

Distribution Agreement

In presenting this thesis or dissertation as a partial fulfillment of the requirements for an advanced degree from Emory University, I hereby grant to Emory University and its agents the non-exclusive license to archive, make accessible, and display my thesis or dissertation in whole or in part in all forms of media, now or hereafter known, including display on the world wide web. I understand that I may select some access restrictions as part of the online submission of this thesis or dissertation. I retain all ownership rights to the copyright of the thesis or dissertation. I also retain the right to use in future works (such as articles or books) all or part of this thesis or dissertation.

Signature:

Ashley Moraguez

Date

Breaking Bargains:
Executive-Legislative Bargaining Under Signing Statements

By

Ashley Moraguez
Doctor of Philosophy

Political Science

Tom S. Clark, Ph.D.
Advisor

Gregory J. Martin, Ph.D.
Committee Member

Daniel Palazzolo, Ph.D.
Committee Member

Jeffrey K. Staton, Ph.D.
Committee Member

Accepted:

Lisa A. Tedesco, Ph.D.
Dean of the James T. Laney School of Graduate Studies

Date

Breaking Bargains:
Executive-Legislative Bargaining Under Signing Statements

By

Ashley Moraguez
Master of Arts, Emory University, 2013
Bachelor of Arts, Vanderbilt University, 2009

Advisor: Tom S. Clark, Ph.D.

An abstract of
A dissertation submitted to the Faculty of the
James T. Laney School of Graduate Studies of Emory University
in partial fulfillment of the requirements for the degree of
Doctor of Philosophy
in Political Science
2015

Abstract

Breaking Bargains: Executive-Legislative Bargaining Under Signing Statements By Ashley Moraguez

The American politics bargaining literature typically assumes the president has an up or down choice on legislation sent from Congress; however, presidents have other powers at their disposal. In particular, the president can issue signing statements on legislation, which manipulate outcomes after legislators have already agreed to a policy. This, I argue, undermines the stability of legislative coalitions and creates a bargaining problem in Congress. Why do legislators commit to bargains within the legislature, if the president can unravel those deals with a signing statement?

To answer this question, I develop a formal model that situates congressional bargaining in a political environment in which the president can issue signing statements. I argue that this power opens up room for legislators to bargain over both their electoral and policy preferences. As a result of bargaining over both goals, legislators can rationally commit to bargains within Congress even when they anticipate a signing statement. I argue that legislators are complicit in the president's use of the signing statement and that anticipation of its use can sometimes facilitate bargains which otherwise would not have occurred. In other conditions, the signing statement can exacerbate the bargaining problem, increasing gridlock. The model yields distinct predictions about the policy process, which I evaluate in a series of empirical chapters.

I derive hypotheses regarding the conditions under which signing statements should occur and the extent to which they can affect policy. I find that the legislative environment, particularly low levels of congressional polarization, incentivizes the president's use of the power. Further, I find that the resource capacity of the executive branch conditions the use of signing statements. In addition, I find that the inter-branch setting influences how far a president will push his power to issue signing statements: generally, he is more likely to issue signing statements with larger intended policy effects when he faces an ideologically hostile Congress.

I conclude that the president's ability to issue signing statements not only affects the implementation of policy but also has the more subtle and pervasive effect of shaping the way in which legislators bargain over and shape legislation.

Breaking Bargains:
Executive-Legislative Bargaining Under Signing Statements

By

Ashley Moraguez
Master of Arts, Emory University, 2013
Bachelor of Arts, Vanderbilt University, 2009

Advisor: Tom S. Clark, Ph.D.

A dissertation submitted to the Faculty of the
James T. Laney School of Graduate Studies of Emory University
in partial fulfillment of the requirements for the degree of
Doctor of Philosophy
in Political Science
2015

Acknowledgments

Graduate school, by its very nature, is not an easy experience; it is also one that can be isolating. I consider myself incredibly lucky to have had a support network that never allowed it to feel that way. My graduate experience and this dissertation have benefitted from so many different people in so many different ways that there is no way to express the breadth or the depth of my gratitude. But, I will try.

I first want to thank the person who was most immediately in the trenches with me on this project. Tom Clark handled every panic attack, breakdown, and dumb question I threw his way with such grace and patience that I am forced to conclude he is some version of a saint. I cannot have been an easy student to work with—I would show up at Tom's door, inevitably unannounced, multiple times a week (and sometimes a day) to ask questions or probe him for help. Never in six years do I remember being turned away. I suspect now that I am moving on from Emory, Tom might actually get some of his own research done, but I will miss having him a couple floors up. I thank Tom for his unfailing belief in me and his willingness to share all his wisdom and advice, hours of his time, and his friendship with me.

Jeff Staton has contributed immensely to this project since the very first day I pitched the idea as a potential dissertation topic in DisCo. Further, I will always remember that he was one of the first people to tell me that the idea had legs it could one day stand on. I am happy to say that he was, as he often is, correct. I appreciate his sharp insight and the empathy with which he approaches grad students. We are all better for having him on our side.

In the short time I have known Dan Palazzolo, he has had an indispensable impact on me and on my research. Dan has been incredibly selfless in taking a graduate student he hardly knew under his wing and for supporting this project to its completion. He provided some of the most detailed, thorough, and helpful comments on this project; it would not be half the project it is today without his thoughtful and

gracious feedback.

Greg Martin agreed to be the fourth member of my dissertation committee as a first-year faculty member who doubtlessly had other things to which he could be dedicating his limited time. I thank him for not even hesitating when I asked for his help on this project. His intellect and insight are admirable, if slightly intimidating, and my project is better for it.

I must also thank the Emory faculty as a whole for believing in me and always providing the support I needed to succeed. In particular, I appreciate Cliff Carrubba for always treating me as if I were a student of his own and Danielle Jung, for her friendship and her advice.

Whatever is left of my sanity after graduate school is in no small part due to the support of the other graduate students. I thank them for pushing me on my ideas, for being honest in their criticisms of my work, and most importantly, for providing me with distractions when I needed them most (and sometimes when I really didn't). In particular, I thank Leeann Bass for the endless supply of comments on my work, good stories, and gummie bears, as well as Lizzy Wiener and Laura Maxwell for being my favorite partners in crime. I also must thank Caitlin Ainsley, the person with whom I have probably spent the most time over the past six years. I could not have asked for a better office mate, cheerleader, rock, or best friend. I'll miss hanging out on the West Side with you.

I would also like to thank my family and those who may as well be part of it. Julissa, Jill, and Paul, I thank for always be there, for only slightly judging me when I panicked for no reason or cried at the drop of a dime, and for giving me some of my favorite memories; they are the greatest friends for which a girl could ask.

They say you get to pick your friends, but you don't get to pick your family. However, if I had the choice, I wouldn't change a thing. This dissertation is as much a product of my family's support as it is of my own hardwork. I thank Taylor

for sometimes acting like the Big Sister when I needed one and Brian for being my strength; his emotional, financial, and mathematical support has buoyed me along all through this process. I also owe such a debt of gratitude to my parents. I thank Dad for reminding me there is life outside political science and Mom for reminding me that the world would not end if a presentation went poorly but celebrating as if it could have when things went well.

Finally, I would like to express my extraordinary gratitude to Randall Strahan. I learned and continue to learn so much from him about Congress, grammar, and, most importantly, about life and about friendship. Though no longer physically with us, he is in every page and every word of this dissertation.

I want to reiterate my gratitude to all of these fantastic people and to so many more; you all deserve credit for the strengths of this project. Any flaws (or split infinitives) that remain are my own.

For Prof. S

Contents

| | | |
|----------|--|-----------|
| 1 | Introduction | 1 |
| 1.1 | The Puzzle of this Particular Power | 4 |
| 1.2 | Presidential Power & Signing Statements | 7 |
| 1.2.1 | Bargaining versus Unilateral Powers | 7 |
| 1.2.2 | A Power By Any Other Name | 10 |
| 1.2.3 | The Second Face of Power | 12 |
| 1.3 | Roadmap | 14 |
| 2 | A Political History of Signing Statements | 18 |
| 2.1 | Historical Use of the Signing Statement | 22 |
| 2.2 | The Purpose Behind Institutionalization | 26 |
| 2.3 | But, Do They Actually Matter? | 30 |
| 2.4 | The Data | 36 |
| 2.4.1 | The Prominence of Signing Statements | 40 |
| 2.4.2 | The Political & Policy Context | 43 |
| 2.5 | Discussion | 48 |
| 3 | A Theory of Bargaining | 50 |
| 3.1 | Theoretical Foundations | 51 |
| 3.1.1 | Players and the Sequence of Play | 53 |
| 3.1.2 | Strategies | 54 |
| 3.1.3 | The Players and Their Goals—An Overview | 54 |
| 3.1.4 | Information Setting | 61 |
| 3.2 | Equilibrium Analysis | 64 |
| 3.2.1 | Equilibrium Behavior of the President | 64 |
| 3.2.2 | The Legislative Veto Player’s Equilibrium Behavior | 69 |
| 3.2.3 | The Proposer’s Calculus | 72 |
| 3.2.4 | Equilibrium Outcomes | 77 |
| 3.3 | Modeling Choices | 78 |
| 3.4 | Discussion | 79 |
| 4 | Bridging the Theoretical and the Political | 82 |
| 4.1 | The PATRIOT Improvement and Reauthorization Act: An Instructive Example | 83 |
| 4.1.1 | The Backdrop | 84 |

| | | |
|----------|--|------------|
| 4.1.2 | Politics and Preferences | 85 |
| 4.1.3 | The Puzzling Politics | 89 |
| 4.1.4 | A Solution | 92 |
| 4.2 | Testable Implications of the Theory | 96 |
| 4.2.1 | Legislative Preferences and Signing Statements | 96 |
| 4.2.2 | Presidential Incentives & the Signing Statement | 99 |
| 4.3 | Discussion | 104 |
| 5 | Polarization & Signing Statements | 106 |
| 5.1 | The Data | 107 |
| 5.2 | Congress-Level Analysis | 110 |
| 5.3 | Bill-Level Analysis | 114 |
| 5.3.1 | Specification and Results | 116 |
| 5.3.2 | Robustness Checks | 121 |
| 5.4 | Bush I vs. Bush II: An Examination | 126 |
| 5.5 | Alternate Measures of Polarization | 129 |
| 5.6 | Discussion | 132 |
| 6 | Costs, Benefits, & Signing Statements | 134 |
| 6.1 | The Fixed Cost to a Signing Statement: A Resource/Opportunity Cost Analysis | 135 |
| 6.1.1 | The Resource Cost: Size of the EOP and Signing Statements . | 136 |
| 6.1.2 | The Opportunity Cost: Signing Statements and the Agenda . | 150 |
| 6.1.3 | Discussion | 156 |
| 6.2 | The Scope of Policy Change with a Signing Statement | 157 |
| 6.2.1 | Operationalization and Measurement | 159 |
| 6.2.2 | Potential Threats to Inference | 161 |
| 6.2.3 | Specification and Analysis: The First Cut | 163 |
| 6.2.4 | Alternate Specification: Presidential Random Effects | 169 |
| 6.2.5 | Making Sense of George W. Bush | 171 |
| 6.3 | Discussion | 172 |
| 7 | Conclusion | 174 |
| 7.1 | The Good News and the Bad News About Signing Statements | 176 |
| 7.2 | Future Avenues of Research | 180 |
| A | Proof of Formal Results | 183 |
| A.1 | President's Subgame | 183 |
| A.2 | Legislative Veto Player's Subgame | 187 |
| A.3 | Proposer Subgame | 189 |
| B | Data Appendix | 194 |
| B.1 | Signing Statement Coding: Rhetorical vs. Constitutional | 194 |
| B.2 | Specifically Challenged Sections | 197 |

List of Tables

| | | |
|-----|---|-----|
| 2.1 | Signing Statements by President (1977-2012) | 37 |
| 5.1 | Congress-Level Regression Results | 112 |
| 5.2 | Bill-Level Results | 118 |
| 5.3 | Robustness Checks | 123 |
| 5.4 | Chamber Differences and Signing Statements | 131 |
| 6.1 | Executive Capacity and Signing Statements | 145 |
| 6.2 | Executive Capacity: Robustness Checks | 149 |
| 6.3 | Opportunity Costs and Signing Statements | 154 |
| 6.4 | The Scope of Signing Statements | 166 |

List of Figures

| | | |
|-----|--|-----|
| 2.1 | The Exercise of Presidential Power, 1981-2012. | 41 |
| 2.2 | Vetoes and Signing Statements, 97-112th Congresses. | 42 |
| 2.3 | Policies Areas Affected by Signing Statements, 1981-2012. | 46 |
| 3.1 | The President's Low-Cost Decision Calculus. | 67 |
| 3.2 | A Diagram of the Veto Player's Decision Calculus. | 71 |
| 3.3 | A Spatial Demonstration of the Proposer's Decision-making. | 76 |
| 4.1 | Political Landscape Around the PATRIOT Act Reauthorization. | 87 |
| 4.2 | PATRIOT Act Signing Statement. | 93 |
| 4.3 | The Fixed Cost of the Signing Statement. | 101 |
| 4.4 | The Scope of a Signing Statement. | 104 |
| 5.1 | Polarization and Signing Statements Over Time. | 109 |
| 5.2 | Congress-Level Results. | 113 |
| 5.3 | Polarization and Signing Statements at the Bill Level: Raw Data. | 115 |
| 5.4 | Bill-Level Results. | 119 |
| 5.5 | Random Effects by Bill Type. | 124 |
| 6.1 | Size of the EOP and Signing Statements Over Time. | 142 |
| 6.2 | Effect of EOP Size. | 147 |
| 6.3 | The President's Agenda and Signing Statements Over Time. | 152 |
| 6.4 | Effect of Size of the President's Agenda. | 155 |
| 6.5 | Inter-Branch Ideological Differences and Statement Scope. | 168 |
| 6.6 | Random Effect of Ideological Distance Across Presidents. | 170 |

Chapter 1

Introduction

One need not look much farther than recent politics to see that presidents regularly and boldly exercise their policy powers. President Barack Obama has used executive directives to create or alter policy in a host of controversial policy areas, including immigration, gun control, and defense. This exercise of power is interesting in light of the promises Obama made on the campaign trail in 2008. At one campaign event, then-Senator Obama stated, “The biggest problems that we’re facing right now have to do with George Bush trying to bring more and more power into the executive branch and not go through Congress at all.”¹ Shortly after taking office, however, Obama issued executive orders and signing statements to guarantee policy outcomes he favored, just as had President George W. Bush and many other presidents before him. He has continued to do so into his second term.

One notable example of Obama’s use of executive power revolved around the release of prisoners of war. In May 2014, Obama negotiated the release of Sgt. Bowe

¹<http://abcnews.go.com/blogs/politics/2014/02/obamas-long-lost-campaign-promise/>

Bergdahl, the lone American prisoner of war in Afghanistan, in exchange for five Taliban detainees being held at Guantanamo Bay.² This action raised a lot of criticism within military and political circles. His military critics claimed that the action presented a security risk, and they also questioned the propriety of negotiating for a soldier that was suspected of desertion. Obama's critics in Congress also worried about threats to national security in releasing Guantanamo detainees but, more interestingly, expressed more concern about Obama's exercise of executive power in directing the prisoners' release. In particular, the concern was over his use of signing statements, which he had promised never to use to undermine Congress while campaigning in 2008, stating, "We're not going to use signing statements as a way of doing an end run around Congress." However, a signing statement that did just that set the stage for the controversy over Bergdahl's release. In December 2013, Obama had signed the National Defense Authorization Act for 2014 into law, in which Section 1035(d) required that the president give Congress 30 days notice before transferring detainees from Guantanamo. Upon signing it into law, Obama issued a signing statement which expressed the administration's belief that the provision "would violate constitutional separation of powers principles. The executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers."³ It was under the authority of this signing statement that Obama negotiated the release of Bergdahl without first notifying Congress, raising questions about the extent of presidential

²http://www.nytimes.com/2014/06/01/us/bowe-bergdahl-american-soldier-is-freed-by-taliban.html?_r=0

³<http://www.presidency.ucsb.edu/ws/index.php?pid=104530>

power to undermine the law.

Speaker of the House John Boehner has been one of the most open critics of Obama's exercise of authority. In the aftermath of Obama's controversial signing statements and other prerogative powers, Boehner stated that such executive action was unconstitutional and would "make it harder for Congress and the White House to work together successfully on other areas where there might otherwise be common ground."⁴ In the midst of these criticisms, Boehner's comments reveal a perhaps more important point: that there is something more to such presidential power beyond simply determining particular policy outcomes. The president's ability to influence or create policy may actually affect the policy *process* itself, the way in which bills become laws. That is, executive action, or the anticipation thereof, can alter how legislators bargain with one another within the legislature and affect whether and which policies emerge from Congress.

I am interested in how the president's policy powers affect bargaining in the first instance—how members of Congress come to agreements under the threat of looming presidential action. Do bargains struck in Congress anticipate subsequent executive action? Do legislators build these expectations into the laws they write? Can executive powers undermine, or perhaps facilitate, intra-branch bargaining? In this book, I will answer these questions through the specific lens of the president's ability to issue signing statements on legislation. A signing statement is simply a short document that presidents issue at the time they sign a bill into law; importantly, however, these statements often serve as a means by which the president can alter what law means.

⁴<http://www.cnn.com/2014/11/07/politics/immigration-lede-all/>

Bureaucratic directives are important tools for shaping the law, and signing statements often lay the groundwork for future interpretation of legislation (Evans 2011, Kelley and Marshall 2008, Rodriguez, Stiglitz and Weingast 2015, Thrower n.d.*a,n*). With a signing statement, the president can refuse to enforce or reinterpret specific provisions of legislation. The president's ability to undermine legislation as such likely has consequences for the bargains to which legislators are willing to enter and their ability to pass legislation through the chambers. Further, their usage presents a particular puzzle for legislative behavior, which will serve as the motivating force behind this project. An example will make these dynamics of interest more concrete.

1.1 The Puzzle of this Particular Power

In 2006, the George W. Bush administration faced significant opposition in Congress to the reauthorization of the USA PATRIOT, stemming from concerns over civil liberties. Members of the Senate, notably some members of the president's own party, demanded restrictions on the government's ability to conduct searches and access private information under the bill. To avoid a filibuster that could have derailed the legislation, the Bush administration agreed to accept provisions which required congressional oversight of executive actions (Savage 2007). Bush signed the bill into law; however, upon doing so, he also issued a signing statement, in which he asserted that he did not consider parts of the legislation to be binding on his administration. Calling on his "constitutional authority" to withhold information from Congress for national security reasons and to direct the Executive branch, Bush nullified the very

oversight provisions of the legislation that were responsible for its passage through Congress in the first place.⁵ This action could not have blindsided Congress. President Bush had publicly derided the oversight provisions, and, more importantly, the congressmen were already aware of President Bush's ability and willingness to issue signing statements to cater policies more to his liking. Just three months before, Bush had agreed to the addition of the McCain Torture Ban to a defense bill, only to use a signing statement that implicitly reneged on the agreement after the fact.⁶ If the senators who threatened the filibuster knew of Bush's ability to issue signing statements, why, then, did they demand amendments to the bill that they knew Bush could and potentially would undermine?

This example raises more general questions about legislative behavior. Much of the extant literature on bargaining between the president and Congress focuses on the veto power and assumes the president has a take-it-or-leave-it choice on legislation that has passed both chambers of Congress; however, the signing statement complicates this dynamic. The tool allows the president to manipulate policy outcomes after legislators have already agreed to a bargain in Congress. Indeed, Senator Patrick Leahy has called the signing statement a "clever device" which allows the president to "duck the responsibility of voting it [the bill] up or down and ambush the congressional compromise after the fact" (Leahy 2006). Why, then, do legislators commit to bargains within the legislature, if the president can unravel those deals with a signing statement? That is, if the signing statement creates an inability on the

⁵www.whitehouse.gov/news/releases/2006/03/20060309-8.html

⁶The text of this signing statement in regards to the McCain Torture Ban can be found at: <http://www.presidency.ucsb.edu/ws/index.php?pid=65259>

part of the president to commit to keeping legislative bargains in tact, how (and why) do legislators come to agreements in the first place? Perhaps Senator Arlen Specter put it best when he asked, “What’s the point of having a statute if the president can cherry-pick what he likes and what he doesn’t like?”⁷

To answer these questions, I argue that presidential prerogatives such as the signing statement open up room for legislators to bargain over two separable dimensions; rather than just bargaining over the eventual policy outcome, legislators also bargain over the form that policy proposals take. That is, legislators are motivated by both position-taking and policy concerns and will have to balance these goals and their associated tradeoffs in making their voting and coalition decisions. As a result of bargaining over their two preferences, it can, under some conditions, be rational for legislators to commit to bargains within the legislature, even when they anticipate a presidential signing statement. I argue that legislators are complicit in the president’s use of the signing statement, and that anticipation of its use can sometimes facilitate bargains among legislators with distinct preferences which otherwise would not have occurred. In other circumstances, the signing statement can exacerbate the bargaining problem in Congress, increasing legislative gridlock. In this way, the president’s ability to issue signing statements not only affects the implementation of policy but also has the more subtle and pervasive effect of shaping the form legislative proposals take within Congress. At its core, this book is about the nature and extent of presidential power and how the threat thereof affects not only the policies we see but the very process by which policies are made.

⁷<http://www.cbsnews.com/news/specter-is-making-a-statement/>

1.2 Presidential Power & Signing Statements

Howell (2003, xiv) defines presidential power as the “capacity [of the President] to influence the content of public policy.” The Constitution grants the president an explicit role in the legislative process in providing him with the power to veto legislation that has passed both chambers of Congress. It also gives the president an additional hand in the process by providing a role for the president in recommending legislation to the Congress and in giving State of the Union addresses. In the modern political environment, however, the president has more opportunities to influence policy and a greater set of tools by which to do so, many of which are not explicitly mentioned in the Constitution. The president also has the ability to issue other powers, including executive orders and signing statements. All of these powers give the president additional leverage in creating, shaping, or implementing policy. While the signing statement shares many qualities with other extra-constitutional powers, it is a very particular power. In some respects, it is much more like the veto than it is the executive order, for instance. This, I argue, has implications for how we should think about the use and effect of the signing statement. In what follows, I will situate the signing statement in the literature on executive power and discuss how it can affect not only political outcomes but how and why it may affect the legislative calculus.

1.2.1 Bargaining versus Unilateral Powers

Because of its constitutional basis, the veto is the most high-profile of the president’s powers. In providing the president with negative power over legislation, the Consti-

tution gives the president the bargaining chip necessary to be a viable player in the policy process. As such, much of the literature on bargaining between the executive and legislative branches has focused on this power. Previous work has found that the president's preferences are often considered by Congress because of his ability to reject legislation (Cameron 2000, Krehbiel 1998, McCarty 1997).

On top of this negative power, the president also has the positive power to create policy, often known as unilateral action. According to Moe and Howell (1999*b*, 850), unilateral action is the “formal capacity of the president to make law on his own” (Moe and Howell 1999*b*, 850). The defining characteristics of such action are that the president is the first-mover in setting the policy and that he acts alone in doing so. The executive powers that fall into this category include the executive order, presidential memoranda, and national security directives. These powers are to be distinguished from the president's bargaining powers, such as the veto, which require the president to work with Congress to pass policy. As Howell (2003, 14) notes, “bargaining does not define all aspects of presidential policymaking. Rather, modern presidents often exert power by setting public policy on their own and preventing Congress and the courts—and anyone else for that matter—from doing much about it.”

The signing statement, in extant literature, has been categorized as a unilateral power of the president (Devins 2007, Evans 2011, Kelley and Marshall 2008, 2010). The signing statement allows the president to offer his interpretation of legislation and make his intentions for the enforcement of policy explicit, giving him a greater hand in determining outcomes than perhaps intended in the Constitution. Critically, how-

ever, the signing statement does not allow the president to make policy on his own; it only allows him to alter or manipulate the agreements he receives from Congress. The president's ability to use this power to influence policy is thus contingent upon receiving a bill from Congress. As such, consistent with Ostrander and Sievert (2013*b*), I argue that the unilateral framework is inappropriate for understanding the signing statement. By considering it in such a framework, we may miss how its usage actually affects Congress and policy-making.

The signing statement, instead, seems fall somewhere between the bargaining and the unilateral powers of the office. Given the president's dependence on congressional action to use the signing statement, I argue that the signing statement should be considered in the bargaining framework, similar to the veto. However, the work on inter-branch bargaining has generally assumed that the president has a dichotomous choice on legislation, ignoring the ability of the president to act outside the constitutional confines of Article II (Cameron and McCarty 2004). I am interested in a political context in which the president can manipulate the policies he receives from Congress. The ability of the president to do so, I argue, compounds the bargaining problem between the branches and within Congress. Legislators in such an environment, cannot count on their bargains being held in tact once a bill leaves the chambers; this can create instability in coalition dynamics within Congress. I argue that legislators have adapted to the political reality that the president can manipulate policies with these statements and have found ways to take advantage of this. The regular use of this power has affected the ways in which legislators bargain with each other and gives legislators a unique way in which to balance their multiple goals in

anticipation of presidential action. That is, legislators can balance their goals and rationally enter into agreements even on the presumption that gains they acquire in the policy process may not be maintained by the president. This approach to studying presidential power provides insights about the policy process not captured in previous frameworks. It can explain why legislation may sometimes take unexpected forms and why presidents may sign legislation that restricts their own powers. The line of argumentation advanced can also speak to how the president's usurpation of legislative powers has affected the operation of and the outcomes produced by the legislative branch of government.

1.2.2 A Power By Any Other Name

Given the ambiguity about where the signing statement fits relative to other executive powers in the president's toolkit, I will choose to refer to it instead as an extra-constitutional or prerogative power of the presidency. In his *Second Treatise on Government*, Locke (1689) spoke of the prerogative power of executives, which he defined as the power to "act according to discretion, for the public good, without the prescription of law, and sometimes even against it." Many presidential powers feasibly fall under this definition; I argue that the signing statement is among them. The power of the signing statement is not explicitly granted to the president in the Constitution or by law. It is a power that presidents used periodically since the early nineteenth century but has evolved to meet the demands on the modern executive branch.

Presidents have asserted the right to issue signing statements to direct the implementation of policy, despite lack of explicit provision for the power in any authoritative text. Presidents argue that the power to issue signing statements is inherent in the grants of executive power provided in the Constitution and that the power can be used to meet executive needs when the law does not provide. In particular, presidents rely on the Oath Clause and the Take Care Clause to justify their signing statements. The Oath Clause (Article II, Section 1) commits the president to “preserve, protect, and defend” the Constitution; presidents taken this commitment to mean that they have independent authority to interpret the Constitution and that they must implement laws in ways that serve this interpretation. This argument is bolstered by the Take Care Clause (Article II, Section 3), which obligates the president to make sure that the laws are faithfully executed (Kelley 2007). This clause, presidents have argued, gives them full control over the enforcement of legislation as they see fit. Indeed, in a 2009 memorandum to the heads of executive agencies and departments, Obama (2009) asserted that “they [signing statements] 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.”⁸ Thus, presidents have found a basis for exercising prerogative power in the ambiguities associated with Article II of the Constitution. The signing statement provides a vehicle by which presidents can advance their interpretation of legislation; it allows the president to give legislation meaning beyond the written word. The interesting tension is that in claiming such executive power, presidents have increased their capacity to

⁸<http://www.gpo.gov/fdsys/pkg/DCPD-200900138/pdf/DCPD-200900138.pdf>

legislate. The increased ability of the president to create and alter laws is critical for understanding policy bargaining in the modern political climate. As Charles O. Jones (2005, 23) argued, the American separation of powers framework is better thought of as one of “separated institutions sharing and competing for power.”

1.2.3 The Second Face of Power

An important feature of presidential power is that it need not be overt and forceful to have an impact. In *Federalist 73*, Alexander Hamilton wrote,

A power of this nature in the Executive will often have a silent and unperceived, though forcible operation. When men, engaged in unjustifiable pursuits, are aware that obstructions may come from a quarter which they cannot control, they will often be restrained by the apprehension of opposition, from doing what they would with eagerness rush into, if no such external impediments were to be feared. (Hamilton, Madison and Jay 1787)

Hamilton is referring to the president’s veto power and what has come to be termed the “second face of power” (Bachrach and Baratz 1962). The veto awards the president two kinds, or faces, of power. The first is direct negative power over legislation, the power to block a bill from becoming law. However, the veto also has a more subtle or “silent” influence on the legislative process, the so-called “second face of power.” This is the power of legislative anticipation—the idea that the president does not need to exercise the veto (or any other power) for it to have an influence over the

shape of public policy.

In the literature on the bargaining powers of the president, scholars have found that the threat of veto can affect the legislative calculus and fundamentally alter the form of legislation that emerges from the legislature. That is, legislators will try to anticipate the veto and will incorporate the president's preferences into legislative so as to avoid its use (Cameron 2000, Krehbiel 1998, McCarty 1997). While this form of power is less overt, it is also far more pervasive than the number of vetoes a president issues would suggest; vetoes are a relatively rare occurrence, yet the power to wield them leaves a mark on a much greater set of bills than just those that receive one.

This insight underlies much of scholarship on the veto and presidential-congressional bargaining. The bargaining literature, however, has failed to account for the reality that the president has more powers at his disposal beyond the veto. Because these powers are outside the constitutional scope does mean that they do not fundamentally alter how the system set up in the Constitution operates. While there is ample literature on the extra-constitutional powers of the office, it too has its limits. Most of the scholarship focuses on the overt use of the tools and has thus overlooked the insights of the bargaining literature: that the president's capacity to make and alter policy can affect how and whether legislators make law. The goal of this project is to merge and synthesize the insights of these two disparate branches of the literature into a more unified theory of presidential power and of legislative bargaining. The exercise of presidential prerogatives, particularly the signing statement, can have implications for bargaining between the president and Congress, and more importantly, for bargaining within the legislature itself.

I argue that legislators likely temper the proposals to which they agree, the concessions they make, and the coalitions they join in expectation of a signing statement that could affect the policy outcome in some way. If this is the case, the president has a more refined influence over the policy process and legislative bargaining than we have generally considered. I examine how the president's direct hand in the legislative process, through the veto and the signing statement, gives the president a more subtle influence over legislative action. In addition to examining how the president's two powers shape the form that legislation takes, I also consider how legislators bargain with one another under the threat of presidential action. The key insight I advance is that the "second face" of presidential powers beyond the veto affects the ability of legislators to bargain with one another earlier in the legislative process, well before presidential action takes place.

1.3 Roadmap

In order to uncover these dynamics, I develop and test a theory of bargaining under signing statements, which is grounded in insights from previous literature and in the political reality about the scope of presidential power. In the chapters that follow, I set up the theoretical arguments, predictions, and statistical tests incrementally, proving substantive examples and explanations along the way.

To begin, I describe the political history of the signing statement in the next chapter. I first provide an in-depth discussion of what a signing statement is and how the power has evolved over time. In addition, I discuss the purpose behind and the

impact of signing statements as a policy tool of the modern presidency. I conclude the chapter with a discussion of the trends in the use of the signing statement since 1980 and describe the data which will provide the basis for evaluation of the theoretical arguments.

In the subsequent chapter, building from this discussion, I advance a theory of bargaining that resolves the puzzle of why legislators enter into agreements in an environment in which the president can negate their deals with signing statements. I develop a formal model of policy bargaining, which nests legislative bargaining within an inter-branch setting. Legislators in the model can anticipate presidential action and bargain over their policy and electoral goals. The ability of legislators to bargain over these two dimensions has implications for the output we see from the legislature. The model reveals that, while the signing statement can frustrate congressional bargaining under some conditions, it can also facilitate unlikely legislative bargains that would not otherwise have occurred. Importantly, the theory demonstrates how and when the president's policy powers affect dynamics within the legislature, before policies even pass through the chambers. As such, the model yields predictions about the legislative process distinct from other models of veto bargaining. In chapter 4, I discuss the logic behind three of these predictions. The predictions involve the conditions under which signing statements occur, the constraints in issuing them, and the extent to which they can be used to manipulate policy outcomes. This discussion will set the stage for the empirical evaluation of the theory in Chapters 5 and 6.

One of the primary hypotheses derived from the formal model focuses on how the legislative environment conditions the president's use of the signing statement. I

derive the implication that the alignment of preferences within the Congress, rather than between the branches, should affect the president's use of the tool. In particular, I predict that signing statements should be more likely when the president faces a Congress that is less polarized. In Chapter 5, I evaluate this hypothesis at both the bill-level and at the congressional level. Using data on partisan polarization and executive signing statements from 1981 until 2012, I find that signing statements are less likely in the aggregate and on any given bill at lower levels of congressional polarization, contrary to popular perceptions about when the president will wield these powers.

In chapter 6, I assess two other hypotheses derived from the formal model. First, I explore the relationship between the resource costs associated with a signing statement and the likelihood that the president will exercise the power. I find that the president is more likely to issue signing statements on a given bill when the size of the Executive Office of the President is larger and when the president's agenda is smaller; this is consistent with expectations that the directives are more likely when the president's cost to issuing a signing statement is lower. In addition, I also explore the hypothesis that the president is more likely to issue detailed statements, those which challenge more provisions of legislation, when he faces a Congress with preferences distinct from his own. While the environment between the branches may not condition when signing statements occur, I find that it does affect the scope of the policy change that president's will pursue with a signing statement.

In the final chapter, I recap and synthesize the results of the analyses in the previous chapters and discuss further implications of the arguments. I conclude with

a discussion of the normative implications of the signing statement and executive prerogative powers more generally.

Chapter 2

A Political History of Signing Statements

A signing statement, at the most basic level, is a written pronouncement that the president issues upon signing a bill into law. For this reason, the signing statement is not inherently controversial. In fact, most signing statements throughout history have been used for purely rhetorical or ceremonial reasons. In these statements, the president often just expresses his opinions on legislation, sometimes thanking members of Congress or others for their efforts and sometimes urging Congress to take further action in future legislation. These rhetorical signing statements are thus largely a credit claiming exercise for the president. For example, President George W. Bush issued a statement on a piece legislation which created a wildlife refuge in 2001. In the statement, Bush stated,

Today I am very pleased to sign into law H.R. 1230, which will establish

the Detroit River International Wildlife Refuge, the first-ever international wildlife refuge...This innovative legislation enhances public-private partnerships for conservation and habitat restoration. I want to thank the many area businesses and groups that developed the conservation vision for the refuge.¹

This signing statement was meant as a way for the president to publicly thank those responsible for providing the resources that made the legislation possible. This type of statement does not have any implications for public policy and thus does not push the boundaries of executive power.

However, signing statements are not all created equal. There is a significant subset of signing statements that are far more controversial in nature, for the president uses them to assert his executive authority and to influence the implementation of policy. In contrast to rhetorical signing statements, these constitutional signing statements are those in which presidents challenge, reinterpret, or reject parts of legislation that he has signed into law. According to Kelley and Marshall (2010, 169), constitutional statements are “designed to shape the implementation of legislation, defend or establish precedent for presidential prerogatives, or simply halt enforcement of provisions the president determines are unconstitutional.” An example of such a directive is President Barack Obama’s signing statement on the Department of Defense and Continuing Appropriations Act in 2011. In this statement, Obama stated,

Section 2262 of the Act would prohibit the use of funds for several positions that involve providing advice directly to the President. The

¹<http://www.presidency.ucsb.edu/ws/index.php?pid=73488>

President has well-established authority to supervise and oversee the executive branch, and to obtain advice in furtherance of this supervisory authority. The President also has the prerogative to obtain advice that will assist him in carrying out his constitutional responsibilities, and do so not only from executive branch officials and employees outside the White House, but also from advisers within it.

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 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. Therefore, the executive branch will construe section 2262 not to abrogate these Presidential prerogatives.²

In this statement, Obama takes issue with a provision of the legislation and gives instructions for how it should be interpreted and enforced. Statements such as these have concrete policy implications, as they serve as directives to bureaucrats and judicial actors. It is these statements with which I take interest and for which I will provide analytic attention.

In issuing signing statements, presidents often justify their actions with overtures to constitutional grants of power to the executive in the Constitution, as already discussed. Further, when presidents advance their challenges to particular parts of

²<http://www.presidency.ucsb.edu/ws/index.php?pid=90269>

legislation within the text of a signing statement, they often couch them in constitutional language to further bolster their actions. Despite these justifications, there has been a lot of controversy and debate about the legality and normative implications of the signing statement. The controversy surrounds the fact that there is no firm constitutional basis for the power, leading many to claim that they represent an unconstitutional expansion of executive power. In particular, many argue that they violate the spirit of the Constitution, generally, and the presentment clause (Article I, Section 7, Clauses 2 and 3), specifically. This clause requires that every bill that passes Congress be presented to the president and, “If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated.” The Constitution thus gives the president the ability to accept or reject legislation, not to enforce it in part. For this reason, many have likened the signing statement to a substantive line item veto, a form of power which the Supreme Court has found unconstitutional (Cooper 2005, Halstead 2006, Kelley and Marshall 2008, 2009, Ostrander and Sievert 2013*a,b*).

Regardless of the veracity of these criticisms, the fact of the matter is that signing statements have become an important policy instrument to the president; these debates only serve as evidence to that point. This, however, has not always been the case—signing statements have evolved into the tool we know today. Though they have been used, on occasion, to affect policy since the early nineteenth century, the signing statement did not really transform into a regularly wielded policy tool until the 1970s and 1980s. This has important implications for how we should think about the power and where we should look to see its impact.

2.1 Historical Use of the Signing Statement

The historical basis of the signing statement is important for understanding how the modern presidency operates. The development of the signing statement into a commonly wielded policy tool was a conscious political choice of presidents, beginning in the 1970s, to give themselves a larger say on the outcomes of the political process. Early in United States history, signing statements were rare, though not non-existent. President James Monroe was the first to issue a signing statement as a policy exercise. Monroe issued a special message to Congress to resolve what he considered a confusion in a law which reduced the size of the army and laid out a process by which the president would select new military officers (Kelley 2003). This signing statement had the intended policy effect, and Monroe's use of the power went unquestioned. In the aftermath, however, the signing statement was still used infrequently. Andrew Jackson issued the first controversial signing statement; it was the first to attract criticism and the first to elicit a response from Congress. In 1830, Jackson signed an appropriations bill into law which provided funding for internal improvements. In particular, the law set aside funds for the construction of a road from Detroit to Chicago. Jackson generally opposed the expansion of such projects, so he issued a signing statement to limit the construction. He stated,

I have approved and signed the bill entitled 'An act making appropriations for examinations and surveys, and also for certain works of internal improvement,' but as the phraseology of the section which appropriates the sum of \$8,000 for the road from Detroit to Chicago may be construed

to authorize the application of the appropriation for the continuance of the road beyond the limits of the Territory of Michigan, I desire to be understood as having approved this bill with the understanding that the road authorized by this section is not to be extended beyond the limits of the said Territory.³

In this statement, Jackson quite literally imposed boundaries on the legislation. As a result, he was censured by the House of Representatives for actively and knowingly pursuing an interpretation at odds with that set by Congress. Some legislators argued that his action amounted to an “item veto” of the legislation (Halstead 2006, Ostrander and Sievert 2013*b*). Thus, such assertions of presidential power were on tenuous grounds from the beginning.

Despite a few notable instances like these, constitutional signing statements were not used widely until the Ford and Carter presidencies. During these administrations, the foundations were laid for the transformation of the signing statement into a real policy power, a process which was cemented under Reagan. Ford and Carter took charge of the executive branch during a challenging period in history, one that had raised many questions about the separations of powers system and the appropriate extent of presidential power. In particular, the Watergate Affair and the Vietnam War led to popular distrust of government and a “resurgent” Congress intent on curbing executive power (Kelley 2003, 2007, Kelley and Marshall 2008, 2010, Rudalevige 2005). To combat legislative encroachment on the responsibilities of the executive branch, the Ford and Carter administrations, particular through the effort of the

³<http://www.presidency.ucsb.edu/ws/index.php?pid=66775>

Justice Department, took an aggressive approach to re-conceptualizing presidential power. Their efforts set the stage for a theory of presidential influence known as the unitary executive, which asserted that the president has the independent authority to interpret the Constitution and the exclusive responsibility to direct the officials of the executive branch and, thus, the implementation of policy (Kelley 2003). The signing statement was one means by which the executive branch chose to solidify such a view of executive power.

Thus, by the time Reagan became president, he was the head of a Justice Department that was poised to use the signing statement to protect the constitutional powers of the president and to accomplish his policy goals. Building on the efforts of the Ford and Carter administrations, the Reagan administration went much farther in transforming the signing statement into a powerful tool, under the guidance of Attorney General Edwin Meese III. Phillip Cooper notes that it was Meese who was “responsible for the development of the signing statement into a significant and commonly used instrument of executive direct action” (2005, 517). Under Meese, the signing statement became incorporated into the Legislative History section of the *United States Code Congressional and Administrative News*. Prior to this, signing statements were only available in the *Weekly Compilation of Presidential Documents* and the *Official Papers of the President*. By institutionalizing signing statements into the legislative history of bills, the Reagan administration ensured that the courts and bureaucrats tasked with implementing policy would always have the president’s intentions for and interpretation of legislation alongside the text of the bill.

