The Dynamics of Presidential Control and Agency Compliance

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THE DYNAMICS OF PRESIDENTIAL CONTROL AND AGENCY COMPLIANCE

by

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A thesis submitted to the

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Find that both the content and the form meet acceptable presentation standards
Of scholarly work in the above mentioned discipline.
For decades, presidential scholars have posed various theories of what makes the President of the United States an institution of such magnitude and influence. Executive power has long been taken as a given in the study of American institutions, but quantifying this power and determining what it looks like in practice has proven to be a more vexing endeavor. One particularly fruitful avenue of research into the study of presidential influence focuses on unilateral powers whereby the chief executive can set policy essentially without interference from Congress or the courts (though with some important exceptions). This dissertation expands upon our understanding of presidential power in the context of the unilateral executive by asking the following central research question: how effective are unilateral exercises of authority by the president? Assuming that an order given by the president is an order implemented, while appealing to those who would favor a strong activist chief executive, is a deeply flawed proposition. The United States federal apparatus, like many other hierarchical organizations, is subject to the same kinds of costs that have led so many bureaucratic scholars to study the impact of principal-agent theory; the president, too, faces these considerable obstacles. Using executive orders as the bedrock of the analyses herein, I expound upon the conditions that make directives appealing to presidents and when the bureaucracy will (and will not) respond to these orders as the president wishes. The two central conclusions are that presidents must develop a strategy in their usage of executive orders and that federal agencies have wide latitude in implementing directives. Extant theories of unilateral power must take these limitations into account as scholars
continue to build towards a more comprehensive understanding of presidential power.
Dedication

To my family - Mom, Dad, Eli, Logan, Lauren, Grace, and Melissa; and to the memories of Lauren Woodall Roady and Oliver Henry Wright.
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CHAPTER 1: INTRODUCTION

“I want to work with Congress on [my] agenda where I can. But in this year of action, whenever I can take steps without legislation to expand opportunity for more American families, I will. I’ve got a pen and a phone -- a pen to take executive action, and a phone to rally citizens and business leaders who are eager to create new jobs and new opportunities. And we’ve already begun.”

- President Barack Obama; February 8th, 2014

Introduction

How effective are unilateral presidential powers? In the long and storied history of the American presidency, there exist numerous examples of a chief executive taking power into his (someday her) own hands, pushing forward an agenda unilaterally. Often this is done in the face of a reticent Congress, as was the case when President Barack Obama said in February of 2014, as he had in other instances, that he was willing to take unilateral action to counteract an unmoving legislature. The president’s political opponents, both those within government and without, reacted predictably. “Of all the troubling aspects of the Obama presidency,” Republican Senator Ted Cruz wrote, “none is more dangerous than the president’s persistent pattern of lawlessness, his willingness to disregard the written law and instead enforce his own policies via executive fiat.” Elsewhere, in a weekly address, the Speaker of the House, John Boehner, said of Obama: “Instead of looking to work together, the president this week has reminded people that he has -- quote -- ‘a pen and a phone.’ I would remind the president that he also has a

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1 Weekly address. Transcript available online at http://www.realclearpolitics.com/video/2014/02/08/obama_weekly_address_whenever_i_can_expand_opportunity_without_congress_i_will.html.

Constitution, and an oath of office that he took where he swore to faithfully execute the laws of our country.”

And of this executive power, a libertarian commentator for the Fox News Channel pondered: “Will this deliver us to tyranny?”

It was hardly the first time a president’s political opposition took such great pains to point out the dangers of excessive executive power. It was, in fact, a view Senator Barack Obama shared before entering the White House, when he said during his campaign of then-President George W. Bush, “The biggest problems that we’re facing right now have to do with George Bush trying to bring more and more power into the executive branch and not go through Congress at all. And that’s what I intend to reverse when I’m President of the United States.”

Bush was not alone in taking such criticism. Former Oklahoma Senator Don Nickles said of President Bill Clinton’s unilateral executive action during their shared time in office, “He’s [Clinton] not a king. He’s trying to circumvent the constitutional legislative process.”

Franklin Roosevelt was routinely criticized for his use of executive power, with 1936 Republican presidential nominee Governor Alfred Landon saying that the President “proposes to destroy the right to elect your own representatives, to talk politics on street corners, to march in political parades, to attend the church of your faith, to be tried by jury, and to own property” (qtd. in DeGregorio 2004, 504). Abraham Lincoln was spoken of similarly for a number of his actions during the Civil War, and Thomas Jefferson, a staunch opponent of executive overreach, purchased the Louisiana Territory from France mostly on his own, an action he himself doubted.

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5 March 31, 2008.
6 Quoted in Susan Page, “When a law is unlikely, often an order will do.” USA TODAY, August 11, 1997.
was truly legal (e.g. Meacham 2012).

Concerns about presidential power are as old as the presidency itself, and general thoughts on executive power are, of course, far older (e.g. Cooper 2002). These issues were clearly critical points of debate at the Constitutional Convention in 1787 (e.g. Calabresi and Yoo 2008; Cooper 2002). Normative concerns about the appropriate level of executive authority are not new, though the debate always seems to be reinvigorated with each new administration, when opponents of unilateral power during the presidency of one seem to suddenly forget (or at least lessen) their opposition in the presidency of another. And indeed, it is a debate worth having, especially out of the confines of partisan politics. But this concern over presidential power has at its core an underlying question that must be answered: is unilateral executive authority effective? If so, under what circumstances?

Developing an understanding of executive power is important to the study of American political institutions for a number of reasons. Chief among these is refining general theories of presidential power, of which scholars have offered many over the course of the institution’s study. In the next chapter, I will highlight some of the extant theories of executive power, their predictions and implications, and how this dissertation will contribute in unique ways to theoretical development. Second, this research contributes to the study of other institutions within American politics, providing an evaluation of when presidents choose to turn to certain types of powers to advance an agenda. The president’s decision can, in turn, demand that other governmental actors adjust their own strategies in choosing how to react to a flexing of presidential muscle. Third, studying executive power has implications not only for the American presidency, but for numerous other hierarchical organizations both public and private. The presidency is certainly a unique institution, but broader theories of executive control (especially

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8 Ibid.
in the context of principal-agent dilemmas) are applicable to all variety of bureaucracies of one form or another.

Understanding the potential dangers of executive power requires an understanding of how executive power works in practice. This dissertation aims to help develop this understanding principally through the analysis of executive orders, which are only one available tool in the president’s unilateral arsenal. In this introduction, I will give a brief overview of the theoretical underpinning of the unitary executive and outline the research that follows in the succeeding chapters. The real and very apparent limits on unilateral policy-making call for a reexamination of how scholars study presidential power.

The Unitary Executive

The heart of any discussion on executive power rests in large measure around the theory of a unitary executive. The president, of course, does not and cannot make law unilaterally, but there are nevertheless a wide array of tools at his disposal to shape policy. The concept of a unitary executive refers specifically to “the president’s power to remove subordinates in the executive branch or to direct their actions” (Calabresi and Yoo 2008, 3), and the methods of doing so are legion: executive orders, memoranda, national security directives, presidential proclamations, and more are ostensibly meant to direct the activities of those in the bureaucracy over which the president is the chief executive (e.g. Cooper 2002). Presidents throughout history have tested the limits of their powers and established new boundaries for their office, in some cases running into considerable counteraction from the other branches of government (e.g. Cooper 2002; Calabresi and Yoo 2008; Neustadt [1960] 1990). President Andrew Jackson was censured during his presidency for what the Senate perceived to be an unjustified firing of a
cabinet official (e.g. Calabresi and Yoo 2008). Andrew Johnson, who succeeded to the White House after the assassination of Abraham Lincoln, was the first president to be impeached, falling a single vote short of conviction, after removing numerous executive branch subordinates over the provisions of the Tenure of Office Act (e.g. Calabresi and Yoo 2008; DeGregorio 2004). Harry Truman’s executive order calling for the seizure of various steel mills was strongly rebuked as unconstitutional by the Supreme Court (e.g. Neustadt [1960] 1990).

But even in spite of these cases, there is broad agreement among scholars, and the general public, that the powers of the presidency have expanded enormously over time (e.g. Cooper 2002; Howell 2003; Mayer 2001). Whether this expansion is a normatively desirable outcome or not is the subject, understandably, of intense debate (e.g. Bruff 2010; Cooper 2002; Kagan 2001; Shane and Bruff 2011; Strauss 2007), much of which was reignited during the presidency of George W. Bush. Bush, for his part, made numerous references to a concept of a “unitary executive” in several of his controversial signing statements issued after signing a bill in which he objected to certain provisions (e.g. Kelley 2007b; Kelley and Marshall 2008, 2010; Peters and Woolley 1999-2012). This, coupled with a number of other actions, especially in light of the September 11th attacks, led a plethora of scholars to openly wonder about the possible ramifications of an increasingly powerful chief executive (e.g. Cooper 2002; Howell 2003; Strauss 2007). Though the contention that Bush’s actions were unique was significantly overstated, there was surely legitimate concern over policy-making through what essentially amounted to executive fiat.

Indeed, the power of command is precisely at the heart of unitary executive theory. Taking the Constitution to indicate that the president is solely in charge of executing the law (e.g. Calabresi and Yoo 2008), there would remain the possibility that, in conducting these duties, the
president could order his subordinates in the executive branch to implement policy in very specific ways and perhaps counter to the wishes of Congress. This line of thinking essentially turned presidential scholarship on its head; whereas Richard Neustadt’s ([1960] 1990, 11) contention that “Presidential power is the power to persuade” had for decades been taken virtually at face value, a newer generation of researchers focused instead on the considerable powers of presidential command (e.g. Cooper 2002; Mayer 2001; Howell 2003; Kelley and Marshall 2008, 2010).

It is clear enough why unitary executive theory in practice would make some individuals nervous. The thought of a president with a massive bureaucratic apparatus at his or her disposal, willing to carry out commands in the implementation of policy, even counter to the wishes of Congress or the public at large, is troubling. But the normative concerns about a unitary executive are not particularly at issue in this dissertation; what is more pertinent to my research is how a president’s unilateral powers are used in practice and the effectiveness thereof. Unitary executive theory is, in and of itself, consigned largely to legal debates about its validity. We must ask additionally how it works in practice.

An impressive breadth of research into the president’s interaction with the executive branch is enough to call the actual applicability of the unitary executive into question. It is well-known that presidents expend considerable energy trying to shape federal agencies in different ways. They attempt to influence the bureaucracy’s design (e.g. Lewis 2003), the proliferation of “friendly” appointees in the executive branch (e.g. Lewis 2008), and centralization of the regulatory process within the broader White House apparatus (e.g. Howell 2003; Mayer 2001), to name a few. Were it the case that presidents essentially possessed command authority over the bureaucracy, one has to wonder why these efforts would even be necessary.
This, then, is the crux of the dissertation’s argument: notwithstanding the constitutional justification for or against unitary executive theory, the executive branch, like many other kinds of organizations, is not a monolith. Indeed, Neustadt ([1960] 1990) is quick to point this out. Ultimately, bureaucrats have their own preferences, their own motives, and their own tools at their disposal when it comes to policy implementation (e.g. Wilson [1980] 2000). Why would we expect that presidents possess the kind of command power that would be necessary to oversee the federal bureaucracy? Such power would require the executive have virtually unlimited authority to, among other things, hire and fire subordinates, direct funds, and create agencies; but the reality is that all of these are extraordinarily limited powers in practice (e.g. Lewis 2003, 2008; Neustadt [1960] 1990).

I will address these issues in the succeeding chapters in an effort to demonstrate the profound obstacles that presidents face in setting policy on their own. Far from being able to, as Howell (2003, 13) argues, “make all kinds of public policies without the formal consent of Congress,” presidents often face an executive branch reluctant to follow his commands. The when, why, and how of this noncompliance form the basis of the dissertation. Studies of the personal presidency (e.g. Greenstein 2004; Neustadt [1960] 1990) may indeed be less useful than they once were, as Howell (2003) has said. However, bargaining remains a critical component in a president’s toolkit, and the power to persuade still underlies much of what presidents do.

**Overview of the Dissertation**

I now provide a brief outline of where this research project proceeds from this point forward. Chapter 2 establishes general theoretical precepts concerning presidential control of the bureaucracy through a careful consideration of the various literatures which inform conceptions
of presidential power throughout time. Chapter 3 outlines the data used to answer the central research question, focusing on the dependent variables as well as the key independent variables. Chapter 4 tests the circumstances under which presidents issue executive orders based on varying types of agency characteristics. Chapter 5 tests the conditions under which agencies respond formally to executive orders as opposed to when these directives are essentially ignored. Chapter 6 explores the issue of agency compliance through the use of case studies and interviews to obtain a more nuanced picture. Chapter 7 discusses conclusions of the dissertation and implications for presidential policy-making.

**Chapter 2: A Theory of Executive Order Usage and Agency Responsiveness**

In this chapter, I explore the definitions of presidential power, a broad concept, in greater depth, paying particular attention to the principal-agent dilemmas that presidents face, as do all managers. The vastness of the executive branch makes perfect monitoring an impossible task (or, at the absolute least, wholly impractical), and I will argue that this fact gives federal agencies the latitude they need to selectively enforce presidential directives. I develop a theory that is based on two principal facets: first, that presidents make strategic considerations in the first step of the executive order process about whether and where to direct these commands. Second, that agencies in turn make their own considerations about whether to respond to these directives.

Of course, all agencies and all executive orders are not created equal, and so it is useful to consider the varying circumstances under which the bureaucracy might respond to a directive as to when it will ignore one. Agencies may have their own preferences, but the work of numerous scholars (e.g. Golden 2000; Huber 2007) tells us clearly that most bureaucrats are committed to doing their jobs, even in the face of perceived policy disagreements. It is not the case that liberal
agencies uniformly ignore conservative presidents, or that conservative agencies uniformly ignore liberal presidents. It can thus not be said that responsiveness to executive command is based wholly on policy positions. This chapter poses a theoretical framework elucidating the circumstances under which we would expect responsiveness versus non-responsiveness.

Chapter 3: Quantifying Executive Orders and Agency Characteristics

In this chapter, I detail the data collection process and why I choose to use the units of analysis employed herein. This dissertation is broadly about presidential power, but I approach this question through the study of executive orders. There are limitations to focusing on this particular subset of executive tools for unilateral policy-making, for there are indeed a wide array of powers presidents have at their disposal to influence political outcomes. I will justify the use of executive orders on theoretical and methodological grounds, arguing chiefly that the availability of these directives as well as their traceability allows for a clear test of the general theory I propose in the dissertation. This is a two-pronged empirical approach, focusing on both presidents and agencies, and so the chapter also details how I construct different measures of each institution by which to judge executive order issuance and responsiveness.

Chapter 4: Executive Orders: When, Why, and How Presidents Use Them

The degree of bureaucratic responsiveness to executive orders is of interest only insofar as presidents discriminate concerning which agencies they wish to command. I detail in this chapter some of the broad strategic considerations that presidents make when it comes to issuing executive orders. There are of course numerous studies on the circumstances under which presidents choose to “go it alone” (e.g. Howell 2003; Mayer 2001), but these studies have mostly
focused on presidency- and congress-centric factors. I argue instead that presidents take agency characteristics into account when they make the decision to issue an executive order. Chiefly, we might expect that presidents vary their usage of directives on the basis of how they think different agencies will react. This chapter plumbs when and where presidents choose to steer their directives, and how the bureaucracy’s structure and ideology might play into these executive decisions. Presidents cannot afford to consider only how Congress, the courts, or the public might react to these directives; they must also recognize that bureaucrats have latitude in implementing them and respond accordingly.

Chapter 5: “‘Do This! Do That!’ And Nothing Will Happen”: Executive Orders and Bureaucratic Responsiveness

Chapter 4 is principally concerned with a president’s motivation in using executive orders. Chapter 5, by contrast, explores the circumstances under which bureaucracy responds to these directives, if they even respond at all. This research highlights the considerable latitude that bureaucracies have in implementing orders from their principal (the president) and why they choose to forego presidential directives. The principal contribution in this chapter is of the true limitations that presidents face in imposing policy unilaterally. In spite of conventional wisdom suggesting that presidents can “go it alone” to counteract an obstinate Congress, agencies have their own tools with which to resist undue executive influence. Specifically, I argue that the same factors that presidents may take into strategic account when it comes to issuing executive orders also influence how responsive agencies are to executive orders. It is indeed true that an order issued is not necessarily an order implemented, but whether bureaucrats follow through is dependent on a host of factors relevant both to the agency itself and to the implementing president.
Chapter 6: Executive Orders in Practice: Agency Compliance and the Limitations of Presidential Power

This chapter takes a more nuanced view of the executive order process, from initial conception to implementation and agency compliance. It is worth noting, as I discuss in greater detail in succeeding chapters, that responsiveness does not by itself equate to compliance. The issue of whether agencies are fulfilling their duties as the president expects them to is far more complicated. Though Chapter 5 provides a quantitative basis to study agency responsiveness, Chapter 6 uses in-depth case studies and reviews with former governmental officials to get a sense of the executive order process in practice. In brief, any conceptualization of presidential directives as unilateral, I argue, is misplaced; they are often part of a long and complicated bargaining process, and after issuance, agencies have a considerable amount of leeway in complying. The executive order process is as much an exercise in persuasion as any other presidential power is, and the formulation process determines in large part how executive agencies will respond. Presidents do indeed have some methods of coercing reluctant agencies into compliance, but the effectiveness of coercion depends in part on how agents evaluate the costs of compliance weighed against the costs of disobedience.

Chapter 7: Unilateral Powers and the Strategic Presidency - Conclusions

Chapter 7 outlines the dissertation’s main findings relating to executive order issuance, agency responsiveness, and agency compliance. The results have a number of implications for presidential power and the unitary executive broadly construed. Regardless of the normative desirability of a unitary executive, the dissertation’s conclusions demonstrate that the president is far from a unilateral policy-maker. There are significant ways in which the federal bureaucracy can push back against a president that is ostensibly the head of all federal agencies, and I argue
chiefly that studies of presidential power must consider these limitations in greater depth.

Richard Neustadt’s ([1960] 1990) contention that persuasion amounts to the president’s power is not yet a theory that can be cast aside; the president’s interactions with the executive branch are as much an exercise in persuasion as anything else.
CHAPTER 2: A THEORY OF EXECUTIVE ORDER USAGE AND AGENCY RESPONSIVENESS

ABSTRACT

This chapter develops a general theory of executive order usage and responsiveness based on the tenets of principal agent theory (PAT). The executive branch is not a monolithic entity, and though presidents may occasionally have the advantage over Congress of being able to publicly present a united front, the reality is that the bureaucracy must deal with the same kinds of bargaining commonly observed in other institutions of American politics. The president’s power to shape agency action, though a considerable normative concern, is limited as a result. I place presidents and agencies within a theoretical construct that emphasizes strategic calculation, arguing that both actors will alter their behavior on a number of considerations relating to other institutions of government, characteristics of the institution in which they operate, and distinguishing characteristics of the directives they are employing or are expected to implement.
Introduction

James Q. Wilson ([1989] 2000, 156), in his treatise on the bureaucracy, wrote that it “is surprising that bureaucrats work at all rather than shirk at every opportunity.” He identifies a number of constraints and incentives (some more effective than others) which can induce productivity from the various agencies which comprise a vast governmental apparatus. But the question of compliance remains a complex one; how do political actors beholden to voters, like the president, get what they want from agencies that are beholden to a different set of principals? Even if bureaucrats are hard at work, what guarantee is there that they are doing the work as their principals actually expect it to be done? Can we get a handle on presidential action on the one hand and agency outcomes on the other? These questions form the basis of the dissertation.

I pose this central research question: when and why do agencies respond to unilateral presidential directives (specifically in this study, executive orders)? Similarly, do agencies ever ignore these directives, and if so, under what circumstances? Much research on agency compliance with the executive has been largely theoretical or, when empirically tested, relatively limited. This is not for lack of effort on the part of researchers; with the various complexities of principal-agent problems, there is room for agents to implement orders in ways that their principals did not intend (e.g. McCubbins, Noll, and Weingast 1987; Wilson [1989] 2000). I aim to untangle part of the complex relationship between the president and the various agencies which together comprise the federal bureaucracy.

Normative concerns about democratic governance abound in research on political institutions. A comprehensive study of executive attempts at bureaucratic control and compliance at the agency-level will address a number of these concerns. In the realm of presidential politics, for example, many political scientists have expressed concerns about growing presidential power...
and what this power means for responsible government (e.g. Cooper 2002; Mayer 2009). But the validity of concerns about presidential power depends on the assumption that presidents are more powerful than ever, that they can exercise high degrees of control over a vast federal apparatus, and that the concentration of such power in one individual is dangerous. Does this describe the political reality of being president? Agencies, after all, are the governmental entities charged with implementing policy at the grassroots. If these agencies ignore the president or misconstrue his orders, then concerns about presidential power need to be weighed against the prospect of agency autonomy.

This chapter establishes general theoretical precepts and testable hypotheses and is organized as follows: in the first section, I lay out some of the motivating theories of presidential power which inform this project’s frame and discuss why I take an administrative approach (i.e., how presidents interact with the bureaucracy) to evaluate a particular facet of presidential power. Second, I present critical literature on government bureaucracy and the president, how this research is connected, and what is missing from previous studies. In the third section, I use what we know about the president and the bureaucracy to establish some basic theoretical assumptions and testable hypotheses to answer my central research question. In the fourth section, I will outline the organization of the dissertation, including which data sources and models I will use.

**Perspectives on Presidential Power**

This is a project largely concerning presidential power: how it ought to be conceived, how it is applied, and how it works in practice. But the phrase “presidential power” on its own is overly broad because of the legion of ways in which scholars have classified this multifaceted concept. For some, “presidential power is the power to persuade” (Neustadt [1960] 1990, 11), a
reflection of the idiosyncratic skills and personalities of the various individuals who have occupied the Oval Office. For others, presidential power is a function of the executive’s ability to effectively frame and communicate an agenda to the voters that will in turn bear fruit relative to the other institutions of the federal government (e.g. Canes-Wrone 2006; Kernell 2007). Power, too, can be a function of the president’s ability to negotiate and bargain with Congress to the greatest extent practicable (e.g. Bond and Fleisher 1990; Cameron 2000), his or her ability to navigate within the federal bureaucracy (e.g. Lewis 2003, 2008), and his or her ability to command agents to execute policy at the president’s direction (e.g. Howell 2003; Mayer 2001).

These perspectives are by no means mutually exclusive, of course. Political scholars have taken great efforts to demonstrate some of the circumstances under which presidents would choose one strategy over the other. Perhaps the most comprehensive view of presidential power is that provided by Edwards (2009), who argues in his book *The Strategic President* that Richard Neustadt’s ([1960] 1990) famous judgment of presidential power was misplaced. The view of presidential power as akin to persuasion, according to Edwards (2009, 6), “has led some scholars to overlook the importance of the context in which the president operates as well as his institutional setting. Ironically, this focus has also discouraged reaching generalizations about the strategic level of power.” The author instead suggests that circumstances and the president’s ability to make the best of those circumstances to advance an agenda are at the heart of presidential power (Edwards 2009).

There is little doubt that Edwards has offered a compelling view of what makes a president effective. Regardless of the various perspectives on presidential power, accepting the constitutional weakness of the presidency has often been a starting point from which to evaluate the office (e.g. Edwards 2003; Jones 2005; Neustadt [1960] 1990). This weakness from a
constitutional point of view is not in dispute amongst scholars. Instead, disagreements are centered around how the president can navigate a complicated process to achieve the desired policy results necessary to advance an agenda. Whatever one can say about the nature of presidential power, much of the most recent research has passed the judgment that persuasion, to the extent that it is used in advancing an agenda, is at best a minor facet of what makes for an effective president (e.g. Edwards 2003, 2009; Howell 2003; Mayer 2001).

I take the view that Edwards’s (2009) strategic president accurately and, to this point in scholarship, most efficiently encapsulates a broad theory of presidential power. I seek now to extend and expand upon this logic so that scholars can consider the president’s use of unilateral activity in strategic ways. Edwards (2009, 192) hints at a need for such development when he writes: “if presidents cannot persuade, exercising discretionary authority may be a key to success. It is perhaps ironic that, finding the potential of persuasiveness limited, some scholars are returning to a focus on the president’s discretionary authority -- the power to command.” But given assumptions about the utility of command, I argue that strategy plays as important a role in unilateral action as it does elsewhere. Unilateral powers are an important component of presidential power, but to develop an understanding of these powers requires a fresh theoretical perspective.

Though it is my assessment that Edwards (2009) is largely correct in his casting of the president as a strategic player, I argue also that Neustadt’s ([1960] 1990) view of the power to persuade, while having some important caveats, has perhaps been cast aside too quickly. Persuasion does matter, I will argue, but this is largely a function of what we mean by “persuasion.” In this dissertation, I define persuasion as something akin to bargaining, a view which Neustadt ([1960] 1990, 40) shares; persuasion, like bargaining, is not a one-way street:
“The essence of a President’s persuasive task, with congressmen and everybody else, is to induce them to believe that what he wants of them is what their own appraisal of their own responsibilities requires them to do in their interest, not his....Overtly or implicitly, hard bargaining has characterized all illustrations offered up to now. This is the reason why: Persuasion deals in the coin of self-interest with men who have some freedom to reject what they find counterfeit.”

It may be true that Neustadt overstates the case of personal persuasive capabilities, as Edwards and others suggest; but this dictum of persuasion as something akin to bargaining is still completely relevant in modern presidential scholarship. Interactions with Congress necessitate bargaining, for example (e.g. Cameron 2000). It is true that the president’s institutional capabilities, and the capabilities of the legislature, influence the extent to which this bargaining can be effective. But it is also true that, on some level, much of what presidents do is about persuasion.

Why, then, focus on unilateral powers? I do not present herein a unified theory of presidential power in all of its facets. Presidential power, after all, is not an easily classifiable variable. Power shifts in different circumstances with different governmental actors interacting in different political climates. What makes a president powerful today is no guarantee of power tomorrow. But unilateral directives have become such a focal point of executive scholarship in recent years for very good reason: they raise, as many (e.g. Edwards 2009; Howell 2003; Mayer 1999, 2001) have already noted, the possibility of command authority independent of the need to bargain. Bargaining between the executive and the legislature is a well-studied phenomenon (e.g. Bond and Fleisher 1990; Cameron 2000; Edwards 1989). What is lacking however is a clearer picture of the bargaining that occurs within the executive. As I have already noted, political
scientists have begun to recognize that directives are not, by their very nature, necessarily self-executing (e.g. Mayer 2009). It therefore follows, I argue, that the strategic calculations discussed by Edwards (2009), the ability to exploit existing opportunities for political advantage, are inherent in “unilateral powers” as they are elsewhere in the institution of the presidency. I will discuss this concept more completely when discussing how presidential power applies to bureaucratic action, but suffice it to say for the moment that bargaining between principals and agents occurs within the federal government in ways mirrored in other organizations.

The president’s power of command is not absolute. Neither is it an illusion. Developing a comprehensive understanding of presidential power requires a nuanced look at how presidents interact with their bureaucratic agents. Were the theory of this research to be boiled down to one sentence, it would be this: *presidents and agencies are engaged in bargaining, and the decision by presidents to direct agencies as well as the decision by agencies as to whether to respond to an order are a function of strategic calculations.* The goal of the rest of this chapter is to give some insight as to what circumstances alter these calculations and to pose testable hypotheses to evaluate the theory.

**Bureaucratic Autonomy, Bureaucratic Control**

Agencies are an inescapable and well-studied political component of the federal government. Taken together, they have been separately called the “fourth branch of government” (Meier 1979, vxii), “the bureaucratic state” (Carpenter 2005, 41), and the fundamental building blocks of “the modern American state” (Skowronek 1982, 3). Clearly, the importance of administrative governance has not been lost on social scientists. In this section I will focus on the relevant concept of bureaucratic autonomy as well as its causes, consequences, and how other
political actors seek to counteract it.

At the heart of any study of the bureaucracy is the principal-agent problem. The problem first took root in organizational theory before economists of the early 1970s began adapting it to fit their models (e.g. Miller 1992, 2005; Spence and Zeckhauser 1971). Over time, principal-agent theory has been adopted by political scientists to tackle a range of problems that arise between and among political actors (e.g. Miller 2005). Miller (2005, 203-204) sums up principal-agent theory thusly: the theory “assumes a relationship in which the agent has an informational advantage over the principal….In particular, the question is whether the principal can induce the more expert agent to take those actions that the principal would take.” The informational advantage exists because complexity is at the very heart of the bureaucracy’s existence; if legislators and presidents could run the country completely and independently, they would. Obviously they cannot, and this fact has given rise to a wide and deep bureaucratic state to which the legislature and the president must often defer in order to implement policy (e.g. Epstein and O’Halloran 1999; Skowronek 1982). As Wilson ([1989] 2000, 245) points out, “Congress may judge an army by whether it wins a battle…but it will have a most difficult time trying to specify in any meaningful way how to fight the battle.” Thus a complex and opaque policy will depend more on how employees at the agency-level implement it rather than control from the principal; in other words, the bureaucrats have the expertise and talent to know what they are doing (see also Potoski [2002]).

Therefore, the principal must rely on the agent’s expertise to implement policy, but the agent has incentives to divert from the principal’s preferences in circumstances where each party wants something different. In other circumstances, however, the agent and the principal want very similar things. This can be, for example, because the agent depends on the principal for his
or her career or because the agent and the principal share similar ideologies (e.g. Epstein and O’Halloran 1999; Lewis 2003, 2008).

Thus understanding how the president interacts with agencies involves understanding how principals can overcome the problem of dealing with agents who have considerably more knowledge and expertise. Sometimes principals are incentivized to structure their organizations in such a way as to maximize the probability that their agents will faithfully implement the principal’s goals (e.g. Miller 1992). This approach, which emphasizes the importance of rational, utility-maximizing actors contrasts with a second view, what Miller (1992, 2) characterizes as an approach that highlights “leadership – that is, inspiring a willingness to cooperate.” The latter view echoes early assessments of presidential power. The most famous of these works is by Neustadt ([1960] 1990), who argues that formal unilateral powers are a sign of presidential weakness rather than strength. The key, he argues, is a president whose personal bargaining powers encourage other political actors, including the agencies, to go along with the president’s agenda of their own free will.

When do agencies comply and when don’t they?

Given Miller’s (1992, 2005) summary, the central question with respect to federal agencies is what makes some agencies compliant while others resist outside control? Some scholars have separately assessed attempts by the president and the Congress to control agencies (e.g. Epstein and O’Halloran 1999; Lewis 2003, 2008), while others have looked to explain just how it is that agencies maintain a degree of separation and independence from their principals (e.g. Carpenter 2001; Meier 1979; Potoski 2002). It is easy to formulate some of the normative arguments underlying concerns about bureaucratic autonomy. On the one hand, there is a reasonable concern that bureaucrats, free of the constraints of electoral retribution, can become
too comfortable in their positions, insulated from the public and subsequently unresponsive to the public’s needs (e.g. Campbell 2005; Ingraham 2005). However, it was that same desire to make agencies responsive that led to the patronage crisis and subsequent merit reforms of the 1800s (e.g. Carpenter 2005). There is something to be said for bureaucratic independence; the public expects service agencies to be competent (e.g. Carpenter 2005; Ingraham 2005), and that competence arguably depends on keeping bureaucrats insulated from the passions of the public.

Therein lies the tension between the president and legislature on the one hand and the bureaucratic state on the other. Presidents and legislators, facing electoral sanctions, have incentives to control agencies in ways that best maximize their chances for political gain (e.g. Eisner 2000; Epstein and O’Halloran 1999; Lewis 2003; Moe 1989). Agencies, on the other hand, face a different set of incentives. Insulated agencies may be staffed with bureaucrats who are motivated by ideological concerns, the efficient implementation of public policy, or agency budget maximization (e.g. Carpenter 2005; Eisner 2000; Niskanen 1975). If agencies are more politicized (i.e., more of the bureaucrats in an agency are politically appointed), bureaucratic behavior may take a more political bent, reflecting the loyalty some agents might have to a specific actor rather than to maximizing the efficient implementation of a particular policy (e.g. Lewis 2008). One central concept explaining autonomy is, therefore, centralization: how much control does the president have over a given agency?

Another component of bureaucratic autonomy is the difficulty of monitoring what it is that an agency does. McCubbins et al. (1987, 246) argue that “the costliness of monitoring” makes the strategy often untenable. Why is monitoring so costly? In part, it is because of the resources that the monitoring body must expend: oversight of an agency takes time, manpower, and research in order to determine whether the agency is doing what they are tasked to do (e.g.
McCubbins et al. 1987). But no agency is entirely like any other. In every case the principal must bear costs to exercise good oversight, but these costs will vary depending on what the agency does and how they do it. Wilson ([1989] 2000, 158) identifies four separate types of agencies on the basis of two questions: “[c]an the activities of their operators be observed? Can the results of those activities be observed?” The tougher it is to answer either of these questions in the affirmative, the tougher it will be to monitor the agency. The tougher it is to monitor the agency, the easier it will be for bureaucrats to shirk or avoid compliance.

Wilson’s⁹ four agency types are as follows: procedural organizations, craft organizations, production organizations, and coping organizations. For Wilson, the observability of the work that an agency does (what he calls the “outputs”) and the results (what he calls the “outcomes”) distinguishes one type from another. Table 2.1 below illustrates the differences in observability over outputs and outcomes for each agency type (along with some examples of governmental entities which fit the criteria).

