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SIGNING STATEMENTS AND DIVIDED GOVERNMENT

Neal Devins*

A striking but largely unnoticed feature of the controversy spurred by George W. Bush's aggressive use of signing statements is that Republicans, with only a brief interruption, controlled both houses of Congress from 2000 until 2006.¹ The question of *why* a Republican President would use signing statements to slap down a Republican Congress did not meaningfully register in either a July 2006 American Bar Association (ABA) Task Force Report, a series of *Boston Globe* articles that won the Pulitzer Prize, or congressional hearings held by Republicans in June 2006 and Democrats in January 2007.² The subject of this controversy, instead, has been whether the President has a legal duty to enforce laws he thinks are unconstitutional and, relatedly, whether the President is improperly expanding his power by "quietly claim[ing] the authority to disobey more than [800] laws enacted since he took office."³

I do not doubt the appropriateness of journalists, academics, and lawmakers focusing their energies on the related questions of whether Presidents can disobey laws they sign and, even if they can, whether President Bush is nevertheless going too far in pushing his vision of presidential power. Those questions should be front and center in this conversation. At the same time, I think the question of *how* the President's use of signing statements might differ in periods of unified and divided government is worth examining.⁴

* Goodridge Professor of Law and Professor of Government, College of William and Mary. Thanks to Matt Getty and Jonathan Hyslop for helping me research this Essay. Thanks to Katherine Martin, Paul LaFata, Mike Pacella, and the Bill of Rights Journal staff for putting together such a good event. Thanks also to Nelson Lund, Bill Marshall, Renee Letow Lerner, Dave Lewis, and Chris Kelley for sharing their insights with me.

¹ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, at 249 (2007).

² AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), available at http://www.abanet.org/op/signing-statements/aba_final_signing_statements_recommendation-report_7-24-06.pdf; David Mehegan, *Globe Writer Wins Pulitzer for National Reporting*, BOSTON GLOBE, Apr. 17, 2007, at A1; Charlie Savage, *House Panel Probing Bush's Record on Signing Statements*, BOSTON GLOBE, Feb. 1, 2007, at A4; Jonathon Weisman, *Bush's Challenges of Laws He Signed is Criticized*, WASH. POST, June 28, 2006, at A9.

³ Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1 (noting that the President had objected to more than 750 statutory provisions by April 2006). When Democrats gained control of Congress in 2007, the number of "objectionable" provisions had climbed to 800. *Full Comm. Oversight Hearing on Signing Statements Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (opening statement of John Conyers, Jr., Chairman, House Comm. on the Judiciary).

⁴ I am not the first person to examine this issue. Christopher S. Kelley and Bryan W.

In this Essay, I will focus on the use of signing statements to advance the President's policy agenda. My central claim is that Presidents have far stronger incentives to use signing statements to advance their agendas in periods of divided government. I am not arguing, however, that our system of checks and balances would be improved by increasing the use of signing statements during periods of divided government. Even though I will call attention to ways in which Presidents have advanced their political agendas through unilateral action, I do not take a position on the larger question of whether Presidents have too much or too little power vis-a-vis Congress.⁵ My argument is straightforward: when the President and Congress are of the same party, Presidents can advance their policy agendas by working informally with Congress and federal agencies. In periods of divided government, Presidents have less control of agency heads and less influence in Congress. Pre-enforcement directives—like signing statements—can be used to constrain agency discretion, signal Congress about presidential priorities, and—like other forms of unilateral presidential action—shift the burden to those who disapprove of presidential policies to override instructions to agency heads.

The fact that Presidents should make greater use of policy-based signing statements in periods of divided government does not mean that Presidents, in fact, have used signing statements for this purpose. Unlike executive orders, signing statements do not have much of a historical pedigree. Before Ronald Reagan sought to centralize presidential power through a host of 1980s reforms, Presidents hardly ever attached a signing statement to legislation.⁶ More than that, even though Reagan's legal team saw

Marshall have considered some of the questions examined in this Essay, providing empirical support for the propositions that Presidents will use signing statements to unilaterally advance their policy agendas and that signing statements are an especially useful tool to Presidents in periods of divided government. See Christopher S. Kelley & Bryan W. Marshall, *The Last Mover Advantage: Presidential Power and the Role of Signing Statements* (2006) (unpublished paper, on file with author). My Essay supplements this paper, providing additional details of how presidential administration is shaped by party control in Congress. In so doing, I provide additional support for the claim that signing statements are especially useful to Presidents during periods of divided government. Unlike Kelley and Marshall, however, I do not limit my analysis to signing statements. I focus, instead, on pre-enforcement directives that limit agency discretion. Signing statements are one type of pre-enforcement directive; presidential memoranda are another type. In so doing, I consider a question that Kelley and Marshall do not examine, namely, whether Presidents should prefer signing statements to other types of pre-enforcement directives. See *infra* Part II.

⁵ For an argument that Presidents have too little power, see Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 YALE L.J. 2611 (2006). For an argument that Presidents have too much power, focusing on budget and war, see LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING (2000).

⁶ See T.J. HALSTEAD, CONG. RESEARCH SERV., REPORT FOR CONGRESS: PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 2–10 (2007), available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>; Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35

signing statements as a useful mechanism for centralizing executive branch policy priorities,⁷ Reagan made only sporadic use of pre-enforcement signing statements. In short, because no President has systematically used signing statements to advance his policy agenda, there is little hard evidence to assess differences between policy-based signing statements in periods of unified and divided government.

