

## **Signing Statements and Presidentializing Legislative History**

John M. de Figueiredo and Edward H. Stiglitz\*

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\* John M. de Figueiredo is the Russell M. Robinson II Professor of Law at Duke Law School and Professor of Strategy and Economics at the Duke Fuqua School of Business, Visiting Professor at the Stanford University Graduate School of Business, and Research Associate at the National Bureau of Economic Research; Edward H. Stiglitz is Associate Professor of Law and Jia Jonathan Zhu and Ruyin Ruby Ye Sesquicentennial Fellow at Cornell Law School. We are indebted to Matthew Vandenberg for alerting us to this topic and beginning a research project in this area. In addition, Jane Bahnson, Jennifer Behrens, Kristin Ellsworth, and Guangya Li provided excellent research assistance. We thank Joseph Blocher, Curt Bradley, Walter Dellinger, William Eskridge, and David Levi for helpful comments. We also thank seminar participants at Duke University and participants at the annual meetings of the International Society of New Institutional Economics (ISNIE) and Conference on Empirical Legal Studies (CELS). All errors in this Article are our own.

## Abstract

Presidents often attach statements to the bills they sign into law, purporting to celebrate, construe, or object to provisions in the statute. Though long a feature of U.S. lawmaking, the President has avowedly attempted to use these signing statements as tool of strategic influence over judicial decisionmaking since the 1980s—as a way of creating “presidential legislative history” to supplement and, at times, supplant the traditional congressional legislative history conventionally used by the courts to interpret statutes. In this Article, we examine a novel dataset of judicial opinion citations to presidential signing statements to conduct the most comprehensive empirical examination of how courts have received presidential legislative history to date. Three main findings emerge from this analysis. First, contrary to the pervasive (and legitimate) fears in the literature on signing statements, courts rarely cite signing statements in their decisions. Second, in the aggregate, when courts cite signing statements, they cite them in predictably partisan ways, with judges citing Presidents’ signing statements from their own political parties more often than those of the opposing parties. This effect, however, is driven entirely by the behavior of Republican-appointed appellate jurists. Third, courts predominately employ signing statements to buttress aligned statutory text and conventional sources of legislative history, and seemingly never rely on them to override contrary plain statutory text or even unified traditional legislative history. This suggests that signing statements have low rank among interpretative tools and courts primarily use them to complement rather than substitute for congressional legislative history. In this sense, Presidents have largely failed to establish an alternative corpus of valid interpretive material.

## INTRODUCTION

Even as executive power creeps into nearly every domain of government affairs,<sup>1</sup> one might think that legislative authority is at least unmolested in the area stamped with that branch's name—legislative history. But this would be wrong. For the last one hundred and fifty years, Presidents have been issuing statements when they sign laws.<sup>2</sup> These presidential signing statements have varied uses,<sup>3</sup> but in recent decades one important objective of the statements is to influence how courts interpret the statute in question. They seek, in other words, to presidentialize legislative history.<sup>4</sup>

For most of this country's history, signing statements were used sparingly, mainly for rhetorical purposes, praising legislation or recognizing individuals or organizations for their effort in the passage of a bill.<sup>5</sup> For example, President Kennedy signed a bill on October 16, 1962 that removed the requirement that National Science Foundation (NSF) beneficiaries sign an anti-Communist oath.<sup>6</sup> Celebrating the bill, Kennedy said in a signing statement attached to the

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1. See, e.g., Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009); JOHN C. YOO, *CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* (2010) (describing the growth of executive power, particularly in times of crisis).

2. See, e.g., Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMM. 307, 312 (2006) (noting the historical evolution of signing statements); Christopher S. Kelley, *The Unitary Executive and the Presidential Signing Statement 57–68* (2003) (unpublished Ph.D. dissertation, Miami University).

3. See *infra* Part II.

4. See Dellinger, *infra* note 10.

5. For a comprehensive history of presidential signing statements, see Kelley, *supra* note 2, at 57–68.

6. Statement on Signing Bill Modifying the Anti-Communist Oath Requirement for Student Loans (Oct. 16, 1962), <http://www.presidency.ucsb.edu/ws/index.php?pid=8968>.

bill, “It is highly unlikely that the affidavit requirement kept any Communist out of the programs. It did, however, keep out those who considered the disclaimer affidavit a bridle upon freedom of thought. I am glad to approve the legislation.”<sup>7</sup> Though it is possible to find such statements recently, at least since the Carter and, particularly, the Reagan Administrations, some signing statements have taken on a new and more assertive character.<sup>8</sup>

The question of why Presidents issue signing statements is much debated:<sup>9</sup> perhaps they represent a vehicle of public communication;<sup>10</sup> or perhaps they represent a way of communicating to agencies;<sup>11</sup> or perhaps to Congress.<sup>12</sup> Among the rationales for signing statements,<sup>13</sup> however, one has received more attention than others—that, at least recently, a presidential signing statement enters as part of the legislative history of the act, and thereby influences how courts subsequently construe the statute itself.<sup>14</sup> By common account, this was indeed Attorney General Edwin Meese’s motivation for lobbying the West Publishing Company

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7. *Id.*

8. See *infra* Part II.A. So far, President Trump’s signing statements—at the time of writing, three—have continued in this pattern. See Statement on Signing the Consolidated Appropriations Act, 2017 (May 5, 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=124186>; Statement on Signing the DHS Stop Asset and Vehicle Excess Act (June 6, 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=126288>; Statement on Signing the Countering America’s Adversaries Through Sanctions Act (Aug. 2, 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=126763>.

9. Recently, the question of how courts should treat presidential speech has become salient. For an excellent treatment of this issue, see Kate Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2981475#%23](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2981475#%23).

10. See generally, Memorandum from Walter Dellinger, Assistant Attorney Gen., to Bernard M. Nussbaum, Counsel to the President (Nov. 3, 1993).

11. *Id.*

12. *Id.*

13. Bradley & Posner, *supra* note 2, at 312 (discussing generally the range of content contained within presidential signing statements).

14. Dellinger, *supra* note 10.

in 1986 to include signing statements in the *U.S. Code Congressional and Administrative News*, a source of legislative history commonly used by courts and legal actors.<sup>15</sup> As Meese put it, doing so ensured that “the President’s own understanding of what’s in a bill is the same. . . or is given consideration at the same time of statutory construction later on by a court. . . so that [the legislative history and signing statement] can be available to the court for future construction of what that statute *really* means.”<sup>16</sup>

Yet no study has systematically examined this common view. This Article is the first to study precisely this issue: how often do courts cite to signing statements and under what conditions do they do so? Some authors have argued there is limited evidence that courts cite or even notice signing statements.<sup>17</sup> Other authors, however, have argued that federal courts have increased their citations to signing statements and thus that they may be important to judicial decisionmaking.<sup>18</sup> In this way, existing evidence on this question of how often courts cite signing statements is fragmentary and inconclusive. Conditional on citing a signing statement, we anticipate that courts treat signing statements much as they do other pieces of legislative history. We suspect, in particular, that courts follow Judge Leventhal’s quip that likens the use

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15. See, e.g., Daniel B. Rodriguez, Edward H. Stiglitz, & Barry R. Weingast, *Executive Opportunism, Presidential Signing Statements, and the Separation of Powers*, 8 J. LEGAL ANALYSIS 95, 100 (2016).

