

# Presidential Signing Statements in the Federal Bureaucracy

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*This Note examines the relationship between presidential signing statements and administrative decision-making over the Obama and Trump presidencies and from a variety of institutional angles, updating previous studies rooted in a narrow set of observations from the mid-2000s. It identifies occasions where presidents, agencies, and other Executive Branch actors have referenced statements in the course of justifying inactions, rules and regulations, and legal characterizations of executive entities. In moving the focus beyond a strict causation approach to measuring influence, which suffers from proof limitations and indeterminacy, the Note offers a more modest formulation of statements' contextual and atmospheric role in shaping bureaucratic decision-making. It also brings these observations into conversation with debates over the interpretative uses of statements in separation-of-powers disputes.*

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## Introduction

When signing bills into law, presidents often issue “signing statements”—documents that announce future visions of executive implementation, congratulate bill sponsors and supporting interest groups, express the President’s understanding of statutory meaning, or register constitutional concern. While the academic literature on signing statements is vast, scholars have generally bracketed a key question underwriting constitutional disagreements over their issuance and interpretative disagreements over their meaning: are executive actors and agencies influenced by statements in the course of statutory implementation, or do they simply disregard them? If the reality falls closer to simple disregard, then statements may be ultimately indistinguishable from the mine run of presidential speech—perhaps politically interesting but of limited constitutional significance or interpretative use. But if statements track patterns of underenforcement, concerns over their constitutionality may become more salient. So too statements may take on additional meaning in separation-of-powers analyses if they track the actual practices of executive actors.

This Note therefore examines the relationship between statements and executive decision-making from a variety of contemporary institutional angles, and with particular attention to statements issued by the Obama and Trump Administrations. It identifies some of the ways presidents, agencies, and other actors within the Executive Branch have referenced statements in the course of justifying inactions, rules and regulations, configurations of executive entities, or legal characterizations. It also seeks to bring these empirical observations into conversation with arguments for and against an interpreter’s invocation of statements in separation-of-powers disputes. If patterns of executive conduct generally correlate with the course of action articulated in statements (i.e., that *X* provision will not be enforced), then statements may indicate a degree of institutional entrenchment and non-acquiescence at times afforded credence under a “historical gloss” approach to the separation of powers.

The analysis unfolds in four Parts. Part I surveys the literature on statements to date and observes the relevant constitutional and interpretative debates. Part II then describes how these debates can be informed by additional empirical clarity, especially with respect to the possibility that statements shape executive decision-making across future administrations for reasons of institutional reliance and path dependency. The Note then shifts to an account of statement issuance and administrative behavior during the Obama and Trump Administrations. Part III first classifies statements across four styles or forms—policy, avoidance, nonenforcement, and a newly identified form I refer to as “overrides.” I observe a recent turn away from the avoidance form and toward nonenforcement and overrides, and attempt to make sense of this development. Part IV then reviews a limited (and nonrandom) set of Obama and Trump Administration statements, observing that—at least in the contexts selected—presidential and administrative practices at times aligned with the associated statement’s enunciated position. The Note concludes by inviting a future, more

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systematic inquiry into possible generalizable patterns with respect to executive conduct and statements.

Before proceeding, it is important to acknowledge that the observations made across this Note are not aimed at sustaining the strict causal claim that statements drive statutory underenforcement (i.e., that enforcement would improve if statements were issued less frequently). To date, academic commentary has either rejected the existence of a meaningful causal relationship or has remained agnostic on the question, largely because causal claims face significant problems of proof in the underenforcement context.<sup>1</sup> Underenforcement is a common, if not intractable, feature of resource scarcity across the administrative landscape, such that isolating a connection between a statement and downstream underenforcement is conceptually and methodologically difficult. Moreover, even if a President's constitutional doubt drives downstream underenforcement, statements enunciate but do not create that doubt; instead, they may be only epiphenomenal byproducts of a President's constitutional concern, which in a world without statements could be expressed through other means—whether it be through public speech acts or less publicly perceptible communications.<sup>2</sup> But the typical formulation of the causation question (*do or do not statements lead to underenforcement?*) has flattened and overshadowed more circumspect, moderated formulations of the role statements can play in structuring executive decision-making. Statements may, for instance, help define the parameters of what is politically or legally viable. And bureaucratic actors may conveniently draw upon statements to publicly justify a course of conduct, without necessarily viewing them as directives that call for automatic instantiation. I approach the cases considered across this Note with these various possibilities in mind.

### I. Constitutional, Interpretative, and Policy Debates

Debates over signing statements have taken place in three related registers. First, analyses have considered constitutional objections to their issuance—namely, whether statements violate the Take Care Clause by implementing a version of the law not contemplated by Congress;<sup>3</sup> both the Take Care Clause

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1. Commentary has revolved around a narrow set of observations from the mid 2000s, which this Note attempts to update. See *infra* Section IV.A.

2. David Barron et al., *Untangling the Debate on Signing Statements*, GEO. L. FACULTY BLOG (July 31, 2006), [https://gulefac.typepad.com/georgetown\\_university\\_law/2006/07/thanks\\_to\\_the\\_p.html](https://gulefac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html) [<https://perma.cc/G9J8-PNPD>]. (“[T]he whole point of such signing statements—the reason that making them is actually a valuable practice . . . —is that they make transparent the President’s intent to decline to enforce statutes in the manner contemplated by Congress.”)

3. See, e.g., David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 92-95 (2000); Ross A. Wilson, Note, *A Third Way: The Presidential Nonsigning Statement*, 96 CORNELL L. REV. 1503, 1517 (2011) (“[B]y signing a bill that the President himself claims has unconstitutional provisions, the President either violates the oath to ‘preserve, protect and defend the Constitution’ or the duty to ‘take Care that the Laws be faithfully executed.’” (citations omitted)); cf. Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994) (stipulating that the President retains the authority not to execute laws he or she deems unconstitutional).

and Presidential Oath or Affirmation Clause by reflecting a President's constitutional objection in the same stroke he or she signs a bill into law;<sup>4</sup> or the Presentment Clause by amounting to a post-enactment line-item veto.<sup>5</sup> In light of the potential structural constitutional harms of distorted enforcement, commentators have even considered whether statements qualify as final agency actions reviewable under the Administrative Procedure Act (APA)—though most have correctly rejected this possibility on the basis that it is the agency's downstream underenforcement decision, not the initial statement as such, that would constitute the justiciable moment if there ultimately is one.<sup>6</sup>

Second, scholars have disagreed over whether and in what manner courts should consider statements when ascertaining statutory meaning. The literature suggests that courts rarely treat statements as dispositive interpretative evidence,<sup>7</sup> though some commentators have argued that statements may inform other

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4. Some scholars have argued that the President is constitutionally obligated to veto legislation he or she deems unconstitutional under both the Take Care Clause and Presidential Oath or Affirmation Clause. See, e.g., Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 81-83 (2007); Michael B. Rappaport, *The President's Veto and the Constitution*, 87 Nw. U. L. Rev. 735, 771-76 (1993) (“[A] constitutional obligation strong enough to justify and require nonenforcement would also require a veto . . . . The President’s *legal* obligation to disapprove an unconstitutional bill . . . takes precedence over *policy* justifications.”).

5. See *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding that line-item vetoes violate the Presentment Clause). Many analyses have developed the argument that the President's refusal to enforce a statute amounts to an unconstitutional line-item veto in violation of the Presentment Clause. See, e.g., Library of Congress Research Guides, *Compiling a Federal Legislative History: Presidential Signing Statements*, <https://guides.loc.gov/legislative-history/presidential-communications/signing-statements> [<https://perma.cc/S4Y8-PE4E>] (“Commentators and journalists, including the American Bar Association, have taken issue with the increasing use of signing statements by Presidents to object to provisions of law, arguing that in effect such statements constitute a veto to which Congress cannot respond, and therefore represent a line item veto.”). But see Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801 (2016) (evaluating the propriety of signing statements under an “equal dignity” principle, and determining that executive statutory interpretation is both inevitable and preferable for a variety of constitutional and policy reasons); David Barron et al., *Untangling the Debate on Signing Statements*, *supra* note 2.

6. See Michele E. Gilman, *Litigating Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 131, 135, 153-66 (2007) (concluding that “a signing statement is not synonymous with final agency action” under the APA and “[t]hus, courts would likely be inclined to wait to see how the executive branch chooses to implement a statute before ruling on the validity of a signing statement”); cf. Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 25-26 (2000) (arguing that a President “may have the raw power to disregard constitutionally objectionable laws without risk of an adverse judicial response,” but that this justiciability impediment “does not, of course, resolve whether the presidential action was proper”). In 2006, when concerns over statement use peaked, the American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine urged Congress to legislate a cause of action to challenge signing statements. See ABA, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 25 (2006), <https://balkin.blogspot.com/aba.signing.statments.report.pdf> [<https://perma.cc/5TPH-8HH2>].

7. For a descriptive account of court practice, which concludes that statements are an infrequently leveraged interpretative tool, see John M. de Figueiredo & Edward H. Stiglitz, *Signing Statements and Presidentializing Legislative History* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23951, 2017), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2693&context=facpub> [<https://perma.cc/N8HX-7JWZ>]. See also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-B-308603, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS 11 (2007), <https://www.gao.gov/products/b-308603> [<https://perma.cc/46KE-3EXQ>] [hereinafter GAO Study] (noting that between 1945 and 2006 courts cited signing statements in fewer than 140 cases).

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aspects of judicial decision-making—including determinations of non-justiciability under the political question doctrine by indicating a longstanding constitutional disagreement between the political branches.<sup>8</sup> Against this background, some commentators argue that courts should afford presidential statutory and constitutional interpretation greater weight than they currently do.<sup>9</sup>

And third, social-scientific research has traced historical trends in signing statements, presidents' political motivations for issuing them, and their effects on interbranch relations. For instance, disagreement exists over whether statements stoke legislative gridlock or instead provide salient signals to Congress that makes future lawmaking more efficient and constructive.<sup>10</sup>

While the literature on signing statements is as vast as the constitutional stakes are high, these debates have proceeded against a vague empirical background with respect to the post-enactment behavior of executive actors. Commentators often take as their subject the horizontal relationship between the President and Congress, but generally fail to account for the vertical relationship between the President and the federal bureaucracy. There have only been a few works considering the effect of statements on bureaucratic conduct, all of which rely heavily—if not exclusively—on data from a 2007 Government

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8. A 2011 Note raises the interesting claim that “even if a signing statement would not influence a court’s statutory interpretation, it might raise a red flag of nonjusticiability [pursuant to the political question doctrine] by signaling a conflict with Congress. Thus, ‘executive history’ may bind courts’ hands even more strongly than legislative history.” Wilson, *supra* note 3, at 1514 (characterizing the D.C. Circuit’s non-justiciability determination in *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009), *vacated and remanded by Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012), as an instance where President Bush’s statement may have constituted such a “red flag”).

9. In a memorandum he drafted while working in the Office of Legal Counsel, Justice Alito expressed the position of the Reagan Administration and Attorney General Edwin Meese that “the President’s understanding of [a] bill should be just as important as that of Congress” because “a bill becomes law only when passed by both houses of Congress and signed by the President (or enacted over his veto)” and “the President’s approval is just as important as that of the House or Senate.” Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., Office of Legal Counsel, to the Litig. Strategy Working Grp. (Feb. 5, 1986), <https://www.archives.gov/files/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf> [<https://perma.cc/GK6Y-6VNS>]; see also Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, 16 WM. & MARY BILL RTS. J. 307, 307 (2007) (“Attorney General Meese’s position was fairly straightforward: the President is a significant actor in the legislative process.”). In *Hamdan v. Rumsfeld*, 548 U.S. 557, 655-78 (2006), Justice Scalia’s dissent gestures toward a similar view of presidential interpretation. See *id.* at 666 (“Of course in its discussion of legislative history the Court wholly ignores the President’s signing statement.”). For additional accounts arguing that courts should pay regard to presidential interpretation, see Steven G. Calabresi & Daniel Lev, *The Legal Significance of Presidential Signing Statements*, 4 FORUM, Sept. 15, 2006, at 1; Paul T. Stepnowsky, *Deference to Presidential Signing Statements in Administrative Law*, 78 GEO. WASH. L. REV. 1086, 1095-100 (2010), which argues that courts should afford the interpretations reflected in statements *Skidmore* deference; and David C. Jenson, Note, *From Deference to Restraint: Using the Chevron Framework to Evaluate Presidential Signing Statements*, 91 MINN. L. REV. 1908, 1913 (2007). See also Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 617-18 (2006) (arguing that “courts can and should grant context-sensitive weight to signing statement interpretations” by considering the “Executive’s self-interest” within the statutory domain at issue).

