

## **Executive Orders, Signing Statements, and Veto Messages, Part One**

Presidential signing statements and executive orders have been much in the news, as has the revival of the concept of the line-item veto. Can a president, via a signing statement, effectively amend a bill as he signs it into law, by virtue of written his words? Can the president make law via an executive order and, if so, does his power extend outside the boundaries of the executive branch of government? Can a line-item veto authority created by statute ever survive Supreme Court scrutiny?

My thought this month is not to examine the federal doctrine of the “unitary executive.”<sup>1</sup> Rather, in this Part One, I plan to survey where one can access executive orders, signing statements and veto messages at both the federal and state levels. In addition, I will explore the use (and availability) of the signing statement at the state level, particularly in Indiana.

Next month, in Part Two, my focus will be on the use of the executive order by Indiana governors, and the issues raised by these orders.

### **Where to find these documents at the federal level**

#### ***Presidential executive orders.***

It is easy enough to find the executive orders issued by President George W. Bush. They are all neatly listed on the White House website.<sup>2</sup> But what about a more permanent source, including past presidential orders?

The National Archives has online disposition tables that list the status of executive orders from January 8, 1937 to the present.<sup>3</sup> This is a really useful resource. For instance, look at the entry on President Kennedy’s Executive Order 11074 establishing the President’s Council on physical fitness:

#### **Executive Order 11074**

Establishing the President's Council on Physical Fitness

- Signed: January 8, 1963
- Federal Register page and date: 28 FR 259; January 10, 1963
- Amends: EO 10830, July 24, 1959

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<sup>1</sup> For more on the unitary executive, see, for example: Van Bergen, Jennifer, “*The Unitary Executive: Is The Doctrine Behind the Bush Presidency Consistent with a Democratic State?*” Jan. 9, 2006, Findlaw’s Commentary at: [http://writ.news.findlaw.com/commentary/20060109\\_bergen.html](http://writ.news.findlaw.com/commentary/20060109_bergen.html)

<sup>2</sup> <http://www.whitehouse.gov/news/orders/>

<sup>3</sup> <http://www.archives.gov/federal-register/executive-orders/index.html>

- Revokes: [EO 10673](#), July 16, 1956; [EO 10772](#), June 30, 1958; [EO 10931](#), March 29, 1961
- Revoked by: [EO 11398](#), March 4, 1968

The underlines above indicate hyperlinks, enabling the user to quickly access the related documents, a real plus.

The National Archives FAQ explains:

Executive orders are official documents, numbered consecutively, through which the President of the United States manages the operations of the Federal Government. The text of Executive orders appears in the daily *Federal Register* as each Executive order is signed by the President and received by the Office of the Federal Register. The text of Executive orders beginning with Executive Order 7316 of March 13, 1936, also appears in the sequential editions of Title 3 of the Code of Federal Regulations (CFR).

***Presidential signing statements.***

Much less well-known than the executive order is the presidential signing statement, which, as “a presidential power tool,” according to Phillip J. Cooper in his recent book, *By Order of the President*, is “relatively new and still evolving.”<sup>4</sup> As defined by Cooper:

Presidential signing statements (PSSs) are announcements made by the president, usually prepared by the Justice Department, that go beyond merely lauding passage of a statute to identify provisions of the legislation with which the president has concerns. They also provide the president’s interpretation of the language of the law, announce constitutional limits on the implementation of some of its provisions, or indicate directions to executive branch officials as to how to administer the new law in an acceptable manner. So constituted, the signing statement has been used as a tool of presidential direct action since the Reagan administration.<sup>5</sup>

As with current executive orders, current presidential signing statements are available on the White House website. However, it is important to distinguish between the similarly-named public-oriented statement and the legal statement.

For instance, under “news” - March 9, 2006 are two distinct documents. One, “President Signs USA PATRIOT Improvement and Reauthorization Act”<sup>6</sup> is the public statement, in the nature of a press release.

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<sup>4</sup> Cooper, *By Order of the President, The Use and Abuse of Executive Direct Action*, 2002, University Press of Kansas, p. 201.

<sup>5</sup> Cooper, p. 201.

<sup>6</sup> “President Signs USA PATRIOT Improvement and Reauthorization Act ” at: <http://www.whitehouse.gov/news/releases/2006/03/20060309-4.html>.

The other, "President's Statement on H.R. 199, the USA PATRIOT Improvement and Reauthorization Act of 2005,"<sup>7</sup> announces and memorializes how the president intends to execute the law. Here is a quote from the President's Statement on H.R. 199:

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

Presidential signing statements are available in the *Weekly Compilation of Presidential Documents*<sup>8</sup> published by the Office of the Federal Register, and available online going back to 1993. This publication also includes executive orders, communications to Congress and Federal agencies, and statements regarding bill signings and vetoes.