16. Dellinger, *supra* note 10, at 135 (quoting Meese at length) (italics added).

17. See, e.g., T.J. HALSTEAD, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 21 (Apr. 13, 2007).

18. Kristy L. Carroll, *Whose Statute is it Anyway? Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U. L. REV. 475, 503–04 (1997) (noting that between 1986 and 1996, the courts cited signing statements forty-two times).

of legislative history to “looking out over a crowd and picking out your friends.”<sup>19</sup> In their study of judges’ use of legislative history, Professors Abramowicz and Tiller, for instance, find general support for Leventhal’s suggestion.<sup>20</sup> Similarly, here we expect judges to use the statements in an effort to justify their legal decisions when the record is sparse; or if the record is thick, presidential signing statements provide yet an additional layer of support to buttress a judge’s decision to rule in a particular way.<sup>21</sup> Thus, in creating further legislative history, the signing statements may represent an important way for Presidents to enhance the probability that their preferred policies and interpretations are carried out by the lifetime tenured judges long after the President leaves office.<sup>22</sup>

The findings from our empirical analysis support three main conclusions.<sup>23</sup> The first finding is that the overall rate of citations to signing statements by appellate judges is extremely low. In the Supreme Court and the federal appellate courts, there is only one citation to a signing statement per 7,500 non-criminal cases.<sup>24</sup> This suggests that Attorney General Meese and the Reagan Administration largely failed in their objective of presidentializing legislative history. To the extent judges cite to legislative history in their opinions, they do so primarily to sources

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19. See Michael Abramowicz & Emerson Tiller, *Citation to Legislative History: Empirical Evidence on Positive Political and Contextual Theories of Judicial Decision-Making*, 38 J. LEGAL STUD. 419, 419 (2009) (quoting Judge Leventhal).

20. *Id.* (demonstrating that at the appellate level, the panel composition and the broader political environment of the circuit can also have an effect on citation patterns).

21. See *infra* Part III.A.

22. *Id.*

23. See *infra* Part III.

24. See Appendix.

that derive from Congress.<sup>25</sup>

The second finding, however, is consistent with the findings on the use of legislative history generally<sup>26</sup>—in those few instances when judges cite signing statements, they tend to use them in a slanted way.<sup>27</sup> In short, judges find their friends in the crowd. Statistical tests demonstrate that judges often cite the signing statements of Presidents of their own party.<sup>28</sup> Importantly, though, this effect is asymmetric—it is entirely driven by Republican-appointed judges. Democratic-appointed judges show no difference in citation behavior.<sup>29</sup>

A third set of findings emerges from a careful survey of the cases with the most extended discussions of signing statements in the dataset. In an examination of the detailed contexts in which courts rely on signing statements, we find that courts tend to employ signing statements as a gloss on statutory text or other sources of legislative history that largely align with the position of the statement.<sup>30</sup> And though courts sometimes seem to give signing statements greater interpretive weight, as in traditional areas of executive prerogative, they also balk when the President expresses a view in his signing statement that is plainly contrary to the text of the statute or to other more conventional sources of legislative history.<sup>31</sup> Indeed, in this analysis we fail to find a single example of a court using a signing statement in the manner most feared in the

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25. *See infra* Part III.

26. *E.g.*, Abramowicz & Tiller, *supra* note 19.

27. *See infra* Part III.D.

28. *Id.*

29. *Id.*

30. *See infra* Part III.E.

31. *Id.*

literature, as an effective line item veto that overrides otherwise plain statutory language—though that remains a conceptual possibility.<sup>32</sup>

Overall, we find that Presidents have largely failed in the decades-long project to presidentialize legislative history through signing statements.<sup>33</sup> Courts rarely cite signing statements. When they do cite signing statements, they do so in predictably ideological manner—at least for Republicans—but they use them primarily as an additional, corroborating layer of “evidence,” rather than as a way to override statutory language or even other more conventional sources of legislative history.<sup>34</sup>

This Article proceeds as follows. In Part I we provide a typology of signing statements and briefly address their history in the modern presidency, highlighting the common view that Presidents use them to influence the judiciary. In Part II, we then turn our attention to the judiciary. We first present a theory of how signing statements provide presidential “cover” to the judiciary; we then probe the theory by way of data and a statistical analysis of judicial citations to signing statements at the appellate level; finally, we conduct a survey of the judicial opinions with the most in-depth discussions of signing statements to qualitatively assess how courts employ signing statements.

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32. Perhaps the closest case in this regard is *Zivotofsky v. Kerry*, 135 S.Ct. 2076 (2015), *infra* Part III.E, but the evidence is at best indirect there as the Court does not cite the signing statement as an authority for its position.

33. *See infra* Part III.

34. *See infra* Part III.E.



## I. PRESIDENTIAL SIGNING STATEMENTS

### *A. Typology and Descriptive Statistics*

Presidential signing statements—in contrast to proclamations, directives, speeches or comments about legislation—are limited to a very narrow class of presidential actions.<sup>35</sup> For a position to be a signing statement, it must be a written statement that accompanies the President’s signature on a piece of legislation.<sup>36</sup> It will be recorded in official documents and clearly linked to the legislation that it accompanies.<sup>37</sup>

Given the wide range of subjects and objectives of presidential signing statements, scholars have developed varying taxonomies for studying them.<sup>38</sup> One common method for classifying signing statements is to place them into three broad categories.<sup>39</sup> The first category contains constitutional statements in which the President notes that certain parts of the legislation

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35. The president has many tools available for influencing courts: executive orders, proclamations, national security directives and signing statements, to name just a few, that are discussed in the literature. *See, e.g.*, Kelley, *supra* note 2, at 51–55. Although beyond the scope of this Article, courts have at times cited presidents’ proclamations, speeches, and messages to congress. *See, e.g.*, Griffith v. City of Des Moines, 387 F.3d 733, 739 (8th Cir. 2004); Ortiz v. City of Philadelphia, 28 F.3d 306, 338 (3d Cir. 1994); United States v. Eklund, 733 F.2d 1287, 1289 (8th Cir. 1984); La. Credit Union League v. United States, 693 F.2d 525, 540 (5th Cir. 1983).

36. Dellinger, *supra* note 10.

37. For decades, presidential signing statements have been recorded in the President’s Weekly Compilation of Documents and its more modern online equivalent, the President’s Daily Compilation of Documents. *See* Popkin, *infra* note 54, at 700 n.4 (indicating that signing statements were included in the weekly compilation since its inception in 1965).

38. Some scholars refer to rhetorical, political and constitutional statements; others prefer a simple bifurcation between symbolic and interpretative; others still would divide political or constitutional statements into further subcategories. *See* Bradley & Posner, *supra* note 2, at 323 (acknowledging an active debate about coding definitions and providing an example of the impact of those disputes). These differences have resulted in widely different, and arguably inaccurate, counts of presidential signing statements. *See, e.g.*, Kelley, *supra* note 2, at 44.

39. *See* Dellinger, *supra* note 10; Rodriguez et al., *supra* note 15; Bradley & Posner, *supra* note 2.

are, in his view, in violation of constitutional principles.<sup>40</sup> The second category consists of interpretative statements, in which the President interprets the parts of the legislation and may add to the “legislative history” and meaning of the statute.<sup>41</sup> The third category is comprised of rhetorical or celebratory statements in which the President congratulates or celebrates individuals, the process, or the legislative accomplishment.<sup>42</sup>

For example, President Obama’s first signing statement, which accompanied the American Recovery and Reinvestment Act of 2009, was largely rhetorical, addressing the difficult economic circumstances of the time, the benefits of the legislation, and the need for Americans to take further action.<sup>43</sup> In contrast, the second signing statement issued by President Obama, after a very brief paragraph providing context for the statement, referenced five areas of “constitutional concern.”<sup>44</sup> The subsequent paragraphs include interpretations,<sup>45</sup> concerns,<sup>46</sup> and directives.<sup>47</sup>

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40. *E.g.*, Rodriguez et al., *supra* note 15.

41. *Id.* The first category often blends into the second, as the president construes a statute precisely to avoid what he sees as a constitutional infirmity. *See infra* notes 106–109 and accompany text for one such example.

42. *E.g.*, Rodriguez et al., *supra* note 15.

43. Presidential Statement on Signing American Recovery and Reinvestment Act of 2009, 2009 DAILY COMP. PRES. DOC. 00088 (Feb. 17, 2009), <http://www.presidency.ucsb.edu/ws/index.php?pid=85782>.

44. Presidential Statement on Signing the Omnibus Appropriations Act, 2009 (Mar. 11, 2009), <http://www.presidency.ucsb.edu/ws/index.php?pid=85848>.

