

DETERMINING DUE DEFERENCE: EXAMINING WHEN COURTS SHOULD DEFER TO AGENCY USE OF PRESIDENTIAL SIGNING STATEMENTS

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INTRODUCTION

In December 2005, Congress passed, with broad bipartisan support, an amendment to the Department of Defense's 2006 Appropriations Act prohibiting the federal government from engaging in cruel, inhuman, and degrading treatment of detained persons, regardless of their location or nationality (McCain Amendment).¹ In a signing statement dated December 30, 2005, President Bush reserved the right not to enforce the provisions of the law that he deems an unconstitutional infringement on his Commander in Chief powers,² effectively permitting both the armed forces and federal agencies to circumvent the McCain Amendment's prohibition of torture. This controversial statement sparked a renewed interest in the legality of signing statements and their appropriate usage.³

Ever since the Reagan Administration's increased use of presidential signing statements almost twenty years ago, the debate on the legality and utility of these statements has raged on in academia and popular media.⁴ President George W. Bush uses signing statements with particular frequency, and has challenged more laws than all of his predecessors

1. 42 U.S.C.A. §§ 2000dd-2000dd-1 (2007). Notably, one provision of this law requires the President to take action to ensure compliance with the prohibition of cruel, inhuman, and degrading treatment, including the establishment of administrative rules and procedures. 42 U.S.C. § 2000dd-0(3) (2007).

2. Statement of President George W. Bush on Signing of H.R. 2863, 2005 U.S.C.C.A.N. S50 (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html> [hereinafter McCain Amendment Statement].

3. See Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, available at http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/ (citing the concern of many legal scholars that President Bush's use of signing statements to challenge over 750 laws violates constitutional separation of powers). Savage won the 2007 Pulitzer Prize in National Reporting for "his revelations that President Bush often used 'signing statements' to assert his controversial right to bypass provisions of new laws." See The Pulitzer Prize, Winners 2007, <http://www.pulitzer.org> (last visited July 4, 2007) (noting Savage's work analyzing the use and abuse of presidential signing statements).

4. The debate focuses mostly on signing statements that challenge a law as unconstitutional, consider the law "advisory" only, or interpret the law to mean something substantially different from its original purpose. See, e.g., Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 366 (1987) (arguing that the Reagan Administration used signing statements as a tool of statutory interpretation that attempted to usurp power from the Judiciary and the Legislature); AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, REPORT WITH RECOMMENDATION, 5 (2006), available at http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf [hereinafter ABA TASK FORCE REPORT] (opposing, as contrary to "our constitutional system of separation of powers," a President's use of signing statements to deem a law unconstitutional or to refuse to enforce a law); see also Savage, *supra* note 3 (voicing concern amongst legal scholars over the negative impact of signing statements on the constitutional separation of powers).

combined.⁵ As of June 20, 2006, President Bush had issued signing statements that question the constitutionality of 110 bills.⁶ Although some argue that “constitutional” signing statements permit the President not to enforce a law that he deems unconstitutional,⁷ many believe signing statements have little or no legal effect—similar to a press release detailing the Executive’s interpretation of a law or his intention to enforce the law.⁸ However, when executive agencies explicitly rely on these statements in promulgating regulations, signing statements have a clearer and more direct effect in shaping law because those statements become the primary rationale for agency policy.

When federal courts refer to signing statements, they often cite to them as a minor piece of legislative history or use them as one factor in analyzing a particular statute.⁹ Rarely, if ever, do courts use the signing

5. See ABA TASK FORCE REPORT, *supra* note 4, at 14-15 (contrasting President George W. Bush’s use of signing statements to challenge over 800 laws with that of all his predecessors combined, who challenged fewer than 600 laws in this manner).

6. See *Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Michelle E. Boardman, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice), available at <http://judiciary.senate.gov/hearing.cfm?id=1969> (reporting that President Bush has issued “constitutional” signing statements with respect to 110 bills as of June 20, 2006).

7. See *infra* notes 20-21, 25, and accompanying text; see also Savage, *supra* note 3 (referencing several signing statements in which President Bush declared that “he does not need to ‘execute’ a law he believes is unconstitutional”).

8. One observer noted that

[t]he President has full discretion whether to issue a [s]igning [s]tatement and as to its contents. That action is neither required nor limited by law; it is simply one of a number of mechanisms available by which the President may choose to communicate with the public. As such, [s]igning [s]tatements have no legal force or effect. They have the same standing as other informal mechanisms through which the President makes his views known, such as remarks at photo opportunities or answers at press conferences.

John F. Cooney, Venable LLP, PRESENTATION TO THE 2006 ADMINISTRATIVE LAW CONFERENCE, AM. BAR ASS’N SECTION ON ADMINISTRATIVE LAW AND REGULATORY PRACTICE: SIGNING STATEMENTS: A PRACTICAL ASSESSMENT 3 (2006) [hereinafter Cooney Memo] (report on file with author); see also Garber & Wimmer, *supra* note 4, at 367-68, 381 (arguing that courts interpreting the intent of Congress should give no weight to signing statements and that courts “must declare that the President lacks the constitutional authority to speak for Congress and that a President’s signing statement simply contains the views of the Executive Branch issued pursuant to its executive—and not legislative—authority”).

9. See, e.g., *United States v. Perlaza*, 439 F.3d 1149, 1163 (9th Cir. 2006) (incorporating both a House Conference Report and President Clinton’s statement upon signing a particular amendment as evidence of the amendment’s legislative history); *Mark H. v. Lemahieu*, 372 F. Supp. 2d 591, 599 (D. Haw. 2005) (exploring the legislative history of the Handicapped Children’s Protection Act and examining the Senate Report, the House Conference Report, and the presidential signing statement); *S. Offshore Fishing Ass’n v. Daley*, 995 F. Supp. 1411, 1427 n.23 (M.D. Fla. 1998) (citing in a footnote the signing statements of both President George H.W. Bush and President Clinton in interpreting the Magnuson Act and its amendments as not permitting Congressional encroachment into the Executive’s powers to conduct foreign relations); *Clemmer v. Enron Corp.*, 882 F. Supp. 606, 609 (S.D. Tex. 1995) (recognizing President George H.W. Bush’s statement upon signing the Americans with Disabilities Act as indicative of the bill’s broader legislative history with respect to the phrasing in of the Act).

statement's interpretation of legislation as controlling.¹⁰ The level of deference courts give agency actions that rely on signing statements is unclear, likely because courts give inconsistent levels of deference to signing statements generally.¹¹ Some observers argue that presidential signing statements that interpret legislation deserve a similar level of deference as that given to legislative history¹² or even an agency's interpretation of a statute.¹³ Despite these arguments, no established doctrine or level of scrutiny exists to accord these statements a particular legal status.

