

Presidential Signing Statements and Separation of Powers Politics

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ABSTRACT

Research on presidential policymaking tends to mostly focus on the ways in which congressional actors shape executive decisions. Yet, the judiciary and bureaucracy are crucial in sustaining presidents' direct actions. Accordingly, this paper considers how both influence the use of signing statements through the president's desire to impact the interpretation and implementation of the law. By empirically testing Thrower's (2019) formal model, I find that presidents are more likely to issue constitutional signing statements when ideologically aligned with both the Supreme Court and Congress, i.e. when opposition from these two branches of government is less imminent. Building off theories of delegation, I also find that presidents are more likely to issue agency signing statements when bureaucratic drift is the most likely — that is, when the responsible agency is ideologically distant, independent, and granted sufficient discretion. Overall, this study demonstrates that both inter- and intra-branch dynamics are important for understanding presidential policymaking.

Keywords: Executive power; presidency; separations of power; policymaking; signing statements

Introduction

Resting on their constitutional duty to “take care that the Laws be faithfully executed” (US Constitution, Article I, Section 3), modern presidents have come

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to rely on a variety of measures to directly influence the policymaking process. Such tools of direct executive action — including executive orders, memorandum, proclamations, and executive agreements — allow presidents to leave their mark on public policy. But, what motivates these presidential actions? Given their ability to potentially create policy outside of the traditional legislative process, the answer for many in the both public and academic spheres usually lies with Congress. Presidents, as the prevailing conventional wisdom goes, use these kinds of directives to circumvent unfriendly or unproductive congresses. Accordingly, executive policymaking scholars frequently examine how partisan or ideological battles between these two branches of government motivate direct presidential action. Although they typically find evidence that modern presidents are constrained in the exercise of these powers (e.g., Belco and Rottinghaus, 2017; Howell, 2003; Lowande, 2014), other scholars recognize that intra-legislative barriers might inhibit these constraints as well (Bolton and Thrower, 2016; Brockway and Hollibaugh, 2018; Chiou and Rothenberg, 2017).

Congress, however, is not the only institution that can impact the president's decisions. Both the courts and executive branch agencies are crucial to the effectiveness of presidential direct actions. Unilateral directives, such as executive orders, can and have been challenged in court, where judges have the final say in whether these actions will remain a part of the law. The judiciary, furthermore, determines what constitutes the meaning of the law — which may or may not include the president's interpretations depending on their ruling. Additionally, presidential actions must be carried out by a vast array of expert agencies, all of which have varying degrees of independence and ideologies. Such implementation may consequently result in final policies that are inconsistent with the president's own preferences. Both courts and agencies should therefore be critically influential in shaping the president's strategies when using these policymaking tools. Yet, less attention is given to their role in motivating presidential direct action in a literature largely focused on congressional catalysts.

Scholars do widely recognize the many constitutional and legal questions surrounding various presidential actions (e.g., Cooper, 2014), with some studies examining the political factors that determine judicial decision-making on cases related to executive power (Smith, 2007; Yates, 1999, 2002; Yates and Whitford, 1998). Less research, however, actually explores how presidents might anticipate constraints from the judiciary when engaging in these powers (see Thrower, 2017, 2019). Likewise, a growing number of studies consider presidential decisions regarding agency design, structure, or appointments (Hollibaugh and Rothenberg, 2018; Lewis, 2003, 2008). Yet, few study how these agency differences might ultimately shape the way presidents choose to direct them — despite evidence that agencies can greatly influence the formulation and implementation of presidential directives (Kennedy, 2015; Rudalevige, 2012, 2015).

In this paper, I examine how both the Supreme Court and executive branch agencies motivate presidential direct action by examining the case of signing statements. Given presidents' desire to influence both the judicial interpretation and bureaucratic implementation of the law through their objections and instructions (Dellinger, 1993; Devins, 2007; Thrower, 2019), signing statements are an appealing tool to study these institutional forces. Like the literature more broadly, empirical research on signing statements has predominately centered on their use in the face of congressional opponents (Kelley and Marshall, 2008, 2009, 2010; Kennedy, 2014; Ostrander and Sievert, 2012). Thrower (2019), however, offers one of the only theoretical accounts of signing statements that incorporates the Supreme Court into the president's calculus. But, no empirical study to date has engaged the role of either the judiciary or bureaucracy.

Accordingly, I empirically test the inter-branch predictions from Thrower's model, while also developing additional ones related to the use of signing statements to direct agencies. Thrower (2019) predicts that presidents are more likely to issue a signing statement raising constitutional objections when they are ideologically close to both the Supreme Court and Congress. With respect to the former, she argues that presidents anticipate that a friendly judiciary will tend to side with their position in a signing statement. At the same time, oppositional congresses can either head off signing statements or retaliate — therefore prompting presidents to issue them more often when the legislature is also on their side. Building from theories of delegation, I argue that presidents can also use instructions in signing statements to redirect agencies that are at the greatest danger of implementing policies counter to presidential preferences. As such, I predict that agency signing statements are more likely to occur on legislation where the implementing agency is ideologically distant from the president — particularly when it maintains a high degree of independence and discretion. Using a dataset of all legislation passed between 1981 and 2012, I examine the probability of a constitutional and agency signing statement, finding support for these predictions.

Overall, this study demonstrates that presidents are concerned with politics beyond the halls of Congress when strategizing their policymaking actions. Both the courts and executive branch agencies are important determinants in presidential decision-making. Intra-branch dynamics, between the president and her agencies, as well as inter-branch dynamics amongst all three arms of the government, are both crucial in truly understanding the reach and limitations of presidential power. The remainder of this paper proceeds as follows. Section "Background" provides background information on presidential signing statements. Section "The Politics of Presidential Signing Statements" engages in the separation of powers literature to produce testable predictions on the influence of intra- and inter-branch dynamics on signing statements. Following a description of the data (Section "Data and Methods"), these

predictions are empirically tested in Section “Results”. I conclude by discussing the implications and possible future research questions in the final section (“Section Discussion and Conclusion”).

