Congress and the Unilateral Presidency

On the Constraints Imposed by Gridlock and Divergence from the Majority Party Median

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Abstract

This paper develops a theory of executive unilateralism where ideological divergence between Congress and the executive influences variation in executive orders in both the pre- and post- World War II periods. Specifically, this research effort investigates the capacity of *gridlock*, operationalized as the ideological distance between the left and right veto pivots (Krehbiel 1998; Deering and Maltzman 1999) and the *ideological distance* between the ideal points of the president and the majority party median in Congress (Cox and McCubbins 1993;2005) to cause variation in the executive's issuance of executive orders. In contrast to previous analyses, a multilevel model is used to explicitly model president-level variables and capture variation in use of orders between presidents. Results of the analysis indicate that while gridlock does not seem to be substantially related to variations in executive orders, there is a *negative relationship* between the absolute distance between the ideal point of the president and the majority party median in Congress: Congress seems to be both capable and successful in causing the executive to think twice before acting unilaterally in the face of congressional hostility.

Introduction

Modern media assessments of the American presidency are often characterized by a combination of awe and outrage in recognizing the flexibility and broad authority wielded by the executive branch. In 2014, with the stroke of a pen, President Barack Obama issued several controversial executive actions that expanded the population eligible for the Deferred Action for Childhood Arrivals (DACA) policy, which, alongside other initiatives (USCIS 2014), would grant "temporary, quasi-legal status and work permits to as many as 4 million parents who entered the U.S. illegally prior to 2010" (Totenberg 2016). Republicans, including conservative commentator George Will in *The Washington Post*, slammed Obama's actions as "executive overreach" (Will 2016). Most recently, President Donald Trump signed an executive order that enacted a blanket ban on travel from seven predominantly Muslim nations, in addition to requiring a religious test to vet immigrants, including refugees, from Muslim countries (Shear and Cooper 2017). Left-leaning publications such as *The Huffington Post* jumped at the chance to label Trump's order an "unconstitutional Muslim ban" (Cohn 2017). In short, sweeping actions like these may lead casual observers of politics to picture an unfettered president that, polarized Congress or not, acts unilaterally to satisfy the public's considerable demands.

However, the context surrounding these particular actions also symbolizes the considerable institutional checks the U.S. system has built in against the president's ability to act unilaterally. Obama's 2014 immigration actions were nullified after the Supreme Court deadlocked in considering their constitutionality (Gerstein 2016), and both of Trump's orders regulating immigration into the U.S. underwent challenges in the federal courts (Jarrett 2017). Congress, while not necessarily an ideal institution to check executive power (Moe and Howell 1999a), *can* alter the strategic calculations of the executive when he is determining whether to act unilaterally: even if it is unlikely that the executive will fail in any given unilateral action, there will be "heavy political costs to be paid" if Congress or the courts are able to reverse his actions (Moe and Howell 1999b). Clearly, institutional mechanisms to check the unilateral executive are perhaps not as strong as the framers of the Constitution envisioned them, but they are far from toothless.

Indeed, in contrast to the image of the "Imperial Presidency" famously dictated by Schlesinger (2004) and echoed in media portrayals, political scientists have recently wondered why the president has not acted unilaterally *more* often, given the ripe opportunities that seem to exist. A widely accepted (and perhaps counterintuitive) answer, as theorized by political scientist William Howell (2003), is that Congress is able to alter the strategic potential of the executive to act unilaterally, particularly during periods of ideological or partisan disagreement (such as during periods of divided government). Several contemporary empirical efforts within the separation of powers literature (Fine and Warber 2012; Young 2013; Bailey and Rottinghaus 2014; Bolton and Thrower 2015) have confirmed this finding with relation to divided government; however, previous efforts (with the exception of Bolton and Thrower) have limited their analysis to the modern (Post- World War II) period, ignoring a significant span from the turn of the 19th century to the Great Depression, where executive orders were especially prominent.

This paper provides two main contributions to the literature on unilateral actions: first, the analysis in the paper investigates executive orders in the pre- *and* post-WWII period, a time span that few empirical efforts have analyzed. Second, this paper provides a more rigorous test of the relationship between ideological disagreement (among Congress and the president) and variation in executive orders than has been attempted in the past. Ultimately, this research effort concludes that the ideological preferences of Congress, conceptualized as the distance between the ideal points of the president and the congressional median, are a significant influence on variation in executive orders: *the more ideologically distant the majority party median from the president, the fewer orders issued by the president.* Legislative gridlock, however, when conceptualized without partisan forces, does not appear to be a significant influence on the number of orders issued by the executive.

I. Literature Review

Richard Neustadt famously observed that they power of the American presidency was fundamentally the "power to persuade." For Neustadt, the president was at his *weakest* when he was forced to rely on the formal powers of the executive branch, as the other branches of government and even the other key actors within the executive branch (including the president's own staff) all have access to their own sources of formal power. The strength of the presidency came in persuading other governmental actors that what was in the president's best interest was also in their interest, avoiding potentially costly political conflict altogether (Neustadt 1960). While Neustadt's insights provided considerable leverage towards understanding the American presidency, emphasizing the personal dealmaking and persuasion abilities of a given president came at the cost of ignoring the formidable formal powers the executive branch posessess: namely, the veto power and the ability to act unilaterally. That is, while Neustadt focused on the implementation of public policy, a new group of presidential scholars brought the focus back to direct actions taken by the president to influence the *content* of policies (Howell 2003).

Unilateral Action

The president possesses two primary formal weapons to fight his political battles: the veto power and the ability to act unilaterally. Unilateral action may be less obvious of a political tool than the veto power, but it is no less consequential. Indeed, the president possesses a stark advantage over Congress because he can be the first mover in the policy process, forcing Congress to react to his proposals. Also, should the president so choose, he is able to act alone, foregoing arduous bargaining with other political actors that could incur costs in terms of political capital or time (Howell 2003). Moreover, the president possesses wide latitude in his basis for acting unilaterally. Indeed, while the veto power is quite obvious in the Constitution, America's founding document serves as, at best, an "incomplete contract" with the "president in an ideal position to take advantage of this ambiguity"(Moe and Howell 1999a, 855).

