

The Presidential Power of Unilateral Action

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In this article we highlight a formal basis for presidential power that has gone largely unappreciated to this point, but has become so pivotal to presidential leadership and so central to an understanding of presidential power that it virtually defines what is distinctively modern about the modern presidency. This is the president's formal capacity to act unilaterally and thus to make law on his own. Our central purpose is to set out a theory of this aspect of presidential power. We argue that the president's powers of unilateral action are a force in American politics precisely because they are *not* specified in the Constitution. They derive their strength and resilience from the ambiguity of the contract. We also argue that presidents have incentives to push this ambiguity relentlessly to expand their own powers—and that, for reasons rooted in the nature of their institutions, neither Congress nor the courts are likely to stop them. We are currently in the midst of a research project to collect comprehensive data for testing this theory—data on what presidents have done, as well as on how Congress and the courts have responded. Here we provide a brief history of unilateral action, with special attention to the themes of our theoretical argument. We also make use of some early data to emerge from our project. For now it appears that the theory is well supported by the available evidence. This is a work in progress, however, and more is clearly needed before definitive conclusions can be justified.

A few observations about politics are so widely accepted that virtually all political scientists have committed them to memory. One of these is Richard Neustadt's (1960) famous dictum, "Presidential power is the power to persuade," which expresses, in shorthand form, his view that the powers of the modern American presidency are rooted in the personal qualities of the individual occupying the office—in his skills, his temperament, and his experience.

This notion of the personal presidency dominated the field for decades, but its influence is on the decline. The main reason is that it seems increasingly out of sync with the facts. The personal presidency became a popular theoretical notion just as the American presidency was experiencing tremendous growth

and development as an institution and as studies of presidential leadership increasingly found themselves focusing on the “institutional presidency” (Nathan, 1983; Moe, 1985; Burke, 1992). As time went on, the field clearly needed to adjust to a new reality in which formal structure and formal power have more central roles to play in explaining presidential leadership (Moe, 1993).

These developments coincided with the rise of the “new institutionalism” in economics and political science generally. Scholars across fields exhibited renewed interest in institutions of all kinds, new analytical tools were developed for the task—and the presidency, long studied via thick description and traditional methods, became part of the revolution. To date, the new analytic work emerging from this movement has rarely focused on the presidency *per se*. But by including presidents as one of several key players—in models of political control of the bureaucracy (Ferejohn and Shipan, 1990), for instance, or policy gridlock under separation of powers (Krehbiel, 1996; Brady and Volden, 1997), or the appropriations process (Kiewiet and McCubbins, 1991)—scholars have taken the first tangible steps toward building a rigorous institutional theory of the presidency.

In this article, we will continue this line of inquiry and encourage its evolution into a new phase that focuses more directly on the presidency itself. Our point of departure is the same question that motivated Neustadt and has oriented the mainstream literature in the field ever since. What are the foundations of presidential power? The new institutional literature speaks to this issue by providing rigorous treatments of specific formal powers granted presidents under the Constitution. Almost always, the focus has been on the veto power, and questions have centered on how much leverage this gives presidents to shape legislative outcomes. This is surely a key part of the larger picture of presidential power. Another is the appointment power, which offers presidents important formal means of engineering bureaucratic outcomes.

Our aim here is to highlight a formal basis for presidential power that has gone largely unappreciated to this point, but, in our view, has become so pivotal to presidential leadership, and so central to an understanding of presidential power, that it virtually defines what is distinctively modern about the modern American presidency. This is the president’s formal capacity for taking unilateral action, and thus for making law on his own. Often presidents do this through executive orders. Sometimes they do it through proclamations or executive agreements or national security directives. But whatever vehicles they may choose, the end result is that presidents can and do make new law—and thus shift the existing status quo—without the explicit consent of Congress.

The fact is, presidents have always acted unilaterally to make law. It is just that their power to do so has grown over time and become more consequential. Here are but a few of the better-known historical examples of policy changes brought about by presidents acting on their own:

- Louisiana Purchase
- annexation of Texas
- freeing of the slaves (Emancipation Proclamation)

- withdrawal of public lands for a system of national parks
- internment of the Japanese
- desegregation of the military
- initiation of affirmative action
- creation of major agencies, for example, EPA, Food and Drug Administration, Peace Corps
- abrogation of U.S. treaty responsibilities to Taiwan
- imposition of regulatory review

Why are presidents able to do these sorts of things? After all, the Constitution grants the lawmaking power solely to Congress, so wouldn't the courts step in to prevent presidents from making law on their own? And isn't it likely that, when presidents seem to be acting unilaterally, they are really just executing existing laws, and thus using the discretion delegated them by Congress—and that major departures from the will of Congress rarely happen, or if they do, are overturned by new legislation or the courts? These are the kinds of questions that an analysis of unilateral action must address. They have to do, above all else, with the constitutional and statutory bases for the president's powers of unilateral action, with the president's incentives to use these powers, and with the incentives of the Congress and the courts to stop him.

So far these sorts of issues have not been well addressed. There is presently a small empirical literature on presidential lawmaking, centered on executive orders. Some of this work has been carried out by legal scholars and is rooted in normative concerns about the law—concerns, for example, about whether presidents have exceeded their rightful authority under the Constitution (Cash, 1963; Neighbors, 1964; Hebe, 1972; Fleishman and Aufses, 1976). In recent years, political scientists have shown increasing interest in unilateral action by presidents, and there is a growing body of quantitative work that is taking pioneering steps toward a more rigorous treatment of the subject (Shanley, 1983; Wigton, 1991; Gomez and Shull, 1995; Mayer, 1996, 1997; Cohen and Krause, 1997a, b; Cooper, 1986, 1997; Krause and Cohen, 1997; Deering and Maltzman, 1998). As things now stand, however, the literature as a whole devotes little attention to theory, and still awaits a systematic inquiry into the political and institutional forces that shape the contours of unilateral action by presidents. The facts are slowly becoming better known, but how they fit together and why remains a mystery.

In this article, we want to take a few modest steps toward a better understanding of unilateral action by presidents. Our central purpose is to set out a theoretical perspective that, while not formally developed at this point, contains what we think are the key elements that need to be taken into account, and shows how they work together to generate expectations for the presidency. We argue that the president's powers of unilateral action are a force in American politics precisely because they are *not* specified in the Constitution. In sharp contrast to the veto, appointment, and other enumerated powers, they derive their strength and resilience from the ambiguity of the contract. We also argue that presidents have strong incentives to push this ambiguity relentlessly—yet

strategically and with moderation—to expand their own powers, and that, for reasons rooted in the nature of their institutions, neither Congress nor the courts are likely to stop them.

We are currently involved in a research project to collect comprehensive data on presidential orders, as well as on how Congress and the courts have responded to them. Results are a ways off at this point, but our aim is ultimately to put our theoretical ideas to the test. In the meantime, we offer in the second part of this article a brief overview of the history of unilateral presidential action, with special attention to the basic themes of our theoretical argument. This is useful in itself, since the topic has largely been ignored in scholarly accounts of the presidency. But it also allows us to summarize the relevant facts, and to suggest why, at least for now, the arguments we make here seem to be plausible on empirical grounds.

1. A Theoretical Perspective

When the founders designed and negotiated the Constitution, they essentially agreed upon an incomplete contract for governing the nation. This contract avoids specifying precisely what decisions must be made under all current and future contingencies (which would have been impossible anyway). Instead, it sets up a governing structure that defines the official actors—the president, the Congress, and the courts—allocates powers and jurisdictions among them, structures incentives (if implicitly), specifies certain procedures for decision making, and, in general, provides a framework of rules that allow the nation's leaders to make public decisions and deal with whatever contingencies may arise.

Within this framework, it was inevitable that the three branches would engage in a struggle for power in the making of public policy (Corwin, 1984). Indeed, the design was premised on it, and took advantage of it. The whole idea was that divided and shared powers among the key actors would promote a rivalry conducive to the public good—for ambition could be made to check ambition, and no one actor could gain dominance over the others. The result would be a stable republic and the avoidance of tyranny. The framework would constrain and channel the struggle for power.

It was also inevitable, however, that there would be a struggle for power over the framework itself. The Constitution sets out the entire design of American government in just a few brief pages and is almost entirely lacking in detail. It does not define its terms. It does not elaborate. It does not clarify. While some of the powers it allocates are reasonably straightforward—the president's power to veto legislation, for instance—many of the others, including powers that are quite fundamental, are left wholly ambiguous. The actual powers of the three branches, then, both in an absolute sense and relative to one another, cannot be determined from the Constitution alone. They must, of necessity, be determined in the ongoing practice of politics. And this ensures that the branches will do more than struggle for influence over day-to-day policy making. They will also engage in a higher-order struggle over much higher stakes: a struggle over the allocation of power, and the practical rights to exercise it.

Throughout the course of American history, this higher-order struggle has been reasonably well contained. No single actor has dominated, decisions have been made for the nation, and the same formal Constitution has prevailed. Nonetheless, the reality of the governing structure has changed substantially over the years to the point that the Founders would barely recognize the system that now governs our nation. Who has power, and how that power gets exercised, looks dramatically different today than it did 200 years ago. The struggle has transformed it.

This transformation has affected all three branches in many ways, and the story is a much bigger one than we can tell or try to explore here. What we want to show in the analysis that follows is simply that there is a logic to this political struggle, and that this logic helps explain why presidents have been able to develop and expand their powers of unilateral action—powers that the Constitution nowhere explicitly grants them.

1.1 Constitutional Ambiguity

If this analysis were mainly about legislators, we would begin by embracing a standard theoretical assumption: that legislators are motivated by reelection. This is simple, and it does a good job of explaining legislative behavior (Mayhew, 1974). But what motivates presidents? Reelection obviously cannot explain the behavior of (modern) presidents during their second terms, since they cannot run again. And even in their first terms, presidential behavior seems to be driven more centrally by other things.

A truly accurate characterization of what motivates presidents would be complicated, of course, and somewhat different for different historical periods, for the incentives of institutional actors are partly a function of the Constitution and partly a function of the (changing) society it governs. Broadly speaking, however, it is fair to say that most presidents have put great emphasis on their legacies and, in particular, on being regarded in the eyes of history as strong and effective leaders. They have a brief period of time—four years, perhaps eight—to establish a record of accomplishments, and to succeed they must exercise as much control over government and its outcomes as they can. For this they need power—which, as Neustadt perceptively noted, is the foundation of presidential success. Whatever else presidents might want, they must at bottom be seekers of power.

For the most part, this has always been true. But it has especially been true since the turn of the century. One reason is that, as strong parties have weakened, presidents have gained stature and flexibility as entrepreneurial political leaders—and, in consequence, they have had both the incentives and the opportunities to shape their own political fates and to seek the power to do it. During this same period, moreover, the public began to demand positive governmental responses to pressing social problems and to hold the president, as the symbol and focus of national leadership, responsible for the successes and failures of government. As presidential scholars have long noted, these demands and expectations are overwhelming, and they far outstrip the president's actual power to get results—which gives them still greater incentives to develop and expand their power in whatever ways they can (Lowi, 1985; Moe, 1985).

The ambiguity of the governing structure gives them plenty of opportunities to do just that. This is so even for enumerated powers that seem on the surface to be quite specific. The president is granted the powers of commander in chief of the armed forces, for instance. But does this mean he can send troops into another country without a declaration of war by Congress, or that he can act to destabilize unfriendly regimes in foreign nations? On these sorts of details, the Constitution is silent—giving the president ample room to maneuver. Similarly, the president is granted the right, subject to Senate approval, to enter into treaties with other nations. But can he unilaterally enter into international “agreements” that need not be submitted to the Senate at all? Again, the Constitution does not say—and presidents can move in, if they want, to claim these powers for themselves.

While there is ambiguity even in enumerated powers, the Constitution is especially ambiguous on the broad nature and extent of presidential authority. In sweeping language, it endows the president with the “executive power” and gives him responsibility to “take care that the laws be faithfully executed,” but it doesn’t say what any of this is supposed to mean. Because these phrases are so widely applicable to virtually everything the president might contemplate doing, their inherent ambiguity “provide(s) the opportunity for the exercise of a residuum of unenumerated power” (Pious, 1979:38)—and thus for presidents to lay claim to what is not explicitly granted to them. The founders, we should note, were well aware of this eventuality. Those (including Madison) who favored a limited executive argued for spelling out the president’s authority in detail, while those (such as Hamilton) who favored a strong executive wanted language that was ambiguous. On the language issue, the latter mostly won. But both were right about its implications for power.

The president is in an ideal position to take advantage of this ambiguity. To begin with, although he is charged with executing the laws passed by Congress, he is an independent authority under the Constitution, and thus has an independent legal basis for taking actions that may not be simple reflections of congressional will. He is not Congress’s agent. Any notion that Congress makes the laws and that the president’s job is to execute them—to follow orders, in effect—overlooks the essence of separation of powers. The president is an authority in his own right, coequal to Congress, and not subordinate to it.

The president’s base of independent authority, in fact, is enormously enhanced rather than compromised by the executive nature of his constitutional job (see Moe, 1998).

(1) Because presidents are executives, they must be (and in practice are) regarded as having certain legal prerogatives that allow them to do what executives do: manage, coordinate, staff, collect information, plan, reconcile conflicting values, and respond quickly and flexibly to emerging problems. These functions are what it means, in practice, to have the “executive power.” They give presidents tremendous discretion in the exercise of governmental authority, and allow them, in effect, to make and change governmental policy through their own unilateral action.

(2) Because presidents are executives, the reins of government are in their hands. While Congress has the right to create programs and appropriate money,

and while the courts have the right to say what the law is, the unavoidable fact of life in American government—and in all governments of any size—is that virtually all authoritative governmental decisions are made within the executive. The opportunities for presidential imperialism are too numerous to count—or to monitor, or to respond to—because, when presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power.