This was a particularly important maneuver insofar as it meant the executive branch was advancing a coordinated strategy for expanding its own capacity to legislate. In the past, signing statements were used sparingly, only when the president felt a particular need to issue one on an important bill. Under Reagan, instead, a plan was established to use signing statements more frequently and more regularly to secure outcomes consistent with the president's preferences. The inclusion of the directives into the legislative history helped accomplish this goal and set the precedent for future presidents to use the documents in much the same way. As such, it is in this period, from the Reagan administration on, that signing statements should be most likely to have policy implications, and thus affect legislative bargaining; it is in this period that presidents fundamentally altered how they can and would respond to legislation. To put the historical context into perspective, before Ford took office, only 41 signing statements had been issued across the other 37 presidents.⁴ Ford himself only issued 10 and Carter 34, despite their efforts to make the signing statement a policy vehicle for the president. In the 30 or so years since Carter's presidency, the five presidents who have been in office have issued over 450 signing statements with policy implications, more than five times those issued by all other presidents combined. As such, I will focus on this period in the analyses in subsequent chapters.

⁴Kelley (2003) provides a count on all constitutional signing statements issued before Carter.

2.2 The Purpose Behind Institutionalization

It is not only the sheer number but the intent behind the signing statements in the modern presidency that make them an important policy power and one that should have an impact on how legislators bargain. The institutionalization of the signing statement had the practical, yet important, effect of making the president's interpretation of policy a factor to be considered on par with the legislative history of a bill. The main motivation behind Meese's strategy was to transform the signing statement into a streamlined way for the president to direct the implementation of policy. The Reagan administration believed in strong assertions of executive power; in particular, historians consider him to be the first president to fully embrace the idea of the unitary executive (Kelley 2003). The signing statement was thus an explicit way for the president to direct the actors tasked with the implementation policy and to inform them of the president's intent for and interpretation of legislation.

Samuel Alito, who now serves as a Justice on the Supreme Court, served as Deputy Assistant Attorney General under Reagan. In 1986, he issued an official document for the OLC and Justice Department outlining the administration's strategy for using the signing statement. In it, he noted, that prior to Reagan, the signing statement was primarily used to point out constitutional defects in legislation; he argued, instead, that the signing statement should be used as a way to advance the president's interpretation of legislation. The document reads,

Since the President's approval [of a bill] is just as important as that of the House or Senate, it seems to follow that the President's understanding of

the bill should be just as important as that of Congress. Yet in interpreting statutes, both courts and litigants (including lawyers in the Executive branch) invariably speak of “legislative” or “congressional” intent. Rarely if ever do courts or litigants inquire into the President’s intent. Why is this so? (Alito 1986, 1)

He went on to explain that this is likely because president’s have not used the tools of the office aggressively enough in doing so and that the signing statement is a way to adjust the balance of power. This enumeration of the administration’s strategy shows that institutionalizing the signing statement was a very strategic and orchestrated maneuver to increase the president’s power—the evolution of the tool was not completely organic; it was the result of political ingenuity.

There is further evidence from the period to corroborate Alito’s perspective on the signing statement. In a memorandum to one of Reagan’s top advisers, Assistant Attorney General Ralph Tarr (1985, 1-12) similarly noted that the Justice Department sought to “increase the influence these statements have,” arguing they were “underutilized” and had potential to “become far more important as a tool.”⁵ The Reagan administration was also very explicit about how it intended to use the signing statement to achieve its goals. First, signing statements were intended to communicate the president’s intentions to the federal agencies, with the goal of influencing their outlook on the law and the regulations they would set. Second, signing statements were intended to signal the president’s interpretation of legislation to the federal courts.

⁵<http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>

The administration's plan for influencing agencies was the most straightforward, as bureaucrats are agents of the executive branch and, as such, this strategy would not involve influencing the other branches. Tarr (1985, 12) noted that "the President can direct agencies to ignore unconstitutional provisions or to read provisions in a way that eliminates constitutional or *policy* problems" (emphasis added). This statement is particularly important because it was the first time an administration had overtly admitted that signing statements were being used in disagreements with Congress on policy grounds. Along the same lines, Douglas Kmiec, an official in the Office of Legal Counsel under Reagan, noted that adding the signing statement to the legislative history of a bill "was crucial for the administration to give top-down guidance on inevitable interpretation." He argued that institutionalization "conveyed presidential direction to members of the executive branch at the earliest possible point of implementation...it let agencies know that their work produced under new law was not only to reflect their considered judgment, but also that of the president, who unfortunately can sometimes seem like a distant abstraction when one works in a sprawling administrative agency" (Kelley 2007, 741).⁶ The important take away from these statements is that signing statements are intended to give the president a medium by which to offer his intentions for legislation and to control the bureaucrats under his tutelage. In short, they are a way for the president to control policy outcomes.

In addition, as noted, the Reagan administration also sought to use signing state-

⁶These quotes are taken from an email interview between Kmiec and political scientist Christopher Kelley.

ments to influence how the federal courts interpreted statutes. In 1986, at a press conference at the National Press Corp, Meese announced the inclusion of the signing statement into the legislative history, the goal of which, he stated, was to “make sure that the President’s own understanding of what’s in a bill is the same...or is given consideration at the time of the statutory construction later on by a court” (Kelley 2007, 739). Indeed, in his letter to the West Publishing Company to request the inclusion of the signing statement into the *United States Code Congressional*, Meese (1985, 2) had made the same argument, writing that “lawyers and courts engaged in statutory interpretation would have more readily available to them both the procedural history of an given statue and its interpretation by the Chief Executive upon enactment.”⁷ Meese considered it essential for judicial actors to consider the president’s interpretation alongside that of Congress. Tarr reiterated this sentiment in a Justice Department report:

It should be the policy of this Department, and of the Executive Branch generally, to encourage courts to view signing statements as authoritative statutory history. As they unambiguously represent the view of one of the three participants in the lawmaking process, such documents at least should be treated as on a par with congressional reports, and are clearly better indicators of statutory intent than floor statements of individual legislators (Tarr 1985, 1).

Given the explicit strategy behind the development of the signing statement into

⁷<http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>

the tool we recognize today, there is little ambiguity about the purpose of the signing statement: it was intended to give the president more of a say on legislation than an up or down vote. This strategy thus changed the way laws are implemented, which, in turn, should affect the process by which laws are made. Legislators, as a result of the institutionalized signing statement, can no longer presume that the policies they pass will be implemented as written, if the president signs them into law. The president's ability to offer his interpretation of legislation, if heeded by the bureaucrats and the courts, should complicate legislative bargaining.

2.3 But, Do They Actually Matter?

While the president may assert his interpretation of the law in a signing statement, there is still room for shirking among the political actors he is trying to influence and the possibility that Congress too can influence bureaucrats and the courts. This raises the pressing question of whether signing statements are actually effective in practice. One of the difficulties in answering this question is that there is a general lack of systematic analyses on policy implementation and on the implementation of signing statements in particular. This is true for both academic and government studies alike. The study of implementation is one plagued by difficult measurement problems; it often requires an in-depth and case by case analysis of the operation of a policy on the ground. Unfortunately, no such data exist for the enforcement of signing statements and such an effort is outside the scope of this project. However, there is reason to believe that signing statements do, in fact, matter and that they

can have important consequences for the policy outcomes we observe. I am not alone in this sentiment. Tony Fratto, a spokesman for the George W. Bush White House, once stated, “We are executing the law as we believe we are empowered to do so. The signing statements certainly do and should have an impact. They are real.”⁸

There is some evidence that this may be the case. In 2007, the Judiciary committee in the House of Representatives held a hearing on President George W. Bush’s use of the signing statement, after the public became aware his actions on high-profile and controversial legislation. The committee requested that the Government Accountability Office (GAO) conduct an investigation on the extent to which the federal agencies and courts executed the provisions of legislation with which the president took issue in signing statements. The investigators only examined the implementation of appropriations acts from fiscal year 2006, across which 11 signing statements were issued. Of the 160 provisions that the president challenged in these statements, the GAO examined the implementation of 19 by contacting and interrogating federal bureaucrats in various agencies (Kepplinger 1985). In terms of agency implementation, ten of the provisions examined were implemented as Congress intended, three were indeterminate, and six were implemented at odds with the intentions of Congress. Given the limitations of the analysis, the GAO was only able to document this noncompliance and could not conclude that this was explicitly the result of signing statements.

While this evidence is, of course, tempered by the limitations of the GAO investigation, it does give reason to believe that signing statements can influence agency

⁸http://www.boston.com/news/nation/articles/2007/06/19/us_agencies_disobey_6_laws_that_president_challenged/

action, at least some of the time. First, it is important to note that when a president challenges a provision of legislation, this does not mean that he will refuse to enforce it in all instances—often, the president reserves the right to do so in certain circumstances (Savage 2007). As such, we should not necessarily expect to always see noncompliance when signing statements are issued. Second, while the GAO could not trace the noncompliance to the signing statement, it is not unreasonable to assume that the signing statement gave the agencies the bureaucratic cover necessary to shirk from the congressional intent. For example, in one of the laws examined by the GAO, Congress required the Customs and Borders Patrol to relocate checkpoints for illegal immigrants every seven days to prevent smuggling, but the agency failed to do so.⁹ In his signing statement on the legislation, Bush had instructed the the border patrol to “construe the relocation provision as advisory rather than mandatory.”¹⁰ In this instance, it seems clear that the signing statement had an impact.

The GAO also found that, with respect to the 11 signing statements examined, the federal courts did not cite or refer to signing statements often, but occasionally relied on them as “authoritative interpretations of law” (Kepplinger 1985, 1). There is other evidence which suggests that the federal courts consider signing statements in making their decisions. For example, during World War I, President Franklin Roosevelt issued a signing statement which challenged a provision in an appropriations act “to avoid delaying our conduct of the war.”¹¹ This action was litigated, and, in *United States v. Lovett* (1946), the Supreme Court sided with Roosevelt’s interpretation of the

⁹http://www.boston.com/news/nation/articles/2007/06/19/us_agencies_disobey_6_laws_that_president_challenged/

¹⁰<http://www.presidency.ucsb.edu/ws/index.php?pid=63739>

¹¹<http://www.loc.gov/law/help/statements.php>

legislation and cited his signing statement in the majority opinion. Similarly, signing statements played an important part in the Court's decision process in more recent and high-profile court cases, including *INS v. Chadha* (1983) and in *Bowsher v. Synar* (1986). In the former, the Court declared the legislative veto, which had allowed one house of Congress to nullify an action of executive authority, unconstitutional. In the majority opinion, the Court cited all signing statements, which dated as far back as Woodrow Wilson's presidency, that had raised issues about this legislative encroachment (Kelley 2007, Kelley and Marshall 2008). In *Bowsher v. Synar*, the Court was tasked with demarcating the line between congressional and executive power with respect to the removal of government officials; in the decision, the Court asserted that Congress cannot control how the laws it passes are executed, as that is, at its core, the definition of executive power. In making the decision, the majority cited a Reagan-era signing statement; further, the opinion borrowed language from the signing statement in explicating the logic behind the decision (Kelley and Marshall 2008). Thrower (n.d.a) finds that this is a systematic occurrence: the Court is more likely to rule in favor of a president's position when he has issued a signing statement on the issue.

It is, however, not always the case that the Court will be responsive or sympathetic to the president's signing statements. In *Hamdam v. Rumsfeld* (2006), for instance, the majority rejected the arguments presented in a signing statement President George W. Bush issued on the Detainee Treatment Act. In his dissent, however, Justice Antonin Scalia wrote of the majority, "Of course in its discussion of legislative history the court wholly ignores the president's signing statement, which explicitly set forth *his*

understanding that the [Detainee Treatment Act] ousted jurisdiction over pending cases,” suggesting that there should be no legal difference between congressional and executive interpretations of legislation.¹² While Bush’s signing statement was not enforced in this instance, Scalia’s dissent does demonstrate that presidential signing statements are considered by judges and that they have the capacity to influence the decisions of federal courts.

There is also some case-by-case evidence that signing statements have concrete policy implications. Bush’s signing statement on the 2005 reauthorization of the PATRIOT Act serves as one example. President Bush, as mentioned in the previous chapter, issued a signing statement which reinterpreted provisions of the law regarding civil liberties protections and limits on executive power. In particular, one of the provisions with which he took issue involved the requirement for the executive branch to get court orders before engaging in wiretapping. It later emerged that the Bush administration had been intercepting phone calls and emails without said court orders, sparking renewed controversy (Savage 2007).

All this evidence suggests that signing statements can and do have important policy consequences. However, I will further note that for the assumptions of the theory advanced in the subsequent chapter to hold, all that need be necessary is that legislators *think* that signing statements matter. While I hold that signing statements are tools that induce concrete policy effects, the important link between the signing statement and legislative bargaining for the theoretical lens of this project is that

¹²http://www.boston.com/news/nation/washington/articles/2006/07/15/scalias_dissent_gives_signing_statements_more_heft/

legislators believe that signing statements can and do have such consequences.

On this point, there is ample evidence. Between June 2006 and July 2008, for instance, congressional committees held five distinct hearings on the legality and propriety of the president's use of signing statements. In one of these, Representative John Conyers, Chair of the Committee on the Judiciary, stated:

It is no secret that I have grave concerns about the excesses and the exercises of the executive branch authority as has been used in this present Administration. And at my direction, this Committee has spent a considerable portion of its time, energy and resources investigating allegations concerning the politicization of the Department of Justice; the misuse of signing statements...¹³

Given the effort that the congressional committees put into these hearings and the resources they spent on conducting investigations and issuing reports, it is clear that there was concern in the legislature, suggesting that legislators must believe signing statements have influence. Further, in the six years between the 109th and 111th congresses, over a dozen individual bills were introduced in both chambers of Congress to either limit the use or scope of signing statements, to prohibit funding for their implementation, or to outright prohibit their use.¹⁴ While these bills received some support among legislators in the chambers, they have generally not advanced very far within Congress. This indicates, however, that many legislators oppose the use of this power, likely because of its implications for policy.

¹³<http://www.gpo.gov/fdsys/pkg/CHRG-110hrg43710/pdf/CHRG-110hrg43710.pdf>

¹⁴<https://www.law.georgetown.edu/library/research/guides/presidentialsigningstatements.cfm>

In light of this discussion, I believe it reasonable to assume that signing statements do often fulfill their intended purpose of giving the president the ability to influence legislative outcomes. It also gives justification for assuming that legislators are both aware of and concerned about the president's increased legislative powers as a result of its use. Before moving on to laying out the theoretical arguments, however, I discuss recent trends in the use of this power. The insights from the data on signing statements will provide a further basis for the arguments I will advance in the next chapter.

2.4 The Data

Archival data on many facets of the presidency are publicly available as part of the American Presidency Project.¹⁵ Among their many and varied resources, they provide the full text of all signing statements issued since Herbert Hoover's presidency. This resource has provided the means by which scholars have created databases on signing statements; Ostrander and Sievert (2013a) provide one such data base. Their data provides information on each signing statement issued between 1977 and 2008 (Carter through W. Bush). As presidents do not differentiate between rhetorical and constitutional signing statements in issuing them, identifying those with policy implications requires content analysis of each statement. Ostrander and Sievert coded each of the 1245 statements issued across the period for whether they were rhetorical or constitutional in nature. Using their coding rules, I update the data through

¹⁵<http://www.presidency.ucsb.edu/signingstatements.php>

Obama’s first term as president.¹⁶

Ostrander and Sievert code as rhetorical, consistent with the definition provided previously, those signing statements which solely provide the president’s impressions of legislation; according to the coding rules, these statements often include “celebratory remarks, reservations, or a list of desired changes in future legislation.” Importantly, these rhetorical statements do not cite any violations of presidential power, constitutional defects of legislation, or provide an interpretation of legislation.¹⁷ They code constitutional statements as those that present objections to or interpretations of one or more sections of a piece of legislation. Table 2.1 shows the the number of constitutional, rhetorical, and total statements issued by each president from Carter to Obama.¹⁸

Table 2.1: Signing Statements by President (1977-2012)

| | Constitutional | Rhetorical | Total |
|-----------|----------------|------------|-------|
| Carter | 34 | 193 | 227 |
| Reagan | 93 | 156 | 249 |
| H.W. Bush | 123 | 105 | 228 |
| Clinton | 90 | 291 | 381 |
| W. Bush | 132 | 28 | 160 |
| Obama I | 11 | 10 | 21 |

As Table 2.1 shows, President Clinton issued the most signing statements of any other modern president by a significant degree; most of these statements were rhetor-

¹⁶I provide examples of the coding procedure in an appendix.

¹⁷Rhetorical statements may, however, discuss specific provisions of legislation, as long as there is no challenge or interpretation of the provision. Once a challenge is made, the signing statement is considered constitutional. Thus, constitutional statements may have some rhetorical aspects to them.

¹⁸Again, it only includes Obama’s first term as president. I have not updated the data through the second term, as his second term is not yet complete.

ical in nature and thus did not challenge legislation. A substantial number did, however. One notable instance is a signing statement he issued on a high profile campaign finance reform law, the Lobbying Disclosure Act of 1995. On the other hand, President George W. Bush issued more of these constitutional statements than did the other presidents, as well as far fewer of the rhetorical variety than most other presidents. President H.W. Bush, notably, comes in a close second to his son in terms of the use of constitutional signing statements; this is particularly interesting as he only served four years in office, compared to his son's eight. In that time, he issued signing statements on many salient bills, including one of the major domestic reforms passed during his presidency: the Civil Rights Act of 1991. In stark contrast, Obama's use of the signing statement seems to be the outlying observation, in terms of the number he issued, though not in kind. In his first four years in office, Obama only issued 21 signing statements upon signing bills into law, 11 of which were constitutional. Thus far, this trajectory has continued through his second term.

There may be an important political reason behind Obama's anomalous strategy of rarely using the signing statement. In 2006, George W. Bush received a lot of negative media attention and angered many members of Congress when he issued a series of signing statements on salient legislation, including the PATRIOT Act Reauthorization and the McCain Torture Ban. Given the high profile nature of these laws and the contentiousness in congressional debates that preceded them, the signing statements attracted coverage from large news outlets, which led not only to the public condemnation of his actions but also resulted in multiple congressional hearings and investigations of his executive power. All this negative attention contributed to Bush's

low levels of public approval in his second term. Likely as a result of this, Bush only issued 8 constitutional signing statements in his last two years in office, which pales in comparison to numbers he issued during other meetings of Congress (ranging from 34 to 49). It was in the aftermath of this public outcry over the signing statement that Obama hit the campaign trail.

Unsurprisingly, signing statements became an issue during the 2008 presidential election. For instance, in an interview with the *Boston Globe*, Obama was specifically asked whether and when he would use signing statements to bypass laws. Obama's response was:

While it is legitimate for a president to issue a signing statement to clarify his understanding of ambiguous provisions of statutes and to explain his view of how he intends to faithfully execute the law, it 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. I will not use signing statements to nullify or undermine congressional instructions as enacted into law.¹⁹

Within two months of taking office, however, Obama had started to use his power to issue signing statements on legislation. Further, he used them in much the same controversial fashion as had Bush, albeit less frequently. This, of course, led to criticism for breaking his campaign promises. The controversy surrounding the signing statement since 2006 has likely suppressed presidents' incentives to use the power regularly. That being said, Obama has used signing statements on occasion and, in doing

¹⁹<http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>

so, has challenged parts of legislation and refused to enforce others. As such, there is no reason to think that Obama's statements are fundamentally different in nature from or would affect bargaining differently than those those of previous presidents.

I will now describe trends in the use of the signing statement from 1981 and 2012. Because I am interested in the extent to which signing statements can affect policy outcomes and the legislative calculus, I limit my discussion and the subsequent analyses to constitutional signing statements issued in the period after Carter's presidency. Given the efforts of the Reagan administration in institutionalizing the signing statement and using it strategically, the period since he took office is that in which the dynamics of interest are most likely.

2.4.1 The Prominence of Signing Statements

Between 1981 and 2012, 449 constitutional signing statements were issued across the five presidents. In the same time period, the presidents vetoed a total of 173 bills and issued 1402 executive orders. These trends suggest that, though the veto is the most well-known and perhaps visible of the president's powers, it is also relatively rare. Presidents do not veto legislation very often. Figure 2.1 shows the raw number of vetoes, executive orders, and constitutional signing statements issued by each president from Reagan to Obama (only considering his first term). Executive orders are, by far, the most common of the three presidential powers generally and for each president. All five presidents issued far more executive orders than they did either vetoes or signing statements. Of course, these powers are not directly comparable,

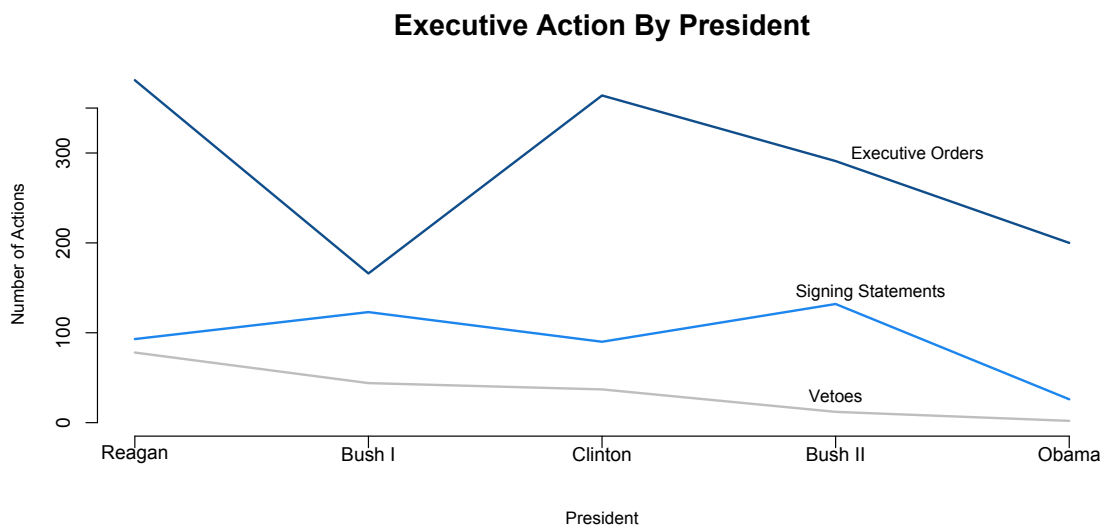


Figure 2.1: The Exercise of Presidential Power, 1981-2012.

This plot shows the aggregate number of executive orders, vetoes, and constitutional signing statements that each president since Carter issued (this only includes Obama's first term, however). Executive orders are clearly the most common power exercised of the three, across all five presidents. Vetoes are relatively rare; signing statements outstrip the number of vetoes issued by each president. This suggests they are an important, and prominent, part of the policy process.

as signing statements and vetoes can only be issued upon the receipt of a bill from Congress. The president thus has more flexibility as to when and whether he issues executive orders.

All five presidents, however, were more likely to issue signing statements than they were to veto legislation in the aggregate. This was particularly true of George W. Bush; in his eight years in office, he only vetoed 12 bills but issued 132 constitutional signing statements. Figure 2.2 shows the trends in use of signing statements against the use of vetoes during each congress from 1981 to 2012 (97th–112th congresses) to examine the powers across smaller increments of time. At this level, signing statements were more likely than were vetoes during almost every congress. Vetoes only outnumber signing statements during the 97th congress (Reagan), the 104th Congress

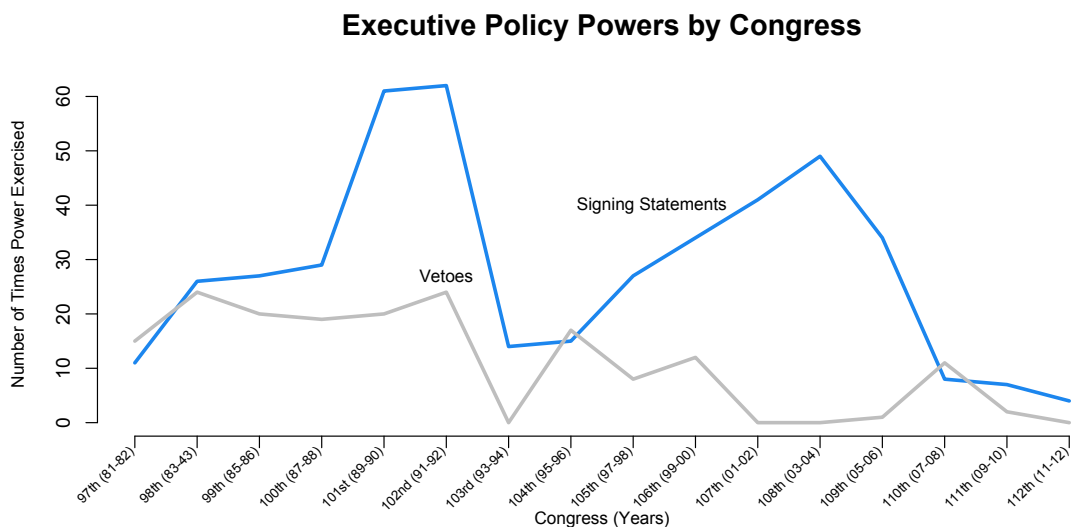


Figure 2.2: Vetoes and Signing Statements, 97-112th Congresses.

This plot directly compares the number of vetoes and constitutional signing statements per congress from 1981 to 2012. Both of these powers require that Congress act first and successfully pass legislation. For almost every period examined, the number of signing statements is larger than is the number of vetoes.

(Clinton), and the 110th Congress (W. Bush). The 1994 congressional election (104th Congress) resulted in huge wins for the Republican party, which gained control of both houses of Congress for the first time since the 1950s; it was a very active and conservative Congress, which may have given Clinton the incentive to use his veto power more often. The 110th Congress met between 2007 and 2009, in the aftermath of Bush's negative attention for using the signing statement. As such, it is not surprising that the number of statements dropped during this period. Otherwise, signing statements outstrip vetoes, often by significant numbers.

These trends illuminate an important political reality: the president's prerogative powers are a more common feature of the political landscape than is the veto. This is particularly interesting given the attention that scholars of the presidency give the veto power. While some work has been done on the prerogative powers, there is

a disconnect between what scholars have focused upon and the reality of executive power. Given the limited literature on the signing statement, these trends suggest it is a relatively understudied phenomenon. As the signing statement appears to be a prominent part of the policy process, legislators must be aware of its potential policy effects, and it likely affects their ability and willingness to draft legislation, as well as the form such legislation will take.

2.4.2 The Political & Policy Context

To this point, the literature that does exist on signing statements has largely focused on the conditions under which signing statements are likely. There is little theoretical work on how its use affects the bargaining process between the branches, and, in particular, there is no work that tries to uncover the upstream effects of the signing statement on the legislature. That being said, the extant work on signing statements has made important contributions to our understanding of the tool. In this section, I will discuss previous findings on signing statements and show political trends in the data that will be of interest.

One of the most puzzling aspects of the empirical work on signing statements is that there is little consensus on how or even whether the inter-branch bargaining environment conditions their use. A significant portion of those who study signing statements argue that they should be more likely under divided government, as the president should have more incentive to use them when he faces as hostile Congress; their findings support this line of argumentation (Devins 2007, Kelley and Marshall

2008, 2009). More recent work, on the other hand, contends and finds that signing statements are more likely under unified government. For example, Kelley and Marshall (2010) apply the unilateral framework to the signing statement, arguing that under unified government, Congress will be more deferential to the president and less likely to overturn his actions, making unilateral action less costly and more inviting; they indeed find this is the case. Still other scholars find that the political environment does not have a significant effect on whether and when presidents use signing statements (Ostrander and Sievert 2013*a*, 2014). In examining the data, there do not appear to be significant differences across periods of unified and divided government in terms of the aggregate number of statements issued. Of the 449 statements examined, 345 were issued during divided government and 104 under unified control of the branches. In period examined, divided government was the modal political environment, marking 12 of the 16 congresses covered in the data. On average, then, periods of divided government resulted in 29 statements per congress, compared to an average of 26 under unified government. While there is a gap, it is not as large as may be expected. Of course, to determine the true effect of unified or divided government, one would also need to take into account the amount of legislation that was sent to the president for approval. However, the conflicting findings in the literature suggest that a theoretical framework is needed to understand whether preference alignment between the branches affects the president's use of the signing statements and, if so, when it matters.

In addition, the literature on signing statements finds that there are features of the bill or law that may make the president more likely to issue signing statements.

For instance, signing statements are more likely on salient legislation (Kelley and Marshall 2008, 2009, 2010, Ostrander and Sievert 2013a, 2014). Indeed, I find a correlation between signing statements and two different measures of issue salience. Mayhew (1991) provides one of the standard measures of the salience of legislation. Mayhew relied on contemporary judgments about the importance of legislation. In particular, he identified as major/important those laws discussed by journalists of the *New York Times* and *The Washington Post* in wrapup session stories.²⁰ From 1981 to 2012, Mayhew identified 153 pieces of legislation as important, 35 of which received signing statements. In addition, I also considered an alternate measure of salience: *Congressional Quarterly's* key votes. *CQ* considers as key votes those that involve a matter of major controversy, a test of presidential or political power, or a decision that could have widespread impact on the nation.²¹ I identify 238 key votes in the thirty year period I examine; seventy of these votes received signing statements. Given that signing statements, while more common than vetoes, are still a relatively rare event, it does seem that significant legislation has a higher probability of getting this additional attention from the executive branch.

The use of signing statements also varies significantly across the policy area of the legislation the president is considering. Previous work has found that the president is more likely to issue these directives on laws that focus on certain policy areas, such as defense policy or international affairs, which lie within the bounds of the president's explicit grants of power in the Constitution (Evans 2011, Ostrander and Sievert

²⁰Note that I use his Sweep 1 measure.

²¹http://library.cqpress.com/congress/html/help/Help_keyVote.htm

2013a). To code the major policy area of each law which received an accompanying signing statement, I use data from The Policy Agendas Project, which provides information about the policy content of all legislation passed by Congress. The Project classifies every piece of legislation into one of 20 major topics, which range broadly from foreign trade to community development. Using this data, I examined the policy areas affected by signing statements between 1981 and 2012. Of the Project's twenty policy categories, only one (immigration policy) did not show up in the data. Figure 2.3 shows the dispersion of statements across the various policy areas.

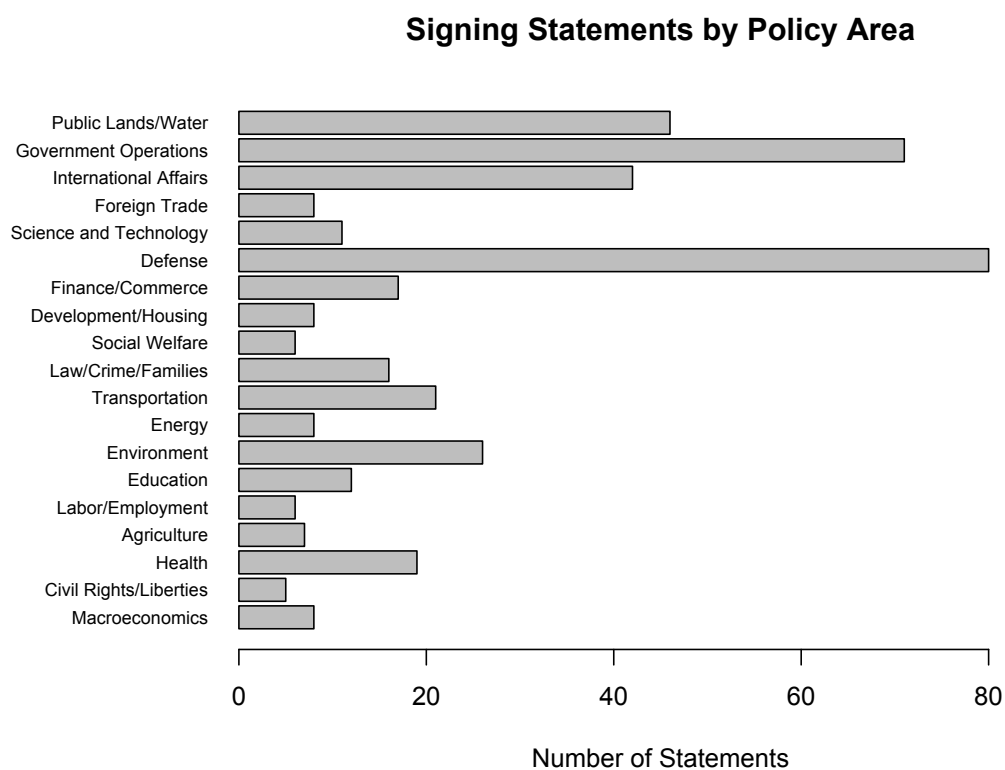


Figure 2.3: Policies Areas Affected by Signing Statements, 1981-2012. This bar plot shows the major policy areas of the 449 laws that received a signing statement between 1981 and 2012, using Policy Agendas Project data to code the topic area. The defense, government operations, and public lands/water arenas had the largest number of signing statements issued in this time period. However, there is a wide dispersion of signing statements across the 20 policy areas identified by the Project.

In the aggregate, defense bills, those that primarily address funding or operations of the Department of Defense or the armed forces, received the most signing statements. Eighteen percent of the statements in this period were issued on defense bills, which is a substantial proportion.²² Government operations bills were also very likely to receive signing statements, relative to the other policy areas. Of the 449 signing statements, presidents issued 71 on this type of legislation. Government operations legislation is that in which budget or appropriations requests for agencies are made. Signing statements were also common on international affairs bills, which typically address the Department of State or foreign policy and diplomatic relations with other nations. Notably, all these policy areas fall into the traditional purview of presidential power, as the previous literature holds. Together, bills in these policy areas account for 43 percent of the signing statements issued between 1981 and 2012.

However, other policy areas also see significant numbers of signing statements, including some major domestic policy arenas. In particular, substantial numbers of signing statements were issued on public lands and water management legislation, as well as environmental bills. Thus, while there are apparent trends in which laws receive signing statements, there is still significant variation in the types of policies to which presidents attach them. It does not appear that the president's ability to influence policy with signing statements is confined to one issue area or one realm of policy. In practice, this means that the president's use of signing statement should have a marked effect on the policy process, in general, rather than only on bargaining in certain policy areas.

²²Eighty signing statements out of the 449 were on defense bills.

Together, these trends in the signing statement data raise many questions and empirical puzzles about the use of signing statements and their effect on the political process. If the signing statement is wielded more regularly than is the veto, does it have a similarly pervasive impact on policy? Do legislators anticipate the statement as they do the veto, and, if so, on what basis do they agree to pass legislation that might result in one? Does the political environment between the branches condition the president's use of signing statements? Do ideological differences and policy preference matter when it comes to signing statements? Does the threat of a signing statement effect bargaining in all policy areas and on all bills? On top of these questions, the discussion here raises more general questions about the constitutional system in the United States. Is the president constrained in the use of the signing statement by Congress or otherwise? Does the president's ability to issue signing statements create a struggle between the branches for control over policy, or is there a tacit agreement between the branches as to when the president wields the power? In the following chapters, I will answer each of these questions in due turn.

2.5 Discussion

In this chapter, I have provided the historical and political foundations from which to build a theory of bargaining under signing statements. Presidents have used the signing statement since the early nineteenth century. However, through much of history, the signing statement has had little policy effect and has been uncontroversial, as it was largely used for rhetorical reasons. The use of the signing statement as a

policy tool is a much more recent phenomenon. The signing statement as we know it today is a product of the modern presidency. It evolved slowly through history to fit the political circumstances and the needs of the executive branch. Today, it is an institutionalized means by which the president can instruct courts and bureaucrats on how to implement the legislation drafted in Congress. It gives the president a vestige of control over policy outcomes.

As I will argue in the next chapter, the signing statement, or the threat thereof, should leave a mark on the way in which the constitutional system operations—that is, it should fundamentally alter the process by which a bill becomes a law. As signing statements are used more frequently by the president than is the veto, legislators should and likely do anticipate the signing statement and thus consider the president's preferences and expected actions in crafting legislation. This should especially be so, as presidents issue them on salient legislation and in important and controversial policy areas. In the next chapter, building from these insights, I will develop a theory about how signing statements influence both inter- and intra-branch bargaining dynamics.

Chapter 3

A Theory of Bargaining

In this chapter, I develop a theory of inter-branch bargaining in which the president can affect the policy process with his two of his primary policy powers, the veto and the signing statement. The main causal mechanism of interest is the “second face of power,” or the power of anticipated response. While the signing statement and the veto give the president an overt form of control over the fate of policy, the threat of these powers can have a more pervasive effect on the policy process and particularly on the legislative calculus. Thus, in addition to examining how the president’s two powers shape the form that legislation takes, the theory considers how legislators bargain with one another in the face of looming presidential action. I seek to answer the following question: how does the prospect of a signing statement affect the ability of legislators to bargain with one another earlier in the legislative process, before policies are even sent to the president?

That the president has the ability to influence policy is well-documented (Cameron 2000, Howell 2005, Kernell 1997, Krehbiel 1998, Neustadt 1991). Building from this,

I theorize about and describe the *process* by which he does so—how the president’s actions, or the anticipation thereof, influence the agreements that legislators are willing to opt into in the first place and how this, then, has implications for the policy outcomes we see.

3.1 Theoretical Foundations

I build a formal model to address how (or whether) political actors with divergent and competing preferences can overcome these differences to enact policy change. The defining feature of most of the models that focus on this tension is that they assume when legislation passes through both chambers of Congress, it is sent to the president as a take-it-or-leave-it offer (Cameron and McCarty 2004). My interest, however, lies in a political environment in which the president has a wider choice in how to respond to legislation. I model the interactions between legislators and a president equipped with the decision between signing, vetoing, and issuing signing statements on legislation. The addition of the signing statement to a model of veto bargaining complicates bargaining not only between the president and the legislature, but also among legislators themselves.

Legislators confront a bargaining problem that involves fostering a large enough enacting coalition to pass a bill through Congress. An implicit assumption in veto bargaining models is that legislative coalitions, once formed, are stable, as the president can only accept or reject a bill. If a legislator commits to a coalition, she can be certain that the agreements will be upheld. The bargaining problem, however,

is exacerbated in a political environment in which signing statements are a viable option for the president. If the president can issue a signing statement and alter the meaning of a law or choose which parts to enforce, this undermines the stability of legislative coalitions—legislators cannot be certain that their agreements will be kept in tact. This, then, should make the legislators less willing to commit to bargains in the first place. The puzzle, then, becomes why legislators would and do enter into policy bargains in such an environment.

The formal model I develop resolves this puzzle. The model builds directly from canonical models of veto bargaining (see Krehbiel 1998, Cameron 2000, McCarty 1997 for notable examples) but specifically addresses the bargaining tensions that legislators confront when faced with a president who can issue signing statements. I argue that ability of the president to issue signing statements with policy implications creates room for legislative bargaining through position-taking incentives; that is, I argue that signing statements allow legislators to bargain over two dimensions, a policy and a position-taking dimension, separately. The signing statement does so by creating a situation in which legislators can publicly vote for a policy proposal but receive a policy payoff relative to a different policy outcome, one that the president has re-set with a signing statement. Legislative bargaining on these two dimensions results in conditions under which it is rational for legislators to commit to bargains within the legislature, even when they anticipate a presidential signing statement that will undermine the deal and, perhaps, shift the policy outcome in an adverse way. The incorporation of the signing statement into the veto bargaining process results in predictions about the policy process that differ from those in extant models.

3.1.1 Players and the Sequence of Play

The model consists of three actors: the president and two legislators. Legislative bargaining is modeled as an interaction between a proposer and a veto player. The proposer is a legislator with agenda setting power in the legislature, and the veto player is a pivotal legislator who must accept a proposal for it to advance; bargaining between these actors is meant to capture the intra-congressional collective action problem. As legislation is also the product of bargaining between the branches, the president also has a pivotal role in inducing policy change in the model.

Each actor has an ideal point, or a most preferred position, in a unidimensional policy space, \mathbb{R} . I assume that all ideal points, policy proposals, and outcomes can be represented on the same policy space. The president's ideal point is $P \in \mathbb{R}$, the veto player's is $l \in \mathbb{R}$ and the proposer's is $L \in \mathbb{R}$. The legislative proposer has the first move of the game; she is tasked with choosing whether or not to propose a bill. If she chooses not to propose, an exogenous status quo, q , remains as the standing policy. If the proposer chooses instead to propose, she sets some policy, $\beta \in \mathbb{R}$. The policy, β , is then considered under a closed rule by the legislative veto player whose vote is necessary for the bill to advance through Congress. If the veto player rejects the offer, the game ends and the status quo remains as the policy. If she accepts, the game proceeds; the legislation, β , passes through the legislature and is sent to the president. In the final stage of the game, the president is presented with the policy and has a trichotomous choice over whether to sign the bill into law, veto the bill, or whether to issue a signing statement on the bill upon signing it into law. If the

president signs the bill, β becomes law. If the president vetoes β , q remains in tact. In the event of a signing statement, the president is able to manipulate or shift the policy outcome in the policy space to a new location, $B \in \mathbb{R}$.