Because of the ambiguousness surrounding the executive power in the Constitution,[1] unilateral action by the president can take several forms, including: *executive orders*, which can pertain to domestic or foreign policy issues and often give specific instructions to government officials and administrative agencies to take a prescribed action; *presidential proclamations*, which "target individuals and groups outside of the government;" *national security directives*, which remain classified and presumably mainly pertain to national security (or other topics the president may wish to shelter from prying congressional and public eyes), and *executive agreements*, which act as an alternative to the treaty-making process that avoids the requirement of congressional ratification but do not carry over from administration to administration (Howell 2003, 17-19).

The present research considers only executive orders, primarily because of their widespread use since the turn of the century (Bolton and Thrower 2015) and their inherent flexibility: not only can presidents use executive orders in a Neustadtian sense where orders act as a command that other actors must obey, but presidents issuing executive orders also "use their executive authority to shape and alter the institutional landscape in which they reside," and as "a bargaining tool in an effort to shape the strategic context in which they operate" (Mayer 2002, 29-31).

Executive Orders

The most widely studied indicator of the variation of executive orders, however, has been congressional opposition, most often conceptualized as an instance where the preferences of the president and members of Congress (MCs) diverge. Moreover, two competing theories have emerged that offer alternate guidance on the correct relationship between executive orders and congressional opposition: the "strategic theory," as articulated by Deering and Maltzman (1999), among others, and an alternative conception of unilateral action (referenced above) put forward by Moe and Howell (1999a; 1999b) and Howell (2003). The strategic theory, in its most basic form, largely follows the logic of Neustadt, arguing that presidents will only use executive orders as a last political resort. Thus,

[1] In bestowing the exeuctive power, Article II merely notes that the president should "take care that the laws be faithfully executed."

when presidents are highly constrained by Congress (as in periods of divided government or in instances of marked preference divergence between Congress and the executive), one should observe *more* executive orders than when Congress is of the same party as the president. From the strategic theory's perspective, the president will be able to rely on legislation to accomplish his agenda during periods of unified government, avoiding potential damage to his political reputation that might come with a failed attempt at unilateral action. In short, if a president finds himself with a poor legislative success rate in a chamber of Cognress, he will be more inclined to issue executive orders as a means to bypass the conventional legislative process (Krause and Cohen 1997, 462).

In contrast, the theory of unilateral action conceived by Howell and Moe (1999a; 1999b) and later formalized by Howell (2003) makes just the opposite prediction: because presidents anticipate the degree of difficulty their unilateral actions will encounter in Congress, presidents should issue *more* executive orders when Congress is more politically favorable to them (during periods of unified government) than during periods of political opposition (during divided government or low preference divergence). That is, as more legislators prefer the previous particular status quo to a potential new status quo, it becomes more likely that Congress can overcome collective action problems and oppose the executive's attempts to act unilaterally (Moe and Howell 1999b).

In the existing literature, partially due to the ease of including unified versus divided goverment as a predictor variable in models of the variance of executive orders and partially due to the prominence it is given as an indicator of legislative preferences in key theoretical work (e.g. Deering and Maltzman 1999; Howell 2003), the most common indicator of congressional opposition to the president has been divided government. In considering the association of divided government and variation in executive orders, Most empirical efforts (e.g. Howell 2005; Fine and Warber 2012; Young 2013; Bailey and Rottinghaus 2014) are consistent with the predictions of Howell and Moe (1999a; 1999b) and Howell (2003) in finding that fewer executive orders are issued during periods of divided government or periods where the majority party has fewer seats. Some findings, however, have been inconclusive in their findings regarding the association of divided government

or majority party seat share and variation in executive orders (Krause and Cohen 1997; Deering and Maltman 1999; Mayer 2002; Mayer and Price 2002).

Other Theories

Resources

Previous studies of executive orders have found that presidents tend to issue more executive orders when the resources available to the executive branch are higher (Krause and Cohen 1997), or when congressional capacity is low (Bolton and Thrower 2015). In particuar, while the executive will have more ability to issue executive orders as more resources are available, Congress also has a say in how much discretion is granted to the executive. Bolton and Thrower (2015) argue that, unlike in previous accounts, this discretion is not exogenously given, but related to congressional capacity, which they believe was fundamentally altered around 1946, with the Legislative Reorganization Act and other institutional changes.

Public Opinion

Presidents may also issue fewer executive orders when their approval ratings are low or they are lame ducks: the mass public has a significant ability to constrain the president's use of unilateral action (Mayer 1999; Reeves and Rogowski 2016). Ultimately, a president who relies too much on acting unilaterally runs the risk of sacrificing his public support, especially from his strongest supporters (Reeves and Rogowski, forthcoming). Given that a president's personal reputation is likely to be correlated with his ability to persuade Congress to adopt his agenda (Deering and Maltzman 1999; Neustadt 1990), public opinion seems to serve as a significant indicator of relations between the president and Congress, and thus variation in executive orders.

Foreign Affairs

Presidents tend to issue executive orders more frequently when an international crisis has occured (Young 2013), and on matters of foreign policy (Marshall and Pacelle 2005).

Other scholarly efforts note that under some well-defined circumstances, including when Congress has large and cohesive majorities that oppose the president, when the president has deployed the military in a large-scale conflict, and when the president is not clearly bound by the international community, Congress does have the ability to oppose the president's attempts at acting unilaterally with respect to foreign policy, especially the use of force (Canes-Wrone, Howell, and Lewis 2008; Howell, Jackman, and Rogowski 2013). Thus, during wartime and other international crises (Young 2013), Congress should afford the president additional deference on matters of unilateral action, resulting in more executive orders.

In short, a variety of empirical efforts have given the discipline a clearer understanding of many facets of the use of unilateral power. However, this research effort returns to focus on ideological disagreement, and, in particular, the prudence of its application to the pre-World War II period. In the following section, I review existing theoretical conceptions of Congress and develop testable hypotheses that provide a more nuanced and theoretically relevant test of the association of partisan and preference-based divergence between Congress and the executive and variation in executive orders.

II. Theory

Congressional Opposition

A president can rely on either his *positive power* (acting unilaterally or proposing legislation through Congress) or his *negative power* (the veto) to accomplish his agenda. That is, even if the president finds himself incapable of getting his agenda through Congress, the veto can act as a formidable weapon to prevent Congress from overturning an executive order.

