

A Reassessment of the Presidential Use of Executive Orders, 1953-2008

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A REASSESSMENT OF THE PRESIDENTIAL USE OF EXECUTIVE ORDERS,
1953-2008

by

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A thesis submitted in partial fulfillment of the requirements
for the degree of Master of Arts
in the Department of Political Science
in the College of Sciences
at the University of Central Florida
Orlando, FL

Fall Term
2015

ABSTRACT

Quantitative studies of the presidential use of executive orders have attempted to determine whether presidents are more prone to resort to unilateral action when faced with legislative opposition. To date, the results have been mixed however, with studies demonstrating that the type of executive order is an important factor in understanding the conditions under which presidents will resort to unilateral action. Despite this advancement in theory, there has been little consensus regarding the actual conditions under which presidents will issue the different types of executive orders that have been identified in the literature.

This thesis addresses this puzzle through an empirical analysis that engages the "Two Presidencies Thesis," which argues that presidential decision-making, action and success is conditioned by policy area (foreign and domestic) and executive order type (major, routine, or symbolic). An original dataset was constructed by coding all executive orders issued between 1953 and 2008 as related to either foreign or domestic policy. Thus, an analysis is undertaken of major executive orders, minor executive orders, foreign policy-based executive orders, domestic policy-based executive orders, and major and minor categories of each policy area.

A multivariate analysis is completed using negative binomial regression given that the dependent variables are overdispersed count variables. The effects of divided government and ideological distance are the primary independent variables examined. The ideological distance variable consists of the absolute distance between the president's ideology and the ideology of the median member of the Senate. Various other control variables are included, including presidential party, election year, and approval ratings. The findings indicate that executive order

type does matter in predicting presidential use of executive orders and that the prevailing political climate does influence the president's use of executive orders.

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CHAPTER ONE: INTRODUCTION

On November 20, 2014 President Barack Obama announced a series of executive actions designed to carry out his immigration plan (Shear 2014). Obama rolled out the plan with a series of speeches, the issuance of presidential memoranda, and a website on which he displayed his strategy for reforming U.S. immigration policy, along with his justification for doing so (Obama 2014). The rhetoric that surrounded this action, from Republicans, Democrats, and the media, reflected many of the issues explored, and debated, by students of the presidential use of unilateral action.

The media coverage of this initiative described Obama's actions as a challenge to Congress to act, questioned the legality of the president's actions, and frequently referred to the president's frustration over Congressional gridlock (Eilperin, O'Keefe, and Zezima 2014; Fitz 2014; Shear 2014). These depictions mirror certain aspects of the literature on presidential unilateral action; some scholars have argued that president may use unilateral action to prod Congress to act or to move legislation being considered in Congress closer to the president's ideal point (Deering and Maltzman 1999; Howell 2003). Other scholars have examined the implications of presidential executive action including the sources of its legitimacy (Cooper 1986; Bailey and Rottinghaus 2013). The passage of legislation, particularly in times of gridlock, has been well studied (Binder 2003; Bond and Fleisher 2000; Brady and Volden 2005; Mayhew 1991). These studies have been extended to evaluations of presidential strategies for breaking policy gridlock (Brady and Volden 2005; Fine and Warber 2012).

The administration, and its supporters, made it a point to state that they would prefer immigration reform via legislation, but that months of Congressional inaction left the president

with no choice other than to act (Eilperin, O’Keefe, and Zezima 2014). The reasons given for the president’s decision to act alone are reflective of many of the arguments in the unilateral models literature. The literature argues that presidents prefer the permanence of legislation but will use executive action on issues of importance to them if they believe that it is the best way to overcome perceived gridlock in Congress (Deering and Maltzman 1999; Mayer 2010).

Other studies of the presidential use of unilateral action have highlighted the importance of public opinion in determining presidential use of unilateral action (Krause and Cohen 1997; Mayer and Price 2002). The Office of the Press Secretary (2014), exhibited a keen awareness of the importance of public support for the president’s initiative when they put together a website that not only summarized the president’s plan, but also grounded his decision to take executive action in historical and legal precedent.

The terminology used by opponents of the president’s plan was representative of specific questions that have been addressed in the literature. Some of the opposition challenged both the wisdom and legality of the president’s actions (Eilperin, O’Keefe, and Zezima 2014; Fitz 2014; Shear 2014). Others chose to threaten the legacy of the president by promising a lack of cooperation on any legislation that was important to him in the final two years of his presidency (Eilperin, O’Keefe, and Zezima 2014; Shear 2014). Scholars who have studied presidential use of executive action have attempted to measure the president’s concern with legacy in multiple ways including accounting for new presidents, presidents who are campaigning for reelection, and those who are at the end of an eight year term (Bailey and Rottinghaus 2013; Deering and Maltzman 1999; Mayer 1999).

This scenario, involving the president's actions on U.S. immigration policy, is quite interesting because it consists of so many parts of one of the most significant puzzles in the study of the President of the United States, namely, the source of the president's power. Furthermore, it highlights the question of whether presidents are strategic actors who use executive action to achieve their policy goals or are political actors whose power arises from their ability to negotiate with, and influence, other political actors.

Competing Models of Presidential Power

For a significant portion of the second half of the twentieth century, Richard Neustadt's model of presidential bargaining was the dominant theoretical framework for studies of the American presidency (Mayer 2010; Waterman 2010). Neustadt argues that presidents do not have the power to command; therefore, they must rely on their ability to bargain with, or persuade, other political elites in order to achieve their policy goals. The effectiveness of this persuasive power is measured by the president's ability to strategically influence other political actors in such a way that it results in the president having influence when he wants it, or needs it, rather than in a specific moment (Neustadt 1990). In this way, Neustadt's definition of power is forward-thinking in that it requires the president to continually develop, and nurture, positive working relationships with other political actors. Based on this definition of power, Neustadt views unilateral actions by the president as a "forced response to the exhaustion of other remedies, suggestive less of mastery than of failure" (Neustadt 1990, 24).

Neustadt's book, *Presidential Power and the Modern Presidents*, was originally published in 1960 and has undergone multiple updates since that time to account for changes in

the political environment. However, the overall premise of Neustadt's argument remains the same: that presidents must effectively use their powers of persuasion to be successful. In the mid-1980's, political scientists began to challenge Neustadt's theory based on developments that were taking place in the structure of the presidency (Moe 2009). They argued that Neustadt's approach was decidedly personal and did not account for the increasing institutionalization of the presidency (Mayer 2010; Moe and Howell 1999). The political world Neustadt's model is grounded in does not exist for contemporary presidents. Increasing polarization among political elites and the electorate (Binder 2003; Bond, Fleisher [Eds.] 2000), increasing media scrutiny, and increasingly aggressive interest groups have negatively impacted the ability of the president to form coalitions and negotiate with other political actors (Waterman 2010).

The extent to which political scientists have challenged Neustadt's theory varies. Initially, the institutional-based approaches functioned more as an extension of Neustadt's theory rather than a direct challenge (Mayer 2010). Gradually, the shift to institutional based theories led to a sharper focus on unilateral action and a redefining of presidential power, which served as a more direct challenge to Neustadt's bargaining model. Mayer and Price (2002) argue that Neustadt's definition of power is based on a false dichotomy. They argue that the separation "between 'formal power' and 'persuasion' is artificial; the two categories are neither mutually exclusive nor exhaustive of all possible avenues of presidential influence" (Mayer and Price 2002, 370). Howell's (2003) definition of presidential power abandons Neustadt's policy implementation requirement altogether and focuses instead on the president's ability to impact the content of public policy.

The institutional approach to the study of the presidency has led to the development of the strategic school, which is influenced heavily by rational choice models (Moe and Howell 2009). This approach has allowed scholars to model the conditions under which presidents will resort to unilateral action and what constraints will prevent them from doing so. Some of the concerns that guide this school of thought are: are presidents strategic actors who take advantage of times of congressional gridlock to implement policy through the use of executive orders? Or, do presidents take advantage of favorable times, such as unified government, when there is little risk of challenge to their executive orders? There is also a focus on whether issues such as public approval or party affiliation impact the president's use of executive orders.

Much of the work in this field has been concerned with the impact of divided government on the use of executive orders (Deering and Maltzman 1999; Edwards 2009; Mayer 1999; Warber 2006). The findings regarding the impact of divided government have been mixed, but ultimately led to the development of two innovations in how presidential use of executive orders would be studied: the first was the use of ideology scores to measure the distance between the president and Congress (Deering and Maltzman 1999). The second advancement was disaggregating the executive orders into major and minor categories (Fine and Warber 2012; Warber 2006). Although many important advancements have emerged from the findings in these studies, there is a need to develop improved methods for measuring the concepts of interest.

Advancements in Concept Measurement

This thesis will contribute to the study of the president's use of executive orders in two primary ways. First, it will analyze the two presidencies thesis to develop a more precise

measurement of the types of executive orders that the president issues. Second, it will use Bailey's ideal point estimate scores to measure the preferred policy position of the president and the median Senate member. These two adjustments will advance our understanding of the political conditions that lead to the president using executive orders rather than passing legislation through the traditional Congressional process. This study will then use multivariate analysis to evaluate the impact of these more precise categorizations and measurements on the use of executive orders.

Prior studies have separated executive orders into categories denoting whether they are significant orders or routine orders (Fine and Warber 2012; Mayer 1999; Warber 2006). The terminology differs across these studies but the concepts are the same. This thesis will build upon Warber's approach by incorporating categories to denote foreign policy and domestic policy. To build upon the prior categorizations of executive orders this thesis will incorporate Wildavsky's (1966; 1998) two presidencies thesis to create categories representing major executive orders, minor executive orders, foreign policy-based executive orders, domestic policy-based executive orders, and major and minor categories of each policy area.

Wildavsky (1996; 1998) argues that there are two presidencies; one for foreign policy and one for domestic policy. His two presidencies thesis states that presidents generally enjoy comparatively more congressional support for their foreign policy initiatives, but struggle to gain congressional support for their domestic policies. Because the strategic model posits that presidents will use executive orders to circumvent roadblocks in Congress it is necessary to examine executive orders in the context of domestic and foreign policy. If presidents are facing less resistance for their foreign policy initiatives under both unified and divided government, or

regardless of their ideological differences with Congress, then analyzing domestic policy and foreign policy-based executive orders as a single variable could skew the findings as it relates to either divided government or ideological differences. In other words, the differences in presidential behavior logically extend beyond a simple major/minor dichotomy into policy area.

Prior studies that have taken the ideological differences between the president and Congress into account have relied on NOMINATE or ADA scores. This thesis will build upon those results by using Bailey's ideal point estimates (Bailey 2007; 2011) to determine the absolute difference between the president and the median Senate member. Bailey's estimates are a more appropriate measurement to use for this type of analysis because they are comparable across time and institution, whereas the NOMINATE and ADA scores are not as effective of a measurement of this concept across time and institution (Bailey 2007; 2011). The use of an appropriate cross-temporal and cross-institution measure will allow for greater confidence in the results and thereby contribute to our understanding of presidential unilateral action in relation to ideological differences with Congress.

Research Question

The research question this thesis will address is whether presidents are comparatively more likely to resort to unilateral action when faced with legislative opposition. The question will be addressed under two scenarios: first, a multivariate analysis will be specified to test the president's use of executive orders under divided government. For the purposes of this thesis, divided government will be disaggregated into variables denoting pure divided government (both houses of Congress are controlled by a different party than the president's party), mixed

government (one house of Congress is controlled by a different party than the president's party), and unified government. This approach is taken to account for varying degrees of contention between the president and a Congress where he presumably has very little support (pure divided), a Congress where he has some support (mixed government), and a Congress where there would be an expectation of widespread support (unified government) (Godwin and Ilderton 2014). As a test of the unilateral powers model, this methodology has distinct advantages over a simple unified/divided government dummy variable because it accounts for variation in the level of constraint that the president faces and should therefore better model the conditions that lead to the use of executive orders.

The second scenario that will be tested via multivariate analysis will be based on the ideological distance between the president and the median Senate member. It is theorized that as the ideological distance between the president and the median Senate member increases, the president will face greater resistance in trying to pass legislation. Due to the increased opposition to the president's legislative agenda, the president (if the unilateral powers model holds true) should react by increasing the use of executive orders (Deering and Maltzman 1999). This model has advantages over the divided government model in that it is a more precise measurement of the potential constraints that the president may face. The disadvantage of this approach is that there is a subjective element to the scores that does not exist in the divided government variable. The condition of divided, mixed, or unified government is easily observable, whereas ideology scores only capture particular behaviors (such as votes) that could be influenced by unobservable pressures on a political actor that may not influence the person's behavior subsequently. This is a minor concern as there is typically a large sample size to calculate an ideology score, meaning it

is fairly representative of a political actor's ideology, but, again, it is not as straightforward as divided government.

