

The Law

President Obama's Signing Statements and the Expansion of Executive Power

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Barack Obama campaigned for president of the United States on a promise of fidelity to the Constitution and stated that he would not issue any signing statements to revise legislative intent. His vision of the presidency stood in marked contrast to President George W. Bush's actions and seemed to suggest a reversal of the trend toward increased executive powers. We will analyze how and why President Obama has largely continued the unilateral presidential action of his predecessor, despite earlier promises to the contrary, outline why signing statements are not useful governing tools, and offer a solution to abuses of constitutional signing statements that impact appropriations.

“The Decider” Returns?

In a January 2013 signing statement, President Barack Obama stated that his constitutional powers as president limited him to signing or vetoing a law outright and that he lacked the authority to reject legislative provisions “one by one.” Yet he then proceeded in a nearly 1,200 word statement to pick the law apart, section by section, and to effectively challenge many provisions by declaring that they violated his constitutional powers as commander in chief.

According to his signing statement, a provision restricting the president's authority to transfer detainees to foreign countries “hinders the Executive's ability to carry out its

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military, national security, and foreign relations activities and would, under certain circumstances, violate constitutional separation of powers principles” (Obama 2013). Obama did not mention, however, that Congress specifically authorized transfers to foreign countries as long as the secretary of defense, with the concurrence of the secretary of state and in consultation with the director of national intelligence, certified that the foreign government receiving the detainees was not a designated state sponsor of terrorism and possessed control over the facility the individual would be housed (P.L. 112-239; see Fisher 2013).

Obama also objected to a number of provisions that he claimed would violate his “constitutional duty to supervise the executive branch” and several others that he said could encroach upon his “constitutional authority to recommend such measures to the Congress as I ‘judge necessary and expedient.’ My Administration will interpret and implement these provisions in a manner that does not interfere with my constitutional authority” (Obama 2013).

What the president could not block or modify through concessions or veto threats during budget negotiations with members of Congress, he decided he could unilaterally strip from a signed bill. Similar to his predecessor, George W. Bush, Obama suggested that he was the ultimate “decider” on what is constitutional and proper. Few acts by occupants of the White House so completely embody the unchecked presidency.

Candidate Obama on Signing Statements

President Obama’s actions have been surprising given that he proclaimed while first running for his office that he would not issue signing statements that modify or nullify acts of Congress (YouTube 2013). In a December 2007 response to the *Boston Globe*, presidential candidate Obama provided a detailed explanation for his thinking: “I will not use signing statements to nullify or undermine congressional instructions as enacted into law. The problem with [the George W. Bush] administration is that it has attached signing statements to legislation in an effort to change the meaning of the legislation, to avoid enforcing certain provisions of the legislation that the President does not like, and to raise implausible or dubious constitutional objections to the legislation” (Savage 2007a).

Candidate Obama’s objection to President Bush’s actions centered on one of the three varieties of signing statement, in this case, a “constitutional” signing statement. In a “constitutional” signing statement, a president not only points out flaws in a bill, but also declares—in often vague language—his intent not to enforce certain provisions. Such statements may be different than ones that are “political” in nature. In “political” signing statements, a president gives executive branch agencies guidance on how to apply the law.¹ Finally, the most common type of signing statements are “rhetorical,” whereby the intent of the president is to focus attention on one or more provisions for political gain (Kelley 2003, 45-50).

1. Sometimes a signing statement may be classified as “political” or “constitutional” depending on its content. Here, we adopt Christopher Kelley’s definitions for each.

President Obama's Policy on Signing Statements

At the start of his term, it seemed that President Obama would honor his campaign commitments and break with his predecessor when he issued a memorandum to heads of executive branch departments and agencies regarding his policy on signing statements. In this memorandum, he wrote, "there is no doubt that the practice of issuing [signing] statements can be abused." He objected to the use of signing statements where a president disregards "statutory requirements on the basis of policy disagreements." Only when signing statements are "based on well-founded constitutional objections" do they become legitimate. Therefore, "in appropriately limited circumstances, they represent an exercise of the President's constitutional obligation to take care that the laws be faithfully executed, and they promote a healthy dialogue between the executive branch and the Congress." President Obama proceeded to list four key principles he would follow when issuing signing statements: (1) Congress shall be informed, "whenever practicable," of the president's constitutional objections; (2) the president "will act with caution and restraint" when issuing statements that are based on "well-founded" constitutional interpretations; (3) there will be "sufficient specificity" in each statement "to make clear the nature and basis of the constitutional objection"; and finally, (4) the president would "construe a statutory provision in a manner that avoids a constitutional problem only if that construction is a legitimate one" (Obama 2009a).