<table>
<thead>
<tr>
<th>Observability of Outputs</th>
<th>Observability of Outcomes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Easy</strong></td>
<td><strong>Difficult</strong></td>
</tr>
<tr>
<td><strong>Production Organizations</strong></td>
<td></td>
</tr>
<tr>
<td>Internal Revenue Service</td>
<td>Food and Drug Administration</td>
</tr>
<tr>
<td>Social Security Administration</td>
<td>Nuclear Regulatory Commission</td>
</tr>
<tr>
<td><strong>Craft Organizations</strong></td>
<td><strong>Coping Organizations</strong></td>
</tr>
<tr>
<td>Wartime Divisions of the Army</td>
<td>Police Departments</td>
</tr>
<tr>
<td>Army Corps of Engineers</td>
<td>Public School Systems</td>
</tr>
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</table>

How are these distinctions relevant to Wilson? With production organizations, overseers

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⁹ All of the remaining information in this section (up to the section titled “Presidential Power and the Bureaucracy”) is found on pages 158-171 of Wilson ([1989] 2000) and paraphrased here for convenience. The examples of agencies in the table below are provided by Wilson except for the procedural organizations; in that case, I chose to use a different set of examples.
(managers in his study, though we could extend the logic to the president, who also practices significant oversight) know what their employees are doing and the results of their actions. As Wilson ([1989] 2000, 160) says, the IRS is such an organization because its managers “can observe the activities of [their] clerks and auditors and can measure the amount of money collected in taxes.” To be sure, there are hiccups (for example, people sometimes underreport their income in an attempt to deceive the government), but for the most part, the management of these organizations is straightforward.

Procedural organizations at the federal level are often regulatory agencies like the NRC or the FDA. The success of such organizations is harder to quantify. Who is to say if the NRC has done its job well? The commissioners can set goals for inspectors and the legal division of the NRC, but how can we truly evaluate the effectiveness of inspection? If a nuclear reactor melts down six months after an inspector visits the plant, is it the failure of the NRC or a freak accident? Such difficult questions mean that the success of regulatory organizations is often an elusive concept.

When outputs are hard to see but outcomes are easily measured, we have what Wilson calls “craft organizations.” His example is an army in wartime; it is not easy to know what every member of a specific division is doing (or even what the division as a whole is doing), but managers (generals, admirals, presidents) know when there is a successful outcome: the battle is won. It is not the case “that only results matter” (Wilson [1989] 2000, 168) in such agencies, but the results are at least easily evaluated.

Finally, coping organizations are those that are virtually invisible to observation. Wilson uses public school systems as an example: it is difficult to always have an eye on teachers, and how do we measure the success of something as complicated as education? If education is
measured by a student’s skill at reading, writing, and arithmetic, quantitative assessments may suffice. However, it is unclear, as Wilson says, whether all that student knowledge is the result of classroom instruction or of something else, like parental guidance or educational television programs. Thus organization type complements centralization in determining the level of an agency’s autonomy.

One particular point is worth mention, as it drives the structure of the dissertation: it is entirely possible that the process of directed attempts at control from the president and the responsiveness of agencies is endogenous. In other words, we may find no evidence of responsiveness or non-responsiveness to the president from decentralized agencies precisely because presidents do not attempt to control these agencies via executive order. The clues for this come from Lewis (2003) and Moe (1989) with respect to agency design. Some agencies are going to be more important to the president’s agenda and his re-election efforts than others; in this case, the president may fight with Congress to keep the agency centralized. In other circumstances, however, presidents may not concern themselves with what a particular agency does and therefore allow it to be decentralized with little fuss. Decentralized agencies may ultimately receive fewer presidential directives because of their mission rather than because of their design.

But this question of endogeneity is precisely why I focus on the president and agencies together rather than on one institution alone. This research therefore has two chief components: first, under what circumstances do presidents issue executive orders? Do they discriminate based on different agency-specific factors, or are they just as likely to give orders to some agencies as to others? Second, when an order has been issued, what affects the likelihood of an agency response? I therefore develop a theory that generates testable hypotheses both for the issuance of
executive orders and the responsiveness of agencies thereto. This will help tackle the endogeneity problem because it gives us an idea of whether presidents, for example, even give enough directives to certain types of agencies to be significant.

**Presidential Power and the Bureaucracy**

Neustadt’s ([1960] 1990) classic argument that presidents derive their authority from their ability to persuade other governmental actors had enormous effects on presidential scholarship in a variety of arenas. Such a view of presidential power rests, in many ways, on how we evaluate the individuals who have served as president; in other words, the presidency as an institution of government is secondary to the president as a unique individual. This characterization of presidential power inspired a great deal of scholarship oriented around exploring the psyche, strategies, and character of individual presidents (e.g. Barber 1977; Greenstein 2004; Skowronek 1993).

However, Neustadt’s dismissal of formal powers as presidential weakness glosses over the assumptions and appeal of rational choice theory, presenting instead a view of presidents who change the minds of other politicians through force of personality and character. Perhaps this occurs at the margins; yet it is more pertinent to look at the full range of presidential tools rather than constraining oneself to the intricacies and idiosyncrasies of individuals who occupied the White House. Formal tools (through the politics of agency design, unilateral powers, veto bargaining, etc.) have the power to directly alter the incentive structure of other actors in the various agencies, the legislature, or the courts independent of the president’s personal appeal.

Therefore an increasingly prominent lens through which to study presidential power considers the formal institutional aspects of the presidency rather than the individual behavioral
aspects of the men who have occupied the office. This former approach has been gaining traction in presidential scholarship, especially in the last fifteen years (e.g. Cameron 2000; Howell 2003; Kelley and Marshall 2008, 2010; Mayer 2001). Such research has allowed political scientists to make more generalized statements about the institutional capacities of the presidency. The breadth and depth of recent research on the presidency is impressive, but for my purposes, I focus more narrowly on the consequences of direct presidential action, such as executive orders, national security directives, and signing statements (e.g. Berry 2009; Cooper 2002; Howell 2003, 2005; Kelley 2007a, 2007b; Kelley and Marshall 2008, 2010).

Much of the research on how presidents get what they want, then, is oriented around the nature of the other institutions of government and how those institutions react to assertions of presidential power. Political scientists have learned a great deal about when presidents will use unilateral powers, but still lack systematic empirical studies which evaluate successful uses of unilateral powers. None of this suggests, however, that political scientists are unaware of the frustration presidents face from occasionally noncompliant agencies or that scholars are unconcerned with the possible consequences of noncompliance. Franklin Delano Roosevelt succinctly captured the problems of dealing with an often rigid bureaucracy with its own goals and incentives:

“The [Department of the] Treasury is so large and far-flung and ingrained in its practices that I find it almost impossible to get the action and results I want….But the Treasury is not to be compared with the State Department. You should go through the experience of trying to get any changes in the thinking, policy, and action of the career diplomats and then you’d know what a real problem was.” (qtd. in Neustadt [1960] 1990, 37)

Some scholars, recognizing this classic principal-agent problem, have studied ways in which
presidents actively work to control agencies (e.g. Lewis 2003, 2008; Rudalevige 2002). However, there is still a pivotal scholarly disconnect between attempts at control and how effective those attempts are, yet scholars are leaning on one area of presidential politics, unilateral powers, to inform this disconnect. The increasing proportion of research looking into unilateral powers can be traced, in part, to unitary executive theory (as discussed, e.g., by Calabresi and Yoo [2008]). Unitary executive theory holds that the president is charged with complete and total oversight of all executive branch functions; this means, more practically, that the president runs the bureaucracy. The legal basis of unitary executive theory is found in Article II, Section 1 of the Constitution (“The executive Power shall be vested in a President of the United States of America”).

The unilateral politics view of the presidency inspired an explosion of work on presidential power in the last ten years as scholars recognized the potential for studying the presidency through its formal institutional powers (e.g. Cooper 2002, 2005; Howell 2003; Kelley and Marshall 2008; Mayer 2001). But, as Mayer (2009) has pointed out, much of this work is based on taking presidential power as fixed. In other words, studies of the presidency and unilateral powers assume that these powers are, by definition, effective. This assumption is tenuous. It suggests that agencies are passive and pliant when it comes to orders from the president, but that is not universally true. As Wilson ([1989] 2000) notes, bureaucrats are willing to work with the president to a certain point until he begins to impinge upon their interests; at that point, they will push back and undermine the White House’s agenda to the extent that they are able. If a given agency can and does actively ignore or subvert the president’s orders, then normative concerns about presidential power are misplaced. Instead, political scientists should concentrate on the normative benefits or drawbacks of bureaucratic autonomy. On the other
hand, if presidents exert substantial unilateral control over agencies, then scholars can rightly focus on the potential damage of one person controlling such a vast governmental apparatus.

Scholars have approached these aspects of unilateral power from two different perspectives: political science and the legal literature. Political scientists have largely skirted the issue of the effectiveness of direct presidential power, but legal scholars have implied that, in many ways, presidents are not nearly as powerful as we think they are (e.g. Bruff 2010; Shane and Bruff 2011). Indeed, such work has argued that it is not at all unusual for presidential directives or other attempts to manage an agency to fall on deaf ears.

Much of the driving force behind legal studies of executive control of the bureaucracy is encapsulated in a debate about whether the president has any basis for authority over statutorily created agencies whatsoever but that which is directly given to him by Congress. Kagan (2001) argues generally in favor of presidential control of bureaucratic administration on the basis that such a structure has both normative and practical benefits, in addition to having a sound constitutional basis. Strauss (2007), meanwhile, maintains that the constitutional view of a unitary president is a misinterpretation, arguing instead that the president’s chief responsibility is oversight in making sure that agencies faithfully implement congressional statutes.

Unfortunately, little empirical evidence exists in political science that would allow scholars to reach conclusions that many administrative lawyers take as a given: to paraphrase Mayer (2009, 442), a presidential order directed is not necessarily an order implemented. Even so, the basis for concluding that presidential directives are not always effective rests on a long tradition of in-depth case studies as well as constitutional and statutory analysis. The question has not been subjected to any rigorous empirical tests, which I will address in this project.

The literature establishes a firm theoretical foundation which is based on a few key
precepts: the president and the bureaucracy have different incentives, agencies have varying latitude to implement presidential orders based on agency type, and presidents recognize that some agencies are more compliant than others. The president, as a national figure, seeks to establish a lasting legacy and implement his ideological and policy preferences (Moe 1989), but also has re-election goals in his first term and concerns about his party’s continued fortunes in his second (e.g. Light 1999). Agency incentives vary based on institutional characteristics of the agency; thus agencies in the Executive Office of the President (EOP), feeling an attachment to the president for his direct involvement in their employment (and likely sharing key policy preferences), should tie their incentives most closely to those of the president. More independent bureaucrats have careers to pursue and budgets to spend and should be less responsive to executive meddling.

From Generalities to Testable Hypotheses

Up to this point my goal has been to convey the general theoretical precepts which underlie the analysis to follow in the succeeding chapters. I have discussed the dynamics of principal-agent problems and how this dilemma ought to affect presidential interactions with the bureaucracy. In the dissertation I will approach the research question using executive orders. As to why I am using these to answer the question, I will discuss this in some more depth in Chapter 3 on research design. In brief, executive orders provide a clear, reliable, and quantifiable subject to form the basis of empirical analysis. They are certainly not the only tool by which presidents can influence agency behavior (I will expand upon other methods in Chapter 3), but they are the most direct and provide an excellent benchmark for hypothesis testing.

Generating hypotheses requires first an examination of the directive process. There are, in
essence, two stages to any order (and arguably more -- I return to this point in Chapter 6): the
decision by the principal to issue a directive, and the decision by the agent(s) to respond. Thus I
will pose two sets of hypotheses generally relating to these two distinct stages. On the one hand,
how are we to evaluate the strategic considerations which lead a president to issue a directive;
and on the other, what are the strategic considerations that influence the probability that the
bureaucracy will respond to this directive?

The President: When, Why, and How are Directives Used?

What are the factors most likely to affect general patterns of executive order usage? As
Mayer (2009) has pointed out, much past research is based on taking presidential power as fixed.
In other words, studies of unilateral powers assume that these powers are, by definition,
effective. But this is a tenuous assumption, I have argued, for two reasons: first, the president’s
ability to control agencies through unilateral powers is not absolute, as scholars in the legal field
have argued (e.g. Bruff 2010; Kagan 2001; Shane and Bruff 2011; Strauss 2007). Second, not all
agencies are created equal; some are more insulated from presidential control than others, and
insulated agencies may have more latitude in implementation than their more centralized
counterparts (e.g. Epstein and O’Halloran 1999; Lewis 2003).

Naturally, executive orders are not made in a game that involves only the president and
the agency. Congress matters as well. Indeed, Howell (2003) has shown that congressional
composition and the legislature’s ability to counteract presidential exercises of power has a
dramatic effect on how willing presidents are to use executive orders. Because the president and
Congress face different incentives (e.g. Mayhew [1974] 2004; Moe 1989), the two are often at
odds when it comes to controlling the bureaucracy, and the executive must account for this when
attempting to constrain and control bureaucratic behavior.
Past work, therefore, has informed our understanding of the president and the bureaucracy, but much of this has been done in separate arenas. On the one hand, we have some evidence that agencies have significant latitude in implementing presidential directives. On the other hand, we know that presidents are not reluctant to use their unilateral authority to achieve their preferred policy outcomes. We are left with a tension between these two perspectives, which this chapter will address in part. The crux of this section’s argument is this: presidents should strategically issue orders based on agency type with the expectation that orders given to centralized agencies will have a greater likelihood of being faithfully implemented than will orders given to insulated agencies.

How do I define centralization? I lean on categories established by Epstein and O’Halloran (1999) and Lewis (2003) in agency classification. Chiefly I will talk of insulation and centralization, terms introduced by Lewis and applied to Epstein and O’Halloran’s classification system. Put simply, the most centralized agencies are those over which presidents have the most control. The most insulated agencies are those over which presidents have the least control. Agency centralization is established on a five point scale; again, this scale is borrowed directly from the sources above (see Epstein and O’Halloran 1999, 97; Lewis 2003, 44-45). The most centralized agencies are those located within the EOP. Cabinet agencies are slightly less centralized, but still subject to significant presidential control. Independent agencies (e.g., the Environmental Protection Agency; the Central Intelligence Agency) are further insulated still; usually the president will appoint the heads of these organizations with senatorial consent, but his opportunities to make other appointments are much more limited than cabinet agencies or those located in the EOP. Independent regulatory commissions (e.g., the Nuclear Regulatory Commission; the National Labor Relations Board) have modest presidential influence; the
agencies are structured such that they do not have an agency head, but rather a chairperson and various commissioners. These individuals are nominated by the president and confirmed by the Senate, but importantly, member terms are staggered. In other words, the president does not have the authority to appoint an entire commission of his choosing. Finally, government corporations (e.g., the National Railroad Passenger Corporation; the Tennessee Valley Authority) are almost completely insulated from political control. Presidents do not appoint the heads of these agencies or any membership thereof. Figure 2.1 illustrates the concept of insulation:

**Figure 2.1 - Centralization and Insulation in the Executive Branch**

It is certainly the case, as will be demonstrated in Chapter 3 (see Table 3.1), all things being equal, that more orders go to centralized agencies than to those further outside the president’s purview. But what, ultimately, drives variation in the number of orders to each type of agency? Do presidents take congressional preferences into account when considering where orders are going to go? Assuming that presidents are aware that their orders might not be faithfully implemented, what motivates them to issue orders affecting insulated agencies? Howell (2003) gives one possible answer. One of the principal findings of his research is that
presidents rely on executive orders under conditions of congressional unity as a go-around in the face of legislative inaction. When unity is high, in other words, Congress will have an easier time changing a status quo policy, because the gridlock interval (as discussed, e.g., by Krehbiel [1998]) will be “smaller.”

Congressional unity, however, does not say anything about whether government is divided or unified, and I argue that one concept cannot be evaluated without accounting for the other. That is, there is a very different dynamic at play when unity is high and when government is divided as opposed to when unity is high and government is unified. When unity is high and government is divided, I argue that the president will be more likely to have orders to insulated agencies overturned by Congress, and thus the president will be less likely to give orders in the first place under such conditions.

**Hypothesis 1:** As congressional unity increases during divided government, presidents will issue fewer executive orders to insulated agencies than they do as congressional unity increases during unified government.

With respect to centralized agencies (here, those in the EOP and the cabinet agencies or their sub-elements), I argue that congressional unity should have no effect on the number of executive orders issued. These agencies are traditionally within the president’s purview, and Congress, I theorize, should be less likely to attempt counteraction under any circumstances. The expectation here, then, is a null relationship.

Additionally, I expect that presidents will be encouraged to attempt to enact broad reforms both when they immediately enter office and right before they leave. Mayer (1999) posits a similar hypothesis, arguing that presidents are prone to more action in the early and late stages of their administrations. The author’s argument, generally speaking, is that presidents
want to effect change early, to set a quick pace for decisive action, as well as late, “to put a legacy in place” (Mayer 1999, 451). His empirical findings give mixed results. But again, it is worth reconsidering these variables in the face of exploring agency variation in terms of decentralization. The theory here differs little from Mayer (1999). I argue that presidents entering office will attempt reform across a wide spectrum of government, in part to set the pace to which Mayer refers, but also to attempt to gain control of the governmental apparatus. Similarly, on their way out, presidents will want to do whatever is possible to leave their mark on government. In either case, they should be more motivated to issue orders to a range of agencies, lessening their concern for variation in compliance and instead engaging in “spray and pray” tactics.

Hypothesis 2: As presidents are just entering or preparing to leave the White House, they will issue more orders to all types of agencies than at any other time in their administrations.

These two hypotheses are both general precepts about broad executive order usage patterns. It is also crucial to consider in more nuanced context what agency factors beyond insulation might influence presidents to use executive orders. As discussed earlier, insulation is expected to change the number of orders a president gives to a particular agency. However, this concept becomes more difficult to measure given the limited data available for a useful subset of government organizations.

Therefore, I turn to a more measurable concept, which I broadly call “decentralization,” to evaluate variation in the number of orders directed at a given agency. The theoretical appeal of the concept of decentralization is that some agencies are more difficult to control than others; President Obama cannot simply tell the Federal Reserve what to do, for example, because the Federal Reserve is structured as an independent regulatory commission whose membership is not
as subject to the whims of the president as would the membership of an agency in the Executive Office of the President. In other words, decentralization is about control.

Chapter 3 details the construction of the variables representing decentralization. Briefly, I measure both the level of discretion in a given bureaucratic organization (measured as the percentage of agency employees authorized to exercise discretionary authority) and agency sub-elements (measured as the absolute number of sub-offices that are part of a given agency). The expectation is that presidents recognize centralized agencies as easier to control than decentralized agencies and thus vary their use of executive orders in accordance with the following hypothesis:

*Hypothesis 3: Presidents issue fewer executive orders to decentralized agencies than to centralized agencies.*

What other agency characteristics are relevant considerations for presidents? I argue, chiefly, for two: agency politicization and agency ideology. These are two separate concepts. Politicization refers to “the...number of political appointees” (Lewis 2008, 1) in a given agency, and the variable is measured as the percentage of employees in the agency who are political appointees. I hypothesize that a link should exist between politicization and the prevalence of orders given to an agency, as an agency with more employees subject to political appointment should “owe” their position more personally to the president. As such, presidents may anticipate that politicized agencies are more likely to follow through on executive orders than are more career-oriented agencies, leading to Hypothesis 4:

*Hypothesis 4: Presidents issue more executive orders to politicized agencies than to non-politicized agencies.*

The final principal variable of interest is agency ideology. One highly plausible
explanation for non-compliance on the part of government bureaucrats is that the agency in question simply does not share the president’s policy preferences. We know that given the structure of the bureaucracy, command can be a complicated issue. But what is the role for policy preferences? Does the Environmental Protection Agency give the same diligence to an executive order from Ronald Reagan as they would to one from Barack Obama? I argue not, and thus expect presidents to limit the number of executive orders given to ideologically non-congruent organizations.

*Hypothesis 5: As ideological distance between the president and a given agency grows, the president issues fewer executive orders to the agency.*

These hypotheses are principally concerned with the “first stage” in the directive process: the criteria which affect the president’s calculation about whether to issue an order. The next set of hypotheses are concerned with the “second stage” of the process: what affects the likelihood that an agency will respond to an order? A number of the factors discussed above, particularly those in Hypotheses 3, 4, and 5, I argue, will play an important role in influencing agency behavior and strategy.

At first blush, the conceptualization of unilateral presidential directives as a tool of control is an appealing one. Executive orders, one form of control, carry the force of law and require neither congressional nor judicial approval, save for potential *ex post facto* responses (e.g. Howell 2003; Mayer 2001). The utility of executive orders is dependent in large part on unitary executive theory (e.g. Bruff 2010; Calabresi and Yoo 2008; Rudalevige 2012), which holds that the president, as head of the executive branch, has complete control over all agency actions. Assuming that unitary executive theory holds, presidents need not persuade, as Howell (2003) argues; presidents can use executive orders to simply *tell* agencies what to do.
The potential ramifications of unitary executive theory are readily apparent; Cooper (2002) devotes an entire volume to discussing the consequences of a president’s virtually unlimited power. This focus on institutional capacity heralded a shift in the study of the presidency from a more qualitative focus on the historical intricacies of individual administrations (e.g. Barber 1977; Greenstein 2004; Neustadt [1960] 1990; Skowronek 1993) to a broader conceptualization of presidential power that endures from administration to administration (e.g. Canes-Wrone 2006; Edwards 2003, 2009; Howell 2003; Lewis 2003, 2008; Mayer 1999, 2001). The classic Neustadtian ([1960] 1990, 11) idiom that “Presidential power is the power to persuade” was in large part swept away in a flood of excellent empirical work indicating that presidential power need not involve any bargaining or convincing on the part of the executive; the president is, in a real sense, in command of the bureaucracy. Many were eager to conclude that President Truman’s warning to his successor (“’Do this! Do that!’ And nothing will happen” [as cited in Neustadt [1960] 1990, 10]) was not entirely relevant in the context of the modern presidency.

However, serious methodological doubts as to the true effectiveness of unitary executive theory were already beginning to emerge in the legal literature at the same time as political scientists were making such large strides in presidential scholarship (e.g. Bruff 2010; Kagan 2001; Shane and Bruff 2011; Strauss 2007). To many in the field of administrative law, the conceptualization of a unitary executive is neither theoretically nor practically sound (e.g. Shane and Bruff 2011). As presidency-centered research continued to advance, political scientists began to openly acknowledge this dilemma; as Mayer (2009, 442) writes in a comprehensive review of the state of unilateral scholarship, “the quantitative literature assumes that a unilateral order issued is a unilateral order carried out. It seems clear enough that on many issues a
presidential assertion of unilateral power will be resisted.”

Executive orders, then, are subject to the same kind of principal-agent problems as other forms of presidential oversight. But why, when executive orders are directives which carry the force of law, would bureaucrats be able to shirk or otherwise ignore them? The answer is multifaceted. First, the legal basis of unilateral directives is not a settled issue (e.g. Raven-Hansen 1983; Shane and Bruff 2011; Strauss 2007), and so there remains some “wiggle room” in terms of implementation. The president has limited enforcement capabilities, so the ability of the president to make a credible commitment to retaliatory action is questionable.

Second, and more importantly, responding to an executive order is not a simple matter. At first blush it may seem as such; the president tells an agency what to do, and the agency has to decide whether to respond or not. But as Rudalevige (2012) has documented, these orders are often part of a long and complex bargaining process, and what the agency is expected to do and how it is expected to enforce a directive is not always entirely clear. Further, the dilemma of multiple principals is not absent in the executive order process. As discussed previously, agencies must also answer to Congress, which may have divergent preferences from those of the president. Bureaucrats also have loyalty to their agencies. Even when agency heads act in accordance with the president’s commands, there is no guarantee that lower-level bureaucrats, who are committed to their organization’s mission and independence (e.g. Carpenter 2001; Huber 2007), will fall in line with the head of their agency (e.g. Golden 2000; Kaufman 1981).

And even though an executive order is a supposedly “unilateral” action, the problem of multiple principals still emerges. Congress can countermand an executive order via statute, and though this process is rare (e.g. Howell 2003), it can be used to great effect. A recent example is Executive Order 13492, which was President Barack Obama’s (2009) attempt to satisfy a
campaign promise to close the Guantanamo Bay detention camp. The President ordered the base’s closure and made arrangements for relocating detainees, but he soon learned just how difficult a prospect this was, politically and practically. Congress was not nearly as enthusiastic as the White House and reacted in decisive fashion, refusing to appropriate the funds necessary for the executive order to be implemented (e.g. Johnson, Gibbons, and Gibson, 2010; Pfiffner 2011). The camp remains open in early 2014, though in December of 2013 the President signed a law that included, in part, a loosening of regulations governing prisoner transfers, which Obama hailed as “a welcome step toward closing the facility.” Nevertheless, even if the President should succeed in closing Guantanamo Bay, it will not have been as easy as issuing an executive order.

The executive order process is therefore a complex web, responsiveness heavily influenced by serious limitations on presidential enforcement as well as questions about any given order’s legal basis. Unilateral power, it seems apparent, is only as effective as those who are on the receiving end of the instructions. This is not to suggest that presidents are powerless; though enforcement power is limited, it is certainly not completely absent. Further, there is something to be said for the power and prestige of the office itself, as discussed by Neustadt ([1960] 1990). Evidence suggests that bureaucrats are committed to doing their jobs faithfully (e.g. Golden, 2000), and as such, presidents may get a response not because they hold any great enforcement power, but because the agencies feel that responding to the president is part of their job. That being said, it is clear that responsiveness is far from universal.

Theorizing on what makes an agency responsive or not depends in part on an evaluation

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of the bureaucracy as it is structured. Given that agencies theoretically can avoid implementing executive orders, what factors would we expect make such avoidance more likely? A few answers are readily apparent: not all orders require a response. When the president tells the executive branch, for example, that they are to cooperate with a particular advisory commission’s requests for information, this requires no formal promulgation. Secondly, some executive orders are unclear in their targeting or in their intended effect. When President Clinton (1993b) issued Executive Order 12862 requiring that agencies “be customer driven” and provide “service equal to the best in business,” the implication is that government was somehow working to provide poor customer service before this directive (or at least not at all concerned with customer service). Further, the order does not clearly specify what rules or regulations are necessary to give people better customer service, and so the question remains: did government service improve following this directive? Answering this general question (did they “do that?”) has proven difficult.

Other factors may influence responsiveness beyond clear and concise language, however, including agency decentralization, ideology, and politicization, discussed above with respect to executive order issuance on the part of the president. The hypotheses advanced here are similar to Hypotheses 3, 4, and 5, only now I am less concerned with a president’s strategic calculations in issuing an executive order and more concerned in what leads an agency to respond to such an order.

First consider decentralization. An important tenet of principal agent theory holds that the costs incurred to monitor an agent will impact the effectiveness of said monitoring, a function of the principal’s lack of information about what the agent is doing (e.g. Miller 2005). The president’s quest to limit the effects of such decentralization are clear in persistent attempts over
time to move policy decisions closer to the White House apparatus (e.g. Lewis 2003; Wilson [1989] 2000). Presidents then are certainly aware of the difficulties posed by costly monitoring costs when it comes to carrying out directives, and I argue that the gap in information between the principal and the agents grows under conditions of decentralization. When less of the policy-making process takes place in the White House proper, when the president’s own appointees have less of an opportunity to implement that policy at their direction, and when the work that agencies do is sufficiently outside of the president’s purview, agents have more opportunities to shirk. The result, I argue, is that more decentralized agencies are less responsive generally to executive orders.

Hypothesis 6: The more decentralized an agency is, the less likely that agency will be to respond to an executive order.

What of agency ideology? The linkage here, too, seems clear: agencies should be less likely to respond to a given order when they do not share the president’s preferences. The whole basis of unilateral power is built on the notion that the president can tell agencies to do what the president wants, but when agencies do not want what the president wants, what is to stop the bureaucrats from ignoring these directives? This goes to the heart of the principal-agent problem: with the inability to perfectly monitor what his agents are doing, the president cannot guarantee responsiveness. This was the problem President Clinton referred to when expressing his frustration about executive orders: “you can never be 100 percent sure that they were implemented” (as cited in Rudalevige 2012, 157). Though many speak of the benefits of a neutral and competent bureaucracy (e.g. Carpenter 2001; Huber 2007; Golden 2000), the fact remains that agencies have their own ideological leanings (e.g. Bertelli and Grose 2009, 2011; Clinton, Bertelli, Grose, Lewis, and Nixon 2012; Lewis 2008).
Do these ideological leanings within the bureaucracy influence agents’ responsiveness to the president? That has yet to be established, but it is certainly the case that presidents worry about this possibility and set out to develop a strategy to counteract ideological schisms within the administrative apparatus (e.g. Lewis 2008; Wilson [1989] 2000). It is certainly worth considering, given the pronounced distrust among presidents about the ideological goals of the bureaucracy, to investigate whether ideology truly informs the likelihood that an agency will answer a presidential directive.

If it is the case that agencies respond to presidents differently based upon their ideological leanings, there are normative as well as practical implications for such a consequence. First, the president is an elected official, and the extent to which people within the bureaucracy are actually subject to the will of the public, it is indirectly done via the president and Congress. But the personnel system is complex, and there are ultimately millions of individuals within the federal bureaucracy, some of them almost totally outside of the president’s control or even that of Congress (e.g. Lewis 2003, 2008). Ideologically-driven action on the part of the bureaucracy threatens to undermine norms of representative government, and on the practical political side, the inability of elected officials to affect the behavior of ideological agents threatens the effectiveness of governing more generally.

Hypothesis 7: As agencies become more ideologically distant from the president’s ideal point, they will be less likely to respond to executive orders than agencies closer to the president’s ideal point.

Finally, what is the role of agency politicization in governing how responsive bureaucrats are to an executive order? Defining politicization as the proliferation of appointees in a government organization (e.g. Lewis 2008), it seems logical to argue that politicized agencies are
more likely to respond to presidential directives because the president’s appointees should be more loyal to the president than agency careerists (e.g. Aberbach and Rockman 2000). The president’s hiring and firing power over the bureaucracy is highly variable and far from absolute, and while the president has substantial control over agencies in the Executive Office of the President (e.g. Rudalevige 2012), as organizations become more and more insulated from political control, the president’s capacity to influence agency make-up diminishes (e.g. Lewis 2003, 2008). The problem is evident: the president can tell an agency to “do this,” but with only limited enforcement capabilities, it is difficult for the president to make a credible commitment to follow through on retaliatory action should an agency fail to implement an executive order.

The extent to which these conflicts emerge and potentially damage the agency’s ability to function is also dependent, in part, on the differences between career and non-career (i.e., “politicized” in this study’s context) officials. Aberbach and Rockman (2000) discuss the adaptability of career bureaucrats to political appointees and vice versa, suggesting further that responsiveness of agents to their elected principals is, while not universal, relatively stable. But survey-based evidence from Maranto (1993, 2004) suggests that career bureaucrats are much more uncomfortable with political appointments from a president who does not share the agency’s ideological viewpoint (e.g., Anne Gorsuch Burford’s appointment to head the Environmental Protection Agency during the Reagan Administration).

There are thus two conceivable ways of studying politicization’s effects on rates of responsiveness: the first is to look to Lewis’s (2008) analysis of increased politicization as a lone variable. Aberbach and Rockman (2000) and Maranto (1993, 2004), meanwhile, raise the theoretical possibility that politicization’s effects on responsiveness could be moderated by the agency’s political ideology: specifically, the greater the ideological distance between the
president and the agency, the less effective politicization will be because of goal incongruence. I therefore posit two hypotheses: first, that politicized agencies, because they should have a higher proportion of officials sympathetic to presidential goals, are more likely to respond to executive orders; second, that the greater the ideological distance between the president and a given agency, the more negatively politicization will affect rates of responsiveness.

*Hypothesis 8a:* Politicized agencies will be more likely to respond to executive orders than non-politicized agencies.

*Hypothesis 8b:* Politicized agencies closer to the president’s ideal point are more likely to respond to executive orders than politicized agencies further from the president’s ideal point.

These hypotheses are meant to establish the general dilemmas that both presidents and agencies face when it comes to the issuance and implementation of executive orders. It is clear based on the observations of past presidents and other employees of the executive branch that getting an agency to take some action is rarely as simple as simply insisting that the action be taken. Knowing this, the above theory and hypothetical propositions seek to provide an answer for what changes the likelihood of a response. The ability to drive administrative behavior is an important facet of presidential power, and evaluating these hypotheses will provide a glimpse into how firm a pillar of executive power administration actually is.

**Conclusion**

In his memoirs, Harry Truman (1955a, 88) expressed his dissatisfaction with handling the administrative state with a perhaps apocryphal tale to serve as a metaphor for his own experiences:

“There is a story of the great, but not good, queen, Catherine of Russia, who in her way
was as dictatorial as any of her modern successors. It seems that a river with a rapid
current flows through the Baltic city of Riga, and in Catherine’s time a bridge was built
across it. This bridge, I am told, still stands and carries a bronze tablet which reads, in
Russian: ‘Oh current, stop thy flow. The Queen demands it.’”

The lesson Truman is communicating is the sheer arduousness of navigating a vast federal
bureaucracy with its own preferences and motives. This frustration is neither uncommon nor
particularly surprising, and presidents of all political stripes have taken pains to point to the
necessity of having the right individuals working at the behest of the White House. “The people
you choose to surround you,” George W. Bush (2010, 65-66) reflected, “determine the quality of
advice you receive and the way your goals are implemented.” Matters of personnel and how a
president can manage the extraordinarily vast executive branch are always among the most
principal of concerns in any White House (e.g. Lewis 2008).