This piece explores the level of deference courts should give to agency action when the agency specifically relies in whole or in part on a presidential signing statement in making policy. Part I of this Comment examines the history of signing statements and their emergence as justifications for administrative regulations and policy. Part II analyzes the rationale for deference to agency action in common law doctrines developed in *Skidmore v. Swift & Co.*,¹⁴ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁵ *Motor Vehicle Manufacturers Ass'n*

10. For some of the few cases where signing statements were a central factor in the court's reasoning, see for example *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 152 (D.D.C. 2002) (relying on President George W. Bush's signing statements as one factor in determining that the signed bill did not abrogate a bilateral treaty), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003); *Nat'l Audubon Soc'y v. Evans*, No. Civ. A. 99-1707 (RWR), 2003 WL 23147552, at *8 (D.D.C. July 3, 2003) (citing to presidential signing statements on the Magnuson Act and its amendments in determining that executive action falling under the political question doctrine is not justiciable).

11. Although federal courts have in a few instances granted the statements some deference, the U.S. Supreme Court refused to give any deference to the McCain Amendment Statement, *supra* note 2. Compare *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2772 (2006) (ruling that federal courts have the congressional authority to decide matters related to military commissions in the war on terror), and *id.* at 2816 & n.5 (Scalia, J., dissenting) (denouncing the majority for giving no weight to the President's signing statement that sought to preclude federal courts from hearing matters related to the military's detainees in the war on terror), with *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 824-25 (D.C. Cir. 1993) (relying on a presidential signing statement that declared invalid a congressional limitation on the President's constitutional authority).

12. See generally *Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Prof. Christopher S. Yoo, Vanderbilt University Law School) [hereinafter Yoo testimony], available at <http://judiciary.senate.gov/hearing.cfm?id=1969> (arguing that "recognizing Presidential signing statements as legislative history would better promote the democratic process. . . . [T]he President's understanding of the meaning of the statutory language is entitled to no less respect than the House's or the Senate's"). But see, Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 598-99 [hereinafter *Context-Sensitive Deference*] (challenging the assertion that signing statements should be treated as legislative history or accorded *Chevron* deference, and arguing that they should, at most, receive *Skidmore* deference).

13. See Douglas W. Kmiec, *Judges Should Pay Attention to Statements by President*, NAT'L L.J., Nov. 10, 1986, at 13 (likening judicial reliance on signing statements to reliance on agency interpretation of ambiguous statutes).

14. 323 U.S. 134 (1944).

15. 467 U.S. 837 (1984).

v. *State Farm Mutual Automobile Insurance Co.*,¹⁶ and *United States v. Mead Corp.*,¹⁷ and concludes that the primary justification for judicial deference to agency action is an agency's expertise. Accordingly, Part II argues that *Chevron* and *Skidmore* deference cannot be given to agency action that relies solely on a signing statement because the President generally lacks the expertise the common law requires for that deference. Part II further examines several federal agency rules that rely fully or partially on presidential signing statements for their justification, and analyzes whether and to what extent deference should be given to those rules. Part III explores legislative proposals to clarify the legal status of signing statements and their impact on federal agencies. This Comment concludes that federal agencies should not rely solely on a presidential signing statement for their reasoning because doing so would fail to merit deference under the common law standards developed in *Skidmore*, *Mead*, and *Chevron*, and could arguably be considered arbitrary and capricious under *State Farm*.

I. HISTORICAL BACKGROUND

The presidential signing statement has existed within the U.S. political landscape since at least the early nineteenth century.¹⁸ In the past, a signing statement would, for example, thank a Congressman for his support or promote the benefits of legislation.¹⁹ These relatively innocuous statements contrast with the signing statements of today, which often reserve the right not to enforce a law, either by refusing enforcement altogether on the basis of the law's perceived unconstitutionality²⁰ or by treating the law as "advisory" only.²¹

16. 463 U.S. 29 (1983).

17. 533 U.S. 218 (2001).

18. See Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements,"* 40 ADMIN. L. REV. 209, 210-11 (recognizing that Presidents Andrew Jackson, John Tyler, and Ulysses S. Grant issued signing statements upon signing new bills into law).

19. Cooney Memo, *supra* note 8, at 2.

20. See, e.g., McCain Amendment Statement, *supra* note 2 and accompanying text; Statement of President Ronald Reagan in Signing the Deficit Reduction Act of 1984, 2 PUB. PAPERS 1053 (July 18, 1984) (objecting vigorously to the provisions of a bill he finds unconstitutional). See generally ABA TASK FORCE REPORT, *supra* note 4, at 7-18 (detailing the history and usage of presidential signing statements, particularly those that deem a part of a law unconstitutional).

21. See Statement of President George W. Bush on Signing the Intelligence Reform and Terrorism Prevention Act of 2004, 40 WEEKLY COMP. PRES. DOC. 2993-94 (Dec. 17, 2004) [hereinafter IRTPA Statement] (citing the President's constitutional authority to conduct foreign relations as the reason for viewing "as advisory" the interview requirement for foreign diplomats and officials); see also ABA TASK FORCE REPORT, *supra* note 4, at 16 (citing a presidential signing statement to the Intelligence Authorization Act of 2002, treating as "advisory" the requirement that Congress be provided with certain special reports).

Current Supreme Court Justice Samuel Alito developed the idea of using signing statements in this manner in a 1983 memorandum written during his tenure in the Reagan White House Office of Legal Counsel (OLC).²² The Reagan Administration believed signing statements should be considered as an element of legislative history, and as evidence of this belief, arranged for their publication in the United States Code Congressional and Administrative News (U.S.C.C.A.N.) through an agreement with West Publishing Company.²³

Working for the OLC under President Clinton in the early 1990s, Walter Dellinger described four functions of presidential signing statements: explaining the bill to the public, directing subordinate officers on how to implement the bill, declaring a bill's constitutionality, and creating legislative history.²⁴ In a memorandum the following year, Dellinger further refined the argument for the President's ability not to execute laws he signs but deems unconstitutional.²⁵ After these memoranda, the number

22. See Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel to the Litigation Strategy Working Group 1 (Feb. 5, 1986), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf> (describing his memorandum as a preliminary proposal to make "fuller use" of presidential signing statements, particularly in the field of statutory interpretation, and arguing that "the President's understanding of the bill should be just as important as that of Congress"). The memorandum also emphasizes a central advantage of interpretive signing statements as increasing the power of the Executive to shape the law. *Id.* at 2. Interestingly, Justice Alito poses a "theoretical problem" in this memorandum, wondering, "[i]f presidential intent is of little or no significance when inconsistent with congressional intent, what role is there for presidential intent? Is it entitled to deference comparable to that customarily given to administrative interpretations?" *Id.* at 3. This Comment attempts to answer that question in the negative. See *infra* Part II.

