Judicial Review of Presidential Agency Instructions: Can the President Use the Law to Get What She Wants?

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Abstract: American politics scholars widely recognize the variety of tools presidents deploy to influence policy implementation. The implications of these tools for judicial review, however, are less understood. Notably, presidents can direct agencies on how to interpret the law through signing statements, often in direct conflict with the desires of Congress. Such interbranch disagreements can serve as an invitation for judicial review. Accordingly, our theory predicts that signing statements should increase the probability that a law is reviewed and invalidated by the U.S. Supreme Court. Further, this relationship should be strongest when the Court disagrees with the president's instructions, agencies are controlled by presidents, and when presidential authority is low. We find empirical support for this theory using a dataset of all laws passed and reviewed between 1981 and 2020. Overall, this study demonstrates the judiciary's role in adjudicating interbranch disputes over the law, while highlighting the limits of presidential policymaking.

In 2002, President George W. Bush's signed the Foreign Relations Authorization Act (FRAA) for Fiscal Year 2003 (Pub. L. No. 107-228). Upon signing the Act, the President stated his opposition to Section 214(d), which dictated that a person born in Jerusalem should have "Israel" recorded as the birthplace in their passport if requested. He issued a signing statement that claimed this section "impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch… U.S. policy regarding Jerusalem has not changed" and asserted the executive branch would treat it as "advisory."[1] The State Department subsequently issued a cable to overseas posts consistent with the signing statement.[2]

Perhaps inevitably, the executive branch's conflictual interpretation of the statute was challenged in federal court. Though both the U.S. District Court for the District of Columbia and the D.C. Circuit Court of Appeals found the case non-justiciable under the political questions doctrine,[3] the Supreme Court disagreed in *Zivotofsky v. Kerry* (2015) and held that the

[1] Bush, George W. 2002. "Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003." Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. https://www.presidency.ucsb.edu/documents/statement-signing-the-foreign-relations-authorization-act-fiscal-year-2003.

[2] See *Zivotofsky v. Secretary of State* 2007

[3] Specifically, they argued that it would be necessary for the court to resolve the status of Jerusalem to resolve the claim—an action it considered outside the scope of its duties and authority.

Constitution grants the president the exclusive right to recognize foreign nations. Consequently, Bush's interpretation was vindicated, and Section 214(d) was invalidated.

The *Zivotofsky* case demonstrates how the judiciary adjudicates disputes between the president and Congress over statutory interpretation. Here, presidents can offer alternative interpretations of the law that are often in direct conflict with legislative intent and can use their position atop the bureaucratic hierarchy to instruct agencies to follow suit. Notably, they guide agencies' policy implementation through any number of ways—through informal instructions (e.g., conversations, email, phone calls), executive orders, memoranda, or signing statements – all of which can influence judicial review (see Cooper 2014; Thrower 2017, 2019).

In this paper, we develop a theory on how the president's interpretation of the law influences Supreme Court decision-making. We specifically focus on signing statements since they are clearly traceable to statutes -- unlike other directives (e.g., executive orders and memoranda) that can invoke any range of historical and contemporary laws (or none) -- thus making comparisons between presidential interpretation and statutory text more straightforward. This tool is especially powerful because it is sufficiently precise to allow the executive branch to target particular statutes *before* the Supreme Court makes decisions – as opposed to other retaliatory actions that have been studied like court-curbing legislation and executive branch non-enforcement (Clark 2009; Gardner and Thrower 2023).

Specifically, our theory contends that the Supreme Court is more likely to review a law when the president has issued a signing statement objecting to its content. Here, the statement signals to the Court presidents' conflicting interpretation of the law and their instructions to agencies on how to implement it differently. We further argue that the Court is the most likely to intervene in such inter-branch disputes over statutory interpretation when it disagrees with the

president's position, based on ideological proximity, to prevent less favorable policy outcomes from being realized. And this relationship is dependent on whether the implementing agency is highly controlled by the president. Otherwise, the signing statements is less at risk of being implemented, making judicial review of the agency action less necessary. Finally, we argue that the Court is more likely to intervene following unfavorable presidential interpretations when the president has only been given weak statutory authority. If presidential authority is high, the Court is more prone to executive deference.

To test this theory, we analyze a dataset of all public laws passed between 1981 and 2020, noting the presence of any signing statement at the time of the law's adoption (Thrower 2020) and whether the law is subsequently subject to judicial review by the Supreme Court (Whittington 2019). We find support for these theoretical predictions. Overall, our results suggest that when the Supreme Court receives reliable signals of potential conflict between executive implementation and legislative intent, the justices are more likely to step in if they believe judicial review will result in policy closer to their preferences. More broadly, this study demonstrates just one way in which the president can influence judicial review and contributes to a body of literature that mostly focuses on the role of the Solicitor General. Further, our study helps clarify the limits and logic of signing statements—the purpose of which has been subject to much scholarly debate (Ostrander and Sievert 2013a,2013b, 2017; Howell 2013).

In the next section, we define and discuss signing statements and further situate our analysis in both the executive and judicial politics literatures. Then, we develop our theory of judicial review of signing statements and develop hypotheses. Next, we outline our data and methods before discussing the results of our analysis. Finally, we conclude and consider future directions. In particular, we note the potential to examine how the Supreme Court rules on the

merits of these cases, deepening our understanding of the strategy of presidential agency instructions in this arena.

Background

Institutional independence has insulated the Supreme Court from influence by the elected branches. Yet, recent scholarship has demonstrated that these institutional bulwarks can be breached (Harvey and Friedman 2006, Clark 2010, Harvey and Friedman 2009, Gardner and Thrower 2023). This collective work has argued that Congress and the president are able to influence Supreme Court behavior by threatening its institutional position. These studies, however, leave the president largely passive, with the Court independently inferring expectations of presidential preferences and behavior (see, e.g., Gardner and Thrower 2023, Owens 2010). There is significant value in these studies as explanations of Supreme Court behavior—there is good reason to believe that justices of the Supreme Court are sophisticated political observers with their finger on the pulse of Washington's political life (Baum and Devins 2009). Scholars, however, have described how members of Congress signal threats to the Court's institutional position through, for example, court curbing (Rosenberg 1992, Clark 2009, 2010), clarifying a mechanism within the discretion of Congress for influencing judicial behavior (Harvey and Friedman 2006, 2009).