This chapter has served to lay out the broad theoretical precepts and testable hypotheses I
will use to evaluate the effectiveness of presidential directives. The story in this dissertation is
one of strategic actors within the executive branch; presidents have preferences that they would
like to see put into administrative effect, and bureaucrats too have preferences about how their
work ought to be done. Each is dependent to some extent upon the other, and the decision by the
president about whom to direct involves careful calculation, just as does the decision by the
agencies to respond (or not to respond, as the case may be). The succeeding chapters are meant
to fit what Edwards (2009, 192) refers to as “the power to command” into a broad conception of
the strategic presidency. We know, both from anecdotal as well as archival research (e.g.
Neustadt [1960] 1990; Rudalevige 2012) that presidents and agencies are always engaged in a
tug-of-war on matters of governance. The task now is to tease out the factors that explain who
comes out on top in the struggle.

Chapter 3 moves us from a general theory of presidential strategy to data construction. As noted, I use executive orders as a way to assess the utility of the theory of a unilateral presidency. To do this involves the creation of a new data set that can follow the directive process from issuance to response, a process that I will cover in greater depth in the pages to follow. I will also discuss some of the trends in executive order usage that we have observed over time, patterns of responsiveness, and potential limitations to the analysis. The succeeding chapters ultimately demonstrate the sincere limitations presidents face in directing the executive branch and the factors which are likely to lead to greater success in the arena of unilateral politics.
CHAPTER 3: QUANTIFYING EXECUTIVE ORDERS AND AGENCY CHARACTERISTICS

ABSTRACT

This chapter details the data collection process in broad strokes, exploring the various units of analysis that are used to test the propositions advanced in Chapter 2. Empirically examining these propositions requires the construction of a unique dataset using information from a variety of sources. These data include characteristics not only of executive orders (the lens through which I study the effectiveness of unilateral powers) but also statistics relevant to individual agencies, allowing for the creation of numerous empirical models. The research design also involves a qualitative component meant to evaluate the directive process from a more in-depth perspective. The chapter additionally provides a general overview of executive orders: their form, purpose, and how their usage has changed over long periods of time. As with any analysis, there are limitations to this research design, including complications posed by the presence of additional methods at the president’s disposal to influence agency behavior. I discuss these limitations in depth as well as the justification for why the dissertation’s research design provides useful answers to questions about unilateral presidential powers.
Introduction

In 1935, Congress passed the Federal Register Act which, among other things, required that presidents have their executive orders formally published in the Federal Register, a daily document that contains published materials relating to presidential and agency activity. It was one of a series of federal activities that followed in the wake of the Great Depression and the election of Franklin D. Roosevelt to the presidency. The government, both its elected officials and its agencies, began to take on more responsibility in more arenas than ever before, and one of the legacies of this era was the explosion of activity within the administrative apparatus and the resulting access to information about presidential and agency actions. This, combined with numerous advancements in the study of both the presidency and the bureaucracy, enables me to construct a unique data set from multiple perspectives to evaluate the utility of presidential directives.

In this chapter I want to give the reader an overview of the data with which I will be working to address Chapter 2’s theory and hypotheses. I do this from a number of perspectives: I describe the research design and data collection process in depth, and I also discuss why these questions are answered using executive orders. To be sure, executive orders are not the only tool presidents have at their disposal to influence agency outcomes, and so a discussion of viable alternatives is important in communicating why I ultimately settle on these particular directives. Included in this is a necessary discussion on executive orders: what they are, how they work in practice, and what trends we have observed over an extended period of time relating to their usage.

The data discussed herein will allow me to test numerous propositions that have

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For more information, see the Federal Register Act (44 U.S.C. 15) via the National Archives, available online at http://www.archives.gov/federal-register/laws/federal-register/. 
heretofore gone unestablished in the realm of presidential politics. The chapter proceeds as follows: first, I provide the reader with a general overview of the research design. Second, I discuss why I chose executive orders as the foundational unit with which to study agency responsiveness and compliance. This section also includes a discussion of some of the other powers available to presidents and possible limitations to studying my central research question through executive orders. Third, I detail the coding process for executive orders and discuss how their usage has evolved generally over time. Fourth, I detail data sources used to compile statistics on the characteristics of various agencies, providing a sense of how different models are used to address different components of the theory.

Research Design

The dissertation employs a multi-method approach to assess the utility of the unitary executive model from three perspectives. I conduct the analyses using executive orders, which are presidential directives used as a command tool most commonly over the behavior of agencies within the executive branch (e.g. Cooper 2002; Howell 2003; Mayer 2001). There are, all told, three components to the analysis. First, I ask under what conditions presidents issue executive orders considering a variety of circumstances, including individual agency design and characteristics. Second, I study under what conditions agencies respond to executive orders through the issuance of formal rules or regulations using the same sorts of agency characteristics relevant to the issuance of directives. Third, I tackle the issue of agency compliance, which I argue is conceptually distinct from agency responsiveness. Analysis of order issuance and agency responsiveness is largely quantitative, while analysis of agency compliance is largely qualitative and based on numerous interviews and three separate cases to demonstrate the limits
of compliance independent of the concept of responsiveness.

In the remainder of this chapter I will present the reader with the fundamental information they need to understand how my data are collected and analyzed. I will also describe and defend the measures in this section to give readers enough incentive to evaluate the validity and reliability of the results in the succeeding empirical chapters. Because there are three components to the project broadly speaking, this section will also involve three separate discussions: collection of data on executive orders, collection of data on agency responsiveness, and collection of data on agency compliance.

*Why Executive Orders? Possible Limitations to the Study*

Executive orders, of course, are not the only tool presidents have at their disposal for influencing agency behavior. Other directives, like memoranda, proclamations, and national security directives (e.g. Cooper 2002) can be used to similar effect. Recent scholarly interest has also turned toward signing statements as well, a “semi-unilateral” power of the president to attach his specific interpretation to a bill upon its signing (e.g. Cooper 2002, 2005; Berry 2009; Kelley 2007a, 2007b; Kelley and Marshall 2008, 2010). Using this power, however, requires that Congress first pass a law, making the signing statement a viable policy option only when the legislature is actively putting bills in place. Presidents also retain a certain amount of authority to shape agency structure and staffing, which they attempt to use to gain leverage over the rest of the executive branch when it comes to policy implementation (e.g. Lewis 2003, 2008).

This dissertation is specifically about executive orders but also seeks to add to broader discussions of presidential power with respect to leading the bureaucracy. With all of this in mind, why focus on executive orders given the range of unilateral powers at the president’s disposal? There are a number of advantages to using these directives to evaluate some of the
intricacies of the utility of the unilateral presidency. First, executive orders, excepting those that are confidential for reasons of national security, are readily published and available in a consistent format within a consistent source, the *Federal Register*. This allows for reliable data collection over various periods of time; the reliability of such data collection for other methods of agency control is more questionable, largely because different kinds of directives are not published as consistently or in so parsimonious a format. For example, executive memoranda are not presented in the same format and with the same frequency as executive orders, and the standards governing their structure and publication are not as clear as those governing executive orders (e.g. Cooper 2002). They can be used in general to the same effect, some have argued (e.g. Cooper 2002; Howell 2005), but their inconsistency makes them a somewhat trickier tool to quantify.

Other forms of unilateral directives exist, though their structure, form, purpose, and availability sometimes differ quite significantly from executive orders. Proclamations tend to address more public matters and are often issued for ceremonial reasons (e.g. Mayer 2001). They, like executive orders, are published in the *Federal Register* and are thus readily accessible, but they are not as frequently concerned with the inner workings of the bureaucracy, instead serving broader purposes that do not necessarily require agency action. Meanwhile, presidents can use national security directives in the pursuit of unilateral policy implementation, but these directives are particularly concerned with a specific subset of national security agencies and are, for the most part, not publicly available (e.g. Cooper 2002). Signing statements, which I classified as a “semi-unilateral power,” require action on the part of Congress, and though they are potentially tools which can influence agency behavior, the practical impact of signing
statements is questionable.\textsuperscript{12}

The legal basis of executive orders, combined with their consistent style, formatting, and breadth in terms of the agencies they affect, make them an attractive tool to study questions of unilateral presidential power. Many frequently require formal rule promulgation, providing a clear link from point A (the issuance of the order) to point B (the agency response). Other unilateral directives lack this clear linkage, making evaluating their effectiveness a particularly difficult prospect. Executive orders do not provide for a way to exhaustively test the unilateral presidency model, but they do give scholars valuable insights into how presidents shape policy on their own and the difficulties of controlling executive agencies.

All of this begs the question: how do we know that presidents are not influencing agencies to carry out his preferences in ways other than executive orders? The plain truth is that we do not know this for sure, and it does not require one to venture a guess to understand that in all likelihood, there are other ways for presidents to accomplish their objectives. Three alternatives, outside of the unilateral powers discussed above, come readily to mind. The first is influencing agency behavior through the process of going public. The second is communicating presidential preferences via the federal budget. The third is using informal methods, something outside of direct commands, to encourage bureaucratic action. All three are important components of presidential leadership and still need more study in the context of the administrative presidency, but it is important to recognize that these strategies have important limitations and are, except in the last circumstance, difficult to describe as unilateral.

Consider going public first. This is often considered to be a strategy presidents use to leverage action within Congress (e.g. Kernell 2007), though some research suggests ways in

\textsuperscript{12} This should not suggest that the impact of signing statements is a settled issue; it is not. Previous studies are largely anecdotal and Government Accountability Office reports (see, e.g., GAO-08-553T [2008a] along with GAO B-308603 [2007a] and GAO B-309928 [2007b]) suffer from selection on the dependent variable.
which going public can motivate action from the bureaucracy (e.g. Eshbaugh-Soha 2008; Pfiffner 1988; Wood and Waterman 1993). This influence, however, has some critical caveats. As an illustrative example, Wood and Waterman (1993) discuss Ronald Reagan’s management of the Environmental Protection Agency and present a picture of ineffectiveness. The authors argue that the EPA pushed back against the President’s negative critiques of the agency and its management style, concluding that “[the agency] reacted to it and in a manner suggesting a dearth of executive influence” (Wood and Waterman 1993, 520). The general conclusion relative to the effect of going public on bureaucratic behavior is resistance on the part of federal agencies (E.g. Wood and Waterman 1993).

Eshbaugh-Soha (2008) provides some evidence which offer important clarifications on this point, however. Going public can have effects on the bureaucracy that match up with the president’s preferences, but the extent to which this is so depends in part about whether the president takes a positive or a negative approach. Says the author, “[p]ositive signals reinforce an agency’s mission and motivate bureaucrats to do more of what they do, increasing bureaucratic activity. Yet, negative signals have had no statistically significant impact, providing a clear limitation to presidential leadership of the bureaucracy through speeches” (Eshbaugh-Soha 2008, 129). As was the case with Wood and Waterman’s (1993) research, though, Eshbaugh-Soha notes that there are possible limitations to this work given the narrow scope of agencies studied.

The extent to which going public has the potential to enhance bureaucratic responsiveness, limited though studies to this point may be, seems to be indirect at best. It is not a unilateral power in the traditional sense, because whatever consequences agencies will face for not answering the president’s call depend on pressure applied from elsewhere. Edwards (2003) has discussed the sincere limitations presidents face when it comes to molding public opinion,
though Canes-Wrone (2006) underscores the importance of strategy in terms of what issues presidents choose to make a public priority. Assuming that public appeals can be effective in some circumstances for some issues, agencies in question still have to make calculations about how or whether to respond to pressure from the president. Executive orders require no indirect involvement; they are statements from the president communicating some form of policy preference, often with built-in mechanisms to address how the bureaucracy ought to respond.

Next consider the impact of the president’s budget, which can be an important mechanism when it comes to leverage over the bureaucracy (e.g. Carpenter 1996; Wood 1988; Wood and Waterman 1991). The mechanism linking budgets to outcomes is self-evident: a reduced ability to follow through on implementation (which could be practically enforced through reduced agency budgets) prevents the agency from fulfilling its mission, necessitating some type of change in behavior to capture or re-capture the favor of Congress and the president. This was precisely the reaction of Wood’s (1988) example of EPA activity following budgetary reductions. Carpenter (1996), however, presents a more nuanced view of the effect of budgetary decisions: he argues that shifts in bureaucratic behavior are less about reduced bureaucratic capability and more about the importance of signalling. As he concludes, “[a]necdotal and statistical evidence alike suggest that yearly budgets carry powerful political signals from elected authorities to the agencies” (Carpenter 1996, 298).

Budgets are undoubtedly a powerful force for controlling agency behavior (to the extent such behavior can be controlled). However, here we bump up against the same confound introduced by the potential utility of going public: budget constraints are not unilateral and whatever impact they have must be tempered by the preferences of actors outside the White House. The president can certainly communicate displeasure to an agency using the federal
budget, but Congress retains the ultimate authority to put this budget into effect. We can imagine that such threats might ring hollow in cases where the legislature is not nearly as enthusiastic about enforcing the White House’s goals as the president is. Indeed, Wood’s (1988) illustrative case of the EPA in the Reagan years paints such a picture; the budgetary reductions were effective, the author argues, because the President had received such a broad mandate in the 1980 election. Congress was, as a result, somewhat more supplicant to White House prodding than they would be at a later point in time when Reagan’s handpicked successor, Anne Gorsuch Burford, was unable to keep peace within the organization and ultimately had to resign (e.g. Golden 2000; Wood 1988). The federal budget unquestionably matters to agency behavior, but it falls significantly outside of the scope of unitary executive theory and the president’s unilateral powers.

Finally, consider informal suggestions or requests on the president’s behalf. These have not, to the best of my knowledge, been quantified in any meaningful way, nor is it certain that they could be because of the lack of some consistent source. Nevertheless, presidents need not signal their preferences or desires to an agency via formal means, though there can be little doubt that formal filed requests ought to attract attention. A rather humorous anecdote from a former administration official addresses the complications of informal suggestions well:

“Half of a President’s suggestions, which theoretically carry the weight of orders, can be safely forgotten by a Cabinet member. And if the President asks about a suggestion a second time, he can be told that it is being investigated. If he asks a third time, a wise Cabinet officer will give him at least part of what he suggests.” (qtd. in Neustadt [1960] 1990, 36).

This particular individual is speaking of cabinet officers, of course, but the lesson should not be
all that different for different kind of agency officials (as a matter of fact, one might argue that the president would need to ask more than three times to get something out of an agency that is not part of the cabinet structure and therefore more difficult to control).

Studying informal requests and suggestions would certainly be worthwhile, but to do this would require extensive case study research and most likely interviews from multiple administration officials over a broad length of time. This is not to suggest that such research should therefore not be done, but the reason I principally avoid dealing in informalities is because of the difficulty in pinpointing where a president places an issue on a list of priorities. To be sure, not all executive orders are equal in terms of their urgency or presidential involvement, but something affixed with the president’s signature and formally published in the Federal Register, I argue, should carry much more weight than something mentioned in passing.

Executive orders present a unique opportunity to study the unilateral presidency for two important reasons. First, the alternatives I discussed above can hardly be considered unilateral, except in the case of informal (i.e., non-published and non-official) instructions from the president. All three of these tools are important components of administrative management by the White House, but each falls somewhat outside of the scope of this research. Going public and budget maneuvering require cooperation from voters (in the first case, at least indirectly) and Congress, which ensure they fall outside the scope of the unitary executive. Informal suggestions, meanwhile, are not quantifiable; this in no way means scholars should avoid studying such suggestions, but to do so will require an in-depth qualitative approach that is outside the scope of this project.

Second, executive orders represent a clear (to a degree\textsuperscript{13}) expression of the president’s

\textsuperscript{13} Chapter 6 discusses some important caveats; specifically, cases where neither the president nor the rule’s proponents expect responsiveness or compliance.
preferences. It is not always the case that orders require a rule response, nor is it always the case that presidents even want a formal response (I will discuss both of these issues a bit later in the chapter), but the accessibility of executive orders, combined with the coding process I discuss at length in the next section, provide a clear and reliable way to test the propositions put forward in Chapter 2. Executive orders certainly have their limitations, but if nothing else we can say that a directive which rises high enough to require the president’s signature and formal promulgation within the Federal Register carries with it some degree of importance (e.g. Rudalevige 2012). There can be no question when a president issues a formal directive that it ought to carry some weight that a suggestion, a budgetary signal, or public plea may not carry. Executive orders are ultimately issued at the president’s direction, are significantly better-understood than other unilateral powers, and follow a generally comparable format over a large set of administrations. They are by no means the perfect or only tool to assess the utility of the unilateral executive; nevertheless, they are the most logical.

Executive Orders

Before discussing the agencies that will be the subject of this study, I wish to describe the executive order coding process. The bulk of the data collection for this analysis is centered around categorizing the agencies targeted in all publicly available executive orders from 1946 through 2011.14 To do this, I accessed the executive order databases made available through The American Presidency Project online (Peters 1999-2012; available at www.presidency.ucsb.edu/) and the National Archives. Orders were classified on various criteria, including whether they are addressed to a single or multiple agencies, whether they are addressed to all agencies, whether

14 Some directives which could rightly be classified as “executive orders” are not made public for reasons of national security.
the order deals with the creation of an advisory committee or commission, and the insulation level of each agency named in the order, using the scales discussed by Epstein and O’Halloran (1999) and Lewis (2003). Thus, agencies in the EOP have values of “1,” cabinet departments have values of “2,” independent agencies have values of “3,” independent regulatory commissions have values of “4,” and government corporations have values of “5.” Most crucial, I specifically identify each agency to which the order applies, whether that agency is expressly named in the directive or not.

It is helpful to consider how executive order usage has changed and evolved over time. Howell (2003) and Mayer (2001) have both noted that the frequency of executive orders dropped and continued to decline steadily after World War II. Both authors attribute this decline, in part, to a shift in the nature of executive orders. As Mayer (2001, 74) describes it, many directives before and during the war dealt with “routine orders covering individual exceptions to civil service rules and orders managing public lands,” and though these issues did not end after the war, the president was no longer the sole person responsible for dealing with them. Howell (2003, 84) argues that the shift is reflective of “the general growth of presidential power in the modern era,” noting that so-called “significant” executive orders today constitute a greater proportion of the overall number.

Both of these explanations are partially correct, but there are other interesting observable patterns in the proliferation of executive orders. Consider, first, the absolute number of executive orders issued in the time period of this study (1946-2011). Refer to Figure 3.1 below. As Howell and Mayer discuss, overall executive order usage has declined. But some of the systematic changes in usage are not apparent either from looking at the figure below or from looking to Howell’s discussion of significant orders. Scholars, to this point, have not analyzed
executive orders from the perspective of the agencies to which they apply. Some orders apply to only one agency (as is the case with the above-referenced civil service orders), while others can apply to every single agency, sub-element, and corporation that is part of the federal government. Figure 3.2 below plots how executive order usage has changed with respect to the employment of multi-agency, as opposed to single-agency, executive orders.\textsuperscript{15} During the Truman administration, single-agency orders accounted for more than half of all orders given in every year from 1946 through 1952.\textsuperscript{16} Not since the Reagan Administration have the majority of a president’s orders been addressed to single agencies, and in 2011 fewer than ten percent of orders were addressed to one agency.

\textsuperscript{15} Included also in this figure are blanket orders, or those orders addressed to all federal agencies.
\textsuperscript{16} Truman’s last full day as president was technically January 19th, 1953, but for my purposes, the orders from that time frame are grouped as though they occurred in 1952.
Similarly, Figure 3.3 tracks the proliferation of “blanket” orders; that is, those orders that apply universally to every agency in the federal government. Today it is common for nearly every other executive order to apply to every agency in government; from 1946 into the Nixon Administration, it was quite rare for more than one in five orders to be blanket in nature. The pattern emerging from this information is clear: presidents are doing more in one order than they used to, and so although the absolute number of executive orders has declined, the number of agencies affected has not.

The proliferation of multi-agency and blanket orders poses on its own an interesting motivation for the project, because this trend has been fairly consistent over time. The reasons for the trend are, as of yet, not entirely clear; it is true, as Mayer (2001) points out, that
presidents issue fewer orders dealing with civil service matters, but this could hardly account for the totality of the shift. It remains an important point, however, that trends in the absolute number of executive orders seriously belie what is occurring within the executive branch. In one recent op-ed in Columbus, Georgia’s *Ledger-Enquirer*, one political scientist defended President Barack Obama’s use of executive orders, noting that criticism the President received seems off because “[o]f the 14 most recent U.S. Presidents, Obama was second to last, narrowly beating out President George H.W. Bush, by one executive order.”\(^\text{17}\) However, this defense rings fairly hollow when one accounts for the fact that, through 2011, President Obama’s percentage of multi-agency orders have hovered around 90%, while the percentage of orders directed to all

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federal agencies has not fallen below 50%. This is a considerable shift relative to how executive orders have been used in the past. Raw numbers tell us little about what agencies are directed and when an order has engendered a response or not, precisely because so many bureaucratic organizations can be affected by these directives.

Where are executive orders going? Given the earlier discussion of insulation, we might expect a perfectly linear relationship between centralization and where executive orders are targeted: most orders go to the EOP, followed by the Cabinet and its various sub-elements, and so forth. However, this is not exactly the case, as Table 3.1 shows:

**Table 3.1 - Where Direct E.O.s Go**

<table>
<thead>
<tr>
<th>1946-2011</th>
<th>Direct Single-Agency Orders</th>
<th>Direct Multi-Agency Orders</th>
<th>Total Direct Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Office of the President</td>
<td>568</td>
<td>1,120</td>
<td>1,688 (16.69%)</td>
</tr>
<tr>
<td>Cabinet Departments</td>
<td>699</td>
<td>5,072</td>
<td>5,766 (56.92%)</td>
</tr>
<tr>
<td>Independent Regulatory Agencies</td>
<td>164</td>
<td>1,486</td>
<td>1,649 (16.30%)</td>
</tr>
<tr>
<td>Independent Regulatory Commissions</td>
<td>189</td>
<td>634</td>
<td>823 (8.14%)</td>
</tr>
<tr>
<td>Government Corporations</td>
<td>32</td>
<td>161</td>
<td>198 (1.96%)</td>
</tr>
</tbody>
</table>

An important point deserves mention when considering these figures: Table 3.1 accounts for every agency affected by every executive order from 1946 through 2011 *in which the agency was either named or expressly identifiable*. That is, blanket orders or orders referring to several agencies indirectly are not included in the total. The figures in Table 3.1 are not the number of executive orders, but rather the number of agencies in each category addressed in those orders. So, for example, a single order speaking to the Department of State, the Department of the
Treasury, and the Department of Justice would count for three observations directed to the cabinet.

The expectations given the relationship between centralization and presidential control are not completely borne out; more executive orders go to the cabinet than to the EOP. However, as expected, the total number of orders addressed to other kinds of government agencies declines as one moves further up the scale of insulation. Nearly 75% of all agencies named in executive orders from 1946-2011 were located either in the EOP or in the cabinet. A significant number are addressed to regulatory agencies, but this number drops sharply when considering regulatory commissions, and presidents address, on average, three government-owned corporations per year in their directives.

**Agency Characteristics**

Chapter 4 plumbs these differences in more depth considering agencies under the five insulation categories discussed herein over the period of 1946-2011 in the evaluation of Hypotheses 1 and 2. The unit of analysis for these particular hypotheses will be time periods, with counts of executive orders serving as the dependent variable. However, the latter part of the chapter, which will analyze Hypotheses 3, 4, and 5 require more nuanced information about individual agencies. For this reason, I collected data on a subset of agencies so that I can assess how presidents vary their executive order usage (and how agencies respond) based on levels of decentralization, ideological distance, and politicization. The list of agencies I chose is based on the work done by Clinton, Bertelli, Grose, Lewis, and Nixon (2012), who estimate ideology scores for twenty-four separate organizations. The unit of analysis is arranged as a year-agency

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18 The organizations are: The Department of the Army; the Department of Commerce; the Department of Homeland Security; the Department of Defense; the Department of Energy; the Department of Education; the Department of...
dyad, such that the dependent variable represents the number of orders addressed to each agency in each year.

The next relevant point is the time period covered by the models. I chose to include the years of 1989-2011 for numerous reasons. First, some of the most important data for testing my hypotheses are not available prior to 1988 (see Lewis [2008] for a discussion of why earlier data provided by the federal government are potentially unreliable). Second, ideology estimates of various agencies only go back so far; the ideal point estimates that Clinton et al. (2012) provide were calculated for the period of 2005 to 2006, and while I argue that estimates of agency ideology should stay relatively constant for significant periods of time, going back too far would increase the likelihood of biased results. Third, Bertelli and Grose (2011) devise comparable ideology estimates for Presidents George H.W. Bush, Bill Clinton, and the first term of the George W. Bush administration, providing for clear metrics by which to compare ideology scores."  

Lastly, not all of the agencies included in Clinton et al.’s (2012) estimates were in existence before 1989 (or even in 1989; the Social Security Administration was, at this point, part of the Department of Health and Human Services, and there was no Department of Homeland Security until 2003).

There are, then, clear measures of agency ideology available to evaluate Hypothesis 5. The next task is to measure decentralization (in two ways) and politicization. I first consider decentralization, a concept based on both the amount of discretion an agency has in policy-making as well as the extent to which policy-making occurs within numerous agency sub-

Justice; the Department of Labor; the Department of Transportation; the Department of the Treasury; the Department of Veterans Affairs; the Environmental Protection Agency; the General Services Administration; the Department of Health and Human Services; the Department of Housing and Urban Development; the Department of the Interior; the National Aeronautics and Space Administration; the Department of the Navy; the National Labor Relations Board; the Nuclear Regulatory Commission; the Social Security Administration; the Department of State; the Department of the Air Force; and the Department of Agriculture.

President Obama’s ideal point estimates are obtained from Poole and Rosenthal’s NOMINATE scores.
elements. To construct a measure of agency decentralization, which is the subject of Hypothesis 3, I create a variable which indicates the percentage of employees in the agency who fall under either the professional or administrative classifications. The Office of Personnel Management (OPM) has five classifications for the work done by employees of federal agencies operating under the General Schedule (GS). These categories are: professional, administrative, technical, clerical, and other. OPM clearly defines the first two categories as requiring the exercise of discretion, while the other three categories provide no such guidelines. By virtue of the fact that they are entrusted with certain decision-making authority, we would expect such agencies to be less centralized in terms of their political control.

The second measure of decentralization, agency sub-elements, is also relatively straightforward to determine. To do this, I looked at organizational charts for all twenty-four agencies as published in the United States Government Manual from 1989-2012. For agencies that did not publish their organizational structures, this variable is coded as “missing.” Higher values indicate a more decentralized agency with the expectation that agencies with numerous sub-offices and tasks are necessarily less centralized politically. These data are therefore used in both Chapters 4 and 5, first to test the circumstances under which presidents issue more or fewer orders to executive agencies, and second, to test how agencies respond to these directives.

Politicization data are constructed using the aforementioned sources that led to construction of the decentralization measures. This variable is measured as the percentage of the agency’s employees who are politically appointed and is used to test Hypothesis 4. The data are made freely available by David Lewis (my.vanderbilt.edu/davidlewis/data/) for the period of 1988-2005, and are easily constructed for the period of 2006-2011 using the Office of Personnel Management’s publicly available data (fedscope.opm.gov). The expectation is that presidents
seek greater control over agencies through the appointments process, and thus agencies with a higher proportion of political appointees (at the president’s discretion) will be more likely to receive direction as well as more likely to respond to commands from the White House.

**Agency Responsiveness**

The principal dependent variable in Chapter 5 is whether a given agency responded to an executive order; this requires creating a quantifiable measure of responsiveness. Construction of the dependent variable involves an in-depth procedure. First, I randomly selected ten agencies from the list above (Clinton et al. 2012). Ten agencies were chosen because the data collection process for this project required a balance between generalizability and feasibility. Studying this subset allows me to keep construction of the data reasonable while still providing enough variation across agency tasks and characteristics to allow for reliable conclusions.

Second, I identified every executive order on the basis of which agencies were expected to follow its provisions (as mentioned, orders were accessed at presidency.ucsb.edu [Peters and Woolley 1999-2012]). Next, I matched the ten agencies selected with every executive order applied to them, such that the data are structured dyadically as executive order-agency. There are therefore often multiple observations per executive order. I then evaluated whether agencies implemented a rule in response to the executive order with the assistance of two sources: the *Federal Register* (FR) and the *Code of Federal Regulations* (CFR). The *Federal Register* is a daily compendium of a variety of governmental activity, including proposed and final agency regulations and presidential executive orders. The CFR, meanwhile, includes all regulations

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20 The Department of Commerce; the Department of Energy; the Department of Education; the Department of Transportation; the Department of the Treasury; the Department of Veterans Affairs; the Environmental Protection Agency; the Department of Housing and Urban Development; the Department of State; and the Nuclear Regulatory Commission.
currently in effect and is available as a yearly document.

The *Federal Register* website (www.federalregister.gov) allows users to search for rule promulgation by agency for the years of 1994 through the present. It was therefore a fairly straightforward procedure to see whether an executive order was used as the basis for a rule or rules by the agencies directed. In this instance, I considered only final rules and regulations rather than mere proposals. This was done to capture responsiveness at the implementation stage rather than the formulation stage. Still, this search function does not cover any period before 1994, requiring a different data source for the years of 1989 through 1993. To do this, I accessed the CFR via HeinOnline (heinonline.org) and searched for regulations that included a given executive order as at least part of the regulation’s basis. If an agency promulgated a rule using the executive order as a reference, the dependent variable is assigned a value of “1,” and “0” otherwise.

There are, all told, 4,120 separate observations. The unit of analysis is again a dyad, only this time it is arranged as *executive order-agency*, given that a single order can apply to multiple agencies. Agencies responded via rule promulgation in 371 cases, or just around nine percent of the time. At first blush, this might seem like a remarkable rate of non-responsiveness, but recall the earlier discussion on executive order type: not all orders require, expect, or even need any kind of rule promulgation. When the president directs the entire government to close down for a holiday, no rule is necessary. As such, I further classified the observations on both whether the agency was named in the executive order, and whether the promulgation of rules was expressly requested. Table 3.2 provides some useful descriptive statistics, and Figure 3.4 presents this.

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21 Because I only searched for final rules in the Federal Register, these data are comparable given that final rules are subsequently made part of the CFR.
information in a visual format:

Table 3.2 - E.O.s by Agency

<table>
<thead>
<tr>
<th>Agency</th>
<th>Total Directives</th>
<th>Named In</th>
<th>Promulgation Requested</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commerce</td>
<td>447</td>
<td>154</td>
<td>31</td>
<td>72</td>
</tr>
<tr>
<td>Energy</td>
<td>400</td>
<td>100</td>
<td>23</td>
<td>36</td>
</tr>
<tr>
<td>Education</td>
<td>395</td>
<td>88</td>
<td>20</td>
<td>13</td>
</tr>
<tr>
<td>Transportation</td>
<td>430</td>
<td>115</td>
<td>33</td>
<td>54</td>
</tr>
<tr>
<td>Treasury</td>
<td>430</td>
<td>184</td>
<td>91</td>
<td>88</td>
</tr>
<tr>
<td>VA</td>
<td>402</td>
<td>77</td>
<td>25</td>
<td>12</td>
</tr>
<tr>
<td>EPA</td>
<td>390</td>
<td>85</td>
<td>19</td>
<td>33</td>
</tr>
<tr>
<td>HUD</td>
<td>382</td>
<td>60</td>
<td>21</td>
<td>28</td>
</tr>
<tr>
<td>NRC</td>
<td>359</td>
<td>11</td>
<td>18</td>
<td>10</td>
</tr>
<tr>
<td>State</td>
<td>485</td>
<td>234</td>
<td>35</td>
<td>25</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>4,120</strong></td>
<td><strong>1,108</strong></td>
<td><strong>316</strong></td>
<td><strong>371</strong></td>
</tr>
</tbody>
</table>

This information clarifies that neither naming nor requests for promulgation guarantee the implementation of a rule. In some cases, agencies responded to fewer orders than the president requested or, as is the case with the Department of Commerce, responded far more frequently than the president requested. I plumb why these differences exist in more depth in Chapter 5, which assesses the concept of agency responsiveness to executive orders.

Agency Compliance

Chapter 6 of the dissertation deals with the concept of agency compliance from a largely qualitative perspective. Responsiveness and compliance, I argue, are not the same thing:
agencies can respond to an executive order via boilerplate language in a rule or regulation while still avoiding dealing with the substance or intent of the order in question. However, determining what constitutes compliance is particularly complicated. The Government Accountability Office (GAO) has, over time, conducted numerous investigations into agency compliance, which at first blush would seem to present a unique opportunity for quantitative data collection. However, this is hampered by the fact that the GAO reports are ultimately selecting on the dependent variable; the agency investigates at the request of members of Congress, and as such, it may be the case that those orders selected for further study have been chosen precisely because compliance is lacking.