23. See PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION 202-03 (2002) (citing Edwin Meese III, MAJOR POLICY STATEMENTS OF THE ATTORNEY GENERAL: EDWIN MEESE III, 1985-1988, 78-79 (Washington, D.C.: Government Printing Office, 1989)) (describing Attorney General Edwin Meese's success in securing a publishing agreement with West Publishing Company with the goals of improving statutory interpretation by clarifying the President's understanding of a bill, recognizing the signing statement as legislative history, and making these statements more available to the Bench and the Bar); see also ABA TASK FORCE REPORT, *supra* note 4, at 10 (noting that the Reagan Administration was the first to view signing statements as a "strategic weapon in a campaign to influence the way legislation was interpreted by the courts and Executive agencies as well as their more traditional use to preserve Presidential prerogatives" in a Democratically-controlled Congress). The issuance of signing statements that interpret the law acquires even more significance when an opposition political party controls Congress because the President can use signing statements to preserve his party's policy objectives over those of the other party.

24. Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Bernard M. Nussbaum, Counsel to the President, *The Legal Significance of Presidential Signing Statements* (Nov. 3, 1993), available at <http://www.usdoj.gov/olc/signing.htm>.

25. Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Abner J. Mikva, Counsel to the President (Nov. 2, 1994), available at <http://www.usdoj.gov/olc/nonexecut.htm> (arguing that a President's decision not to enforce a law is consistent with his constitutional obligation to faithfully execute the laws, but that "[w]here possible, the President should construe provisions to avoid constitutional

of signing statements reserving the right not to enforce the law at issue, for constitutional or other reasons, rose dramatically.²⁶

Perhaps taking note of this increase, federal agencies have begun to cite signing statements as justification in their rulemaking and policy statements.²⁷ This Comment examines several instances where agencies cite signing statements as their reasoning, in whole or in part, for making a particular policy decision, and whether that reasoning is sufficient to merit judicial deference. This Comment discusses two instances where an agency relied in full on a signing statement in deciding policy: a 1990 Department of Interior (DOI) policy statement,²⁸ and a 1995 Office of Management and Budget (OMB) rule.²⁹

problems”). Ultimately, the Constitution is silent on the issue of whether the President should enforce laws he deems unconstitutional. *See* U.S. CONST. art. II, § 3 (requiring only that the President “take [c]are that the [l]aws be faithfully executed”).

26. The increased use of signing statements to controvert legislative intent by refusing to enforce the law or deeming it unconstitutional was one reason why the American Bar Association created a task force to investigate the issue. *See generally* ABA TASK FORCE REPORT, *supra* note 4, at 7-18 (detailing the history of presidential signing statements that reserve the President’s right not to enforce part of a law, and noting President George W. Bush’s substantial increase in usage of this type of signing statement); Erin Louise Palmer, *Reinterpreting Torture: Presidential Signing Statements and the Circumvention of U.S. and International Law*, HUM. RTS. BRIEF, Fall 2006, at 21 (noting that “President Reagan challenged 71 legislative provisions, President George H.W. Bush challenged 232, and President Clinton challenged 140,” and that some scholars have identified over 800 challenges to laws through the signing statements of President George W. Bush).

27. Some agencies cite presidential signing statements as the central reasoning for their decision-making, and some only mention them in a subsidiary point. *See infra* Part II.B.1-2. By contrast, the Food and Drug Administration once implemented a regulation as required by the Prescription Drug Marketing Act that completely ignored the objections of President Reagan’s statement upon signing that bill into law. *Compare* Guidelines for State Licensing of Wholesale Prescription Drug Distributors, 21 C.F.R. § 205.5(a) (2007) (requiring states to adhere to federal minimum standards for wholesale drug distribution), *with* Statement on Signing the Prescription Drug Marketing Act of 1987, 1 PUB. PAPERS 505-06 (Apr. 22, 1988) (objecting to the provision requiring state adherence to federal licensing standards for wholesale drug distributors as “contrary to fundamental principles of federalism upon which our Constitution is based”).

28. *See* Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9,233, 9,233 (Mar. 12, 1990) [hereinafter Indian Water Rights Policy]. The Indian Water Rights Policy noted the Administration’s policy

as set forth by President Bush on June 21, 1989, in his statement signing into law H.R. 932, the 1989 Puyallup Tribe of Indians Settlement Act, that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation. Accordingly, the Department of the Interior adopts the following criteria and procedures to establish the basis for negotiation and settlement of claims concerning Indian water resources.

Id. at 9,233; *see also* Statement on Signing the Puyallup Tribe of Indians Settlement Act of 1989, 1 PUB. PAPERS 771-72 (June 21, 1989) (affirming that the Administration is “committed to establishing criteria and procedures to guide future Indian land and water claim settlement negotiations”).

29. *See* 5 C.F.R. §§ 1320.5(a)(1)(iii)(E), 1320.8(a)(5) (2007) (requiring agencies to determine whether collection of documents can be done electronically, to evaluate whether the burden of document collection can be reduced through the use of electronic means, and to notify OMB of these findings); Remarks on Signing the Paperwork Reduction Act of

By contrast, this Comment examines instances where an agency relies in part on a signing statement and in part on its expertise in making a rule, as was the case with a 1997 Legal Services Corporation (LSC) rule.³⁰ Lastly, in considering a military and foreign affairs exception to the notion that agency reliance on a signing statement alone does not merit judicial deference, this Comment examines a 2006 State Department rule that establishes visa interview requirements in accordance with a presidential signing statement.³¹

The propriety of these agencies' decisions is beyond the scope of this Comment. Instead, this Comment focuses primarily on agency reasoning and explores the level of judicial deference that should be given to agency action based solely or in part on a signing statement. Partly due to the newness of agency use of signing statements, courts have not yet clearly stated the weight such usage deserves.³² Lack of judicial resolution on the issue has led legal scholars and observers to argue both for and against judicial deference to signing statements.³³ Although this Comment argues

1995, 1 PUB. PAPERS 733-35 (May 22, 1995) (noting President Clinton's view that "[f]rom this point forward, I want all of our agencies to provide for the electronic submission of every new Government form or demonstrate to OMB why it cannot be done that way"). OMB reliance on President Clinton's signing statement is demonstrated in the relevant notice of proposed rulemaking. Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act, 60 Fed. Reg. 30,438, 30,440-42 (June 8, 1995) [hereinafter OMB Rule].