Background

Article I, Section 7, Clauses 2 and 3 of the Constitution, commonly known as the Presentment Clause, delineates the process by which a bill is to become federal law. Following its passage in both chambers, the bill is presented to the president who: “if he approve he shall sign it, but if not shall return it.” This clause thereby specifies the procedures for a veto if a president disapproves the bill. Nowhere in the Constitution, however, does it mention a signing statement — even though this presidential tool has become integrally associated with the legislative process over the last couple of decades.

Signing statements are not the only presidential power absent from constitutional texts. Presidents have employed other means of direct action, such as executive orders, proclamations, memorandum, and executive agreements, based on their inherent power to faithfully execute the law as head of the executive branch. Presidents likewise justify their use of signing statements in the same way, but less is known historically about their use as compared to these other types of direct actions. So, the remainder of this section asks: What are signing statements? How did they originate and develop over time? What explains their use?

Definition and Functions

In general, signing statements are statements written by the president that accompany a bill she is signing into law. They serve a variety of purposes, with their tone ranging from neutral to defiant (see Kelley *et al.*, 2013). On the neutral or positive side, these statements can summarize a bill’s contents or offer words of gratitude, praise, and congratulations to members of Congress. Presidents may show their support for the bill, often highlighting the benefits of particular sections. Scholars have generally categorized these as rhetorical signing statements (e.g., Kelley and Marshall, 2008).

In the more negative vein, presidents can also use these statements to express concerns or reservations about all or parts of the bill. Sometimes, they leave it at that and such statements are still viewed as largely rhetorical in nature. Other times, presidents take a more defiant approach in their objections by vowing to ignore problematic sections of the bill. They most often object to the section on the basis that it violates the Constitution in some way. Presidents often assert that they will interpret the unconstitutional section differently or give agencies instructions on how to implement it in a

manner that is more constitutionally appropriate. Political scientists have coined these types of statements as constitutional signing statements (Kelley and Marshall, 2008). Many legal scholars have questioned whether signing statements themselves are a violation of the Constitution. It is debatable as to whether presidents have the authority to ignore the law and if signing statements encroach upon the power of Congress and the courts (Broomfield, 2006; Butzman, 2007; Cass and Strauss, 2007; Crabb, 2008; Garber and Wimmer, 1987; Rappaport, 2007). They are commonly likened to line item vetoes, which were deemed unconstitutional in *New York v. Clinton* (1997).

Why do presidents feel empowered to issue such controversial statements? Modern presidents justify their ability to object to the law with the unitary executive theory, which asserts that presidents have the independent authority to interpret the Constitution and maintain a duty to ignore constitutional violations or intrusions upon executive power by the other branches of government (Barilleaux and Kelley, 2010). In fact, presidents' objections within signing statements frequently evoke this sort of language. They often claim that sections of the law infringe upon their constitutional ability to "take care that the Laws be faithfully executive" or their duty as the head of the executive branch or Commander in Chief. Presidents commonly find reporting requirements or legislative vetoes within bills, for instance, as violations of these constitutional roles. Where, then, did this power originate?

Developments in the Use of Signing Statements Over Time

Though the first signing statement was penned by James Monroe (Kelley, 2007), these statements were only sporadically issued until the mid-twentieth century. Figure 1 shows the total number of signing statements issued every year between 1929 and 2018. Presidents prior to Truman rarely relied on this power, issuing an average of just three signing statements per year. Following 1945, however, their use started to increase in comparison to previous decades. Signing statements slightly retrenched in the late 1950s, but spiked in the mid-1960s under the Johnson presidency. Since then, they have fluctuated and reached a peak of 91 statements issued by Carter in 1980. Overall usage declined throughout the 2000s, but has somewhat resurged during the early years of the Trump presidency.

Despite these patterns, the total number of signing statements can mask the manner in which this tool has been used over time — particularly with the advent of the modern presidency. Scholars widely recognize Ronald Reagan as the first president to systematically use signing statements to expand presidential power and advance policy goals through administration (Cooper, 2005; Kelley, 2006, 2007; Pfiffner, 2008). His attorney general, Edwin Meese III, successfully advocated for their inclusion in legislative histories, in the hopes that the courts might consider the president's position when interpreting the

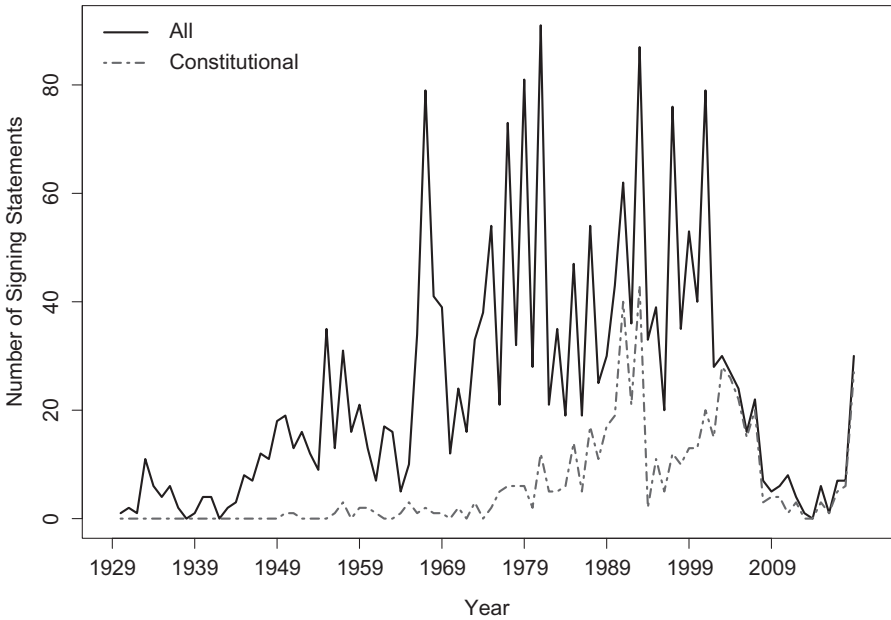


Figure 1: Number of signing statements over time, 1929–2018.

