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New Models of the Unilateral Presidency

DISSERTATION

A dissertation submitted in partial
fulfillment of the requirements for
the degree of Doctor of Philosophy
in the College of Arts and Sciences
at the University of Kentucky

By
Yu Ouyang
Lexington, Kentucky

Director: Dr. Richard W. Waterman, Professor of Political Science
Lexington, Kentucky 2015

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ABSTRACT OF DISSERTATION

New Models of the Unilateral Presidency

Though scholars have assessed the unilateral presidency with renewed interests, the literature remains weak in three important areas. What relation, if any, exists between the public and presidential unilateral actions? What impact does the judiciary have on unilateral presidential power? To what extent do presidents use the many tools in the unilateral policy toolchest? The three essays in this dissertation address each of these questions in term. Results have implications for both the unilateral presidency and broader works in executive decision-making and democratic governance.

KEYWORDS: Unilateral Presidency, Executive Decision-Making, Institutional Support, Executive-Judicial Relations, Historical Development

Author's signature: Yu Ouyang

Date: July 24, 2015

New Models of the Unilateral Presidency

By
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Director of Dissertation: Richard W. Waterman

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Date: July 24, 2015

Dedicated to Xiudan, Kenneth, and Thomas, without whom this dissertation
would certainly not have existed.

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As always, all faults are mine’s alone.

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Chapter 1 Institutional Support, Constraints, and Unilateral Presidential Actions

Abstract

What relation, if any, exists between the public and presidential unilateral actions? Though presidents routinely appeal to the public when they issue executive unilateral actions, we have not yet assessed the relation between presidential unilateral actions and the public. Using executive orders data from 1981-2001 and ANES survey data, we hypothesize that public support for the institution of the presidency represents an important constraint on the presidents' ability to make policies unilaterally. Results support our expectations. We find that institutional support constrains the total number of executive orders issued annually. Further, we find that institutional support has a varying impact on salient vs. non-salient unilateral directives. These results have broad implications for the unilateral presidency literature specifically, as well as broader works in political science such as the law and public opinion.

1.1 Introduction

“Without a doubt, the most urgent challenge that we face right now is getting our economy to grow faster and to create more jobs... we can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will.”

President Barack Obama, October 24, 2011

Increasingly frustrated with a “dysfunctional” Congress, President Obama shifted his attention toward unilateral actions in order to change government policies. On January 19, 2012, under the defiantly-named “We Can't Wait” campaign to stimulate the economy, President Obama signed Executive Order 13597, which calls for increases in and expedited processing of travel visas to encourage travel to and tourism within the U.S. borders to spur economic growth while maintaining the stringent security requirements imposed after 2001. Obama further publicized the event with a public unveiling at the Disney resort in Orlando, Florida. The publicity associated with Obama's executive order raises an interesting question: what relationship, if any, exists between the public and presidential unilateral actions?

Many scholars have assessed the circumstances under which presidents will favor unilateral action (Howell, 2003; Mayer, 2001, 2009; Warber, 2006; Waterman, 2009). Yet, less clear are the internal and external constraints on presidential unilateral actions. The internal constraints of presidential unilateral action derive from presidents themselves, as well as the advice and recommendation of their close advisors. For example, Fine and Warber (2012) find that Democratic presidents issue more major policy executive orders, but less symbolic and routine executive orders, compared to their Republican counterparts. In contrast, external constraints flow from the institutional and the political environments within which presidents operate. For instance, Congress, the Supreme Court, the media, and the public itself all represent potential constraints on the extent to which presidents can actually take unilateral actions. In this paper, we examine one potential source of external constraints: the mass public. Specifically, we assess how the overall support for the institution of the presidency constrains a president's ability to make public policy unilaterally.

While various scholarly works have examined uses of unilateral action, few attempts have been made to link presidential unilateral powers with the mass public.¹ The reasons appears to be twofold. First, presidential unilateral actions rarely achieve the level of salience whereby they are reported by major media outlets. For instance, Howell (2003) found that the *New York Times* reported on about 10% of all executive orders issued annually between 1945-1998. As a result, the majority of the public typically does not know that presidents making decisions via unilateral directives. Second, even when the news media does report on the president's unilateral decisions, the media outlets themselves pay scant attention to the potentially-damaging consequences of presidential unilateral actions. For instance, though the *New York Times* reported that President Obama will issue an executive order in response to

¹To our knowledge, there have been no published empirical works thus far that link presidential unilateral actions and the public. For exception, see Brandon Rottinghaus and Adam Warber's conference paper at the 2013 Meeting of the Midwest Political Science Association.

vital pharmaceutical drug shortages, the focus of the news article examined how Obama’s actions may mitigate the drug shortage problem (Harris, 2001), instead of how President Obama’s unilateral decision potentially represented: (1) an attempt to take over Congress’s role as the law-making body and (2) an abdication by Congress of its constitutional authority.