This thesis will argue that under divided government, presidents will issue more major executive orders and more major domestic policy-based executive orders to overcome legislative constraints. It is also argued that the wider the ideological gap is between the president and the median Senate member, the more frequently the president will issue major executive orders and major domestic policy-based executive orders. These arguments are consistent with the assumptions outlined above regarding the president's strategic use of executive powers and Congress generally acquiescing to the president on issues of foreign policy.

Methodology

To test the theoretical expectations discussed above, two multivariate analyses using executive orders issued between 1953 and 2008 as the dependent variable were specified and estimated. Because the dependent variable in this study is an overdispersed count variable (the annual number of executive orders), negative binomial regression is used to test the arguments (Cameron 1998). Negative binomial regression handles overdispersed count data better than a simple Poisson regression; therefore, it is the appropriate method to use. To test each model, divided government and the ideological gap, the dependent variable was disaggregated further into major/minor and foreign/domestic categories as noted above. In the first model, divided and mixed government were the primary independent variables. In the second model, the absolute value of the difference in ideology scores between the president and the median Senator was the primary independent variable. A series of control variables, including approval rating, major

events, Democratic president, election year, and a new president were added to the regression based on the findings of various prior studies.

The dataset used in this thesis is an original dataset that was compiled from various sources. The ideal point estimates are taken from Bailey (2007; 2011). The major, minor, and symbolic executive order counts are taken from Warber (2006) and Fine and Warber (2012). The divided/mixed/unified government coding was done through original research. The foreign policy and domestic policy counts were coded by the researcher through a review of the language of each executive order that the president issued from 1953 to 2008. The executive order language was obtained from The American Presidency Project (Peters 2015).

The thesis will demonstrate that in the case of executive orders, specificity is important to determining the use of unilateral action by the president. There is, of course, the danger of losing meaning through the use of overly specific categories however; aggregating all executive orders together, with no regard for their content, is not the most valid way to evaluate their use either. Prior studies have taken the important step of examining these major and minor categories. This thesis takes the next step, and makes an important contribution, by introducing policy area to the analysis.

CHAPTER TWO: LITERATURE REVIEW

Unilateral Powers Theory

Following its publishing in 1960 Richard Neustadt's *Presidential Power* held a uniquely preeminent role in the field of presidential studies for more than 40 years (Moe 2009). Neustadt (1960; 1990) argues that presidents do not have the power to command; therefore, in order to achieve their policy goals, presidents must rely on their ability to bargain with other political elites. Neustadt's definition of presidential power is decidedly informal and personal in nature. It treats each president as an individual and views unilateral action as a, "forced response to the exhaustion of other remedies, suggestive less of mastery than of failure" (Neustadt 1990, 24). During the 1990s, the field of presidential studies underwent a transformation in which scholars began to develop theories that would address the realities of the modern presidency with more analytical rigor than did Neustadt's personality-based approach (Mayer 2010; Moe 2009). Increasing institutionalization (Moe and Howell 1999), increasing polarization among political elites and the electorate (Binder 2003; Bond and Fleisher [Eds.] 2000), increasing media scrutiny, and increasingly aggressive interest groups (Waterman 2010) marked the modern presidency. Neustadt's approach lacks the tools to evaluate the impact of these changes on presidential behavior.

To contend with these changes in the relationship between the president and other actors, the field of presidential studies adopted an institutional approach, which led to the development of the unilateral powers theory. This theory rejects the notion that power is personality based (Edwards 2009). The unilateral powers model is built on two basic assumptions (Mayer 2010). The first assumption is not concerned with presidents as individual personality types, but as

“generic types” functioning within a system in which their “powers and incentives are institutionally determined” (Moe 2009, 704). The second assumption is that presidential success or failure in aligning policy with their preferences is a result of the legal authority granted by the Constitution and Congress, not the president’s relative ability to persuade other political actors to enact his policy agenda (Mayer 2010).

Unilateral powers theory examines, among other actions, presidential use of executive orders, signing statements, military orders, proclamations, National Security Directives, and recess appointments (Fine and Warber 2012; Mayer 2010). Despite the president having these tools at his disposal, unilateral power theory does not argue that presidents have free license to act unilaterally (Mayer 1999; 2001). There are limitations on the extent to which presidents can, and will, use unilateral action. One constraint on the use of unilateral action is that, ultimately, presidents should, theoretically, prefer that their policies be enacted through legislation because of the permanence legislation entails, as opposed to the inherent temporary nature of executive orders (Deering and Maltzman 1999; Mayer 2010). Presidents are aware of the fact that unilateral action can be overturned by the unilateral actions of a subsequent president or challenges from the other branches of government (Deering and Maltzman 1999; Howell 2003). Presidents also have to consider factors such as protecting allies, prior governmental commitments, maintaining services, and protecting rights when taking unilateral action (Edwards and Wayne 1985). Presidents are also constrained by the potential costs, in light of the potential benefits, of taking unilateral action (Moe and Howell 1999). The overarching goal of unilateral power theory is to explain when, and how, presidents will use the unilateral powers at their disposal.

The Strategic Model

One of the most studied aspects of presidential behavior in the unilateral powers literature is the impact of divided government on presidential use of executive orders (Fine and Warber 2012). A significant portion of the literature focuses on the “strategic model”, which posits that a president is more likely to rely on executive orders during periods of divided government (Deering and Maltzman 1999). The most successful presidents, under this model, “evaluate strategic positions correctly” (Edwards 2009, 190). Unfortunately, the literature on this topic has not provided clarity regarding the relationship between divided government and presidential use of executive orders. Some studies have demonstrated that presidents will resort to the use of executive orders when facing a hostile Congress (Deering and Maltzman 1999). Other studies have found that factors other than divided government, such as approval ratings and manipulation of his base of support, explain the presidents increased use of executive orders (Mayer 1999; 2001; Mayer and Price 2002; Warber 2006).

The strategic model’s focus on the relationship between executive orders and divided government has a considerable presence in the unilateral powers literature. The impact of divided government on policy gridlock became a popular topic in political science following Mayhew’s (1991) finding that the passage of significant legislation was not negatively impacted by the presence of divided government. Multiple subsequent studies reported that divided government does in fact lead to policy gridlock (Binder 2003; Bond and Fleisher 2000; Brady and Volden 2005). Because presidents have policy agendas they want to enact, they have an incentive to seek methods for breaking, or taking advantage of, legislative gridlock (Brady and Volden 2005; Fine and Warber 2012). Executive orders are one method by which presidents can accomplish this

goal. Theoretically, divided government may lead to an increase in presidential unilateral action because, under divided government, the president will have a more difficult time gaining votes for his policies, thereby limiting his success; and, because under divided government it is more likely that the president and Congress will hold divergent viewpoints (Fine and Warber 2012).

Although the president has a variety of unilateral actions available to circumvent policy gridlock, executive orders have remained the primary focus in the literature. The primary reason for this focus is that executive orders, “present the clearest alternative presidents have to the legislative process” (Howell 2003, xvi). Second, unlike many of the other unilateral tools available to the president, executive orders cover a wide range of policy areas (Howell 2003). Two other reasons that they have been studied so extensively have to do with research concerns. Executive orders are more likely to garner attention from the media than other types of unilateral action, thereby making their impact easier to evaluate (Waterman 2010). Also, they are easily referenced as they have been consistently numbered and cataloged since the Federal Register Act of 1935 (Howell 2003; Warber 2006). Although there are gaps in the Federal Register’s record of executive orders, a majority of them are publically available and they are not subject to being deemed classified as are other types of unilateral directives.

Because presidents have a desire to build a policy record, they must work with Congress under the constitutional structure, even when facing a hostile Congress (Fine and Warber 2012). This fact demonstrates a key aspect of the relationship between the strategic model and Neustadt’s bargaining model, namely that they need not be mutually exclusive approaches to understanding presidential power (Deering and Maltzman 1999; Mayer and Price 2002; Waterman 2010). Even when presidents take unilateral action, there is room for negotiation with

Congress. In the strategic model, unilateral action simply takes the place of bargaining, coalition building, and other personality-based tools of persuasion (Waterman 2010). Unilateral action, particularly executive orders, allow the president to place himself in a power position for any negotiations by preempting Congressional action. This approach shifts the burden to Congress, or the courts, to overturn the executive order the president has issued. This has historically been a difficult task to accomplish because, for various reasons, Congress, or the Supreme Court, have lacked the power, or desire, to overturn the president's executive orders (Deering and Maltzman 1999; Howell 2003).

The difficulties that Congress has historically faced in attempting to overturn executive orders are multifaceted. One difficulty Congress faces is that the president will be more likely to act unilaterally when Congress is unable to pass legislation, thereby meaning that it is too weak to constrain the president (Howell 2003). Because presidents will weigh the costs and benefits of issuing a particular executive order before doing so, it is unlikely that an executive order will be issued unless Congress is too weak to overturn it (Deering and Maltzman 1999; Mayer and Price 2002). Another difficulty identified in the literature is the "gridlock interval", which is a policy space in which the ideological composition of Congress is unfavorable to passing legislation (Brady and Volden 2005). In this model, the president can use executive orders to either move an issue into or out of the gridlock interval based on their policy preferences (Brady and Volden 2005). In other words, the president can take advantage of Congressional gridlock to either promote or hinder the passage of a particular policy.

Presidents have a distinct strategic advantage over Congress in this type of struggle because, "legislators will evaluate the presidential shift in the status quo in terms of their

constituency-based policy preferences, not in terms of the institutional power struggle” (Moe and Howell 1999, 863). So, by acting first, the president puts Congress in a position wherein it’s overturning the executive order may be unfavorable for constituency reasons or unfeasible based on institutional reasons. The potential downside of this strategy is that if the president does not weigh the potential costs accurately, and chooses an issue with a strong constituency based feeling that coincides with the status quo, then it will be more likely that Congress may take action to overturn the executive order (Moe and Howell 1999).

Congress also has to contend with the veto when considering whether to challenge an executive order (Howell 2003). The percentage of votes needed to overturn an executive order, two-thirds, to avoid the veto threat is typically unobtainable for Congress due to intrabranched conflict or partisan loyalty. Howell (2003) found that between 1945 and 1998, Congress made only forty-five formal attempts to directly challenge an executive order through passage of a bill. Warber (2006) finds that as the presidency has become more institutionalized, Congress has presented fewer challenges to executive orders. Under Truman, Congress modified 11.6 percent of all executive orders, whereas under George H.W. Bush it modified only 0.3 percent of all executive orders (Warber 2006, 119). The decline in challenges to executive orders could be an effect of the process of institutionalization of the presidency or a result of presidents being more strategic in their issuance of executive orders. Further, more nuanced, study of this aspect of executive orders is needed to address that particular question.

The judiciary is another potential obstacle to the president’s use of unilateral power. In the unilateral power model, judges are considered, “along the same policy dimension as...Congress and the president” (Howell 2003, 136). Placing judges on the same policy

dimension in the strategic model is consistent with the idea that judges make decisions based on their own policy preferences (Howell 2003; Segal and Spaeth 1993). Studies have reported that the judiciary has been hesitant to overturn executive orders despite having the power to do so. For instance, the Supreme Court has the power to invoke judicial review of executive orders but do not do so with frequency (Warber 2006). This hesitancy to overturn executive orders could be a result of the Courts not having the means to monitor all administrative activity coming out of the White House or it could represent the fact that the judiciary is reliant on the president for enforcement of its rulings and acts strategically to maintain a favorable relationship with the executive branch (Howell 2003; Warber 2006).

Some studies have found alternatives to divided government and the political environment to explain the conditions under which presidents will issue executive orders. Mayer (2001) finds that the president's approval rating is an important component of the relationship between the president, Congress, and the judiciary. He argues that presidents having comparatively low approval ratings may use executive orders to circumvent, "institutional actors who might be emboldened in their opposition to what they perceive as a weak White House" (Mayer 2001, 90). This finding is in contrast to earlier studies, which found weak support for the idea that presidential popularity would impact the number of presidential executive orders (Krause and Cohen 1997). The share of seats that the president's party holds in Congress is another alternative explanation that has had mixed results with some scholars refuting the importance of seat share (Deering and Maltzman 1999) and others finding support for the importance of seat shares (Marshall and Pacelle 2005). The importance of this concept is that seat share and ideological congruence may be more important factors than divided government

in explaining use of executive orders. Unfortunately, the mixed findings in the literature to date do not resolve the issue of whether the strategic model explains presidential use of executive orders. These mixed findings are the result of imprecision and inconsistency in how the concepts are substantively measured.