Data collected from The American Presidency Project.

law. Samuel Alito, Reagan’s Deputy Assistant Attorney General in the Office of Legal Counsel, drafted a 1986 memo that expressed the administration’s intentions for using signing statements to express the president’s interpretation of the law to the courts (Alito, 1986). Furthermore, Reagan was the first president to explicitly evoke the unitary executive as a justification for ignoring the law in a 1987 signing statement:

“If this provision were interpreted otherwise, so as to require the President to follow the orders of a subordinate, it would plainly constitute an unconstitutional infringement of the President’s authority as head of a unitary executive.”¹

Such language has become commonplace in signing statements. Accordingly, presidents since Reagan have increasingly issued more signing statements raising constitutional objections over time, as shown in Figure 1. The first

¹Ronald Reagan. September 29, 1987. “Statement on the Bill to Increase the Federal Debt Ceiling.” By Gerhard Peters and John T. Woolley, the American Presidency Project. <https://www.presidency.ucsb.edu/documents/statement-signing-the-bill-increase-the-federal-debt-ceiling>.

constitutional objection occurred in 1949. These kinds of statements slowly increased until the more rapid expansion during the Reagan presidency. He issued more constitutional signing statements (80) than any prior president combined (64). Their use continued to increase under the George H.W. Bush's administration, but declined during the Clinton years. George W. Bush became notorious for his use of constitutional signing statements, as reflected in their increase during his first six years of office. Additionally, Bush far surpasses the previous administrations when examining the number of constitutional objections by president in Figure 2. He issued an average of 143 constitutional objections per year, while the average prior to 2001 was 14 (the average was 30 between 1981 and 2000). Reagan doubled the number of objections over Carter, while this number increased even more dramatically under George H.W. Bush and then declined under Clinton — consistent with Figure 1.

Notably, the use of constitutional statements and objections decreased during the last two years of the Bush administration and continued to decline throughout the Obama presidency. The beginning of Trump's term has marked a rise in constitutional signing statements once again. In his first two years in office, Trump has already surpassed the average number of objections per year from George W. Bush at 158.

Modern presidents appear to be devoting the majority of their signing statements for constitutional objections, rather than for rhetorical purposes. In fact, 80%, 54%, and 88% of signing statements issued by presidents George W. Bush, Obama, and Trump, respectively, raised constitutional objections. In

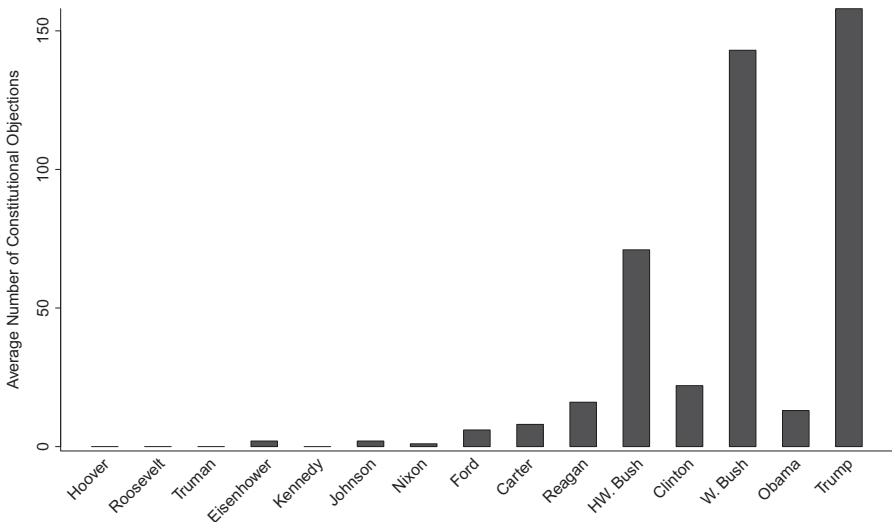


Figure 2: The average number of constitutional objections per year.

comparison, this percentage ranges from 23% to 54% under Reagan, Clinton, and George H.W. Bush. Prior to Reagan, only 4% of signing statements were constitutional in nature. These patterns suggest a transformation of the signing statement into a controversial presidential tool, with its use varying significantly over time across and within administrations. So, what explains this variation?

Explaining the Variation in Signing Statement Use

Prior to the early 2000s, little was known about presidential signing statements amongst both academics and the public. George W. Bush's presidency, however, brought a flood of negative media attention surrounding his use of this now controversial tool. Not long after, the study of signing statements in political science also flourished. Most of this literature considers the president's partisan or ideological relationship with Congress as the main impetus for signing statements, though producing null, mixed, or inconsistent findings (Berry, 2009; Evans, 2011; Kelley and Marshall, 2008, 2009, 2010; Kennedy, 2014; Ostrander and Sievert, 2013; Sievert and Ostrander, 2017).

An executive–legislative perspective is not unique to the study of signing statements, however, but endemic to the broader literature on presidential policymaking — where the recurring question is whether presidents use their powers to bypass Congress or if they are in fact constrained (e.g., Cameron, 2000; Howell, 2003; Lowande, 2014; Yackee and Yackee, 2009). Yet, legislators and committees are not the only political forces that impact presidential decision-making. The judiciary and executive branch agencies both have considerable clout in determining the effectiveness of presidents' direct actions in achieving their policy goals. Thus, both of these actors weigh heavily in presidential strategies for policymaking actions, though they are not equitably represented in this literature. The remainder of this paper considers how both inter- and intra-executive branch politics can influence presidential signing statements.

The Politics of Presidential Signing Statements

It may come as no surprise that presidents seek to pursue their policy goals through the use of various direct actions in the policymaking process (e.g., Cooper, 2014; Howell, 2003; Moe and Howell, 1999); and signing statements are no exception. In general, there are two primary ways in which presidents seek to influence policymaking with signing statements — through both the *interpretation* and *implementation* of the law. With these avenues in mind, I consider how both the courts and executive branch agencies are instrumental in the president pursuing her policy goals and speculate about how each of these actors influences the use of signing statements.

Presidential Signing Statements and Inter-branch Politics

First, signing statements can influence the *interpretation* of the law. When objecting to sections of the law, presidents highlight certain constitutional defects and offer their own view on how it should be interpreted to avoid such violations. Many argue that presidents, at least since Reagan, write signing statements in the hopes that the courts will rely on their interpretation of the law if reviewed (Alito, 1986; Cooper, 2014; Dellinger, 1993; Devins, 2007). In fact, Reagan's attorney general Edwin Meese III successfully campaigned to include signing statements in legislative histories — which courts consider when interpreting the intent of the law — for this very purpose in 1987. Furthermore, presidents may even issue signing statements in order to spur litigation (Cooper, 2014). Although there is some limited evidence that courts have directly cited signing statements (Thrower, 2019), judges may still indirectly consult them in legislative histories. Further research is needed to systematically evaluate the direct and subtle effects of signing statements in the judicial review of legislation. Even so, there is more scholarly consensus around presidents' intentions for issuing signing statements with judicial interpretation in mind.