In theory, Congress can overturn an executive order simply by passing legislation that would override the order, which would only require a simple majority vote in both houses. In practice, however, the president will veto Congress' attempt to override the order, effectively requiring Congress to have a 2/3 majority in both houses to override the

president's veto and overturn an executive order. Following the vast majority of scholarly treatments of executive orders (e.g. Deering and Maltzman 1999, Howell 2003, Fine and Warber 2012; Bolton and Thrower 2015), this research effort assumes that congressional preferences are a fundamental determinant of variation in executive orders. Thus, a theory that addresses Congress' ability to affect variation in executive orders must address two pivotal actors, often conceived of in spatial models as the veto pivot and the filibuster pivot (Brady and Volden 1998; Krehbiel 1998) or simply the conservative veto pivot and the liberal veto pivot (e.g. Deering and Maltzman 1999). Assuming we can represent the ideal points of legislators in a unidimensional space, these pivots represent the legislators that will cast the decisive vote on a potential veto override attempt.

Congressional Parties

Political scientists have persuasively argued that, under certain well-defined circumstances, policy decisions in Congress will converge to the congressional median (e.g. Krehbiel 1991). Indeed, many models that use the median member of Congress as a summary of congressional preferences, including Howell's (2003), provide useful summary predictions about congressional behavior that have contributed significantly to our knowledge of the institution.[2] Other powerful models of Congress, including the influential "procedural cartel theory" developed in Cox and McCubbins (1993; 2005) have taken issue with using the median member as a proxy of congressional preferences. In brief, Cox and McCubbins' perspective views members of Congress as willing to bestow the powers of "special agenda control" on congressional leaders in the House, because doing so will minimize the number of unpopular votes they will be forced to take. That is, the majority party is able to exercise negative agenda control to prevent policy proposals unpalatable to a majority of the majority party from reaching the floor. Thus, the relevant actor in models of congressional behavior in the 20th century and beyond should be the House *majority party* median, rather than the median member of the entire chamber. Subsequent efforts have provided systematic evidence that the mechanism of negative

[2]Howell's model is fundamentally preference driven: "Parties, to the extent that they play any role whatsoever, can only be considered proxies for members' ideal points" (Howell 2003, 70).

agenda control is relevant in the Senate, as well (e.g. Gailmard and Jenkins 2007).

Regarding executive orders, Howell admits that his stylized version of Congress, where policy converges to the congressional median, may either overstate or understate presidential power, depending on the partisan composition of Congress (2003, 52), but he does not attempt to incorporate the implications of Cox and McCubbins' (1993) model, only including a measure of the size of the majority party and a binary divided government variable in his empirical analyses. Similarly, Bolton and Thrower (2015) account for divided government and the size of the majority party, and also include a measure of the distance between the president and the median member of Congress.

If one believes that the Cox and McCubbins model is a more accurate conception of policymaking in Congress (and in turn congressional efforts to pass legislation overturning executive orders), ideological summary measures incorporating absolute distance between the president and the majority party median should provide a more valid test of the effect of ideological disagreement between Congress and the president on executive orders. In addition, using ideological distance avoids relying on a dummy variable for divided government, which, as Fine and Warber (2012) note, "for much of the post-World War II period, [is] statistically indistinguishable from a dummy variable that captures party control of the presidency" (8). Similar to Howell's usage of divided government to capture congressional opposition, this research effort operationalizes ideological opposition as the distance between the president's ideal point and the ideal point of the majority party median in Congress. From this assertion, the following hypothesis is generated:

H_1 : *As the absolute distance between the president's ideal point and the ideal point of the median legislator of the majority party becomes larger, then the president will issue fewer executive orders.*

Gridlock and Pivotal Actors

In Keith Krehbiel's well-known pivotal politics model, he theorizes that the width of the "gridlock interval" (the distance between the leftmost and rightmost pivots) is related to legislative productivity. That is, assuming that the status quo positions are distributed

uniformly,[3] as the distance between the preferences of the pivots increases, there are fewer status quo positions outside the gridlock interval that are available to shift. Conversely, as the gridlock interval shrinks, more status quo positions become available for the president to move (Krehbiel 1998). While Krehbiel's model was originally applied to congressional policy proposals, its logic can easily be extended to unilateral action. The wider the gridlock interval, the greater the deference afforded to the executive to shift policy unilaterally. Conversely, as the gridlock interval becomes smaller, the executive's freedom to act unilaterally decreases (Howell 2003, 65).

In the context of this analysis, the most relevant "pivotal" actors are the two veto pivots (left and right). After all, through the veto power, the president wields a conditional check on any legislation that Congress may wish to pass. If a president vetoes an act of Congress, a two-thirds vote in each house is required (with a quorum being present) to override the veto. This requirement is often unattainable within Congress, making even the threat of a veto a substantial vehicle for altering the strategic considerations of Congress. Additionally, as political scientists such as Charles Cameron have argued, through the president's own personal reputation, he is able to use an intricate process of veto bargaining to extract concessions from Congress (Cameron 2000). Because the veto represents a much more theoretically relevant institutional feature in a treatment of executive orders than the filibuster, operationalization of Krehbiel's gridlock interval will incorporate the two veto pivots alone. [4].

Following Howell (2003) and others,[5] the gridlock interval prediction generates the following hypothesis:

H_2 : *As the absolute distance of the gridlock interval becomes larger, the president will issue more executive orders.*

[3] As Chiou and Rothenberg (2003) note, "Krehbiel did not make this assumption explicitly, but his hypothesis requires it."

[4] See the section below on variables for more on operationalization of the gridlock interval

[5] As Howell (2003) and Deering and Maltzman (1999) note, there is a potentially another prediction regarding congressional gridlock that could be tested: because the probability that the president acts unilaterally increases when the president is inside the gridlock interval, we might expect that presidents whose ideal points fall *inside* the gridlock interval will issue more executive orders than extreme presidents whose ideal points fall *outside* the gridlock interval. Unfortunately, as Howell notes, "there has been only one president (Eisenhower) in the last sixty years to fall within the gridlock interval, making it impossible to actually test this hypothesis" (2003, 208: fn. 11).

Data

Dependent Variable

The dependent variable for this analysis is a yearly count of (both numbered and non-numbered) non-ceremonial executive orders.[6] As a general overview of the time period for the analysis, Figure 1 illustrates a count of non-ceremonial orders from 1905-2013. For reference, in 1917 (the first year of Wilson's second term), Woodrow Wilson issued 501 executive orders. Franklin Roosevelt issued 471 and 473 orders, respectively, in his first two years as president.