30. See 45 C.F.R. pt. 1643 (2006) (prohibiting the use of LSC funding for any litigation, advocacy, or other activities related to assisted suicide, euthanasia, or mercy killing); Statement on Signing the Assisted Suicide Funding Restriction Act of 1997, 1 PUB. PAPERS 515-16 (Apr. 30, 1997) (citing First Amendment concerns in directing Federal agencies to construe the law to "prohibit federal funding for activities and services that provide legal assistance for the purpose of advocating a right to assisted suicide . . . and not to restrict Federal funding for other activities, such as those that provide forums for the free exchange of ideas"). LSC reliance on this signing statement is demonstrated in the relevant final rule. Restriction on Assisted Suicide, Euthanasia, and Mercy Killing, 62 Fed. Reg. 67,746, 67,747-48 (Dec. 30, 1997) [hereinafter Euthanasia Rule] (reiterating the First Amendment concerns in President Clinton's signing statement as the rationale for not restricting funding to other activities such as those that "provide forums for the free exchange of ideas").

31. See 22 C.F.R. § 41.102(b) (permitting a consular official to waive the personal appearance requirement for diplomatic or official visa applicants); IRTPA Statement, *supra* note 21 (treating as "advisory" the personal interview requirements for diplomatic visa applicants). State Department reliance on the presidential signing statement is described in the relevant final rule. Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 71 Fed. Reg. 75,662, 75,662 (Dec. 18, 2006) [hereinafter Visa Rule].

32. See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power* 3 (Univ. of Chicago Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 133), available at <http://www.law.uchicago.edu/academics/publiclaw/index.html> (observing that "courts pay little attention [to signing statements and, as a result,] it is not clear how they can increase the President's authority vis-à-vis Congress").

33. See *Context-Sensitive Deference*, *supra* note 12, at 598-99 (arguing that "[c]ourts should adopt a flexible approach to the amount of deference accorded signing statements," and that at most, signing statements should receive *Skidmore* deference, but never *Chevron* deference); Kmiec, *supra* note 13, at 32 (claiming that "[w]hether a court *should* rely on a

a different premise—namely, that agency reliance on signing statements alone violates the common law doctrines that permit judicial deference to agency action—such reliance can also violate the constitutional separation of powers in certain circumstances.³⁴

II. ARGUMENT

Several common law doctrines govern the level of judicial deference granted to agency fact-finding and statutory interpretation. These doctrines, founded primarily on deference to agency expertise, give the agency more or less deference depending on the presence of congressional intent in delegating powers to an agency in its enabling statute. One doctrine also permits a court to strike down agency action if it is deemed arbitrary and capricious.³⁵

A. Agency Expertise is the Primary Basis for Judicial Deference to Agency Action at Common Law

Common law doctrines provide for varying levels of judicial deference to agency judgment depending on whether the issue in question is one of law or fact.³⁶ Both categories of doctrines, those for questions of fact and those for questions of law, are primarily based on the rationale that deference is due to agencies because of their expertise.³⁷ Of those

signing statement in a given case depends on the context . . . but there can be no claim—and there is none by anyone—that a court *must* rely”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376-77 (2000) (suggesting that *Chevron* deference to agency action can be linked to presidential involvement and that according to one interpretation, “courts could apply *Chevron* when, but only when, presidential involvement rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes”).

34. For example, if the President signs into law a bill he deems unconstitutional, declares an intent not to enforce all or part of a bill, or interprets a bill in a manner clearly inconsistent with Congressional intent, he is effectively disapproving of that bill and should not sign it—as Article I of the U.S. Constitution requires. Article I explicitly requires the President return a bill to Congress if he disapproves of it:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes 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.

U.S. CONST. art. I, § 7. For the past twenty years, Presidents have issued hundreds of signing statements to this effect. Agency reliance on such statements in their rulemaking would uphold an unconstitutional lawmaking process.

35. See *infra* Part II.A.4 (describing the arbitrary and capricious standard developed in *State Farm*).

36. See STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 191-403 (6th ed. 2006) [hereinafter ADMINISTRATIVE LAW] (separating the analysis of judicial review of fact and law).

37. See *infra* Part II.A.1-4 (arguing that *Chevron*, *Skidmore*, *Mead*, and *State Farm* all cite to agency expertise as the primary basis for judicial deference).

doctrines discussed below, *Skidmore*, *Chevron*, and *Mead* generally apply to questions of law, whereas *State Farm* applies to questions of fact.

1. *Skidmore v. Swift & Co.*

As the oldest of the doctrines of judicial review of agency action, *Skidmore v. Swift & Co.* permits limited deference when an agency issues an interpretive rule, policy statement, or guideline, based on its “power to persuade.”³⁸ The level of deference will vary on the facts of each case.³⁹ In reaching its decision, the *Skidmore* Court focused on the expertise of the administrator and his important role in regulating industry according to Congress’s mandate.⁴⁰

2. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*

In perhaps the most famous doctrine of judicial deference to agency action, the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* required that deference be given to reasonable agency interpretations of statutes they administer if the statutory language is ambiguous.⁴¹ This relatively broad standard does not apply if Congress has spoken clearly or unambiguously on the issue—in which case Congress’s interpretation controls.⁴² This notion of statutory ambiguity is

38. 323 U.S. 134, 140 (1944). *Skidmore* held:

[T]he rulings, interpretations and opinions of the [agency] Administrator . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id.; see also Cross, *supra* note 18, at 234 (proposing the standard established in *Skidmore* as the standard of judicial deference for signing statements that interpret the law).