Presidents can likewise threaten the Court's institutional position, through their role in approving court-curbing legislation and their ability to direct executive branch non-enforcement. For these reasons, recent work has demonstrated that the Court is attentive to presidential preferences to avoid executive retaliation (Gardner and Thrower 2023). As the most visible figure in American government, presidents regularly use their bully pulpits to influence policy

(Kernell 2006; Tulis 2018), though few studies have specifically examined how they use rhetoric to engage with the Court (Blackstone and Goelzhauser 2013; Collins Jr and Eshbaugh-Soha 2020). Rhetoric is not an entirely unstudied area, at least when it comes to one prominent *agent* of the president, the Solicitor General. Scholars have argued that the court is more likely to adopt the position of briefs of the Solicitor General when justices are ideologically aligned with the president, for example (Bailey, et al. 2005; Bailey and Maltzman 2011).[4]

But while some scholarship has investigated the Court's role in supporting presidential prerogatives, less attention is devoted to the *tools* and *means* by which a president can exert influence over the Supreme Court. Scholars have argued that the Court can provide regime support, but largely leaves open the question of how elected officials influence that support (Graber 1993, Whittington 2005). In previous accounts, the president remains mostly passive; dissatisfaction with policy is not signaled or communicated, but regime partners on the Court are still expected to resolve these constitutional conflicts to the president's advantage. We argue that presidents can directly signal their interpretation of the law, while flagging constitutional or policy defect, and their intention to direct agency actions that might conflict with how Congress intended the law to be implemented. And such conflicts have implications for judicial review – as discussed in the remainder of this section.

[4] Substantial literatures on *Chevron* deference describe when and how judges defer to executive agencies' legal interpretations (for discussion, see Bednar 2018).

Agency Implementation and the Law

Executive branch agencies are responsible for translating statutory law into actual public policy, through rulemaking and other processes. Though Congress delegates substantial authority to the bureaucracy for this purpose, it simultaneously provides varying levels of instructions to guide agency implementation. Legislators, moreover, use administrative procedures to further prevent bureaucratic drift, through "fire alarms" and the threat of litigation if agency action violates statutory parameters (McCubbins and Schwartz 1984; McCubbins, Noll, and Weingast 1987). Yet presidents can likewise offer their own view on how agencies should implement and interpret the law, which might conflict with legislative intent. Like Congress, presidents too have mechanisms to ensure bureaucratic compliance, through politicization (i.e., appointments and the threat of removal) and centralization (e.g., oversight and gatekeeping in the budgetary, rulemaking, and legislative processes).

Notably, presidents can both formally and informally instruct agencies on how exactly to implement the law, in ways that further their goals. Informally, presidents or their staffers can provide instructions through phone calls, emails, or in-person conversations. Such informal communications, however, are almost always difficult to observe, do not have any legal force, and often leads to internal confusion due to a lack of transparency (McClain n.d.). Alternatively, presidents can instruct agencies on how to implement the law through formal documents, such as unilateral directives or signing statements.

Unilateral directives, like executive orders or memoranda, provide agencies instructions on how to implement the law and can be issued by presidents at any time, independent of legislation. They are known to give presidents a first-mover advantage; they can be issued prior to legislative action, thus allowing presidents to set policy and placing the burden of response on

Congress (Howell 2003). While these directives generally have the force of law barring any statutory or constitutional violations (Cooper 2014) and are often used to bolster agencies' authority to act in the eyes of the courts (Thrower 2017a), they can easily be overturned by subsequent presidents (Thrower 2017b). Unilateral directives cover a wide variety of topics, many of which have not been addressed via statute. Though presidents often reference some statutes as a source of authority for their unilateral actions, they can strategically select which ones – old or new – to cite (Belco and Rottinghaus 2017). Other times, they might vaguely cite statutes of the Constitution as their source of authority.

Signing statements also allow presidents to instruct agencies on how to implement or interpret the law (Magill 2007). Unlike unilateral directives that can be issued at any time, signing statements are issued when presidents sign a bill into law and are thus attached to a specific law. Indeed, the Reagan administration successfully pushed for their inclusion in the legislative histories that the courts consider when reviewing the merits of law. Signing statements are generally used to express the president's thoughts on a newly signed law. She can express her support for the bill, highlights its benefits to certain constituencies, and commend Congress for its work. More importantly, presidents use signing statements to object to certain sections of the bill, usually on constitutional grounds. With these objections, presidents usually state their intention to instruct agencies to interpret or implement the problematic sections differently. Thus, signing statements are thought to give presidents a last mover advantage in shaping the way a law is implemented after Congress has passed it (Kelley and Marshall 2008), through executive branch instruction and judicial review (Thrower 2020).

In summary, executive branch agencies can be given conflicting instructions from both Congress and the president when implementing the law, which might have implications for

judicial review to serve as the final arbitrator. The following section develops a theory of how presidents' instructions to agencies influences Supreme Court behavior. We specifically focus on signing statements for several reasons. First, they are easily observable and documented, unlike informal instructions or even some formal directives that are not published (e.g., memoranda). Second, they are directly linked to specific laws. Presidents issue them when signing a bill, they are included in that law's legislative histories, and they cite specific sections. Thus, we can observe clear instances of when presidents and Congress give conflicting instructions to agencies. It is more difficult to study this conflict with other unilateral directives that are issued independent of statutes (e.g., executive orders and memoranda). Finally, signing statements are more durable than unilateral actions. Since Reagan, they have become a permanent part of the legislative record, whereas directives like executive orders are easily and frequently overturned by subsequent presidents (Thrower 2017b).