10. See Christopher S. Kelley & Bryan W. Marshall, *Going It Alone: The Politics of Signing Statements from Reagan to Bush II*, 91 SOC. SCIENCE Q. 168 (2010) (describing the ways in which statements can shape political discourse); Daniel B. Rodriguez, Edward H. Stiglitz & Barry R. Weingast, *Executive Opportunism, Presidential Signing Statements, and the Separation of Powers*, 8 J. LEGAL ANALYSIS 95 (2016) (concluding that signing statements have exacerbated legislative gridlock).

Accountability Office (GAO) study.<sup>11</sup> But renewed attention to contemporary practice could inject new observations into these debates. Like the presidency itself, statements straddle the legislative and executive domains, and empirical assumptions about institutional behavior are often embedded within arguments over statement constitutionality and interpretative significance.

## II. The Benefits of Empirical Clarity

### A. *Empirical Clarity and the Constitutionality of Statements*

Generally speaking, the constitutional objections described in Part I become less salient if statements have no practical bearing on downstream bureaucratic behavior. Most obviously, if a statement lacks practical effect, there is no reason to believe it approximates a line-item veto raising Presentment Clause problems.

That said, whether or not they direct bureaucratic decision-making, statements may still be in tension with strict accounts of the Take Care Clause or Presidential Oath or Affirmation Clause, which some commentators have argued constitutionally obligate the President to veto a bill he or she finds constitutionally deficient.<sup>12</sup> For those who subscribe to such a view, it would still be possible to conceive of statements as vehicles for *voicing* a President's independently existing and separately constituted doubt, rather than sources *generating* that doubt. If this were so, statements would indicate a constitutional problem (the President's decision not to assert a veto) without themselves being the locus of that problem. But in response, one could argue that statements *do create* constitutional doubt by virtue of communicating it to the public. This view of the problem may find greater purchase when one understands the President's "constitutional concern" in institutional rather than personal terms.<sup>13</sup>

In any case, I expect the constitutional position of most commentators to be informed, at least in part, by whether bureaucratic actors tailor enforcement decisions—overtly or in otherwise subtle ways—to the views expressed by the President at the moment of enactment. Less straightforward, however, is the relationship between bureaucratic decision-making and interpretative value.

### B. *Empirical Clarity and the Interpretative Significance of Statements*

While it is not always clear what function statements are intended to serve when courts or other interpreters—including actors within the political branches themselves—cite them to support a statutory or constitutional interpretation, there seem to be three general possibilities. Each has been reflected in Supreme Court and lower court reasoning in separation-of-powers contests at one time or

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11. See *infra* Section IV.A (surveying the thin empirical work to date, specifically the GAO study, and identifying unanswered questions).

12. See sources cited *supra* note 4.

13. Cf. Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1127-39 (2020) (describing these two sides of the Presidency).

another. First, statements are construed as descriptions from the Executive Branch's vantage of what *Congress* meant, and thereby folded into an account of legislative intent. Second, on what I call the "past viewpoint" theory, an interpreter characterizes a statement as having preserved a previous administration's constitutional objection.<sup>14</sup> And third, on what I call the "past practice" theory, an interpreter not only understands the statement to have captured an earlier viewpoint, but goes further by assuming that the statement reflects the practical instantiation of that position. While both "past viewpoint" and "past practice" can be tied into a story of executive non-acquiescence, which has often been treated as a meaningful consideration in evaluating the extent of presidential authority, a statement underwritten by a pattern of actual behavior would indicate the institutionalized and entrenched non-acquiescence associated with Justice Frankfurter's account of "historical gloss."<sup>15</sup> The first two theories do not assume that statements are given practical effect, but the third theory does. I take each theory in turn.

### 1. Statements as Proxies for Legislative Intent

As will be described in Part III, only a limited proportion of statements contextualize a statute's goals or overarching purposes without registering a constitutional objection. While such statements have become much less common as a share of total statements since the Clinton Administration,<sup>16</sup> those in circulation are still sometimes invoked as legislative historical material. For instance, in the 2019 case *United States v. Prado*, the Second Circuit referenced a Clinton statement articulating the 1996 Coast Guard Authorization Act's general aims of "strengthen[ing] drug interdiction," and used this description to

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14. At least in the context of justiciable legal challenges, the current President faces no difficulty in expressing his or her constitutional viewpoint directly before the Court—such that signing statements from the current President will almost always be interpretatively redundant. The question of interpretative value therefore concerns the use of a past administration's statement to represent *that* administration's viewpoint.

15. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (arguing that "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive power' vested in the President by § 1 of Art. II"); *Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government . . . give meaning' to the Constitution." (quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring))); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413, 418-24 (2012) (detailing how "the Supreme Court, executive branch lawyers, and academic commentators have all endorsed the significance of such practice-based 'gloss'" in the decades after Justice Frankfurter articulated the view in his *Youngstown* concurrence); *id.* at 419 (arguing that historical practice is likewise meaningful within the intermediate "zone of twilight" of Justice Jackson's tripartite *Youngstown* framework).

16. Critically, very few statements issued since the Clinton Administration are amenable to this intent-based approach. In theory, statements styled as constitutional avoidance could be integrated into an account of at-enactment congressional intent, to the extent one assumes overlapping constitutional understanding between the political branches (in other words, the President's constitutionally driven interpretation could be imputed to Congress). But this conceptualization of avoidance statements is untenable for a variety of institutional reasons. See *infra* Sections III.A, III.B.



interpret the statutory phrase “jurisdiction of the United States.”<sup>17</sup> When courts use a statement as a proxy for *Congress’s* at-enactment legislative intent, which is a fixed and backward-looking inquiry, whether the statement has informed downstream agency behavior or enforcement determinations is irrelevant.

## 2. Statements as Past Viewpoints

Rather than tying statements to congressional intent under an assumption of interbranch alignment, statements expressing constitutional concern—including those purporting to interpret a provision’s at-enactment meaning in the mode of constitutional avoidance—reflect a past President’s counter-vision of the scope of presidential authority and the law’s legality. As compared to the “past practice” conception of a statement’s interpretative value, the “viewpoint” approach does not assume that the President’s constitutional concern necessarily altered enforcement decisions or the execution of the enacted law. Instead, the statement registered constitutional opposition even though the enacted law was presumptively still honored.

For instance, in holding that the Consumer Financial Protection Bureau (CFPB) single-director leadership structure violated the separation of powers in *Seila Law*, the Supreme Court referenced President Clinton’s 1995 statement regarding the single-director structure of the Social Security Administration (SSA).<sup>18</sup> The statement noted a “significant constitutional question” with respect to the conditioning of the Director’s removal on “neglect of duty or malfeasance in office,” and went on to describe how the Executive is “prepared to work with the Congress on a corrective amendment that would resolve this constitutional question so as to eliminate the risk of litigation.”<sup>19</sup> Likely due to the overall dearth of justiciable separation-of-powers disputes, the Court has only invoked

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17. *United States v. Prado*, 933 F.3d 121, 139-40 (2d Cir. 2019). For a similar interpretative use, see *United States v. Castillo*, 460 F.3d 337 (2d Cir. 2006), *abrogated by* *Kimbrough v. United States*, 552 U.S. 85 (2007), where the Second Circuit cited President Clinton’s statement attending the Violent Crime Control and Law Enforcement Act of 1994: “Upon signing this bill into law, President Clinton took the opportunity to state specifically that it was inappropriate to “dramatically reduc[e] the penalties for crack,” given the “devastating impact [of crack] on communities across America, especially inner-city communities.” *Id.* at 347 (quoting Presidential Statement on Signing S. 1254, 1995 WL 634347 (Oct. 30, 1995)). But for a recent instance where a court declined to evaluate a policy statement as meaningful legislative history, see *United States v. Timmons*, No. 3:04-cr-00092, 2019 WL 3767473, at \*2 & n.2 (W.D. Va. Aug. 9, 2019) (declining “to read in an implicit limitation to the First Step Act to nonviolent offenders based on statements made at the presidential signing statement”).

18. *Seila Law L.L.C. v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2202 (2020) (“[T]he CFPB’s defenders note that the [SSA] has been run by a single Administrator since 1994. That example, too, is comparatively recent and controversial. President Clinton questioned the constitutionality of the SSA’s new single-Director structure upon signing it into law.”). *But see id.* at 2241 (Kagan, J., concurring in part) (“If signing statements and veto threats made independent agencies unconstitutional, quite a few wouldn’t pass muster. Maybe that’s what the majority really wants . . .”).

19. Presidential Statement on Signing the Social Security Independence and Program Improvements Act of 1994, 2 PUB. PAPERS 1471, 1472 (Aug. 15, 1994). While the Court seemed to use the statement to evidence President Clinton’s constitutional opposition to the single-director structuring of independent agencies writ large, the statement arguably stops short of staking out such a broad position; instead, it couches the concern in the more modest and prudential terms of litigation risk.

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statements on a few additional occasions, each time in a “viewpoint” mode à la *Seila Law*.<sup>20</sup> Unsurprisingly, non-judicial interpreters—namely, the President and other executive actors—refer back to earlier administrations’ statements with greater frequency.<sup>21</sup> For example, and as examined in greater depth in Part IV, the Trump Administration invoked an Obama Administration statement as its primary justification for refusing to entertain Congress’s request for Global Magnitsky sanctions following the disappearance of journalist Jamal Khashoggi.<sup>22</sup>

In each of these instances, the statement is used to indicate a past administration’s constitutional objection, though that objection has not necessarily insinuated itself into past executive practice (i.e., the Trump Administration did not claim that the Obama Administration ever refused to comply with a congressional Global Magnitsky request). Even still, the invocation of an earlier administration’s constitutional concern, especially when that position has been continuously advanced across administrations and party lines, may display accrued wisdom or transhistorical understanding with respect to a constitutional problem.<sup>23</sup> In a related vein, a past statement may be viewed as preserving a constitutional objection, reflecting the Executive Branch’s “non-waiver” of that objection and related non-acquiescence on the associated interbranch dispute.<sup>24</sup> Statements themselves sometimes refer back to earlier statements, forming chains of precedent mirroring the continuous (and bipartisan) quality of the concern.

But the “past viewpoint” approach faces two fundamental difficulties. First, if a statement’s claim (i.e., that a provision will be treated as advisory) has no

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20. See *Bowsher v. Synar*, 478 U.S. 714, 719 n.1 (1986) (“In his signing statement, the President expressed his view that the Act was constitutionally defective because of the Comptroller General’s ability to exercise supervisory authority over the President.” (citing Statement on Signing H.J. Res. 372 Into Law, 21 WEEKLY COMP. PRES. DOC. 1490 (Dec. 12, 1985)); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 523 (2010) (Breyer, J., dissenting) (“There is no indication that the two comparatively more expert branches were divided in their support for the ‘for cause’ provision at issue here. . . . The President signed the Act. And, when he did so, he issued a signing statement that critiqued multiple provisions of the Act but did not express any separation-of-powers concern.” (citing President’s Statement on Signing the Sarbanes-Oxley Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1286 (July 30, 2002)). In *United States v. Lopez*, 514 U.S. 549 (1995), which concerned the reach of the Commerce Clause, the Court also used a statement to represent an earlier administration’s viewpoint. See *id.* at 561 n.3 (“Most egregiously, section [922(q)] inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress.” (quoting Statement of President George Bush on Signing the Crime Control Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1944, 1945 (Nov. 29, 1990))).

21. This is consistent with the frequent use of other forms of “executive precedent” within the Executive Branch. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1470-88 (2010) (observing that the Office of Legal Counsel has rarely departed from its prior opinions since the Carter Administration).

22. See *infra* Section IV.B.1.

23. Bradley & Morrison, *supra* note 15, at 428 (“[I]nvocations of historical precedent highlight the fact that institutional predecessors have reached the same conclusion, which can help persuade audiences that the conclusion reflects a reasonable constitutional interpretation.”).