In explaining why Presidents should see policy-driven signing statements as a useful mechanism to advance their agendas in periods of divided government, this Essay will proceed in two parts. Part I will detail why Presidents have incentives to pursue their policy agendas through unilateral action. Executive orders, unilateral presidential war-making, and structural initiatives that allow Presidents to centralize and coordinate agency policymaking are well documented examples of this phenomenon. Signing statements and other *ex ante* efforts to instruct agencies on how they should interpret recently enacted legislation likewise allow Presidents to advance their policy agendas. Part II will explain why policy-driven signing statements are especially useful in periods of divided government. Specifically, during periods of divided government, Congress is unlikely to back the President's preferred legislative agenda, so presidential policymaking often requires unilateral action (whether it be an executive order or a signing statement that provides a pro-President spin on legislation). More significantly, Congress is more likely to use its oversight and confirmation powers to pressure agency heads to advance a legislative agenda at odds with the President's policy priorities. This is especially true today; the ideological gap between Democrats and Republicans has never been wider, and consequently, Congress-President relations have become increasingly acrimonious during periods of divided government.⁸ Against this backdrop, Presidents have good reason to use signing statements and other pre-enforcement directives as a tool to both rein in agency heads and signal lawmakers about the President's willingness to battle over his preferred interpretation of a recently enacted statute.

Before turning to Part I, a comment about George W. Bush's extensive use of signing statements in a period of unified government: more than anything, the Bush White House used signing statements to advance its vision of a strong presidency—voicing constitutional objections to legislation impinging on presidential power, especially the President's power as Commander in Chief.⁹ With a supportive Congress,

PRESIDENTIAL STUD. Q. 515, 516–20 (2005); Christopher S. Kelley, *The Unitary Executive and the Presidential Signing Statement* 41–75 (2003) (unpublished Ph.D. dissertation, Miami University), available at <http://www.ohiolink.edu/etd/view.cgi?miami1057716977>; see also DOUGLAS W. KMIEC, *THE ATTORNEY GENERAL'S LAWYER* 52–57 (1992) (discussing Reagan administration efforts to coordinate agency policymaking through signing statements).

⁷ See KMIEC, *supra* note 6, at 52.

⁸ On the other hand, party line voting is a boon to Presidents in periods of unified government. For this reason, as suggested above, Presidents—during periods of unified government—have less reason to make use of policy directives to fend off a too aggressive Congress.

⁹ See Walter Dellinger, Op-Ed, *A Slip of the Pen*, N.Y. TIMES, July 31, 2006, at A17 (noting that the controversy over President Bush's claims that he will not enforce the laws that

the President could launch such attacks without fearing a legislative backlash.¹⁰ Congressional retaliation was also unlikely because the President did not meaningfully follow through on threats not to enforce laws that he found unconstitutional.¹¹ Against this backdrop, it is not surprising that constitutional theorists in the Bush White House would see signing statements as an excellent vehicle to make broad claims about presidential power.¹²

After the 2006 elections, however, the costs of launching such rhetorical broadsides have increased. With Democrats now in control of Congress, democratic lawmakers will use their oversight powers to challenge presidential claims of inherent power.¹³ Presidents, in other words, can make more effective use of signing statements as a bully pulpit to assert broad claims of executive power during periods of unified government (where those claims will not be countered) than in periods of divided government. More to the point, the very forces that should push the White House to make greater use of signing statements and other pre-enforcement directives to advance their policy priorities during periods of divided government should also push the White House to tone down their campaign to use signing statements as a bully pulpit for a strong presidency.¹⁴

he signs should be viewed as an “attack on the current president” because this controversy has been precipitated by “this administration’s sweeping claims of unilateral executive power,” precisely its “extravagant claims of unilateral authority to govern”).

¹⁰ See Savage, *supra* note 3 (noting that “Bush’s fellow Republicans control both chambers, and they have shown limited interest in launching the kind of oversight that could damage their party”).

¹¹ See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power* 21 (U. Chi. Pub. Law & Legal Theory Working Paper Series, Paper No. 133, 2006), available at <http://ssrn.com/abstract=922400> (noting that “critics of the Bush administration’s use of signing statements have not identified a single instance where the Bush administration followed through on the language in the signing statement and refused to enforce the statute as written”). A June 2007 GAO Report, however, concludes that the Bush administration disobeyed six laws that the President had challenged in signing statements. See Charlie Savage, *U.S. Agencies Disobey 6 Laws that President Challenged*, BOSTON GLOBE, June 19, 2007, at A1.

¹² See Charlie Savage, *Cheney Aide is Screening Legislation*, BOSTON GLOBE, May 28, 2006, at A1 (noting the critical role that David Addington, chief of staff and legal advisor to Vice President Cheney, plays in Bush’s signing statement campaign).

¹³ Witness, for example, House Judiciary Committee Chair John Conyers’s decision to make presidential signing statements the subject of the very first oversight hearing that he scheduled three weeks after Democrats took over Congress in January 2007. See *Presidential Signing Statements Under the Bush Administration: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007); Savage, *supra* note 2.