Theory

There are two avenues, we argue, that signing statements can affect judicial review. First, as previously discussed, signing statements can offer alternative interpretations of the law demanding executive branch implementation, which counters legislative intent but aligns with presidential preferences. These agency actions may generate standing for affected parties to engage in litigation challenging this interpretation of statute. Though there is some evidence that agencies follow presidential instructions in signing statements (May 1998), executive branch implementation of presidential directives generally remains severely under-studied (Kennedy 2015). Even so, signing statements can still act as a powerful signal to the federal courts, which is the second avenue of influence.

More specifically, signing statements induce judicial action to resolve interbranch disagreements over the meaning or constitutionality of statutes. Judicial action is invited both through the direct signal that signing statements send — judges can directly observe the nature of the conflict raised by the presidential statement — but also because those declining to enforce statutory text draw litigation from parties that would benefit from the statute as written (Gilman 2007). Signing statements, then, are a useful presidential tool to prompt the resolution of conflicts that were not settled through the regular legislative process. Whittington (2005) argues that there exist several scenarios in which presidents may support legislation despite defects it might contain, with the hope that regime partners on the Court can correct those defects.

We argue signing statements constitute an observable signal from the president to the Court that there is a legal or constitutional avenue available to solve a policy defect in congressional legislation. Indeed, some argue that presidents issue signing statements in the hopes that the courts will review the legislation (Alito 1986; Cooper 2014; Dellinger 1993; Devins 1987) – as further evidence by their push to be included in legislative histories. Even when a president is uncertain that the current Supreme Court is an ally on the issue at hand, the president can "lock in" their interpretation of the statute for future courts to consider even after she has left office (as in *Zivotofsky*). Furthermore, public-facing signing statements are likely to act as a signal to potential litigants about how to construct lawsuits challenging government policy.

Overall, the very nature of signing statements is likely to raise the risk of judicial review. On its face, a signing statement which objects to, rejects, or advances a controversial interpretation of a particular provision of a statute should signal to courts that constitutional review or statutory interpretation by the judiciary may be merited. Moreover, as in *Zivotoksy*, an

apparent conflict between the facial interpretation of a statute and the executive implementation of a statute may generate standing for parties to challenge executive action. The Court therefore will view the signing statement as a signal of legal conflict and salience.

H1: The probability that a law will be reviewed by the Supreme Court will increase if it has been issued with a signing statement.

Although the Court has an institutional duty to adjudicate interpretive disputes between Congress and the president, it is limited in its time and resources to do so. Thus, we argue that it will not intercede in these disputes unless the case can serve one of its own goals, primarily to pursue outcomes that are consistent with its ideology (e.g., Segal and Spaeth 2002). If the Court declines to review an agency's statutory implementation based on a signing statement, then the president's interpretation and preferred policy outcome stands.[5] When the Court agrees with the ideological position of the president, then judicial review is not needed. However, if the Court disagrees with the president's interpretation, then it will be more likely to oppose the policy implemented by the agency and, thus, judicial review is more likely. Overall, the signing statement only leads to judicial review if the Court has ideological incentives to correct the executive's interpretation.

[5] We think this is a reasonable assumption. It is rare that the Supreme Court denies petitions for certiorari submitted by the U.S. federal government. Therefore, cert petitions and denials are more frequent when the United States was the successful party at the circuit stage. See, e.g., McGuire 1998.

H2: The probability that a law will be reviewed by the Supreme Court will increase if it has been issued with a signing statement and the Court is ideologically distant from the issuing president. If the Court and the issuing president are ideologically close, a signing statement will not impact the probability of judicial review.

The previous hypotheses implicitly assume that agencies will perfectly implement presidential desires reflected in signing statements, thus prompting judicial review. Agencies, however, have their own preferences that they want to pursue in the policymaking process (e.g., Hollibaugh Jr and Rothenberg 2018). Though presidents have means to control agencies' behavior through politicization and centralization (Moe 1985), the degree to which they can do so varies by agency and determined by its structure (e.g., Lewis 2003). The stronger the president's control over the agency, the more likely it is that the agency's actions reflect presidential goals. Therefore, an ideologically motivated Court will be more likely to review executive interpretations by agencies that are subject to strong presidential control.

H3: The probability that a law will be reviewed by the Supreme Court will increase if it has been issued with a signing statement and the Court is ideologically distant from the issuing president. This relationship is strongest when the agency implementing the law is highly controlled by the president.

Finally, there are some areas of the law in which presidents enjoy greater deference from the courts and other political actors. Much of this deference comes from how much authority or discretion Congress has given them in the statutes themselves. Most notably Justice Robert Jackson famously stated in the concurring opinion of *Youngstown v. Sawyer* (1952) that

presidential authority is greatest (weakest) when explicitly (not) granted through statutes, but judicial scrutiny is warranted when Congress is silent. We expect the same logic to apply here. That is, when Congress gives presidents greater authority to act in the statute, their interpretations offered in signing statements may be viewed as more justified by the Court and by litigants. Thus, these statements may not lead to judicial review. However, when presidents have not been granted explicit authority, then their interpretations are more likely to be challenged, particularly by ideologically distant courts.

> ***H4: The probability that a law will be reviewed by the Supreme Court will increase if it has been issued with a signing statement and the Court is ideologically distant from the issuing president. This relationship is strongest when the presidents have low statutory authority.***

Data and Measurement

Empirical studies of judicial decision-making largely use a *case-based approach*, where the individual case is the unit of analysis (e.g. Spiller and Gely 1992, Owens 2010). But there are two main limitations to this approach. First, scholars can only analyze the *merit phase* of judicial decisions, that is, what determines whether courts and judges decide to uphold or invalidate a law that is being reviewed. Exclusive investigations of the merit phase, however, do not consider whether courts decide to *review* a law in the first place. In particular, the Supreme Court has considerable agenda setting powers through its cert decisions, thus affording justices tremendous opportunities to strategically pursue their goals well before (and often in lieu of) the merit phase.