(3) Because presidents are executives, they have at their disposal a tremendous reservoir of expertise, experience, and organizational capacity, both in the institutional presidency and in the bureaucracy at large. As executives, they also have the ability to act quickly and with flexibility in responding to problems and changing political, economic, and social circumstances as they arise, and to fashion policy responses. They have, in short, enormous informational and operational resources at their disposal for taking advantage of the myriad opportunities for aggrandizement that present themselves in the course of governmental decision making, resources that are far superior to those of the other branches.

(4) And finally, there is a key advantage that is often overlooked. Because presidents are executives, and because of the discretion, opportunities, and resources executives have available to them in politics, presidents are particularly well suited to be first-movers and to reap the agenda powers that go along with it. If they want to shift the status quo by taking unilateral action on their own authority, whether or not that authority is clearly established in law, they can simply do it—quickly, forcefully, and (if they like) with no advance notice. The other branches are then presented with a *fait accompli*, and it is up to them to respond. If they are unable to respond effectively, or decide not to, the president wins by default. And even if they do respond, which could take years, he may still get much of what he wants anyway.

The bottom line, then, is that the Constitution's incomplete contract sets up a governing structure that virtually invites presidential imperialism. Presidents, especially in modern times, are motivated to seek power. And because the Constitution does not say precisely what the proper boundaries of their power are, and because their hold on the executive functions of government gives them pivotal advantages in the political struggle, they have strong incentives to push for expanded authority: by moving into gray areas of the law, asserting their rights, and exercising them, whether or not other actors, particularly in Congress, happen to agree.

This does not mean presidents will be reckless in their pursuit of power. Should they go too far or too fast, or move into the wrong areas at the wrong time, they would find that there are heavy political costs to be paid—perhaps in being reversed on the specific issue by Congress or the courts, but more generally by creating opposition that could threaten other aspects of the presidential policy agenda or even its broader success. It is a matter of strategy. Presidents have to calculate *ex ante* the costs as well as the benefits of any attempt to expand their power and take action when the situation looks promising. They have to pick their spots.

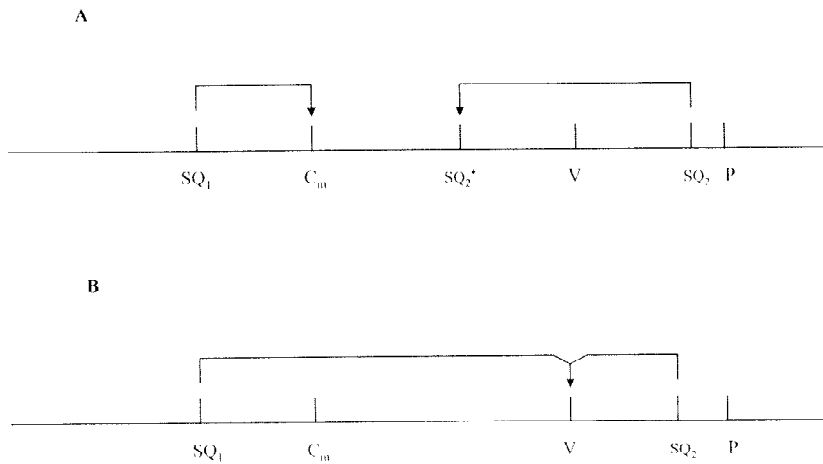


Figure 1. The legislative advantages of unilateral action. (A) Legislative politics. (B) Unilateral politics.

1.2 A Simple Spatial Model

Spatial models are a standard tool for exploring struggles among political actors over policy and power. Such models are difficult to use in this case because some of the most important features of the problem—discussed at length in the sections below—cannot readily be taken into account. (We are working on resolving this in a way that makes sense.) Nonetheless, we think it is useful at this point to consider very briefly a simple model that helps illustrate the kind of leverage presidents can gain from acting unilaterally.

Take a look at Figure 1. We've assumed policies can be arrayed along a single dimension, and that the players have ideal points along this continuum. The president's ideal point is at P , and Congress is treated as a one-house body whose median legislator's ideal point is at C_m . The president can veto congressional legislation, but his veto will only be upheld if he can attract the support of one-third of Congress—represented in the figure by all members to the right of V , the ideal point of the legislator who can be termed the “veto pivot.”

In this simple scenario, consider what happens when policy outcomes are generated according to classic constitutional rules: Congress makes the laws, the president gets to veto (see Figure 1A). If the original status quo were at SQ_1 , Congress would simply pass new legislation imposing C_m as the new policy, and the president—although he would like a further shift to the right—would have to accept this outcome. Both would be better off, and Congress would actually get its ideal point. For comparative purposes, let's suppose instead that the original status quo were SQ_2 , a policy close to the president's ideal point. In this case, Congress would legislate a new policy SQ_2^* much closer to its own ideal point. The president loses from this shift in policy, and would like to veto it, but because Congress has strategically chosen it such that the veto pivot, located at V , is just indifferent between SQ_2^* and SQ_2 , the president

cannot mobilize enough legislative support to stop Congress from making the change. The president does in fact have a measure of power here: were it not for his ability to veto, Congress would have moved policy all the way to C_m instead of stopping at SQ_2^* . Thus he is better off than he would otherwise have been. Nonetheless, the equilibrium outcome gives Congress a beneficial shift in policy, and the president loses ground.

Now consider what happens when presidents have the power to act unilaterally. This is depicted in Figure 1B. Here, if the original status quo were again at SQ_1 , the president could act unilaterally to move policy all the way to V , and this new policy would be an equilibrium. Congress would like to move policy back toward C_m , but any move in that direction could be successfully vetoed by the president. Note the difference that unilateral action makes. When presidents lack this power, as in Figure 1A, Congress moves policy to C_m , its own ideal point, and that is where it stays even though presidents would like to see a further shift to the right. When presidents can act unilaterally, they can make this shift on their own, and as long as they are “moderate” and only go as far as V , Congress cannot stop them. Congress is not powerless in this contest, for otherwise presidents would simply set policy at their own ideal point, P . It is congressional power that keeps policy at V rather than P . But the president still does much better here—and Congress worse—because of the leverage unilateral action gives him.

A similar conclusion follows if we begin with SQ_2 as the original status quo. In this case, were the president not able to take unilateral action, Congress would simply move policy all the way back to SQ_2^* , much closer to its ideal. When he has the power to act unilaterally, however, he can step in to move policy from SQ_2^* to V , and he is able to use his veto to prevent any movement away from this point. Here again, V is the equilibrium outcome. And although the president actually loses ground overall in this example, as policy moves from the original SQ_2 to V , unilateral action allows him to keep policy closer to his ideal point—and farther from Congress’s ideal point—than would otherwise have been the case. He has more power over outcomes when he can act unilaterally.

This is only an illustration based on a simple model that leaves out key aspects of the power struggle, aspects that we will discuss in the sections that follow. Congress, for instance, can write restrictive statutes in an effort to limit the president’s ability to act unilaterally, and the courts can declare a president’s actions illegal if he goes too far. If these were put to effective use—a big if, as we will see—they would obviously introduce additional constraints on the president that need to be recognized. But far and away the most important factor omitted from this model, and indeed from virtually all spatial models, would have the effect of expanding the scope for presidential power considerably. This is that Congress is burdened by collective action problems and heavy transaction costs that make it extremely difficult for that institution to fashion a timely, coherent response to presidential action, or even to respond at all. Until spatial models can incorporate these fundamental features of Congress, they will systematically overstate Congress’s capacity for taking strategic action, and understate presidential power.

We have to be wary, then, of putting too much stock in simple models. Still, the one we've employed here does help to illustrate two points that are quite central to our theoretical argument. The first is that unilateral action can make a big difference in determining what presidents are able to achieve, and this is why they value it and want more of it. The second is that, even when they can act unilaterally, they are constrained to act strategically and with moderation. They cannot have everything they want.

1.3 Statutory Constraint and Presidential Power

Now let's return to the kinds of theoretical concerns that are not so easily captured in these models. In our earlier section on constitutional ambiguity, we concluded by noting that presidents are greatly advantaged by the executive nature of their jobs. While there are good reasons for this, it might seem that such a conclusion is premature—and indeed that, far from being a boon to presidential power, the fact that presidents are executives is ultimately their Achilles' heel. For even though they have independent authority under the Constitution and are not properly Congress's agents, they are still required to "take care that the laws be faithfully executed." And this means, presumably, that Congress can constrain presidential behavior through the statutes that it writes.

It is true, of course, that what presidents can and cannot do is shaped by the statutes they are charged with executing. And Congress has the right to be quite specific in designing these laws, as well as the agencies that administer them. If it wants, it can specify policy and structure in enough detail to narrow executive discretion considerably, and thereby the scope for presidential control. It can also impose requirements that (if the courts agree) explicitly limit how presidents may use their enumerated powers, as it has done, for instance, in protecting members of independent commissions from removal and in mandating civil service protections for most government personnel.

Yet statutory constraint cannot be counted upon to work especially well as a check on unilateral action by presidents. In the first place, legislators may actually prefer *broad* delegations of authority on many occasions, granting presidents substantial discretion to act unilaterally. This can happen, for instance, (1) when their policy goals are similar to those of presidents, (2) when they are heavily dependent on the expertise and experience of the administration, (3) when they want to avoid making conflictual decisions within the legislature, and thus find it attractive to "shift the responsibility" to the executive, (4) when Congress, as a collective institution, really doesn't have specific preferences and can only decide on the broad outlines of a policy, (5) when, in complex policy areas with changing environments, it is impossible to design a decent policy that promises to meet its objectives unless substantial authority is delegated to the executive, and (6) when certain policies require speed, flexibility, and secrecy if they are to be successful (Moe, 1990, 1998; Epstein and O'Halloran, 1999). Most of these conditions, we should point out, are more likely to be met in foreign rather than domestic policy, so there is good reason to expect broad delegations to be more common in that realm.

When delegations are broad, presidential powers of unilateral action are at their greatest. One might be tempted to think that they are also innocuous in their effects on the balance of institutional power—for as long as presidents stay within the broad bounds set by statute, they are simply following the will of Congress, and all is as it should be. This would be something of a misconception, though. The key issue is, who actually has power to make policy for the nation? And in these cases, that power would rest overwhelmingly with presidents, for with broad delegations of authority and discretion they would be the ones making virtually all the key choices about the content, meaning, and practical consequences of policy. Whether or not presidents stay within congressional boundaries, then, delegation itself puts expanded powers into their hands that shifts the institutional balance in their favor.

While Congress will sometimes have incentives to make broad delegations, legislators are more often likely to see the value in putting statutory restrictions on what presidents can do. Presidents, after all, have broad national constituencies, are less susceptible to pressures from special interest groups, are concerned about their historical legacies as strong national leaders, and in general have different political stakes in policy than parochially oriented legislators do—and the coalitions behind particular pieces of legislation, especially on domestic issues, will often have good reason to fear that presidents might use any discretion delegated them in unwanted ways. If so, they will want to constrain the president's powers of unilateral action through narrow and strategically crafted delegations (Moe, 1990; Epstein and O'Halloran, 1999).

How well can this be expected to work? To begin with, legislators can only go so far with a strategy of truly narrow delegations. They are fundamentally concerned with making constituents happy, and thus with ensuring the flow of benefits. For policies of even moderate complexity in an ever-changing world, this unavoidably calls for placing most decisions in the hands of executives and allowing them to use their own expert judgment in fleshing out the details. Like the founders, then, the best legislators can do is to write statutory analogues to incomplete contracts, and thus to set up governing structures that, while perhaps restrictive in certain ways, still contain substantial discretion. And once these statutory governing structures are set up, it is the president and the agencies who do the governing, not the Congress.

To the extent that legislators find themselves proposing highly restrictive delegations, moreover, they have to reckon with the fact that presidents are pivotal players in the legislative process. They can veto any piece of legislation they want, and if they do, it is exceedingly difficult for Congress to override them. (Empirically, only about 7% of presidential vetoes have been overridden; see Cronin and Genovese, 1998). Since everyone is aware *ex ante* of how consequential the veto can be, presidents will have a major say in shaping the content of legislation, and as they do they will be highly sensitive to how legislation stands to affect their own formal power. Among other things, they will push hard for provisions that give them as much discretion as possible, and they will seriously discourage provisions that limit their prerogatives.

Even when restrictions are included in final bills, Congress faces the problem

of making them stick in practice—for a president will not be easy to control once governing shifts to his bailiwick. In part, this is due to the same problem that owners face in trying to control the management of a private firm, for managers—like presidents and their agencies—have expertise, experience, and operational leverage that allow them to engineer outcomes to their own advantage. Although expected to faithfully execute the laws, managers have a very substantial capacity to shirk. The problem that Congress faces, however, is even more severe than this classic economic analogy can suggest. The president possesses all the resources for shirking that the corporate manager does, but his position is far stronger, precisely because he is not really Congress's agent. He is not a subordinate, but a coequal authority. As a result, Congress cannot hire him, cannot fire him, and cannot structure his powers and incentives in any way it might like, yet it is forced to entrust the execution of the laws to his hands. From a control standpoint, this is a nightmare come true.

Finally, whatever the discretion contained in specific pieces of legislation, and whatever opportunities for shirking they open up, it is crucial to recognize that the president is greatly empowered by the sheer proliferation of statutes over time. In part, the reasons are pretty obvious. When new statutes are passed, almost whatever they are, they increase the president's total responsibilities and give him a formal basis for extending his authoritative reach into new realms. At the same time, they add to the total discretion available for presidential control, as well as to the resources contained within the executive.