¹⁴ This is not to say that the Bush White House will moderate its use of constitutional signing statements. For example, the presidential (and vice presidential) advisors that are behind President Bush’s signing statement campaign may see the benefits of asserting a strong vision of presidential power as outweighing the costs of contentious oversight hearings, etc. See Savage, *supra* note 12 (discussing the role of Vice President Cheney’s office in pushing for the more aggressive use of signing statements). With that said, the signing statement controversy

I. THE PRESIDENTIAL POWER OF UNILATERAL ACTION¹⁵

Presidential policymaking is often pursued through executive orders, directives, and other unilateral acts. The reason is two-fold: first, Congress is often unwilling to enact the President's policy priorities into law; second, unilateral presidential action often expands the scope of presidential power. "The opportunities for presidential imperialism are too numerous to count . . . because, when presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power."¹⁶

Consider, for example, Bill Clinton's health care reforms and George W. Bush's faith-based initiatives. In both instances, the President went to Congress seeking legislative authorization for his policy agenda. Here, Congress had the upper hand. Rather than having to do battle with the President on his own field (enacting legislation that is subject to a presidential veto), it is up to the President to cajole Congress into action. In both cases, Congress did not bite, leaving it to the President either to abandon his policy initiative or pursue it through unilateral action. Clinton did so by issuing "directives that established a patient's bill of rights for federal employees, [reforming] health care programs' appeals processes, and [setting] new penalties for companies that deny health coverage to the poor and people with pre-existing medical conditions."¹⁷ Bush likewise advanced his agenda through unilateral action. He issued an executive order establishing the White House Office of Faith-Based and Community Initiatives and "ordered an internal audit of department regulations, procurement policies, and practices that discouraged (or forbade) faith-based organizations."¹⁸

The lesson here is simple. Presidents will look for ways to advance their policy priorities, even if it means going over the heads of Congress.¹⁹ Unilateral action, as the Bush and Clinton examples make clear, is often pursued because Congress typically chooses not to respond, or its response is ineffective. Witness, for example, executive orders: between 1973 and 1998, Presidents issued roughly one thousand executive

seems to have quieted (at least during the first nine months of the Democratically controlled Congress). A factiva.com search of newspaper stories (from January to October 2007) yielded no stories about controversial assertions of presidential power through signing statements.

¹⁵ The title for this section is based on Terry Moe and William Howell's outstanding and highly influential article. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999). Four paragraphs from this section are drawn from Neal Devins, *Abdication by Another Name: An Ode to Lou Fisher*, 19 ST. LOUIS U. PUB. L. REV. 65 (2000).

¹⁶ Moe & Howell, *supra* note 15, at 138.

¹⁷ William G. Howell, *Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUD. Q. 417, 418 (2005).

¹⁸ *Id.* at 434-35.

¹⁹ It is often the case, however, that Presidents need Congress to appropriate funds to back presidential initiatives. When that happens, Congress has the upper hand. "Members can attach any number of stipulations on how the president spends the appropriated moneys, limiting what the program, agency, or commission does, whom it serves, what it reports, and how effectively it operates." WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION* 121 (2003).

orders.²⁰ Only thirty-seven of these orders were challenged in Congress.²¹ More striking, only three of these challenges resulted in legislation.²² Furthermore, by end-running the burdensome and often unsuccessful strategy of seeking legislative authorization, unilateral presidential action expands the institutional powers and prerogatives of the presidency. In other words, the President's personal interests and the presidency's institutional interests are often one and the same.

Unlike the presidency, the individual and institutional interests of members of Congress are often in conflict with one another. While each of Congress's 535 members has some stake in Congress as an institution, parochial interests will overwhelm this collective good. In particular, members of Congress need to be reelected to advance their (and their constituents') interests. For this reason, lawmakers "are trapped in a prisoners' dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride in favor of the local constituency."²³

Presidential incentives to act unilaterally extend beyond the pursuit of substantive policy goals and structural reforms that buttress presidential control of the administrative state. Examples abound, including the centralization of agency policymaking through Office of Management and Budget review of proposed agency regulations, Justice Department control of agency litigation, the use of political appointees both to staff agencies and to implement agency policies, and the use of presidential signing statements and pre-regulatory directives to ensure agency conformity to the President's policy agenda.²⁴ Through such unilateral action, Presidents have simultaneously pursued their policy agendas while significantly expanding the power of the presidency.

²⁰ Moe & Howell, *supra* note 15, at 165–66.

²¹ *Id.*

²² *Id.* For a more complete inventory of congressional acquiescence to unilateral presidential policymaking, see HOWELL, *supra* note 19, at 112–120.

²³ Moe & Howell, *supra* note 15, at 144. Kenneth Mayer makes a similar point in his study of executive orders, noting that legislators respond to "issues directly affecting their constituents," not "vague concerns that the president is encroaching on its administrative or procedural prerogatives." KENNETH R. MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* 27 (2001).

²⁴ For a general treatment of this subject, emphasizing Clinton-era initiatives, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). For a discussion of how Presidents use executive orders to reorganize the federal bureaucracy, see PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT* 15–38 (2002). For a discussion of Office of Management and Budget review and presidential signing statements and directives, see *infra* note 78 and accompanying text. For an excellent treatment of the politicization of agency personnel (through the unilateral expansion of the President's power to staff agencies), see David E. Lewis, *Staffing Alone: Unilateral Action and the Politicization of the Executive Office of the President, 1988–2004*, 35 PRESIDENTIAL STUD. Q. 496 (2005). For an examination of presidential incentives to coordinate legal policymaking in the Justice Department, see Neal Devins & Michael Herz, *The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, LAW & CONTEMP. PROBS., Winter/Spring 1998, at 205.