45. *Id.* (noting, “I do not interpret this provision to detract from my authority to direct the heads of executive departments to supervise, control, and correct employees’ communications with the Congress in cases where such communications would be unlawful or would reveal information that is properly privileged or otherwise confidential.”)

46. *Id.* (noting, “This provision raises constitutional concerns by constraining my choice of particular persons to perform specific command functions in military missions. . .”)

47. *Id.* (noting that “spending decisions shall not be treated as dependent on the approval of congressional committees.”)

Our focus is on “substantive” signing statements that purport to interpret a statute, either on its own terms, or in light of the President’s view of constitutional principles; we exclude rhetorical or celebratory statements from our analysis. Notice that this approach conflates to some extent the conventional “statutory” and “constitutional” designations made in the literature.<sup>48</sup> For our part, the critical feature of the statement is that it construes the meaning of the statute. This approach equally captures interpretations of statutes motivated by a stated desire to avoid a perceived constitutional infirmity, as well as interpretations motivated by non-constitutional considerations. In Figure 1,<sup>49</sup> we present the data on substantive presidential signing statements attached to Public Laws since 1950. As can be seen, it was in the Reagan Administration that there began an explosion in the number of signing statements. Indeed, since the 1980s, Presidents have issued over 1,000 signing statements,<sup>50</sup> and they appear particularly assertive about constitutional and interpretive issues later in their terms.<sup>51</sup> Moreover, these trends hold whether there are Democrats or Republicans in office.

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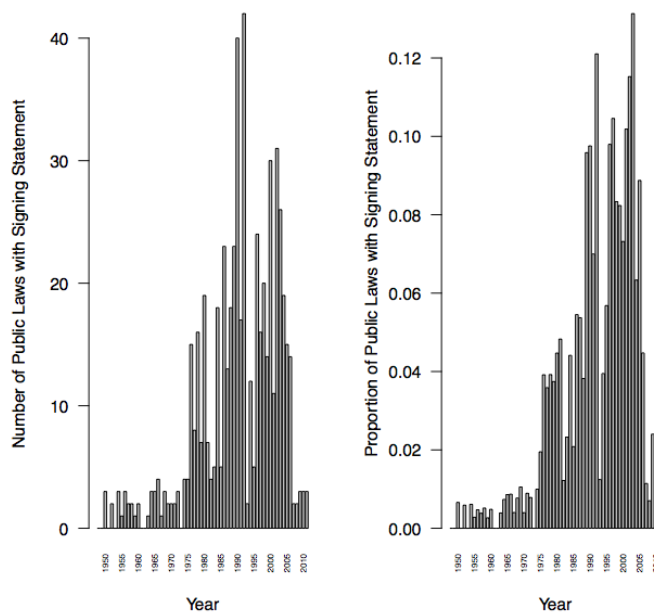
48. See e.g., Rodriguez et al., *supra* note 15.

49. This Figure is based on data developed in Rodriguez et al., *supra* note 15, on which Stiglitz was a co-author (containing details on the coding scheme and presenting similar figures).

50. See Christopher S. Kelley & Bryan W. Marshall, *The Last Word: Presidential Power and the Role of Signing Statements*, 38 PRES. STUD. Q. 248, 259 (2008).

51. *Id.* at 264; see also Rodriguez et al., *supra* note 15, at 117 (observing that this pattern might result from the nature of legislation shifting over a president’s term).

Figure 1: Presidential Signing Statements



Beyond the incidence of signing statements, one might also be interested in the policy areas in which they appear. For instance, if signings statements only appear with respect to statutes dealing with foreign policy, we might not have as great concern with the President injecting his views into the statute—as foreign policy has long been recognized as a traditional area of executive control.<sup>52</sup> But we might have a different sentiment in other policy areas, domestic policy, for example. Again following Rodriguez et al.,<sup>53</sup> we track the main policy area

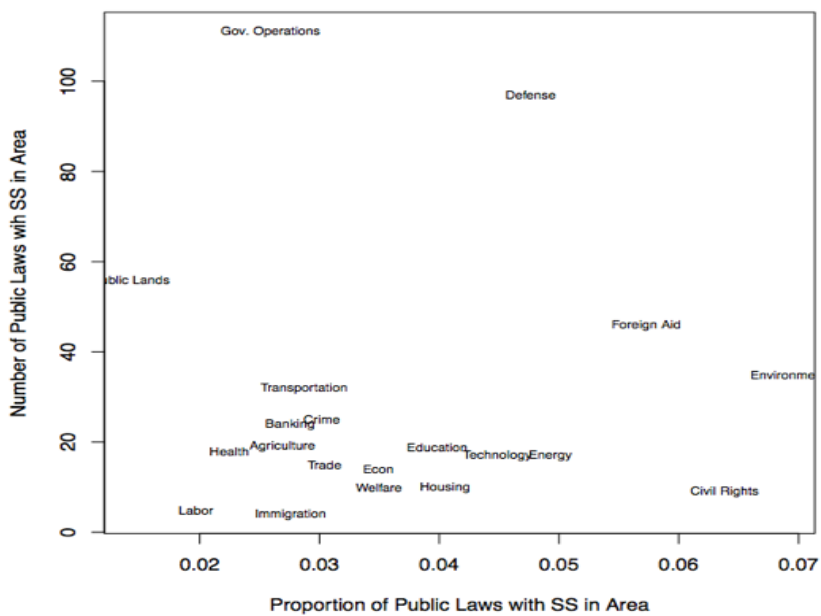
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52. E.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 298 (2001).

53. Rodriguez et al., *supra* note 15, at 103.

of each signing statement and illustrate our results in Figure 2. For each of the most common policy areas of legislation, we plot the number of public laws in the area that have received signing statements against the proportion of public laws in that area with signing statements. Focusing on the proportion of public laws with signing statements, on the x-axis, foreign aid and defense appear among the top ten topics, both plausibly traditional areas of executive control. However, also appearing in the top ten topics are the environment, civil rights, housing, and welfare, all contentious domestic areas where congressional views take on substantial weight. Overall, both foreign and domestic areas populate the topics most proportionately frequented by signing statements.

*Figure 2: Topics of Signing Statements*



These figures corroborate the notion that the effort to presidentialize legislative history has been underway since at least the 1980s. Since that time, there has been an explosion in the number of signing statements issued by Presidents, only recently dipping, and these signing statements span a variety of issue-areas, including controversial areas of domestic policy, such as civil rights and the environment.

### *B. The Literature: A (Mostly) Dim View*

For the most part, the literature adopts a dim view of signing statements. The concerns fall, roughly, into two categories. First, some scholars raise legal concerns largely involving separation of powers issues.<sup>54</sup> Second, more recently, Stiglitz (with co-authors) raised institutional concerns with signing statements from the perspective of positive political theory.<sup>55</sup> We address these strands of the literature in turn.

The dominant view in the legal literature is that signing statements raise serious separation of powers concerns.<sup>56</sup> The fear that many have is that the President, in issuing a

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54. See generally, e.g., ABA, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, Report with Recommendations (2006); Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRES. STUD. Q. 515 (2005); William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991); Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. LEGIS. 363 (1987).

55. See generally Rodriguez et al., *supra* note 15. For a contrary view, see Christopher S. Yoo, *Presidential Signing Statements*, 164 U. PA. L. REV. 1801 (2015).