Figure 1: *This line graph depicts the number of executive orders issued by year. Note the stark difference between the counts for the Great Depression era and earlier, compared to the relatively small number of orders issued in the "modern" period most often analyzed by prior research efforts.*

In terms of the raw counts, the difference is stark: Jimmy Carter issued only 98

[6]This data was collected by Bolton and Thrower (2015): the authors note that examples of ceremonial orders would include "creating flags or seals" (2015). In addition, this research effort does not attempt to identify "significant" executive orders as some other scholarly efforts have in the past (e.g. Mayer 2002; Howell 2003). Indeed, empirical efforts such as Krause and Cohen (1997) have found similar results using non-ceremonial orders in their study of the modern (post-WWII) period as other research efforts that isolated "significant" orders.

orders in the last year of his presidency, a "peak" for the modern period. The most striking feature of the graph is that, contrary to popular assessments or perceptions of the "imperial presidency," substantially more executive orders were issued in the period before World War II than in the modern period. Yet, few scholars have endeavored to systematically analyze orders issued during and before the Great Depression, leaving a gap in our knowledge of how these early orders correspond to existing theories of unilateral action.

Key Independent Variables

Ideological Opposition

As noted above, the model of congressional behavior theorized by Cox and McCubbins (1993; 2005) posits the ideal point of the median member of the majority party in Congress as the decisive determinant of policy outcomes. Here, the distance between the ideal points of the median member of the majority and the president are calculated using DW-NOMINATE scores (Poole, Rosenthal, et al., updated 2015), which allow legislators' ideal points to move dynamically over time (Poole and Rosenthal 2011). Ideological opposition is operationalized as the absolute distance between the ideal point of the median member of the majority party in Congress and the ideal point of the president. Figures 3 and 4 present a summary of this measure for the House and Senate, respectively. The gap in the measure represents Hoover's presidency, as Hoover did not take a sufficient number of roll call votes for his ideal point to be estimated.

The distance between the president and the majority party median varies similarly across chambers, with the notable exception of the end of the time period (2005-2013), where the distance in the House varies considerably and the distance in the Senate from the president remains small. In the House, the mean distance was 0.428, the maximum distance (1.1) occured in the 113th Congress, and the minimum (0.012) in the 69th Congress. Moreover, for the Senate the mean distance was 0.36, the maximum distance (1.02) occured in the 84th Congress, and the minimum (0.003) in the 112th Congress.

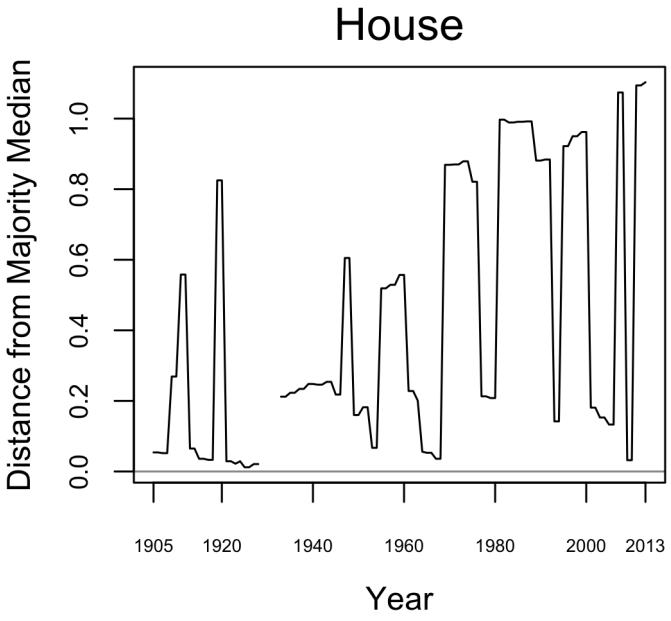

Figure 2

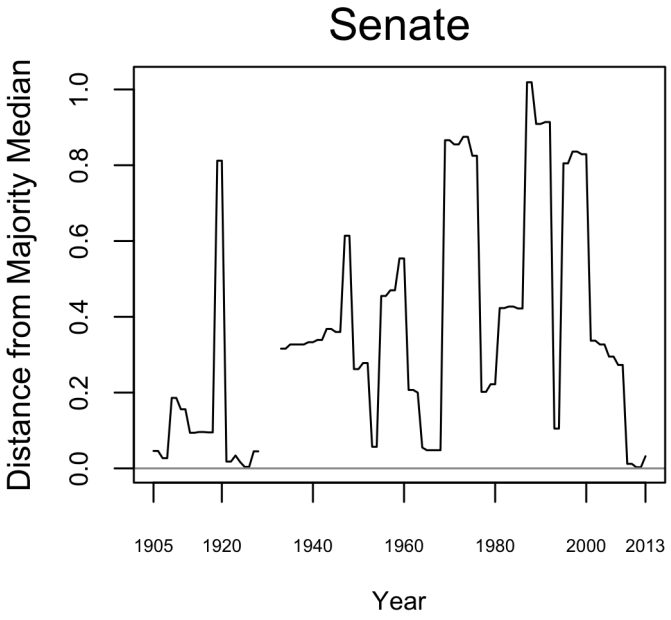

Figure 3

Gridlock

To test the first prediction, a method must be devised to calculate the gridlock interval as first identified in Krehbiel (1998). Past efforts to analyze pre-modern executive orders have relied on measures of the average size of the majority party between houses, legislative potential for policy change scores (as discussed in Howell 2003), or a size-unity ratio (Bolton and Thrower 2015). Rather than using these indirect measures, this research effort relies on a calculation of the gridlock interval using common space DW-NOMINATE scores, calculated as the absolute distance between the members representing the left and right veto pivots.

Operationalizing the gridlock interval requires making several important methodological decisions. This research effort follows previous scholarship (e.g. Chiou and Rothenberg 2003, 2006; Woon and Cook 2015; Gray and Jenkins 2015) in using Common Space DW-NOMINATE scores (Poole, Rosenthal, et al., updated September 2015), which enable comparisons between the Senate and House, providing a way of evaluating congressional preferences that is consistent with Krehbiel's (1998) original model incorporating only a single policy dimension. NOMINATE scores provide a measure of revealed preferences that is not explicitly partisan, providing a better operationalization of Krehbiel's theory than shifts in seats between the two major parties.