Second and relatedly, only examining the merit phase of judicial decisions does not allow scholars to account for other reasons why some laws are reviewed, and others are not. Such

factors – like salience and complexity of the law, and its implementation – might confound results produced by an empirical analysis of just the merit phase. Altogether, empirical studies analyzing whether a law is invalidated can lead to misleading inferences, since they do not account for how judges might strategically avoid reviewing certain laws and how other factors might make some laws more likely to be on the agenda than others.

Data and Dependent Variable

Following recent scholarship (Harvey and Friedman 2006, 2009; Gardner and Thrower 2023), we use a *law-based approach* to ameliorate some of these concerns. Here, the unit of analysis is law-year, allowing us to observe whether a given law is reviewed and invalidated in any particular year. Once a law is invalidated, it is eliminated from the dataset. To construct the dataset, we identify every law passed by Congress between 1981 and 2020 using data from the Comparative Agendas Project (CAP). We eliminate commemorative laws, such as naming highways or declaring holidays. We begin the analysis with the Reagan administration, since he is widely believed to be the first president to systematically use signing statements to advance presidential prerogatives through administrative and judicial avenues (Thrower 2020; Cooper 2005; Kelley 2006, 2007; Pfiffner 2008).[6]

While the law-based approach allows us to estimate whether and when a particular statute will be reviewed, it does not directly account for how litigant behavior might influence cert decisions and whether laws are challenged in the first place. To measure the latter, we would

[6] Alternatively, we begin the empirical analysis in 1986, when signing statements were officially part of the legislative histories and find the results to be robust.

need a dataset of all laws that were considered at the cert phase and their outcome. Such data, however, would require a massive amount of data collection. But there are numerous steps we can take to account for what influences whether laws are challenged by litigants in the first place. First, we limit the subset of laws that could possibly be reviewed in our analysis by identifying significant laws.[7] Second, we identify the issue area of the law based on the CAP's coding of major topics and include policy-specific fixed effects. We believe that the more significant laws are the ones most likely to attract litigation, in addition to certain policy areas.[8] Finally, we can include other control variables, such as the salience and complexity of the law (as described in the following sections) that might also affect how likely these laws are to be challenged.

To construct our dependent variables, we use Whittington's *Judicial Review of Congress Database, 1979-2022*[9] to identify all laws that were reviewed and overturned by the Supreme Court. Our first dependent variable is the probability a law is reviewed, which assumes the value of 1 if the law was reviewed by the Court in a given year and 0 otherwise. Similarly, our second

[7] We measure significance as whether the law received above average coverage in the Congressional Quarterly Almanac, as reported by the CAP. We use this measure because it gives us the most amount of coverage in the years that we analyze. While Mayhew does identify laws that are landmark, and this dataset is updated through 2020, this measure significantly limits the size of our sample. Indeed, in some years (particularly the later years), there are only a small handful of laws identified as landmark. Even so, we use the Mayhew subset as a robustness check (finding our analyses to still hold) and we control for it in our analyses.

[8] The analysis is robust when omitting these fixed effects.

[9] Available at https://kewhitt.scholar.princeton.edu/judicial-review-congress-database.

dependent variable is an indicator for whether the law is invalidated in a particular year. If this law is fully invalidated on its face, it is eliminated from the dataset in every year thereafter.

Main Independent Variables

Our first independent variable of interest is whether the president issued a relevant signing statement on any given law (*Signing Statement*). To construct this variable, we first identify the entire universe of signing statements issued between 1981 and 2020 from the *American Presidency Project*. We then read the text of each statement to identify the ones that raise any objection to the law, which is the subset of statements used for this variable. As previously mentioned, signing statements are sometimes used for more rhetorical purposes like to praise the bill or identify constituencies that might benefit from the newly passed law. For the purposes of our theory, we are interested in identifying only those statements that might lead to instructions to agencies on how to interpret the law differently. As such, we identify those statements that raise objections to the law – which often lead to presidents giving instructions to agencies on alternative implementations.[10]

[10] Alternatively, we code statements based on whether presidents object to the law based on constitutional grounds – which yield similar results. Furthermore, the results hold when using a subset of signing statements where the president specifically instructs agencies to implement or interpret the law differently. However, this coding decreases the sample of statements and further, presidents do not always explicitly instruct agencies – as demonstrated in the opening example.

To test the H2, we measure the absolute distance between the ideal point of the president who signed the law and that of the current Supreme Court median (*D(Issuing President, Current Court)*), using the *Judicial Common Space* (JCS) scores.[11] The main advantage of the JCS scores is that they scale Supreme Court Justices, members of Congress, and the President in the same policy space, thus facilitating comparisons. Furthermore, these measures are offered through 2022.[12] This distance should capture the degree to which the Court agrees or disagrees with the signing statement, assuming that the president's ideal point is a reasonable proxy for the ideological location of her statement.

To test the H3, we use the Selin (2015) measure of agency independence, where low (high) values of this measure correspond to high (low) presidential control.[13] We use Thrower's (2020) dataset of laws, where she identifies the primary agency responsible for implementing that particular law, and we match it to its corresponding score for agency independence. We take the mean value of agency independence and subset the analysis based on laws where the responsible agency is under high presidential control (below the mean of agency independence) and laws where the responsible agency is under low presidential control (above the mean of agency independence). According to Hypothesis 3, we expect to find significant conditional

[11] Available at https://epstein.usc.edu/jcs

[12] The analyses are robust to using the Bailey scores.

[13] We use the first dimension of Selin's measure, Independence of Decision-Makers, where fewer stipulations on appointments (e.g., term length, partisan balancing, staggered terms), and Cabinet or Executive Office of the President agencies correspond to greater presidential control (i.e., lower agency independence).

effects of *SS x D(Issuing President, Current Court)* only for agencies under high presidential control.

