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INTRODUCTION

Unilateral Powers: A Brief Overview

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To advance their policy agenda, presidents have two options. They can submit proposals to Congress and hope that its members faithfully shepherd bills into laws; or they can exercise their unilateral powers—issuing such directives as executive orders, executive agreements, proclamations, national security directives, or memoranda—and thereby create policies that assume the weight of law without the formal endorsement of a sitting Congress. To pursue a unilateral strategy, of course, presidents must be able to justify their actions on some blend of statutory, treaty, or constitutional powers; and when they cannot, their only recourse is legislation. But given the ambiguity of Article II powers and the massive corpus of law that presidents can draw upon, as well as the well-documented travails of the legislative process, the appeal of unilateral powers is readily apparent.

Not surprisingly, almost all the trend lines point upward. During the first 150 years of the nation's history, treaties (which require Senate ratification) regularly outnumbered executive agreements (which do not); but during the last 50 years, presidents have signed roughly ten executive agreements for every treaty that was submitted to Congress (Margolis 1986; Moe and Howell 1999b). With rising frequency, presidents are issuing national security directives (policies that are not even released for public review) to institute aspects of their policy agenda (Cooper 1997, 2002). Since Truman fatefully called the Korean War a "police action," modern presidents have launched literally hundreds of military actions without first securing a formal congressional authorization (Blechman and Kaplan 1978; Fisher 2004b). Though the total number of executive orders has declined, presidents issued almost four times as many "significant" orders in the second half of the twentieth century as they did in the first (Howell 2003,

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83). Using executive orders, department orders, and reorganizations plans, presidents have unilaterally created a majority of the administrative agencies listed in the *United States Government Manual* (Howell and Lewis 2002; Lewis 2003). These policy mechanisms, what is more, hardly exhaust the options available to presidents, who regularly invent new ones or redefine old ones in order to suit their own strategic interests.

For years, political scientists paid precious little attention to these trends. Until recently, only one book had been written on the president's unilateral powers (Morgan 1970), and most journal articles on the topic were published in law reviews (see, e.g., Cash 1963; Fleishman and Aufses 1976; Hebe 1972). There are signs, though, that change is afoot. In the past several years, three books have focused exclusively on the president's unilateral powers (Cooper 2002; Howell 2003; Mayer 2001), and others are in the works. A number of articles on executive orders have been published in mainstream political science journals (Cooper 2001; Deering and Maltzman 1999; Howell and Lewis 2002; Krause and Cohen 1997, 2000; Mayer 1999; Mayer and Price 2002; Moe and Howell 1999a, 1999b). And for the first time, edited volumes on the general topic of the presidency are devoting full chapters to unilateral powers (Edwards 2005; Rockman and Waterman, forthcoming).

The nation's recent experience under the last two presidential administrations makes the subject all the more timely. From the creation of military tribunals to try suspected "enemy combatants" to tactical decisions made in ongoing conflicts in Afghanistan and Iraq to the freezing of financial assets in U.S. banks with links to bin Laden and other terrorist networks to the reorganization of intelligence gathering domestically and abroad, Bush has relied upon his unilateral powers in virtually all facets of his "war on terror." And to the considerable consternation of congressional Democrats, Bush has issued numerous rules that relax environmental and industry regulations concerning such issues as the amount of allowable diesel engine exhaust, the number of hours that truck drivers can remain on the road without resting, and the logging of federal forests.

During his tenure, Bill Clinton also "perfected the art of go-alone governing."¹ Though Republicans effectively undermined his 1993 health care initiative, Clinton subsequently managed to issue directives that established a patient's bill of rights for federal employees, reformed health care programs' appeals processes, and set new penalties for companies that deny health coverage to the poor and people with pre-existing medical conditions. While his efforts to enact gun control legislation met mixed success, Clinton issued executive orders that banned various assault weapons and required trigger safety locks on new guns bought for federal law enforcement officials. Then, during the waning months of his presidency, Clinton extended federal protections to literally millions of acres of land in Nevada, California, Utah, Hawaii, and Arizona.

Nor are Bush and Clinton unique in this respect. Throughout the modern era, presidents have used their powers of unilateral action to intervene in a whole host of policy

1. Francine Kiefer, "Clinton Perfects the Art of Go-Along Governing," *Christian Science Monitor*, July 24, 1998, p. 3.

arenas. Examples abound: by creating the Fair Employment Practices Committee (and its subsequent incarnations) and desegregating the military in the 1940s and 1950s, presidents defined federal government involvement in civil rights decades before the 1964 and 1965 Civil Rights Acts; from the Peace Corps to the Bureau of Alcohol, Tobacco, and Firearms to the National Security Agency to the Food Safety and Inspection Service, presidents unilaterally have created some of the most important administrative agencies in the modern era; with Reagan's executive order 12291 being the most striking example, presidents have issued a long string of directives aimed at improving their oversight of the federal bureaucracy; without any prior congressional authorization of support, recent presidents have launched military strikes against Grenada, Libya, Lebanon, Panama, Haiti, Bosnia, and Somalia. A defining feature of presidential power during the modern era, one might well argue, is a propensity, and a capacity, to go it alone.

This edition of *Presidential Studies Quarterly* takes a hard look at these powers, and the ways that presidents have used them to advance their policy agendas. While it hardly exhausts the range of issues involved, this volume assembles an eclectic array of perspectives on, and evidence about, the president's unilateral powers. Louis Fisher provides a historical overview of judicial checks on presidential war powers, to which unilateral directives have contributed significantly in the modern era. Phillip Cooper scrutinizes presidential signing statements, which enable presidents to ascribe meanings to legislation not intended by members of Congress and thereby influence the processes of judicial review. Lisa Martin presents and then tests a game theoretic model that predicts when presidents will propose treaties and when they will issue executive agreements. David Lewis shows how presidents use their appointment powers to improve the chances that the bureaucracy will faithfully implement policies issued unilaterally. William Howell and Kenneth Mayer consider patterns of unilateral activity during presidential transitions, and demonstrate that outgoing presidents whose party has lost a November election have every incentive and opportunity to advance the last vestiges of their policy agenda with executive orders and rule changes.

This introductory article outlines some of the more general conceptual issues in play. Specifically, it illustrates ways in which unilateral powers challenge conventional understanding of presidential power; it identifies key institutional constraints on unilateral powers; it presents new data that suggest that presidents exercise these powers at precisely those moments when Congress is least capable of governing; and it debunks the claim that because unilateral directives must be implemented, the president must continue to persuade other political actors to do things that he cannot accomplish on his own—making unilateral powers, at most, a small subset of those powers that Richard Neustadt posited nearly a half-century ago as the pillars of presidential success.

Power and Persuasion

What theoretical tools currently allow us to discern when presidents exercise their unilateral powers, and what influence they glean from doing so? For answers, scholars

habitually turn to Richard Neustadt's seminal book *Presidential Power*, originally published in 1960 and updated several times since. This book not only set an agenda for research on the American presidency, it structured the ways scholars conceived of presidential power in America's own highly fragmented system of governance.

When thinking about presidents since FDR, Neustadt argues, "Weak remains the word with which to start" (Neustadt 1990, xix). The modern president is more clerk than leader, struggling to stay atop world events, congressional dealings, media cycles, and dissension within his party, cabinet, and White House. Though held responsible for just about everything, the president controls almost nothing. Congress, after all, enacts laws and the bureaucracy implements them, placing the president at the peripheries of government action. The pursuit of his policy agenda is marked more by compromise than conviction; and his eventual success ultimately depends upon the willingness of others to do things that he cannot possibly accomplish on his own.

