

President Trump and the Presidential Signing Statement:
A First Look

Christopher S. Kelley
Department of Political Science
Miami University (OH)

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Abstract:

The Trump presidency has seen a dizzying array of actions and behaviors that make it difficult to discern legitimate exercises of power from hyperbole. One thing that has been clear since Trump took office in 2017 is his penchant towards unilateralism—in executive orders, emergency declarations, proclamations, and memoranda. One thing that has not gotten the attention it deserves is the presidential bill signing statement. The signing statement received a great deal of attention during the George W. Bush presidency, only to fall dormant during the Obama administration. What this paper attempts to do is to take a first cut look at how President Trump has used the signing statement in his first two years in office. I will see how his use compares to the first two years of his five predecessors, and then conduct a deep examination of his administration to see how or whether his usage varies, what patterns emerge, and what insights can be made about his view of presidential power, and what the future holds as his administration moves forward.

The presidential bill signing statement is part of a package of unilateral tools available to a president in order to deal with the tough political circumstances of his or her tenure. This also includes executive orders, proclamations, and memoranda, to name a few.¹

The signing statement can be delivered in written and/or verbal form, such as the statement the president makes during a formal signing ceremony at the White House. For those who study signing statements, it is the content of each statement that is important. The signing statement is useful to a president because it is flexible. As a result of the flexibility, those who study the signing statements categorize them into one of two categories: Those statements where the president either challenges or interprets provisions of the bill are categorized as *constitutional*. Those statements where the president explains the bill, congratulates or attacks individuals, or proclaims the great successes of the administration are categorized as *rhetorical*.²

The signing statement's historical lineage dates to the Monroe administration, but it has taken on greater importance to the Executive Branch starting in the latter part of the 20th century when presidents needed to figure out ways to deal with an ever-increasing polarized political system.

The Reagan administration was the first to deploy it as a weapon with multiple uses, which included guidance to the courts regarding the president's understanding of the law upon signing and as guidance to bureaucrats when they cannot understand the clear meaning of the

¹ Cooper, Phillip. 1997. "Power Tools for an Effective and Responsible Presidency." *Administration and Society*. Vol. 29, no. 5.

² See Evans, Kevin A. 2014. "Framing the Accomplishment: How, and Why, Presidents Use the Rhetorical Content in Signing Statements for Strategic Purposes, FDR-Carter." *Congress & the Presidency*. Vol. 41, Issue 1.

laws. Furthermore, presidents found that a signing statement was a useful way to build relationships with members of Congress by recognizing them as important or instrumental in getting legislation to the president's desk. In addition, the signing statement also was a way to reach the public and the press in order to help harness support for the president's policies or opposition to his or her enemies.

It was in the George W. Bush administration that the signing statement became well known to the public at-large, and not just to academics and legal scholars. The Bush administration had been using the signing statement to challenge hundreds of provisions of law, including issuing more challenges in the first term than all previous president's combined.³ This came to light after the Bush administration, on New Year's Eve 2005, attempted to hide a challenge to a provision in a defense spending bill that took back concessions on the treatment of military detainees that the administration had made with the Congress in order to get the bill passed.⁴

As a result of the political toxicity of the abusive use of the signing statement by the George W. Bush administration, President Obama promised on the campaign trail, and then issued a memorandum after taking office, that spelled out the limited nature of how his administration would use the signing statement.⁵ And for the most part, the use of the signing statement for any purpose dropped during the Obama presidency, although there were some

³ Kelley, Christopher S. 2007. "Contextualizing the Signing Statement." *Presidential Studies Quarterly*. Vol. 37, no. 4.

⁴ Kelley, Christopher S. and Bryan Marshall. 2008. "The Last Word: Presidential Power and the Role of Signing Statements." *Presidential Studies Quarterly*. Vol. 38, no. 2.

⁵ Kelley, Christopher S. 2012. "Rhetoric and Reality: Unilateralism and the Obama Administration." *Social Science Quarterly*. Vol. 93, No. 5.; Spitzer, Robert J. 2013. "Comparing the Constitutional Presidencies of George W. Bush and Barack Obama: War Powers, Signing Statements, & Vetoes." *White House Studies*. Vol. 12, No. 2.

controversies. It was clear that as far as the “toolkit” metaphor goes, the signing statement was not a preferred tool of President Obama.⁶

When Trump came to office in 2017, it was unclear, given his lack of experience in government as well as with the U.S. presidency (his executive experience was not suitable training to be the nation’s chief executive officer), just how Trump would approach the office. On one hand, he was blessed with unified party government that seemed supportive to help him tackle his big agenda items—repealing “Obamacare,” passing a tax-cut, and building a wall on our border with Mexico. On the other hand, unified party government has had mixed results, and Donald Trump might have been a Republican president, but he was not the type of Republican that members of Congress were.

In addition, Donald Trump lacked patience and focus. This was clear on the campaign trail, and it was clear in the lack of care that went into his transition after the 2016 election ended. How much patience would he have for our system of incrementalism was uncertain, but most observers did not hold out hope. Thus, the ability to go unilateral might have been more tempting for him than for any of his predecessors. This was evident during his first 100 days, when he held public ceremonies for the executive orders he signed to send a clear message that he was “getting things done”.⁷

During his first two years, with the swirling controversies, the revolving cast of characters to enter, and then leave his administration, and the jarring reset of the media

⁶ This is not to suggest that Obama’s preference for unilateralism abated. He advanced the cause of unilateral action in domestic and foreign politics, although he did so while using other tools, such as the executive order, memorandum, and proclamation.

⁷ Along with bold statements of accomplishing more in his first 100 days than any previous administration.

narrative every couple of days has made it difficult for the public to focus on Trump's use of unilateral power. It is in this context that I decided to look at the use of the signing statement.

In this paper, I want to make a first-cut examination of the uses of the presidential signing statement in order to answer some initial questions, and hopefully to direct future research into the Trump presidency.

Some initial questions I have set out to answer: How has the Trump presidency used the signing statement in the first two years in office? How many signing statements have they issued, and how many make constitutional challenges? How does Trump's use of the signing statement compare with his predecessors, Reagan – Obama? How does Trump's use of the signing statement comport with what scholars know about why president's use the device? How does it differ?

This paper will mostly provide qualitative answers to the questions with a few descriptive statistics to illustrate the comparative use of the signing statement, Reagan – Trump.

The data for the Trump signing statements is drawn from two major sources. The first is the White House website, which has a page dedicated to "Briefings and Statements." I signed up for the RSS feed when the Trump White House website went live in order to receive the press releases that include any signing statement or signing ceremony. The second source I used is the "Daily Compilation of Presidential Documents," or DCPD. The DCPD took over for the "Weekly Compilation of Presidential Documents" in 2009. It is an official accounting of White House activity, complete with a table of contents (and searchable) of all bill signings. The DCPD is published by the Office of Federal Register at the National Archives and Records

Administration (NARA). I use both to ensure that I have captured all of the signing statements issued by the White House. In my initial research, I found that the White House website did not always have a complete record of all the president's signing statements. Furthermore, as I will discuss below, the White House website is not always transparent in their issuances of signing statements.