Finally, we measure presidential authority based on Thrower's (2020) dichotomous coding of whether the statute explicitly grants the president any authority. We accordingly subset the data into laws with high presidential authority and low presidential authority. Consistent with Hypothesis 4, we expect the conditional relationship between the effect of a signing statement and president-court distance to be significant for laws with low presidential authority.

Control Variables

We include numerous control variables that might also impact the probability a law is reviewed or invalidated. To begin, the Court's relationship to the current ruling regime can influence whether a law is reviewed or invalidated. In particular, the Court may avoid reviewing (or invalidating) a law if it believes Congress or the Court might find their ruling unfavorable to avoid potential sanctions (Harvey and Friedman 2006, 2009; Gardner and Thrower 2023). As such, we include the ideological distance between the current president and the Court (*D(Current President, Current Court)*), the current Congress and the Court (*D(Current Congress, Current Court)*), and the current President and current Congress (*D(Current President, Current Congress)*). Relatedly, the extent to which the status quo could be moved might also impact whether the Court decides to hear the case. Following previous studies, we proxy this impact by

using the ideological distance between the Congress that passed the bill and the Current Congress (*D(Issuing Congress, Current Congress)*).[14]

We include several law-specific features that might influence judicial review. First, we control for whether the law is considered landmark, as identified by Mayhew, which could increase the likelihood that it is reviewed or invalidated. Second, we control for the complexity of the law, by including a measure of the logged number of words it contains. More complex laws might also invite greater litigation.

We also measure the public's appetite for policy change by including measures of the current policy-specific public mood (as measured by Stimson), and the current unemployment rate. Similarly, presidents with high public approval might be more willing to issue signing statements in the first place and thus their approval rating, as measured by the Gallup Poll, is also included in the analyses. Finally, we control for the possible effects of time by including a variable for the number of times the law has been previously reviewed and cubic spline measures that account for the age of the law at different intervals, following previous studies (see Beck 1998; Gardner and Thrower 2023).

Results

Table 1 shows the logit regression coefficients on the probability that an individual law is reviewed in any given year. Column 1 reports the results for the entire population of laws passed between 1981 and 2020, while column 2 analyzes only the subset of significant laws (as measured by CQ coverage). Across both models, the probability of review is positively

[14] The results are robust when using the distance between the issuing Congress and the Current Court.

correlated with the presence of a signing statement – as evidenced by the positive and significant coefficients. Indeed, when the president signed a statement objecting to sections of the law, the Court became 0.30% more likely to review the same law. Though these effects are seemingly small, they are on par with the fact that the likelihood of a law being reviewed in any given year is only 0.07%. Another way to interpret these effects is to consider the odds a law is reviewed when a signing statement is not issued in relation to the odds of review when a statement is issued. Here, a shift from no statement to statement corresponds to a 103% increase in the probability of review. Overall, this analysis provides some suggestive evidence that the Court is more likely to audit agency activity based on the president's conflicting interpretation of the law, consistent with H1.

Table 1: Signing Statements and Judicial Review

	(1)	(2)
Signing Statement	0.85 (0.30)***	0.78 (0.28)***
D(Issuing President, Current Court)	-0.17 (0.50)	0.30 (0.52)
D(Current President, Current Court)	-0.21 (0.45)	-0.45 (0.48)
D(Current President, Current Congress)	1.00 (0.60)*	1.16 (0.63)*
D(Current Congress, Current Court)	0.77 (0.76)	0.98 (0.87)
D(Current Congress, Issuing Congress)	0.95 (0.83)	1.15 (0.93)
Times Previously Reviewed	0.47 (0.07)***	0.49 (0.06)***
Landmark Law	2.58 (0.42)***	2.38 (0.35)***
Ln(Law Length)	0.36 (0.13)***	0.14 (0.10)
Unemployment	-0.05 (0.09)	-0.04 (0.09)
Presidential Approval	0.02 (0.01)***	0.02 (0.01)**
Public Mood	-1.90 (2.20)	-1.99 (2.31)
Age Cubic Spline	Yes	Yes
Policy Area Fixed Effects	Yes	Yes
Significant Laws	No	Yes
Constant	-9.05 (1.62)***	-7.80 (1.64)***
N	122,512	27,980
Log-Likelihood	-751.66	-553.61

Coefficients from logit regression, with robust standard errors clustered by law in parenthesis. The dependent variable is the probability a law is reviewed in a given year. Column (1) analyzes all laws passed and column (2) analyzes the subset of significant laws, based on CQ coverage. Two tailed tests, *p < 0.1, **p < 0.05, ***p < 0.01.

Table 2 evaluates Hypothesis 2, which expects the effects of a signing statement to be strongest when the Court disagrees with the president's interpretation of the law, as proxied by their ideological distance. Indeed, the results show significant interactive effects between the presence of a signing statement and president-Court distance. For ease of interpretation, we visualize these effects in Figure 1. This figure shows the marginal effects of a signing statement on the probability of a law being reviewed by the Court, at varying levels of *D(Issuing President, Current Court)*.