24. See *id.* at 435-36 (“[I]f one branch of government has been engaging in a practice for a long time without any resistance, if (and potentially also third parties) may have formed reasonable expectation interests surrounding the practice.”).

connection to the post-enactment conduct of the issuing President or other executive actors, then the interpreter faces the difficulty of explaining why the articulation of the claim *as such* qualifies as meaningful non-acquiescence for purposes of a separation-of-powers analysis. This issue is further considered in the next Section’s discussion of the “past practice” theory.

And second, statements compose a one-sided, one-directional set of authority that can overstate presidential opposition to legislative action and conceal executive nonobjection. To take one example, when President Trump signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act into law in response to the global coronavirus pandemic in March 2020, he issued a high-profile statement announcing “constitutional concerns” with the newly established Special Inspector General for Pandemic Recovery’s authority to audit loans made by the Secretary of the Department of Treasury.<sup>25</sup> The statement claimed that this authority, together with direct-reporting requirements, was a historically extreme degree of congressional oversight inconsistent with the “presidential supervision required by the Take Care Clause” as understood by previous administrations.<sup>26</sup> It is true that interbranch disagreement over the constitutionality of statutory mandates requiring officers to bypass the President extends back decades—for instance, President Reagan issued a statement repudiating the Central Intelligence Agency Inspectors General reporting requirement, as did Presidents Clinton and Obama with respect to similar national security-related requirements.<sup>27</sup> But as Professor Peter Shane noted at the time, previous administrations *have acquiesced*, if not affirmatively supported, direct-reporting requirements outside the national-security domain.<sup>28</sup> Critically, President Bush did not issue a statement in response to the Economic Stabilization Act of 2008, which provided a model for many of the CARES Act’s

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25. See Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020); Presidential Statement on Signing the Coronavirus Aid, Relief, and Economic Security Act, 2020 DAILY COMP. PRES. DOC. 194 (Mar. 27, 2020). Controversially, the statement objected to CARES Act § 4018I(4), which both “authorizes the SIGPR to request information from other government agencies and *requires* the SIGPR to report to the Congress ‘without delay’” any “unreasonable” refusals of such requests. See Presidential Statement on Signing the Coronavirus Aid, Relief, and Economic Security Act, *supra*.

26. *Id.*

27. See Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007, 32 Op. O.L.C. 27, 27-28 (2008) (memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General) (concluding that a direct reporting requirement imposed upon DHS’s Chief Privacy Officer by the 9/11 Commission Act of 2007 “does not prohibit DHS and OMB personnel from reviewing” reports before they are transmitted to Congress, and noting that “[f]or decades, the Executive Branch has consistently objected to direct reporting requirements similar to the one at issue here on the ground that such requirements infringe upon the President’s constitutional supervisory authority over Executive Branch subordinates and information.”). See generally TODD GARVEY, CONG. RSCH. SERV., LSB10463, PRESIDENTIAL OBJECTIONS TO SPECIAL INSPECTOR GENERAL FOR PANDEMIC RECOVERY REPORTING REQUIREMENTS 2 (May 12, 2020), <https://sgp.fas.org/crs/misc/LSB10463.pdf> [<https://perma.cc/7JHH-G23V>] (“This disconnect in constitutional understanding has led to a long-running dispute between the branches over IG reporting requirements.”).

28. Peter Shane, *A COVID-19 Signing Statement from the Unaccountable President*, ACS EXPERT FORUM (Mar. 31, 2020), <https://www.acslaw.org/expertforum/a-signing-statement-from-the-unaccountable-president> [<https://perma.cc/D3TJ-VPJJ>].

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elements including those related to congressional oversight and reporting.<sup>29</sup> But such an instance of non-objection or positive support is not encapsulated within the corpus of statements (to the extent the absence of a statement should imply support, which may be a fair inference in a world of oversaturated use). Statements themselves provide but a partial picture of previous patterns of objection and acquiescence.

To express the point in the “two body” parlance of Professor Daphna Renan, we might say that statements exist on the same legal and analytical plane as press announcements, spoken addresses, or other forms of presidential speech, providing not the “impersonal, continuous, and composite” view of the Executive Office of the President but the “personal, temporary, and singular” view of an individual occupant.<sup>30</sup> A comparison to other forms of executive precedent, like Office of Legal Counsel (OLC) opinions or executive orders, may prove instructive. OLC opinions remain formally in place across administrations and can be withdrawn or repealed; they also enjoy a strong, if de facto, form of *stare decisis*.<sup>31</sup> By contrast, a statement can be informally disavowed, set aside, or simply ignored by subsequent administrations—a quiet “reversal” of the associated viewpoint that may not manifest in an identifiable public statement or action.<sup>32</sup> At other times, presidents have publicly announced default presumptions *against* past statements writ large, a move that throws into focus the temporary and discontinuous quality of statements and their associated viewpoints. President Obama, for instance, disseminated a memorandum at the

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29. *Id.* (observing that the Troubled Assets Relief Fund (TARP), established through the Economic Stabilization Act of 2008, is the “immediate model” for comparison to the CARES Act, but that President George W. Bush, “whose enthusiasm for signing statements exceeded those of all his predecessors combined, signed the TARP statute into law without any signing statement at all”).

30. *See* Renan, *supra* note 13, at 1127-39 (elucidating distinctions across public law between the “impersonal, continuous, and composite” President and the “personal, temporary, and singular” President).

31. *See* Morrison, *supra* note 21, at 1470-88 (observing that, as a descriptive matter, the OLC has rarely departed from its prior opinions since the Carter Administration and therefore reflects a strong, if de facto, commitment to *stare decisis*).

32. David Barron and Walter Dellinger have argued that a statement’s legally non-binding quality, and the potential of subsequent administrations to reinvigorate enforcement and reject earlier statements, ameliorates many of the structural constitutional concerns chronicled in Section II.A. *See* Barron et al., *supra* note 2. Repudiation most obviously happens in the context of litigation challenges, when an administration takes a position opposite that of a previous administration’s signing statement, thereby disavowing the earlier viewpoint. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995). On at least one occasion, an *agency* has explicitly rejected a past administration’s statement. In a 2013 promulgated rule, the Obama Department of Housing and Urban Development (HUD) repudiated President Reagan’s position, as expressed in his statement attending the Fair Housing Amendments Act of 1988, that “a violation of the Fair Housing Act requires a finding of intentional discrimination.” Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,467 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100). HUD stipulated that the statement does not “affect[] or override[] the longstanding, consistent construction of the Act by HUD, the agency with delegated authority to administer the Act.” *Id.*

beginning of his presidency directing agencies to consult with the Department of Justice before relying upon statements from prior administrations.<sup>33</sup>

That said, an important question for interpreters is whether statements are *in substance* lodged within the workings of the Executive Branch, exhibiting staying power across time and transcending the issuing administration. If agencies and other executive actors do in fact rely on statements—the principal question raised in this Note, though one for which a more systematic empirical investigation is required—to what extent does this reliance cut across administrations (i.e., how common was it for agencies during the Obama Administration to act in accordance with prior statements and thereby against the presumption announced in the memorandum)? This reliance may be subtle and even unintentional; actors may inhabit, and in turn extend, roles or practices once informed by statements. Either way, evidence of staying power may well give the interpreter reason to associate a statement with the “impersonal” presidency, and its attending viewpoint with a more entrenched practice of the Executive Branch.

### 3. Statements as Past Practices

On rare occasion, courts have seemed to move beyond the “past viewpoint” approach by characterizing statements as both the articulation of an objection as well as evidence of executive conduct. In the 2021 case *Veterans4You L.L.C.*, for instance, the Federal Circuit recognized that President Clinton’s statement “raises serious constitutional concerns” and “indicates that the President would interpret the amendments . . . in a manner that minimizes the potential constitutional deficiencies.”<sup>34</sup> Similarly, in the 2019 decision *Green v. U.S. Department of Justice*,<sup>35</sup> the D.C. District Court referenced a Clinton statement expressing that the Copyright Office is an executive agency before quoting the Supreme Court’s statement in *NLRB v. Noel Canning* that “the longstanding ‘practice of the government’ . . . is an important interpretive factor” in considering structural constitutional questions.<sup>36</sup> Statements themselves

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33. See White House Office of the Press Secretary, Memorandum for the Heads of Executive Departments and Agencies, Subject: Presidential Signing Statements (Mar. 9, 2009), <https://fas.org/sgp/obama/signing.html> [<https://perma.cc/R8RB-RRZP>] (directing Executive Branch offices to “seek the advice of the Attorney General before relying on signing statements issued prior to the date of this memorandum as the basis for disregarding, or otherwise refusing to comply with, any provision of a statute”). The fact the Obama Administration felt the need to issue the memorandum is at the least suggestive of the possibility that statements were presumed to have ongoing enforcement effects. See *infra* Part IV.

34. *Veterans4You L.L.C. v. United States*, 985 F.3d 850, 858-59 (Fed. Cir. 2021) (determining that the U.S. Government Printing Office’s expansively defined role in Executive Branch paper printing “raises serious constitutional concerns,” though ultimately deciding the case on other issues). The court cited the statement alongside a 1996 OLC opinion to substantiate the claim that “[e]xecutive branch actors have long maintained the position that the [U.S. Government Printing Office’s] printing mandate in 44 U.S.C. § 501 violates the separation of powers.” *Id.* at 858. The description “maintain[ing] the position” sounds in “past viewpoint” more than “past practice.”

35. *Green v. U.S. Dep’t of Justice*, 392 F. Supp. 3d 68, 98 (D.D.C. 2019).

36. *Id.* at 100 (citing *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014)).

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typically frame statements from prior administrations as evidencing longstanding *patterns* of conduct. For instance, President Obama objected to a statutory provision limiting executive discretion over the immigration status of United Nations representatives by announcing that, “as President Bush also observed, ‘curtailing by statute my constitutional discretion to receive or reject ambassadors is neither a permissible nor a practical solution.’”<sup>37</sup> The statement goes on to announce that President Obama “shall therefore *continue* to treat [the provision] . . . as advisory in circumstances in which it would interfere with the exercise of this discretion.”<sup>38</sup> Various cross-party and cross-administration permutations abound, including a President Trump statement referring to a President George W. Bush statement,<sup>39</sup> a President Trump statement referring to a President Obama statement that in turn refers to a President Reagan statement,<sup>40</sup> and a President Obama statement referring to a President Clinton statement.<sup>41</sup> Some statements likewise assert the “continu[ation]” of an executive practice without citing to any particular antecedent.<sup>42</sup>

This rhetorical move asserting longstanding patterns of executive noncompliance leverages a conception of historical gloss.<sup>43</sup> As indicated by Professor Curtis Bradley and Dean Trevor Morrison in their seminal account, a sustained pattern of executive conduct can take on normative significance by

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37. Presidential Statement on Signing Legislation Concerning Visa Limitations for Certain Representatives to the United Nations, 2014 DAILY COMP. PRES. DOC. 275 (Apr. 18, 2014) (quoting Presidential Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 1 PUB. PAPERS 240 (Feb. 16, 1990)).

38. *Id.* (emphasis added).

39. See Presidential Statement on Signing the North Korean Human Rights Reauthorization Act of 2017, 2018 DAILY COMP. PRES. DOC. 495 (July 20, 2018) (“Like its predecessor, however, H.R. 2061 contains a number of provisions, including sections 5(3), 7(c), 7(d), and 8(a)(2), that could be read to require the President to adopt a particular foreign policy of the United States or to direct negotiations with foreign governments and international organizations. (See Statement on Signing the North Korean Human Rights Act of 2004.)”).

40. See Presidential Statement on Signing the Frederick Douglass Bicentennial Commission Act, 2017 DAILY COMP. PRES. DOC. 809 (Nov. 2, 2017) (“Consistent with Signing Statements issued by President Obama and President Reagan regarding similar legislation, I understand that, with respect to their work on the Commission, the members of the Congress and their appointees ‘will be able to participate only in ceremonial or advisory functions’ and ‘not in matters involving the administration of the act in light of the separation of powers and the Appointments and Ineligibility Clauses of the Constitution.’ (Public Papers of the President, Barack Obama, Vol. I, 2009, page 756 (quoting Public Papers of the President, Ronald Reagan, Vol. II, 1983, page 1390)).”).

41. See Presidential Statement on Signing the Intelligence Authorization Act for Fiscal Year 2010, 2010 DAILY COMP. PRES. DOC. 845 (Oct. 7, 2010) (“[T]he whistleblower protection provisions in section 405 are properly viewed as consistent with President Clinton’s stated understanding of a provision with substantially similar language in the Intelligence Authorization Act for Fiscal Year 1999. See *Statement on Signing the Intelligence Authorization Act for Fiscal Year 1999*: Public Papers of the Presidents of the United States, William J. Clinton, 1998 (p. 1825).”).