Media coverage praised President Obama's action. The *Boston Globe* declared, "Obama reins in signing statements" (Editorial 2009). David Jackson of *USA Today* reported, "Obama tried to overturn his predecessor again on Monday, saying he will not use bill signing statements to tell his aides to ignore provisions of laws passed by Congress that he doesn't like" (Jackson 2009). Another reporter noted, President Obama "signaled that, unlike Bush, he would not use signing statements to do end runs around Congress" (James 2009).

Any expectations for a shift in the exercise of signing statements ultimately were misplaced, as President Obama, like his predecessor, has used signing statements in ways that attempt to increase presidential power. In this article, we first describe and analyze the continuity of policy and action between Barack Obama and George W. Bush. Second, we address why signing statements—at least one type of them—can not only be unconstitutional abuses of presidential power, but may also be unproductive tools for promoting interbranch dialogue and cooperation. Third, we show that signing statements are a natural result of expanding power in the modern presidency and that they have come to be used as a means of unilateral executive action. Finally, we provide a possible corrective to some of the more aggressive forms of constitutional signing statements that impact appropriations.

The Evolution of President Obama's Policy on Signing Statements

Year One

Despite the press's praise for President Obama's signing statements memorandum, a closer examination suggests that there is not as much separation between Bush and

Obama as once believed. Only one of the four principles set out in the president's memorandum offers any real limits on the use of signing statements. The first principle merely states that Congress shall be informed when the president issues a signing statement. This never was a criticism of Bush, as the former president's signing statements were generally accessible to Congress and the public. President Obama left himself an opening for the nondisclosure of signing statements by noting that Congress would be informed "whenever practicable." Did he mean that a signing statement, under certain conditions, could be withheld from Congress and the public? To our knowledge, he has yet to do that, nor would it be credible to do so.

The second principle is troublesome as well. In it, Obama said he would "act with caution and restraint, based only on interpretations of the Constitution that are well-founded." Of course, the president would decide when he is acting with caution and restraint, and whether an interpretation is well founded is also up to him. The fourth principle offers no clear change from his predecessor. Only with the third principle did Obama set himself apart from Bush. President Obama explained that he would provide "sufficient specificity to make clear the nature and basis of the constitutional objection."

Vague and opaque signing statements were a frequent criticism during the Bush years. For example, one of Bush's signing statements from 2002 argued, "the executive branch shall construe and implement [the E-Government Act which set information security standards and provided protection for confidential information] in a manner consistent with the President's constitutional authorities to supervise the unitary executive branch and to protect sensitive national security, law enforcement, and foreign relations information" (Bush 2002). Such broad nonspecific statements were standard fare during the Bush years, as the president claimed a general authority to construe a statutory restriction or legal objection "in a manner consistent" with the Constitution.

If President Obama had implemented his third principle to provide greater clarity, it would have represented a real transformation in how presidents use signing statements. However, just two days after outlining his signing statements principles, President Obama appears to have violated his promise to be transparent and clear when making constitutional objections. On March 11, 2009, he issued his first constitutional signing statement, which focused on the Omnibus Appropriations Act, 2009. Although not all of the president's constitutional objections were specific or clear, the signing statement did attempt to list many of the provisions he believed violated the Constitution. For example, President Obama listed section 7050 in Division H of the law as interfering with his duties as commander in chief, and therefore the president would apply it "consistent with" his "constitutional authority and responsibilities." However, the Commander in Chief Clause has its share of ambiguities.

Other parts of the statement were less than clear about why certain provisions were constitutionally objectionable. At one point, the president noted that "legislative aggrandizements" or committee-approval requirements were impermissible, but he did not cite which constitutional provisions they violated or any case law. More importantly, Obama failed to take into consideration the practical realities and benefits of executive branch agencies having the ability to move funds during the fiscal year, subject only to committee notification or, at times, approval (Fisher 2012). Without such an accommodation,

only a law can provide the authority to shift money between accounts. Finally, he failed to provide a specific listing of the objectionable provisions in the bill (Obama 2009b).