The paper will proceed as follows: First, I will provide a short discussion of how Trump's use of the signing statement—constitutional and rhetorical—compares with his predecessors to determine whether he is behaving similar to or different from Reagan – Obama, or as a recent article in *PS* asked, will the Trump administration be one of continuity or change?⁸ Second, I will look at Trump's use of the constitutional signing statement in order to get a clearer picture of what triggers a challenge. And third, I will discuss how Trump uses the rhetorical signing statement, and in particular the bill signing ceremony, in a manner that varies from past usage.

Trump in a Comparative Perspective⁹

To get an idea of where President Trump resides in the use of the signing statement, I compared his first two years with the first two years of each of his last five predecessors. I begin with the Reagan administration since it is there where the signing statement became an instrumental part of presidential power. My analysis looks at the 97th, 101st, 103rd, 107th, 110th, and the 115th Congresses (1981-82; 1989-90; 1993-94; 2001-02; 2009-10; and 2017-18). This yields a total of 368 signing statements. The signing statements are coded by type to distinguish

⁸ Potter, Rachel Augustine et. al. 2019. "Continuity Trump Change: The First Year of Trump's Administrative Presidency." 2019. *PS: Political Science & Politics*. May 3. pp.1-7.

⁹ This analysis builds upon previous research. See Kelley, Christopher S. and Bryan Marshall. 2010. "Going it Alone: The Politics of the Constitutional Signing Statement." *Social Science Quarterly*. Vol. 91, Issue 1. pp. 168-187.

the rhetorical from the constitutional statements. If a signing statement either *challenged* or *interpreted* a provision of law, it was coded as constitutional even if the president spent part of the time making rhetorical remarks. If the signing statement did not contain any challenges or interpretation, but instead explained the purpose of the law, congratulated or condemned individuals, or simply praised the work of the administration it was coded rhetorical. In the statements coded as constitutional, I also counted, as best I could, the number of challenges. An exact count is difficult since the statements themselves are vague as to what the president is precisely challenging. As a result, the numbers I report should be interpreted as the *minimum* number of challenges identified.

The results in Table 1 describe the use of presidential signing statements in the first two years of the Reagan – Trump administrations:

[Table 1 About Here]

The second column represents the total number of signing statements for the first two years of each administration, and the third column represents the total number of bills signed into law for each of the first two years. The fourth column is the percentage of bills with signing statements to give us a better sense of what patterns emerge, and where President Trump fits in comparison.

As Table 1 demonstrates, and without surprise, the Obama administration had the lowest percent of signing statements to the bills signed into law (6.3%), and the Clinton administration had the highest (15.9%), with the two Bush administration tied with each other (15.6%). The Trump administration came in fifth (of six) in the percent of signing statements to the bills signed into law (11.1%), and the average for Presidents Reagan - Trump was 13.4%.

Obama and Trump issued fewer signing statements (24 and 49 respectively), and Reagan, Bush I, Clinton, and Bush II issued more (65, 102, 74, and 59 respectively). In looking at Table 1, one may conclude that there has been nothing extraordinary in how the Trump administration uses the signing statement.

Table 2, however, allows us to dive deeper into the data, and as a result tells a different story from Table 1.

[Table 2 About Here]

Table 2 describes the use of the presidential signing statement by type—rhetorical or constitutional—as well as the total number of challenges and average number of challenges for each president for the first two years.

Column two and three includes the total number of constitutional and rhetorical signing statements (in parenthesis), as well as percentage of each of the two statement types. Column five represents the total number of constitutional challenges for each of the presidencies, and column four represents the average number of signing statement challenges per the first two years of each administration. The bottom row gives the totals for each column, including in the last row of column four, the average number of challenges across all administrations under review.

The totals tell us that the rhetorical statements outnumber the constitutional statements from Reagan – Trump in the first two years of each administration, although the bulk of rhetorical statements come from the Reagan – Clinton presidencies, and fall off from Bush II – Trump. President Reagan had the highest percentage of rhetorical statements with

86%, and President Clinton issued the second most with 82%. President Trump had the fewest percentage of rhetorical statements for all presidents under review at 25%.

This flips when looking at the constitutional signing statements. Again, as a percentage of total statements issued for each presidency, this time Trump is first with 75% of the statements he has issued are categorized as constitutional. Next is Bush II at 69%, and the Reagan administration is last at 14%. This should not be surprising if one recalls the story of the Bush II administration, which brought the constitutional signing statement to the attention of the public at large.

Columns four and five are particularly interesting. First, the Trump administration has issued more challenges in just the first two years than any of the preceding administrations, including more than 100 more challenges than even the Bush II administration (343 to 238). And the Trump administration is averaging more challenges per statement than any of his predecessors at 9.3 challenges per statement. The Bush II administration comes in second with an average of 5.8 challenges per statement

The comparison shows us that Trump prefers to use the signing statement to challenge provisions that threatens presidential power. As I will discuss below, it also shows us that the Office of Legal Counsel (OLC) is working tirelessly to shield the president's Article II powers, as many of Trump's challenges read as OLC challenge-boilerplate. And the next closest administration in the total number of challenges in the signing statement is the Bush II administration, and that administration set records for the number of challenges by the time it left office in 2009.

Trump's use of the constitutional signing statement also continues to fit the adage that the "devil is in the details." Back in 2006, the Senate Judiciary Committee convened a hearing to examine the use of the signing statement by the Bush administration.¹⁰ During that hearing, the Bush administration argued that they were not doing anything unprecedented in their signing statements since the number of statements issued was not out of line with its predecessors. It isn't the document that is important, but rather what is contained within that matters. And for the Trump administration, they have only issued 37 constitutional signing statements (fewer in number than Bush I and Bush II), but as Table 2 shows, in those 37 statements resides at least 343 challenges.

I turn next to a closer examination of the use of the signing statement in the first two years of the Trump administration. I will start first with the constitutional signing statement as it has the most relevance to constitutional power and issues. After this, I will look at how the Trump uses the rhetorical signing statement, and what that tells us about his presidency.

Trump and the Constitutional Signing Statement

In Trump's first two years in office, he issued a total of 36 constitutional signing statements with at least 343 separate challenges. In 2017, he issued five constitutional signing statements, with at least 139 separate challenges, and in 2018 he issued 31 constitutional signing statements with at least 204 separate challenges. In his first signing statement to the signing of the "Consolidated Appropriations Act, 2017,"¹¹ Trump challenged at least 81 different provisions of the bill, including a provision that funded Historically Black Colleges and

¹⁰ *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*. 109th Congress. June, 2006.