42. In President Trump’s March 2020 CARES Act statement, for instance, he objected to requirements to recommend future legislation to Congress—stipulating that “my Administration will *continue* the practice of treating provisions like these as advisory and non-binding.” Presidential Statement on Signing the Coronavirus Aid, Relief, and Economic Security Act, *supra* note 25 (emphasis added).

43. See sources cited *supra* note 15; see also *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014) (“[T]he Court puts significant weight upon historical practice. The longstanding practice of the government can inform this Court’s determination of what the law is in a separation-of-powers case.” (citations and quotations omitted)).

generating various kinds of institutional reliance interests.<sup>44</sup> In addition, the law is, in part, what institutional actors already accept as legitimate, such that some settled patterns of behavior are owed legal imprimatur.<sup>45</sup> Critical to these justifications for imbuing custom or practice with normative weight is that the institutional actor—here being the President—goes beyond rhetorical assertion by participating in a pattern of conduct.<sup>46</sup> That said, the question of whether or not a given agency action or program, or lack thereof, is attributable to a statement brings into focus the risks of interpretative subjectivity when it comes to invocations of “relevant historical practice.”<sup>47</sup>

### III. Trends in Statement Classification

Variation in the overall volume of statements issued across presidencies is significant and has been well-recognized in the literature.<sup>48</sup> This variation was particularly acute over the Bush, Obama, and Trump presidencies: the Bush Administration issued a total of 228 statements (107 of which raised constitutional objections) between both terms; the Obama Administration issued a total of only 37 statements (23 of which raised constitutional objections) between both terms; and the Trump Administration issued 67 statements (56 of which raised constitutional objections) in a single term.<sup>49</sup> But volume provides

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44. See Bradley & Morrison, *supra* note 15, at 457-58.

45. See *id.* at 456; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980) (“[I]t is only through a history of continuing assent or acquiescence that the [Constitution] could become law. Our constitutional tradition, however, has not focused on the document alone, but on the decisions and practices of courts and other institutions.”); Henry P. Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 791 (2010) (“[I] follow Hart and look at law from an ‘internal’ point of view. That law is what officials accept and apply as law is not a new insight . . .”).

46. See Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 134 (1984) (“[T]he custom in question must consist of acts; mere assertions of authority to act are insufficient.”); Bradley & Morrison, *supra* note 15, at 432 (endorsing Glennon’s formulation of institutional acquiescence).

47. See Alison LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. FORUM 75, 77-79 (2012) (“If historical practice is synonymous with custom, the question then becomes how the relevant custom can be identified retrospectively from the disorderly mass of mere day-to-day actions by governmental actors. . . . To pose the question, ‘What is the historical practice?’ is to presume an artificial degree of unity and coherence within institutions, and from one action to another. . . . Messiness, unspoken accommodation, and explicit disagreement abound.”).

48. See Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 723 (2008) (citations omitted):

President Reagan . . . issued 250 [signing statements], eighty-six of which contained provisions questioning the constitutionality of one or more of the statutory provisions signed into law. President George H.W. Bush issued 228 signing statements, 107 of which raised constitutional objections. President Clinton issued 381 signing statements, seventy of which raised constitutional concerns or objectives [sic].

49. For the Bush Administration statistics, see *id.*; and Christopher S. Kelley, *President Trump and the Presidential Signing Statement: A First Look* at 3-4 (Paper Delivered at the 115th Annual APSA Meeting, Washington, D.C., 2019), <https://preprints.apsanet.org/engage/api-gateway/apsa/assets/orp/resource/item/5d7bf79cf5751a001222596e/original/president-trump-and-the-presidential-signing-statement-a-first-look.pdf> [https://perma.cc/689Q-7ZUP]. For the Obama and Trump Administration statistics, see *Signing Statements Archive*, AM. PRES. PROJECT OF UC SANTA BARBARA (Nov. 1, 2021),

only one dimension along which to compare statement practice across administrations. Examining shifts not only in the overall volume of statements, but also in the forms of executive reasoning reflected within them, reveals significant trends in the use of statements over time and across administrations.

To lay the foundation for Part IV's evaluation of the ways in which statements are suffused through the federal bureaucracy, this Part traces patterns in statement practices across these administrations and draws constitutionally relevant distinctions between four forms: policy, avoidance, nonenforcement, and what I call "overrides." Similar classification schemes have been introduced by previous scholars and executive lawyers, including Walter Dellinger, who as Assistant Attorney General of OLC issued a memorandum in 1993 outlining at least three styles of constitutional objection.<sup>50</sup> Other scholars have followed suit, developing subclassifications within these categories to group statements by substantive issue area.<sup>51</sup> But the four-fold scheme introduced here is the first to recognize override statements as distinct phenomena with a unique analytical structure. The Part also observes various empirical shifts in the nature of the practice—specifically, that the Obama and Trump Administrations moved statements away from the Bush-era avoidance mode and into the register of nonenforcement, and that override statements have become more common over time.

#### A. Policy Statements

The Reagan, H.W. Bush, and Clinton Administrations often issued statements that enunciated the enacted law's purpose without raising constitutional concerns or purporting to narrow the law's applications. In contextualizing the law in political or policy terms, these statements are akin to typical forms of presidential speech. But the Bush Administration moved away from this form, instead primarily using avoidance to narrow the scope of statutory applications and articulate the Executive's constitutional vision regarding contested separation-of-powers questions. From there, the Obama and

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[https://www.presidency.ucsb.edu/documents/app-categories/written-statements/presidential/signing-statements?items\\_per\\_page=60.4](https://www.presidency.ucsb.edu/documents/app-categories/written-statements/presidential/signing-statements?items_per_page=60.4); and data on file with author (sorting archived statements by constitutional objection).

50. The Legal Significance of Presidential Signing Statements, 17 Op. O.L.C. 131, 132 (1993) (identifying "statements that declare that the legislation (or relevant provisions) would be unconstitutional in certain applications; statements that purport to construe the legislation in a manner that would 'save' it from unconstitutionality; and statements that state flatly that the legislation is unconstitutional on its face"). Professors Curtis Bradley and Eric Posner, in collapsing the "unconstitutional applications" and "facially unconstitutional" categories into a single "constitutional" category, and in describing the "saving from unconstitutionality" category as "interpretive," have classified statements as political, constitutional, and interpretative. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 313-22 (2006).

51. See, e.g., Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 521-22 (2005); Michael T. Crabb, "The Executive Branch Shall Construe": *The Canon of Constitutional Avoidance and the Presidential Signing Statement*, 56 U. KAN. L. REV. 711 (2008); Yoo, *supra* note 5, at 1804.



Trump Administrations have rarely issued policy statements, though there are a few exceptions.<sup>52</sup>

Rarely, statements expressly contemplate statutory meaning or future possible statutory applications but in a manner that does not raise constitutional doubt. President Trump issued a statement clarifying that a 2018 statute had not quietly overridden the Department of Homeland Security's (DHS) parole discretion over inadmissible noncitizens pursuant to the Immigration and Nationality Act.<sup>53</sup> This is an interesting, albeit unique, instance where a President articulated a vision of inter-statutory interaction—here specifically, the statement deploys an “elephants-in-mouseholes”-like rule of statutory construction to shore up DHS discretion.<sup>54</sup> Such statements parallel policy statements in their analytical structure and public function—both describe the enacted law's purpose, albeit with different degrees of specificity, but without use of constitutional reasoning.

### *B. Constitutional Avoidance Statements*

Constitutional avoidance statements, resembling avoidance doctrines applied by courts to resolve constitutional doubt on non-constitutional grounds, construe statutes to avoid purported constitutional problems. In the judicial context, different formulations of avoidance have been applied in different historical moments, with “classical” and “modern” avoidance doctrines varying as to the level of constitutional doubt required before a court construes an ambiguous statute in the pro-constitutional direction.<sup>55</sup> But while the interpretative theories underwriting judicial and executive avoidance are similar, the institutional configurations and interpretative contexts are distinct. For one, and as elucidated by Dean Trevor Morrison, statutory ambiguity is altogether rarer in executive interpretation, as executive officials—and the President in particular—are more proximate to the congressional lawmaking process and therefore have a more developed sense of statutory purpose.<sup>56</sup> The threshold

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52. For instance, when President Trump signed legislation denouncing a terror attack in Charlottesville, Virginia, he issued a short statement condemning domestic terrorism. *See* Presidential Statement on Signing Legislation Regarding the Violence and Domestic Terrorist Attack in Charlottesville, Virginia, 2017 DAILY COMP. PRES. DOC. 638 (Sept. 14, 2017).

53. The Trump Administration's Statement on Signing the Sanctioning the Use of Civilians as Defenseless Shields Act articulates the Executive's vision for squaring the Act's provisions with section 212(d)(5)(A) of the Immigration and Nationality Act, “which provides the Secretary of Homeland Security discretion to parole into the United States . . . a foreign national whose presence is sought for law enforcement purposes.” Presidential Statement on Signing the Sanctioning the Use of Civilians as Defenseless Shields Act, 2018 DAILY COMP. PRES. DOC. 862 (Dec. 21, 2018).

54. *See* *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

55. *See* Ryan M. Folio, Note, *Constitutional Avoidance, Severability, and a New Erie Moment*, 42 HARV. J. L. & PUB. POL'Y 649, 652-53 (2019) (distinguishing “procedural,” “classical,” and “modern” avoidance doctrines).

56. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1190 (2006).

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question—whether there is in fact statutory ambiguity—is therefore less likely to be genuinely met in the executive context. In any case, avoidance statements from the Obama and Trump Administrations rarely raise the threshold question of statutory ambiguity; instead, they take the statute to be unambiguous in its meaning and scope, and use the rhetorical frame of avoidance to exclude purportedly unconstitutional applications.

For instance, President Obama’s statement regarding the National Defense Authorization Act for Fiscal Year 2017 observed that one provision would “authorize certain cabinet officials to ‘drop from the rolls’ military officers without [his] approval.”<sup>57</sup> The statement goes on to describe how the President “will direct [his] cabinet members to construe the statute as permitting them to remove the commission of a military officer only if the officer accepts their decision or [he] approve[s] the removal.”<sup>58</sup> As subsequent Sections will describe, the distinction between avoidance and nonenforcement is primarily semantic, turning on use of the word “construe” as opposed to something akin to “not enforce.” To the extent this statement is abided by, the upshot is clear: cabinet members will seek approval for the removal of a military commission from the President. But other avoidance statements operate at a higher level of generality, such that their possible practical consequences remain vague. Consider President Obama’s statement attending the Trade Facilitation and Trade Enforcement Act of 2015, which describes how the Administration will interpret statutory provisions related to international negotiations “in a manner that does not interfere with [the Executive’s] constitutional authority to conduct diplomacy.”<sup>59</sup>

Before proceeding, it is worth noting that avoidance statements—like nonenforcement statements—can reflect “past viewpoints” or (under an assumption of behavioral influence) “past practices,” but should not be taken to delineate legislative intent on the order of traditional legislative historical materials. An intent-based use assumes that a statement is coextensive with the legislative process, refining the statutory text to comport with constitutional commitments shared between both political branches.<sup>60</sup> But this assumption is at odds with many of the patterns traced throughout this Note. For one, statements are predictable and highly routinized responses to a relatively narrow set of congressional moves—most often in repeat domains like appointments and reporting—that represent longstanding interbranch disagreements. Legislative

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57. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2017, 2017 DAILY COMP. PRES. DOC. 863 (Dec. 23, 2016).

58. *Id.*

59. Presidential Statement on Signing the Trade Facilitation and Trade Enforcement Act of 2015, 2016 DAILY COMP. PRES. DOC. 98 (Feb. 24, 2016).

60. *Cf.* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 335 (2015) (posing the question whether, in certain circumstances, the interpreter can “infer that members of the enacting legislature probably had the [constitutional] interpretation in mind” when “a statute lends itself to two possible interpretations”).

drafters are, in all likelihood, generally aware of these disagreements,<sup>61</sup> and nonetheless continue to write in such provisions. Moreover, keying an avoidance-inflected interpretation to actual legislative intent may be plausible when the interpretation occurs long after enactment; in such a situation, the interpreter has the benefit of hindsight and may be reviewing constitutionally dubious applications not reasonably anticipated by Congress *ex ante*. But the problem of unconstitutional applications is hardly present at the moment a statement is issued and before a statute is ever applied. Thus, in substance, executive uses of avoidance should not be understood to ascertain or reconstruct the positive contents of the enacted law.