The provision that most clearly violated President Obama's third principle and tracked well with many of his predecessor's statements dealt with "executive authority to control communications with the Congress." The president objected to sections 714(1) and 714(2) in Division D of the bill. These sections prohibited "the use of appropriations to pay the salary of any Federal officer or employee who interferes with or prohibits certain communications between Federal employees and Members of Congress." Although he never mentioned the term, these sections dealt with "whistleblower" protections. Obama said he would "not interpret this provision to detract from my authority to direct the heads of executive departments to supervise, control, and correct employees' communications with the Congress." Nowhere does he list a specific constitutional clause violated by these sections. In opting to be neither specific nor clear, President Obama violated the third principle listed in his March 9 memorandum.

Almost immediately, observers offered alternative interpretations of President Obama's objections to sections 714(1) and 714(2). Christopher Kelley explained that the president was merely stating that he is "the head of the executive branch, accountable for the actions of all inferior executive officers," and that he was signaling to anyone employed in the executive branch that "regardless of what the Congress demands, you are not to act until you have the approval of a representative from the White House" (Kelley 2009). Senator Chuck Grassley (R-IA) did not think President Obama's statement was so innocuous. He claimed that the president made the declaration that he can "supervise, control, and correct employees' communications with Congress" and in so doing had restricted "current and previously existing whistleblower protections." Grassley claimed the president was "attempting to circumvent the statutes and precedents by which Congress currently has a right to access classified information—including Top Secret information" (Grassley 2009). *New York Times* reporter Sheryl Gay Stolberg and open government groups such as the Project on Government Oversight supported Grassley's interpretation of the signing statement (Stolberg 2009; see Marks 2009).

Year Two

In his second year, Obama continued to violate the principles set forth in his March 2009 memo. For example, on October 7, 2010, the president issued a signing statement on the Intelligence Authorization Act for Fiscal Year 2010. In his statement, President Obama made a cryptic reference to a 1998 signing statement by President Bill Clinton: "the whistleblower protection provisions in section 405 are properly viewed as consistent with President Clinton's stated understanding of a provision with substantially similar language in the Intelligence Authorization Act for Fiscal Year 1999" (Obama 2010). As before, President Obama violated the promise of clarity noted in the third principle of his March memorandum by requiring interested parties who wanted to understand the current president's concerns to locate his predecessor's signing statement on their own. The Clinton signing statement contains the following clause: "The Act does not constrain my constitutional authority to review and, if appropriate, control disclosure of certain

classified information to the Congress” (Clinton 1998). Far from being clear, President Clinton’s challenge raises questions over what kind of “control” President Obama would be able to exercise over whistleblowers. Does the president alone decide the proper access to information within the executive branch?

Years Three and Four

Obama continued to follow Bush’s style in issuing signing statements throughout his first term in office. In April 2011, President Obama issued a signing statement on a budget compromise law. One of the provisions he objected to was section 2262, which prohibited any congressional appropriations from being used to pay the salaries and expenses of the czars of energy, health reform, auto recovery, and urban affairs. Using curiously vague and imprecise language, the president justified his plan to set aside this anticzar provision by stating that the “President has well-established authority to supervise and oversee the executive branch, and to obtain advice in furtherance of this supervisory authority.” Continuing, he noted that he has “the prerogative to obtain advice” from any official or employee within the executive branch or the White House to meet his “constitutional responsibilities.” “Legislative efforts that significantly impede the President’s ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers,” he claimed, “violate the separation of powers by undermining the President’s ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed.” The end result? President Obama would “construe section 2262 not to abrogate these Presidential prerogatives” (Obama 2011a). Of course, Obama has no “prerogative” to create and fund White House positions (Sollenberger and Rozell 2011). The number and salary level of these positions are determined by statute (Sollenberger and Rozell 2012, 114-120; 92 Stat. 2445 [1978]).

At the end of 2011, President Obama issued two additional controversial signing statements which spurred criticism that he acted to minimize public fallout and congressional pushback. On December 23, 2011, the president signed into law an omnibus year-end spending bill. In doing so, he issued a signing statement that declared that some of the bill’s provisions infringed on his executive powers and therefore were unconstitutional. He seemed to suggest that the fact that he had previously alerted Congress to his objections on the spending bill strengthened the validity of the signing statement: “My Administration has repeatedly communicated my objections to these provisions, including my view that they could, under certain circumstances, violate constitutional separation of powers principles. In approving this bill, I reiterate the objections my Administration has raised regarding these provisions, my intent to interpret and apply them in a manner that avoids constitutional conflicts, and the promise that my Administration will continue to work towards their repeal” (Obama 2011b). This statement appears to concede that the provisions he objected to in the bill are legally binding and will remain so unless repealed.

