

term.⁴⁵ Presidential support scores comparable to those analyzed in this paper are not yet available for the Bush administration, but, among Democrats, the difference between votes on proposals dealing directly with the terrorist threat and those dealing with the domestic agenda are likely to be dramatic.

CONCLUSION

The surge of national unity provoked by terrorist attacks on the United States in September 2001 set up something of a natural experiment testing the durability of the strong party divisions that had emerged over the previous three decades. The results so far suggest that polarized politics is indeed a durable component of national politics. This is not surprising, for, as I have tried to show in this paper and others, deep party divisions in Washington are firmly rooted in electoral politics and consistent with divisions in popular opinion. Elite and popular consensus supporting the president's war on terrorism was initially strong but narrowly focused; it did not spread to issues that split the parties before September 11, and congressional Democrats felt little pressure from electoral constituents to support Bush's positions on those issues. As Bush's support among ordinary Democrats deteriorated in the year following the invasion of Iraq, Democrats in Congress had even less reason to follow his lead. Meanwhile, congressional Republicans remained overwhelmingly loyal to the president, leaving Congress highly polarized once again.

If the analysis presented here is correct, the only force able to affect party differences in presidential support (on issues unrelated to the war on terrorism) in the short run is the president himself. More moderate presidents win greater support from the opposing party; Bush could presumably increase his support among Democrats by pursuing policies closer to those they prefer, as he did on his education package. But given his own ideological instincts and considering the resistance he would get from the highly disciplined, largely conservative Republican majorities in the House and Senate, Bush's second term will most likely resemble his first. The extraordinarily partisan and polarized race for the presidency left neither side in a mood to back down. Unless and until electoral constituents tell them otherwise, there will be little pressure on either party to bend.

45. For the House and Senate combined, Democrats had a party unity score of 85 percent for 2001, tying their highest ever (1993); the combined Republican score was 90 percent, surpassed only by 91 percent in 1995; 85 and 90 were the parties' respective average unity scores for the next three years as well (*Congressional Quarterly Weekly Report*, December 11, 2004, 2953).



Power without Persuasion

Rethinking Foundations of Executive Influence

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Ours is a system of federated and separated powers, a government that by its very design frustrates passions and stymies change. For activists with a new idea and a sweeping policy agenda, the legislative process can be nothing short of maddening. As a practical matter, a few individuals—a key committee chair, two-fifths of the Senate, and, not least, the president himself—can block the enactment of laws. What with the proliferation of subcommittees, the weakening of parties, and the growing involvement of interest groups during the past 30 years, the chances of assembling and sustaining coalitions is further complicated. And if that were not enough, transaction costs and collective action problems further undermine possibilities for passing a wide assortment of laws. Politicians who set their sights on advancing new policy initiatives invariably have a harder time of it than those who take it upon themselves to protect the status quo.

That all politicians struggle, however, does not mean that all politicians struggle equally. Presidents, in particular, have an ace up their sleeves. Using a wide variety of mechanisms, presidents can unilaterally set public policy and thereby place upon others the onus of coordinating a response. Through executive orders, executive agreements, national security directives, proclamations, memos, and other kinds of unilateral directives, presidents can exert power and initiate change to an extent not possible in a strictly legislative setting. During eras defined by gridlock, presidents have deployed these policy devices with increasing frequency and effect—so much so, in fact, that they constitute a defining feature of the modern presidency itself.

1. I would like to thank Doug Kriner, David Lewis, Kenneth Mayer, and Paul Peterson for helpful feedback. As always, standard disclaimers apply.

This chapter speaks to the larger, more conceptual issues that these unilateral powers raise, exploring some of the ways in which they challenge the more traditional notions of bargaining and negotiating that have guided scholarly research on the American presidency for almost half a century. More specifically, this essay engages Richard Neustadt's central thesis that presidential power is synonymous with persuasion and that the ability of presidents to accomplish anything of consequence depends upon the goodwill and cooperation of other political actors located in others parts of the federal government. The White House, I suggest, is itself a vital center of activity, one where policies are not only devised but also issued. And precisely because the president can act unilaterally, he (someday she) can place other political actors in a defensive posture, scrambling to manufacture an effective response. Should they fail, then the president's orders stand, as a unilateral directive retains the weight of law until and unless somebody else overturns it. As such, the boundaries of unilateral powers depend less upon the inclination of other political actors in other branches of government to do the president's bidding and more upon their willingness and capacity to intervene and dismantle executive actions already taken.

From the outset, let me be absolutely clear about two matters. First, the president's unilateral powers are not boundless. If their directives are to endure, presidents must issue them only when opportunities permit, lest their actions provoke retaliation from either Congress or the courts. And second, persuasion and unilateral action are not mutually exclusive enterprises. When implementing their orders, or when trying to secure funding for unilaterally created agencies and programs, persuasion can be valuable. But the fact that unilateral powers have limits does not mean that they are inconsequential; and the fact that persuasion sometimes complements unilateral action does not mean that Neustadt identified all aspects of presidential power. Unilateral powers augment presidential power in material ways, enabling the Chief Executive to create policies that look markedly different from those that would emerge through the legislative process. And as presidents have deployed them with increasing regularity, it seems long overdue that we update our thinking about the foundations of executive power.

A FLURRY OF ACTIVITY

From the moment he took office, President George W. Bush began issuing executive orders, proclamations, and national security directives that dramatically reshaped the domestic and foreign policy landscapes. In the spring of 2001, he issued an executive order that instituted a ban on all federal project labor contracts, temporarily setting in flux Boston's \$14 billion dollar "Big Dig" and dealing a major blow to labor unions. He later required federal

contractors to post notices advising employees that they have a right to withhold the portion of union dues used for political purposes. He created the White House Office of Faith-Based and Community Initiatives, which was charged with "identify[ing] and remov[ing] needless barriers that thwart the heroic work of faith-based groups."² He set new guidelines on federal funding of fetal tissue research. In order to block the release of presidential papers, he claimed the power for presidents and their kin to invoke executive privilege years after leaving office. By including salmon raised in fish hatcheries in counts for the Endangered Species Act, Bush managed to take numerous species of wild salmon off the list of endangered species and thereby lifted federal regulations that applied to the rivers and streams where they spawn. Without securing a congressional authorization, Bush withdrew from the Kyoto Protocols, the International Criminal Court, and the Antiballistic Missile Treaty. And just as Truman used a 1950 national security directive to identify the doctrine of deterrence, which guided foreign policy during the Cold War, Bush issued a national security strategy endorsing the principle of preemptive war, which may guide foreign policy efforts to confront terrorism in the 21st century.

For Bush, scaling back environmental and industry regulations has been a major priority. "Stymied in [their] efforts to pass major domestic initiatives in Congress," a recent *New York Times* feature story revealed, "officials have turned to regulatory change."³ Under Bush's watch, "Health rules, environmental regulations, energy initiatives, worker-safety standards and product-safety disclosure policies have been modified in ways that often please business and industry leaders while dismaying interest groups representing consumers, workers, drivers, medical patients, the elderly and many others. And most of it was done through regulation, not law—lowering the profile of the actions. The administration can write or revise regulations largely on its own, while Congress must pass laws. For that reason, most modern-day presidents have pursued much of their agendas through regulation." The Bush administration has issued rules that alter the amount of allowable diesel-engine exhaust, that extend the number of hours that truck drivers can remain on the road without resting, and that permit Forest Service managers to approve logging in federal forests without standard environmental reviews. These rule changes, moreover, represent but a fraction of the total.