Neustadt identifies the basic dilemma facing all modern presidents: the public expects them to accomplish far more than their formal powers alone permit. This has been especially true since the New Deal when the federal government took charge of the nation's economy, commerce, and the social welfare of its citizens. But now presidents must address almost every conceivable social and economic problem, from the proliferation of terrorist activities around the globe to the "assaults" on marriage posed by same-sex unions. Armed with little more than the powers to propose and veto legislation and recommend the appointment of bureaucrats and judges, however, modern presidents appear doomed to failure from the very beginning. As one recent treatise on presidential "greatness" puts it, "Modern presidents bask in the honors of the more formidable office that emerged from the New Deal, but they find themselves navigating a treacherous and lonely path, subject to a volatile political process that makes popular and enduring achievement unlikely" (Landy and Milkis 2000, 197).

If a president is to enjoy any measure of success, Neustadt counsels, he must master the art of persuasion. Indeed, for Neustadt, power and persuasion are synonymous. As George Edwards notes, "Perhaps the best known dictum regarding the American presidency is that 'presidential power is the power to persuade.' This wonderfully felicitous phrase captures the essence of Neustadt's argument in *Presidential Power* and provided scholars with a new orientation to the study of the presidency" (2004, 126). The ability to persuade, to convince other political actors that his interests are their own, defines political power and is the key to presidential success.² Power is about bargaining and negotiating; about convincing other political actors that the president's interests are their own; about brokering deals and trading promises; and about cajoling legislators, bureaucrats, and justices to do his bidding. The president wields influence when he manages to enhance his bargaining stature and build governing coalitions—and the principal way

2. Neustadt certainly was not the only scholar to equate power with persuasion. Some seven years before Neustadt published his seminal tract on presidential power, Robert Dahl and Charles Lindbloom observed that "like everyone else in the American policy process, the president must bargain constantly—with Congressional leaders, individual Congressmen, his department heads, bureau chiefs, and leaders of nongovernmental organizations" (1953, 333).

to accomplish as much, Neustadt claims, is to draw upon the bag of experiences, skills, and qualities that he brings to the office.³

The image of presidents striking out on their own to conduct a war on terrorism or revamp civil rights policies or reconstruct the federal bureaucracy contrasts sharply with scholarly literatures that equate executive power with persuasion and, consequently, place presidents at the fringes of the lawmaking process. Conducting a secretive war on terrorism, dismantling international treaties brokered by previous administrations, and performing end runs around some of the most important environmental laws enacted during the past half-century, Bush has not stood idly by while committee chairs debated whether to introduce legislation on his behalf. Instead, in each instance he has seized the initiative, he has acted boldly (some would say irresponsibly, or even unconstitutionally), and then he has dared his political adversaries to counter. Having issued a directive, Bush sought not so much to invigorate Congress's support as to neutralize its criticism. An inept and enervated opponent, rather than a cooperative and eager ally, seemed to contribute most to this president's powers of unilateral action.

The actions that Bush and his modern predecessors have taken by fiat do not fit easily within a theoretical framework of executive power that emphasizes weakness and dependence, and offers as recourse only persuasion. For at least two reasons, the ability to act unilaterally is conceptually distinct from the array of powers presidents rely upon within a bargaining framework. First, when presidents act unilaterally, they move policy first and thereby place upon Congress and the courts the burden of revising a new political landscape. If they choose not to retaliate, either by passing a law or ruling against the president, then the president's order stands. Only by taking (or credibly threatening to take) positive action can either adjoining institution limit the president's unilateral powers. Second, when the president acts unilaterally, he acts alone. Now of course, he relies upon numerous advisers to formulate the policy, to devise ways of protecting it against congressional or judicial encroachment, and to oversee its implementation (more on this below). But in order to issue the actual policy, the president need not rally majorities, compromise with adversaries, or wait for some interest group to bring a case to court. The president, instead, can strike out on his own. Doing so, the modern president is in a unique position to lead, to break through the stasis that pervades the federal government, and to impose his will in new areas of governance.

The ability to move first and act alone, then, distinguishes unilateral actions from other sources of influence. Indeed, the central precepts of Neustadt's argument are turned upside down, for unilateral action is the virtual antithesis of persuasion. Here, presidents just act; their power does not hinge upon their capacity to "convince [political actors] that what the White House wants of them is what they ought to do for their sake and for their authority" (Neustadt 1990, 30). To make policy, presidents need not secure the formal consent of Congress. Instead, presidents simply set public policy and dare others to counter. And as long as Congress lacks the votes (usually two thirds of both chambers) to overturn him, the president can be confident that his policy will stand.

3. A number of scholars have challenged this last claim, namely that power is personal and depends upon a president's reputation and prestige. For one of the more trenchant critiques, see Moe (1993).

Institutional Constraints on Presidential Power

Plainly, presidents cannot institute every aspect of their policy agenda by decree. The checks and balances that define our system of governance are alive, though not always well, when presidents contemplate unilateral action. Should the president proceed without statutory or constitutional authority, the courts stand to overturn his actions, just as Congress can amend them, cut funding for their operations, or eliminate them outright.⁴ Even in those moments when presidential power reaches its zenith—namely, during times of national crisis—judicial and congressional prerogatives may be asserted (Howell and Pevehouse 2005, forthcoming; Kriner, forthcoming; Lindsay 1995, 2003; and see Fisher's contribution to this volume). In 2004, as the nation braced itself for another domestic terrorist attack and images of car bombings and suicide missions filled the evening news, the courts extended new protections to citizens deemed enemy combatants by the president,⁵ as well as noncitizens held in protective custody abroad.⁶ And while Congress, as of this writing, continues to authorize as much funding for the Iraq occupation as Bush requests, members have imposed increasing numbers of restrictions on how the money is to be spent.

Though we occasionally witness adjoining branches of government rising up and then striking down presidential orders, the deeper effects of judicial and congressional restraints remain hidden. Bush might like to unilaterally institute a ban on same-sex marriages, or to extend additional tax relief to citizens, or to begin the process of privatizing aspects of Social Security accounts, but he lacks the constitutional and statutory basis for taking such actions, and he therefore prudently relents.⁷ And so it is with all presidents. Unilaterally, they do as much as they think they can get away with. But in those instances when a unilateral directive can be expected to spark some kind of congressional or judicial reprisal, presidents will proceed with caution; and knowing that their orders will promptly be overturned, presidents usually will not act at all.

Elsewhere, I survey the historical record on legislative and judicial efforts to amend and overturn executive orders issued by presidents (Howell 2003, chapters 5 and 6). On

4. Future presidents, too, can overturn the unilateral directives of their predecessors. Incoming presidents regularly relax, or altogether undo, the regulations and orders of past presidents; and in this respect, the influence a sitting president wields is limited by the anticipated actions of their successors. As Richard Waterman correctly notes, "Subsequent presidents can and often do . . . reverse executive orders. Clinton reversed abortion policy established via executive order by the Reagan and G.H.W. Bush administrations. G.W. Bush then reversed Clinton's orders on abortion. . . . This is not a constraint if we think only within administrations, but for presidents who wish to leave a long-term political legacy, the fact that the next president may reverse their policies may force them, at least on occasion, to move to the legislative arena" (2004, 245). The transfer and exchange of unilateral directives across administrations, however, is not always as seamless as all this supposes. Often, presidents cannot alter orders set by their predecessors without paying a considerable political price, undermining the nation's credibility, or confronting serious, often insurmountable, legal obstacles (see Howell and Mayer in this volume).

5. *Hamdi v. Rumsfeld*, 03-6696, June 28, 2004; *Rumsfeld v. Padilla*, 03-1027, June 28, 2004.

6. *Bush v. Gherebi*, 03-1245, Ninth Circuit U.S. Court of Appeals, December 18, 2003. On June 30, 2004, the Supreme Court remanded the case back to the appellate level in light of the *Hamdi* and *Padilla* decisions.