3.1.2 Strategies

A strategy for the proposer, L , is a policy choice, $\beta \in \emptyset \cup \mathbb{R}$. A strategy for the legislative veto player, l , is response to a proposal, $\rho \in \{accept, reject\}$. A strategy for the president, P , is a pair $\sigma = \langle s, B \rangle$, where s is a response to a policy such that $s \in \{sign, veto, ss\}$, and $B \in \emptyset \cup \mathbb{R}$ is a location of a signing statement.

3.1.3 The Players and Their Goals—An Overview

In this section, I explicate the goals of each of the actors in the model and specify their utility functions.

The President

The president conceivably has multiple goals while in office; a president in his first term may have reelection goals, presidents can be motivated to strengthen or protect their office, and executives certainly have policy goals. However, I argue that, in the use of his legislative tools, the president primarily cares about policy outcomes. In particular, presidents use their executive powers to maximize their influence over policy. Constitutionally, when the president is sent a law that has been passed by both chambers of Congress, he has the choice between signing and vetoing the legislation. The inter-branch bargaining literature generally assumes that the president

is policy-motivated in making this decision (see Krehbiel 1998 and Cameron 2000). These models rest on the assumption that the president will only sign into law those policies most reflective of his policy preferences, in particular those bills closer to his ideal policy than is the reversion point. Cameron argues that constitutional design “almost guarantees periods when the president and Congress differ over major policy objectives” (divided government) and when the two branches disagree, “the president has a strong incentive to use the veto” (2000, 9). Evidence supports this claim.

Similarly, I argue that signing statements are used to shape policy outcomes and to affect the implementation of legislation to achieve policy goals.¹ They give the president the additional leverage to acquire such gains. Some of the literature on executive use of signing statements (and other executive prerogative powers) argues that the president uses these tools to strengthen the office of the president; it is undoubtedly the case that signing statements have been used to protect executive power from legislative encroachment (Cooper 2005, Moe and Howell 1999*a*, Ostrander and Sievert 2013*a*, Pfiffner 2008). However, I assume that these goals are ancillary to securing policy gains. Presidents likely seek to strengthen their office in order to gain influence in the policy-making process. While presidents may and often do justify their use of signing statements in constitutional language, these institutional defenses are likely meant to protect the policy gains from criticism or, worse yet, rescindment by other political actors (namely, Congress and the courts).

As such, the president in the model derives the crux of his utility based on the location of the policy outcome relative to his ideal point. The primary element of

¹I do not consider rhetorical signing statements in this framework.

his utility function is given by $-(P - x_o)^2$, where P is the president's ideal point and x_o is the location of policy outcome in the same undimensional space; that is, the president suffers a quadratic utility loss as the policy outcome diverges from his preferred point in the policy space.

The president's utility to issuing a signing statement, however, is more complicated than his utility for signing or vetoing legislation. I conceptualize the signing statement as shift of a policy in the policy space from that which Congress proposed to a new location closer to the president's ideal point. When the president issues a signing statement, he technically signs the bill into law but, in practice, is able to implement the bill at a different location.² As such, I assume that the president suffers a quadratic loss in the distance between his ideal point and the location of the policy he sets with the signing statement, $-(P - B)^2$. The president, however, is also assessed two costs for issuing a signing statement in the model, which will temper his ability to completely alter the policy Congress passed.³

First, the president accrues a loss of $-(B - \beta)^2$, which represents a cost that varies as a function of how far he moves the policy he sets with the signing statement, B , from that which Congress issues, β . As $(B - \beta)^2$, the square distance between the signing statement and the bill proposal, increases, this scope cost also increases. This cost represents the inability of the president to completely change the meaning or intent of the congressional bill with a signing statement; the signing statement

²I abstract away from the politics of implementation and assume that once a statement is issued, it always takes effect.

³These costs also mean that the president would prefer to get policy concessions through bargaining with Congress earlier in the process, rather than with the use of such a power; in the absence of bargaining success, the president will sometimes have the incentive to use the signing statement to get these policy gains after the fact.

changes policy on a provision by provision basis and cannot remove any text or rewrite the policy. In practice, this cost can be interpreted as a reputation loss or political cost to the president. The farther a president shifts the policy from the one intended by Congress, the more he is stretching the scope of his extra-constitutional powers. This can adversely affect his reputation with other governmental actors and the other branches, making future bargaining more difficult. Further, the more the president stretches the power of the signing statement, the more likely he may be to elicit a reaction from Congress or the courts, both of which can (and have) acted to overturn or negate such presidential directives (Kelley 2007, Rodriguez, Stiglitz and Weingast 2015, Thrower n.d.*b*).

In addition to this scope cost, the president is also assessed a fixed cost, c , for issuing a signing statement. This cost represents the initial resource or opportunity cost to issuing a signing statement. Most signing statements are prepared by the Justice Department and approved by the Office of Management and Budget and require a certain amount of expertise, time, and manpower, for they dissect congressional laws provision by provision in order to find sections with which the president disagrees (Alito 1986). Dedicating such resources (staff, time, expertise, etc) to a particular bill means that those resources cannot be used for other issues or bills or for the use of other presidential powers.

As such, the president's utility function is given by:

$$U_p(\sigma) = \begin{cases} -(P - \beta)^2 & \text{if sign} \\ -(P - q)^2 & \text{if veto} \\ -(P - B)^2 - (B - \beta)^2 - c & \text{if signing statement} \end{cases}$$

It is worth noting that while I construe signing statements as vehicles for acquiring policy gains, it is possible that they are issued for electoral purposes, as signals to vested constituencies or interest groups. However, I argue that rhetorical signing statements, which are outside the scope of my theoretical argument, are those most geared towards position-taking exercises. In advancing constitutional objections to or interpretations of parts of legislation, the president is likely trying to accomplish more than trying to appease a constituency with a constitutional signing statement; he is trying to affect the implementation of policy. Doing so, however, may be consistent with his electoral or position-taking goals. In such a case, however, the president would receive the same policy and electoral utility, both of which would be gauged in the distance between the outcome and his ideal point. When these goals are consistent as such, it will not change the president's calculus assumed here.

Congress

Legislators have multiple goals (Arnold 1990, Cox and McCubbins 2005, Fenno 1973, Hall 1996, Schickler 2001, Smith and Remington 2001). While in office, legislators pursue their policy, electoral, and career goals, among others. When it comes to the bargaining and voting dynamics in the legislature, I assume there are, in particular,

two elements to congressional preferences—legislators are motivated by re-election concerns, as well as by personal policy preferences.

Mayhew (1974) argued that remaining in office can be seen as the proximate goal of legislators. Unlike the president, legislators do not have term limits and, especially in the House, are constantly running for reelection and campaigning. Legislators do not want to vote in ways that will jeopardize their career in office by voting against constituent preferences on salient issues. I assume legislators have quadratic preferences over the location of policy proposals, given by $-\alpha(i - x_p)^2$, where i is the legislator's ideal point, either l or L , and x_p is the location of the proposal in space. The value of x_p depends on the value of the bill the proposer has proposed, β , or the value of the status quo, q , if no proposal is made or if a legislator votes nay on the bill. The α parameter represents the weight that each legislator puts on position-taking relative to policy. I assume $\alpha \geq 0$; the higher α is, the more a legislator will care about the proximity of the bill proposal to her ideal point relative to the proximity of the policy outcome to her ideal point. This exercise can be seen as a legislative attempt to publicly signal their constituents about their positions on issues. Practically, the utility loss associated with the distance between a legislator's ideal point and the proposal location can be interpreted as a loss in constituent support.

In addition to caring about constituent evaluations, legislators in the model care about policy outcomes. This assumption is well-founded in the research on congressional politics. Fenno (1973), despite focusing on electoral goals, notably documented that legislators care about particular policy outcomes. Empirical work on legislative behavior has corroborated Fenno's finding—in particular, the body of work on ideal

point estimation has shown that legislators tend to vote along ideological lines and that a single ideological dimension can explain much of the variation in legislative voting behavior (Clinton, Jackman and Rivers 2004, Poole and Rosenthal 1997, 2000). I assume the legislators receive policy utility $-(i - x_o)^2$; that is, legislators also experience a quadratic loss in utility as the policy outcome diverges from their ideal points in the policy space. In this term, x_o represents the location of the actual policy outcome in policy space. Critical to the model, this policy may be different than the one proposed. x_o can take on the value of the congressionally passed bill, β , only if a proposal is made that both the veto player and the president accept. x_o will take the form of the status quo if no proposal is made or if the bill is rejected. Finally, x_o can take the form of a new policy location, B , when the president has an incentive to shift the policy with a signing statement. Below, I provide the utilities to each legislator for all possible contingencies of the model.

The legislative veto player's utilities are given by:

$$U_l(\rho; \beta, \sigma) = \begin{cases} -(1 + \alpha)(l - q)^2 & \text{if } \begin{cases} \beta = \emptyset \\ \rho = \text{reject} \end{cases} \\ -(1 + \alpha)(l - \beta)^2 & \text{if } \beta \in \mathbb{R}, \rho = \text{accept}, \& s = \text{sign} \\ -\alpha(l - \beta)^2 - (l - q)^2 & \text{if } \beta \in \mathbb{R}, \rho = \text{accept}, \& s = \text{veto} \\ -\alpha(l - \beta)^2 - (l - B)^2 & \text{if } \beta \in \mathbb{R}, \rho = \text{accept}, \& s = \text{ss} \end{cases}$$

The proposer's utility function is as follows:

$$U_L(\beta; \rho, \sigma) = \begin{cases} -(1 + \alpha)(L - q)^2 & \text{if } \beta = \emptyset \\ -(1 + \alpha)(L - \beta)^2 & \text{if } \beta \in \mathbb{R}, \rho = \textit{accept}, \& s = \textit{sign} \\ -\alpha(L - \beta)^2 - (L - q)^2 & \text{if } \begin{cases} \beta \in \mathbb{R}, \rho = \textit{accept}, \& s = \textit{veto} \\ \beta \in \mathbb{R} \& \rho = \textit{reject} \end{cases} \\ -\alpha(L - \beta)^2 - (L - B)^2 & \text{if } \beta \in \mathbb{R}, \rho = \textit{accept}, \& s = \textit{ss} \end{cases}$$

The potential for competing incentives captured in these utility functions could induce strategic behavior among legislators. In a political environment in which proposals do not map cleanly into outcomes, legislators, in many instances, will need to decide whether to use their legislative powers as a public stance or as a means to a policy end. Such strategic balancing of goals has ramifications for the bargaining that takes place within the legislature and between the branches, which is the central focus on this project. Competing goals will directly influence the voting and coalition decisions legislators will make, especially in anticipation of presidential response to legislation.

3.1.4 Information Setting

In addition to the assumptions already laid out, I also assume that the actors in the model are completely informed about each other's preferences and actions when they make their decisions. Under this assumption, legislators, thus, will be able to

fully anticipate presidential actions. While this assumption is made for reasons of tractability, there is reason to believe that it is not just a simplifying assumption for the model; evidence shows that legislators do get fair warning of the use of the president's policy powers. For instance, Cameron (2000) finds that, under divided government, almost a quarter of all bills presented to the president between 1945 and 1992 received a veto threat at some point in the process, meaning that presidents often do signal their policy discontent to Congress.

Similarly, there is reason to believe that legislators have information about the president's use of signing statements before they occur. Signing statements are often preceded by Statements of Administration Policy (SAP) (Kelley and Marshall 2009, Rice 2010). An SAP is a document produced by the Office of Management and Budget (OMB) that expresses an administration's official views on a bill; the OMB can issue these documents on behalf of the president at any point during which Congress is considering a bill. Some SAPs come in the form of veto threats, warning Congress that if they retain certain provisions in the legislation or advance a bill, the president will reject it. More often, however, SAPs will list the president's objections to a bill, to make Congress aware of potential problems. Rice (2010) notes that it is quite common for the objections made in a signing statement to be the same as or similar to those advanced previously in an SAP. For example, when Congress was considering the Department of Defense Appropriations Bill for FY 2006, the Bush administration issued an SAP, which specifically addressed a few problematic parts of the bill and several amendments under consideration, including one known as the McCain Torture Ban. The SAP stated,

The Administration understands that amendments may be offered to establish a national commission on the detainee operations or to regulate the detention, treatment, or trial of terrorists captured in the war on terror. The Administration strongly opposes such amendments, which would interfere with the protection of Americans from terrorism by diverting resources from the war to answer unnecessary or duplicative inquiries or by restricting the President's ability to conduct the war effectively under existing law. The Constitution and the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, September 18, 2001) provide the authority the President needs to conduct the war effectively and protect the American people.⁴

Congress approved the bill with the amendment despite this warning, and Bush issued a signing statement on the legislation, which specifically addressed the Torture Ban. Thus, Congress was not blindsided with a signing statement in this instance, nor does it seem that they often are. The legislators likely knew that leaving the Ban in the bill could elicit a signing statement and voted for its inclusion anyway. As such, there is reason to believe that legislators can make accurate assessments about the fate of legislation when considering bills within the legislature.

⁴<http://www.presidency.ucsb.edu/ws/index.php?pid=24877>

3.2 Equilibrium Analysis

To analyze the model, I identify and characterize a subgame perfect Nash equilibrium. I begin with a discussion of the president's equilibrium strategy, then move on to a discussion of the strategy of the legislative veto player. I conclude with a description of the proposer's calculus and the equilibrium outcomes of the game. The analysis reveals that when signing statements are of sufficiently low cost to the president, he will have the incentive to sign, veto, and issue signing statements upon legislation. The political environment and the array of preferences will condition the president's choice of which option to pursue. Proofs of the results are provided in the technical appendix.

3.2.1 Equilibrium Behavior of the President

As the president is motivated by policy concerns, he will use the powers of his office to ensure that policy outcomes are as close as possible to his ideal point, P . In the model, the president only has a move if the proposer and the veto player agree to a policy. In this case, three actions are open to him: the president can sign the bill into law, veto the bill, or the president can issue a signing statement upon signing the bill. When the president issues a signing statement, he is presented with a continuous choice over where to reset the policy in the policy space. The unconstrained optimal signing statement, then, is given by:

$$B^* = \frac{P + \beta}{2}$$

Substantively, this represents the president's incentive to shift any given bill from Congress, β , to the midpoint between his ideal point and the proposal upon issuing a signing statement. Because the signing statement is a costly action, he will not have the incentive to move the policy any closer than this midpoint. As there is no check on the president's ability to issue a signing statement in the model, if the president issues a signing statement, the policy will always shift to this new location in the policy space.⁵

For any given subgame perfect Nash equilibrium, the president's decision rule takes the form of:⁶

⁵Note that this optimum is independent of the fixed cost, c , to a signing statement. When the president maximizes his utility for issuing a signing statement, he always has an incentive to shift the policy to the midpoint between his preferred location and the proposal, regardless of the value of c . As c is an exogenous parameter and is always assessed upon the issuance of a statement, it does not affect this calculus.

⁶These decision rules assume that the status quo is greater than the President's ideal point. Here, κ_2 and κ_3 represent cutpoints of the values $P - \sqrt{2c}$ and $P + \sqrt{2c}$ respectively. κ_1 and κ_4 represent $P - \sqrt{2q^2 + 4q - 2c + 2}$ and $P + \sqrt{2q^2 + 4q - 2c + 2}$.

$$\sigma(\beta)^* = \left\{ \begin{array}{ll} s=\text{sign}, B = \emptyset & \text{if } 2P - q \leq \beta \leq q \quad \text{and} \quad c \geq \frac{q^2+2q+1}{2} \quad \text{or} \\ & \kappa_2 \leq \beta \leq \kappa_3 \quad \text{and} \quad c < \frac{q^2+2q+1}{2} \\ s=\text{veto}, B = \emptyset & \text{if } \beta \notin [2P - q, q] \quad \text{and} \quad c \geq \frac{q^2+2q+1}{2} \quad \text{or} \\ & \beta \notin [\kappa_1, \kappa_4] \quad \text{and} \quad c < \frac{q^2+2q+1}{2} \\ s=\text{ss}, B = B^* & \text{if } \kappa_1 \leq \beta \leq \kappa_2 \quad \text{or} \\ & \kappa_3 \leq \beta \leq \kappa_4 \quad \text{and} \quad c < \frac{q^2+2q+1}{2} \quad \text{or} \\ & \emptyset \quad \text{if} \quad c \geq \frac{q^2+2q+1}{2} \end{array} \right.$$

The president's equilibrium action is thus conditioned by the fixed cost to issuing a signing statement. When costs are sufficiently low to issuing a signing statement (when $c < \frac{q^2+2q+1}{2}$), then signing statements are in the equilibrium strategy of the president. The president's decision on which power to utilize depends on how close (far) the proposals are from his ideal point. Figure 3.1 shows the partitioned policy space in regards to the president's equilibrium strategy when the fixed cost is below this critical threshold.

As Figure 3.1 demonstrates, when the fixed cost to a signing statement is below the threshold, policy proposals from Congress that are close enough to the president's ideal point will be signed into law as is. If the policy proposal lies between κ_2 and κ_3 (see Figure 3.1), the policies are already reflective of the president's preferences, so the costs of a signing statement are not worth the possible gains. As the policy

The Policy Spaced Partitioned by the President's Strategy

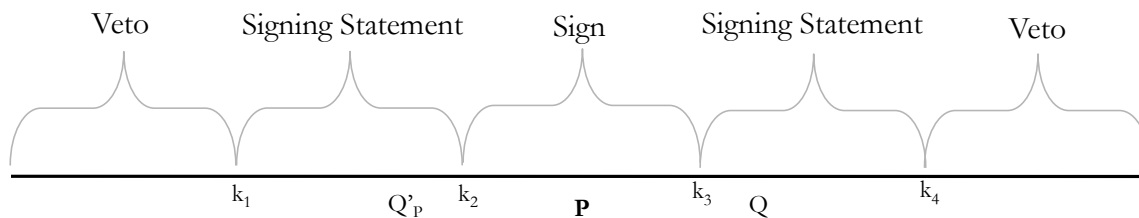


Figure 3.1: The President's Low-Cost Decision Calculus.

In this diagram, P represents the president's ideal point. Q is the position of the status quo in the policy space and Q'_P is the reflection point of Q about P . The policy space is partitioned into five sections based on the president's optimal strategies. Those bills proposed closest to the president's ideal point (between κ_2 and κ_3) are close enough to the president's ideal point to be signed into law. Proposals between cutpoints κ_1 and κ_2 and between cutpoints κ_3 and κ_4 will receive a signing statement in equilibrium. These policies are far enough from the president's ideal point that the policy gains from the signing statement outweigh the costs. Those proposals to the left of cutpoint κ_1 and to the right of cutpoint κ_4 will be vetoed according to the president's strategy. In these regions, the sliding cost is prohibitive.

proposals move past those cutpoints and further from the president's ideal point in either direction, then the president will begin to issue signing statements. In the regions between κ_1 and κ_2 and between κ_3 and κ_4 , the policies are far enough from the president's ideal point to warrant the costs associated with issuing a signing statement but close enough that he still would like to sign it into law. As former house majority leader Dick Armey once stated, "Can you imagine vetoing 100 percent of what you want because someone got 10 percent of what they want [that] you disagree with? That would be a foolish choice" (Rice 2010). Thus, if a proposal is made in one of these regions, then the president will issue a signing statement which shifts the outcome closer to his preferred position. Take President George W. Bush's signing

statement on the McCain Torture Ban, mentioned previously, for example. In 2005, Bush sought the passage of the defense bill to fund the Pentagon for the following year. Senator John McCain proposed an amendment to the bill which banned the use of torture and cruel treatment against detainees from the war on terror and threatened to filibuster the legislation without the amendment. In doing so, McCain forced through Congress a bill that was more liberal than the bill President Bush would have liked. Upon receiving the bill, President Bush signed it into law but issued a signing statement upon it, refusing to enforce just those parts of the bill with which he disagreed. In the statement, he essentially instructed the armed forces, as Commander in Chief, to abide by his orders, rather than the text of the law. In this way, Bush used the signing statement as a way to implement a policy more conservative and thus more to his liking than the congressional version.

Referring back to Figure 3.1, as policy proposals move even further from the president's ideal point in either direction (to the left of κ_1 or the right of κ_4), towards the extremes of the policy space, then the sliding cost to issuing a signing statement, $(B - \beta)^2$, becomes prohibitively high to warrant any policy gains. The president will veto policies proposed in these regions because he will be better off with the status quo than he would be by issuing a signing statement or signing the proposal. President Bush's veto of the Stem Cell Research Enhancement Act in 2006 is a good example of this dynamic. The bill proposed lifting restrictions on human embryonic stem cell research. Using the first veto of his presidency, Bush rejected the legislation, claiming the bill would "would support the taking of innocent human life in the hope

of finding medical benefits for others.”⁷ Bush took issue with the main goal of the bill, rather than with parts of it, so it was in his interest to reject the bill *en toto*, rather than to issue a signing statement upon it. Thus, this presidential calculus results in a policy space divided symmetrically around the president in terms of his preferred action, as seen in Figure 3.1.

If the fixed cost of a signing statement increases so that $c \geq \frac{q^2+2q+1}{2}$, then the president will no longer find it in his best interest to issue signing statements in regards to the policy proposals he receives from Congress. In this situation, the signing statement falls out of the equilibrium strategy of the president because the cost always outweighs the possible policy gains, in all regions of the policy space. In this case, the president’s strategy becomes identical to that of the president in extant models, such as those of Krehbiel (1998) and Cameron (2000). That is, when the costs are sufficiently high, the president will sign any bills that are closer to his ideal point than is the status quo and veto all others. Because of the theoretical interest in the effect of signing statements on legislative bargaining, I hereafter focus analytic attention on the low-cost equilibrium, in which signing statements are possible.

Lemma 1. *The president has an incentive to exercise all three of his policy choices. Signing statements are more likely when the fixed cost to issuing one is low.*

3.2.2 The Legislative Veto Player’s Equilibrium Behavior

Before a policy can be sent to the president for approval in the model, the legislative veto player has an up-or-down choice to make on the proposal, knowing how the president will respond if she accepts the offer. Thus, the veto player’s decision, upon receiving a bill from the proposer, is based on an evaluation of whether rejecting the

⁷<http://www.washingtonpost.com/wp-dyn/content/article/2006/07/19/AR2006071900524.html>

offer will benefit her more than will accepting the offer. If she accepts, her position-taking payoff will be assessed in the distance between her ideal point and the proposal location and her policy payoff will be determined by presidential action. If she rejects the bill, both her policy and electoral payoffs will be determined in her distance from the status quo. The veto player's goal is to make the choice that results in a policy proposal and a policy outcome as close as possible to her ideal point.

If the veto player receives a proposal which she knows the president will either sign or veto, her strategy is only to accept the offer if it is closer to her ideal point than is the status quo. If the president signs the law, she can only be made better off with a proposal closer to her ideal point than is the reversion point, as both parts of her utility will be assessed in the distance between her ideal point and the bill. In the case of an anticipated veto, she cannot gain on policy grounds, as the status quo will prevail as the policy outcome; however, she can reap position-taking benefits by accepting proposals closer to her ideal point than is the status quo.

In response to bills that are proposed in regions of the policy space in which signing statements are expected, the veto player's calculus is more complicated. Since a signing statement shifts the policy towards the president's ideal point, the veto player must balance the position-taking payoff she will get from the proposal from the legislature, β , and the policy payoff that she will receive from the policy shift induced by the signing statement, $B^* = \frac{P+\beta}{2}$. Instead of making the decision to accept or reject the offer solely in reference to the proximity of the proposal and of the status quo to her ideal point, the veto player makes the decision of whether to accept a proposal that will receive a signing statement in reference to several additional factors, including the location of the president's ideal point and how much weight she places on position-taking relative to policy (the α parameter). Thus, the decision calculus in expectation of a signing statement results in an acceptance range that is distinct from the preferred-to set by which the veto player makes her decisions

Veto Player's Strategy

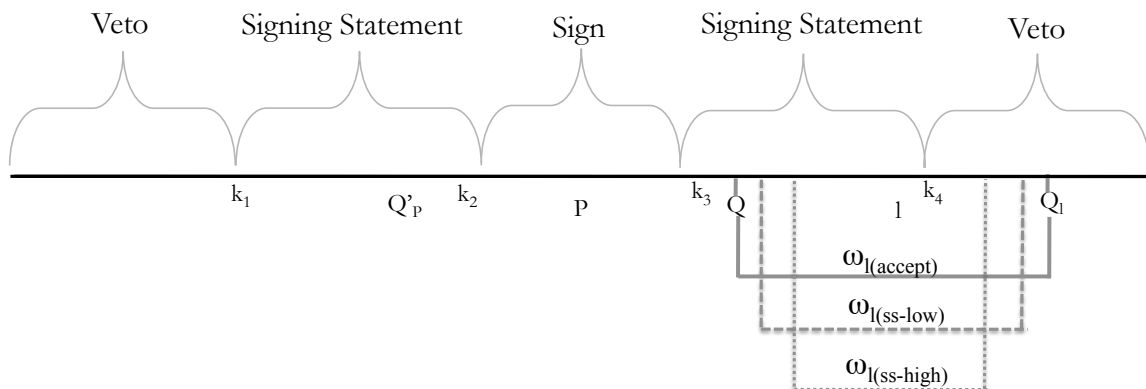


Figure 3.2: A Diagram of the Veto Player's Decision Calculus.

This figure shows an example of the veto player's strategy in response to a proposal. The veto player, l , will only accept proposals that will get vetoed or signed by the president if they lie within the $\omega_l(\text{accept})$ winset, which is defined by the location of the status quo, Q , and its reflection point around the veto player, Q_l . The veto player's accept range (winset) for proposals made in the signing statement region of the policy space is distinct from that for bills in the other regions. This winset is a function of how much the veto player cares about position-taking, as well as other factors. In the diagram, the signing statement winset for two different position-taking weights are depicted, to demonstrate how the logic works. When the veto player's weight on position-taking is sufficiently low, for instance, the veto player will accept any proposals in the signing statement region that are within the winset $\omega_l(\text{ss} - \text{low})$. Proposals in this region will make the veto player better off than would the status quo, in expectation of a signing statement. However, the more the veto player cares about position-taking, the smaller this region becomes (as shown with $\omega_l(\text{ss} - \text{high})$), as she will have a stronger desire for the proposal to be closer to her ideal point.

in response to proposals made in the veto and sign regions of the policy space.⁸ In other words, when the veto player anticipates a signing statement, she adjusts the set of proposals she will be willing to accept. She knows the president will use the signing statement to implement the policy closer to his own ideal point and she is thus willing to consider different policies proposals in expectation of this action. Figure 3.2 shows how these distinct winsets play out in practice for one configuration of preferences.

⁸The veto player will accept all policies between $\frac{4\alpha l + 2l - P - 2\sqrt{(4\alpha^2 + 5\alpha + 1)q^2 - (8\alpha^2 + 10\alpha + 2)lq + (4\alpha^2 + 4\alpha + 1)l^2 + 2\alpha lP - \alpha P^2}}{4\alpha + 1}$ and $\frac{4\alpha l + 2l - P + 2\sqrt{(4\alpha^2 + 5\alpha + 1)q^2 - (8\alpha^2 + 10\alpha + 2)lq + (4\alpha^2 + 4\alpha + 1)l^2 + 2\alpha lP - \alpha P^2}}{4\alpha + 1}$ in the face of a signing statement.

Lemma 2. *In any subgame perfect Nash equilibrium, the legislative veto player will accept any proposal closer to her ideal point, l , than is the status quo, in anticipation of presidential acceptance or rejection of the bill. In expectation of a signing statement, the veto player's decision to accept a proposal will depend on her position-taking incentives and the locations of the status quo, the proposal, and the president's ideal point.*

Importantly, as a result of this calculus, it is sometimes rational for the veto player to vote for a proposal that results in policy losses relative to the status quo, if the proposal is close enough to her ideal point such that her electoral gains outweigh those losses. This could explain why John McCain insisted on the inclusion of the Torture Ban to the defense bill, even when he knew Bush could and likely would issue a signing statement to negate it. In other circumstances, the veto player may be willing to take an electoral hit by voting for a proposal more distant from her ideal point, in anticipation of a signing statement that will shift the policy outcome towards her preferred position. In this way, the president's use of the signing statement can result in situations in which legislators are forced to cast their votes in the face of tradeoffs between their two goals, inducing strategic behavior.

3.2.3 The Proposer's Calculus

As the first mover in the game, the proposer must decide whether or not to propose a policy to send to the veto player and the president for approval. In the simplest sense, then, she faces a dichotomous choice between proposing legislation or not. If she chooses to propose, however, she then has a choice over where to set the policy proposal in the policy space. The proposer's goal is to propose a policy as close as possible to her own ideal point that will result in a policy outcome as close as possible to her ideal point; she optimizes over both her position-taking and policy interests. However, in trying to accomplish this goal, the proposer is constrained by the strategies of the other two actors and the array of preferences in the policy space. She will propose the best possible policy, given these constraints.

For any configuration of preferences, the proposer may have up to three possible proposals from which to choose. Given that the proposer is informed of the preferences of the other actors, she may have the choice between proposing a bill that will be signed into law, one that will receive a signing statement, or one that will result in gridlock (maintenance of the status quo).⁹

In the general sense, for the proposer to have an incentive to propose a bill that will be signed into law, the bill must be closer to her ideal point than is the status quo; whether this is possible will depend on those policies the veto player and the president are willing to accept *en toto*. Similarly, the proposer will only have an incentive to propose policies that will result in gridlock if they are closer to her ideal point than is the status quo, as it is the only way that she can reap any position-taking benefit from a proposal that maintains the status quo. When considering a proposal that will receive a signing statement, the optimal strategy for the proposer is not to propose a policy as close as possible to her own ideal point, as is her strategy for other proposals. Since the president will shift the policy towards his own ideal point with a signing statement, the proposer will anticipate this and make a proposal that maximizes her own utility in the expectation of this presidential action. The optimal proposal that the proposer can make in expectation that $s^* = ss$ is:

$$\beta_{ss} = \frac{L(4\alpha + 2) - P}{4\alpha + 1}$$

This optimal proposal shows that, in anticipation of a signing statement, the proposer's choice is a function of her distance from the president, as well as the weight she places on her position-taking interest, α . Thus, in proposing legislation that will receive a signing statement, the proposer wants to propose a bill as close as possible to β_{ss} , rather than to her own ideal point. This optimal proposal is, critically,

⁹I define gridlock as the maintenance of the status quo, despite a majority of actors who would prefer policy change. Gridlock can be the result of an executive veto or failures of bargaining the legislature (legislative gridlock).

always to the opposite side of the proposer's ideal point than is the president. The logic for this is that the proposer is attempting to compensate for the presidential shift in the outcome towards his own ideal point. The more the proposer cares about position-taking, however, the closer β_{ss} will be to her ideal point, even if that means losing on the policy dimension because of the shift induced by a signing statement; in these cases, she is more concerned with constituent evaluations than with actualizing a policy outcome. It is important to note that the proposer is constrained in maximizing her proposals with respect to β_{ss} . In order for the proposer to propose β_{ss} in expectation of a signing statement, it need be within the set of policies the veto player will accept and those upon which the president is willing to issue a statement. If this is not the case, the proposer's best (constrained) option is to propose the policy as close as possible to β_{ss} that does lie within those winsets.

Lemma 3. *In any subgame perfect Nash equilibrium, the proposer will only propose bills closer to her own ideal point than is the status quo in anticipation of gridlock or acceptance of the bill. In expectation of a signing statement, the proposer will instead propose policies which maximize her utility in the face of this presidential action. To do so, she will consider her distance from the president and her position-taking utility; these factors will determine her optimal proposal for a given configuration. However, the proposer may be constrained in making this optimal proposal by the other actors. The proposer will choose not to propose only when these options fail to improve upon the utility she receives from maintaining the status quo.*

To further explicate the proposer's calculus, I have provided an example of policy bargaining. Figure 3.3 displays the decision calculus for one configuration of preferences.¹⁰ There are two possible outcomes from this configuration, depending on how much the legislators care about their electoral concerns relative to their policy concerns. When electoral incentives are high, then legislative gridlock is the inevitable outcome. However, when electoral incentives are relatively low, a signing statement will be issued in equilibrium. Note that for this configuration a bill will never be

¹⁰Note that the policy space is technically symmetric around the president, in terms of signing statement and veto regions. However, in this configuration, since the president is the most liberal of the actors, the other half of the policy space is not relevant to the bargaining taking place.

signed into law *en toto*. The set of policies that the veto player prefers to the status quo does not overlap the set of policies that the president is willing to sign into law; because of the veto player's proximity to the status quo, she and the president will never be able to reach an agreement, except in the case of a signing statement.

In the first case, when electoral incentives are high, the legislators in the model are going to care much more about how close policy proposals are to their respective ideal points than they will about their proximity to policy outcomes. The best proposal the proposer can make for electoral reasons is to propose a bill at her own ideal point, L . This proposal sends a perfect signal of her preferences to her constituents and maximizes her position-taking utility. In this configuration, as seen in Figure 3.3, the proposer's ideal point, L , lies outside the veto player's winsets, so the proposer knows that if she proposes her own ideal point, the veto player will reject the offer. Despite knowing that she will not gain anything on policy grounds in making this proposal, the proposer will make this offer because of the electoral boon she will receive. Thus, it is sometimes within the proposer's best interest to propose a policy that induces legislative gridlock.

The politics surrounding immigration reform during the 113th Congress are a good example of this type of dynamic. At the time, immigration reform was a top priority for President Obama and many members of Congress. In June 2013, the Senate passed a bipartisan overhaul of the nation's immigration policy, which would have facilitated millions of undocumented residents becoming citizens and allocated resources for border security. The Republican-controlled House, however, rejected the Senate version of the bill, considering it too costly and too encompassing.¹¹ It is likely that members of the Senate intentionally proposed this version of the bill, expecting/knowing the House would reject it. Rather than bargain with the House to pass a more mild immigration reform, they likely wanted to publicly advertise

¹¹<http://www.msnbc.com/msnbc/gop-fails-pass-border-bill>

their commitment to expansive immigration reform, as a signal to constituents. The electoral benefit members of the Senate received from doing so may have outweighed the policy gains they would have expected from an attempt to compromise with the House to pass an actual reform. Thus, it can be rational for legislators to propose policies that they know will result in legislative gridlock.

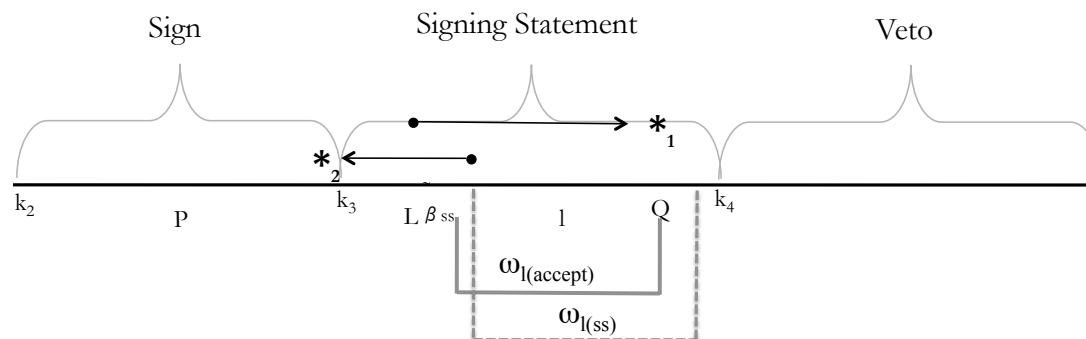


Figure 3.3: A Spatial Demonstration of the Proposer's Decision-making. For this configuration, the proposer has two viable proposals she can make. First, she can propose her ideal point, L , which will be rejected by the veto player and result in legislative gridlock (the outcome will be the status quo at $*_1$). The other alternative open to the proposer is to propose the lower bound of the veto player's signing statement winset, which will receive a signing statement from the president that will result in a policy outcome at $*_2$.

The other possible outcome for the configuration in Figure 3.3 is a signing statement. When the legislators, instead, care more about their policy preferences than their electoral concerns, then policy change is possible in this configuration. The proposer will not be able to propose a policy that will be signed into law without contingencies, as discussed above, but she can propose one that will induce the president to issue a signing statement. The proposer's optimal proposal in expectation of a signing statement is β_{ss} ; however, because this policy does not lie within the set of policies that the veto player will accept ($\omega_{l(ss)}$ in Figure 3.3), the best proposal the proposer can make that the veto player will accept is on the lower (left-most) boundary of this winset. The veto player will accept this policy; the president will

sign it into law with a signing statement which implements the policy at the midpoint between the proposal and his own ideal point, $*_2$ in Figure 3.3. While this proposal does not maximize the proposer's electoral utility as proposing her ideal point would, it does result in a policy outcome much closer to the proposer's ideal point than is the status quo. Thus, the more the proposer cares about policy relative to position-taking, the more likely she will be to propose this policy destined for a signing statement, in this configuration.

This example demonstrates the complicated bargaining dynamics that legislators face within Congress in anticipation of a signing statement. The proposer and veto player are able to come to an agreement as a result of bargaining on separate dimensions; the proposer agrees to the deal for policy reasons, and the veto player is amenable because of the electoral boon. The ability to bargain on these two dimensions allows the legislators to come to agreements which otherwise would not have been possible in the face of the tradeoffs that signing statements induce. These unlikely bargains are not predicted by extant policy bargaining models, nor are these dynamics unique to the configuration chosen.

3.2.4 Equilibrium Outcomes

As the proposer's strategy is contingent upon the configuration of preferences and actors within the policy space, this gives rise to a large number of cases to consider. To limit the number of cases and to provide some analytic traction, I have made further assumptions to facilitate model solution. Without loss of generality, I have assumed that the proposer is always more conservative than (to the right of) the president in the policy space; further, I assume that the proposer's ideal point has a value of 1 and the president's of -1 . As a consequence, there are three major cases for which to solve the model: a moderate president, a moderate veto player, and a moderate proposer. I solve the model for varying values of the legislative veto player's

ideal point and for various values of the status quo, rather than parameterizing those values. The fixed cost to issuing a signing statement, c , and the weight that legislators place on their position-taking utility, α , remain parameterized in the model. While these assumptions are quite strong and restrictive, making them allows for greater tractability in solving the model. Also, the values of the parameters assumed allow for plenty of variation in the configuration of preferences, the extremity of the actors, and in the relative location of status quo policies.

In light of these assumptions, all policy outcomes are possible in equilibrium. The proposer will propose policies that will be signed, those that will receive signing statements, and those that will result in gridlock under different conditions. Her choices are contingent on the array of preferences and the parameter values.

Proposition 1. *There exists a subgame perfect Nash equilibrium in which signed bills, signing statements, vetoes and legislative gridlock can occur. Gridlock is the inevitable outcome when there is a moderate status quo relative to the actors. Gridlock is also possible when there is a relatively extreme status quo, particularly when the electoral incentives of the legislators are high. Signed bills and signing statements can only occur in the face of an extreme status quo. Signing statements, in particular, are more likely when actor preferences are aligned.*

The model also yields testable implications about the bargaining process and the use of signing statements, which I will discuss at length in the following chapter.

3.3 Modeling Choices

A model is simply that—an abstraction of the world. Therefore, all models must abstract away some elements of reality in order to have analytic purpose. In order to focus on the tensions of interest, I make a number of modeling choices. As I focus on the dynamics and tensions surrounding policy-making, the model does not speak to the politics of policy implementation. Thus, as modeled, neither the signing statement nor the veto can be overturned, once issued by the president. Similarly, I assume when

a signing statement has been attached to a bill, there is perfect bureaucratic (and judicial) implementation of the president's intent; I assume that signing statements will translate into their intended policy outcomes and that there will not be any shirking by policy implementors. While implementation is an important political problem, it is outside the scope of the arguments advanced here. For tractability in analyzing the upstream effects of presidential action, I do not consider these dynamics, and, as such, all results should be interpreted in light of these assumptions.

3.4 Discussion

The theory advanced in this chapter captures the dynamics of inter-branch bargaining in a setting in which the president has more than a dichotomous choice on legislation. The model speaks to the president's incentives in using signing statements (as well as for signing and vetoing legislation). More importantly, however, the model speaks to the bargaining challenges that the signing statement may present for the legislators tasked with drafting policy in the first place. I resolve the puzzle of why legislators come to agreements within the legislature when the president may not faithfully implement the policies they pass. I model the interactions between legislators as an exercise in balancing both policy and electoral goals. As a result of bargaining over their two interests, legislators are able to come to agreements in the face of presidential policy manipulation. Sometimes legislative action is clear cut and their goals work in tandem to reinforce their actions. In other situations, legislators may be cross-pressured and the balancing of their goals has ramifications for the outcomes we see. Legislators at times will de-emphasize their policy goals to secure their reelection and at others will prioritize their policy goals at the expense of their electoral incentives. This willingness to differentially prioritize their goals opens the possibility for a larger and distinct set of bargains to emerge from the legislature, relative to extant models

of bargaining.