Signing statements and pre-enforcement directives typify this practice. As part of its efforts to assert control over the executive branch, the Reagan administration saw signing statements as an excellent vehicle to attack perceived congressional excess.²⁵ According to Doug Kmiec, one of the architects of Reagan's signing statement initiative, Congress sought to limit presidential control of the administrative state by enacting veto-proof omnibus legislation and by leaving it to agencies (and their congressional overseers) to fill in the details of vague statutory language.²⁶ Kmiec argued that the "signing statement was 'crucial for the administration to give the executive branch direction top-down on inevitable interpretation, rather than relying solely upon the far less transparent judgment of someone in an executive agency applying the law for the first time.'"²⁷ Through the use of pre-enforcement directives, the Clinton administration made "presidential intervention in regulatory matters ever more routine and agency acceptance of this intervention ever more ready."²⁸ In particular, because these directives were overt and official, the President was able to "accomplish what backdoor pressure cannot," that is, impelling recalcitrant agency officials to follow the President's lead and "even more important, locking in that action over time."²⁹

Presidential power, as the above discussion makes clear, is much more than "the power to persuade."³⁰ By acting unilaterally, Presidents are well positioned to advance

²⁵ Reagan administration efforts to transform the signing statement into a policymaking tool drew some fire from Congress. See Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements,"* 40 ADMIN. L. REV. 209 (1988). Likewise, the first President Bush drew fire for his efforts to make use of a signing statement to direct federal agencies to "phase out regulations authorizing the use of racial preferences and quotas in hiring and promotions." Steven A. Holmes, *Bush to Order End of Rules Allowing Race-Based Hiring,* N.Y. TIMES, Nov. 21, 1991 at A1.

²⁶ KMEIC, *supra* note 6, at 52–53.

²⁷ Kelley & Marshall, *supra* note 4, at 6 (quoting Douglas Kmiec). Kmiec's argument stresses policy coordination, not the related efforts of the Reagan administration to influence judicial decisionmaking by having signing statements included in the legislative history published in the *United States Code Congressional and Administrative News*. See also COOPER, *supra* note 24, at 215–16 (depicting the Reagan signing statement initiative as an effort to influence judicial decisionmaking).

²⁸ Kagan, *supra* note 24, at 2299. For a general treatment of presidential memoranda, see COOPER, *supra* note 24, at 81–116. The Clinton administration also saw signing statements as a mechanism to direct agency officials to adhere to presidential priorities. Walter Dellinger, who headed the Clinton Office of Legal Counsel, said that signing statements were sometimes used to direct "subordinate officers within the Executive Branch how to interpret or administer the enactment." Memorandum from Walter Dellinger, Ass't Att'y Gen., to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993), in *Recent Legal Opinions Concerning Presidential Powers*, 48 ARK. L. REV. 311, 333 (1995).

²⁹ Kagan, *supra* note 24, at 2299. For this very reason, Clinton made extensive use of directives, issuing 107 as compared to 9 by President Reagan and 4 by the first President Bush. *Id.* at 2294.

³⁰ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 10 (1960).

their interests before Congress, the nation, and the world—so much so that critics of the modern day presidency complain that our system of checks and balances has been displaced by a regime in which Presidents “regularly ‘go over the heads’ of Congress” so that the powers of the American people have been invested in a single office.³¹ Irrespective of whether presidential critics overstate their case, it is certainly true that “presidents care intensely about securing changes that promote their institutional power, while legislators typically do not. [Lawmakers] are unlikely to oppose incremental increases in the relative power of presidents unless the issue in question directly harms the special interests of their constituents.”³² Efforts by the Reagan and Clinton administrations “to ensure bureaucratic responsiveness to the president” through signing statements and pre-enforcement directives exemplify today’s administrative presidency.³³

Another feature of the modern day presidency is the need for the President to advance his agenda in periods of divided government. When Congress and President come from different political parties (as they typically do), ideological polarization in Congress stands as a significant roadblock to the President’s ability to advance his political agenda. The rise of unilateral presidential policymaking is, in significant respects, tied to divided government. In particular, as the next Part will detail, Congress is more likely to make use of its appointments and oversight powers to press a competing policy agenda before federal agencies during periods of divided government. To combat Congress and advance their policy agendas, Presidents have greater incentive to act unilaterally in periods of divided government.

II. SIGNING STATEMENTS AND DIVIDED GOVERNMENT

Before 1955, the party in control of the White House invariably controlled Congress.³⁴ Since 1955 and especially since 1969, divided government has been the norm.³⁵ When George W. Bush leaves the White House, government will have been divided for thirty of the prior forty years (or seventy-five percent of the time).³⁶

³¹ JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 4 (1987); *see also* HOWELL, *supra* note 19, at 134–35 (summarizing evidence about the President’s ability to make policy without fear “that a watchful Congress will . . . subsequently overturn him”).

³² Terry M. Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 437, 448 (Michael Nelson ed., 5th ed. 1999).

³³ MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* 5 (2000).

³⁴ *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2311, 2330 (2006).

³⁵ *Id.* at 2331.

³⁶ Before the 2000 presidential election, “government was divided for twenty-six of [the prior] thirty-two years” (eighty-one percent). *See id.* From 2001 to 2003, Republicans controlled the White House and House of Representatives; Democrats controlled the Senate. From 2003 to 2006, Republicans controlled Congress and the White House; Democrats regained control of Congress in 2007.

This Part will focus on two ways that Congress seeks to exert control over the administrative state during periods of divided government: lawmaker oversight of agency decisionmaking and the Senate's use of its power to confirm agency heads. Focusing on Congress's confirmation and oversight powers, I will argue that presidential influence over the administrative state is limited during periods of divided government. As such, Presidents have an incentive to find ways to exercise control over administrative agency decisionmaking. Signing statements and presidential directives specifying how an agency should enforce recently enacted legislation are two ways that Presidents may seek to expand their power during periods of divided government.

