
RECENT SIGNING STATEMENT

OMNIBUS APPROPRIATIONS ACT, 2009 — PRESIDENT OBAMA ISSUES FIRST CONSTITUTIONAL SIGNING STATEMENT, DECLARES APPROPRIATIONS BILL PROVISIONS UNENFORCEABLE. — Statement on Signing the Omnibus Appropriations Act, 2009, DAILY COMP. PRES. DOC. No. DCPD200900145 (Mar. 11, 2009).

As the mechanism through which the President signals to Congress his intended nonenforcement of federal law, “constitutional” signing statements¹ track a growing separation of powers conflict. In constitutional signing statements, the President claims the authority to determine which provisions in an enacted law violate the Constitution and whether the executive branch will disregard or reinterpret such provisions. In contrast to “rhetorical” signing statements — those that “reward constituents, mobilize public opinion,”² and reflect, generally, the President’s extralegal opinions and concerns³ — constitutional statements are a source of great legal and political controversy.⁴ In such statements presidents employ the canon of constitutional avoidance to save ambiguously worded legislative text or refuse to enforce altogether those provisions deemed irreconcilable with the Constitution.

On March 11, 2009, President Barack Obama signed the Omnibus Appropriations Act, 2009,⁵ into law. President Obama attached to the Act a constitutional signing statement,⁶ the first of his presidency. With it, President Obama became the latest President to signal constitutional objections to statutory provisions through rote and largely symbolic signing statements. This uniform practice is telling: institutional pressures not only mandate that presidents signal their disapproval, but also militate strongly in favor of the signing statement as the default executive mechanism. Indeed, the sheer strength of these pressures helps explain why President Obama would continue to rely on signing statements given the heightened political costs.

¹ See, e.g., Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 313–14 (2006).

² Christopher S. Kelley, *The Unitary Executive and the Presidential Signing Statement* 4 (2003) (unpublished Ph.D. dissertation, Miami University), http://etd.ohiolink.edu/send-pdf.cgi/Kelley%20Christopher%20S.pdf?acc_num=miami1057716977.

³ See *id.* at 49–50.

⁴ See, e.g., Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7, 8 (noting that the underlying constitutional issue remains “hotly contested”); Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON SUNDAY GLOBE, Apr. 30, 2006, at A1.

⁵ Pub. L. No. 111-8, 123 Stat. 524.

⁶ Statement on Signing the Omnibus Appropriations Act, 2009, DAILY COMP. PRES. DOC. No. DCPD200900145 (Mar. 11, 2009) [hereinafter Omnibus Signing Statement], available at <http://www.gpoaccess.gov/presdocs/2009/DCPD200900145.pdf>.

The Omnibus Appropriations Act allocates \$410 billion in funding and contains over 8500 earmarks totaling \$7.7 billion.⁷ President Obama's March 11 signing statement was constructed in accord with a March 9 memo that set out the Administration's policy with respect to signing statements. The memo acknowledged that "signing statements serve a legitimate function in our system, at least when based on well-founded constitutional objections."⁸ It also specified the required elements for statements: identification of the offending sections, the constitutional logic underlying the objections, and the Administration's intended response.⁹

The March 11 statement first invoked the President's foreign affairs powers. Scattered provisions of the Omnibus Appropriations Act mandate, *inter alia*, that the U.S. Trade Representative pursue recognition in the World Trade Organization of the right to distribute funds collected through "antidumping and countervailing duties" pursuant to the "negotiati[on] objectives contained in the Trade Act of 2002."¹⁰ The President objected, claiming that this "unduly interfer[ed] with [his] constitutional authority in the area of foreign affairs by effectively directing the Executive."¹¹ He would "not treat these provisions as limiting [his] ability to negotiate."¹²

The President next objected to certain provisions that purported to undermine his powers as Commander in Chief. Section 7050 prohibits the use of funds when a United Nations peacekeeping mission "involve[s] United States Armed Forces under the command or operational control of a foreign national" and "the President's military advisors have not submitted . . . a recommendation that such involvement is in the national interest[.]"¹³ President Obama stated that the law undermines his "authority as Commander in Chief" by conditioning the exercise of his power on the "recommendations of subordinates."¹⁴

The signing statement also took issue with portions of the Act concerning executive communications with Congress. Section 714 of Division D prohibits the use of appropriations to pay the salary of any federal officer who "prohibits or prevents, or attempts . . . to prohibit or

⁷ Jonathan Weisman & Greg Hitt, *Obama Outlines Plan To Curb Earmarks*, WALL ST. J., Mar. 12, 2009, at A6.