¹¹ P.L. 115-31.

Universities (HBCUs), which Trump was forced to walk back a couple of days after when his challenge ignited a public firestorm (more later).

In addition to the 81 challenges in the “Consolidated Appropriations Act, 2017,” Trump has eight more signing statements where his challenges range in the double digits:

- “Countering America’s Adversaries through Sanctions Act”¹²: 12;
- “National Defense Authorization Act for FY 2018”¹³: 44;
- “McCain National Defense Authorization Act for FY 2019”¹⁴: 52;
- “Energy, Water, Legislative Branch & Military Construction, VA Appropriations Act, 2019”¹⁵: 21;
- “Department of Defense and Labor, HHS Appropriations Act, 2019 & Continuing Appropriations Act, 2019”¹⁶: 17
- “FAA Reauthorization Act of 2018”¹⁷: 17;
- “SUPPORT for Patients and Communities Act”¹⁸: 12; and
- “Asia Reassurance Initiative Act of 2018”¹⁹: 21.

These challenges were made despite Trump having unified party control of government, with both chambers of Congress in the hands of a (mostly) pliant Republican majority.

The focus of Trump’s challenges has been very similar to those of his predecessors, which suggests that the main engine for the signing statement challenges is likely the Office of Legal Counsel (OLC), located inside the Department of Justice. The OLC is a shield for the president’s powers, and thus many of the signing statements issued by all recent presidents

¹² P.L. 115-44.

¹³ P.L. 115-91.

¹⁴ P.L. 115-232.

¹⁵ P.L. 115-244.

¹⁶ P.L. 115-245

¹⁷ P.L. 115-254.

¹⁸ P.L. 115-271.

¹⁹ P.L. 115-409.

have a type of “boilerplate” look to them, with the phrasing of the challenges appearing identical across presidencies.

Trump did not come into office with any type of grand theory to explain his approach to the presidency. Unlike the George W. Bush administration, for example, which had the “Unitary Executive” to help explain how and why it used the constitutional signing statement, Trump has offered no such help. In order to try and explain how his constitutional signing statements vary, I have chosen to differentiate “domestic policy” from “foreign policy” challenges.

Foreign Policy Prerogatives

In the foreign policy focus area, the challenges are mostly designed to protect the president’s constitutional powers as *Commander in Chief* and as *Chief Diplomat*.

In the area of *Commander in Chief*, most of the challenges involve the president’s power to “command and control” military troops, munitions, appropriations, and military strategy. Trump asserted his Commander in Chief responsibilities over 18 different provisions of the bill he signed.²⁰ Thus, the challenges could range between how the president controlled munitions, such as section 1664 of the “National Defense Authorization Act for FY 2018”²¹ which included restrictions on the president’s ability to reduce our nation’s stockpile of ICBMs, as well as restrictions related to the military detainees at the Guantanamo Bay military facility.²² In Trump’s signing statement, he wrote that even though he shared Congress’s objectives, he

²⁰ The assertions are thematic. Each one may include anywhere from one to several specific challenges to provisions of the legislation.

²¹ P.L. 115-91.

²² See, for instance, the “Consolidated Appropriations Act, 2017”, Division B, section 527; Division C, section 8101; and Division F, section 571 (related to transfer of prisoners to the United States); and Division C, section 8103 (related to transfer to a foreign country). P.L. 115-31.

would treat the provisions “...consistent with the President’s authority as Commander in Chief.”²³

In the area of *Chief Diplomat*, Trump’s objectives ranged from rebuffing attempts by Congress to either set the foreign policy of the United States vis a vis other countries or international organizations, to restrictions on how the president either recognizes foreign governments or receives diplomats. In fact, interference with the president’s power to set foreign policy was the second most challenged area (23) in all of Trump’s constitutional signing statements.

For example, in his signing of the “Countering America’s Adversaries through Sanctions Act,”²⁴ which Trump referred to as a “deeply flawed bill,”²⁵ he objected to section 257, which committed the United States to supporting the territorial sovereignty and independence of the Ukraine. In his objection, Trump wrote that section 257’s policy stipulations were “...in contravention of the President’s exclusive constitutional authority to determine the time, scope, and objectives of international objectives,” and that he would “...give careful and respectful consideration to the preferences expressed by the Congress...in a manner consistent with the President’s constitutional authority to conduct foreign relations.”²⁶

Domestic Policy Prerogatives

²³ Trump, Donald J. 2017. “Statement by President Donald J. Trump on H.R. 2810.” December 12. <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-h-r-2810/>.

²⁴ P.L. 115-44.

²⁵ Trump, Donald J. 2017. “Statement by President Donald J. Trump on Signing the ‘Countering America’s Adversaries Through Sanctions Act.’” August 2. <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-signing-countering-americas-adversaries-sanctions-act/>.

²⁶ Trump, Donald J. 2017. “Statement by President Donald J. Trump on the Signing of H.R. 3364.” August 2. <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-signing-h-r-3364/>.

In the area of domestic policy, nearly all of the challenges fall under the president's responsibilities as *Chief Executive*. This responsibility requires the president to execute his powers as president, to direct those inferior executive officers under him, and to vigorously protect the office of the presidency. In this area, there are a couple of sub-topics where the president has been particularly vigorous in challenging congressional encroachment into presidential responsibilities.

President Trump issued at least 36 distinct challenges to various provisions of bills he signed that infringed upon his powers to *supervise* the Executive Branch—in the George W. Bush administration, this category was often in the catch-all “supervise the unitary executive branch”.²⁷ Even though this is the top challenge for all categories, Trump has only used the phrase “unitary executive branch” once, when signing the “FAA Reauthorization Act of 2018.”²⁸

The supervision-challenge is largely designed to cut Congress out from how the president manages the Executive Branch, including his appointment and removal powers. For instance, a number of the challenges are similar to the example above, where the president forbids subordinates from transmitting reports or communicating with the Congress directly, instead moving that responsibility into the White House. In other instances, as I will discuss later, Trump claims *executive privilege* to the information that Congress is requesting. Trump does the same thing regarding the control of information in foreign policy, where he stipulates a privilege claim *before* Congress has requested any specific communications or reports.

²⁷ See Kelley, Christopher S. 2010. “To Be (Unitarian) or Not To Be (Unitarian): Presidential Power in the George W. Bush Administration.” *White House Studies*. Vol. 10, Issue 2.

²⁸ P.L. 115-254.

In other supervisory challenges, the president objected to attempts at giving “prosecutorial discretion” to any subordinate office outside of the Department of Justice²⁹ or placing limitations on the reasons why a president could remove an inferior executive branch officer.³⁰

The final supervisory area to receive significant attention by President Trump involves a separation of powers claim concerning his appointment and removal powers. This area, which has received consistent challenge by Trump’s predecessors, involves some violation of his appointment powers, which ranges from the creation of *hybrid* commissions (a mix of executive and non-executive officials) to placing the ability to appoint executive officials in some entity other than the president, as well as insulating executive officers from removal.

