general interpretive power. A proposer's views regarding a statute's meaning carry interpretive weight only if these views are incorporated into the legislation.\footnote{67} Therefore, courts should view executive proposals as legislative context that illuminate the legislature's objectives and not accord executive proposals any independent interpretive authority.

B. Political Manipulation of Legislative History

Even if the President possessed some independent legislative authority to create legislative history, judicial reliance on a number of President Reagan's

\footnote{65} The Department of Justice may also be involved when the issue has constitutional overtones. See Statement Accompanying Signing of Pub. L. No. 98-183, 19 Weekly Comp. Pres. Doc. 1626 (Nov. 30, 1983) (setting forth the views of the Department of Justice, not the President, on the constitutionality of a statute).

\footnote{66} At one time the President's effort to influence legislation was considered an affront to the legislators. J. Sundquist, The Decline and Resurgence of Congress 28, 127 (1981). This view has faded, along with the view that vetoes should not rest on policy disagreements with the legislature. Id. at 136-54.

\footnote{67} For example, in Kosak v. United States, 465 U.S. 848, 853-57 (1984), the Court interpreted the language "in respect to" to include damage done to property in possession, not just damage from possession. The drafter, who worked in the executive branch, had taken that view, but the Court emphasized that this was relevant only on the assumption that the interpretation was known to the legislature. See also Horner v. Merit Sys. Protection Bd., 815 F.2d 668, 674-75 (Fed. Cir. 1987).

A similar approach prevails at the state level. Institute of Living v. Town & City of Hartford, 50 A.2d 822 (Conn. 1946) (a legislative ad hoc committee report underwent change when its views were acted on by the legislature); Twentieth Century Furniture, Inc. v. Labor & Indus. Relations Appeal Bd., 482 F.2d 151, 153 (Haw. 1971) (the views of a nonlegislator who drafted legislation are not legislative will).
signing statements cannot be justified because these statements addressed issues that should not be resolved in legislative history. A number of President Reagan's signing statements either adopted positions in a contentious, unresolved political debate or attempted to undermine the statutory structure. Such political manipulation, even if attempted by legislators, should not be permitted to circumvent the process by which statutory texts are adopted.

On at least four occasions, President Reagan demonstrated a propensity to employ signing statements in a politically manipulative manner. First, with regard to the "substantial justification" standard for determining the government's obligation to pay attorneys' fees to prevailing parties under the Equal Access to Justice Act, President Reagan adopted the more restrictive of two interpretations that had been disputed in the legislative debates. Second, President Reagan interpreted the Safe Drinking Water Act of 1986 to permit presidential discretion in obtaining compliance by public water systems. This interpretation undermined the statutory structure requiring federal enforcement, as evidenced by a Senate committee report and the fact that discretionary language ("may") in the prior law had been replaced by the mandatory "shall." Third, President Reagan interpreted the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 to require aliens to prove discriminatory intent, not just disparate impact, despite the explicit dispute about this issue in the congressional legislative history. Fourth, the President's interpretation of the Sentencing Act of 1987 agreed with the Senate rather than the House legislative history and opted for more limited judicial discretion to depart from the Sentencing Commission's guidelines and for greater retroactive impact.

The President's interpretation may or may not have been correct in these examples. In each instance, however, the President attempted to use legislative history to win an unresolved, contentious political battle or to undermine the statutory structure. Even if the President does possess an independent interpretive power, judicial reliance on such politically manipulative signing statements cannot be justified.

C. Is There Anything Left for Presidential Legislative History?

This critique does not entirely eliminate the President's right to create legislative history. In rare instances, the President possesses a limited right

68. See supra text accompanying notes 23-27.
69. See supra text accompanying notes 28-33.
70. See supra text accompanying notes 34-39.
71. See supra text accompanying notes 40-42.
72. See supra note 22 and text accompanying notes 32-33.
to create legislative history. Although the President's article I veto power does not create an independent legislative power, this veto power does force legislators to seek compromises with the President. These compromises are part of the legislative process and should, in rare instances, be accorded weight as an interpretive aid when recorded in presidential signing statements.

Some evidence in the rhetoric of certain signing statements suggests that President Reagan recognized the difference between recording agreements with legislators and other types of legislative history. Four signing statements have included such phrases as "I am assured," "receive assurances" and "I have been informed." Such statements imply that the President had reached an agreement with legislators. Other phrases in signing statements, such as "I understand" or "understanding" suggest that the President is engaging in an independent interpretation of the law.

