

## New President, Old Precedent

Obama's use of signing statements, which he decried as a candidate, is drawing some bipartisan criticism

BY DAVID NATHER

THE LETTER FROM FOUR top House Democrats was a stark warning to the president. If you continue to insist that you don't have to follow the conditions Congress placed on aid to the International Monetary Fund and the World Bank, the lawmakers wrote, it will be "virtually impossible" for Congress to approve any more such aid in the future.

It was the sort of ultimatum Democratic lawmakers might have directed at President George W. Bush, back when Bush was taking the use of signing statements to new heights. The statements — official messages issued by presidents as they sign bills — can be ceremonial or a forum for presidents to voice limited objections to a law's provisions, but Bush routinely used them to reject provisions as intrusions on his presidential authority.

But last week, Democratic lawmakers were setting down their marker before a Democratic president, Barack Obama, who had campaigned against Bush's use of signing statements and promised that if elected he would not use them to evade the will of Congress.

"During the previous administration, all of us were critical of the president's assertion that he could pick and choose which aspects of congressional statutes he was required to enforce. We were therefore chagrined to see you appear to express a similar attitude," said the letter, signed by Financial Services Chairman Barney Frank of Massachusetts, Appropriations Chairman David R. Obey of Wisconsin, and New Yorkers Nita M. Lowey and Gregory



**TAKING THE PLEDGE:** Obama at the rally in Montana last year where he swore off signing statements.

W. Meeks, who chair the Appropriations and Financial Services subcommittees that oversee the international financial institutions.

The missive's extraordinary tone, together with an official rebuke the House approved two weeks earlier, demonstrated that Congress is starting to take notice of Obama's signing statements and might fight back in a way it rarely did under Bush. That would be the height of irony, since Bush used the statements far more often, and far more expansively, than Obama has. But the tension over the IMF signing statement also shows that, in

his first six months in office, Obama has failed to make the clean break from Bush's practices that he'd vowed on the 2008 campaign trail.

"What's happened is that Bush drew attention to this as being a presidential prerogative that was not really shot down by the Congress," said Mickey Edwards, a former Republican congressman from Oklahoma who served on an American Bar Association task force that examined Bush's use of signing statements. Therefore, Edwards said, Obama and his legal team have learned those statements are "something you can do" — even

# Signings of the Times

In his six months as president, Barack Obama has issued five signing statements raising constitutional objections to provisions in legislation he was signing. Most have remained under the radar of Congress, although Democrats are angry that Obama objected to conditions on funding for the International Monetary Fund and

the World Bank, and Republicans are angry he suggested he might not enforce language to protect whistleblowers that's been in law for years. That was the most controversial aspect of Obama's initial signing statement, in March, which also raised four other concerns. The other four statements each articulated a single objection.

DATE	LAW	WHAT HE OPPOSES	STATEMENT
March 11	Omnibus fiscal 2009 appropriations (PL 111-8)	Federal managers may not restrict employees from talking to Congress (most prominent of five objections)	"I do not interpret this provision to detract from my authority to direct the heads of executive departments to supervise, control and correct employees' communications with the Congress in cases where such communications would be unlawful or would reveal information that is properly privileged or otherwise confidential."
March 30	Public lands expansion & management (PL 111-11)	Interior Department must fill a new Erie Canal commission with people recommended by House members	"Because it would be an impermissible restriction on the appointment power to condition the secretary's appointments on the recommendations of members of the House, I will construe these provisions to require the secretary to consider such congressional recommendations, but not to be bound by them, in making appointments to the Commission."
May 20	Financial fraud enforcement (PL 111-21)	Requires executive branch agencies to give records to a new congressional commission	"As my administration communicated to the Congress during the legislative process, the executive branch will construe this subsection of the bill not to abrogate any constitutional privilege."
June 2	Creating a Ronald Reagan centennial commission (PL 111-25)	Some members of the commission must be members of Congress	"In accord with President Reagan's signing statement made upon signing similar commemorative legislation in 1983, I understand, and my administration has so advised the Congress, that the members of Congress 'will be able to participate only in ceremonial or advisory functions of [such a] commission, and not in matters involving the administration of the act' in light of the separation of powers and the Appointments and Ineligibility clauses of the Constitution."
June 26	Supplemental fiscal 2009 appropriations (PL 111-32)	Directs Treasury to set certain conditions on U.S. support for World Bank and IMF loans	The law "would interfere with my constitutional authority to conduct foreign relations by directing the executive to take certain positions in negotiations or discussions with international organizations and foreign governments, or by requiring consultation with the Congress prior to such negotiations or discussions."

though presidents' only explicit constitutional options are to sign a bill or veto it.