In constructing the gridlock interval, MCs that cast the fewest votes in a given year were eliminated until each chamber's membership in the dataset was at the appropriate size for the time period.[7] Then, the Common Space scores were used as members' ideal points to estimate the positions of pivotal actors. As the veto pivots are the pivotal actors most relevant to an evaluation of unilateral action, this operationalization considers only the veto pivots in determining the width of the gridlock interval. For example, the 66th senator from either direction would represent the left and right veto pivots, respectively.[8]

[7]For the Senate, 90 Senators in the 59th Congress, 92 in the 61st/62nd, 96 in the 63rd-87th; For the House 386 in the 59th, 391 in the 60th-61st, 394 in the 62nd, and 435 in the 63rd and all subsequent congresses.

[8]Following Krehbiel (1998), this calculation of the gridlock interval ignores party affiliation.

Then, the gridlock interval is calculated as:

$$Gridlock = |V_L - V_R| \tag{1}$$

That is, the absolute distance between the left and right veto pivots.[9] Figure 2 represents the results of this calculation from 1905-2013. The mean of the gridlock interval is 0.526, spanning more than half of the potential range for policy locations and ideological preferences. The maximum width (0.776) was in the 113th Congress in 2013, and the minimum width (0.221) occured in the 75th Congress (1937-1938).

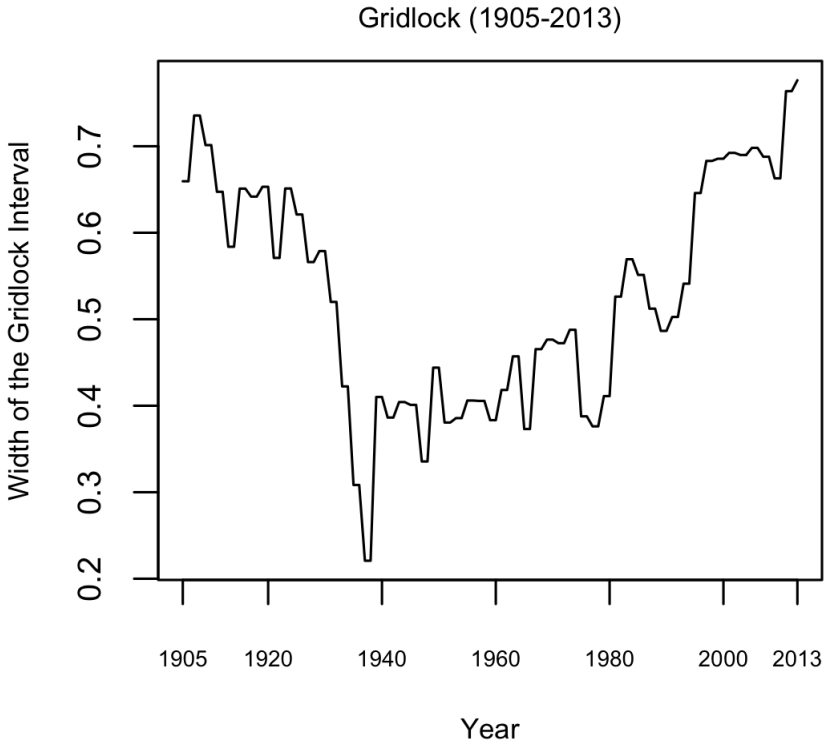

Figure 4: *This line graph depicts the width of the gridlock interval by year. Note the relatively small gridlock interval from the Great Depression era into the 1960s, and the steadily increasing width of the interval post-1980.*

[9]Since both houses are collapsed into one policy space, the "left" and "right" pivots are identified as whichever pivotal actor (House or Senate) on that side of the policy space has a more extreme ideal point.

Control Variables

War time: Even if under normal circumstances the ideological distance between Congress and the president dictate variation in executive orders, following the arguments of previous scholars (Canes-Wrone, Howell, and Lewis 2008; Howell, Jackman, and Rogowski 2013),[10] during wartime Congress should afford the president additional deference, particularly on foreign policy issues. Including a variable for wartime accounts for variation in executive orders created by this increased deference during times of international conflict.[11]

Partisan Change in the Presidency: A binary variable coded as 1 if the elected president comes from the opposite party than the previous president. This variable captures not only the greater availability of status quo policies for a president to shift when the presidency changes partisan hands, but also potential changes in congressional voting behavior that might result from a change in the party of the president (Krehbiel 1998).

Inflation: Previous research efforts (e.g. Krause and Cohen 1997) have found that presidents tend to issue more executive orders during hard economic times. Additionally, inflation also acts as a useful proxy measure for the public approval or "public prestige" (Krause and Cohen 1997, 472) of the president, particularly for time periods that do not have reliable survey data for presidential approval. Moreover, because a president's personal reputation is likely to be correlated with his ability to persuade Congress to adopt his agenda (Deering and Maltzman 1999; Neustadt 1990), inflation rates should affect both the president's strategic decisions in deciding whether to act unilaterally and Congress' willingness to overturn executive orders should an unpopular president decide to challenge the legislative branch.

Lame Duck: Presidents typically issue more executive orders during the last year of

[10]Importantly, though, Howell and Pevehouse (2011) note that under some well-defined circumstances, including when Congress has large and cohesive majorities that oppose the president, when the president has deployed the military in a large-scale conflict, and when the president is not clearly bound by the international community, Congress does have the ability to oppose the president's attempts at acting unilaterally with respect to foreign policy, especially the use of force.

[11]The wartime variable is coded following Howell, Jackman, and Rogowski (2013), with the addition of World War I. Periods of war coded are World War I (1917-1918) World War II (1941-1945), the Korean War (1950-1953), the Vietnam War (1964-1975), the Gulf War (1990-1991), and the period of heaviest fighting during the Afghanistan and Iraq Wars (2001-2003).

Table 1: Overdispersion Diagnostic

Dispersion Ratio	Chi-Squared Sig.
9.13	< 0.001

their presidency (Mayer 2002). They may also be perceived differently by members of Congress if arguments about the importance of presidential reputation (Neustadt 1990) are taken into account. Thus, a binary control for a president as a "lame duck" is included.