Signing statements and pre-enforcement directives are especially important today. In particular, presidential unilateralism is very much tied to the growing ideological polarization in Congress. Presidents now have little opportunity to advance their political agenda before a Congress controlled by the other political party. No longer are there forces that push Democrats and Republicans towards the political center. The liberal "Rockefeller Republican" and the conservative "Southern Democrat" have given way to party loyalists who see themselves as members of a political party, not as independent power brokers.³⁷ Measures of ideology reveal that the most liberal Republican in Congress is more conservative than the most conservative Democrat.³⁸ Correspondingly, when legislation is enacted, party cohesion has resulted in a shift in power to party leaders who see the lawmaking process as a way to stand behind a unified party message and, in this way, distinguish their party from the other.³⁹

Party polarization has also resulted in a dramatic shift in the locus of governmental decisionmaking—such that executive and administrative agency action has displaced lawmaking as the principal source of policymaking.⁴⁰ With Democrats and Republicans embracing conflicting ideological agendas, it is unlikely that Congress and the White House will enact significant legislation during periods of divided government.⁴¹

³⁷ This point and the points made in the balance of this paragraph are drawn from my essay on how ideological polarization has transformed congressional hearings so that both parties see congressional hearings as a mechanism to advance their pre-existing political agenda. Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 DUKE L.J. 1525, 1534–39 (2005). For additional sources, see Levinson & Pildes, *supra* note 34, at 2333.

³⁸ Devins, *supra* note 37, at 1535–36; *see also* 110th House Rank Ordering, <http://voteview.com/houll0.htm> (last updated July 5, 2007).

³⁹ Devins, *supra* note 37, at 1537–38; *see also* C. Lawrence Evans, *Committees, Leaders, and Message Politics*, in CONGRESS RECONSIDERED 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001).

⁴⁰ *See* Kagan, *supra* note 24, at 2248–50 (discussing emergence of "presidential administration" during the Clinton administration, a period of divided government).

⁴¹ *See* RICHARD S. CONLEY, *THE PRESIDENCY, CONGRESS, AND DIVIDED GOVERNMENT: A POSTWAR ASSESSMENT* 214–18 (2003) (concluding that ideological divergence has "produced less room for presidents to find a middle course of action acceptable to both sides"); William Howell et al., *Divided Government and the Legislative Productivity of Congress*,

Relatedly, when legislation is enacted, ideological divergence between Democrats and Republicans makes it likely that the President and Congress will have competing spins on legislative meaning.⁴²

Put another way, during periods of divided government, the fight over government policymaking is very much a fight over who controls agency decisionmaking. As a result, the dance that takes place between Congress and the White House has moved. Rather than battle over presidential vetoes and congressional efforts to statutorily insulate government agencies from executive control,⁴³ Presidents are much more interested in advancing their policy agenda through unilateral decisions that constrain agency discretion. In this way, signing statements and other pre-enforcement directives are important mechanisms by which Presidents can limit congressional influence over agency decisionmaking.

But why is it that Presidents need to constrain agency discretion this way? The President appoints executive agency heads, and as such, agencies should adhere to the President's political agenda. At the same time, as this Part will demonstrate, Presidents have less control of agency decisionmaking during periods of divided government.⁴⁴ The sharp ideological divide between Democrats and Republicans spills over to Congress–agency relations. Specifically, during periods of divided government, Congress will use its confirmation and oversight powers to push agencies away from presidential priorities and towards competing congressional preferences.

When delegating power to executive agencies, “Congress takes the risk that the president will direct agencies to enforce laws in a manner that deviates from Congress's

1945–94, 25 LEGIS. STUD. Q. 285 (2000) (demonstrating a significant decline in landmark legislation during periods of divided government).

⁴² See *infra* notes 44–46 and accompanying text.

⁴³ See DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 30–36, 54–55 (2003) (demonstrating that Congress seeks to create politically insulated agencies during periods of divided government); David Epstein & Sharyn O'Halloran, *Divided Government and the Design of Administrative Procedures: A Formal Model and Empirical Test*, 58 J. POL. 373 (1996) (demonstrating both that the President vetoes more legislation and that Congress delegates less authority to executive agencies during periods of divided government); David W. Rohde & Dennis M. Simon, *Presidential Vetoes and Congressional Response: A Study of Institutional Conflict*, 29 AM. J. POL. SCI. 397 (1985) (demonstrating that Presidents veto more legislation during periods of divided government).

⁴⁴ This is not to suggest that agencies are not vulnerable to interest group (and other forms of) capture during periods of unified government. So-called iron triangles between interest groups, congressional overseers, and agency heads, for example, are purported to limit presidential control of the administrative state. For an overview of this literature (pre-1994), see B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS 18–19 (1994). For extensive case studies involving civil rights interest groups, see HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972, at 363–65 (1990); Jeremy A. Rabkin, *Office for Civil Rights*, in THE POLITICS OF REGULATION (James Q. Wilson ed., 1980). But see MORRIS P. FIORINA, DIVIDED GOVERNMENT 104–07 (1992) (arguing that proliferation of interest groups has diminished the influence of so-called iron triangles).

intent.”⁴⁵ To reduce that risk, as well as to limit Presidents from unilaterally pursuing ideologically divergent policy initiatives, Congress typically turns to its oversight and advise-and-consent powers.⁴⁶ During periods of divided government, Congress seeks to close the gap between presidential and lawmaker preferences by making aggressive use of these powers.⁴⁷

Consider, for example, the Senate’s confirmation power. More than anything, the Senate’s willingness to confirm presidential nominees is affected by variation in the ideological tilt in Congress so that a more liberal Congress is apt to put greater pressure on a conservative President than is a conservative Congress (and vice versa).⁴⁸ For their part, “presidents must anticipate the preferences of the Senate in order to get their nominees confirmed, and a potential nominee’s policy preferences are central to explaining the appointment outcome.”⁴⁹ In addition to making sure that their appointees are confirmed, Presidents are guided by related pragmatic concerns. These include ease of confirmation, party loyalty, and the need to placate interest groups.⁵⁰ Even during periods of unified government, the Senate likewise anticipates that the President will allow powerful members of Congress the opportunity to “recommend” individuals who will play key policy roles in government agencies.⁵¹

During periods of divided government, these pragmatic concerns push the President’s nominees away from presidential preferences and towards competing congressional preferences. Most significantly, interest groups that disapprove of the President’s agenda are likely to have more sway with Congress during divided government. Consequently, a President seeking to avoid a bitter confirmation battle is likely to appoint nominees who are acceptable to ideologically divergent interest groups. Alternatively, Presidents may feel compelled to withdraw nominees after opposition interest groups signal their willingness to launch a confirmation fight.