In an example of a challenge to his appointment powers, President Trump objected to a section of the “Agricultural Improvement Act of 2018”³¹ that created a “Tribal Advisory Committee,” an 11 member advisory committee made up almost entirely of Members of Congress who would advise the Secretary of Agriculture on matters of interest to native American-Indian tribes.³² In Trump’s signing statement, he declared that even though he supported the goals of the Committee, it cannot exist because:

...it includes legislative branch appointees, however, the Committee cannot be located in the executive branch, consistent

²⁹ Trump, Donald J. 2018. “Statement by the President”. December 21. <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-18/>. The bill he signed was the “Abolish Human Trafficking Act of 2017.” P.L. 115-392.

³⁰ Trump, Donald J. 2018. “Statement by the President.” January 8, 2019. <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-24/>. The bill he signed was the “Civil Rights Cold Case Records Collection Act of 2018.” P.L. 115-426.

³¹ P.L. 115-334.

³² Section 12303.

with the separation of powers. I will therefore instruct the Secretary not to establish this Committee.³³

Trump declared that he would work with the Congress to pass remedial legislation in order to correct the problem, while also stating that his administration would work to carry out the spirit of the functions of the Committee while remedial legislation was being passed.³⁴

An example of a challenge to his authority to remove inferior executive officers can be found in section 5(f)(1)(b) of the “Civil Rights Cold Case Records Act of 2018.”³⁵ This legislation contained a number of challenges from President Trump, including the assertion of Executive Privilege to protect not just Trump, but also future presidents, from being compelled to release sensitive information.

Section 5 of the Act creates a “Civil Rights Cold Case Records Review Board” responsible for working with the Archivist of the United States to comb through and release any information on “unsolved civil rights cases” from the 1940s through the 1970s.³⁶ Section 5(f)(1)(b) stipulated that the members of the Board could only be removed by the President for “...for inefficiency, neglect of duty, malfeasance in office, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the member’s duties.”³⁷ In President Trump’s signing statement, he argued that the Congress could not place such restrictions on why a president may remove a subordinate.

³³ Trump, Donald J. 2018. “Statement by the President.” December 20. <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-13/>.

³⁴ Ibid.

³⁵ P.L. 115-426.

³⁶ “Congress Enacts Civil Rights Cold Case Records Collection Act.” 2019. *The National Coalition for History*. February 15. <http://historycoalition.org/2019/02/15/congress-enacts-civil-rights-cold-case-records-collection-act/>.

³⁷ “Civil Rights Cold Case Records Collection Act of 2018.” P.L. 115-426. Section 5(f)(1)(b).

The Congress placed these qualifications for removal in the hope that it would protect an executive branch official from being pressured or terminated as a result of complying with the law and releasing information that a president claimed was privileged.

The area with the second most challenges (18) involved the president's Article II, section 3 powers to recommend legislation to the Congress. In fact, the "Recommendations" challenge, is one of the few instances where President Trump singled out a specific section of the Constitution that was violated.

The "Recommendations" challenges are related to his supervisory prerogatives discussed above in that the Congress will stipulate that an inferior executive branch official recommend legislation to the Congress. For instance, in his signing statement to the "Iraq and Syria Genocide Emergency Relief and Accountability Act of 2018,"³⁸ section 7 of the bill required the Secretary of State to recommend to the appropriate congressional subcommittees the feasibility of prosecuting ISIS members who are accused of atrocities in Iraq and Syria. In the signing statement challenge, President Trump wrote that he will:

...treat this provision in a manner consistent with Article II, section 3 of the Constitution, which provides the President the discretion to recommend for the consideration of the Congress only "such measures as he shall judge necessary and expedient."³⁹

The third area (13) to be challenged by President Trump is a requirement that the president either consult with Congress *before* or *after* taking action on a particular policy,

³⁸ P.L. 115-300.

³⁹ Trump, Donald J. 2018. "Statement by the President." <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-12/>. December 11, 2018.

including instances where the Congress attempts to stop the president from taking any action without first securing the approval of a committee or a chamber of the Congress—more generally known as a *legislative veto*.⁴⁰ In most cases, the language in these bills are requests of the administration rather than demands, and although the president raises an objection, in most cases the White House tries to work with the Congress to provide them with any notices, reports, or other information requested in the legislation. These objections, which in some cases do cite Supreme Court precedent, are boilerplate objections raised by the OLC to ensure that no action creates a precedent that may potentially limit or impinge on the president's constitutional powers.⁴¹

Trump and the Rhetorical Signing Statements

Presidents also use signing statements for purely rhetorical purposes that allows them to garner goodwill among members of Congress (by recognizing them or sharing the spotlight), to attack his opponents, and to attract press attention that enables the president to reach the public at large. The rhetorical signing statement can be issued both in written form and/or as part of a public signing ceremony.

In Donald Trump's case, his use of the rhetorical statement, while few, are nonetheless interesting. First, Donald Trump coupled nearly every constitutional signing statement with a

⁴⁰ The legislative veto was ruled unconstitutional in the Supreme Court case *INS v Chadha*. 462 US 919. (1983). In the opinion, the Supreme Court referenced presidential objections to the legislative veto dating back to Woodrow Wilson.

⁴¹ See Korte, Gregory. 2017. "Facing veto override on Russia sanctions, Trump's signing statement raises constitutional issues." *USA Today*. August 2. <https://www.usatoday.com/story/news/politics/2017/08/02/trump-russia-sanctions-signing-statement-raises-constitutional-issues/534099001/>; Epstein, Richard A. 2017. "The Troubled Status of Russian Sanctions Legislation—with the President's Signing Statement Attached." *Just Security*. August 4. <https://www.justsecurity.org/43855/troubled-status-russian-sanctions-legislation-with-presidents-signing-statement-attached/>.

rhetorical statement delivered during a public signing ceremony. Of the 12 bill signing statements coded “Rhetorical,” eight of them were issued as a statement during a public signing ceremony. In an additional attempt at obscuring his challenges, on the White House website for “Briefings and Statements,” the rhetorical signing statement would be clearly listed by the name of the bill while the constitutional signing statement would simply list the bill number or no bill at all. For example, the public signing ceremony for the “Orrin G. Hatch—Bob Goodlatte Music Modernization Act” is listed on the White House website as “Remarks by President Trump at the Signing of H.R. 1551, the “Orrin G. Hatch—Bob Goodlatte Music Modernization Act”⁴² while the signing statement with the constitutional challenges is simply listed as “Statement by the President.”⁴³

To the untrained eye, one may see the statement made during the public ceremony without knowing there was a separate statement containing challenges—in some case many challenges—to the bill he was happy to sign. And in Trump’s case, every rhetorical statement listed on the White House website is by the name of the bill, and nearly every constitutional challenge is simply listed as “Statement by the President.”