Less obviously, though, the proliferation of statutes creates substantial ambiguity about what the "take care" clause ought to mean in operation, ambiguity that presidents can use to their great advantage (Corwin, 1973, 1984). While it may seem that the burgeoning corpus of legislative requirements would tie the president up in knots, the aggregate impact is liberating. For the president, as chief executive, is responsible for *all* the laws, and inevitably the laws turn out to be interdependent and conflicting in ways that the individual statutes themselves do not recognize. In the aggregate, what they require of him is ambiguous. The president's proper role, as would be true for any executive, is to rise above a myopic focus on each statute in isolation, to coordinate policies by taking account of their interdependence, and to resolve statutory conflicts by balancing their competing requirements. All of this affords him enormous discretion to impose his own priorities on government unilaterally and to push out the boundaries of his own power—claiming all the while that he is faithfully executing the laws.

Even though presidents are mere executives, then, charged with "taking care that the laws be faithfully executed," Congress cannot be expected to use statutory constraints with great effectiveness in restricting the expansion of presidential power.

1.4 Congressional Resistance to Presidential Power

What can we say, more generally, about how Congress is likely to respond to the presidential drive for power? For starters we should note that, when scholars and journalists consider almost any issue that seems to pit Congress

against the president, they tend to reify Congress, treating it as a unitary actor with its own objectives and concerns, just like the president. The president and Congress are portrayed as fighting it out, head to head, over matters of institutional power and prerogative, each defending and promoting its own institutional interests.

But this misconstrues things. Congress is made up of hundreds of members, each a political entrepreneur in her own right, each dedicated to her own reelection and thus to serving her own district or state. Although all have a common stake in the institutional power of Congress, this is a collective good that, for well-known reasons, can only weakly motivate their behavior. They are trapped in a prisoners' dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride in favor of the local constituency.

What is likely to happen in Congress, then, when presidents take unilateral action by issuing executive orders that shift the policy status quo? The answer is that legislative responses (if there are any) will be rooted in constituency. An executive order that promotes civil rights, for example, will tend to be supported by legislators from urban or liberal constituencies, because it shifts the status quo in their preferred direction, while members from conservative constituencies will tend to oppose it. The fact that this executive order might well be seen as usurping Congress's lawmaking powers, or that it has the effect of expanding presidential power, will for most legislators be quite beside the point. Thus if Congress tries to take any action at all in responding to the executive order, the battle lines will be determined by the order's effects on legislative constituencies, not by its effects on Congress's power vis-à-vis the president. Even when presidents are clearly taking action to push out the boundaries of their power, Congress will not tend to vote or respond on that basis, and will not, as a result, be able to defend or promote its institutional power very effectively.

Congress is not incapable of coherent action. Its internal organization, especially its party leadership, imposes a modicum of order on member behavior and gives the institution a certain capacity to guard its power. But disabling problems still run rampant, and they are built in. Party leaders are notoriously weak, and they are weak because their "followers" want them to be. Good leadership means promoting the reelection prospects of members by decentralizing authority, expanding their opportunities to serve special interests, and giving them the freedom to vote their constituencies (Mayhew, 1974; Cox and McCubbins, 1993).

Presidents are not hobbled by these collective action problems. They sit alone atop their own institution, and what they say goes. Although their interests as individuals may sometimes conflict with those of the presidency as an institution—their desire for loyalty in presidential agencies like the Office of Management and Budget, for example, may undermine the institution's long-term capacity for expertise—their drive for strong leadership almost always motivates them to promote the power of their institution. Thus not only is the presidency a unitary institution with the capacity for coherent action, but there

is also substantial congruence between the president's individual interests and the interests of the institution.

This sets up a fundamental imbalance. Presidents have both the will and the capacity to promote the power of their own institution, but individual legislators have neither and cannot be expected to promote the power of Congress as a whole in any coherent, forceful way. This means that presidents will behave imperialistically, but that Congress will not do the same in formulating an offensive of its own, and indeed will not even be able to mount a consistently effective defense against presidential encroachment.

Congress's situation is all the worse because its collective action problems do more than disable its own will and capacity for action. They also allow presidents to manipulate legislative behavior to their own advantage, getting members to support or at least acquiesce in the growth of presidential power. One basis for this has already been established by political scientists: in any majority rule institution with diverse members, so many different majority coalitions are possible that, with the right manipulation of the agenda, outcomes can be engineered to allow virtually any alternative to win against any other. Put more simply, agenda-setters can take advantage of the collective action problems inherent in majority rule institutions to get their own way (McKelvey, 1976).

Presidents exercise two important kinds of agenda power in their relations with Congress. The first is now part of the familiar, textbook description of American politics: precisely because Congress is so fragmented, the president's policy proposals are the focal points for congressional action. The major issues Congress deals with each year, as a result, are fundamentally shaped by what presidents decide will be the salient concerns for the nation. While this kind of agenda power is of great consequence, a second kind is probably more important for the institutional balance of power, yet it is rarely recognized as such. This is the agenda power that presidents exercise when they take unilateral action to alter the status quo. When they do this, they present Congress with a *fait accompli*—a new, presidentially made law—and Congress is then in the position of having to respond or acquiesce.

Note the key differences between these forms of agenda control. Under the first, presidential success ultimately requires an affirmative act by Congress, and thus that Congress go through all the laborious steps necessary to produce new legislation—which is politically very difficult, often highly conflictual, typically very time consuming, and in the final analysis unlikely to happen (more on this below). This is why modern presidents have incentives to shy away from the “legislative strategy” of presidential leadership (Nathan, 1983). Even with all their resources, they can expect to have a hard time getting their programs through Congress.

On the other hand, the second form of agenda control, rooted as it is in unilateral action, gives the president what he wants immediately—a shift in the status quo, and perhaps a new increment to his power—and depends for its success on Congress's *not* being able to pass new (and veto-proof) legislation that would overturn or change it. Such a requirement is much more readily met,

for it is far easier, by many orders of magnitude, to block congressional action than it is to engineer new legislation. And if this were not enough, the new status quo initiated by the president may in itself defuse legislative opposition and do away with the need to block at all. When a president unilaterally launches an invasion of another country, for instance, Congress faces a drastically different set of options than it did before the conflict started, and may find itself politically compelled to support and provide funds for an exercise it never would have agreed to beforehand. Needless to say, these advantages of agenda control give modern presidents strong incentives to favor an “administrative strategy” of leadership as opposed to a “legislative strategy” (Nathan, 1983).

Let’s take a closer look at why it is so difficult for Congress to respond when presidents act unilaterally. Again, the starting point is that legislators are beset by collective action problems. Aside from the points we discussed earlier, the simple fact is that a maze of obstacles stands in the way of each congressional decision. A bill must pass through subcommittees, full committees, and floor votes in the House and the Senate; it must be endorsed in identical form by both houses; and it is threatened along the way by party leaders, rules committees, filibusters, holds, and other roadblocks. Every single veto point must be overcome if Congress is to act. Presidents, in contrast, need to succeed with only one in order to block and thus ensure whatever status quo their unilateral action has created.

More generally, the transaction costs of congressional action are enormous. Not only must coalitions somehow be formed among hundreds of legislators across two houses and a variety of committees, which calls for intricate coordination, persuasion, trades, promises, and all the rest, but owing to scarce time and resources, members must also be convinced that the issue at hand is more deserving than the hundreds of other issues competing for their attention. Party leaders and committee chairs can help, but the veto-filled process of generating legislation remains incredibly difficult and costly. And because it is, the best prediction for most issues most of the time is that Congress will take no action.

When presidents shift the status quo unilaterally, then, Congress is unlikely to reverse them. This is true even without any overt attempts by presidents to manipulate legislative outcomes, but it is especially so when presidents get involved in the legislative process, as they ordinarily will. Presidents have tremendous resources to deploy on their own behalf. Their central position leaves them ideally situated to exercise leadership, make side payments, and cement deals. And to win, they merely need to block at one veto point, which is a relatively easy matter. Even if Congress is somehow able to manage an affirmative act of reversal, moreover, the president can still exercise his own veto, and sustain it by mobilizing just one-third of the members of one house to support him.

Usually, blocking won’t even require all-out reliance on the president’s arsenal. Many legislators will gladly line up behind the president. As we noted earlier in our civil rights example, legislators will evaluate the presidential shift in the status quo in terms of their constituency-based policy preferences, not in terms of the institutional power struggle. If the president has thought ahead (see

below), at least some and perhaps many of these legislators will find the new status quo preferable to the previous one, and they will act to prevent a reversal. In addition, for reasons that also (but less directly) arise from constituency, the president can likely count on support from many members of his own party. The combination of these two sources of support should often be sufficient. If not, the president can rely on his firepower to attract additional legislators into the fold—legislators that, we should remember, are always ready to deal when something of value to their reelection is offered in payment. All things considered, then, presidents should lose these contests only rarely.

This doesn't mean that presidents can be cavalier about taking unilateral action. While it is exceedingly difficult for Congress to reverse a presidentially made law, the probability of its doing so will obviously depend on how the new law squares with legislative preferences. The greater the number of legislators that prefer the old status quo to the new one, and the more intensely they feel about it—which turns on how great a departure the president has made from their ideal points—the more likely it is that Congress will be able to overcome its collective action problems and reverse. All preferences, however, are not equally relevant here. While legislators may have preferences on every issue under the sun, they only have strong incentives to act on them when the issues are related to constituency. When presidents act unilaterally, then, legislative preferences are most likely to come into play to the extent that presidential action has an adverse effect on constituency interests, particularly if those interests are organized and powerful. The stronger the constituency connection—and, given that, the greater the departure of presidential action from what legislators want—the more motivated legislators will be to mobilize a reversal.

Because presidents know this *ex ante*, however, this is another way of saying that the issues on which they choose to act unilaterally, and the distances they choose to shift the status quo, need to be chosen strategically—and thus subject to legislative constraint. They have incentives, clearly, to favor unilateral actions that are only weakly related to constituency. And on these matters they can afford to be quite bold in their departures from legislative preferences. They need to be more careful, and more moderate, when their actions have adverse effects on important constituency interests. While these conclusions apply generally to presidential incentives, an obvious implication is that presidents should find foreign policy a much more attractive sphere for taking bold unilateral actions, while in domestic policy they will be more prone to incrementalism and moderation (Canes et al., 1999).

Constituency and the corresponding incentives toward presidential moderation do not change the fact that, in the politics of unilateral action, presidents hold virtually all of the cards. When presidents act and Congress must reverse, presidents are heavily advantaged to get what they want. There is one crucial consideration, however, that we have yet to discuss, and that gives Congress a trump card of far-reaching consequence. This is the fact that Congress has the constitutional power to appropriate money—which means that, to the extent that unilateral actions by presidents require congressional funding, presidents depend on getting Congress to pass new legislation that at least implicitly (via

appropriations) supports what they are doing. When appropriations are involved, presidents cannot succeed by simply preventing Congress from acting. They can only succeed if they can get Congress to act, which, of course, is much more difficult and gives legislators far greater opportunities to shape or block what presidents want to do.

This is not a crippling constraint. The congressional appropriations process is built around logrolling and omnibus appropriations bills; and specific items, especially if they have powerful patrons, are likely to be funded (and funded routinely over the years) even if they could not attract majority support standing on their own. Thus presidents do not have to get special legislation passed should they need funding. They only need to see that their funding requests are successfully merged into the appropriations process, which is a good deal easier to accomplish. Moreover, many unilateral actions do not require legislative appropriations anyway. This is the case, for instance, when presidents impose new rules on the way government agencies interpret and implement policy, which is in fact a major way presidents make law. They can also create agencies or programs that are funded out of existing resources already available to the executive, and only later (after they have had a chance to expand their support) seek out funding from the legislature.

Nonetheless, the appropriations constraint remains very real. Presidents are obviously best off if they can take unilateral actions that do *not* require legislative appropriations, and they will have incentives to do just that. Similarly, presidents will obviously not want to initiate major new programs through unilateral action—for even if the courts were to regard egregious instances of presidential lawmaking as constitutional, their need for substantial budgetary outlays would inevitably single them out for special legislative attention and lead to a decision process that is no different than what would have occurred had presidents simply chosen to seek a legislatively authorized program from the beginning. When presidents do take unilateral actions that require legislative funding, both the actions and their funding requirements are likely to be moderate and to take legislative preferences into account.

In the final analysis, presidents still hold substantial advantages over Congress, due largely to the disabling effects of Congress's collective action problems and to the relative ease with which presidents can block any congressional attempts to reverse them. Presidents are well positioned to put their powers of unilateral action to use, as well as to expand the bounds of these powers over time. But they cannot simply do what they want. They are constrained by constituency, and by the legislative power of appropriation. And largely for these reasons, they will proceed with moderation, with an eye to legislative preferences, and with biases that channel their behavior in certain directions.

1.5 Supreme Court Resistance to Presidential Power

If Congress can't stop presidents from expanding their powers, then perhaps the courts can, for presidents are exercising powers nowhere explicitly granted them by the Constitution, and the Supreme Court has every right to step in and prohibit them from doing these things. While we have argued that constitutional

ambiguity works to the great advantage of presidents, allowing them to rush into gray areas of the law and claim new turf for themselves, the fact is that the Supreme Court has the right to say what the Constitution means—and thus to resolve any and all ambiguities. In a given case, the Court can strike down a president's unilateral action as unconstitutional or as inconsistent with his executive responsibilities under statute. More generally, it can issue rulings that spell out in explicit, all-encompassing terms what the boundaries of presidential power are, and it can set these boundaries as narrowly as it likes.

But is this what we should expect the Court to do? Or is it possible that the Court would tend to do just the opposite, by upholding presidential actions and promoting an expansive view of presidential power? To answer these sorts of questions we need a theoretical basis for understanding how the Court is likely to approach issues of presidential power.