Considerable activity has centered around the president's war on terrorism. In the aftermath of September 11, Bush created a series of agencies—the

2. For a thorough review of this particular executive order, as well as Bush's aggressive use of his unilateral powers more generally, see Anne Farris, Richard P. Nathan, and David J. Wright, "The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative," (Washington, DC: The Roundtable on Religion and Social Policy, 2004).

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

Office of Homeland Security, the Office of Global Communications, and the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction—to collect and disseminate new intelligence while coordinating the activities of existing bureaus. He issued a national security directive lifting a ban (which Ford originally instituted via executive order 11905) on the CIA's ability to "engage in, or conspire to engage in, political assassination"—in this instance, the target being Osama bin Laden and his lieutenants within al Qaeda. He signed executive orders that froze all financial assets in U.S. banks that were linked to bin Laden and other terrorist networks. And perhaps most controversially, Bush signed an order allowing special military tribunals to try noncitizens suspected of plotting terrorist acts, committing terrorism, or harboring known terrorists.

The most visible of Bush's unilateral actions consisted of military strikes in Afghanistan and Iraq. Having secured congressional authorizations to respond to the mounting crises as he saw fit,⁴ in the fall of 2001, Bush directed the Air Force to begin a bombing campaign against Taliban strongholds while Special Forces conducted stealth missions on the ground; and in the spring of 2003, he launched a massive air and ground war against Iraq, plunging the United States into the most protracted military conflict since the Vietnam War. And if recent reports are true, the president is using "findings and executive orders" to launch a wide range of covert military actions in the Middle East, just as he shifts numerous intelligence-gathering responsibilities from the CIA to the Pentagon.⁵ Though not always packaged as traditional policy directives, these commands nonetheless instigate some of the most potent expressions of executive power. Within a year, Bush's orders resulted in the collapse of the Taliban and Baathist regimes; the flight of tens of thousands of refugees into Pakistan, Iran, and Turkey; the destruction of Afghanistan and Iraq's social and economic infrastructures; and the introduction of new governing regimes.

Bush hardly invented these powers. Nor was he the first president to utilize them with such frequency and consequence. During his tenure, Clinton "perfected the art of go-alone governing."⁶ Though Republicans effectively

4. In many policy arenas, presidents find the authority they need to act unilaterally in some vague statute or broad delegation of power. And when doing so, it is difficult to make the case that the president is merely fulfilling the expressed wishes of Congress (more on this in a later note). In this instance, it is worth noting that Congress refused to formally declare war against Afghanistan or Iraq. Rather, it passed authorizations in the falls of 2001 and 2002 that gave the president broad discretion to use the military as he deemed appropriate in the nation's campaign against terrorism.

5. Seymour M. Hersh, "The Coming Wars: What the Pentagon Can Now Do in Secret," *The New Yorker*, January 24 & 31, 2004, pp. 40–47.

6. Francine Kiefer, "Clinton Perfects the Art of Go-Alone Governing," *Christian Science Monitor*, July 24, 1968, p. 3.

undermined his 1993 health care initiative, Clinton subsequently managed to issue directives that established a patient's bill of rights, reformed health care programs' appeals process, and set new penalties for companies that deny health coverage to the poor and people with preexisting medical conditions. During the summer of 1998, just days after the Senate abandoned major tobacco legislation, Clinton imposed smoking limits on buildings owned or leased by the executive branch and ordered agencies to monitor the smoking habits of teenagers, a move that helped generate data needed to prosecute the tobacco industry. While his efforts to enact gun-control legislation met mixed success, Clinton issued executive orders that banned numerous assault weapons and required trigger safety locks on new guns bought for federal law enforcement officials. Nor did this activity decline in the waning years of his administration. Instead, Clinton "engaged in a burst of activity at a point when other presidents might have coasted . . . Executive orders have flown off Clinton's desk, mandating government action on issues from mental health to food safety."⁷ And during the final months of his presidency, Clinton turned literally millions of acres of land in Nevada, California, Utah, Hawaii, and Arizona into national monuments. Though Republicans in Congress condemned the president for "usurping the power of state legislatures and local officials" and vainly attempting to "salvage a presidential legacy," in the end they had little choice but to accept the executive orders as law.⁸ Rather than wait on Congress, Clinton simply acted, daring his Republican opponents and the courts to try to overturn him. With a few notable exceptions,⁹ neither did.

Nor are Clinton and George W. Bush unique in this regard. Throughout the 20th century, presidents have used their powers of unilateral action to intervene in a whole host of policy arenas. Examples abound: By creating the Fair Employment Practices Committee (and its subsequent incarnations) and desegregating the military in the 1940s and 1950s, presidents defined federal government involvement in civil rights decades before the 1964 and 1965 Civil Rights Acts; from the Peace Corps to the Environmental Protection

7. Sonya Ross, "Searching for a Way to Make History Forget Impeachment," December 20, 1999, posted on CNN.com.

8. Quotes in "Clinton's Lands Designation Refuels Efforts to Narrow Monuments Law," *Congressional Quarterly Weekly Report*, January 15, 2000, p. 86. In 1999, the House passed HR 1487 that would have restricted the president's authority to designate national parks, but the bill died in the Senate. William G. Howell, *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton, NJ: Princeton University Press, 2003).

9. One of the more visible repudiations of an executive order issued by Clinton concerned the permanent replacement of striking workers. *Chamber of Commerce of the United States v. Reich* (DC Cir. 1996). For more discussion on the institutional constraints of presidential power, see a later section of the chapter.

Agency to the Bureau of Alcohol, Tobacco, and Firearms to the National Security Agency to the Federal Emergency Management Agency, presidents unilaterally have created some of the most important administrative agencies in the modern era. With Reagan's executive order 12291 the most striking example, presidents have issued a long string of directives aimed at improving their oversight of the federal bureaucracy. Without any prior congressional authorization of support, recent presidents have launched military strikes against Grenada, Libya, Lebanon, Panama, Haiti, Bosnia, and Somalia. These, moreover, are just a small sampling of the policies issued and actions taken via executive orders, proclamations, reorganization plans, and other kinds of directives.¹⁰ As Peter Shane and Harold Bruff argue in their casebook on the presidency, "Presidents [now] use executive orders to implement many of their most important policy initiatives, basing them on any combination of constitutional and statutory powers that is thought to be available."¹¹ A defining feature of presidential power during the modern era is a propensity and a capacity to go it alone.