Methodology

As noted above, the dependent variable in this analysis is a yearly count of non-ceremonial executive orders. In analyzing count data, it is most appropriate to choose an event count model, such as a Poisson or negative binomial model, rather than attempting to produce an estimate using ordinary least squares (OLS). OLS estimates, when applied to event count data, may produce incorrect standard errors or negative predictions for the count of events, and are less efficient than estimates using Poisson or negative binomial regression models (King 1988). Additionally, because the Poisson model does not include an independent parameter for the variance, Poisson models are usually subject to overdispersion. This is problematic because overdispersion provides an indicator that the data has more variation than is being explained by the model (Gelman and Hill 2007). Table 1 illustrates the results of a test for overdispersion for a Poisson model with the covariates described above.[12] As indicated by the dispersion ratio, a multilevel Poisson model with identical specifications (as outlined above) suffers from overdispersion.[13] Thus, a negative binomial will be used to model the data.

[12]The Poisson model was estimated using the *lme4* package in R, and optimized using the *optimx* optimizer from the *nloptwrap* package in R, using the "NLOPT_LN_NELDERMEAD" method with $10 * 10^6$ iterations and tests for the function and parameters and Kuhn, Karush, Tucker optimality conditions turned off.

[13]Throughout this research effort, a p-value of 0.05 or less is taken to indicate evidence of statistical significance.

To model variation in executive orders, I specify the following multilevel negative binomial model:[14]

$ln(\text{Executive Orders}) \sim (\text{President}_{j[i]} + \beta_1 \text{Gridlock Width}_i + \beta_2 \text{Majority Party Distance}_i + \beta_3 \text{War}_i + \beta_4 \text{Inflation}_i + \beta_5 \text{Lame Duck}_i, \sigma_y^2)$

$\text{President}_j \sim N(\gamma_0 + \gamma_1 \text{Party\_Change}_j, \sigma_\alpha^2)$

Where the i subscript indicates "individual-level" observations by year and the j subscript indicates "group-level" observations by president.

Previous studies (e.g. Krause and Cohen 2000) have demonstrated that individual presidents vary in how they use executive orders. Additionally, congressional voting behavior may systematically vary in response to differences in a president's strategic use of executive orders. Accordingly, previous efforts (e.g. Bolton and Thrower 2015) have modeled this presidential heterogeneity using presidential fixed effects (dummy variables for each presidential tenure). However, multilevel modeling presents a potentially more elegant and efficient way of modeling presidential heterogeneity in the use of executive orders. A multilevel approach can explicitly model variation in both the year-level ("individual level") and president level ("group level") observations in the model estimation process, producing an intercept for each president. This potentially provides more accurate estimates of presidential variation in the use of executive orders. Additionally, using a multilevel model does not require the estimation of a parameter for each president, affording more statistical power, and does not require the arbitrary choice of a president as a "baseline" to compare all other presidents to. By including a group-level variation parameter (σ_α), the varying intercepts in the model can also capture variation in presidents' use of executive orders without having to worry about collinearity or overfitting the data (Gelman and Hill 2007).

[14]The model was estimated using the *lme4* package in R, and optimized using the *optimx* optimizer from the *optimx* package in R, using $10 * 10^6$ iterations and tests for the function and parameters and Kuhn, Karush, Tucker optimality conditions turned off.

Table 2: Distance From the Majority Median, Gridlock, and Executive Orders

Variable	**Coefficient Estimate**	**Confidence Interval**
Senate Majority Distance	-0.52 (0.18)	[-0.87, -0.16]
Gridlock	0.002 (0.997)	[-2.08, 2.08]
War	-0.05 (0.09)	[-0.226, 0.126]
Opposite Party President	-0.35 (0.35)	[-1.036, 0.336]
Inflation	0.01 (0.01)	[-0.01, 0.03]
Lame Duck President	0.07 (0.12)	[-0.165, 0.305]

Results

Table 2 contains point estimates and confidence intervals for the model specified above. Preliminary evidence indicates that the ideological distance hypothesis is supported, while little evidence exists for the gridlock hypothesis (the *Gridlock* coefficient is essentialy zero). As expected, the *Senate Majority Distance* coefficient is negative and reliable at conventional levels.[15] Only one house at a time is included because the measures for the House and Senate are highly correlated, and thus may introduce collinearity into the model if included simultaneously: therefore, the results displayed here show the results for the Senate scores. However, results for the analagous *Majority Distance* variable for the U.S. House are substantively similar.[16]

The use of random intercepts in the model captures a substantial amount of variation: the varying intercepts for presidents have a standard deviation of 0.7, compared to the individual level standard deviation of 0.89.[17] Likewise, comparing the model variance

[15] Throughout this research effort a conventional standard of $p < .05$ will be adopted to assess statistical signficance.

[16] See the Appendix for these results in more detail.

[17] Estimated in R using the model's deviance residuals.

Table 2: Assessing Varying Intercepts for Presidents

	σ_y^2	σ_y	σ_α^2	σ_α^2	ICC
Model 1 (Senate Distance)	0.797	0.893	0.494	0.703	0.383
Model 2 (House Distance)	0.798	0.893	0.494	0.703	0.383

(the "within variance") σ_y^2 to the variation between presidents (the "between variance") σ_α^2 returns an intraclass correlation coefficient (ICC) of 0.383. Moreover, Sagan (2013) notes that an additional model level can be justified even with an ICC as low as 0.05. These results are summarized in Table 3, and Figure 3 provides a plot of the varying intercept estimates and confidence intervals.