We argue that public support for the institution of the presidency represents an important constraint on presidents’ ability to make policies unilaterally. In addition to potential constraints from Congress and the U.S. Supreme Court that prior studies found to be important (Howell, 2003, 2005; Howell and Lewis, 2002; Howell and Pevehouse, 2007), we show that presidential diffuse support—a set of affective and favorable attitudes toward the political institution—constrains the extent to which presidents issue unilateral directives.² Further, the impact of presidential institutional support on unilateral actions varies depending on the salience of the particular unilateral directives.

We proceed in several parts. First, we examine the extant literature on unilateral powers and the circumstances under which presidents may decide to act unilaterally. We then offer a framework which links the unilateral presidency literature with that on institutional support. Next, we present a discussion of the data and the empirical models used. Last, we discuss the empirical results and what they contribute to present knowledge on presidential unilateral action.

1.2 The Significance of Presidential Unilateral Powers

Although presidential scholars, following Neustadt (1990), have traditionally emphasized the weak formal powers of the president, recent work on unilateral powers suggests that the Oval Office is anything but weak (Cooper, 2002, 2005; Howell, 2003, 2005; Mayer, 2001, 2009; Warber, 2006; Waterman, 2009). In fact, numerous scholars

²In this paper, we use the terms "institutional support" and "diffuse support" interchangeably.

see the recent increase in the use of unilateral powers as potentially “. . . emblematic of an alarming trend in American politics—a propensity of presidents, especially during times of crisis, to unilaterally impose their will on the American public” (Howell, 2003, 3).

Executive unilateral actions such as executive orders are “presidential directives that require or authorize some action within the executive branch.” They are “presidential edicts, legal instruments that create or modify laws, procedures, and policy by fiat” (Mayer, 2001, 4). Presidential scholars agree that unilateral action has wide-ranging policy implications. A brief survey of major presidential unilateral decisions by executive orders in recent decades confirms that executive unilateral action often has profound consequences:

- Via an executive order, President Franklin D. Roosevelt established the Executive Office of the President in 1939.
- In 1942, President Roosevelt ordered the evacuation, relocation, and internment of Japanese-Americans during World War II.
- President Lyndon Johnson, with Executive Order 11246, instituted the nation’s first affirmative action policy.
- In 2001, in the aftermath of the terrorist attacks on September 11, President Bush created a new bureaucracy, the Office of Homeland Security, which coordinates the efforts of federal agencies to combat terrorism.

Unilateral actions are written and often released outside of the public’s view. So how does public support relate to presidential unilateral actions? In what follows, we offer a theoretical framework that places unilateral presidential action in the context of the political science literature on decision-making, particularly those from judicial decision-making.

1.3 Institutional Support and Decision-Making

In discussions of political support and its implications for democracy, Easton (1965*b*) conceptualizes two general types of support: specific and diffuse. While may be difficult to empirically distinguish at times, Easton (1965*b*) suggests that specific support relates to policy satisfaction. When, for instance, the public places specific demands or inputs on the political system and receives, as *quid pro quo*, fulfillment of those demands, specific support increases. Thus, “. . . wherever the input of support can be closely associated with the satisfactions obtained from specific classes of output, we shall designate it as specific support” (Easton, 1965*b*, 268).

In contrast, diffuse support is largely independent of the outputs, except in the long run. It is a set of affective and favorable attitudes toward the system that is largely unaffected by specific benefits or outputs. “[Diffuse support] forms a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effect of which they see as damaging to their wants” (Easton, 1965*b*, 273).

While Easton’s (1965*b*) conception of specific and diffuse support has received its fair share of criticisms (Hibbing and Theiss-Morse, 1995), it remains an excellent framework for studies of democratization and institutional legitimacy, particularly in the comparative context (Chen, 2004; Dalton, 2004). Within American politics, Easton’s (1965*b*) framework remains important in studies of judicial decision-making.

Students of the judicial decision-making literature argue that Supreme Court justices follow a strategic behavior model, which states that justices rationally anticipate the potential responses from Congress, the president, and the public (Caldeira and Gibson, 1992; Casillas, Enns, and Wohlfarth, 2011; Epstein and Knight, 1998; McGuire and Stimson, 2004). Specifically, McGuire and Stimson (2004) assert that what impels the justices to follow public opinion are the Court’s expectations about the future consequences of its decisions. In other words, the justices themselves take

notice of public opinion, assess the potential impact of their decisions on future attitudes and evaluations of the Court, and alter their behaviors accordingly. However, recognizing that they "... must on occasions stand against the winds of public opinion" (Caldeira and Gibson, 1992, 635), Supreme Court justices must be cautious in how they craft their decisions so as not to lose their broad base of support from the public. Thus, by maintaining some minimal level of broad, institutional support, the Supreme Court has the capital to stand against public opinion, if necessary. The question, then, is how we can apply the insights from this literature to unilateral presidential directives?