After reading Obama’s statement, it is fair to ask under what kind of “certain circumstances” would separation of powers principles be violated? What specifically in

the bill is unconstitutional? Obama never provides details and, again, violates the third principle of his March memorandum. Although he never came out and said so directly, President Obama's signing statement seemed to nullify provisions of the bill that limited his flexibility in dealing with Guantanamo Bay prisoners. But in fact those provisions were accepted as binding. The signing statement also objected to provisions that mandated presidential consultation with congressional committees before authorizing military exercises costing above a specified amount, or that required congressional approval before U.S. forces could operate under United Nations command.

Andrew Rudalevige immediately saw the similarity of President Obama's action to former president Bush's late 2005 holiday signing statement giving him the discretion to decide whether to follow a law that banned the use of torture (2011). Some of President Obama's defenders have emphasized that his YouTube speech criticizing President Bush's use of signing statements actually did not categorically disavow the use of such a device. President Obama said he would not use signing statements "to nullify or undermine congressional instructions as enacted into law." Rudalevige maintains that this semantic distinction is meaningless as "nullifying or undermining congressional instructions *is the entire reason* to use signing statements" (2011; emphasis in original). We find Rudalevige's analysis on target. Obama's constitutional signing statements have the same intended purpose as those used by past presidents, which is to attempt to nullify, ignore, or otherwise work around legal restrictions Congress places into a bill.

The second controversial signing statement President Obama issued during the 2011 holiday season occurred on December 31, 2011, when he signed H.R. 1540, the National Defense Authorization Act for Fiscal Year 2012. In so doing, he argued that certain provisions in the bill violated core executive responsibilities. One provision, for example, forbade the use of appropriated funds to transfer Guantanamo detainees to be tried in U.S. federal courts. President Obama objected that the provision "does not serve our national security. Moreover, this intrusion would, under certain circumstances, violate constitutional separation of powers principles." Again, this reference to "separation of powers principles" is quite vague and lacks the specificity he promised. Moreover, he did not defy the statutory prohibition and try Guantanamo detainees in U.S. federal courts. He proceeded to argue that other provisions conflicted with his "constitutional foreign affairs powers" and that he would treat such provisions as "non-binding." Concluding, the president stated he would "aggressively seek to mitigate" his expressed concerns "through the design of implementation procedures and other authorities available to me as Chief Executive and Commander in Chief" (Obama 2011c).

President Obama and Congress had struggled for months to come to some agreement regarding various provisions in this bill. At several points the president even threatened to veto the legislation if Congress did not remove certain objectionable portions. However, Congress passed both bills largely intact and, as a result, President Obama chose not only to sign them into law, but also to claim that he could strike out the offending provisions. What the president could not achieve through lengthy negotiations with Congress, he believed he could mandate unilaterally in his signing statement. But he greatly overstated his constitutional powers. While objecting to statutory provisions, he regularly complied with them.

Signing Statements by Another Name?

Perhaps in response to criticism, President Obama appears to have altered the methods he uses to object to what he believes are unconstitutional measures within bills. New avenues of protest could greatly reduce the number of signing statements he might need and, as a result, he could cut down on constitutional objections that might draw attention and criticism. Laurie L. Rice initially suggested such an approach when she theorized that “presidents may be asserting even more power to disregard or reinterpret on constitutional grounds than previously thought through the long-overlooked documents entitled Statements of Administration Policy” (2010, 704). Because of the controversial nature of signing statements, President Obama has an incentive to cite other bases of authority that effectively achieve the same outcome. This change in approach appears to have happened early in President Obama’s first term, as *New York Times* reporter Charlie Savage explained that the Obama administration had reduced its reliance on signing statements (Savage 2010). The evidence was clear: the president had not issued a signing statement since summer 2009, but his administration continued making constitutional objections to provisions in bills through other vehicles, including Statements of Administrative Policy and Office of Legal Counsel (OLC) Opinions, and by directly submitting objections to Congress.