That being said, few theoretical or empirical accounts of presidential policymaking incorporate the courts. Thrower (2019) offers one of the only theoretical accounts of how the Supreme Court might influence the use of constitutional signing statements through a formal model of lawmaking where all three branches of government bargain over policy in a one-dimensional space. In her model, presidents can choose to either sign, veto, or issue a signing statement following the passage of a bill. The Supreme Court then decides the outcome of the case based upon the law, the signing statement, and the status quo. Overall, Thrower (2019) finds that constitutional signing statements are more likely to occur when the president is ideologically aligned with both the Court and Congress.² She argues that the Court is more likely to side with the president's position if it shares her ideology, thus incentivizing presidents to rely more heavily on this tool when facing a friendly judiciary. Furthermore, signing statements might increase the likelihood of judicial review by raising the salience of the bill or bringing attention to litigants concerning its constitutional defects; so, presidents may not want to garner this attention if the judicial outcome will be unfavorable.

Likewise, Thrower (2019) argues that Congress may take measures to avoid legislation that would spawn signing statements from ideologically distant

²Specifically, her model shows that signing statements only occur when both the Court and Congress prefer the location of the signing statement (at the president's ideal point) to the status quo. If one of these conditions does not hold, presidents will not issue a statement. Thus, the president's relative proximity to each actor are both necessary conditions for a signing statement.

presidents who may move policy too much in the extreme. This prediction is also consistent with the notion that Congress can retaliate against unfavorable executive actions through a variety of statutory and non-statutory means, thus inducing presidents to moderate their behavior when facing legislative opponents (e.g., Bolton and Thrower, 2016; Chiou and Rothenberg, 2017). Indeed, Congress tends to increase its oversight activity of the executive branch in response to constitutional signing statements and during divided government (Ainsworth *et al.*, 2012). Presidents, therefore, might be wary of issuing signing statements when congressional retaliation is more likely. Taken together, Thrower's (2019) prediction states:

The Inter-branch Alignment Prediction: The president is more likely to issue a signing statement when he is ideologically aligned with both the Court and Congress (p. 13).³

Presidential Signing Statements and Intra-branch Politics

The second way presidents want to use signing statements to influence policymaking is through *implementation* (Dellinger, 1993; Devins, 2007). These statements often provide agencies with instructions on how to implement the law, which can sometimes clarify ambiguous sections or run counter to congressional intent. These dynamics reflect a larger tug-of-war between Congress and the president over the executive branch. With the crucial responsibility of translating the law into actual policy, the question of who controls the bureaucracy and its policymaking actions has in fact long consumed academic inquiries (e.g. Hammond and Knott, 1996; Moe, 1985; Rogowski, 2016). Since agencies hold their own policy preferences they seek to pursue (Bonica *et al.*, 2015; Chen and Johnson, 2014; Ferejohn and Shipan, 1990; Hollibaugh and Rothenberg, 2018), presidents and legislators have incentives to direct their activities in order to obtain policy outcomes that more closely reflect their own ideological preferences and thus prevent bureaucratic drift. And both branches of government have the means to do so.

In general, executive branch agencies must rely on discretion when implementing the law, or else face judicial intervention (Thrower, 2017). Statutes are their primary source of discretion, with Congress having the ability to select which agencies to delegate to and the degree of discretion to grant. Congress generally delegates to agencies that are ideologically proximate and therefore more likely to implement policy according to its preferences (Bendor and Meirowitz, 2004; Epstein and O'Halloran, 1999). The president can likewise give his own instructions to agencies on how to implement policy, through

³This prediction, renamed here to distinguish it from later predictions in this paper, is found on p. 13 of Thrower (2019).

various instruments of direct action such as executive orders or memorandum, in an effort to exert her own influence over agency actions and policy implementation.

In the case of signing statements, presidents are presented with the opportunity to respond to Congress's instructions to agencies with a set of their own. If Congress gives authority to an agency which holds policy preferences counter to that of the president in the bill, she can issue a signing statement with alternative instructions to prevent unfavorable policy outcomes from being implemented. In this way, signing statements can be used as a tool for the presidents to regain control over the executive branch from congressional influence (Devins, 2007). On the other hand, the president may not need to use these statements if the agency responsible for implementing the law already shares her policy goals. Accordingly, the first intra-branch prediction states:

President-Agency Alignment Prediction: The president is less likely to issue a signing statement when she is ideologically aligned with the agency responsible for implementing the law.

Other characteristics of the agency can increase the likelihood that they can implement policies away from presidential preference, thus swaying the use of agency-directed signing statements. First, the agency's independence can determine the degree to which presidents need to exert these supplementary instructions. If the agency responsible for implementing the law is under a high degree of presidential control, it is more likely to follow the desires of the president without additional prompting. Even if an agency's ideology does not directly align with that of the president, mechanisms such as the threat of removal or White House oversight can induce compliance. On the other hand, agencies that are highly independent from presidential control can more freely move policies away from the president's preferences if there is disagreement. Second, agencies with sufficient discretion have the most freedom to move policy as they choose, given they are less likely of being subsequently overturned by the courts. Without discretion, agencies are limited in their implementation activities, and thus do not require signing statements to redirect them. Taken together, presidents should be most concerned about bureaucratic drift from ideologically opposed agencies with ample discretion and independence. Thus, I argue in the final prediction that a conditional relationship exists between these three agency characteristics:

The Agency Characteristics Prediction: The president is more likely to issue a signing statement when the agency responsible for implementing the law is ideologically distant, independent, and granted high discretion from Congress.