Second, President Trump uses the public signing ceremonies as a way to create a powerful visual image—for instance, President Trump assembled a group of military vets in the Rose Garden when he signed the “VA Mission Act of 2018.” In the ceremony, President Trump announced a “truly historic moment...for our country” in signing the “...landmark legislation to provide healthcare choice” to our veterans, while taking time to recognize two veterans—Steve

⁴² <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-1551-orrin-g-hatch-bob-goodlatte-music-modernization-act/>. October 11, 2018.

⁴³ <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-7/>. October 11, 2018.

Cooper and Laura Vela—who “served their country with honor, only to be denied the medical treatment they desperately needed.”⁴⁴ At the same time, he was challenging five different sections of the law as unconstitutional,⁴⁵ as well as silently communicating to the Congress via memo his objections to proposed funding for the new programs included in the Act.⁴⁶ Nonetheless, the image of the President, flanked by veterans as well as a large gathering of congresspersons reinforced a 2016 campaign promise by President Trump to fix the problems in the VA.

A third use of the rhetorical signing statements are largely idiosyncratic to Donald Trump. This idiosyncrasy reveals itself in a variety of ways. First, it is well known that President Trump holds a grudge, taking any act of defiance as a personal insult. So, when Senator John McCain (R.AZ) voted “no” in 2017 to kill legislation to do away with the Affordable Care Act, or “Obamacare,” President Trump took McCain’s “no” vote personally. And this hostility did not dissipate after it was clear that Senator McCain was diagnosed with terminal brain cancer, ultimately succumbing to his illness in August 2018.

In August 2018, just a little over a week before Senator McCain passed, Congress sent to President Trump’s desk the “John S. McCain National Defense Authorization Act for FY 2019.”⁴⁷ The NDAA is one of the most important military spending bills, and its importance was meant as

⁴⁴ Trump, Donald J. 2018. “Remarks by President Trump at Signing of the VA MISSION Act of 2018.” <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-va-mission-act-2018/>. June 6.

⁴⁵ Trump, Donald J. 2018. “Statement by the President.” <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-3/>. June 6.

⁴⁶ Davidson, Joe. 2018. “Trump Rejects Parts of VA Law He was ‘Very Happy’ to Sign.” *Washington Post*. June 11.

⁴⁷ P.L. 115-232.

a public sign of congressional respect for McCain’s military service and support, including the years he spent as a POW during the Vietnam War.

President Trump gathered an impressive group of VIPs for his public signing ceremony, which included members of the Joint Chiefs, military personnel, and members of Congress. At no point during the ceremony did President Trump mention McCain’s name, including when he started his remarks with the reason they were all assembled—to sign a bill dedicated to Senator McCain! Trump began: “I’m here to sign our new defense bill and to pay tribute to the greatest soldiers in the history of the world: The U.S. Army” (McCain was in the Navy).⁴⁸

A second idiosyncrasy in Trump’s rhetorical statements—something of a truism in any of his public remarks—is his penchant for self-promotion regardless of whether it is related to the bill or not. One of the common refrains that emerges in his signing statement ceremonies is the riff he delivers on unemployment—from the macro-economic indicators to the specific groups that have benefited from his presidency, in particular women and minorities.

For instance, in the signing ceremony for the “Economic Growth, Regulatory Relief, and Consumer Protection Act,”⁴⁹ he states that in the history of the presidency, no other president has been able to cut regulations as much as he has, leading to unemployment at its “lowest level in nearly two decades.”⁵⁰ And then:

⁴⁸ Trump, Donald J. 2018. “Remarks by President Trump at a Signing Ceremony for H.R. 5515, ‘John S. McCain National Defense Authorization Act for Fiscal Year 2019.’” <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-ceremony-h-r-5515-john-s-mccain-national-defense-authorization-act-fiscal-year-2019/>. August 13.

⁴⁹ P.L. 115-174.

⁵⁰ Trump, Donald J. 2018. “Remarks by President Trump at Signing of S. 2155, Economic Growth, Regulatory Relief, and Consumer Protection Act.” <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-s-2155-economic-growth-regulatory-relief-consumer-protection-act/>. May 24.

African American unemployment has reached its lowest level in history. And the same thing for Hispanic unemployment—lowest level in history. Women—lowest level in 19 years.”⁵¹

Trump would recite these great unemployment statistics in three additional signing ceremonies, where sometimes it would be thrown in as an afterthought and in some cases, his numbers would change.

For example, when signing the VA reform bill mentioned above, which was a ceremony largely focused on veterans, Trump managed to segue from reforming the VA to his great economic numbers. He declared that because of his actions, the veterans are able to come home to a great economy:

And they can be very proud of their country because, literally, this week, we have gotten the best financial numbers, the best economic numbers, the best numbers on unemployment and employment that we’ve ever had as a country. Strongest economy we’ve ever had. It’s so good, because we can do so many more things when that happens, including, of course, jobs.⁵²

He then points to the best unemployment numbers of African Americans and Hispanics, and then when he gets to women, it is still the best numbers for women, only now, instead of the best numbers for the last 19 years, it was now the best numbers for the last 21 years.⁵³

⁵¹ Ibid.

⁵² Trump, Donald J. 2018. “Remarks by President Trump at Signing of the VA MISSION Act of 2018.” <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-va-mission-act-2018/>. June 6.

⁵³ Ibid.

And finally, in the signing ceremony for the McCain defense authorization bill, he once again recites the great unemployment numbers, and again, the best in history for African Americans and Hispanics, and this time he also includes Asians. Only this time, when getting to women's unemployment numbers, Trump says:

Women's unemployment is not—I'm sorry—doing quite as well. It's only the lowest level in 65 years (emphasis mine). So we're not doing as well. But we'll do better. I think within about three weeks, when the new numbers come out, you'll (sic) probably be lowest in history also.⁵⁴

On May 24, 2018, President Trump had produced unemployment numbers for women that were the best in 19 years. On June 6, 2018, he had produced unemployment numbers for women that were the best in 21 years. Then, on August 13, 2018, he had produced unemployment numbers for women that were the best in 65 years! And for good measure, if the public was largely unaware of these economic successes, it was the fault of the "fake media," which he singled out for blame in two different signing ceremonies.⁵⁵

A third idiosyncrasy in his ceremonial signing statements is his tendency towards hyperbole. Anyone who has paid attention to Trump's public remarks will recognize his tic of referring to things as "beautiful," "best," "historic," etc. For example, in signing the VA reform bill discussed above, Trump remarks: "This is truly a historic moment, historic time for our

⁵⁴ Trump, Donald J. 2018. "Remarks by President Trump at a Signing Ceremony for H.R. 5515, 'John S. McCain National Defense Authorization Act for Fiscal Year 2019.'" <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-ceremony-h-r-5515-john-s-mccain-national-defense-authorization-act-fiscal-year-2019/>. August 13.