⁴⁵ Bradley & Posner, *supra* note 11, at 37.

⁴⁶ *See id.*; *see also* Ronald C. Moe, *At Risk: The President’s Role as Chief Manager, in THE MANAGERIAL PRESIDENCY* 265, 274 (James P. Pfiffner ed., 2nd ed. 1999).

⁴⁷ *See generally* JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* (1990) (examining the reasons behind the growth of congressional oversight).

⁴⁸ *See* David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J.L. ECON. & ORG. 438 (2004).

⁴⁹ *Id.* at 439.

⁵⁰ *See generally* MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000) (analyzing the development of the institution of federal appointments); Ronald C. Kahn, *Presidential Power and the Appointments Process: Structuralism, Legal Scholarship, and the New Historical Institutionalism*, 47 CASE W. RES. L. REV. 1419 (1997) (discussing the use of external factors to study presidential power in the appointments arena).

⁵¹ Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 136–37 (2006).

From 1947 to 1949, for example, Democratic President Harry S. Truman buckled to a Republican-controlled Senate by withdrawing more than two hundred nominations.⁵²

Increasing ideological polarization in Congress has complicated this dynamic. With Presidents increasingly making policy through unilateral directives, the President's opponents in Congress are more likely to use the Senate's confirmation power to push for ideologically compatible nominees. Lawmakers, likewise, are increasingly willing to draw out the confirmation process, so much so that Presidents "must make appointments for which an extraordinarily favorable consensus can emerge."⁵³ In order to win over a significant number of senators from the opposing party, Presidents are pressured into making compromises with their political opponents. Needless to say, during periods of divided government, Congress will push especially hard for "compromise" nominees.

Combusting (from the President's perspective) with greater congressional influence on appointments, divided government also brings with it a dramatic rise in adversarial oversight hearings. By pressuring agency heads, whose Senate confirmation might well have been tied to their perceived willingness to break ranks with the President's policy agenda, the President's opponents in Congress hope to move agency policymaking towards lawmaker—and away from presidential—preferences.⁵⁴ This phenomenon is longstanding: from 1961 to 1977, congressional committees held roughly twenty-five percent more oversight hearings during divided government than during unified government.⁵⁵ And, as noted above, ideological polarization between Democrats and Republicans makes it even more likely that the majority party in Congress will aggressively use oversight during periods of divided government.

Exemplifying this phenomenon is the drastic increase in both the rhetoric of oversight and the pursuit of executive branch wrongdoing during two recent changes from unified to divided government: the 1994 Republican takeover of Congress during the Clinton presidency and the 2006 Democratic takeover of Congress during the George W. Bush presidency.⁵⁶ When Bill Clinton was President, Republicans viewed oversight as integral to a well-functioning democracy. Reflecting the view

⁵² GERHARDT, *supra* note 50, at 165; *see also id.* at 166 (listing other examples).

⁵³ Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations, 1885–1996*, 43 AM. J. POL. SCI. 1122, 1141 (1999).

⁵⁴ In general, agency heads have strong incentives to work with Congress, irrespective of divided government and ideological polarization. *See* Beermann, *supra* note 51, at 136–37; Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109 (1996) (explaining why agency heads typically turn over information to Congress—even if the President might be willing to invoke executive privilege). During periods of divided government, Congress is likely to push for outcomes less to the President's liking so that the gap between presidential preferences and agency behavior is likely to increase.

⁵⁵ ABERBACH, *supra* note 47, at 60.

⁵⁶ Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 56 DRAKE L. REV. (forthcoming 2007).

that power should not be centralized in a too powerful President, Republican Jim Leach said in 1994 that it is “indefensible that a [Democratically controlled] Congress charged with oversight lacks the backbone to investigate the executive branch, even if it may be embarrassing to their party’s President.”⁵⁷ And when Republicans gained control of Congress, comprehensive federal agency oversight was a top agenda item for most committees.⁵⁸ For example, there was an “impulse among [House] Republicans to use the Judiciary Committee’s oversight role to question lawyers, prosecutors and senior officials on the [Clinton] Administration’s enforcement of environmental, civil rights and antitrust laws.”⁵⁹ Oversight also picked up on national security and intelligence issues.⁶⁰ For their part, Democrats accused Republicans of “misusing Congressional oversight powers to harass and intimidate the Administration.”⁶¹

But when Democrats took over Congress in 2006, oversight was considered a necessary part of our system of checks and balances. Complaining that “up until now the Republican Congress has given [the George W. Bush administration] a blank check with no oversight, no standards, no conditions,” Democrats made oversight reform a top priority.⁶² Democrats accused Congressional Republicans of “having abdicated their responsibility for oversight.”⁶³ Domestic spying, telecommunications, and Federal Drug Administration policymaking headed the list of Democratic targets, with Senator Robert Byrd, Representatives John Dingell and Henry Waxman, and other long-time champions of aggressive oversight leading the Democrats’ charge.⁶⁴ Two months into the campaign, House Democratic Caucus Chair Rahm Emanuel

⁵⁷ Keith Bradsher, *House Inquiry is Urged on Clintons’ Land Deals*, N.Y. TIMES, Jan. 12, 1994, at A16.