Data and Methods

Dependent Variable

To test these predictions, I collect a dataset of all legislation passed between 1981 and 2012 from the Comparative Agendas Project (CAP). I omit the laws identified by CAP as commemorative, which includes the commissioning of holidays or the naming of post offices. From there, I collect all signing statements issued from the American Presidency Project and match them with the appropriate law during the same time period. Since Ronald Reagan is widely viewed as the first president to systematically use signing statements to advance presidential prerogatives (Cooper, 2005; Kelley, 2006; Pfiffner, 2008), I begin the analysis in 1981 — the first year of his presidency.⁴ In general, the dependent variable is an indicator for whether a signing statement was issued on a particular law. Specifically, I identify two types of signing statements to serve as separate dependent variables, in order to isolate the statements most relevant for each prediction.

I first identify constitutional signing statements to test the Inter-branch Alignment Prediction, because these are the most controversial ones and presidents tend to use these objections for the purposes of garnering the attention of the courts through their own interpretation of the law. A signing statement is coded as constitutional if it objects to any section of the law based on a violation of the Constitution. Of the 5,624 non-commemorative laws passed between 1981 and 2012, the president issued a constitutional signing statement on 7% of them. This dependent variable is coded as 1 if the law is accompanied by a constitutional signing statement and 0 otherwise.⁵

To test the intra-branch predictions, I identify those signing statements in which presidents give instructions to agencies on how to implement the law (“agency signing statements”). Naturally, these should be the signing statements in which presidents are the most responsive to agency characteristics. About 4% of all laws in the dataset were issued with an agency signing statement. This dependent variable is coded as 1 if the president issued an agency signing statement with the law and 0 otherwise.

⁴The analysis ends in 2012 because of limitations in the data availability of some of the independent variables described below, mainly the ideal point estimates.

⁵Given the infrequency of signing statements occurring on legislation, one may be concerned about selection bias. As such, I subset the analysis by narrowing the set of legislation to those deemed significant by different measures (e.g., Mayhew, 1991; Stathis, 2014). This analysis isolates those laws upon which presidents are already more likely to issue signing statements and thus should abate some of these issues of selection. The results of the empirical analysis in Section “Results” largely hold in these robustness checks. Future researchers could further address these concerns by using selection models.

Independent Variables of Interest

The main independent variables of interest for the Inter-branch Prediction is the president's ideological distance to both the Supreme Court and Congress, which I measure using Bailey's (2007) ideal point estimates available through 2012. Particularly, $D(\textit{President}, \textit{Court})$ is measured as the absolute distance between the president's ideal point and that of the Supreme Court median. The advantage of these ideal point estimates is that it allows the Court's ideal point to vary from year to year. Likewise, $D(\textit{President}, \textit{Congress})$ is the absolute distance between the president and median of Congress's ideal point, averaged across both chambers. Since the president's proximity to the Court and Congress are both necessary conditions for signing statement issuance in Thrower's (2019) model, I include the interaction ($D(\textit{President}, \textit{Court}) \times D(\textit{President}, \textit{Congress})$) to fully test this first prediction.

For the President–Agency Alignment Prediction, I rely upon the Bonica *et al.*'s (2015) ideal point estimates (BCJ) of political appointees, averaged across agencies, between 1987 and 2012. Though not on the same scale, both the Bailey and BCJ scores range from negative to positive values, which correspond to liberal to conservative ideologies. Using these ideal points, I construct a measure indicating the alignment between the agency and the president. To do so, I examined each piece of legislation in the dataset and identified which agency is primarily given responsibility over the subject matter in the law. This coding is primarily based on the agency mentioned the most times or given the most responsibility.⁶

Next, I coded these identified agencies as liberal (conservative) if they fall below (above) the median of the BCJ scores. I likewise assign presidents as liberal (conservative) if they fall below (above) zero in the Bailey scores. These assignments correspond to natural divisions of presidents between liberals and conservatives (i.e. Reagan, George H.W. Bush, and George Bush are conservative; Clinton and Obama are liberal). Finally, I create an indicator for whether the president and agency hold the opposite ideology. *President–Agency Divergence* is coded as 1 if the president is liberal (conservative) and the agency is conservative (liberal) and 0 if they hold the same ideology.

To test the Agency Characteristics Prediction, I measure the independence of the primary agency responsible for implementing the law, using scores estimated by Selin (2015). *Decision-Maker Independence* is the first dimension of her measure and is based on structural features related to personnel, such as term limits, candidate qualifications, for cause removal, or party balancing. *Policy Decisions Independence* is the second dimension that captures the degree of freedom in agency decisions, based on features such as various means of

⁶I was unable to identify a primary agency for about 24% of the laws in the dataset, mostly when Congress did not give responsibility to any executive branch agency. These cases drop out of the dataset for the intra-branch analysis.

White House oversight. For both dimensions, higher scores correspond to greater independence from the president, while lower scores reveal stronger presidential control over the agency.

Finally, I use Bolton and Thrower's (2019) measure of agency discretion based on the appropriations process. This measure yields an annual estimate of discretion for each agency in the House and the Senate, which I average across chambers for the analysis. I match this measure with the primary agency identified in each law in the dataset. While this does not capture the exact amount of discretion given to an agency within the law, it gives an estimate of the annual discretionary attitude Congress has towards that agency in a given year. Higher values correspond to greater perceived discretion of that agency.

Controls

I include a number of control variables that might also influence the occurrence of signing statements. First, I use an indicator for whether or not the law is identified as significant, based on Mayhew's (1991) updated list (*Significant Legislation*). Second, I include control variables for whether the legislation deals with foreign or defense policy (*Foreign-Defense Legislation*) and whether it is an appropriations law (*Appropriations Legislation*). All of these variables have been previously found to increase the probability of a signing statement (Evans, 2011; Kelley and Marshall, 2008, 2009, 2010; Ostrander and Sievert, 2012; Rice, 2010; Sievert and Ostrander, 2017). Third, I measure the logged number of pages in the law (*Logged Pages*). Longer laws simply provide presidents more sections in which to object.

Fourth, I use a measure of *Presidential Approval*, based on Gallup Poll data aggregated annually, to account for the possibility that presidents with higher public support are granted more leeway in pursuing their policy agendas (e.g., Beckmann, 2010), particularly through signing statements (Kennedy, 2014). Next, I include a within president trend variable, corresponding to 0 in the first year of their presidency, 1 in their second year, and so on. Previous literature on presidential policymaking has posited that different moments in a president's term (such as the beginning and end of term) can correspond to different strategies in using these policy tools (e.g., Mayer, 2001), based on factors such as the honeymoon period. Finally, I control for individual differences in signing statement use with presidential fixed effects.