56. See generally Rodriguez et al., *supra* note 15 (using positive political theory to demonstrate the negative effects of signing statements, if credited by courts); Cooper, *supra* note 54, at 531 (arguing that signing statements “can and have been used as line-item vetoes of legislation presented to the president for signature or veto but without the use of the formal veto or the opportunity for legislative override processes.”); ABA, *supra* note 54, at 5 (resolving that the ABA “oppose[s], as contrary to the rule of law and our constitutional system of separation of

signing statement, is in effect issuing a line item veto, an institutional device that the Court invalidated in *Clinton v. City of New York*.<sup>57</sup> For example, when the President construes a clause in a statute to be unconstitutional and sidelines the provision in a signing statement, has he thereby “vetoed” an item in the statute? And in doing so, does the President violate the separation of powers, trenching on legislative powers? Such questions as these animate large portions of the unsettled legal literature on signing statements and raise serious concerns about the role of these statements.<sup>58</sup>

Notice, however, that for the statements to raise these concerns, they have to be taken seriously by other institutions—agencies and, ultimately, courts, in a way that is different than the way these institutions would treat other forms of presidential communication, such as an executive order, or an ordinary memo. As Professors Bradley and Posner aptly observe,<sup>59</sup> the President may express his view about a statute through these other means without exciting controversy. However, controversy attaches specifically to signing statements because—some fear—they, in effect, “amend” the language of the statute, changing its meaning in a way that these other presidential expressions cannot. For this to happen, however, courts must credit signing statements with the authority to do so. Otherwise, even if an agency takes the signing statement as firm instructions not to enforce some provision of the statute, the agency action at

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powers, the issuance of presidential signing statements that claim the authority or intention to disregard or decline to enforce all or part of a law the president has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress”).

57. 524 U.S. 417, 448–49 (1998).

58. See, e.g., ABA, *supra* note 54.

59. See generally Bradley & Posner, *supra* note 2, at 307.

issue may be set aside. Thus, signing statements may have a privileged position via courts, or per Bradley and Posner, they may be difficult to distinguish from other presidential communications.<sup>60</sup> Hence, our interest is in understanding how courts regard signing statements, specifically, and their use in legislative history, line item veto, or other force of law.

A related concern in the literature is more institutional in nature. The concern articulated in recent research is that signing statements upset the equilibrium between the executive and the legislature, and that, if credited by courts, signing statements will induce the legislature to respond in problematic ways.<sup>61</sup> In particular, one concern is that if the President can, in effect, “amend” a bill after it leaves Congress, Congress will be less likely to reach agreements during the legislative process, because agreements made will be overturned or changed after final votes have been tallied.<sup>62</sup> This will exacerbate gridlock in that branch of government.<sup>63</sup> Congress may also retaliate along other problematic margins, for instance holding up confirmation on nominees as a form of hostage taking, or threatening to not extend the debt ceiling.<sup>64</sup> For these institutional reasons, too, one might not want to see courts give credit to presidential signing statements—at least not more credit than they would give to a presidential speech or other less formal mode of communication. This concern in the literature, too, motivates our empirical inquiry to understand how courts view these signing statements.

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60. *Id.*

61. *See generally* Rodriguez et al., *supra* note 15.

62. *See id.* at 96–98.

63. *Id.*

64. *Id.*



## II. THE JUDICIARY AND SIGNING STATEMENTS

### *A. Empirical Predictions*

We now turn to an empirical analysis of signing statements. The first part of this section contains a statistical analysis of signing statement citations of appellate and Supreme Court opinions. The second part of the analysis encompasses a careful read and qualitative analysis of the content of “major” citations to signing statements.<sup>65</sup> Underlying both of these analysis are the predictions of the legal literature as to how signing statements will be used by the judiciary.

If the President is successful in creating presidential legislative history, one might expect three types of outcomes. First, we should see courts actively, frequently, and significantly citing the signing statements. If signing statements matter as pieces of legislative history, they should appear in judicial opinions.<sup>66</sup>

Second, if the President is successful in altering the meaning of a statute, his gloss on the statute should persist well after he has left office. Judges who share the preferences of the President and who hear these cases years later can turn to the presidential signing statements to inform their votes. This is especially true if the President is more expert on the issue than a court. The court may not know how to fully and effectively implement its own preferences. So it looks for cues that presidential signing statements provide for guidance on that question—the

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65. *See infra* Part III.E.

66. *E.g.*, Stephen Breyer, *The Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 845–46 (1991) (examining the use of legislative history through extent to which courts rely on or refer to that material).

President, if successful, has “embedded” his view into the statute. Hence, it would be reasonable to expect that judges should cite presidential signing statements not only during the President’s term in office, but long after the President has left power.

Third, if Presidents use signing statements to bolster their ideological agenda, and judges use signing statements as presidential legislative history, then one would expect judges to cite the presidential signing statements in ways consistent with Judge Leventhal’s famous quip.<sup>67</sup> The fact that judges are ideological in decisionmaking has now been widely demonstrated in countless empirical studies.<sup>68</sup> Most work examines judicial votes or decisions as evidence of this tendency, but other papers discuss the particular tools that judges employ to make their decision more ideologically aligned with their preferences.<sup>69</sup> Presidential legislative history, one would expect, would fit into this larger pattern of partisan and ideological judging.

If so, we should see judges acting ideologically with respect to how they cite signing statements, much as they do with respect to conventional legislative history. That is, judges should be more likely to cite statements of Presidents who are of the same political affiliation as

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67. See Abramowitz & Tiller, *supra* note 19.

68. There is a substantial literature showing that the president who appointed the judge is a good measure of a judge’s ideology and has substantial predictive power. See, e.g., HAROLD J. SPAETH & JEFFREY A. SEGAL, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence? The Determinants of U.S. Supreme Court Labor Relations, 1949–1988*, 23 *RAND J. ECON.* 463 (1992); John M. de Figueiredo, *Strategic Plaintiffs and Ideological Judges in Telecommunications Litigation*, 21 *J.L. ECON. & ORG.* 501 (2005); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *VA. L. REV.* 431 (1989); Richard Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *VA. L. REV.* 1717 (1997).

69. See generally Emerson Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 *J.L. ECON. ORG.* 349 (1999); Frank Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 *YALE L.J.* 2155 (1998); Abramovicz & Tiller, *supra* note 19, at 419–21.

the judge. Thus, Democratic judges should cite Democratic presidential signing statements and Republican judges should cite Republican presidential signing statements. We now examine how the empirical evidence lines up with these predictions.

### *B. Data and Frequency in Citations*

To explore how the judiciary handles presidential signing statements, we developed a novel dataset consisting of the universe of published and unpublished decisions that had citations to presidential signing statements by federal appellate courts and the Supreme Court between 1976 and 2011. The dataset therefore focuses on the courts most likely to be influential in interpreting legislation, the appellate courts.<sup>70</sup> Collecting these data was challenging because judges do not cite presidential signing statements in a uniform way.<sup>71</sup> As reflected in the appendix, we developed a search algorithm through substantial trial and error and consultation with a range of legal research librarians; using Westlaw and this search algorithm, we found ninety-six appellate and Supreme Court opinions during this thirty-six-year period that contained citations to presidential signing statements.<sup>72</sup> We believe this to be the most comprehensive search for appellate citations to presidential signing statements to date. The data is informative

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70. The appellate courts have outsized influence by virtue of the hierarchy of the American judicial system. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) (observing that “longstanding doctrine dictates that a court is *always* bound to follow precedent established by a court ‘superior’ to it”).

71. Although there is a Bluebook citation method for presidential signing statements, few judges actually adhere to that format in their opinions. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION T1, at 243 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015).

72. *See infra* Part V (explaining the search methods and parameters).

on a number of dimensions.