There are three problems with relying on legislative agreements recorded in presidential legislative history. First, presidential agreement with selected legislators might occur outside of the normal process of creating legislative history from legislative sources. Legislators might therefore be unaware that legislative history is being created and have no opportunity to influence its content. Judicial reliance on presidential legislative history therefore should be limited to instances in which it comports with legislative history recorded in committee reports and other typical sources of legislative history. However, if the legislative compromise is recorded elsewhere, the interpretive value of the presidential legislative history is minimal.

A second problem is that determining whether the President agrees with conventionally recorded legislative history is difficult. The terminology employed in signing statements is an unreliable indicator of the President's views regarding more conventional legislative history. I found only two signing statements in which President Reagan used the word "understand" and one using the word "assured" where recorded legislative history from

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73. See supra note 20 (containing examples).
74. See supra note 19 and accompanying text.
legislative sources agreed with the President’s interpretation. Moreover, digging through the legislative history to determine whether such an agreement exists is time consuming. Efficiency therefore suggests that reliance on presidential legislative history should be limited to instances in which the signing statements themselves refer specifically to the legislative history with which the President agrees. I located only one signing statement77 containing reference to such additional legislative history. Once its importance is understood, however, it should be relatively simple to record in the signing statement the legislative history with which the President agrees.78

A third problem with relying on legislative agreements in presidential legislative history arises when the signing statement addresses unresolved politically controversial issues or attempts to undermine the statutory structure. Such politically manipulative signing statements should be accorded no interpretive weight. Once again, the language of signing statements (“assured” versus “understanding”) is of little significance. Because the presence of these terms in signing statements does not correlate with the absence or presence of such issues,79 it is difficult to identify such politically manipulative signing statements.

As a result of these problems, very few presidential signing statements constitute reliable legislative history. Developing a presidential practice of citing legislative history from legislative sources, however, might increase the number of reliable presidential signing statements.

The only other instance in which presidential legislative history could arguably carry some interpretive weight involves legislation that threatens to infringe on an area in which the President is specifically granted constitutional power. In recognizing this interpretive power, however, the court would only be according the President rulemaking power to defend himself


78. Even this approach poses problems because there may be other legislative history not noted by the President which disagrees with the President’s view. Cf. Statement Accompanying Signing of Pub. L. No. 100-6, 23 WEEKLY COMP. PRES. DOC. 148 (Feb. 12, 1987). This statement was cited by the court in Humphrey v. Baker, 665 F Supp. 23, 25 (D.D.C. 1987), rev’d on other grounds, 848 F.2d 211 (D.C. Cir. 1988). The court said that the President agreed with the views of several members of Congress that salary raises were effective, id., but failed to mention that not all members agreed with that conclusion. See 45 CONG. Q. WEEKLY REP. 219 (1987).

79. For example, words like “understand” appeared in interpretations involving unresolved political disputes. See supra notes 23-27, 34-42 and accompanying text; see also Special Message to the Congress Upon Signing the Portal-to-Portal Act, PUB. PAPERS OF PRESIDENT HARRY S. TRUMAN 243 (1947) (President Truman’s signing statement dealing with politically sensitive labor legislation stated: “I understand it to be the intent of Congress”). But they also appear in some politically uncontroversial interpretations. See supra note 19.

Words like “assured” also do not correlate with the presence or absence of issues which can appropriately be resolved through legislative history. See supra note 20 and accompanying text (three statements involved politically uncontroversial issues, but a fourth did not).
from congressional infringement on his article II powers. For example, the
court arguably might recognize an independent presidential interpretive
power in signing statements attached to statutes pertaining to the appoint-
ments or foreign relations power. This interpretive power, if it does exist,
does not extend to all statutes because most statutes do not infringe on the
President's express constitutional powers.

CONCLUSION

Presidential legislative history must overcome a special burden before
courts should use it to interpret statutes. First, as a constitutional matter,
the President is not a legislator endowed with an independent power to
create legislative history. Second, some recent presidential signing statements
cannot satisfy standards for sound political decisionmaking because these
statements were obvious attempts to settle contentious political disputes or
to undermine the statutory structure. Presidential legislative history should
be an interpretive aid only when it records agreements with legislators and
cites traditional legislative history, such as committee reports. The only
other instance in which the President arguably possesses an interpretive
power involves signing statements attached to statutes that threaten to
infringe on the President's constitutional powers. In most instances, there-
fore, courts should not rely on presidential legislative history to interpret
statutes.