"PRESIDENTIAL POWER IS THE POWER TO PERSUADE"

What theoretical tools currently are available for understanding when presidents exercise their unilateral powers and what influence they glean from doing so? For answers, scholars habitually turn to Richard Neustadt, who continues to set the terms by which every student of American politics comes to understand presidential power. His seminal book *Presidential Power*, originally published in 1960 and updated several times since, not only set an agenda for research on the American presidency, it structured the ways scholars thought about presidents as they operated in a highly fragmented system of governance. It defined the parameters and scope of all subsequent debate and, by Robert Shapiro, Martha Kumar, and Lawrence Jacobs's account, it "has continued to be the most widely assigned and read book on the subject and has been the cornerstone of far-reaching research on the presidency."¹² Nearly a half century since its original publication and with over a million copies sold, *Presidential Power* continues to be assigned in nearly every graduate and

10. See Philip Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Lawrence: University Press of Kansas, 2002), for many more.

11. Peter Shane and Harold Bruff, *The Law of Presidential Power* (Durham, NC: Carolina Academic Press, 1988), p. 88.

12. Robert Shapiro, Martha Kumar, and Lawrence Jacobs, eds., *Presidential Power: Forging the Presidency for the Twenty-First Century* (New York: Columbia University Press, 2004), pp. 1–2.

undergraduate course on the American presidency. It is quite simply, as George Edwards notes, "the most influential, and most admired, book on the American presidency."¹³

What, then, does this book say? When thinking about presidents since Franklin Delano Roosevelt, Neustadt argues, "weak remains the word with which to start."¹⁴ Held captive by world events, by competing domestic interests and foreign policy pressures, by his party, his cabinet, the media, a fickle public, and partisan Congress, the modern president is more clerk than leader. To make matters worse, the president exercises little control over any of these matters—current events and the political actors who inhabit them regularly disregard his expressed wishes. As a result, the pursuit of the president's policy agenda is marked more by compromise than conviction, and his eventual success or failure (as determined by either the public at the next election or historians over time) ultimately depends upon the willingness of others to do things that he cannot possibly accomplish on his own.

To be sure, Neustadt effectively identified the basic dilemma facing all modern presidents: The public expects them to accomplish far more than their formal powers alone permit. This has been especially true since the New Deal, when the federal government took charge of the nation's economy, commerce, and the social welfare of its citizens. But now presidents must address almost every conceivable social and economic problem, from the proliferation of terrorist activities around the globe to the "assaults" on marriage posed by same-sex unions. Armed with little more than the powers to propose and veto legislation and recommend the appointment of bureaucrats and judges, however, modern presidents appear doomed to failure from the very beginning. As one recent treatise on presidential leadership puts it, "Modern presidents bask in the honors of the more formidable office that emerged from the New Deal, but they find themselves navigating a treacherous and lonely path, subject to a volatile political process that makes popular and enduring achievement unlikely."¹⁵

If a president is to enjoy any measure of success, Neustadt counsels, he must master the art of persuasion. Indeed, for Neustadt, power and persuasion are synonymous. As George Edwards notes in his moving tribute to the scholar and public servant, "perhaps the best known dictum regarding the

13. George Edwards, "Neustadt's Power Approach to the Presidency," in Robert Shapiro, Martha Kumar, and Lawrence Jacobs, eds., *Presidential Power: Forging the Presidency for the Twenty-First Century* (New York: Columbia University Press, 2000), p. 14.

14. Richard E. Neustadt, *Presidential Power and the Modern Presidents* (New York: Free Press, 1990), p. xix.

15. Marc Landy and Sidney Milkis, *Presidential Greatness* (Lawrence: University of Kansas Press, 2000), p. 197.

American presidency is that 'presidential power is the power to persuade.' This wonderfully felicitous phrase captures the essence of Neustadt's argument in *Presidential Power* and provided scholars with a new orientation to the study of the presidency.¹⁶ The ability to persuade, to convince other political actors that his interests are their own, defines political power and is the key to presidential success. Power, under this formulation, is about bargaining and negotiating; about convincing other political actors that the president's interests are their own; about brokering deals and trading promises; and about cajoling legislators, bureaucrats, and justices to do his bidding. The president wields influence when he manages to enhance his bargaining stature and build governing coalitions—and the principal way to accomplish as much, Neustadt claims, is to draw upon the bag of experiences, skills, and qualities that the president brings to the office.¹⁷

Plainly, the image of presidents striking out on their own to conduct a war on terrorism or revamp civil rights policies or reconstruct the federal bureaucracy stands in stark relief to scholarly literatures that equate executive power with persuasion and, consequently, place presidents at the peripheries of the lawmaking process. Conducting a secretive war on terrorism, dismantling international treaties brokered by previous administrations, and performing end runs around some of the most important environmental laws enacted during the past half-century; George W. Bush has hardly capitulated to members of Congress nor has he stood idly by while committee chairs debated whether to introduce legislation on his behalf. Instead, in each instance he seized the initiative, he acted boldly (some would say irresponsibly, even unconstitutionally), and then he dared his political adversaries to counter. Having issued a directive, the challenge Bush faced was not so much to invigorate Congress's support as it was to neutralize its criticism. An inept and enervated opponent, rather than a cooperative and eager friend, typically contributes more to the president's powers of unilateral action.

The actions that Bush and his modern predecessors have taken by fiat do not fit easily within a theoretical framework of executive power that emphasizes frailty and dependence, and offers only persuasion as recourse. For at least two reasons, I suggest, the ability to act unilaterally is conceptually distinct from the array of powers presidents rely upon within a bargaining framework. First, when presidents act unilaterally, they stand at the front end

16. George Edwards, "In Memorium, Richard Neustadt," *PS* 37, no. 1 (2004): 126.

17. This last claim that power ultimately is personal, and that its evaluation requires notions of prestige and reputation, has been subject to considerable controversy. For one of the more trenchant critiques, see Terry Moe, "Presidents, Institutions, and Theory," in George Edwards, John Kessel, and Bert Rockman, eds., *Researching the Presidency: Vital Questions, New Approaches* (Pittsburgh, PA: University of Pittsburgh Press, 1993).

of the policymaking process and thereby place upon Congress and the courts the burden of revising a new political landscape.¹⁸ If they choose not to retaliate, either by passing a law or ruling against the president, then the president's order stands. Only by taking (or credibly threatening to take) positive action can either adjoining institution limit the president's unilateral powers. Second, when the president acts unilaterally, he acts alone. Now, of course, he relies upon numerous advisors to formulate the policy, to devise ways of protecting it against congressional or judicial encroachment, and to oversee its implementation (more on this later). But in order to issue the actual policy, the president need not rally majorities, compromise with adversaries, or wait for some interest group to bring a case to court. The president, instead, can strike out on his own. By doing so, the modern president is in a unique position to lead, to break through the stasis that pervades the federal government, and to impose his will in more and more areas of governance.

The ability to move first and act alone, then, distinguishes unilateral actions from all other sources of influence. Indeed, the central precepts of Neustadt's argument are turned upside down, for unilateral action is the virtual antithesis of bargaining and persuading. Rather than leaning on individual members of Congress in quiet deliberations and then standing back and waiting for them to do things that suit White House interest, here presidents just act. Their power does not hinge upon their capacity to "convince [political actors] that what the White House wants of them is what they ought to do for their sake and for their authority."¹⁹ To make policy, presidents need not secure the formal consent of Congress, the active support of bureaucrats, or the official approval of justices. Instead, presidents simply set public policy and dare others to counter. And as long as Congress lacks the votes (usually two-thirds of both chambers) to overturn him, the president can be confident that his policy will stand.