Table 2: Signing Statements, Ideological Distance, and Judicial Review

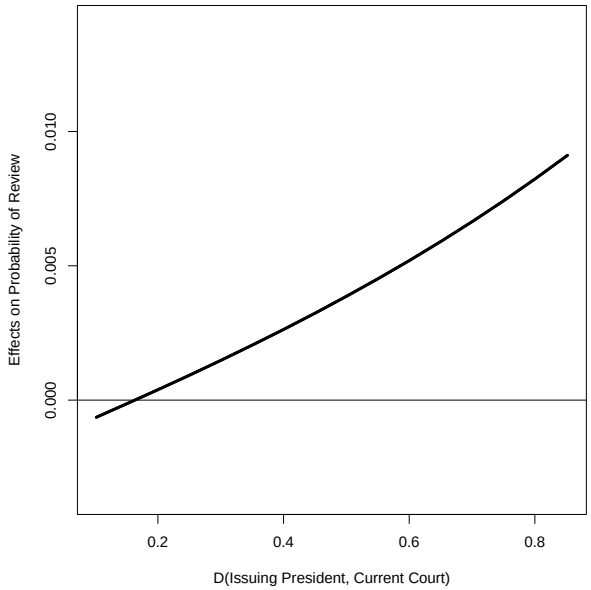
	(1)	(2)
Signing Statement	-0.31 (0.53)	-0.44 (0.57)
D(Issuing President, Current Court)	-1.29 (0.66)*	-1.14 (0.82)
Signing Statement x D(Issuing President, Current Court)	2.61 (1.01)***	2.73 (1.07)**
D(Current President, Current Court)	-0.22 (0.46)	-0.44 (0.48)
D(Current President, Current Congress)	0.97 (0.60)	1.16 (0.63)*
D(Current Congress, Current Court)	0.55 (0.76)	0.72 (0.87)
D(Current Congress, Issuing Congress)	1.33 (0.83)	1.64 (0.97)*
Times Previously Reviewed	0.48 (0.07)***	0.49 (0.06)***
Landmark Law	2.54 (0.41)***	2.37 (0.34)***
Ln(Law Length)	0.36 (0.13)***	0.14 (0.10)
Unemployment	-0.04 (0.08)	-0.02 (0.09)
Presidential Approval	0.02 (0.01)***	0.02 (0.01)**
Public Mood	-2.04 (2.24)	-2.16 (2.38)
Age Cubic Spline	Yes	Yes
Policy Area Fixed Effects	Yes	Yes
Significant Laws	No	Yes
Constant	-8.38 (1.76)***	-7.07 (1.77)***
N	122,512	27,980
Log-Likelihood	-748.12	-550.47

Coefficients from logit regression, with robust standard errors clustered by law in parenthesis. The dependent variable is the probability a law is reviewed in a given year. Two tailed tests, *p < 0.1, **p < 0.05, ***p < 0.01.

When the Court is ideologically aligned with the issuing president (and thus more likely to agree with her interpretation), the presence of a signing statement does not significantly impact judicial review. However, as these two branches disagree, signing statements become an increasingly impactful determinant of review. At the highest levels of president-Court discord,

the Court becomes significantly more likely to review a law that has been signed with a presidential statement. Thus, the Courts appear to be most likely to audit the actions of agencies implementing conflicting presidential interpretations of the law when it is the most prone to disagreeing with those interpretations – consistent with H2.

Figure 1: Marginal Effects of Signing Statement on the Probability of Review, Varying President-Court Distance



This figure shows the marginal effects of *Signing Statement* on the probability of review (y-axis) at varying levels of *D(Issuing President, Current Court)* (along the x-axis).

Yet we contend that these relationships are moderated on the degree to which agencies are actually responsive to the president's instructions (H3). As such, Table 3 subsets the analysis based on laws where the implementing agency is under high (Column 1) and low (Column 2) presidential control. We expect the effects of signing statement, moderated by ideological distance, to hold most strongly for the former; and we find just that in Table 3. While the coefficient on *Signing Statement x D(Issuing President, Current Court)* is positive for both models, it is only statistically significant for laws pertaining to agencies highly controlled by the president.

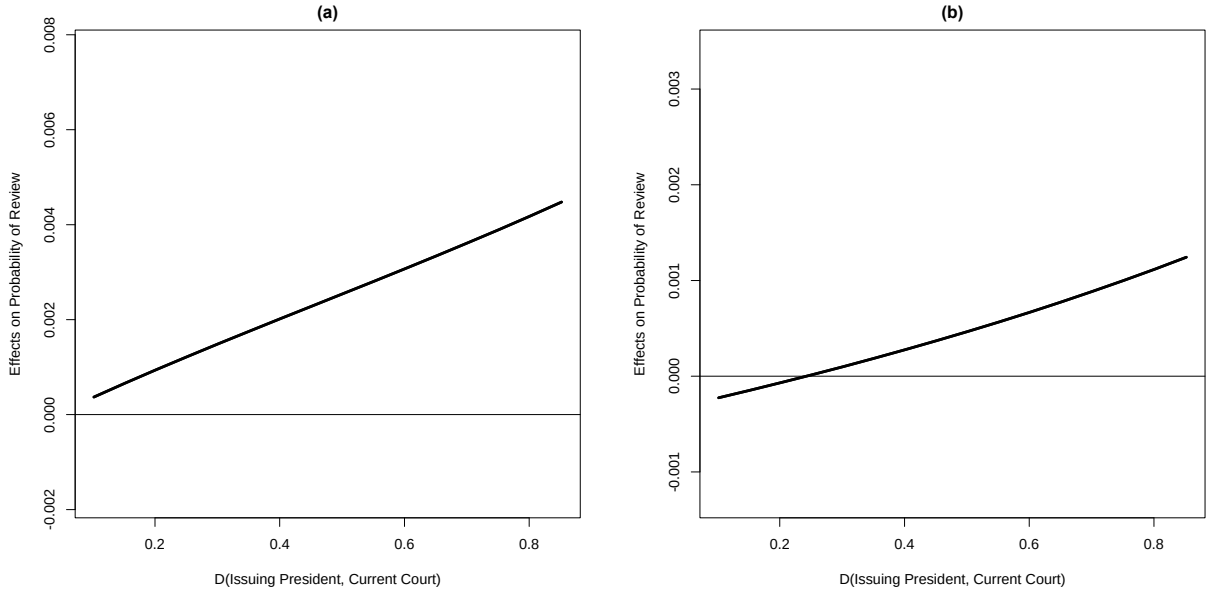
Table 3: Presidential Control and Judicial Review