The Two Presidencies

The two presidencies thesis argues that presidents will generally have comparatively higher levels of congressional support for their foreign policy initiatives but will typically struggle to gain congressional support for their domestic policy initiatives (Wildavsky 1966; 1998). The reason for this is that members of Congress are concerned with the wishes of their constituencies who are typically more focused on domestic issues. Foreign policy, on the other hand, is viewed as the president's domain because he has informational advantages (Wildavsky 1966; 1998). The two presidencies thesis has inspired a debate about whether there really are two presidencies or if the two presidencies thesis only holds under certain conditions.

Sigelman (1979), in the first major challenge to the two presidencies thesis, argues that Wildavsky's methodology, using box score votes, was flawed and that one must limit the analysis to key votes on major issues. Sigelman concludes that the two presidencies thesis does not exist empirically when one excludes routine roll call votes that are, in his estimation, meaningless for determining whether the president is granted greater latitude by Congress on foreign policy issues. Disagreements with Wildavsky's methodology continued in several later studies.

In an examination of what they term conflictual roll call votes, Fleisher and Bond (1988) find that the two presidencies phenomenon exists only for Republican presidents. They argue that this is because Democrats are more likely to support Republican presidents on issues of foreign policy than vice versa. They also find that on the foreign policy votes they deemed as important, the evidence in support of the two presidencies thesis disappears entirely. It has also been argued that support for presidential policy initiatives, both foreign and domestic, has become increasingly partisan since the 1980's, thereby erasing any two presidencies phenomenon that may have previously existed (Fleisher, Bond, et. al 2000). Other studies have extended, and found support for, this methodology and conclusions regarding the lack of evidence for the two presidencies thesis (Schraufnagel and Shellman 2001).

Not all of the literature published after Wildavsky's article disagrees with his findings regarding the two presidencies, however. Canes-Wrone, Howell, and Lewis (2008) argue that Congress has institutional incentives for allowing the president leeway in making foreign policy. They hypothesize that this freer hand on foreign policy is sometimes given to the president through inaction on the part of Congress, thereby making analysis of roll-call votes ineffective for detecting the presence of the two presidencies. To test this theory, they conduct an analysis in two areas, one that Congress can delegate (agency creation), and one it cannot (budgetary appropriations). They find evidence that the president does have more influence over foreign policy and, therefore, argue that the two presidencies thesis is valid.

Overall, the inconsistency in the findings on the two presidencies thesis results from a lack of recognition of the complexity of the relationship between the president and Congress. It is possible that the existence of the two presidencies is issue-specific and therefore, much like

with executive orders, broad categorizations do not reveal the mechanisms at work. This study will be a valid test of the two presidencies thesis as it will be evaluated in a specific area with carefully designed categories that will allow for comparison across types of executive orders.

Methodological Approaches

Mayer (2010) points out that unlike the normative approach to studying the presidency that was dominant in the bargaining theory literature, the unilateral power school has taken a more empirical approach to the study of the presidency. However, despite taking a more data-driven approach than the bargaining theory based studies that came before it, the unilateral powers literature has failed to operate in a rigorous and theoretically consistent manner (Moe 2009). The lack of empirical rigor in the field has led to mixed findings regarding the impact of multiple variables such as divided government, public approval and partisan difference between the president and Congress on the president's decision to issue executive orders. The most significant reason for the mixed findings is the variety of ways in which executive orders have been defined and measured. In this section, I will examine the various methodological approaches that political scientists have taken.

One of the earliest works on the use of executive orders by the president was *By Order of the President* (Cooper 1986). In this article Cooper argues that through the use of unilateral power, presidents have greater power than is traditionally recognized but warns that this expanding power is a threat to constitutionally based administrative law. Cooper makes two primary arguments in his article. The first is that executive mandates have become so wide ranging in their usage that they must be viewed as "mechanisms of governance" (Cooper 1986,

234). The second is that extensive use of executive orders represents an attack on public administration by the president. Cooper (1986) views the use of executive orders as an attempt by presidents to circumvent the Constitution-based system of law. This second concern demonstrates the ties that Cooper's work has to Neustadt's view of the president as a clerk, and thusly, the early ties between the bargaining model and unilateral model of presidential behavior. Although Cooper is recognizing power beyond persuasion he is not comfortable with its use and argues for limitations on the president's use of unilateral action. Cooper does not call for the abolition of executive orders, but rather that they be used carefully and only when needed.

Krause and Cohen (1997) examined the annual issuance of executive orders from 1953 to 1994 to determine what factors lead a president to issue an order. Their theoretical approach was to account for both the legislative environment and the institutional composition of the presidency, while also factoring in what they termed "public prestige". In constructing their dependent variable, they aggregated the number of annual executive orders but excluded those they deemed to be ceremonial or cultural in nature. Their statistical approach, which is common to many of these studies, is to model their estimation using negative binomial distribution and Poisson regression. They find that party seat margin in Congress is a significant predictor of the use of executive orders in that as the president's party gains more seats in the House, he will issue more executive orders. They find the inverse to be true for the Senate. In terms of public prestige, they find that presidential popularity is not a significant predictor of unilateral action, but that a rise in the public's dissatisfaction with the economy results in the issuance of more executive orders. Krause and Cohen argue that this finding demonstrates that the institutional approach is not completely accurate and that there are other factors to consider. What their model

does not take into account, however, is the president's ability to calculate potential political gains and losses as a result of his actions.

Deering and Maltzman's (1999) strategic model is designed to account for the president's anticipating the consequences of his actions when deciding whether to issue an executive order. Unlike other studies (Krause and Cohen 1997; Mayer 1999) that argue against the strategic model, Deering and Maltzman argue that the president does take advantage of having executive orders at his disposal when facing a hostile Congress. An important caveat to their finding is that presidents only issue executive orders in this manner when they are fairly certain Congress will not overturn them via legislation. The dependent variable in their model is the total number of executive orders issued annually from 1946 to 1994.

To determine when a president is most likely to face having an order overturned, Deering and Maltzman (1999) use a veto pivot model to calculate the ideological distance between the president and the veto pivots in each chamber of Congress. The second aspect of their ideological model is the relationship between the president and legislative leaders. To calculate the ideological distance between the president and the median members in Congress, they use the absolute value of the difference of each party's W NOMINATE score. Using this method, they conclude that divided government does not predict an increase in the use of executive orders but the ideological distances described above do. In sum, their argument is that presidents strategically issue orders to circumvent Congress, but the president's decision to issue an executive order, "depends upon both his positive power to get legislation enacted by Congress and his negative power to stop legislation overturning such an executive order" (Deering and Maltzman 1999).

Mayer (1999; 2001) argues that Neustadt's behavioral approach to the study of the presidency has gone too far in depicting the executive branch as weak. In Mayer's estimation, prior research "has mistakenly concluded that executive power generally and executive orders in particular are not important to presidents" (Mayer 2001, 22). Mayer contends that the previous literature on the subject lacks an accurate perspective on executive orders. Mayer characterizes executive orders "as an indicator of executive flexibility and initiative in policymaking" (Mayer 1999, 450). Starting with this viewpoint, Mayer attempts to account for variation in how presidents take advantage of the activist nature of the executive office. Mayer argues that ultimately Democratic presidents, because they believe in a larger role for government, will issue more executive orders.

Mayer analyzes a sample (N=1,028) of executive orders issued from 1936 to 1999 (approximately 5,800 orders were issued in that time period). He disaggregates them into categories of executive branch administration, civil service, public lands, defense and military policy, foreign affairs, war and emergency powers, labor policy, and domestic policy. Mayer then isolates significant orders by considering whether they were subject to attention by the press, attention from other political actors/institutions such as congressional hearings, whether scholars referred to the order as important, whether presidents themselves deemed it important, whether the order created an institution with policy implications, and whether the order resulted in litigation. The weakness of this approach is that Mayer is relying on a representative sample of orders and then dividing them into a large number of categories. This approach lacks the parsimony of a simple division such as foreign policy and domestic policy executive orders or major and symbolic executive orders.

Mayer (1999; 2001) finds that divided government does not have the expected impact on the number of executive orders issued by the president. For a majority of time, the impact of divided government was no different than measuring the difference between Republican and Democratic presidents due to the fact that the Democrats controlled Congress for much of the time period that these studies covered. For those presidents who faced both unified and divided government during their terms (Truman, Eisenhower, and Clinton), the results show no effect for Truman and an increased number of executive orders for Eisenhower and Clinton during times of unified government.

What Mayer (1999; 2001) does find is that the overall political environment (approval ratings, campaigning, where in the term the president is), not divided government, is predictive of the number of orders that a president will issue. He also finds that at the end of a term, or during periods of reelection, there is an uptick in the number of orders issued. Low approval ratings also predict increased use of executive orders. He argues that these findings suggest that the president can use executive orders to set an agenda and move Congress and the courts in his preferred policy direction. Presidents, in Mayer's estimation, are, "less dependent on personality or powers of persuasion than on the office's formal authority" (Mayer 2001, 224) when it comes to affecting policy.

Mayer and Price (2001) use a similar approach to Mayer (1999; 2001); however, they exclude indicators for each president because their interest is in reviewing the "larger contours of the institution" (Mayer and Price 2001, 378) more so than individual presidential action. Their results essentially mirror Mayer's results with the exception of finding no evidence of party difference in the issuance of executive orders.

Marshall and Pacelle (2005) examine the use of executive orders by the president to test whether the two presidencies thesis remains a useful concept for understanding presidential behavior. Their analysis covers the time period of 1953 to 1997. Marshall and Pacelle examine the use of executive orders in both domestic and foreign policy areas to test their hypothesis that the two presidencies thesis is still valid, but only for understanding specific presidential behaviors. They include a variable measuring the presence of divided government, however their primary independent variable for testing the two presidencies thesis was the percentage of House and Senate seats that the president's party held. They estimated two models; one with all of their independent variables included and one with the House and Senate seat variable excluded. In the model with all independent variables included, divided government was shown not to be significantly predictive of the issuance of either foreign or domestic policy centered executive orders. However, when they estimated the model excluding the House and Senate seat variable, divided government showed signs of significance in the foreign policy arena. This finding warrants further exploration of the impact of divided government on the issuance of executive orders across foreign and domestic policy.

The literature on the unilateral presidency has resulted in mixed findings due to incomplete measuring of both the types of executive orders issued and ideological gaps between the president and Congress (Fine and Warber 2012). Fine and Warber (2012) attempt to reconcile the differences between those studies that find that presidents issue more orders to bypass an ideological gap with Congress (Deering and Maltzman 1999) and those studies that find that the issuance of executive orders increases with unified government (Howell 2003; Krause and Cohen 1997; Mayer 1999; 2001). In Fine and Warber's estimation, divided

government should theoretically matter due to its being, “harder for presidents to assemble a sufficient number of votes to achieve policy success...and the policy preferences of presidents and legislators are more likely to diverge” (Fine and Warber 2012; 259).

Fine and Warber (2012) construct their executive order dependent variable by content analyzing every available executive order from 1953 to 2008 and classifying it as either routine, symbolic or major. They define major executive orders as those, “either departing from the status quo of a specific policy that has already been implemented, or interpreting and implementing legislation that diverts from the original intent of Congress” (Warber 2006, 143)¹. Like Mayer (1999; 2001), Fine and Warber use monthly data. To measure the ideological separation between the president and Congress, they use the Common Space DW-NOMINATE scores to calculate the absolute distance between the median member of the Senate and the president. The median House member score is not included in the model due to issues of multicollinearity. They chose the Senate based on Deering and Maltzman (1999) demonstrating that the Senate and president distance matters more to the prediction of the presidents use of executive orders than the House distance (Fine and Warber 2012).

The results of Fine and Warber’s study demonstrate that divided government alone is not enough to predict an increase in the use of major executive orders. However, as the ideological distance between the president and Congress increases, there is a significant increase in the use

¹ This definition is taken from Warber’s (2006) earlier book and applied to the updated research design of Warber and Fine (2012).

of executive orders. They also find that presidential approval has a significant inverse impact on the use of executive orders.