INSTITUTIONAL CONSTRAINTS ON PRESIDENTIAL POWER

Plainly, presidents cannot institute every aspect of their policy agenda by decree. The checks and balances that define our system of governance are alive, though not always well, when presidents contemplate unilateral action. Should the president proceed without statutory or constitutional authority, the courts stand to overturn his actions, just as Congress can amend them, cut

18. Terry Moe, "The Presidency and the Bureaucracy: The Presidential Advantage," in Michael Nelson, ed., *The Presidency and the Political System* (Washington, DC: Congressional Quarterly Press, 1999).

19. Neustadt, *Presidential Power and the Modern Presidents*, p. 30.

funding for their operations, or eliminate them outright.²⁰ Even in those moments when presidential power reaches its zenith—namely, during times of national crisis—judicial and congressional prerogatives may be asserted.²¹ In 2004, as the nation braced itself for another domestic terrorist attack and images of car bombings and suicide missions filled the evening news, the courts extended new protections to citizens deemed enemy combatants by

20. Future presidents, too, can overturn the unilateral directives of their predecessors. Incoming presidents regularly relax, or altogether undo, the regulations and orders of past presidents; and in this respect, the influence a sitting president wields is limited by the anticipated actions of his forerunners. As Richard Waterman correctly notes, "subsequent presidents can and often do . . . reverse executive orders. Clinton reversed abortion policy established via executive order by the Reagan and G. H. W. Bush administrations. G. W. Bush reversed Clinton's orders on abortion . . . This is not a constraint if we think only within administrations, but for presidents who wish to leave a long-term political legacy, the fact that the next president may reverse their policies may force them, at least on occasion, to move to the legislative arena." Richard W. Waterman, "Unilateral Politics," *Public Administration Review* 64, no. 2 (2004). Many of Bush's actions overturned Clinton orders passed in the waning days (and, in some instances, hours) of the Democrat's administration. As soon as he took office, George W. Bush instructed the Government Printing Office to halt publication in the Federal Register of any new rules, "to ensure that the president's appointees have the opportunity to review any new or pending regulations." (Final regulations have the force of law once they are printed in the Federal Register.) The new administration then issued a 60-day stay on regulations that were published in the Register but had not yet taken effect. Shortly thereafter, Bush undid a number of Clinton environmental orders that extended federal protections to public lands, tightened restrictions on pollution runoff in rural areas, established new pollution-reporting requirements for manufacturers of lead compounds. In addition, Bush reinstated the ban on federal funding for international agencies that provide abortion counseling, a ban that Clinton lifted eight years prior.

It is not at all clear, though, that because of these dynamics we should downwardly adjust our assessments of presidential power. Two points deserve consideration, neither of which suggests that we do. First, from the perspective of any individual president, these tendencies may wash out. Just as future presidents may subsequently overturn or amend his actions, a sitting president is not forced to abide by every standing order that he inherits from past presidents. And second, the transfer and exchange of unilateral directives across administrations is not always as seamless as all this supposes. Often, presidents cannot alter orders set by their predecessors without paying a considerable political price, undermining the nation's credibility, or confronting serious, often insurmountable, legal obstacles. William Howell and Kenneth Mayer, "The Last 100 Days," *Presidential Studies Quarterly*, 2005.

21. William Howell and Jon Pevehouse, "Presidents, Congress, and the Use of Force," *International Organization* (2005); William Howell and Jon Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* (forthcoming); James M. Lindsay, "Congress and the Use of Force in the Post-Cold War Era," in The Aspen Strategy Group, ed., *The United States and the Use of Force in the Post-Cold War Era* (Queenstown, MD: The Aspen Institute, 1995); James M. Lindsay, "Deference and Defiance: The Shifting Rhythms of Executive Legislative Relations in Foreign Policy," *Presidential Studies Quarterly* 33, no. 3 (2003).

the president,²² as well as noncitizens held in protective custody abroad.²³ And while Congress, as of this writing, continues to authorize as much funding for the Iraq occupation as Bush requests, members have imposed increasing numbers of restrictions on how the money is to be spent and have articulated increasing numbers of objections to how the war is being conducted.

Though we occasionally witness adjoining branches of government rising up and striking down presidential orders, the deeper effects of judicial and congressional restraints remain hidden. George W. Bush might like to unilaterally institute a ban on same-sex marriages or to extend additional tax relief to citizens or to begin the process of privatizing aspects of social security accounts, but he lacks the constitutional and statutory basis for taking such actions and therefore prudently foregoes them.²⁴ And so it is with all presidents. Unilaterally, they do as much as they think they can get away with. But in those instances when a unilateral directive can be expected to spark some kind of congressional or judicial reprisal, presidents will proceed with caution; and knowing that their orders will promptly be overturned, presidents usually will not act at all.

Elsewhere, I survey the historical record on legislative and judicial efforts to amend and overturn executive orders issued by presidents.²⁵ On the whole, Congress has had a difficult time enacting laws that amend or overturn orders issued by presidents, though efforts to either codify in law or fund an executive order enjoy markedly higher success rates; and while judges and justices have appeared willing to strike down executive orders, the vast majority of these orders are never challenged, and for those that are, presidents win over 80 percent of the time. Providing an exhaustive account of these findings is beyond the reach of this chapter.²⁶ Instead, here I want to make two points about the

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

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

24. But for a discussion on the difficulties of constraining the president through crafting carefully worded statutes, see Terry Moe and William Howell, "Unilateral Action and Presidential Power: A Theory," *Presidential Studies Quarterly* 29, no. 4 (1999); Terry M. Moe and William G. Howell, "The Presidential Power of Unilateral Action," *Journal of Law, Economics and Organization* 29, no. 4 (1999).

25. Howell, *Power without Persuasion: A Theory of Direct Presidential Action*, chaps. 5–6.

26. For longer treatment of Congress's capacity to check the president's unilateral powers, see *ibid.*; Kenneth Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton, NJ: Princeton University Press, 2001); Moe, "The Presidency and the Bureaucracy: The Presidential Advantage"; Moe and Howell, "Unilateral Action and Presidential Power: A Theory"; Moe and Howell, "The Presidential Power of Unilateral Action."

institutional limitations on presidential power, the first of which involves budgetary politics and the second of which concerns the relationship between strategic behavior and persuasion.

First, some programs and agencies that presidents create unilaterally require funding. And when they do, Congress retains additional leverage to influence them, as its members can attach any number of stipulations on how the president spends the appropriated moneys, limiting what the program, agency, or commission does; whom it serves; what it reports; and how effectively it operates. Still, for at least three reasons, presidents manage to eke out a measure of influence even when they must reengage Congress within a bargaining framework. First, and most obviously, not all bargaining frameworks are equivalent. The appropriations process is considerably more streamlined and therefore easier to navigate, than the legislative process; hence, presidents will enjoy a higher rate of success when seeking funding for an existing program or agency than when trying to establish one legislatively. Second, when attempting to extract funding from Congress, the president does not always need to convince majorities of the merits of a particular program or agency. Instead, due to the complexities of budgets, presidents retain opportunities to shuffle funding sources around and draw from discretionary accounts to fund them.²⁷ And third, it is considerably easier to rally support for entities that are already up and running. By unilaterally establishing a policy or program, presidents can often shift in their favor the terms of the subsequent debate over funding.