	(1) High Presidential Control	(2) Low Presidential Control
Signing Statement	-0.13 (0.80)	-0.38 (0.78)
D(Issuing President, Current Court)	-2.09 (0.95)**	-0.45 (0.98)
Signing Statement x D(Issuing President, Current Court)	3.27 (1.42)***	1.57 (1.61)
D(Current President, Current Court)	0.27 (0.66)	-0.77 (0.66)
D(Current President, Current Congress)	0.93 (0.96)	0.95 (0.74)
D(Current Congress, Current Court)	0.91 (1.05)	0.19 (1.14)
D(Current Congress, Issuing Congress)	1.46 (1.19)	0.74 (1.27)
Times Previously Reviewed	0.42 (0.15)***	0.36 (0.06)***
Landmark Law	2.96 (0.49)***	1.90 (0.54)***
Ln(Law Length)	0.12 (0.10)	0.77 (0.18)***
Unemployment	-0.08 (0.11)	-0.02 (0.13)
Presidential Approval	0.01 (0.01)	0.03 (0.01)**
Public Mood	-2.64 (3.28)	-2.03 (2.26)
Age Cubic Spline	Yes	Yes
Policy Area Fixed Effects	Yes	Yes
Presidential Control	**High**	**Low**
Significant Laws	No	No
Constant	-5.79 (2.28)***	-10.81 (2.04)***
N	54,178	55,160
Log-Likelihood	-385.91	-335.70

Coefficients from logit regression, with robust standard errors clustered by law in parenthesis. The dependent variable is the probability a law is reviewed in a given year. Column (1) analyzes the subset of laws where the implementing agency is under high presidential control and column (2) analyzes the subset of laws where the implementing agency is under low presidential control. Two tailed tests, *p < 0.1, **p < 0.05, ***p < 0.01.

The marginal effects of *Signing Statement* on the probability of review from these models are shown in Figure 2. As before, these marginal effects are shown as *D(Issuing President, Current Court)* is varied along the x-axis. But now, these conditional effects are shown under conditions of high presidential control (Panel a) and low presidential control (Panel b). Under the former, signing statements are associated with an increasingly positive and significant effect on judicial review as president-Court distance increases.

Figure 2: Marginal Effects of Signing Statement on the Probability of Review, Varying President-Court Distance and by Presidential Control



This figure shows the marginal effects of *Signing Statement* on the probability of review (y-axis) at varying levels of *D(Issuing President, Current Court)* (along the x-axis). Panel (a) shows the analysis when the president exerts high control over the implementing agency. Panel (b) shows the analysis when the president exerts low control over the implementing agency.

But this relationship only holds when the agency is most likely to follow the president's instructions in those signing statements, otherwise these instructions are less effective at predicting judicial review. Indeed, when presidential control is low (Panel b), the conditional effects of signing statement and ideological distance are insignificant. Consistent with H3, laws with signing statements are the most likely to be reviewed when both the Court disagrees with the president's interpretation and when the agency is most likely to follow those instructions.

Finally, we argue that the effects of a signing statement should be most pronounced when presidential authority is at its lowest, given the increased likelihood of judicial and litigant scrutiny (H4). We test this hypothesis in Table 4, which analyzes the effect of *Signing Statement x D(Issuing President, Current Court)* on laws where presidents have low authority (Column 1) and high authority (Column 2). As expected, signing statements have the strongest impact on

judicial review for laws that give presidents less authority, as demonstrated by the positive and significant coefficient on the interaction term in Column 1 and the insignificant (and negative) effect in Column 2.

Table 4: Presidential Authority and Judicial Review

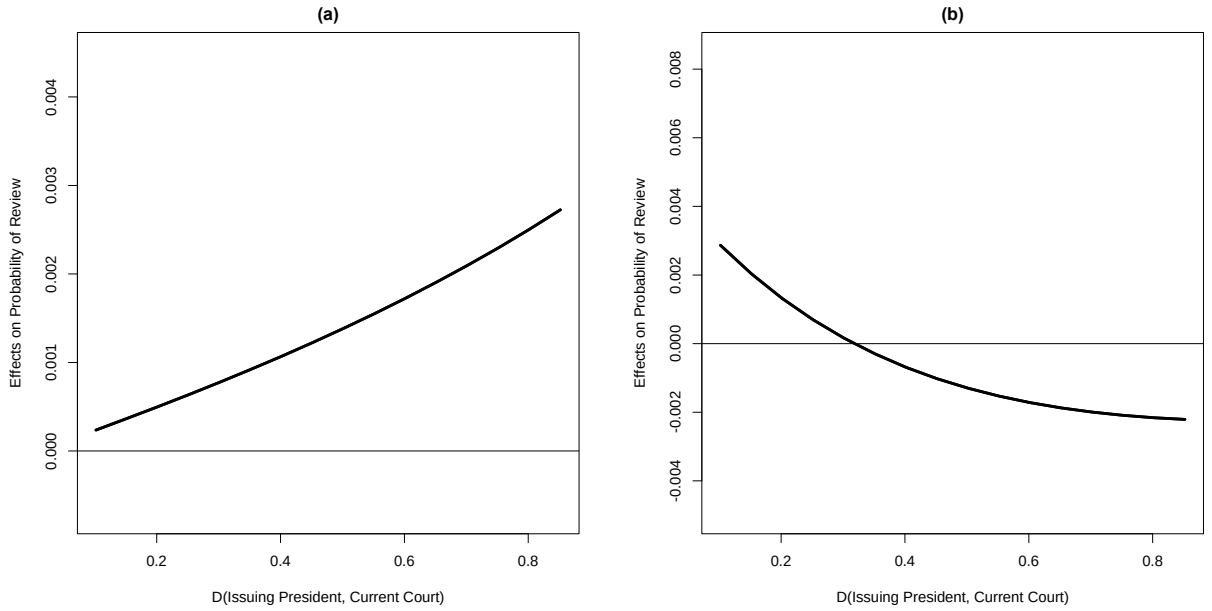
	(1)	(2)
Signing Statement	-0.02 (0.65)	0.98 (0.85)
D(Issuing President, Current Court)	-1.18 (0.84)	-0.67 (1.61)
Signing Statement x D(Issuing President, Current Court)	2.58 (1.15)***	-3.08 (2.25)
D(Current President, Current Court)	0.79 (0.63)	-2.16 (0.84)**
D(Current President, Current Congress)	2.02 (0.85)***	-1.15 (0.98)
D(Current Congress, Current Court)	-0.66 (0.87)	3.51 (1.72)**
D(Current Congress, Issuing Congress)	1.42 (0.92)	2.05 (2.10)
Times Previously Reviewed	0.61 (0.14)***	0.40 (0.08)***
Landmark Law	2.55 (0.47)***	2.18 (0.70)***
Ln(Law Length)	0.26 (0.12)**	0.48 (0.18)***
Unemployment	0.10 (0.09)	-0.40 (0.17)**
Presidential Approval	0.01 (0.01)	0.04 (0.01)***
Public Mood	-5.44 (2.52)**	8.21 (4.34)*
Age Cubic Spline	Yes	Yes
Policy Area Fixed Effects	Yes	Yes
Presidential Authority	No	Yes
Significant Laws	No	No
Constant	-7.54 (2.21)***	-12.58 (3.48)***
N	102,083	11,557
Log-Likelihood	-540.27	-162.56