One conclusion that can be drawn from the totality of these studies is that divided government alone is not enough to explain a shift to prerogative politics by the executive branch. The factors that have led to the unilateral presidency are much more nuanced than that. Although there have been many important, and consistent, findings across these studies, there remains much room for debate. Are presidents strategic actors who take advantage of times of congressional gridlock to implement policy through the use of executive orders? Or do presidents take advantage of favorable times, such as unified government, when there is little risk of challenge to their executive orders?

These questions remain largely unanswered due to the lack of consistent measurement of key concepts in the prior studies. As this review has demonstrated, even when scholars agree on dividing executive orders into groups demarcating those that are significant from those that are not they have not taken a consistent approach. Some have used content analysis, while others have relied on media coverage or congressional attention. The content analysis approach allows for a more direct evaluation of the content and purpose of the orders, but is subject to the coder's subjective opinions. The media analysis approach allows for a more objective outside opinion, but does not allow for the nuance that a researcher can glean from direct analysis of the text of the orders. Addressing some of these inconsistencies is what informs the current research question of this present study.

CHAPTER THREE: METHODOLOGY

This chapter will detail the four hypotheses that have been developed based on the theoretical findings discussed in the literature review. After setting forth the hypotheses this chapter will provide a detailed description of the methodology that will be used to test the four hypotheses. Hypotheses 1 and 3 are designed to determine whether the methodological updates this study undertakes result in similar findings to prior studies. Hypotheses 2 and 4 then extend the specification and estimation of the models to the original foreign policy-based and domestic policy-based data that was developed for this study.

Hypotheses

Following the foundational logic of the unilateral power model, the primary theoretical proposition of this study is that when faced with strong legislative opposition, presidents will resort to unilateral actions, such as issuing executive orders, to achieve their policy goals. As the review of prior literature on this topic reveals, studies operating under the same premise have reported mixed findings. The inconsistencies in these findings create an empirical challenge to the basic presumptions of the unilateral power model. Namely, there is a questions as to whether the theory is flawed or that the specifications of prior models have failed to adequately model presidential behavior in relation to the use of unilateral power. This study argues that the unilateral power model is empirically valid and that the mixed findings have been a result of measurement issues.

Although divided government alone has generally been shown not to be predictive of an increase in the issuance of executive orders, there have been findings to support the idea that, to

some degree, divided government matters to this issue. The literature on this topic has made attempts to define the parameters in which the president will take unilateral action and what role divided government has in defining those parameters. The lack of scholarly consensus regarding the extent of the effect of divided government on unilateral action leaves open the question of under which circumstances divided government impacts the issuance of executive orders. The goal of this study is to contribute to the current literature by further defining the constraints and obstacles that lead presidents to take unilateral action by evaluating their use of executive orders in foreign and domestic policy under both unified and divided government.

The president's relationship with Congress has historically differed on issues of domestic and foreign policy. Presidents are typically able to garner comparatively more congressional support for their foreign policy initiatives while they struggle to gain congressional support for their domestic policies, regardless of whether they are operating under unified or divided government (Wildavsky 1966; 1998). This is an important concept to keep in mind when analyzing presidential use of unilateral actions. Because unilateral power theory posits that presidents will use executive orders to circumvent roadblocks in Congress, it is necessary to examine executive orders in the context of domestic and foreign policy; in that if presidents face less resistance from Congress in relation to their foreign policy initiatives, under both unified and divided government, then measuring executive orders monolithically may skew the findings as they relate to the impact divided government. Conversely, subdividing executive orders into overly-specific topical categories lacks parsimony and, ultimately, the ability to define the theoretical circumstances under which the president will resort to unilateral action. Maintaining

categories, such as foreign and domestic policy, that are specific but broad allows for evaluating the “larger contours” of presidential action that Mayer and Price argue in favor of (2001).

By isolating foreign and domestic policy orders as separate variables, it is possible to test whether presidents issue more executive orders under divided government, in a policy area (domestic policy) that is more likely to be contentious, than in a policy area where they typically meet less resistance from Congress (foreign policy). If it holds true that more domestic policy orders are issued under divided government than unified government, it would lend credence to the basic assumptions of the unilateral powers model. If the findings are as expected, they would also demonstrate that the two presidencies thesis is to some extent empirically supported, at least in this area of presidential action. Such a finding regarding presidential issuance of executive orders would accord with recent scholarship on the two presidencies thesis, which argues that the two presidencies thesis cannot be detected across all domains of presidential behavior but rather, applies to specific areas of presidential action (Canes-Wrone, Howell, and Lewis 2008).

However, simply dividing the executive orders by foreign and domestic policy is not sufficient, alone, for testing the assumptions of the unilateral powers model. To more effectively gauge the impact of divided government on the use of executive orders, they must be divided based on their substantive merits. Prior studies have accomplished this by categorizing them as major, routine, and symbolic executive orders (Fine and Warber 2012; Mayer 1999; 2001). That methodology will be followed in the current study, because doing so indicates, if a president is acting strategically, there are likely different circumstances under which they will issue different types of executive orders. For instance, presidents that are operating under divided government may issue a larger number of major policy orders; whereas, those facing unified government may

issue more routine and symbolic orders. When facing divided government, it is unlikely that presidents would want to risk provoking Congress by issuing a large number of relatively unimportant executive orders. Rather, the president would likely want to reserve the use of executive orders for pushing through major policy initiatives or reframing the debate over a major policy issue (Fine and Warber 2012; Mayer 1999; 2001). Under unified government, the issuance of executive orders, regardless of type, should not be a significant concern for the president.

This study hypothesizes that the president will issue more major domestic policy centered executive orders under divided government. By categorizing all executive orders as a single entity, or disaggregating them into overly specific categories, prior studies have not detected the difference between the president's use of foreign and domestic policy-based executive orders. This shortcoming has led, in part, to the mixed results noted above. The first two hypotheses in this study are related to this concept.

H₁: Presidents will be more likely to issue major executive orders during periods of divided government than routine and symbolic orders.

H₂: Presidents will be more likely to issue major domestic policy-based executive orders during times of divided government than foreign policy-based executive orders.

Presidential and congressional preferences are also an important dynamic that needs further study. Although the strictest form of the unilateral powers model does not account for factors such as presidential psychology and personal preferences I adopt here the less strict approach that many of the studies in this field have taken. Presidential policy preferences, and the political environment, are important factors in understanding how and when the president will engage in unilateral action (Deering and Maltzman 1999; Fine and Warber 2012; Mayer

2010; Moe and Howell 1999; Waterman 2010). Taking a rational choice approach to the unilateral powers model allows for a more detailed analysis of presidential unilateral action than simply analyzing divided, or mixed, government. In this approach, the ideological position of the president, in relation to the Congressional veto pivots and median chamber members, is likely to impact his decision making process when determining whether to act unilaterally. This approach to the question of when presidents will act unilaterally informs the second set of hypotheses.

H₃: The wider the ideological gap is between the president and median chamber members, the more likely the president is to issue major executive orders.

H₄: The wider the ideological gap is between the president and median chamber members, the more likely the president is to issue domestic executive orders.

Consistent with the unilateral powers theory, I expect to find that presidents will issue major executive orders in a strategic manner in order to overcome legislative obstructions resulting from divided government and ideological gaps. By testing for different presidential approaches to the issuance of domestic and foreign policy centered executive orders, this study will add to the literature that has already examined the difference between major, routine, and symbolic executive orders. Because unilateral power theory posits that unilateral action is taken to circumvent institutional barriers, namely Congress, it is reasonable to suspect that presidents will use their unilateral tools more often in the domestic policy sphere, which tends to be more antagonistic, than the foreign policy sphere where they traditionally meet less congressional resistance.

Variables and Methodology

Construction of the dependent variables for this study was informed by prior studies before adding a new factor, domestic and foreign policy, to the specification. Many of the prior

studies on this topic employ a dependent variable that consists of the number of either the monthly or yearly executive orders issued by the president (Deering and Maltzman 1999; Fine and Warber 2012; Mayer 1999, 2001; Mayer and Price 2002; Warber 2006). Utilizing a dataset compiled by Warber (2006; Fine and Warber 2012) this study subdivides the executive orders into two categories; the first category is all major executive orders issued on a yearly basis; the second category combines all routine and symbolic executive orders into a single annual count. Other studies have similarly divided executive orders, but did so using only a sample of orders (Mayer 1999, 2001; Mayer and Price 2002). Although the sampling methods used in the aforementioned studies are quite sophisticated, this study follows Warber's (2006; Fine and Warber 2012) method of content analyzing all executive orders the president issued between 1953 and 2008. Content analyzing all of the executive orders in the chosen timeframe increases the findings validity because there is less chance of sampling error.

There are several methodological reasons for subdividing the dependent variable into significant and routine/symbolic orders. First, doing so allows for a clearer depiction of the rise of unilateral activity by the president that is more accurate than if the orders were categorized as a single unit. During the earlier years covered by this study, there were many aspects of routine government activity (that are now handled by governmental agencies) that were conducted by executive order. Therefore the total number of executive orders issued by the president is skewed upward in the earlier parts of the twentieth century (Howell 2003). If one were to graph the total number of executive orders it would reflect a precipitous drop in the number of executive orders as time goes on. However, Howell (2003) has shown that the number of significant executive orders issued by the president has increased over the same time period that the total number of

executive orders has decreased. Second, because this study argues that presidents make choices regarding what type of executive orders to issue based on the extent of resistance they may face from Congress, it is necessary to divide the orders into specific categories that provide a clearer test of the strategic model. In other words, symbolic and routine executive orders may be impacting the results when major policy based orders are what truly matter to the theory (Fine and Warber 2012).

The dependent variable in this study is further disaggregated based on whether the executive order in question pertained to foreign policy or domestic policy. To accomplish this, all executive orders issued between 1953 and 2008 were content analyzed to determine if they should be coded as related to foreign or domestic policy. The text of the executive orders is available online through The American Presidency Project (Peters 2015). In the case of any potential overlap, such as with issues of immigration which can impact both foreign and domestic policy, it was decided which policy area that the order most impacted and coded as belonging to that category. This approach resulted in six categories for the domestic/foreign policy dependent variables: domestic policy, domestic major, domestic minor, foreign, foreign major, and foreign minor executive orders. The domestic minor and foreign minor categories consist of the combined symbolic and routine orders.

To test hypotheses one and two the first independent variable is coded to capture the presence of divided, unified, or mixed government. The variable is coded as unified government when the president's party controls both chambers of Congress. For the purposes of this study, divided government means only those situations in which the party that is different from the president's party controlled both chambers of Congress. When two different parties control each

chamber of Congress, the variable is coded as mixed government. A simple dummy variable for divided and unified government was not used because it has been shown that the president's strategy changes depending on whether he is facing pure divided or mixed divided government (Binder 2003; Godwin and Ilderton 2014).

In relation to hypothesis one the theoretical expectation for the divided government variable is that the coefficient for divided government will have the strongest explanatory power when presidents issue major executive orders. The divided government coefficient is expected to be positive. Consistent with the theory, mixed and unified government should have relatively less influence, if any, over the issuance of executive orders by the president. For hypotheses two, the expectations are essentially the same with the difference being that the greater impact should be seen in the issuance of major domestic policy executive orders rather than major foreign policy executive orders because there is an expectation that the president has comparatively greater support in the foreign policy arena so he would not need to resort to unilateral action.

Because hypotheses three and four posit that the ideological gap between the president and the median chamber members is an important explanatory factor in understanding presidential use of executive orders, an independent variable consisting of Bailey's ideal point estimates (Bailey 2007; 2011) is used. This variable was calculated by using the Bailey score to determine the absolute value of the distance between the president and the median chamber members. Bailey's ideal point estimates are designed to be comparable across both time and institution making them appropriate for this type of study (Bailey 2007; 2011). The temporal and spatial comparability of the Bailey scores make them preferable to other preference measurements, such as NOMINATE scores (Carroll et al. 2013) or ADA scores (Groseclose,

Levitt, and Snyder 1999), which suffer from a lack of comparability across either time or institution (Bailey 2007; 2011). The other measurement scores are useful for certain types of research questions however; for this study, which is concerned with the impact of institutional relations, over time, on presidential executive action, the Bailey measurement is most appropriate.

The primary expectation for the model testing hypothesis three is that the coefficient for the ideological distance variable will be positive and significant in relation to the issuance of executive orders, meaning that as the ideological gap between the president and the median chamber member increases, the use of major executive orders will increase. This expectation arises from the theoretical assumption that the president will use major executive orders to circumvent, or spur action by, a hostile Congress. It is expected that this coefficient will not be statistically significant in relation to the issuance of routine/symbolic orders.