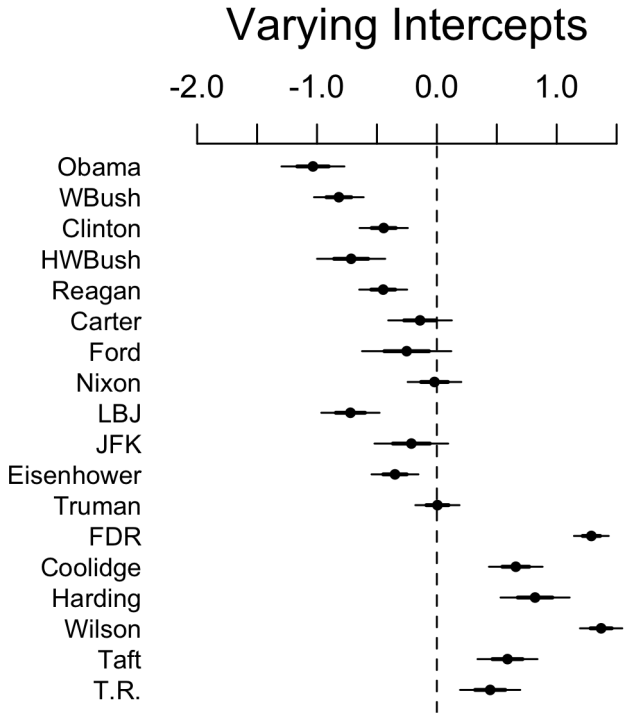

Figure 5: Varying Intercepts Estimates

In essence, these varying intercepts on the presidents tell us how much the intercept estimated for each presidency shifts from administration to administration. For example, on the extreme high end, Franklin Roosevelt's intecept of 1.2 indicates that the model expects Roosevelt to issue 3.6 times more executive orders (in an average year of his presidency) than the average president, after accounting for the other covariates in the

model. Conversely, on the low end of the scale, Obama's intercept of -1 indicates that in an average year of Obama's presidency, we would expect him to issue only 0.36 times (36 percent of) the number of executive orders as the average president.

Figure 4 provides predicted counts of executive orders with varying levels of ideological distance between the ideal points of the Senate majority party median and the president. These counts are generated using simulated coefficients generated by the *sim* function in R and the observed values in the dataset.[18]

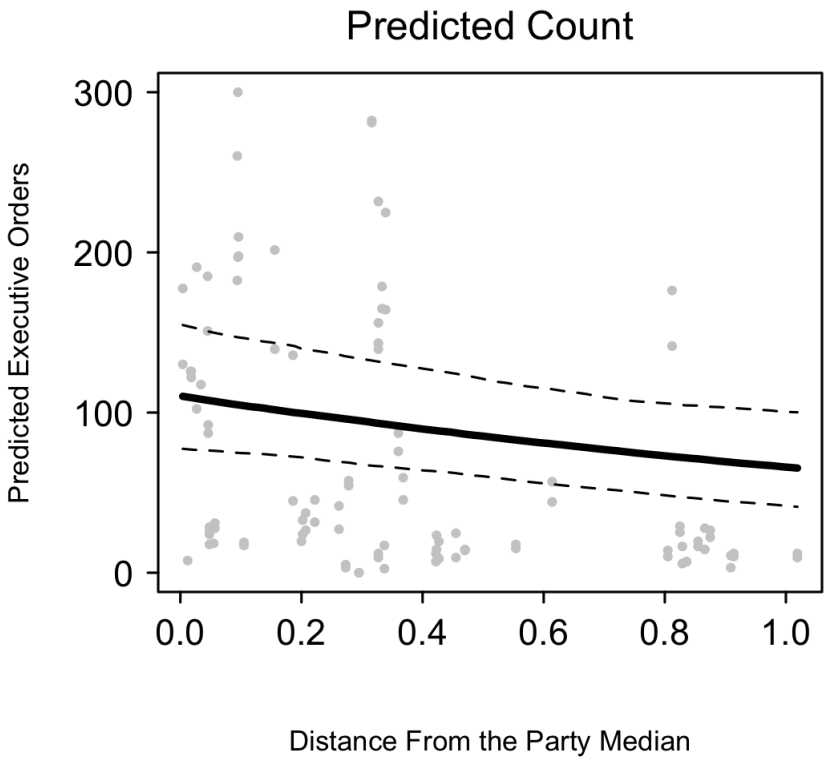

Figure 6

Figure 4 illustrates the general trend that as the distance between the president's ideal point and the ideal point of hte majority party median increases, the expected count of executive orders decreases. Specifically, at the first quartile of distance on the DW-NOMINATE scale between the president and Senate majority party median (0.095),

[18]This approach is preferable because investigating the "average case" does not provide a meaningful inference, and prior research efforts have indicated that the observed-value approach produces results more robust to model mis-specification than the average case approach. For more on the methodological and theoretical advantages of the observed values approach, see Hanmer and Kalkan (2013).

the model predicts that the president will issue 105 executive orders, on average, taking into account the gridlock interval, wartime, the inflation rate, and whether the president comes from the opposite party as the previous president or is a lame duck. By contrast, a president facing a majority party median that is distant on the DW-NOMINATE scale equivalent to the third quartile of the Senate distance measure (.470) would be expected to issue 86 executive orders. Morever, a president facing a Congress at the mean observed level of distance on the NOMINATE scale (.360) would be expected to issue 92 executive orders, while a president facing an extremely distant Congress (1.0) would be expected to issue only 64 orders, on average.