⁸ Presidential Signing Statements, Memorandum for the Heads of Executive Departments and Agencies (Mar. 9, 2009) [hereinafter March 9 Memo], *in* 74 Fed. Reg. 10,669 (Mar. 11, 2009). In requiring agency heads "to seek the advice of the Attorney General before relying on [previous administrations'] signing statements," *id.* at 10,670, the memo called into question the validity of Bush-era signing statements.

⁹ *See id.* at 10,669.

¹⁰ *E.g.*, Omnibus Appropriations Act, 2009, div. B, tit. IV, 123 Stat. at 594.

¹¹ Omnibus Signing Statement, *supra* note 6.

¹² *Id.*

¹³ Omnibus Appropriations Act, 2009, div. H, tit. VII, § 7050, 123 Stat. at 892–93.

¹⁴ Omnibus Signing Statement, *supra* note 6.

prevent” oral or written communications between other federal employees and Congress.¹⁵ President Obama asserted executive privilege, stating that he did “not interpret this provision to detract from [his] authority to direct the heads of executive departments to supervise, control, and correct employees’ communications with the Congress . . . where such communications would be unlawful or would reveal information that is properly privileged.”¹⁶

The President further alleged that some sections of the Act amount to legislative aggrandizement: “Numerous provisions . . . purport to condition the authority of officers to spend or reallocate funds on the approval of congressional committees.”¹⁷ President Obama took issue with such clauses, calling them “impermissible forms of legislative aggrandizement in the execution of laws other than by enactment of the statutes.”¹⁸ To remedy this perceived encroachment, President Obama pledged that while the Administration would “notify the relevant committees before taking the specified actions” and give their “non-binding” recommendations “all appropriate and serious consideration,” it would not, ultimately, require committee approval.¹⁹

Finally, the President expressed Recommendations Clause concerns. Section 215(b) of Division B, one of several of the Act’s provisions concerning executive reporting, established the particular form that a budget report must take.²⁰ President Obama concluded that because the executive has “discretion to recommend only ‘such Measures as he shall judge necessary and expedient,’”²¹ he would “treat these directions as precatory.”²²

Whether President Obama’s interpretations rest upon *well-founded* constitutional objections is a matter beyond the scope of this comment. It is enough to note that the objections are, by and large, boilerplate. For each disputed issue — foreign affairs,²³ the powers of the Com-

¹⁵ Omnibus Appropriations Act, 2009, div. D, tit. VII, § 714, 123 Stat. at 684.

¹⁶ Omnibus Signing Statement, *supra* note 6.

¹⁷ *Id.* For example, section 733 of Division D requires that “no funds shall be available for transfers or reimbursements to the E-Government initiatives . . . prior to 15 days following submission of a report to the Committees on Appropriations by the Director of the Office of Management and Budget and receipt of approval to transfer funds by the Committees on Appropriations.” Omnibus Appropriations Act, 2009, div. D, tit. VII, § 733, 123 Stat. at 688.

¹⁸ Omnibus Signing Statement, *supra* note 6.

¹⁹ *Id.*

²⁰ Omnibus Appropriations Act, 2009, div. B, tit. II, § 215(b), 123 Stat. at 586.

²¹ Omnibus Signing Statement, *supra* note 6 (quoting U.S. CONST. art. II, § 3).

²² *Id.*

²³ *See, e.g.*, Statement on Signing the Palestinian Anti-Terrorism Act of 2006, 42 WEEKLY COMP. PRES. DOC. 2199, 2200 (Dec. 21, 2006) (“The executive branch shall construe as advisory the provisions . . . that purport to direct . . . negotiations by the executive branch with entities abroad. Such provisions, if construed as mandatory[,] . . . impermissibly interfere with the President’s constitutional authorities to conduct the Nation’s foreign affairs . . .”).

mander in Chief,²⁴ executive communications,²⁵ legislative vetoes,²⁶ and budget reporting²⁷ — the Obama White House borrowed both language and arguments from previous presidents' signing statements. It is the rote nature of the signing statement — indeed, its very existence — that gives it great legal significance. Although signing statements have a rich pedigree,²⁸ allegations of misuse by the George W. Bush Administration politicized signing statements and imbued them with reputational costs.²⁹ President Obama likely understood these costs when he issued the March 11 statement, yet his decision can be explained (though perhaps not justified) by the significant role signing statements play in preserving the institutional power of the presidency.