The expectations for hypothesis four are as follows; the coefficient for the distance variable will be positive and statistically significant in relation to the issuance of major domestic policy-based executive orders. The coefficients in relation to foreign policy-based domestic orders are not expected to be statistically significant. This prediction is based on the idea that the president is usually able to garner comparatively higher levels of support for his foreign policy agenda regardless of the presence of unified, divided, or mixed government. Because Congress tends to support the president on foreign policy, he need not use executive orders of this type to circumvent Congress. However, because domestic policy is a more contentious arena, particularly under divided government, it is expected that the president will have to resort to the

use of executive orders when facing a Congress that is not ideologically aligned with his policy preferences.

A variety of control variables based on prior studies and findings will be included in the models as well. The first control variable is presidential approval rating. The approval ratings were obtained from The American Presidency Project website, which contains all Gallup poll approval ratings for the time period covered by this study. Because this study uses a yearly event count variable as the dependent variable, the approval rating variable was calculated by taking the average approval rating for the year. This approach lacks the specificity that being able to use monthly data would provide; however, because of the nature of the dependent variable, this methodology was necessary.

Presidential approval ratings have been included as a variable because prior research has shown that they impact the president's decision to issue an executive order. Unfortunately, the results have been mixed. Some researchers have found that the use of executive orders increases as approval ratings also increase (Krause and Cohen 1997); whereas, others have found the inverse to be true (Deering and Maltzman 1999; Mayer 1999; 2001; Mayer and Price 2002). Despite these inconclusive findings, it is clear that there is a relationship between approval ratings and presidential use of executive orders. It may be that presidents will strategically take advantage of an increase in popularity to take unilateral action because they believe that Congress will be less likely to challenge the actions of a popular president. Conversely, presidents with declining approval ratings may be tempted to use unilateral action on issues salient to the general public to demonstrate that they are serious about "getting things done".

A dummy variable measuring the president's party has been included as well. This variable is coded "0" for all Republican presidents and "1" for all Democrats. This control variable has been included because prior studies have demonstrated that the president's party influences the number of executive orders the president issues. There are varying theories as to why but they all arrive at the same conclusion; that Democratic presidents issue more executive orders than Republican presidents. One explanation has been that Democrats, in general, prefer larger government than Republicans and, therefore, use more executive orders (Deering and Maltzman 1999; Mayer 2001; Warber 2006). Mayer (2001) also argues that testing for the impact of divided government on the use of executive orders and testing for the effects of the president's party affiliation are essentially the same thing. He found the results to be indistinguishable from one another. Fine and Warber (2012) argue that Democratic presidents have a more diverse base of support and, therefore, may use more executive orders than Republican presidents simply to acknowledge the concerns of different constituencies.

A control variable has been included for major events, such as the September 11, 2001 attacks on the World Trade Center and the Pentagon, to account for periods of time when presidents may be more likely to issue executive orders regardless of their relationship with Congress. The variable is coded "0" for years in which no major event, as defined in this study, has taken place and is coded "1" for those years in which one has taken place. The years that are coded "1" are as follows: 1953 (Korean War), 1964-1973 (Vietnam Conflict), 1991-1992 (Persian Gulf War), 2001-2009 (9/11, Iraq War, and Afghanistan War). This list is not inclusive of all major events that took place during the years this study covers, but rather those that were likely to be associated with an increase in the use of executive orders.

Individual models were estimated for each of the dependent variables designed to test the strategic model within the context of the two presidencies thesis. The dependent variables are all count variables, so negative binomial regression was used to estimate them (Cameron and Trivedi 1998). Negative binomial regression is a more appropriate test of count data than Ordinary Least Squares regression or Poisson regression when over-dispersion is present in the data because it accounts for the fact that the conditional variance of the dependent variable is greater than the conditional mean (Cameron and Trivedi 1998; Jackman, Kleiber, and Zeileis 2008). Over-dispersion in the count data in this study was confirmed using the *dispersiontest* command in the AER (Zeileis 2008) package in R and the *odTest* command from the PSCL (Jackman 2008) package in R. Both tests confirmed that alpha was greater than zero, with p-values of zero; therefore, negative binomial regression was a more appropriate test than using a Poisson regression for all models.

CHAPTER FOUR: DATA ANALYSIS

This chapter begins with an evaluation of the descriptive statistics related to the hypotheses and theoretical expectations outlined in the previous chapters. After a short review of the descriptive statistics, the chapter moves on to describe the results of the negative binomial regressions that were estimated. Finally, the chapter will discuss the implications of these findings both in the context of this study, and the larger body of scholarly work on this topic.

Descriptive Statistics

Between 1953 and 2008, presidents issued a total of 3,055 executive orders. As seen in Table 1 (Appendix) there is variance in the total number of orders that each president issued varies dramatically. The numbers demonstrate a disparity in the total number of orders issued that appears to be influenced by factors other than total number of years in office. For instance, in a comparison of the presidents who served two terms G.W. Bush issued 286 total orders and Dwight D. Eisenhower issued 484 total orders. Bill Clinton and Ronald Reagan both issued a number of orders between Eisenhower and G.W. Bush with 364 and 381 total orders, respectively.

The significant decline in the total number of orders issued is partly indicative of the era during which each president served. Figure 1 demonstrates that there has been an overall decline in the total number of executive orders issued since 1953. However, as seen by comparing Figures 2 and 3, the decline in total orders can largely be attributed to a significant decrease in the number of symbolic and routine orders. The explanation for why symbolic and routine orders have declined so precipitously is fairly straightforward; as the bureaucratization of the executive

branch has increased, and executive orders have been used to delegate authority, there has been a corresponding decrease in the need for the president to handle routine administrative tasks via executive order (Deering and Maltzman 1999).

The number of major executive orders issued on an annual basis has not undergone as dramatic a change as the number of symbolic and routine orders; however the total number has clearly trended upwards over the 55 years covered by this study. That is the factor that leads to one of the central questions addressed in this study: specifically, why presidents are issuing more major executive orders while the total number of issued orders has declined.

Table 2 addresses the second central question, namely, whether there is evidence to support the two presidencies in how presidents have issued executive orders. Based on the total number of orders issued in each policy area (1,019 in foreign policy and 2,036 in domestic policy) this question warrants further exploration. This study seeks to determine if presidents are issuing fewer foreign policy orders because they have greater success in Congress when it comes to foreign policy or if there are other factors that would explain the disparity in the total number of orders issued.

Negative Binomial Regressions

Table 3 and Table 4 report the results of the models estimated to test hypotheses one and two. Column one in Table 3 shows the impact of the independent variables on the president's issuance of executive orders in general. Unlike prior studies, this study accounts for pure divided government by including a variable for mixed government. In relation to the issuance of all executive orders, divided government is the only statistically significant indicator of the

president's behavior. Under divided government, for each one standard deviation increase in the variable, presidents issue 21% fewer executive orders. The remainder of the columns in Table 3 report the results regarding specific categories of executive orders to determine if the president's decision to issue an executive order is affected by the type of order.

In column two, a model of the president's issuance of major executive orders by the president is specified. The findings regarding divided government are consistent with those of Fine and Warber (2012) in that there is no apparent impact. However, by taking the analysis one step further and including mixed government, the findings show that presidents are 48% more likely to issue major executive orders when their party controls one of the chambers of Congress. This finding suggests that the impact of the relationship between the president and Congress on the issuance of executive orders is much more nuanced than simple conceptualizations, such as divided and unified government, can explain. This finding is important because it supports that notion that ideology is an important factor to consider.

Column two also demonstrates that the president's party and approval ratings impact on the president's issuance of major executive orders. This is consistent with prior findings regarding these two variables (Deering and Maltzman 1999; Fine and Warber 2012; Mayer 1999, 2001). In this model, Democratic presidents are shown to be 57% more likely to issue major executive orders than Republican presidents while controlling for divided government. The coefficient for approval ratings is statistically significant and negative indicating that as the president's approval ratings increase there is less likelihood of his issuing an executive order. This particular finding could indicate that popular presidents are able to achieve more legislatively and, therefore, do not have to resort to unilateral action.

The estimated impact of the independent variables on the president's issuance of symbolic and routine executive orders is reported in column three. Unlike major executive orders, both divided and mixed government have a statistically significant negative impact. In times of pure divided government, presidents are 41% less likely to issue symbolic and routine executive orders. Under mixed government they are 63% less likely to issue symbolic and routine executive orders. The results indicate that, unlike with major executive orders, it is Republican presidents who are more likely to issue symbolic and routine orders. The coefficient for approval ratings is significant at the .06 level, so any conclusions drawn from that coefficient are tenuous; but may indicate that popular presidents issue more symbolic and routine executive orders.

Overall, the results reported in Table 3 demonstrate that use of the different types of executive orders is impacted by various factors; therefore, it is important to identify how presidential decision making differs, and is influenced, across executive order type. The division of executive orders into the major and symbolic and routine categories is an initial step to understanding this behavior. However, because there is reason to suspect that there are two presidencies (one for foreign policy and one for domestic policy) it is necessary to delineate foreign and domestic policy-based orders. Following the methodology of the first three models, the independent variables are first tested against the issuance of foreign and domestic policy-based executive orders. The independent variables are then tested against major executive orders in each policy area and minor (consisting again of symbolic and routine orders) executive orders in each policy area. These results are reported in Table 4.

For foreign policy executive orders, the only variables that reached conventional levels of statistical significance are those for divided government and major events. Both variable's coefficients are negatively signed, indicating that the president issues fewer foreign policy-based executive orders when facing pure divided government or when a major event has recently occurred. The finding that presidents issue 24% fewer foreign policy-based executive orders after a major event has occurred is an interesting finding. This may be indicative of bi-partisan unity during times of crisis, diminishing the need for executive orders. This is the same principle behind Brody's (1991) conception that in times of crisis opinion leadership, such as that in Congress, "will be unusually full of bipartisan support for the president's actions" (Brody 1991, 66). However, this is the only model in Table 3, or Table 4, in which the major event variable's coefficient estimate is statistically significant, so any conclusions drawn from this finding require further exploration to determine their theoretical value.

The findings in columns two and three of Table 4 have interesting implications for the findings in column one. They also further support the idea that it is important to evaluate specific aspects of presidential behavior in relation to the issuance of executive orders. The results indicate that the decline in foreign policy-based executive orders during times of pure divided government is explained by a decrease in the president's issuance of routine and symbolic foreign policy orders. Under pure divided government these minor foreign policy orders decrease by 48%; whereas the relative number of major foreign policy orders is unaffected. The decrease in the issuance of minor foreign policy orders extends to times of mixed government when presidents are 59% less likely to issue them. These findings support the notion that presidents use executive orders strategically. The fact that major foreign policy orders do not decrease under

divided or mixed government, but minor foreign policy orders do, could be a result of presidents not wanting to alienate the opposing party in Congress by issuing a large number of relatively meaningless executive orders. Presidents may be attempting to mitigate the perception that they are abusing their unilateral powers by saving the use of foreign policy-based executive orders for major issues when they confront divided or mixed government.

The only other coefficient estimates that achieved statistical significance in columns two and three also support that perception is an important factor. Democratic presidents are 41% less likely to issue minor foreign policy executive orders than their Republican counterparts. This could be a result of the idea that foreign policy is a Republican arena, so Republican presidents feel more comfortable issuing executive orders of all types in relation to foreign policy. The other perception-centered variable that is statistically significant, in relation to major foreign policy orders, is the president's approval rating. Consistent with the findings of Deering and Maltzman (1999), Fine and Warber (2012), and Mayer (1999, 2001), this variable indicates that an increase in presidential popularity coincides with the president's issuance of fewer executive orders. The prior studies were concerned strictly with major orders, but this study demonstrates that the trend extends to major foreign policy-based orders as well. Once again, it appears that popular presidents are able to achieve more through the traditional legislative process and do not have to resort to the strategic use of unilateral action.

The model's estimates reported in columns four, five, and six of Table 4 test the president's use of domestic policy-based executive orders in relation to divided and mixed government. Interestingly, none of the variables reach statistical significance for domestic policy-based executive orders. However, when subdividing those orders into major and minor

orders, it becomes clear why; the issuance of major and minor domestic policy executive orders varies significantly in opposite directions. Under mixed government, the president is 54% more likely to issue a major domestic policy executive order; whereas minor domestic policy executive orders decrease by 65%. The coefficient estimates under divided government are also in the opposite direction of each other; however, the coefficient for major domestic policy orders is not statistically significant. The model does show that under divided government presidents issue fewer minor domestic policy-based executive orders. As in all other categories it appears that when facing divided, or mixed, government the president will temper the use of symbolic and routine executive orders. Again, this could demonstrate a willingness to show restraint in the use of unilateral action so that it can be deployed as a strategic tool on issues of greater importance to the president's legislative goals.