Recall, by way of example, President George W. Bush's efforts in October 2003 to secure \$87 billion in supplemental appropriation for an occupation of Iraq that was proving to be much more expensive than originally anticipated. Because troops were already in the field and because the United States' credibility in the region had already been wagered, the terms of the debate had shifted to the president's advantage. A number of members who initially opposed the military venture nonetheless saw fit to keep the military's coffers full, as the world had been remade by a series of presidential orders, and a prior status quo could no longer be recovered. Consider the reflections of Senator Jon Corzine (D-NJ):

There is no getting around the fact that our troops are in Iraq, and they must be supported. Similarly, we have to accept that, even if we shouldn't have begun this conflict, it is now our Nation's responsibility, and it is in our Nation's interest, to ensure that Iraq is rebuilt and emerges as a modern democratic state in the context of its own culture. We simply can't walk away from Iraq. And it is imperative that we demonstrate to

27. Louis Fisher, *Presidential Spending Power* (Princeton, NJ: Princeton University Press, 1975).

the Iraqi people, and the international community, that Americans across the political spectrum are committed to this cause, and will fully support the Iraqi people as they move toward a free Iraq. Reluctantly, after balancing these many considerations, I will cast my vote "aye."²⁸

And so did a supermajority of members of the House and Senate. They did manage to place some restrictions on how the funding would be spent, and they refused to fund certain requests made by the administration. But in the end, members enacted a resolution that actually exceeded the president's request by roughly \$500 million.

The second point concerning institutional constraints on presidential power is more foundational. That presidents anticipate congressional and judicial actions before issuing a unilateral directive does not mean that presidents are intent on persuading nor that the foundations of these executive powers revert back to a Neustadtian paradigm. Executive orders, proclamations, and their ilk cannot be simply added to the list of other powers (formal and informal) that presidents regularly employ in order to persuade. Within a bargaining framework, politics centrally involves consensus building—and presidential power is checked where consensus breaks down. In a unilateral policy-making framework, the president acts as an independent entrepreneur, advancing policies and implementing change where opportunities allow—and his power is checked by the deliberate efforts of Congress, the courts, and other interested parties (the public, interest groups, foreign nations) to either stop him a priori or undo his actions thereafter. The institutional constraints on presidential powers are real; indeed, they are the building blocks of any theory of unilateral action. But though there are important legal and political limits to such powers, and though presidents must exercise them with care, it is a mistake to conceive of them as a special case of persuasion.

THE EXERCISE OF POWERS AND THE DEMONSTRATION OF INFLUENCE

Reflecting on changes in the modern presidency since the original publication of *Presidential Power*, Neustadt concluded in 1990 that the president "still shares most of his authority with others and is no more free than formerly to rule by sheer command. Persuasion in a sense akin to bargaining remains for major

28. Congressional Record, Emergency Supplemental Appropriations for Iraq and Afghanistan Security and Reconstruction Act, 2004 (Senate—October 17, 2003), p. S12809.

purposes the order of his day."²⁹ The facts suggest otherwise. Virtually every indicator suggests that modern presidents have deployed their unilateral powers with increasing frequency and effect.

From the very beginning, presidents have issued important unilateral directives, the Neutrality Proclamation, Louisiana Purchase, and Emancipation Proclamation being early highlights. But since the Supreme Court formally acknowledged the constitutionality of executive orders and agreements in the 1930s and 40s,³⁰ the practice has really taken hold. Almost all the trend lines point upward. During the first 150 years of the nation's history, treaties (foreign agreements that must be ratified by Congress) regularly outnumbered executive agreements (foreign agreements that automatically take effect); but during the last 50 years, presidents have signed roughly 10 executive agreements for every treaty submitted to Congress.³¹ With rising frequency, presidents are issuing national security directives (policies that are not even released for public review) to institute aspects of their policy agenda.³² Though the total number of executive orders has declined, the number of "significant" orders has increased by roughly an order of three.³³ Using executive orders, department orders, and reorganizations plans, presidents have unilaterally created a majority of the administrative agencies listed in the United States Government Manual.³⁴ These policy mechanisms, what is more, hardly exhaust the totality of options available to presidents, who regularly invent new mechanisms or redefine old ones in order to suit their own strategic interests.

That presidents are using their unilateral powers with rising frequency, of course, does not necessarily indicate that they are getting more of what they want. Neustadt fairly warns that one must distinguish the exercise of powers

29. Neustadt, *Presidential Power and the Modern Presidents*, p. 199.

30. See *United States v. Curtiss-Wright*, 299 U.S. 304 (1936); *United States v. Belmont*, 301 U.S. 324 (1937); and *United States v. Pink*, 315 U.S. 203 (1942). Glendon Schubert, *The Presidency in the Courts* (New York: Da Capo Press, 1973) contains a useful summary of these cases.

31. Lawrence Margolis, *Executive Agreements and Presidential Power in Foreign Policy* (New York: Praeger, 1986); Moe and Howell, "The Presidential Power of Unilateral Action."

32. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action*; Philip Cooper, "Power Tools for an Effective and Responsible Presidency," *Administration & Society* 29, no. 5 (1997).

33. Howell, *Power without Persuasion: A Theory of Direct Presidential Action*, p. 83. See also Kenneth Mayer and Kevin Price, "Unilateral Presidential Powers: Significant Executive Orders, 1949-99," *Presidential Studies Quarterly* 32, no. 2 (2002).

34. William Howell and David Lewis, "Agencies by Presidential Design," *Journal of Politics* 64, no. 4 (2002); David E. Lewis, *Presidents and the Politics of Agency Design* (Stanford, CA: Stanford University Press, 2003).

(plural) from the demonstration of power (singular),³⁵ for one hardly guarantees the other. As *powers*, Neustadt would surely concede that unilateral directives are an integral part of the president's arsenal. His skepticism lies in whether these powers yield *power*, and he outright rejects the notion that commands enable presidents to meaningfully address the awesome tide of responsibilities laid before their feet.³⁶ Just as it is difficult, if not impossible, to gauge the influence that other formal powers (for example, vetoes) afford presidents by assessing the frequency with which they are utilized,³⁷ so too is it difficult to measure the influence of unilateral directives by counting the sheer number issued. For if presidents are merely acting on behalf of other political actors and issuing orders that otherwise would be printed as laws, as much of the "congressional dominance" literature presumes,³⁸ then unilateral powers hardly augment executive power. To identify power, the president's actions must leave a unique imprint on the law and, ultimately, on the doings of government.³⁹

When will presidents exercise their unilateral powers, and what influence do they gain from doing so? Under two circumstances,⁴⁰ presidents have strong incentives to issue unilateral policy directives; and in both, they create policies that differ markedly from those that other branches of government would produce were they left to their own devices. First, when Congress is poised to enact sweeping policy changes that the president opposes, the president occasionally can preempt the legislative process with more moderate policy shifts. Recall, by way of example, the weakening Office Safety and Health

35. Neustadt, *Presidential Power and the Modern Presidents*. See note on p. 7.

36. *Ibid.*, pp. 10-28. More on this in a later note.