Supreme Court justices are appointed for life. They are not readily controlled by other political actors, are not beholden to political constituencies, and have substantial autonomy to chart their own courses. Thus they may use judicial decisions to pursue their own ideologies or policy agendas. They may also act on their scholarly beliefs in the proper meaning of the law and the Constitution. In either event, they are likely to care about the reputations they are building for themselves as respected public servants—their historical legacies. They are likely to care as well about upholding the reputation of the Court as a whole, for their own legacies are heavily dependent on the prestige of the institution. Because there are only nine justices, moreover, they are far better able than Congress to act upon their common institutional interests.

In some sense, then, the judges on the Supreme Court can do what they want in resolving the ambiguities of presidential power. They have the autonomy to clamp down on presidents, if that is what their policy interests or legal philosophies or the integrity of the institution require. And they have the autonomy to do just the opposite, depending again on how they see the issue. Similarly, their autonomy allows them to safeguard the prestige of their institution by responding to public opinion and other aspects of the political environment—for when presidents take unilateral actions that are distinctly unpopular, the Court can add to its prestige by declaring their actions illegal, and when presidents take unilateral actions that are popular, the Court can add to its own prestige by upholding them.

The Court is inherently something of a wild card, therefore, and cannot be counted upon to give presidents *carte blanche*. Presidents can engineer Congress's decisions by manipulating its collective action problems. But they cannot interfere with or participate in Court decisions in the same way and are vulnerable as a result to exercises of judicial autonomy. Nonetheless, even within the judiciary there are fundamental forces working to the advantage of presidents, encouraging the Court to uphold presidential actions and promote an expansive view of presidential power. The Court may sometimes be a problem for presidents, even on important issues, but on the whole it is far more likely to support and legitimate the kind of imperialism presidents are naturally inclined to practice.

Two basic factors tend to give the Court an orientation favorable to presidents. The first—and the less influential, in our judgment—is that presidents appoint all members of the Court. It is conventional wisdom that presidents appoint justices whose ideologies and legal philosophies are consistent with their own (or are perceived to be *ex ante*), and thus that presidents who are Republican or Democratic, conservative or liberal, tend to make different types of appointments to the Court. This makes perfect sense, given the incentives of presidents to promote their own agendas and exercise their own brand of leadership. It is also perfectly plain, however (although it is less often recognized in the literature), that presidents of all ideological and partisan stripes have a common interest at stake in these appointments as well—namely, an interest in putting individuals on the Court who will uphold and promote the power of the presidency.

This is not so hard to do. All potential nominees for the Court have track records and reasonably well-developed reputations. Their prior judicial decisions, articles, speeches, and public actions, together with what is known about them informally via acquaintances and friends, give presidents a great deal of information about their intellectual orientations, and thus about their likely behavior on the Court. These reputations are imperfect, but presidents are still in a position to make well-informed selections. Thus they clearly have the opportunity as well as the motive to screen out individuals who favor a restrictive view of the presidency and to promote the candidacies of individuals who, in addition to having compatible ideologies and philosophies, are thought to be favorable to presidential power.

When presidents make nominations to the Court, the Senate has to concur. Won't the Senate tend to reject candidates who take a favorable stance toward presidential power? The answer is generally no. Again, senators are primarily oriented by reelection, and thus by the way issues affect their state constituencies. They are only weakly motivated by concerns about the balance of institutional power. In evaluating judicial nominees, they will be responsive to constituency pressures, and therefore to the implications that a candidate's philosophy or ideology might have for important policies of relevance to their state support coalitions. For the most part, issues of presidential power are not part of their calculus and won't get in the way.

The weakness of the appointments strategy is that it is ultimately based on an unenforceable contract. Once an appointee assumes office, the president loses all control over him, and he can use his autonomy to pursue on an intellectual trajectory that confounds prior expectations—as Earl Warren did after his much-regretted appointment by President Eisenhower. Despite this imperfection, however, the appointments strategy stands to work well for presidents on average. They have the freedom to pick pro-presidential types for the bench, they have good information on which to base their picks, and, as these justices proceed to make their own decisions, they can be expected to behave “according to type” most of the time. This is enough to tilt the Court in the president's favor.

In addition to appointments, there is a second—and probably more important—factor that works to the president's advantage with the Courts. This one

is rooted in the basic design of separation of powers: under the Constitution, the Court is not empowered to enforce its own decisions, but must rely on the executive branch to enforce them. While the Court is said to be an independent branch of government, then, its power and prestige are profoundly dependent on the executive. The decisions that it renders, however well reasoned or legally significant in the abstract, are little more than meaningless slips of paper unless they are put into effect, and they can only be put into effect if the executive is willing to implement them. If the executive refuses to cooperate—or more likely, if it purposely acts very slowly, ineffectively, or in ways that alter or distort judicial intent—the policy pronouncements of the Court threaten to be empty, and its integrity and social standing as a political institution are put seriously at risk (Corwin, 1984).

Legal scholars have long recognized that the Court cannot simply act on principle and let the chips fall where they may, for this sort of strategy would ultimately prove self-destructive (e.g., Bickel, 1962). Judges have incentives to be pragmatic and to exercise a kind of self-restraint that is suited to the precarious position they find themselves in. Among other things, this means that they have incentives to choose their cases and fashion their decisions not just with reference to what is “right,” given their philosophies or ideologies, but also with reference to whether and how well these decisions are likely to be enforced by the executive—which turns on the interests of the executive, and on a range of political factors that can shape those interests. It is of great relevance, obviously, if the executive is opposed to a decision and not inclined to implement it effectively (or at all). It is also relevant if the public is opposed, for not only would this tend to damage the Court’s standing in itself, but it would also give the executive political reasons not to implement the law with any zeal. As a general matter of strategy, then, the Court should have incentives to take these sorts of factors into account and craft its decisions accordingly. Judicial decisions should therefore be attuned to politics, and to the executive.

When the Court is dealing with issues of a local nature, it can take advantage of divisions within the executive to promote enforcement. With an issue like school desegregation, for instance, the Court may not have confidence that local school boards or police will carry out its decisions, but it may have greater confidence that, if the latter don’t, then state or federal executives—with different constituencies and different interests—will step in and see that the law is implemented. When it deals with issues affecting the presidency, however, its strategic situation is less favorable. There is no higher executive authority than the president, so no other executive is going to come riding to the Court’s rescue to force the president into action. The president, moreover, is in charge of the entire federal executive branch, and thus has a major say in how all the Court’s decisions are enforced at that level. Thus the Court has a double problem. If it decides against the president on an issue the president cares about, he may evade compliance. And if it decides against the president on lots of issues, and is in some sense antipresident in its general rulings over time, the president could well become anti-Court in his general enforcement responsibilities throughout

the executive branch, threatening the entire edifice of Court decisions (Strum, 1974).

The Court has reason, then, to be friendly to presidents. And this means, above all else, being favorable to them on the issues they care most about: those involving presidential power and its exercise. They do not, moreover, have the same incentive to be friendly to Congress on issues of institutional power, nor to preserve some sort of balance between the two branches. While Congress does have certain leverage over the Court—it can change its size, for instance, or change its jurisdiction—legislators do not have the same intense concern about institutional power that presidents do, for reasons discussed earlier, and are unlikely to retaliate against the Court on these grounds. If they tried, the president would still be in a position to veto, and public outrage would probably stop them before the president had to anyway. Congress does not have a club over the Court's head. The president does.

What, then, should we expect the Court to do when presidents take unilateral action to further their own political leadership, and when they are challenged by antagonists who claim they have no legal right to do what they are doing? In general, we should expect the Court to uphold the presidency and its rights to act, at least most of the time. But this is not always straightforward, given all the other factors—intellectual, philosophical, political—that come into play in these decisions, and given the Court's interest in maintaining its independence and integrity. How can the Court support presidents and still honor other concerns? Among other things, they can do the following:

(1) The Court can simply avoid deciding many issues that arise about institutional power, arguing that these are matters that the president and Congress have to resolve on their own. This protects the Court from the risk of alienating presidents. It is also an indirect way of giving presidents what they want, because Congress is not equipped to win this kind of struggle.

(2) The Court can issue rulings favorable to presidents, but justify its decisions by appearing to give due deference to the legislature. More specifically, it can argue that presidential action under statutory law must be consistent with the what Congress is presumed to want, and then proceed to construct a rationale by which this criterion is met. In fact, this is easy to do without compromising presidential interests. Congress's collective action problems, combined with the zillions of statutes already on the books, make it entirely unclear what the institution's "will" is—and this gives the Court tremendous scope for arguing that, almost whatever presidents are doing, it is consistent with the "will of Congress."

(3) The Court can decide against presidents when, perhaps as a result of unwise *ex ante* political calculations, presidents take actions that are highly unpopular with the public, Congress, and opinion leaders. This is unlikely to occur very often if presidents play their cards right. But it is useful in the grander scheme of things because it allows the Court to enhance its own prestige, demonstrate its independence, and still decide in favor of presidents in most all other cases.

The Supreme Court is not the whole story, of course. All challenges to presidential action will start out, and most will end, in the lower federal courts—and

judges at these lower levels will have somewhat different incentives. They will not be as concerned about the prestige or integrity of the court system as a whole, and, as numerous as these judges are, they cannot be expected—just as legislators cannot—to take concerted action to protect their institutional interests. Nonetheless, all lower judges are presidential appointees, and thus can be subjected to pro-presidency selection criteria. And they still have to be concerned about the enforceability of their orders, should they rule against the president. More important still, they are part of a hierarchy: they are expected to make decisions that conform to principles enunciated by the Supreme Court, and their decisions are likely to be overturned if they get out of line. This is particularly true on issues of real salience to the Court, as issues of presidential power surely are. Thus there is a reasonable basis for thinking that the pro-presidency bias will not just be restricted to the Supreme Court, but will be reflected (if imperfectly) in decisions throughout the federal court system.

Let's be clear. The Court is capable of limiting the president's powers of unilateral action, and indeed is more threatening in this regard than Congress is. The Court has substantial autonomy and coherence as an institution, and it may choose to act against him. Nonetheless, the best bet, owing largely to the president's control over appointments and to the court system's profound dependence on the executive for the enforcement of its rulings, is that the courts will ordinarily be supportive and refrain from imposing serious limits on presidential expansionism.

1.6 An Overview of the Argument

Shorn of its details, the argument we offer here is pretty simple. Presidents have incentives to expand their institutional power, and they operate within a formal governance structure whose pervasive ambiguities—combined with advantages inherent in the executive nature of the presidential job—give them countless opportunities to move unilaterally into new territory, claim new powers, and make policy on their own authority. Congress will have a difficult time stopping them because its collective action problems render it ineffective and subject to manipulation. The Supreme Court is capable of taking action against presidents but is unlikely to want to most of the time, and indeed has incentives to be sympathetic.

This does not mean that presidents are unchecked in their quest for power. They can only push Congress or the Court so far before these institutions react, so there are constraints on how far presidents can go. They will moderate their actions accordingly. Moreover, presidents are political animals, and this is an important check in itself on what they are willing to do. Generally speaking they want to take actions that are popular, and they will be careful to recognize that bold action in one realm of policy could have political repercussions that undermine the presidential agenda in other realms. Thus, even if presidents figure they can take unilateral actions that will go unchecked by Congress or the Court, they may often decide not to move on them, or to take much smaller steps than their *de facto* powers would allow.

The grander picture, then, is not one of presidents running roughshod over Congress and the Court to dominate the political system. Rather it is a picture of

presidents who move strategically and moderately to promote their imperialistic designs—and do so successfully over time, gradually shifting the balance of power in their favor.

2. Evidence

Testing these ideas is a complicated business that we must leave to future research. As we noted in the introduction, we are involved in collecting a longitudinal dataset that will ultimately allow us to explore the political dynamics of unilateral presidential action and to see if some of the basic ideas we have laid out here hold up under scrutiny.

As things now stand, there is not much empirical research that directly explores this topic. And while there is a lot of evidence out there that is potentially quite relevant, it is at this point scattered and incomplete. Our plan, in the discussion below, is to try to impose a modicum of coherence on all this and to offer a brief historical overview of how presidents have employed unilateral action through the years and how Congress and the Courts have responded. This account is no substitute for actual tests, but we think it is informative—and provides at least an initial basis for thinking that the argument we've made here is broadly consistent with the known facts.

2.1 How Boldly Do Presidents Act?

Presidents began making law right away, from the earliest years of the Republic. Perhaps the first instance of real note was Washington's issuance in 1793 of the Neutrality Proclamation, which declared—without any prior authorization by Congress—that it was the policy of the United States to remain neutral in the brewing war in Europe between Britain and France, and thus, by implication, that American states and businesses were to refrain from supporting either side. This bold move, an obvious thrust into uncharted legal terrain, gave rise to the famous *Pacificus–Helvidius* debate between Hamilton and Madison over the proper bounds of executive power, a debate that still rages among legal scholars and students of government (Cooper, 1986).

Whatever the intellectual merits of the two sides, the practical import of this event (and others like it) is that Washington took advantage of the ambiguity of the Constitution to assert expanded rights of presidential action. Future presidents followed in his path and, over the next two centuries, used their powers of unilateral action to make law on many thousands of specific issues. In some cases, including most of those that we listed in the introduction, these actions were truly important exercises in national policy making and leadership. When Jefferson carried out the Louisiana Purchase (which he even funded, by the way, without congressional authorization), when Lincoln freed the slaves, when Truman desegregated the military, and when Johnson set up the nation's first affirmative action program, they were taking bold steps with major consequences for the country.

So presidents have used their unilateral powers to bring about big, even historic changes in national policy on their own authority. This is obviously a key point about American politics that one would never expect from a simple

reading of the Constitution, and that argues the need for understanding why and when presidents do such things. We must also emphasize, however, that bold action of this sort is by no means the norm, empirically. For the most part, even when presidents take actions that are intended to set new policy for the nation, the shift in policy is usually—and quite purposely—rather moderate, especially in domestic policy. In 1995, for instance, President Clinton issued an executive order that directed all federal agencies and federal contractors to withhold past-due child support from the salaries of “dead-beat dads.” That same year, he issued another executive order prohibiting federal agencies and contractors from hiring permanent replacements for striking employees. Both deal with important social issues, and both contribute to the president’s policy agenda and his image as a leader. But the steps they take are modest, and this is very common. Note, moreover, that neither one of these requires congressional appropriations—which, again, is common, and a key reason that presidents favor these types of actions.