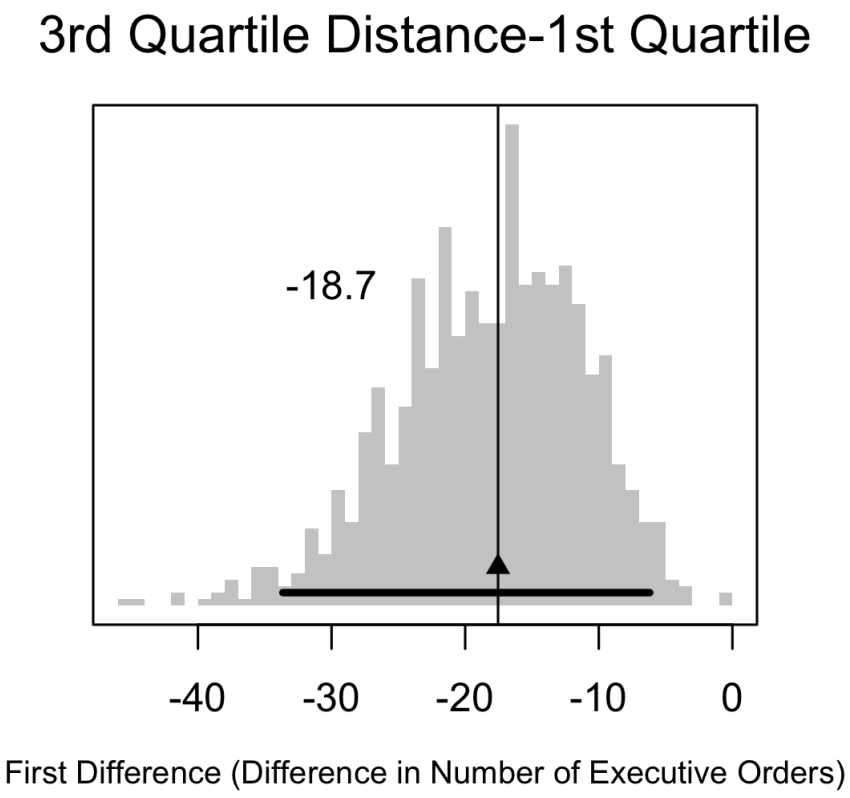

Figure 7

Figure 5 provides an explicit test of changes in the number of executive orders at the third quartile of the Senate distance variable (.470) minus the first quartile (0.095). The result indicates that a president facing a Congress at the third quartile of distance on the NOMINATE scale would be expected to issue 19 *fewer* orders, on average, than a

president facing a Congress at the first quartile of distance.[19]

Discussion and Conclusion

The impact of the results of the above findings is obviously dependent on the historical context one is considering. In the modern period, where presidents seem to be more judicious in their use of executive orders, a president issuing 19 fewer orders could be quite significant. Under the working definition of executive orders as all non-ceremonial orders, three recent U.S. presidents, George H.W. Bush, Bill Clinton, and George W. Bush, issued an average of 40, 45, and 72 executive orders per year, respectively (on average). However, in comparison, presidents governing during and prior to World War II routinely issued hundreds of executive orders per year, including presidents typically thought as supportive of limited government, such as Calvin Coolidge and Warren Harding.

Even with this important historical context in mind, though, this research effort departs from previous accounts of variation in executive orders that incorporate the pre-World War II period (e.g. Bolton and Thrower 2015) by asserting a *consistent negative effect* of ideological distance between the president and the majority party median over time. Additional analyses in the research appendix demonstrate that the negative estimate for distance from the majority median is robust to whether an estimate for the House or Senate is included, and whether the results are divided between the pre-and post-World War II period or not.

Future research should seek to further contextualize the choices made by the executive in acting unilaterally. Indeed, it may be the case that some of the observed variation in executive orders noted in this study and prior research efforts may not be representative of the president choosing not to act unilaterally, but instead choosing to resort to other forms of unilateral action or communication, such as presidential memoranda, which have seen increased use in the modern era (Lowande 2015).

Further efforts may also seek to exploit variation in the institutional arrangements in the premodern era that is not present when studies of executive orders are isolated to

[19]The confidence interval for this estimate is displayed using a black line segment in the figure.

the modern era alone: for example, in the premodern era there are regular instances of the executive's ideal point lying inside the gridlock interval (when calculated as the left and right veto pivots), an empirical indicator often associated with theories of unilateral action but previously left untested. It may be possible that it is simply the narrow conception of the gridlock interval used in this research effort that is associated with its apparent irrelevance to theories of unilateral action.

In summary, although the president may have been relatively unconstrained in the pre-modern period, it seems that he has always had to account for the preferences of Congress to some degree. Accordingly, this research effort argues that while relevant institutional factors, such as congressional resources and capacity, have changed over time, the president has had to consistently incorporate the ability of Congress to oppose his agenda, should he choose to act unilaterally. This research effort provides an empirical confirmation of theories of unilateral action that argue for the relevance of congressional ideology. It seems far from prudent to abandon ideological theories of unilateral action as unsuited to the premodern era. Congressional opposition has remained a consistent and influential factor in the president's strategic considerations surrouding executive orders throughout the 20th and 21st century, and theories of unilateral action must continue to grapple with congressional influence corresponding to changes in congressional ideology in both the modern and premodern periods.

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Summary Statistics

Variable	Description	Mean	Median	Std. Deviation	Minimum	Maximum
Executive Orders	Non-ceremonial executive orders issued	140.2	70	123.7	20	501
Distance From Senate Majority Median	Absolute distance between the ideal point of the president and the Senate majority median	0.360	0.316	0.303	0.003	1.019
Distance From House Majority Median	Absolute distance between the ideal point of the president and the House majority median	0.428	0.234	0.379	0.012	1.103
Gridlock	Distance between the ideal points of the left and right veto pivots	0.526	0.520	0.131	0.221	0.776
Inflation	Inflation rate (in 2009 U.S. dollars)	3.18	2.66	4.86	-10.68	20.49
War	Binary: coded 1 for a year in a period of war, 0 otherwise					
Lame Duck	Binary: coded 1 for the last year in a president's term, 0 otherwise					
Opposite Party	Binary: coded 1 if a president is of the opposite party from the previous president, 0 otherwise					

Model Estimates for Executive Orders 1905-1945

Variable	Coefficient Estimate	Confidence Interval
Senate Majority Distance	-0.70 (0.36)	[-1.41, 0.006]
Gridlock	-0.55 (0.56)	[-1.65, 0.550]
War	-0.41 (0.18)	[-0.763, -0.057]
Opposite Party President	0.29 (0.14)	[0.016, 0.564]
Inflation	0.03 (0.01)	[0.010, 0.050]
Lame Duck President	0.28 (0.32)	[-0.347, 0.907]

Model Estimates for Executive Orders 1945-2013

Variable	Coefficient Estimate	Confidence Interval
Senate Majority Distance	-0.24 (0.12)	[-0.475, -0.0048]
Gridlock	-1.86 (0.44)	[-2.722, -0.998]
War	0.17 (0.07)	[0.033, 0.307]
Opposite Party President	-0.02 (0.13)	[-0.275, 0.234]
Inflation	0.02 (0.01)	[.0004, 0.040]
Lame Duck President	-0.01 (0.09)	[-0.186, 0.166]

Model Estimates for House Distance Variable, 1905-2013

Variable	Coefficient Estimate	Confidence Interval
House Majority Distance	-0.37 (0.14)	[-0.64, -0.096]
Gridlock	0.24 (0.64)	[-1.014, 1.494]
War	-0.07 (0.09)	[-0.246, 0.106]
Opposite Party President	-0.32 (0.34)	[-0.986, 0.346]
Inflation	0.01 (0.01)	[-0.010, 0.030]
Lame Duck President	0.07 (0.13)	[-0.185, 0.325]