⁵⁵ The first in the May 24th ceremony for the regulatory relief bill, and the second in the August 13th signing of the McCain defense authorization bill.

country. I'll be signing landmark legislation to provide healthcare choice—what a beautiful word that is, 'choice'—and freedom to our amazing veterans.”⁵⁶ Or, in his signing of the McCain defense authorization bill, he called the M-1 Abrams tanks “beautiful”, and then said this about the stealth bombers: “Seventy seven F-35 Joint Strike Fighters. You know, that's stealth. I talked to a couple of pilots—great pilots—I said, 'How are they? They said, 'They're hard to beat because you can't see them.' It's always hard to beat the enemy when you can't see it. The greatest in the world.”⁵⁷ And finally, in the same signing ceremony, after discussing how manufacturing jobs are returning to America, Trump made this non-sequitur: “No longer are we apologizing for America. Instead, we are now standing up for America. It's called 'America First,' if that's okay with you. We're standing up for our military, and we're standing up for our great American flag. We're standing for our flag.”⁵⁸

One final thing regarding Trump's signing ceremonies that is noteworthy, and it is not just that he likes the attention it gives him or that he will often pack the events with people who are there to simply praise Donald Trump (such Kid Rock, who attended an October 2018 signing ceremony in the Roosevelt Room—the same day Kanye West visited the White House); it is how much attention he gives to Vice-President Mike Pence. In nearly every one of Trump's public signing ceremonies, Trump acknowledges Pence, and in most cases, will ask Pence to speak. It is a rare thing for a president to share the spotlight with anyone, let alone the vice-

⁵⁶ Trump, Donald J. 2018. “Remarks by President Trump at Signing of the VA MISSION Act of 2018.” <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-va-mission-act-2018/>. June 6.

⁵⁷ Trump, Donald J. 2018. “Remarks by President Trump at a Signing Ceremony for H.R. 5515, 'John S. McCain National Defense Authorization Act for Fiscal Year 2019.'” <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-ceremony-h-r-5515-john-s-mccain-national-defense-authorization-act-fiscal-year-2019/>. August 13.

⁵⁸ Ibid.

president. But Trump does, which speaks both to their close working relationship and the trust that Trump has in Pence to be loyal.

Concluding Thoughts on Donald Trump's Use of the Signing Statement

In looking at Donald Trump's use of the signing statement in his first two years, and in particular, those statements where he challenges provisions of the law he has signed, there are some interesting patterns that emerge that are in some cases consistent with, and in other cases contrary to, the manner in which previous presidents used the signing statement.

First, in comparing Trump's use of the constitutional signing statement to Presidents Reagan-Obama, it is obvious that this White House has been far more aggressive than any previous president in making the constitutional challenges to various provisions on the law. When comparing Reagan-Trump, the closest president to Trump in the number of challenges is George W. Bush, which is not a surprise given the historic nature of the Bush43 administration and the assertions of presidential power. This is also consistent with Republican administrations from Bush41 through Donald Trump, where the tendency is to vigorously defend presidential prerogatives. Furthermore, looking at Table 2 and the average number of challenges per statement, Trump continues a trend in increasing the average number of challenges with each successive administration.

A second area of consistency carried forward from previous administrations is Trump's defense of foreign policy prerogatives. In particular, two areas stand out—the ability to recognize foreign governments/diplomats, and the Commander in Chief and the prosecution of war.

In the recognition area, Trump broke with recent administrations in recognizing Jerusalem as the capital of Israel. This issue had been at the heart of a back and forth between the Congress and recent presidents in an effort to push U.S. policy closer toward Israel by requiring the United States to move its embassy in Israel to Jerusalem,⁵⁹ as well as a requirement that the State Department list “Jerusalem, Israel” on the passports of citizens born in Israel.⁶⁰

In George W. Bush’s signing statement of the Act, he stated that this requirement:

“...impermissibly interferes with the President’s constitutional authority to conduct the Nation’s foreign affairs and to supervise the unitary executive branch...(and) if construed as mandatory rather than advisory, impermissibly interfere with the President’s constitutional authority to formulate the position of the United States to speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.”⁶¹

As a result, the Bush administration refused to recognize the requirement as constitutional. The Obama administration adopted the Bush administration challenge and was sued in Federal Court by the parents of Menachem Binyamin Zivotofsky, who was born in Jerusalem in 2002, and who wished to have his passport identify Jerusalem, Israel as his place of birth.⁶² Eventually the case reached the Supreme Court, and was resolved in favor of the

⁵⁹ “Jerusalem Embassy Act.” P.L. 104-45. 1995.

⁶⁰ “Foreign Relations Authorization Act for Fiscal Year 2003.” P.L. 107-228, section 214(d). 2002.

⁶¹ Bush, George W. 2002. “Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003.” *Weekly Compilation of Presidential Documents*. Vol. 38, No. 40. September 30. p. 1659.

⁶² Zivotofsky v Kerry, 576 U.S. 1059. 2015.

president, arguing that the president has “exclusive” power in the area of foreign affairs, and part of that power is to determine what is written on a passport.

In allowing the case to go to court, the proponents of this policy inadvertently gave to the president a Supreme Court precedent that helps cement power in the executive. For instance, President Trump doesn’t just have to assert “sole organ” authority in his signing statements, as he has done multiple times, but he can also assert “sole organ” authority AND cite Supreme Court precedent, which he also has done. For instance, in his 2017 signing statement to the “Countering America’s Adversaries through Sanctions Act,”⁶³ Trump wrote

In its haste to pass this legislation, the Congress included a number of clearly unconstitutional provisions. For instance, although I share the policy views of sections 253 and 257, those provisions purport to displace the President’s exclusive constitutional authority to recognize foreign governments, including their territorial bounds, in conflict with the Supreme Court’s recent decision in *Zivotofsky v. Kerry*.⁶⁴

Section 253 and 257 deal with a variety of hostile Russian military invasions. Section 253 involves a “Statement of Policy” that asserts the “Stimson Doctrine,” a 1930s-era policy not to recognize the legitimacy of territory seized by force. In this case, the Doctrine is focused on the “...illegal invasions and occupations of Abkhazia, South Ossetia, Crimea, Eastern Ukraine, and Transnistria.”⁶⁵ Section 257 deals with the Russian invasion of Eastern Ukraine, and it

⁶³ P.L. 115-44.

⁶⁴ Trump, Donald J. 2017. “Statement by President Donald J. Trump on the Signing of H.R. 3364.” <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-signing-h-r-3364/>. August 2.