The first observation about the data is foundational: there are strikingly few opinions that actually cite signing statements. Despite the furor over signing statements one finds, on average, only 2.7 appellate or Supreme Court opinions per year that cite signing statements during this time period. Given that these bodies reach judgment on some 30,000 total cases—or 20,000 non-criminal cases—per year,<sup>73</sup> it is remarkable that so few case opinions cite signing statements—indeed, only 0.0135% of all non-criminal cases include a reference to a signing statement, a vanishingly small fraction of the appellate docket.<sup>74</sup> Indeed, we can further restrict the relevant population of cases, and the executive’s adventure into controlling legislative history fares little better: signing statements appear in only about 0.0289% of decisions that refer to a “statute” or “legislation”,<sup>75</sup> or about 0.1629% of decisions that refer to “legislative history” and “statute” or “legislation.”<sup>76</sup>

This simple finding greatly informs our view of how successful presidential legislative history has been. Whatever influence signing statements exert on courts must be sharply limited,

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73. United States Court of Appeals, Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding, During the 12-Month Period Ending March 31, 2016 (Mar. 31, 2016), [http://www.uscourts.gov/sites/default/files/data\\_tables/fjcs\\_b5\\_0331.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/fjcs_b5_0331.2016.pdf)

74. That is, 2.7 divided by 20,000 gives 0.000135.

75. We estimate the denominator by searching for “statute” in the opinions of the circuit courts and Supreme Court; Google Scholar estimates 332,000 such cases. Dividing 96 by this number yields 0.000289. GOOGLE SCHOLAR, [https://scholar.google.com/scholar?q=\(statute|legislation\)&hl=en&as\\_ylo=1973&as\\_yhi=2011&as\\_sdt=fff87fe0000000001000000000000004](https://scholar.google.com/scholar?q=(statute|legislation)&hl=en&as_ylo=1973&as_yhi=2011&as_sdt=fff87fe0000000001000000000000004) (last visited Sept. 20, 2017).

76. Google Scholar estimates 58,900 such cases over the period. Dividing 96 by this number yields 0.001629. GOOGLE SCHOLAR, [https://scholar.google.com/scholar?q=%28statute%7Clegislation%29+%26+%22legislative+history%22&btnG=&hl=en&as\\_sdt=fff87fe0000000001000000000000004&as\\_ylo=1973&as\\_yhi=2011](https://scholar.google.com/scholar?q=%28statute%7Clegislation%29+%26+%22legislative+history%22&btnG=&hl=en&as_sdt=fff87fe0000000001000000000000004&as_ylo=1973&as_yhi=2011) (last visited Sept. 20, 2017).

as fewer than 100 opinions between 1976 and 2011 cite them. Scholars have doubted the influence of signing statements in earlier research,<sup>77</sup> but until now scholars have not had a clear empirical portrait of the extent to which courts employ signing statements. Judged by Edwin Meese's objectives of presidentializing legislative history, the data of this Article shows signing statements to be an almost complete failure. It only modestly exaggerates to say that courts simply do not cite presidential signing statements.

### *C. Timing of Citations*

Despite the infrequency of citations to signing statements in judicial opinions, there are a sufficient number of citations over the thirty-six-year period to conduct a statistical analysis of court behavior with respect to signing statements. Figure 3 shows the frequency distribution of signing statement citations by number of years elapsed between the year of the signing statement and the year of judicial citation to that signing statement. An examination of the data of these ninety-six citations shows that the average elapsed time between signing statement issuance and judicial opinion is ten years, two months, with the median time being six years. Some citing judicial opinions follow long after the President leaves office, such as the Pledge of Allegiance cases, which came roughly half a century after the signing statements at issue.<sup>78</sup> In fact, over 70% of the opinions citing signing statements were written after the President left office. This

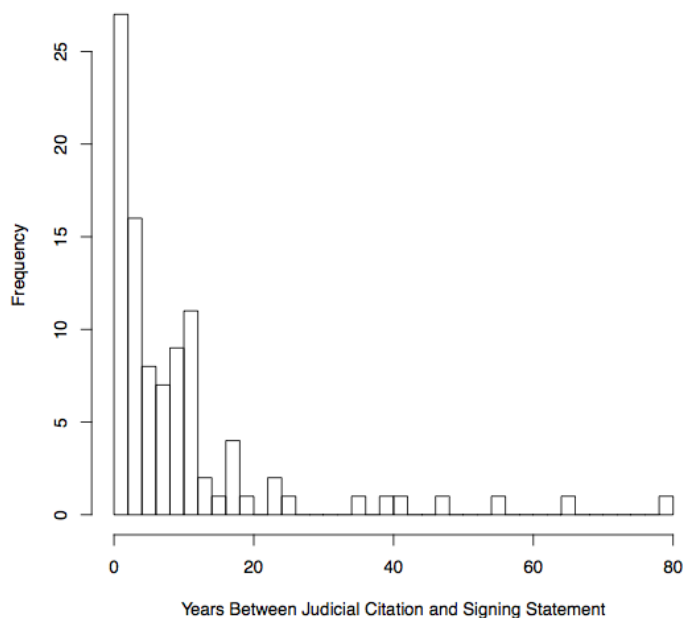
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77. See HALSTEAD, *supra* note 17.

78. The pledge of allegiance cases cited signing statements nearly fifty years earlier. See *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Even if we trim the sample to opinions in which more than forty years have elapsed between statement and citation, the average elapsed time between statement and citation is seven years nine months with a median elapsed time of six years.

second finding cuts modestly against the first finding, in that it suggests that the influence Presidents exert through signing statements may meaningfully “embed” into the statute, touching the decisions of a future judiciary whose outcomes he cannot influence directly through briefs and oral argument in the courtroom. In this way, presidential signing statements seem to affect the enduring meaning of the statute, if credited by courts.

*Figure 3: Elapsed Time from Signing Statement to Judicial Opinion Citing Signing Statement*



*D. Role of Ideology in Citations to Presidential Signing Statements*

Now consider how the political leanings (or ideology) of judges might influence citations to signing statements. As noted earlier, the question is whether, conditional on citing signing

statements, judges act in ways that are predicted by the literature on judicial decisionmaking—citing statements from Presidents of their own party more frequently than Presidents of opposing parties.<sup>79</sup> We begin by measuring two variables. The first variable, “President Party,” is the political party of the President who signed the statement. The second variable, “Judge Party,” is the political party of the President who appointed the authoring judge who cited the signing statement. Table 1 presents a cross tabulation for all citations to signing statement by the party of the signing President and the party of the citing judge.

*Table 1: All Citations of Presidential Signing Statements by Judge and Signing President*

*Political Party (n=92)<sup>80</sup>*

		President Party		
		Democrat	Republican	
Judge Party	Democrat	16 (44%)	20 (56%)	36 (100%)
	Republican	15 (27%)	41 (73%)	56 (100%)
		31	61	

79. See, e.g., SPAETH & SEGAL, *supra* note 68; Abramowitz & Tiller, *supra* note 69.

80. The appendix contains citations for the cases in our database. Four decisions were per curiam and no political affiliation was assigned. See *Frovola v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985); *Eguba v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998); *Clevenger v. Oak Ridge School Bd.*, 848 F.2d 189 (6th Cir. 1988); *Johnston v. Office Pers. Mgmt.*, 99 F.3d 1160 (Fed. Cir. 1996).

The basic story of Table 1 is one of asymmetry. Democratic judges appear to cite statements from both Democratic and Republican Presidents at roughly the same frequency. Republican judges, on the other hand, cite Republican signing statements almost three times more often than they cite Democratic signing statements. To explore this observation using univariate statistical methods, we conducted simple t-tests. The tests examines if the judges from one political party cite signing statements written by Presidents of their own party more than they cite signing statements of Presidents of opposing parties. This hypothesis finds support with a t-test at the 95% level of confidence. However, subsequent tests show this result is driven entirely by Republican judges. Republican judges are more likely to cite signing statements of Republican Presidents than they are to cite Democratic President signing statements at the 99.9% level of confidence according to a simple test of means. However, we cannot reject that Democratic judges cite Republican signing statements and Democratic signing statements with equal frequency.