I tackle this issue by taking a more in-depth case study approach in Chapter 6. The purpose of the chapter is to provide the reader with an understanding of the circumstances under
which agencies feel like they can avoid compliance, what the president and his allies can do to counteract non-compliance on the part of an agency, and what methods stand the best chance of encouraging follow-through from the bureaucracy. Mayer (2001) provides a good discussion of the executive order generation process, detailing that orders tend to move in one of two directions: either down from the White House, or up through the agency. The chapter will study two cases of environmental issues in two separate Republican administrations, but which were formalized through very different processes: Executive Order 12630, issued by Ronald Reagan, and Executive Order 13352, issued by George W. Bush. Agencies reacted in vastly different ways to these two separate orders, and I supplement information on these cases with in-depth interviews with administration officials involved in the formulation process. However, these cases raise the question of agencies responding to an executive order in spite of a reluctance to do so. To address this particular circumstance, I include a third case, E.O. 12291 issued by Ronald Reagan, which was resisted but ultimately largely successful in encouraging compliance. Compliance is, of course, a complex concept that will require more nuanced development in future research, but Chapter 6 provides the reader with some important insights into the executive order development and monitoring process.

Conclusion

This chapter serves the purpose of introducing the major concepts which underlie the central theory about presidential directives and agency responsiveness. Normative concerns at the heart of presidential power are important, but I aim in this dissertation to provide a picture of how malleable the bureaucratic apparatus is to a president choosing to flex his or her unilateral muscle. Patterns of executive order usage have changed in important ways over the course of the
modern presidency (after World War II), but it is apparent that the principal-agent problem in the executive branch exists today as it did more than seventy years ago when Franklin Roosevelt expressed his own frustration with the bureaucracy. The theory developed in Chapter 2, and in later chapters, is meant to add to scholars’ understanding of principal-agent theory as applied within the context of the unilateral presidency. It is meant as well to provide an explanation for the recognized limitations of direct presidential action, which suggests a re-evaluation of the utility of extant theories on executive power.

Of course, executive orders are not the only tool presidents have at their disposal when it comes to influencing agencies. Other unilateral directives as well as non-unilateral tactics can have some effectiveness in encouraging bureaucratic responsiveness to presidential preferences. But executive orders provide us with a clear, consistent, and reliable way to test numerous theories related to their issuance as well as how agencies react to assertions from the White House. This study does, however, have important limitations; some of those I have discussed already, but I will address others more directly in the concluding chapter.

The question of agency responsiveness and compliance is multi-faceted, depending largely on considerations of both the president’s preferences as well as the preferences of the agency or agencies so directed. The succeeding empirical chapters will test these varying facets more directly with the introduction of measures of presidential and agency characteristics. I begin first, in Chapter 4, with an examination of the president’s strategic calculations concerning when, where, and how often executive orders ought to be issued. I then proceed to evaluate the factors that influence bureaucratic reactions to these orders in both Chapters 5 and 6, which employ very distinct methods.
ABSTRACT

Why do presidents use executive orders? Past scholarship has offered varying explanations for why presidents choose to “go it alone,” including a lack of support in Congress as well as the inherent power of being able to make policy unilaterally. However, to this point much of what political scientists know of executive orders does not adequately address the role the agency plays in the president’s decision. This chapter classifies executive orders from 1946-2011 and considers the importance of agency characteristics (e.g. agency ideology, level of decentralization, politicization, etc.) in determining to which kinds of agencies the president will direct executive orders generally. In other words, what strategic considerations enter the mind of a president when deciding to issue directives? The results show that while presidents prefer giving orders to agencies they can more easily oversee, other agency characteristics play a limited role, and external factors like congressional composition and timing effects seem to be more important in determining when and why executive orders are used.
Introduction

In a recent *Wall Street Journal* article, Laura Meckler pointed to a growing reliance on unilateral power in the Obama administration, noting some of the ironies in the way in which the President campaigned and the way in which he now governs. “When he ran for president,” she writes, “Barack Obama promised to roll back President George W. Bush’s use of executive power….The allure of [that] power, it turns out, is hard to resist.” Indeed, concerns about presidential power are nothing new. Numerous scholars (e.g. Cooper 2002; Howell 2003, 2005; Mayer 1999, 2001, 2009) have waded into the normative debate, assessing the possible consequences of an increasingly unitary chief executive.

But just how powerful *is* the president? Most would conclude that he is quite influential indeed, and this seems an obvious and tautological observation. It is surprising, then, that very little systematic research exists on the effectiveness of presidential assertions of power (in particular, unilateral power). Presidential researchers, Mayer (2009) notes, have long assumed that presidential directives (e.g. executive orders, signing statements, presidential proclamations) are self-executing by their very nature. And yet this is an assumption that has not been subjected to empirical scrutiny.

Chapter 4 takes the first step to analyzing bureaucratic responsiveness by exploring to which kinds of agencies presidents direct executive orders. After all, if presidents leave certain types of agencies alone, then we must reconsider the proposition that presidents exercise a high degree of control over the executive branch (or indeed, that they even try to exercise control). Past scholarship has highlighted that not all agencies are equal when it comes to presidential influence (e.g. Lewis 2003), but as of yet, no classification system of executive orders on the basis of the agencies they address has been developed. I first borrow a previously-studied

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classification system and subject it to methodological analysis in assessing whether presidents
discriminate with respect to which kinds of agencies they try to control. In the second stage of
the paper, I introduce a set of agencies for which there are available metrics to evaluate whether
these agency characteristics influence the number of executive orders a president will direct to
the agency. The results indicate that while presidents do discriminate on the basis of certain
bureaucracy-specific variables, other factors, such as congressional composition and the point in
the term at which the president is influence the decision with more force.

The Importance of Presidential Strategy

Chapter 2 introduced a set of hypotheses relating both to the president’s decision to issue
executive orders and the agency’s decision to respond. This chapter evaluates the set of
hypotheses dedicated to the “first stage” of the executive order process: namely, when and how
many directives the White House will issue. This analysis is itself situated within the broader
theoretical context of the strategic presidency, which assumes that presidents are both aware of
the existence of principal-agent problems in the executive branch and that they anticipate them
through the discretionary usage of executive orders (and, by extension, other unilateral powers,
though these other powers are outside the scope of this research). If presidents are strategic, that
fact should reveal itself in the analysis of the number of directives given to varying agencies
based on a multitude of characteristics.

It would be fair to say that no president has come into office expecting absolute
compliance from the bureaucracy; some may feel they deserve it, and all of them certainly want
it, but that does not mean they get it. It is no wonder that in the early days of their
administrations, when new presidents must fill a multitude of positions with appointees, that they
engage in careful screening to determine who will best serve their policy interests, whatever those interests may be (e.g. Pfiffner 1988). Distrust is almost always the name of the game when it comes to relationships between the president and the bureaucracy, at least early on in the administration (e.g. Aberbach and Rockman 2000; Golden 2000; Nixon 1978; Pfiffner 1988). It therefore makes a good deal of sense to argue that the use of executive orders, an administrative tool over the operations of the bureaucracy, ought to be treated with the same careful consideration as the appointments process, for example (e.g. Lewis 2008).

What, then, are the factors which influence a president’s strategic calculation? I covered a set of five hypotheses that I expect will affect presidential rates of response. I begin with a discussion of insulation, as defined by Epstein and O’Halloran (1999) and Lewis (2003). In Chapter 2 I described insulation as the extent to which an agency is outside of the president’s purview. This has numerous consequences; it is more difficult for presidents to staff those agencies with loyalists, more difficult to manipulate their budgets, and more difficult to direct because of their statutory authority than are agencies closer to the president. Table 3.1 demonstrated that this was largely the case, with most orders going to the cabinet agencies and a gradual decline when moving further up the scale of insulation, first to independent agencies (e.g., the Environmental Protection Agency), then to independent regulatory commissions (e.g., the Federal Reserve), and finally to government corporations (e.g., the Tennessee Valley Authority). Fewer executive orders go to the most president-centralized of government organizations, those located within the Executive Office of the President, than to cabinet organizations, but this makes is explicable. After all, agencies in the EOP include numerous advisory bodies that have no formal power to promulgate regulations. Presidents expecting agency action outside of Washington, D.C. must therefore turn to agencies vested with more
formal powers.

The observation that more executive orders go to agencies that are “easier” for presidents to control may seem tautological, but it makes a good deal of intuitive sense. Insulated agencies like independent regulatory bodies are purposely designed to be outside of political control (e.g. Lewis 2003), at least to the greatest extent possible, and presidents attempting to direct them are likely to bump into more resistance for a multitude of reasons. These independent agencies, for example, are not subject to the level of presidential appointment influence as are more centralized agencies in the EOP and the cabinet (e.g. Lewis 2003, 2008). It should come as no surprise, then, that a president’s first attempt to put a mark on the bureaucracy is not through throwing out orders, but in making careful staffing decisions (e.g. Lewis 2008; Pfiffner 1988). An example of these decisions at work is provided by Richard Nixon (1978, 355-356) as it pertains to influencing federal agencies:

“Ever since Andrew Jackson and the era of ‘To the victor belong the spoils,’ the Democrats had understood and excelled at acting on this premise. I could remember my concern when Eisenhower, upon entering office after twenty years of uninterrupted Democratic power, failed to press his Cabinet members and other appointees to Republicanize their agencies and departments. After the eight Kennedy-Johnson years the need was hardly less great, and at every meeting during the transition and the first months of my administration I urged, exhorted, and finally pleaded with my Cabinet and other appointed officials to replace holdover Democrats with Republicans who would be loyal to the administration.”

President Nixon’s anecdote obviously reflects a sincere mistrust of a liberal bureaucracy, but his recollections are nonetheless illustrative because they highlight the importance of focusing on
appointments and leaning on the cabinet when it comes to implementing administration goals. To the extent that presidents find the cabinet an important tool in putting policy into practice, it makes sense, given these agencies’ statutory and rule-making power, that executive orders go there at a rate much higher than to any other agency type.

It is, perhaps, an acknowledgement of the president’s limited command ability over agencies outside of the cabinet structure that during the administrations of Presidents Bill Clinton and George W. Bush, executive orders began to include more and more the following clarifying provision: “Independent agencies are encouraged to comply with the provisions of this order.”

There is here no insinuation of command, no demands that agencies outside the cabinet structure follow the president’s wishes; it seems instead to be a fairly polite request rather than an order. It is certainly indicative of the difficulty (acknowledged, no less) that presidents have in reining in certain kinds of agencies and is reflective of what we already know about agency insulation.

We know, then, that presidents direct more orders to centralized agencies than to insulated ones. However, this begs the question: when and why do presidents direct orders to insulated agencies? It is certainly the case that these agencies are on the receiving end of orders, but less well-understood is when such orders occur. The first hypothesis I put forward in Chapter 2 is as follows:

_Hypothesis 1: As congressional unity increases during periods of divided government, presidents will issue fewer executive orders to insulated agencies than they do as congressional unity increases during unified government._

Congressional unity, the construction of which I will detail in greater depth below, is a function of how easily the legislature can enact statutory change. It is important to acknowledge that this

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23 Numerous orders contain this language or similar language. In this instance, the language comes from E.O. 13221, issued by George W. Bush on July 31st, 2001. See references for details.
hypothesis has several moving parts: first, there is consideration of the role of divided
government; second, there is consideration of the role of congressional unity; finally, there is
consideration of agency insulation. The logic for this is as follows: I argue that part of the reason
insulation may place agencies further outside presidential control is that the Congress, wanting to
keep these organizations apolitical (to an extent), will be more willing to rein in presidential
power. We might expect this to be more common in periods of divided government; a Congress
controlled by the president’s own party, on the other hand, may be perfectly willing to let the
president attempt to influence independent agencies (and may in some cases sanction these
tries).

But the difficulty of looking at divided government as its own variable is that it
communicates too little about the nature of Congress’s activity. For example, George W. Bush
came into office with exceedingly slim majorities in the House of Representatives and the
Senate: 222-211 in the House and 50-50 in the Senate, with the Vice President able to cast a
decisive vote in case of a tie. One could scarcely compare Bush’s political situation to Lyndon
Johnson, who after being elected in his own right in 1964 came to office with Democratic
majorities in the House and Senate of 295-140 and 68-32, respectively. Though both presidents
operated in times of unified government, their experiences were vastly different.

This is why I chose to include congressional unity as a moderating variable. It is not
sufficient that government be divided or unified; rather, it is crucial that one consider Congress’s
ability to act. George W. Bush’s first few months in office (Republicans would lose their Senate
majority in mid-2001) were doubtlessly more difficult to navigate than Lyndon Johnson’s
throughout his presidency. Congress’s ability to act should, in turn, depend in part on their level
of unity (e.g. Howell 2003; Krehbiel 1998). In this instance, congressional unity is a substitute
for Congress’s *ability* to act while divided government is a substitute for Congress’s *willingness* to act. A Republican Congress may wish to counteract the policies of a Democratic president, but if that Congress is operating with a slim majority and little party unity, it is going to be much harder for them to do so.

Finally, why separate out insulated agencies from centralized agencies? I argue that presidents should feel more “ownership” of centralized agencies; it is standard practice to administrate EOP and cabinet agencies to a degree, and presidents should be willing to do so regardless of Congress’s ideological make-up. Insulated agencies, on the other hand, should be more difficult to control, and thus if the legislature is united in opposition to the president, he or she should in turn issue fewer orders to such agencies. I do not expect such a relationship to emerge with respect to centralized agencies (i.e., those in the EOP and the cabinet).

The second broad proposition I make with respect to executive order usage is that presidents will use the beginning and ends of their terms as a time for more action. The theoretical logic is that these are the circumstances under which presidents will be most eager to act. As Nixon (1978, 355) observed, “I thought that one of our most important tasks would be to place our stamp on the federal bureaucracy as quickly and as firmly as we possibly could.” What better way to do this, besides the appointments process, than to issue directives right away in an attempt to shape agency actions? At the same time, there may be a preference among presidents to place this same stamp to which Nixon refers on agencies as they are beginning to leave office. This leads to Hypothesis 2:

*Hypothesis 2: As presidents are just entering or preparing to leave the White House, they will issue more orders to all types of agencies than at any other time in their administrations.*

The next section will give a quick refresher (discussed in detail in Chapter 3) of the construction
of the dependent variable and the unit of analysis. I will then discuss in more depth the other measures included in the model.

Data and Methods

To briefly reiterate, I analyzed every executive order from 1946-2011 to determine to which agencies such orders apply and then developed a count of the number of orders directed to each agency type on the insulation scale ("1" being the least insulated, "5" being the most insulated). The data are structured as quarterly\(^{24}\) such that the unit of analysis is structured as quarter-year and the dependent variable is the count of executive orders issued directly (the agency must be specifically mentioned to count in the models as a direct order) to each agency type. Negative binomial regression is used in all instances to account for the possibility of over- or under-dispersion (e.g. Long 1997).

Testing Hypothesis 1 requires quantification of two more variables, both divided government and congressional unity. Divided government is coded as a dummy variable, where a value of “1” means that Congress (the House, the Senate, or both) and the presidency are controlled by different parties. Congressional unity, however, requires a bit more work. Howell (2003) constructs a measure called the “legislative potential for policy change,” or LPPC, which captures the ability of Congress to enact new legislation. It is constructed in a manner identical to Howell’s method.\(^{25}\) LPPC data are collected only for the House of Representatives. This variable is then interacted with divided government such that the two concepts can be evaluated in tandem. The next variable (Hypothesis 2) concerns whether a president is in the beginning or

\(^{24}\) Tests indicate no serial correlation present.

\(^{25}\) Howell (2003, 209) details measurement construction thusly: “Chamber LPPC = [(majority party size in percent) \times (cohesion of majority party)] – [(minority party size in percent) \times (cohesion of minority party)]…Congressional Quarterly’s party unity scores are utilized” to determine levels of cohesion. Though I used Howell’s criteria to create the variable, I collected the data independently also using Congressional Quarterly.
the end of his term. This, too, is constructed as a binary variable where values of “1” indicate that the president is in either the first or last year of his term, respectively.

I also control for a number of additional factors that may establish alternative drivers for presidential issuance of executive orders. I discussed previously (Chapter 3) how going public could potentially influence bureaucratic behavior. It is possible that going public can be combined with the issuance of unilateral directives in an attempt to control agency outcomes. Because the success of going public is predicated in part on the president’s own prestige (e.g. Kernell 2007), it is important to control for presidential popularity. There are, however, essentially two arguments to the popularity component. On the one hand, it could encourage presidents to take more unilateral action because they are emboldened by public support. On the other, as Mayer (2001) argues, presidents without public support may have to turn to other methods, including unilateral powers, leading to an increase in executive orders. These popularity data come from Peters and Woolley (1999-2012) as originally collected by Gallup. This variable is averaged quarterly and annually, and values range from a low of around 25% to a high of over 75%.

Additional controls include president-specific fixed effects, a dummy variable indicating whether the president is a Republican, and a dummy variable indicating whether it is an election year (either presidential or midterm). Finally, I control for the total number of executive orders, the total number of executive orders dealing with advisory commissions, the total number of executive orders addressed to multiple agencies, and the total number of blanket orders.

Results and Analysis

Table 4.1 presents the results of the five separate models based on each type of agency on
Table 4.1 - Determinants of E.O. Usage

<table>
<thead>
<tr>
<th></th>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>LPPC*Divided Gov.</td>
<td>0.372 (2.454)</td>
<td>-1.471 (1.385)</td>
<td>-1.214 (2.140)</td>
<td>0.785 (2.967)</td>
<td>-6.223 (6.085)</td>
</tr>
<tr>
<td>LPPC</td>
<td>-0.175 (1.609)</td>
<td>1.074 (0.930)</td>
<td>2.071 (1.448)</td>
<td>3.475 (1.883)</td>
<td>5.283 (3.889)</td>
</tr>
<tr>
<td>Divided Gov.</td>
<td>0.079 (0.254)</td>
<td>0.020 (0.147)</td>
<td>-0.134 (0.224)</td>
<td>-0.394 (0.338)</td>
<td>0.006 (0.667)</td>
</tr>
<tr>
<td>Republican President</td>
<td>-0.207 (0.230)</td>
<td>0.023 (0.147)</td>
<td>-0.034 (0.215)</td>
<td>0.127 (0.403)</td>
<td>-0.512 (0.704)</td>
</tr>
<tr>
<td>Pres. Popularity</td>
<td>0.002 (0.004)</td>
<td>0.001 (0.003)</td>
<td>-0.006 (0.004)</td>
<td>-0.011 (0.006)</td>
<td>-0.010 (0.012)</td>
</tr>
<tr>
<td>Beginning of Term</td>
<td>0.246 (0.135)</td>
<td>-0.084 (0.083)</td>
<td>0.048 (0.121)</td>
<td>0.181 (0.184)</td>
<td>-0.956* (0.413)</td>
</tr>
<tr>
<td>End of Term</td>
<td>-0.156 (0.133)</td>
<td>0.176* (0.080)</td>
<td>0.334*** (0.115)</td>
<td>0.189 (0.177)</td>
<td>0.168 (0.352)</td>
</tr>
<tr>
<td>Election Year</td>
<td>0.048 (0.130)</td>
<td>-0.122 (0.080)</td>
<td>-0.135 (0.116)</td>
<td>-0.068 (0.173)</td>
<td>-0.509 (0.352)</td>
</tr>
<tr>
<td># of EOs</td>
<td>0.029* (0.014)</td>
<td>0.016 (0.008)</td>
<td>0.011 (0.012)</td>
<td>0.036* (0.018)</td>
<td>0.011 (0.036)</td>
</tr>
<tr>
<td># of Adv. Council EOs</td>
<td>-0.059** (0.022)</td>
<td>0.003 (0.014)</td>
<td>0.038* (0.019)</td>
<td>-0.039 (0.028)</td>
<td>0.024 (0.061)</td>
</tr>
<tr>
<td># of Multi-Agency EOs</td>
<td>0.112*** (0.021)</td>
<td>0.105*** (0.014)</td>
<td>0.111*** (0.019)</td>
<td>0.081** (0.027)</td>
<td>0.133* (0.059)</td>
</tr>
<tr>
<td># of Blanket EOs</td>
<td>0.006 (0.027)</td>
<td>-0.029 (0.018)</td>
<td>-0.038 (0.025)</td>
<td>0.025 (0.037)</td>
<td>0.004 (0.079)</td>
</tr>
</tbody>
</table>

President-Specific Fixed Effects

<table>
<thead>
<tr>
<th></th>
<th>Truman</th>
<th>Eisenhower</th>
<th>Kennedy</th>
<th>Johnson</th>
<th>Nixon</th>
<th>Ford</th>
<th>Carter</th>
<th>Reagan</th>
<th>GHW Bush</th>
<th>Clinton</th>
<th>Constant</th>
<th>Log-Likelihood</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>-1.420*** (0.340)</td>
<td>-0.354 (0.199)</td>
<td>-0.841*** (0.296)</td>
<td>0.865 (0.466)</td>
<td>0.605 (0.885)</td>
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<td>264</td>
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<tr>
<td></td>
<td>-0.776*** (0.210)</td>
<td>-0.416*** (0.124)</td>
<td>-0.282 (0.188)</td>
<td>1.171*** (0.323)</td>
<td>1.603* (0.636)</td>
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<td>264</td>
</tr>
<tr>
<td></td>
<td>-1.156*** (0.325)</td>
<td>-0.633*** (0.195)</td>
<td>-0.923*** (0.296)</td>
<td>0.843 (0.470)</td>
<td>-0.324 (0.857)</td>
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<td>264</td>
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<tr>
<td></td>
<td>-0.879** (0.277)</td>
<td>-0.257 (0.167)</td>
<td>-0.926*** (0.252)</td>
<td>1.282** (0.403)</td>
<td>0.093 (0.724)</td>
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<td>264</td>
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<tr>
<td></td>
<td>-0.494* (0.204)</td>
<td>-0.410** (0.130)</td>
<td>-0.151 (0.190)</td>
<td>1.485*** (0.320)</td>
<td>0.355 (0.719)</td>
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<td>264</td>
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<tr>
<td></td>
<td>-0.232 (0.347)</td>
<td>-0.427* (0.211)</td>
<td>-0.487 (0.313)</td>
<td>0.974* (0.450)</td>
<td>1.045 (0.973)</td>
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<td>264</td>
</tr>
<tr>
<td></td>
<td>-0.342 (0.270)</td>
<td>-0.644*** (0.178)</td>
<td>-0.482 (0.248)</td>
<td>0.799 (0.414)</td>
<td>-1.382 (0.797)</td>
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<td>264</td>
</tr>
<tr>
<td></td>
<td>-0.468* (0.212)</td>
<td>-0.218 (0.126)</td>
<td>0.185 (0.182)</td>
<td>0.446 (0.330)</td>
<td>0.472 (0.684)</td>
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<td>264</td>
</tr>
<tr>
<td></td>
<td>-0.364 (0.282)</td>
<td>-0.312 (0.166)</td>
<td>0.125 (0.239)</td>
<td>-0.426 (0.446)</td>
<td>0.970 (0.813)</td>
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<td>264</td>
</tr>
<tr>
<td></td>
<td>0.048 (0.213)</td>
<td>-0.054 (0.143)</td>
<td>0.229 (0.199)</td>
<td>0.658 (0.362)</td>
<td>1.083 (0.599)</td>
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<td></td>
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<td></td>
<td></td>
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<td>264</td>
</tr>
</tbody>
</table>

Constant: 0.630 (0.350) 2.215*** (0.212) 1.129*** (0.314) -0.787 (0.496) -1.386 (0.936)

Log-Likelihood: -587.531 -909.044 -649.039 -510.06 -226.860

N: 264 264 264 264 264

*p<0.05; **p<0.01; ***p<0.001. Standard errors in parentheses.
the insulation scale. What is perhaps most notable from a quick glance at the results is the lack of significance for most of the variables in the model. Hypothesis 1 posits that executive orders to insulated agencies will increase in periods of unified government as the legislative potential for policy change grows. However, this is not the case. As a corollary, I argued that LPPC and divided government should have no effect on the number of orders issued to more centralized agencies (those located in the EOP or the cabinet). This result seems to hold, but as it pertains to these models, the interaction between LPPC and divided government has no effect on the number of orders presidents give to any agency type, broadly considered.

Similarly, there is only modest support for Hypothesis 2, which states that presidents should issue more orders to all kinds of agencies at the beginning and ends of their terms. The beginning of a president’s term is a significant predictor only of fewer executive orders to government corporations, but this is an exceedingly modest effect, as is to be expected given the very small number of directives issued to such organizations. Presidents in their first year of office issue 0.28 fewer orders to government corporations than they do in any succeeding years of their administrations. Additionally, a president in the final year of his term is expected to issue around 5.45 more executive orders to cabinet agencies than at any other time, and an additional 2.52 executive orders to independent regulatory agencies.2627

What else governs the distribution of executive orders? The only other significant predictors aside from fixed-effects for presidencies are the proliferation of total orders, multi-agency orders, and orders dealing principally with the establishment of advisory councils and

26 I also ran the models with a measure accounting for whether a president was about to turn over the White House to a president of a different party as well as whether the new president is inheriting the White House from a different party. This variable was constructed as binary, such that it equals “1” when the president is in the last quarter of his term before a president of the other party is inaugurated or when the president is in the first quarter of his term after a president of the other party has just left office. The results are insignificant for all types of agencies.

27 Predicted counts obtained via Clarify software package (Tomz, Wittenberg, and King 2003).
commissions. The total number of executive orders issued is a positive and significant predictor of orders to agencies within the EOP as well as independent regulatory commissions. Moving from the mean number of total orders to one standard deviation above the mean increases the number of directives to EOP agencies by 1.40 and the number of directives to regulatory commissions by 0.31.

Orders principally dealing with advisory councils are negatively related to the number of orders given to agencies in the EOP but positively related to the number of orders given to independent regulatory agencies like the EPA. Moving from the mean number of advisory orders to one standard deviation above the mean leads to a decrease of 0.72 orders to the EOP and an increase of 0.58 orders to independent regulatory agencies. Lastly, a proliferation of multi-agency orders expectedly leads to more orders addressed to all types of government agencies. A standard deviation increase in the average of multi-agency orders leads to 3.15 more directives to the EOP, 14.30 more to the cabinet and its sub-elements, 3.42 more to independent regulatory agencies, 0.35 more to independent regulatory commissions, and 0.32 more to government corporations.

But it is important to remember that Table 4.1 only accounts for executive orders in which the agencies targeted are specifically named (i.e., direct orders). I also catalogued orders that are addressed broadly to all agencies of the federal government since their patterns of usage may be broader and hence motivated by different strategic considerations. Therefore, it is useful to consider what factors motivate the issuance of blanket orders, or those executive orders applying to all agencies of the federal government, whether they are named or not. Table 4.2 presents these results.

Again, the interaction between LPPC and divided government has no statistically
significant effect on orders issued. However, other variables in the model do a better job at predicting the issuance of blanket executive orders than they do more direct single- or multi-

**Table 4.2 - Determinants of Blanket E.O. Usage**

<table>
<thead>
<tr>
<th>Determinant</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>LPPC*Divided Gov.</td>
<td>1.510</td>
<td>(2.217)</td>
</tr>
<tr>
<td>LPPC</td>
<td>0.214</td>
<td>(1.376)</td>
</tr>
<tr>
<td>Divided Gov.</td>
<td>-0.023</td>
<td>(0.233)</td>
</tr>
<tr>
<td>Republican President</td>
<td>-0.380*</td>
<td>(0.186)</td>
</tr>
<tr>
<td>Pres. Popularity</td>
<td>-0.008*</td>
<td>(0.004)</td>
</tr>
<tr>
<td>Beginning of Term</td>
<td>0.265*</td>
<td>(0.121)</td>
</tr>
<tr>
<td>End of Term</td>
<td>-0.313**</td>
<td>(0.116)</td>
</tr>
<tr>
<td>Election Year</td>
<td>0.255*</td>
<td>(0.117)</td>
</tr>
<tr>
<td># of EOs</td>
<td>0.057****</td>
<td>(0.007)</td>
</tr>
<tr>
<td># of Adv. Council EOs</td>
<td>0.046**</td>
<td>(0.018)</td>
</tr>
<tr>
<td>Truman</td>
<td>-1.814***</td>
<td>(0.235)</td>
</tr>
<tr>
<td>Eisenhower</td>
<td>-1.059***</td>
<td>(0.195)</td>
</tr>
<tr>
<td>Kennedy</td>
<td>-1.309***</td>
<td>(0.260)</td>
</tr>
<tr>
<td>Johnson</td>
<td>-1.039***</td>
<td>(0.203)</td>
</tr>
<tr>
<td>Nixon</td>
<td>-0.498**</td>
<td>(0.178)</td>
</tr>
<tr>
<td>Ford</td>
<td>-1.179**</td>
<td>(0.345)</td>
</tr>
<tr>
<td>Carter</td>
<td>-0.856***</td>
<td>(0.214)</td>
</tr>
<tr>
<td>Reagan</td>
<td>-0.525**</td>
<td>(0.189)</td>
</tr>
<tr>
<td>GHW Bush</td>
<td>-0.574*</td>
<td>(0.266)</td>
</tr>
<tr>
<td>Clinton</td>
<td>-0.261</td>
<td>(0.169)</td>
</tr>
<tr>
<td>Constant</td>
<td>1.115***</td>
<td>(0.283)</td>
</tr>
<tr>
<td>LR χ²</td>
<td>166.83***</td>
<td></td>
</tr>
<tr>
<td>Log-Likelihood</td>
<td>-473.688</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>264</td>
<td></td>
</tr>
</tbody>
</table>

*p<0.05; **p<0.01; ***p<0.001. Standard errors in parentheses.

agency orders. Presidential popularity, whether a president is at the end of his term, and whether a president is a Republican all have significant and negative effects on the number of blanket orders issued. As presidential popularity increases from its quarterly mean to one standard deviation above that mean, the number of blanket orders falls by about 0.43. This comports with Mayer’s (1999, 2001) contention that unpopular presidents need other avenues to enact policy
change than would popular presidents. Furthermore, Republicans issue around 1.86 fewer blanket orders per quarter than do their Democratic counterparts, and presidents preparing to leave office issue 1.09 fewer blanket orders than they do at any other time in their administrations.

Meanwhile, the absolute number of executive orders, the number of advisory orders, and whether a president is beginning his term are all positive predictors of a greater volume of blanket orders. As the total number of orders rises from its mean by one standard deviation, the number of blanket orders increases by 2.13. This result is not particularly surprising; the more executive orders a president issues, the more opportunities he will take to apply (or make the attempt to apply) broad policy changes to the executive branch. Additionally, as the number of advisory orders increases by one standard deviation from its mean, the number of blanket orders rises by about 0.47. This finding is easily explained: such advisory commissions often come with orders from the president to the entire executive branch to provide the commission with any assistance it might request. Finally, presidents at the beginning of their terms issue 1.27 more blanket orders than do presidents at any other time.

Support for the Hypotheses 1 and 2 is mixed at best, but perhaps these data paint too broad a picture. After all, grouping agencies based on their level on the insulation scale may be somewhat illustrative in establishing general patterns, but it does not allow for the testing of other variables that delve into more specifics about the bureaucracy. In the next section I introduce the data in a slightly different manner to account for these distinctions.

What About the Agencies?

The preceding results provide some valuable insight into patterns of executive order
usage broadly construed, but they do not allow us to make inferences about how these patterns might vary with respect to agency characteristics. Before detailing the data collection and analysis process, some additional theoretical discussion is necessary. Chapter 2 identified three hypotheses relating to agency-specific variables which might prove fruitful in accounting for shifts in a president’s use of executive orders.

As discussed in Chapters 2 and 3, I do not measure agency insulation for specific agencies for two reasons: first, insulation on its own is a broad concept, and when dealing with a smaller subset of individual agencies, I argue it is useful to consider a more parsimonious measure. Second, the list of agencies for which we have reliable data on various measures do not vary much on the insulation scale, necessitating a different approach to considering the effects of centralization. There are, then, good theoretical and practical methodological reasons for turning to decentralization. To reiterate, I argue that decentralized agencies are further outside of the president’s purview because of two components: their structure (i.e., how many sub-elements they have within the organization and thus how many different responsibilities the agency has) and the independence of their personnel (i.e., how much discretion the agency’s employees are expected to exercise). Presidents may thus choose to be strategic in issuing directives to such agencies; if, after all, they are harder to control than agencies with more centralized structures and duties, a strategic individual may decide to be more judicious in the use of unilateral powers in such a circumstance.

Hypothesis 3: Presidents issue fewer executive orders to decentralized agencies than to centralized agencies.

The next proposition relates to agency politicization, which is defined as the percentage of agency employees who are appointed at the discretion of the president (with or without
senatorial approval) or the president’s immediate subordinates. Presidential scholars have discussed at length the importance presidents place on staffing agencies with loyal enforcers to act on their behalf and encourage broader bureaucratic responsiveness (e.g. Lewis 2008; Pfiffner 1988). This desire knows no partisanship; Democrats and Republicans alike are eager to push back against the bureaucracy that they perceive as, in many ways, difficult to control if not openly hostile (e.g. Pfiffner 1988). The counterweight that so many chief executives look to is in appointments; that is, the ability to put people in positions of authority who are loyal to the president. Careerists do not owe their jobs to the White House, after all; appointees, on the other hand, almost always need the president’s blessing to assume such a role within a federal agency. President Gerald Ford captured the argument in favor of politicization thusly: “I think a president ought to have a little more flexibility further down in the bureaucracy, as to both the people appointed and those that can be dismissed....if he cannot reach into the bowels of a department, his decisions...will seldom be adequately implemented” (qtd. in Lewis 2008, 57). Do presidents then strategically change their usage of executive orders based on an agency’s level of politicization? Hypothesis 4 aims to test this:

_Hypothesis 4: Presidents issue more executive orders to politicized agencies than to non-politicized agencies._

The last hypothesis of the chapter concerns the role of agency ideology in governing presidential strategy. Clearly, liberal and conservative presidents ought to have different priorities when it comes to which agencies they ought to influence. Evidence to this point about the ideological motivations of the bureaucracy does not altogether suggest that, for example, traditionally liberal agencies ignore a traditionally conservative executive (e.g. Aberbach and Rockman 2000; Golden 2000; Huber 2007). It is unquestionably the case, however, that
presidents worry about bureaucratic ideology. Earlier, I referenced a passage from Richard Nixon’s (1978) autobiography wherein he discussed his doubts about whether the bureaucracy, after so many years of Democratic administrations and Congresses, would be responsive to a Republican president. Whether agencies are responsive independent of their ideology or not, it is hardly a stretch to claim that presidents worry whether ideological differences will interfere with policy implementation. As a result, I argue that presidents will issue fewer executive orders to agencies that are more ideologically distant from the president’s own ideal point.