In addition, according to the Library of Congress:

Public laws are reprinted by public law number in the United States Code Congressional and Administrative News, published by West Group, a private company. \* \* \* USCCAN contains major committee reports and sometimes Presidential signing statements as part of its Legislative History section for the public laws.<sup>9</sup>

Why is it relevant that the signing statements are published in this private publication? According to Phillip Cooper, it was the intention of the Reagan administration to:

present the president's views as a legitimate and authoritative part of the legislative history of new statutes. To accomplish [this], the administration had to find a way to ensure regular presentation of the signing statements along with legislative history materials. [Attorney General Edwin Meese III] accomplished this in 1986 though an agreement with West Publishing Company to include the statements in the *U.S. Code Congressional and Administrative News* legislative histories.<sup>10</sup>

### ***Presidential veto messages.***

Because President Bush has not vetoed any bills during his five years in office, I am unable to point to an example on the White House website. Veto messages of earlier presidents, however, are available in the *Weekly Compilation of Presidential Documents*.

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<sup>7</sup> President's Statement on H.R. 199, the "USA PATRIOT Improvement and Reauthorization Act of 2005" at: <http://www.whitehouse.gov/news/releases/2006/03/20060309-8.html>.

<sup>8</sup> Main page at: <http://www.gpoaccess.gov/wcomp/index.html>; "About page" at: <http://www.gpoaccess.gov/wcomp/about.html>

<sup>9</sup> "Source of Statutes", at: <http://www.loc.gov/rr/law/fedstat.html>

<sup>10</sup> Cooper, p. 202.

## Where to find these documents at the state level

### *State executive orders.*

The executive orders issued by Governor Daniels are not directly accessible from the Governor's home page,<sup>11</sup> but there is a link to them from the Governor's Media Center.<sup>12</sup> The documents accessible via the Media Center unfortunately are scanned graphical reproductions of the executive orders.

The executive orders are also published in the *Indiana Register*, albeit several months after their issuance. A cumulative table of executive orders has been published since 1989 in the January issue of the *Indiana Register*. Prior to that, and going back to Volume 2 of the *Indiana Register*, the table was published in various months.

The online version of the *Indiana Register* goes back only to Volume 24, Oct. 1, 2001 – Sept. 1, 2002.<sup>13</sup> As of July 1, 2006, by virtue of decisions of the Indiana general assembly, there will be no other versions of the *Indiana Register* – the bound and CD-ROM versions have been totally eliminated and there is to be no distribution to federal depository libraries.<sup>14</sup>

### *State signing statements.*

The Indiana Law Blog<sup>15</sup> from several years back has links to signing statements by Governors Kernan and O'Bannon. However, the links no longer lead to anything -- the information apparently has not been preserved online by the State.

The signing statements are not compiled in the *Indiana Register*. And according to the Indiana Division of the Indiana State Library, Indiana has nothing equivalent to the *Weekly Compilation of Presidential Documents*. It should, otherwise these documents may, for all practical purposes, be lost to history.

Here is an example<sup>16</sup> -- a paragraph from Governor Kernan's signing statement on HEA 1285 from 2004 – the “PERF confidentiality” bill:

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<sup>11</sup> <http://www.in.gov/gov/>

<sup>12</sup> Media center: <http://www.in.gov/gov/media/index.html>. Executive orders: <http://www.in.gov/gov/media/eo/index.html>.

<sup>13</sup> [http://www.in.gov/legislative/ic\\_iac/](http://www.in.gov/legislative/ic_iac/)

<sup>14</sup> I am also told that the new *Indiana Register* will not be in paged, and will not have a regular publication date. Instead, documents simply will be posted online as they are submitted to the *Register* office. I have no word on tables, indexes, etc.

<sup>15</sup> [indianalawblog.com](http://indianalawblog.com)

<sup>16</sup> This March 19, 2004 ILB entry (found at [http://indianalawblog.com/archives/2004/03/indiana\\_law\\_gov.html](http://indianalawblog.com/archives/2004/03/indiana_law_gov.html)) titled “Governor Kernan Signs PERF Confidentiality Bill into Law” included this link to the Governor's signing statement. However, it is no longer available. [http://www.in.gov/gov/pdfs/1285\\_signing\\_statement.pdf](http://www.in.gov/gov/pdfs/1285_signing_statement.pdf)

While personal information must remain confidential, I believe that Indiana law should make more pension information public. The public is entitled not only to the names and dates of service of PERF members, which is available under current law, but also to the amounts being paid to PERF members. Just as salary information for current employees is a public record, pension payment amounts also should be public records. I will work with the 2005 General Assembly to exempt PERF payment amounts from confidentiality restrictions.