2.2 How Presidents Make Law: The Nature of Presidential Orders

Presidential laws are usually instituted through the issuance of orders of various kinds. Sometimes they are called executive orders, a term often reserved for orders directed at subordinates within the executive branch (since the latter are the ones who actually carry out government policy). Presidents have also acted, however, through proclamations, a term that has traditionally (but not always) been used when the order is aimed at citizens rather than government employees. When national security is involved, modern presidents have relied heavily on national security directives, which have legal force but can be kept secret from Congress and the courts. And there are other forms of presidential action as well: executive agreements, memoranda of understanding, letters of agreement, and the like.

Historically presidents have had virtually a free hand in deciding what form their orders will take, what the content will be, and how (if at all) they will be entered into the public record. Prior to 1935, there was literally no system for keeping track of all this, and it is unclear, as a result, exactly how presidents were utilizing their unilateral powers. Many important instances of presidential action are well known—those singled out above, for example. But in general, and especially on matters of national security, scholars do not know for sure what orders were issued or on what matters. Nor do Congress and the courts (e.g., Cash, 1963; Hebe, 1972; Fisher, 1993).

This changed somewhat with the Federal Register Act of 1935, which called for presidents to register and thus make public all executive orders and proclamations. The Court had requested as much in the *Panama Refining* case (239 U.S. 388, 1935), pointing out that there can be no coherent knowledge of what “the law” is until presidentially made laws are known and systematically kept track of, much as statutory laws are. With the meteoric rise in the use of presidential orders during the New Deal—and rising confusion on everyone’s part because of it—President Franklin Roosevelt and Congress agreed, leading to the new legislation. More recently, efforts have been made to codify these pub-

lished orders so that they are more easily referenced, compared, and understood as a corpus of law (CIS, 1986).

While all this has helped to clarify what presidents have done in making new law, the fact is that presidents can rather easily evade these requirements. If they prefer not to call certain directives executive orders or proclamations, the directives do not have to be published. And national security directives—of which there are huge numbers—do not have to be revealed at all. Thus the true extent of presidential lawmaking is difficult to examine and document, and difficult as well for Congress and the courts to oversee and respond to. The official count of executive orders and proclamations is about 17,000 going back to 1862. But a special committee of the Senate set up in 1974 to study presidential lawmaking estimated that between 15,000 and 50,000 executive orders and some 4,500 proclamations with the force of law have been issued over the years but never formally recorded (U.S. Senate, 1974:2).

As for those that are formally recorded, and thus available for study, sheer numbers can never tell us what we need to know about their content and importance. A superficial look at the time series would show that the numbers have dropped off since the early decades of this century, and particularly since their peak during the New Deal and World War II. This might seem to suggest that modern presidents have somehow been relying less on unilateral action than their predecessors. Yet a look at the gross numbers is misleading and masks a very different underlying trend. The overwhelming majority of these presidential orders are minor, dealing with the kind of lower-level policy concerns that presidents, like all executives, have to deal with in the routine performance of their duties. When these minor orders are screened out, it can be shown that the number of consequential orders has actually increased during modern times. Whereas at the turn of the century presidents issued only a handful of important executive orders in their entire term, now presidents can be expected to issue between 15 and 20 important orders every year.¹

2.3 Historical Growth in Presidential Powers of Unilateral Action

Despite all the data problems, this basic trend in presidential lawmaking seems reasonably clear. Scholars widely agree that presidents have been doing more of it over time, and that the modern era has seen a substantial rise in presidential leadership and power (e.g., Cronin and Genovese, 1998). Presidents have had their greatest opportunities to act unilaterally during wars and economic hard times, when they have seized additional powers to deal with emergencies.

1. To determine which executive orders were significant and which not, we surveyed federal court documents and the *Congressional Record* from 1900 to 1996. If an order was mentioned in either of these sources, it was automatically deemed significant. This, however, presents a basic problem. An order issued in, say, 1910 will have had close to 90 years to be mentioned by either the courts or Congress whereas an order issued in 1990 has had not even a decade. To minimize the bias this introduces, we cross-referenced those orders mentioned by the courts or Congress with those cited in the *New York Times* after 1969. For further discussion on the methodology employed to construct this time series, see Howell (1998) and Moe and Howell (1998).

Not only were presidents generally allowed to do these things by the other branches, but they were also allowed, in effect, to pass their expanded powers on to successors. As Cooper (1986:236) describes it:

The most significant growth in the use of executive mandates came with periods of war and emergency, most notably the Civil War, World War I, the Great Depression, and World War II. The ratchet effect of expansion of accepted authority in the office of the president with each new emergency meant both more frequent and wider use of executive orders with or without supporting legislative delegations of authority.

It is not so surprising that emergencies should bring with them an expansion of presidential power, nor even that the other branches should acquiesce to them. For how else are emergencies to be handled? The dawn of the modern era, however, also gave rise to a far more generalized expansion of presidential power that, while doubtless shaped by the precedents of presidential supremacy during emergency, was rooted in broader developments in the political system and the larger society, and went well beyond emergencies to touch virtually all aspects of American politics and policy making, foreign and domestic.

At the turn of the century, the nation was rapidly undergoing fundamental changes—urbanization, industrialization, immigration, economic growth—and demands were escalating for positive governmental responses to the burgeoning problems of modern society. Increasingly those demands came to focus on the presidency, and presidents responded to their new incentives by asserting their leadership and looking for ways to take action unilaterally. By this standard, the first modern president was not Franklin Roosevelt, who is usually regarded as such by presidency scholars, but rather Theodore Roosevelt, who, quite outside the exigencies of wartime, first enunciated a philosophy of aggressive presidential leadership in solving the nation's problems—and acted on it.

Theodore Roosevelt's perspective on the presidency, widely referred to as the "stewardship theory," argued that presidents have the duty to take whatever steps they think necessary to promote the nation's best interests, unless they are specifically prohibited from doing so by explicit language in the Constitution or statute. On this view, legal ambiguity allows them—indeed, invites them—to fill the void and take charge of national policy. In an autobiographical reflection on his own actions as president, Roosevelt (1914:198) observed, "Under this interpretation of executive power I did and caused to be done many things not previously done by the president and the heads of departments. I did not usurp power, but I did greatly broaden the use of executive power."

Roosevelt's own actions, moreover, suggest that in practice he was willing to exercise leadership unilaterally even when the law actually forbid him to do so. One of the most celebrated domestic initiatives of his administration, for instance, was the reservation of public lands for a system of national parks. Roosevelt justified these discretionary actions by reference to a statute that allowed him to withdraw lands in which mineral deposits were found—yet he reserved lands without regard for whether they actually had mineral deposits.

He wanted certain lands included, and he simply went ahead with it on his own authority (Hebe, 1972).

This “stewardship” approach is the norm for modern presidents. It was stated most baldly by Franklin Roosevelt, who put it this way: “In the event that Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act” (quoted in Fleishman and Aufses, 1976). Succeeding presidents have usually been more demure than this in claiming their right to act unilaterally, but it is clear that their view of presidential leadership is very much in the spirit of the the two Roosevelts (Fleishman and Aufses, 1976). Indeed, it has become such an integral part of the presidency that new presidents begin to put these powers to use almost immediately upon assuming office—allowing them, in very visible and forceful ways, to demonstrate their new brand of leadership. In 1960, John F. Kennedy campaigned on a promise to create a Peace Corps that would send American youth abroad to help struggling nations, and less than 2 months after assuming the presidency he issued an executive order that created the agency unilaterally. Other presidents have done similar things to get their political agendas off to energetic starts. Bill Clinton, to take another example, campaigned in 1992 on a platform favoring a liberal view of abortion, and within 1 week of taking office he issued an executive order that permitted federal funding for health clinics counseling patients on abortions, as well as an order that allowed federal funding of medical research using tissue from aborted fetuses. The use of executive orders to reshape national policy is simply the kind of thing that presidents routinely do now, from the very beginning of their terms and throughout their years in office.

To some extent, Congress has paved the way for presidents to exercise ever-greater powers of unilateral action. Among the most widely noted features of modern American politics is the inclination of Congress to make broad delegations of authority to the executive over a wide range of policy areas, allowing presidents and their administrative subordinates to engage in highly discretionary lawmaking activities (Lowi, 1979, 1985). Much of Roosevelt’s New Deal was designed and implemented under delegations so broad that he could do virtually anything he wanted. In 1933 alone, Roosevelt issued 593 executive orders to put his agenda into operation. Another classic example is the broad mandate Congress gave Richard Nixon to institute (if he so desired) a system of wage and price controls, which then became an entirely presidential exercise in planning, design, policy making, and implementation. Empirically, then, it is clear that presidents have often had tremendous scope for taking unilateral action, and thus for being the ones who actually make the key decisions about the contours of national policy in many spheres, simply because Congress has chosen to stand back and let them do it (Fleishman and Aufses, 1976).

Not all congressional delegations give presidents such a free hand, of course. Thousands of statutes have been passed over the years, and their delegations range across a full spectrum, from highly restrictive to extraordinarily broad (Epstein and O’Halloran, forthcoming). Although in the case of individual statutes presidents have sometimes found their scope for action substantially narrowed, the proliferation of statutes over time has had the effect of creating

an elastic framework of statutory law that, because of the great breadth of responsibilities it heaps on the executive and the inconsistencies and conflicts it contains across statutes, gives presidents plenty of room to maneuver in pursuing their own agendas (Diver, 1987).

Perhaps the best empirical example of this is regulatory review. Since the presidency of Richard Nixon, all presidents have insisted on reviewing the proposed rules of regulatory agencies—particularly those, like the Environmental Protection Agency, whose rules threatened to impose billions of dollars in costs on business, and thus have a major impact on the economy. Presidents have been serious and systematic about this, causing a number of rules to be delayed, modified, or shelved. Members of Congress and their group supporters have complained loudly that regulatory review is a violation of statute, for such a presidential process is nowhere authorized by Congress, and it prevents government agencies from carrying out the mandates explicitly assigned them under law. Yet presidents have persisted in imposing their priorities through this form of unilateral action, and they have gotten away with it.

The key is that presidents are responsible not just for the particular statutes governing a given agency, such as the Clean Air Act and the Federal Water Pollution Control Acts for the EPA, but for all the thousands of statutes that make up the full corpus of law—including statutes, like the Employment Act of 1946, that direct presidents to reduce inflation and unemployment, promote economic growth, conserve energy, and otherwise enhance the nation's economic well-being. Thus as presidents have engaged in the kind of coordination and balancing that is inherent in executive responsibilities, they have brought these other values to bear on the regulatory agencies—selectively, of course, emphasizing those that promote their own agendas.

Presidents do this sort of thing all the time, often in ways that are nothing short of ingenious, and that are clearly crafted to take advantage of the ambiguities and loopholes that the proliferation of statutes creates. The Feed and Forage Act of 1861, for example, was intended to make funding available so that members of the cavalry in the American west would be able to feed their horses when Congress was not in session. Yet presidents have used this statute as legal justification for funding the 1958 deployment of marines to Lebanon, the 1962 Berlin mobilization, and the initial deployment of troops to Vietnam (Mayer, 1996). As this suggests, any statute on the books is fair game to justify presidential action, and there are so many of them that presidents can almost always find some legal basis for what they want to do.

To date, there is too little research on the topic of unilateral action by presidents to say how closely or how often their actions tend to square with congressional intent. But while much remains to be learned about exactly how presidents have put their powers to use, it is clear that they have used them strategically and creatively—and that, at least in many cases, they have *not* simply been executing the will of Congress. There are plenty of examples of this throughout history, especially in the conduct of foreign policy, where presidential prerogatives are greatest. But domestic policy is also rife with cases in which presidents have gone their own ways.

Even in our brief discussion we have already come across two examples of this. One is Theodore Roosevelt's celebrated withdrawal of public lands, which violated statutory law. The other is regulatory review, which has led presidents to impose policy decisions unilaterally that almost certainly would not have passed Congress, and in many cases have outraged environmental groups and the legislators responsible for writing the EPA's legal mandates.

Among the many instances in which presidents have strayed from congressional will, however, perhaps the most important string of examples in domestic policy has to do with civil rights. From the 1940s through the early 1960s, the conservative coalition held the balance of power within Congress, southern Democrats controlled key committees, and the emerging civil rights movement could count on little support from Congress as an institution. The opponents of civil rights could always block any serious proposals for legislation, and did on many occasions. Outside the courts, the important advances in civil rights policy came from the unilateral action of presidents, who simply made new civil rights law without going through Congress. Franklin Roosevelt issued an executive order to promote nondiscrimination in hiring within the defense industry, a policy that was later broadened and strengthened by subsequent presidents. Truman desegregated the military through executive order. Kennedy required nondiscrimination in federally funded housing and set up the first machinery for affirmative action in employment, again through executive order. Johnson issued his own orders continuing these policies and significantly strengthening affirmative action—indeed, it is Johnson's order that is widely regarded as the true beginning of the nation's affirmative action policy (Morgan, 1970; Moreno, 1996).

These shifts in national policy would not have passed Congress. Presidents, by moving ahead on civil rights issues, were knowingly and quite publicly acting contrary to the will of Congress on matters of major importance to the country. They were acting as leaders, and taking the nation in directions Congress refused to go.