The importance of signing statements in the American political system is not, at first, readily apparent. As a practical matter, presidents rarely act upon the objections advanced within the statements.³⁰

²⁴ See, e.g., Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, 1 PUB. PAPERS 807, 809 (Apr. 30, 1994) (“Section 407 sets forth . . . a requirement for 15-day advance notification . . . before the United States provides certain in-kind assistance to support U.N. peacekeeping operations. . . . I will . . . construe these reporting and notification requirements consistent with my constitutional prerogatives and responsibilities as Commander in Chief . . .”).

²⁵ See, e.g., Statement on Signing the National Defense Authorization Act for Fiscal Year 2004, 2 PUB. PAPERS 1607, 1608 (Nov. 24, 2003) (“A number of provisions of the Act . . . require the executive branch to furnish information to the Congress The executive branch shall construe such provisions in a manner consistent with the President’s constitutional authority to withhold information the disclosure of which could impair foreign relations [or] national security . . .”).

²⁶ See, e.g., Statement on Signing the Treasury, Postal Service, and General Government Appropriations Act, 1994, 2 PUB. PAPERS 1855, 1855–56 (Oct. 28, 1993) (“Several provisions in H.R. 2403 condition the President’s authority — and the authority of certain agency officials — to use funds appropriated by this Act on the approval of congressional committees. The Administration will interpret such provisions to require notification only, since any other interpretation of such provisos would contradict the Supreme Court ruling in *INS v. Chadha*.”). Interestingly, Obama advanced the same argument, see Omnibus Signing Statement, *supra* note 6, but did not invoke *INS v. Chadha*, 462 U.S. 919 (1983).

²⁷ See, e.g., Statement on Signing the Military Construction Appropriations Act, Fiscal Year 1989, 2 PUB. PAPERS 1230 (Sept. 27, 1988) (“Section 125 . . . provides that . . . the budget request for fiscal year 1990 shall include a request for sums necessary to implement a [military housing] pilot program The Constitution grants exclusively to the President the power to recommend for the consideration of the Congress such measures as he judges necessary and expedient.”).

²⁸ See T.J. HALSTEAD, CONG. RESEARCH SERV., PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 2–9 (2007), available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

²⁹ See, e.g., Savage, *supra* note 4, at A18.

³⁰ See Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 977 (1994) (noting that there were just twenty incidents of “actual defiance” from 1789 to 1981, half of which occurred from 1974 to 1981). In studying twenty-nine provisions to which a President had objected, the Government Accountability Office (GAO) found only nine examples of agencies failing to execute the provisions as written. U.S. GOV’T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS: AGENCY IMPLEMENTATION OF SELECTED PROVISIONS OF LAW 1 (2008), available at <http://www.gao.gov>.

When dealing with minor provisions unlikely to create politically irreconcilable disagreements, executives prefer comity to conflict.³¹ This fact speaks to the highly institutionalized character of the separation of powers struggle played out in the signing statement text. Because parties are often without standing in court³² and the judiciary often lacks the ability or desire to regulate this interbranch power struggle,³³ political actors have developed their own set of norms and institutional practices to establish and defend branch prerogatives. For example, Congress regularly includes legislative veto provisions to which the President objects through signing statements.³⁴ This routine exchange has run continuously through past administrations, only to surface again in the Obama White House.

But this observation raises an obvious question: why continue this back-and-forth? To answer this, consider the interaction between branches as having created an inefficient equilibrium. For Congress, the costs of including self-aggrandizing bill provisions are de minimis. The executive, in contrast, must internalize the high costs of an overt, defensive response because the interbranch dialogue occupies two planes: one political, one constitutional. Small political issues, like obscure omnibus provisions, implicate larger constitutional questions. For example, President Obama's objection to budget reporting provisions may seem insignificant, but it reflects a broader concern that Congress might aggrandize its constitutional powers. The executive, it follows, continually fears that the Court and Congress might interpret a *political* compromise as a *constitutional* concession in the absence of a signal to the contrary. Concession, it is feared, might foreclose for present and future administrations the ability to invoke executive prerogative when needed.³⁵ To minimize this risk, the executive adopted a positive system of denial, which, across administrations, entrenched

gov/new.items/do8553t.pdf. Even with those nine, the GAO "could not conclude that agency non-compliance was the result of the President's signing statements." *Id.* at 2.

³¹ See Bradley & Posner, *supra* note 1, at 320; John F. Cooney, *Signing Statements: A Practical Analysis of the ABA Task Force Report*, 59 ADMIN. L. REV. 647, 664 (2007).