1.4 How Institutional Support Constrains Unilateral Actions

Studies linking public opinion and presidents often come to one conclusion: despite its constant struggle to carefully maintain a presidential "image" (Waterman, Wright, and St. Clair, 1999) and to measure and to lead public opinion using strategies such as direct appeals to the public and public relations (Edwards 1983), the presidency is increasingly "out-of-touch" with the public and public opinion (Towle, 2004). However, one problem with this literature is that they often only examine public opinion toward the presidency with regard to presidential approval ratings. We question whether using such measures as presidential approval to assess the relationship between public opinion and the presidency is sufficient, particularly when we make generalizations with regard to the institution and not individual presidents. To make the type of sweeping generalizations often made that the presidency is "out-of-touch" with the American public, we must examine the relationship between the institution of the presidency and the public. The distinction Easton (1965*b*) made regarding specific support and diffuse support provides such an opportunity.

Conceptually, specific support and diffuse supports are simple concepts. To achieve their political and policy goals, presidents must have the support of like-

minded individuals who have similar goals. As those policy goals become political reality and subsequently are implemented as public policy, they translate into higher levels of approval and support for the incumbent president. This is evidence of specific support, which derives from policy agreements with the president's actions and policies. Operationally, the survey analog of specific support is questions relating to a respondent's approval/disapproval of a particular president, as well as the strength of the approval/disapproval. In other words, when prior studies claim that the presidency has become "out-of-touch" with public opinion, they assess this claim with regard to presidential approval ratings.

However, as presidential approval ratings only measure the popularity level of a given president, it does not measure overall support for the presidency as an institution. For example, Hibbs, Rivers, and Vasilatos (1982) assess how political support for American presidents differs across different occupational and partisan groups. Using presidential approval as a measure of political support, Hibbs, Rivers, and Vasilatos (1982) find that group support for a specific president is contingent upon various economic performance indicators, such as unemployment and inflation rates. In a more recent study that uses presidential approval to measure political support, Lebo and Cassino (2007) show that motivated-reasoning partisan groups do reward and punish presidents for economic performance. However, Lebo and Cassino (2007) find that the impact of economic indicators on presidential approval generally only applies to presidents of the opposite political party. Thus, if presidential approval ratings only indicate a specific president's popularity at a given point in time, we would then need some other indicators that measure popular support for the institution of the presidency.

In contrast to specific support, diffuse support deals with support for the institution. Diffuse support is not policy-related. It is support for the overall legitimacy and viability of the institution as a whole. Applied to the presidency, diffuse support

is the set of affective and favorable attitudes toward the office of the presidency that, at times, allows the chief executive to pass and implement policies contrary to public expectations. While members of the public can tolerate some policy outputs from the executive branch to which they are opposed, no individual president can take diffuse support for granted, particularly when presidents continually push against the boundaries of which the public allow by acting unilaterally. Specifically, with regard to unilateral action, diffuse support represents a potential constraint on unilateral actions primarily because presidents are cognizant of their boundaries and the extent to which unilateral action can be used to achieve policy goals. As a result, while presidents have increasingly turned toward unilateral actions as means of achieving their policy initiatives and goals, there is a limit to which presidents can rely solely on unilateral action. Specifically, we argue that when contemplating unilateral actions, presidents must account for two factors: (1) their preferred policy outcomes and (2) institutional support.

To begin, we must examine presidential unilateral action in the context of the political environment within which presidents operate. First and foremost, unilateral actions allow presidents to achieve their preferred policy outcomes.³ This means that when other political strategies—e.g., legislations, direct appeals to the public, and public relations—present greater challenges to accomplishing those policy objectives, presidents will forego alternatives and issue unilateral directives. Of course, presidents' ability to issue unilateral directives is constrained by their relationship with Congress (Fine and Warber, 2012; Howell, 2003, 2005). Second, presidents must consider the future impacts that their unilateral decisions may have on public's perceptions of the institution. Elsewhere, scholars suggest that all presidents recognize the distinct mark they each will leave on the institution. Not only do presidents share

³We acknowledge that unilateral directives are not the optimal method to make public policies. Future presidents can easily overturn their predecessors' policies via unilateral directives of their own. However, when all else fails or when presidents wish to shift policies quickly, unilateral actions then become attractive options.

a sense of camaraderie with each other, irrespective of political parties (Gibbs and Duffy, 2012), they also share similar desires to leave the office stronger than when they found it (Pious, 1979). Thus, presidents' decision calculation with respect to unilateral actions should represent a balancing act between seeking their preferred policy outcomes and maintaining and strengthening their institutional support.