_Hypothesis 5: As ideological distance between the president and a given agency grows, the president issues fewer executive orders to the agency._

**Data and Methods, Part II**

How should one conduct this analysis? Chapter 3 discussed in some detail the reasons for narrowing the scope of the analysis for practical purposes, but it is worth restating. As mentioned previously, the agencies I chose come from the work done by Clinton et al. (2012), whose ideology scores for various bureaucratic organizations serve as the master list of agencies to be studied.\(^{28}\) I also discussed in Chapter 3 how each of the independent variables in the above hypotheses are constructed, so I reiterate them only briefly. Decentralization is measured in two ways: first based on the number of sub-elements within an agency (e.g., the Internal Revenue Service is a sub-element of the Department of the Treasury), and second on the percentage of employees who are vested with discretionary authority. Ideological distance is measured as the absolute value of the agency’s mean ideal point less the president’s ideal point. Finally, politicization is measured as the percentage of agency employees classified as appointees.

In addition to the chief independent variables detailed above, I include many of those

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\(^{28}\) Refer to Chapter 3, Footnote 18 for the list of these organizations.
controls presented in Tables 4.1 and 4.2: presidential popularity (averaged across year), whether it is an election year, whether the president is a Republican, an interaction between LPPC and divided government, whether a president is in the beginning or end of his term, and controls for the total number of advisory orders issued. The data are structured such that the unit of analysis is the agency-year.29 Fixed effects are included for presidential administrations and for each agency.

Results and Analysis, Part II

Table 4.3 - Determinants of E.O. Usage (Agency-Specific)

<table>
<thead>
<tr>
<th></th>
<th>Direct Orders</th>
<th>Total Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideological Distance</td>
<td>-0.098 (0.087)</td>
<td>-0.018 (0.045)</td>
</tr>
<tr>
<td>Discretion</td>
<td>-0.197 (0.459)</td>
<td>-0.360 (0.256)</td>
</tr>
<tr>
<td>Sub-Elements</td>
<td>0.007 (0.005)</td>
<td>-0.001 (0.002)</td>
</tr>
<tr>
<td>Politicization</td>
<td>-30.411** (10.768)</td>
<td>-17.892** (5.698)</td>
</tr>
<tr>
<td>LPPC*Divided Gov.</td>
<td>-7.560** (2.175)</td>
<td>-7.644*** (1.145)</td>
</tr>
<tr>
<td>LPPC</td>
<td>3.277** (1.216)</td>
<td>5.208*** (0.658)</td>
</tr>
<tr>
<td>Divided Gov.</td>
<td>0.326 (0.187)</td>
<td>0.730*** (0.098)</td>
</tr>
<tr>
<td>Presidential Popularity</td>
<td>0.007* (0.003)</td>
<td>-0.004* (0.002)</td>
</tr>
<tr>
<td>Election Year</td>
<td>-0.471*** (0.091)</td>
<td>-0.068 (0.050)</td>
</tr>
<tr>
<td>Republican Administration</td>
<td>-0.164 (0.116)</td>
<td>-0.183** (0.060)</td>
</tr>
<tr>
<td>Honeymoon</td>
<td>-0.325*** (0.092)</td>
<td>0.008 (0.049)</td>
</tr>
<tr>
<td>End of Term</td>
<td>0.552*** (0.072)</td>
<td>0.306*** (0.039)</td>
</tr>
<tr>
<td># of Adv. Orders</td>
<td>0.012 (0.007)</td>
<td>0.014*** (0.004)</td>
</tr>
<tr>
<td># of Direct/Total Orders_{t-1}</td>
<td>0.007 (0.008)</td>
<td>-0.010*** (0.002)</td>
</tr>
</tbody>
</table>

President-Specific Fixed Effects

<table>
<thead>
<tr>
<th></th>
<th>Direct Orders</th>
<th>Total Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>G.H.W. Bush</td>
<td>0.469 (0.276)</td>
<td>-0.144 (0.159)</td>
</tr>
<tr>
<td>Clinton</td>
<td>-0.038 (0.112)</td>
<td>-0.181** (0.058)</td>
</tr>
</tbody>
</table>

Constant                   | 0.245 (0.518)       | 2.883*** (0.255)  |
Log-Likelihood             | -931.596            | -1359.744         |
N                          | 478                 | 478               |

*p<0.05; **p<0.01; ***p<0.001

Table 4.3 includes two separate models: one for direct orders (those orders in which the

29 Tests indicate the presence of serial correlation. A lagged dependent variable is included to correct for this.
agency was explicitly named or identified), and one for total orders (all orders which apply, including blanket orders where the agency was not named). Numerous significant results are apparent. Beginning with those variables pertaining to agency characteristics, only politicization matters for the number of executive orders issued to an agency, and the relationship is negative, which is the opposite of what Hypothesis 4 predicts. Rather than presidents issuing more executive orders to politicized agencies, they actually issue significantly fewer orders to such organizations. When politicization is held at its mean, the yearly number of direct orders is approximately 3.56, while the total number of orders is 17.66. Increasing the politicization by one standard deviation lowers the number of direct orders by 0.77 and the total number of applicable orders by 2.32. Figures 4.1 and 4.2 plot this relationship:

**Figure 4.1 - Effect of Agency Politicization on E.O. Usage, Total Orders**

Why should this be the case? After all, politicized agencies have more presidential appointees, and therefore more presidential influence on agency makeup; why would presidents not want to give orders to these organizations than to those that are more independent? Lewis (2008, 196) provides one plausible explanation with his discussion of an “appointee-careerist management
That is, one of the criticisms of politicization is that it leads to a less competent agency; Lewis uses the example of the Federal Emergency Management Agency’s (FEMA) performance during Hurricane Katrina as an illustrative case. However, as Lewis acknowledges, evidence on this point is mixed. Another possible explanation has to do with the nature of executive orders more broadly considered. Are they tools presidents need in order to get “friendly” agencies to comply with White House policy, or can presidents secure this compliance through more informal means? There is not yet an answer to this question, in part because one must consider how politicized agencies actually implement executive orders. If they are less likely to respond to executive orders than are careerist organizations, this might reflect Golden’s (2000, 155) assertion that careerists “carry out the president’s...directives” out of a sense of professional duty. If, however, politicized agencies are no more or less likely to respond to executive orders than other agencies, it is suggestive that presidents are intentionally restrained in issuing directives to appointees, perhaps because they can secure cooperation through other means.

There is, additionally, no support for Hypothesis 3 or Hypothesis 5; neither
decentralization nor ideological distance seem to predict the number of executive orders presidents give to an agency. Again, this does not mean that decentralized or ideologically distant agencies are more or less likely to implement executive orders; it simply means that presidents do not use ideology or decentralization as cues for which agencies to direct. This is perhaps understandable; executive orders are often presented as tools of command, and though presidents and scholars alike have noted the impracticalities of command, it is not surprising that such a tool would be used without discriminating on ideology or decentralization. Presidents ought to want to control all agencies of the government, not only those that are more centralized or more ideologically friendly. Chapter 5 will plumb whether these factors affect rates of responsiveness, but as far as presidential strategy is concerned, Hypotheses 3 and 5 do not reflect a president’s strategic calculation when it comes to issuing executive orders.

Other factors seem more relevant in guiding the president’s executive order strategy. Whereas the interaction between LPPC and divided government was insignificant in Table 4.2, it is significant in both models of Table 4.3. With respect to direct orders, the predicted count when government is unified and LPPC is held at its mean is approximately 4.64. When, however, government is divided, the predicted count of direct orders falls to 2.85. Taking LPPC to one standard deviation above its mean in periods of unified government predicts a rise in direct orders of 0.98, while in periods of divided government the number falls by 0.61. With respect to total orders, the predicted count to a given agency when LPPC is at its mean and government is unified is 18.11; when government is divided, this number is 16.50. With LPPC at one standard deviation above the mean, the number rises by 6.36 in periods of unified government while falling by 2.11 in periods of divided government. Figures 4.3 and 4.4 demonstrate this relationship.
This provides a further glimpse into Howell’s (2003) argument that presidents should use executive orders more frequently when Congress has a hard time passing legislation (i.e., when LPPC is low). This relationship changes significantly when accounting simultaneously for divided government. Indeed, when government is divided, a lower LPPC is predictive of more executive orders, but this is not the case when government is unified. Why do presidents issue
more orders when Congress is able to enact significant policy change and the president’s party controls both houses? According to Howell (2003, 65) “when most members share a common ideological orientation, Congress can readily respond to the president.” However, it is not clear why Congress would want to respond when they are, essentially, on the president’s side. Indeed, Howell finds that LPPC and divided government have similar effects, but he does not evaluate these variables simultaneously. In my estimation, it is most useful to think of LPPC as a moderator of the effects of divided government, and this analysis seems to justify such a specification. The clear implication is that, unsurprisingly, presidents do not consider only agency characteristics when strategizing about executive order usage; they must also consider how Congress might be poised to react. The executive order process, unilateral though it may be (and only in the strictest sense is it unilateral, a point to which I return in Chapter 6), does not occur in a vacuum. Presidents consider the preferences of extra-executive governmental actors when deciding how many directives to issue.

The remaining variables of interest also significantly influence the proliferation of executive orders to a given agency, though this significance does not necessarily hold across models of both direct and total orders. Presidential popularity is a positive predictor of the number of direct orders issued, while it is a negative predictor of the number of total orders issued (including blanket orders). However, these effects are very modest. For a standard deviation increase in presidential popularity above its mean, presidents issue 0.28 more direct orders and 0.87 fewer total orders. This suggests a relevant distinction between orders that directly name agencies as opposed to those which are simply blanket in nature, but because large swings in presidential popularity in a given year are rare, this effect is particularly muted.

Meanwhile, election years are negative predictors of direct orders given to an agency in a
year, while there is no such effect when considering total orders to the same agencies. In an election year, the number of direct orders falls by about 1.69 per year. Additionally, Republicans issue fewer total orders than their Democratic counterparts, though there is no significant difference between parties when it comes to the number of direct orders. On average, Republicans issue 3.19 fewer total orders per year than do Democrats.

The honeymoon period (i.e., the first year) of a presidency is a significantly negative predictor of direct orders, but not total orders. In the first year of a term, presidents issue around 1.04 fewer direct orders than at any other time of their administration. This result, while small, makes intuitive sense: a president first coming into office may be eager to put his stamp on government, and that in turn may require more blanketed orders. At the end of a president’s term, meanwhile, the number of direct orders rises by about 2.29, and the number of total orders rises by approximately 5.86. This comports with Mayer’s (2001, 89) argument that presidents on their way out of office want “to put a legacy in place.” Finally, advisory orders are a positive and significant predictor of total orders given to an agency; as I discussed earlier, such advisory orders often require the cooperation of every agency of the federal government, meaning they will often apply to all of the twenty-four agencies included in this analysis. When the number of advisory orders increases by a standard deviation above its mean, the number of total orders applicable to a given agency rises by about 0.21.

Conclusion

The purpose of this analysis is twofold: to illuminate where executive orders go, and to answer what causes presidents to vary the agencies to which they give directives. A few noticeable patterns emerge: presidents prefer giving orders to less centralized agencies,
specifically those located within the Executive Office of the President or the cabinet. Additionally, and more importantly, agency characteristics do not appear to be “driving the bus” when it comes to the president’s decision about where to direct his orders. Congressional composition seems, at first glance, to be more relevant. Politicization does predict fewer orders, but ideological distance and decentralization do not. The results suggest that presidents do not discriminate to a great degree in deciding where to direct their executive orders. This may be caused by one of two things: 1) presidents either do not understand or do not care about the possibility of noncompliance; or 2) presidents always get what they want. Both of these possibilities are certainly oversimplifications of reality, but are nevertheless suggestive.

First, it is not at all the case that presidents always get what they want from agencies. The proliferation of research from legal scholars on the prevalence of noncompliance by the bureaucracy suggests that expecting an order to be heeded automatically is misguided. Second, it is far-fetched to argue that presidents are unaware that agencies will occasionally disobey their commands; several presidents have said directly, after all, that the bureaucracy can be unwieldy and, on occasion, combative (e.g. Lewis 2008; Neustadt [1960] 1990). Indeed, President Clinton had this to say about executive orders particularly (quoted in Rudalevige [2012], 157): “[O]ne of the things that I was frustrated about when I was president, was that...I’d issue all these executive orders, and then you can never be 100 percent sure that they were implemented.” With this in mind, where does scholarship into executive orders go from here?

One important point of consideration is the nature of executive orders directed to multiple agencies. Presidents are not naïve; they know that their commands must be executed at lower levels of government, and that their agents will have some room to maneuver and manipulate the specifics of implementation. Perhaps, then, the executive chooses to throw orders at multiple
agencies secure in the knowledge that responsiveness and compliance will be spotty. That is, the
president might be aware that certain agencies will simply ignore him, but he will accept that
outcome in the hope that a significant portion of the bureaucracy will still carry out his
preferences.

This chapter only presents the first step in the relationship between the president and the
bureaucracy with respect to executive orders. The next two chapters plumb more specifically
questions of agency responsiveness and compliance. Agents still must actually comply with the
president if we wish to conclude that the executive has become more and more powerful and in
the process gained significant control over the federal bureaucracy. If, on the other hand,
agencies exercise significant discretion (or, in the most extreme cases, they simply ignore the
president), then concerns about presidential power should be reevaluated in favor of a harder
look at the bureaucratic apparatus. This chapter provides some preliminary insight into the
willingness of the president to attempt to direct the bureaucracy, but this speaks only to the
“presidency side” of the equation. A greater understanding of agency behavior in response to
directive must be established before political scientists can draw larger conclusions about the
effectiveness of unilateral power.
ABSTRACT

How effective is unilateral presidential power? Recent developments have shifted presidential scholarship in the direction of a more institutional approach, and one of the most important tenets of this work holds that the president has the ability to make policy on his own. However, there is significant anecdotal evidence suggesting that agency responsiveness to executive orders is not at all guaranteed. This study leverages a unique data set tracing the implementation of executive orders across ten government agencies, and the results indicate that, despite conventional wisdom, presidential directives are not universally implemented, and a host of factors come to bear on an agency’s decision as to whether they will respond. This project represents among the first quantitative empirical assessments of the utility of unilateral power and suggests that the field may benefit most from shifting towards a bargaining-based model similar to those employed in legislative scholarship. The central finding indicates that politicization counter-intuitively leads to lower rates of agency responsiveness to the president, perhaps because of a loss in administrative capability. However, the extent to which we observe this relationship is dependent in part on how ideologically distant an agency is from the president’s ideal point.
Introduction

In the early summer of 2013, President Barack Obama offered stern words\(^{30}\) for those who would resist new initiatives to address climate change: “We don’t have time for a meeting of the Flat Earth Society,” the President said. “Sticking your head in the sand might make you feel safer, but it’s not going to protect you from the coming storm.” Several months earlier, in the first State of the Union Address of his second term, Obama (2013) made clear that he was not reluctant to take executive action: “...if Congress won’t act soon to protect future generations, I will. I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.” These were not empty words; in June, the Obama Administration unveiled *The President’s Climate Action Plan*,\(^{31}\) a multifaceted document that includes various steps, among them unilateral executive action, to deal with climate change.

The story is not an unfamiliar one; a president, facing a stubborn Congress, decides to use the powers of the executive to affect change that legislators are apparently unwilling to accept. Richard Nixon (1978, 414), as “the first President in 120 years to begin his term with both houses of Congress controlled by the opposition party,” took extensive steps to establish greater control of the bureaucratic process in order to push his agenda, though with decidedly mixed results (e.g. Campbell 2005; Lewis 2008). Facing serious opposition to his approach to apartheid South Africa, Ronald Reagan circumvented Congress with an executive order designed to outflank legislative attempts at more drastic sanctions against that nation (e.g. Howell 2003). When Republicans claimed control of Congress during Democrat Bill Clinton’s tenure, one of


\(^{31}\) Available online at http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.
Clinton’s advisors, Paul Begala, indicated that the President was more than willing to take action on his own: “‘Stroke of the Pen...Law of the Land. Kind of cool’” (as cited in Mayer 2001, 7), Begala said. The picture painted is often the same: a bold leader taking decisive action in the face of an obstructionist, non-responsive Congress. The exercise of unilateral power has led to a dramatic increase in the study of the institutional capacities of the presidency, and may signal a shift in the study of executive politics.

But the increased attention paid to the politics of the unilateral presidency rests on a central foundation that, to this point, presidential scholars have not adequately established. The concern about unilateral power is self-evident: should one individual have the ability to essentially direct the bureaucracy at his or her command? Numerous scholars have waded into this normative debate (e.g. Cooper 2002, 2005; Mayer 2001), and though there are cases to be made for and against expanded presidential power, any discussion depends upon the necessary condition that unilateral authority is effective. As others have noted (e.g. Mayer 2009), this condition is far from given. Executive orders, and other forms of direct presidential action, are not self-executing. The question is, as Rudalevige (2012, 157) has asked, “[when] agencies are told, ‘do this,’ do they ‘do that’?”

Clearly, presidential scholars recognize the need to follow the executive order process to its conclusion (or as close to that conclusion as one can come). The principal difficulty has been classifying what responsiveness actually looks like. How is it measured, and when do we know when the bureaucracy does not “do that?” This analysis represents the first attempt at tracking implementation and provides some clear answers to the issue of agency responsiveness. In brief, the answer to the question of whether agencies respond to executive orders is a firm, if somewhat unsatisfying, “sometimes.” An order given is not necessarily an order implemented, but the
conditions under which agencies will forego responding to a presidential directive are multifaceted.

The President, Congress, the Bureaucracy, and the Principal-Agent Problem

The problem of non-responsiveness from bureaucratic officials is founded in principal-agent theory. Rooted in economic literature (e.g. Spence & Zeckhauser 1971), political scientists began to apply these theories of organization to their own work beginning in earnest in the early 1980s (e.g. Fiorina 1981; Moe 1985; Weingast and Moran 1983). The theoretical tenets of principal-agent theory concern the difficulty of overseeing the agent’s actions as well as the potential for different, and perhaps conflicting, incentives which could induce behavior that is not ideal for the principal (see Miller [2005] for a summary of PAT and its contributions to political science). This problem is particularly relevant in studies of the bureaucracy, and scholars have endeavored to demonstrate how principals conflict with bureaucratic agents as well as the methods for establishing control over these agencies (e.g. Lewis 2003, 2008; McCubbins, Noll, and Weingast 1987, 1989; Moe 1989).

In his seminal work on the bureaucracy, Wilson ([1989] 2000, 51) illustrates the apprehension felt by newly elected leaders over concerns about entrenched bureaucrats:

“When Richard Nixon became president in 1969, he was worried that the federal bureaucracy would sabotage his administration’s plans. To Nixon, the government agencies over which he nominally presided were staffed by liberals...who would resist his conservative policies....[Similarly,] [w]hen the Labour party came to power in Great Britain in 1945, its leaders suspected that the British civil service, most of whose members had been hired by Conservative administrations, would sabotage Labour plans
to expand the welfare state and nationalize major industries.”

Certainly, then, principals are aware of the problems they face when monitoring bureaucrats, and for presidents this is no different. Persistent attempts to politicize government agencies (e.g., Aberbach and Rockman 2000; Maranto 2004; Lewis 2008), determine bureaucratic structure (e.g., Lewis 2003), put loyal agency heads in place (e.g., Aberbach and Rockman 2000; Golden 2000), and centralize agency processes (e.g. Moe 1989) demonstrate the president’s sincere awareness of the principal-agent dilemma.

The problem is further complicated by the bureaucracy’s obligations to the Congress, introducing a dynamic of multiple principals (e.g. Aberbach and Rockman 2000; Epstein and O’Halloran 1999; Gailmard 2009; McCubbins, Noll, and Weingast 1987, 1989; Moe 1985, 1989; Weingast 2005; Whitford 2005). Congress’s role highlights just how nominal the president’s control of the executive branch actually is, for while the president is ostensibly the head of the federal bureaucracy, agencies rely on Congress for their appropriations and much of the power that they are statutorily granted (e.g. Weingast and Moran 1982; Weingast, 2005). As Moe (1989) notes, the motivations of these two actors (Congress and the president) are distinct, and they pursue different methods of achieving their goals. Agencies, Weingast (2005, 313) explains, wind up “‘caught in the middle’ between Congress and the president.”

The consequences for this particular problem can be vexing for all involved in the policy-making process. On the one hand, answering to different principals carries with it the possibility that these principals will have distinct goals that will be virtually impossible for the agents to accomplish simultaneously (e.g., Hammond and Knott 1996; McCubbins, Noll, and Weingast 1987; Moe 1984). This, in turn, guarantees that agents will have to compromise on their own in an attempt to perform a balancing act that will satisfy their principals, which can be a delicate
task (e.g. Bertelli and Grose 2009; Whitford 2005). But, as Gailmard (2009, 182) demonstrates, the simple presence of multiple principals (a function of the institutional structure under which agencies operate) “is sufficient to induce control loss.” In other words, bureaucratic drift is likely to occur even under scenarios where the president and Congress have the same preferences.

This is to say nothing of the bureaucracy’s preferences, however. Government agents are not mindless drones, and though different levels of constraints can work in tandem to reduce the amount of agency loss, bureaucrats are still unique individuals with their own desired outcomes (e.g. Carpenter 2001; Golden 2000; Huber 2007; Lewis 2008). The question, as the title of Golden’s (2000) book asks, is “what motivates bureaucrats?” Do agencies, as President Nixon and the Labour Party of the 1940s feared, deliberately sabotage principals with whom they do not agree? Such an outcome is possible, but evidence for it is anecdotal at best. Bureaucrats seem largely interested in focusing on their own tasks free from political meddling (e.g. Carpenter 2001; Huber 2007), and some evidence suggests that agencies respond to the wishes of their political principals without serious regard for their own ideology, choosing to dismiss the notion of deliberate manipulation out of hand (e.g. Aberbach and Rockman 2000; Golden 2000). Aberbach and Rockman (2000, 132) even go so far as to claim “that the U.S. bureaucracy is now a quite flexible and responsive institution....Whatever is wrong with the higher civil service (and administrative system), it is not that it is unresponsive or insulated.”

None of this is meant to imply that agencies answer every command with perfect compliance. Bureaucrats certainly do have ideological preferences (as Wilson, [1989] 2000 notes, they are considerably more liberal than conservative in their leanings), but it is unclear what role ideology plays in governing agency responsiveness to directives from political actors like the president. Still, political preferences need not govern the rate of agency response to
various orders. As Niskanen (1975) points out, bureaucrats often act to maximize their agency budgets, and these concerns do not have to be ideologically based; at the same time, a sincere desire for expert control over policy can motivate agencies to resist political pressures (e.g. Bruff 2010; Carpenter 2001; Huber 2007). These factors, and others, could help to explain why agencies are not universally responsive to the president’s wishes as head of the executive branch.

In the preceding chapter, I posited that presidents make strategic calculations when deciding to which agencies they ought to direct executive orders. This chapter now applies the concept of strategy to bureaucratic responsiveness. I argue that agents, by virtue of having their own preferences, capabilities, and motives, make their own strategic decisions when it comes to whether or not to respond to an executive order from the White House. The data described in Chapter 3 present a unique opportunity to test several propositions about agency responsiveness to executive orders. Chapter 2 describes the theoretical justification behind these hypotheses in more detail, but here I provide a quick refresher on the propositions about how different factors influence response rates to directives from the White House.

I begin first with decentralization. As discussed in earlier chapters, decentralization refers to the extent to which the policy process as handled by federal agencies are outside of the president’s purview. Decentralized agencies have more sprawling structures (i.e., they have more offices dedicated to specific missions) which in principal-agent theory terms should make oversight more costly since there are more organizations within a single agency to monitor. These agencies also have personnel vested with more discretionary authority, which should also increase monitoring costs; the logic here is that agents vested with decision-making powers and entrusted with a certain degree of independence ought to be more insulated from the political process. This is not to say they are more invested in doing good work than are bureaucrats with
carefully-defined duties, but agents with discretionary authority are clearly expected to exercise a certain amount of leeway in performing their jobs. Part of this leeway, I argue, is that they may be less responsive to executive orders, feeling instead that they are plenty capable of doing their work without interference from the president who may (and probably does considering the entire universe of government agencies) lack their same expertise.

One way to test decentralization’s importance is to determine whether presidents change their behavior with respect to executive orders when it comes to agencies that are more heavily decentralized, but Chapter 4 indicated this not to be the case. Decentralization does not enter into the strategic calculus of the president when deciding where and how many directives ought to be issued. However, this does not answer the question as to whether decentralized agencies are less responsive; perhaps presidents do not consider this variable because they are unaware that such organizations follow through at lesser rates than their more centralized counterparts. This leads me to Hypothesis 6:

Hypothesis 6: The more decentralized an agency is, the less likely that agency will be to respond to an executive order.

Next, consider agency ideology; it is the case, I have argued, that presidents worry about the ideological predispositions of the bureaucracy that they are tasked with overseeing (e.g. Wilson [1989] 2000). Though Wilson ([1989] 2000) notes that government workers tend to be much more liberal than conservative, Lewis (2008) has demonstrated that Democrats are no less interested in pursuing greater control over agencies than are Republicans. Given the bureaucracy’s political proclivities, we might expect that Republican administrations would fret more over liberal agencies, but this is not the case. Further, Lewis (2008), based on expert surveys, notes that plenty of agencies throughout Washington are thought of as conservative in
nature, even putting aside the individual political opinions or partisan affiliations of government bureaucrats. There is no reason, then, to suspect that this concern about ideological orientation is dependent on the president’s party.

I have also acknowledged the significant amount of work demonstrating that agents are not driven principally by their ideology (e.g. Aberbach and Rockman 2000; Carpenter 2001; Golden 2000; Huber 2007), and so one might question why this ought to be included in the analysis at all. Put simply, such ideological considerations have not been thoroughly and quantitatively evaluated in the context of the unilateral presidency; there is some base utility to determining whether ideology “matters” concerning agency responsiveness to executive orders. Second, ideology need not refer to the agency alone. The agency head, who is often the person charged in executive orders with making sure the policy is implemented, may also have opportunities to influence agency responsiveness. This proposition itself begs the question: why would a president ever nominate someone with ideologically disparate viewpoints? As Pfiffner (1988, 42) notes, “processes and criteria guarantee that members will not be chosen only for their personal and ideological loyalty to the president. Other factors tend to dominate cabinet choices, such as partisan concerns, symbolic statements, expertise, management experience, and clientele concerns.” The consequence of this is that all agency heads are unlikely to be lock-step with the policy goals of the administration. These considerations together lead to Hypothesis 7:

*Hypothesis 7: As agencies become more ideologically distant from the president’s ideal point, they will be less likely to respond to executive orders than agencies closer to the president’s ideal point.*

Consider next the role of agency politicization. I have highlighted the work of numerous scholars, and, for that matter, presidents (e.g. Bush 2010; Lewis 2008; Nixon 1978; Pfiffner
1988) that focus on the sincere need to staff the bureaucracy with responsive agents. Presidents make it an early priority, as they should, to staff agencies and offices in such a way as to encourage responsiveness. This is not surprising; given the expectations the public holds of the president (e.g. Stimson 1976-1977), a freshly inaugurated leader ought to want to shape the bureaucracy as much as possible if he or she is to carry out an ambitious agenda. It makes a good deal of intuitive sense to argue, then, that the presence of more appointed agents (who owe their jobs to the president or the president’s immediate subordinates) should encourage greater responsiveness.

There is, however, a corollary to this proposition. Chapter 2 discusses Maranto’s (1993, 2004) survey-based work relating to relations between careerists and political appointees. One of his most critical findings is that ideology can affect the extent to which career and non-career (i.e., non-appointees and appointees) employees cooperate effectively. In other words, relations have the potential to become strained (and thus the agency’s efficiency may conceivably be compromised) in circumstances where career and non-career agents do not share ideological goals. It is conceivable then that ideology works to moderate the effects of politicization, such that agencies that are ideologically distinct from the president’s position are less efficient because of a proliferation of appointees who share the White House’s preferences. As such, I aim to test two hypotheses in this chapter related to politicization: one concerned with its direct effects, and one concerned with how agency ideology could moderate the effects of appointments.

*Hypothesis 8a: Politicized agencies will be more likely to respond to executive orders than non-politicized agencies.*
Hypothesis 8b: Politicized agencies closer to the president’s ideal point are more likely to respond to executive orders than politicized agencies further from the president’s ideal point.

**Data and Methods**

Chapter 3 includes a detailed description of the data sources and coding process used to create the dependent variable, agency responsiveness, but a refresher is worthwhile. Using a collection of data sources, principally the *Federal Register* and the *Code of Federal Regulations*, I determined which agencies implemented final rules or regulations specifically citing an executive order as justification or clarification. The dependent variable is constructed dichotomously where a value of “1” indicates that the agency responded and a value of “0” indicates that the agency did not.

Of course, it bears noting that not every executive order requires a response (and, in some cases, presidents may not even want one; I will return to this point in Chapter 6). Orders requiring all agencies of the federal government to cooperate with a temporary advisory commission set up in the same directive do not necessarily merit any kind of formal response. It is for this reason that I further classified executive orders based on two important factors: 1) was the agency in question specifically named in the executive order; and 2) did the president specifically call for rule promulgation? Neither are necessary in order for an agency to respond, but it is clear that when these factors are introduced in an order, the chances of a response ought to increase significantly. Distinguishing among executive orders where the White House expects a response from those orders where no response is needed or expected is a difficult task, but controlling for whether an agency was named and whether responsiveness was formally requested allow for at least a partial accounting of these directives. The unit of analysis in the
models to follow is dyadic, structured as *agency-executive order*. One executive order can (and often does) apply to multiple agencies, such that a single directive can represent as many as ten observations in the data set (one for each organization studied herein; see below).

It is also important to consider the time period and structure of the data. From the Clinton et al. (2012) list, I randomly selected ten agencies for further evaluation.\(^3\)\(^2\) This provides a starting point from which to collect other data for testing the hypotheses. Ten agencies were chosen because the data collection process for this project required a balance between generalizability and feasibility. Studying this subset allows me to keep construction of the data reasonable while still providing enough variation across agency tasks and characteristics to allow for reliable conclusions. The variables discussed in Chapter 3 and employed in Chapter 4 to measure agency decentralization, politicization, and ideological distance from the president are again used here. To give a brief refresher, decentralization is measured in two ways: the number of sub-elements within a bureaucratic organization (which reflects the “sprawl” of that agency’s tasks) and the percentage of employees within the agency who are given some degree of discretionary authority (as defined by the Office of Personnel Management). Ideological distance is measured as the absolute value of the president’s ideal point less the agency’s median ideal point and, additionally, as the absolute value of the president’s ideal point less the agency head’s ideal point (Bertelli and Grose 2011). Finally, politicization is measured as the percentage of agency employees who are politically appointed as defined by Lewis (2008).

Various other controls are included. Based on Chapter 4’s finding that congressional unity can influence the strategic calculation presidents make in issuing executive orders, I

\(^{32}\) Again, these agencies are the Department of Commerce; the Department of Energy; the Department of Education; the Department of Transportation; the Department of the Treasury; the Department of Veterans Affairs; the Environmental Protection Agency; the Department of Housing and Urban Development; the Department of State; and the Nuclear Regulatory Commission.
include both the variable presenting unity (LPPC) as well as a dichotomous variable for whether
government is divided or unified. To account for the possibility that agencies pay attention to the
president’s public standing when making decisions about responsiveness, I also control for the
yearly average of the president’s popularity as measured by Gallup (as collected by Peters and
Woolley [1999-2012]). The models also control for whether it is a presidential election year,
accounting for the possibility that agencies might either stall or, alternatively, move quickly to
enact policy changes with uncertainty about who will occupy the White House in the succeeding
year. Along similar theoretical lines, it is a well-known maxim that presidents in the early
honeymoon period of their administrations tend to have more legislative success (e.g. Light
1999). It is possible that the same is true of success in the executive arena, so I control for
whether a president is in the honeymoon period of an administration. I also control for two
executive order-specific variables: first, whether the order is addressed to all agencies of the
federal government (i.e., it is a blanket order) to evaluate whether broad directives receive more
or fewer responses; and second, whether the order deals principally with an advisory
commission, for which the necessity for rule promulgation is exceedingly rare.

The following models are estimated using logistic regression. I cluster standard errors
around both the agency and the executive order.33 Fixed effects are included for each presidential
administration (G.H.W. Bush, Clinton, G.W. Bush, and Obama in the below estimates).