7. But for a discussion on the difficulties of constraining the president through crafting carefully worded statutes, see Moe and Howell (1999a, 1999b).

the whole, Congress has had a difficult time enacting laws that amend or overturn orders issued by presidents, though efforts to either codify in law or fund an executive order enjoy markedly higher success rates; and while judges and justices have appeared willing to strike down executive orders, the vast majority are never challenged, and for those that are, presidents win over 80 percent of the cases that actually go to trial. Providing an exhaustive account of these findings is beyond the reach of this article—for a host of reasons, not least of which is the fact that these events are out-of-equilibrium behaviors, the meanings of these legislative and case histories are less than self-evident.⁸ Instead, here, I want to make three points about institutional constraints on presidential power, the first of which concerns the informational symmetries that can derail the efforts of legislators and courts to monitor White House activities, the second of which involves Congress and agenda setting, and the third of which concerns the funding of unilaterally created agencies and programs.

Information and Foreign Policy

In foreign affairs, the president enjoys important informational advantages. This is especially true in matters involving the use of force, where a massive network of national security advisers, an entire intelligence community, and diplomats and ambassadors stationed all over the globe report more or less directly to the president, and where nothing comparable supports members of Congress. Instead, members must rely on the president and those within his administration to share information that might bear upon contemporary foreign-policy debates. To deal with the fact that presidents are not always forthcoming, Congress has established a variety of oversight procedures, a complex rule-making process, and liaison offices throughout the federal bureaucracy (Kiewiet and McCubbins 1991; McCubbins and Schwartz 1984). But a more basic problem often goes unnoticed: the issuance of unilateral directives without Congress knowing, or without its membership finding out until it is too late to craft an effective response. Such sorts of informational breakdowns, plainly, corrode congressional checks on presidential power; and so as to mitigate these specific effects, over the past century Congress has enacted several important laws.

Before Franklin Roosevelt's first term, Congress could not take for granted that presidents would publicly release the contents of their policy directives. Though they issued literally thousands of executive orders, proclamations, rules, and regulations, presidents were not required to publish them, and no central clearinghouse existed for lawmakers to review them. With the growth of the federal government came considerable confusion, as legislative enactments conflicted with unilateral directives, as judges and bureaucrats wondered what the law of the day was, and as different departments within the executive branch struggled to keep track of each other's doings. Recognizing that the "number and importance of administrative regulations [had] enormously increased," and that no system was in place to classify or catalogue them, Harvard Law Professor E.

8. For longer treatment of the capacity of Congress and the courts to check the president's unilateral powers, see Howell (2003); Mayer (2001); Moe (1999); and Moe and Howell (1999a, 1999b).

N. Griswold warned that the very principles of limited government and checks and balances were imperiled. "It might well be said that our government is not wholly free from Bentham's censure of the tyrant who punishes men 'for disobedience to laws or orders which he had kept them from the knowledge of'" (1934, 213). To correct this state of affairs, in 1935 Congress enacted the Federal Register Act, which required the Government Printing Office in collaboration with the National Archives to publish all executive orders, proclamations, agency rules, and regulations; later, notices and proposed rules were added to the list. The act typically is understood as a pragmatic solution to a growing administrative problem—and for obvious reasons, given the pervasive inefficiencies that then existed. But the act also had important consequences for the workings of the nation's system of separated powers. For by promptly publishing and cataloging various kinds of unilateral directives, the act at last established a system for members of Congress to oversee, and hence to check, presidential policy making.

Almost forty years later, Congress revisited these issues, this time addressing the issuance of executive agreements. As the Federal Register Act does not require presidents to publish accords reached with foreign countries, Congress often was left in the dark about new trade or security agreements brokered by the president.⁹ During the 1950s and 1960s, for example, the Eisenhower, Kennedy, and Johnson administrations negotiated a series of executive agreements with the government of South Vietnam, but Congress did not learn of their existence until Nixon assumed office. And so, in 1972 Congress passed the Case Act, requiring presidents to report every "international agreement, other than a treaty" within sixty days. In 1977, and again in 1979, Congress passed additional legislation that reduced the reporting period to twenty days and expanded the scope of the act to include international agreements brokered by executive agencies and departments. Unlike executive orders and proclamations, however, executive agreements still do not have a uniform classification or numbering scheme, making it more difficult for politicians (not to mention scholars) to track them.

The 1973 War Powers Resolution, the most renowned of the three laws considered here, dealt with related problems associated with the use of military force. Requiring presidents to consult with Congress "in every possible instance" before introducing military forces into foreign hostilities, and then requiring that troops be withdrawn if Congress does not authorize the action within sixty or ninety days, the resolution attempted to limit the president's ability to freely decide when, and for how long, troops would be sent abroad. Having to obtain congressional authorization, it was supposed, presidents would supply members of Congress with the information they so sorely lacked about the costs and benefits of military action. And should members disagree with the president's initial decision to enter into the conflict, they could then force him to withdraw.

Though the Federal Register Act, the Case Act, and the War Powers Resolution have helped Congress monitor the exercise of a president's unilateral powers, problems nonetheless persist. Presidents regularly ignore the War Powers reporting requirements

9. For more on the conditions under which presidents issue executive agreements versus treaties, see Lisa Martin's contribution to this volume.

(Fisher 2000, 2004b); they re-label “executive agreements” as “arrangements” or “accords” in order to circumvent the Case Act (Hall 1996, 267); and they declare executive privilege to conceal their efforts to construct and implement public policy (Fisher 2004a; Rozell 2002). Meanwhile, one of the most auspicious displays of executive secrecy continues unchecked: national security directives (sometimes called national security decision memoranda, national security decision directives, or presidential decision directives), which are kept confidential, making it virtually impossible for members of Congress to regulate them. In the past several decades, presidents have used national security directives to do such things as escalate the war in Vietnam, initiate support for the Nicaraguan contras in the 1980s, commission studies on the “Star Wars” missile defense system, direct the nation’s efforts to combat the international drug trade, develop national policy on telecommunications security, and define the nation’s relationship with the former Soviet Union.¹⁰ These particular actions, moreover, come at the behest of orders that have recently been declassified. Many more continue to come down the pipeline, though Congress, and the public, will have to wait some time to learn about them.

Obviously, to check executive power, legislators and judges must know what presidents have done, or what they plan to do. It is of considerable consequence, then, that for stretches of American history, presidents did not always inform members of Congress about their unilateral dealings. And still today, presidents continue to issue classified directives that often have far-reaching policy consequences. With a nontrivial amount of freedom to craft new kinds of unilateral directives, citing national security concerns and executive privilege as justifications for concealing their actions, presidents have obstructed the efforts of members of Congress to keep pace.

Getting on to the Agenda

Amid the congestion of interest groups and government expansion, political actors struggle to place on the public agenda the issues they care most about. Given the sheer number of problems that Congress now must cope with, and the limited amount of time and resources available to legislators, it can be difficult just to secure a hearing for one’s chosen issue. To be sure, by going public, introducing their annual budget proposals, or leaning on key committee members, presidents have unique advantages, especially on issues of national importance. By holding a summit or announcing a policy initiative in the annual State of the Union address, presidents often succeed in launching public deliberations on their legislative agendas. But on smaller matters, members of Congress can check presidential influence not so much by organizing and mobilizing coalitions in opposition, but rather by letting his proposals languish. Instead of taking the president head on and debating the merits of specific proposals, members simply preoccupy themselves with other policy matters. As a consequence, congressional inaction, often more

10. The National Security Archive has recently assembled a sample of declassified national security directives issued by every president since Truman. See <http://nsarchive.chadwyck.com/pdintro.htm> (accessed January 6, 2005).

than action, is occasionally the preferred response to White House entreaties, and the bane of a president banking his legacy on legislative victories.