Near the end of this string of executive orders, Presidents Kennedy and Johnson saw an opportunity—the crisis atmosphere produced by civil rights demonstrations in the South—to push for a major legislative change. The result, the Civil Rights Act of 1964, was the culmination of years of presidential maneuvering to shift policy, first by going around the Congress and then, when the time was right, by working with it and going through it. There is no denying, however, that the great achievement was the legislation itself, and that this kind of landmark change could never have happened through unilateral action alone. Thus while presidents used their powers of unilateral action to defy and circumvent a recalcitrant Congress, the steps they took were moderate by comparison to what they really wanted—and what they really wanted, in the end, took legislation. This is a story, then, not only of presidents defying Congress to impose their own policies, but also of presidents acting moderately due to congressional constraints, and of their efforts in the end to get Congress to go along with the major changes they really aimed for.

It is a story, moreover, that continues to unfold, because presidents keep pushing and never stop using their unilateral powers. The last executive order

that we mentioned above, the one issued by President Johnson on affirmative action, was designed to go beyond the 1964 Civil Rights Act. Johnson had lobbied Congress to strengthen Title VII of the act, dealing with discrimination in employment, and when Congress refused to do that, the president later issued an executive order in which he strengthened the act—and made new law—on his own (Nathan, 1969). This, at the time, was a modest addition to a landmark piece of legislation. But as we can all see some 35 years later, it helped nurture and promote a national policy on affirmative action that has been truly significant in its political and social impacts.

2.4 Foreign Policy and Executive Agreements

Presidents have been even more assertive in exercising their powers of unilateral action in foreign policy. The founders intended for presidents to play pivotal roles in foreign affairs and gave them special powers, notably as commander in chief, to promote their leadership in that realm. Congress was not expected to recede into the background and was given the power to declare war and to regulate international trade. But over the years the inclination of Congress to make broad delegations to presidents has been even more pronounced in foreign policy than in domestic policy. The reasons are straightforward and probably unavoidable, having to do with the need for expertise, continuity, speed, flexibility, and so on, especially in an age of interdependence, complexity, and nuclear technology. There is some evidence that, with the end of the Cold War and the rising importance of international trade, which is more closely connected to constituency, Congress may be entering a new era in which it is less willing to delegate. On the whole, though, the constitutional and statutory governing structure in foreign affairs has long been extremely favorable to unilateral action by presidents, and still is (e.g., Silverstein, 1997).

Precisely for this reason, presidents have traditionally seen foreign policy as a more attractive arena than domestic policy for demonstrating their leadership. In foreign affairs, moreover, they have continually taken advantage of the ambiguity of the governing structure to lay claim to powers not explicitly granted them, and to carry out their policy agendas in whatever ways they could. They have been especially successful at doing so, as we noted above, during times of war and emergency, when their unilateral actions have ranged from military operations to the creation of new agencies to the mobilization of domestic industries to the imposition of wage-price controls. It is worth noting, however, just how presidentialized international conflicts of all sorts have become, and what this has meant for presidential powers of unilateral action. Since World War II, Congress has not declared war once. Yet the nation has been involved in extended wars in Korea and Vietnam, a brief war in the Persian Gulf, and a number of conflicts, for example, the invasions of Panama and Granada, and the bombing of Libya. All of these were exercises in presidential leadership from beginning to end, with Congress—despite its constitutional war powers—playing a distinctly secondary role, if that. Presidents have largely been acting on their own (Fisher, 1997; Cronin and Genovese, 1998).

Presidents exercise power in these cases not simply because the nation needs a leader in times of emergency, but because their powers of unilateral action give them the ability to move first, and thus to get into these situations by their own choice. This in turn allows them to control Congress's agenda—for once presidents involve the nation in an international conflict, Congress's options are limited. Kennedy and Johnson made early decisions to send troops to Vietnam, for instance, presenting Congress with an evolving commitment that could not easily be reversed. President Bush unilaterally sent massive numbers of troops to the Persian Gulf and only then asked Congress to approve of his plans for war. Bush sent troops into Panama without asking for Congress's approval at all, as did Reagan in sending troops to Granada, and Nixon in the invasions of Cambodia and Laos—all of which engaged the nation in conflict before Congress could even consider preventing it. Historically, moreover, these sorts of president-initiated conflicts are quite common. President Polk sent troops into Mexico, putting the nation into a *de facto* war, and then asked Congress to declare war on Mexico. President McKinley sent the battleship *Maine* to Cuba, where its destruction created a warlike situation with Spain, and then asked Congress to declare war on Spain. Theodore Roosevelt proposed sending the U.S. fleet around the world as a demonstration of American power and prestige, and when legislators complained, said he would use his own funds to send them just halfway around the world, daring Congress to withhold the rest of the funds and leave the ships stranded. The ships were sent (and funded) (Nathan and Oliver, 1994; Cronin and Genovese, 1998).

Presidents also have advantages in foreign affairs because of the expertise they control, and because of the frequent need for secrecy. These are reasons why Congress feels the need to delegate—but they also give presidents key resources, whatever the delegation, for taking unilateral action that can easily go beyond the bounds of what Congress intends. This is true throughout the realm of foreign policy, but it is perhaps most consequential for policies bearing on the intelligence community. While the Central Intelligence Agency and other intelligence organizations within the government have played key roles in U.S. foreign policy, they have been almost entirely under the control of presidents—who have used these agencies to promote their own agendas throughout the world, exercised their control largely in secret, and sometimes, as in the Iran-Contra affair, done things of which Congress would never have approved if it knew (Fleishman and Aufses, 1976).

The key is that Congress often doesn't know. Presidents control the intelligence community through their own orders, with heavy reliance on "national security directives," which can be kept secret. Thus even though Congress, as part of its "resurgence" after Vietnam and Watergate, set up committees to oversee aspects of the intelligence community, the pervasive secrecy has made their job extremely difficult. Consider the words of Lee Hamilton [(D) Indiana], chair of the Iran Contra Committee, who vented his frustration at a 1988 House hearing:

The use of secret [national security directives, or NSDs] to create policy infringes on Congress's constitutional prerogatives by inhibiting effec-

tive oversight and limiting Congress's policymaking role. [NSDs] are revealed to Congress only under irregular, arbitrary, or even accidental circumstances, if at all. Even the Intelligence Committees do not usually receive copies of [NSDs]. (U.S. House of Representatives, 1988:29)

Finally, we need to recognize that foreign policy is not solely about wars, international conflicts, and national security issues. More generally, it is about relations among nations, which are usually peaceful rather than conflictual, and involve national leaders in the pursuit and negotiation of all sorts of cooperative arrangements—from economic trade to cultural exchange to military alliances—intended to promote the mutual advantage of participating states. Traditionally, these arrangements among nations have been called treaties, and the Constitution recognizes their central importance to the nation's foreign policy by carefully dividing the treaty-making power between the president and Congress. Presidents are given the right to negotiate treaties with foreign nations, but these agreements do not become law until approved by the Senate.

Since the making of such agreements is normally at the heart of any nation's foreign policy, this would seem to place a serious constraint on the ability of presidents to act unilaterally in this key realm of policy making. In practice, however, it doesn't, because presidents have gotten around it through the vehicle of "executive agreements" (Margolis, 1986). Years ago, this term was often (but not always) used in reference to international agreements that were less important than treaties, and thus could with some justification be adopted on the president's own authority without going through the process of getting Senate approval. There was obvious political advantage to this, of course—for, to the extent presidents could call any given arrangement an executive agreement rather than a treaty, they could set foreign policy through their own unilateral action, without having to worry about the possible delays, amendments, and defeats that the requirement of senatorial approval obviously threatened.

Over time, presidents have simply done what is in their best interests: when they have negotiated agreements with foreign nations, they have moved away from calling them treaties in favor of calling them executive agreements. And as they have done so, they have issued executive agreements on all sorts of important policy matters—tariffs, the annexation of territory, military commitments, environmental standards, drug trafficking, immigration, arms control, and foreign assistance, among others. Executive agreements have also been used to establish a number of international organizations, among them the International Monetary Fund (Margolis, 1986; Wilcox, 1971; Johnson and McCormick, 1978).

While, again, numbers cannot reveal content, the figures in Table 1 provide a striking demonstration of how aggressively presidents have moved in this direction. During the early and middle 1800s, treaties clearly dominated executive agreements as the standard form of international cooperation. The gap between them began to narrow in the late 1800s, as America and its presidents became more important players in world politics, and by the 1920s executive agreements had begun to take on greater prominence. This trend continued

Table 1. Executive Agreements and Treaties, 1790–1997

| Year | Executive Agreements | Treaties | Percent Agreements |
|-----------|----------------------|----------|--------------------|
| 1790–1799 | 0 | 3 | 0% |
| 1800–1809 | 0 | 7 | 0 |
| 1810–1819 | 1 | 7 | 13 |
| 1820–1829 | 2 | 23 | 8 |
| 1830–1839 | 1 | 22 | 4 |
| 1840–1849 | 10 | 33 | 23 |
| 1850–1859 | 22 | 43 | 34 |
| 1860–1869 | 6 | 52 | 10 |
| 1870–1879 | 13 | 37 | 26 |
| 1880–1889 | 26 | 52 | 33 |
| 1890–1899 | 34 | 41 | 45 |
| 1900–1909 | 73 | 121 | 38 |
| 1910–1919 | 61 | 89 | 41 |
| 1920–1929 | 197 | 164 | 55 |
| 1930–1939 | 257 | 123 | 68 |
| 1940–1949 | 1167 | 92 | 93 |
| 1950–1959 | 2092 | 46 | 98 |
| 1960–1969 | 2170 | 46 | 98 |
| 1970–1979 | 2524 | 39 | 98 |
| 1980–1989 | 3524 | 166 | 96 |
| 1990–1997 | 2369 | 188 | 93 |

Source: Harold Stanley, 1994. *Vital Statistics on American Politics*. Washington, D.C.: CQ Press; Gary King and Lyn Ragsdale, 1988. *The Elusive Executive: Discovering Statistical Patterns in the Presidency*. Washington, D.C.: CQ Press. FAX from Randall Snyder, Law Librarian, Office of the Legal Advisor, Department of State, Washington, D.C.: March 1998.

for two decades, then shifted quite dramatically toward an almost exclusive reliance on executive orders after the end of World War II, when America's role as a world hegemon really began, and along with it a huge increase in its connectedness to other nations. Since the war, modern presidents have entered into many thousands of agreements with foreign nations, and more than 95% of them have been called executive agreements, which means that they have been adopted unilaterally by presidents without the need of approval by the Senate.

For political reasons, presidents still decide that some agreements need to be called treaties and be submitted to the Senate. Had Clinton, for instance, tried to call NAFTA an executive agreement in order to circumvent the Senate, he would almost certainly have generated a damaging political firestorm. In general, agreements that Senators have electoral incentives to care about with some intensity, or that presidents have political incentives to want to share responsibility on, will tend to be called treaties. In any event, presidents have the freedom to decide which route to go, and this gives them an agenda power of key strategic value. Moreover, the fact that they can enter into literally thousands of executive agreements with other nations, often on matters that turn out to be quite important indeed, means that presidents have been able to use this tool to vastly expand their powers of unilateral action—and thereby their own leadership and their own agendas. The rise of executive agreements is

one of the most striking (and least appreciated) trends in contemporary foreign policy making.

2.5 Congress: A Closer Look

We have now taken a brief look at how presidents have exercised their unilateral powers in both domestic and foreign policy. What role has Congress played in constraining presidential behavior and in exercising its own power on these matters? While detailed evidence is limited, a few basic points seem reasonably clear.

We can only begin by reiterating that Congress has actively promoted, or at least invited, the rise of unilateral action by presidents through numerous, sometimes extensive delegations of authority, both in domestic and (especially) foreign policy. To judge from existing scholarship, this is by far the most important influence that Congress itself has had, positive or negative, on presidential powers of unilateral action (Fleishman and Aufses, 1976; Lowi, 1985; Silverstein, 1997). When Congress delegates, even when presidents happen to stay within congressional guidelines, whole ranges of policy decisions are being made by presidents, not by Congress. Congress might think this is okay. But that does not change the fact that presidents are making policy.

Whether Congress delegates or not, it always has the option of reversing a president who gets out of line with congressional preferences. Observing this, however, is difficult. For if Congress were actually doing a good job of protecting its own interests, how often would we actually see it responding to presidential actions, empirically? No one can really say at this point, because there is insufficient data on how presidential actions actually square with what Congress might want. Obviously, if presidents always did what Congress wanted, Congress would never have to respond. To appreciate Congress's empirical behavior, moreover, we would also have to recognize that many presidential orders are about rather minor matters, and are not important enough to warrant a congressional response anyway. Until an empirical analysis can incorporate these kinds of distinctions, an assessment of how Congress responds to presidential action must be made with caution.