The most interesting outcome of the model is that legislators are complicit in the deals that result in signing statements and sometimes knowingly enter into bargains that will result in losses on one dimension of their preferences (what I term “perverse” bargains) to accrue gains on the other. Legislators anticipate presidential action and this will drive their bargaining dynamics earlier on in the legislative process. The anticipatory nature of their behavior gives the president more leverage in the policy process. However, the anticipatory nature of the legislative calculus can also limit the power of the president. Legislators will sometimes be able to come to agreements in the face of a signing statement; bargaining on two-dimensions actually allows for stable coalition formation in the face of presidential shifts in policy outcomes. However, if the legislators fail to come to the agreement in the face of such action, then the president will not have the ability to wield his power. In this way, legislative bargaining actually conditions the ability of the president to use his prerogative powers.

Most of the literature and media coverage on the signing statement assumes that it is a tool the president uses to leverage his last-mover advantage and to acquire gains in the face of a hostile Congress which will not compromise with his demands. While the signing statement does give the president additional control over policy outcomes, the president is not doing so in an unchecked manner. The legislators in the model look down the game tree towards his expected actions and this informs their decisions to support or oppose legislation. If a policy passes which the president then issues a signing statement upon, this is only because the legislators allowed for the possibility. As such, the president is not manipulating or undermining bargains, as the use of the power and its coverage may suggest. Instead, the legislators expect his actions and thus propose policies that will benefit themselves as a result of the signing statement. The legislators are “in on” the deal, so to speak.

The main contribution of the theoretical lens is to demonstrate how inter-branch

bargaining can have important implications for intra-branch bargaining. The model nests a theory of legislative bargaining into a wider theory of legislative-executive bargaining and unpacks the process by which presidential action can affect the legislative calculus. In doing so, the model yields predictions about the conditions under which legislators will successfully bargain with one another in the face of a signing statement, as well as implications for the president's incentives to wield the power, independent of the legislative environment. I derive, discuss, and evaluate these predictions in the following chapters.

Chapter 4

Bridging the Theoretical and the Political

The theory advanced in the previous chapter characterizes dynamics between political actors in the legislative and executive branches in light of the president's ability to issue signing statements. I argue that a theory of inter-branch bargaining is incomplete without consideration of the president's capacity to direct bureaucrats and federal judges about the meaning of legislation with these documents. The politics between the executive branch and Congress are fundamentally different in an environment in which the president has more than an up or down choice on legislation. The inclusion of the signing statement into a model of veto bargaining more accurately captures political reality, given how often the modern presidents seem to use them to accomplish their policy goals. Of perhaps greater interest is the effect that the president's ability to issue signing statements has on the politics within the legislature. The capacity of the president to change policy outcomes looms over legislators as they try to bargain with one another. In some conditions, this can grease the wheels for agreements, while in others it can frustrate legislative bargaining and lead to greater levels of gridlock.

The model's analytic power allows me to isolate these tensions of interest. In this chapter, I will further demonstrate that the model has analytic traction. First, I will apply the theoretical framework to the politics around the 2005 PATRIOT Act reauthorization to illustrate that the insights of the model can speak to concrete bargaining dynamics. Then, I derive and discuss three primary predictions from the model, which will serve as the basis upon which I will systematically evaluate the theory in the remainder of this book. It is the aim of this chapter to bridge the abstractions of the formal model of inter- and intra-branch bargaining to the real world politics surrounding the use of the signing statement.

4.1 The PATRIOT Improvement and Reauthorization Act: An Instructive Example

In this section, I revisit the PATRIOT Act reauthorization example which motivated the puzzle introduced in the first chapter. In the preceding chapter, I demonstrated a theoretical resolution to the puzzle of why legislators bargain with each other if the president can essentially invalidate parts of the agreement; I argue that legislators strategically balance their policy and electoral goals in bargaining with one another in anticipation of presidential action. I conclude that legislators are complicit in the bargains that result in signing statements—they only vote for legislation that receives a signing statement when they can benefit from such presidential action in some way. Here, I will use these theoretical propositions to provide an in-depth interpretation of the politics around and the outcome of the PATRIOT Act reauthorization in 2005. First, I provide the historical context surrounding the reauthorization. Then, I discuss the politics around the debate, focusing, in particular, on the motivations and preferences of the pivotal actors. I conclude with an explanation for why legislators may have voted for the reauthorization, even if they knew George W. Bush would

issue a signing statement which would undercut the deal.

4.1.1 The Backdrop

In 2001, just forty-five days after the September 11th terrorist attacks, President George W. Bush signed into law the USA PATRIOT Act to strengthen the federal government's ability to conduct national security; though controversial from the beginning, the bill passed through both chambers of Congress with large margins. As a result of compromises made to pass the bill, many parts of the legislation included sunset provisions which were due to expire in 2005. In anticipation of Congress's need to revisit the issue, Bush, beginning in 2004, made the reauthorization of these provisions a priority for his administration. In his State of the Union address, he stated:

Inside the United States, where the [War on Terror] began, we must continue to give our homeland security and law enforcement personnel every tool they need to defend us. And one of those essential tools is the Patriot Act, which allows federal law enforcement to better share information, to track terrorists, to disrupt their cells, and to seize their assets. For years, we have used similar provisions to catch embezzlers and drug traffickers. If these methods are good for hunting criminals, they are even more important for hunting terrorists.

Key provisions of the Patriot Act are set to expire next year. The terrorist threat will not expire on that schedule. Our law enforcement needs this vital legislation to protect our citizens. You need to renew the Patriot Act.¹

¹Text of the State of the Union address can be found here: <http://www.presidency.ucsb.edu/ws/index.php?pid=29646>.

It was against this backdrop that the PATRIOT Act once again became a major issue on both the legislative and presidential agendas and the source of a hotly contested political debate.

4.1.2 Politics and Preferences

In the four years after the original bill was passed, the controversy over the PATRIOT Act had not subsided. In fact, the political contestation over the reauthorization was far more divisive than the original debate over the legislation. In the new legislation, President Bush sought to make permanent the sunset provisions in the original act, to expand the scope of FBI powers under the law, and to limit the restrictions on wiretapping and surveillance (Palazzolo and Lawrenz n.d., Savage 2007). These measures activated ideological divides over the appropriate line between civil liberties and national security. Generally, Republicans supported the expansion of executive power under the law as a means to winning the “war on terrorism” and keeping the homeland safe, whereas Democrats tended to be more concerned with protecting the civil liberties of individuals under the law.

The reauthorization was first considered in the House of Representatives. Representative Jim Sensenbrenner introduced legislation in July 2005. Though the debate over the legislation was divisive in the House, a bill eventually passed the chamber that, for the most part, reflected the preferences of President Bush. The House bill made permanent many of the provisions that previously had expirations and gave concessions to the executive branch on surveillance issues (Palazzolo and Lawrenz n.d.). In the Senate, Arlen Specter introduced an alternate version of the bill. Though it accomplished much of what President Bush sought, the Senate version of the bill was less reflective of President Bush’s goals than was the House version of the bill. While it made many of the sunset provisions permanent, the Senate did not agree to as many as did the House. The Senate version also included more safeguards against

executive power under the law. To reconcile the differences between the versions of the bill, the reauthorization was sent to a conference committee. In the midst of conference negotiations, however, six senators came forth and publicly announced their opposition to any version of the bill that did not include civil liberties protections and provide for greater congressional oversight of executive action under the bill. These senators included Democrats Russ Feingold, Dick Durbin, and Ken Salazar, as well as Republicans Larry Craig, John Sununu, and Lisa Murkowski. They demanded more stringent requirements on the government's ability to seize personal and business records, shorter sunset provisions on some controversial parts of the legislation (such as those dealing with roving wiretaps and national security letters), judicial review of certain FBI actions under the law, and greater reporting requirements of FBI activity (notably under the "sneak and peak" provisions of the law (Palazzolo and Lawrenz n.d.).² Further, the senators threatened to filibuster the legislation if their demands were not met.³ Senator Lisa Murkowski stated, "We have worked too long and too hard to allow this conference report to eliminate the modest protections for civil liberties that were agreed to unanimously in the Senate."⁴ These threats significantly prolonged the debate over the legislation, jeopardizing one the Bush administration's legislative priorities.

After months of deadline extensions and standstill on the issue, the White House began negotiating with members of the Senate. Eventually Bush agreed to relax his firm stance on the issue and agreed to some of the Senate demands. The resulting compromise version of the bill did not completely appease either the White House or those congressmen concerned for civil liberties, but it was in a form to which both

²The sneak and peak provisions allowed the FBI/federal government to search private premises without the owner/subject's permission or knowledge. Under this provision, the federal government could apply for a delayed warrant. The senators threatening to filibuster the reauthorization demanded that the FBI give Congress shorter notice of their searches than was provided in the draft legislation.

³<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/17/AR2005111700844.html>

⁴<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/17/AR2005111700844.html>

sides could publicly agree. For instance, the bill included more checks on executive power than did the original version of the legislation, including requirements for the Justice Department to make regular reports to congressional oversight committees regarding the expansion of executive power under the law, including notification about searches and record seizures (Savage 2007). In exchange, the senators agreed to extend some sunset provisions that they had previously opposed. Figure 4.1 shows a simple depiction of political landscape at the time, placing the political actors and the bill proposals on a unidimensional policy space.

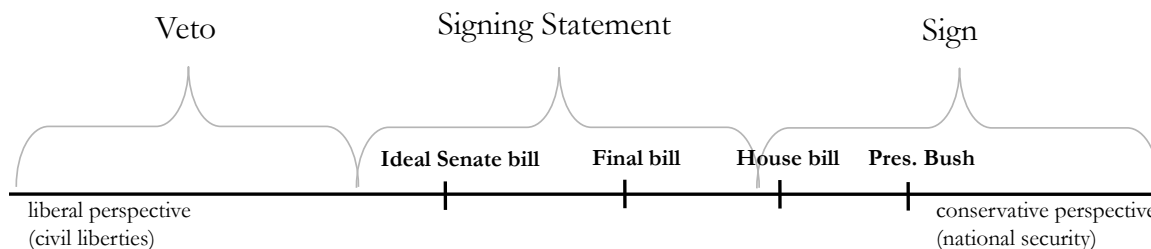


Figure 4.1: Political Landscape Around the PATRIOT Act Reauthorization. This figure shows the landscape of the politics surrounding the PATRIOT Act Reauthorization. We can imagine the policy on a single dimension which spans from the liberal position of prioritizing civil liberties to the conservative side of prioritizing national security. The House version of the reauthorization was much to President Bush’s liking, as it accomplished many of the goals he sought for security reasons. The dissenting senators sought a bill far more liberal, which would have added protections for individual civil liberties. The final bill emerging from Congress was a compromise between the two opposing sides.

Finally, eight months after its introduction, both chambers of Congress agreed to the compromise version of the bill. On March 9, 2006, President Bush hosted a signing ceremony at the White House and signed the USA PATRIOT Improvement and Reauthorization Act into law. In doing so, Bush was surrounded by many of the congressmen responsible for its passage, as well as all the major media outlets. Before signing the bill, he referred to it as “a piece of legislation that’s vital to win the war on terror and to protect the American people.”⁵ However, just hours after signing it

⁵<http://www.washingtonpost.com/wp-dyn/content/article/2006/03/09/AR2006030901294.html>

into law, after the media had left the White House, Bush issued a signing statement on the bill, which stated:

Today, I have signed into law H.R. 3199, the “USA PATRIOT Improvement and Reauthorization Act of 2005,” and then S. 2271, the “USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006.” The bills will help us continue to fight terrorism effectively and to combat the use of the illegal drug methamphetamine that is ruining too many lives.

The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch, such as sections 106A and 119, in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.

The executive branch shall construe section 756(e)(2) of H.R. 3199, which calls for an executive branch official to submit to the Congress recommendations for legislative action, in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and expedient.⁶

In this statement, Bush declared he did not consider as binding on his administration some of the very oversight provisions to which he had agreed to streamline the legislation through Congress. Notably, he stated his intentions not to enforce the provisions that required the executive branch to make reports to Congress about the FBI’s activities under the law, such as the “sneak and peak” provision. In doing so,

⁶www.whitehouse.gov/news/releases/2006/03/20060309-8.html.

Bush reneged on the agreement he had made with the pivotal senators and expressed his intentions to implement a bill decidedly more conservative than the policy agreed upon in Congress, that is, one that prioritized national security over civil liberties protections.

4.1.3 The Puzzling Politics

The signing statement on the reauthorization, as discussed in the first chapter, raises an important question about policy bargaining between the branches. Why did the pivotal members of the Senate, after threatening to filibuster, agree to the compromise version of the bill, if they knew Bush could and potentially would issue a signing statement?

One possible explanation is that the senators did not know the President Bush would issue a signing statement and were thus surprised by the bold presidential action. After Bush issued the statement, Representatives Jane Hartman and John Conyers sent a letter to Attorney General Alberto Gonzalez, deriding the action and arguing that, “Many members who supported the final law did so based upon the guarantee of additional reporting and oversight” (Savage 2007, 230). While this may have been true, it could not have been the case that the signing statement completely blindsided these legislators. In fact, Senator Patrick Leahy, shortly after Bush issued a signing statement on the law, stated that it this action was no surprise to him. In a meeting of the Judiciary Committee, he stated:

Last week, the USA PATRIOT Improvement and Reauthorization Act of 2005 was signed into law. I was one of ten Senators who voted against this legislation... As I said in a floor statement during the debate, the defects in the reauthorization legislation are particularly dangerous because we currently have an Administration that does not believe in checks and balances and prefers to do everything in secret. We know that the Bush-

Cheney Administration has engaged in secret, warrantless wiretapping of Americans' emails and telephone calls contrary to the FISA law; we know that it attempted to rush the Dubai Ports deal through in secret, without following legally required review procedures; and we have reason to suspect that it has secretly engaged in extraordinary rendition and created conditions for torture of prisoners, again contrary to law.

I also remarked on the President's claims that he need not fulfill his constitutional responsibility to faithfully execute the laws but can pick and choose among the laws he decides to recognize. Confronted with claims of inherent and unchecked powers, I concluded, the restraints we were able to include in this reauthorization of the PATRIOT Act were not sufficient.

It took no time at all for the Administration to prove me right. In the very act of signing the reauthorization bill into law, the President signaled that he intends to follow that law only insofar as it suits him, and to ignore its minimal requirements of public accountability.(Leahy 2006).⁷

This goes to show that legislators were not only aware of Bush's opposition to the oversight provisions, as both he and Attorney General Alberto had publicly stated as much, but that they knew a signing statement was a real possibility. At this point in his presidency, Bush had already issued 120 constitutional signing statements, including one on the McCain Torture Ban just three months before, while the PATRIOT reauthorization was still stuck in conference. The politics around this signing statement were very similar to those underlying the PATRIOT Act reauthorization. The president urged Congress to pass the bill to fund the war on terror. However, Senator John McCain, alongside others, threatened to filibuster the legislation; they demanded the inclusion of an amendment to the bill known as the Detainee Treatment

⁷<http://www.judiciary.senate.gov/imo/media/doc/Leahy%20Member%20Statement%20031506.pdf>

Act (more commonly as the McCain Torture Ban, as discussed previously). The amendment prohibited the “cruel, inhuman, or degrading treatment or punishment” of detainees and prisoners of war in the war on terror.⁸ Bush pushed back and threatened to veto any bill with such a provision. After the bill got stuck in the Senate for months, however, Bush relented and agreed to accept the terms of the torture ban to push the bill forward. Upon signing it into law it into law, however, he issued a signing statement, which expressed the following interpretation of the torture ban:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.⁹

In essence, Bush used the statement to inform military officials that the president’s interpretation of the legislation would be the final word, not that of Congress; he asserted that he alone could judge which interrogation techniques would ensure national security. In doing so, he undermined the very part of the bill of the bill that had greased the wheels for its passage through Congress.

Thus, there is plenty of reason to believe that legislators were aware that Bush could issue a signing statement on the PATRIOT Act reauthorization, given his know opposition to the amendments the Senate demanded. In light of all this, why would the legislators agree to invoke cloture on the reauthorization? How did legislators with such divided opinions finally come to an agreement on the policy under the threat of this action? The theory articulated in the previous chapter provides one

⁸<http://thomas.loc.gov/cgi-bin/query/z?i110:I03128:i110DEPARTMENT.html>

⁹<http://www.presidency.ucsb.edu/ws/index.php?pid=65259>

useful interpretation of these dynamics. The legislators in Congress may have been acting strategically in anticipation of the signing statement. It is likely that the senators threatening to filibuster the legislation knew the signing statement was a real possibility and that their policy gains (in the form of civil liberties protections) would not be maintained, should the president issue one. However, given the attention surrounding and the high profile nature of the reauthorization, it is possible that they agreed to invoke cloture and vote in favor of the compromise bill for electoral reasons. I elaborate below.

4.1.4 A Solution

From Bush' standpoint, a signing statement was the best response to the compromise legislation he received from Congress. He publicly agreed to the Senate demands, the bill passed, and he issued a signing statement which guaranteed a policy outcome closer to what he wanted. As Bush only opposed a few provisions, it was not worth vetoing the legislation, especially after the long slog it took to get the legislation out of Congress. Instead, he used a statement to strike the problematic provisions. Figure 4.2 shows how the signing statement shifted the policy to one more reflective of the president's preferences.

While the signing statement was thus straightforward from the president's perspective, it likely complicated policy making at the legislative stage, before this presidential action even took place. The threat of a signing statement loomed over bargaining in Congress, rendering more difficult an already divisive and controversial policy debate. The PATRIOT Act was an issue that activated the policy preferences of legislators, as it involved important national security issues and implicated civil liberties debates. The legislation also had important implications for the electoral interests of legislators. It was a very visible, well known issue about which constituents cared a lot. That this policy implicated both policy and electoral preferences so strongly may

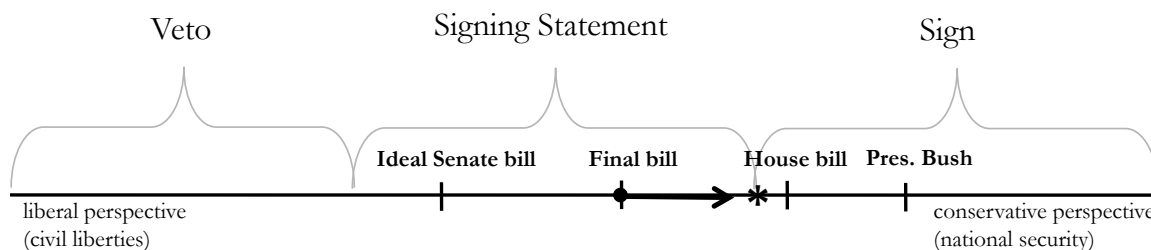


Figure 4.2: PATRIOT Act Signing Statement.

This figure again shows the political landscape surrounding the PATRIOT Act Reauthorization; however, it includes Bush's action in issuing a signing statement upon the bill. In issuing a statement, Bush directed the executive branch to enforce a more conservative policy (at the star in the diagram) than the final bill passed in Congress. This outcome was much closer to President Bush's ideal point than was the compromise bill. House members likely supported the bill because it resulted in a policy closer to that which they originally passed. The dissenting senators, on the other hand, were able to reap position-taking benefits from proposing a more liberal bill, despite the conservative shift in the policy outcome.

have opened up room for the legislators to come to an agreement, even in the face of a signing statement (or the expectation thereof).

Both chambers of Congress were controlled by the Republicans at the time. The House majority, in particular, was aligned with Bush when it came to the PATRIOT Act, having passed a version of the bill that largely met his demands. In the Senate, however, while the Republicans too held a majority, it was not filibuster proof; this empowered members of both parties, and perhaps especially the minority party, to demand concessions before throwing to their support to the legislation. The incentive to demand concessions was particularly heightened given the public awareness and concern over the renewal of the Act.

Just as the parties in Congress were polarized on the reauthorization, so too was the public (Palazzolo and Lawrenz n.d.). When the bill came up for reauthorization, it attracted a lot of media coverage and activated important constituencies and interest group activity, including that of the American Civil Liberties Union (ACLU). The ACLU, in particular, was active in appealing to the public and to members of Congress

regarding the lack of civil liberties protections and unchecked executive power under the original version of the bill. With an administration pushing the legislation and key constituencies pressuring legislators, it is very likely that members of Congress, especially the pivotal members in the Senate, felt cross-pressured on the issue. The six senators threatening to filibuster the legislature were likely torn between compromising with Bush to pass important policy change and standing firm on the civil liberties issue to represent the activated constituencies. This was especially the case for those senators who were electorally vulnerable at the time, for whom appeasing constituents was likely tantamount on such a visible bill. For instance, John Sununu had won the New Hampshire Senate election in 2002 by a very small margin of 51% to 46% and had been sworn into office amidst allegations of election tampering. Senators Murkowski and Salazar similarly were electorally vulnerable going into the vote on the reauthorization. Murkowski did not ever secure a majority in the Alaska Senate elections, netting 48.6% of the vote to her opponent's 45.6%. Salazar had won his election in Colorado in 2004 by less than two thousand votes. If these senators were forward-thinking and planning ahead for their next campaign, the electoral pressures on a bill like the PATRIOT Act reauthorization were likely a large determinant of their actions. The pressure from constituents and interest groups likely gave them the incentive to demands civil liberties protections, regardless of future presidential action.

That is, these legislators likely had to strategically balance their goals and saw a solution to the bargaining problem in anticipation of a possible signing statement. For the electoral benefit, the senators could make their support contingent on the inclusion of civil liberties protections and threaten to filibuster the legislation without such amendments; this would serve as a strong signal about their commitment to prioritizing the rights of individuals against government encroachment, even in the face of an important national security issue, which was the heart of the concern for many con-

stituents. Thus, even if the pivotal senators knew that Bush probabilistically would issue a signing statement that undermined the concession on the policy front, they would still get the position-taking benefit for demanding the individual protections under the law and threatening to derail such high-profile legislation. Indeed, after the Bush administration agreed to the senators' demands, the ACLU published a report applauding the six senators, and their other supporters in the Senate, for their actions in ensuring a "victory for freedom."¹⁰ Thus, even if those legislators knew they would lose on policy grounds if a signing statement was issued, it would still benefit them on the electoral front. Likewise, at this point, President Bush and his supporters in the House were likely willing to accept the oversight provisions after months of congressional gridlock, on the presumption of a signing statement which would shift the policy outcome to one they preferred. For these reasons, the bill passed through Congress with large margins, despite the polarized politics on the issue.

As such, an unlikely or perhaps perverse bargain seems to have resulted in the legislature, in which it was rational for the very senators who demanded the civil liberties provisions to vote for the compromise bill *even if* they knew Bush would issue a signing statement and would not maintain their demands. That is, the legislators likely fully anticipated the policy losses they suffered but still voted for the bill because of the electoral benefit of doing so. They were able to ensure that an important national security issue was legislated upon, while making a public stance for their constituents' support. As such, legislators can strategically take advantage of the political environment and of anticipated presidential action to accomplish their goals.

The theory of bargaining under signing statements advanced can thus provide one explanation for such puzzling behavior in Congress. If the signing statement had not been a possibility, perhaps policy change would not have been possible on the reau-

¹⁰<https://www.aclu.org/news/aclu-welcomes-new-senate-compromise-patriot-act-reauthorization-calls-congress-fully-address?redirect=national-security/aclu-welcomes-new-senate-compromise-patriot-act-reauthorization-calls-congress-ful>

thorization; it gave legislators the opportunity bargain over their electoral and policy goals. The important conclusion is that legislators can, at times, effectively bargain with one another in anticipation of presidential action. Legislators will strategically balance their goals when considering their actions, and the president's anticipated response to those actions affects the policies they are willing to craft and those they will advance through the chambers. In the sections that follow, I will discuss the conditions under which legislators are particularly likely to enter into these agreements, as well as the president's incentives and constraints in wielding the signing statement.

4.2 Testable Implications of the Theory

The example above is merely illustrative, meant to provide a plausibility check on the theoretical propositions; it suggests the model can speak to real politics. However, the formal model yields several testable implications about the bargaining process and the use of signing statements upon which I can more systematically evaluate the theory. The first prediction speaks to the central tension at the heart of this project; it focuses on the relationship between legislative preferences and the use of the signing statement. The second set of predictions shift the focus more towards the president's calculus in issuing signing statements. In particular, the model yields predictions about how the political costs to a signing statement affect the president's willingness to use them and about how the inter-branch setting determines the scope of policy change a statement can accomplish. In the remainder of this chapter, I will derive and explicate these predictions, which I will empirically test in subsequent chapters.

4.2.1 Legislative Preferences and Signing Statements

As discussed the previous chapter, one of the major insights of the theory is that legislators are complicit in the president's use of signing statements; that is, legislators

anticipate the signing statement and their bargaining dynamics actually condition the ability of the president to wield the power. If legislators cannot come to an agreement in expectation of a signing statement, then the president will not have the flexibility to exercise this power. There are conditions under which legislators are willing to and do strike these bargains, but these deals can be difficult to maintain precisely because of the nature of the policy change induced by a signing statement.

In anticipation of a statement, legislators will sometimes enter into unlikely or perverse bargains with one another—those that legislators enter into willingly, despite knowing they will result in either position-taking or policy losses. That is, under some conditions, a legislator may vote for a proposal for purely electoral reasons, expecting a signing statement that will result in policy losses, much like the senators in the PATRIOT Act reauthorization example above. In other situations, legislators may prioritize their policy goals over their electoral goals in anticipation of presidential action. Thus, in the face of a looming statement, legislators may be cross-pressured in making their decisions. In an environment in which the president is equipped with the signing statement, legislators will often be forced to make decisions in the face of their at times competing electoral and policy goals. The nature of the tradeoffs will condition whether and when legislators can come to agreements in expectation of the manipulation of policy outcomes by the president.

In equilibrium, bargains that result in signing statements can only be reached when the status quo is extreme relative to the actors. When the status quo is extreme, the legislators are more likely to have aligned preferences and thus generally agree on the direction of policy change. This level of agreement is the necessary condition to facilitate legislative bargaining in the face of tradeoffs. As signing statements often induce legislators into these seemingly perverse bargains, both legislators need to be able to benefit from the bargain. Each legislator must benefit enough on at least one dimension of their preferences to compensate for any of the requisite losses a signing

statement may present on the other. The ability of both legislators to benefit from a bargain is far more likely when they have similar policy preferences, as any losses they suffer from the tradeoff will be more easily offset by potential gains to the agreement. In other words, when legislators can reach some semblance of consensus on the form the policy should take, they are more likely to enter into a bargain that may only benefit them on one dimension of their preferences; in these cases, they can expect the losses on the other dimension to be relatively minor compared to the potential gains from the agreement. While reliable measures of the extremity of status quo policies do not exist, we are able to measure the preference alignment of the actors in Congress. This leads to the following testable implication:

Result 1. *Signing statements should be more likely when congressional polarization is low.*

This hypothesis speaks directly to the bargaining problem that legislators face in a world in which the president can unravel their deals with a signing statement. Even though presidents can issue directives which manipulate policies and undermine agreements, legislators can rationally enter into agreements with one another in such an environment, even when an adverse signing statement is issued. I argue that legislators anticipate the presidential action and leverage this foresight to reap benefits in terms of both their position-taking and policy interests. However, the signing statement can complicate bargaining within the legislature if the policy shift disproportionately benefits one legislator over the other. This dynamic makes for unstable coalition formation. Thus, it is only when legislators have generally aligned preferences with one another that they can form stable coalitions in the face of a signing statement. In this way, it can be rational for legislators to enter into bargains that appear to result in losses or to disadvantage them. This legislative calculus conditions the president's use of the power.

4.2.2 Presidential Incentives & the Signing Statement

While the legislative environment determines the president's strategy with respect to the signing statement, at least in part, his incentives to use this tool also vary independently of these factors. In particular, in making the decision on whether and to what extent to use the power, the president engages in a cost-benefit analysis; he considers his potential policy gains against the resource and political costs he must face when deciding the fate of policy. This presidential calculus determines which bills receive signing statement, as well as how detailed and expansive each signing statement will be.

The Fixed Cost to a Signing Statement—A Constraining Effect

As discussed in the last chapter, I model the signing statement as a costly endeavor for the president; the president is assessed what I call the fixed cost to issuing a signing statement, which represents a resource or opportunity cost. In the previous chapter, I demonstrated that the signing statement is only within the equilibrium strategy of the president when this fixed cost is sufficiently low; when this condition does not hold, the policy gains from exercising the power never outweigh the costs to doing so, diminishing the president's incentives to use them.¹¹ This is obviously a hard constraint on presidential power. Further, even below this critical threshold, the cost will condition the president's willingness to issue statements. As the cost increases, his willingness to exercise the power declines.

In the low cost equilibrium, the president has the incentive to sign, veto, and issue signing statements on legislation, depending on how reflective a proposal is of his preferences. The president will sign those proposals most reflective of his preferences into law and veto those the least so. For those proposals between the extremes, he issues signing statements; these policies are those for which it is worth the cost of

¹¹See Lemma 1.

exercising the power in order to get substantial policy gains. As a result of the signing statement, the president is actually willing to sign fewer policies into law en toto than in an environment without signing statements or in which they are too costly to issue. That is, the president will issue signing statements on some proposals closer to his ideal point than is the status quo. On the same token, the president also vetoes less legislation in an environment in which there are signing statements than in one without them; the possibility of the statement induces the president to sign bills (with a signing statement) that he otherwise would have rejected (policies farther from him than is the status quo). Thus, when the president has the incentive to issue signing statements, it alters the set of policies that can become law.

However, as the fixed cost to a signing statement increases, approaching the critical cost threshold, these incentives decrease. That is, as the cost rises, the set of policies upon which the president is willing to issue signing statements contracts, which has the practical effect of decreasing the number of signing statements the president will issue. As a result of the increased cost, more bills will be signed or vetoed. Figure 4.3 illustrates how the fixed cost affects the presidential calculus, from a theoretical standpoint. It draws on the depictions of the president's strategy for how to respond to legislation introduced in the previous chapter. In the top panel, when the fixed cost is above the critical threshold, signing statements do not occur. The president signs bills closer to this ideal point than is the status quo and vetoes all others. In the middle panel, we see that when the cost is below the threshold, there are substantial regions of the policy space for which the president will issue signing statements, should he receive such a proposal. The last panel, however, shows that even below the critical threshold, as the cost increases, the regions for which the president is willing to issue signing statements shrink, meaning there are less policies upon which the president will issue statements. The testable implication which follows is:

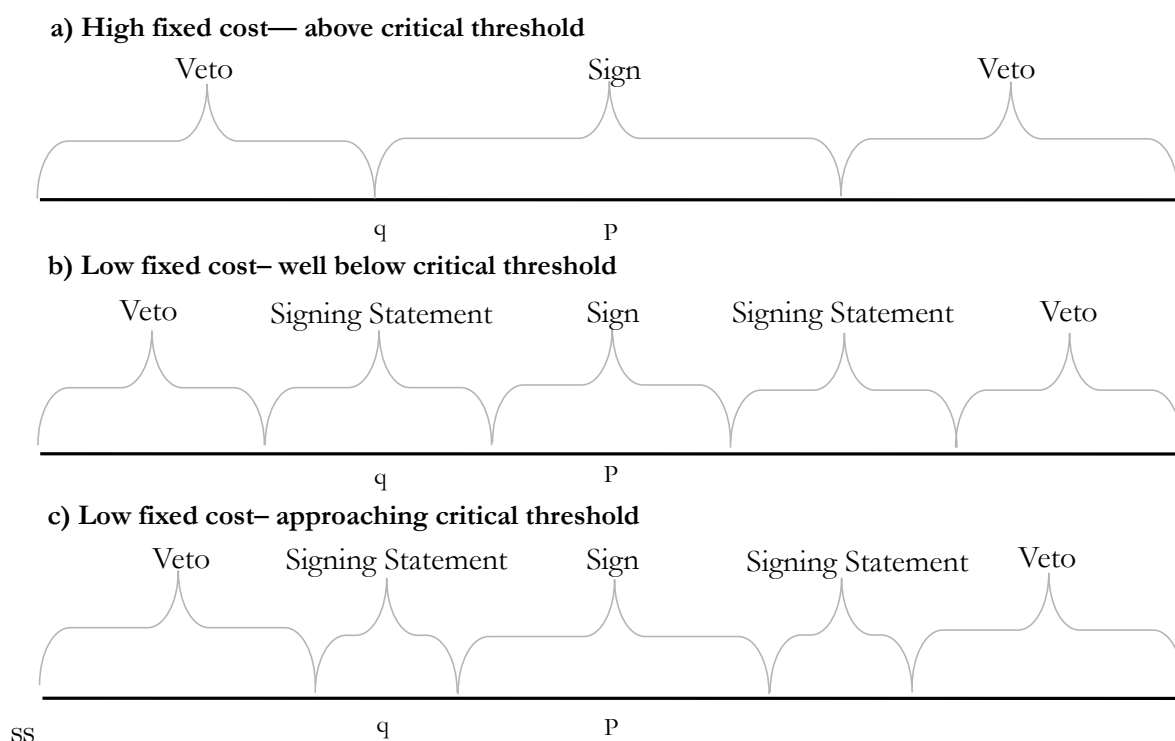


Figure 4.3: The Fixed Cost of the Signing Statement.

When the fixed cost to a signing statement is sufficiently high, signing statements are not in the equilibrium strategy of the president; he will sign bills closer to his ideal point that is the status quo, q , and veto all others, as seen in Panel A. When the fixed cost is below this threshold, the president will begin to issue signing statements. However, as the fixed cost approaches the threshold, signing statements become less and less likely, and the president will favor signing and vetoing bills. In Panel B, we can see that there is a significant portion of the policy space for which the president issues signing statements. As the fixed cost increases, however, those regions shrink, as seen in Panel C. In this case, there are less possible proposals for which the president will have an incentive to issue signing statements.

Result 2. *Signing statements should be more likely when the fixed cost to issuing one is low.*

This prediction is quite intuitive. As it becomes costlier to issue signing statements, the president will become less likely to issue them, in practice. The president will only issue signing statements when he can accrue policy gains from doing so, that is when the gains outweigh the costs. As the cost increases, these gains are mitigated, up until the point that the costs completely outweigh the benefits. In exercising this power, the president will be mindful of cost-benefit tradeoff of his actions. In chapter 6, I explore this hypothesis using several alternative measures to proxy for the fixed cost.

The Scope Cost of a Signing Statement

In addition to the fixed cost to issuing a signing statement, I assume the president also suffers a cost that increases in the scope of a signing statement, in how much he manipulates a policy with a signing statement. The farther the president shifts a law from that which Congress intended (i.e. the wider the scope of his signing statement), the higher this cost will be. In practice, this means that with each section or provision of legislation a president challenges in one of these documents, the scope cost increases. This cost represents the political costs to wielding executive power: the further the power is stretched, the more likely it is to be overturned or to have an adverse impact of the president's reputation.

In equilibrium, the model yields the proposition that the president always has the incentive to shift the policy to the midpoint between his ideal point and the proposal, conditional upon issuing a signing statement. The president never has the incentive to shift it any closer to his ideal point. This shift maximizes his utility in the face of his cost-benefit analysis. For example, if the president shifts the policy closer to his ideal point than this midpoint, the scope cost to that statement would become

prohibitively high; in particular, the cost would outweigh the benefits of the action. On the other hand, if the president issued a signing statement which shifted the policy to less than the midpoint, then the president is simply not maximizing his utility—he could stand to gain more on policy grounds by shifting the policy farther. As the president is motivated by policy concerns, it is in his interest to stretch the scope of the power as far as he can, up until the point that the costs overtake the gains. Thus, should the president receive a proposal for which he prefers to issue a signing statement, he will use the document to instruct agencies and the courts to implement the policy at this midpoint.

It logically follows from this result that, conditional upon issuing a signing statement, the president will be able to shift those policies more distant from his ideal point farther than he will those that are proposed closer to his ideal point, before hitting the point at which the costs outweigh the benefits; the farther a proposal is from the president, the farther the president will have to shift the policy to successfully implement it at the midpoint between the bill and his own preferred position. Generally, this reflects the reality that the president has more to gain when considering a proposal relatively more distant from his ideal point than one already more reflective of his preferences. Figure 6.5 demonstrates this dynamic.

Thus, the scope of a signing statement should then increase in the distance between the president and the proposal location. While there are currently no robust measures of the location of policy proposals, we can proxy the bill location with the ideological measure of the enacting Congress. This generates the following prediction:

Result 3. *The scope of a signing statement should increase in the distance between the president and Congress.*

This assumption that the enacting Congress serves as a good proxy for the proposal only requires the belief that the more ideologically distinct Congress is from the president, the more likely it is to propose policies that are farther from his ideal point.

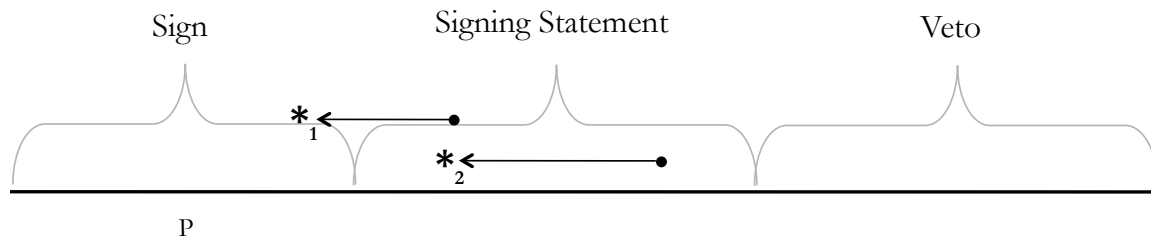


Figure 4.4: The Scope of a Signing Statement.

Conditional upon issuing a signing statement, the president should issue signing statements that challenge more provisions, and thus shift the policy farther, when his ideal point, P , is more distant from the bill proposal. Since the president always shifts policies to the midpoint between the proposal and his ideal point with a signing statement, this means that the farther a proposal is, the farther he will shift it, as can be seen in the diagram. Proposal 1 is relatively close to the president, so he will not have to shift the policy far to accomplish an outcome at the midpoint. However, proposal 2 is much farther from his ideal point, warranting a larger shift (and thus a signing statement with a larger scope).

Thus, we should expect to see presidents issuing signing statements that challenge more provisions of legislation and thus have a wider scope or policy impact when facing a hostile Congress.

4.3 Discussion

In order to understand whether and how signing statements affect the bargaining process, we require empirical verification of theoretical arguments. The theory advanced in Chapter 3 provides many insights for understanding presidential action and the process by which legislators make decisions. In this chapter, I laid the foundations for the evaluation of the theory advanced.

The PATRIOT Act demonstrative example revealed that the contentions of the model are plausible and have the capacity to capture the nuances of the political world that other models have missed. To evaluate the model in a more rigorous fashion, I derive three testable implications of the model in this chapter. In the

next chapter, I examine the hypothesis that signing statements are more likely when congressional polarization is low at different levels of aggregation. In chapter 6, I evaluate the president-centric hypotheses. I examine the relationship between resource/opportunity costs and the use of the signing statement and whether the inter-branch setting tempers the policy impact that signing statements have.

Chapter 5

Polarization & Signing Statements

Much of the extant research on the exercise of presidential power and congressional-executive relations assumes that the president and Congress are often at loggerheads over their policy goals; as such, it is generally argued that presidents are more prone to exercise the policy powers of their office when they face a hostile Congress or in a particularly polarized environment. For instance, the literature on the veto finds that they are more likely under divided government, when the president and Congress have divergent policy preferences (Cameron 2000). On the other hand, executive orders are more likely under unified government, but the president often issues them when he faces a Congress marked by partisan divisions and gridlock (Howell 2003, Lowande and Milkis 2014).

The work on signing statements has generally built directly from these literatures. Kelley, for example, argues that signing statements are used to “influence policy when the normal methods break down, particularly in this modern period of divided government characterized by high levels of partisanship inside Congress and inside the electorate” (2007, 249). As such, most of the empirical work on signing statements has focused on how the inter-branch setting affects their usage. Far less is known about whether and how the legislative environment shapes the president’s ability and

incentives to issue signing statements. I argue that the legislative context is critical to understanding presidential power; if legislators anticipate presidential action and bargain with one another under these expectations, as I have posited, then the political make up within Congress should affect the president's ability to act. Contrary to previous arguments about the conditions under which signing statements are likely to occur, the model of inter-branch bargaining I advance predicts that signing statements should be more likely when congressional polarization is *low*—that is, when Congress is internally ideologically cohesive—rather than when partisan politics are at their most divisive. In this chapter, I explore this hypothesis at both the congress and the bill level. Using data on partisan polarization and executive signing statements from 1981 until 2012, I find that signing statements are more likely in the aggregate and on any given bill at lower levels of congressional polarization.