## Results and Analysis

Table 5.1 presents the results for four models covering two separate time periods: 1989-
2011 (Models 1 and 3) and 1989-2008 (Models 2 and 4). Model 2 is estimated only to show that
all variables retain their signs and significance when narrowing the time-frame to before Barack

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33 This model was developed by Cameron, Gelbach, and Miller (2011).
Table 5.1 - Executive Order Responsiveness Pt. 1

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Named in E.O.</td>
<td>1.340*** (0.291)</td>
<td>1.405*** (0.309)</td>
<td>1.348*** (0.293)</td>
<td>1.417*** (0.310)</td>
</tr>
<tr>
<td>Promulgation Requested</td>
<td>3.058*** (0.281)</td>
<td>2.943*** (0.297)</td>
<td>3.054*** (0.281)</td>
<td>2.930*** (0.296)</td>
</tr>
<tr>
<td>Ideological Distance (Pres./Agency)</td>
<td>0.218 (0.349)</td>
<td>0.171 (0.330)</td>
<td>0.555 (0.396)</td>
<td>0.597 (0.398)</td>
</tr>
<tr>
<td>Discretion</td>
<td>-1.264 (2.389)</td>
<td>-1.578 (2.561)</td>
<td>-1.096 (2.387)</td>
<td>-1.274 (2.586)</td>
</tr>
<tr>
<td>Sub-Elements</td>
<td>-0.016 (0.017)</td>
<td>-0.017 (0.019)</td>
<td>-0.016 (0.017)</td>
<td>-0.016 (0.019)</td>
</tr>
<tr>
<td>Ideological Dist. x Politicization</td>
<td>---</td>
<td>---</td>
<td>-100.022* (39.549)</td>
<td>-128.349** (42.757)</td>
</tr>
<tr>
<td>Presidential Popularity</td>
<td>0.004 (0.012)</td>
<td>0.006 (0.013)</td>
<td>0.003 (0.012)</td>
<td>0.006 (0.013)</td>
</tr>
<tr>
<td>LPPC</td>
<td>-0.399 (3.716)</td>
<td>-0.138 (3.818)</td>
<td>-0.332 (3.707)</td>
<td>-0.009 (3.805)</td>
</tr>
<tr>
<td>Divided Government</td>
<td>0.650* (0.289)</td>
<td>0.622* (0.299)</td>
<td>0.649* (0.287)</td>
<td>0.616* (0.299)</td>
</tr>
<tr>
<td>Presidential Election Year</td>
<td>-0.144 (0.245)</td>
<td>-0.102 (0.270)</td>
<td>-0.145 (0.244)</td>
<td>-0.103 (0.269)</td>
</tr>
<tr>
<td>Honeymoon</td>
<td>0.196 (0.258)</td>
<td>0.229 (0.258)</td>
<td>0.179 (0.256)</td>
<td>0.208 (0.254)</td>
</tr>
<tr>
<td>Advisory E.O.</td>
<td>-2.573*** (0.354)</td>
<td>-2.719*** (0.365)</td>
<td>-2.571*** (0.352)</td>
<td>-2.718*** (0.363)</td>
</tr>
<tr>
<td>Blanket E.O.</td>
<td>0.581* (0.267)</td>
<td>0.682** (0.264)</td>
<td>0.576* (0.266)</td>
<td>0.673** (0.261)</td>
</tr>
</tbody>
</table>

*President-Specific Fixed Effects*

<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>GHW Bush</td>
<td>0.810 (0.686)</td>
<td>-0.216 (0.762)</td>
<td>0.869 (0.689)</td>
<td>-0.265 (0.740)</td>
</tr>
<tr>
<td>Clinton</td>
<td>0.938* (0.472)</td>
<td>-0.072 (0.242)</td>
<td>0.993* (0.463)</td>
<td>-0.126 (0.236)</td>
</tr>
<tr>
<td>GW Bush</td>
<td>0.969 (0.562)</td>
<td>--</td>
<td>1.069 (0.551)</td>
<td>--</td>
</tr>
<tr>
<td>Constant</td>
<td>-3.405 (2.891)</td>
<td>-2.369 (3.184)</td>
<td>-3.705 (2.905)</td>
<td>-2.710 (3.212)</td>
</tr>
<tr>
<td>Pseudo $R^2$</td>
<td>0.349</td>
<td>0.338</td>
<td>0.350</td>
<td>0.341</td>
</tr>
<tr>
<td>$N$</td>
<td>4,120</td>
<td>3,445</td>
<td>4,120</td>
<td>3,445</td>
</tr>
</tbody>
</table>

*p<0.05; **p<0.01; ***p<0.001. Robust standard errors in parentheses.
Obama took office. This was done for two reasons: first, it can take some time for executive orders to work their way into rules, so it might be unfair to include President Obama’s orders, given that non-responsiveness at this point of his administration does not necessarily represent non-responsiveness in finality. Second, the ideal point estimates for Obama are based on Poole and Rosenthal’s NOMINATE scores, while the ideology estimates for George H.W. Bush, Bill Clinton, and George W. Bush’s first and second terms are based on ideal points derived by Bertelli and Grose (2011) and Clinton et al. (2012). As such, these estimates might not be comparable, and so the second model serves to demonstrate that little changes when excluding President Obama’s orders. The specific predicted probabilities I will discuss, then, are with respect to Model 1. The distinction between Models 1 and 2 and Models 3 and 4 is based on the separate politicization hypotheses (H_{8a} and H_{8b}): Models 3 and 4 test the moderating effect of politicization on ideological distance.

I discuss Model 1 (1989-2011) first. As expected, the very best predictors of whether an agency responds to an executive order through the promulgation of a rule are whether that agency was explicitly named in the order or whether promulgation was specifically requested by the president. When an agency is not named in an executive order, and no promulgation is requested, the predicted probability of a rule response is approximately 2.58%, all else held equal. Simply naming the agency raises this predicted probability to 9.18%, an increase of 6.60%. Meanwhile, requesting promulgation (without naming the agency) raises this predicted probability to 36.04%. When the agency is named and promulgation requested, the probability of a response reaches 68.27%. So, when presidents say, “do this,” does the agency do it? The evidence suggests they do something most of the time.

Perhaps most readily apparent from this table is the lack of agency factors that affect the
probability of a response. Ideological distance between the agency and the president has no
independent bearing on the outcome, and neither do either of the measures of decentralization;
thus, there is no support for Hypotheses 6 or 7. Politicization does have some noticeable effects,
but they are in the opposite direction of that posited in Hypothesis 8a. All else held equal, when
politicization is at its minimum, the probability of a response is 3.14%. At its mean, that
probability drops to 2.58%, and at one standard deviation above the mean, an agency’s
likelihood of responding is 1.94%. Recall that Hypothesis 8a posited that politicization would
lead to greater responsiveness as a result of an agency being staffed with more individuals loyal
to the president. Instead, it seems that greater politicization leads to lower rates of
responsiveness.

Why might this be? Some scholarship on the relationship between politicization and
bureaucratic efficiency provides some possible answers. First, the trade-off between politicized
and non-politicized agencies is not always a trade-off between presidential loyalty and
presidential disloyalty. It is, in essence, a fundamental conflict between responsiveness and
neutrality. As Huber (2007, 13) maintains, “[p]olitical control, in short, may come at the cost of
capable public administration.” This is to say that politicization and the agency’s competence are
not mutually exclusive concepts. We know, as Moe (1989, 279) writes, “that presidents want to
control the bureaucracy” (see also Lewis, 2008). At the same time, we have been inundated with
bureaucratic research describing the development of neutrality, competence, and the willingness
of bureaucrats to do their jobs, regardless of what they think of the president’s policies (e.g.

34 I also ran the models with a “team” measure, reflecting whether the agency was classified as traditionally liberal,
moderate, or conservative (Lewis 2008), then comparing the agency’s ideological position with the president’s
(where Presidents Bush were classified as conservative and Presidents Clinton and Obama as liberal). This did not
produce any substantive changes in the results presented in Table 2.
The politicization finding thus calls to mind the tension between bureaucratic responsiveness and efficiency. As Carpenter (2001, 14) writes, “[b]ureaucratic autonomy requires political legitimacy, or strong organizational reputations embedded in an independent power base.” And how is that legitimacy established? Again, I refer to Carpenter (2001, 353; emphasis mine): “Autonomy arises when bureaucrats...ground [their] reputation in a diverse coalition....These coalitions, suspended in beliefs and in networks, and uncontrollable by politicians, are the stuff of autonomous bureaucratic policy innovation.” The author’s clear implication is that politicization comes at the cost of expertise and competence, though the evidence on this point is somewhat mixed (see Lewis 2008). The lesson in Model 1, then, may be that more politicized agencies, even by virtue of having a greater proportion of presidential appointees, are less responsive because they are less competent. This complements Golden’s (2000, 155) argument that, by and large, “[c]areerists were unwavering in their contention that their role was...to carry out the president’s or the appointee’s directives.” In other words, it seems that many careerist bureaucrats do as they are instructed, a finding which seems to be supported based on the model’s results.

Other predictors of a response in the model include whether the order principally involved the creation of an advisory council or commission and whether there was a blanket order given. The probability that an agency will respond to an order dealing with an advisory organization is only 0.20%, all else held equal. Meanwhile, when considering an order that does not apply to all agencies of the federal government, the probability of a response drops from 2.58% to 1.46%. Finally, divided government has a significant positive effect on agency responsiveness to executive orders. When government is unified, the probability of a response is 1.36%. In divided government, however, the predicted probability is significantly higher at
2.58%. This finding does support the notion that agencies react differently to executive orders depending on the make-up of Congress.

Model 3 (1989-2011) is designed to test Hypothesis 8b (ideological distance moderates the effect of politicization on rates of responsiveness). The principal difference between this model and Model 1 is the interaction between ideological distance and politicization, which is significant and negative. This indicates, in brief, that agencies further away from the president’s ideal point become significantly less responsive as politicization increases than do agencies closer to the president’s ideal point. In all cases, however, greater politicization leads to lower rates of responsiveness, but this is attenuated depending on ideological congruence with the president. The baseline probability of a response is 2.43%. When ideological distance is held at one standard deviation below its mean (i.e., ideological distance between the agency and the president is small), the rate of response in an agency with average levels of politicization is 2.53%. When politicization is at its minimum in this circumstance, the rate of response is slightly higher at 2.65%, and at one standard deviation above its mean, responsiveness is measured at 2.38%. These are obviously very modest effects, but the differences become more distinct as ideological distance grows.

Next consider ideological distance held at its mean. With politicization at its minimum, the predicted rate of response is 3.10%. At its mean, this probability drops to 2.43%, and at one standard deviation above the mean the probability of a response is 1.71%. There is clearly a much more pronounced effect of politicization on responsiveness in this instance; greater politicization means lower responsiveness, as was the case when ideological distance was held at one standard deviation below its mean, but now the difference across this range is 1.39% rather than 0.27%.
Finally, consider the circumstance when ideological distance between the president and the agency is significantly great (i.e., ideological distance is held at one standard deviation above its mean). The rate of response for a minimally politicized agency in this instance is 3.62%. This drops by over a full percentage point when politicization is held at its mean to 2.33%, and by nearly as much when politicization reaches one standard deviation above its mean to 1.22%.

These results lend some credibility to the general conclusion in Model 1 that greater politicization leads to lower rates of responsiveness; that is indeed true even when interacted with ideology, but perhaps unsurprisingly, responsiveness rates sink much more quickly in ideologically distant agencies than they do in ideologically congruent agencies. This makes a good deal of sense: if we assume that more politicized agencies are less competent, we would expect that this incompetence would be somewhat more masked in an agency that shares the president’s policy goals. Bureaucrats in agreement are not going to experience as much friction from political appointees as bureaucrats in disagreement. This finding calls attention to Maranto’s (2004, 141) conclusion that “ideology matters. Though many high-level careerists are political moderates, ideological clashes between organization and administration goals apparently do far more to explain career-noncareer relations than do noncareer (in)experience or careerist respect for the politics-administration dichotomy, which seem relatively uniform.”

I estimated two additional models to allow for a different measurement of agency ideology. Golden (2000) has argued that careerists are responsive not just to the president, but to appointees. It makes some theoretical sense, then, to argue that it is not the agency’s ideology as a whole that is relevant, but the ideology of the agency head. Helpfully, data made available by Bertelli and Grose (2011) allow me to test this hypothesis in a somewhat more limited setting. The authors compute ideal point estimates for the heads of the various cabinet agencies during
the George H.W. Bush Administration, the Clinton Administration, and the first term of George
W. Bush’s presidency. I constructed this variable in identically the same fashion as the
ideological distance measure between the agency and the president, by taking the absolute value
of the distance between the president and the agency head. All other variables from Table 5.1 are
included, excluding a fixed effect for the Obama Administration, and standard errors are again
clustered around both the agency and the executive order. Model 1 does not include the
interaction between politicization and ideological distance from the agency to the president while
Model 2 does include this. Table 5.2 presents the results:

<table>
<thead>
<tr>
<th>Table 5.2 - Executive Order Responsiveness Pt. 2</th>
<th>1989-2004 Model 1</th>
<th>1989-2004 Model 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Named in E.O.</td>
<td>1.298*** (0.336)</td>
<td>1.298*** (0.336)</td>
</tr>
<tr>
<td>Promulgation Requested</td>
<td>3.130*** (0.321)</td>
<td>3.131*** (0.321)</td>
</tr>
<tr>
<td>Ideological Distance (Pres./Agency)</td>
<td>1.281 (1.035)</td>
<td>1.297 (1.190)</td>
</tr>
<tr>
<td>Ideological Distance (Pres./Secretary)</td>
<td>-1.733* (0.758)</td>
<td>-1.730* (0.755)</td>
</tr>
<tr>
<td>Discretion</td>
<td>-0.223 (2.978)</td>
<td>-0.221 (2.985)</td>
</tr>
<tr>
<td>Sub-Elements</td>
<td>-0.007 (0.020)</td>
<td>-0.007 (0.020)</td>
</tr>
<tr>
<td>Politicization</td>
<td>-35.178** (10.939)</td>
<td>-32.662 (61.861)</td>
</tr>
<tr>
<td>Ideological Dist.×Politicization</td>
<td>---</td>
<td>-4.848 (110.407)</td>
</tr>
<tr>
<td>Presidential Popularity</td>
<td>0.050 (0.046)</td>
<td>0.050 (0.046)</td>
</tr>
<tr>
<td>LPPC</td>
<td>-0.240 (11.009)</td>
<td>-0.239 (11.011)</td>
</tr>
<tr>
<td>Divided Government</td>
<td>0.259 (0.323)</td>
<td>0.258 (0.331)</td>
</tr>
<tr>
<td>Presidential Election Year</td>
<td>0.127 (0.430)</td>
<td>0.127 (0.430)</td>
</tr>
<tr>
<td>Honeymoon</td>
<td>0.048 (0.408)</td>
<td>0.048 (0.411)</td>
</tr>
<tr>
<td>Advisory E.O.</td>
<td>-2.688*** (0.508)</td>
<td>-2.687*** (0.503)</td>
</tr>
<tr>
<td>Blanket E.O.</td>
<td>0.462 (0.314)</td>
<td>0.462 (0.318)</td>
</tr>
</tbody>
</table>

President-Specific Fixed Effects

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>GHW Bush</td>
<td>-0.521 (1.612)</td>
<td>-0.523 (1.606)</td>
</tr>
<tr>
<td>Clinton</td>
<td>0.669 (0.410)</td>
<td>0.666 (0.398)</td>
</tr>
<tr>
<td>GW Bush</td>
<td>--</td>
<td>--</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-6.021 (5.830)</td>
<td>-6.032 (5.858)</td>
</tr>
<tr>
<td>Pseudo $R^2$</td>
<td>0.345</td>
<td>0.345</td>
</tr>
<tr>
<td>$N$</td>
<td>1,959</td>
<td>1,959</td>
</tr>
</tbody>
</table>

*p<0.05; **p<0.01; ***p<0.001. Robust standard errors in parentheses.

Immediately apparent is that previously significant and insignificant variables from the
last models estimated in Table 5.1 largely retain their signs and (in)significance in Table 5.2. As before, whether an agency is named or whether the president requests promulgation are both highly significant predictors of an agency response. The base probability of a response in this model is 3.69%. If an agency is specifically named, that probability rises to 12.29%. If promulgation is requested, even without naming the agency, the probability of a response reaches 46.67%. And if the president both names the agency and requests promulgation, the probability of a response reaches 76.22%.

Notice also that the ideological distance between the president and the agency head is a significant predictor of a rule response. If we evaluate Hypothesis 2 in this context (ideological distance predicts lower levels of responsiveness), then Table 5.2 provides some support. The ideological distance between the president and the agency as a whole, however, still remains insignificant as a predictor. With respect to the agency of the ideology head, though, when ideological distance is held at one standard deviation below its mean, the probability of a rule response to an executive order rises by 1.51%, from 3.69% to 5.20%. At one standard deviation above the mean of ideological distance, the probability of a rule response drops to 2.60%.

This finding conveys two important points: first, ideology does matter, though not in the way originally hypothesized. What seems more relevant is the ideology of the agency head as compared with the president, as opposed to the ideology of the entire agency broadly construed.

The second point pertains to the argument concerning politicization and bureaucratic competence. Recall Golden’s (2000) assertion that careerists largely do as they are told by their politicized superiors (in this case, the president and any of the president’s appointees). The heads of these cabinet departments represent, in many ways, the penultimate appointee, reinforcing

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35 The exceptions are divided government and whether an E.O. was directed at all agencies of the federal government, both of which were significant predictors in Table 5.1.
Golden’s finding that bureaucrats further entrenched the agency apparatus, those occupying careerist positions, do not seem to be motivated by ideology, but rather by a kind of service ethic that encourages them to “follow the leader.”

As was the case in Table 5.1, the level of politicization and whether the order was principally dealing with an advisory council are significantly negative predictors of a rule response. When politicization is held at its minimum, the probability of a response is 4.65%, an increase from the mean of 0.96%. When politicization is increased one standard deviation above its mean, the probability of a rule response drops from 3.69% to 2.71%. Further, the probability of response to an advisory order, all else held equal, is 0.26%.

In contrast to Table 5.1, however, the interaction between politicization and ideological distance between the president and the agency (Model 2) is not a significant predictor of agency responsiveness. What explains this finding? It is possible that accounting for agency head factors absorbs some of the variance explained by politicization, but the correlation between ideological distance from the president to the agency head and politicization is only 0.07. It seems more likely that the head of the agency, as a political appointee, accounts in part for the ideology of those implementing policy at the lower levels of the bureaucracy. Politicization may stand in for this ideological distinction to a limited extent because, as Table 5.1 shows, the loss in bureaucratic responsiveness owed to politicization is significantly more pronounced in agencies that are ideologically distant from the president’s ideal point as opposed to agencies that are ideologically close. There are, otherwise, few substantive distinctions from Model 1. The ideological distance of the president from the agency head predicts significantly lower rates of responsiveness, as does whether an order is principally advisory in nature.

It is important to acknowledge the sample’s limitations: future research should expand to
study not only the additional agencies included in Clinton et al. (2012), but other agencies further outside of the cabinet structure. The data herein include information from the Environmental Protection Agency and Nuclear Regulatory Commission, but in-depth analysis of other independent bureaucratic entities is necessary to draw more generalizable conclusions. Further, the question of ideology should be examined more deeply by considerations of the ideology of lower-level bureaucrats in the field. At this time, such estimates are unavailable, but though the agency head is ostensibly the individual in charge of implementing the order, this task must necessarily be delegated as well. The lack of reliable ideology estimates for this sub-delegation needs to be rectified.

Conclusion

William Howell’s (2003) book *Power Without Persuasion* is framed so as to put it in direct contrast to Richard Neustadt’s ([1960] 1990, 11) seminal work on presidential power, the chief contention of which is that “[p]residential power is the power to persuade.” Howell, and others (e.g. Cooper 2002; Edwards 2009; Mayer 2001) cautioned against this approach, instead pointing to the range of unilateral powers at the president’s disposal that enable the White House to drive policy, at times with seemingly no check from the other branches of government. However, this assumes that the bureaucracy itself is not a check on the president’s power, that bureaucrats do precisely as they are told and that presidential directives are self-executing. This is decidedly not the case.

It is the case that when presidents say “do this,” the agency often does *something*, but even that is not a certainty. Heavily politicized agencies are less likely to respond to directives than are their more career-oriented counterparts, with this relationship becoming decidedly more
pronounced in agencies that are ideologically distinct from the president. Further, the ideology of the agency head does seem to affect the likelihood that an agency will implement a rule in reaction to an executive order. It is not wholly accurate to classify executive orders as powerful in and of themselves, nor is it accurate to say that power and persuasion are identical terms. Presidential scholars would likely agree with these sentiments -- there are, after all, rarely absolutes in the world of political science. But this work has clarified some of the circumstances under which presidents can expect their orders to carry some weight, and circumstances under which presidents (or their agents) may wish to pay closer attention to the implementation of unilateral directives. Ultimately, executive orders can be powerful, but they are not so by definition. They must be carried out by willing bureaucrats, and as the results herein demonstrate, different factors can have an impact on the level of willingness of the various agencies of the government. Presidential power is still the power to persuade, in part if not in whole.

There are also policy lessons to learn. If the president wants an agency to do something, he or she needs to say, clearly and directly, what is expected of each agency. When executive orders are unclear in their requirements, this gives bureaucrats much more wiggle room when it comes to how they should respond (if they respond at all). But the most urgent need is a way to track how executive orders are implemented. This study has provided some indication of agency responsiveness, but I cannot offer with any statistical certainty that when the president says “do this,” his agents “do that,” because we cannot yet be sure what “that” looks like. When President Reagan (1981) signed Executive Order 12291 calling for new rules to include various impact statements on the costs of regulations in order to reduce perceived regulatory burdens, most agencies did so. But has this actually changed how agencies implement rules? They now often
include a section indicating their compliance with E.O. 12291, but is the fact that agents say they are complying evidence of compliance? Certainly agencies responded to the order, but it is more difficult to determine whether they complied with its intentions. Future research on executive orders and other unilateral powers must find additional ways to monitor compliance as a concept, as this will be an absolute requirement in evaluating the effectiveness of presidents who decide to “go it alone.”

These models provide a good overview of and insight into agency responsiveness, but Chapter 6 is designed to plumb the executive order process in greater detail. Certainly an order’s lifespan neither begins with issuance nor does it end with a response (or a non-response). Evaluating the process in a more in-depth way is extremely useful for obtaining a fuller picture of how executive orders work (and do not work) in practice. Responsiveness is useful as a first step in determining how agencies answer unilateral directives from the president, but it says little about whether the bureaucracy is actually complying with an order’s provisions. What does compliance look like? When is a president’s use of executive orders successful, and how does one define success? The next chapter explores these questions.
CHAPTER 6: EXECUTIVE ORDERS IN PRACTICE: AGENCY COMPLIANCE AND THE LIMITATIONS OF PRESIDENTIAL POWER

ABSTRACT

The preceding chapters provide a quantitative analysis of the executive order process from the point of issuance to the point of the agency’s immediate reaction (either response or non-response). However, it is clearly the case that the lifespan of any given executive order extends outside of these parameters. In this chapter I take a qualitative approach to study in greater depth how these directives originate (i.e., before official issuance) as well as how agencies can either embrace or evade compliance. I explore the factors that drive presidents in choosing when or whether to issue an order and those that drive federal agencies to react as they do. While the preceding chapter sheds some light on when the bureaucracy will “answer” a president’s directive, the study of compliance in practice is more complicated and demands a modified methodological approach. I initially evaluate two cases chosen for their similar circumstances: both orders were issued by Republican presidents and both concerned environmental protection, but each was implemented in drastically different ways. In brief, one order failed largely because of its unilateral nature and broad disagreement within the administrative apparatus about how it was to be applied, and one succeeded because it was decidedly not unilateral, involving bargaining and cooperation from multiple sources in pursuit of a common goal. I then introduce a third case to study circumstances when agencies complied reluctantly to a broadly unilateral directive. This chapter encourages scholars to reconsider what they consider “unilateral,” pointing to the instances in which presidents must engage in bargaining within the executive branch (as they might, for example, with Congress) or face the consequences of an uncooperative agent.
Introduction

The preceding chapters highlight the conditions under which presidents will use executive orders and the factors which influence the likelihood of an agency response. The process these directives follow from conception to implementation, however, is extraordinarily complex. The order’s initial issuance is often taken as a starting point, but some scholars (e.g. Rudalevige 2012) have given us many clues in this area pertaining to the generation of executive orders and the bargaining that occurs. A directive is typically issued only after an extended effort by interested parties (presidential staffers, affected agencies, other interested parties, and sometimes the president himself) to settle on what the order should include. Neither does the process end with an agency response to an executive order. Responsiveness does not by itself equate to compliance, and a greater focus on the limitations of enforcement and what these limitations mean for presidential power is needed.

What is the distinction between responsiveness and compliance? Here, I measured responsiveness as whether an agency implemented a final rule or regulation using a specific executive order as partial or total justification for the said regulation. But just because agencies include an order in a regulation does not necessarily mean that they are complying with its intent. In the last chapter I wrote briefly of Executive Order 12291, which was Ronald Reagan’s (1981) attempt to significantly curtail the amount of federal regulation (e.g. Mayer 2001). The order requires agencies to “prepare, and to the extent permitted by law consider, a Regulatory Impact Analysis,” which involves, among other things, “[a] description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms.” As far as responsiveness is concerned, agencies have certainly answered the order, often including a particular statement acknowledging that they have considered the potential effects of a proposed
regulation and judged the regulation necessary anyway. In other cases, agencies claim that the rule falls outside the bounds of what is required for analysis via E.O. 12291 and that no analysis is done. Certainly this qualifies as a response, but does it equate to compliance?

That is a more difficult question to answer. The guidelines set forth in E.O. 12291 as to what constitutes a regulation that requires a Regulatory Impact Analysis are vague; when agencies claim they evaluated a rule and determined it required no such analysis, we are not given much information as to how they reached this conclusion. Are they complying with the order? That is difficult to say conclusively. The agency has responded to the order in determining an analysis does not apply, but this does not mean agencies are complying in the way the president intends. Compliance, then, demands a more intense evaluation and a different method to determine what it looks like.

In this chapter I will provide an in-depth look at where orders come from, the circumstances under which they are issued, and the limits to compliance that presidents face after orders are implemented. This chapter takes a qualitative approach to highlight the advantages and limitations to “unilateral” executive powers through interviews with governmental officials in multiple administrations and an initial focus on two illustrative cases: Ronald Reagan’s Executive Order 12630, dealing with government takings of private property, and the Cooperative Conservation efforts of the George W. Bush Administration (Executive Order 13352).

This chapter principally concerns the bargaining process inherent in the use of executive orders. Far from being a case of “going it alone,” interviewees with whom I spoke were unanimous in their contention that orders are collaborative, not unilateral, and that agencies have ways of resisting that which they do not want to do. The chapter proceeds as follows: I first
provide a general overview of what those involved in the process said about the formulation, implementation, and enforcement of executive orders, detailing the problems with enforcing compliance. I then discuss the two aforementioned cases in greater depth from their initial conception up to implementation and ending with analysis of compliance rates. I then return to E.O. 12291 as a supplemental third case; this directive more closely mirrors E.O. 12630 in terms of its generation than it does E.O. 13352. However, E.O. 12291 did achieve a level of compliance not observed in the case of 12630, and exploring the distinction provides valuable insights into securing compliance from reluctant agencies.

Executive Orders: From Conception to Implementation

One thing made abundantly clear in my discussions with various governmental representatives and readings of numerous executive orders is that these directives are unilateral only in a very limited sense. It is the president’s signature, affixed to the order, that gives it legal authority, but as Rudalevige (2012) and others have contended, we must pay more attention to how executive orders are generated in the first place. The process can be complicated, involving input from multiple agencies and allowing for repeated drafts to deal with concerns raised by interested parties. And bargaining does not end upon issuance; even taking agency considerations into account, there is rarely any guarantee of compliance. This, in turn, requires monitoring of implementation and the ability to impose consequences for non-responsiveness, which can be difficult or, in some cases, virtually impossible.

I begin with the formulation process. A cursory look at executive orders is all one needs to know that the process is not unilateral and rarely involves the use of command authority in anything but a technical sense. Executive orders deal with varying kinds of matters, from
administrative “house-keeping” issues to the implementation of congressional statutes, from highly complicated and non-salient directives to those still discussed today because of their lasting impacts. One thing is abundantly clear: regardless of from where the order originates, issuance is often the final step in a long process that involves an extended “back-and-forth” among many actors in the executive branch. As Neustadt ([1960] 1990) notes, the executive branch is hardly a monolithic actor, and when it comes to presidential directives, the multi-actor nature of the bureaucracy is on full display.

Other scholars have classified executive orders on the basis of subject area (e.g. Krause and Cohen 2000; Howell 2003; Mayer 2001; Rudalevige 2012) and I do not wish to re-hash their schema. Instead, I wish to draw attention to a different kind of classification scheme pertaining to order origination, discussed also by Mayer (2001) and Rudalevige (2012): those directives that originate in a “top-down” fashion from within the White House (either at the direction of the president or through some advisory commission) and those that originate from the agency itself (a “bottom-up” approach). Though the role the agency plays in the issuance of executive orders is becoming clearer (e.g. Rudalevige 2012), it is still imperative to recognize that presidential orders are not always, as Truman’s famous quote suggests, a case of the president saying “‘Do this! Do that!’” (qtd. in Neustadt [1960] 1990, 10); often, presidential orders are carried out at the request of the agency itself, a case of the bureaucrats asking the president for the legal justification they need to carry out some action. In some cases, then, agencies do not need to be told what to do, but are rather content to ask the president to tell them what to do (e.g. Mayer 2001; Rudalevige 2012). In other instances, executive orders can come at the request of Congress (e.g. Rudalevige 2012).

The other circumstance involves executive orders that began in the White House or some
extension thereof. This can be at the behest of the president himself or based on the work of
types of agencies in the EOP. Other executive orders work their way up to the president through advisory
councils or interagency working groups, usually created via presidential directive (e.g. Mayer
2001). Presidency-initiated orders can be based on responses to a particular constituency the
president wishes to reward or, in some cases, because of intense personal interest in a particular
topic. One example is Executive Order 13221, titled “Energy Efficient Standby Power Devices,”
which as a directive came straight from President George W. Bush.36 The order reads, in part:

“Each agency, when it purchases commercially available, off-the-shelf products that use
external standby power devices, or that contain an internal standby power function, shall
purchase products that use no more than one watt in their standby power consuming
mode. If such products are not available, agencies shall purchase products with the lowest
standby power wattage while in their standby power consuming mode.” (Bush 2001)

In brief, the order was in response to Bush’s personal interest in energy consumption via devices
like chargers for cellular telephones. This may seem like a relatively minor issue, and perhaps it
is, but it demonstrates one use of executive orders as something like a unilateral power -- a
president decides on a course of action and uses the administrative powers of his office to
implement his goals.

Regardless of where any given executive order generates, once it has been issued there is
a question of how compliance among affected agencies will be monitored and enforced. In some
instances, the order may not be enforced at all; it may simply best be classified as a statement of
policy, meant more for consumption than for action,37 though divining the intent of an executive
order is not a straightforward process. In other cases, presidents clearly intend their orders to

36 Personal interview with Gale Norton (Secretary of the Interior, 2001-2006); September 10, 2013.
37 Telephone interview with Roger Marzulla (Assistant Attorney General for the Land and Natural Resources
Division, Department of Justice, 1987-1989); January 29, 2014.
shape policy within (and sometimes outside of) the executive branch of the federal government. Though executive orders do carry the force of law (e.g. Howell 2003, Mayer 2001), the extent to which presidents can actually enforce them is more debatable. There are but a limited range of options to attempt to encourage compliance.

One former administration official said there is a clear understanding that executive orders are “just a piece of paper...you want some accountability.” That accountability can come in various forms; executive orders often contain reporting requirements, for example. Statements such as this, from President Bill Clinton (1993a), are common: “Not later than 6 months after the effective date of this Executive order, each Federal agency shall submit to the Office of Management and Budget a report regarding the implementation of this order.” Still, the question remains: if the president or his staff should find that agencies are not following through, what recourse is available?

Performance criteria for individuals can be enforced through financial incentives, and if subordinates prove ineffective, they can sometimes (but not always) be fired or otherwise relocated. But any budgetary consequences will necessarily require the cooperation of Congress, and the importance of messaging simply highlights how important persuasive power is. It is rarely as simple as telling agencies to do something; the process of compliance takes an extended period of time. In this way we observe some of what Neustadt ([1960] 1990, 33) meant when he said that it was a fallacy to speak of “a single structure, ‘the’ executive branch,” and his subsequent admonitions for persuasive bargaining seem much more palatable under this view.

39 Both Lynn Scarlett and Gale Norton emphasized that much of the implementation is carried about by individuals in the career Senior Executive Service (SES), who do not possess the same employment protections as other career employees. While they can be difficult to fire, career SES officials can be relocated a form of punishment for ineffective management. One example, Scarlett said, involved a particularly obstinate official from the SES who was moved to a much less desirable location.
Two Illustrative Cases

To explore the executive order process in greater depth, I chose two cases that had very different formulation processes and very different responses from the agencies involved. Mayer (2001, 61) describes the dual nature through which directives tend to arise: “executive orders typically either originate from the advisory structures within the Executive Office of the President or percolate up from executive agencies desirous of presidential action.” This is an absolutely critical distinction, one to which I refer as a “top-down” versus a “bottom-up” method of executive order issuance. In the former case, the directives are driven largely by the president or by the president’s close advisers; in the latter, agencies take the lead and seek to have some policy codified at the president’s direction.