With these caveats in mind, though, we think it is still quite suggestive to take a look at some preliminary data we have collected on executive orders, which are set out in Figure 2. To the best of our knowledge, this is a comprehensive list of all congressional responses to executive orders during the period 1973–1997 (chosen because the pre-1973 data are not quite as reliable), augmented by a few attempts to constrain the president's right to issue orders in the first place.² Three findings stand out. First, Congress rarely even attempts to respond to executive orders. While presidents issued about 1,000 orders over this 25-year

2. To make it into our dataset, a bill which sought to directly amend or overturn a specific executive order must have been introduced in Congress. Thus simple mentions of executive orders in, say, floor debates or congressional hearings do not qualify as congressional actions. For further discussion on how these bills were identified, see Howell (1998) and Moe and Howell (1998).

| Bill # | House Comm | Senate Comm | House Floor | Senate Floor | Pass House | Pass Senate | Sent to Pres. | Public Law |
|-----------------------------|------------|-------------|-------------|--------------|------------|-------------|---------------|------------|
| S 891 (1997) | | | | | | | | |
| HR 1378 (1997) | | | | | | | | |
| HR 596 (1997) | | | | | | | | |
| HR 94 (1997) | | | | | | | | |
| S 1295 (1995) | | | | | | | | |
| S 989 (1995) | | | | | | | | |
| HR 1159 (1995) | | | | | | | | |
| S 603 (1995) | | | | | | | | |
| HR 1176 (1995) | | | | | | | | |
| HJR 1868 (1995) | | | | | | | | 104-107 |
| HR 2127 (1995) | | | | | | | | |
| HR 667 (1993) | | | | | | | | |
| HI (1993) | | | | | | | | 103-3 |
| HR 2058 (1989) | | | | | | | | |
| HR 1633 (1989) | | | | | | | | |
| HJRes 738 ('86) | | | | | | | | |
| HR 4590 (1984) | | | | | | | | |
| HR 1204 (1983) ¹ | | | | | | | | |
| S 1080 (1981) | | | | | | | | |
| S 2319 (1980) | | | | | | | | |
| HR 2068 (1980) | | | | | | | | |
| HR 6272 (1980) | | | | | | | | |
| HR 4499 (1979) | | | | | | | | |
| HR 4389 (1979) | | | | | | | | |
| SUpA 205 (1979) | | | | | | | | |
| S 996 (1979) | | | | | | | | |
| HR 2625 (1979) | | | | | | | | |
| S 519 (1979) | | | | | | | | |
| S 3290 (1978) | | | | | | | | |
| SUpA 1368 ('78) | | | | | | | | |
| SUpA 1202 ('78) | | | | | | | | |
| HR 9804 (1977) | | | | | | | | |
| HR 8231 (1975) ² | | | | | | | | |
| HR 1531 (1975) | | | | | | | | |
| HR 1331 (1975) ³ | | | | | | | | |
| HCR 166 (1973) | | | | | | | | |
| HR 15067 (1973) | | | | | | | | 93-549 |

Source: All bills were identified in electronic searches of *Thomas On-line*, *Congressional Information Services* and *Congressional Alert*, and systematic searches of the indexes of *Congressional Record*, the *Congressional Quarterly Almanacs* and the *Commerce Clearinghouse Annual Reports*.

¹ This bill would have eliminated the president's power to issue executive orders generally.

² This bill would have required the president to submit all executive orders to Congress for review.

³ This bill would have required the president to submit copies of every executive order or proclamation no later than two days after issuance.

Figure 2. Bills introduced to amend or overturn existing and threatened executive orders, 1973–1997.

period, Congress tried to overturn them just 37 times. Second, even when Congress does respond, the proposed legislation almost never succeeds. Of the 37 bills that were submitted, only 3 ultimately became law. Presidents saw their executive orders overturned, therefore, just three times in 25 years. The vast majority of Congress's attempts died in committee. Third, 11 of Congress's 37 responses came in the last 3 years, when the Republicans gained control of Congress after decades in the minority. This may be a sign that the system

was previously in some sort of equilibrium—in which, arguably, presidents were more in line with fairly stable congressional preferences—and the shift in preferences after 1994 then led to a rash of congressional responses to whip presidents back into line. There is some abstract plausibility to this story, and we will explore it in future work. For now, though, we have to emphasize the bottom line: only one of these responses ever became law. The other 10 went nowhere. Even in times of a “resurgent” Congress, effective responses are difficult and rare.

Again, these data are only suggestive. But they are reinforced by other evidence that points in the same direction. While it is true that Congress’s low response rates might possibly be due to presidents’ conforming to congressional preferences, there are important instances in which presidents have acted unilaterally to establish policies that are clearly unpopular with Congress, and Congress did not respond effectively. While there are presumably many examples that can be dredged up, we have taken special note here of two that seem especially prominent: the pioneering actions of presidents on civil rights, and the imposition by presidents of regulatory review. While both of these cases occur in domestic policy, where Congress is presumably more inclined to be responsive, and while both animated important political constituencies, the fact is that presidents did not shy away from taking action and Congress was unable to stop them.

It’s not as though legislators didn’t try, though. From the 1940s until the passage of the Civil Rights Act in 1964, a number of bills were introduced in Congress aimed at reversing what presidents were accomplishing through unilateral action. But with only one exception worth mentioning, all these efforts failed—another reflection of how easy it is to block congressional action. The exception, moreover, is instructive. The “successful” congressional response was the Russell Amendment, which had been championed by Senator Richard Russell of Georgia, an opponent of Roosevelt’s unilateral action on civil rights. The amendment passed as part of an appropriations bill in 1944 and required congressional approval of all funds for agencies set up through executive order that remained for over a year—a specific attempt to eliminate the Fair Employment Practices Committee, which had been created by Roosevelt’s civil rights order. We won’t go into the politics of this, but the telling result is that presidents very quickly found a statutory way around it. Taking advantage of a harmless-sounding clause in the 1946 Independent Offices Appropriations Act, which allowed interdepartmental committees “engaged in authorized activities of common interest” to be financed by executive departments, Truman and subsequent presidents used this as authority to unilaterally create and fund (via executive monies) civil rights commissions. The Russell Amendment was the only time in over 20 years, then, that Congress was able to manage a response to presidential action on civil rights, and presidents simply maneuvered around it (see Nathan, 1969; Morgan, 1970).

The situation is not so different for regulatory review. Presidents have been engaged in reviewing proposed rules by regulatory agencies for about 25 years, and it has never been popular within Congress—for it is a clear threat to con-

gressional power, and its policy decisions have generated strong opposition from interest groups and their legislative allies. Yet Congress has been unable to do much about it. The most turbulent fighting came during the Reagan and Bush years, after Reagan's infamous executive order 11291 significantly strengthened the presidential review process. But Congress was never able to do the obvious: pass legislation overturning the order. Instead, it nibbled about the edges. It threatened not to fund or reauthorize the review agency, OIRA (the Office of Information and Regulatory Affairs)—underlining, again, the pivotal nature of appropriations—and it got Reagan to agree, in return for funding and authorization, to make the head of OIRA confirmable by the Senate. But this was not much of a concession for the president. And during the Bush years, when legislative opponents continued their fight against OIRA, the president simply shifted the responsibilities of regulatory review to a new, presidentially created group called the Competitiveness Council and continued to do what he wanted to do. Things calmed down when Clinton came into office, since his own agenda was more in line with legislative supporters of the agencies, but significantly, Clinton did not give up on regulatory review. He just imposed different priorities and a somewhat different process (Moe, 1998).

Regulatory review is, in a meaningful sense, a best-case scenario for Congress. For while legislators are little motivated by issues of power, the effects of regulatory review on interest groups has been so strong that these groups have lit a fire under legislators and prompted them, in effect, to take action in their own institutional interests in opposing the aggrandizement of presidents. This testifies to the problems constituencies can cause for presidents. Yet even here, Congress has not been very effective. It has occasionally caused trouble, uncertainty, and disruption. But through it all, presidents have held onto their powers of regulatory review and continued to exercise them.

Another way to approach the question of congressional response is to focus on issues that deal not with policy, but with institutional power directly. If Congress wants to stop presidents from acting, it can do so by opposing them in particular policy disputes, but it can also respond—much more consequentially—by passing general legislation that simply prohibits presidents from exercising certain powers at all, or sets rules on how their powers are to be exercised. This may or may not be constitutional, depending on what is involved. But this kind of nicety, of course, has never stopped presidents from plunging ahead. Why should it stop Congress? Doubtless it wouldn't, as long as Congress could overcome its collective action problems and presidential opposition (backed by the veto) to get something passed.

Figure 2 is relevant here. What it shows is that Congress almost never makes an effort to pass legislation that would restrict the president's powers with regard to executive orders, and when it has these efforts have failed. Specifically, we find that Congress tried to pursue such restrictive legislation on just three occasions during the entire 25-year period from 1973 to 1997. One bill would have eliminated the presidential power to issue executive orders altogether, another would have required the president to submit all orders to Congress for review prior to their issuance, and the third would have required him to submit

copies of orders to Congress no later than 2 days after their issuance. None of these proposals even made it past a congressional committee.

Congress has, of course, taken aim at presidential power in other ways, although these too are uncommon. The most celebrated is the War Powers Resolution, which was passed by Congress in 1973, near the end of the Vietnam experience, in the midst of Watergate, and the same year that Arthur Schlesinger published *The Imperial Presidency*. This was a rare time, and the War Powers Resolution represented a rare mobilization of institutional interest on Congress's part, an indicator, some thought, of a "resurgence" that would put the legislature more on a par with the presidency (Sundquist, 1981). But while this resolution was intended to force presidents to get congressional authorization for the commitment of troops and the waging of war, and thus to restrict his powers of unilateral action, in fact it has not worked at all as supporters had hoped.

When Reagan invaded Granada and bombed Libya, and when Bush invaded Panama, they simply did so on their own authority, without any attention to the requirements of the War Powers Resolution. Clinton did the same in sending U.S. troops into Haiti, Somalia, and Bosnia. Bush did seek congressional approval for the Gulf War, but as we noted, he did so only after troops, planes, and ships had been moved to the Middle East at huge economic and political cost, which boxed Congress in. In the final analysis, then, as Cronin and Genovese (1998:191) observe, "presidents have mostly ignored the resolution and viewed it as a nuisance." Meantime, they have insisted on retaining and using their powers of unilateral action, and Congress has been able to do little about it.

Congress has had a success or two as well. The Congressional Budget and Impoundment Control Act, passed in 1974—during the same crisis period as the War Powers Resolution—was intended to address, among other things, the president's unilateral power to impound congressionally appropriated funds. While this had never been much of a problem with past presidents, Richard Nixon had begun making overt use of impoundments as a way to influence policy, and Congress reacted with new rules requiring presidents to get legislative approval and specifying exactly how and when this was to be done. The evidence to this point seems to suggest that presidents have mainly gone along with these rules, and thus that Congress's constraints have worked. If so, this may be because (Nixon aside) there was never much of a problem there to begin with. But it may also be that congressional interests are more easily defended when money is involved, and when constituents and districts threaten to scream if the money isn't spent (Middlekauff, 1990).

A great deal remains to be learned on this topic. But for now there is good reason to think that Congress has had a very difficult time putting a lid on unilateral action by presidents. It appears that Congress contributes to its own problems by delegating so broadly and so often, and by the sheer proliferation of its laws. It also appears that Congress rarely attempts to do anything about these problems by constraining the unilateral powers of presidents, even when the latter are clearly straying from congressional preferences. And finally, it appears that when they do attempt to step in, they almost always fail.

2.6 The Courts

The Supreme Court could presumably put an end to all this by doing away with the legal ambiguities and broad delegations that have allowed presidents to behave imperialistically. It could define presidential power as narrowly as it likes, and in very specific terms. Assuming presidents comply with Supreme Court rulings, then, any concerns about excessive presidential power could be easily resolved.

In the practice of American politics and jurisprudence, however, particularly in modern times, the Supreme Court has not acted to impose clear, restrictive limits on presidents. Quite the contrary. As Cronin and Genovese (1998) recently observed,

The history of presidential–Supreme Court relations is primarily one of the nation’s highest court aiding and abetting an expansive view of presidential power. Although the Supreme Court has occasionally halted presidential action or declared a presidential act unconstitutional, the Court has more frequently labored to approve or legitimize the growth of presidential power (p. 225). . . . Nearly every analyst of Court-presidency relations emphasizes the Court’s role in the expansion of presidential powers (p. 254).

We don’t want to get into a detailed discussion here of how the Court has decided major cases on the presidency. Instead, we’ll try to highlight a few points that seem best to summarize how the Court has generally approached and resolved issues of presidential power.

Perhaps the first point to make is that the Court has often tried to avoid taking explicit stands on separation of powers issues, especially when presidential actions are challenged. Rather than wading into or causing political battles by addressing these most fundamental of issues, the Court frequently claims that cases are not sufficiently ripe for consideration, that administrative avenues have not yet been exhausted, that the issue is moot because of subsequent redress, that the parties lack standing, or some similar technical reason for not getting involved. When the Court can find a way out, they generally take it (e.g., Kloppenberg, 1994).

The rationale has its origin in the pioneering case that first established judicial review, *Marbury v. Madison* (5 U.S., 1 Cranch 137, 1803). This was in fact a case that arose over an executive order. President Jefferson had ordered his Secretary of State, James Madison, not to give a judicial commission to William Marbury. Chief Justice Marshall’s opinion in that case introduced the following line of reasoning:

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court (p. 170).

While “never” was something of an overstatement, this rationale laid the foundation for what came to be known as the “political question doctrine,” which the Court has employed over the years to justify not getting involved in separation of powers issues, particularly issues of presidential power. It is not an explicit legal principle that the Court is somehow bound to. It is really a line of reasoning, and a background of precedent, that is available to the Court when its members choose to use it, and thus when their own political sensibilities tell them that it would be wise to stay out. Having such a mechanism is clearly in the Court’s best interest, given its weakness as a political institution and its vulnerability to the other branches, especially the presidency.

The upshot is that the Court, in staying out of many separation of powers issues, has essentially left it up to Congress to protect its own institutional interests against presidential aggrandizement. This has been true in domestic policy (e.g., Fisher, 1991), but it has gone even farther in foreign policy, to the point where the Court now almost entirely avoids foreign policy disputes between the branches and simply puts the ball in Congress’s court. As Silverstein (1992:25) observes:

A close examination of judicial doctrine in foreign policy cases over the past 200 years reveals a remarkably consistent doctrine that sends a clear signal to Congress and the president that there are limits in foreign policy, and that there are congressional prerogatives—but that Congress must exercise and police its own prerogatives rather than expect the court to do so for it.

The problem, of course, is that Congress is not good at this. Both theory and evidence suggest that Congress cannot protect itself very effectively, and thus when the Court calls on Congress to fight its own battles with the president, it is virtually guaranteeing (whether it realizes this or not) that presidents will win out over the long haul.

The Court does not always stay out, of course. On some occasions, it has decided important separation of powers issues that bear directly on presidential power. When it has gotten involved, then, what stands has it taken?