Although tabular data and univariate statistical analysis show a pattern in the data, we conduct a more powerful statistical analysis to control for other factors that might be explaining this pattern. We examine two dependent variables. The first dependent variable used in Model 1



in Table 2 is Own Citation. Own Citation is equal to 1 if a judge is citing a presidential signing statement by the President of his/her own party, and equal to 0 otherwise. The second dependent variable used in Model 2 in Table 2 is an indicator for whether the reference to the presidential signing statement is considered to be a “major” citation in the opinion, taking a 1 if so, and 0 if the reference is fleeting. Under the coding scheme we employ, a citation would be characterized as major if it is in the body of the opinion, as opposed to a footnote, is cited alone rather than as part of a string citation, or is a citation that is used to support what seems to be a critical point in the argument of the opinion. By comparison, citations that appear in footnotes, or in a string of citations, or in which the judge uses the citation to support a minor point in the argument classify as a minor citation.<sup>81</sup>

A number of independent variables are used in the regression analysis. *Republican Judge* is the party of the judge as described above, and is equal to 1 if Republican and 0 if Democratic. *Republican Signing President* is the political party of the President who signed the statement, and is equal to 1 if Republican and 0 if Democratic. *Republican Concurrent President* is the political party of the President at the time of the judicial opinion citing the statement, and is equal to 1 if the concurrent President is Republican and 0 if the concurrent President is Democratic. *Time Elapsed to Decision* is the number of years between the signing statement and the judicial opinion, as discussed earlier in the Article.<sup>82</sup> We use a linear probability model to

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81. Most of these characteristics are objective coding characteristics of the citation. Nevertheless, to avoid researcher bias, the research librarians and research assistants coded this variable.

82. See *supra* Part III.C. Not reported in the table—but available on request—we also include a time trend and

estimate the relevant relationships.<sup>83</sup>

Table 2 presents the results of the regression analysis. As discussed below, Models 1–3 present the results for the effect of the independent variables on Own Citations, and Models 4–6 present the results for the effect of the independent variables on whether the citation is a Major Reference. Both models have ninety-two observations, omitting the four per curiam decisions. Standard errors are reported in parentheses below the coefficients.

Despite there being only ninety-two observations we obtain meaningful results. Consider first Model 1. There, we see that the coefficient on Republican Judge is positive and statistically significant at the 99% level. This means that Republican judges are more likely to cite Republican presidential signing statements than Democratic judges are to cite Democratic presidential signing statements. Indeed, the coefficient indicates that Republican judges are thirty percentage points more likely to cite Republican signing statements than Democratic judges are to cite Democratic signing statements. This is both statistically significant and substantively very large, especially given this sample's small size. This is one of the main statistical findings of this Article and lends credibility to the notion that Republican-appointed judges are particularly prone to seek out “friends” when citing signing statements.

Model 1 also shows that as more time elapses between the signing statement and the

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the square of the time trend in some of the specifications; the table identifies the specifications with this feature.

83. We have also analyzed the data using a random effects probit model using random effects for judges or random effects for circuits. David K. Guilkey & James L. Murphy, *Estimation and Testing in the Random Effects Probit Model*, 59 J. ECONOMETRICS 301 (1993). The results from analyzing that model do not differ qualitatively from those reported for the linear probability model in this body of the Article; we will make those results available on request. We opt for the simpler linear probability model due to its transparency and ease of interpretation.

judicial opinion that cites the statement, judges are less likely to cite their own party's statement and are more likely to cross party lines in citations. These latter results are consistent with the idea that presidential-judicial politics has become more partisan with the passage of time. It is also consistent with the argument that there is ideological drift of political parties over time.

In Models 2 and 3, we add time trends (Model 2) and circuit fixed effects (Model 3). The time trends should capture any (quadratic) trend in the tendency of judges to cite signing statements of their own parties over time—for example, if citation culture changes over time. The circuit fixed effects absorb any time-invariant feature of the circuits with respect to citation practices—for instance, it may be that some circuits have an idiosyncratic culture of citing Republican signing statements, quite apart from the fact that Republican judges also sit on the circuit. The fixed effects allow us to examine how citation behavior varies within circuits. These two sets of additional checks, however, do little to change the core substantive results. In Model 3, which is the most demanding specification and features both time trends and circuit fixed effects, the magnitude of the coefficient on *Republican Judge* attenuates somewhat, but remains large and statistically significant, implying that Republican judges are about twenty-three percentage points more likely to cite statements of their own party than Democratic judges.<sup>84</sup>

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84. That is, the coefficient is 0.229; this suggests an effect of the magnitude noted in the text. In this specification, the coefficient on *Time Elapsed to Decision* also attenuates to the point that it is no longer statistically significant.

Table 2: The Effect of Political Ideology on Judicial Citations to Signing Statements

	<u>Own Citation</u>			<u>Major Reference</u>		
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Republican Judge	0.304** (0.096)	0.302** (0.097)	0.229* (0.107)	-0.146 (0.105)	-0.146 (0.106)	-0.082 (0.12)
Republican Signing President	0.057 (0.101)	0.047 (0.102)	0.003 (0.106)	0.122 (0.11)	0.118 (0.112)	0.138 (0.119)
Republican Concurrent President	0.116 (0.095)	0.137 (0.098)	0.135 (0.106)	0.084 (0.103)	0.094 (0.107)	0.045 (0.119)
Time Elapsed to Decision	-0.008' (0.003)	-0.007' (0.004)	-0.002 (0.004)	0.004 (0.004)	0.004 (0.004)	0.004 (0.005)
Year Trend (and square)	No	Yes	Yes	No	Yes	Yes
Circuit Fixed Effects	No	No	Yes	No	No	Yes
N	92	92	92	92	92	92
R-Squared	0.17	0.18	0.32	0.05	0.05	0.17

Note: ' 90 percent level statistical significance; \*\* 99 percent level statistical significance. Own Citation is the dependent variable in models 1–3 and takes a 1 if the judge is citing a presidential signing statement by the President of his or her own party and a 0 otherwise. Major Reference is the dependent variable in models 4–6 and takes a 1 if the reference to the signing statement is considered “major” and 0 otherwise.

Now consider Model 4, which focuses on the ability to predict “major” references to signing statements in judicial opinions. No coefficient in the regression is statistically significant at the 90% level or above, meaning that the independent variables we examine do a poor job at predicting major versus minor citations to signing statements. Adding time trends and circuit

fixed effects does not change this pattern.

In summary, Table 2 shows that there is a partisan divide in judicial behavior on the citation of presidential signing statements, with Republican judges citing own party statements with much higher frequency than Democrats. In addition, coefficients on control variables suggest that judges are more willing to cross party lines to cite opposing party signing statements as time elapses between signing statements and opinions. Finally, there seem to be few, if any, predictors of the type of citation, major or minor, judges will employ.

Combining the findings from this statistical exercise, we see a regular pattern in the data. Courts rarely cite signing statements. When courts do cite them, it is usually after the signing President has left office. We also find evidence that Republican judges tend to favor signing statements issued by Presidents of their own party. This conforms to searching for one's friends, and to the more general findings in the literature on the strategic use of citations. But we do not find the symmetrical finding for Democratic judges—they seem to cite signing statements issued by Presidents of both parties about equally.

#### *E. Major Statutory and Constitutional Citations to Signing Statements*

The quantitative analysis in the previous section provided essential insight into the statistical regularities of *when* judges cite signing statements. To supplement this quantitative analysis, we also carefully read the cases involving major citations to signing statements to examine *how* courts use them. This investigation generates several conclusions. The most

general conclusion is that, even when courts cite signing statements, they do not use them to override clear statutory text or even more conventional sources of legislative history, such as committee reports. Contrary to the greatest fears of some legal scholars, courts do not appear to use signing statements as an effective line item veto.<sup>85</sup> Still, courts do seem to credit signing statements in some contexts and to definitely reject them in others, as discussed below.

Perhaps most commonly, courts appear to use signing statements to buttress their interpretation of a statute when the text itself is not entirely plain and the other conventional sources of legislative history are not contrary to the statement. In this regard, *United States v. Fisher* is characteristic.<sup>86</sup> There, the issue was whether Congress had designated the Florida Keys as a marine sanctuary in the Florida Keys National Marine Sanctuary and Protection Act, thereby displacing the full set of more general procedures for such designations set forth in the Marine Protection, Research, and Sanctuaries Act (Sanctuaries Act).<sup>87</sup> The court concluded that Congress had done so, in part relying on statutory text, which provided that the Keys “should be treated as if it ‘had been designated’ under the Sanctuaries Act,” and in part based on President H.W. Bush’s signing statement, which remarked that Congress had “bypassed” the procedures of the Sanctuary Act.<sup>88</sup> In this case, as in perhaps the modal signing statement case, there is no evident conflict between the statement and statutory text or other sources of legislative history.