Fortunately, from the president's perspective, unilateral directives provide a way out. For when presidents act unilaterally, they do not call into an expansive void, hoping that someone will respond. Quite the opposite, with the stroke of a pen presidents instantly make gays in the military or arsenic in drinking water or military tribunals the news of the day. And if its members hope to affect the course of policy making, Congress had better spring to action, for an executive order retains the weight of law until, and unless, someone else overturns it. The strategy of ignoring the president is turned against Congress; and the check on presidential power that complacency typically affords is instantly removed. Indeed, having issued a unilateral directive, presidents would just as soon pass unnoticed, for congressional inaction often is functionally equivalent to support.

By issuing a unilateral directive, however, presidents do more than capture the attention of members of Congress. They also reshape the nature of the discussions that ensue. The president's voice is not one of many trying to influence the decisions of legislators on committees or floors. The president, instead, stands front and center, for it is his order that motivates the subsequent debate. When members of Congress consider whether or not to fund a unilaterally created agency or to amend a newly issued order or to codify the president's action in law, discussions do not revolve lazily around a batch of hypotheticals and forecasts. Instead, they are imbued with the urgency of a world already changed; and they unavoidably center on all of the policy details that the president himself instituted. And because any policy change is difficult in a system of separated powers, especially one wherein transaction costs and multiple veto points line the legislative process, the president is much more likely to come out on top in the latter debates than in the former.

This fact is made abundantly clear when presidents consider sending troops abroad. Though Clinton faced a fair measure of opposition to his plans to intervene in Haiti and Bosnia—as Bush (41) did when he tried to make the case for invading Iraq, and as Reagan did when he considered action in Grenada—the terms of debate irrevocably changed the moment these presidents launched the military ventures. As soon as troops were put in harm's way, the exigencies of protecting American lives muted many of the reservations previously raised about military action. The domestic political world shifted the moment that presidents formally decided to engage an enemy. Though Congress retained important avenues of influence over the ongoing conduct of these military campaigns, opponents of the president, at least initially, were put on the defensive. By using force unilaterally, these presidents effectively remade the political universe, launching their policy initiatives toward the top of Congress's agenda and ensuring that they received a considerably fairer hearing than they would have during the weeks and months that preceded the actions.

We must not overstate the point, of course. There are many policy areas where presidents lack the constitutional or statutory authority to act unilaterally; and in these instances, the president's only option is to engage the legislative process. Moreover, even when they retain the option of an administrative strategy, presidents cannot be

sure that Congress will abstain from amending or overturning his actions. The basic point, however, remains: if inattention and disregard are effective means of checking executive power, unilateral directives instill subsequent discussions with a renewed sense of urgency and alter the terms of debate in ways that are more favorable to the president.

Budgets

If it has one, the power to appropriate money for unilaterally created programs is Congress's trump card. When a unilateral action requires funding, considerable influence shifts back to the legislative branch—for in these instances, a president's directive requires positive action by Congress. Whereas before, presidents needed only to block congressional efforts to amend or overturn their orders—something more easily done, given the well-documented travails of the legislative process—now they must build and sustain the coalitions that often prove so elusive in collective decision-making bodies. And should they not secure it, orders written on paper may not translate into action taken on the ground.

For at least three reasons, however, the obligations of funding do not torpedo the president's unilateral powers. First, and most obviously, many unilateral actions that presidents take do not require additional appropriations. Bush's orders took immediate effect when he decided to include farm-raised salmon in federal counts under the Endangered Species Act, removing twenty-three of twenty-seven salmon species from the list of endangered species and thereby opening vast tracks of lands to public development;¹¹ when he issued rules that alter the amount of allowable diesel engine exhaust, that extend the number of hours that truck drivers can remain on the road without resting, and that permit Forest Service managers to approve logging in federal forests without standard environmental reviews;¹² and when he froze all financial assets in U.S. banks that were linked to bin Laden and other terrorist networks.¹³ These orders were, to borrow Neustadt's term, "self-executing," and the appropriations process did not leave him open to additional scrutiny.

Second, the appropriations process is considerably more streamlined, and hence easier to navigate, than the legislative process. It has to be, for Congress must pass a continually expanding federal budget every year, something not possible were the support of supermajorities required. But by lowering the bar to clear appropriations, Congress relaxes the check it places on the president's unilateral powers. There are a range of programs and agencies that lack the support of supermajorities that are required to create them, but that have the support of the majorities needed to fund them. Just because the

11. Timothy Egan, "Shift on Salmon Re-ignites Fight on Species Law," *New York Times*, May 8, 2004, p. A1.

12. David Brinkley, "Out of Spotlight, Bush Overhauls U.S. Regulations," *New York Times*, August 14, 2004, p. A1.

13. Carolyn Lochhead, "Bush Goes after Terrorists' Funds," *San Francisco Chronicle*, September 25, 2001, p. A1. Patrick Hoge, "U.S. List of Frozen Assets Gets Longer," *San Francisco Chronicle*, October 13, 2001, p. A8.

president cannot convince Congress to enact a program or agency does not mean that he cannot build the coalitions required to fund them.

Third, and finally, given the size of the overall budget and the availability of discretionary funds, presidents occasionally find ways to secure funding for agencies and programs that even a majority of members of Congress oppose. Presidents may request moneys for popular initiatives and then, once secured, siphon off portions to more controversial programs and agencies that were unilaterally created. They can reprogram funds within budgetary accounts or, when Congress assents, they may even transfer funds between accounts. And they can draw from contingency accounts, set-asides for unforeseen disasters, and the like, in order to launch the operations of certain agencies that face considerable opposition within Congress. By Louis Fisher's account, "The opportunity for mischief is substantial" (1975, 88). While discretion is far from absolute, the president does have more flexibility in deciding how funds are spent than a strict understanding of Congress's appropriations powers might suggest.

As evidence of this last scenario, recall Kennedy's 1961 executive order creating the Peace Corps. For several years prior, Congress had considered, and rejected, the idea of creating an agency that would send volunteers abroad to perform public works. Republicans in Congress were not exactly thrilled with the idea of expending millions on a "juvenile experiment" whose principal purpose was to "help volunteers escape the draft"; and Democrats refused to put the weight of their party behind the proposal to ensure its passage (Whitnah 1983). By unilaterally creating the Peace Corps in 1961, and then using contingency accounts to fund it during its first year, Kennedy managed to change all of this. For when Congress finally got around to considering whether or not to finance an already operational Peace Corps in 1962, the political landscape had changed dramatically—the program had almost 400 Washington employees and 600 volunteers at work in eight countries. Congress, then, was placed in the uncomfortable position of having to either continue funding projects it opposed, or eliminate personnel who had already been hired and facilities that had already been purchased. Not surprisingly, Congress stepped up and appropriated all the funds Kennedy requested.

These three caveats aside, the exigencies of funding recommend an important distinction. The president's powers of unilateral action are greatest when they do not require congressional appropriation. For where funding is required, nonaction on the part of Congress can lead to the demise of a unilaterally created agency or program. And as a consequence, the president's power of unilateral action diminishes, just as congressional influence over the scope and operations of these agencies and programs expands.

Exercising Powers, Demonstrating Influence

When will presidents exercise their unilateral powers, and what influence do they gain from doing so? Under two circumstances (derived formally in Howell 2003), presidents have strong incentives to issue unilateral directives; and in both, they create policies that differ markedly from those that Congress would produce were it left to its own devices. First, when Congress is poised to enact sweeping policy changes that the pres-

ident opposes, the president occasionally preempts the legislative process with more moderate policy shifts. Recall, by way of example, the weakening Office Safety and Health Administration created under Nixon, the modest sanctions levied by Reagan against South Africa's Apartheid regime, and the narrow focus, and minimal powers, assigned to the independent commission investigating intelligence failures on Iraq. In each of these cases, Congress stood poised to create either a stronger agency or more robust public policy, and a presidential veto would likely have been overridden. So in each, the president unilaterally imposed portions of the proposed legislation, and thereby derailed the support of moderates within Congress who were considering stronger and more sweeping policy change.