What about Governor Daniels' signing statements? For the most part, rather than first-person signing statements, what has been located for Governor Daniels at this point in his administration are press releases announcing that the governor has signed a bill. Currently, these documents are available online as media releases, as were Gov. Kernan's and Governor O'Bannon's in the past.

Of interest, however, is a variation on the signing statement, Governor Daniels' "non-signing statement" on 2005's SEA 512, where the Governor, on April 29, 2005, announced that he was allowing the Enrolled Act to become law without his signature, explaining:

My decision not to sign reflects my degree of uncertainty as to the constitutionality of this bill, given that its annexation provisions may be interpreted to be impermissible special legislation under Article 4, Section 23 of our Constitution.<sup>17</sup>

What about other states? Brief research turned up a signing statement from Governor Taft of Ohio that moves a step beyond those of Governors Kernan and Daniels. Here is a quote:

Columbus — Today Governor Bob Taft issued the following statement:

"I do not believe that 10 and 11 year olds should be incarcerated with other violent juvenile offenders. That is why today in signing Senate Bill 179, the Sentencing Commission's Juvenile Crime Bill, I have also signed an executive order making it absolutely clear that no ten or eleven year old is to be placed in a Department of Youth Services (DYS) institution.

"It is with serious reservations that I sign this legislation. While this bill contains a number of valuable, new sentencing tools for judges, including some I, myself, have proposed, I am troubled by the idea of incarcerating young offenders who are not yet even teenagers.<sup>18</sup>

Interestingly, Governor Jeb Bush of Florida comes closest to duplicating the signing statements of his brother, President Bush. His webpage<sup>19</sup> setting out the governor's

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<sup>17</sup> <http://www.in.gov/serv/presscal?PF=gov2&Clis=196&Elist=83618>

<sup>18</sup> <http://www.governor.ohio.gov/releases/Archive2001/1520014662.htm>

<sup>19</sup> [http://eogtmp.sto.fl.gov/html/2005\\_legislative\\_actions.html](http://eogtmp.sto.fl.gov/html/2005_legislative_actions.html)

actions on legislation might also serve as a model for Indiana (as could the GAO's model with respect to executive orders).

Governor Jeb Bush's legal signing statements for "bills signed with concerns" are written as transmittal letters to the Secretary of State. Here is a sample:

The Authority's power to subjectively take state owned land when not in use for state purposes appears to contravene the Public Trust Doctrine. This doctrine is established by the Florida Constitution and provides that title to state owned property shall remain in trust for all of the people. Any unilateral attempt by the Authority to take, exclusively occupy, use and possess state lands is inconsistent with the Public Trust Doctrine. Furthermore, the language "in use for state purposes" is arbitrary and confusing, given that all property owned by the state must be presumed to be held in use for state purposes by virtue of the Public Trust Doctrine.<sup>20</sup>

### *State veto messages.*

Governor Daniels' veto messages, like his press releases, are currently available via the Governor's website, but, if history serves, may simply be taken down with the election of a new governor.<sup>21</sup>

As is the case with signing statements, the veto messages of Governors Kernan and O'Bannon are no longer available online. Fortunately, veto messages are preserved in the Journals of the Indiana House and Senate, and have been throughout the State's history.<sup>22</sup>

Although the House and Senate Journals are not reliably available online, one hundred copies of each are published annually in bound format. A limited number of CD-ROMs are also produced.

### **Next Month – Part Two.**

Some of the issues that will be explored: Does a governor's executive order continue in effect when his term is over? Can a governor, via an executive order, legally impact entities outside the executive branch of government? Can the general assembly by passing a statute preempt an area – thereby invalidating an executive order on the same subject?

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<sup>20</sup> [http://www.myflorida.com/myflorida/government/laws/2005legislation/pdfs/HB\\_987\\_letter.pdf](http://www.myflorida.com/myflorida/government/laws/2005legislation/pdfs/HB_987_letter.pdf)

<sup>21</sup> Here is Daniels' April 26, 2005 veto message on HEA 1224, relating to the establishment of the aerospace and aeronautics initiative:

<http://www.in.gov/serv/presscal?PF=gov2&Clist=196&Elist=83603>

Veto messages on HEA 1142, "related to the expansion of Medicaid eligibility and organ procurement procedures.," and SEA 218, "related to the use of safety belts in vehicles.," are currently available at

<http://www.in.gov/serv/presscal?PF=gov2&Clist=196&Elist=83786> and

<http://www.in.gov/serv/presscal?PF=gov2&Clist=196&Elist=83787>, respectively.

<sup>22</sup> Article 4, Section 12 of the Indiana Constitution begins: "Each House shall keep a journal of its proceedings, and publish the same."