37. Charles Cameron and Nolan M. McCarty, "Models of Vetoes and Veto Bargaining," *Annual Review of Political Science* 7 (2004): 414.

38. See, for example, Roderick Kiewit and Mathew McCubbins, *The Logic of Delegation* (Chicago: University of Chicago Press, 1991). For critiques of this perspective, see Terry Moe, "An Assessment of the Positive Theory of 'Congressional Dominance,'" *Legislative Studies Quarterly* 12, no. 4 (1987); Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*; Keith Whittington and Daniel Carpenter, "Executive Power in American Institutional Development," *Perspectives on Politics* 1, no. 3 (2004).

39. In a critique of this view, Mathew Dickinson insists that unilateral directives "must be evaluated in the context of their overall impact on [presidents'] bargaining power," Mathew Dickinson, "Agendas, Agencies and Unilateral action: New Insights on Presidential Power?" *Congress & the Presidency* 31 (Spring 2004). But this suggestion confuses power's means and ends. Presidents do not issue directives and commands in order to augment their bargaining stature. Rather, they do so in order to materially change the world around them. And to the extent that these unilateral powers accomplish as much, president are well advised to continue issuing them.

40. Derived formally in Howell, *Power without Persuasion: A Theory of Direct Presidential Action*.

Administration created under Nixon, the modest sanctions levied by Reagan against South Africa's Apartheid regime, and the narrow focus and minimal powers assigned to independent commissions investigating intelligence failures on Iraq and weapons proliferation. In each of these cases, Congress stood poised to create either a stronger agency or more robust public policy, and the president lacked the support to kill these initiatives with a veto. And so in each, executive influence was measured by the president's ability to unilaterally impose portions of the proposed legislation and thereby derail the support of moderates within Congress who were considering stronger and more sweeping policy change.

More often, presidents use their unilateral powers to shift status quo policies over which Congress remains gridlocked. And here, the signature of power is not an altered policy but the creation of one that otherwise would not exist at all. As Congress failed to deal in any substantive way with civil rights issues during the 1940s and 50s, the classification of information during much of the post-War era, or terrorism since September 11th, presidents have stepped in and unilaterally defined the government's involvement in these policy arenas.⁴¹ As Joel Fleishman and Arthur Aufses recognize, "Congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."⁴² Incapable of effecting policy change, presidents may step in, grab the reigns of government, and issue policy changes that members of Congress, left to their own devices, would not enact. When doing so, presidents do not always get everything that they want, for should they push too far, their actions may galvanize a congressional or judicial response. And in some instances, presidents might well prefer to have their policy inscribed in law rather than in a unilateral directive, if only to guard them against the meddling of future presidents (see note 20). But a window of opportunity nonetheless presents itself when members of Congress remain mired in gridlock—one that presidents can take without ever convincing a single member of Congress that they share the same interests or serve the same goals.

In both of these scenarios, the contours of executive influence are readily discernible. In the first, the counterfactual to a unilateral directive is a more radical policy shift by Congress—were it not for the president's actions, Congress would retain the votes of its more moderate members in support of sweeping legislative change. And in the second, the mark of presidential influence is not a public policy that is weaker (or stronger) than what Congress prefers—rather, it is the unilateral creation of a policy that otherwise would not

41. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action*; Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power*.

42. Joel Fleishman and Arthur Aufses, "Law and Orders: The Problem of Presidential Legislation," *Law and Contemporary Problems* 40 (Summer 1976): 24.

exist at all. For were it not for the president's ability to unilaterally change public policy, the federal government would appear incapable of changing public policy in either a liberal or conservative direction.

PROSPECTIVE INFLUENCE

Neustadt is sensitive to the downstream costs of policy change and the possibilities of alienating political allies when abruptly redirecting the doings of government. Influence, he argues, cannot be measured along each policy dimension taken one at a time. Rather, as he notes in personal correspondence, "I do distinguish between the president as a person and the institution of which he is a part. I have to do *that* because the first stated objective of my book is to pursue the question of how he, himself, can exert influence upon the outputs of that (and other) institutions in our separated system. And the second stated objective is to pursue that question *strategically*, in terms not of actual, momentary influence, but rather of *prospective* influence" (emphasis in original). Or, as Charles Jones puts it, "Critical . . . to the Neustadt formulation is the continuous calculation of the effects of a particular choice on personal influence for making the next and succeeding choices."⁴³ What gains achieved in one instance must be weighed against losses registered in others. And battles won today, it would seem, may foment opposition that will strike tomorrow, effectively undermining the president's longer-term prospects of effecting meaningful policy change.

On this matter, Neustadt's argument enjoys widespread appeal. Scholars continue to monitor the ways in which change can breed contempt, and there emerges, in John Mueller's phrase, "a coalition of minorities."⁴⁴ Stephen Skowronek has written one of the most nuanced examinations of the internal forces that drive the formation and decline of political coalitions.⁴⁵ Once

43. Charles Jones, "Richard E. Neustadt: Public Servant as Scholar," *Annual Review of Political Science* 6 (2003): 12.

44. John Mueller, "Presidential Popularity from Truman to Johnson," *American Political Science Review* 64, no. 1 (1970): 20. In some instances, though, change may breed newfound consensus. Jennifer Hochschild, for instance, has documented the ways in which some Southern communities turned to embrace the goals of desegregation once executive and judicial orders were handed down, often over the vocal objections of local community members. Jennifer Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation* (New Haven, CT: Yale University Press, 1984). In such instances, the interventions themselves subsequently engendered a measure of local support that could not be manufactured any other way. The following section discusses in further detail some of the issues surrounding the implementation of unilateral directives and laws.

45. Stephen Skowronek, *The Politics Presidents Make* (Cambridge, MA: Harvard University Press, 1993).

established, Skowronek argues, governing coalitions must balance competing interests against one another, and as commitments are made, so too are disaffected minorities. In success lie the seeds of a regime's undoing—for with great deeds come the creation, and eventual mobilization, of enemies. Such is the logic of coalition formation, Skowronek argues, and the logic of regime change more generally.

Unilaterally issued policies, however, are hardly unique in this regard. If presidents must proceed with care when issuing a unilateral directive, for fear that drastic action might alienate key constituents,⁴⁶ so too must members of the House and Senate proceed with caution before bringing a bill before their assemblies.⁴⁷ Moreover, it is not clear what presidents can, or should, do about this apparent dilemma. There may be instances when presidents ought to sacrifice their policy preferences today in order to maintain goodwill tomorrow. But if influence, ultimately, is measured by a political actor's ability to get things done, to redirect the doings of government, then they must take a stand. Lasting change does not always require that every vested interest buy into a proposed course of action. Often, it comes when unilateral powers are asserted and parties are forced to adapt to a new status quo not of their own making.