39. See *Skidmore*, 323 U.S. at 140 (declaring that “[e]ach case must stand on its own facts”).

40. See *id.* at 137-38 (remarking that Congress “did create the office of Administrator, impose upon him a variety of duties, [and] endow him with powers [to regulate industry]. . . . Pursuit of his duties has accumulated a considerable experience . . . and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere”) (emphasis added).

41. 467 U.S. 837, 866 (1984) (holding that “[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail”).

42. See *id.* at 842-43. The *Chevron* Court ruled that:

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the

central to the decision in *Chevron*, and the Court noted the important role agency expertise plays in clarifying those ambiguities.⁴³ In contrast to *Skidmore* deference, which applies to policy statements or other interpretive rules or documents, *Chevron* deference applies to legislative rules, which are those agency interpretations made in exercise of congressionally-delegated legislative authority.⁴⁴

Chevron also reinforces the frequent congressional practice of “punting,” whereby Congress intentionally leaves bills ambiguous to facilitate their passage, thus permitting the agency to define the legislation’s terms more narrowly.⁴⁵ The reason for this punting, and the subsequent deference it entails, is that the agencies’ expertise in making complex policy choices with widely varying factual bases outweighs the ability of Congress or the Judiciary to make the same judgments.⁴⁶

question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Id.

43. *Id.* at 865 (recognizing that where Congress has failed to specifically define the relevant terms, “the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies”) (footnotes omitted); see also Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 591 (2005) [hereinafter *Statutory President*] (emphasizing the agency’s “greater expertise” as the justification for deference in *Chevron* and that presidents and their staff cannot be as experienced in a regulatory area as an agency).

44. See ADMINISTRATIVE LAW, *supra* note 36, at 239 (describing legislative rules as “the product of an exercise of delegated legislative power to make law through rules,” and interpretive rules as those without exercising that authority (citing K. Davis, 2 ADMINISTRATIVE LAW TREATISE 36, 51-52 (1979))).

45. See *Chevron*, 467 U.S. at 865 (proposing the idea that Congress “consciously desired the Administrator to strike the balance . . . thinking that those with *great expertise* and charged with responsibility for administering the provision would be in a better position to do so”) (emphasis added); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) [hereinafter *Judicial Deference*] (acknowledging that “Congress now knows that the ambiguities it creates . . . will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known”).

46. See, e.g., ADMINISTRATIVE LAW, *supra* note 36, at 247 (opining that “*Chevron* is best understood as reflecting an understanding that Congress, as a general rule, has given administrative agencies authority to resolve ambiguities in statutes” and also that *Chevron* represents “the judgment that agencies have comparative advantages over courts in interpreting statutory terms, because political accountability and technical specialization are relevant to interpretation”); Oren Eisner, Note, *Extending Chevron Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 CORNELL L. REV. 411, 426-27, 434-35 (2001) (noting “expertise” as one of the three rationales for judicial deference to agency action in *Chevron*); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2087-88 (1990) (remarking that “*Chevron* reflects a salutary understanding that these judgments of policy and principle should be made by administrators rather than judges. . . . [A]dministrators are in a far better position than courts to interpret ambiguous statutes in a way that takes account of new conditions”).

3. United States v. Mead Corp.

In *United States v. Mead Corp.*, the Court held that a “ruling letter” issued by the United States Custom Service Headquarters merited *Skidmore* and not *Chevron* deference because there was no indication that Congress intended the letter’s tariff classification to carry the force of law.⁴⁷ Citing the benefit of the agency’s “specialized experience” and its “thoroughness, logic and *expertness*,” the Court applied *Skidmore* deference to the ruling letter’s tariff classifications.⁴⁸ In effect, this holding revived *Skidmore* deference and applied it to agencies’ interpretive rules.⁴⁹

4. Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.

In *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, the National Highway Traffic Safety Administration (NHTSA) revoked a rule that new cars be equipped with passive restraints to protect passengers.⁵⁰ Addressing a question of fact, the Court struck down NHTSA’s rescission of the rule as arbitrary and capricious.⁵¹ In articulating the arbitrary and capricious standard, the Court held that the “agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”⁵² While acknowledging the agency’s duty to utilize its expertise,⁵³ the Court found that the agency failed to do so and thus reversed the agency action.⁵⁴ The arbitrary and capricious standard of

47. See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (holding that a “tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore* . . . the ruling is eligible to claim respect according to its persuasiveness”) (citations omitted).

48. *Id.* at 235 (emphasis added).

49. See *id.* at 240-41 (Scalia, J., dissenting) (observing that *Skidmore* now applies when the *Chevron* doctrine does not).

50. 463 U.S. 29, 38 (1983).

51. See *id.* at 46 (explaining that the question at issue is “whether NHTSA’s rescission of the passive restraint requirement . . . was arbitrary and capricious” and concluding that it was). Notably, the Court found that “[a]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Id.* at 42.

52. *Id.* at 43 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

53. *Id.* at 54 (noting that NHTSA “must bring its expertise to bear on the question” at hand if it sought to rescind an old rule).

54. *Id.* at 56 (holding that because NHTSA’s did not consider highly relevant studies, NHTSA “failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary-and-capricious standard”).

judicial review applied in *State Farm* is also codified in the Administrative Procedure Act (APA), and applies to all agency action, findings, and conclusions.⁵⁵

A review of the doctrines discussed above reveals that whether addressing a question of law or fact, an interpretive rule, or a legislative rule, the Supreme Court consistently cites agency expertise as a primary rationale for deferring to agency action.⁵⁶

B. When an Agency Relies on a Presidential Signing Statement, and Not on its Own Expertise, Courts Should Not Defer to That Agency Action

Given that federal agencies generally have a superior understanding of important technical concepts and terminology in their area of specialty,⁵⁷ it makes sense for judges to defer to their policy decisions. In fact, Congress creates federal agencies and assigns them powers and functions through enabling statutes in order to handle specialized, complex issues that Congress itself does not have the time or capacity to address.⁵⁸ The scope of this congressionally-delegated authority is crucial because it defines those areas in which an agency can act with the force of law, and those in which it cannot—a distinction often characterized as the difference between legislative and interpretive rules.⁵⁹ Logically, whether Congress intended for the courts to defer to agency judgment can depend on whether the agency's expertise is related to the question of law at hand.⁶⁰

55. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000) (requiring a reviewing court to hold unlawful and set aside agency action, findings, and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

56. See *Judicial Deference*, *supra* note 45, at 514. Justice Scalia observed that: the cases, old and new, that accept administrative interpretations, often refer to the ‘expertise’ of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes. In other words, they are more likely than the courts to reach the correct result.