5.1 The Data

To evaluate this hypothesis, I use the data on presidential signing statements drawn from Ostrander and Sievert (2013*a*), as described in Chapter 2. Between 1981 and 2012, 449 constitutional signing statements were issued. I use this data to create the dependent variables necessary to test the hypothesis of interest at both the congress and the bill-level. For the congress-level analysis, I create a count variable to capture the number of signing statements issued per congress between the 97th and 112th congresses. On average, presidents issued 28 signing statements per meeting of Congress during this period, ranging from 7 statements in the 112th to 62 in the 102nd. At the bill-level, I use the Ostrander and Sievert data to create an indicator for whether a public law passed between 1981 and 2012 received a signing statement. In this period, approximately eight percent of all laws received a signing statement upon being signed by the president.

The main independent variable in the analysis is congressional polarization. To capture this concept, I first require a measure of legislative preferences with which to calculate the level of polarization. I use a measure of legislative ideology made available by Bonica (2013). Bonica's procedure relies on information provided by campaign finance contributions to estimate the relative ideological positions of legislators. Based on the contributions legislators receive from PACs in each election cycle, Bonica scales legislators on a single left-right dimension, which correlates highly with other ideological measures. I use this measure of preferences rather than more conventional vote-based measures of ideology, such as DW-NOMINATE scores, because of the assumptions I made about legislative decision-making. NOMINATE scores are estimated under the assumption that legislators vote sincerely on every vote they cast. The utility functions I have specified assume that legislators consider both policy and position-taking concerns when casting votes and that they will vote strategically at times. As such, NOMINATE data is inappropriate for testing the predictions of the model. Bonica's measure has the benefit of being relatively more independent from the legislative action about which I theorize, such as voting, than are NOMINATE scores.¹ The Bonica data ranges from the 1980 election cycle until 2012, which covers the same time period in which the signing statement has been an institutionalized power of the president.

While there are many ways to think about polarization and to identify pivotal actors within the legislature, I choose to operationalize polarization as a function of the parties in Congress. Since party alignment is a major determinant of legislative behavior and because some element of party cooperation is necessary for the passage of most legislation, I believe that party dynamics best capture the array of preferences in Congress. As such, I measure $polarization_j$ as the absolute difference in the mean

¹Of course, it could be the case that legislative behavior is what attracts campaign finance in the first place, and, thus, finance is not truly independent of legislative behavior, namely strategic behavior. However, given the difficulty in measuring legislative ideology, this was the best measure available.

conservatism between the two parties in Congress.² This variable is thus measured at

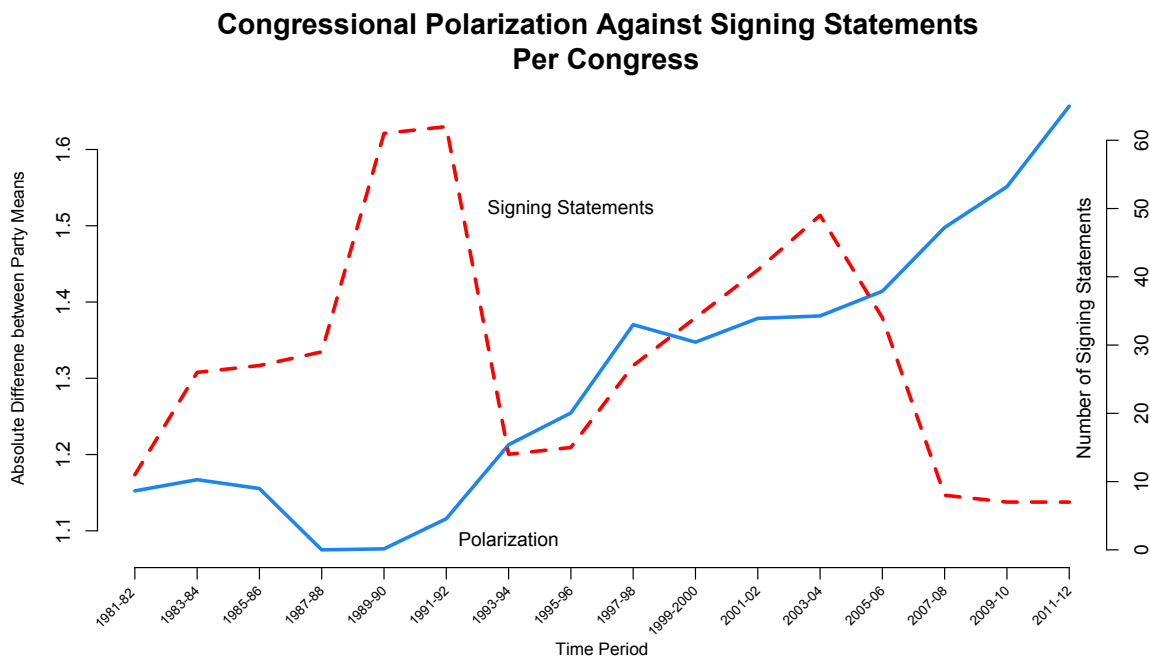


Figure 5.1: Polarization and Signing Statements Over Time.

This plot shows the number of signing statements and the level of partisan polarization for each congress between the 97th and the 112th, using Bonica’s measure of legislative ideology. When polarization is at its height in the 112th Congress, the signing statement trend is at its lowest. When polarization is lowest, between the 100th and 102nd congresses, signing statements are at their height. These variables will be the variables of interest in the following analyses.

the congress level and not the bill level. Figure 5.1 displays the aggregate trends of signing statements and partisan polarization for each congress between 1981 and 2012 (97th–112th congresses). The figure shows that there is a general, if noisy, negative correlation between the variables at such an aggregated level, as expected.³ When polarization is at its nadir in the late 1980s and early 1990s, the use of signing state-

²There are several factors to note about using Bonica’s data. First, since he measures Senators and House members on the same scale, I group together members of the same party from both chambers together to calculate the mean party ideology. Second, for each Congress, I use the ideal points estimated from the previous election cycle. If a legislator is missing an ideal point for a specific election cycle, I use the legislator’s career ideal point as a proxy for the election-specific measure. Finally, I also tried various ways to measure partisan polarization, including the median of party ideology, etc, but the results do not change.

³The range of $polarization_j$ is from 1.07 to 1.66 with a mean of 1.27 and a standard deviation of 0.16.

ments was at its height. Similarly, as polarization has peaked in recent congresses, the use of signing statements has generally declined.

In the sections that follow, I use these data to analyze the primary hypothesis at the congress level— I evaluate the effect of the level of partisan polarization on the number of signing statements the president issues per congress. In addition, I test the prediction at the bill level. To do so, I estimate a multilevel model that considers congress-level variables, such as polarization, as well as bill-level characteristics, to predict whether a specific piece of legislation receives a signing statement. I also provide a discussion of the robustness of the results, as well as one regarding the limitations of the findings.

5.2 Congress-Level Analysis

I first evaluate the hypothesis that signing statements are more likely when polarization is low at the congressional level. While signing statements are issued on particular bills, the predictor I am interested in, polarization, only varies at the level of the congress; preferences in Congress do not change much until an election occurs and, as such, polarization is generally stable for the two year periods between elections. Thus, as a first cut, I will examine the effect of polarization on the aggregate number of signing statements issued per meeting of Congress. I also control for whether there is unified government per congress, in case the inter-branch setting may affect the outcome of interest and confound the results.⁴

Given the nature of the dependent variable, a count model is appropriate. I reject using a Poisson regression to model the relationship, as the dependent variable is overdispersed and thus violates the assumptions necessary to generate reliable estimates

⁴I also controlled for whether there was divided party control of Congress and for the amount of major legislation passed per congress; neither had a significant impact on the outcome nor did they change the results of interest.

from a Poisson model.⁵ I instead estimate a negative binomial regression; negative binomial regression is more flexible than the Poisson model and can estimate reliable standard errors when the dependent variable is widely dispersed. I choose to estimate the model in a Bayesian framework due to data limitations. Between 1981 and 2012, only 16 congresses served, meaning there is a very small sample for the congress-level analysis. Bayesian analysis produces more reliable estimates of uncertainty in small samples. The functional form I estimate is given by:

$$\text{Signing Statements}_{t|\lambda,\alpha} \sim \text{NB}(\lambda_t, \alpha_t) \quad (5.1)$$

$$\lambda_t = \exp(\beta_0 + \beta_1 \text{polarization} + \beta_2 \text{unified}) \quad (5.2)$$

$$\alpha_t > 0, \quad (5.3)$$

where the dependent variable, the number of signing statements in congress t , is distributed according to the negative binomial distribution. λ is the mean of the distribution and is a function of the variables of interest and their coefficients, the β parameters. α is the estimated dispersion parameter, which distinguishes the negative binomial distribution from that of the Poisson. I assign improper uniform (uninformative) priors to estimate these model parameters.

I program and implement the model in R (R Development Core Team 2008) via `MCMCpack` (Martin, Quinn and Park 2011). Table 5.1 shows the results from the negative binomial analysis between signing statements and polarization. Model 1 displays the results from the bivariate regression and Model 2 the results controlling for unified government. The results are based on 100,000 iteration simulations with 5,000 iteration burn-in periods. Trace plots for the parameters suggests the models converge quickly.

⁵The mean of the dependent variable is 28.06 and the variance, 333.66.

Table 5.1: Congress-Level Regression Results

| Variable | Model 1 | Model 2 |
|--|-----------------|-----------------|
| Intercept | 6.05 (1.37) | 6.71 (1.38) |
| Polarization | -2.11 (1.05) | -2.75 (1.10) |
| Unified Gov't | | 0.50 (0.38) |
| Posterior standard deviation in parentheses N=16; $\hat{\alpha}$ = 3.48 in Model 1, 4.02 in Model 2 | | |

Results from Bayesian negative binomial regression, based on 100,000 iteration simulations with 5,000 iteration burn-ins. All parameters were given improper uniform prior distributions for estimation.

The polarization variable has a strong negative effect on the number of signing statements in both models; this means that as the level polarization increases, the number of signing statements a president issues per congress decreases. In the bivariate analysis, the coefficient on polarization is -2.11 with a 95% credible interval of [-4.18, -0.03]. Upon controlling for unified government, the polarization variable has a stronger effect on signing statements, with a coefficient of -2.75. The 95% credible interval around this estimate is [-4.89, -0.52]. In both cases, at least 95% of the posterior density is below zero, indicating a negative correlation between polarization and signing statements, as expected. In addition, Model 2 shows that unified government has as a positive but insubstantial effect on the number of signing statements.⁶ This suggests that the legislative environment may be a more important predictor of presidential action than is the inter-branch environment.

Figure 5.2 displays the substantive results from Model 2. The plot shows the predicted number of signing statements across the actual range of polarization during the time period of interest, assuming that government is divided. The hypothesized negative relationship is apparent. When polarization was at its highest, during the

⁶The 95% credible interval on the unified government is [-0.25,1.26].

112th Congress, the model predicts approximately 9 signing statements, while Obama actually issued 4 during that period. When polarization was at its lowest, during the 101st congress, the model predicts approximately 43 signing statements compared to the actual 61 that President H.W. issued. Obama’s statements were no less controversial than were President H.W. Bush’s—there were just far fewer. For example, during the 101st Congress, President H.W. Bush issued a signing statement on the National Defense Authorization Act for FYs 1990 and 1991, in which he challenged 13 provisions of the law; in 2011, Obama issued one on the National Defense Authorization Act (NDAA) for FY 2012, which challenged 17 parts of the law. As political scientist Kevin Evans noted to the *Washington Post*, “the difference is really with volume, not in kind.”⁷ Part of the explanation for this difference may be the different legislative environments the presidents faced while in office.

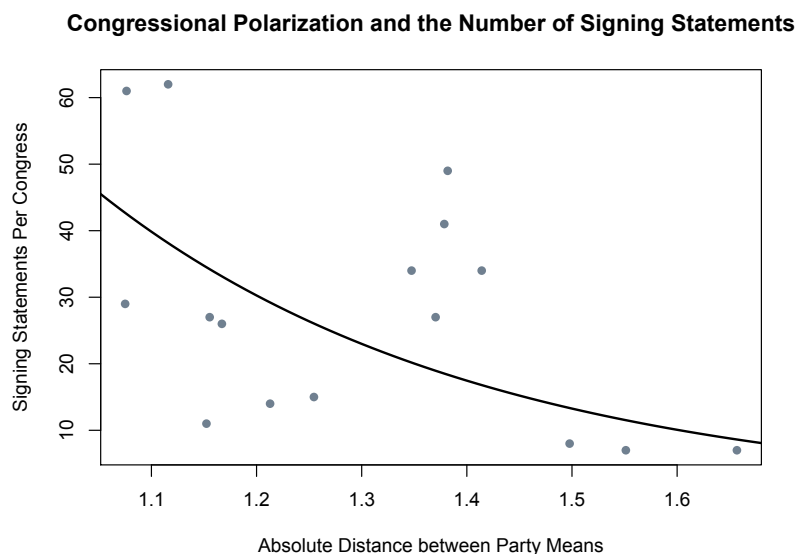


Figure 5.2: Congress-Level Results.

This plot displays the results of the negative binomial model regressing the number of signing statements per congress on the level of polarization and an indicator of whether or not there was unified government. For the purposes of displaying the results, government is assumed to be divided. The plot shows the number of predicted signing statements across the actual range of partisan polarization in Congress. The negative relationship is apparent.

⁷http://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a_story.html

While these results show promising support for the hypothesis of interest, there are limitations to the empirical analysis as such. First, as there are only 16 congresses in the sample, data limitation is a threat to inference. Second, there is the risk of an ecological fallacy in evaluating the formal model at such an aggregated level. As the formal model speaks to policy bargaining on a single bill at a time, to evaluate the model thoroughly, a bill-level analysis is necessary. Inferring that bill-level bargaining effects will transfer to the congress-level may bias the results; correlations at the group level do not necessarily hold at the individual level, often leading to aggregation bias, as well as leading to greater potential for confounding (King 2013). However, the congress-level support for the hypothesis serves as a good plausibility check on the prediction.

5.3 Bill-Level Analysis

To explore the hypothesis at the bill-level, I require data on the legislation signed into law between 1981 and 2012. To identify all public laws, I refer to the Congressional Bills Project; in the period of interest, 4,895 bills were signed into law.⁸ I limit my analysis to those bills that became law, as signing statements can only be issued if the president signs a bill. For this analysis, the dependent variable is a dichotomous indicator for whether a each piece of legislation received a signing statement. Of the 4,895 bills, 410 (8.4%) received a policy-oriented signing statement from the president upon being signed into law. One important limitation of the Congressional Bills Project data is that it only includes public and private legislation; it does not include resolutions. Presidents can issue signing statements upon resolutions that they sign into law, but these signing statements will be excluded from this analysis as I cannot identify the universe of resolutions passed during the period of interest. Thus, the

⁸The data is publicly available at: <http://congressionalbills.org/>. For the purposes of the analysis, I excluded all commemorative legislation, as constitutional signing statements are unlikely to get attached to these bills.

39 signing statements that presidents attached to resolutions in the 30 year window examined are not included in the bill-level analysis. However, there is no reason to think the exclusion of these signing statements should systematically bias the results of the analysis.

The main independent variable is, again, the level of partisan polarization in Congress, measured as the absolute distance between party means per congress. In addition to the variable of interest, I control for factors at both the congress and bill levels that may confound the results of interest. First, I include an indicator for whether there was unified government during each congress ($unified_j$) examined.⁹ I

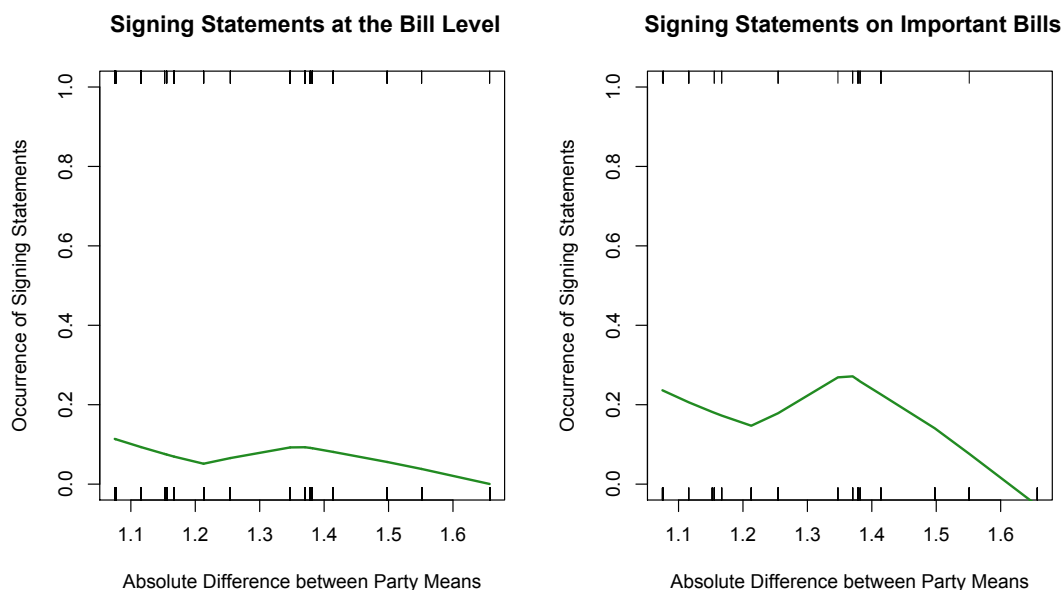


Figure 5.3: Polarization and Signing Statements at the Bill Level: Raw Data. This plot displays the raw data of bills that received signing statements (those coded as 1 on the y-axis) and those that did not (zero on the y-axis), plotted against the range of observed polarization in Congress from the 97th to 112th congresses. The left panel plots all 4,985 public laws in the data set. A loess smoother of the data shows that there seems to be a negative trend between polarization and bills that receive signing statements. This finding is even stronger when looking at the loess smoother of the subset of the data that Mayhew designated as important, as seen in the right panel. It is apparent that significant legislation is more likely to receive a signing statement and the negative trend between bills receiving signing statements and polarization is more stark.

⁹Of the sixteen congresses in the analysis, four were coded as unified government.

also control for features of the bill that may affect the propensity for a particular piece of legislation to receive a signing statement. Consistent with past literature on signing statements, I control for whether a public law is considered a major piece of legislation (*major_i*). In the analyses that follow, I will present the results using the Mayhew Sweep 1 measure of legislative importance described in Chapter 2. However, all results are robust to using the *CQ* key vote measure, in its stead. I expect this variable to be positively associated with a bill receiving a signing statement. Figure 5.3 shows the raw trends between the bills that receive signing statements and the observed level of polarization. As the plots show, there does seem to be a negative relationship between polarization and the likelihood of legislation receiving signing statements, and this effect appears to be stronger when considering major legislation.

Finally, I consider how the major topic area of legislation may affect the probability of a bill receiving a signing statement, using the coding of legislation from the Policy Agendas Project. In particular, I control for policy areas that implicate the constitutional powers of the president, which include defense bills (*defense_i*), international affairs bills (*internat_i*), and government operations legislation (*govtops_i*).¹⁰ I create a dichotomous indicator for whether each bill fell into each of those three categories. I expect that bills in these policy areas should be more likely to receive signing statements than are other bills.

5.3.1 Specification and Results

The data for this analysis consist of 4,895 laws passed across 16 different congresses, each of which had a different political climate and context that could affect the bargaining dynamics of interest. The independent variable of interest, polarization, only varies at the level of the congress, but the dependent variable is a bill level indicator for whether a law received a signing statement. In addition, many of the

¹⁰Please see Chapter 2 for definitions of each type of legislation. In the data set, 669 bills are coded as government operations, 417 as defense, and 224 as international affairs.

control variables of interest are measured at the bill level. Given the two-tiered structure of the data, a multi-level model is appropriate. Rather than using fixed (or unmodeled) effects at the congress-level, the multi-level modeling technique allows me to model the effects of the group level predictors, while also estimating a bill-level regression. When data have a natural hierarchical structure, multilevel modeling is an improvement over classical regression in that it presents a compromise between pooled and unpooled estimates and generates more reliable standard errors (Gelman and Hill 2007). In light of these advantages, I specify a multilevel logistic regression as follows:

$$Pr(Y_i = 1) = \Lambda(\alpha_{j[i]} + \beta_1 major_i + \beta_2 defense_i + \beta_3 internat_i + \quad (5.4)$$

$$\beta_4 govtops_i) \quad (5.5)$$

$$\alpha_j \sim N(\gamma_0 + \gamma_1 polarization_j + \gamma_2 unified_j, \sigma_\alpha^2) \quad (5.6)$$

where Λ is the inverse logit function and Y_i is an indicator that takes on the value of 1 if bill i receives a signing statement and zero otherwise. Here, α_j represents a congress-specific intercept shift, where j indexes one of the 16 congresses from which each bill was passed; the intercepts vary as a function of the congress level predictors, and σ_α^2 is an estimated variance parameter. The β parameters represent the effects of the individual-level predictors and γ , the group-level predictors. I program and implement the model in R (R Development Core Team 2008) via `lme4` (Bates et al. 2014). The results of the model are shown in Table 5.2.

All the variables, with the exception of unified government, are significant predictors of signing statements. Unified government has a positive effect on whether a signing statement will get attached to a bill, but the effect is not statistically distinguishable from zero. In terms of the bill-level controls, all the variables have a

Table 5.2: Bill-Level Results

| Variable | Estimate |
|--|-----------------|
| Intercept | -0.25 (1.40) |
| Polarization | -2.23 (1.10) |
| Unified Government | 0.20 (0.42) |
| Major | 1.53 (0.22) |
| Defense Bill | 1.39 (0.15) |
| International Affairs | 1.37 (0.19) |
| Government Operations | 0.64 (0.15) |
| Standard errors in parentheses | |
| N=4895, $\hat{\sigma}_\alpha^2 = 0.36$ | |
| AIC=2650, BIC=2702, deviance=2634 | |

These estimates are the result of a multilevel logistic regression with varying intercepts at the congress-level. The intercept presented in the table is the mean intercept across the 16 congresses. The independent variable of interest, polarization, which is measured at the congress-level, has the expected negative coefficient and is statistically and substantively significant.

significant and substantial effect. For instance, the indicator for whether legislation was considered major has a large positive effect on whether a bill receives a signing statement. At average levels of polarization, the probability that a bill receives a signing statement increases from 4 to 17 percent when considering whether or not it was considered major.¹¹ The effect of whether a bill was defense-related is also considerable. A major defense bill has a 45 percent probability of receiving a signing statement, compared to the 17 percent for a non-defense related major bill, at average levels of polarization.¹² These effects are quite large, considering only 8 percent of

¹¹These estimates assume all other independent variables were held at zero. A non-major piece of legislation has a predicted probability of 0.04 with a 95% confidence interval of [0.03,0.05], while a major piece has a predicted probability of 0.17 with a confidence interval of [0.11, 0.23].

¹²Again, this assumes all other variables are held at zero. The confidence interval around this estimate is [0.33, 0.57].

the bills in the sample received a signing statement.

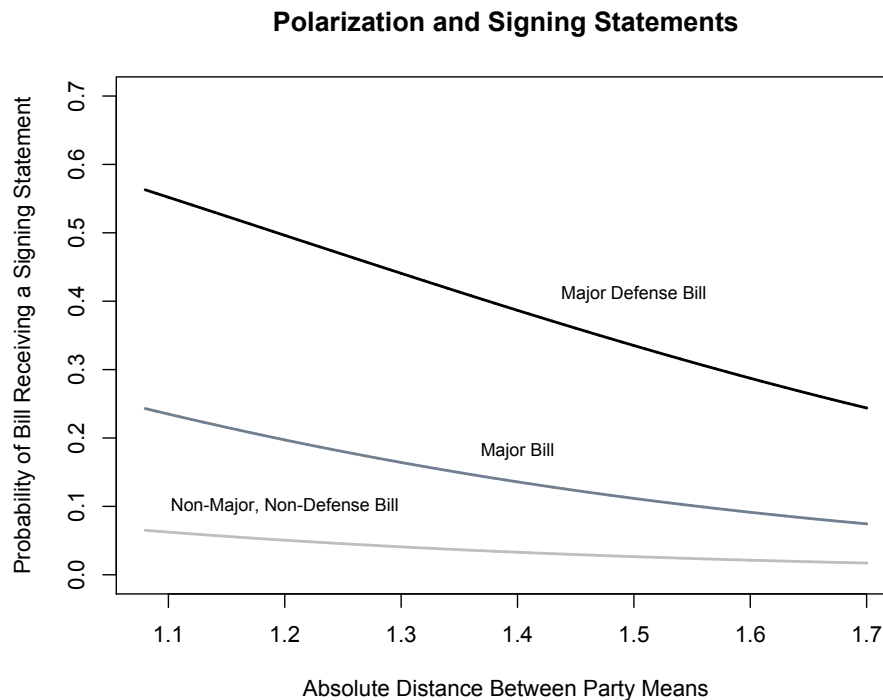


Figure 5.4: Bill-Level Results.

This plot shows the predictions from the bill-level analysis across the observed range of partisan polarization. Based on the predicted probability curves, it is clear that the main hypothesis holds: when congressional polarization is low, any particular piece of legislation is more likely to receive a signing statement. In addition, defense bills and major legislation are more likely than are other laws to receive signing statements.

The variable of interest, partisan polarization, consistent with expectations, has a significant and negative coefficient. This means that it is more likely for bills to receive signing statements when they are passed during a congress marked by low levels of polarization. Figure 5.4 demonstrates the substantive effects of polarization for three hypothetical bills.¹³ Moving across the observed range of the polarization variable, the probability that an ordinary (non-major, non-defense) bill receives a signing statement drops from 6 percent at low levels of polarization to 2 percent at high levels.¹⁴ A four percent change in the predicted probability is not a large

¹³The predicted probabilities assume all variables, besides polarization, are at zero, unless otherwise noted

¹⁴The 95% confidence intervals are [0.04,0.06] and [0.01,0.03], respectively.

substantive effect, but this result is not surprising considering the small proportion of bills that received a signing statement in the sample.

The effect of polarization is much more substantial when examined in interaction with the bill-level predictors. Figure 5.4 further demonstrates this. The probability that an important piece of legislation receives a signing statement decreases from 24 percent to 8 percent when moving from the minimum to the maximum levels of polarization observed in the data.¹⁵ A 16 percent difference is a marked disparity in the probability of a signing statement being issued on a bill, given the low likelihood of any public law receiving one. The probability falls 6.5 percent across the interquartile range, from 18.5 percent to 12 percent. The difference is even more stark when considering a major defense bill; at low levels of polarization, a major defense bill has a 56 percent probability of receiving a signing statement compared to a 25 percent chance when polarization is at its peak.¹⁶ Moving across the interquartile range of polarization, the effect drops from a probability of 51 percent to 38 percent. Importantly, the magnitude of these effects is the difference between a bill receiving a signing statement and a bill being signed into law without one.

These results reflect the political reality behind the data. When polarization was at its height under Obama, approximately 2% of the laws he signed received a signing statement, compared to 15% of the laws that H.W. Bush signed when he faced a very cohesive Congress between 1989 and 1991. During the 112th Congress, Obama only issued 4 signing statements, three of which were on defense bills, including the NDAA for FY 2012 discussed previously. On the other hand, during the 101st Congress, H.W. Bush issued 61 signing statements. A significant proportion of these statements were issued on defense bills; however, Bush issued signing statements on many different types of legislation, as well. For instance, he issued a signing statement on the Clean Air Act of 1990, a major environmental law which increased the federal

¹⁵Confidence intervals are [0.14,0.34] and [0.04,0.12].

¹⁶Confidence intervals of [0.47,0.65] and [0.13,0.37].

government's role and responsibility in regulating air quality. Further, Bush also issued statements on non-major bills; for example, he struck down oversight provisions in the National and Community Service Act of 1990, a law creating programs to engage citizens in community project. This evidence suggests that H.W. Bush was far less constrained in his use of signing statements than was Obama. Obama faced a highly polarized legislature and thus only issued signing statements on important legislation that specifically implicated the president's constitutional powers, such as defense bills. Bush had more flexibility to issue statements on many laws and in many different policy areas, likely because of the less polarized setting he faced.

Taken together, the results provide strong support for the main hypothesis. There is an inverse relationship between congressional polarization and the president's likelihood of issuing signing statements on any given bill. This suggests that the president's ability to exercise his prerogative powers is conditioned by the political environment within the legislature. Below, I demonstrate that the results are robust to a variety of specifications.

5.3.2 Robustness Checks

The findings reported above are not driven by model selection. In particular, the results are robust to a series of alternative specifications. I summarize five such alternatives in Table 5.3. First, I relax the hierarchical structure of the multi-level model and estimate a model that considers polarization as an individual-level predictor. Doing so does not significantly change the effect of the variable of interest (see Model 1), suggesting that the multilevel specification is not disproportionately affecting the results. Polarization still has a negative and significant effect on the probability of legislation receiving signing statements. All other independent variables have positive and significant coefficients.

I also estimate the multi-level model allowing the effect of polarization to vary by

congressional term. In this random slope specification, polarization has a consistently negative and significant effect on the probability of a bill receiving a signing statement. Model 2 in Table 2 shows the average effect of polarization across all 16 congresses. However, polarization had the largest negative effect during the 107th congress (-2.59) and the smallest effect in the 97th (-2.03), suggesting that the legislative environment was more of a constraint on presidential behavior during the former. The 107th congress was very closely divided in its partisan breakdown of members, as the Senate majority flipped several times, so it is not surprising that polarization would be the most constraining in this period. In general, however, the effect of polarization did not vary much across the different congresses.

In addition, the results of the multilevel model are robust to the inclusion of presidential fixed-effects (see Model 3). The results of the independent variables do not change much upon the inclusion of the indicators for each president. Presidents George H. W. Bush and George W. Bush have strong positive intercept shifts upon the inclusion of fixed effects; this result is not unexpected considering both presidents were avid users of the signing statement, which will be discussed further below. The results of this model suggest that at the average level of polarization during the time period examined, a major piece of legislation would have a 28 percent probability of receiving a signing statement under H.W. Bush and a 25 percent probability under W. Bush, compared to a 12 percent probability under Bill Clinton. The effect of polarization, however, is still negative and statistically significant. Model 4 shows the results from a model which considers presidential random effects, rather than fixed effects. For this analysis, I allow the intercepts to vary as a function of the president's political party. Polarization, again, has a strong negative effect on the probability of a bill receiving a signing statement in this specification.¹⁷ The indicator for whether a president is a Republican has a positive effect, but it is not statistically significant.

¹⁷Note that the effect just misses being significant at the 0.05 level. It is significant at the 0.06 level, however.

Table 5.3: Robustness Checks

| Variable | Model 1 Pooled Sample | Model 2 Congressional REs | Model 3 Presidential FEs | Model 4 Presidential REs | Model 5 Mayhew |
|------------------------|--------------------------|------------------------------|-----------------------------|-----------------------------|-------------------|
| Intercept | -0.85 (0.47) | -0.22 (1.32) | 0.12 (1.56) | -1.07 (1.39) | 0.99 (1.6) |
| Polarization | -1.61 (0.38) | -2.29 (1.01) | -2.50 (1.20) | -1.78 (0.94) | -2.01 (1.25) |
| Unified Gov't | 0.17 (0.14) | 0.52 (0.41) | 0.08 (0.37) | 0.02 (0.16) | 0.69 (0.45) |
| Major | 1.4 (0.21) | 1.53 (0.22) | 1.52 (0.21) | 1.42 (0.21) | |
| Defense | 1.35 (0.14) | 1.39 (0.15) | 1.39 (0.15) | 1.33 (0.15) | 0.37 (0.62) |
| International Affairs | 1.41 (0.19) | 1.37 (0.19) | 1.36 (0.19) | 1.36 (0.19) | 1.31 (1.44) |
| Government Operations | 0.57 (0.15) | 0.64 (0.15) | 0.63 (0.15) | 0.59 (0.15) | 0.53 (0.64) |
| Republican President | | | | 0.59 (0.45) | |
| For Models 1-3, N=4985 | | | | | |
| For Model 4, N=170 | | | | | |

Results from robustness checks. Model 1 represents a pooled logit model that relaxes the hierarchical structure of the model. Model 2 estimates a random effects model that allows the effect of polarization to vary by congress. Model 3 adds presidential fixed effects to the hierarchical model of interest. Model 4 allows for presidential random effects; I allow the intercepts to vary by president, as a function of their party alignment. Model 5 shows the results from the hierarchical model applied to Mayhew's Sweep 1 legislation as the universe of laws. The polarization variable has a strong negative effect on the probability of a law receiving a signing statement in first three models. It also has a negative effect in the Mayhew model, but the effect just misses standard levels of significance.

I also estimate the multilevel model of interest using Mayhew's Sweep 1 legislation as the universe of laws, rather than all public laws (see Model 5). The coefficient on the polarization variable is large and negative, as expected, but the coefficient slightly misses conventional levels of statistical significance. However, estimating a pooled model, which considers polarization as an individual rather than group level predictor, results in a negative and statistically significant effect.¹⁸ Given that this analysis is conducted on 170 laws, only 35 of which received signing statements, the weaker results are not surprising.

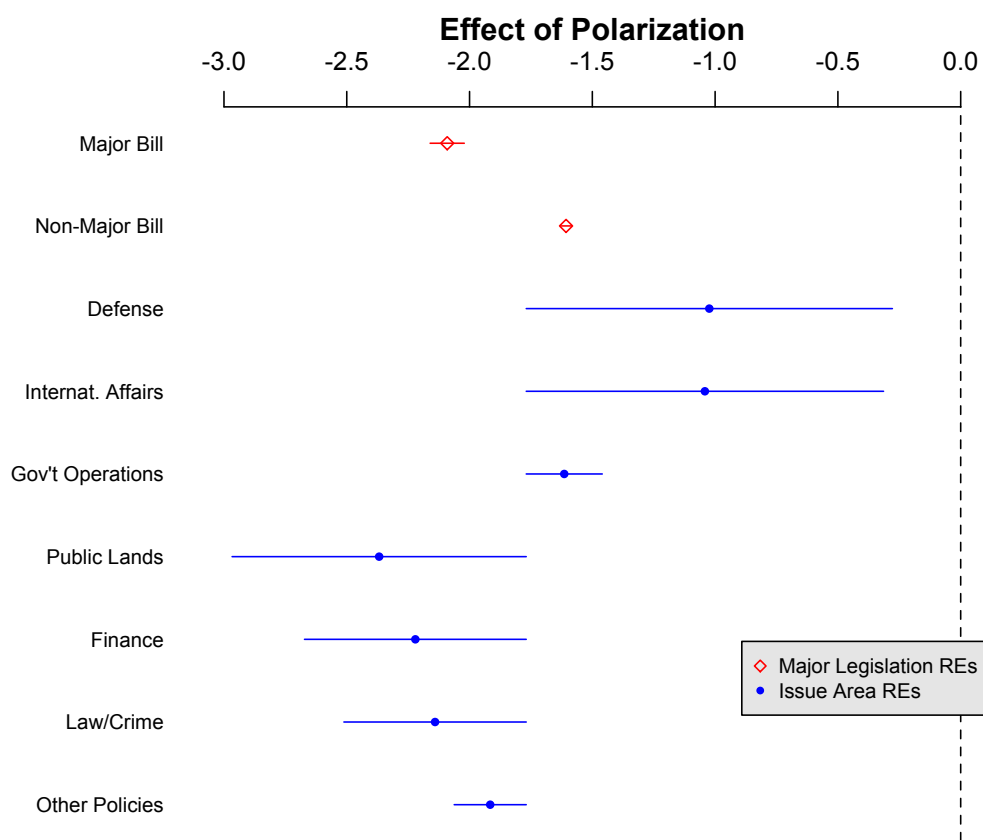


Figure 5.5: Random Effects by Bill Type.

This plot shows the coefficients estimated from two different random effects models meant to evaluate the effect of polarization on the probability of a bill receiving a signing statement across different types of bills. Regardless of the importance of or the policy or issue area that characterizes a bill, polarization has a large negative and statistically significant effect.

¹⁸It is significant at the 0.09 level.

Finally, I estimate regressions that model the random effect of polarization by bill type. In the first, I allow the slope on the polarization variable to vary based on whether or not the legislation is considered major, to examine whether polarization has a negative effect on both types of bills receiving signing statements. In the second regression, I allow the slope on polarization to vary according to the topic area of the bill, in order to assess whether polarization has a similar effect on bills receiving signing statements depending on the issue area they address. Figure 5.5 shows the coefficients estimated on polarization for each model. As is apparent, polarization has a strong and statistically significant negative effect on the probability that both major and non-major legislation receive signing statements. In addition, the negative effect holds across a variety of most common issue areas covered in legislation from 1981-2012. This means that, regardless of the bill type or issue salience, a bill is more likely to receive a signing statement when polarization is low.

Figure 5.5 shows that the coefficients on polarization are among the smallest for defense, international affairs, and government operations bills. This is likely because these bills are *ceteris paribus* more likely to receive signing statements; that is, bills in these policy areas are much more likely than other bills to receive signing statements, regardless of the level of polarization in Congress (this may also explain the higher uncertainty around the estimates on polarization for defense and international affairs legislation). For example, the policy areas that received the most signing statements during George H.W. Bush's and George W. Bush's presidencies were defense bills and government operations legislation, despite the fact that H.W. Bush faced a far less polarized Congress than did his son. In fact, 39 percent of W. Bush's signing statements were in these policy areas and 20 percent of his father's statements. Notably, however, George H.W. Bush's signing statements were less concentrated in certain policy areas. He especially issued a significant number of statements on public lands and water management bills. Forty percent of the signing statements on this type

of legislation were issued during H.W. Bush's presidency, when polarization was at its lowest. Reagan also issued statements regularly in this policy area, when polarization was low. This explains the strong negative effect of polarization of this type of bill. These results further suggests that presidents may have more flexibility to use the signing statement power on policy areas outside their constitutional purview when they face a less polarized Congress. Taken together, these robustness checks show that the inverse relationship between polarization and bills receiving a signing statement holds for a variety of tests.

5.4 Bush I vs. Bush II: An Examination

These statistical results presented in this chapter may seem to run counter to popular perceptions of the signing statement. In the 1980s, after the Reagan administration made efforts to include signing statements as part of the legislative history of a bill, there was some interest in Congress and in the media over Reagan's use of the tool; however, this interest was short-lived and was often overshadowed by more high profile presidential exercises of power, such as the veto and the executive order (Kelley 2007). The signing statement did not get much press coverage and was really not part of the public lexicon again until the presidency of George W. Bush. In fact, political scientist Christopher Kelley has called 2006 "the year of the signing statement" (Kelley 2007). In light of the results above, it may seem puzzling that Bush got so much attention for his use of the power, as previous presidents also used them often and were arguably less constrained by the legislative environment in doing so.

While W. Bush did use signing statements as a regular tool of the office, the actual number of signing statements he issued was not remarkable, given their usage by the three previous presidents. There are, however, several reasons that W. Bush's signing statements attracted widespread media, congressional, and legal attention.

First, President George W. Bush did not wield his veto power at all in the first five and a half years of his presidency. In fact, that President Bush never used a veto in his first term was a remarkable feature of his presidency relative to other recent presidents. The dearth of vetoes caught the attention of many politicians and political pundits, who then noticed that, while he was not using this constitutional power, President Bush was making use of the signing statement regularly (Seeley 2008). In addition, President Bush issued signing statements on very high-profile and controversial legislation, which led to increased notice being taken on his actions. In particular, the signing statement he issued on the McCain Torture Ban launched much of the public outcry over his use of signing statements. After the months-long debates over the legislation and the vocal and public stance that McCain had taken on the issue, Bush's signing statement on the bill had little chance of going unnoticed. This signing statement, in particular, led members of Congress to introduce legislation to ban signing statements, an American Bar Association inquiry into the use of the power, and coverage of his actions in major national news outlets. In the aftermath of the Torture Ban statement, Charlie Savage of the *Boston Globe* wrote a series of articles about Bush's use of signing statements that brought the power to the public's attention and is responsible for much of the public criticism Bush received for his actions.

The final reason that 2006 was the "year of the signing statement" revolves around the appointment of Samuel Alito to the Supreme Court. In October 2005, Bush nominated Alito to replace Sandra Day O'Connor on the Court. While the Senate was considering his nomination, documents from the Reagan administration were made public which showed that Alito played a large role in the institutionalization and defense of the signing statement. While serving as Deputy Assistant Attorney General under Reagan, Alito had written memoranda which outlined a strategy for the president's use of the signing statement to "increase the power of the executive

to shape the law,” which informed Meese’s decisions to encourage the use of these tools.¹⁹ As this involvement in the institutionalization became a potential stumbling block to Alito’s confirmation, the media picked up the story in conjunction with coverage over Bush’s use/abuse of the power.