³² See AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS & THE SEPARATION OF POWERS DOCTRINE, RECOMMENDATION 25 (2006) [hereinafter ABA REPORT].

³³ Although the Supreme Court held in *Chadha* that one-house vetoes were unconstitutional, Congress continues to include them twenty-five years later, and the executive still promises to give them "serious consideration." Omnibus Signing Statement, *supra* note 6. The judiciary, it seems, has been marginalized in this particular power struggle, with the political branches preferring to hash out political compromises rather than pursue litigation.

³⁴ See, e.g., Omnibus Signing Statement, *supra* note 6.

³⁵ See Cooney, *supra* note 31, at 664. John Cooney argues that when "[c]onsidered against the backdrop of de facto Executive Branch compliance," President Bush's approach to signing statements "represent[ed] a defensive effort to preserve the ability of future Presidents to raise similar constitutional objections on matters of real import, while avoiding political confrontation with a co-equal Branch that appear[ed] indifferent to the Executive Branch's stated concerns." *Id.*

itself as the default practice. But having established this pattern of denial, the executive cannot go back. In this system, silence no longer constitutes an objection; courts and Congress may construe silence as a concession. In effect, executive practice engendered an inefficient equilibrium in which a skewed incentive structure precipitated — and later solidified — Pavlovian signaling practices. Signaling costs might change, but the risk-averse and forward-thinking executive will continue to signal — not because it is efficient, but because the executive has delegitimized silence as an alternative.

But this fact alone cannot explain the executive's decision to rely on signing statements in particular as the default signal. Indeed, the March 11 statement was just "one of several mechanisms the President" might have used to communicate his views.³⁶ Public remarks, for example, may be used alone or in conjunction with executive orders, proclamations, agency rules, internal guidelines, or executive memos to articulate the President's constitutional and interpretive vision.³⁷ Other signaling mechanisms are similar to signing statements, which have limited or no legal force or effect³⁸ and receive minimal levels of deference in courts.³⁹ And all these mechanisms ably communicate the executive's position to Congress, the press, and interested constituencies.⁴⁰ Signing statements do, however, have a temporal connection to the bill — a connection some believe could legitimize the President's objections over time.⁴¹

This temporal connection might amount to a comparatively marginal benefit over other mechanisms, but it could help explain the initial choice in favor of signing statements. So understood, signing statements remained a fairly cost-effective signal for nearly two decades. The status quo, however, changed radically with the politicization of signing statements during the George W. Bush presidency.⁴² Critics charged the Bush Administration with systematically utilizing

³⁶ *Id.* at 651.

³⁷ Bradley & Posner, *supra* note 1, at 361–62. The Department of Justice "has long made it a practice of sending 'bill comments' to Congress, which object to constitutionally problematic provisions in pending bills." *Id.* at 331.

³⁸ See Cooney, *supra* note 31, at 651–52.

³⁹ See *id.* at 652.

⁴⁰ The ability to use mechanisms other than signing statements is well known to an Obama Administration that, just three months after issuing this signing statement, released a Department of Justice Office of Legal Counsel memo on June 1, 2009, to signal its constitutional objections to an overlooked provision in the Omnibus Appropriations Act. Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. Off. Legal Counsel (June 1, 2009), available at <http://www.usdoj.gov/olc/2009/section7054.pdf> (calling on the Department of State to "disregard" section 7054 as unconstitutionally infringing on the executive's authority to conduct foreign relations).

⁴¹ See Bradley & Posner, *supra* note 1, at 361–62.

⁴² See Savage, *supra* note 4.

signing statements to aggrandize executive power.⁴³ In 2006, the American Bar Association concluded that constitutional signing statements are “contrary to the rule of law and our constitutional system of separation of powers.”⁴⁴ Then-Senator Obama adopted similarly critical views throughout the 2008 presidential campaign, writing, “[I]t is a clear abuse of power to use such statements as a license to evade laws that the president does not like or as an end-run around provisions designed to foster accountability.”⁴⁵ This politicization has, in theory, altered the cost-benefit calculus of mechanism choice. Indeed, President Obama received only the marginal temporal benefits while absorbing a cognizable political and reputational loss from issuing the March 11 statement. Immediately following the statement, both supporters and critics of the President moved to condemn its use. Some charged the President with outright hypocrisy.⁴⁶ The backlash did not ebb.⁴⁷ Why then would President Obama continue to rely on signing statements given the availability of politically palatable alternatives?