Id.

57. See Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 309-10 (1986) (emphasizing the “advantages of agency expertise” in “an era of burgeoning judicial caseloads,” and that “[a]gency administrators, who have extensive expertise . . . are much better placed than generalist judges to make the policy decisions”).

58. See Melissa M. Berry, *Beyond Chevron's Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 543-44 (2007) (noting that Congress leaves ambiguities in enabling statutes that agencies and courts must resolve); Carl N. Pickerill, Note, *Specialized Adjudication in an Administrative Forum: Bridging the Gap Between Public and Private Law*, 82 NOTRE DAME L. REV. 1605, 1623 (2007) (noting that “Congress may impose additional rules on individual agencies in their enabling statutes”).

59. See *supra* note 44 and accompanying text.

60. See ADMINISTRATIVE LAW, *supra* note 36, at 240 (describing “the nature of the agency's specialized experience in relation to the legal question and the practical implications” as relevant to whether Congress intended the court to pay special heed to agency views).

When an agency cites a presidential signing statement as the sole justification for a particular policy, the agency essentially contravenes the common law requirement to use its own expertise, thus risking judicial sanction. In contrast, when an agency only relies in part on a presidential signing statement, and in part on its own expertise, courts should be more deferential to that action under the common law and less likely to deem that reliance arbitrary and capricious.

1. *Full Reliance on a Signing Statement*

As a branch of the Department of the Interior (DOI), the Bureau of Indian Affairs (BIA) handles all federal relations with the Indian tribes.⁶¹ The DOI's enabling act permits the Secretary of the Interior to supervise all public business related to Indian tribes.⁶² A 1990 DOI policy statement relied completely on one of President George H.W. Bush's signing statements as the basis for developing procedures for the negotiation and settlement of claims concerning Indian water resources.⁶³

As demonstrated earlier, both *Skidmore* and *Mead* require an agency to use its expertise in promulgating interpretive rules and policy statements.⁶⁴ Given President George H.W. Bush's lack of expertise in negotiating or litigating Indian water rights relative to that of the DOI,⁶⁵ the DOI's acceptance of the President's policy choice to negotiate instead of litigate substitutes his opinion for the agency's own expertise. The DOI's use of its expertise is important here because the agency has decades of experience in handling complex policy decisions affecting hundreds of Indian tribes, and in contrast to the inexpert President, is more likely to make a better policy choice, especially in identifying those conflicts that

61. See generally 25 U.S.C. §§ 1-2 (2000) (creating the Bureau of Indian Affairs and delegating powers to the Commissioner of Indian Affairs).

62. 43 U.S.C. § 1457 (2000) (charging the Secretary of the Interior with the "supervision of public business" related to, *inter alia*, "Indians").

63. See *supra* note 28 and accompanying text.

64. See *supra* Parts II.A.1, II.A.3.

65. See Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 309 (2006) [hereinafter *Statutory Powers*] (noting that "Presidents are generalists. But presidents' position at the apex of administration puts them in a good position to demand the expertise of executive branch officers."); Alfred R. Light, *Environmental Federalism in the United States and the European Union: A Harmonic Convergence?*, 15 ST. THOM. L. REV. 321, 331-32 (2002) (opining that a "group of environmental specialists more likely holds similar perspectives among themselves that are different from generalists (such as Presidents or Governors with responsibility over a large number of different policy areas)"); see also *Statutory President*, *supra* note 43, at 591 (noting that agencies have more expertise in their regulatory field than a president's staff).

are better resolved through litigation.⁶⁶ A reviewing court would therefore likely find this interpretive rule lacked the “relative expertness” and the “power to persuade” required for *Skidmore* deference.⁶⁷

Similarly problematic, in 1995 the OMB issued a notice of proposed rulemaking that cited one of President Clinton’s signing statements as the sole basis for parts of its rule that directs agencies to permit electronic submission of documents.⁶⁸ While allowing electronic submission of documents appears to be within the OMB’s statutory authority, the signing statement provides the only justification for the rule in this instance.⁶⁹ The OMB therefore undermined Congress in that it circumvented the authority Congress specifically delegated to the OMB, and not to the President. The correct procedure would have been to rely on OMB expertise, as required by *Chevron*,⁷⁰ instead of relying fully on the President for decision-making in an area outside his expertise.⁷¹ The portion of the rule relying

66. See Bureau of Indian Affairs, <http://www.doi.gov/bureau-indian-affairs.html> (last visited Oct. 24, 2007) (noting the BIA’s expertise in conducting relations with 561 federally recognized tribal governments; the “administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives[;] . . . [d]eveloping forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development,” and providing education to 48,000 students).

67. See *supra* note 38 and accompanying text.

68. It is important to note here that this lengthy proposed rule contained several subsections with several different justifications. See OMB Rule, *supra* note 29, at 30,438-44 (proposing amendments to 5 C.F.R. §§ 1320.1-1320.19 and for some subsections, relying on various legislative and judicial sources for its reasoning). Those subsections that relied on the presidential signing statement, however, relied on nothing else for their reasoning and are thus individually suspect for lack of expert justification. See *id.* at 30,440-42 (responding to President Clinton’s signing statement and incorporating its proposals into the new regulation).

69. See *id.* at 30,440-42; see also 31 U.S.C. § 503(b)(6)(B) (2000) (permitting the Deputy Director for Management of the OMB to adopt modern technologies to more efficiently and effectively manage federal agencies).

70. See *supra* notes 41-46 and accompanying text.

71. See *Statutory President*, *supra* note 43, at 591 (noting that agencies generally have more expertise than Presidents). At least two scholars have noted that agency statutory interpretation deserves some judicial deference whereas signing statements do not, because the former utilizes agency expertise and congressional delegation, and the latter does not. See Garber & Wimmer, *supra* note 4, at 386 n.125. Those scholars contended that:

[I]n most cases where the Executive Branch acts in making an initial interpretation of a statute, it is the agency trusted with implementing the act that makes the decision. Because of agency expertise and congressional delegation, these decisions are given appropriate deference by the courts. However, the presidential signing statements should be accorded no deference as an agency interpretation. Presidential signing statements go much further, and with much less justification, than traditional executive interpretation of statutes made in the course of implementing a congressional program.