A few other coefficients of interest in the model are the Democratic president variable and the approval rating variable. Democratic presidents are shown to be more likely to issue major domestic policy-based orders than Republican presidents, but less likely to issue minor domestic policy-based orders. The model and estimates also demonstrate that as presidential popularity increases, presidents issue fewer major domestic policy-based orders and more minor domestic policy-based orders².

Hypothesis one posited that presidents would be more likely to issue major executive orders under divided government than routine and symbolic orders. The findings in relation to

² Although the coefficient for minor orders is only significant at the .10 level the actual *p* value is .058; therefore, interpret this coefficient as having some meaning in the overall context of the study.

this hypothesis are mixed, but support the need to disaggregate executive orders into specific categories for comparison. Across all types of executive orders in this study there was a statistically significant decrease in the number of symbolic and executive orders under both divided and mixed government. The coefficient estimates for major executive orders, of all types, did not achieve conventional levels of statistical significance under divided government. So, under pure divided government, presidents clearly limit their use of unilateral action by decreasing the number of minor executive orders they issue. However, in terms of major orders there appears to be no impact on their behavior either way. Under mixed government, the president's behavior is slightly different in that there is a definite statistically significant increase in the use of major executive orders. These mixed findings suggest that perhaps ideology, rather than simple divisions such as unified and divided government, is key to understanding when presidents will take unilateral action. This will be addressed in the review of the results from Table 5 and Table 6.

The findings related to hypothesis two are also mixed and supportive of the need for more nuanced analysis. The results demonstrate a significant decrease in the use of foreign policy-based executive orders under divided government; however, this decrease appears to be largely explained by the decrease in the use of minor foreign policy orders. The coefficient estimate for major foreign policy orders was not statistically significant. Divided government appears to have no impact on domestic policy orders other than a decrease in minor orders of that type. Under mixed government, there is an increase in the use of major domestic policy orders, but no discernible impact on the use of major foreign policy orders. Overall, the results do not definitively support or reject hypothesis one or two but rather demonstrate that further evaluation

is needed to understand the conditions under which a president will resort to the use of unilateral action.

Table 5 and Table 6 report the results of the models estimate to test the impact of ideology on the president's use of unilateral action. This was accomplished by including a variable to capture the absolute value of the ideological distance between the president and median Senate member. The Senate was chosen because prior studies have established that inclusion of both the median House and Senate members resulted in issues of multicollinearity (Deering and Maltzman 1999; Fine and Warber 2012). Of the two chambers of Congress, the distance between the median Senate member and the president has been shown to be of more significance than the distance between the president and the median House member (Deering and Maltzman 1999); therefore, the Senate member variable was employed.

The inclusion of the ideological distance variable mutes the impact of divided government on the presidential use of executive orders when considered in their totality. Whereas in Table 3 the divided government coefficient estimate was negative and statistically significant at the .05 level, the inclusion of the ideological distance variable drops its significance into the .10 level as seen in column one. None of the variables in column one of Table 5, including ideological distance, achieves statistical significance. However, a review of the results reported in columns two and three reveal that the lack of significance in column one can be explained by the fact that there is a vast difference in the use of different types of orders under different circumstances.

As the ideological distance between the president and the median chamber member increases, the use of major executive orders increases by 47% and the use of symbolic and

routine orders decreases by 38%. The stark difference in the use of these different types of executive orders cancel each other out and hide their significance when executive orders are combined as they are in column one. Clearly, as the ideological distance between the president and the median Senate member increases, the president takes a more aggressive unilateral approach to major issues and lessens the use of minor orders. These results support prior findings that suggest the president may use major executive orders as a means to accomplish legislative priorities in the face of an ideologically hostile Congress (Deering and Maltzman 1999; Fine and Warber 2012).

The coefficient results reported in columns two and three also show that under divided government the president will issue fewer symbolic and routine executive orders, and there is a null finding for major orders. Mixed government is similar to ideological distance in that for a one standard deviation increase in mixed government, the president is 36% more likely to issue a major executive order and 58% less likely to issue a minor order. Democratic presidents are shown to be more likely to issue major executive orders than Republican presidents, while the opposite is true for symbolic and routine orders. Based on the results of this model, presidents are less likely to issue major executive orders when their approval ratings are high.

Hypothesis three suggests that as the ideological gap between the president and the median chamber member widens there is an increase in the issuance of major executive orders. For the reasons outlined above, this assumption was tested using the absolute value of the distance between the president and the median member of the Senate. The results support this hypothesis as not only did the number of major executive orders increase as the ideological gap widened, but the use of symbolic and routine orders decreased. In the divided government

model, the variable indicating the presence of mixed government represented a 48% increase in the use of major executive orders. The inclusion of the ideological distance variable has a dampening effect on the influence of mixed government as the latter's explanatory power is decreased by 11% when controlling for ideological distance. This finding further supports the idea that the political environment impacts the president's issuance of executive orders.

The models in Table 6 test the policy area based assumptions associated with hypothesis four. Foreign policy-based executive orders, in their totality, are not shown to be impacted by ideological distance; however, much like executive orders in general the results are impacted by differences in the president's issuance of major and minor foreign policy-based orders. For a one standard deviation increase in the ideological distance between the median member of the Senate and the president, there is an 80% increase in the use of major executive orders. In contrast, when that same one standard deviation increase occurs in the ideological distance, there is a 42% decrease in the use of minor foreign policy-based executive orders. When addressing foreign policy, presidents clearly reserve the use of executive orders for major policy initiatives when facing greater ideological opposition.

Divided government is shown to be associated with a decrease in the use of foreign policy executive orders by 34%. This finding is similar to the 35% decrease in the model without the ideological distance variable. Again, much like in the model reported in Table 3, this overall decrease is driven by a significant reduction in the use of minor foreign policy executive orders under divided government (which decrease by 46% for each one standard deviation increase in divided government). Mixed government also is associated with a decrease in the use of

symbolic and routine foreign policy-based executive orders, but has no impact on the use of major foreign policy-based orders.

The pattern established with total executive orders and foreign policy-based executive orders continues with domestic policy-based executive orders; but the statistical significance levels being above conventional thresholds do not allow for any conclusions to be drawn confidently. The ideological distance variable is not statistically significant in relation to the aggregated domestic policy-based executive orders. For major domestic policy-based orders, the coefficient estimate is positive with a p value of .06. For minor domestic policy-based orders, the coefficient is negative with a p value of .07. It is possible that the ideological distance between the president and the median Senate member impacts the president's use of domestic policy-based executive orders but the coefficient estimates do not meet the traditional .05 level of statistical significance. Considering that ideological distance has a significant impact on the use of executive orders in general and in foreign policy-based executive orders, it is reasonable to conclude that it would have some impact on the president's use of domestic policy-based orders that is why, despite higher p values, the major and minor domestic executive order variables warrant further evaluation.

Major domestic policy-based executive orders are not impacted by divided government, but are shown to increase by 8% under mixed government. The weak relationship between the ideological distance and major domestic policy-based executive orders variables combined with the results for the divided government and mixed government variables could indicate that presidents are very careful about using executive orders in this policy area. Perhaps rather than increasing their use of major domestic policy-based orders as Congress is more hostile, they

increase the use of this type of order when facing a moderately hostile Congress in which they still have some support. The model demonstrates that the relationship between the president and Congress in this policy area is quite complex and warrants further exploration. Unfortunately, the current model lacks the explanatory power to fully model that relationship. In the conclusion, some suggestions are made as to how future studies could accomplish this.

Unlike major domestic policy-based orders, the use of minor domestic policy-based orders is impacted by divided government. For one standard deviation increase in divided government, there is a 35% decrease in the use of minor domestic policy executive orders. Under mixed government, the use of these orders decreases 61%.

Major domestic policy-based executive orders are also shown to be used more by Democratic presidents than Republican presidents. Conversely, Democratic presidents are comparatively less likely to issue symbolic and routine domestic policy-based executive orders. As was the case with major executive orders and foreign policy-based orders presidents are less likely to issue major domestic policy-based orders when their approval ratings are high.

The findings in these models do not support hypothesis four. The theoretical expectation was that as the ideological gap increased between the president and the median chamber member, the president would be more likely to issue domestic policy-based executive orders. Not only did the data reveal that major executive orders increased in both policy areas, but that the use of major foreign policy-based executive orders reached relatively higher levels of statistical significance. This is an unexpected finding because it is assumed that Congress generally acquiesces to the president on foreign policy matters. It has also been argued that the two presidencies thesis applies to only Republican administrations (Fleisher and Bond, 1988);

however, that is not the case here. The presidential party variable did not reach conventional levels of statistical significance (unlike in the models for major executive orders and major domestic executive orders), indicating that both Republican and Democratic presidents contribute to this unexpectedly heightened use of foreign policy-based orders. The increased use of foreign policy-based orders by presidents of both parties when facing a comparatively larger ideological gap indicates that presidents will use unilateral action, regardless of policy area, when facing a hostile Congress.

Implications

Within the context of prior findings, the current findings support the theoretical expectation that executive orders must be carefully categorized based on their individual characteristics, rather than considered monolithically, in order to reveal how and when presidents will use them. By extending Warber's (2006) major, symbolic, and routine categories to specific policy areas this study supports some prior findings while demonstrating that others were likely a result of underspecified measurements of the concepts being studied.

In most cases, the underspecified measurements were the result of creating variables that measured executive orders too broadly, thereby obscuring the underlying processes that influence presidential decision-making in this area. For instance, Marshall and Pacelle (2005) argue that the two presidencies thesis applies to the strategic use of executive orders but the present study demonstrates that accounting for major and minor executive orders negates the two presidencies argument. By accounting for major and minor orders, it is shown here that the use of both major foreign and major domestic executive orders increases when the president faces

legislative opposition. In fact, major foreign policy orders increase to a greater degree than major domestic policy orders when the ideological gap between the president and the median Senate member increases. This finding runs counter to the idea that presidents are generally given greater leeway in foreign policy by Congress and, therefore, would not need to resort to unilateral action, even when operating in an adverse political climate. It may be true that the two presidencies thesis is empirically valid for certain areas of government operations, such as budgetary appropriations and agency creation (Canes-Wrone, Howell, and Lewis 2008) however, in relation to executive orders, this study demonstrates that the two presidencies thesis is not empirically supported.

A key puzzle the prior studies on the president's strategic use executive orders has addressed is whether divided government increases the likelihood of a president acting unilaterally. Divided government has generally been shown not to be predictive of an increase in the use of executive orders (Deering and Maltzman 1999; Mayer and Price 2002). However, there have been some findings that indicate divided government may matter under certain limited circumstances (Fine and Warber 2012; Marshall and Pacelle 2005). This study confirms the findings of Fine and Warber (2012) that divided government exerts a negative influence on the total number of executive orders a president issues, but that the finding is driven by the significantly large decrease in the number of symbolic and routine orders. Those orders that are considered to be major executive orders are not impacted by the presence of divided government, however.

This study further contributes to the divided government question by accounting for the presence of mixed government. Interestingly, when the president's party controls one chamber of

Congress, there is an increase in the use of major executive orders. The increase in the use of major executive orders when the president presumably has the support of one chamber of Congress indicates that the president calculates the odds of success depending on the extent of opposition he is facing. The mixed government results support the argument of Deering and Maltzman (1999) that presidents will use executive orders to circumvent a hostile Congress unless they believe the order is susceptible to being overturned. Clearly, Congress is more likely to be capable of overturning an executive order under pure divided government than under mixed divided government.

The president can use executive orders for reasons other than to simply enact legislation. They can be used to spur action by a gridlocked Congress or to move legislation that is under consideration closer to the president's ideological point of view (Deering and Maltzman 1999; Howell 2003). For this reason, it is expected, under the strategic model, that as the ideological gap increases between the president and the median chamber member of Congress, the president will issue more executive orders to overcome a lack of legislative success. Deering and Maltzman (1999) found this to generally be the case. Fine and Warber (2012) found that this presidential behavior was true for major executive orders. This study confirms Fine and Warber's (2012) findings while extending the analysis to foreign and domestic policy.

The results of the foreign and domestic policy models contribute to our knowledge of presidential use of executive orders by demonstrating the increased use of major executive orders is not constrained by policy area. The consistency in these findings suggests that ideological distance has greater explanatory power than other variables, such as divided government, mixed government, and seat shares in evaluating presidential use of executive orders. The advantage of

the ideological distance variable is that it captures potential rifts within the president's party that a simple divided government variable overlooks.