In 2011, one congressional attorney wrote that the evidence tends to support the theory that “other interpretative mechanisms, such as opinions of the Office of Legal Counsel and Statements of Administrative Policy, could potentially play an increased role as a partial substitute for the politically unpopular signing statement” (Garvey 2011, 393). *New York Times* reporter Savage confirmed that understanding when he reported that “the administration will consider itself free to disregard new laws it considers unconstitutional, especially in cases where it has previously voiced objections elsewhere” (Savage 2010). It appears that the change in methods does match up well with Phillip J. Cooper’s theory that presidents will look to all types of unilateral executive action tactics to accomplish their preferred goals (2002).

By replacing signing statements with other devices, President Obama also greatly reduces the likelihood that Congress will be offended by his constitutional objections, as OLC opinions do not have to be published and often are kept secret for many years or even decades (Garvey 2011, 405). In addition, the change in tactics would make it more difficult to “keep track of which statutes the White House believes it can disregard” (Savage 2010). The irony here is that turning to less controversial devices actually makes President Obama less accountable than his predecessor since, unlike OLC opinions, signing statements are published alongside laws.

Statements of Administration Policy and OLC opinions have not entirely replaced signing statements, as evidenced by the fact that Obama issued one in January 2013, but they serve the same function: increasing presidential power. The newer, less recognized devices provide ways for President Obama to conceal his constitutional and legal objections to a signed law and thereby stifle public and academic outcry. In short, he may receive all the practical benefits but does not take much of the political blame.

Signing Statements: Are They “Sinister”?

A recently published article asked, “What’s So Sinister about Presidential Signing Statements?” (Ostrander and Sievert 2013b). Our response is that it depends on the circumstances. Signing statements fit within the framework of the Constitution if they merely clarify the meaning of a law for the public or simply provide guidance to subordinate officers within the executive branch on how the president believes certain provisions should be interpreted. A president could use other methods of delivery to convey such information, including press releases, news conferences, and intraexecutive branch memoranda. Seen in this light, signing statements can be viewed as an effective tool for presidents to use to communicate with executive branch officials and employees in certain circumstances.

Signing statements become objectionable when a president attempts to transform statutory authority and circumvent the rule of law. To be sure, a president may find that certain provisions of legislative enactments violate executive authority or principles of separation of powers. Such weighty issues are appropriate for resolution through a process of deliberation and accommodation between the political branches or, if not settled in that fashion, through the courts. However, signing statements do not, as some suggest, start a productive dialogue (Ostrander and Sievert 2013b, 60). Instead, they invite interbranch conflict and encourage additional acts of presidential unilateralism. From Andrew Jackson through Obama’s 2009 objection to various provisions of the Supplemental Appropriations Act, signing statements have resulted in unnecessary battles between the branches.

Members of Congress often object to signing statements because the presence of one sometimes means that the administration is attempting to settle a policy debate without legislative input. The proper time to exchange views is during the legislative process, which takes place *before* a bill is submitted to the president to sign. Presidents often make deals with members of Congress on legislation in order to secure its passage. In 2009, President Obama did just that. In the process of convincing Congress to pass a funding measure for the International Monetary Fund and the World Bank “Obama agreed to allow the Congress to set conditions on how the money would be spent” and to attach a reporting requirement provision. However, the president turned around and issued a signing statement arguing that those restrictions would “interfere with my constitutional authority to conduct foreign relations.” Congress was not happy. Representative Barney Frank (D-MA) wrote to the president and accused him of breaking his word. The House even passed a bill that barred funding of the president’s challenges (Kelley 2012, 11-12).

Instead of encouraging dialogue and political accommodations, such actions by presidents actually short circuit the free exchange of ideas and poison relations with Congress, including lawmakers of the president’s own party. If a proposed statute so clearly violates what the president views as vital constitutional principles, then he has an obligation to veto it. He should not agree to the provisions during the legislative process and then turn around and effectively challenge them. Not only does this approach increase distrust and promote greater polarization on

Capitol Hill, but it also goes against the text of the Constitution. Nowhere in Article I or Article II does the Constitution provide line-item veto authority to the chief executive. As George Washington explained, “From the nature of the constitution I must approve all the parts of a bill, or reject it in toto” (Washington 1891, XII, 327). Even if a president makes constitutional objections during the lawmaking process, such protests do not make credible his actions of signing a bill and later challenging certain provisions through a signing statement. As Representative Frank remarked, presidents “have a legitimate right to tell us their constitutional concerns—that’s different from having a signing statement.” However, he explained that “Anyone who makes the argument that ‘once we have told you we have constitutional concerns and then you pass it anyway, that justifies us in ignoring it’—that is a constitutional violation. Those play very different roles and you can’t bootstrap one into the other” (Savage 2010).