### C. Nonenforcement Statements

In form as well as in substance, nonenforcement statements assert the President's enforcement authority. For instance, in signing into law the African Growth and Opportunity Act and Millennium Challenge Act Modernization Act, President Trump issued a statement stipulating that "[m]andatory consultation [with Congress] is not consistent with the Constitution's separation of powers," such that the President would treat that provision of the Act as "advisory."<sup>62</sup> Nonenforcement statements have at times taken on a conditional or "as-applied" cast, stipulating that a provision may be enforced in some factual contexts but not in others;<sup>63</sup> otherwise, they have stated that a provision will not be enforced categorically, indicating executive belief in "facial" unconstitutionality.<sup>64</sup> This distinction tracks that between as-applied and facial constitutional challenges in the judicial context, as well as the judiciary's use of severability analysis when disposing of the latter.<sup>65</sup>

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61. See Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1546, 1551, 1567 (2020) (describing how legislative drafters often work closely and exhibit familiarity with the Executive Branch); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 92-93 (1995) ("[T]here is no evidence whatsoever that members of Congress are risk-averse about the possibility that legislation they believe to be wise policy will be invalidated by the courts" so "[o]ne would expect them to err on the side of assuming constitutionality under conditions of uncertainty about what the courts are likely to do.").

62. Presidential Statement on Signing the African Growth and Opportunity Act and Millennium Challenge Act Modernization Act, 2018 DAILY COMP. PRES. DOC. 260 (Apr. 23, 2018). The statement cites a statement issued by President Bush in response to a similar statutory provision, though interestingly that prior statement was in the register of avoidance rather than nonenforcement. See Presidential Statement on Signing the Consolidated Appropriations Act, 2004, 40 WEEKLY COMP. PRES. DOC. 137 (Jan. 23, 2004). This reflects, albeit at a small scale, the shift from avoidance to nonenforcement. See *infra* notes 66 and accompanying text.

63. See, e.g., Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2016, 2015 DAILY COMP. PRES. DOC. 843 (Nov. 25, 2015) ("Under certain circumstances, the provisions in this bill concerning detainee transfers would violate constitutional separation of powers principles.").

64. See, e.g., Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2017, *supra* note 57.

65. Analytically, nonenforcement statements approximate a kind of severability analysis. Rather than vetoing the bill (akin to a court's decision to strike down a law on its face), the Executive "severs" unconstitutional portions by not enforcing them. Cf. Michael C. Dorf, *Facial Challenges to State and*

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Compared to the Bush Administration, which framed nearly all of its objections as constitutional avoidance,<sup>66</sup> the Obama Administration made greater use of the nonenforcement framing as a proportion of the total share of statements, and the Trump Administration further shifted statements away from avoidance and into the register of nonenforcement. But as previously described, the distinction between avoidance and nonenforcement statements is likely only superficial. With respect to post-enactment institutional dynamics, the salient divide is more likely to be between statements that transparently forecast the scope of intended nonapplications of the law and those that leave the intended scope undefined (along this dimension, conditional nonenforcement statements are closer in function to avoidance statements than they are to categorical nonenforcement statements). This is because a conditional framing or overall lack of specificity may make it difficult for Congress to understand the nature of the objection and—if it chooses—to acquiesce in future lawmaking, or—if it chooses—to monitor enforcement trends and respond through additional oversight or legislation. Moreover, and to the extent statements are meaningfully considered by implementing agencies, conditional statements may require the agency to undertake a secondary level of constitutional analysis—that is, the agency would need to differentiate factual situations implicating the enunciated constitutional objection from those avoiding the objection, which itself is an irreducibly constitutional determination. Related considerations regarding agency constitutional interpretation are considered in Part IV.<sup>67</sup>

### *D. Reclassification and Appointments Overrides*

A small share of statements over the Obama and Trump Administrations not only purport to narrow the scope of a statute's application, but also seem to *add* or *substitute* a new element into the statutory scheme that cures the constitutional objection. President Obama and President Trump issued these statements, which I refer to as “overrides,” in the context of reclassifying commissions as “independent” to avoid separation of powers concerns. There have also been a few similarly structured statements in the appointments context. President Obama appears to have issued three reclassification and one

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*Federal Statutes*, 46 STAN. L. REV. 235, 251 (1994) (“Courts cannot reduce every facial challenge to a severability question. As a doctrine of statutory construction, severability must defer to constitutional principles.”).

66. See Crabb, *supra* note 51, at 719 (“[A]fter an exhaustive study, the Congressional Research Service found that ‘in almost all instances where President Bush has raised a constitutional concern or objection, he has stated that he will construe the provision at issue in a manner that will avoid his concerns.’ . . . ‘[I]t is exceedingly rare for a President to make a direct announcement that he will categorically refuse to enforce a provision he finds troublesome.’” (citations omitted)); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb - A Constitutional History*, 121 HARV. L. REV. 941, 1097 (2008) (making such an observation); Cooper, *supra* note 51, at 520-22 (same); Morrison, *supra* note 56, at 1246 (same).

67. See *infra* Section IV.C.2.

appointments overrides over his presidency,<sup>68</sup> while President Trump issued two reclassification and four appointments overrides over a single term.<sup>69</sup>

For instance, in 2016 Congress established the Alyce Spotted Bear and Walter Soboleff Commission on Native Children within the Department of Justice's (DOJ) Office of Tribal Justice. Given the configuration of the Commission (some Commission members were to be appointed by congressional leaders), President Obama issued a statement stipulating that the Commission "cannot be located in the executive branch consistent with the separation of powers because it includes legislative branch appointees."<sup>70</sup> Therefore, the statement "instruct[s] the Attorney General to treat the Commission as an independent entity, separate from the executive branch."<sup>71</sup> Unless one were to conceptualize "independent entity" status as a kind of statutory default that would control in the absence of an express statutory directive (here being that the Commission should be established in the Office of Tribal Justice), the statement both "severs" the unconstitutional element of the statute and then inserts a *new* element into the statute to make it workable.

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68. The Obama Administration issued three reclassification overrides, all in the final months of his presidency. *See* Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2017, *supra* note 57 ("Because the commission [established by section 553] contains legislative branch appointees, it cannot be located in the executive branch consistent with the separation of powers. My Administration will therefore treat the commission as an independent entity, separate from the executive branch."); Presidential Statement on Signing the Ensuring Access to Pacific Fisheries Act, 2016 DAILY COMP. PRES. DOC. 854 (Dec. 16, 2016); Presidential Statement on Signing the Alyce Spotted Bear and Walter Soboleff Commission on Native Children Act, 2016 DAILY COMP. PRES. DOC. 695 (Oct. 14, 2016). The Administration issued only one appointments override. *See* Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2017, *supra* note 57 ("While my Administration supports the empowerment of a Chief Executive Officer with the authority to carry out the [Broadcasting Board of Governors]'s important functions, the manner of transition prescribed by section 1288 raises constitutional concerns related to my appointments and removal authority. My Administration will devise a plan to treat this provision in a manner that mitigates the constitutional concerns . . .").

69. The Trump Administration issued two reclassification overrides. *See* Presidential Statement on Signing the Route 66 Centennial Commission Act, 2020 DAILY COMP. PRES. DOC. 905 (Dec. 23, 2020) ("To avoid concerns regarding the separation of powers, my Administration will consider this Commission [with responsibility to conduct a study on ways to honor the centennial anniversary of Route 66 and to provide recommendations exclusively to the Congress] to be located in the legislative branch."); Presidential Statement on Signing the John S. McCain National Defense Authorization Act for Fiscal Year 2019, 2018 DAILY COMP. PRES. DOC. 533 (Aug. 13, 2018) ("[S]ection 1051 purports to establish an advisory commission in the executive branch for the purpose of producing reports and recommendations on the national security uses of artificial intelligence and machine learning. . . . My Administration accordingly will treat the commission as an independent entity . . ."). The Administration issued four appointments overrides. *See* Presidential Statement on Signing the Save Our Seas 2.0 Act, 2020 DAILY COMP. PRES. DOC. 897 (Dec. 18, 2020) ("Section 112(b) of the Act requires the Under Secretary of Commerce for Oceans and Atmosphere to appoint . . . members of the Board of Directors of the Marine Debris Foundation, who would be inferior officers. . . . The Under Secretary is not the head of a department who could constitutionally be authorized to appoint inferior officers. I will, therefore, . . . requir[e] that the Under Secretary make these appointments either with the Secretary of Commerce's approval or by designating already duly appointed officers who would be exercising authorities in their new roles that are germane to their pre-existing duties."); Presidential Statement on Signing the Taxpayer First Act, 2019 DAILY COMP. PRES. DOC. 450 (July 1, 2019); Presidential Statement on Signing the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 2018 DAILY COMP. PRES. DOC. 692 (Oct. 11, 2018); Presidential Statement on Signing the Frederick Douglass Bicentennial Commission Act, *supra* note 40.

70. Presidential Statement on Signing the Alyce Spotted Bear and Walter Soboleff Commission on Native Children Act, *supra* note 68.

71. *Id.*

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Statements remedying appointments problems have taken a similar tack. For instance, President Trump’s statement attending the Taxpayer First Act observed that “the Act require[s] the Commissioner of Internal Revenue to appoint persons to positions responsible for significant functions of the Internal Revenue Service.”<sup>72</sup> But because “[s]uch persons are likely inferior officers under the Appointments Clause,” and because “the Commissioner is not the head of a department and thus lacks constitutional authority to appoint inferior officers,” the statement “direct[s] the Secretary of the Treasury . . . to approve any appointments” made pursuant to the statute.<sup>73</sup> The statement casts department-head approval as an implicit background assumption and then actively integrates that requirement into the statutory scheme. Again, this diverges from the negative orientation of avoidance and nonenforcement statements, which traditionally have been rooted in the president’s prerogative to *abstain* or *refuse* to enforce unconstitutional legislation.<sup>74</sup>

Overrides have not received attention in the popular or academic literature, likely because the prospects of wholesale underenforcement are—at least as a policy and political matter—more salient than the above situations. But overrides still have significant constitutional stakes and require a constitutional justification that goes beyond the negative logic of executive refusal. One might understand some overrides, particularly those that do not seem to undo the intended consequences of the associated legislation, as a good-faith form of executive self-help or interbranch cooperation.<sup>75</sup> Interestingly, the kinds of appointments issues that recent reclassification overrides attempt to remedy had in previous eras been addressed through the threat or actual use of a veto—for instance, Presidents H.W. Bush and Clinton waited on at least a few occasions for Congress to remedy appointments concerns before establishing a legislated

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72. Presidential Statement on Signing the Taxpayer First Act, *supra* note 69.

73. *Id.*

74. See sources cited *supra* notes 3-4.

75. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 1, 10 (2014) (“The leading constitutional law treatments of interbranch conflict . . . abstract away from remedial practices and justifications, and turn away from legal modes of reasoning altogether. They envision the branches as engaging in ‘constitutional showdowns’ or playing ‘constitutional hardball.’ . . . They are attentive to the potential for legislative-executive struggle to generate new legal and quasi-legal understandings, but not to the ways in which unwritten norms may bear on the struggle itself.” (citations omitted)).

commission.<sup>76</sup> That said, the rise of omnibus legislation and the resultant heightened stakes of the veto may provide part of the justification for this shift.<sup>77</sup>

Setting aside these constitutional questions, the next Part returns to overrides in the course of considering their post-enactment effects. Overrides are particularly accessible cases to consider, as the affirmative element is easier to empirically observe than the “refusal to enforce” dimension of avoidance and nonenforcement statements.

#### IV. Patterns in Post-Enactment Conduct

This Part reviews the current academic understanding of the relationship between statements and post-enactment practice. It then considers recent instances where agencies have cited to statements in the course of enforcement determinations.

##### A. *The 2007 GAO Study and Its Limits*

To date, the only sustained treatment of this Note’s primary subject—the degree to which signing statements have been given practical effect—came in a 2007 Government Accountability Office (GAO) study.<sup>78</sup> It is worth pausing to consider the methodological contours of this study and its findings, which have long provided the baseline of understanding upon which this Note builds.