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85. See, e.g., Cooper, *supra* note 54, at 531. It is possible, of course, that agencies do regard signing statements as effectively containing line item vetoes. If so, courts might never be in a position to review the agency action and that interpretation of the statute would not be in our dataset.

86. 22 F.3d 262 (11th Cir. 1991).

87. *Id.* at 265–69.

88. *Id.* at 268–69.

Nevertheless, the court laces the language of the statement into the opinion for support.<sup>89</sup> In these cases, the President is successful, though by inches and not yards, in presidentializing legislative history with signing statements.

It would be misleading, however, to completely dismiss signing statements as always inch movements of the ball. In our dataset, signing statements seem to have the most force in two scenarios. The first occurs when the statute is unclear and other sources of legislative history themselves conflict. For instance in *United States v. Story*,<sup>90</sup> the court considered the relationship between “straddle crimes” and the Sentencing Reform Act of 1984 and its various amendments, which provided sentencing guidelines as well as an effective date for those guidelines.<sup>91</sup> So-called straddle crimes began before the guidelines went into effect, and continued until after they went into effect, giving rise to the question of whether the guidelines applied to sentencing decisions for such crimes.<sup>92</sup> The House and the Senate apparently reached different interpretations of the statute on this question. On the House side, citing concerns over the Ex Post Facto clause of the U.S. Constitution, Representative Conyers entered an analysis into the Congressional Record indicating that the guidelines would not apply to straddle crimes.<sup>93</sup> By contrast, on the Senate side, Senator Biden entered a contrary analysis, which viewed the

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89. For other cases along this line, see, for example, *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); *United States v. Ventre*, 338 F.3d 1047 (9th Cir. 2003); *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001); *Love v. Morton*, 112 F.3d 131 (3d Cir. 1997).

90. 891 F.2d 988 (2d Cir. 1989).

91. For a similar use of a signing statement, see, for example, *United States v. Gonzalez*, 311 F.3d 440 (1st Cir. 2002).

92. *Story*, 891 F.2d at 990–91.

93. *Id.* at 992–93.

guidelines as reaching straddle crimes.<sup>94</sup> The court adopted the Senate view on the question, citing to President Reagan’s signing statement, which plainly favored the Senate perspective.<sup>95</sup> Though there is “room for doubt as to the weight to be accorded a presidential signing statement,” the court hedged, in this case the statement is “significant” as the President “participated in the negotiation of the compromise legislation.”<sup>96</sup>

The other scenario in which signing statements plausibly have some force is in traditional areas of executive prerogative, foreign policy and national security. The most recent and high profile example in this regard is *Zivotofsky v. Secretary of State*,<sup>97</sup> where the D.C. Circuit, and later the Supreme Court,<sup>98</sup> sided with the President’s view on a constitutional matter, over the clear language of the statute.<sup>99</sup> At issue in that case was § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, which required the State Department to list “Israel” as the place of birth in passports for U.S. citizens born in Jerusalem.<sup>100</sup> This statutory requirement threatened to upset the United States’ longstanding policy of studied ambiguity on the status of Jerusalem.<sup>101</sup> President W. Bush observed in his signing statement that of the 2003 Act, if § 214(d) is read as mandatory rather than advisory, it would “impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the

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94. *Id.*

95. *Id.* at 993.

96. *Id.* at 994.

97. 571 F.3d 1227 (D.C. Cir. 2009).

98. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

99. *Zivotofsky*, 135 S. Ct. at 2076; *Zivotofsky* 571 F.3d at 1227.

100. 571 F.3d at 1228–29.

101. *Id.* at 1229.



Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.”<sup>102</sup> The D.C. Circuit, and the Supreme Court on subsequent review,<sup>103</sup> concluded that § 214(d) was unconstitutional, violating the exclusive power to recognize other states vested in the President.<sup>104</sup> Though the Court did not explicitly rely on President Bush’s signing statement as a constitutional authority—doing so would have been extraordinary—and it impossible to show how much influence the signing statement had, it is notable that the Court cited it and adopted the same theory of the Constitution expressed in it, effectuating a constitutional veto of clear statutory text.<sup>105</sup>

Even as courts thus seem to credit signing statements in some contexts—with divided legislative history or in foreign affairs—they also disavow the influence of signing statements in others. For example, President Reagan attempted an effective line item veto of certain procedures that Congress established for procurements in the Competition in Contracting Act of 1984, arguing that the procedures trenched on his “executive” powers.<sup>106</sup> As President Reagan wrote in his statement, “I must vigorously object to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system

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102. *Id.* at 1229.

103. 135 S. Ct. at 2076; Zivotofsky 571 F.3d at 1227.

104. *Id.*

105. *Id.* at 2082.

106. *Lear Sigler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988).

may be performed only by officials of the executive branch.”<sup>107</sup> The President then instructed the Attorney General to advise executive agencies on how to comply with his constitutionally informed view of the Act.<sup>108</sup> The court emphatically rejected these moves by the President:

Art. I, § 7 [of the U.S. Constitution] does not empower the President to revise a bill, either before or after signing. It does not empower the President to employ a so-called ‘line item veto’ and excise or sever provisions of a bill with which he disagrees. The only constitutionally prescribed means for the President to effectuate his objections to a bill is to veto it and to state those objections upon returning the bill to Congress.<sup>109</sup>

In this way, the court refused to credit a signing statement that attempted to override clear statutory text.<sup>110</sup> Courts adopt much the same posture with respect to signing statements when they run contrary to a unified legislative history emanating from more conventional sources. In *Taylor v. Heckler*,<sup>111</sup> for instance, the court considered the Equal Access to Justice Act, which entitles a party prevailing against the United States to reasonable fees and costs in certain circumstances.<sup>112</sup> However, under the Act, if a court finds the position of the United States to be

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107. *Id.* at 1119.

108. *Id.*

109. *Id.* at 1124.

110. Although an analysis of veto statements is outside the scope of the Article, courts do cite veto statements in their opinions. See *Calloway v. District of Columbia*, 216 F.3d 1 (D.C. Cir. 2000); *Gersman v. Grp. Health Ass’n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992). Such an analysis would be worthy of future research. We have had discussions with Professor William Eskridge about this precise topic.

111. 835 F.2d 1037 (3d Cir. 1987).

112. *Id.* at 1039.

“substantially justified,” the prevailing party would not be entitled to such fees and costs.<sup>113</sup> A question the court confronted was whether an agency action that was set aside as arbitrary and capricious—or as failing the substantial evidence test—under the Administrative Procedure Act could nonetheless be substantially justified, thereby barring fees and costs to the prevailing party.<sup>114</sup> The court noted legislative materials from the House, which suggested that an agency action set aside as arbitrary and capricious was “virtually certain” to not be substantially justified, but backed off from any “per se” equivalence of the two standards of review.<sup>115</sup> Critically, however, the court also pointedly rejected a sharp distinction between the standards, as President Reagan called for in his signing statement.<sup>116</sup> In particular, President Reagan declared that, “The substantial justification standard is a different standard, and an easier one to meet, than either the arbitrary and capricious or substantial evidence standard. A separate inquiry is [therefore] required.”<sup>117</sup> Without determining what weight to give the signing statement, the court observed that “[t]his statement of executive intent is, we believe, largely inconsistent with the legislative history,”<sup>118</sup> and sidelined it on the grounds that circuit precedent on this question focused on the House Report that largely aligned the two standards.<sup>119</sup>

In sum, courts seem to adopt three basic postures with respect to signing statements

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113. *Id.*

114. *Id.* at 1039–40.

115. *Id.* at 1044.

116. *Id.*

117. *Id.* at 1044 n.17 (alteration in original).