Despite all this attention, particularly in 2006, George W. Bush is not unique in using the signing statement to accomplish his policy goals, nor is he particularly unique in the frequency with which he issued them. Other presidents, most notably President George H.W. Bush, also used the directives vigorously. George W. Bush faced a highly polarized political environment while he was president, and this may have constrained his ability to use the power, at least to some extent. President H.W. Bush, on the other hand, served as president during the least polarized congresses in the time period analyzed. In the four years he was president, he issued 123 constitutional signing statements to challenge or reinterpret parts of legislation; George W. Bush issued 132 across his *eight* years in office. Almost 18 percent of all bills that were signed into law under H.W. Bush received signing statements, compared to 11.5 percent under W. Bush. Further, these signing statements under H.W. Bush often affected high-profile legislation, meaning they were no less consequential than those issued later by his son. For instance, he issued one on the Civil Rights Act of 1991, arguably one of the most important pieces of domestic legislation passed during his presidency. In the signing statement, he advanced a narrower interpretation of the act than the Democratic legislators intended when they passed the legislation, which had important consequences for the enforcement of the act (Milkis and Nelson 2011). Thus, despite the coverage W. Bush received for his actions, they were not unprecedented. Importantly, the lower levels of congressional polarization during

¹⁹http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.archives.gov%2Fnews%2Fsamuel-alito%2Faccession-060-89-269%2FAcc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf&ei=KXZwVdfpGpKWyATG24H4Ag&usg=AFQjCNHdxdyyeLBZSbT4VaNAXKNK8yB2LA&sig2=hSdxEFdTPzD-PmE-0Plt_w&bvm=bv.94911696,d.aWw

H.W.'s presidency may have contributed to his greater flexibility in using the signing statement, as he almost issued as many in four years as his son did in eight. Most importantly, this shows that the signing statement as a policy tool is not a feature of the W. Bush administration, in particular, and that the usage of the tool has been an integral part of the bargaining process since the 1980s, at the very least.

5.5 Alternate Measures of Polarization

In the previous statistical analyses, I have operationalized polarization as a partisan concept. I argue that partisan politics are the dominant politics in Congress and have been for the entirety of the period since 1981, which is why I conceptualize polarization as a party-based measure. However, this is not to say that other measures of polarization are not important to the outcomes we see emerging from the legislature. There are other important ways of thinking about the concept, including differences between the two chambers of Congress. As such, I also conduct the bill-level analyses of interest using alternate measures of preference alignment and polarization in Congress; in doing so, I receive mixed support for the hypothesis of interest.

The first alternate measure I employ is the absolute ideological difference between the median member of the House of Representatives and the median member of the Senate, again relying on Bonica's measure of legislative preferences. I expected a negative relationship between the distance between the chambers of Congress and the probability of a bill receiving a signing statements. In estimating the multilevel model previously described with this measure of polarization, however, the results were statistically indistinguishable from zero. In addition, I employ another measure of polarization, calculated as the absolute distance between the filibuster pivot in the Senate and the median member of the House, but these results too were indistinguishable from zero.²⁰ Thus, the ideological alignment across the chambers does not

²⁰I also calculated both these measures using the median of the majority party in the House,

seem to be an important determinant of the usage of signing statements.

As a final test of the effect of the preference alignment across the chambers, I consider whether there was split-party control of Congress during each period. To do so, I created a dichotomous indicator for whether or not the same party controlled both chambers of the legislature during a particular congress; I coded each congress as a 1 if different political parties controlled each chamber of Congress and zero otherwise. Four of the sixteen congresses examined had split-party control. I expected there to be a negative effect of the split control variable, meaning that when the chambers are controlled by different parties, I expect a given bill to be less likely to receive a signing statement from the president. The results are consistent with this expectation. Table 5.4 presents these results. In Model 1, I present the results of the multilevel logit model that predicts the probability that a given bill will receive a signing statement, as a function of the aforementioned bill level predictors, as well as the group level predictors of unified government and whether there was a split Congress. Consistent with expectations, the effect of a split-party congress is negative and statistically significant; however, the result is significant at the 0.08 level, rather than the conventional 0.05 level. The results are substantively significant. For example, the predicted probability of a major bill getting a signing statement under split-party control of Congress is 11 percent compared to a 21 percent chance under a party-aligned Congress. The effect is larger for major defense bills; under a split congress, the predicted probability of a signing statement is 34 percent, while it is 52 percent under a unified Congress. These effects are large given the unlikelihood that any given bill will receive a signing statement in practice. Model 2 shows that model specification is not driving the results. It presents the results of a pooled model, which considers unified government and split congress as individual rather than group level predictors. Here, the split-party Congress indicator has a negative rather than the House median; however, this did not change the nature of the results. They were consistently null for the effect of polarization.

Table 5.4: Chamber Differences and Signing Statements

| Variable | Model 1 Multi-Level | Model 2 Pooled |
|--------------------------------|------------------------|-------------------|
| Intercept | -2.83 (0.24) | -2.63 (0.8) |
| Split Congress | -0.73 (0.42) | -0.71 (0.15) |
| Unified Government | -0.29 (0.41) | -0.23 (0.13) |
| Major | 1.51 (0.21) | 1.31 (0.21) |
| Defense Bill | 1.39 (0.15) | 1.34 (0.14) |
| International Affairs | 1.37 (0.19) | 1.35 (0.19) |
| Government Operations | 0.63 (0.15) | 0.56 (0.15) |
| Standard errors in parentheses | | |

Model 1 presents the results of a multilevel logistic regression with varying intercepts at the congress-level. The intercept presented in the table is the mean intercept across the 16 congresses. The independent variable of interest, whether or not there was split control of Congress, has the expected negative coefficient and is statistically and substantively significant. Model 2 presents the results of a pooled model, rather than a multilevel model.

effect that is statistically significant at standard levels.

While together these three analyses do not lend complete support to the hypothesis that signing statements should be more likely when polarization in Congress is low, they do provide some insight about the relationship between the legislative environment and presidential power. It does seem that partisan dynamics in Congress, whether in the form of polarization or partisan control of the chambers, do influence and constrain the president's use of signing statements. Chamber differences, themselves, however, do not alone seem to predict presidential action in significant ways.

5.6 Discussion

In this chapter, I have explored the prediction that signing statements should be more likely when partisan polarization is low. Indeed, the empirical results support this claim at both the aggregate and bill-level. These findings lend support to the theoretical claims I have made in other chapters. In particular, they provide some evidence in favor of the claims that legislators do anticipate signing statements when they bargain with one another in the legislature and that the existence of the signing statement, or the threat of its usage, can shape inter-branch and intra-branch bargaining.

The empirical findings presented in this chapter are perhaps counter-intuitive. The previous literature on presidential directives suggests that presidential powers have expanded in the past four decades due, at least in part, to the dominance of partisan politics. Kelley and Marshall (2008, 250) argue that the rise in the use the president's extra-constitutional policy powers, including the signing statement, has been a function of the president needing to "deal with the highly polarized environment of the last 30-35 years." That is, these presidential directives are generally seen as a way the president may be able to grease the wheels for policy change when polarization or divided government preclude the possibility of policy change through traditional means. The signing statement, in particular, has been conceptualized as a way that the president can manipulate policies when he is dissatisfied with the bargaining process. While the signing statement certainly does give the president this leverage, previous literature has largely focused on the president's intent in using the power, rather than on the upstream effects his action can have on the legislative calculus.

By endogenizing legislative anticipation of the president's use of signing statements, I find that presidential directives, at least in the case of the signing statement, should not be conceptualized as a result of or a solution to higher levels of parti-

sanship or polarization in the political environment. Instead, it appears as though the president is constrained in his use of signing statements by the political environment within Congress and is least likely to be able to manipulate the policy process with signing statements during times of high polarization. I argue that legislators are complicit in the bargains that result in signing statements. During times of high polarization, legislators have less incentive to cooperate with one another or to let the president manipulate the policies. Indeed, it may be the case that the credible threat of the president's use of signing statements can exacerbate bargaining problems when congressional polarization peaks. The tool complicates an already difficult bargaining dynamic, potentially making it less likely that legislators will or can bargain with one another in the face of tradeoffs that presidential action can induce. In this way, signing statements may increase gridlock, rather than providing a solution to or alleviating gridlock.

Together, these results suggest that the president's increasing role in the policy process throughout history, especially recent history, has likely had an important effect on the ability of legislators to come to agreements and enact policy change. The insight that inter-branch bargaining affects intra-branch bargaining has important implications for how we think about the operation of the separation of powers system. The results of this chapter provide some support for the theory of bargaining I have advanced; in the subsequent chapter, I test additional hypotheses of the theory to provide greater support for argument.

Chapter 6

Costs, Benefits, & Signing Statements

In the previous chapter, I discussed the relationship between the legislative environment and the president's use of signing statements. I found that the political landscape within Congress conditions and constrains the president's ability to influence policy with the signing statement. In this chapter, I will more closely examine the president's (dis)incentives to issue signing statements as a function of the resource and political costs he faces in exercising this prerogative power. While I model the signing statement as a tool with which the president can garner significant policy gains, his ability to accomplish these policy goals is tempered by the costs the president faces in issuing a statement. I model a fixed cost on the president in issuing a statement, as well as a cost that varies by the context of each particular statement. As a result of these costs, the signing statement is not an unchecked power that the president can use widely; the costs to a signing statement condition when and how the president will use the signing statement.

In the sections that follow, I will focus on the examination of two hypotheses pertaining to the presidential calculus in issuing a signing statement. First, I explore

the hypothesis that the president is more likely to wield a signing statement when the fixed cost he faces to issuing one is relatively low. As I conceptualize the fixed cost as a resource or opportunity cost, I examine the relationship between executive capacity and signing statements, as well as the relationship between the executive agenda and the signing statement.

In addition to the analysis regarding the conditions under which signing statements happen, I also explore a hypothesis about the nature and character of the statements presidents issue and the policy change they induce. Building from theoretical insights about the scope cost of the signing statement, I examine whether the ideological landscape between the executive and legislative branches conditions the level (or scope) of policy change a president will seek to accomplish within a single signing statement. Using data on the preferences of political actors and on the number of provisions challenged within a signing statement, I find partial support for the hypothesis that there should be a positive relationship between the variables.

6.1 The Fixed Cost to a Signing Statement: A Resource/Opportunity Cost Analysis

In this section, I focus on the fixed cost that the president bears in issuing signing statements. As the president is a policy-motivated and rational actor, he will only want to issue statements if they yield net gains, that is, if the policy benefits outweigh the costs. In the simplest sense, as signing statements become more costly for the president, he will have less incentive to use them. The fixed resource/opportunity cost is thus a real constraint on presidential action.

The fact of the matter is that the president does not and cannot issue signing statements on every bill that he signs into law. The executive branch often does not have the capacity, time, or manpower to dissect every law and give explicit and

detailed prescriptions for their implementation. As such, the president and executive branch officials must prioritize which bills will receive the detailed examination that results in a signing statement. These constraints likely contribute to the infrequency of signing statements relative to the total number of bills the president receives from Congress. As such, there should be a negative relationship between the costs to and the use of the signing statement.

This hypothesis is consistent with a resource-based definition of presidential power, at least in part. In the time period I examine (1981-2012), each of the five presidents had the same prerogative powers at their disposal; in particular, each had the ability to issue signing statements on legislation, which were attached to the legislative history of the bills. Despite this, there is considerable variation in the use of the signing statement across presidents. I have already found that the legislative environment a president faces can affect the presidents use of the signing statement. Here, I will delve into how features of the particular administration can also temper or facilitate the use of these powers. While features particular to Congress matter, I argue that there are features of the executive branch that should matter as well. In what follows, I use alternative measures of executive branch capacity, including the size of the executive branch and the size of the president's legislative agenda, to predict whether a president will issue signing statements on legislation he receives from Congress.

6.1.1 The Resource Cost: Size of the EOP and Signing Statements

The exercise of presidential prerogative powers often demands the allocation of substantial executive branch resources. Signing statements, while often brief and straightforward in their text, require a considerable amount of work, coordination, and expertise among officials in the executive branch. The capacity of the executive branch to meet these needs should condition whether the president can or will be willing

to issue signing statements. When the executive branch has more resources at its disposal, we should be more likely to see signing statements in practice; the cost to a particular signing statement will be lower when there are more resources to dedicate to policy implementation and the exercise of presidential power. Resources are thus a hard constraint on the president.

When Congress sends a bill to the president for approval, facsimiles of the bill are immediately sent to the Office of Legal Counsel (OLC) in the Justice Department and to the Office of Management and Budget (OMB). The OLC provides the president with legal counsel and often gives advice (both written and oral) on how the executive should respond to legislation. The OLC is also tasked with identifying constitutional defects in legislation; if particularly concerned with the constitutionality of legislation, officials within the OLC may recommend the president to veto the legislation or they may draft a signing statement to address the issue. Upon drafting a statement, the OLC circulates the document to other officials in the executive branch for approval.

The OMB also plays a major role in advising the president on how to respond to legislation and in the decision on whether or not to issue signing statements. The OMB's task is to aid the president in implementing legislation and achieving his policy goals. It also helps to coordinate the various departments and agencies within the executive branch. Two departments within the OMB are critical to the process by which a signing statement will get attached to a bill. The Office of the General Counsel within the OMB is tasked with identifying potential legal issues within legislation and is designated with the responsibility of advising the president on and drafting executive orders, presidential memoranda, and signing statements. Second, the Legislative Reference Division is important to the process. It sends copies of the legislation to implicated federal agencies to gather their opinions on and concerns about an enrolled bill. Agencies have 48 hours to submit an opinion on the legislation (Kelley 2003). This process is particularly important as the agencies

will be those implementing the policies; as such, the executive branch seeks their counsel on identifying portions of legislation that may prove problematic to advancing the goals of the administration on the ground. These two OMB departments then coordinate their views on the bill and issue a memorandum for the White House which summarizes the bill, expresses any legal and agency concerns, and advises the president on how to respond to the legislation. Many signing statements are drafted by officials in the OMB, particularly in the Office of the General Council, upon receiving reports from the agencies. In addition, agencies officials themselves can draft signing statements. For example, Bill Reilly, the director of the Environmental Protection Agency under George H.W. Bush played a large role in the signing statement that was attached to the Clean Air Act of 1990. When an agency drafts a signing statement, it must be approved by the OMB before advancing to the White House.

In addition to approval from the OMB, all signing statement drafts must receive the approval of officials in the White House. The Office of White House Counsel reviews all the legislation and signing statement drafts, providing further legal counsel on moving forward for the president. In addition, the White House Office must approve of all drafts of a signing statement for them to be issued; the WHO consists of the president's top assistants and political/policy advisers. These advisers will review the text of signing statement proposals and choose whether they are significant enough to be added to the bill. In addition to legal issues, these advisers also consider whether the signing statement will advance a president's policy goals. Further, members of the WHO have been known to draft signing statements themselves, even in the absence of recommendations from other departments of the executive branch. The George W. Bush administration, in particular, was known for shaping and writing signing statements within the White House. Vice President Dick Cheney's Chief of Staff, Dave Addington, played a pivotal role in writing some of the Bush administration's high profile signing statements, such as that on the McCain Torture Ban and one of

the federal budget proposal for 2005; in the latter, Bush stated that the spending limit would only be heeded insofar as it did not hinder his actions as Commander in Chief.¹ The president, of course, has the final say about whether a bill will receive a signing statement; he can request alterations to the statements or choose not to issue them.

All of this coordinating among the various departments in the executive branch has to be completed very quickly. The president only has 10 days to act upon receiving a bill from Congress. As such, the OMB often aims to have a draft of a signing statement, should one be recommended, complete by the fifth day of the period, in order to ensure time for the WHO and the president to make revisions (Kelley 2003). When serving in the Attorney General's office under Reagan, Samuel Alito noted that the time horizon in responding to legislation was a severe constraint on the president's ability to issue statements, especially as they "become longer, more substantive, and more detailed" (1986, 2). Thus, in order for a signing statement to take effect, there need be dispatch, efficiency, and expertise in the executive branch. The capacity of the executive branch to accomplish this should vary as a function of the resources within the executive branch. I argue that the greater the resources in the executive branch, the lower should be the cost to issuing any particular signing statement. When resources are high and there are more staff in the executive branch, there will be a more effective division of labor and a greater ability to dedicate time to a variety of different issues at once. Any particular issue or signing statement is thus less costly, in a relative sense. I explore this line of inquiry below.

Operationalization and Measurement

In the modern period, during which signing statements have been a viable policy power for the president, executive branch capacity has been quite high relative to

¹http://www.boston.com/news/nation/washington/articles/2006/05/28/cheney_aide.is_screening_legislation/

past periods of history. In particular, since Franklin D. Roosevelt's presidency and the New Deal, we have seen the rise of the "administrative presidency," which is characterized by increased capacity of the president to use administrative powers and the bureaucracy to achieve his policy goals (Milkis 1993, Milkis and Nelson 2011). The rise of the administrative presidency can, in part, explain the increased usage of presidential prerogatives, such as executive orders and signing statements, in recent history. As my interest in signing statements lies from 1981 through 2012, the entirety of this period is marked by high levels of executive capacity. However, there is still significant variation in the resources available across presidents and presidential terms that, I argue, can help explain the variation we observe in the usage of signing statements.

To operationalize executive branch resources, I use a measure of the executive branch workforce. In a memo to other executive officials regarding signing statements during Reagan's presidency, Alito (1986, 2) stated,

The most important problem [in using the signing statement] is the manpower that will be required. One need only consider the size of the congressional staffs responsible for creating legislative history to appreciate the dimensions of the potential commitment that may be required if the Executive Branch were to undertake to issue interpretive statements regarding all important legislation touching on matters of federal concern. In all likelihood, it would be necessary to create a new office with a substantial staff to serve as a clearinghouse for statements furnished by the various departments and agencies. Each department and agency would also have to devote significant resources to the project.

This provides evidence that signing statements require substantial resources, including, though not limited to, a large executive branch staff. As such, I use a measure of the size of the Executive Office of the President (EOP) as a proxy for executive

branch resources. The EOP consists of the advisers and staff tasked with supporting the president and helping him govern effectively.² It was created in 1939 under Franklin Roosevelt as part of the Reorganization Act of 1939 and set the stage for the growth of the executive branch. Today, the EOP encompasses many entities within the executive branch, including the OMB, the WHO, and many of the president's policy advisers. In particular, many of the bodies responsible for the drafting and approving of signing statements are housed under the EOP umbrella. Thus, I assume the size of this body likely facilitates the use of presidential powers, such as the signing statement. A larger EOP should translate into more executive resources, including greater manpower to dissect and analyze legislation, as well as a more effective division of labor. While a larger EOP may mean that coordinating among executive branch units could potentially be more difficult, I assume that having more employees is, on average, beneficial to the president and the actualization of his policy goals. When the executive branch is larger, there is more opportunity for officials within it to specialize in certain policy areas or legal concentrations, which should foster greater levels of expertise. This greater expertise should cut down on the resource costs (such as time and labor) needed to draft signing statements. As I assume that a larger EOP means a resource-rich administration, and thus a lower fixed cost, I expect a positive relationship between the number of EOP employees and the signing statements.

Data on the size of the EOP is made available in *Congressional Quarterly's* "Vital Statistics on the Presidency;" this resource provides information on the average number of EOP employees per presidential term beginning with the Coolidge administration and ending with Obama's first term (Ragsdale 2014). I will, however, be focusing on the period between 1981 and 2012, as this is the period in which signing statements were an institutionalized power of the president. During this period,

²<https://www.whitehouse.gov/administration/eop>

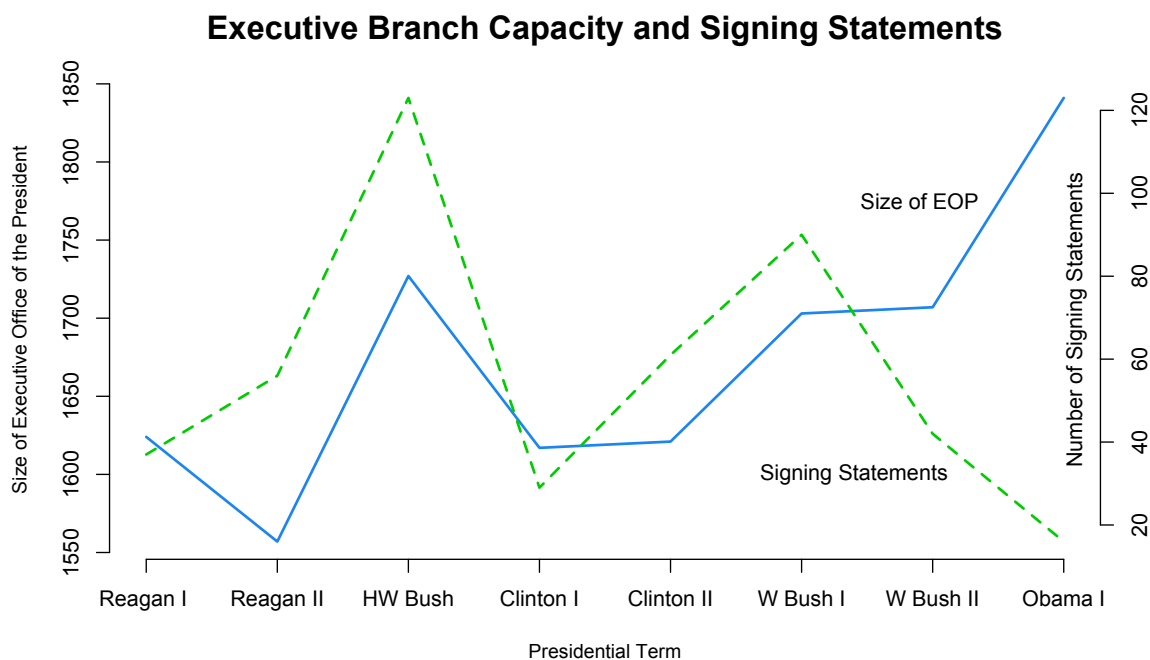


Figure 6.1: Size of the EOP and Signing Statements Over Time.

This figure shows the raw data trends between the number of employees in the Executive Office of the President and the number of signing statements issued per presidential term between 1981 and 2012. There is a general positive correlation between the variables. For example, when the size of the EOP was particularly high under George H.W., we also observed a large number of signing statements. Barack Obama's first term appears to be an exception to this general trend.

there is significant variation in the size of the EOP. It ranges from 1557 employees during Reagan's second term to 1841 during Obama's first term, with an average of 1675 employees per term. Figure 6.1 displays the number of EOP employees during each presidential term from 1981 to 2012 against the number of signing statements issued during the same intervals. The number of signing statements ranges from a low of 11 during Obama's first term to a peak of 123 during George H.W. Bush's administration. As seen in Figure 6.1, with the exception of Obama's first term, there seems to be a very strong positive correlation between the aggregate number of signing statements and the size of the EOP, as expected. For instance, both the number of signing statements and the size of the EOP were quite high during HW Bush's one term in office, while both dipped significantly when Clinton took office. Both

trends then peak again in W. Bush's first term. While the positive trend between the variables generally holds at this aggregate level, I conduct a bill-level analysis of the relationship between signing statements and the size of the EOP, as it is a more appropriate test of the theoretical proposition and due to data limitations regarding the number of presidential terms in the time period of interest.³

Analysis

The dependent variable for the bill-level analysis is a dichotomous indicator for whether a public law passed between 1981 and 2012 received a signing statement. I expect the independent variable of interest, the size of the EOP (EOP_k) to have a positive effect on whether the president will issue a signing statement on a bill. This variable is measured at the level of the presidential term. In addition, I include variables in the regression that vary at the level of the bill and the congress. Consistent with the analysis in the previous chapter, I include indicators for features of the bill that affect the probability that it will get a signing statement: namely, whether a bill is considered major and whether it pertains to defense, international affairs, or government operations. At the congress-level, I control for the level of partisan polarization in Congress, as I found it to be an important determinant of the dependent variable of interest in the last chapter, as well as for unified government.

These data have a nested structure. That is, individual bills are signed into law (with or without a signing statement) within a particular congress, and each congress is nested within a particular presidential term. To respect this natural structure of the data, I will again estimate a multi-level model; however, for this analysis, I will include two grouped levels: the presidential term and the congress. This modeling technique will allow me to simultaneously estimate a bill-level regression while modeling group level effects; I can thus leverage variation within and between congresses

³There are only 8 presidential terms in the time period analyzed. This sample is too small to make trustworthy inferences from a term-level analysis.

and presidential terms with this estimation procedure.

I specify a multi-level logistic regression (where i indexes the individual bill and j the congress in which it was signed) as such:

$$Pr(Y_i = 1) = \Lambda(\alpha_{j[i]}^{cong} + \beta_1 major_i + \beta_2 defense_i + \beta_3 internat_i + \quad (6.1)$$

$$\beta_4 govtops_i) \quad (6.2)$$

where Λ is the inverse logit function and Y_i is an indicator that takes on the value of 1 if bill i receives a signing statement and zero otherwise. the β parameters are the coefficients on the bill-level predictors. α_j^{cong} represents the modeled effects at the congress level effects, modeled as such (where k represents the presidential term):

$$\alpha_j^{cong} \sim N(\gamma_1 polarization_j + \gamma_2 unified_j + \alpha_{k[j]}^{pres}, \sigma_{cong}^2) \quad (6.3)$$

Each congress-level effect is drawn from a normal distribution with a mean that is a function of the congress-level predictors (and their coefficients, the γ parameters) and presidential term effects, denoted as α_k^{pres} . The variance of the distribution, σ_{cong}^2 , is an estimated parameter. The presidential term variable is, in turn, also a modeled effect:

$$\alpha_k^{pres} \sim N(\delta_0 + \delta_1 EOP_k, \sigma_{pres}^2) \quad (6.4)$$

It is drawn from a normal distribution with a mean that varies as a function of the term-level predictors, including the size of the EOP. The coefficients on the term

level predictors are denoted by the δ parameters. σ_{pres}^2 represents the variance of the distribution, which will be estimated by the model. This specification allows me to estimate the effect of the predictors at all three levels of grouping. I program and implement the model in R (R Development Core Team 2008) via `lme4` (Bates et al. 2014). The results of this specification are shown in Model 1 of Table 6.1.

Table 6.1: Executive Capacity and Signing Statements

| Variable | Estimate |
|---|------------------|
| Intercept | -5.13 (1.32) |
| Size of EOP | 0.004 (0.001) |
| Polarization | -2.29 (0.44) |
| Unified Government | 0.11 (0.14) |
| Major | 1.41 (0.21) |
| Defense Bill | 1.33 (0.14) |
| International Affairs | 1.4 (0.19) |
| Government Operations | 0.56 (0.15) |
| Standard errors in parentheses | |
| N=4895, $\hat{\sigma}_{cong}^2 = 0.008$, $\hat{\sigma}_{pres}^2 = 0.003$ | |
| AIC=2665, BIC=2730, deviance=2645 | |

These estimates are the result of a multilevel logistic regression with predictors at the bill, congress, and presidential term level. The independent variable of interest, the size of the Executive Office of the President (EOP), has the expected positive coefficient and is statistically and substantively significant.

All the variables, with the exception of unified government, are statistically significant predictors of signing statements. All the bill-specific variables have positive effects on the probability that a bill receives a signing statement. Consistent with the results in the previous chapter, partisan polarization has a strong negative effect. The variable of interest, the size of the EOP, has the predicted positive and statis-

tically significant effect on whether a bill receives a signing statement; as I assume a larger EOP reduces the cost of a signing statement, I interpret this as support for the hypothesis that as the fixed costs to signing statements decreases, the probability that any given law receives one increases. In terms of the substantive effect of executive capacity, for the average piece of legislation, the probability of a bill receiving a signing statement ranges from 4 percent to 9 percent, moving from the minimum to maximum size of the EOP observed during this period.⁴ This effect is obviously not large, but the likelihood of any bill receiving a signing statement in the data is quite low, so this result is expected. The positive effect of the size of the EOP reflects political reality. George H.W. Bush had one of the largest executive branches in the time period and issued signing statements on almost 18 percent of the bills he signed into law. When Clinton took office right after Bush, he significantly decreased the size of the EOP and used far fewer signing statements, only issuing them on about 5 percent of the bills he signed into law. Decreasing the size of the executive branch was a very concerted effort on Clinton's part. In his State of the Union Address in 1996, he stated, "Today the Federal work force is 200,000 employees smaller than it was the day I took office as President. Our Federal Government today is the smallest it has been in 30 years, and it's getting smaller every day."⁵ However, it may have come at the cost of his ability to wield his executive powers with the same dispatch as presidents with larger staffs.

The effect of executive capacity is much larger when considered in conjunction with features of the bill that might make the legislation a higher priority to the administration. Figure 6.2 displays the predicted probabilities that both a major bill and a non-major bill receive a signing statement across the observed range of EOP employees. It is clear, as discussed above, that average bills (non-major) have a low

⁴At minimum levels, the predicted probability is 3.8 percent with a confidence intervals of [0.03 to 0.046]. At maximum levels, the probability is 8.7 percent with a confidence interval of [0.067,0.107].

⁵<http://www.presidency.ucsb.edu/ws/index.php?pid=53091>

probability of receiving a signing statement, regardless of executive branch capacity. The effect of the size of the EOP is much more stark for major legislation. The probability that a major bill receives a signing statement increases from 14 to 28 percent across the range of the EOP variable; a 14 percent difference is a large gap, considering only 8 percent of public laws received a signing statement in the data.⁶ For a major defense bill, the probability rises precipitously from 37.7 to 59.3 across the range of EOP employment during the period; this 20 percent gap marks the difference between whether or not a president issues a signing statement on a bill.

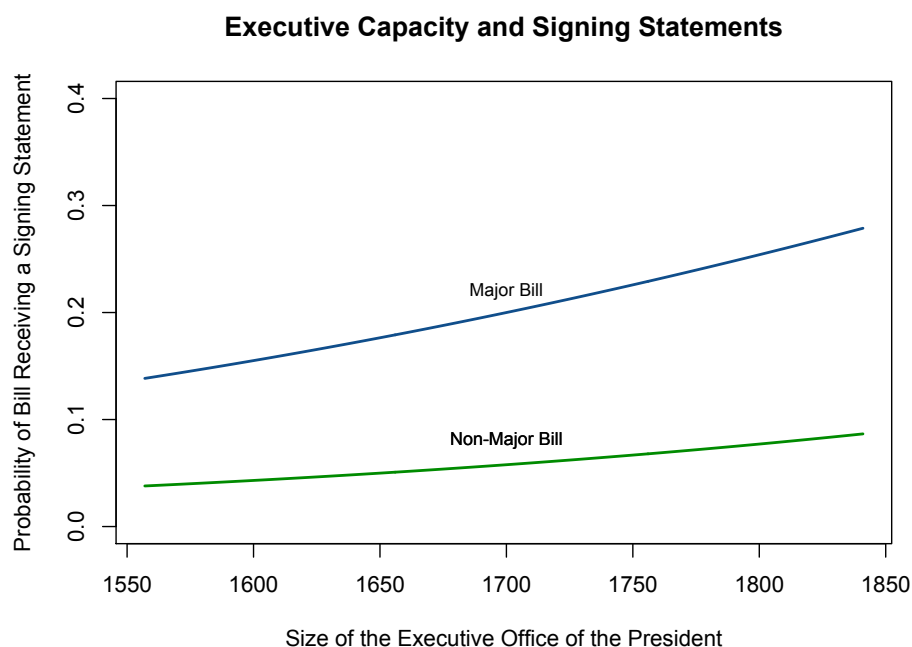


Figure 6.2: Effect of EOP Size.

This plot shows the predicted probability of two hypothetical bills receiving a signing statement across the observed range of the number of EOP employees. Regardless of bill type, the probability increases as the EOP size grows, consistent with expectations. The predicted probability of receiving a signing statement is higher for major bills than for non-major bills.

The results are robust alternate specifications. They are robust to the relaxation

⁶At low levels, the predicted probability was 13.9 percent with a CI of [0.098,0.18], while at high levels it was 27.9 percent [0.186,.0372]. There is also a 7 percent difference in the predicted probability when considering a move from one standard deviation below the mean of EOP size and one standard deviation above it (a move from 15 to 22 percent).

of the multi-level structure of the model, as well as to congressional random effects; regardless of the specification, the size of the EOP has a strong positive effect on whether a bill receives a signing statement. The results are also much stronger upon excluding Obama's first term from the analysis. Referring back to Figure 6.1, Obama's first term appears to be an outlier; the size of the EOP increased dramatically from W. Bush's second term to Obama's first, while the number of signing statements decreased significantly, against the general trend between the variables. For an ordinary piece of legislation, across the range of EOP employment, the predicted probability of a signing statement ranges from 4 to 11 percent when excluding Obama from the analysis, compared to the 4 to 9 percent when he was included. For major legislation, the gap in the predicted probability of a signing statement is 20 percent (from 15 to 35 percent) when excluding Obama, compared to a 14 percent gap (14 to 28 percent) when including him.

Together these results provide evidence for a positive relationship between the size of the Executive Office of the President and the probability that any given bill will receive a signing statement. As a larger EOP generally means that the executive branch has more manpower and resources to dedicate to executive tasks, it should mean that any given signing statement is less costly to the president. As such, the results suggest, consistent with theoretical expectations, that as the resource cost to a signing statement decreases, signing statements become more likely.

Alternate Measures

There are other ways to operationalize executive branch capacity or resources. *Congressional Quarterly's* "Vital Statistics on the Presidency" provides more fine-grained measures of the executive branch, including the size of the White House Office and the size of the Office of Management and Budget. As both departments are very involved in the process by which a signing statement gets attached to a law, I estimate

the multilevel logit model using each in turn to test the hypothesis of interest. The results are presented in Table 6.2.

Table 6.2: Executive Capacity: Robustness Checks

| Variable | Model 1 | Model 2 |
|--------------------------------|-----------------|-----------------|
| | WHO | OMB |
| Intercept | 2.79 (4.01) | 7.02 (1.45) |
| Size of WHO | -0.01 (0.02) | |
| Size of OMB | | -0.01 (0.02) |
| Polarization | -0.7 (0.21) | -3.04 (0.47) |
| Unified Government | 0.33 (0.42) | 0.05 (0.14) |
| Major | 1.53 (0.22) | 1.40 (0.21) |
| Defense Bill | 1.39 (0.15) | 1.38 (0.15) |
| International Affairs | 1.38 (0.19) | 1.39 (0.19) |
| Government Operations | 0.63 (0.15) | 0.60 (0.15) |
| Standard errors in parentheses | | |
| N=4895 | | |

Neither alternate measure was a statistically significant predictor of signing statements. While this serves to temper the support for the hypothesis of interest, this result is not surprising. Each of these measures only captures one of the entities in which signing statements must be approved with in the executive branch; they do not necessarily capture the resources open to the entire executive branch or the coordination or expertise that the branch as a whole may develop. In addition, neither measure varies significantly during the time period examined. As such, the measure of the EOP is likely a better match to the concept of executive branch resources.

6.1.2 The Opportunity Cost: Signing Statements and the Agenda

Related to the resource cost argument, another way to conceptualize the fixed cost to a signing statement is as a potential opportunity cost to the president. The more time, effort, and labor the president dedicates to drafting and issuing a particular signing statement, the less resources he will have to dedicate to other legislation and the exercise of other policy powers. That is, dedicating resources to issuing signing statements potentially comes at the cost of pursuing/achieving other goals. As discussed in the previous section, the cost to issuing a signing statement is alleviated when the executive branch has more resources (employees) to dedicate to the task. However, there are other factors particular to an administration that may affect how the president assesses the opportunity cost to issuing a signing statement.

In particular, I will focus on how the size of the president's legislative agenda will affect the president's use of signing statements. The president's agenda consists of the issues, policies, or programs that the president prioritizes while in office and hopes to push through the legislature (Light 1982*a,b*). As Light (1982*a*, 16) states, "presidential priorities demand heavy investments of internal resources" and are "more complex and demand more time than does routine legislation." Because of the demanding nature of presidential priorities on executive time and resources, presidents often limit the number of issues on their agenda. In terms of the use of signing statements, I argue that when a president has a larger legislative agenda, the president will find it more costly to issue signing statements, generally, and thus should be less likely to issue them.

As signing statements are also demanding of executive branch time and resources, their usage could come at the cost of executive branch officials dedicating effort to the items on the president's agenda. The president's top advisers, including the members of the WHO, are intimately involved in pushing the president's priorities

through Congress and working with legislators to come to agreements; they are also the advisers who work on, draft, and must approve signing statements. Thus, time and resources spent on signing statements could come directly at the cost of time and resources dedicated to other issues. Of course, it is possible that issues on the president's agenda are those that are more likely to receive signing statements, upon passing through the legislature. However, my argument is that the size of the president's agenda should increase the start up cost for any particular piece of legislation receiving a signing statement. That is, I expect agenda size to inversely affect the probability that the president will issue a signing statement on a given bill.

Operationalization and Measurement

In order to operationalize the size of the president's agenda, I use a measure of the absolute number of issues on the agenda provided by Light (2004). Light considers an issue to be part of the president's agenda if it meets three criteria. First, the issue must have been mentioned in the president's State of the Union address. Second, the administration must have acted towards making it a serious legislative proposal (the issue cannot be one made for purely symbolic or position-taking reasons). Finally, to be considered on the president's agenda, Light require that *Congressional Quarterly* consider it major legislation. An important caveat to this operationalization is that Light restricts his analysis to domestic policy; any foreign policy priorities are not included in his analysis. While this is a limitation to the data, the size of the president's domestic agenda still captures an important part of the president's wider agenda and should still affect the opportunity costs the president faces in exercising the powers of the office. As such, I believe it to be a solid measure of the concept of interest. This measure is also the standard way of measuring the concept.

Light provides data on the presidential agenda for each presidential term between Lyndon Johnson and George W. Bush's first term. I will examine the period between

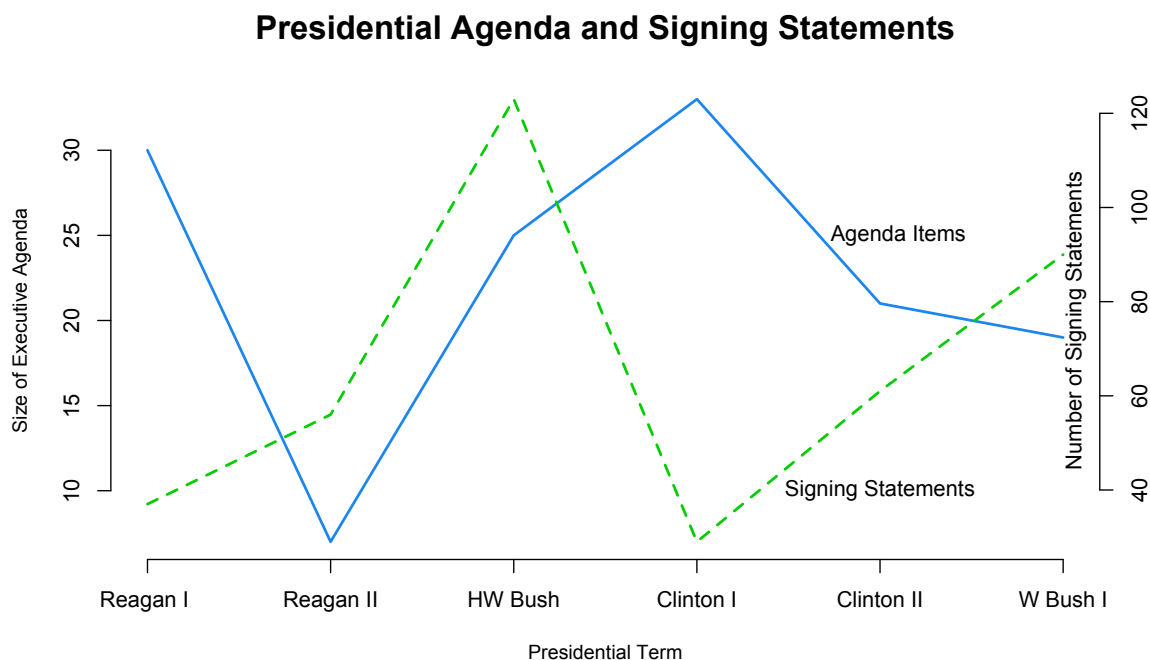


Figure 6.3: The President's Agenda and Signing Statements Over Time. This plot shows data trends between the number of items on the president's domestic agenda and the number of signing statements issued per presidential term between 1981 and 2012. The solid trend line shows the size of the agenda, while the dashed line depicts the number of signing statements. Generally, there appears to be an inverse, if noisy, relationship between the variables, as expected.

Reagan and W. Bush's first terms (1981-2004). Thus, the results from this analysis are limited relative to previous empirical tests, in that they do not include Bush's second term or Obama's first. In this period, the agenda data ranges from 7 items in Reagan's second term to 33 in Clinton's first. Figure 6.3 shows the aggregate number of legislative requests by the president per term against the number of signing statements issued per presidential term. At this aggregate level, there is a lot of noise in the data but there does appear to be an inverse relationship between the variables, as expected.

Analysis

To gauge the effect of the size of the presidential agenda on the president's incentives to issue signing statements, I estimate a multi-level model identical to that in the previous section, given the nested structure of the data, except for the distinct independent variable of interest. The dependent variable is a dichotomous indicator for whether a law received a signing statement. Using data from the Congressional Bills Project, I identify 4008 bills that were signed into public law in the 14 congresses and the 7 presidential terms between 1981 and 2004. Of these laws, 362 (9 percent) received a signing statement upon being signed into law. The independent variable of interest is the size of the president's agenda ($agenda_k$), which is measured at the presidential term. I include the bill level and congress level predictors described in the previous section.