The distinctions between these two order types could potentially have far-reaching consequences. Rudalevige (2012) has shed some light on the bargaining process inherent in any seemingly “unilateral” directive, and whether an order comes from the president or the agency may very well confound the way in which this bargaining process works. It is possible that because of a continued centralization of policy-making within the White House apparatus (e.g. Lewis 2003) that agencies are more reluctant to comply with orders that come from the top (especially if they feel excluded from the formulation of the directive in question). As such, I selected two cases, one from each perspective (“top-down” or “bottom-up”) to highlight some of the critical differences between the two.

These examples are meant to provide a glimpse into how orders are generated, what factors seem to encourage compliance, and the circumstances under which agencies stall or otherwise ignore directives. The cases have a number of similarities: both were at the direction of conservative Republican presidents, both were aimed towards environmental regulations, and
both involved significant bargaining before and after-the-fact. Critical, however, are the differences in these cases: E.O. 12630 (a “top-down” directive) was heavily disliked and fought every step of the way by affected agencies such that it was, for practical purposes, simply ignored. On the other hand, Cooperative Conservation (a “bottom-up” directive) was a mostly successful initiative (i.e., agencies agreed with and implemented the order’s goals) that was largely embraced by the affected agencies. In the case of E.O. 12630, there was much wailing and gnashing of teeth among those in the environmental movement as to its feared devastating consequences, yet the ability of agencies to seemingly disregard it demonstrates the profound lack of enforcement power the president possesses. Cooperative Conservation, on the other hand, demonstrates the bargaining and give-and-take involved in the executive order process: agencies went along dutifully because they agreed with the order’s goals, not simply because they were directed to take some action.

*What Defines Success?*

It is worthwhile to consider for a moment what one means by “success” and how varying definitions can lead us to evaluate executive orders in very different ways. In this chapter, when I discuss success, I am referring to agencies implementing executive orders in the manner in which the order describes. It is true, and important to note, that “success” is, however, a fluid term. In the next section I will be discussing E.O. 12630, which failed to meet the bar for success when considering what the order demanded. But Roger Marzulla, who served in the Department of Justice during the Reagan Administration, noted that his expectations about compliance were fairly low. In other words, the administration may have recognized that compliance with the order would not be forthcoming but decided to move forward anyway as a form of position-taking. E.O. 12630 could rightly be viewed as a “success” from this perspective; if all the

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40 Telephone interview with Roger Marzulla; January 29, 2014.
administration hoped to accomplish was to get a directive on the books stating their preferences, they did so.

But this tells us little about compliance with executive orders. It is true that presidential intent can conceivably alter what we evaluate as “successful,” but determining intent has proven a difficult task. Scholars are beginning to make headway in the executive order process prior to issuance (see, e.g., Rudalevige [2012]); this research has the potential to shed more light on what a president’s motives are, but research is still a long way off from establishing this definitively. Therefore, “success” as described herein refers to the extent to which agencies complied with the order’s provisions, whether the president expected them to or not.

**Executive Order 12630: Regulation and Property Takings**

In 1982, James and Marilyn Nollan, a married couple, applied for government permission to demolish a small house on a parcel of land they had leased, but decided to buy, near the beach in Ventura Country, California. The reason for such a demolition, the Nollans claimed, was so that they could build a permanent home in which they could reside, and such a home would need to be considerably larger than the small vacation property they possessed at the time. The state agency charged with making such decisions about land use granted the request, but it was predicated on the condition that the Nollans provide for a degree of access on their property such that general parties could access other public areas of the beach. The Nollans filed suit, claiming that such a general requirement was a violation of the Fifth Amendment’s provision on government takings [emphasis mine]: “No person shall...be deprived of life, liberty, or property,

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without due process of law; nor shall private property be taken for public use, *without just compensation*” (U.S. Constitution, Amendment V). The requirement that they allow public access to part of their land, in short, was argued to be an infringement on their property rights.

The extent to which government regulations were subject to the Fifth’s “takings clause” was not a new issue in the 1980s. In the 1922 Supreme Court case *Pennsylvania Coal Co. v. Mahon* (260 U.S. 393), the Court acknowledged that “[o]ne consideration in deciding whether limitations on private property...are exceeded, is the degree in which the values incident to the property are diminished by the regulation in question.” At issue was a property owner concerned that the company’s mining activities would damage the structural integrity of his home, in spite of the company having legal rights to mining in the area. A subsequent state statute purported to undo these legal rights, but the Supreme Court ultimately found in favor of the Pennsylvania Coal Company, writing: “The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.” The decision dramatically changed the applicability of the Fifth Amendment to issues of government regulation and was the first in a series of cases that would raise these particular issues (e.g. Marzulla 1988).

The legal fact that government regulations could conceivably be viewed as violations of the Fifth Amendment eventually spurred robust scholarly debate (e.g. Engel 1989; Epstein 1985; Fischel and Shapiro 1988; Michelman 1967; Rose 1984), a number of additional cases, and a movement designed to take advantage of this doctrine and loosen the grip of government regulation, colloquially called by many the “takings project” (e.g. Kendall and Lord 1998; see also Epstein 1985, 2008; Wise 1992). The general idea, according to Richard Epstein (1985, 263)

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44 The opinion was written by Justice Oliver Wendell Holmes, Jr.
is that “land use regulation and more comprehensive forms of economic regulation...are all
(large-number) takings of private property.” Epstein, a noted conservative legal scholar, is
considered by some (e.g. Kendall and Lord 1998) to be the ideological progenitor of this
movement within government, and the project did ultimately gain some favor within the Reagan
Administration (e.g. Epstein 2008; Kendall and Lord 1998). However, numerous legal scholars,
including some on the ideological right, adamantly rejected Epstein’s general thesis (e.g. Fried

But the issue of regulations as a conceivable violation of the takings clause was fresh on
the minds of administration officials when the Supreme Court handed down its ruling in Nollan
v. California Coastal Commission as well as other cases. The Court found in favor of the
Nollans, writing in the majority opinion that, regardless of the possible utility of public access on
the private beach, “if [California] wants an easement across the Nollans’ property, it must pay
for it.” Several months later, in a message to Congress, President Ronald Reagan referenced the
case as he staked out his position on the issue of regulation and property takings: “the
Administration has urged the courts to restore the constitutional right of a citizen to receive just
compensation when government at any level takes private property through regulation or other
means. Last spring, the Supreme Court adopted this view in Nollan v. California Coastal
Commission.” The President would follow this up shortly thereafter on March 16th, 1988, with
the issuance of Executive Order 12630, titled “Governmental Actions and Interference With
Constitutionally Protected Property Rights.”

45 The other case concerning regulations as property takings is First English Evangelical Lutheran Church of
Glendale v. County of Los Angeles, California (482 U.S. 304).
46 483 U.S. 825; the opinion was written by Justice Antonin Scalia.
The text of the order, couched in legalese, may seem at first blush to be relatively inconsequential. The purpose, Reagan (1988) explained, was “to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public resulting from lawful government action.” The protections to which the President referred concerned the Fifth Amendment’s “takings clause,” which holds that “private property [shall not] be taken for public use, without just compensation.” The directives included, among other things, several reporting requirements meant to compel agencies to disclose to the Office of Management and Budget their compliance with the order through proof of “awards of just compensation.”

The response to this order was unrestrained and, among environmentalists, highly negative. While those in support of the order viewed it as making significant positive strides in the area of property rights (e.g. Marzulla 1988), opponents were far less generous. One legal scholar described E.O. 12630 as “significantly overstating the threat that takings law posed,” as “fictionalizing the threat that the Fifth Amendment poses to the public purse,” and concludes that “the Takings Order amounts to nothing more than a President’s attempt to control executive agency decisionmaking by claiming that certain regulations are simply too costly to implement” (Folsom 1993, 642; see also Engel, 1989; Kendall and Lord, 1998). The League of Conservation Voters said the order “advocates a biased anti-regulatory view toward government regulatory programs” and represented “an erroneous interpretation of the Just Compensation Clause,” and the Sierra Club called the order (and its mimics at the state level) an “epidemic” which had the effect of “weakening and sometimes killing green legislation” (Bergman 1994).

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Reagan had already earned a reputation as an opponent of regulation well before he issued E.O. 12630; indeed, this opposition was a crucial component of his platform during all of his presidential runs (e.g. Folsom 1993; Golden 2000; Reagan 1990; Reeves 2005). After he took office, it seemed clear that Reagan intended to fulfill this goal right away. He created a task force, chaired by Vice President George H.W. Bush, aimed at finding avenues for reductions in over-regulation,\(^{50}\) and one of Reagan’s first unilateral actions as president was an executive order requiring that the agency satisfy certain criteria before putting new rules in place, ostensibly to “reduce the burdens of existing and future regulations.”\(^{51}\) For a while, this strategy seemed to work; in 1980, the year before Reagan took office, the Federal Register (which includes rules and regulations promulgated by federal agencies) stretched to just over 87,000 pages. In Reagan’s first year, the number of pages in the register dropped by over 20,000 and eventually reached a nadir in 1986 of under 48,000 pages before resuming a gradual incline.\(^{52}\)

Simultaneously, Reagan had built quite a negative perception among those in the environmental movement. His nomination of Anne Gorsuch (later Anne Burford) to head the Environmental Protection Agency in 1981, for example, immediately raised objections from some in the green movement. One activist in Colorado said of Gorsuch, immediately preceding her formal nomination, “She’s hard-working and conscientious, but she’s not particularly sympathetic to environmental concerns.”\(^{53}\) Meanwhile, an editorial in The Washington Post, days after her nomination, described “the naming of Mrs. Gorsuch...[as] a crippling blow”\(^{54}\) to the environmental movement. Her tenure was contentious, and Gorsuch ultimately left her position.

\(^{50}\) “FACT SHEET: President Reagan’s Initiatives to Reduce Regulatory Burdens.” Office of the Press Secretary, February 18, 1981.
\(^{52}\) The Federal Register again passed the 80,000 page threshold in 2013.
in the early spring of 1983 after facing heavy resistance from Congress and environmental activists in addition to numerous controversial scandals within the agency (e.g. Cannon 2000; Golden 2000; Huber 2007).

Given the heavy skepticism with which many viewed Reagan’s approach to both regulations and environmental issues, opposition to E.O. 12630 was expected. Still, the order was a clear directive handed down by the president applying to a wide subset of government agencies; did it have the effect, as Folsom (1993) warned, of giving the president too much power in the area of environmental regulations? The order itself spawned a number of debates along normative lines (e.g. Folsom 1993; Jackson and Albaugh 1988; Marzulla 1988), but the real point of interest is not whether the Reagan Administration was justified in implementing the order; it is, instead, whether agencies followed through with carrying it out. More than a decade later, the Government Accountability Office undertook a study of the effects of E.O. 12630 on a limited subset of agencies and found that compliance was questionable at best. The report states, for example: “the four agencies [in the study; they are the Departments of Agriculture and Interior, the EPA, and the Army Corps of Engineers] told us that they fully consider the potential takings implications of their planned regulatory actions, but provided us with limited documentary evidence to support this claim” (14). The report goes on to state that establishing whether agencies were complying was elusive:

“We also had difficulty independently verifying the four agencies’ preparation of takings implication assessments from the information contained in the Federal Register notices related to their proposed and final rulemakings. Specifically, 375 notices mentioned the EO in 1989, 1997, and 2002, but relatively few provided an indication as to whether a takings implication assessment was done. Most of these rules included only a simple

55 GAO-03-1015 (2003).
statement that the EO was considered and, in general, that there were no significant takings implications.” (18)

The implementation of the order seems, at best, inconsistent, and some involved in the process claimed there was willful avoidance in the bureaucracy of following E.O. 12630.\textsuperscript{56} What explains why and how agencies, having received a presidential order with relatively clear reporting guidelines, evaded compliance?

Understanding the lack of responsiveness to the order requires a look at the factors that led up to its eventual issuance. As it happens, the Supreme Court’s rulings in the cases that supported the notion of regulations constituting a taking under Fifth Amendment law were not handed down independent of administration involvement. A number of officials in the Department of Justice, as well as the White House, had sympathy for Professor Epstein’s views (e.g. Fried 1991; Kendall and Lord 1998). Many of them, including Roger Marzulla, who served as Assistant Attorney General for Land and Natural Resources in the later years of the Reagan Administration, leaned on the Solicitor General to file \textit{amicus curiae} briefs in favor of the takings as property rights position in a number of cases, including \textit{Nollan}.\textsuperscript{57}

The Solicitor General, Charles Fried, did not react with much enthusiasm. Fried (1991, 183) did not share Epstein’s views to the extent that other officials in the Justice Department and the White House did, writing:

“...Attorney General [Edwin] Meese and his young advisers -- many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein -- had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth

\textsuperscript{56} Personal interview with Gale Norton; September 10, 2013; Telephone interview with Roger Marzulla; January 29, 2014.

\textsuperscript{57} Telephone interview with Roger Marzulla; January 29, 2014.
Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right....If the government labored under so severe an obligation, there would be, to say the least, much less regulation.”

Fried felt the extent to which the Attorney General and his assistants, including Marzulla, were going was excessive and that his concerns were not properly taken into account, and he actively opposed supporting the takings position for a time (e.g. Fried 1991). He eventually partly acceded in an attempt at a compromise, but the Supreme Court’s ruling, in Fried’s (1991, 186) words, “dismissed my halfway proposals in a footnote and adopted the Attorney General’s full-blooded position.”

These debates with Fried were in part the genesis for E.O. 12630, though not the genesis of the takings project more generally. The Supreme Court rulings gave those arguing in favor of regulations constituting government takings legal legitimacy, and the directive followed a few months thereafter. The formulation process took place mostly in White House circles and in the Justice Department among sympathetic officials. Before the order was issued, agencies were given a chance to offer comment, as is standard practice (e.g. Mayer 2001); but, Marzulla noted, none of the agencies effected were particularly enthusiastic about the directive, with the EPA being the most vocally opposed.

Compliance, the GAO report would show more than a decade later, was spotty at best. This was unsurprising to those involved in the process. Marzulla, for his part, noted that the

58 Telephone interview with Roger Marzulla; January 29, 2014.
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60 Telephone interview with Roger Marzulla; January 29, 2014.
61 Telephone interview with Roger Marzulla; January 29, 2014
order came near the end of Reagan’s presidency, and in spite of the fact that he was succeeded by his Vice President, it was unclear that George H.W. Bush would make the takings issue as much of a priority as his predecessor had. But that did not seem to be unduly bothersome; Marzulla points out that many presidential directives, E.O. 12630 perhaps included, “are statements of policy, statements of philosophy.” In other words, it may be sufficient for those involved in the policy process to make their views known even with the knowledge that compliance will be low, or, in some cases, perhaps non-existent.

The case of E.O. 12630 serves to highlight three very important components of the executive order process. First, bargaining seems to be key; government officials, presidents included, acknowledge the difficulties of securing enforcement of their directives in a manner that they, the principals, would find satisfactory (e.g. Rudalevige 2012). And bargaining over 12630 seems to have been modest at best; the Solicitor General, Charles Fried, voiced numerous concerns over the takings project strategy but still felt compelled to go along, at least part of the way (e.g. Fried 1991). The fact that the order’s genesis occurred mostly in circles sympathetic to Reagan’s anti-regulatory agenda, including Justice Department officials and the Office of Management and Budget, suggests that other agencies either lacked input or shared the concerns that were driving the issuance of the directive. Agencies, as the GAO report and government officials who worked in Washington at the time suggest, did not respond well and did not take the order particularly seriously.

Rudalevige (2012) does an excellent job detailing some of the back-and-forth between the president and his advisers and agencies of the federal government. There is some strong suggestion therein that executive orders are unilateral only in a technical sense; that is, the

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63 Personal interview with Gale Norton; September 10, 2013; Telephone interview with Roger Marzulla; January 29, 2014.
president can issue them solely at his own discretion. But because presidential scholars are receiving insight into the bargaining process at work even in unilateral powers, research moving forward may want to consider how bargaining-based models could be applied to president-agency relations. This research is, however, still in its infancy, and more reliable methods for measuring bargaining and determining what it looks like in practice are needed before this line of inquiry can advance.

Second, it is difficult to determine a president’s intent with an executive order. On the one hand, Ronald Reagan had pursued a vigorous agenda of regulatory reform, and reductions in the size of the Federal Register are evidence of at least partial success in this endeavor. At the same time, if Marzulla is correct, the administration may not have overly concerned itself with the actual successful implementation of Executive Order 12630. It is clear that some executive orders are used for purposes of going public or otherwise declaring an administration position, and in the case of the takings project, those working on the directive seemed resigned to the fact that the bureaucracy would not take the order seriously. However, how are we to identify orders that presidents expected would not be carried out? How can directives be evaluated on a symbolic basis, and when are non-compliance and non-responsiveness not of concern to the president? This is a point worth considering as research into presidential power continues to move forward. The president’s willingness to bargain discussed previously may provide for a useful avenue moving forward; after all, someone who imposes an order with no input from the people it will affect is either overly convinced of his or her power or else not particularly concerned with what kind of response the directive receives.

It is important to note at this point, as I have earlier in the dissertation, that an executive order’s life does not begin with its issuance. Strides forward in executive order research will
need to delve more deeply into what presidents actually hope to accomplish via directive. If their intent is symbolic, then non-responsiveness or non-compliance are probably not particularly troublesome to the White House. Non-compliance may indicate a failure to shape policy on the part of the president only when the president is actually attempting to shape policy, and an executive order need not have such a goal as its principal motivation. Determining presidential intent is difficult, but this will be an absolutely crucial step forward in determining not only the utility of executive orders, but of other presidential powers, both unilateral and non-unilateral.

The third important point is that responsiveness does not necessarily translate to compliance. A cursory look through the Federal Register as well as the GAO report on E.O. 12630 shows that agencies were responding, but their methods of actually implementing the directive were, in many cases, perfunctory. The process of compliance is far more nuanced, and future research will need to take this into account. Chapter 5 studied responsiveness through the lens of whether or not an agency used the executive order as partial or total justification in the implementation of a regulation; it is definitely the case, as discussed earlier in this chapter, that agencies will commonly reference executive orders in the making of rules. But this by itself does not mean that agencies are following the rule’s true intent. To be sure, presidents may not actually expect them to (as Marzulla intimated with respect to E.O. 12630), but it would be misleading to say that an agency through simple response has followed through on an order’s provisions. I earlier gave the example of E.O. 12291 dealing with Regulatory Impact Analyses issued before adoption of a final rule or regulation; agencies can certainly say they conducted these analyses, or that these analyses were unnecessary, but this does not provide us with the necessary information to evaluate whether their judgment was based on sound consideration of the order or whether they simply put in a statement to appease the president or some other

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64 Telephone interview with Roger Marzulla; January 29, 2014.
organization like the Office of Management and Budget (OMB) or the Office of Information and Regulatory Affairs (OIRA).

Such was the case with E.O. 12630, according to Marzulla. The extent to which agencies actually followed the order’s intent amounted to little more than boilerplate responses, in his estimation.65 This gets to a larger point in presidential-bureaucratic scholarship generally about determining what compliance looks like in actuality. Is it a quantifiable concept? The Government Accountability Office takes plenty of cases where they are required to evaluate agency compliance with presidential directives, but because these cases are generally initiated by request, they select on the dependent variable and are thus unreliable. After all, if a member of Congress asks the GAO for a review of agency compliance, as one did in the case of E.O. 12630, it is not a stretch to assume they are asking precisely because they expect agencies are not complying. Still, there are some promising avenues moving forward as it pertains to presidential intent and executive order compliance. For example, Rudalevige’s (2012) archival work represents a possible avenue moving forward to better account for executive orders that are considered symbolic or otherwise not enforceable. His detailing of the process before an order is issued could shed some light on when compliance is expected, and thus allow us to better-develop models to test when agencies are following through with an order’s intent.

**Executive Order 13352: Cooperative Conservation**

Though George W. Bush had made statements on environmental issues as a candidate and, later, as president-elect and president (e.g. Cohen 2004; Michaud, Carlisle, and Smith 2008; Rabe 2007), the connection between Bush and environmentalism would seem to be tenuous at best. President Bush was criticized for his approach to environmental issues and climate change

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65 Telephone interview with Roger Marzulla; January 29, 2014.
both during and after his presidency (e.g. Cohen 2004; Harris 2009; Jacques, Dunlap, and Freeman 2008; Lambright 2008; Schlosberg and Dryzek 2002), for dismissing the Kyoto Protocol, questioning scientific data in support of climate change and other environmental maladies, and generally, according to Harris (2009, 967) “actively [seeking] to reverse the [environmental] gains of previous decades.” One editorial in the San Francisco Chronicle in mid-2002, about a year and a half after Bush became president, claimed that the administration “has arguably racked up the worst environmental record since our most important environmental regulations became law.”

Given the decided lack of enthusiasm among many environmentalists for the Bush presidency, one might be inclined to expect very little movement during the administration towards sound environmental policy. And yet this was not the case with cooperative conservation, formalized largely in Executive Order 13352, titled “Facilitation of Cooperative Conservation,” which was defined in the order as “actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals” (Bush 2004).

The seeds for the program had been planted years before the order itself was issued, however. In her first speech as Secretary of the Interior, Gale Norton emphasized to her department what she called the “Four C’s: Communication, Consultation, Cooperation, all in the service of Conservation.” The slogan, Norton said, subsequently became a bedrock of Interior’s attitude towards pursuing its objectives; over time, the “Four C’s” were pared down to the phrase “Cooperative Conservation,” which grew into a large inter-agency executive branch program that

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67 Personal interview with Gale Norton; September 10, 2013.
met with considerable success. But what accounts for this success? On the surface, there are some parallels one can draw between Cooperative Conservation and the preceding case, Ronald Reagan’s E.O. 12630. Both were pursued by Republican Administrations generally viewed unfavorably within the environmental community. Both involved presidents exercising their unilateral powers. Yet E.O. 12630 went virtually unheeded by the executive branch while Cooperative Conservation was judged by most involved as a relative victory policy-wise.

The reasons for this success are varied. Perhaps the most important factor was that the agencies involved (particularly the Department of the Interior, the Department of Agriculture, the Department of Commerce, the Department of Defense, and the Environmental Protection Agency) seemed amenable to a new direction. Much conservation policy was directed at the federal level, and satellite offices in many local communities had poor relations with the neighborhoods of which they were ostensibly a part. However, poor relations were not universal; some federal land managers had met with success dealing with the communities in which they were located, and Cooperative Conservation, Secretary Norton said, was an effort “to replicate those successes.”

There was general enthusiasm for more local community involvement that cut across ideological lines; conservatives and liberals were united in agreeing that the process, as it worked, was inefficient.

Here we see an important step in the executive order process: the agencies who were facing direction were willing to bargain. There was not any initial opposition to the plan, nor was it sprung on agencies much the way E.O. 12630 was. Cooperative Conservation offered a solution to a problem that agency workers, both conservative and liberal, acknowledged needed to be dealt with. This was not a case of a president saying “Do this! Do that!” so much as it was a case of the president and the executive branch working together to reach a mutually satisfactory

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68 Personal interview with Gale Norton; September 10, 2013.
goal.

Yet it could hardly be said that the Bush Administration was content with simply getting agencies on board with the plan; after Cooperative Conservation was put in place, following significant bargaining, there needed to be some sort of monitoring of enforcement and compliance. The Department of the Interior, for its part, took both a “carrot” and “stick” approach to encouraging responsiveness and compliance with the initiative. Employees engaged in facilitating the goals of Cooperative Conservation were eligible for official recognition. Satellite offices of Interior could receive intra-departmental grants to carry out proposed projects designed to further the goal, and private sector groups were eligible for grants as well. The “stick” side involved placing specific measures designed to assess individual employees’ efforts in Cooperative Conservation into standard performance evaluations. Those with significant successes could expect to receive more money, while those who failed to measure up risked taking a financial hit.69 Further, the executive order subjected agencies to various reporting requirements, specifically requiring that they notify the Council on Environmental Quality (CEQ) of their progress in fostering the program’s goals.70 Affected agencies were also expected to contribute money for the White House Conference on Cooperative Conservation, which was established in E.O. 13352 to be conducted in 2005.

The conference went on as planned a year later in St. Louis, Missouri. Enthusiasm among participants was high, though the visibility of their efforts was considerably reduced because the conference took place in late August, coinciding with a number of devastating hurricanes that struck the United States that year (including Hurricane Katrina).71 The conference served to highlight a number of cases where the program’s goals were successfully implemented, drawing

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69 Personal interview with Gale Norton; September 10, 2013.
70 Telephone interview with Lynn Scarlett; September 5, 2013.
71 Personal interview with Gale Norton; September 10, 2013.
attention to projects throughout the United States over the duration of the event (White House Conference on Cooperative Conservation, 2005). One such case was an attempt to conserve a species of tortoise critical to the coastal ecosystem in the gulf area; in this particular instance, low-income residents in southern Alabama were having difficulty finding affordable living conditions, a problem partially handled by increased development to land “essential to the threatened gopher tortoise” (“Faces and Places” 2005, 43). This led to cessation of building in numerous areas of Mobile County in an attempt to avoid possible regulatory violations. The solution involved a special district government, the Mobile Area Water and Sewage System, establishing a special reserve (“a ‘conservation bank’” [“Faces and Places” 2005, 43]) to house the tortoises. MAWSS obtained assistance from federal agencies, local residents and researchers, and interest groups in creating and managing the habitat. The case study is careful to point out the successes: “Since the bank began, the number of resident tortoises has grown from 12 to more than 60...The bank has been equally successful for developers and home buyers. The moratorium on building permits was lifted, allowing construction of affordable housing to continue” (“Faces and Places” 2005, 43). Hundreds of cases were documented similarly, addressing the difficulties areas faced and how partnerships were formed to tackle environmental problems and bring about a satisfactory resolution.

The celebration of voluntary involvement in cooperative conservation helped to underscore its success; as the conference collection of case studies notes, “[the program’s] strength rests in the many voluntary solutions its practitioners bring to the resolution of conservation challenges -- its track record of people working collaboratively at local, regional, and national scales to solve problems that might otherwise only have a regulatory answer”

72 The full title of the publication is “Faces and Places of Cooperative Conservation: Profiles in Citizen Stewardship.” See bibliography for complete citation.
(“Faces and Places” 2005, 6). This spirit of bargaining and cooperation mirror, in many ways, the process that led to the order’s issuance in 2004. There is less a focus on coercion or outright direction from the executive and more bargaining taking place.

In 2008, the GAO undertook a study of cooperative conservation and judged it relatively successful, though with some limitations. Experts consulted in the report, either personally interviewed by the GAO (2008, 5) or their scholarly work reviewed, held the general belief that cooperative conservation’s goals were “an effective approach for managing natural resources.” The report also looked in depth at seven particular cases, concluding that in each, those involved were able to effectively manage an array of environmental problems to reach a satisfactory conclusion. Though the GAO had a number of recommendations to improve the program, the report concluded that cooperative conservation had numerable successes and remains “a promising tool with which to approach the ongoing and potential conflicts that arise in managing the nation’s land and resources” (57).

The example of cooperative conservation illustrates two key points about the nature of compliance with executive orders. The first is that a willingness to bargain among affected agencies is far more likely to yield compliance than situations where agencies are reticent to meet White House goals. This seems an obvious point, but it is worth emphasizing given that, until recently, so much of the research on unilateral presidential power has assumed that executive orders (and other directives) are effective simply by definition (e.g. Cooper 2002; Howell 2003; Mayer 2001, 2009). More recent research has begun giving glimpses into the complexities of the executive order process (e.g. Rudalevige 2012), and scholars of presidential power are beginning to tackle some of the toughest questions about executive discretion. What is clear is that the executive order process is often one of give-and-take, and future models of

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73 GAO-08-262 (2008).
presidential control over the bureaucratic apparatus must take this bargaining into account.

The second point, related to the first, is how strikingly non-unilateral so much “unilateral” action often is. President Bush issued Executive Order 13352 in 2004, but the seeds for Cooperative Conservation had been planted years ago, perhaps most notably when Secretary of the Interior Gale Norton delivered her first address to her department in 2001. It would be years before the directive actually came about, and it is clear from talking to those involved in the process that Cooperative Conservation was a result of efforts of government officials at all levels of government as well as people within the private sector. The executive order process has largely been examined with the issuance of the order as the starting point, but clearly it is far more complex. The truly unfortunate problem is that we do not observe the executive orders that are not issued, nor can we. Perhaps, had agencies not been so willing to tackle environmental problems they all agreed needed to be addressed, E.O. 13352 would never have been a reality.

These points add a new wrinkle to concepts of presidential governance. The administrative presidency may indeed involve just as much bargaining as the legislative presidency, though the extent to which public pressure plays a role is probably distinct in the two cases. Career bureaucrats, it has been noted (e.g. Carpenter 2001; Huber 2007; Golden 2000) are committed to doing their jobs and doing them well, but this does not mean that they are content to simply follow along when the president says “do this.” In fact, they may view bargaining as a very necessary component to doing their jobs well; this can explain, in part, the reticence within the bureaucracy to follow the dictates of E.O. 12630 while responding much more favorably to E.O. 13352. A crucial distinction between these two cases is the level of bargaining involved in each, and the nature of that bargaining was indeed quite different.

These cases help to provide some insight into the difference between “top-down” and
“bottom-up” executive orders, but there are some important caveats to note. First, this information is clearly far from definitive; the cases herein both involve environmental issues handled by a specific subset of agencies. Would these lessons hold in different policy areas? That has yet to be established. Second, both cases occurred during the administrations of conservative Republican presidents. Would agencies react differently when negotiating with Democratic presidents? Some preliminary answers may be gleaned from Rudalevige’s (2012) account of bargaining; his archival work suggests that presidents from both parties face difficulties in dealing with a variety of issues and agencies. Ultimately, however, more comprehensive work across different policy areas is needed to draw any definitive conclusions.

Reluctant Compliance: How Executive Order 12291 Changed Regulatory Behavior in the Environmental Protection Agency

One question emerging from the previous cases is whether so-called “top-down” orders can ever generate effective levels of compliance. Certainly E.O. 12630 had some impact on regulation, but the GAO report makes clear that compliance was largely unachieved. This is, however, not the case with E.O. 12291, issued in the early weeks of the Reagan Administration. This order, much like 12630, was intended to hamper the extent of federal regulation in an attempt to reduce bureaucratic activity. It was part of Reagan’s broader campaign themes on reducing the size and scope of government, was developed largely in circles intimately close to the President, and was disseminated in spite of significant agency reservations (e.g. Blumstein 2001). Yet given the considerable contraction of regulation that followed, it is clear that the order had wide-ranging effects even in spite of its controversy within the executive branch (and, for that matter, outside of the executive branch).

Ronald Reagan’s opposition to excessive federal regulation was well-known by the time
he took office. In a speech at the Conservative Political Action Conference (CPAC) just around two months after he was sworn in, the President summed up his opposition to federal government thusly: “We’re not cutting the budget simply for the sake of sounder financial management. This is only a first step toward reordering the relationship between citizen and government. We can make government again responsive to people...by cutting its size and scope and thereby insuring that its legitimate functions are performed efficiently and justly” (qtd. in Reeves 2005, 31). The order which would generate so much controversy even in the face of an impressive level of compliance was issued a little more than a month before Reagan uttered these words. E.O. 12291 was another in a long line of his attempts to cut down on the size and scope of the federal government, and the directive specifically held that “each agency shall, in connection with every major rule, prepare...a Regulatory Impact Analysis,” which required, among other things, “description of the potential benefits of the rule” combined with a “description of the potential costs” (Reagan 1981). Blumstein (2001, 859-860) described the considerable shock with which bureaucrats reacted to its issuance:

“C. Boyden Gray, counsel to the vice president....spoke mischievously of a meeting of sundry agency officials convened about the new executive order. Gray described a roomful of agency officials and lawyers furiously reading through the order to see what was being proposed. Heads were shaking vigorously, sidebar conversations were expressing disagreement and skepticism....Gray described how the agitated body language and cacophony turned to stunned silence as the officials in attendance, one by one, reached the end of a document they had assumed to be a draft, only to find the signature of Ronald Reagan on the last page...it was a done deal.”

E.O. 12291, then, is the definition of a “top-down” order, as Blumstein makes clear; the agencies
were, in a very real sense, consulted hardly at all. The directive was part of Reagan’s broader agenda to pare down on excessive regulation, and the reactions of those inside and outside of the federal government came pouring forth. The power to oversee these new standards was further vested in a centralized, and thus much more malleable to the president, agency: the Office of Management and Budget.

Numerous legal scholars expressed profound concerns over the potential impact of the executive order. Chief among these concerns was that the order violated the Constitution by virtue of blurring the separation of powers between the executive and legislative branches (e.g. Carlson, Braden, and Martin 1985; Cross 1987; Rosenberg 1981; Sunstein 1981). The tension results from the constitutional vestment of “The executive Power...in a President of the United States of America” (U.S. Constitution, Article II, Section 1). I have already discussed at length in this dissertation how nebulous a term “power” is, and this confusion is certainly not clarified explicitly in the Constitution. If executive power means that presidents have control over the executive branch, a critical tenet in unitary executive theory (e.g. Calabresi and Yoo 2008), then it immediately calls to mind a tension with Congress’s ability to enact policies that are subsequently carried out by the federal bureaucracy (e.g. Bruff 1989; Rosenberg 1981). The order could represent, then, even greater centralization within the confines of the White House, further strengthening the president’s position relative to Congress and the rest of the executive branch. (e.g. Cooper and West 1988).