The strategic model is further supported by the outcomes of the models that include the ideological distance variable. Invariably, a larger ideological gap resulted in the president issuing fewer minor executive orders across all policy types. As the president faces greater resistance from Congress, and has to resort to unilateral action to promote his legislative agenda, it makes sense that there would be fewer symbolic and routine orders issued. The president, as a strategic actor, would not want to increase tensions with Congress by issuing relatively unimportant executive orders thereby spending limited political capital. Under these conditions the logical choice to make is to save the use of orders for legislative issues that are of greater importance to the president. The current results indicate that the president behaves in this manner when making a decision regarding the issuance of executive orders.

Krause and Cohen (1999) argue that the president's decision to use executive orders to achieve legislative goals is influenced by more than the relationship between the president and Congress. In their estimation, there are many other factors that affect the president's decision-making process. This study illustrates that for certain types of executive orders, there are factors beyond the legislative climate that influence the president's decision to use executive orders. As approval ratings increase, presidents are less likely to issue major executive orders of all policy types. This result supports the findings of Mayer and Price (2002), and Krause and Cohen (1997) that popular presidents are less inclined to issue executive orders than relatively less popular presidents.

Another factor that prior studies (Krause and Cohen 1997; Mayer and Price 2002) have identified as significant in explaining the use of executive orders is party affiliation. Those studies have argued that Democratic presidents take an activist approach to the office and are, therefore, more likely than Republicans to use executive orders. This study supports that contention to some degree. Democratic presidents do issue more major executive orders overall, but this is driven by the issuance of major domestic policy-based executive orders. When it comes to major foreign policy-based executive orders, there is no difference between Republicans and Democrats. This finding highlights, once again, the importance of categorizing executive orders as they have been in this study. Evaluating executive orders in their totality, or by policy area alone, does not reveal the different approaches presidents take to issuing major orders in the different policy areas.

Prior studies have not evaluated the impact of major events as defined in this study; however, Bailey and Rottinghaus (2013), have evaluated the impact of the occurrence of a war on presidential use of executive orders and the source of authority that those orders invoke. They find that war is a predictor of the president issuing a larger number of executive orders while citing both presidential and Congressional sources of power (Bailey and Rottinghaus 2013). Their war variable is similar to the major event variable in this study with the exception of the earlier years that they code as being under war conditions, which include World War II and the early years of the Korean War, are not covered by this study. Unlike this study, Bailey and Rottinghaus (2013) do not include the September 11th attacks, but because they include the beginning of the Afghanistan War, the year 2001 is coded the same as in this study. Bailey and Rottinghaus' (2013) results are likely due to the inclusion of World War II in their model. The

World War II era was one in which executive orders were issued with greater frequency than they were in later years (Howell 2003; Mayer 2001). The major event variable in this study tells a different story about presidential use of executive orders in the post-World War II era in that it rarely reaches conventional levels of statistical significance.

In both the divided government and ideological gap models used in this study, the major event variable only reached statistical significance in relation to foreign policy-based executive orders. In both models, the coefficient estimate for that variable was negative thereby indicating that presidents issue fewer foreign policy-based executive orders when major events occur. For the other executive order categories there was no impact. This finding suggests that during major events, Congress is willing to acquiesce to the will of the president on issues of foreign policy. Because Congress is more cooperative during those major events, the president has less of a need to resort to executive action. However, in the case of domestic policy Congress is less obliging; therefore, the president's use of executive orders is not impacted. The use of domestic policy-based orders would not be expected to increase during these major events as the president's focus would be on the foreign policy question.

Generally, the results of this study confirm that presidents behave strategically in their use of executive orders. It is that same strategic behavior that results in complications when it comes to measuring and testing the behavior. The president faces different constraints and, therefore, has to employ different strategies in different policy areas. This makes identifying the conditions under which a particular type of executive order (whether it is a foreign policy-based major executive order or a minor domestic policy-based executive order) will be employed. This study contributes to the scholarly advances that have been made in determining how to measure

executive orders by demonstrating that categories, such as major and minor executive orders combined with consideration for policy area, are important to understanding the president's use of executive orders.

CHAPTER FIVE: CONCLUSION

This thesis has shown that the president is more likely to issue major executive orders, in both policy areas, when the ideological gap between the president and Congress increases. The study also confirms that popular presidents are less likely to issue major executive orders, of any policy type, than less popular presidents. The president is also consistently hesitant to issue minor orders when facing increased legislative constraints. Beyond that, few factors are consistent predictors of the president's use of executive orders when facing legislative opposition.

There are a number of contingencies that affect the president's decision-making process in varying ways across different policy areas. Under mixed government, the president is more likely to issue major domestic policy-based executive orders, but major foreign policy-based executive orders are not impacted. When a major event occurs, presidents are less likely to issue foreign policy-based executive orders, but there is no effect on total orders or domestic policy orders. Democratic presidents are more likely to issue major executive orders, but this is driven by an increased use of major domestic policy executive orders, as there is no difference between Republican and Democratic presidents when it comes to the use of foreign policy-based executive orders.

Divided government had no explanatory power in relation to the president's use of major executive orders. This finding demonstrates that in order to continue building valid theory regarding the president's use of unilateral power, the relationship between the president and other political actors must be modeled with greater specificity than simple divided government indicators. Failing to account for different order types and policy areas is what has led, in part, to

inconsistent findings among prior studies regarding divided government. The lack of precise measurement obscured what was really happening in the data. By accounting for both major and minor orders, and domestic and foreign policy, this thesis shows that a decrease in minor orders drives any findings regarding divided government. Two other variables that have been considered in prior studies (election year and new president) are shown not to be statistically significant in this study.

This thesis makes three significant contributions to the study of the president's use of executive orders. The first is that this study confirms the value of the methodology developed by Warber (2006) and extended by Warber and Fine (2012). Executive orders are a vital piece in the construction of valid theory surrounding presidential unilateral action. Unfortunately, little consensus had been reached regarding the conditions under which executive orders would be used. Warber and Fine (2012) demonstrated that the aggregating of major orders with symbolic and routine orders was a major cause of these inconsistent findings. For theoretical purposes, the concern should be with the use of major executive orders as those are the orders that are designed to significantly alter the policy status quo. Because the concern of the strategic model is with how presidents overcome legislative opposition, the inclusion of minor orders, which do not really impact legislation, in the models led to inconsistent results.

The second contribution is that this study demonstrates that policy area does matter when evaluating presidential behavior in this arena. By extending Warber and Fine's (2012) major and minor categories to specific policy areas, the models specified and estimated in this study show that the president takes a different approach in the use of foreign and domestic policy-based executive orders under different conditions, such as major events. It also demonstrates that

presidents vary their approach to foreign and domestic policy-based executive orders depending on party affiliation and approval ratings. This finding is the next step in theory building as it opens up further avenues of study, some of which will be discussed later in this chapter.

The third contribution this thesis makes is the determination that the president does in fact have to consider constraints in both domestic and foreign policy and is not given completely free reign by Congress in foreign policy. If the two presidencies thesis were to hold true, the theoretic expectation would be that the president would not have to resort to the use of major foreign policy-based orders when facing a hostile Congress. Conversely, it would be expected that the further apart Congress and the president are ideologically, the greater the need for domestic policy-based executive orders. This study shows that to not be the case. In fact, as the ideological gap between the president and Congress increases, there is a larger increase in the use of major foreign policy-based orders than major domestic policy-based orders. Perhaps this is driven by the president's expectation that he should be getting his way in foreign policy, thereby leading to an increased use of those orders but that is a question for future studies to address.

A study of this nature is not without its shortcomings. The largest methodological difficulty is a result of studying the impact of ideology and divided government on the issuance of annual executive orders. This approach is justified in that the ideology of the political actors involved will have minimal variance monthly. It is also a valid approach that allows for consideration of all executive orders that have been issued in the time frame under consideration rather than using a sample, as most monthly count based studies have done. However, by using the annual count, a few compromises had to be made in the construction of the dataset.

The first compromise was in how to handle the executive orders that presidents invariably issued in the last January of their term. For example, in 1977 President Ford issued 17 executive orders and, in 2001, President Clinton issued 12. Leaving these orders as separate data points for the year in question would lead to problems in the regression due to the small number in comparison to full years. It would essentially amount to mixing monthly and yearly data. To overcome this problem, the orders that were issued in the last month of a president's term in office, when the term was ending in January, were added to that president's total for the preceding year. So, in the case of Ford, the 17 orders he issued in 1977 were added to his total for 1976. This solution results in the artificial inflation of the count data for some years, but it was the best methodological solution.

The second shortcoming results from the concern with approval ratings. Approval ratings are generally measured on a monthly basis. So, in order to compare the yearly count of executive orders to the president's approval rating, an average of all approval ratings over the course of the year had to be calculated to represent a yearly approval rating. The problem with this method is that it could fail to adequately capture a short time period where maybe the president's approval rating was high but he still issued a large number of orders. However, due to the large sample size, it is unlikely the yearly approval rating average is misrepresenting the relationship between executive order issuance and approval ratings. Prior studies that have been conducted using the monthly issuance of executive orders as a dependent variable (Mayer 1999) have come to similar conclusions as this study, so the yearly approval rating average, while not ideal, is adequate for the purposes of this thesis.

Another shortcoming of this study is that while it accounts for the median Senate member, it does not account for the veto pivot. The veto pivots are the members of Congress who are ideologically positioned to sustain a presidential veto (Krehbiel 1998). This study has shown that presidents use executive orders more frequently as the ideological gap between them and Congress widens. This finding is important in understanding the president as a strategic actor, however; knowing the impact of the veto pivot on the president's decision-making process would extend this analysis.

There is evidence in the current study to suggest that the veto pivots influence the president. In the analysis of major domestic executive orders, the president is shown to issue more major domestic executive orders under mixed government whereas pure divided government has no impact. This finding could signal that, although the ideological gap is important, there are other considerations, such as the position of the veto pivots, that may impact the president's decision to issue an executive order. It is more likely that the veto pivots would be favorable to the president under mixed government than divided government. Future studies could model this relationship, which would be another step toward defining the parameters of the president as a strategic actor.

Future studies could also account for the role of the judiciary in the president's decision-making process. Howell (2003) has shown that presidents take the likelihood of judicial challenges to their actions into consideration. Extending this analysis to the categories of executive orders developed in this study would be an interesting analysis of the relationship between the president and the judiciary on issues of foreign and domestic policy-based executive

orders. Again, knowing the extent of the impact of this relationship would increase our knowledge of the president as a strategic actor.

A final suggestion for future studies would be to supplement the vast amount of quantitative work that has been completed on this subject with qualitative case studies. Such a study could look at a random sample of executive orders across policy type to examine how the decision to use the executive order came about. Such a study could examine the following theoretical questions. Was it an issue that the president had been battling Congress on for months with little traction gained? What was the ideological composition of Congress in relation to the president? Were there outside factors that influenced the gridlock, decision to issue the executive order, or both? What happened after the order was issued? Did Congress attempt to overturn it? Was it challenged legally? Did another president overturn it later with another executive order? A case study such as this would contribute to the unilateral powers model by demonstrating how the issues that have been quantitatively measured play out in the real world.

APPENDIX: FIGURES AND TABLES

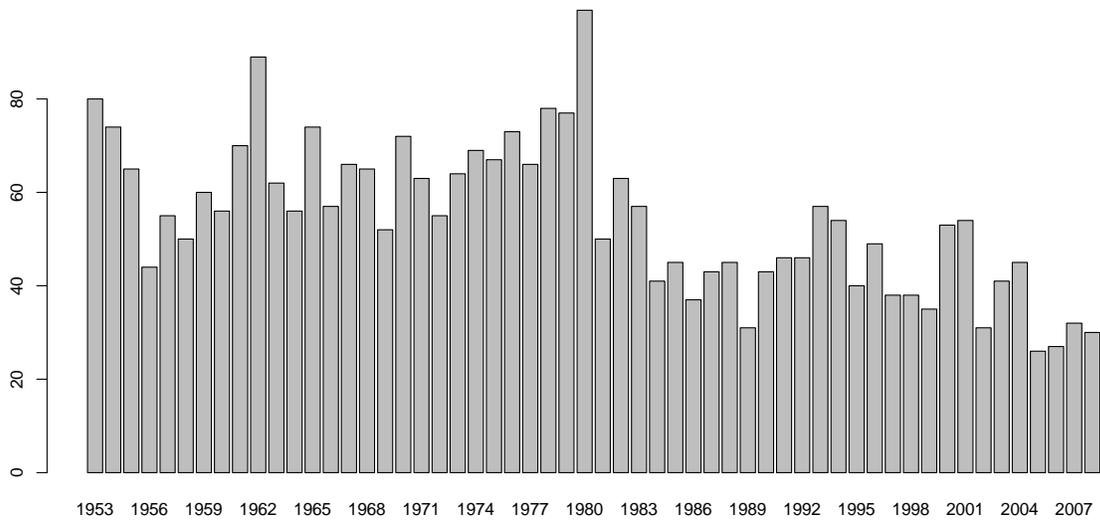


Figure 1 Total Executive Orders by Year. Source: Peters (2015).