The IMF signing statement was an especially puzzling use of the practice, say House Democrats, since Obama was essentially rejecting provisions his own administration had pressed for in order to secure passage of the underlying bill. That measure, a midyear spending package for the Iraq and Afghanistan wars, was in trouble largely because of controversy over the IMF funding.

Officials from the Treasury Department privately told the Democrats not to worry, since the department actually intended to comply with the conditions. But the lawmakers were no longer willing to take Treasury's word for it — and resented the seemingly cavalier way the White House was handling the process.

"I was shocked by that. I was outraged," Frank said. "They knew I was having to do all of these things to get the bill through. To have done this intentionally, when they knew we were doing all these things that they asked for, would have been particularly dumb."

Frank allowed that the statement could have just been "boilerplate" language from the Office of Management and Budget or "the

mistake of a newbie," but he said, "I don't care why it happened. I want to get it rescinded."

## A PRESIDENT'S PREROGATIVE?

Obama administration officials insist the statements aren't trying to set any new precedents for executive power. They mostly just restate positions taken by other presidents to protect standard presidential prerogatives, officials say, and they don't mean Obama actually intends to ignore the laws.

"The president understands the concerns that members of Congress have expressed, and the administration has made it clear that both Congress' intent to make the IMF more effective and the provisions in the bill will be implemented," said a White House spokesman, Ben LaBolt. "The president has also already made it clear that he will not ignore statutory obligations on the basis of policy disagreements and will reserve signing statements for legislation that raises clearly identified constitutional concerns."

No one who follows presidential signing statements closely thinks Obama is about to become another Bush in this regard. So far, Obama has issued statements in only five

instances and, in general, has confined them to narrow separation-of-powers concerns, such as questioning the power of Congress to dictate the membership of an Interior Department commission or to demand certain documents.

But congressional Democrats say they're still surprised that Obama's using signing statements at all, given that he criticized the practice as a candidate. One Democratic leadership aide, who requested anonymity to speak more candidly, said the statements have "annoyed the hell out of Congress at times" and "it's not clear that what they're doing is necessary."

Only Obama's first signing statement — which accompanied his signature in March on a catchall package concluding the fiscal 2009 spending debates that were suspended before the election — listed more than a single objection to legislation. But political scientist Christopher Kelley of Miami University in Ohio, who maintains a Web site that tracks presidential signing statements, says parts of that statement were extraordinarily broad. Language objecting to "numerous provisions" that require congressional committee approval to spend funds, he said, could be construed

to apply to as many as 126 provisions.

That's still relatively tame compared with Bush, who, by Kelley's count, challenged 1,168 provisions in his eight years as president — more than Ronald Reagan, George Bush and Bill Clinton combined. But the vagueness of some of Obama's challenges makes it hard to get an accurate count, Kelley says, and he's off to an unusually fast start — even compared with his predecessor, who disputed only 19 provisions in 2001 before ramping up to 218 challenges in 2002.

Still, some legal experts say the nature of Obama's challenges isn't at all outside the modern presidential mainstream. The kind of provisions he objected to in the omnibus spending bill — often called a "legislative veto" — have been common targets of presidential signing statements since the 1920s, because they short-circuit the constitutional process that requires approval of both chambers of Congress and the president before legislation can become law, according to Peter M. Shane, a law professor at Ohio State University and author of "Madison's Nightmare: How Executive Power Threatens American Democracy."

Among the signing statements so far issued, Shane said, "There's none in the ones I've seen that are particularly surprising in their assertions of executive power." Kelley added that in his view Obama "clearly isn't making the general, grand claims to executive authority that Bush was making."