There were also practical concerns about the order’s feasibility pertaining to actual implementation. The guidelines in E.O. 12291, as far as what agencies are required to undertake in their Regulatory Impact Analyses (RIAs), are decidedly non-specific (e.g. Carlson et al. 1985; Sunstein 1981), and this in turn led to doubts as to the directive’s true nature in terms of what it
sought to accomplish. As Sunstein (1981, 1276) suggests, E.O. 12291 may cloak its intent in language:

“The rhetoric of costs and benefits [in E.O. 12291], however, might be understood as something very different: a convenient and workable means of assuring that regulatory decisions are controlled by the President or by officials who are more likely to share his views than the career bureaucrats in the various federal agencies. The very indeterminancy of the order tends to support this view. The order defines neither benefits or costs. If the order intends to include all costs and benefits in some felicific calculus, the analysis it mandates will be absurdly open-ended.”

With such nebulosity governing the application of E.O. 12291, it was assumed by some that the directive’s true purpose was oriented less towards efficiency and more towards general deregulation. One scholar wondered whether the order would “cut back significantly, if not actually...destroy, the regulatory system established by Congress” (Morrison 1986, 1062-1063). It was not too great a leap of logic to argue that the order’s intent was to reduce regulation given President Reagan’s own ideological orientation toward doing so (e.g. Cross 1987; Reagan 1990; Reeves 2005). The directive did allow the OMB to exercise, in function if not in form, a veto over agency rules by refusing to clear them within a period of time (e.g. Olson 1984).

Defenses of the order, meanwhile, were based largely on the need for efficient oversight of agency activity (e.g. Cross 1987; Miller, Shughart, and Tollison 1984). Cross (1987), referencing several previous Supreme Court decisions, argues explicitly that the provisions of the executive order, and its underlying assumptions relative to presidential power, are entirely constitutional and within the executive’s prerogatives. Miller et al. (1984, 83), meanwhile, argue in favor of the greater centralization in the rule-making process presented by E.O. 12291: “If
regulatory administration is decentralized, with rules issued piecemeal by a variety of independent agencies, then concentrated interests will typically be more successful in inducing regulators to fashion their decisions to benefit them. In other words, centralization of regulatory processes could potentially be to the advantage of consumers by avoiding problems posed through lobbying by business interests which can, in theory, lead to regulatory capture.

The Reagan Administration was, of course, no stranger to controversy and conflict with agencies, a relationship characteristically captured by interactions with the EPA throughout the 1980s. It is unsurprising, then, that the EPA reacted to E.O. 12291 about as well as they would later react to E.O. 12630 or to the appointment of Anne Gorsuch Burford to head their agency. E. Donald Elliott (1994, 168), who served as General Counsel within the agency during part of the first Bush Administration, describes his work as being “on the front lines of perhaps the most contentious and troubled relationship between the OMB [the agency charged with regulatory review under E.O. 12291] and the agencies.” The EPA, for its part, felt especially targeted by the OMB during the Reagan Administration following the issuance of E.O. 12291 (e.g. Olson 1984). The rule-making process within EPA, and other agencies for that matter, requires significant OMB input before a regulation can be approved, a process which some argue undermines the ability of the EPA to effectively govern its own operations (e.g. Olson 1984).

But as was the case concerning E.O. 12630, and as is assuredly the case in numerous other presidential directives, agencies have means of resistance. Why, then, would the EPA (and other agencies opposed to the centralization of rule-making authority) abide by E.O. 12291 and bend to the OMB’s direction? The OMB is, after all, an agency directly responsive to presidential concerns because of its location within the EOP. The EPA is under no such jurisdiction, and though its administrator can be removed at the discretion of the president (e.g.

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74 It bears mentioning that Dr. Miller would later serve as OMB Director during the Reagan Administration.
Blumstein 2001), it is not nearly as centralized as the OMB in terms of White House influence. Surely there are numerous tools by which an agency could resist these rules, and it begs the question as to why the EPA’s regulatory activity took a significant tick downward in response to President Reagan’s issuance of E.O. 12291.

Anecdotal evidence suggests that the EPA did indeed push back. It was not always the case that they chose the regulation best abiding by the executive order’s specifications (e.g. Elliott 1994; Goodstein 1995). This is perhaps unsurprising given the directive’s rather vague requirements, and numerous examples demonstrate that significant bargaining continued to occur between the OMB and the EPA well after the order was formally issued (e.g. Elliott 1994; Olson 1984). But the extent to which the Environmental Protection Agency was willing to act explicitly against the OMB’s wishes was moderated at least in part by functional statutory requirements of the Paperwork Reduction Act of 1980, which vests significant authority within OMB (e.g. Bruff 1989), in addition to numerous other statutory, judicial, and presidential acknowledgements or grants of authority to the office over time (e.g. Cross 1987). Having said that, the legal authority of the OMB to stonewall regulations under presidential direction is questionable (e.g. Cooper and West 1988), leaving executive branch agencies further wiggle room in avoiding compliance.75

But outright defiance to OMB’s requirements was rare within the EPA. What explains this? Elliott draws an important distinction between E.O. 12630 (the “takings” order) and E.O. 12291: principally, 12630 lacked the carefully established enforcement mechanisms put in place within 12291.76 Indeed, the OMB’s role as an interagency coordination mechanism can be traced

75 Cooper and West (1988, 876) note, importantly, that “the issue [of ignoring OMB] is highly academic. Instances in which agencies have chosen to defy OMB...are rare.”
76 Telephone interview with E. Donald Elliott (General Counsel, Environmental Protection Agency, 1989-1991); April 12, 2014.
back decades (e.g. Bruff 1989; Cross 1987; Morrison 1986), and it was likely the case that the bureau’s well-established central role in the regulatory process helped lend credibility to its actions relating to E.O. 12291.\textsuperscript{77} The order, in other words, had teeth; the president directed OMB to coordinate agency responses to the order, and agencies were reluctant to engage in disobedience out of fear of attracting the president’s ire and either losing employment or otherwise fostering a contrarian image which would make further advancement within government difficult.\textsuperscript{78}

But though defiance was rare, it was not completely absent. Elliott recounted one such instance with respect to E.O. 12291. William Reilly, then the administrator for the EPA, consulted his legal options in putting forth a rule he argued was outside the bounds of the directive and therefore legally issuable without OMB input. Elliott in turn advised Reilly that such action would probably be legal, but that the Administrator was putting himself in danger of being fired by President Bush. Reilly, Elliott would recall, brushed this aside, reasoning that Bush would not run the political risk of firing him, especially since Reilly was due to accompany the President to an event at the John F. Kennedy Center for the Performing Arts. The Administrator ultimately chose not to issue his decision as a formal regulation, but nevertheless instructed the EPA’s regional offices to behave as though it were a rule. They did so, and Reilly retained his job as he anticipated he would.\textsuperscript{79}

This rare example provides some important insight into the compliance process: both bureaucratic actors and the president have trade-offs they have to consider. It is true that, to force compliance, the president could begin firing political appointees or taking other actions to get the results he wants. Yet both the White House and the agencies recognize that there are political

\textsuperscript{77} Telephone interview with E. Donald Elliott; April 12, 2014.
\textsuperscript{78} Telephone interview with E. Donald Elliott; April 12, 2014.
\textsuperscript{79} Telephone interview with E. Donald Elliott; April 12, 2014.
costs to doing so and that dismissals can backfire on the president. The agency actors, meanwhile, have to evaluate whether they are willing to lose their job over standing against the president. If they are, they can always resign, again focusing unwanted negative attention on the president that will likely work to his political disadvantage.\(^{80}\)

Given these insights, a few important points can be made relative to compliance with E.O. 12291. Various federal agencies were of course not always pleased with the order, but they may have reasoned that, given the president’s seriousness of pursuing the directive’s requirements, that the costs of compliance were less than the costs of non-compliance, all things considered. Certainly this does not mean that the EPA, or other agencies, went along happily with the OMB’s comments or suggestions (e.g. Elliott 1994; Olson 1984). But it does mean that compliance can be achieved, even within reluctant organizations, when the order achieves a proper balance between costs of compliance versus those of non-compliance.

The fate of E.O. 12291 is instructive, however. The Reagan and Bush Administrations may have gotten a good deal of what they wanted in terms of compliance, but Elliott (1994) would later argue that the order, regardless of its effectiveness at changing agency behavior, was not functioning as well as it could be. He urged a different course of action oriented far more around open dialogue and bargaining between centralized White House agencies and the federal bureaucrats charged with administering regulations. The alternative to bargaining, Elliott (1994, 179) cautions, is an adversarial model that slows down advancement: “As long as agencies continue to see themselves as being locked in a competitive power struggle with the OMB over the content of the regulations, a struggle in which one side ultimately ‘wins’ and the other ‘loses,’ all the proper planning in the world will not lead to real improvements.” The fallacy, Elliott further argued, was in assuming that career bureaucrats do not see themselves as being

\(^{80}\) Telephone interview with E. Donald Elliott; April 12, 2014.
responsive to the president, thus leading to conflict where there need not be.\textsuperscript{81} His 1994 article was a call to the new administration to revisit the process in a way that would make it less adversarial.

Elliott’s efforts were successful. E.O. 12291 was formally revoked by E.O. 12866, issued by President Bill Clinton in 1993. Yet the Clinton order did not abandon the regulatory review process; it kept much of what the Reagan Administration had put in place, but with an eye towards more transparent communications between OMB and the affected agencies. This, Elliott (1994) argued, was critical to strengthening the efficiency of the administrative state. Thus, in spite of the fact that agencies were essentially complying with E.O. 12291, its effect was to frustrate the process. The issue was not that presidents were exerting control over agencies, but rather that they were doing so in a manner that treated the federal bureaucracy as an enemy when in reality such a view is a gross oversimplification (e.g. Elliott 1994).\textsuperscript{82} As past research has endeavored to demonstrate (e.g. Aberbach and Rockman 2000; Carpenter 2001; Golden 2000; Huber 2007), bureaucrats have a desire to do their jobs and are not interested, for the most part, in outright subversion. Presidents would be wise to learn this lesson well before engaging in strong-arming of federal agencies, as the results have the potential to be more harmoniously achieved through bargaining beforehand.

\textbf{Conclusion}

For several years, it seemed that Richard Neustadt’s ([1960] 1990, 11) famous idiom that “Presidential power is the power to persuade” would inevitably fall by the wayside in a tidal wave of research focused on the ability of presidents to flex their unilateral muscles. The title of

\textsuperscript{81} Telephone interview with E. Donald Elliott; April 12, 2014.
\textsuperscript{82} Telephone interview with E. Donald Elliott; April 12, 2014.
William Howell’s (2003) exceptional work on executive orders, *Power Without Persuasion*, conveys this judgment in absolute simplicity. “Using executive orders, proclamations, and other kinds of directives,” Howell (2003, 175) writes, “presidents have helped define federal policies on civil rights, the environment, health care, and social welfare; and using executive agreements and national security directives, presidents since FDR have fastened their command over foreign policy.” The flaw in this thinking, however, is the assumption that presidents and presidents alone have done these things. Unquestionably, executive orders have contributed to the shaping of U.S. policy in critically important ways. But as the cases herein demonstrate, viewing them as unilateral or in a world without bargaining is inherently flawed.

Neustadt ([1960] 1990, 33-34) implies as much when he writes:

“In only one sphere is the concept [of power as bargaining] unfamiliar: the sphere of executive relations. Perhaps because of civics textbooks and teaching in our schools, Americans instinctively resist the view that power in this sphere resembles power in all others. Even Washington reporters, White House aides, and congressmen are not immune to the illusion that administrative agencies comprise a single structure, ‘the’ executive branch, where presidential word is law, or ought to be. Yet we have seen...that when a President seeks something from executive officials his persuasiveness is subject to the same sorts of limitations as in the case of congressmen, or governors, or national committeemen, or private citizens, or foreign governments. There are no generic differences.”

Indeed, the cases of E.O. 12630 (the takings executive order) and 13352 (cooperative conservation) serve to make Neustadt’s point quite eloquently. In one case, the order failed, in large part because agencies could not agree on its utility; disagreements within the very
department where the order was largely being fomented (the Department of Justice) convey that individual organizations could not reach a mutually satisfactory goal. The agencies did not want the order, and, if administrative officials are to be believed, perhaps the president was not concerned about its implementation either. Responsiveness existed, but compliance was highly questionable; and why not? What recourse did the president have at his disposal?

In the case of E.O. 13352, the order was a success. Agencies agreed with its intentions. Officials in government as well as in the private sector recognized a problem and saw a mutual way forward to resolve a number of environmental crises. The order’s formulation did not take place in tight White House circles, but was rather a collaborative effort. The president did not tell agencies to “do that;” he instead gave them the legal justification and the blueprint for pursuing goals that most of the parties together found mutually satisfactory. Cooperative conservation was in no sense an example of a president exercising unilateral authority over an agency apparatus ostensibly under his control; it was instead, as Neustadt suggested years ago, a case of bargaining.

E.O. 12291, a “top-down” order, did manage to accrue a good deal of responsiveness and compliance within the federal apparatus, but even this order had its limitations. Individuals involved in the process (e.g. Elliott 1994) believed, in spite of compliance, that better results could be achieved through an open bargaining process, a suggestion which would later be codified by President Clinton. But the case does illustrate that presidents can force compliance even among reluctant agencies when conditions are right: namely, when agencies fear presidential reprisal, when there is a formal process in place for determining compliance, and when the costs of compliance are outweighed by the costs of non-compliance.

In light of this, it is time for presidential scholars to reconsider the formerly accepted
truism that presidential power is indeed “the power to persuade,” and that unilateral presidential powers are rarely as straightforward as we might think initially. The process is complex and certainly requires a degree of bargaining to be successful. It is true that presidents can issue orders on their own, but as the case of E.O. 12630 tells us, a limited ability to enforce the provisions of an unpopular directive open up plenty of opportunities to avoid compliance. Presidents who intend to make direct executive action a hallmark of their administrative style must be aware of the challenges they will face from bureaucrats at all levels. The power of command is not an absolute truism in the realm of the American presidency.
Abstract

This chapter summarizes the dissertation’s main findings, offering policy lessons for presidents (and agencies, by extension) as well as avenues for future research. The dissertation began with a conception of the president and the executive branch both situated as strategic actors who must anticipate and react to what the other is doing. The empirical results bear this notion out: executive orders are not a tool of command, and the office of the presidency by itself guarantees no compliance on the part of the bureaucracy. But what are the broader lessons? Can presidents control the executive branch? Would we even want them to? In short, there are serious limitations to these supposedly unilateral powers that ensure that the office of the presidency does not balloon into something like a dictatorship. Perhaps the president is not as constrained as the Founders might like, but he (someday she) does not have nearly the power many assume.
Introduction

Scholarly understanding of the intricacies of unilateral power within the presidency has grown exponentially in the last ten or fifteen years in response to something of a revolution in presidential studies. To be sure, political scientists had not ignored the president’s powers of command before this revolution, but only in recent years have scholars gained enough of a foothold into the questions of power, questions made answerable in large part by enormous strides in methods of studying the presidency, to give a closer look at unilateral powers (and indeed a host of other presidential powers). But now there is another shift heralded in large part by a renewed focus on the limitations of the president’s power. Far from being able to say “Do this! Do that!” and expect perfect compliance, unilateral powers, like so many other aspects of the presidency, have real practical limits. The consequence of these limits, I argue, is that even in the realm of the unitary executive, scholars must fit the president within a broader strategic framework. The bargaining taken as inherent in interactions between the president and, say, Congress, or interactions between Congress and the bureaucracy must now be applied to the executive branch as a whole.

The dissertation began with this broad research question: when and why are unilateral powers effective? I studied executive orders to provide some possible answers to this question, and though these directives are hardly the only unilateral tool at the president’s disposal, they are arguably the most formal and most accessible. Answering this question is important for both normative and practical reasons. On the normative side, people have rightly expressed concerns during a variety of administrations about the consequences of a potentially unchecked chief executive who can set policy on his or her own. The other side of this coin is perhaps just as concerning: what if a bureaucracy becomes so insulated that it can, in essence, ignore the will of
the elected branches of government? Both outcomes threaten norms of democratic governance.

The truth is that neither extreme is accurate. Presidents do not command the bureaucracy unchecked, but neither are agencies completely insulated from direction. There is no runaway executive anymore than there is a runaway bureaucracy, at least in the strictest sense. That said, there are still instances where presidents can exercise significant power, and agencies can exercise significant discretion, that demand careful attention to the appropriateness of each actor’s actions and responsibilities. A runaway executive or a runaway bureaucracy is not impossible, but given the structure of the United States government, the serious limitations on unilateral presidential powers, and the sprawling nature of the bureaucracy, such an outcome is unlikely. There may always be a give and take between presidents and the bureaucracy, but the continued frustration of chief executives to control their subordinates, as well as the experiences federal employees relate on their own, indicate a status quo bias just as familiar in studies of legislatures. Just as a president’s bargaining power over Congress can be leveraged in certain circumstances, so too can the bargaining power over the executive branch be leveraged, but it will never be absolute. The advantages presidents have are always tempered by the bureaucracy’s own expertise and experience.

On the practical side, the dissertation’s research sheds new light on questions of presidential power in an era of increasingly vibrant studies of the White House and executive branch apparatus. Executive orders, and perhaps other unilateral powers as well, do not carry the force that many think they might, and this requires political scholars to re-evaluate how presidents operate within a broader executive branch context. The theory of the unitary executive advanced by Calabresi and Yoo (2008) is, perhaps, useful only as a thought exercise; it does not describe the presidency in practice in any meaningful sense. Presidents may think they ought to
have control over the federal bureaucracy, and they may actively seek that control, but they do not get it automatically. Presidential scholarship can continue to advance by developing new bargaining theories which relate not just to inter-branch relations, but indeed to *intra*-branch relations. Many have long suspected that it is not as simple as the president telling an agency to do something, and the evidence provided herein confirms, in part at least, some of those suspicions.

This chapter concludes by first discussing the dissertation’s general findings and what they mean for executive orders in practice. I then move on to consider the normative and practical implications of the findings in terms of how they relate to extant theories of presidential power and democratic governance as well as how they enhance scholars’ understanding of the process of unilateral directives and intra-branch bargaining. I close by reconsidering the utility of the strategic presidency as well as models of unilateral power in light of the findings detailed herein.

**General Findings**

The dissertation has contributed to our understanding of unilateral politics, more specifically the executive order process, in a number of important ways. I situated the dissertation in a broader context of the strategic presidency, or the notion that presidents must adapt to circumstances and recognize that their powers of command and ability to influence policy are seriously limited. By the same token, federal agencies have strategic calculations of their own to make when it comes to responding to their principals higher up the ladder. The methodological analyses in Chapters 4, 5, and 6 detail the limitations presidents face in attempts to control the bureaucracy and serve as a reminder that unilateral powers are subject to the same
hurdles as other methods of presidential policy-making.

I began with the assumption that presidents are strategic when it comes to directing executive orders, and there is indeed some support for this. The results indicate that presidents pay attention to congressional preferences when determining how many orders to issue to certain agency types, and when Congress is united in opposition to the president’s policy goals, the predicted number of executive orders drops substantially. This corroborates, in part at least, Howell’s (2003) findings that presidents vary their usage of these directives based on how they anticipate Congress will react, though the research herein introduces a new and important wrinkle by accounting for various agency characteristics that have heretofore not been evaluated in the context of unilateral politics.

Presidents also account for agency variation on some level, though not in the ways originally hypothesized. For example, in spite of the sincere concern presidents across the decades have expressed relating to the bureaucracy taking orders, ideological distance is not a predictor of executive order issuance. We might expect that a liberal president would be more reluctant to give directives to a conservative agency, for example, but this is not the case. Similarly, presidents are also not wary about giving orders to decentralized agencies (i.e., those with more policy-making authority further outside of the White House’s reach). The one factor which does seem to matter is agency politicization, and counter-intuitively, this drives presidents to issue fewer executive orders. I have posited that this could be due to the loss of competence generally sustained by more politicized agencies (e.g. Lewis 2008), but the dissertation does not explicitly test this. The results are suggestive, perhaps, but hardly conclusive, that presidents may be aware of the negative effects of politicization and thus drop their usage of formal directives to such agencies, although this must be established with greater precision before reaching any
Agency responsiveness to executive orders, meanwhile, is variable on a host of factors. It is no surprise that the best predictors of a response are whether the agency was named in the order and or whether the president requested a formal rule in response to the directive. Other results, however, shed some additional light on what drives agency behavior. Ideological distance on its own does not account for responsiveness rates; although this contradicts my hypothesis, it does fit in nicely with extant research on bureaucratic motives (e.g. Carpenter 2001; Golden 2000). There are, however, two interesting wrinkles to the ideology story: first, it can serve to exacerbate the effects of politicization, a variable which on its own predicts lower rates of responsiveness. Ideological distance magnifies this agency loss resulting from politicization such that the drop in responsiveness is much more pronounced in agencies that do not share the president’s preferences than in agencies that do share them.

Second, the ideological distance of the president and the agency head is significantly negative (and it removes the statistically significant relationship present in the interaction between politicization and agency ideological distance). This makes some intuitive sense, as the agency head is often the individual charged with carrying out a directive’s provisions. It does not explain, however, why the interaction with politicization and ideological distance would cease to hold. One possibility is that the agency head’s ideology absorbs this variation given that this individual is a political appointee, thus accounting in some part for the effects of politicization. However, it is important to note that the data available extend only to 2004, and updates are needed to obtain a clearer picture of the effects of this variable on agency responsiveness.

Chapter 6 provides some valuable insight into the practicalities of the executive order process from conception to implementation and beyond. A few lessons are particularly
important: first, bargaining seems to be key in the executive order process. When agencies are not on board with a directive, it seems much less likely that compliance will be widespread. On the other hand, when agencies are intimately involved with the order’s structure and content, they are likely to have a stake in the policy and pursue it with greater fervor. Second, there are key distinctions between orders that come from the top (i.e., the president or immediate subordinates) and those that come from the bottom (i.e., within the agency apparatus itself). “Top-down” orders may not have the same effect, especially if agencies are not heavily involved in the bargaining process as was the case with E.O. 12630. “Bottom-up” orders, meanwhile, are likely more successfully implemented precisely because of their nature. After all, in such a circumstance, the agency is less looking for direction and more for justification provided by the president to carry a policy forward. It is little wonder that an order which rises from the bowels of an agency only to be signed by the president is subsequently put into action. Third, and perhaps most importantly, is the complexity of compliance. Responsiveness is easily classified in a binary manner: either an agency responded or they did not. Compliance, on the other hand, is much more nuanced; the bureaucracy can comply part of the way, all of the way, or not at all. This is only further complicated by the fact that the agencies affected by the order can all comply (or not comply) to varying degrees.

Lessons for Presidents

What could a President of the United States learn from these findings? One answer that is readily apparent, and probably obvious to anyone who has even seriously sought the office, let alone held it, is that agencies are not eager to simply do the president’s bidding. The notion of outright sabotage is likely misplaced (e.g. Aberbach and Rockman 2000), but bureaucrats have
their own sets of preferences, their own experiences, and often expertise that presidents do not have and cannot possibly have simply given the enormous sprawling nature of the federal bureaucracy. They are devoted to doing their work, and doing it well (e.g. Huber 2007; Golden 2000), but a president who expects that a given order will yield the kind of results he or she seeks is doubtlessly set up for tremendous disappointment. Federal agencies are unique creatures within government, and management thereof requires careful strategizing. Presidents would do well to enter office with this knowledge firmly at the ready, because no president in modern times, or likely ever, has had perfectly smooth relations with the executive branch over which they are ostensibly the head.

A more concrete lesson with readily available remedies is this: if the president wants something done, he or she must say what that something is. This may seem a trite point, but so many executive orders lack any kind of firm direction about what is expected of agencies. Oftentimes this is satisfied via additional criteria issued by someone else (e.g., the Attorney General), but without conclusive benchmarks to evaluate responsiveness and compliance, there is no way for a president to know if a directive is being carried out. It is true that some executive orders are intentionally vague, serving as symbols or as mere statements of policy preferences, but any executive who expects concrete action needs to define what that action looks like in clear terms. Chapter 5 showed that the single best predictors of an agency response were 1) that agency was specifically named in the order; and 2) the president requested formal promulgation. This is a start; presidents ought to be careful to say what they expect and, perhaps more to the point, to name specifically which agencies they want to carry out the directives. Many executive orders do this already, of course, but some are overly vague, leaving doubt as to which agencies are supposed to follow through.
Another important point to keep in mind is that *responsiveness is not compliance*. Many within the White House apparatus are aware of this, which is why so many executive orders list concrete benchmarks or require agencies to give reports to the president or one of his surrogates. Still, just because an agency has published a rule or regulation using the executive order as partial or total justification does not mean that agency will actually comply fully as the president intends. Again, benchmarks like those referenced above can provide a partial solution to the compliance problem, but presidents must recognize that not every employee at every affected agency is likely to react to a directive in the same way. Compliance is, after all, largely in shades of gray: some segments of the bureaucracy may comply, others may not. The order may fall completely flat with some minor exceptions, or it may have most of the consequences the administration seeks. In either case, some agencies will, because of a host of factors, not implement an order exactly as the president would like. This is to be expected, and the White House ought to prepare for this likelihood.

Knowing that compliance and responsiveness are far from universal, presidents may be tempted to staff agencies with loyal individuals who owe their allegiance to the White House and its policy goals. Such is the motivation for large-scale politicization over time, after all. But there is a potentially dangerous consequence: Chapter 5 demonstrated how politicization, moderated by ideological distance between the president and the agency, can lead to significantly lower rates of responsiveness. Counter-intuitively, by pursuing greater responsiveness presidents can potentially be left with less, perhaps because of a reduced level of competence (though this has not been explicitly tested herein). David Lewis’s (2008, 202) work on politicization gives us some additional insight: “The evidence...demonstrates that politicization hurts performance across the government, sometimes dramatically and to catastrophic effect. Why, then, do
presidents add political appointments...? The solution to this puzzle is that presidents have to ensure bureaucratic responsiveness....They are willing to trade some competence in order to get agencies to do what they want.”

The evidence in this research, however, suggests that even trading in that competence may not get the president what he or she wants. Another important lesson for presidents, then, is that they must be strategic in deciding who to appoint and to where those individuals ought to be appointed. A former Secretary of the Interior related that certain political appointees lack the necessary experience to drive agency policy, leading to ineffectiveness, and Lewis’s (2008) example of the incompetent handling of the Federal Emergency Management Agency (FEMA) by political appointee Michael Brown seems only to underscore this point. Presidents may need to take a different track to ensure responsiveness; rather than appointing those with little experience to key policy-making positions, they might save the politicization for posts that provide some oversight pertaining to what is occurring within the agency. This would have the potential to reduce information costs, thus allowing for better oversight on the part of the president. Even though Chapter 6 demonstrated that forcing compliance is difficult, there are still tools to encourage greater responsiveness, and if presidents know which agencies are not following through, they may be better able to manage the bureaucracy.

The final lesson is that presidents must always be willing to bargain, even with the executive branch over which they have constitutional authority. Agencies want to do their jobs, but the practicalities of carrying out policy do not always match up with the ideals presidents advance in directives like executive orders. Part of the solution to enhanced bargaining is for presidents to develop more trust for the career civil service. It is true that most bureaucrats in the federal government are liberal (e.g. Wilson [1989] 2000), but this does not mean that they ignore

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83 Personal interview with Gale Norton; September 10, 2013.
conservative presidents, for example. Even liberal presidents are likely to express some trepidation about dealing with politically insulated actors, even those who share the administration’s preferences. But because bureaucrats are by and large prepared to be responsive, taking time to deal with the affected agencies before the order is implemented likely greatly increases the chance of compliance.

**Limitations of the Research**

Though this dissertation provides valuable insights into the unilateral powers process through the lens of executive orders, it is not comprehensive, and future research should take a number of confounds into account as scholars continue to work toward a broader theory of presidential power. One of the lessons I highlighted for presidents is that responsiveness is not compliance; this is itself a limitation to the research herein. What does compliance look like in practice? Is it something we can quantify, or is it destined to remain elusive? Responsiveness is more apparent in a “you know it when you see it” sense. Compliance, however, is much more complicated for a number of reasons. First, it is difficult to tell without some ready-made reservoir of information which agencies are complying with an executive order and which are not. To be sure, numerous governmental actors, like Inspectors General and the Government Accountability Office, have undertaken studies of compliance with particular orders. The drawback here is that this is often a form of “fire alarm” (McCubbins and Schwartz 1984) oversight: it is initiated when a problem is perceived. It would be unsurprising, then, to find low rates of compliance based on the studies undertaken by IGs or the GAO precisely because they were asked to investigate under the suspicion of non-compliance.

Second, compliance is rarely a matter of “yes” or “no.” There are certainly levels of
compliance; in Chapter 6, I gave the example of E.O. 12630 from the Reagan Administration, which dealt with the potential takings implications of environmental regulations. The order was not well-received among agencies and is generally considered ineffective, yet the GAO report makes clear that for some cases among some agencies, the government did pay out sums of money for taking property. Compliance was spotty at best, yet it was not completely absent. Likewise, the more successful E.O. 13352 (Cooperative Conservation) was probably not universally embraced and implemented in the bureaucracy in spite of its general successes in influencing policy. Further research into agency compliance must account for the fact that, unlike responsiveness, we are dealing in the realm of degrees rather than absolutes.

Future research also must consider in more detail the preferences of Congress. An absolute accounting of Congress is beyond the scope of this dissertation, but there can nevertheless be little doubt that the legislature, given its role as another principal for the bureaucracy, plays a central role. I have attempted to account for legislative preferences in part through inclusion of such variables as congressional unity and divided government, but these only scratch the surface. One important and fruitful avenue moving forward is considering the role budgetary politics play in the unilateral politics process. Perhaps agencies become more or less likely to respond based on signals from both the president and Congress, and we might be able to gain leverage over which institution “matters” more using the federal budget as a cue. Much of this research is founded on principal-agent theory, but clearly the dilemma of multiple principals plays an important role in executive politics, and there is little reason to think this does not also extend to unilateral powers.

Next, there is still work to do pertaining to understanding the intent of executive orders. I have been able to account in part for this by controlling for whether presidents request formal
rule promulgation, but it is clear based on conversations with former administration officials that not every directive demands a response. Therefore, a central question moving forward in this particular area of research is: what do presidents hope to accomplish in their orders? We are beginning to gain some insight into this process thanks to the archival work of Rudalevige (2012), but much more needs to be done moving forward. Presidential intent is an important component of the effectiveness of unilateral directives, and teasing this intent out will mark a major advancement in studying the utility of the unitary executive. If, after all, the president has no expectation or concern about the implementation of a directive, can it really be said that such a directive failed when agencies do not respond?

Finally, the dissertation only studies executive orders. There are numerous other directives which fall under the definition of unilateral politics, as discussed at length in Chapter 2. Scholarly interest in some of these other directives has increased along with developments in the study of the unilateral presidency, but these have not received as much attention as executive orders. It is useful to ask whether signing statements, to take one example, actually change the behavior of federal agencies. The same is true of executive memoranda, proclamations, and other powers. I began the dissertation with a broad interest in the politics of the unitary executive, but clearly the orders studied herein represent only a subset of the tools presidents have at their disposal.

Conclusion

Perhaps scholars were too quick to dismiss Richard Neustadt’s ([1960] 1990) focus on presidential power as akin to persuasion. To be sure, this view does ignore important institutional variations that scholars are finally beginning to account for in the realm of presidential politics,
but was Neustadt so far off? After all, he compares persuasion in his text to bargaining, and the
dissertation makes clear that executive orders are not exempt from such bargaining processes. I
call executive orders a unilateral power only for the sake of convenience, after all; they can be
issued at the president’s command with no other outside input. But in practice, these directives
are hardly unilateral at all. There is bargaining, give-and-take, and conflict both before the order
is issued and after. And if the lessons of the dissertation apply to orders broadly, then presidential
scholars must concede that Neustadt’s cautions about formal command powers were right; they
are not indicative of reality.

Still, this does not mean that studying such formal powers is an exercise in futility; it is
anything but. Edwards (2009) and others (e.g. Pfiffner 1988) have provided us with a framework
with which to evaluate presidents, a framework which neither assumes that the only way to enact
change is through persuasion nor is it through directive; rather, presidents succeed or fail based
on their ability to adapt. So it is with unilateral powers. Presidential scholarship has been
mightily advanced by challenges to Richard Neustadt’s classic formulation of executive power,
allowing us to take into account numerous institutional variations which change the calculus
presidents make. Our understanding of the office has progressed so rapidly, even based on where
it was a scant fifteen years ago, as to be somewhat breathtaking. But this does not mean that
Neustadt has nothing left to teach us. Power is not persuasion in the strictest sense, but scholars
likely cast aside its role too eagerly.

Concerns about growing presidential power are legitimate, but the case has been
overstated. None would argue that our government has gained significant power since the
founding, and yet even well over two hundred years after the Constitution was formally ratified,
we encounter a presidency that is still subject to serious limitations as it was intended to be.
Presidents have become more boisterous over time, perhaps, and they have certainly become more publicly known, but their power is not absolute. Their power has grown, of course, but it has not, as some might worry, delivered us to tyranny. It is important to recognize that presidents are constrained not just by Congress or the courts, but by the very executive branch they are elected to lead.
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