IMPLEMENTING PUBLIC POLICY

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

Presidents, however, do not always have it so easy. Issuing an order or command does not automatically make it so. When they set new mandates that require the active cooperation of other political actors who have their own independent sources of authority, presidents can have a difficult time effectuating their orders. Bureaucrats, who have their own independent sources of power, may read the president's mandates selectively, insert their own preferences when they think they can get away with it, and then report back incomplete, and sometimes false, information about the policy's successes and

46. Neustadt, *Presidential Power and the Modern Presidents*, pp. 27–28.

47. It is no coincidence that most of the quantitative research on the tradeoffs between the creation of policy and the maintenance of public support has focused on legislative processes. Douglas Rivers and Nancy Rose, "Passing the President's Program: Public Opinion and Presidential Influence in Congress," *American Journal of Political Science* 29, no. 2 (1985).

failures.⁴⁸ All presidents, and all politicians, struggle to ensure that those who work below them will faithfully follow orders. And to make the most of a difficult situation, persuasion can be helpful.⁴⁹

Recognizing the slippages that occur between an order's issuance and its eventual implementation, however, neither "gives away much of the contested ground" nor "undercut[s] the substantive implications of [the] theory," as Matthew Dickinson suggests.⁵⁰ Four factors help explain why. First, it can be just as difficult to convince bureaucrats to execute laws as unilateral directives. If anything, laws may prove more difficult, if only because their mandates tend to be broader and their contents more ambiguous. In order to placate the required supermajorities within Congress, members often fill laws with loopholes and compromises, granting bureaucrats ample opportunities to substitute their own policy preferences for those of their political superiors. As presidents need not assemble a legislative coalition in order to issue a unilateral directive, their orders can be more direct. And as others have effectively argued, possibilities for shirking decline in direct proportion to clarity with which directions are handed down.⁵¹

Second, we need to be realistic about our expectations. Changes in systems of separated and federated powers almost always come in fits and starts, and policies submitted by any branch of government are regularly contested in others. Ours certainly is not a "presidency dominated" system of government, wherein Congress, courts, interest groups, and the media subvert their own independent interests in order to follow their Chief Executive.⁵² No one who thinks seriously about unilateral powers argues as much. Instead, they attempt

48. Daniel Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Innovations in Executive Agencies, 1862–1928* (Princeton, NJ: Princeton University Press, 2001).

49. Compliance, though, does not always (or even usually) come at the behest of persuasion, as defined by Neustadt. As a massive literature on delegation demonstrates, authority over budgets and hiring and firing decisions gives political authority considerable leverage over the bureaucracy. Knowing that their budgets might be cut, or that they might be transferred to another agency, or that they may simply be fired, bureaucrats often implement presidential orders even when no one has actively persuaded them to do so and even though they remain totally unconvinced that the president's interests are their own.

50. Dickinson, "Agendas, Agencies and Unilateral Action: New Insights on Presidential Power?" p. 103.

51. John Huber and Charles Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (New York: Cambridge University Press, 2002).

52. Charles Jones, *The Presidency in a Separated System* (Washington, DC: Brookings Institution, 1994).

to determine whether presidents can draw upon these powers to change, if only marginally, the doings of government. And having framed the issue (and our expectations) appropriately, there is continued reason to believe that they can. Recall those instances when the legislative branch is mired in gridlock and the president strikes out on his own, altering policies in ways that Congress can neither replicate nor overturn. Bureaucrats may not implement a policy as vigorously as the president might desire and judges may interpret the order in ways he might not prefer, but the president still has set in motion changes that, over time, materially affect the rights and privileges afforded average citizens. Though their actions hardly revolutionized race relations overnight, it mattered greatly that Roosevelt introduced a formal ban on discrimination in the military in 1942, that Truman then desegregated the military in 1948, that Johnson issued the first affirmative action policy in 1965, and that Nixon instituted racial quotas in hiring in 1969. For in each of these actions, presidents identified new national priorities and redirected the government down new courses of action, and each thereby contributed to the gradual uplifting of blacks and other ethnic minorities in America.

Third, presidents are fully cognizant of the challenges of implementation, and they regularly take steps to reduce them. When they unilaterally create programs and agencies, presidents structure them in ways that augment executive control.⁵³ Between 1946 and 1997, fully 67 percent of administrative agencies created by executive order and 84 percent created by departmental order were placed either within the Executive Office of the President or the cabinet, as compared to only 57 percent of agencies created legislatively. Independent boards and commissions, which dilute presidential control, governed only 13 percent of agencies created unilaterally, as compared to 44 percent of those created through legislation. And 40 percent of agencies created through legislation had some form of restrictions on the kinds of appointees presidents can make, as compared to only 8 percent of agencies created unilaterally. Presidents do not suffer quietly under the weight of implementation problems. Rather, they actively participate in the "politics of bureaucratic structure," issuing orders that augment their control over and influence in administrative agencies scattered throughout the federal bureaucracy.⁵⁴

53. Howell and Lewis, "Agencies by Presidential Design"; Lewis, *Presidents and the Politics of Agency Design*.

54. Terry Moe, "The Politics of Structural Choice: Toward a Theory of Public Bureaucracy," in Oliver Williamson, ed., *Organization Theory: From Chester Barnard to the Present and Beyond* (New York: Oxford University Press, 1990); Terry M. Moe and Scott A. Wilson, "Presidents and the Politics of Structure," *Law and Contemporary Problems* 57, no. 2 (1994).

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

To be sure, where implementation concerns arise, the influence afforded by unilateral powers is reduced. Just as presidents must anticipate the likely responses of Congress and the courts when issuing a directive, so too must they remain sensitive to the interests of their own administration. But it is equally important that scholars avoid overstating the case and resist the temptation of falling back into a world wherein all power is equated with bargaining and negotiating. Concerns about implementation pervade politics; but they do not eliminate opportunities for genuine influence. Unilateral powers do have limits for which any theory of unilateral action must account; but it is a mistake to equate these powers with persuasion, to dismiss them as merely epiphenomenal, or to conclude that because they do not allow presidents to secure everything they might like, these powers amount to little of consequence.

NEUSTADT'S THREE CASES OF COMMAND

Neustadt is perfectly aware of the existence of these unilateral powers. Indeed, he begins his book with three such examples: Truman's decision to fire Douglas MacArthur in 1951; Truman's seizure of the steel mills in 1952; and Eisenhower's ordering of federal troops into Little Rock, Arkansas, in 1957. The lessons drawn, however, differ markedly from those outlined in this chapter. In each instance, Neustadt claims, commands were issued where efforts to persuade had faltered. The president proved incapable of convincing a general, a labor union, and a state governor to respect his wishes, and hence was left with no recourse but to holler in the hope that others would, at last, listen. For Neustadt, the exercise of these unilateral powers, as with virtually all formal powers, represents a "painful last resort, a forced response to the exhaustion of other remedies, suggestive less of mastery than of failure—the failure of

attempts to gain an end by softer means."⁵⁵ Unilateral directives would seem to signal weakness, for when presidents issue them, they admit to having lost sway over other political actors and, by extension, the political system more generally.