Results

Inter-branch Politics Analysis

Table 1 reports the results of the empirical analysis testing the Inter-branch Politics Prediction. Across models without (Column 1) and with control variables

Table 1: Inter-branch politics and the probability of a constitutional signing statement.

	(1)	(2)
D(President, Court)	-7.09 (2.67)***	-5.92 (3.10)*
D(President, Congress)	-5.66 (2.07)***	-4.94 (2.36)**
D(President, Court) × D(President, Congress)	6.06 (2.41)**	4.61 (2.76)*
Significant Legislation		1.41 (0.23)***
Foreign-Defense Legislation		1.38 (0.28)***
Appropriations Legislation		2.06 (0.13)***
Presidential Approval		0.02 (0.01)***
Logged Pages		0.26 (0.04)***
Term Trend		0.09 (0.04)**
Intercept	4.36 (2.32)*	1.45 (2.83)
Presidential Fixed Effects	Yes	Yes
N	5,624	5,622

Coefficients of logit regression models reported with robust standard errors in parentheses.
 * $p < .10$, ** $p < .05$, two-tailed test.

(Column 2), the results reveal significant conditional effects of $D(\text{President, Court})$ and $D(\text{President, Congress})$ on signing statement use. For ease of interpretation, Figure 3 graphically depicts these results. Panel (a) shows the marginal effects of $D(\text{President, Court})$ on the probability of a constitutional signing statement on the y -axis, at varying levels of $D(\text{President, Congress})$ along the x -axis. When the president and Congress are the most ideologically aligned, the coefficient for $D(\text{President, Court})$ is negative and statistically significant. Specifically, a standard deviation increase in the president’s distance to the Supreme Court corresponds to a 28% decrease in the probability of a signing statement. Yet, as the president’s distance to Congress increases, the negative effect of $D(\text{President, Court})$ dissipates and becomes statistically insignificant. These results thus offer support for the Inter-branch Alignment Prediction. Presidents are more likely to issue constitutional signing statements as their distance to the Supreme Court decreases; however, this effect only holds if the president is also ideologically close to Congress.

Panel (b) of Figure 3 shows the marginal effects of $D(\text{President, Congress})$ on signing statements, at increasing levels of $D(\text{President, Court})$. Once again, ideological distance between the president and Congress is negatively correlated with signing statement use, but only when conditions are already favorable under low president–Court distance. Specifically, at the lowest levels of $D(\text{President, Court})$, a standard deviation increase in $D(\text{President, Congress})$

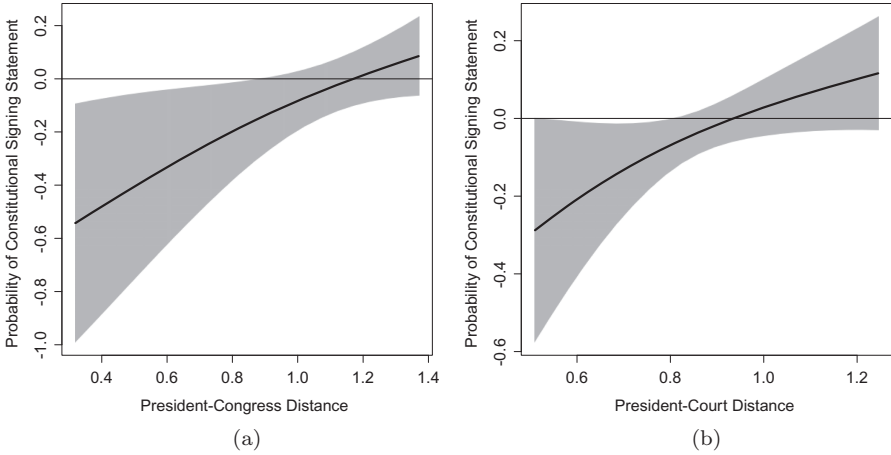


Figure 3: Marginal effects of inter-branch conflict on constitutional signing statements.

Panel (a) depicts the marginal effects of $D(\text{President}, \text{Court})$ on the probability of a constitutional signing statement at varying levels of $D(\text{President}, \text{Congress})$. Panel (b) depicts the marginal effects of $D(\text{President}, \text{Congress})$ on the probability of a constitutional signing statement at varying levels of $D(\text{President}, \text{Court})$. Shown with 95% confidence intervals.

Congress) corresponds to a 12% decrease in the likelihood the president issues a signing statement. These effects vanish, however, as the president becomes increasingly distant from the Supreme Court. Taken together, the president is the most likely to issue a signing statement when ideologically close to both Congress and the Supreme Court — in support of the Inter-branch Alignment Prediction.

With respect to the control variables, signing statements appear to be more likely on significant legislation, foreign or defense legislation, and laws related to appropriations. These results could reflect the salience of these areas that correlate with signing statements. Furthermore, presidents are usually given deference in foreign affairs (e.g., Wildavsky, 1966), which might empower them to issue these statements (Evans, 2011). Appropriations usually contain many stipulations opposed by the president, such as reporting requirements or legislative vetoes that can likewise prompt signing statements (Berry, 2009; Evans, 2011). As expected, longer bills increase the chances of a signing statement, which is likely due to a greater selection of potentially problematic sections. Higher presidential approval corresponds to more signing statements, reflecting the value in political capital when exercising policy powers (Beckmann, 2010). Finally, the likelihood of a signing statement tends to increase as the president’s term continues. This might relate to presidents feeling more freedom as they become closer to being a lame duck president.

Regardless of these controls, the influence of inter-branch relationships on the probability of constitutional signing statements remains robust.⁷

Intra-branch Politics

Next, I examine the effect of Intra-branch Politics on the probability of signing statements giving instructions to agencies. Table 2 shows the baseline effects of agency characteristics, with and without control variables. Across both of these specifications, presidents tend to be more likely to issue an agency signing statement on bills where the primary agency is of the opposing ideology, as evidenced by the positive and statistically significant coefficient on *President–Agency Divergence*. Consistent with the President–Agency Alignment Prediction, presidents are about 3% more likely to issue an instructive signing statement on bills where the agency holds opposing views, as compared to when the agency and president share an ideology. *Policy Decision Independence* and *Discretion* are negatively correlated with agency signing statements.