More often, presidents use their unilateral powers to change existing policies over which Congress remains gridlocked. And here, the signature of power is not an altered policy, but the creation of one that otherwise would not exist at all. As Congress failed to deal in any substantive way with civil rights issues during the 1940s and 1950s, the classification of information during much of the post-War era, or terrorism since September 11th, presidents stepped in and unilaterally defined the government's involvement in these policy arenas (Cooper 2002; Mayer 2001). As Joel Fleishman and Arthur Aufses recognize, "Congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility" (1976, 24). Incapable of effecting policy change, presidents step in, grab the reins of government, and issue policy changes that Congress alone would not enact. Doing so, presidents do not always get everything that they want, for should they push too far, their actions may galvanize a congressional or judicial response. And in some instances, presidents might well prefer to have their policy inscribed in law rather than in a unilateral directive, if only to guard them against the meddling of future presidents (see footnote 4). But a window of opportunity presents itself when members of Congress remain mired in gridlock—and one that presidents can take without ever convincing a single member of Congress that they share the same interests or serve the same goals.

Given scholars' present inability to locate either the status quo or its considered alternatives within a fixed policy space, it is difficult to systematically test the proposition that presidents use their unilateral powers to preempt congressional activity. It is possible, though, to check whether presidents are especially likely to forgo the legislative process and instead pursue an administrative strategy when members of Congress are internally divided. Before doing so, though, it is worth underscoring the importance of such a test. If unilateral activity peaks when members of Congress speak with one voice—that is, when its membership is unified and strong—then one might argue that presidents merely exercise these powers in the service of congressional interests. For when most members of Congress share a common ideological orientation, presidents cannot readily get away with issuing orders that offend congressional interests. On the other hand, if unilateral activity spikes when the "will of Congress" is least coherent—that is, when its membership is internally divided and weak—then there is good cause to believe that presidents use these powers in order to advance their own independent agenda. For in this instance, members of Congress confront a more difficult challenge when attempt-

ing to overturn a presidential order that they dislike, just as they have a harder time codifying in law those presidential orders that they support.

In previous work, I presented evidence that unilateral activity peaks during periods of congressional gridlock, and declines when Congress is better equipped to legislate on a wide array of policy issues (Howell 2003, 76-100). Presidents, on average, issue more “significant executive orders” when the majority party in Congress is relatively small and internally divided, and fewer when the majority party is larger and more unified. These analyses, however, faced some basic data limitations. Specifically, at the time of this research, it was not feasible to use a single source to identify those executive orders with genuine policy and political relevance, as opposed to those that were strictly administrative in nature. To construct a measure of significant unilateral activity that spanned the entire modern era, therefore, I drew from three separate sources: mentions of orders in federal court cases and in Congress for the 1945-83 period; and mentions in the *New York Times* for the 1969-98 period. The dataset I analyzed consisted of political mentions that were actually observed through 1983, and then predicted values drawn from prior regressions using both the political and journalistic mentions brought the time series through 1998.

Fortunately, such acrobatics are no longer necessary, as it since has become possible to electronically search *New York Times* news stories further back in time, allowing for the construction of a single time series based on one source that covers the entire modern era. To wit, I identified every nonceremonial executive order¹⁴ that received front-page coverage¹⁵ in the *Times* between 1945 and 2001.¹⁶ During this period, the *Times* granted page-one coverage to a total of 290 executive orders, or 7.7 percent of all orders issued. As Table 1 shows, presidents on average issued 1.3 significant orders per quarter, with the minimum (and modal) values being zero and the maximum being 11.

I estimated a series of negative binomial regressions that posited the quarterly number of significant executive orders issued by the president as a function of the size and strength of congressional majorities,¹⁷ measured intermittently as the average size

14. Occasionally, executive orders that lack any policy content make it onto the front page—such as Johnson’s order that commemorated the death of Winston Churchill and another that redesigned the pattern of stars on the American flag when Alaska was granted statehood.

15. Virtually all page-one stories carry over to later sections of the paper. I therefore constructed two time series, one based upon mentions of executive orders anywhere in articles that begin on page one, and another based upon mentions of order within the first ten paragraphs of articles that begin on page one. For the most part, the main results presented below do not depend upon which series is used.

16. Using the *ProQuest Historical Newspapers* feature, I searched all published articles using as key words “executive order.” To be included in the time series, executive orders had to be explicitly mentioned in the *New York Times*. As such, vague references to past orders or forthcoming orders were disregarded. In addition, orders issued by mayors, governors, or anyone other than the president of the United States were excluded from the sample. Mentions of executive orders issued more than six months prior to publication were also excluded. And all mentions of planned executive orders were not coded unless the identified executive order was issued within one month of publication. *ProQuest* currently allows one to search newspaper listings through 2001. To verify their accuracy, mentions of orders were checked against the Federal Register’s list of executive orders (available at <http://www.archives.gov>).

17. Autocorrelation function plots reveal limited temporal dynamics at the first autocorrelation, and sporadically thereafter. Simple event count models, as such, may yield inefficient or potentially biased results. Estimates obtained from moving average models that correct for an MA(1) process yield virtually identical results to traditional count models. In addition, when limiting the sample to the post-Johnson period, when

TABLE 1
Descriptive Statistics

	<i>Mean</i>	<i>Std. Dev.</i>	<i>Min</i>	<i>Max</i>
Significant EOs	1.27	1.63	0	11
Majority size	0.57	0.05	0.50	0.68
LPPC scores	0.13	0.06	0.02	0.27
Divided government	0.61	0.49	0	1
<i>New York Times</i> size	10.05	2.53	6.8	13.4

Observations aggregated by quarter between 1945 and 2001, generating 228 total observations. *New York Times* size refers to the average number of articles that began on the front page of the paper for each year. ED = executive order. LPPC = legislative potential for policy change.

of the majority party in the House and Senate and, to account for divisions within parties, as “legislative potential for policy change” scores (for a description of the latter LPPC measure, see Brady, Cooper, and Hurley 1979). If previous findings hold up, then unilateral activity should rise when congressional majorities are relatively small and internally divided, and activity should fall when majorities are large and internally cohesive. All models control for periods of divided government and for linear and quadratic measurements of the average number of articles on the front page of the *Times*, which decline markedly during the period under investigation.¹⁸ Standard errors allow for clustering within presidential administrations. Again, Table 1 includes the relevant descriptive statistics.

The first two columns of Table 2 present the results for the simplest models. As previously observed, unilateral activity covaries with the partisan composition of Congress. Both the average majority size across the chambers and the LPPC scores yield statistically significant and substantively large impacts on the number of important executive orders that are issued each quarter. Moving from one standard deviation below the means of the two congressional strength variables to one standard deviation above translates, on average, to a 42–44 percent decline in the number of significant orders issued. Also, as previously observed, divided government correlates negatively with the

no temporal dynamics are observed, the main effects are actually strengthened. For the sake of simplicity, therefore, I report estimates from negative binomial regressions with robust standard errors that account for clustering on each president. I use negative binomial models because Poisson models assume that events within an observation period are independent, while negative binomial models do not. In this instance, assumptions about independence are problematic for two reasons: first, current executive orders often amend or overturn past orders; and second, presidents occasionally package policy changes in bundles of executive orders. Still, estimating alternative event count models and least squares regressions does not materially affect the findings. In addition, the results do not appear to be sensitive to the level of aggregation employed. Negative binomial regressions aggregated by year generate comparable results as those presented below.

18. I counted the number of articles appearing on the front page of the *Times* on the 15th of every month and then calculated annual averages. None of the primary results depend upon the inclusion of these variables. When estimating additional models that control for the quarterly unemployment rate or for times of war, none of the primary results change. In addition, in none of the models estimated do these additional controls generate impacts that are themselves statistically significant.