Coefficients from logit regression, with robust standard errors clustered by law in parenthesis. The dependent variable is the probability a law is reviewed in a given year. Column (1) analyzes the subset of laws where the president is not given explicit authority and column (2) analyzes the subset of laws where the president is given explicit authority. Two tailed tests, *p < 0.1, **p < 0.05, ***p < 0.01.

Figure 3 shows the marginal effects of *Signing Statement* (along varying degrees of president-Court ideological distance) on the subset of laws with low (Panel a) and high (Panel b) presidential authority. When the president is not given explicit authority in the statute, the presence of a signing statement significantly increases the probability of judicial review at the highest levels of *D(Issuing President, Current Court)*. But this relationship dissipates, as the Court becomes more aligned with the president. For statutes that give presidents high authority, signing statements have an insignificant impact on judicial review, regardless of ideological

distance. These results suggest that signing statements and president-Court distance are the most likely to spawn judicial review when presidential authority is in question – consistent with H4.[15]

Figure 3: Marginal Effects of Signing Statement on the Probability of Review, Varying President-Court Distance and by Presidential Authority



This figure shows the marginal effects of *Signing Statement* on the probability of review (y-axis) at varying levels of *D(Issuing President, Current Court)* (along the x-axis). Panel (a) shows the analysis when the law does not give the president explicit authority. Panel (b) shows the analysis when the law gives the president explicit authority.

Conclusion

Though Alexander Hamilton extolled the virtues of an independent judiciary to ensure "impartial administration of the laws" in Federalist 78, he also famously recognized that the courts had neither the "purse" nor the "sword" and must rely on the other branches of government for enforcement. Accordingly, decades of scholarship have examined how these other branches influence judicial review (e.g., Murphy 1964; Eskridge 1991; Spiller and Tiller

[15] The results also hold when subsetting the dataset on laws related to foreign policy versus domestic policy, with the latter being areas in which the president has been traditionally thought to have less authority relative to the latter (Cooper 2014).

1992). Much of this literature focuses on how Congress, through its threat of court-curbing measures, can deter judges' decisions to review and overturn legislation (Clark 2010; Harvey and Friedman 2006, 2009). Recent studies have shown how presidents can likewise impact these decisions through retaliatory measures, specifically their role in executive branch non-enforcement and supporting court-curbing laws (Gardner and Thrower 2023).

Beyond threats of ex post retaliation, presidents can also play a powerful role in shaping judicial decision-making through actions they take before the Court has decided on a case. Perhaps most familiar, presidents can effectively use their appointed Solicitor General to successfully advocate for their position in particular court cases. But Solicitor General briefs are not the only way presidents can communicate their preferences to the Court. Importantly, presidents can more broadly assert their interpretations of the law and how agencies should implement them accordingly. These interpretations can often conflict with those of Congress, which can serve as an invitation for judicial review.

This paper examines one way in which presidents can communicate their interpretations of the law, that is through presidential signing statements. We argue that signing statements can signal the president's preferences and likewise instruct agencies to implement the law in a manner that is inconsistent with legislative intent, both of which can prompt judicial review. Though its role in mediating inter-branch disputes over statutory interpretation might be consistent with an "impartial administration" of the law, our theory contends that whether or not the Court gets involve is moderated by political factors. Specifically, we argue that the Court is even more likely to review a law if it disagrees with the interpretation offered in the signing statement, based on its ideological proximity to the issuing president. All these relationships are contingent on whether the president controls the agency implementing the law and if her

authority to implement the law is already weak. We find empirical support for these predictions using a dataset of all laws passed between 1981 and 2020, to determine whether the probability that a particular law is reviewed each year is influenced by these theoretical relationships.

Overall, our study demonstrates another powerful way that presidents influence judicial review – that is, through their interpretation of the law and instructions to agencies on how to implement it. We contribute to a literature on judicial decision-making that largely ignores the role of presidents or confines their potential influence to the Solicitor General. Though our study exclusively focuses on the Supreme Court's powerful agenda setting powers when deciding whether to hear a case, we might also expect signing statements to influence how the Court rules on the merits of the case once it is reviewed. Future work will examine how and when an ideologically aligned Supreme Court might be induced by the president to "ratify" a signing statement by invalidating portions of federal statutes. Conversely, an ideologically hostile Supreme Court may "audit" signing statements and declare them inconsistent with the plain meaning of congressionally adopted text. Finally, signing statements are just one avenue by which presidents can express their opinions about the law. Future studies might also consider tools such as statements of administrative policy or even public statements.

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