Table 2: Intra-branch politics and the probability of an agency signing statement.

	(3)	(4)
President-Agency Divergence	0.59 (0.22)***	0.58 (0.25)***
Decision-Maker Independence	-0.15 (0.21)	-0.12 (0.23)
Policy Decisions Independence	-0.47 (0.22)**	-0.41 (0.20)**
Discretion	-0.11 (0.07)	-0.22 (0.09)**
D(President, Court)		2.59 (1.64)
D(President, Congress)		-1.45 (0.78)*
Significant Legislation		-0.88 (0.52)*
Foreign-Defense Legislation		1.11 (0.40)***
Appropriations Legislation		-0.07 (0.28)
Presidential Approval		0.01 (0.01)
Logged Pages		0.89 (0.06)***
Term Trend		-0.06 (0.07)
Intercept	-1.56 (0.42)***	-3.90 (1.51)**
Presidential Fixed Effects	Yes	Yes
N	2,950	2,950

Coefficients of logit regression models reported with robust standard errors in parentheses. * $p < .10$, ** $p < .05$, two-tailed test.

⁷The results also hold when using negative binomial regression models counting the number of constitutional signing statements and objections as an alternative specification.

These effects, however, may be dependent upon the ideology of the agency — as previously argued and subsequently tested in the remainder of this section.

Specifically, Table 3 explores the conditional relationship between discretion, agency independence, and *President–Agency Divergence* in order to test the Agency Characteristics Prediction. Accordingly, this analysis interacts *Discretion* with both *Decision-Maker Independence* (Columns 1 and 2) and *Policy Decisions Independence* (Columns 3 and 4). I examine the effects of this interaction by subsetting the data by conditions when the president and agency are ideologically distant (*President–Agency Divergence* = 1) in Columns 1 and 3, and when they are aligned (*President–Agency Divergence* = 0) in Columns 2 and 4. Indeed, there is evidence of a conditional relationship between these various agency characteristics in the theoretically expected ways.

Specifically, when the primary agency in the bill is ideologically distant from the president, discretion and agency independence have significant and conditional effects on signing statement use. Figure 4 shows the marginal effects of *Decision-Maker Independence* on the probability of an agency signing statement, at varying degrees of *Discretion* along the x -axis. Panel (a) shows these effects when president–agency distance is high (*President–Agency Divergence* = 1), while panel (b) shows the effects when the president and agency are ideologically aligned (*President–Agency Divergence* = 0). Under president–agency disagreement, greater agency autonomy corresponds to a higher likelihood of signing statements when discretion is low. Particularly, at the lowest level of agency discretion, the probability of issuing an agency signing statement decreases by 19% for every standard deviation increase in *Decision-Maker Independence*.

As the agency discretion increases, however, the negative effect of independence on signing statements dampens and ultimately changes signs. In fact, when *Discretion* is at its highest, a standard deviation increase in *Decision-Maker Independence* corresponds to a 5% increase in the probability that the president issues a signing statement instructing agencies. Thus, agency independence only increases the use of agency signing statements if the responsible agency has been granted enough discretion to implement the law. If agency discretion is low, it is less able to move policy and thus less susceptible to agency signing statements. Yet, this relationship only holds for agencies that disagree ideologically with the president, and thus more prone to implement policy counter to presidential preferences. As Panel (b) of Figure 4 demonstrates, the effects of agency independence are insignificant across various levels of discretion when that agency is aligned with the president. These findings are the same when using *Policy Decisions Independence* as an alternative measure of independence (as shown in Columns 3 and 4). Overall, consistent with the Agency Characteristics Prediction, presidents are the most likely to use signing statements to instruct agencies with the greatest risk of drifting policy — those that are ideologically distant, highly independent, and granted

Table 3: The probability of an agency signing statement (interactions).

	(1)	(2)	(3)	(4)
Decision-Maker Independence	-2.81 (1.23)**	-2.21 (1.23)*	0.23 (0.38)	-0.30 (0.28)
Policy Decisions Independence	-0.44 (0.31)	-0.45 (0.27)*	-2.95 (1.26)**	-0.34 (1.16)
Discretion	-0.44 (0.31)	-0.25 (0.12)**	-0.41 (0.20)**	-0.28 (0.14)**
Discretion × Decision-Maker Independence	0.53 (0.21)**	0.34 (0.21)		
Discretion × Policy Decisions Independence			0.44 (0.20)**	-0.01 (0.22)
D(President, Court)	3.76 (4.01)	2.63 (1.78)	3.97 (3.60)	2.53 (1.79)
D(President, Congress)	-1.96 (1.77)	-1.59 (0.90)*	-2.02 (1.76)	-1.59 (0.90)*
Significant Legislation	0.38 (1.00)	-1.47 (0.61)**	0.30 (1.76)	-1.45 (0.61)**
Foreign-Defense Legislation	1.27 (0.89)	1.04 (0.47)**	1.44 (0.91)	1.04 (0.47)**
Appropriations Legislation	0.44 (0.70)	-0.13 (0.31)	0.53 (0.71)	-0.14 (0.31)
Presidential Approval	-0.02 (0.03)	0.01 (0.01)	-0.02 (0.03)	0.01 (0.01)
Logged Pages	0.81 (0.15)***	0.94 (0.06)***	0.78 (0.15)***	0.93 (0.06)***
Term Trend	-0.33 (0.18)*	-0.02 (0.08)	-0.34 (0.18)*	-0.02 (0.08)
Intercept	0.95 (3.78)	-4.09 (1.67)**	0.75 (3.59)	-3.89 (1.70)**
Subset	President-Agency Divergence = 1 Yes 361	President-Agency Divergence = 0 Yes 2581	President-Agency Divergence = 1 Yes 361	President-Agency Divergence = 0 Yes 2581
Presidential Fixed Effects				
N				

Coefficients of logit regression models reported with robust standard errors in parentheses. * $p < .10$, ** $p < .05$, two-tailed test.