A handful of partial explanations shed some light on this puzzle. First, the increased costs might have perverse signaling benefits. Parties will assume greater conviction on the part of the executive knowing that such statements cannot be issued frivolously.⁴⁸ This explana-

⁴³ See *id.* But see Bradley & Posner, *supra* note 1, at 326 (“[T]he Bush administration [may have] significantly broader views of executive power We acknowledge this possibility, but we would note that the text of the signing statements do not by themselves provide compelling support for it.”).

⁴⁴ ABA REPORT, *supra* note 32, at 1.

⁴⁵ Charlie Savage, *Barack Obama’s Q&A*, BOSTON GLOBE, Dec. 20, 2007, <http://boston.com/news/politics/2008/specials/CandidateQA/ObamaQA>. At a campaign town hall, then-Senator Obama responded to a question regarding signing statements, adding:

George Bush has been trying . . . to accumulate more power in the presidency [He says,] “Well I can basically change what Congress passed by attaching a letter saying I don’t agree with this part or I don’t agree with that part, I’m gonna choose to interpret it this way or that way.” That’s not part of his power.

Obama on Presidential Signing Statements, <http://www.youtube.com/watch?v=seAR1S1Mjkc> (last visited Jan. 9, 2010).

⁴⁶ See, e.g., Posting of Kenneth Anderson to The Volokh Conspiracy, <http://www.volokh.com/posts/1246451402.shtml> (July 1, 2009, 08:30); see also Posting of Big Tent Democrat to TalkLeft, The Problem With President Obama’s Signing Statement, <http://www.talkleft.com/story/2009/3/12/9530/52038> (Mar. 12, 2009, 08:05).

⁴⁷ In response to President Obama’s fourth constitutional signing statement, which accompanied the Supplemental Appropriations Act, Pub. L. No. 111-32, 123 Stat. 1859 (2009), signed into law on June 24, 2009, the House voted 429–2 to reinstate the oversight and accountability provisions at issue in the signing statement. See Jonathan Weisman, *President’s Signing Statements Anger Lawmakers*, WALL ST. J., July 15, 2009, at A6. House Financial Services Committee Chairman Barney Frank (D., Mass.) joined others in issuing a vituperative letter to the President. Representative Frank added, “It’s outrageous. It’s exactly what the Bush people did.” *Id.*

⁴⁸ Take, for example, the executive communications provision. See Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, div. D, tit. VII, § 714, 123 Stat. 524, 684. Because President Obama campaigned on a platform of transparency in government, political actors might view his invoca-

tion is plausible but unlikely. The value added is intangible, uncertain, and unlikely to change congressional behavior. A second, stronger argument is that while the costs have indeed increased, they have not become prohibitive. In this view, the costs are low enough to be overcome; Congress will criticize but will not stop cooperating. This theory does not, however, address the underlying puzzle: why accept *any* cost where there exist alternative mechanisms? One might therefore develop a third theory borne out in the March 9 memo: President Obama has a legitimate interest in reviving signing statements after what he believes was irresponsible use during the Bush Administration.⁴⁹ The President will absorb *all* costs, however high, to preserve the entrenched institutional mechanism default as a viable long-term signal. Under this theory, the executive prerogative overtly transcends the political interests of an individual administration.

One assumption, however, pervades all three theories: the signing statement *is the default* — and a powerful one at that. The most persuasive explanation, then, is one with roots in the inefficient equilibrium. The very institutional pressures that require presidents to signal and avoid “concessions” also militate strongly in favor of a uniform, risk-averse, and defensive policy with respect to mechanism choice. A radical change in mechanism presents the risk that Congress and courts will not recognize the replacement as a viable signal. The risk might be slight, but the political costs of using signing statements are not yet high enough to merit a reconsideration of institutional practice. Such conservative long-term thinking drastically constrains the range of viable policy choices for contemporary actors and leads, as it did here, to politically suboptimal outcomes. In this light, institutional pressures stemming from the executive’s defensive posture in a separation of powers conflict forced President Obama’s hand. On March 11, 2009, the Obama White House was free to distinguish facially its practices from those of previous administrations, but institutional pressures all but mandated mechanism choice and content.

tion of executive privilege as being of particular importance to his Administration given the political and reputational costs associated with the signing statement.

⁴⁹ Cf. March 9 Memo, *supra* note 8 (highlighting the recent debate regarding signing statements and acknowledging the potential for their abuse).