I specify and estimate a multi-level logit model as follows (where i indexes the bill, j the congress, and k the term):

$$Pr(Y_i = 1) = \Lambda(\alpha_{j[i]}^{cong} + \beta_1 major_i + \beta_2 defense_i + \beta_3 internat_i + \beta_4 govtops_i) \quad (6.5)$$

$$\alpha_{j[i]}^{cong} \sim N(\gamma_1 polarization_j + \gamma_2 unified_j + \alpha_{k[j]}^{pres}, \sigma_{cong}^2) \quad (6.6)$$

$$\alpha_{k[j]}^{pres} \sim N(\delta_0 + \delta_1 agenda_k, \sigma_{pres}^2) \quad (6.7)$$

$$\alpha_k^{pres} \sim N(\delta_0 + \delta_1 agenda_k, \sigma_{pres}^2) \quad (6.8)$$

where Λ represents the inverse logit function and Y_i is an indicator that takes on the value of 1 if bill i receives a signing statement and zero otherwise. $\alpha_{j[i]}^{cong}$ denotes the modeled congress-level effects which vary as a function of the observed level of polarization and whether there was unified government. $\alpha_{k[j]}^{pres}$, on the other hand, represents the modeled term level effects which vary according to the size of the presidents agenda. The γ parameters are the coefficients on the congress-level predic-

tors and the δ parameters are those on the term-level variables. σ_{cong}^2 and σ_{pres}^2 are estimated variance parameters.

Table 6.3: Opportunity Costs and Signing Statements

| Variable | Estimate |
|--|------------------|
| Intercept | -4.78 (1.65) |
| Size of Agenda | -0.02 (0.007) |
| Polarization | -2.14 (1.3) |
| Unified Government | -0.09 (0.19) |
| Major | 1.44 (0.24) |
| Defense Bill | 1.28 (0.16) |
| International Affairs | 1.31 (0.20) |
| Government Operations | 0.57 (0.16) |
| Standard errors in parentheses | |
| N=4895, $\hat{\sigma}_{cong}^2 = 0.001$, $\hat{\sigma}_{pres}^2 = 0.31$ | |
| AIC=2267, BIC=2324, deviance=2249 | |

Consistent with expectations, the size of the president's agenda has a negative effect on the probability that a given piece of legislation will receive a signing statement. The effect is statistically significant at standard levels. Table 6.3 shows the results of the regression. Figure 6.4 shows the substantive effects; the plot shows the predicted probabilities that two hypothetical bills receive a signing statement across the observed range in the size of the president's domestic agenda. For a regular, non-major piece of legislation, the predicted probability falls from 8.9 percent to 5.1 percent in going from the minimum to the maximum size of the agenda.⁷ These low probabilities reflect the relative scarcity of signing statements compared to all legis-

⁷The confidence intervals on these estimates are [5.5,12.3] and [3.1,7.1] respectively.

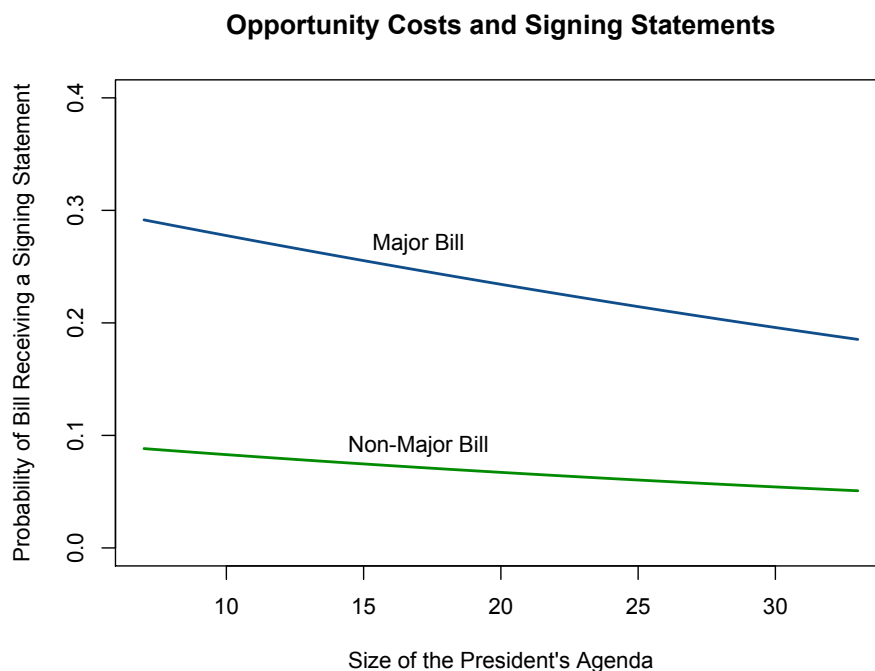


Figure 6.4: Effect of Size of the President's Agenda.

This plot shows the predicted probability curves for hypothetical major and non-major bills receiving signing statements across the range in the size of the president's agenda. As hypothesized, the size of the president's agenda has a negative effect on the probability either type of bill will receive a signing statement from the president. As agenda size increases, presidents are less likely to issue statements on any given bill.

lation signed into law. For a major piece of legislation, on the other hand, the drop in the predicted probability is larger; across the range of agenda size, the predicted probability falls just over 11 points, from 29.8 to 18.5 percent.⁸

President Bill Clinton's two-terms in office can speak to these dynamics. Clinton, in his first term as president, had the largest agenda in the time period examined; he came into office with 33 items on his domestic agenda, including an economic stimulus plan, a deficit cutting plan, campaign finance reform, and health care reform. He issued the fewest signing statements in his first term than did other presidents, which seemingly was, at least in part, a function of his agenda size (Light 1982*b*). The Clinton administration worked very hard to push his agenda items through Congress,

⁸Confidence intervals are [17.9,41.7] and [10.9,26.2].

and they succeeded on many, such as campaign finance reform in the form of the Lobbying Discloser Act of 1995, which, incidentally, Clinton issue a signing statement upon. However, the administration got bogged down on some other agenda items, particularly health care. The fight over health care consumed much of the time, manpower, and other resources of the administration, leaving little time for pursuing other issues and using presidential powers. The Clinton administration went into its second term, after being defeated on health care and losing a Democratic majority in the 1994 midterm election, with a much more muted agenda. In his second term, Clinton wielded many more signing statements than he did in his first. In fact, in late 1997, Clinton's Domestic Policy Council Director noted that this was not a coincidence. In an interview with the *New York Times* regarding Clinton's policy struggles, he noted, "We developed a process by necessity in the wake of the 94 elections where we had to spend a lot more time focusing on executive action. And I think, you know, we have the drill down now."⁹

The results of this analysis provide evidence that as the presidential agenda increases, the opportunity cost to the president issuing a signing statement increases, making their exercise less likely. This analysis provides further support for the hypothesis regarding how the fixed cost to a signing statement affects the presidential calculus in exercising his power. While the data on the president's agenda is limited in some fashions, it likely does capture some of the constraints a president faces, providing additional support for the theory advanced.

6.1.3 Discussion

Thus far, I have explored the constraining effects of the fixed cost to a signing statement. I conceptualize the signing statement as a tool which gives the president greater influence over policy outcomes but one that requires effort and attention to detail to

⁹<http://www.nytimes.com/1997/12/08/us/how-a-presidency-was-defined-by-the-thousand-parts-of-its-sum.html>

be effective; the nature of the tool is that it requires resources and may present opportunity costs for the president. I find that signing statements are more likely on any given bill when these costs are low, using alternate measures to capture the president's resource constraints. The results are consistent with my expectations.

Further, these results shed light into how the president makes decisions in the face of a cost-benefit analysis. In issuing signing statements, the president must balance the policy gains he gets to issuing one against the these costs. In the section which follows, I will focus more attention on this tradeoff between policy gains and political costs. I explore the extent to which the president is willing to pursue his policy goals with the signing statement.

6.2 The Scope of Policy Change with a Signing Statement

On top of the resource constraint, there are also limitations on the policy gains a president can accomplish with a single statement. In a signing statement, a president can take issue with or challenge parts of legislation by reinterpreting their meaning, provide instructions in the face of ambiguity in legal language, or refuse to enforce problematic provisions. I argue that the more parts of a bill with which a president takes issue, the costlier a signing statement is for a president. As the president increases the scope of his policy influence with a statement, he will be more likely to suffer political consequences for his action.

The signing statement is an extra-constitutional power of the president. For this reason, it has been controversial throughout much of history. Members of Congress have censured the president for using these powers, and have introduced legislation to rid the executive of such influence. Some members of Congress have gone on to say that the use of the signing statement will affect future willingness to bargain with

the president. Alito (1986, 2) was aware of this political cost as early as Reagan's presidency, noting:

It seems likely that our new type of signing statement will not be warmly welcomed by Congress. The novelty of the procedure and the potential increase of presidential power are two factors that may account for this anticipated reaction. In addition, and perhaps most important, Congress is likely to resent the fact that the President will get in the last word on questions of interpretation.

On top of this, the federal courts can overturn presidential action and reject his interpretations of legislation.¹⁰ The more parts of legislation that the president challenges with a single statement, the more likely the statement will be to induce such repercussions.

The president, thus, must balance his policy aspirations in issuing a signing statement against these potential costs to actualizing these gains. In Chapter 4, I derived the proposition that, in equilibrium, the president will always shift a policy to the midpoint between the proposal sent to him by Congress and his own ideal point. The logic behind this stylized outcome is simple. While the president would ideally be able to shift a policy to his preferred position with a statement, the scope cost will temper his ability/incentive to do so. It follows from this that, upon deciding to issue a signing statement, the president will issue statements with larger scopes (which challenge more provisions) when the bill proposal is more distant from his ideal point. In these circumstances, the president is willing to suffer the higher scope cost (that is, risk the consequences) because of the greater policy benefit. In this section, I will examine this hypothesis in detail; in particular, I analyze how the distance between the president and Congress affects the number of provisions or sections of legislation that the president attacks/challenges in a statement and how this relationship varies

¹⁰See discussion of *Hamdam v. Rumsfeld* in Chapter 2.

across different presidents.

6.2.1 Operationalization and Measurement

For this analysis, I am interested in how much policy change a president can or will accomplish with a particular signing statement. As such, I require further data on the 449 signing statements issued between 1981 and 2012.¹¹ In particular, for the dependent variable, I require a measure of the scope of a signing statement, or the number of sections of legislation that the president *specifically* challenges within a particular signing statement. I assume that the more provisions of legislation with which the president takes issue, reinterprets, or refuses to enforce within a statement translates into greater policy change; that is, I assume that the president can have a greater influence on policy by attacking or challenging more sections of legislation. One limitation of this assumption is that it treats all sections of legislation as equal. While it is possible that some sections of legislation are more encompassing or salient than others, in order to measure the scope of each signing statement, I assume that each challenged provision induces the same amount of policy change.¹²

In addition to the data already described, Ostrander and Sievert (2013a) also include also an indicator of how many sections of legislation to which the president objects or reinterprets in a signing statement, which I use for this analysis. I update the data through Obama's first term using their coding procedures. To be included into the count of challenged sections, the president must have specifically mentioned the section or provision, by name or article number, in the text of the statement. Any

¹¹Note that the number of signing statements in this analysis is greater than that in the bill analysis in the previous chapter and the previous sections because I am constrained to the data availability of the Congressional Bills Project, which does not include data on resolutions. As the universe of interest here is all the signing statements issued during the period, I am able to include those issued on resolutions.

¹²This is an important but difficult data problem—we know that some provisions are more important, more controversial, or more have greater consequences than others. However, there is no measure of the salience of provisions of legislation, nor does my theoretical framework provide insights on how to go about constructing such a measure. It would likely require legislative expertise.

vague references to problematic provisions will not be picked up in this count. For example, in his signing statement on the Consolidated Appropriations Act of 2005, George W. Bush challenged 42 specific sections of the legislation. In one part of the statement, Bush stated,

The executive branch shall construe section 638 of the Transportation-Treasury Appropriations Act, relating to assignment of executive branch employees to perform functions in the legislative branch, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and as Commander in Chief.

Thus, section 638 would be included in the count of 42 challenged sections. Here, Bush specifically pinpoints a section of legislation and advances a certain interpretation of it. However, later in the same document, Bush goes on to say,

Several provisions of CAA relate to race, ethnicity, or gender. The executive branch shall construe such provisions in a manner consistent with the requirements that the Federal Government afford equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution.¹³

While Bush reinterpreted the meaning of these provisions in the statement, as he did in the previous example, these are not included in the count because there is no statement of the exact provisions or the precise number being challenged. A more fine-grained measure would require an in-depth analysis of the text of the legislation to determine which (and how many) provisions presidents challenge with such vague statements.¹⁴ In the absence of this, the number of specific provisions challenged is the best and most straightforward measure of the policy scope of a signing statement. Thus, the results must be interpreted in light of this limitation. Measured as such,

¹³<http://www.presidency.ucsb.edu/ws/index.php?pid=64673>

¹⁴In moving forward with this for a book project, I intend to recode the data by doing so.

the dependent variable ranges from zero challenged sections to a maximum of 42, which, of course, was in Bush's statement just discussed. The mean of the variable is 3 sections specifically challenged per statement.¹⁵

The main predictor variable for the analysis is the ideological distance between the president and Congress during the period a statement was issued; as discussed in Chapter 4, I assume the enacting Congress is a good proxy for the location of a bill proposal. I again use Bonica's measure of the ideological position of political actors to measure this distance, due to the assumptions I make about legislative voting; because his measures are not directly linked to voting behavior, they are preferable to NOMINATE and Common Space scores, which rely on the assumption that all votes in Congress are cast sincerely. Bonica's data provides ideal point estimates for each president in each election cycle, based on the campaign contributions they receive. His data also provides contribution-based ideal points for every legislator in Congress for each election cycle, as discussed in the previous chapter. I use the mean ideological position of all 535 members of Congress to proxy the proposal location.¹⁶ I then calculate the absolute distance between the president and this congressional mean; $Distance_j$ thus varies at the congress-level. The distance between the president and Congress was at its lowest during the 103rd Congress in Clinton's first term as president, and at its peak during the 112th Congress in Obama's first term.

6.2.2 Potential Threats to Inference

As discussed in previous chapters, President George W. Bush received a lot of media attention for his use of the signing statement as a policy tool. Despite this coverage, I showed that there was nothing particularly remarkable about the number of signing statements he issued or the proportion of bills that received one during his administration, relative to other modern presidents. Bush was, however, unique in the use

¹⁵The actual mean was 3.22 sections per statement.

¹⁶Results hold using the median ideological position as well.

of signing statement in another respect. He challenged many parts of legislation with his signing statements. As Charlie Savage noted in the *Boston Globe*, Bush issued “more than 750 constitutional challenges to provisions of law in his signing statements, a number that exceeded the challenges of all presidents combined.”¹⁷ Most scholars of the Bush presidency chalk up his expansive view of the signing statement as a consequence of his administration’s commitment to espousing the theory of the unitary executive—the idea that the president, as the head of the executive branch, may independently interpret the Constitution and is solely responsible for the execution of the laws (Cooper 2005, Kelley 2003). In addition, scholars have argued the expansive nature of Bush’s individual signing statements was an alternate strategy to wielding his veto power (Cooper 2005); rather than choosing to reject legislation, Bush, instead, chose to alter the meaning of legislation that passed the legislature. Regardless of the reason behind it, the important take away for this analysis is that, while the number of signing statements Bush issued did not particularly stand out next to that of other presidents, the number of provisions he challenged and the extent to which he used signing statements to change particular policies is remarkable relative to other presidents.

Cooper (2005, 515) argues that, during his presidency, Bush “effectively expanded the scope and the character of the signing statement.” This disparity in the scope of signing statements across presidents is apparent in the data. The number of sections challenged within a single statement for President W. Bush ranges from 0 to 42, with an average of 6 sections challenged per statement.¹⁸ For all other presidents since Reagan, the range is from 0 to 23 provisions, with a mean of 2 sections.¹⁹ George W. Bush issued 15 signing statements which challenged over 15 sections of legislation;

¹⁷http://www.boston.com/news/nation/washington/articles/2006/04/30/bush_challenges_hundreds_of_laws/

¹⁸The average was 5.97 sections

¹⁹The actual mean was 2.08 sections.

across the other presidents in the data set, only 3 signing statements did so.²⁰

This tendency of W. Bush to use his signing statements so expansively could potentially pose a threat to inferences about the scope cost of signing statements since the 1980s. It seems that President Bush was fundamentally different in his strategy with signing statements, at least in terms of the challenges to legislation; this means that including Bush in the analysis with the other presidents may mask the trends in the data. Regardless of the political climate he faced, President Bush challenged more provisions within his statements than did previous and subsequent presidents, *ceteris paribus*. This merits a closer examination of the scope of signing statements across presidents. For this reason, in the empirical sections that follow, I will consider not only how the ideological distance between the executive and legislative branches affects the scope of signing statements across the time period examined, but I will also examine how this effect may vary across the presidents who served during this period.

6.2.3 Specification and Analysis: The First Cut

Given the nature of the dependent variable, the number of provisions of legislation challenged within each signing statement, I estimate count models; in particular, I estimate negative binomial regressions due to overdispersion in the outcome variable.²¹ Negative binomial models provide more reliable estimates of uncertainty than other count models, such as the Poisson, when the dependent variable is highly variable. The main independent variable of interest is the absolute ideological distance between the president and the mean of Congress ($Distance_j$); I expect this variable to have a positive effect on the number of provisions with which a president will take issue. I control for whether there was unified government during each congress. In

²⁰Two of these were under Obama and one under H.W. Bush.

²¹For Model 1, the pooled analysis, the mean of the dependent variable is 3.22 with a variance of 25.66. For Model 2, the mean is 2.07 sections with a variance of 7.72. For Model 3, the mean is 5.97 sections with a variance of 58.35.

addition, I control for factors of the bill to which a signing statement was attached that may influence the president to issue more detailed signing statements. Using the Policy Agendas Project data previously described, I include indicators for whether each signing statement was attached to a bill which focused on defense policy, international affairs or government operations.²² Assuming, again, that the president is more likely to exercise his policy powers in the face of policy areas that implicate his constitutional powers and duties, I expect these variables to have a positive effect on the number of provisions a president will challenge within a signing statement. In these policy areas, Congress tends to be more deferential to the president, as he has a constitutional basis to exercise his influence; thus, I would expect the president to be less likely to be challenged by Congress or the courts for his actions in these policy areas, muting the effect of the scope cost.

I specify the negative binomial model as such:

$$\text{Sections Challenged}_{i|\lambda,\alpha} \sim \text{NB}(\lambda_i, \alpha_i) \quad (6.9)$$

$$\lambda_i = \exp(\beta_0 + \beta_1 \text{Distance}_j + \beta_2 \text{Unified}_j \quad (6.10)$$

$$+ \beta_3 \text{Def}_i + \beta_4 \text{GovtOps}_i + \beta_5 \text{IntAff}_i) \quad (6.11)$$

$$\alpha_t > 0, \quad (6.12)$$

where the dependent variable, indexed by statement i , is distributed according to the negative binomial distribution. λ is the mean of the distribution and is a function of the variables of interest and their coefficients, the β parameters. α is the dispersion parameter.

Table 6.4 shows the results of the analysis. Model 1 gives the results of the

²²Of the 449 signing statements examined, 71 were attached to government operations legislation, 42 to international affairs bills, and 80 to defense policies.

baseline model, a pooled model which considers the effect of the distance variable on the number of provisions challenged per statement issued between 1981 and 2012. The independent variable of interest, contrary to expectations, has a negative coefficient, but the effect cannot be statistically distinguished from zero. As discussed previously, however, including all the presidents into the same model may affect the results of interest, given Bush's expansive signing statement usage. In order to disentangle whether or not the inclusion of George W. Bush's signing statements is confounding the results of interest, I first estimate the negative binomial model on the universe of signing statements issued by the other four presidents that served during the time period (Reagan, H.W. Bush, Clinton, and Obama), while excluding those issued by W. Bush; the results are presented in Model 2 in Table 6.4. In Model 3, I present the results of a negative binomial model which only considers those signing statements issued during President W. Bush's eight years in office.

In the analysis which excludes W. Bush, the effect of the ideological distance between Congress and the president has the expected effect; the coefficient is positive and statistically significant. This means that as the president and members of Congress grow more distant from each other, the president will be more likely to issue signing statements with larger scopes and thus challenge more parts of legislation. Across the observed range of the *Distance_j* variable, the predicted number of challenged sections increases from approximately 1 when the president and Congress are the closest ideologically to 2 sections when they are at their maximum distance.²³ This is a substantively significant effect. Most of the signing statements across the four presidents in this analysis only challenged one provision of the respective legislation. Of the 317 signing statements in the analysis, 173 challenged only one section of legislation, while only 60 challenged two sections. Thus, the difference between challenging 1 and 2 sections of legislation is a large difference across Presidents

²³The predicted number of challenged sections is 1.2 at the minimum of the distance variable and 2.26 at the maximum

Table 6.4: The Scope of Signing Statements

| Variable | Model 1 Full Model | Model 2 Excluding W. Bush | Model 3 W. Bush Model |
|--|-----------------------|------------------------------|--------------------------|
| Intercept | 1.07 (0.30) | -0.39 (0.32) | 3.25 (0.8) |
| Distance | -0.49 (0.32) | 0.81 (0.32) | -2.37 (1.02) |
| Unified Government | 0.83 (0.11) | 0.12 (0.21) | 0.64 (0.22) |
| Defense Bill | 0.85 (0.12) | 0.83 (0.14) | 0.68 (0.21) |
| International Affairs | 0.31 (0.16) | 0.75 (0.18) | -0.33 (0.29) |
| Government Operations | 0.23 (0.14) | 0.50 (0.14) | -0.37 (0.27) |
| Standard errors in parentheses | | | |
| Model 1, N=449; Model 2, N=317, Model 3, N=132 | | | |
| Model 1, $\hat{\alpha}$ =1.58; Model 2, $\hat{\alpha}$ =2.83, Model 3, $\hat{\alpha} = 1.32$ | | | |

Reagan, H.W. Bush, Clinton, and Obama, considering the low number of provisions they generally challenged per statement. The effect is even larger when considering the policy area of the bills to which signing statements were attached. All the policy control variables had significant and positive coefficients. For a defense bill, for example, the predicted number of challenged sections was 2.76 (approximately 3) at low levels of the $Distance_j$ variable and 5.19 at the highest level. These are large substantive effects given the low number of sections generally challenged.

In stark contrast, the results of the analysis that only focus on the W. Bush signing statements show a very different relationship between ideological distance and the scope of signing statements. Contrary to the theoretical expectations and at odds with the behavior of the other modern presidents, Model 3 shows that George W. Bush was more likely to challenge larger numbers of legislative provisions within a signing statement when he was *closer* to the average member of Congress than when he was more distant.²⁴ The $Distance_j$ variable has a large negative and statistically significant coefficient in Model 3.²⁵ Figure 6.5 displays the substantive results for both Model 2 and Model 3. In the first panel, the plot shows the effect of the $Distance_j$ variable on the predicted number of challenged provisions for all presidents since 1981 excluding W. Bush. The hypothesized positive relationship is apparent. In the second panel, I have plotted the predicted number of challenged provisions across the range of the ideological distance between the branches observed during Bush's presidency. Here, the strong negative relationship is shown. At the lowest level of the $Distance_j$ variable, the model predicts approximately 5 challenged sections, compared to 2 at the highest levels for President Bush.²⁶ This suggests that, unlike the other four presidents who have served since 1981, Bush challenged far more provisions than other

²⁴Models 2 and 3 are robust to the inclusion of congressional random effects, which I included as a robustness check, as the main independent variable is varies at the congress-level.

²⁵This result is robust to the exclusion of the observations that may be considered outliers; I ran the analysis excluding the 10 signing statements in which Bush challenged more than 20 provisions of legislation, but the coefficient remained negative and significant.

²⁶The predicted numbers were 4.58 and 1.92 respectively.

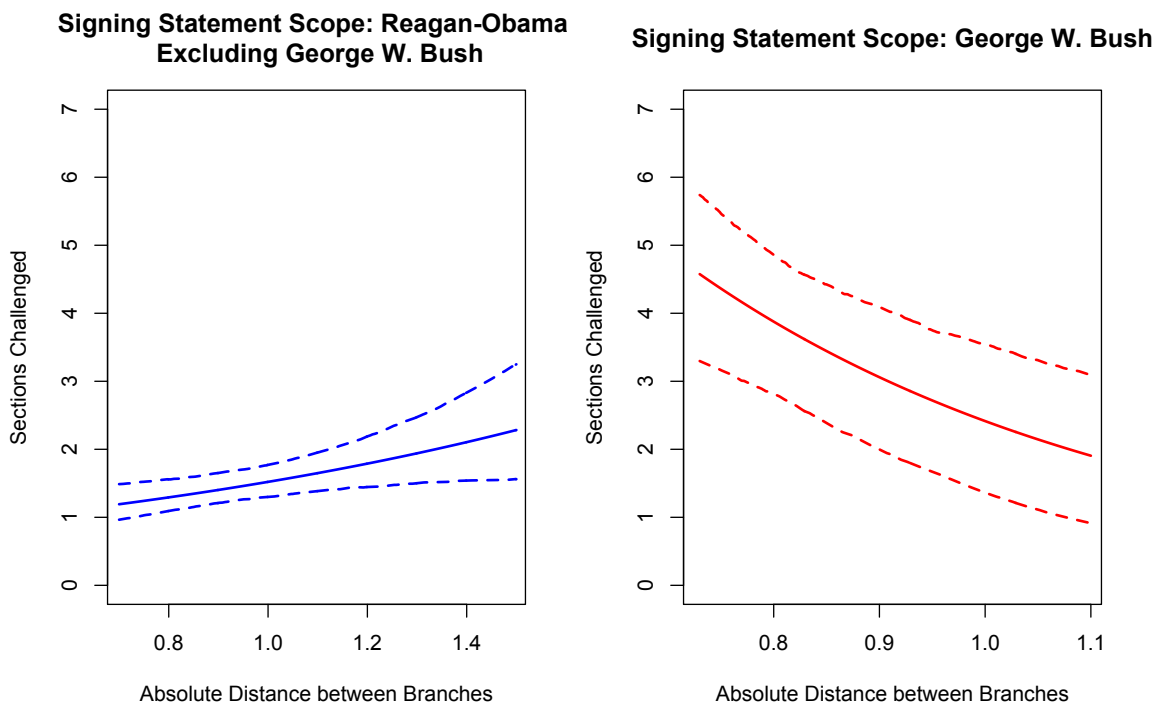


Figure 6.5: Inter-Branch Ideological Differences and Statement Scope. These plots show the predicted number of challenges in a signing statement across the range of the ideological distance between the president and Congress. The first panel excludes the W. Bush signing statements from the analysis, while the second examine only those statement issued by W. Bush. In the former, the hypothesized positive relationship is apparent: as the distance between Congress and the president grows, the president will challenge more provisions of legislation. In contrast, the second panel shows that, contrary to expectations, George W. Bush challenged more sections of legislation when his preferences were relatively aligned with Congress.

presidents and was particularly likely to do so when he faced a Congress more sympathetic to his preferences, contrary to my expectations. This further suggests that there may be something systematically different about how the Bush administration viewed executive power relative to other presidents, at least in terms of the signing statement's capabilities and limitations as a policy tool. It is also interesting to note that, again unlike the other presidents, W. Bush did not challenge more provisions of legislation when it came to government operations or international affairs bills; it seems that defense was the policy area in which he challenged many provisions. Thus, W. Bush is a notable exception to the general trends and to support for the

hypothesis.

6.2.4 Alternate Specification: Presidential Random Effects

The results in the previous section revealed that the effect of the distance between the president and Congress on the scope of signing statements varied significantly by president. To examine the robustness of the results, I estimate the model with alternate specifications. The results were robust to the inclusion of congressional fixed effects, as well as congressional random effects; in the latter, I estimate models that allowed for random intercept shifts by congress, as the main independent variable varies at the congress level. The results of these specifications showed similar results: the hypothesis holds for all presidents, except George W. Bush.

In addition to these specifications, I also estimate a multi-level negative binomial model which allowed for random slopes by president. For this analysis, rather than splitting the sample into the W. Bush signing statements and the other four presidents' statements, I estimate the model on the full sample of signing statements from 1981 to 2012. I specify the model to allow the effect of the main independent variable, the absolute distance between the president and the mean of Congress ($Distance_j$), to vary by president, in order to capture differences in how presidents may vary in their responses to the inter-branch environment in their use of signing statements. Figure 6.6 shows the coefficients estimated on the $Distance_j$ variable for each of the five presidents in the analysis.

Consistent with the previous results, the coefficients, with the exception of that for George W. Bush, are positive. This means that Presidents Reagan, H.W. Bush, Clinton, and Obama all issued signing statements which challenged more provisions on legislation when they faced a relatively more distant, and thus hostile, Congress. This is consistent with the theoretical expectations of the formal model. Presidents H.W. Bush, Clinton, and Obama, in particular, all have strong positive coefficients

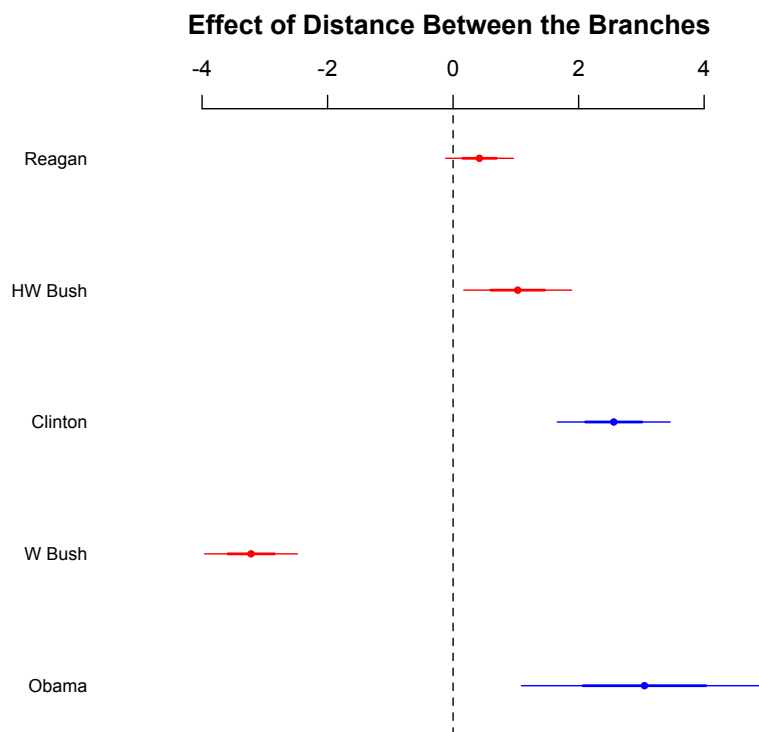


Figure 6.6: Random Effect of Ideological Distance Across Presidents. This coefficient plot shows the results of a multi-level model that allows the effect of the distance between the branches on the scope of a signing statement to vary by president. Consistent with previous models, the coefficient is positive for every president, except for George W. Bush.

that are statistically significant; the coefficient on the distance variable is similarly positive for the period during Reagan's presidency, but the effect just misses standard levels of statistical significance. Once again, contrary to expectations, the coefficient for George W. Bush is negative and statistically significant, suggesting that Bush was more likely to issue statements with expansive scopes when facing a Congress with which he was more ideologically cohesive. Together these results suggest partial support for the hypothesis of interest regarding the scope of signing statements.

6.2.5 Making Sense of George W. Bush

George W. Bush proves to be the major exception, the outlier in the analyses. While there was reason to believe that the sheer volume of objections in Bush's signing statements was systematically different from that of the other presidents, which warranted analyzing his statements separately, there was no theoretical reason to believe that Bush would have the incentive to use these more expansive statements in the exact opposite conditions as the other presidents—that is, when he was more ideologically aligned with Congress. This, then, presents an empirical and theoretical puzzle about Bush's signing statements.

One possible explanation for this marked disparity in Bush's signing statements is one of data limitations. As noted before, the dependent variable in the analysis, the number of challenged provisions per signing statement, is problematic in that it only includes provisions specifically mentioned. In his analysis of the signing statements issued during W. Bush's first term as president, Cooper (2005, 521) notes, "it can be extremely difficult to count the number of specific provisions" because "the administration came to adopt the practice of stringing together references to several claimed constitutional powers without explanation with respect to a particular statutory provision." Cooper goes on to note that Bush quite often did not deal with one objection at a time and instead would give a broad summary about objectionable sections, without explicitly mentioning the sections to which he was referring. As the agencies tasked with implementation often help draft and approve of statements before they are issued, there is reason to believe that even these challenges, which lack specificity in naming sections of legislation, are heeded during the execution of the law. If this is the case, and if this practice of making broad challenges is perhaps unique to the Bush administration, then it could be biasing the findings herein presented.

Indeed, Whitford (2012), who examines Bush signing statements from 2001 to 2006, finds that Bush was more likely to issue more detailed statements (those which

challenge more sections) when he was ideologically distant from Congress, the opposite of the finding I have for Bush. For his analysis, Whitford uses data on the number of constitutional objections in signing statements coded by two experts in constitutional law. This data has the advantage of including even those objections that do not make reference to a specific legislative provision, as the law experts examined both the statements and the associated law in the coding process. While this data provides a more accurate count of the actual variable of interest, it is of limited utility for a cross-president analysis as the data only spans across a 5-year period during one administration. In the future, the detailed coding process should be expanded for all statements between Reagan and Obama to be able to speak more directly to the hypothesis that presidents ideologically distant from Congress issue more complex and detailed signing statements.

6.3 Discussion

In this chapter, I have closely examined the presidents incentives and constraints in both issuing signing statements on particular pieces of legislation and in expanding the scope of particular statements to accomplish the policy change he desires. I have argued that the signing statement is a costly endeavor for the president. First, I argued that the president faces a resource/opportunity cost to issuing statements and that the president should be more likely to issue signing statements when these costs were relatively low. I provided empirical evidence to support this expectation. Signing statements are more likely on any given bill when the executive branch has more resources at its disposal. When executive capacity is high, any particular statement will be less costly to the administration; the evidence supports this claim. I also show that signing statements were more likely when the president has fewer items on his legislative agenda, arguing that when his agenda is smaller, then the opportunity cost

to each statement should be lower.

In addition to this fixed cost to each signing statement that the president issues, there is, I argue, another cost to the president assessed in the scope of the policy change to be enacted with a single statement. Because the signing statement is a power outside his constitutional provision of legislative tools, the farther the president stretches the scope of a statement to enact policy change, the more politically risky and costly the endeavor should be. I argued that the president, in the face of this cost, should only have the incentive to issue statements with large scopes when he has the particular incentive to do so—when he faces a relatively ideologically hostile Congress and thus stands to gain a lot of policy grounds. I received partial support for this hypothesis; the results hold across four of the five presidents in the analysis. President George W. Bush, for reasons discussed above, appears to be an exception to the rule.

An important conclusion from this chapter is that the president is not unconstrained in the use of his prerogative powers. These powers do indeed allow the president to influence policy outside the bounds prescribed by the law or statutes, but this does not mean that the president always has the incentives or ability to wield them. When operating outside the territory of the president's constitutional powers, I argue, the costs of exercising forceful executive power may be very high. Thus, the constitutional structure and the separation of powers may actually serve to check even those powers not mentioned in the text of the Constitution.

Chapter 7

Conclusion

The president's prerogative powers allow the president to act without a firm constitutional basis and without the prescription of law. The signing statement undoubtedly gives the president a greater hand in shaping policy and in legislating than intended by the framers of the Constitution who equipped him solely with the veto power. However, the framers, notably Hamilton, correctly surmised that the impact of executive power would largely be felt through the "apprehension of opposition" in the legislature, the power of anticipated response. In this book, I have demonstrated that the logic of the "second face of power" explicated in the Federalist Papers not only still applies to the veto power today but also applies to the wider array of policy powers that modern presidents exercise. I have advanced a new theoretical framework to understand inter-branch and intra-branch bargaining. In particular, the key insight advanced is that presidential power in the form of the signing statement affects dynamics within, the agreements that emerge from, and the outcomes produced by Congress. While the signing statement may give the president the final say on how a particular bill is implemented, his ability to do so actually alters the entire process by which legislators craft and pass policy. Assertions of presidential power can have a rippling effect through the policy process.

The theory herein advanced provides important insights into how political actors bargain with one another and into the policies they can and will produce in an environment in which the president can issue signing statements. The formal model explains why it is that legislators may sometimes enter into coalitions to support a policy that is then perverted or manipulated by the president; it explains why legislators may, in fact, knowingly vote against their own policy (or electoral) preferences. In passing legislation, legislators bear a heavy burden and attempt to balance their multiple goals to produce the best policy to maximize their own benefits. This process is complicated when they have to bargain with other legislators who have distinct preferences and when they face a president who can undermine bargains they have struck. However, legislators have been able to adapt to and anticipate such presidential action and use the president's policy powers to their advantage. Legislators are complicit in the agreements that facilitate the use of presidential power; sometimes legislators pass legislation that purposely incentivizes the president to legislate in the limited capacity that a signing statement allows him. Thus, while the president may have more policy power in a world with prerogative, it appears that legislators determine, at least in part, when he can wield those powers.

To evaluate the theoretical insights, I derived and tested three of the model's primary implications. The empirical evaluations lend strong support to arguments advanced. First, I evaluated hypotheses pertaining to the conditions under which signing statements are possible and more likely to be issued. I found strong support for the contention that the president is more likely to issue signing statements when partisan polarization in Congress is low. Further, I found that signing statements are more likely when the president's cost to issuing them are low. Signing statements are more likely to be issued on any given bill when the issuing president has more resources to dedicate to the task: when he is equipped with a larger staff and has fewer items on his legislative agenda to pursue. Finally, I evaluated the hypothesis

that the president should issue signing statements which challenge or subvert more provisions of legislation when he faces a hostile Congress. The results show that this hypothesis holds for all presidents since 1980, with the exception of George W. Bush. Together, the evidence suggests that legislators both anticipate and take advantage of the use of signing statements and that the exercise of such presidential power has an important impact on the operation of the modern policy process. Further, the theoretical framework and empirical results provide some normative implications about the use of signing statements and a springboard for future research.

7.1 The Good News and the Bad News About Signing Statements

The arguments and findings in this project provide some good news about the power of the signing statement. Much of the recent public discourse on the signing statement has centered around its faults: primarily, that it is an unconstitutional usurpation of the legislative power by the executive branch. This dialogue is not particular to a certain political party; both President George W. Bush and President Barack Obama have received harsh criticism from the media, congressmen, and members of their own political parties for particular exercises of this power. In 2006, then-Republican Senator Arlen Specter stated, in regards to President Bush's signing statements:

Any action by the president that circumvents this finely structured procedure is an unconstitutional attempt to usurp legislative authority. If the president is permitted to rewrite bills that Congress passes and cherry-pick which provisions he likes and does not like, he subverts the constitutional process designed by our framers.¹

¹www.rollcall.com/news/-19237-1.html

Despite common claims to this effect and while the president has indeed claimed some vestige of power to legislate in wielding the signing statement, I have provided evidence that the signing statement is far from an unchecked power. While it may be unconstitutional in the strictest sense, the signing statement is subject to many of the constraints and checks placed on the executive branch in the Constitution. In particular, Congress has the ability and means by which to restrict the president's ability to issue signing statements. First, Congress can and has acted to reverse or overturn presidential signing statement by passing subsequent legislation to negate their effects or withholding funding from executive departments (Kelley 2007); the federal courts have also checked the executive use of this power on a case-by-case basis. More consequentially, I argue, Congress can anticipate and, as such, limit the opportunities for the president to exercise the power. I have provided evidence that legislators are aware when their bargains will result in a signing statement and thus give their tacit approval when a president issues one on legislation. The legislative environment, the motivations of legislators when they cast their votes, and the willingness/necessity of members of Congress to make decisions in the face of tradeoffs between their goals all serve to condition the ability of the president to use the signing statement. Thus, the president cannot really use the power to subvert or undermine bargains passed by an unsuspecting Congress; instead, the president can use the power to bend policies towards his preferences only when legislators in Congress allow him the opportunity. Thus, the ability of the president to influence particular policy powers is very much a product of the separation of powers system and the consensus it requires between the branches for policy change to occur.

In addition, the evidence suggests that the president is most likely to exercise his power to issue signing statements on policy areas that directly implicate those powers explicitly provided to the executive in the Constitution, such as budgetary and defense policy. While I do find that presidents issue signing statements on legislation

in a variety of different policy areas, including environmental policy and health care, given the constraints on the president in wielding the power, most statements are issued on legislation that implicates the president's constitutional authority. Thus, it appears to be the case that the president wields the power most frequently in those policy areas for which congress already tends to be the most deferent to the president (Wildavsky 1998). This further demonstrates that the president faces some vestige of constitutional constraint in the use of his signing statements and that the ability to issue them is not an unbridled usurpation of legislative power.