Louis Fisher cuts to the core of the problem with constitutional signing statements that purport to nullify statutory provisions. He argues that such statements “encourage the belief that the law is not what Congress puts in public law but what the administration decides to do later on.” Continuing, Fisher notes that “if the volume of signing statements gradually replaces Congress-made law with executive-made law and treats a statute as a mere starting point on what executive officials want to do, the threat to the rule of law is grave” (Fisher 2007, 210). We agree. It is unilateral presidential decision making itself that in this context strikes a serious blow against the core principles of separation of powers.

Another problem with constitutional signing statements is that they generally lack clarity and precision, which greatly hinders the idea that they could be used to help facilitate a dialogue between a president and Congress in the first place (Fisher 2007, 210). As noted earlier, signing statements are often crafted in a world of doublespeak where words are distorted to create confusion, and ambiguity is preferred in order to muddle the president’s true intent. President Bush received frequent criticism for his vague statements. Likewise, as Christopher Kelley explained, “there are numerous instances where Obama’s signing statements resort to the vagaries seen in the Bush signing statements, where it becomes difficult to discern precisely what is being challenged or why” (2012, 10).

The benefits of the obfuscating language are clear. Even when a president intends to ignore a statutory provision, there will be sufficient confusion among reporters, scholars, members of Congress, and certainly the public to prevent any kind of universal response. Consider, for example, President Obama’s April 15, 2011, signing statement dealing with the provision to cut off funding for certain czar positions within the White House. In his analysis of that statement, presidential scholar Robert J. Spitzer argued that it merely “expresses displeasure, not disobedience to the law” (2012, 11). Two of us took the opposite view and declared that the president’s statement “effectively nullified” the anti-czars provision (Sollenberger and Rozell 2011, 819). If scholars can disagree about the intended meaning of presidential signing statements, it is doubtful that a layperson can clearly discern the president’s intentions.

Signing Statements: Presidential Power and Unilateral Executive Action

Signing statements are a natural result of the vast growth in the exercise of unilateral presidential powers in the modern era. Presidents increasingly seek methods for governing by avoiding the traditional constraints provided by a system of separated powers. The rise of an increasingly powerful and virtually unchecked executive has been aided by various factors, including what Gene Healy (2008) calls a “cult of the presidency” in which power-seeking presidents are seen as the norm and even the ideal. It is hard to imagine a president today suggesting the need to give greater deference to the other branches of government.

Nonetheless, the Bush era witnessed a remarkably open and critical national debate over the limits of presidential powers. In 2007-08, presidential candidate Obama made no secret of his disagreement with President Bush’s conception of executive powers. Through his pledges during the campaign, Senator Obama gave clear signals that he would not push the outer limits of executive power and that he would respect the system of checks and balances. Maybe he was not exactly promising to scale back the presidency, but he left the unmistakable impression that he would not continue the Bush era trend of runaway executive powers.

It is therefore appropriate to criticize President Obama for the actions we have described here because he had promised a higher standard of conduct than that practiced by his predecessors. Longtime observers of the modern presidency should not be surprised, though, as his actions fall into a customary pattern: when a new president sees the utility of a particular power established by his predecessors, he is not going to give that power away. On several occasions now, what President Obama has not been able to achieve through the normal ebb and flow of deliberations with the legislative branch, he has stipulated through the issuance of a signing statement. He has even made quips about how he looks for ways to govern without direct congressional involvement (Savage 2012).

The “Unitary Executive” Theory

During the George W. Bush presidency, there was substantial scholarly debate over what had been termed the “unitary executive” theory, defined by Stephen Skowronek as the claim “that the Constitution mandates an integrated and hierarchical administration—a unified executive branch—in which all officers performing executive business are subordinate to the President, accountable to his interpretations of their charge, and removable at his discretion” (2009, 2077). Skowronek’s definition is drawn from four crucial constitutional provisions relating to presidential power. First, the “*executive power*” vested in the president by Article II is interpreted broadly by unitary executive theory proponents to justify vast authority over the rest of the executive branch. Second, the “*vesting*” clause of Article II, which does not contain the “herein granted” language of Article I, seems to imply greater executive power than the explicit words of the Constitution may suggest. Third, the president’s *oath of office* is his responsibility to “preserve, protect and defend the Constitution.” Finally, the “*take care*” clause—the idea

that the president has total control over his subordinates in the executive branch and is responsible to the entire nation for the implementation of the laws—rounds out the list (Skowronek 2009, 2076; see Kelley, forthcoming, 12-13).