Among its most important rulings are those dealing with delegation, and notably with the question of whether Congress has the right to make broad delegations of power to presidents. The Court struggled with this issue in the early years of positive government, when such delegations first made their appearance. But throughout the modern era, and consistently since the late 1930s, the Supreme Court has held that these broad delegations are constitutional, even when they are almost wholly lacking in standards, and thus even when they give presidents a free hand in making law on their own. The two aberrations were the *Schechter* and *Panama Refining* cases, both in 1935, that overturned certain New Deal delegations as overly broad. Roosevelt responded by threatening to expand the size of the Court with his own appointees; and although Congress resisted his plan, the Court quickly backed off its restrictive doctrine—the “switch in time that saved nine”—and has never again ruled

a congressional delegation to the president overly broad (e.g., Corwin, 1984; Hebe, 1972; Lowi, 1979).

The Court could have seriously constrained the president's powers of unilateral action by simply limiting Congress's right to make broad delegations. But it didn't do that. It supported Congress's right to delegate, and thus, in effect, to make its own decisions about its own powers. And because Congress has historically wanted to give presidents a good deal of discretion through its delegations, the Court has given its approval to a legal framework that invites the expansion of presidential power.

This doesn't mean that the Court will accept every delegation of power that Congress wants to make to presidents. The recent line-item veto case demonstrates as much. Here, in a rare foray into separation of powers issues, the Court declared that Congress had no right to delegate its lawmaking power in this particular way, and thus denied presidents a new power they would sorely like to possess. The line-item veto, however, is a specific, well-defined issue about the technical process of lawmaking, one that is quite separable from the broader domain of presidential action and congressional delegation, and whose resolution leaves virtually untouched the pervasive ambiguities that underpin the president's unilateral powers more generally. Moreover, the Court was in the public spotlight on this case, and its integrity and reputation were on the line. It is precisely under these conditions that the Court is likely to take autonomous action that presidents may dislike.

Exceptions aside, the broader delegation issue has been decided over time very much in the president's favor. This is fundamentally important in expanding and legitimizing the scope for presidential power, but it also points to a set of auxilliary questions that naturally arise about exactly what presidents have the right to do. In the absence of specific Court rulings, for instance, it is unclear what needs to happen for presidential action is to be deemed "authorized" by Congress. Indeed, in many cases it is unclear that presidential action requires such authorization, for presidents have their own powers under the Constitution and do not simply derive their power from Congress. What do presidents actually actually have a right to do—and what do they not have a right to do?

To a large extent, the Court has refrained from providing specific answers to these questions, leaving key legal issues ambiguous and unresolved. They have, however, made decisions that give a sense of content and direction, and that, as their delegation decisions have done, create a legal framework that permits and even invites presidents to expand their powers of unilateral action.

In foreign policy, for instance, the Court has ruled that the president is the "sole organ" representing the government in relations with other nations (*United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 1936), and that he has the inherent power to enter into executive agreements (as opposed to just "treaties") with these nations on his own authority (*United States v. Belmont*, 301 U.S. 324, 1937). These and related decisions have resolved important ambiguities in the president's favor. And when combined with the presidents natural advantages, his enumerated powers, and Congress's willingness to delegate, they

have helped widen the terrain on which presidents can move unilaterally in foreign affairs (Hebe, 1972).

Across both foreign and domestic policy, however, the most influential Court decision by far is the *Youngstown* case (343 U.S.C., 1952), which deals with presidential powers of unilateral action more generally and contains broad criteria that have guided judicial opinions ever since. The case arose as a result of President Truman's seizure of the steel mills during the Korean War. A labor dispute had shut down the mills and Truman had seized them as a means of keeping them open, arguing that steel was necessary for the war effort and that his powers as commander-in-chief gave him the authority to engage in such unilateral action. The Court, in a rare move, defied Truman and declared his action illegal. The concurring opinion of Justice Jackson in this case offered a legal framework that has influenced judicial thinking ever since.

Jackson distinguished three categories of presidential action. First, such action may rest on presidential authority granted under the Constitution, or on the implicit or explicit consent of Congress. Here, presidents are properly given wide latitude. Second, presidential action may be in direct violation of the will of Congress, in which case presidents are on the weakest legal ground. And third, presidential action may fall in a "zone of twilight," where presidents and Congress have concurrent authority but Congress has not clearly authorized or prohibited what presidents have done; these situations are ambiguous and require careful court scrutiny to determine what the president's actual authority is (e.g., Hebe, 1972; Fleishman and Aufses, 1976).

These criteria have given judges at all levels a way of framing issues of unilateral action by presidents. The problematic cases are those that fall into the "zone of twilight," for here it is unclear whether presidents have the right to do what they are doing, and the courts are called upon to make some hard choices. What have they done? In many of these cases, they have resorted to the "political question doctrine" and refused to deal with them, allowing the president and Congress to sort things out on their own, which gives presidents the advantage. When they have been willing to tackle these cases and address the basis for presidential action, they have not only tended overwhelmingly to come down on the side of presidents, but have "often been both generous and ingenious in *finding* sources of authority for executive action" (Fleishman and Aufses, 1976:10, emphasis added). That is, even when presidents are quite vague (as they frequently are) about the constitutional and statutory provisions that supposedly justify their unilateral actions, the courts have actively sought out and creatively construed justifying provisions in the law, provisions that presidents did not even employ on their own behalf (see Fleishman and Aufses, 1976, more generally; also Silverstein, 1997).

In doing so, the courts have often relied (at least implicitly) on the "acquiescence doctrine," which dates back to the *Midwest Oil* case (236 U.S., 1915). Here the Court confronted a challenge to an executive order by Taft that withdrew public lands without any clear authorization from Congress. Nonetheless, the Court ruled that, because Congress had known of similar orders in the past and had chosen not to overturn them, its continued silence—its acquiescence—

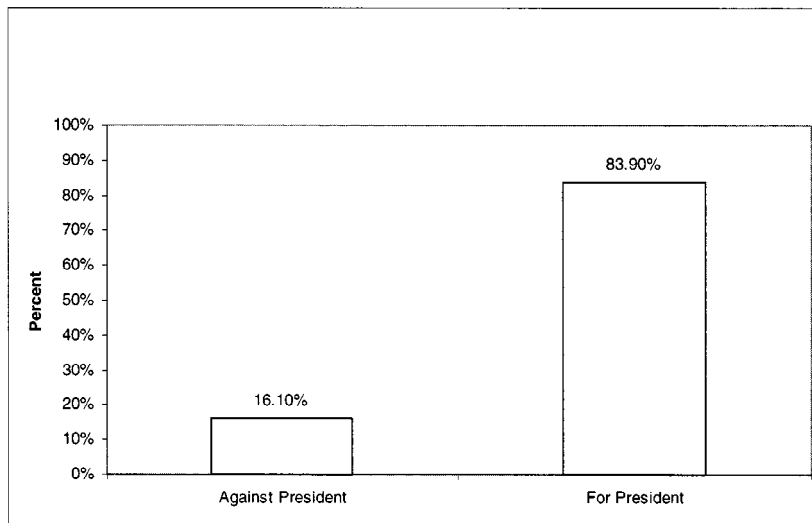
could be construed as consent. Over the years, the courts have used other indicators of congressional consent as well, among them continued funding of an agency established by executive order, orders that are part of a longstanding practice that Congress allows, and legislation passed after the order was issued (Fleishman and Aufses, 1976).

Increasingly over the years, the courts have essentially moved cases out of the “zone of twilight” and into Jackson’s first category, either by searching out and finding congressional authorization or by arguing that, through its acquiescence, Congress has implicitly given presidents the right to move ahead. What the courts increasingly require, in order to invalidate a presidential order, is direct evidence of *explicit congressional opposition*—such as a vote on the precise issue in question that explicitly denies the president authority. Indeed, it is worth noting that this is just what occurred in the *Youngstown* case itself, when the Court issued one of its rare decisions against a president in striking down Truman’s seizure of the steel mills. It happens that, during the Taft–Hartley debates, Congress had actually debated the issue of presidential takeovers and voted against it. Had this specific vote not occurred, Truman may very well have won that case (Fleishman and Aufses, 1976).

The courts, therefore, have pursued a course that is conducive to the expansion of presidential power, and they have done it essentially by *shifting the responsibility to Congress* for keeping presidents under control. On many occasions they have simply avoided dealing with separation of powers issues, and required that Congress and the president settle the issues on the political battlefield. When they have actually decided cases, moreover, they have often relied on a jurisprudence that gives presidents the go-ahead unless Congress has previously expressed its “will” precisely and explicitly in denying presidents the authority.

Owing to its collective action problems, Congress is disadvantaged regardless of which route the courts decide to go. For when presidents and Congress have to fight it out politically, presidents are likely to win, as we saw in the previous section. And when the courts require Congress to express itself definitively in denying presidents certain authority, they are requiring Congress to do something that is very difficult for a collective institution to do, and that presidents can readily block. Thus, whether the courts stay out or decide to get involved, the implications for presidential power are much the same. Presidents tend to win.³

3. Very recently, President Clinton has tried to use the legal powers of the presidency to protect himself from civil and criminal actions related to his own personal behavior (in the Paula Jones and Monica Lewinsky situations) and the courts have ruled against him. By rejecting Clinton’s arguments, the courts have limited presidential power in certain respects—asserting, for example, that presidents can now be subject to civil suits while in office, and that certain legal prerogatives, such as executive privilege and the lawyer-client privilege, do not allow presidents and their aides to withhold evidence from criminal proceedings. But while these decisions may affect the ways presidents do their business in the future, they have little bearing on the vast range of official presidential responsibilities and powers, and do little or nothing to undermine the president’s capacity for unilateral action.



86 total challenges: 14 against president; 72 for president. Cases were identified using *Shepard's Code of Federal Regulations Citations* and Lexis-Nexis's "mega" search engine. District, appellate and Supreme Court cases are included. Only cases that directly challenged the constitutionality or statutory authority of an executive order were entered into the database. See Howell 1998 for complete description of data collection process.

Figure 3. Presidential success rates in court challenges: 1942–1996.

Finally, our own research allows us to shed some additional light on how presidents actually do in the courts.⁴ We have collected data on all cases that challenged the president's right to issue an executive order over the period 1942 to 1996. During this period, presidents issued in the neighborhood of 4,000 executive orders, but only 86 of them wound up being challenged in (and accepted for consideration by) the courts, a remarkably small number, even granting that many presidential orders deal with minor issues. These 86 cases concerned both foreign and domestic policy, and were instigated by interest groups, corporations, and political actors. The outcomes, described in Figure 3, suggest that presidents have indeed done quite well in the courts, winning outright in 86% of the cases. Overall, then, we find that presidents were almost never confronted with challenges to their power in the first place, and when they were, they rarely lost. While, again, numbers do not tell us anything about content or importance, these results are entirely compatible with the rest of the literature.

4. Using Lexis-Nexis's "mega" search engine, we analyzed every federal court case at the district, appellate, and Supreme Court level to determine which ones constituted formal challenges to specific executive orders. In the end we identified 86 such cases. For further discussion on source materials, and on the criteria we employed to distinguish actual challenges from mere mentions of executive orders, see Howell (1998) and Moe and Howell (1998).

3. Conclusion

In this article, we've tried to develop a novel perspective on presidential power. It is different from the long-dominant approach in the presidency field, which sees the president as an individual whose skills, personality, and experiences profoundly shape his success in office. It is also different from most of the institutional analyses that have been applied to the presidency thus far, for the presidency has not been their central institutional concern, and, when presidents have turned up in their models, the focus has been on the impact of specific presidential powers, almost always the veto.

It is time, we think, for institutionalists to begin developing a genuine theory of the presidency, one that sees presidents not as simple veto-players in a game of legislative politics, but as institutional leaders whose powers and political agendas provide much of the dynamic behind modern American politics. There is, of course, much about the presidency that remains to be understood. But the feature of the modern presidency that gives it so much driving force in politics, and that distinguishes it most clearly from the presidency of earlier times, is its capacity for unilateral action—a feature that has so far gone unappreciated and virtually unstudied, even within the mainstream of the presidency field.

Our aim here is to help promote a broader theory of the presidency by developing a set of theoretical ideas about presidential powers of unilateral action and suggesting how these ideas seem to square with the available evidence. Stripped of all its details, the perspective we develop is pretty simple and straightforward. Essentially we argue that the constitutional and statutory powers of presidents are fundamentally ambiguous, and that this sets the stage for a relentless (if usually moderate and incremental) brand of presidential imperialism that Congress and the courts cannot be counted upon to stop—in part because their incentives don't prompt them to want to, and in part because they both suffer from distinctive institutional weaknesses. The result is a governing structure that is conducive to growing presidential powers of unilateral action, and thus an expanding role for presidents in national policy making.

There has been little empirical work on this topic thus far, so the literature is incomplete and sketchy. When the available evidence is patched together, though, it seems to be consistent with the broad outlines of our argument. Presidents have used executive orders, proclamations, national security directives, executive agreements, and other vehicles to make policy on their own authority, sometimes to do things of which Congress clearly does not approve, and their capacity for unilateral action has grown over the years. Congress has sometimes been a willing participant in these developments, through its delegations of power. But it has also had a very difficult time responding when presidents have gone off on their own, and it has not done an effective job of protecting its own institutional interests. The courts, meantime, have steered clear of most confrontations with presidents, and when they have made decisions on issues of presidential power, they have overwhelmingly come down on the president's side.

For now, we believe that our theoretical perspective has merit and is supported by the existing evidence. But we don't pretend to be making some sort of

definitive statement. This is very much a work in progress, and we hope that it will be received as such. What we hope, above all else, is that the arguments and evidence we have presented here will help stimulate new thinking on the presidency, particularly on the president's powers of unilateral action—which are too important to overlook any longer.

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