80. See infra Appendix, §§ II & III (listing examples); cf. Sidak & Smith, supra note 55,
at 457-60 (the most readily defensible item veto power is one which protects the President
from unconstitutional legislative impediments to the executive article II power).

A distinction should also be made between statutes and treaties. The President's power to
negotiate treaties might give him an interpretive power that he lacks in the context of legislation.
See Frolova v. Union of Soviet Socialist Republics, 761 F Supp. 370, 376 (7th Cir. 1985)
citation of presidential signing statement to support the view that the Helsinki accords were
not self-executing). The President, however, might not have the power to alter the interpretation
he gave the Senate to obtain its advice and consent. Compare Rainbow Navigation, Inc. v.
the executive branch representations which form the basis of Senate treaty ratification are
binding on the executive branch; court agrees on the ground that this protects the Senate's
ratification power) with United States v. Stuart, 489 U.S. 353, 374-77 (1989) (Scalia, J.,
concurring) (the executive branch is not bound by legislative history it presented to the Senate).
APPENDIX

OBJECTIONS, CONCERNS AND INTERPRETATIONS OF STATUTES BASED ON CONSTITUTIONAL PROBLEMS CONTAINED IN PRESIDENTIAL SIGNING STATEMENTS

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¹ An asterisk (*) after the Public Law Number means that the statement also appeared in the U.S. Code Congressional and Administrative News (USCCAN).
The following three statutes provided that statutory waiting periods for agency rules could be varied other than by statute. Like legislative vetoes, these provisions altered law other than by legislation.

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II. APPOINTMENTS POWER

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B. Concern over Judicial Appointments Power

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IV. OTHER SEPARATION OF POWERS ISSUES

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C. Special Prosecutor (Independent Counsel)  
Not in Executive Branch

93-190  9/1470  12/17/73  Nixon
100-191*  23/1526  12/15/87  Reagan

D. Commission in Two Branches of Government

98-622  20/1818  11/9/84  Reagan

E. Interference with Power to Recommend Legislation

97-72  17/1217  11/3/81  Reagan
98-76  19/1117  8/12/83  Reagan
100-119*  23/1091  9/29/87  Reagan
100-408*  24/1075  8/22/88  Reagan
100-446*  24/1213  9/27/88  Reagan
100-447*  24/1215  9/27/88  Reagan
100-687*  24/1548  11/18/88  Reagan

F. Pardon Power

95-86  13/1163  8/3/77  Carter

G. Forcing Disclosure of Internal Deliberations to Congress

100-175*  23/1388  11/30/87  Reagan
100-178*  23/1419  12/2/87  Reagan
100-453*  24/1233  9/29/88  Reagan
100-504  24/1331  10/18/88  Reagan

IV. Other Separation of Powers Issues

A. Execution of the Laws and Supervisory Power

91-120  5/1628  11/19/69  Nixon
95-205*  13/1839  12/9/77  Carter
97-58  17/1111  10/9/81  Reagan
98-166  19/1619  11/28/83  Reagan
98-244  20/431  3/26/84  Reagan
99-339*  22/831  6/19/86  Reagan
99-661*  22/1573  11/14/86  Reagan
B. Inter-Agency Lawsuit Not Article III Case/Controversy

100-582*  24/1418  11/2/88  Reagan

C. Power to Protect National Security

100-440  24/1189  9/23/88  Reagan
100-447*  24/1215  9/27/88  Reagan

V. Substantive Constitutional Issues

A. Religion and Other First Amendment Issues

95-629  14/2001  11/10/78  Carter
96-187  16/38  1/8/80  Carter
96-593  17/2856  1/2/81  Reagan

B. Unequal Treatment of Veterans

95-126  13/1511  10/8/77  Carter

C. Nonuniform Bankruptcy Law

96-656  22/1567  11/14/86  Reagan
100-41*  23/536  5/15/87  Reagan

D. Retroactive Attorneys' Fees

99-372*  22/1050  8/5/86  Reagan

E. Affirmative Action

99-552*  22/1461  10/27/86  Reagan
99-557*  22/1462  10/27/86  Reagan
99-578*  22/1464  10/28/86  Reagan
99-661*  22/1573  11/14/86  Reagan
100-175*  23/1388  11/30/87  Reagan