Neustadt's caution that presidents do not automatically have their way every time they issue a command is a fair one. But for a variety of reasons, he overstates matters when he argues that presidents necessarily reveal weakness when they use their unilateral powers. Two stand out, the first of which concerns his case selection. It is misleading to characterize all unilateral actions as last-ditch efforts to salvage a policy that political actors elsewhere in the government are actively working to sabotage. When they alter a civil service rule or strengthen environmental regulation or send military troops to fight foreign armies, presidents are doing considerably more than expressing frustration at their inability to persuade. They are standing at the front end of the policy-making process, materially changing the doings of government, and challenging other lawmakers to catch up. Of course, presidents do not always get everything that they want. As emphasized from the outset, presidents who use these powers are well advised to respect their political and constitutional limitations. But Neustadt overlooks the many instances when presidents never attempted to persuade, when prior requests never went unheeded, and when political actors never overtly disavowed their president's wishes. Rather, seeing an opportunity, presidents struck, issued an order, and thereby set in motion a host of developments that otherwise would never have occurred.

Second, when measuring power, the standards of review cannot be whether presidents secure all aspects of their policy agenda, as all political actors freely cooperate in a set of shared pursuits. Rather, power is properly assessed by reference to conditions that would exist had powers not been exercised. And in all three cases that Neustadt considers, power is readily discernible. Had Truman not fired MacArthur, the general would have continued to wreak havoc on the president's war planning; had he not seized the steel mills, the workers' strike would have proceeded unabated; and had Eisenhower not sent the troops into Little Rock, Central High School would not have been integrated. Truman might well have preferred that MacArthur simply followed his order or that the unions abandon their strike, just as Eisenhower surely would have preferred that Arkansas Governor Orval Faubus would have followed the federal courts' desegregation orders. But it greatly misconstrues things to equate the mere issuance of commands as demonstrations of weakness. They may, in some instances, be second-best options, but they nonetheless yield influence that presidents, without them, would sorely miss.

55. Neustadt, *Presidential Power and the Modern Presidents*, p. 24.

A PRESIDENT STANDS APART

While writing *Presidential Power*, Neustadt struggled to see the world as the president sees it and to take inventory of the peculiar "vantage points in government" that the president holds.⁵⁶ As Jones notes, Neustadt intended to "settle into the head of the President so as to evaluate what is best for him, accepting who that President is and what his advantages are."⁵⁷ Though his immediate concern was the presidency, Neustadt discovered that the president's condition was hardly unique, and that the appropriate prescription for action, and the predictor of success, appeared to apply to politicians generally: Namely, marshal all available resources (personal and otherwise) in order to more effectively bargain, negotiate, and, with good fortune, persuade other political actors to do things that you cannot do for yourself. In his famous dictum, Neustadt observes that ours is a "government of separated institutions sharing power."⁵⁸ As powers are shared, and as members of Congress, judges, bureaucrats, and presidents all have independent means by which to check the actions of others, the importance of persuasion would appear to apply universally.

In one very important sense, Neustadt's argument does carry over to other political actors in other branches of government. To see why, it is useful to return to the context in which Neustadt was originally writing. During the 1940s and 50s, presidential power was conceived of largely in legalistic terms. Scholars dissected the Constitution for clues into the proper scope and content of presidential influence; they scrutinized the formal, enumerated powers bestowed upon the office; and they categorized the varied and various roles that presidents cast themselves in.⁵⁹ Politics, it seemed to Neustadt, were lost in these discussions. The sense that outcomes are not preordained, that power is always contested, that influence is always fleeting, was somehow missing from a literature that tried to piece together the formal powers of an officeholder, studied largely in isolation from the other political actors in other branches of government. The formal powers bestowed upon presidents do not automatically translate into influence over either the writing or the implementation of public policy. Neustadt correctly sought to insert politics into the study of the presidency; moreover, he wanted to offer counsel to presidents operating

56. *Ibid.*, p. 150.

57. Jones, "Richard E. Neustadt: Public Servant as Scholar," p. 13.

58. Neustadt, *Presidential Power and the Modern Presidents*, p. 29.

59. Edward Corwin, *The President, Office and Powers, 1787-1948: History and Analysis of Practice and Opinion* (New York: New York University Press, 1957); Clinton Rossiter, *The American Presidency* (New York: Harcourt, Brace and World, 1956).

within a highly fragmented political system, one that retained strong biases in favor of the status quo. Neustadt's lessons for presidents, as such, resonate throughout politics, for the challenge that presidents face is a challenge that all political actors face: namely, how to alter the flavors and proportions of dishes served from a kitchen with many cooks. In this sense, Neustadt's legacy is strong and vibrant because he was considerably more than just a scholar of the American presidency; he spoke to the entirety of our discipline.

But a basic fact should not go overlooked: Presidential power is not the same as legislative power. And when equating the two, scholars give short shrift to one of the most important ways in which presidents effect policy change in the modern era—namely, by striking out on their own and leaving it to others to revise the new political landscape. Unlike any member of Congress, the president alone can send troops abroad, renegotiate the terms of a tariff agreement with another country, alter environmental or worker safety regulations, or revamp civil rights law *without ever constructing a coalition or holding it together through the legislative process*. To be sure, presidents must employ this tactic strategically, given that Congress and the courts, not to mention future presidents, can overturn a sitting president's orders. But while all members of Congress must rely upon their colleagues to accomplish anything at all, presidents can unilaterally issue public policies that would never survive the legislative process.

After acting unilaterally, presidents may choose to draw upon the resources (professional reputation and public prestige) that Neustadt identifies as being crucial to their eventual success. They do so, however, in order to protect orders already given, to block attempts at meddling with policies already in place. Persuasion may reenter the equation, as presidents may need to convince members of Congress to fund their programs and bureaucrats to implement them. But these two processes of change are not synonymous. It is misleading to suggest that unilateral powers are “but a method of persuasion.”⁶⁰ That persuasion occasionally creeps back into unilateral action does not mean that the president's world always reverts back to the one Neustadt describes. For reasons previously outlined, the structure of negotiations over a policy that is up and running, rather than one that is strictly imagined, differs markedly. And in the end, precisely because they are able to unilaterally impose a new status quo, presidents have additional leverage when deliberations with Congress cannot be avoided.

Neustadt's essential arguments that persuasion is a component of power and that success is regularly fleeting certainly apply to politics generally. But not all politics consists of bargaining, not all bargaining frameworks are alike,

and opportunities to exert influence are not equally allotted across our system of governance. Power does not always find expression in deliberation, in the subtle push of adversaries, in the creation of new alliances, and the abandonment of old ones. And action—unsettling, calculating, and deliberate—is hardly the poor stepson to persuasion—decorous, reasoning, and humble. To the contrary, action often appears where persuasion cannot, reshaping and redirecting the doings of government in hugely important ways. The challenge that presidency scholars now face is to build upon Neustadt's central insight that politics matter greatly and that outcomes are not deterministic, in order to examine how different branches of government fare as they thrust and parry against one another, to identify the distinct advantages and disadvantages that presidents confront in this exchange, and to determine when presidents either succeed or fail in influencing the outcomes of government—sometimes by declaration, sometimes by persuasion, and occasionally by a combination of the two.

60. Neustadt, *Presidential Power and the Modern Presidents*, p. 28.