⁶⁵ P.L. 115-44, section 253.

involves both a statement that the US does not recognize territory seized by force and it also involves sanctions to target Russian energy exports, in particular the Nord Stream2 gas pipeline.⁶⁶

The issue of Trump and the actions of the Russian government are outside the scope of this paper. What is important is that the Supreme Court has given the president an additional tool—a favorable opinion—that he can use, (and now has used) in his enforcement of the law, similar to the way the *Chadha*⁶⁷ opinion is consistently cited to keep the Congress from exacting post-enactment influence of how the president spends appropriated money or how the president enforces policy.

Another foreign policy area where President Trump has been consistent with his immediate predecessor is regarding the issue of military detainees at the Guantanamo Naval Base.

When Barack Obama ran for the presidency in 2008, one of his campaign promises involved closing the offshore detention facilities at the Guantanamo Naval Base in Cuba. Obama argued that Guantanamo was counterproductive to American interests and values and promised to close the facility once in office. As a result of the promise, the Congress consistently blocked the Obama administration from either moving detainees into the US to be prosecuted in civilian courts or to move them to a third-party country.⁶⁸ As a result, Obama

⁶⁶ Ibid. section 257.

⁶⁷ “INS v Chadha.” 462 U.S. 919. 1983.

⁶⁸ Elsea, Jennifer K. and Michael John Garcia. 2015. “Wartime Detention Provisions in Recent Defense Authorization Legislation.” Report R42143. CRS Reports. January 23. Washington D.C.

often signed the legislation while simultaneously raising objections to the intrusions into his commander-in-chief powers.⁶⁹

Despite Donald Trump's claim to want to bring back waterboarding as well as expand the detention facility at Gitmo,⁷⁰ he has continued to raise the exact same objections as President Obama regarding the handling of detainees at the facility. In three different bills,⁷¹ Trump has consistently challenged provisions to bind the president's hands regarding his handling of the military detainees at the facility. It is one of the rare instances where President Trump supports and continues a position advanced by President Obama.

The differences in how Trump uses the constitutional signing statement are also noteworthy. There are two patterns that deserve greater attention.

The first pattern is how Trump not only uses Supreme Court precedent to buttress his objections, but also the signing statement challenges issued by his predecessors. In the first two years, President Trump has referenced an Obama signing statement, two Bush 43 signing statements, a Bush 41 signing statement and two of Reagan's signing statements to support his actions. For example, in signing the "Frederick Douglass Bicentennial Commission Act,"⁷² President Trump wrote: "[C]onsistent with Signing Statements issued by President Obama and President Reagan regarding similar legislation....," he would interpret the Act, which

⁶⁹ See for example Obama, Barack H. 2015. "Statement on Signing the National Defense Authorization Act for Fiscal Year 2016." *Daily Compilation of Presidential Documents*. November 25. GPO: Washington, D.C

⁷⁰ Farmer, John J, Jr. and Edward M. Neafsey. 2018. "Trump and Torture." *Lawfare Blog*. <https://www.lawfareblog.com/trump-and-law-torture>. March 1.

⁷¹ "Consolidated Appropriations Act, 2017." P.L. 115-31; "National Defense Authorization Act for FY 2018." P.L. 115-91; and the "McCain National Defense Authorization Act for FY 2019." P.L. 115-232.

⁷² P.L. 115-77.

potentially allowed non-Executive Branch officials to sit in an Executive Branch capacity without first being appointed by the president, as limiting their participation to a ceremonial role.

While it isn't the first time a president referenced his predecessor's signing statement objections, it is unusual to see the references more than once to twice. This appears to demonstrate the work of attorneys in the Office of Legal Counsel to establish an historical lineage of objections that allows President Trump to both make his case in the courts, if necessary, as well as to publicly declare that his actions are not unusual.

The second interesting pattern is the use of the constitutional signing statement to challenge existing law. For example, in signing the "Act to Amend the Federal Assets Sale and Transfer Act of 2016,"⁷³ Trump issued a single objection to the original law, the "Federal Assets Sale and Transfer Act of 2016"⁷⁴ signed in the final days of the Obama administration. When Barack Obama signed the original law in December 2016, there was no signing statement objections issued. Yet when Donald Trump signed the legislation, he objected to the original law incorporated into the amended act. The objection was an "Appointments" violation where most of the members of an advisory board were made from the Congress, which Trump treated as "advisory".⁷⁵

Finally, the work of the Office of Legal Counsel merits some discussion. Ever since the Reagan administration, the Office of Legal Counsel has used the signing statement to help secure and protect the president's constitutional powers while also advancing his policy

⁷³ P.L. 115-437.

⁷⁴ P.L. 114-287.

⁷⁵ Trump, Donald J. 2019. "Statement by the President." <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-27/>. January 14.

objectives. Thus the Office of Legal Counsel, and the attorneys who work in the office, will often send to the White House numerous objections to the bill the president will sign, and it is up to the White House staff, along with the White House lawyers, to determine whether or not to include OLC objections, which sometimes have the potential to blow up political deals the White House makes with Congress to get a bill to the president's desk, or potentially to embarrass the president.

This happened with the very first signing statement issued by President Trump. In signing the "Consolidated Appropriations Act, 2017,"⁷⁶ Trump made a sweeping objection on 5th amendment due process grounds regarding set asides for minority businesses and for Historically Black Colleges and Universities (HBCUs).⁷⁷ This 5th amendment objection is often used in Republican administrations, and it normally is a general objection, not a specific objection like Trump delivered.⁷⁸

The problem? In February 2017, President Trump, as part of "Black History Month," met with a number of African-American leaders, including those affiliated with HBCUs, to pledge his unwavering support, which also included supportive press releases from Betsy DeVos, the secretary of Education. Trump's signing statement seemed to renege on this support, potentially costing the HBCUs millions of dollars in federal aid.⁷⁹ As a result of the blowback he

⁷⁶ P.L. 115-31

⁷⁷ Trump, Donald J. 2017. "Statement by President Donald J. Trump on Signing H.R. 244 into Law." <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-signing-h-r-244-law/>. May 5.

⁷⁸ See Cooper, Phillip. 2005. "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements." *Political Science Quarterly*. Vol. 35, no. 3. p. 525.

⁷⁹ Chambers, Francesca. 2017. "Trump Insists He's Not Targeting Black Colleges for Budget Cuts after Uproar over a Surprise Statement His Education Secretary didn't even Know about." *Daily Mail*. May 8.

received from critics and from African-American leaders, Trump was forced to issue a public statement days later clarifying his written signing statement. Trump wrote:

The statement that accompanied my signing of the Consolidated Appropriations Act, 2017, sets forth my intention to spend the funds it appropriates, including the funds for Historically Black Colleges and Universities (HBCUs), consistently with my responsibilities under the Constitution. It does not affect my unwavering support for HBCUs and their critical educational missions.⁸⁰

The lack of experienced staff at the White House means that these problems may occur more frequently than in previous administrations. Furthermore, it is important to have counterweight at the White House in order to balance the constitutional zeal in which the Office of Legal Counsel takes in challenging legislation passed by the Congress.