⁵⁸ See, e.g., Ellen Messmer, *Republicans Promise New Outlook on Telecom Reform*, NETWORK WORLD, Nov. 14, 1994, available at http://findarticles.com/p/articles/mi_qa3649/is_199411/ai_n8716272.

⁵⁹ Jason DeParte et al., *New Majority’s Agenda: Substantial Changes May Be Ahead*, N.Y. TIMES, Nov. 11, 1994, at A26.

⁶⁰ At the same time, because of their efforts to enact some of the planks from the so-called Contract with America, oversight slagged a bit at first before picking up, especially in the national security and intelligence arenas. See Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199, 203–04 (1998).

⁶¹ Jerry Gray, *G.O.P. Accuses Administration of Political Improprieties*, N.Y. TIMES, Apr. 8, 1995, at A10.

⁶² Michael R. Gordon & Jeff Zeleny, *Latest Plan Sets a Series of Goals for Iraq Leaders*, N.Y. TIMES, Jan. 8, 2007, at A1 (quoting House majority leader Nancy Pelosi).

⁶³ Philip Shenon, *As New ‘Cop on the Beat,’ Congressman Starts Patrol*, N.Y. TIMES, Feb. 6, 2007, at A18. Indeed, Senator Hillary Rodham Clinton blamed much of the Iraq crisis on a “Congress [that] was supine under the Republican majority, failing to conduct oversight and [demand] accountability.” David S. Broder, *Clinton’s Presidential Posturing*, WASH. POST, Jan. 28, 2007, at B7.

⁶⁴ For an excellent overview of the Democrats’ renewed commitment to oversight, see Brian Friel, *The Watchdog Growls*, NAT’L J., Mar. 24, 2007, at 20.

proudly declared that Democratic oversight had “forced” more Bush administration officials “out of their jobs than in the entire prior six years under this administration.”⁶⁵

Whatever one thinks of Emanuel’s boast or of similar claims by gloating Republicans after their 1994 takeover of Congress, it is certainly true that Congress has more reason to pressure government agencies during periods of divided government. Ideological polarization ensures a significant gap in Democratic and Republican policy preferences; correspondingly, ideological cohesion between Democrats and Republicans spills over to lawmaker attitudes towards the President. Democrats and Republicans are more loyal to their parties than ever before and, as such, will want to undermine a President from the opposition party. The flip side of this coin, of course, is that Congress is more likely to back the President during periods of unified government. Lawmakers are more likely to agree with the President, and more than that, lawmakers will want to stand behind their party.

What this means, of course, is that Presidents have more reason to advance their policy initiatives through unilateral action during periods of divided government than during periods of unified government.⁶⁶ This explains Reagan administration efforts to centralize presidential power by advancing its vision of the unitary executive;⁶⁷ it also explains the first Bush administration’s decision to centralize power through the Quayle Council on Competitiveness;⁶⁸ and, finally, it explains President Clinton’s systematic use of “directive orders to effect policy change through administrative action.”⁶⁹ And while it is too early to tell what George W. Bush will do to advance his policy agenda after the 2006 Democratic takeover of Congress, there is no question that his best chance to advance his policy agenda will be through unilateral action.⁷⁰

CONCLUSION

By binding agency heads to the President’s preferred policy vision, signing statements and other pre-enforcement directives are especially useful during periods of

⁶⁵ *Id* at 22.

⁶⁶ See Joel D. Aberbach & Bert A. Rockman, *Hard Times for Presidential Leadership? (And How Would We Know?)*, 29 PRESIDENTIAL. STUD. Q. 757, 762 (1999).

⁶⁷ This is the central point that Christopher S. Kelley makes in his contribution to the symposium. See Christopher S. Kelley, *A Matter of Direction: The Reagan Administration, the Signing Statement, and the 1986 Westlaw Decision*, 16 Wm. & MARY BILL RTS. J. 283 (2007).

⁶⁸ Robert J. Duffy, *Divided Government and Institutional Combat: The Case of the Quayle Council on Competitiveness*, 28 POLITY 379 (1996).

⁶⁹ Levinson & Pildes, *supra* note 34, at 2363 (discussing Kagan, *supra* note 24).

⁷⁰ It is worth noting that before Democrats gained control of Congress in 2007, the vast majority of President George W. Bush’s signing statements laid out constitutional, not policy, arguments (104 of the 131 signing statements through 2006). Bradley & Posner, *supra* note 11, at 14. During this six-year period of unified government, President Bush—consistent with the analysis in this Essay—did not see the need to use signing statements to direct agency heads on how they should implement federal statutes.

divided government. Agency heads may be less loyal to the President during periods of divided government; Congress is more likely to use oversight and other techniques to pressure agency heads. These problems, as discussed above, are exacerbated by ideological polarization. Furthermore, even if agency heads are loyal to the President, a presidential signing statement provides cover. It is easier for an agency head to tell a disappointed committee chair that he is bound by a presidential directive than that his legal-policy vision does not comport with Congress's vision. And finally, the President signals to Congress that he cares enough about the issue to specify his preferences before the agency even has a chance to interpret the statute.