However, this is not to say that the signing statement's effect on the policy process is an objectively good thing. While the president's ability to issue statements may be constrained, its use produces some dynamics unhealthy for the separations of powers system and for democracy. First, I argue that signing statements may have adverse effects on legislative productivity. In particular, the president's ability to issue signing statements may increase the propensity for gridlock, especially in Congress. I have found that signing statements are more likely when congressional polarization is low. However, signing statements may, counter-intuitively, have an even larger impact on policy outcomes when they are less frequently issued, when congressional polarization is particularly high. When legislative polarization is low, legislators will have more incentive to bargain with each other even in the face of an anticipated signing statement that will subvert part of the legislation; the signing statement, in these circumstances, can facilitate the passage of legislation that otherwise would not have occurred. When polarization is higher in Congress and legislative preferences are more distinct from one another, legislators have less incentive to bargain with one another generally and in the face of a signing statement, in particular. In a polarized climate, when legislators are faced with a choice between passing legislation that will receive a signing statement and maintaining the status quo, they may opt for the latter in the face of the high tradeoffs they will face in agreeing to the former. As such,

the threat of the signing statement may compound an already bad policy situation when polarization is high: it may further disincentivize legislators from successfully bargaining with one another. Given the criticism of recent congresses for their lack of productivity, this effect of the signing statement may be particularly concerning for the operation of the policy process.

In addition to having implications for policy, the arguments advanced have important implications for democracy and legislative representation. The legislators in the model are concerned not only with policy outcomes but with their likelihood of getting re-elected. As such, they have an incentive to consider their constituents' preferences when casting their votes or proposing legislation. On its surface, this sounds like effective representation; however, in practice, in an environment with signing statements, accountability can actually be quite low, despite the legislative concerns with position-taking. That is, legislative motivation to publicly represent constituents does not translate into substantive representation. For instance, the position-taking incentives in the model often induce greater legislative gridlock than there would be otherwise. Especially when their position-taking incentives are high, such as right before an election, legislators have an incentive to vote for bills that look good to their constituents rather than bills that can actually induce policy change. Because the legislators in the model know that their constituents are watching their public stances and evaluate them for their actions and not for outcomes, legislators will often propose bills near their ideal points, rather than joining a coalition to pass legislation that would improve upon the status quo. As such, the representation being provided is superficial. A similar dynamic occurs when legislators join bargains in anticipation of signing statements. Legislators can vote for a policy that their constituents like, knowing that the president will shift the policy away from their preferences with a signing statement; if the legislator cares enough about pandering to constituents, she will vote yes despite the adverse policy effects. This sets up a dynamic where legisla-

tors can vote for policies and then blame the president when the legislation does not translate into tangible policy benefits on the ground. These dynamics are similar to those found in blame-game veto bargaining models (Groseclose and McCarty 2001), in that the incentives to send signals to constituents can lead to the breakdown of negotiations and Pareto inefficient outcomes. Rather than misrepresenting the president as in blame-game models, the legislators in the proposed model have an incentive to signal their true preferences, but, in doing so, they often misrepresent the actual policy that will be implemented because of presidential action. This dynamic of using the president as a potential scapegoat for their decisions may help legislators stay in office, as voters are not often sophisticated enough to hold legislators accountable for strategic decision-making. However, it also leads to less democratic representation on the larger scale.

7.2 Future Avenues of Research

This project raises many interesting questions about signing statements and prerogative powers more generally that should be addressed in future research. In particular, I hope it has provided a potential springboard for delving deeper into how legislators bargain with one another, especially under the threat of signing statements. In this book, I advanced a theory of legislative voting and coalition formation in an inter-branch setting that assumed all policy bargaining takes place in a unidimensional policy space. One limitation of this approach is that it does not capture the reality that legislators often bargain on multiple policy dimensions when voting on a single piece of legislation. The arguments I advance, however, can be generalized to capture these more complicated and interesting multidimensional bargaining problems. Theoretically, it may be interesting to examine how the tradeoffs between the electoral and policy preferences of legislators are compounded when legislators are forced

to consider bills that have multiple policy dimensions. There is interesting work to be done on how legislators balance their goals when considering such legislation; in particular, there is potential for a better understanding of inter-party coalition formation and issue framing as a result of these tensions in a multi-dimensional setting. Empirically, it will be interesting to examine both how legislators vote on and frame omnibus legislation and how the president responds to such legislation when equipped with the power to issue signing statements. In addition, an examination of bargaining over the addition of amendments to legislation and the use of signing statements on amendments may prove to be a fruitful avenue to explore these dynamics.

Further, while I have focused on the upstream effects of signing statements on *policy-making*, many questions remain about the downstream effects of these powers. That is, there is little systematic work, theoretical or empirical, on the extent to which signing statements (or any executive directives, for that matter) are implemented. In order to truly understand the place of the signing statements in and the effect of them on the policy process, we require a better understanding about how they actually effect policy on the ground. This would involve a theoretical understanding for how and why members of Congress will respond to assertions of the presidential power and how bureaucrats implement policy when there are disagreements between or inconsistent signals from the president and Congress. This line of work is particularly important as it can speak to important normative questions about whether the actual policies we see emerging as a result of the signing statements are good for democracy and representative of popular opinion.

The work presented here also raises questions about the effect of presidential prerogative powers more generally. Far more work has been done on the president's ability to issue executive orders than on the president's power to issue signing statements, but very little of this work has considered how the executive order or other unilateral powers can affect the bargaining process. The literature tends to treat the

unilateral framework as completely separate from the bargaining framework, as if the president's ability to make policy on his own does not affect the ability or willingness of Congress to legislate. There is reason to think that, much like the signing statement, these other prerogative powers have an important impact not only on policy outcomes but on how legislators bargain with one another. For example, in response to threats by the Obama administration to take unilateral action on immigration policy in 2014, Speaker of the House John Boehner stated, "I've made clear to the president that if he acts unilaterally on his own outside of his authority, he will poison the well and there will be no chance for immigration reform moving in this Congress. It's as simple as that."² This suggests that when the president chooses not to bargain with Congress and sets policy on his own, that choice has an impact on the ability or willingness of members of Congress to bargain with one another or to legislate at all. In the current political climate, understanding how the executive order and other prerogative/unilateral may affect legislative productivity is critical. As we currently have a Congress highly polarized and gridlocked on many important issues, it raises the specific question about whether Obama's promises to act unilaterally under his "We Can't Wait" campaign are the most effective ways to end gridlock and induce policy change. More generally, these dynamics raise the question of whether presidential policy-making is affecting the capacity of the legislature to make policy. These questions are not only interesting from a scholarly perspective but also have important implications for those who make and are affected by policy.

²<http://dailycaller.com/2014/11/06/boehner-no-chance-of-immigration-reform-if-obama-signs-executive-amnesty/>

Appendix A

Proof of Formal Results

A.1 President's Subgame

Proof. The optimal shift the president can accomplish with a signing statement is to implement the policy at the midpoint between his ideal point, P , and the bill Congress proposed, β .

$$U_P(ss) = -(P - B)^2 - (B - \beta)^2 - c$$

$$\frac{\partial B}{\partial \beta} = 2P - 4B + 2\beta$$

$$0 = 2P - 4B + 2\beta$$

$$4B = 2P + 2\beta$$

$$B^* = \frac{\beta + P}{2}$$

□

Lemma 1. The president's strategy.¹

$$\sigma(\beta)^* = \left\{ \begin{array}{l} s=\text{sign}, B = \emptyset \quad \text{if} \quad \left\{ \begin{array}{l} 2P - q \leq \beta \leq q \quad \text{and} \quad c \geq \frac{q^2 - 2Pq + P^2}{2} \\ P - \sqrt{2c} \leq \beta \leq P + \sqrt{2c} \quad \text{and} \quad c < \frac{q^2 - 2Pq + P^2}{2} \end{array} \right. \\ \\ s=\text{veto}, B = \emptyset \quad \text{if} \quad \left\{ \begin{array}{l} \beta \notin [2P - q, q] \quad \text{and} \quad c \geq \frac{q^2 - 2Pq + P^2}{2} \\ \beta \notin [P - \sqrt{2P^2 - 4Pq + 2q^2 - 2c}, \\ \quad P + \sqrt{2P^2 - 4Pq + 2q^2 - 2c}] \quad \text{and} \quad c < \frac{q^2 - 2Pq + P^2}{2} \\ \\ P - \sqrt{2P^2 - 4Pq + 2q^2 - 2c} \leq \beta \leq P - \sqrt{2c} \\ \quad \text{and} \quad c < \frac{q^2 - 2Pq + P^2}{2} \end{array} \right. \\ \\ s=\text{ss}, B = B^* \quad \text{if} \quad \left\{ \begin{array}{l} P + \sqrt{2c} \leq \beta \leq P + \sqrt{2P^2 - 4Pq + 2q^2 - 2c} \\ \quad \text{and} \quad c < \frac{q^2 - 2Pq + P^2}{2} \\ \\ \emptyset \quad \text{if} \quad c \geq \frac{q^2 - 2Pq + P^2}{2} \end{array} \right. \end{array} \right.$$

Proof.

In a pairwise comparison of signing and vetoing, the president will sign bills closer to his ideal point than is the status quo, that is when $2P - q < \beta < q$.

$$\begin{aligned} U_P(\text{sign}) &> U_P(\text{veto}) \\ -(P - \beta)^2 &> -(P - q)^2 \\ -P^2 + 2\beta P - \beta^2 &> -P^2 + 2Pq - q^2 \\ 0 &> \beta^2 - 2\beta P + 2Pq - q^2 \\ &\quad \frac{2P \pm \sqrt{4P^2 - 4(2Pq - q^2)}}{2} \\ \text{sign when} & \quad : \quad 2P - q < \beta < q \end{aligned}$$

In a pairwise comparison of signing a bill and issuing a signing statement, the president will

¹Decision rules assume the status quo is positive.

sign bills when $P - \sqrt{2c} < \beta < P + \sqrt{2c}$.

$$\begin{aligned}
U_P(ss) &> U_P(sign) \\
\frac{-P^2 + 2P\beta - \beta^2 - 2c}{2} &> -(P - \beta)^2 \\
-P^2 + 2P\beta - \beta^2 - 2c &> -2P^2 + 4P\beta - 2\beta^2 \\
0 &> \frac{-P^2 + 2P\beta - \beta^2 + 2c}{-2} \\
&> \frac{-2P \pm \sqrt{4P^2 - 4(-1)(-P^2 + 2c)}}{-2} \\
&> \frac{2P \pm 2\sqrt{2c}}{2} \\
\text{sign when} &: P - \sqrt{2c} < \beta < P + \sqrt{2c}
\end{aligned}$$

In a pairwise comparison of vetoing a bill and issuing a signing statement, the president will issue signing statements when $P - \sqrt{2P^2 - 4Pq + 2q^2 - 2c} < \beta < P + \sqrt{2P^2 - 4Pq + 2q^2 - 2c}$.

$$\begin{aligned}
U_p(ss) &= U_p(veto) \\
\frac{-P^2 + 2P\beta - \beta^2 - 2c}{2} &> -(P - q)^2 \\
-P^2 + 2P\beta - \beta^2 - 2c &> -2P^2 + 4Pq - 2q^2 \\
0 &> \frac{\beta^2 - 2\beta P - P^2 + 4Pq - 2q^2 + 2c}{2} \\
&> \frac{2P \pm \sqrt{4P^2 - 4(2c - 2q^2 + 4Pq - P^2)}}{2} \\
&> \frac{2P \pm 2\sqrt{2P^2 - 4Pq + 2q^2 - 2c}}{2}
\end{aligned}$$

The president prefers a signing statement when:

$$P - \sqrt{2P^2 - 4Pq + 2q^2 - 2c} < \beta < P + \sqrt{2P^2 - 4Pq + 2q^2 - 2c}. \quad \square$$

Result. The president only has the incentive to issue signing statements in equilibrium when the cost to issuing one is sufficiently low, such that $c < \frac{q^2 - 2Pq + P^2}{2}$.

Proof.

When $c < \frac{q^2 - 2Pq + P^2}{2}$, signing statements will be issued when:

$$P - \sqrt{2P^2 - 4Pq + 2q^2 - 2c} < \beta < P - \sqrt{2c}, \text{ or } P + \sqrt{2c} < \beta < P + \sqrt{2P^2 - 4Pq + 2q^2 - 2c}.$$

When $c \geq \frac{q^2 - 2Pq + P^2}{2}$, the president never issues statements.

Comparing cutpoints derived in Lemma 1:²

$$\begin{aligned} q &> P + \sqrt{2c} \\ q - P &> \sqrt{2c} \\ q^2 - 2Pq + P^2 &> 2c \\ c &< \frac{q^2 - 2Pq + P^2}{2} \end{aligned}$$

$$\begin{aligned} P + \sqrt{2P^2 - 4Pq + 2q^2 - 2c} &> q \\ \sqrt{2P^2 - 4Pq + 2q^2 - 2c} &> q - P \\ 2P^2 - 4Pq + 2q^2 - 2c &> q^2 - 2Pq + P^2 \\ q^2 - 2Pq + P^2 &> 2c \\ c &< \frac{q^2 - 2Pq + P^2}{2} \end{aligned}$$

²Here, I have compared the upper cutpoints. The same cost condition ($c < \frac{q^2 - 2Pq + P^2}{2}$) holds for the comparison of the lower cutpoints as well.

$$\begin{aligned}
P + \sqrt{2P^2 - 4Pq + 2q^2 - 2c} &> P + \sqrt{2c} \\
\sqrt{2P^2 - 4Pq + 2q^2 - 2c} &> \sqrt{2c} \\
2P^2 - 4Pq + 2q^2 - 2c &> 2c \\
2P^2 - 4Pq + 2q^2 - 2c &> 4c \\
c &< \frac{q^2 - 2Pq + P^2}{2}
\end{aligned}$$

□

A.2 Legislative Veto Player's Subgame

Lemma 2. Veto Player's Strategy. The veto player will accept any policies between the status quo and its reflection point about her ideal point, l , provided that the president is going to sign the bill into law or veto the bill. In anticipation of a signing statement, the veto player will only accept proposals between $\frac{4\alpha l + 2l - P \pm 2\sqrt{(4\alpha^2 + 5\alpha + 1)q^2 - (8\alpha^2 + 10\alpha + 2)lq + (4\alpha^2 + 4\alpha + 1)l^2 + 2\alpha lP - \alpha P^2}}{4\alpha + 1}$.

Proof.

$$\begin{aligned}
U_i(\text{accept}|\text{sign}) &> U_i(\text{reject}) \\
-\alpha(l - \beta)^2 - (l - \beta)^2 &> -\alpha(l - q)^2 - (l - q)^2 \\
-(\alpha + 1)(l - \beta)^2 &> -(\alpha + 1)(l - q)^2 \\
(l - \beta)^2 &< (l - q)^2 \\
0 &< -\beta^2 + 2l\beta - 2lq + q^2 \\
&\quad \frac{-2l \pm \sqrt{(2l)^2 - 4(-1)(-2lq + q^2)}}{-2} \\
&\quad \frac{2l \pm 2\sqrt{l^2 - 2lq + q^2}}{2} \\
\text{Accept when :} &\quad 2l - q < \beta < q
\end{aligned}$$

$$\begin{aligned}
U_i(\text{accept}|\text{veto}) &> U_i(\text{reject}) \\
-\alpha(l - \beta)^2 - (l - q)^2 &> -\alpha(l - q)^2 - (l - q)^2 \\
-\alpha(l - \beta)^2 &> -\alpha(l - q)^2 \\
(l - \beta)^2 &< (l - q)^2 \\
0 &< -\beta^2 + 2l\beta - 2lq + q^2 \\
&\quad \frac{-2l \pm \sqrt{(2l)^2 - 4(-1)(-2lq + q^2)}}{-2} \\
&\quad \frac{2l \pm 2\sqrt{l^2 - 2lq + q^2}}{2} \\
\text{Accept when :} &\quad 2l - q < \beta < q
\end{aligned}$$

$$\begin{aligned}
U_l(\text{accept}|SS) &> U_l(\text{reject}) \\
-\alpha(l - \beta)^2 - \left(l - \left(\frac{\beta + P}{2}\right)\right)^2 &> -\alpha(l - q)^2 \\
8\alpha l\beta - 4\alpha\beta^2 + 4l\beta + 4lp - \beta^2 - 2\beta p - p^2 &> 8\alpha lq - 4\alpha q^2 + 8lq - 4q^2 \\
0 &> \beta^2(4\alpha + 1) + b(-8\alpha l - 4l + 2p) + \\
& q^2(-4\alpha - 4) + q(8\alpha l + 8l) + p^2 - 4lp
\end{aligned}$$

Thus, veto player will only accept the proposal when β lies between:

$$\frac{4\alpha l + 2l - p \pm 2\sqrt{(4\alpha^2 + 5\alpha + 1)q^2 - (8\alpha^2 + 10\alpha + 2)lq + (4\alpha^2 + 4\alpha + 1)l^2 - \alpha p^2 + 2\alpha lp}}{4\alpha + 1}$$

□

A.3 Proposer Subgame

Proof. The optimal proposal that the proposer can make in expectation that $s^* = ss$ is

$$\tilde{\beta}_{ss} = \frac{L(4\alpha + 2) - P}{4\alpha + 1}.$$

$$\begin{aligned}
U_L(ss) &= -(L - \beta)^2 - \left(L - \frac{P + \beta}{2}\right)^2 \\
\frac{\partial}{\partial \beta} &= 2\alpha L - 2\alpha\beta + L - \frac{1}{2}P - \frac{1}{2}\beta \\
0 &= 2\alpha L - 2\alpha\beta + L - \frac{1}{2}P - \frac{1}{2}\beta \\
\beta(4\alpha + 1) &= L(4\alpha + 2) - P \\
\tilde{\beta}_{ss} &= \frac{L(4\alpha + 2) - P}{(4\alpha + 1)}
\end{aligned}$$

□

Proposition. In equilibrium, signed bills, signing statements, vetoes and legislative gridlock can prevail as the outcomes of bargaining. Gridlock is the inevitable outcome of a moderate status quo. Signed bills, with or without a signing statement, are only possible when there is an extreme status quo relative to the actors. Signing statements, in particular, are more likely when actor preferences are aligned.

Proof.

Below, I provide utility comparisons for one of the three major configurations of the game: the case of a moderate proposer. For ease of explication, I assume the value of the actor's ideal points to be $P = -1$, $L = 1$, and $l = 2$. The value of the status quo varies by each configuration below. The results presented are generalizable across cases.³

Configuration 1: $q < P < L < l$. For this configuration, when c is sufficiently high, the proposer will propose a bill that will induce gridlock when her position-taking incentive (the α parameter) is high, one that will induce a signing statement when α is at middling levels, and one that will be signed when α is low. When c is sufficiently low, she will propose legislation that will be vetoed when α is sufficiently high and one that will receive a signing statement otherwise. To simplify, I assume $q = -2$.

³For the sake of parsimony, I have excluded all the ancillary math that was necessary to identify the viable proposals for each sub-configuration of preferences. This math, as well as the math for the other two major cases, is available upon request.

$$U_L(\text{gridlock}) > U_L(\text{signed})$$

$$-\alpha(1-1)^2 - (1-2)^2 > -\alpha(1 - (-1 + \sqrt{2c}))^2 - (1 - (-1 + \sqrt{2c}))^2$$

$$-9 > -\alpha(2 - \sqrt{2c})^2 - (2 - \sqrt{2c})^2$$

$$\alpha(2 - \sqrt{2c})^2 > 9 - (2 - \sqrt{2c})^2$$

$$\alpha(4 - 4\sqrt{2c} + 2c) > 5 + 4\sqrt{2c} - 2c$$

$$\alpha > \frac{5 + 4\sqrt{2c} - 2c}{4 - 4\sqrt{2c} + 2c}$$

$$U_L(\text{gridlock}) > U_L(ss)$$

$$-\alpha(1-1)^2 - (1-2)^2 > -\alpha(1 - (-1 + \sqrt{-2c+2}))^2 - \left(1 - \left(\frac{-1 + \sqrt{-2c+2} - 1}{2}\right)\right)^2$$

$$-9 > -\alpha(2 - \sqrt{-2c+2})^2 - \left(\frac{4 - \sqrt{-2c+2}}{2}\right)^2$$

$$\alpha(2 - \sqrt{-2c+2})^2 > 9 + \left(\frac{4 - \sqrt{-2c+2}}{2}\right)^2$$

$$\alpha(6 - 4\sqrt{-2c+2} - 2c) > \frac{9 + c + 4\sqrt{-2c+2}}{2}$$

$$\alpha > \frac{9 + 4\sqrt{-2c+2} + c}{12 - 8\sqrt{-2c+2} - 4c}$$

$$\begin{aligned}
U_L(ss) &> U_L(\text{signed}) \\
-\alpha(2 - \sqrt{-2c + 2})^2 - \left(\frac{4 - \sqrt{-2c + 2}}{2}\right)^2 &> -\alpha(2 - \sqrt{2c})^2 - (2 - \sqrt{2c})^2 \\
-\alpha(2 - \sqrt{-2c + 2})^2 + \alpha(2 - \sqrt{2c})^2 &> \left(\frac{4 - \sqrt{-2c + 2}}{2}\right)^2 - (2 - \sqrt{2c})^2 \\
\alpha(4\sqrt{-2c + 2} - 4\sqrt{2c} + 4c - 2) &> \frac{-8\sqrt{-2c + 2} + 16\sqrt{2c} - 10c + 2}{4}
\end{aligned}$$

The left side is always positive for the relevant range of c . The right side is positive when $c > .2$. Therefore, when $c < .2$, the inequality is always true. Otherwise:

$$\begin{aligned}
\alpha(4\sqrt{-2c + 2} - 4\sqrt{2c} + 4c - 2) &> \frac{-8\sqrt{-2c + 2} + 16\sqrt{2c} - 10c + 2}{4} \\
\alpha &> \frac{-4\sqrt{-2c + 2} + 8\sqrt{2c} - 5c + 1}{8\sqrt{-2c + 2} - 8\sqrt{2c} + 8c - 4}
\end{aligned}$$

Configuration 2: $P < q < L < l$. When the status quo is moderate relative to the actors, gridlock is the inevitable outcome. Here, I show the proof for the case when $q = 0$.⁴

⁴No proposal is possible that will be signed into law en toto when q is moderate.

$$\begin{aligned}
U_L(\text{gridlock}) &> U_L(ss) \\
-\alpha(1-1)^2 - (1-0)^2 &> -\alpha(1 - (-1 + \sqrt{-2c+2}))^2 - \\
&\quad \left(1 - \left(\frac{-1 + \sqrt{-2c+2} - 1}{2}\right)\right)^2 \\
-1 &> -\alpha(2 - \sqrt{-2c+2})^2 - \left(\frac{4 - \sqrt{-2c+2}}{2}\right)^2 \\
\alpha(2 - \sqrt{-2c+2})^2 &> 1 - \left(\frac{4 - \sqrt{-2c+2}}{2}\right)^2 \\
\alpha(6 - 4\sqrt{-2c+2} - 2c) &> \frac{-14 + 8\sqrt{-2c+2} + 2c}{4} \\
\alpha &> \frac{-7 + 4\sqrt{-2c+2} + c}{12 - 8\sqrt{-2c+2} - 4c}
\end{aligned}$$

Always true because the quotient is negative, and α is strictly positive.

Configuration 3: $P < L < l < q$. I assume $q = 3$. When c is low, the proposer will offer a bill that will receive a statement. When c is sufficiently high, she can and will propose a bill (at her ideal point) that will be signed into law en toto, a strictly dominant strategy. The utility comparison for the possible proposals when c is low is shown below.

$$\begin{aligned}
U_L(\text{gridlock}) &> U_L(ss) \\
-4 &> -\alpha \left(1 - \frac{8\alpha + 5 - 2\sqrt{4\alpha^2 - 4\alpha + 1}}{4\alpha + 1}\right)^2 - \left(1 - \frac{8\alpha + 5 - 2\sqrt{4\alpha^2 - 4\alpha + 1}}{4\alpha + 1} - 1\right)^2 \\
-4 &> -\alpha \left(\frac{-4\alpha - 4 + 2\sqrt{4\alpha^2 - 4\alpha + 1}}{4\alpha + 1}\right)^2 - \left(\frac{2\alpha - 1 + \sqrt{4\alpha^2 - 4\alpha + 1}}{4\alpha + 1}\right)^2 \\
0 &> -\alpha \left(\frac{-4\alpha - 4 + 2\sqrt{4\alpha^2 - 4\alpha + 1}}{4\alpha + 1}\right)^2 - \left(\frac{2\alpha - 1 + \sqrt{4\alpha^2 - 4\alpha + 1}}{4\alpha + 1}\right)^2 + 4
\end{aligned}$$

□

Appendix B

Data Appendix

B.1 Signing Statement Coding: Rhetorical vs. Constitutional

I use Ostrander and Sievert (2013*a*)'s data on signing statements for the analyses in the empirical chapters. They code all signing statements issued between Ronald Reagan and George W. Bush's presidencies for whether they are rhetorical or constitutional in nature. Using their coding rules, I update the data through Barack Obama's first term as president.

Rhetorical statements do not cite any violations of presidential power, constitutional infringements, or construe language to provide an interpretation of the legislation. They may make explicit statements about sections of a bill of which the president does not approve; importantly, however, the president will not specifically challenge or provide directions for implementation of these sections. These statements will often include one or more of the following: celebratory remarks, reservations, a list of desired changes in future legislation. Constitutional signing statements, on the other hand, contain constitutional objections to or interpretations of one or more sections of a piece of legislation. Constitutional signing statements include situations where language or content is construed by a president to be more in accordance with his interpretation of the law or Constitution as well as situations in which the President claims a more specific violation of presidential powers such as ap-

pointment powers, executive powers to oversee the Executive Office of the President, and authority in foreign affairs. There is often little ambiguity about the category into which a given statement falls.

For example, Obama's signing statement on the James Zadroga 9/11 Health and Compensation Act of 2010 was rhetorical in nature. Here is the text:

I was honored to sign the James Zadroga 9/11 Health and Compensation Act to ensure that rescue and recovery workers, residents, students, and others suffering from health consequences related to the World Trade Center disaster have access to the medical monitoring and treatment they need. We will never forget the selfless courage demonstrated by the firefighters, police officers, and first-responders who risked their lives to save others. I believe this is a critical step for those who continue to bear the physical scars of those attacks.¹

In this statement Obama lauds the legislation and speaks to its strengths and importance. There is no attempt by Obama to reinterpret sections of the bill or to direct implementation in a certain way.

In contrast, Obama issued a constitutional signing statement on the Ike Skelton National Defense Authorization Act for Fiscal Year 2011:

Today I have signed into law H.R. 6523, the "Ike Skelton National Defense Authorization Act for Fiscal Year 2011." The Act authorizes funding for the defense of the United States and its interests abroad, for military construction, and for national security-related energy programs.

Section 1032 bars the use of funds authorized to be appropriated by this Act for fiscal year 2011 to transfer Guantanamo detainees into the United States, and section 1033 bars the use of certain funds to transfer detainees to the custody or effective control of foreign countries unless specified conditions are met. Section 1032 represents a dangerous and unprecedented challenge to

¹<http://www.presidency.ucsb.edu/ws/index.php?pid=88877>

critical executive branch authority to determine when and where to prosecute Guantanamo detainees, based on the facts and the circumstances of each case and our national security interests. The prosecution of terrorists in Federal court is a powerful tool in our efforts to protect the Nation and must be among the options available to us. Any attempt to deprive the executive branch of that tool undermines our Nation's counterterrorism efforts and has the potential to harm our national security.

With respect to section 1033, the restrictions on the transfer of detainees to the custody or effective control of foreign countries interfere with the authority of the executive branch to make important and consequential foreign policy and national security determinations regarding whether and under what circumstances such transfers should occur in the context of an ongoing armed conflict. We must have the ability to act swiftly and to have broad flexibility in conducting our negotiations with foreign countries. The executive branch has sought and obtained from countries that are prospective recipients of Guantanamo detainees assurances that they will take or have taken measures reasonably designed to be effective in preventing, or ensuring against, returned detainees taking action to threaten the United States or engage in terrorist activities. Consistent with existing statutes, the executive branch has kept the Congress informed about these assurances and notified the Congress prior to transfers. Requiring the executive branch to certify to additional conditions would hinder the conduct of delicate negotiations with foreign countries and therefore the effort to conclude detainee transfers in accord with our national security.

Despite my strong objection to these provisions, which my Administration has consistently opposed, I have signed this Act because of the importance of authorizing appropriations for, among other things, our military activities

in 2011. Nevertheless, my Administration will work with the Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future.²

While this statement, particularly in the last paragraph, has some rhetorical elements, Obama clearly takes specific issue with and advances an interpretation of specific provisions of the law.

B.2 Specifically Challenged Sections

Ostrander and Sievert (2013a) also provide data on the number of sections of legislation challenged in a signing statement, which I use as one of the dependent variables in my analyses in Chapter 6. I updated the data through Obama's first term using their coding standards. This count variable is determined as the number of sections explicitly mentioned in the signing statements. Usually, presidents will specifically mention the section number or name of the section of legislation with which they take issue. Vague references to problematic provisions will not be picked up in this count.

For an example, in the Ike Skelton defense bill signing statement mentioned above, Obama challenged two specific sections of the legislation, Sections 1032 and 1033. Below, I reproduce the signing statement text, underlining the specific section mentioned and its challenge by the president.

Today I have signed into law H.R. 6523, the "Ike Skelton National Defense Authorization Act for Fiscal Year 2011." The Act authorizes funding for the defense of the United States and its interests abroad, for military construction, and for national security-related energy programs.

Section 1032 bars the use of funds authorized to be appropriated by this Act for fiscal year 2011 to transfer Guantanamo detainees into the United

²<http://www.presidency.ucsb.edu/ws/index.php?pid=88886>

States, and section 1033 bars the use of certain funds to transfer detainees to the custody or effective control of foreign countries unless specified conditions are met. Section 1032 represents a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees, based on the facts and the circumstances of each case and our national security interests. The prosecution of terrorists in Federal court is a powerful tool in our efforts to protect the Nation and must be among the options available to us. Any attempt to deprive the executive branch of that tool undermines our Nation's counterterrorism efforts and has the potential to harm our national security.

With respect to section 1033, the restrictions on the transfer of detainees to the custody or effective control of foreign countries interfere with the authority of the executive branch to make important and consequential foreign policy and national security determinations regarding whether and under what circumstances such transfers should occur in the context of an ongoing armed conflict. We must have the ability to act swiftly and to have broad flexibility in conducting our negotiations with foreign countries. The executive branch has sought and obtained from countries that are prospective recipients of Guantanamo detainees assurances that they will take or have taken measures reasonably designed to be effective in preventing, or ensuring against, returned detainees taking action to threaten the United States or engage in terrorist activities. Consistent with existing statutes, the executive branch has kept the Congress informed about these assurances and notified the Congress prior to transfers. Requiring the executive branch to certify to additional conditions would hinder the conduct of delicate negotiations with foreign countries and therefore the effort to conclude detainee transfers in accord with our national security.

Despite my strong objection to these provisions, which my Administration has consistently opposed, I have signed this Act because of the importance of authorizing appropriations for, among other things, our military activities in 2011. Nevertheless, my Administration will work with the Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future.³

³<http://www.presidency.ucsb.edu/ws/index.php?pid=88886>

Bibliography

- Alito, Samuel A. 1986. Letter to The Litigation Strategy Working Group. In *Office of the Deputy Assistant Attorney General*.
- Arnold, R.D. 1990. *The Logic of Congressional Action*. Yale University Press.
- Bachrach, Peter and Morton S Baratz. 1962. “Two Faces of Power.” *American Political Science Review* 56(04):947–952.
- Bates, Douglas, Martin Maechler, Ben Bolker and Steven Walker. 2014. *lme4: Linear mixed-effects models using Eigen and S4*. R package version 1.1-7.
URL: <http://CRAN.R-project.org/package=lme4>
- Bonica, Adam. 2013. “Ideology and interests in the political marketplace.” *American Journal of Political Science* 57(2):294–311.
- Cameron, C. and N. McCarty. 2004. “Models of Vetoes and Veto Bargaining.” *Annual Review of Political Science*. 7:409–435.
- Cameron, C.M. 2000. *Veto Bargaining: Presidents and the politics of negative power*. Cambridge University Press.
- Clinton, Joshua, Simon Jackman and Douglas Rivers. 2004. “The Statistical Analysis of Roll Call Data.” *American Political Science Review* 98(02):355–370.
- Cooper, P.J. 2005. “George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements.” *Presidential Studies Quarterly* 35(3):515–532.
- Cox, G.W. and M.D. McCubbins. 2005. *Setting the Agenda: Responsible Party Government in the US House of Representatives*. Cambridge University Press.
- Devins, N. 2007. “Signing Statements and Divided Government.” *Wm. & Mary Bill Rts. J.* 16:63.
- Evans, K. 2011. “Challenging Law: Presidential Signing Statements and the Maintenance of Executive Power.” *Congress & the Presidency* 38(2):217–234.
- Fenno, R.F. 1973. *Congressmen in Committees*. Little, Brown Boston.
- Gelman, Andrew and Jennifer Hill. 2007. *Data Analysis Using Regression and Multilevel/Hierarchical Models*. Cambridge University Press.

- Groseclose, Tim and Nolan McCarty. 2001. "The Politics of Blame: Bargaining Before an Audience." *American Journal of Political Science* pp. 100–119.
- Hall, R.L. 1996. *Participation in Congress*. Yale University Press.
- Halstead, T.J. 2006. Presidential signing statements: Constitutional and institutional implications. In *DTIC Document*.
- Hamilton, Alexander, James Madison and John Jay. 1787. *The Federalist Papers*. Oxford University Press.
- Howell, W.G. 2003. *Power without Persuasion: The Politics of Direct Presidential Action*. Princeton University Press.
- Howell, W.G. 2005. "Unilateral powers: A Brief Overview." *Presidential Studies Quarterly* 35(3):417–439.
- Jones, C.O. 2005. *The Presidency in a Separated System*. Brookings Institute Press.
- Kelley, C.S. 2003. "The Unitary Executive and the Presidential Signing Statement." *Unpublished Dissertation*.
- Kelley, C.S. 2007. "The Law: Contextualizing the Signing Statement." *Presidential Studies Quarterly* 37(4):737–748.
- Kelley, C.S. and B.W. Marshall. 2008. "The Last Word: Presidential Power and the Role of Signing Statements." *Presidential Studies Quarterly* 38(2):248–267.
- Kelley, C.S. and B.W. Marshall. 2009. "Assessing Presidential Power." *American Politics Research* 37(3):508–533.
- Kelley, C.S. and B.W. Marshall. 2010. "Going it Alone: The Politics of Signing Statements from Reagan to Bush II*." *Social Science Quarterly* 91(1):168–187.
- Kepplinger, Gary L. 1985. Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriations Acts. In *United States Government Accountability Office*.
- Kernell, S. 1997. *Going Public: New Strategies of Presidential Leadership*. CQ Press.
- King, Gary. 2013. *A Solution to the Ecological Inference Problem: Reconstructing Individual Behavior from Aggregate Data*. Princeton University Press.
- Krehbiel, Keith. 1998. "Pivotal politics: A theory of US lawmaking." *Chicago, IL: University of Chicago*.
- Leahy, Patrick. 2006. Opening Statement of The Honorable Patrick Leahy. In *Executive Business Meeting of Judiciary Committee*.
- Light, Paul C. 2004. "Fact Sheet on the Presidents Domestic Agenda." *Brookings Institution, October 12*.

- Light, Paul Charles. 1982a. *The President's Agenda: Domestic Policy Choice from Kennedy to Carter*. Johns Hopkins University Press Baltimore.
- Light, Paul Charles. 1982b. *The President's Agenda: Domestic Policy Choice from Kennedy to Clinton*. Johns Hopkins University Press Baltimore.
- Locke, John. 1689. *Second treatise of government*. Hackett Publishing.
- Lowande, Kenneth S and Sidney M Milkis. 2014. "We Cant Wait: Barack Obama, Partisan Polarization and the Administrative Presidency." *The Forum* 12(1):3–27.
- Martin, Andrew D., Kevin M. Quinn and Jong Hee Park. 2011. "MCMCpack: Markov Chain Monte Carlo in R." *Journal of Statistical Software* 42(9):22.
URL: <http://www.jstatsoft.org/v42/i09/>
- Mayhew, D. 1974. "The Electoral Connection." *New Haven: Yale University* .
- Mayhew, David R. 1991. *Divided we govern*. Yale University.
- McCarty, N.M. 1997. "Presidential Reputation and the Veto." *Economics & Politics* 9(1):1–26.
- Meese, Edwin. 1985. Letter to Dwight D. Opperman, President and CEO of West Publishing Company. In *Office of the Attorney General*.
- Milkis, Sidney M. 1993. *The president and the parties: The transformation of the American party system since the New Deal*. Oxford University Press.
- Milkis, Sidney M and Michael Nelson. 2011. *The American Presidency: Origins and Development, 1776-2011*. Cq Press.
- Moe, T.M. and W.G. Howell. 1999a. "The Presidential Power of Unilateral Action." *Journal of Law, Economics, and Organization* 15(1):132–179.
- Moe, T.M. and W.G. Howell. 1999b. "Unilateral Action and Presidential Power: A Theory." *Presidential Studies Quarterly* 29(4):850–873.
- Neustadt, R.E. 1991. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. Free Press.
- Obama, Barack. 2009. Memorandum on Presidential Signing Statements. In *Administration of Barack H. Obama*.
- Ostrander, Ian and Joel Sievert. 2013a. "The Logic of Presidential Signing Statements." *Political Research Quarterly* 66(1):141–153.
- Ostrander, Ian and Joel Sievert. 2013b. "What's So Sinister about Presidential Signing Statements?" *Presidential Studies Quarterly* 43(1):58–80.
- Ostrander, Ian and Joel Sievert. 2014. "Presidential Signing Statements and the Durability of the Law." 41(3):362–383.

-
- Palazzolo, Daniel J. and Katelyn A. Lawrenz. n.d. "Between the Parties: The Making of the USA Patriot Act." *Unpublished Manuscript* .
- Pfiffner, J.P. 2008. "The Contemporary Presidency Constraining Executive Power: George W. Bush and the Constitution." *Presidential Studies Quarterly* 38(1):123–143.
- Poole, Keith T and Howard Rosenthal. 1997. *Congress: A Political-Economic History of Roll Call Voting*. Oxford University Press.
- Poole, Keith T and Howard Rosenthal. 2000. *Congress: A Political-Economic History of Roll Call Voting*. Oxford University Press.
- R Development Core Team. 2008. *R: A Language and Environment for Statistical Computing*. Vienna, Austria: R Foundation for Statistical Computing. ISBN 3-900051-07-0.
URL: <http://www.R-project.org>
- Ragsdale, Lyn. 2014. *Vital Statistics on the Presidency: The definitive source for data and analysis on the American Presidency*. CQ Press.
- Rice, L.L. 2010. "Statements of Power: Presidential Use of Statements of Administration Policy and Signing Statements in the Legislative Process." *Presidential Studies Quarterly* 40(4):686–707.
- Rodriguez, Daniel B., Edward Stiglitz and Barry R. Weingast. 2015. "Executive Discretion and the Rule of Law: A Positive Analysis of Presidential Signing Statements." *Unpublished Manuscript* .
- Rudalevige, Andrew. 2005. *The new imperial presidency: Renewing presidential power after Watergate*. University of Michigan Press.
- Savage, C. 2007. *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. Little, Brown and Company.
- Schickler, E. 2001. *Disjointed Pluralism: Institutional Innovation and the Development of the US Congress*. Princeton University Press.
- Seeley, Jeremy M. 2008. "How the Signing Statement Thought it Killed the Veto; How the Veto May Have Killed the Signing Statement." *BYU J. Pub. L.* 23:167.
- Smith, S.S. and T.F. Remington. 2001. *The Politics of Institutional Choice: The Formation of the Russian State Duma*. Princeton University Press.
- Tarr, Ralph. 1985. Memorandum for T. Kenneth Cribb Re: Presidential Signing Statements. In *Office of the Assistant Attorney General*.
- Thrower, Sharece. n.d.a. "Considering the Court: Limits to the President's Use of Signing Statements." *Unpublished Manuscript* .

- Thrower, Sharece. n.d.b. "Inter-Branch Conflict and Policy Implementation: Instructing Agencies with Presidential Signing Statements." *Unpublished Manuscript* .
- Whitford, Andrew B. 2012. "Signing statements as bargaining outcomes: Evidence from the administration of George W. Bush." *Presidential Studies Quarterly* 42(2):343–362.
- Wildavsky, Aaron. 1998. "The Two Presidencies." 35(2):23–31.