In connection with the first, a second thing that bears monitoring going forward is Attorney General William Barr. Barr has long been a fierce proponent of presidential power. Back in 1989, when he was the Assistant Attorney General at the Office of Legal Counsel, he wrote a memo that outlined ten ways that the Congress consistently attempts to limit presidential power.⁸¹ Nine of the ten items mirrors perfectly the type of challenges that appear in Trump's signing statements. The list of encroachments:

1. Interference with the appointment power;
2. Hybrid Commissions;
3. Restraints on the removal power;
4. Congressional micromanagement of the Executive Branch;
5. Congressional attempts to retrieve sensitive information;

⁸⁰ Trump, Donald J. 2017. "Statement from President Donald J. Trump on Historically Black Colleges and Universities." <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-historically-black-colleges-universities/>. May 7.

⁸¹ Barr, William P. 1989. "Common Legislative Encroachments on Executive Branch Authority." 13 Op. O.L.C. 248.

6. Reporting requirements to insert Congress into the Executive Branch decision-making process;
7. Legislative Vetoes;
8. Requirements to recommend legislation;
9. Encroachment on the foreign policy powers;
10. Restrictions on recess appointments.

Barr's enthusiasm for presidential power has not waned since he wrote the memo in 1989. Prior to joining the Trump administration, he sent an unsolicited memo⁸² to Deputy Attorney General Rod Rosenstein and OLC head Steve Engel regarding President Trump and the Mueller investigation. That memo, according to Neil Kinkopf, who served in the Justice Department in the Clinton and Obama presidencies, could be interpreted as advancing a view of presidential power he characterized as "the imperial executive."⁸³

Add into the mix Steve Engel at the Office of Legal Counsel, who served in that capacity during the George W. Bush administration and who participated in authoring the infamous "Torture Memo," you get a Justice Department that will push the cause of executive power as far as possible.⁸⁴ It stands to reason that the future for the Trump administration will see even more signing statement challenges, perhaps exceeding even the levels of the George W. Bush administration.

In sum, what makes Trump different from his predecessors is that President Trump does not appear to have any idea of the limits of the president's constitutional power, declaring recently at a conference that Article II means "...I have the right to do whatever I want as

⁸² Barr, William P. 2018. "Mueller's 'Obstruction' Theory." *Memorandum to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel*. <https://www.wsj.com/public/resources/documents/BarrMueller.pdf>. June 8.

⁸³ Kinkopf, Neil. 2019. "The Barr Memo and the Imperial Presidency." *The American Constitution Society*. January 17. <https://www.acslaw.org/expertforum/the-barr-memo-and-the-imperial-presidency/>.

⁸⁴ Kim, Seung Min. 2017. "McCain Opposes Trump Nominee over Torture Memos." *Politico*. November 8. <https://www.politico.com/story/2017/11/08/john-mccain-trump-nominee-steven-engel-torture-244706>.

president.”⁸⁵ And given the paralysis in the Congress, it matters that there is some pushback against the Executive Branch’s natural inclination to expand Article II power, which is what makes the signing statement a perfect tool.⁸⁶

A final example to illustrate the point is Trump’s assertion of executive privilege in his signing statements. He has asserted the privilege to protect information in both the foreign and domestic policy areas. For example, in signing the McCain defense authorization bill, President Trump asserted executive privilege over 18 different sections of the bill.⁸⁷ While it is not unusual for a president to assert executive privilege—and in fact President George W. Bush would also often make the claim—what is different is the sweeping nature of the claim, failing to cite any statutory or constitutional underpinning to support it.⁸⁸ And as Jonathan Shaub argues, Trump’s assertions of privilege “represent an extreme conception of [his] constitutional authority—one that renders congressional authority immaterial.”⁸⁹

⁸⁵ Brice-Saddler, Michael. 2019. “While Bemoaning Mueller Probe, Trump Falsely says the Constitution Gives Him ‘the Right to do Whatever I Want.’” *Washington Post*. July 23.

<https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/>.

⁸⁶ See Barilleaux, Ryan. 2006. “Venture Constitutionalism” in Kelley, Christopher S. *Executing the Constitution: Putting the President back into the Constitution*. NY: SUNY Press.

⁸⁷ Trump, Donald J. 2018. “Statement by President Donald J. Trump on H.R. 5515.”

<https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-h-r-5515/>. August 13.

⁸⁸ Anderson, Scott R. 2018. “What to Make of Trump’s NDAA Signing Statement.” *Lawfare Blog*.

<https://www.lawfareblog.com/what-make-trumps-ndaa-signing-statement>. August 23.

⁸⁹ Shaub, Jonathan. 2019. “The Prophylactic Executive Privilege.” *Lawfare Blog*.

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TABLE 1: Presidential Signing Statements and Legislative Activity from Ronald Reagan to Donald Trump, First Two Years.

<i>Congress</i>	Frequency Signing Statements	Frequency Bills Passed	% Bills with Signing Statements
<i>97th (1981-82) Reagan</i>	65	473	13.7%
<i>101st (1989-90) Bush I</i>	102	653	15.6%
<i>103rd (1993-94) Clinton</i>	74	465	15.9%
<i>107th (2001-02) Bush II</i>	59	377	15.6%
<i>110th (2009-2010) Obama</i>	24	381	6.3%
<i>Reagan - Obama</i>	324	2349	13.4%
<i>115th (2017-2019) Trump</i>	49	441	11.1%
<i>TOTAL (Reagan – Trump)</i>	373	2,790	13.4%

TABLE 2: Presidential Signing Statements by Type from Reagan to Trump

<i>Congress</i>	% Rhetorical Statements	% Constitutional Statements	Average Number Statement Challenges*	Total Number Statement Challenges*
97 th (1981-82) Reagan	86% (n=56)	14% (n=9)	1.56	14
101 st (1989-90) Bush I	48% (n=49)	52% (n=53)	2.11	112
103 rd (1993-94) Clinton	82% (n=61)	18% (n=13)	2.53	33
107 th (2001-02) Bush II	31% (n=18)	69% (n=41)	5.8	238
108 th (2003-04) Obama	52% (n=16)	48% (n=8)	3	24
109 th (2005-06) Trump	25% (n=12)	75% (n=37)	9.3	343
Reagan - Obama	65% (230)	35% (124)	3	421
Reagan - Trump	56% (n=212)	44% (n=161)	4.05	764

Note: The results for columns 4 and 5 are computed for constitutional signing statements only.