Id. (citations omitted).

exclusively on a signing statement could arguably be struck down as arbitrary and capricious for failure to consider relevant factors within the agency's expertise.⁷²

2. *Partial Reliance on a Signing Statement*

The Legal Services Corporation (LSC) is the main federal body that distributes government funding to provide free legal assistance in civil matters, as Congress mandated in the Legal Services Corporation Act.⁷³ In 1997, the LSC issued a final rule prohibiting the use of federal funds to advocate for a legal right to or to seek assistance in performing euthanasia in accordance with the Assisted Suicide Funding Restriction Act of 1997 (ASFRA).⁷⁴ Although the LSC was within its statutory authority to issue this rule (and was required by Congress to do so in the ASFRA),⁷⁵ the LSC relied on a presidential signing statement that limited the scope of the rule so as not to restrict First Amendment rights.⁷⁶ The question thus arises whether a reviewing court should defer to this agency action.

Despite the fact that this rulemaking relied in part on a presidential signing statement, the LSC ruling would likely receive *Chevron* deference for two reasons: (i) the signing statement was only used as a basis for including a limitation in the commentary of the rule and not in the rule itself;⁷⁷ and (ii) the LSC Board contributed heavily to the development of the rule,⁷⁸ thereby injecting its expertise into the rulemaking process.

Thus, when an agency uses its expertise to critically evaluate a signing statement and relies only in part on that signing statement in its rulemaking, a reviewing court should grant deference to the agency action because the agency's expertise played a significant role in the decision making process—thus fulfilling its congressionally-delegated mandate. The LSC

72. See *supra* notes 51-55 and accompanying text.

73. Legal Services Corporation Act, 42 U.S.C. §§ 2996b-2996f (2000) (detailing the LSC's purpose, powers, and duties to provide legal assistance in civil matters to those who cannot afford it and noting that "the legal services program must be kept free from the influence of or use by it of political pressures").

74. See 45 C.F.R. pt. 1643 (2006) (implementing the Assisted Suicide Funding Restriction Act of 1997); see also Assisted Suicide Funding Restriction Act, 42 U.S.C. § 14404(a)(3) (2000) (prohibiting the use of federal funds in law suits to advocate a legal right to euthanasia or to compel any person or institution to provide or fund euthanasia).

75. 42 U.S.C. § 14404(b)(1)(E) (directing the LSC to incorporate the ASFRA into its policy scheme).

76. See *supra* note 30 and accompanying text.

77. See Euthanasia Rule, *supra* note 30, at 67,747-48 (noting the LSC Board's decision to insert the President's suggestion into the rule commentary and not the final rule itself).

78. See *id.* (detailing the LSC Board's substantial input in reviewing the comments and structuring the new rule, and the Board's critical analysis of the signing statement's proposal).

rule represents an agency's legitimate use of a presidential signing statement, and one to which courts will likely defer, given the importance of agency expertise in the common law deference doctrines and in fulfilling duties set forth in the agency's enabling statute.⁷⁹

3. *Military and Foreign Affairs Exceptions*

The State Department has the statutory authority to issue both immigrant and nonimmigrant visas.⁸⁰ Under President George W. Bush, the State Department issued a final rule, which now has the force of law, relaxing interview requirements for nonimmigrant visas.⁸¹ The rule treats as "advisory" the requirement that foreign diplomats personally appear before a consular officer when seeking a visa — a policy decision based solely on a presidential signing statement.⁸² Although this rule may merit deference because of the generally protected status foreign affairs enjoys under the common law and the APA,⁸³ it nonetheless illustrates how a presidential signing statement can become law without passing through Congress or without the input of agency experts.

When issuing signing statements related to foreign affairs or military issues, the President often uses boilerplate language to reserve the right not to enforce a law to the extent that it infringes on his Commander in Chief

79. See *supra* Part II.A.

80. 8 U.S.C. § 1201(a) (2000).

81. See 22 C.F.R. § 41.102(b)(4) (2007) (permitting a consular officer to "waive the requirement of personal appearance in the case of any alien who the consular officer concludes presents no national security concerns requiring an interview and who . . . is an applicant for a diplomatic or official visa").

82. See Visa Rule, *supra* note 31; see also IRTPA Statement, *supra* note 21, at 2994 (citing the President's constitutional authority to conduct foreign relations as the reason for viewing "as advisory" the interview requirement for foreign diplomats and officials).

83. Courts generally give broad deference to the Executive branch's conduct of foreign affairs. See Administrative Procedure Act, 5 U.S.C. § 553(a)(1) (2000) (exempting all matters related to military and foreign affairs from rulemaking requirements); *id.* § 701(b)(1)(G) (2000) (excluding military authority exercised in the field in time of war or in occupied territory from the definition of "agency," thus exempting that action from judicial review under the APA); see also *Dep't of the Navy v. Egan*, 484 U.S. 518, 526-27 (1988) (holding that the strong presumption of appellate review in the absence of a statute precluding review does not apply to national security matters); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) (finding that the presumption of judicial review does not apply to national security or foreign affairs issues).

powers.⁸⁴ A court could conceivably strike down agency reliance on such signing statements and find the agency's use of boilerplate language—with nothing else—arbitrary and capricious under *State Farm* or the APA.⁸⁵

III. PROPOSED LEGISLATIVE SOLUTIONS

The fundamental role of agency expertise in our system of government should not be underestimated.⁸⁶ Congress routinely and deliberately crafts ambiguous legislation to punt difficult or politically sensitive questions to federal agencies so that agency experts might resolve the complex policy questions to the best of their abilities.⁸⁷ When an agency substitutes the non-expert opinion of the President in the place of the opinion of its own experts, the agency risks a court overturning its subsequent action for failing to meet the expertise rationale underlying the *Chevron* and *Skidmore* common law standards of deference.⁸⁸ Legislators, lawyers, and academics have proposed both legislative and judicial solutions that can solve this problem.⁸⁹

84. President Bush made the same reservation in the IRTPA signing statement and the signing statement to the McCain Amendment, among others. See IRTPA Statement, *supra* note 21, at 2995 (noting “[t]he executive branch shall construe the Act, including amendments made by the Act, in a manner consistent with the constitutional authority of the President to conduct the Nation’s foreign relations, as Commander in Chief of the Armed Forces, and to supervise the unitary executive branch”); McCain Amendment statement *supra* note 2 (declaring that “[t]he executive branch shall construe Title X . . . in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power”); Statement on Signing the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, 43 WEEKLY COMP. PRES. DOC. 31-32 (Jan. 12, 2007). The latter statement pronounced that the

executive branch shall construe provisions of the Act that purport to direct or burden the conduct of negotiations by the executive branch with foreign governments or international organizations in a manner consistent with the President’s constitutional authority to conduct the Nation’s foreign affairs, including the authority to determine which officers shall negotiate for the United States with a foreign country, when, in consultation with whom, and toward what objectives, and to supervise the unitary executive branch.