The question remains: why prefer signing statements over other types of pre-enforcement directives? President Clinton, for example, made limited use of signing statements and extensive use of another type of pre-enforcement directive: memoranda specifying how agencies should implement recently enacted laws. In the paragraphs that follow, I will contend that the answer to this question is highly contextual: Presidents should sometimes prefer signing statements, but for the most part, there is little reason for Presidents to prefer signing statements to other types of pre-enforcement directives.

To start, as the controversy over George W. Bush's signing statements (and, with it, this very symposium) makes clear, signing statements are highly visible.⁷¹ They are far more likely to draw attention than a memorandum detailing presidential priorities. In this way, signing statements are both subject to intensive media scrutiny and more likely to galvanize the President's opponents. Along these lines, it is hard to imagine Congress holding hearings or contemplating legislative reforms on the President's power to express his policy preferences by way of a memorandum.⁷² Put another way, signing statements come at a cost; opponents will have an easier time mobilizing around a signing statement than a presidential memorandum.⁷³

Signing statements, moreover, are no more binding on agency officials than are pre-enforcement directives. White House staff, for example, can pressure agency officials to follow the dictates of a presidential memorandum as well as a signing statement. During the Clinton administration, White House staff saw pre-enforcement memoranda as an invitation to "become involved in agency business."⁷⁴

⁷¹ For similar reasons, the signing statements of Ronald Reagan and the first George Bush proved to be lightning rods—a focal point for opponents of the President's policies. See Cross, *supra* note 25 (Reagan); Steven A. Holmes, *With Bush's Stand Uncertain, Lawsuit is Threatened over New Rights Law*, N.Y. TIMES, Nov. 23, 1991, at 8.

⁷² See FISHER, *supra* note 5.

⁷³ Perhaps for this reason, former Clinton Justice Department official Chris Schroeder's contribution to this symposium calls attention to the ways that signing statements put Congress on notice about the President's planned implementation of federal statutes. Podcast: William & Mary Bill of Rights Journal Symposium: The Last Word? Constitutional Implications of Presidential Signing Statements (Feb. 3, 2007) (<http://www.wm.edu/so/borj/index.htm>).

⁷⁴ Kagan, *supra* note 24, at 2302. Likewise, when defending agency action in court, the Justice Department would not draw a distinction between signing statements and presidential memoranda. The Department would view either document as expressing the executive branch

That Presidents may sometimes see the costs of highly visible signing statements as being too high—when other types of pre-enforcement directives can be used to limit agency discretion—does not mean that Presidents ought to disfavor signing statements. It may be that the President wants to draw attention to his signing statement to let his constituents know that he is firmly committed to a particular policy agenda.⁷⁵ And the President may hope that courts will look to his signing statement in sorting out the meaning of some federal statute.⁷⁶ Also, the President may see signing statements as a volley in a conversation with Congress—a chance to see if lawmakers will rise up in opposition to the President's planned implementation of a statute.

There are other advantages to signing statements—advantages tied to the President's efforts to advance his policy agenda through agency decisionmaking. By placing their views in the open, signing statements allow Presidents to put an exclamation mark behind their policy preferences. In so doing, the focus of congressional and interest group opprobrium will be with the White House, and as such, signing statements may provide more cover for agency heads than a presidential directive. In this way, signing statements may do a better job of signaling lawmakers and agency heads that the President has intense preferences so that agency heads will have less wiggle room to navigate around a signing statement than other types of presidential directives.⁷⁷

Signing statements offer one other advantage. Agencies, working with the Office of Management and Budget, play a more extensive role in the writing of signing statements than in the preparation of presidential memoranda.⁷⁸ To the extent that agency heads feel some sense of ownership of the signing statement or, alternatively, understand that the White House rejects their legal or policy preferences, it is possible that agency heads will be more faithful to the commands delineated in signing statements as compared to other presidential directives.

position on a legal policy question.

⁷⁵ Advisors to Presidents Reagan and Clinton, for example, recognized that one of the benefits of signing statements was largely hortatory; they emphasized the President's ability to speak to his supporters and other constituents through the unique bully pulpit of a signing statement ceremony. See KMIEC, *supra* note 6, at 52–53 (Reagan); Dellinger, *supra* note 28, at 333 (Clinton).

⁷⁶ For an argument that courts should defer to presidential signing statements, see Bradley & Posner, *supra* note 11. For an argument that courts should generally not defer to signing statements, see William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 715–16 (1991) (arguing that courts should defer to signing statements only in two situations); Comment, *Whose Statute Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U.L. REV. 475 (1997) (arguing that courts should defer to signing statements or use them in only three situations).

⁷⁷ The use of signing statements to shape agency policymaking, as I mentioned in this Essay's introduction, is of fairly recent vintage. Consequently, there is little in the way of empirical evidence to assess the binding nature of signing statements (as compared, say, to presidential memoranda).

⁷⁸ Kelley, *supra* note 6, at 55–56.

Time will tell whether future Presidents will seek to bind agencies through signing statements or other types of pre-enforcement directives. What is clear is that Presidents should use pre-enforcement directives in periods of divided government. Against the backdrop of ideological polarization in Congress, Presidents have strong incentives to pressure agency heads to adhere to their preferred vision of the law. In sharp contrast, there is little reason for Presidents to issue policy-oriented signing statements or pre-enforcement memoranda during periods of unified government. Presidents can work informally with agency heads and Congress during these times.⁷⁹ Moreover, Congress is likely to back the President, and the President is likely to appoint agency heads whose policy views match up with presidential and congressional preferences.

⁷⁹ For this very reason, Presidents should use signing statements to make bully pulpit pronouncements about the scope of presidential power during periods of unified government. *See supra* notes 9–13 and accompanying text (suggesting a connection between George W. Bush’s 2001–2006 signing statement campaign and Republican control of Congress).