However, Louis Fisher, a constitutional law specialist at the Library of Congress, said that the concerns Obama cited in his omnibus statement about how he should submit his budget requests could mark a very broad assertion of executive authority. And his objection on a public lands bill, which rejected a requirement for the Interior secretary to name members to a commission based on House recommendations, was "like sticking a finger in the eye of the House" because such recommendations are standard practice on other commissions, Fisher said: "I do think Congress has reason to be concerned."

And even those who think Obama has had solid reasons for his objections argue that a signing statement is the wrong way to handle it. In the IMF case, "his basic point was right, that Congress was trying to tell him how to negotiate. They shouldn't have done that," Edwards said. "But the president is wrong in saying that he can ignore the law once he's signed it."

#### QUALIFYING A CAMPAIGN PLEDGE

On the campaign trail last year, Obama seemed to be quite unequivocal in his rejection

of the statements.

In an exchange at a campaign event in Billings two weeks before last year's Montana primary, for example, Obama offered an unequivocal "yes" when a woman in the audience asked, "When Congress offers you a bill, do you promise not to use presidential signings to get your way?"

For good measure, he added, "We're not going to use signing statements as a way of doing an end-run around Congress."

His actual position, though, turned out to be closer to what he (or his campaign staff) wrote in response to a Boston Globe question-

“The president is wrong in saying that he can ignore the law once he's signed it.”

— Former Rep. Mickey Edwards

naire in December 2007 about his views on executive power. "No one doubts that it is appropriate to use signing statements to protect a president's constitutional prerogatives," it said. "Unfortunately, the Bush administration has gone much further than that."

So in March, as Obama prepared to issue his first signing statement, on the spending package, he declared in a memorandum to departments and agencies that "I will issue signing statements to address constitutional concerns only when it is appropriate to do so as a means of discharging my constitutional responsibilities." He listed some ground rules he would follow to keep the practice to a minimum, such as giving Congress warning of his constitutional concerns before legislation is cleared and offering objections "based only on interpretations of the Constitution that are well-founded."

What's especially surprising to some is Obama's use of signing statements while his party enjoys such strong majorities in Congress. As Shane points out, both Reagan and the first George Bush were Republicans who wanted to push back challenges from a Congress controlled by the Democrats. Likewise, Clinton was a Democrat who had to guard his prerogatives against a Republican Congress for six of his eight years. So despite Obama's campaign assurances, he actually

appears to be following George W. Bush's example in one respect: issuing broad assertions of executive authority even when his own party controls Congress.

Administration officials insist they're not engineering Bush-style end runs around the will of Congress. Rather, they say, Obama is simply following a broader Oval Office precedent of putting constitutional concerns about legislation on the record. The statement on the IMF and World Bank funding, for example, closely tracks statements Clinton and both Bushes issued on similar language in past laws.

But some lawmakers see more going on than just a rehash of old signing statements. Republican Sen. Charles E. Grassley of Iowa, for example, objected to a part of the spending package signing statement criticizing language designed to protect government whistleblowers. The administration argued that the language was so broad that it could hamstring the executive branch from stopping harmful disclosures, such as leaks of classified information. But Grassley wrote Obama to complain that his signing statement "gutted the legislative intent" of a provision that had been part of spending bills for more than a decade. Follow-up assurances to the contrary from Office of Management and Budget Director Peter R. Orszag haven't swayed Grassley from the view that the expansive new language could well produce a chilling effect among would-be whistleblowers.

Obama's portfolio of signing statements is, obviously, still very much a work in progress. If it continues on its current course, Shane says, it will probably more closely echo the legacies of the three Oval Office occupants who preceded George W. Bush. Still, with Congress taking a more bellicose posture toward signing statements, the new president may find such declarations cause more trouble than they're worth.

"Sometimes it starts out small and it grows," Frank said of the pattern of conflict over signing statements. "I want to nip it in the bud." ■

**FOR FURTHER READING:** *House vote on IMF-World Bank signing statement*, CQ Weekly, p. 1644; *Obama and executive power*, p. 389; *supplemental fiscal 2009 appropriations (PL 111-32)*, p. 1449; *omnibus fiscal 2009 appropriations (PL 111-8)*, p. 612; *public lands (PL 111-11)*, p. 727; *financial fraud (PL 111-21)*, p. 1220; *the Reagan commission law is PL 111-25*.