At the request of Senator Robert Byrd and Representative John Conyers, amid widespread concern that the Bush Administration had been using avoidance statements to circumvent contested statutes, the GAO examined the statements accompanying appropriations acts for the 2006 fiscal year. President Bush had issued statements in response to 11 of the 12 appropriations acts passed that year, which in aggregate objected to 160 statutory provisions. GAO selected 19 of these provisions reflecting different substantive legal objections—including, for instance, objections related to the theory of the unitary executive, to the Bicameralism and Presentment Clauses, and to the Recess Appointments Clause.<sup>79</sup> GAO also took into consideration which provisions would be amenable

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76. See, e.g., Presidential Statement on Signing the National and Community Service Act of 1990, 2 PUB. PAPERS 1614 (Nov. 16, 1990) (directing the Attorney General “to prepare remedial legislation for submission to the Congress during its next session, so that the Act can be brought into compliance with the Constitution’s requirements”); Presidential Statement on Signing the Dayton Aviation Heritage Preservation Act of 1992, 2 PUB. PAPERS 1848 (Oct. 16, 1992) (positing that “[t]he majority of members are effectively selected by various nonfederal officials and thus are not appointed in conformity with the Appointments Clause of the Constitution”). The Bush Administration waited for Congress to resolve the constitutional infirmity before appointing individuals to the Dayton Aviation Heritage Commission. See Christopher S. Kelley, *A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton* 11-12 (presented at the 61st Annual Meeting of the Midwest Political Science Association, Chicago, IL, Apr. 3-6, 2003).

77. See Bradley & Morrison, *supra* note 15, at 436 (“The increased use of such statements in recent administrations may, in part, be a response to the rise of omnibus bills that Presidents feel they cannot veto in their entirety.”); Bradley & Posner, *supra* note 50, at 313-14 & 357-60.

78. See GAO STUDY, *supra* note 7.

79. See *id.* at Enclosure II.

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to measurement, declining to evaluate ones where “it would be difficult to determine whether the President was executing the provision, either because of the breadth of executive action covered . . . or because the information would not be readily available due to national security or foreign relations concerns.”<sup>80</sup> Given that GAO is an instrument of Congress,<sup>81</sup> it is further possible that the selections were informed by the topic-area interests of certain congressmembers. To measure enforcement, GAO “contacted the relevant agencies and asked them how they were executing the provisions,” evaluated the responses received, and asked follow-up questions as necessary.<sup>82</sup>

Of the 19 evaluated provisions, GAO determined that 6 provisions were not executed as enacted, 10 were executed as written, and 3 provisions had not been triggered because the factual predicates needed to precipitate agency action had yet to arise.<sup>83</sup> The study itself stopped short of recognizing a causal relationship between the 6 provisions and the associated statements, concluding that “[a]lthough we found the agencies did not execute the provisions as enacted, we cannot conclude that agency noncompliance was the result of the President’s signing statements.”<sup>84</sup> Indeed, ascertaining baseline levels of underenforcement against which to measure the possible effect of statements is itself an empirically difficult and analytically slippery question: how often do agencies operating under normal conditions miss statutorily imposed deadlines, and how many degrees of freedom do agencies assume themselves to have when deadlines are unrealistic?<sup>85</sup> Baseline underenforcement may additionally vary by agency and substantive area.

Moreover, if an agency does not take an enforcement action in all instances where a statutorily defined factual predicate obtains, perhaps because the agency failed to notice the factual predicate or viewed the facts differently, does this qualify as nonenforcement? For instance, one of the provisions GAO evaluated stipulated that the Department of Defense (DOD) was required to respond to congressional inquiries regarding veterans’ affairs within twenty-one days.

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80. *Id.* at 14. The GAO gives the example of a Foreign Operations Appropriations Act provision, which conditioned drug-enforcement funding upon the reporting of counter-drug information to Congress. But gauging whether the Executive was complying with these reporting requirements would require an intensive inquiry into “all the counterdrug activities in the Andean region.” *Id.* The GAO noted that 31 of the 160 provisions were precluded on the basis of such a measurement difficulty. *Id.*

81. *See generally* Bridget C.E. Dooling, *Into the Void: The GAO’s Role in the Regulatory State*, 70 AM. U. L. REV. 387, 389-94 (2020).

82. GAO STUDY, *supra* note 7, at 9, 15.

83. *See id.* at 9-10. For instance, the GAO selected one statutory provision stipulating that the Department of the Interior was “required to seek a supplemental appropriation to replenish” its 2006 emergency appropriation *if used*. *Id.* at 10; *see also* Department of the Interior, Environment, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-54, § 101, 119 Stat. 499, 520 (2005).

84. GAO STUDY, *supra* note 7, at 9.

85. *Cf.* Nat. Res. Def. Council, Inc. v. Train, 510 F.2d 692, 692-94 (D.C. Cir. 1974) (describing the high rate at which the Environmental Protection Agency misses its statutory deadlines); Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 937-38 (2008) (“Although a nascent literature studies the use of deadlines in applied contexts, there is little systematic evidence on the prevalence and implications of administrative deadlines for agency rulemaking. How frequently are deadlines imposed on agencies? Which agencies are most likely to be constrained by deadlines?” (citations omitted)).



President Bush’s statement described how “[t]he executive branch shall construe [the provision] in a manner consistent with the President’s constitutional authority to . . . withhold information the disclosure of which could impair foreign relations.”<sup>86</sup> In responding to GAO’s request, DOD identified one instance where it responded to an inquiry on the thirty-eighth day, seventeen days beyond the twenty-one-day requirement, noting that the late response was “due to a delay in staffing.”<sup>87</sup> GAO coded these delays as noncompliance with the provision, though the causal story needed to tie the signing statement to this delay would prove strange. After all, the statement purports to reserve the power to withhold sensitive foreign relations information. At least on the surface, it is not clear how a mere delay of seventeen days would vindicate the President’s enunciated constitutional concern. Similar causation concerns could be directed toward the five remaining provisions.

Notwithstanding the study’s methodological limitations and inconclusive findings, it set off a momentary firestorm in the public sphere after then-*Boston Globe* journalist Charlie Savage—one of the most prominent voices to draw attention to the Bush Administration’s use of avoidance statements—cast a spotlight on the results.<sup>88</sup> In subsequent testimony to Congress, General Counsel of GAO Gary Kepplinger once again reiterated the study’s indeterminate conclusion, but noted that “Congress may wish to focus its oversight work to include those provisions to which the President objects to ensure that the laws are carried out” to “reduce any effect signing statements may have on agency execution of statutes.”<sup>89</sup> But contrary to the tenor of popular concern, academic consensus has coalesced around the presumption that statements lack enforcement effects. In a 2006 article published just before the study’s release, Professors Curtis Bradley and Eric Posner determined that “[a]s far [as] we have found, the critics of the Bush Administration’s use of signing statements have not identified a single instance where the Bush Administration followed through on the language in the signing statement and refused to enforce the statute as written.”<sup>90</sup> In the aftermath of the study, both legal academics and the

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86. Presidential Statement on Signing the Military Quality of Life and Veterans Affairs Appropriations Act, 2006, 2 PUB. PAPERS 1794 (Nov. 30, 2005).

87. GAO STUDY, *supra* note 7, at 27.

88. See, e.g., Charlie Savage, *U.S. Agencies Disobey 6 Laws That President Challenged*, BOSTON GLOBE (June 19, 2007), [http://archive.boston.com/news/nation/washington/articles/2007/06/19/us\\_agencies\\_disobey\\_6\\_laws\\_that\\_president\\_challenged](http://archive.boston.com/news/nation/washington/articles/2007/06/19/us_agencies_disobey_6_laws_that_president_challenged) [<https://perma.cc/HWN2-E9NU>] (describing the widespread negative reaction to the study); Jonathan Weisman, *‘Signing Statements’ Study Finds Administration Has Ignored Laws*, WASH. POST (June 19, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/06/18/AR2007061801412.html> [<https://perma.cc/UC24-2Z2S>]; Editorial, *Don’t Veto, Don’t Obey*, N.Y. TIMES (June 22, 2007), <https://www.nytimes.com/2007/06/22/opinion/22fri1.html?searchResultPosition=&#x3D;2> [<https://perma.cc/ZKD4-96BP>].

89. U.S. Gov’t Accountability Off., GAO-08-553T, Testimony Before the Subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives (Mar. 11, 2008) (Statement of Gary L. Kepplinger, GAO General Counsel), <https://www.gao.gov/new.items/d08553t.pdf> [<https://perma.cc/X5E9-MSZB>].

90. Bradley & Posner, *supra* note 50, at 332.

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Congressional Research Service further extended this view by calling the study's inconclusive results into sharper focus.<sup>91</sup>

As previously noted, problems regarding the proof of causal claims, particularly when the resulting event is an *omission* to act, run deep.<sup>92</sup> But the focus on causation is too myopic and has obfuscated intermediate possibilities with respect to the role statements may play in organizing bureaucratic behavior. Short of *causing* underenforcement in a strict sense, statements may still exert a contextual and atmospheric influence, providing theoretical frameworks upon which executive actors can draw when justifying courses of action.<sup>93</sup> The subsequent Sections elucidate some of the ways in which executive actors have invoked statements to justify an action, or have otherwise indicated that their behavior is aligned with statements.

### *B. Considering Influence Through the Lens of Overrides*

The practical effects of avoidance and nonenforcement statements are difficult to identify, for they typically require determining whether particular factual situations arose before the agency. By comparison, executive uses of reclassification and appointments overrides are more readily identifiable given how they call for positive actions. At least on a few occasions, agencies have signaled their commitment to aligning their practices with override statements from the Obama and Trump Administrations.

For instance, the 2019 National Defense Authorization Act established the National Security Commission on Artificial Intelligence (NSCAI), a commission tasked with making recommendations to the President and Congress “to advance

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91. See, e.g., Nelson Lund, *Presidential Signing Statements in Perspective*, 16 WM. & MARY BILL RTS. J. 95, 110 (2007):

[T]hese six examples are all quite consistent with the proposition that executive failures to comply with statutory directives are almost never dictated by the President's constitutional reservations and with the expectation that such failures will rarely even be influenced by such reservations. Further research may some day paint a different picture about the effects of presidential signing statements, but the evidence currently available suggests that much ado is being made about a practice that amounts in practical terms to very little.

See also TODD GARVEY, CONG. RSCH. SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 26-27 (Jan. 4, 2012), <https://fas.org/sgp/crs/natsec/RL33667.pdf> [<https://perma.cc/F254-6272>] (describing the study and its methodological limits); Gilman, *supra* note 6, at 135 (“The GAO uncovered these acts of non-enforcement but could not conclude whether or not the President's views are affecting how agencies are carrying out the law. Nor do we know whether a similar pattern of non-enforcement is occurring in the absence of signing statements.” (citations omitted)).

92. See *supra* Introduction (describing how underenforcement is ubiquitous such that isolating a causal influence is difficult, and how statements may only be epiphenomenal to a president's constitutional concern, therefore indicating but not driving underenforcement).

93. See Wilson, *supra* note 3, at 1514 (suggesting that statements can “provide the White House with a means to bind and centrally control the various executive agencies”); Christopher S. Kelley, *A Matter of Direction: The Reagan Administration, the Signing Statement, and the 1986 Westlaw Decision*, 16 WM. & MARY BILL RTS. J. 283, 305 (2007) (arguing that the Reagan Administration's motivation for adding signing statements to the legislative history that appeared in West Publishing Company's *United States Code Congressional and Administrative News* “was to influence bureaucratic decision-making when it came to interpreting vague or undefined provisions of law, and/or when it came to provisions deemed unconstitutional by the President”).

the development of artificial intelligence, machine learning, and associated technologies by the United States to comprehensively address the national security and defense needs of the United States.”<sup>94</sup> Section 1051 of the Act established the NSCAI as an advisory commission “in the executive branch.”<sup>95</sup> But President Trump’s statement “treat[ed] the commission as an independent entity, separate from the executive branch,” because members of Congress were responsible for appointing twelve of the NSCAI’s fifteen Commissioners, which would in the President’s view run afoul of the Appointments Clause.<sup>96</sup> Interestingly, the Commission’s Charter accords with the statement by characterizing the NSCAI as “an independent establishment . . . [that] does not report to any executive branch agency” but that “reports its recommendations directly to both Congress and the President.”<sup>97</sup> Whether this semantic shift to “independent entity” has meaningfully affected the NSCAI’s behavior, institutional structure, or access to resources remains difficult to assess.<sup>98</sup>

Additional instances of reclassified commissions may reflect a similar post-enactment dynamic. As described in Section III.D, the Alyce Spotted Bear and Walter Soboleff Commission was statutorily established in the DOJ Office of Tribal Justice, though President Obama’s statement recast the Commission as an independent entity separate from DOJ.<sup>99</sup> Likewise, section 553 of the 2017 National Defense Authorization Act established a commission in the “executive branch” tasked with “conduct[ing] a review of the military selective service process” (“the draft”),<sup>100</sup> though President Obama’s statement professed to “treat the commission as an independent entity, separate from the executive branch.”<sup>101</sup> And so too, a statement from President Trump purported to relocate the Route 66 Centennial Commission from the “executive branch” to the “legislative branch” because some of the Commissioner seats are filled on the basis of congressional recommendation.<sup>102</sup> But unlike in the NSCAI case, I have not identified instances where these commissions refer back to their associated statements or otherwise derogate from their statutorily defined “executive”

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94. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1051, 132 Stat. 1636, 1964 (2018).