For legal scholars Steven Calabresi and Christopher Yoo “all of our nation’s presidents have believed in the theory of the unitary executive” (2008, 4). Along similar lines, although looking at the question from a political development perspective, Skowronek casts the unitary executive theory backers as the latest in a long line of insurgents. In the past progressives extolled the virtues of a strong presidency; more recently the rebels have been conservatives who see the unitary executive theory as a way to gather power and avoid accountability (Skowronek 2009).

The unitary executive theory—at least, in its current form—was essentially a creation of conservative attorneys in the Ronald Reagan Justice Department. As Christopher Kelley and Bryan Marshall note, presidents from Reagan onward have, to some degree, exhibited a belief in the unitary executive theory (2007, 144). After Watergate, the presidency faced unprecedented scrutiny from the public and the mass media, and Congress had passed a series of laws intended to check presidential power, including the Congressional Budget and Impoundment Control Act, the Ethics in Government Act, and the War Powers Resolution (Kelley 2010, 108; see Kelley 2003, 23; Rudalevige 2006). To fight back, lawyers in the Reagan OLC devised plans for the president to act unilaterally, even if against Congress’s wishes (Kelley forthcoming, 6).

Their actions stimulated a debate over the constitutional powers of the presidency. One prominent critic, Cass Sunstein, writes, “It has become a pervasive view within the executive branch, and to a large degree within the courts, that the original vision of the Constitution put the President on top of a pyramid, with the administration below him. This vision, set out in numerous documents by the Department of Justice’s Office of Legal Counsel, my former home, is not an accurate interpretation of the Constitution. It is basically a fabrication by people of good intentions who have spoken ahistorically” (Sunstein 1993-94, 300).

Similarly, it is obvious to Louis Fisher that the president does not have *complete* control over the executive branch. The Constitution assumes that others will share in the workload: “The Constitution does not empower the President to carry out the law. That would be an impossible assignment. It empowers the President to see that the law is faithfully carried out” (Fisher 2009-10, 591). In the separation of powers system, those executive branch agencies actually executing the laws necessarily have relationships with—and are responsible to—the other branches of government and to the laws passed by Congress, not just the president.

The “Decider” Model

Peter Shane argues that a different presidential model took hold during the Bush years. Shane contends that the traditional understanding of the president’s role is that of the chief executive regarding himself as the “overseer” of the executive branch responsible for “general oversight” and able to “indirectly” influence his subordinates. In contrast, Bush believed more in the “decider” model, which gave him direct input into everything

his subordinates might do, “without regard to any limitations Congress might try to impose on the President’s power of command” (Shane 2009, 144-45). Shane concludes that the “decider” model is “profoundly undemocratic and deeply dangerous” (2009, 144). It is also contrary to law. Executive officials carry out numerous mandatory and adjudicatory duties pursuant to statutory policy. Presidents and White House aides may not intervene to change the outcomes of those decisions. Many attorneys general have advised presidents that they may not interfere with statutory duties assigned to particular executive officials (Fisher 2010, 576-79).

Signing statements comfortably fit the “decider” model of presidential power. Scholars identify signing statements as among the current litany of unilateral presidential powers (see Cooper 2002; Moe and Howell 1999), and some see no danger in the exercise of this practice (Ostrander and Sievert 2013a, 2013b). The trouble is that some presidents have used signing statements to revise legislative intent or even to alter the balance of power between the political branches and have thus undermined democratic controls on executive power (Pfiffner 2008, 196; see also Korzi 2011, 197; Fisher 2006, 1).

A Recommendation Based on Congress’s Spending Power

Pushing back against presidential use of signing statements may be challenging for lawmakers, given that such actions are little known to the public. Constitutionally, Congress may act when it perceives a threat to its prerogatives from within government, but it is more likely to move when it draws support from outside government, too. Nonetheless, barring a constitutional challenge by Congress—always risky due to the unpredictable nature of court rulings—there is an intermediate step available that could minimize the impact of some types of future signing statements.