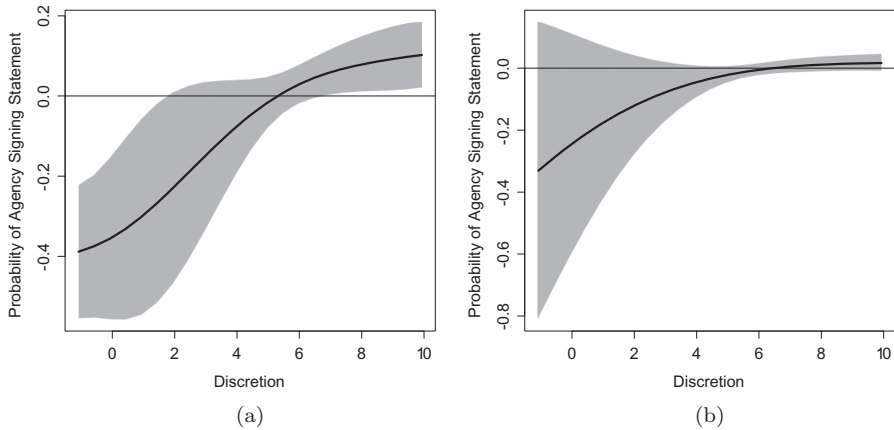


Figure 4: Marginal effects of agency independence, at varying levels of discretion.

This figure shows the marginal effects of *Decision-Maker Independence* on the probability of an agency signing statements when varying *Discretion* on the x -axis. Panel (a) shows these effects when *President-Agency Divergence* is 1 and panel (b) shows these effects when *President-Agency Divergence* is 0.

sufficient discretion. These statements may be used as a device to redirect agency implementation.

Discussion and Conclusion

In October of 2019, *The New York Times* asked the presidential candidates in a survey: “Under what circumstances, if any, would you use signing statements to deem provisions of bills constitutionally valid?” (Savage, 2019). Though Bernie Sanders directly said that he would “not issue signing statements” as president, he was one of the only candidates to completely denounce the use of this controversial tool. Many of the candidates cited their “constitutional responsibility” to ensure that the law was “faithfully executed” to issue signing statements that called out unconstitutional provisions in the law (Cory Booker, Pete Buttigieg, Kamala Harris, William Weld). Many claimed, however, that they would use these statements “not routinely” (Joe Biden) or in “rare circumstances” (Amy Klobuchar). Others vowed not to abuse the power (Bill de Blasio) or not to use it as a line item veto (Joe Sestak, Pete Buttigieg). Signing statements, these candidates claimed under their presidency, would only be issued if they were based on “sound legal theories” (Amy Klobuchar) or “broad legal consensus”(Michael Bennet).

In light of their massive controversy under the George W. Bush presidency, why have presidential hopefuls not disavowed signing statements? Their use

has become more costly, given heightened negative public attention and an increase in retaliatory congressional oversight and legislation (Sievert and Ostrander, 2017). Certainly, the backlash was enough to prompt Barack Obama to vow not to use them as president when he was on the campaign trail in 2008.⁸ Yet, Obama and Trump still continued to employ these statements, with the latter using more objections, on average, so far than even George W. Bush. So, why use signing statements?

In short, presidents can use signing statements to influence both the *interpretation* and *implementation* of the law. Presidents can offer alternative interpretations of problematic sections in the hopes that the courts will consider their position when reviewing challenged legislation. They can also instruct agencies on how to implement the law according to presidential prerogatives. In this way, signing statements are not just reactive devices presidents use to respond to Congress. Instead, presidents can proactively use this tool to leave a lasting impression on policy, with the courts and agencies in mind.

This paper examined the ways in which both the courts and federal agencies influence the president's decision to issue signing statements. Using a dataset of all legislation passed between 1981 and 2012, I found that both inter- and intra-branch dynamics shape the use of signing statements. Consistent with Thrower (2019), presidents are more likely to issue signing statements objecting to the law on constitutional grounds when aligned with both Congress and the Supreme Court. This finding runs counter to the empirical literature on signing statements that mostly focuses on the use of these statements to confront oppositional congresses. Instead, these findings support Thrower's (2019) claim that Congress might take other measures to avoid signing statements from extreme presidents. It also aligns with others' arguments that oppositional legislatures possess extra-legislative tools, such as oversight or appropriations, to retaliate against executives for unfavorable unilateral actions (Barber *et al.*, 2019; Bolton and Thrower, 2016; Chiou and Rothenberg, 2017) and signing statements (Ainsworth *et al.*, 2012). Furthermore, these findings are the first empirical evidence provided to support the notion that presidents tend to issue these kinds of statements with the hopes that the Supreme Court will side with their position if reviewed.

Next, I found that signing statements giving agency instructions are more likely to occur when the agency responsible for implementing the law has a conflicting ideology with the president. Here, presidents can use signing statements as a way to shape the implementation of the law when they fear agencies might move policy away from presidential preferences. Furthermore, I find that this effect is the strongest when opposing agencies are granted discretion and are more independent from presidential control, giving them

⁸Lake, Eli. July 13, 2017. "Obama Embraces Signing Statements after Knocking Bush for Using Them." The Daily Beast. <https://www.thedailybeast.com/obama-embraces-signing-statements-after-knocking-bush-for-using-them>.

even more freedom to pursue their own policy goals and thus incentivizing presidents to rein them in with additional instructions.

Future research should examine what happens after a signing statement is issued. Do signing statements signal to litigants the various constitutional violations in the law? Do they lead to more legal challenges? Does the rhetoric in signing statements mobilize public opinion or interest group action that would influence the courts? Do the courts actually rely upon signing statements — either directly or indirectly — when deciding the constitutionality of a challenged law? Do agencies actually respond to the instructions presidents delineate within signing statements? How might they correspond to other venues of instructing agencies? Although their actual policy effects are currently unknown and more research is needed in this area, I do provide some suggestive evidence here that presidents at least issue signing statements in the hopes of influencing policy in these ways.

Overall, this study contributes to a body of research mostly focused on legislative influences to presidential policymaking. The president, however, is concerned with more than just pivotal actors in Congress when considering how to employ various policy tools. Agencies and the courts are likewise fundamentally important in shaping presidential behavior, given their role in sustaining the effects of her direct actions.

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