95. *Id.*

96. Presidential Statement on Signing the John S. McCain National Defense Authorization Act for Fiscal Year 2019, *supra* note 69.

97. NAT’L SEC. COMM’N ON ARTIFICIAL INTELLIGENCE, CHARTER (June 24, 2020), <https://www.nscai.gov/about/charter> [<https://perma.cc/8BWE-9XTJ>].

98. *Cf.* FCC v. Fox Television Stations, 556 U.S. 502, 523 (2009) (“[I]ndependent agencies are sheltered not from politics but from the President, and . . . [exhibit] increased subservience to congressional direction.”).

99. Alyce Spotted Bear and Walter Soboleff Commission on Native Children Act, Pub. L. No. 114-244, § 3, 130 Stat. 981, 981 (2016); Presidential Statement on Signing the Alyce Spotted Bear and Walter Soboleff Commission on Native Children Act, *supra* note 68.

100. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 553-55, 130 Stat. 2000, 2132-35 (2016).

101. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2017, *supra* note 57.

102. *See* Presidential Statement on Signing the Route 66 Centennial Commission Act, *supra* note 69.

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status. Further research is therefore required to determine whether reclassification statements typically reflect a commission's self-conception or legal status, and if so, whether this status shift has material consequence.

With respect to appointments overrides, agencies seem to display awareness of the relevant statement and may adjust their appointments processes accordingly. Of the five appointments overrides identified between the Obama and Trump Administrations,<sup>103</sup> at least two have been expressly incorporated into the relevant agency's approach to appointments. When the U.S. Agency for Global Media (previously called the Broadcasting Board of Governors) transitioned from a bipartisan board to a single-CEO structure in 2016, its public website description of the transition process quoted President Obama's statement, noting that "[the Obama] Administration will devise a plan to treat this provision in a manner that mitigates the constitutional concerns" related to the President's appointments and removal authority.<sup>104</sup> What this revised plan entailed, and whether the agency ultimately operated in accordance with it over the transition, remains unclear. The second instance involved the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, which tasked an organization—the Mechanical Licensing Collective (MLC)—with administering various provisions related to music licensing.<sup>105</sup> Not long after President Trump's statement objected to the method set forth for appointing future MLC directors,<sup>106</sup> the Copyright Office stated in a Notice of Inquiry that it was acting pursuant to the President's expectation that "the Librarian retain[] the ultimate authority to appoint and remove all directors."<sup>107</sup> The practical upshot of these adjustments to agency appointments processes is uncertain, as is the question of whether override patterns can be generalized to describe the relationship between post-enactment bureaucratic behavior and other statement forms. But these instances at the least suggest that agencies are aware of statements and on occasion afford them consideration when determining how to implement a statutory directive.

### *C. Considering Influence Through the Lenses of Avoidance and*

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103. See *supra* notes 68-69.

104. See *Technical Amendments to the International Broadcasting Act: About This Legislation*, U.S. AGENCY FOR GLOBAL MEDIA (Dec. 23, 2016), <https://www.usagm.gov/who-we-are/oversight/legislation/technical-amendments-international-broadcasting-act> [<https://perma.cc/S3YE-YLME>]; Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2017, *supra* note 57.

105. See Pub. L. No. 115-264, 132 Stat. 3676 (2018).

106. See Presidential Statement on Signing the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, *supra* note 69.

107. Request for Information on Designation of Mechanical Licensing Collective and Digital Licensee Coordinator, 83 Fed. Reg. 65,747 (Dec. 21, 2018) ("The Office notes the Presidential Signing Statement accompanying enactment of the law indicates an expectation that the Register work with the MLC, once it has been designated, to ensure that the Librarian retains the ultimate authority to appoint and remove all directors.").

*Nonenforcement*

This Section evaluates two instances where statements seem to align with patterns in enforcement. In doing so, it yields several insights as to the cross-administration staying power of certain statements, the frequency with which agencies explicitly cite statements in the course of promulgating rules, and whether such reliance should shore up or undercut an agency's claim to interpretative deference.

## 1. Global Magnitsky Sanctions Request

In 2016, President Obama signed into law the Global Magnitsky Human Rights Accountability Act, which authorizes the President to impose economic sanctions upon those deemed responsible for human rights abuses.<sup>108</sup> The Act also empowers Congress to provide relevant information to the President and request the President's determination as to whether sanctions are appropriate.<sup>109</sup> As written, section 1263(d) requires the President to respond within 120 days to such determinations requests.<sup>110</sup> But when section 1263(d) was enacted, President Obama issued a signing statement indicating that he would "maintain . . . discretion to decline to act on such requests when appropriate," as the "constitutional separation of powers . . . limit[s] the Congress's ability to dictate how the executive branch executes the law."<sup>111</sup>

In 2018, following the disappearance of Saudi journalist and *Washington Post* columnist Jamal Khashoggi from the Saudi consulate in Istanbul, Senators Bob Corker and Bob Menendez requested a Global Magnitsky sanctions determination from President Trump with respect to "any foreign person responsible" for Khashoggi's disappearance.<sup>112</sup> The general sense at the time, which has since been widely accepted as true, was that Saudi Arabia's Crown Prince Mohammed bin Salman, as well as other Saudi officials, had ordered Khashoggi's murder and disappearance.<sup>113</sup> But the Trump Administration refused to submit a report to the Senate Foreign Relations Committee as

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108. See Pub. L. No. 114- 328, §§ 1261-65, 130 Stat. 2000, 2533-58 (2016).

109. *Id.*

110. See *id.*; see also MICHAEL A. WEBER & EDWARD J. COLLINS-CHASE, CONG. RSCH. SERV., IFI0576, THE GLOBAL MAGNITSKY HUMAN RIGHTS ACCOUNTABILITY ACT (Oct. 28, 2020), <https://fas.org/sgp/crs/row/IFI0576.pdf> [<https://perma.cc/W8UF-YGRT>] (providing a general overview of § 1263(d)).

111. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2017, *supra* note 57 ("Consistent with the constitutional separation of powers, which limit the Congress's ability to dictate how the executive branch executes the law, I will maintain my discretion to decline to act on such requests when appropriate.").

112. See WEBER & COLLINS-CHASE, *supra* note 110.

113. See *Jamal Khashoggi: U.S. Says Saudi Prince Approved Khashoggi Killing*, BBC NEWS (Feb. 26, 2021), <https://www.bbc.com/news/world-us-canada-56213528> [<https://perma.cc/7QN3-4YTM>] ("The report released by the Biden administration says the prince approved a plan to either 'capture or kill' Khashoggi.").

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stipulated by section 1263(d),<sup>114</sup> which would have required the Administration to take a stance on the culpability of Saudi officials. Strikingly, the Trump Administration invoked President Obama’s 2016 signing statement as justification for ignoring the statutory requirement: Secretary of State Mike Pompeo referenced the statement in a letter to members of Congress,<sup>115</sup> and the White House thereafter issued a separate statement, which announced that “[c]onsistent with the previous administration’s position and the constitutional separation of powers, the president maintains his discretion to decline to act on congressional committee requests when appropriate.”<sup>116</sup> This statement draws nearly word-for-word from President Obama’s 2016 signing statement.

The Trump Administration’s refusal to issue the report triggered intense reactions from commentators and members of Congress, many of whom pointed to the clear, unqualified character of the section 1263(d) statutory requirement.<sup>117</sup> Others defended the Administration’s position as enunciated in the Pompeo letter. One Obama-era National Security Council official told a news outlet that the Obama Administration would have been “much more proactive in terms of responding to this” request, but that “[t]he Trump [A]dministration has some degree of leeway or license here when it comes to ignoring” it.<sup>118</sup> Legal commentary has also split on the merits of the core constitutional question, with some lawyers arguing that the provision runs afoul of *INS v. Chadha*<sup>119</sup> and is therefore constitutionally dubious.<sup>120</sup> Notwithstanding the constitutional

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114. See Conor Finnegan, *Congress, White House Battle Over Report on Saudi Crown Prince’s Role in Khashoggi Murder*, ABC NEWS (Feb. 13, 2019, 4:00 PM), <https://abcnews.go.com/Politics/congress-white-house-battle-report-saudi-crown-princes/story?id=61023129> [<https://perma.cc/A5RC-6T46>] (“A simple reading of the law would show that there’s no wiggle room here given to the executive branch, to the president in terms of whether to provide the report that was requested by Congress.” (quoting Professor Jordan Tama, American University School of International Service)).

115. See *id.* (noting that Secretary Pompeo’s letter “point[ed] to Obama’s signing statement”); Ryan Goodman, *Trump’s Invoking Obama Signing Statement as Reason Not to Report to Congress on Khashoggi Murder: A Roundup of Expert Views*, JUST SECURITY (Feb. 28, 2019), <https://www.justsecurity.org/62737/khashoggi-magnitsky-act-chadha-constitutionality-reporting> [<https://perma.cc/B8HZ-2XZG>].

116. Peter Baker & Eric Schmitt, *Trump Defies Congressional Deadline on Khashoggi Report*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/2019/02/08/us/politics/trump-khashoggi-congress.html> [<https://perma.cc/SM54-ZHQE>] (quoting Trump Administration statement). The statement further described how “the administration had taken action against the killers and would consult with Congress.” *Id.*

117. For instance, Representative Michael McCaul issued a statement expressing how he was “deeply troubled by the letter [he] received from the administration,” and “call[ed] on the administration to immediately comply with the requirements of the law, and to provide Congress with the information required.” Finnegan, *supra* note 114. So too, Senator Marco Rubio described how Secretary Pompeo’s letter “violates the law, and the law is clear about those timelines.” Andrew Desiderio & Burgess Everett, *GOP Livid with Trump Over Ignored Khashoggi Report*, POLITICO (Feb 11, 2019, 07:18 PM) <https://www.politico.com/story/2019/02/11/gop-trump-ignored-khashoggi-report-1164487> [<https://perma.cc/NK2W-U34Z>].

118. Finnegan, *supra* note 114 (official’s name not provided).

119. 462 U.S. 919 (1983).

120. See, e.g., @marty\_lederman, TWITTER (Oct. 11, 2018, 10:06 AM), [https://twitter.com/marty\\_lederman/status/1050387232325033984](https://twitter.com/marty_lederman/status/1050387232325033984) [<https://perma.cc/79R2-3JLE>] (“As Pres. Obama noted in his signing statement, the GMA requirement is unconstitutional because Congress can’t give one of its own committees such power to trigger executive action. . . . Even so, Trump would be wise to follow the

propriety of the refusal, the incident throws into focus the possible cross-party and cross-administration relevance of statements.

This case was of particularly high political salience, making a causation claim—that President Obama’s statement drove the Trump Administration’s refusal to issue the report—difficult to embrace. More likely, the State Department and White House invocations of the statement are epiphenomenal or incidental to the decision reached by the Trump Administration, which leveraged the statement as public justification but privately reached the decision on alternative ideological grounds. But in moving the focus beyond strict causation and toward more modest or intermediate possibilities, we might say that past statements—like other sources of executive precedent—are inculcated into executive practices, defining the boundaries of what counts as “reasonable” executive action.<sup>121</sup> That the Obama Administration’s statement seems to have served as the Trump Administration’s primary basis to refuse to report is meaningful, as it casts the underlying constitutional position as bipartisan and longstanding. And absent the availability of this political cover, it is possible that the Trump Administration’s decision would have been otherwise.