118. *Id.*

119. For another case along these lines, see *In re Unimet Corp.*, 842 F.2d 879, 885 n.6 (6th Cir. 1988) (chastising the district court for using a signing statement).

depending on the context. The most common position, it seems, involves using the statement as supplemental gloss on statutory text or conventional sources of legislative history, where the statement does not conflict with the text or those other sources. Signing statements seem somewhat more influential when they touch on constitutional questions in areas of traditional executive prerogative, as plausibly in *Zivotofsky*, or when the statutory text and other sources of legislative history are fragmentary or contradictory. In such contexts, the position advanced in the signing statements may carry the day, even if courts shy from explicitly relying on them as interpretative authority. Finally, courts seem distinctly unwilling to credit signing statements if they contradict with clear statutory language or a unified (conventional) legislative history, with only the hedging footnote of the *Zivotofsky*. Most importantly, courts have not casually used signing statements as effective line item vetoes by the President.

#### CONCLUSION

The headline story of (at least) the last four decades of constitutional and administrative law is one of the seemingly unstoppable growth of executive authority. Here, we have examined one of the few areas where the executive has tried and largely failed to exert authority: legislative history.<sup>120</sup> Despite the explicit efforts of the Reagan Administration and Edwin Meese, signing statements have not entered the canon of legislative history and statutory construction.<sup>121</sup>

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120. The Executive has lost along other margins, too, though these losses work against the main current. For example, the failure of the executive to win the battle over the Independent Counsel, *Morrison v. Olson*, 487 U.S. 654 (1988), represents another rare loss for the branch of government.

121. Bradley & Posner, *supra* note 13, at 316.

The question of why this project failed is of great interest, and we can only speculate. One view is that the conservative assault on statutory interpretation proceeded along two tracks. The first, the one we examine here, was to change how courts view legislative history. This track largely failed. The second was even more ambitious: to shift interpretive methodology entirely away from legislative history to more favorable ground—that is, to focus judicial attention on statutory text rather than purposes and legislative history. This second track has to a large extent succeeded. Courts now generally appear less willing to credit legislative history, whatever the source.<sup>122</sup>

That said, in those rare instances where courts do engage with signing statements, Meese appears more successful. Judges otherwise sympathetic with the President use signing statements to bolster their arguments, even long after the signing President has left office. To us, this suggests that signing statements have *potential* force in our judicial system—judges at times seem drawn to sympathetic interpretative material. Should courts begin to pursue legislative purposes and use legislative history more freely, signing statements may again become a highly contested battleground.<sup>123</sup>

This pattern stresses the normative issue of whether courts *should* use signing statements. Though not our focus here, other work has argued that—given separation of powers dynamics of

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122. See, e.g., James J. Brundey & Corey Ditslear, *The Decline and Fall of Legislative History?*, 89 JUDICATURE 220 (2005–2006).

123. We see some signs that courts may be moving in this direction, as in *King v. Burwell*, where the Court considered the “context” of the statute, or in the dagger-words of Scalia’s dissent, the “design and purpose” of the statute. See *King v. Burwell*, 135 S. Ct. 2480, 2489, 2502 (2015).

the legislative and executive branches of government—courts should not rely upon signing statements for legislative history.<sup>124</sup> If the President is able to presidentialize legislative history, our country will likely suffer even greater breakdown in the machinery of democratic self-governance.<sup>125</sup>

#### APPENDIX: CREATING THE SIGNING STATEMENTS CITATION DATABASE

Creating a comprehensive list of judicial opinions which cite signing statements is a difficult task. Unable to locate an existing database of signing statement opinions in the literature, we searched for relevant cases using the standard Bluebook citation method for signing statements.<sup>126</sup> This search did not produce comprehensive results because federal appeals courts and U.S. Supreme Court judges often deviated from the prescribed citation format.

We found numerous ways in which presidential signing statements are referenced in judicial opinions, including for example “statement of \_\_\_\_ upon signing,”<sup>127</sup> “weekly compilation of presidential documents,”<sup>128</sup> “presidential statement on signing,”<sup>129</sup> “president’s remarks on signing,”<sup>130</sup> “remarks on signing.”<sup>131</sup>

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124. Rodriguez et al., *supra* note 15, at 113.

125. *Id.*

126. BLUEBOOK, *supra* note 71, at T1.2, p. 244.

127. *See, e.g.*, Estate of Reynolds v. Martin, 985 F.2d 470, 477 n.8 (9th Cir. 1993).

128. *See, e.g.*, Love v. Morton, 112 F.3d 131, 136 (3d Cir. 1997).

129. *See, e.g.*, Lozano v. City of Hazleton, 620 F.3d 170, 211 (3d Cir. 2010), *vacated* 131 S.Ct. 2958 (2011).

130. *See, e.g.*, United States v. Abdullah, 520 F.3d 890, 895 (8th Cir. 2008).

131. *Id.*

Working with legal research librarians, we triangulated on four simple Boolean searches in Westlaw using president! /s sign! /s statement, statement /s signing /s “pub. L”, statement /s signing /s S, and President /s signing/s H.R.. This sequence produced eighty-four cases. We ran an additional search using ((president! /s (message remarks statement) /s (signing regarding) ((weekly daily /s comp! /s pres!) /p (signing regarding)) & date (aft 1975), which located an additional twelve relevant cases. In total, after screening the cases, we located ninety-six cases over the examined thirty-six-year time period.

A comprehensive set of court opinions in which the author cites to a presidential signing statement is a difficult task, and we cannot ensure that our dataset does not omit relevant opinions. It is possible that our searches omit citations that follow a non-standard format or otherwise contain errors in formatting. Notwithstanding this limitation, we are reasonably certain there is no standard citation method for signing statements we have missed. We also believe that there is not a systematic bias in any missing cases.

The list of the cases with opinions citing signing statements is below.

100 F.3d 691	311 F.3d 440	66 F.3d 569
105 F.3d 1063	313 F.3d 620	672 F.2d 252
110 F.3d 1562	322 F.3d 1039	673 F.2d 425

110 F.3d 210	333 F.3d 228	733 F.2d 1343
110 F.3d 873	338 F.3d 1047	741 F.2d 401
112 F.3d 131	344 F.3d 1161	761 F.2d 370
115 S. Ct. 1624	345 F.3d 742	797 F.2d 1164
119 S. Ct. 765	352 F.3d 695	812 F.2d 1133
130 S. Ct. 3138	391 F.3d 120	824 F.2d 923
130 S. Ct. 1577	439 F.3d 1149	835 F.2d 1037
133 F.3d 783	444 F.3d 614	835 F.2d 1037
144 F.3d 1182	459 F.3d 1	842 F.2d 1102
153 F.3d 184	460 F.3d 337	842 F.2d 879
155 F.3d 189	462 U.S. 919	848 F.2d 189
156 Fed. App'x.	478 U.S. 714	871 F.2d 265
169 F.3d 820	503 F.3d 1266	878 F.2d 1163
180 F.3d 1081	508 F.3d 1261	880 F.2d 636
181 F.3d 478	520 F.3d 890	89 F.3d 1523
2 F.3d 1342	547 F.2d 673	891 F.2d 988
206 F.3d 1212	548 U.S. 557	892 F.2d 691
216 F.3d 354	555 F.2d 771	90 F.3d 302
22 F.3d 262	565 F.2d 1172	903 F.2d 1478



228 F.3d 1105	571 F.3d 1227	933 F.2d 477
238 F.3d 1090	576 F.3d 37	947 F.2d 660
24 F.3d 1	580 F.3d 1	95 F.3d 999
240 F.3d 1019	597 F.3d 1007	96 F.3d 856
275 F.3d 490	6 F.3d 821	960 F.2d 1370
292 F.3d 597	618 F.3d 300	962 F. 2d 234
299 F.3d 1273	620 F.3d 170	985 F.2d 470
302 F.3d 161	647 F.2d 320	99 F.3d 1160
303 F.3d 994	654 F.3d 11	990 F.2d 1397
310 F.3d 1188	654 F.3d 919	992 F.2d 1359