TABLE 2
The Issuance of “Significant” Executive Orders, 1945-2001

	(1a)	(1b)	(2a)	(2a)	(3a)	(3b)
Majority size	-5.80*** (1.63)	— —	-5.39*** (1.56)	— —	-3.93*** (1.63)	— —
LPPC scores	— —	-3.96*** (1.27)	— —	-3.73*** (1.07)	— —	-2.49* (1.81)
Divided government	-0.44*** (0.15)	-0.42** (0.18)	-0.35*** (0.14)	-0.32** (0.18)	-0.64* (0.46)	-0.62 (0.49)
<i>New York Times</i> size	0.15 (0.46)	-0.02 (0.49)	0.17 (0.31)	0.02 (0.34)	-4.39* (3.24)	-4.33* (3.20)
(<i>New York Times</i> size) ²	0.00 (0.02)	0.01 (0.02)	-0.00 (0.02)	0.01 (0.02)	0.18* (0.13)	0.18* (0.13)
Constant	2.21 (2.53)	0.20 (2.35)	1.08 (1.77)	-0.82 (1.64)	29.02* (19.49)	26.82* (19.25)
ln(alpha)	-0.69** (0.34)	-0.68** (0.33)	-0.94** (0.37)	-0.94** (0.36)	-1.19*** (0.37)	-1.19*** (0.37)
Fixed effects included for						
Year of term	No	No	Yes	Yes	Yes	Yes
Quarter within year	No	No	Yes	Yes	Yes	Yes
Presidential terms	No	No	No	No	Yes	Yes
(N)	228	228	228	228	228	228

Negative binomial regressions estimated. The dependent variable consists of the total number of non-ceremonial executive orders that are mentioned on the front page of the *New York Times* between 1945 and 2001. *p < .10, one-tailed test; **p < .05; ***p < .01. Robust standard errors that adjust for clustering within presidential administrations are presented in parentheses. LPPC = legislative potential for policy change.

production of significant executive orders.¹⁹ To account for variation within a presidential term and within each calendar year, the next two columns estimate models that include fixed effects for the term of year and for the quarter within the year. Again, all of the main results hold up. The last two columns, my preferred specification, then estimate models that add to the mix fixed effects for each presidential term. Though of slightly smaller magnitude, the main results again yield significant effects.

These findings corroborate two important claims about unilateral powers. First, the frequency with which presidents deploy these powers depends upon the checks that Congress places upon it. Any viable theory of unilateral action must account for the capac-

19. In addition to majority party size and divided government, the “unilateral politics model” presented in Howell (2003) also predicts that newly elected presidents who replace presidents of the opposite party will rely upon their unilateral powers with greater frequency than will newly elected presidents of the same party as their predecessor. When adding to the statistical models 1a-2b in Table 2 an indicator variable for such presidents, positive and statistically significant impacts are once again observed. Because this variable correlates strongly with the fixed presidential effects presented in models 3a-3b, I exclude it. To test the same proposition, however, I tested the joint significance of differences across presidential types. As before, significant differences are observed.

ity (and willingness) of adjoining branches of government to legislate on the president's behalf and to undo unilateral directions that he decides to issue on his own. Second, as presidents exercise these powers most frequently when Congress is least capable of governing, it is difficult to argue that presidents deploy these powers simply to effectuate congressional interests. Just the opposite, presidents seize the opportunity to act unilaterally when Congress, as an institution, has a difficult time either enacting components of the president's policy agenda or overturning, *ex poste*, policies that take the form of executive orders.

Implementing Public Policy

That presidents issue more executive orders when congressional oversight weakens does not mean that presidents are out of the woods. For issuing an order or command does not automatically make it so. When they set new mandates that require the active cooperation of other political actors who have their own independent sources of authority, presidents can have a difficult time effectuating their orders. Bureaucrats may read their mandates selectively, insert their own preferences when they think they can get away with it, and then report back incomplete, and sometimes false, information about the policy's successes and failures. All presidents, and all politicians, struggle to ensure that those who work below them will faithfully follow orders.

Recognizing the perils of implementation, it might be tempting to conclude that the president's unilateral powers amount to very little after all. For at least five reasons, however, such a conclusion is mistaken. First, we need to be realistic about our expectations. Changes in systems of separated and federated powers almost always come in fits and starts; and policies submitted by any branch of government are regularly contested in others. Ours certainly is not a "presidency dominated" system of government, wherein Congress, courts, interest groups, and the media subvert their own independent interests in order to follow their chief executive (Jones 1994). No one who thinks seriously about unilateral powers argues as much. Instead, they attempt to determine whether presidents can draw upon these powers to change, if only marginally, the doings of government. And having framed the issue (and our expectations) appropriately, there is continued reason to believe that they can.

Second, as previously noted, many unilateral directives are effectively self-executing. When presidents change an environmental rule on allowable pollutants, or when they require that firms contracting with the federal government retain some kind of affirmative action policy, or when they extend federal protections to public lands, their orders take immediate effect. Little light shines through the space between the language and implementation of these orders.

Third, it can be just as difficult to convince bureaucrats to execute laws as unilateral directives. If anything, laws may prove more difficult, if only because their mandates tend to be broader and their contents more ambiguous. In order to placate the required supermajorities within Congress, members often fill laws with loopholes and compromises, granting bureaucrats ample opportunities to substitute their own policy

preferences for those of their political superiors. As presidents need not assemble a legislative coalition in order to issue a unilateral directive, their orders can be more direct. And as others have effectively argued, possibilities for shirking decline in direct proportion to clarity with which directions are handed down (Huber and Shipan 2002).

Fourth, the relationship between a president who stands atop his governing institution and subordinates who ultimately are responsible to him differs markedly from that of a legislator who stands on roughly equal footing with 534 colleagues across two chambers. Assuredly, hierarchies reside in both the legislative and executive branches. And party leaders and committee chairs provide a modicum of order to their collective decision-making bodies, wherein no single member has absolute say over which bills are introduced and which amendments are considered. In the executive branch, however, ultimate authority resides with a president who (fairly or not) is given credit or blame for the success or failure of public policies. As David Lewis's contribution to this volume makes clear, while bureaucrats retain a significant amount of discretion to do as they please, the lines of authority regularly converge upon the president.

Fifth, and finally, presidents are fully cognizant of the challenges of implementation, and they regularly take steps to reduce them. When they unilaterally create programs and agencies, presidents structure them in ways that augment executive control (Howell and Lewis 2002; Lewis 2003; Mayer and Weko 2000). Between 1946 and 1997, fully 67 percent of administrative agencies created by executive order and 84 percent created by departmental order were placed either within the Executive Office of the President or the cabinet, as compared to only 57 percent of agencies created legislatively. Independent boards and commissions, which dilute presidential control, governed only 13 percent of agencies created unilaterally, as compared to 44 percent of those created through legislation. And 40 percent of agencies created through legislation had some form of restrictions on the kinds of appointees presidents can make, as compared to only 8 percent of agencies created unilaterally. Presidents do not suffer quietly under the weight of implementation problems. Rather, they actively participate in the "politics of bureaucratic structure," issuing orders that augment their control over, and influence in, administrative agencies scattered throughout the federal bureaucracy (Moe 1990; Moe and Wilson 1994).

Having issued a directive, presidents do not sit idly by, hoping that bureaucrats will step forward and advance their policy goals, languishing in thought that they probably will not. Instead, presidents often follow up with additional orders and rule changes, directing specific personnel to fulfill specific tasks within specific agencies. To see this, consider the recent history of Bush's faith-based initiatives. From the moment he took office, Bush set out to expand the role of religious organizations in addressing a wide range of state purposes and to open the government's coffers to churches and synagogues around the nation. On January 29, 2001, he issued an executive order that established the White House Office of Faith-Based and Community Initiatives (WHOFBCI), which was charged with "identify(ing) and remov(ing) needless barriers that thwart the heroic work of faith-based groups" and to "enlist, equip, enable, empower, and expand" the work of faith-based organizations nationwide. But his reliance on unilateral powers did not cease once broad objectives were identified. Instead, in the following months and

years Bush issued a wide range of rules, directives, and executive orders that served to advance his policy goals throughout the federal bureaucracy.