Id.

85. See *supra* notes 51-55 and accompanying text.

86. See *Christensen v. Harris County*, 529 U.S. 576, 597 (2000) (Breyer, J., dissenting) (noting that “[i]f statutes are to serve the human purposes that called them into being, courts will have to continue to pay particular attention in appropriate cases to the experienced-based views of expert agencies”).

87. See *supra* notes 45-46 and accompanying text (discussing the rationale for the judicial deference to agency actions).

88. See *supra* Part II.

89. See *infra* notes 90-94 and accompanying text (discussing legislative proposals). Furthermore, the ABA Task Force Report urged Congress to:

[E]nact legislation requiring the President promptly to submit to Congress an official copy of all signing statements, and to report to Congress the reasons and legal basis for any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret

In an attempt to clarify the legal status of signing statements, Congressional leaders introduced bills in the House⁹⁰ and the Senate⁹¹ in 2006 and 2007 that present sweeping measures designed to strictly limit the influence of signing statements on executive agencies.⁹² Both House bills sought to restrict all funding for the production of signing statements as well as to prohibit all federal entities from considering any presidential signing statement when construing or implementing any act of Congress.⁹³ If passed, the latest bill would prevent the President from influencing federal agencies through signing statements, and prohibit federal courts from using signing statements in their legal analysis.⁹⁴ Similarly, the

such a law in a manner inconsistent with the clear intent of Congress, and to make all such submissions be available in a publicly accessible database.

. . . [And] enact legislation enabling the President, Congress, or other entities or individuals, to seek judicial review of such signing statements to the extent constitutionally permissible, and urge Congress and the President to support a judicial resolution of the President's claim or interpretation.

ABA TASK FORCE REPORT, *supra* note 4, at 5.

90. H.R. 5486, 109th Cong. (2d Sess. 2006); H.R. 264, 110th Cong. (1st Sess. 2007).

91. S. 3731, 109th Cong. (2d Sess. 2006); *see also* S. Res. 22, 110th Cong. (2007) (resolving to reject "any interpretation of the President's signing statement on the Postal Accountability and Enhancement Act (Public Law 109-435) that in any way diminishes the privacy protections accorded sealed domestic mail under the Constitution and Federal laws and regulations" and reaffirming "the constitutional and statutory protections accorded sealed domestic mail").

92. In effect, these measures attempt to limit what some observers describe as the President's improper attempts to control agency action. *See* Editorial, *The Imperial Presidency 2.0*, N.Y. TIMES, Jan. 7, 2007 (questioning the legality of one of President George W. Bush's most recent signing statements on a Postal Service Bill that uses boilerplate language to, *inter alia*, reserve the right to open first-class mail without a warrant during "exigent circumstances" or for the purposes of foreign intelligence collection). With a similar eye towards increasing his authority over federal agencies, President George W. Bush recently issued an executive order requiring each agency to have a political appointee running a regulatory policy office that supervises agency decision-making. *See* Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES, Jan. 30, 2007, at A1 (observing that the new executive order "gives the White House much greater control over the rules and policy statements that the government develops to protect public health, safety, the environment, civil rights and privacy").

93. The bills' proposed language reads:

None of the funds made available to the Executive Office of the President, or to any Executive agency . . . , from any source may be used to produce, publish, or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution presented for signing by the President [And] a governmental entity shall not take into consideration any statement made by the President contemporaneously with the President's signing of the bill or joint resolution that becomes such Act.

H.R. 264 §§ 3-4, 110th Cong. (1st Sess. 2007); H.R. 5486, 109th Cong. (2006).

94. While those who criticize the current use of signing statements may welcome this bill, if implemented, the law may have the effect of pushing presidential influence of agencies more underground. *See* Yoo testimony, *supra* note 12, at 10 (suggesting that banning reliance on signing statements would only redirect the President's interpretive process towards the agencies, while maintaining presidential influence over agency statutory interpretation). In theory, a President without effective signing statements may use one of

Presidential Signing Statements Act of 2006, introduced by Sen. Arlen Specter (R-PA), proposed to “forbid judicial reliance on presidential signing statements as a source of authority in the interpretation of Acts of Congress.”⁹⁵

In effect, each bill proposes to bring the conclusions of this Comment into law by prohibiting judicial deference to agency action based solely on a presidential signing statement.

CONCLUSION

This Comment demonstrates that agencies should not rely solely on a presidential signing statement for their reasoning in making a rule or policy decision because doing so would fail to merit deference under the common law standards developed in *Skidmore*, *Mead*, and *Chevron* and could arguably be considered arbitrary and capricious under *State Farm*.⁹⁶ When an agency relies on a presidential signing statement as its rationale in making interpretive or legislative rules, it is relying on the Office of the President that, with a few exceptions, lacks the requisite expertise for judicial deference.⁹⁷ If federal agencies want reviewing courts to defer to their actions, they must include their own expertise in the development of the rules and policy.⁹⁸

the other ways to influence agency action (e.g. executive orders, directives, or political appointments), but could also resort to less transparent, and thus less accountable, methods. The possibility also remains that the President may issue a signing statement claiming his intention to treat the law limiting the use of signing statements as “advisory” only, a paradoxical outcome that likely would require judicial resolution.

95. S. 3731 §§ 2(10), 5, 109th Cong. (2d Sess. 2006).

96. See *supra* Part II.A.

97. See *Statutory President*, *supra* note 43; *Statutory Powers*, *supra* note 65 (noting that Presidents are generalists without the same level of expertise as executive agencies). *But see supra* Part II.B.3 (discussing the broad deference given to the President’s exercise of his foreign affairs powers).

98. As demonstrated in Part II.B, *supra*, federal agencies under all presidents since President Reagan have cited to signing statements in ways that, if challenged in court, would not merit judicial deference under the common law. While this Comment notes, in particular, the current administration’s abuses of signing statements, the conclusions of this Comment should apply equally to all administrations—past, present, and future.