## 2. Veterans Affairs Department Center for Innovation for Care and Payment Rule

The 2018 VA MISSION Act<sup>122</sup> established a Center for Innovation for Care and Payment within the Department of Veterans Affairs (VA).<sup>123</sup> In authorizing the creation of new programs for testing payment and service-delivery methods, the Act limited the Center from expending more than \$50 million annually on these programs without congressional approval.<sup>124</sup> But President Trump’s statement announced that the VA Secretary would treat the \$50 million spending cap as “advisory and non-binding,” as “the Congress may not make the approval

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law and accede to what he’ll rightly construe as the SFRC ‘request.’”). *But see* Goodman, *supra* note 115 (“The reporting requirements do not in any way require the executive to impose sanctions, or to alter its view regarding the imposition of sanctions (or not). The requirements do not alter legal rights. And they do not in any way involve a policy decision. At the very least, it seems clear that *Chadha* does not, absent a further elaboration of the definition of ‘legislative,’ dictate the answer with respect to the reporting requirements in the Magnitsky Act.” (quoting Jennifer Daskal, Associate Professor at American University Washington College of Law)).

121. *Cf.* Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIAC L. REV. 579, 579 (2008) (defining constitutional historicism as “the idea that the conventions that determine what makes an argument about the Constitution good or bad, what legal claims are plausible, and which are ‘off the wall,’ change over time in response to changing political, social, and historical conditions”).

122. *See* John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018, Pub. L. No. 115-182, 132 Stat. 1393 (codified at 38 U.S.C. 1703E (2018)).

123. *Id.* For background on the Center for Care and Payment Innovation, see CENTER FOR CARE AND PAYMENT INNOVATION, <https://www.innovation.va.gov/careandpayment/home.html> [<https://perma.cc/PQ6R-45B4>]; *see also* Ashok Reddy et al., *The VA MISSION Act—Creating a Center for Innovation Within the VA*, N. ENG. J. MED. 1592 (2019).

124. *See* 38 U.S.C. 1703E(a)(2), (d), (g)(2) (2018).

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of members of Congress a precondition to the execution of the law.”<sup>125</sup> According to reporting at the time, the Trump Administration had previously communicated this objection to Congress during the drafting process, though the provisions were still enacted.<sup>126</sup> The statement initially drew backlash—for instance, Representative Tim Walz, ranking Democrat on the House Veterans Affairs Committee, announced that he was “deeply concerned by President Trump’s signing statement” but that he did “not find it surprising that before the ink was even dry . . . President Trump took steps to limit Congressional oversight of the bill’s implementation.”<sup>127</sup>

In July 2019, the VA proposed a rule that expressly incorporated President Trump’s objection to the spending limit, stipulating that it “would not condition VA’s obligation of more than \$50 million upon approval of the Chairmen of the Committees on Veterans’ Affairs . . . as is contemplated in section 1703E(g)(2)(B)(iii).”<sup>128</sup> The proposal did note that the VA would still “inform[] the appropriate Committees of Congress” if it were to ultimately obligate above the limit.<sup>129</sup> It then cited the statement for the proposition that “under the separation of powers, the Congress may not make the approval of Members of Congress a precondition to the execution of the law,” concluding that “VA, accordingly, treats the . . . approval requirement as advisory and non-binding.”<sup>130</sup>

This explicit reference to the statement dropped out from the final rule promulgated four months later, which pledged that the VA would not “obligate more than \$50 million in any fiscal year in the conduct of the pilot programs . . . unless VA determines it to be necessary and submits a report to the appropriate Committees of Congress.”<sup>131</sup> Critically, the final rule only conditions an excess obligation on the VA’s *own* determination that the obligation is necessary and on the submission of a report. But the VA need not await congressional approval before exceeding the limit—a requirement clearly entailed by the statutory provision. It remains unclear whether the VA has since exceeded the \$50 million obligation limit in a single year without obtaining congressional approval. In any case, this rulemaking process illustrates agency awareness of statements, and—in an unusually explicit fashion—the possibility that past statements are embedded within and used to justify implementing regulations.

Beyond the VA rule, the only other occasion identified where an agency expressly invoked a statement’s constitutional reasoning is a 1997 Legal Services

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125. Presidential Statement on Signing the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018, 2018 DAILY COMP. PRES. DOC. 403 (June 6, 2018).

126. See Joe Davidson, *Trump Rejects Parts of VA Law He Was “Very Happy” to Sign*, WASH. POST. (June 11, 2018), <https://www.washingtonpost.com/news/powerpost/wp/2018/06/11/trump-challenges-parts-of-va-law-he-was-very-happy-to-sign> [<https://perma.cc/4PEL-XGAZ>].

127. *Id.*; see also *id.* (“I think that there are some issues that we thought were worked out, but now we have to see what develops” (quoting Garry Augustine, Head of the Disabled American Veterans)).

128. Center for Innovation for Care and Payment, 84 Fed. Reg. 36,507-10 (July 29, 2019).

129. *Id.*

130. *Id.*

131. 38 C.F.R. § 17.450(d)(2) (2019).



Corporation (LSC) rule implementing a law prohibiting funding recipients from advocating for euthanasia.<sup>132</sup> Citing President Clinton’s avoidance statement construing the Act narrowly in light of the First Amendment,<sup>133</sup> LSC’s commentary to the final rule voiced the President’s constitutional viewpoint and explained how the rule would avoid implicating protected speech.<sup>134</sup> In other situations, agencies have cited policy statements consistent with a legislative intent-based interpretative approach. For instance, a 1990 Department of Interior rule<sup>135</sup> and a 1995 Office of Management and Budget rule<sup>136</sup> each relied—seemingly exclusively—on a policy statement as justification. Over the Obama and Trump Administrations, agencies similarly referenced policy statements in rulemaking materials on at least a few occasions, though the practice seems to have been uncommon overall.<sup>137</sup>

In light of these observations, and before concluding, it is worth briefly considering how an agency’s interpretative reliance on a statement should inform the deference afforded to the agency’s ultimate interpretation. This question has

132. See 45 C.F.R. § 1643.3 (1997); Restriction on Assisted Suicide, Euthanasia, and Mercy Killing, 62 Fed. Reg. 67,746 (Dec. 30, 1997); Assisted Suicide Funding Restriction Act, 42 U.S.C. § 14404(a)(3) (1997). For a brief discussion of LSC’s reliance upon President Clinton’s signing statement, see Nicholas J. Leddy, Comment, *Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN. L. REV. 869, 876 n.30, 884 (2007).

133. Presidential Statement on Signing the Assisted Suicide Funding Restriction Act of 1997, 1 PUB. PAPERS 515-16 (Apr. 30, 1997) (construing the Act, which “prohibit[s] Federal funding for activities and services that provide legal assistance for the purpose of advocating a right to assisted suicide,” so as “not to restrict Federal funding for other activities, such as those that provide forums for the free exchange of ideas”).

134. See 62 Fed. Reg. at 67,747-48. LSC argued, for example, that “LSC programs are not public forums and LSC funds may not be used to create public forums.” *Id.* at 67,748.

135. A 2007 Comment in the *Administrative Law Review* by Nicholas Leddy identifies these two cases. See Leddy, *supra* note 132, at 875 n.28; 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. 9,223, 9,223 (Mar. 12, 1990) (“[A]s set forth by President Bush on June 21, 1989, in his statement . . . the Department of the Interior adopts the following criteria and procedures to establish the basis for negotiation and settlements of claims concerning Indian water resources.”); Presidential Statement on Signing the Puyallup Tribe of Indians Settlement Act of 1989, 1 PUB. PAPERS 771-72 (June 21, 1989) (announcing that the government is “committed to establishing criteria and procedures to guide future Indian land and water claim settlement negotiations”).

136. See Leddy, *supra* note 132, at 875-76 n.29; 5 C.F.R. §§ 1320.5(a)(1)(iii)I, 1320.8(a)(5) (2007) (stipulating that agencies must notify OMB as to whether document collection can be done electronically); Controlling Paperwork Burdens on the Public; Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act, 60 Fed. Reg. 30,438, 30,440-42 (June 8, 1995); Remarks on Signing the Paperwork Reduction Act of 1995, 1 PUB. PAPERS 733-35 (May 22, 1995) (“From 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.”).

137. See, e.g., John H. Chafee Coastal Barrier Resources System; Hurricane Sandy Remapping Project for Delaware, Massachusetts, New Hampshire, and New Jersey, 83 Fed. Reg. 10,739, 10,739 (Mar. 12, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-03-12/pdf/2018-04889.pdf> [<https://perma.cc/4PVG-G48L>] (referencing President Reagan’s statement regarding the need for market solutions to land-development risk); Social Security Administration, Final Rule: Amendments to Regulations Regarding Withdrawal of Applications and Voluntary Suspension of Benefits, 75 Fed. Reg. 76,256, 76,256 (Dec. 8, 2010) (codified at 40 C.F.R. pt. 404) (quoting President Franklin Roosevelt’s proclamation regarding the aims of the Social Security Act). *But see, e.g.*, Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,467 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100) (rejecting the Reagan Administration’s statement-based interpretation of the Fair Housing Amendment Act’s disparate-impact standard).

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been raised by at least one previous commentator,<sup>138</sup> though it does not appear to have meaningfully come before a court (likely because of the infrequency of explicit references). But if such a scenario were to come to pass, deference rules might vary along at least two dimensions: first, whether the agency treated the statement as intent-based evidence as opposed to a constitutional directive external to the statute; and second, whether the agency included additional reasons for its decision independent of the statement (i.e., was discussion of the statement ancillary commentary or “dicta,” or central to the “holding” of the decision). I would expect deep disagreement over both the relative importance and the *direction* of these dimensions. If, for instance, *Chevron* deference is tied to presidential involvement in an administrative process, then the invocation of a statement should enhance the claim to deference.<sup>139</sup> On the other hand, if deference is anchored in bureaucratic expertise, the prospect that an agency crafted an interpretation on the basis of constitutional judgment may instead undercut the agency’s claim—as constitutional reasoning is a value-laden mode of analysis distinct from the means-end instrumental rationality associated with technocratic administration.<sup>140</sup> Though beyond the bounds of the present study, these questions are ripe for future engagement.

### Conclusion

While the causation debates of the 2000s motivated high-level analyses of the constitutional propriety of presidential signing statements, they directed attention away from other important empirical questions and intermediate approaches to conceptualizing statements’ enforcement effects. Filling this gap, this Note has attempted to identify some of the ways—both explicit and subtle—that executive actors may be influenced by statements in the course of choosing and justifying courses of action. Across the cases presented here, executive actors display an awareness of the presence of statements. This may suggest that statements exert an atmospheric influence in certain decision-making processes, or serve as a vehicle through which presidents coordinate bureaucratic activity,

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138. See Leddy, *supra* note 132, at 881-88.

139. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2377 (2001) (“[C]ourts 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 decision-making processes.”).

140. Cf. Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 23-24 (2001) (“This connection between administration and reason is a familiar theme in the social and political theory of modernity. Max Weber famously explained the legitimacy of bureaucratic activity as its promise to exercise power on the basis of knowledge. And the American Progressive Movement extolled the virtues of administration in terms both of substantive expertise and the creation of ‘rational democracy.’” (citations omitted)); MAX WEBER, 3 *ECONOMY AND SOCIETY* 956-80 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968). Arguably, when agencies cite constitutionally-inflected statements, they treat the constitutional objection as a prefabricated constraint, without the need for critical engagement in the underlying constitutional reasoning (i.e., the constitutional constraint functions like a hard “fact” that operates on the plane of means-end reasoning). But statements typically enunciate a constitutional objection at a high level of generality, such that the agency’s efforts to apply the constitutional judgment require a second phase of constitutional analysis.

implying that the intended audience of a statement includes agencies and bureaucratic actors as much as it includes Congress or the general public.

The cases discussed herein represent some of the more high-profile instances over the Obama and Trump presidencies where statements seemed to bear on enforcement decision-making. It is therefore difficult to say whether this Note's observations indicate broader trends in administrative behavior that extend across statutory domains and between presidencies. Future, more systematic engagement with these questions may well yield additional insights regarding the staying power of statements, administrative reason-giving, and agency uses of executive precedent more generally. This Note provides a starting point.