In August of 2001, Bush ordered an internal audit of department regulations, procurement policies, and practices that discouraged (or forbade) faith-based organizations from receiving federal grants and delivering social services. He set up offices whose job it was to identify opportunities to promote government partnerships with faith-based organizations, and placed these outposts throughout the federal government: in the Departments of Housing and Urban Development, Labor, Education, Justice, Agriculture, Veterans Affairs, and Commerce, as well as such agencies as the Environmental Protection Agency, the Small Business Administration, and Fannie Mae and Freddie Mac. The administration conducted dozens of workshops and conferences that advised religious organizations about new funding opportunities. It opened a "Compassion Capital Fund" and resource centers around the nation that provided technical assistance with grant writing, staff development, and management. And for smaller faith-based organizations, agencies simplified application processes, developed networking opportunities, and provided specialized training seminars.

The results of these efforts have been astounding. The WHOFBCI has torn down past regulations on religious organizations' hiring practices, displays of religious symbols, eligibility requirements for federal grants, and opportunities to obtain government-forfeited properties. Religious institutions now can apply for federal funds to renovate their places of worship, just as they can hire and fire people on the basis of their religious beliefs. And literally billions of dollars now flow to religious institutions, which use them to serve such varied tasks as tutoring children in underperforming public schools; promoting abstinence, marriage, and drug prevention; and providing child care, job training, and literacy programs both domestically and abroad.

In this instance, a single executive order launched the president's faith-based initiative, but numerous unilateral directives soon followed, each designed to ensure that departments and agencies would duly implement its key provisions. As Anne Farris, Richard Nathan, and David Wright report in their comprehensive review, "In the absence of new legislative authority, the President has used executive orders, rule changes, managerial realignment in federal agencies, and other prerogatives of his office to aggressively implement the initiative" (2004, 1). Note the language here: presidents used these powers not just to write the initiative, but to implement it. And if these authors are correct, Bush is hardly the first to use these powers to see their orders through. "Modern presidents . . . have attempted to strengthen their capacity to achieve intended ends by wielding administrative powers through the bureaucracy, rather than working through divided powers with a fractious legislative branch. They have taken strong, sometimes creative steps to advance their values and purposes by attempting to assert control over federal agency operations" (2004, 2). And while not uniformly, at least often, presidents have succeeded.

To be sure, where implementation concerns arise, the influence afforded by unilateral powers is reduced. Just as presidents must anticipate the likely responses of Congress and the courts when issuing a directive, so too must they remain sensitive to the interests of their own administration. Unilateral powers do have limits, for which any

theory of unilateral action must account. Nonetheless, just because unilateral directives do not allow presidents to secure everything they might like, one should not conclude that these policy mechanisms yield little influence of consequence.

Some Concluding Thoughts

Over the past several decades, the vast majority of quantitative work on presidential power has focused exclusively on the conditions under which presidents successfully guide their policy agenda through Congress. Whole literatures are devoted to whether presidents are more successful in convincing Congress to enact their foreign-policy than their domestic-policy initiatives (see, e.g., Wildavsky 1966, 1989); to the influence that presidents garner from wielding a veto at the end of the legislative game (Cameron 1999; Cameron and McCarty 2004); to the effects that presidential appeals to the public have on legislative deliberations (Canes-Wrone 2005; Kernell 1997); and to the incentives that presidents have to politicize and centralize the crafting of legislative proposals (Rudalevige 2002). More than any other yardstick, scholars measure presidential power by reference to his variable success at coaxing legislative processes in directions and distances they would not otherwise traverse.

All of this work is vital; and much more remains to be done. But if we are to account for the full range of powers that presidents exercise, we need a comparable literature that scrutinizes the conditions under which presidents issue unilateral directives and the influence that they glean from doing so. The legislative arena is hardly the only venue in which presidents exercise power. Increasingly, they pursue their policy agenda not through laws, but instead through some combination of executive orders, executive agreements, proclamations, memoranda, and other sorts of unilateral directives. And until we have a firm understanding of the trade-offs associated with administrative and legislative strategies, and we more fully document the regularity with which presidents pursue one versus the other, our understanding of presidential power will remain incomplete.

As we build this literature, scholars should keep two considerations in mind. First, the theory that was (and is) used to explain presidential success within Congress may not accurately explain presidential success outside of Congress. Theories of lawmaking and theories of unilateral action will likely generate different expectations about the conditions under which policy change occurs. For instance, two recent pivotal politics models suggest that Congress and the president will produce more laws when the preferences within and across the two respective branches are relatively cohesive; but as preferences disperse, opportunities to enact legislation typically decline (Brady and Volden 1998; Krehbiel 1998). As we have seen, however, the production of significant executive orders follows a very different logic. When members of Congress are unified and strong, unilateral activity declines; but when gridlock reigns, presidents seize the opportunity to issue policies through unilateral directives that would not possibly survive the legislative process. This particular empirical finding should not come as a surprise, for unilateral power varies according to the legislative and judicial checks placed upon

the president. When these checks weaken, unilateral power expands; and when they strengthen, unilateral power declines. So doing, though, presidential influence through legislation would appear to increase at precisely those times when, and in those areas where, presidential influence through unilateral directives dissipates.

This leads to the second point concerning the construction of a literature on unilateral action. That theories (and tests) of presidential power must be embedded within larger theories (and tests) of systems of separated powers is well understood (see, e.g., Jones 1994). Few scholars would now argue that we can understand the American presidency outside of the larger political system that individual presidents inhabit. But when examining unilateral powers, the president's relationships with Congress and the courts shift in important ways. Specifically, when unilateral powers are exercised, legislators, judges, and executive do not work collectively to effect meaningful policy change, and opportunities for change do not depend upon the willingness and capacity of different branches of government to cooperate with one another. To the contrary, the system looks more like a system of pulleys and levers—as presidents issue unilateral directives, they struggle to protect the integrity of orders given and to undermine the efforts of adjoining branches of government to amend or overturn actions already taken. Rather than being a potential boon to presidential success, Congress and the courts represent threats. For presidents, the trick is to figure out when legislators and judges are likely to dismantle a unilateral action taken, when they are not, and then to seize upon those latter occasions to issue public policies that look quite different from those that would emerge in a purely legislative setting.

Recent journal articles and books on executive orders and executive agreements have taken important steps toward building this literature. The essays collected in this volume make further advancements. Still, issues that have received enormous amounts of attention within the legislative politics literature remain essentially unexamined in the emerging unilateral politics literature. Does the two-presidencies thesis extend to unilateral powers? Do presidents have incentives to make public appeals either before or after issuing an executive order? How have the growth of interest groups or the polarization of parties affected the willingness of presidents to exercise their unilateral powers? Do incentives to centralize and politicize have the same influence on the crafting of executive orders as they do on the crafting of legislative proposals? Considerable work remains. Encouragingly, though, scholars are getting started.

References

- Blechman, Barry, and Stephen Kaplan. 1978. *Force without war: U.S. armed forces as a political instrument*. Washington, DC: Brookings Institution Press.
- Brady, David, and Craig Volden. 1998. *Revolving gridlock: Politics and policy from Carter to Clinton*. Boulder, CO: Westview Press.
- Brady, David, Joseph Cooper, and Patricia Hurley. 1979. The decline of party in the U.S. House of Representatives, 1887-1968. *Legislative Studies Quarterly* 4(3): 381-407.
- Cameron, Charles M. 1999. *Veto bargaining: Presidents and the politics of negative power*. New York: Cambridge University Press.