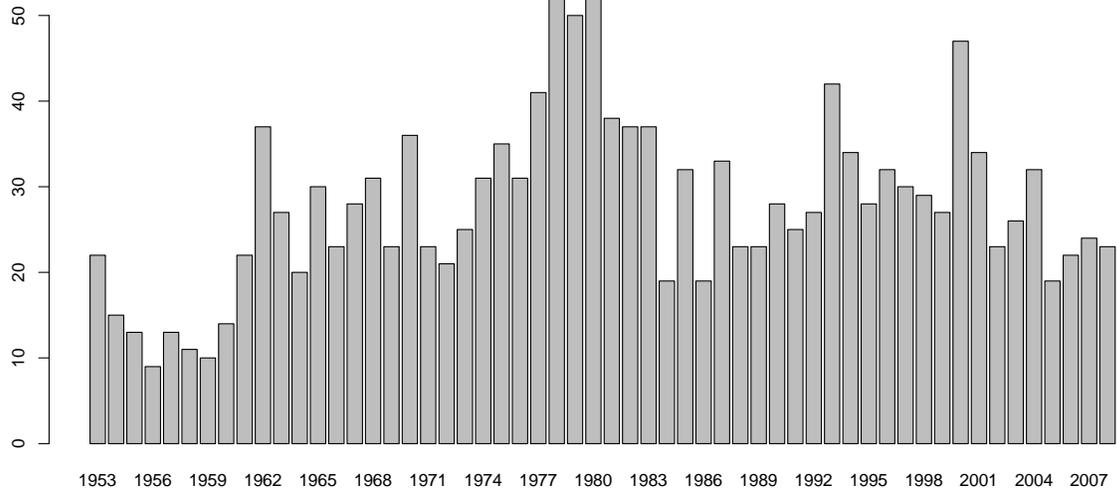


Figure 2 Total Major Executive Orders by Year. Source: Fine and Warber (2012)

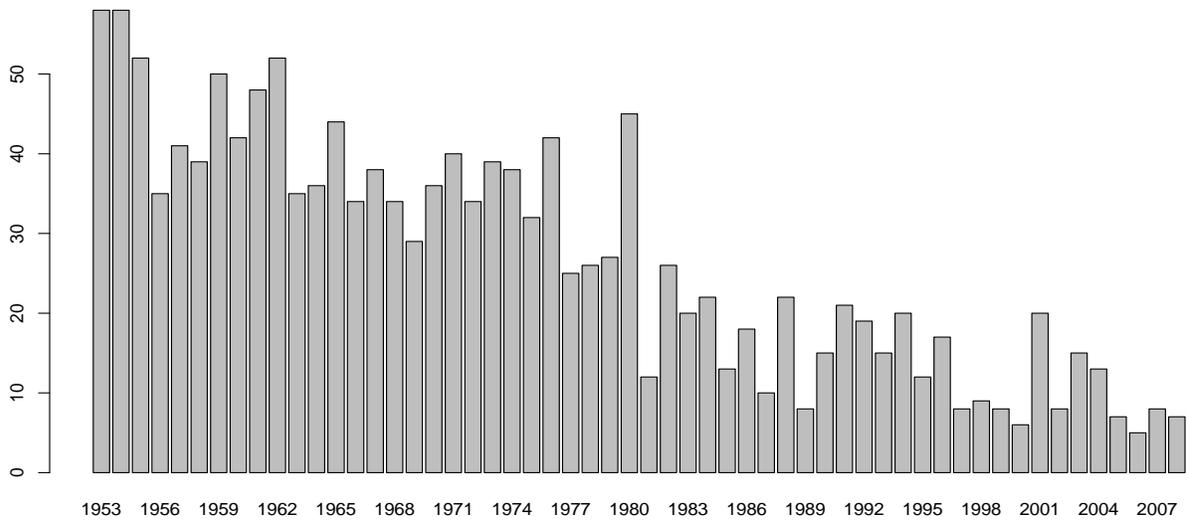


Figure 3 Total Symbolic and Routine Orders by Year. Source: Fine and Warber (2012)

Table 1 Total Number of Executive Orders Issued by U.S. Presidents 1953-2008

President	Total Orders	Percent
Eisenhower	484	15.843
Reagan	381	12.471
Clinton	364	11.915
Nixon	346	11.326
Johnson	325	10.638
Carter	320	10.475
Bush, G.W.	286	9.362
Kennedy	214	7.005
Ford	169	5.532
Bush, G.H.	166	5.433
Total	3055	100

Source: Peters (2015).

Table 2 Total Number of Executive Orders by Type 1953-2008

Executive Order Type	Total Orders	Percent
Foreign policy	1019	33.35
Domestic policy	2036	66.65
Total	3055	100

Table 3 Total Executive Orders with Divided and Mixed Government Variables

	Total Orders	Major Orders	Minor Orders
Divided Government	-0.22* (0.11)	-0.002 (0.11)	-0.52** (0.19)
Mixed Government	-0.25 (0.16)	0.39* (0.15)	-0.97*** (0.27)
Democratic President	0.001 (0.11)	0.45*** (0.11)	-0.47* (0.19)
Approval Rating	0.04 (0.37)	-1.33*** (0.36)	1.15^ (0.63)
Election Year	0.03 (0.10)	0.02 (0.10)	0.04 (0.17)
Major Event	-0.06 (0.09)	0.05 (0.09)	-0.10 (0.16)
New President	-0.10 (0.12)	0.06 (0.12)	-0.28 (0.20)
Intercept	4.11 (0.23)	3.72 (0.23)	3.22 (0.40)
N	3055	1560	1495
Log Likelihood	-490.714	-411.363	-456.744
χ^2	7.92	35.75	15.50
Pseudo r^2	0.11	0.36	0.20
LR test against Poisson χ^2	133.87	33.36	229.94
	p=.000	p=.000	p=.000

^p<0.10; *p<0.05; **p<0.01; ***p<0.001. Standard errors are in parentheses. Pseudo r^2 derived from McFadden's r^2 .

Table 4 Executive Orders by Policy Area with Divided and Mixed Government Variables

	Foreign	Major Foreign	Minor Foreign	Domestic	Major Domestic	Minor Domestic
Divided Government	-0.41** (0.15)	-0.23 (0.19)	-0.65** (0.21)	-0.13 (0.13)	0.10 (0.12)	-0.44* (0.21)
Mixed Government	-0.31 (0.20)	0.25 (0.25)	-0.87** (0.29)	-0.25 (0.18)	0.43* (0.17)	-1.04*** (0.30)
Democratic President	-0.20 (0.15)	0.13 (0.19)	-0.51* (0.21)	0.09 (0.13)	0.59*** (0.12)	-0.43* (.21)
Approval Rating	0.03 (0.48)	-1.22* (0.61)	1.02 (0.68)	0.05 (0.43)	-1.33** (0.40)	1.32^ (0.70)
Election Year	0.22^ (0.13)	0.18 (0.16)	0.20 (0.18)	-0.05 (0.12)	-0.05 (0.11)	-0.04 (0.19)
Major Event	-0.26* (0.12)	-0.18 (0.16)	-0.26 (0.18)	0.01 (0.11)	0.14 (0.10)	-0.009 (0.18)
New President	-0.20 (0.16)	-0.007 (0.20)	-0.43 (0.23)	-0.06 (0.14)	0.08 (0.13)	-0.21 (0.23)
Intercept	3.23 (0.30)	2.82 (0.38)	2.35 (0.43)	3.60 (0.27)	3.22 (0.25)	2.62 (0.45)
N	1019	492	527	2036	1068	968
Log Likelihood	-390.795	-329.049	-344.89	-458.682	-376.316	-414.603
χ^2	12.93	14.76	14.75	6.70	33.63	14.80
Pseudo r^2	0.17	0.19	0.19	0.10	0.35	0.19
LR test against Poisson χ^2	54.14	23.94	51.91	121.40	24.65	168.57
	p=.000	p=.000	p=.000	p=.000	p=.000	p=.000

^p<0.10; *p<0.05; **p<0.01; ***p<0.001. Standard errors are in parentheses. Pseudo r^2 derived from McFadden's r^2 .

Table 5 Total Executive Orders with Ideological Distance Variable

	Total Orders	Major Orders	Minor Orders
Ideological Distance	-0.15 (0.13)	0.38** (0.13)	-0.47* (0.23)
Divided Government	-0.21^ (0.11)	-0.03 (0.10)	-0.50** (0.19)
Mixed Government	-0.21 (0.16)	0.30* (0.15)	-0.84** (0.27)
Democratic President	-0.007 (0.11)	0.50*** (0.11)	-0.48* (0.19)
Approval Rating	0.04 (0.36)	-1.37*** (0.34)	1.12^ (0.61)
Election Year	0.03 (0.10)	0.01 (0.09)	0.06 (0.17)
Major Event	-0.04 (0.09)	0.006 (0.09)	-0.05 (0.16)
New President	-0.09 (0.12)	0.05 (0.11)	-0.22 (0.20)
Intercept	4.23 (0.26)	3.43 (0.24)	3.59 (0.43)
N	3055	1560	1495
Log Likelihood	-489.423	-404.119	-452.318
χ^2	9.41	47.49	21.31
Pseudo r^2	0.13	0.43	0.26
LR test against Poisson	129.83	26.78	199.49
χ^2			
	p=.000	p=.000	p=.000

^p<0.10; *p<0.05; **p<0.01; ***p<0.001. Standard errors are in parentheses. Pseudo r^2 derived from McFadden's r^2 .

Table 6 Executive Orders by Policy Area with Ideological Distance Variable

	Foreign	Major Foreign	Minor Foreign	Domestic	Major Domestic	Minor Domestic
Ideological Distance	-0.06 (0.18)	0.58* (0.23)	-0.52* (0.24)	-0.18 (0.16)	0.29^ (0.15)	-0.45^ (0.25)
Divided Government	-0.41** (0.15)	-0.31^ (0.18)	-0.59** (0.20)	-0.12 (0.13)	0.07 (0.12)	-0.43* (0.21)
Mixed Government	-0.29 (0.21)	0.12 (0.25)	-0.71* (0.29)	-0.20 (0.19)	0.37* (0.17)	-0.92** (0.30)
Democratic President	-0.21 (0.15)	0.22 (0.19)	-0.52** (0.20)	0.09 (0.13)	0.62*** (0.12)	-0.43* (0.21)
Approval Rating	0.03 (0.48)	-1.23* (0.58)	1.00 (0.65)	0.05 (0.42)	-1.38*** (0.39)	1.25^ (0.68)
Election Year	0.22^ (0.13)	0.15 (0.16)	0.21 (0.18)	-0.05 (0.11)	-0.05 (0.11)	-0.03 (0.19)
Major Event	-0.25* (0.13)	-0.28^ (0.16)	-0.19 (0.17)	0.04 (0.11)	0.11 (0.10)	0.03 (0.18)
New President	-0.19 (0.16)	-0.01 (0.19)	-0.39^ (0.22)	-0.04 (0.14)	0.07 (0.13)	-0.14 (0.22)
Intercept	3.28 (0.34)	2.36 (0.41)	2.74 (0.46)	3.75 (0.30)	3.00 (0.27)	3.00 (0.48)
N	1019	492	527	2036	1068	968
Log Likelihood	-390.684	-323.417	-340.326	-457.294	-372.893	-411.285
χ^2	13.06	21.79	20.69	8.26	38.75	19.09
Pseudo r^2	0.17	0.26	0.24	0.12	0.39	0.24
LR test against Poisson χ^2	54.07	20.57	44.00	117.65	21.93	148.74
	p=.000	p=.000	p=.000	p=.000	p=.000	p=.000

^p<0.10; *p<0.05; **p<0.01; ***p<0.001. Standard errors are in parentheses. Pseudo r^2 derived from McFadden's r^2 .

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