We agree with James Pfiffner, who opined that “there appears to be no easy way for Congress to compel [a president] to stop” issuing signing statements. However, we also believe that lawmakers could be more proactive in checking the presidential misuse of power. For example, as Pfiffner advised, “If a president takes actions that are against the law, Congress can cut off funds. . . .” (2009, 253). The trouble is that the bill to do so is subject to a presidential veto, which requires a two-thirds majority in both houses of Congress to override it.

Because the spending power is a core and quintessential function of Congress, we propose a corrective to presidents who issue signing statements that mandate the spending of money in ways not stipulated in law. We recommend that Congress create an office within the Treasury Department headed by a presidentially nominated and Senate-confirmed official who would serve a 14-year term and could not be removed but for cause.

The proposed office head would be independent from the influence of any one administration, and staff would have substantial and separate authority to render final decisions on legal questions raised by presidential signing statements, memorandums, or other written communications to federal departments and agencies that pertain to spending. In addition, the office could review questionable expenditures that have been

flagged by members of Congress. If the office found problems with the legality of an expenditure, it could block payment of the specified appropriation by not certifying its disbursement. (For a detailed description for how such a procedure has previously been administered, see Willoughby 1927, 25-38.) Any law creating such an office should clarify that the decisions rendered cannot be trumped by an opinion from the attorney general; Office of Legal Counsel; or any other official, unit, or office within the executive branch. The president or an impacted department or agency could seek judicial review of an adverse decision.

There is a history of such a position, as the comptroller general once possessed and exercised similar decision-making and preaudit powers in the early twentieth century (see generally, Mansfield 1939; Willoughby 1927). To avoid confusion with the Government Accountability Office (GAO) and comptroller general, we suggest the new office and Senate-confirmed position be given the titles of the Audit Office and auditor general. Such an office and powers are well within the authority of Congress to prescribe by law (Willoughby 1927, 37). We believe that Congress may want to request that GAO monitor the implementation of laws to determine inappropriate actions by the president and his officials, particularly in response to his signing statements.

Potential Challenges to the Proposal

The most likely objections to such a proposal would be based on some combination of the unitary executive theory and the separation of powers principle, although we believe that such objections would be misplaced. Neither presidents nor other executive branch officials have a discretionary power under the Constitution to make spending decisions that conflict with the law. In *United States v. Kendall* (1838), the Supreme Court confirmed that presidents or other executive branch officials cannot alter or otherwise refuse to obey the spending decisions made by officials in whom Congress has vested the legal authority to make such assessments. In that case, Congress had empowered the solicitor of the Treasury Department to settle and adjust certain claims within the Post Office Department. Having received instructions to make certain allowances for claims by the solicitor, the postmaster general refused to honor the decision. As the Court noted,

There are certain political duties imposed upon many officers in the executive department the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper which is not repugnant to any rights secured and protected by the Constitution, and, in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President (*United States v. Kendall*, 610).

Chief among the nondiscretionary duties is the spending power. When Congress has passed a law specifying certain expenditures or empowering an official to determine claims against the government, then no other executive branch official can refuse to disperse the appropriated funds or choose not to accept the spending decision(s) rendered. More recently, Congress itself settled the question of proper placement of spending

controls when it passed the Congressional Budget and Impoundment Control Act of 1974.

This proposal, if enacted, would not solve all of the problems associated with presidential signing statements. It only attempts to address the challenge of a president appropriating funds in ways not provided by law. Many signing statements do not involve presidential attempts to expend funds, but rather are directions to federal departments and agencies not to implement provisions of laws. Overcoming that problem requires additional correctives.

Conclusion

We admit that finding a solution to presidential abuse of signing statements is not an easy task. Leading scholars who have plowed this ground have not been impressed by either the correctives advocated by the American Bar Association (Fisher 2006) or those initiated by the legislative branch (Fisher 2006; Pfiffner 2009). We are hopeful that presidents will begin to exercise restraint in the use of this power, and that Congress will be more diligent in using the various traditional powers at its disposal—appropriations, hearings, confirmations, among others—to keep presidents in line. In short, any corrective against signing statements is only as good as Congress's willingness to push back against executive encroachments. Lawmakers must regain a sense of their institutional prerogatives.

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