- Cameron, Charles, and Nolan M. McCarty. 2004. Models of vetoes and veto bargaining. *Annual Review of Political Science* 7: 409-35.
- Canes-Wrone, Brandice. 2005. *Who's leading whom?* Chicago: University of Chicago Press.
- Cash, Robert. 1963. Presidential power: Use and enforcement of executive orders. *Notre Dame Lawyer* 39(1): 44-55.
- Cooper, Phillip. 1997. Power tools for an effective and responsible presidency. *Administration & Society* 29(5): 529-56.
- . 2001. Presidential memoranda and executive orders: Of patchwork quilts, trump cards, and shell games. *Presidential Studies Quarterly* 31(1): 126-41.
- . 2002. *By order of the president: The use and abuse of executive direct action*. Lawrence: University Press of Kansas.
- Dahl, Robert, and Charles Lindbloom. 1953. *Politics, economics, and welfare*. New York: Harper and Row.
- Deering, Christopher, and Forrest Maltzman. 1999. The politics of executive orders: Legislative constraints on presidential power. *Political Research Quarterly* 52(4): 767-83.
- Edwards, George C. III. 2004. In memoriam. Richard E. Neustadt. *Political Science and Politics* 37(1): 125-27.
- . ed. 2005. *Presidential politics*. Belmont, CA: Wadsworth.
- Farris, Anne, Richard P. Nathan, and David J. Wright. 2004. *The expanding administrative presidency: George W. Bush and the faith-based initiative*. Washington, DC: Roundtable on Religion and Social Policy.
- Fisher, Louis. 1975. *Presidential spending power*. Princeton, NJ: Princeton University Press.
- . 2000. *Congressional abdication on war and spending*. College Station: Texas A&M University Press.
- . 2004a. *The politics of executive privilege*. Durham, NC: Carolina Academic Press.
- . 2004b. *Presidential war power*. 2nd ed. Lawrence: University of Kansas Press.
- Fleishman, Joel, and Arthur Aufses. 1976. Law and orders: The problem of presidential legislation. *Law and Contemporary Problems* 40(Summer): 1-45.
- Griswold, E. N. 1934. Government in ignorance of the law: A plea for better publication of executive legislation. *Harvard Law Review* 48(2): 198-215.
- Hall, Richard. 1996. *Participation in Congress*. New Haven, CT: Yale University Press.
- Hebe, William. 1972. Executive orders and the development of presidential powers. *Villanova Law Review* 17(March): 688-712.
- Howell, William G. 2003. *Power without persuasion: The politics of direct presidential action*. Princeton, NJ: Princeton University Press.
- Howell, William, and David Lewis. 2002. Agencies by presidential design. *Journal of Politics* 64(4): 1095-114.
- Howell, William, and Jon Pevehouse. 2005. Presidents, Congress, and the use of force. *International Organization* 59(1): 209-32.
- . Forthcoming. *While dangers gather: Congressional checks on presidential war powers*. Princeton, NJ: Princeton University Press.
- Huber, John, and Charles Shipan. 2002. *Deliberate discretion? The institutional foundations of bureaucratic autonomy*. New York: Cambridge University Press.
- Jones, Charles. 1994. *The presidency in a separated system*. Washington, DC: Brookings Institution Press.
- Kernell, Samuel. 1997. *Going public: New strategies of presidential leadership*. Washington, DC: Congressional Quarterly Press.
- Kiewiet, Roderick, and Mathew McCubbins. 1991. *The logic of delegation*. Chicago: University of Chicago Press.
- Krause, George, and David Cohen. 1997. Presidential use of executive orders, 1953-1994. *American Politics Quarterly* 25(October): 458-81.
- Krause, George, and Jeffrey Cohen. 2000. Opportunity, constraints, and the development of the institutional presidency: The case of executive order issuance, 1939-1996. *Journal of Politics* 62(February): 88-114.

- Krehbiel, Keith. 1998. *Pivotal politics: A theory of U.S. lawmaking*. Chicago: University of Chicago Press.
- Kriner, Douglas. Forthcoming. Hollow rhetoric or hidden influence: Domestic constraints on the presidential use of force. Ph.D. diss., Department of Government, Harvard University, Cambridge, MA.
- Landy, Marc, and Sidney Milkis. 2000. *Presidential greatness*. Lawrence: University of Kansas Press.
- Lewis, David E. 2003. *Presidents and the politics of agency design*. Stanford, CA: Stanford University Press.
- Lindsay, James M. 1995. Congress and the use of force in the post-Cold War era. In *The United States and the use of force in the post-Cold War era*, edited by T. A. S. Group. Queenstown, MD: Aspen Institute.
- . 2003. Deference and defiance: The shifting rhythms of executive-legislative relations in foreign policy. *Presidential Studies Quarterly* 33(3): 530-46.
- Margolis, Lawrence. 1986. *Executive agreements and presidential power in foreign policy*. New York: Praeger.
- Mayer, Kenneth. 1999. Executive orders and presidential power. *Journal of Politics* 61(2): 445-66.
- . 2001. *With the stroke of a pen: Executive orders and presidential power*. Princeton, NJ: Princeton University Press.
- Mayer, Kenneth, and Kevin Price. 2002. Unilateral presidential powers: Significant executive orders, 1949-99. *Presidential Studies Quarterly* 32(2): 367-86.
- Mayer, Kenneth, and Thomas Weko. 2000. The institutionalization of power. In *Presidential power: Forging the presidency for the twenty-first century*, edited by R. Shapiro, M. Kumar, and L. Jacobs. New York: Columbia University Press.
- McCubbins, Mathew, and Thomas Schwartz. 1984. Congressional oversight overlooked: Police patrols versus fire alarms. *American Journal of Political Science* 28(1): 165-79.
- Moe, Terry. 1990. The politics of structural choice: Toward a theory of public bureaucracy. In *Organization theory: From Chester Barnard to the present and beyond*, edited by Oliver Williamson. New York: Oxford University Press.
- . 1993. Presidents, institutions, and theory. In *Researching the presidency: Vital questions, new approaches*, edited by G. Edwards, J. Kessel, and B. Rockman. Pittsburgh, PA: University of Pittsburgh Press.
- . 1999. *The presidency and the bureaucracy: The presidential advantage*. In *The presidency and the political system*, edited by M. Nelson. Washington, DC: Congressional Quarterly Press.
- Moe, Terry, and William Howell. 1999a. Unilateral action and presidential power: A theory. *Presidential Studies Quarterly* 29(4): 850-72.
- . 1999b. The presidential power of unilateral action. *Journal of Law, Economics, and Organization* 15(1): 132-79.
- Moe, Terry M., and Scott A. Wilson. 1994. Presidents and the politics of structure. *Law and Contemporary Problems* 57(2): 1-44.
- Morgan, Ruth P. 1970. *The president and civil rights: Policy making by executive order*. New York: St. Martin's Press.
- Neustadt, Richard E. 1990. *Presidential power and the modern presidents*. New York: Free Press.
- Rockman, Bert, and Richard W. Waterman, eds. Forthcoming. *Presidential leadership: The vortex of power*. Los Angeles: Roxbury Press.
- Rozell, Mark. 2002. *Executive privilege: Presidential power, secrecy, and accountability*. Lawrence: University of Kansas Press.
- Rudalevige, Andrew. 2002. *Managing the president's program: Presidential leadership and legislative policy formation*. Princeton, NJ: Princeton University Press.
- Waterman, Richard W. 2004. Unilateral politics. *Public Administration Review* 64(2): 243-45.
- Whitnah, Donald R. 1983. *Government agencies*. Westport, CT: Greenwood Press.
- Wildavsky, Aaron. 1966. The two presidencies. *Trans-Action* 4(December): 7-14.
- . 1989. The two presidencies thesis revisited at a time of political dissensus. *Society* 26(5): 53-59.