Importantly, we make no strong assumptions about the public's awareness of presidential unilateral actions. We argue that the only requirement is that the public *might* notice unilateral decisions that stand in stark contrast to public opinion. As Howell (2003) show, the news media do report on presidential unilateral decisions; it is plausible that those same media reports also describe the increasing frequency of unilateral decisions. To summarize, the public does not need clear knowledge that presidents are taking unilateral action. Presidential unilateral decisions should reflect public opinion because presidents have an incentive to protect the institution's legitimacy. Thus, presidents should refrain from repeatedly issuing more unilateral decisions on issues where the public reaction is likely to be strong.⁴

How exactly does institutional support influence presidential unilateral directives? Specifically, the impact of diffuse support on presidential unilateral decisions is akin to a threshold mechanism. At low levels of institutional support, below the threshold, presidents will seek policies unilaterally. As Easton (1965*b*) notes, diffuse support is not related to specific policies. The impact of specific policies, if any, on diffuse support for the institution will only show up in the long run. Under these circumstances, if levels of institutional support are already low, presidents can do little to further damage how the public feels toward the institution. Moreover, unilateral

⁴The argument that presidents can act freely so long as they remain within a given boundary is widely established in prior research. For instance, Stimson's (1991) discussion of the public's "zone of acquiescence" suggests that policymakers can escape public attention as long as they do not stray too far from public opinion. Similarly, judicial literature that assesses institutional support and Supreme Court decision-making offer comparable arguments (McGuire and Stimson, 2004; Mishler and Sheehan, 1996)

actions may represent the sole alternative available to the president. Conversely, during times of high institutional support, above the threshold, presidents should also seek policies unilaterally. The reasons are twofold. First, when operating within the environments of high institutional support, presidents will have more political capital to spend (Canes-Wrone and de Marchi, 2002; Johnson and Roberts, 2004; Kastellec, Lax, and Phillips, 2010; Oliver, 1955; Smelcer, Steigerwalt, and Vining, N.d.) and therefore can issue more unilateral directives to make public policies. Where presidents are concerned, it is doubtful that any single unilateral actions, or series of actions, can cause substantial harm to institutional support. Thus, it is only within a certain threshold that institutional support constrain presidential unilateral actions. Specifically, when the institution is within a certain level or range of institutional support, presidents refrain from unilateral actions. Therefore, we expect: (1) *when level of institutional support is low, presidents issue more unilateral directives* and (2) *when level of institutional support is high, presidents issue more unilateral actions.*

While diffuse support is a potential source of constraint for presidential unilateral actions, it is possible that not all unilateral actions are similarly constrained. Here, we argue that there is a distinction between salient and non-salient unilateral decisions. As Casillas, Enns, and Wohlfarth (2011) note in regard to Supreme Court justices and judicial decision-making:

... many factors may lead justices to *perceive* that repeatedly issuing unpopular decisions—for nonsalient cases—risks compromising the Court’s institutional legitimacy. In other words, even if a case does not originally attract public attention, the outcome may receive attention at a future time period. Accordingly, considering public opinion in non-salient cases may help preserve the Court’s reservoir of diffuse support, allowing increased latitude to issue decisions that might contradict public opinion in select salient cases that hold clearer political or personal significance (81,

emphasis in original)

We argue that logic holds for the presidency.⁵ Unilateral decisions should generally reflect public opinion in non-salient cases in order to maintain and/or to strengthen institutional support. Such strategies allow presidents to issue controversial unilateral directives should the need arises.

As with previous works (Casillas, Enns, and Wohlfarth, 2011; Howell, 2003; Fine and Warber, 2012), we define salience as those unilateral actions reported on the front page of the *New York Times* the day following the decision. If maintaining the reservoir of diffuse support allows presidents to, at times, issue unilateral directives contrary to public expectations, then we should expect the above hypothesis to hold only for non-salient unilateral decisions. Unilateral directives that stand in stark contrast to public opinion are more likely to be reported by the news media, and therefore become part of the public’s consciousness. As a result, when we disaggregate unilateral actions into those that are politically salient and those that are not, we should see that diffuse support only constrains non-salient unilateral actions. Thus, we expect *institutional support to only constrains non-salient unilateral actions*.

1.5 Data and Model

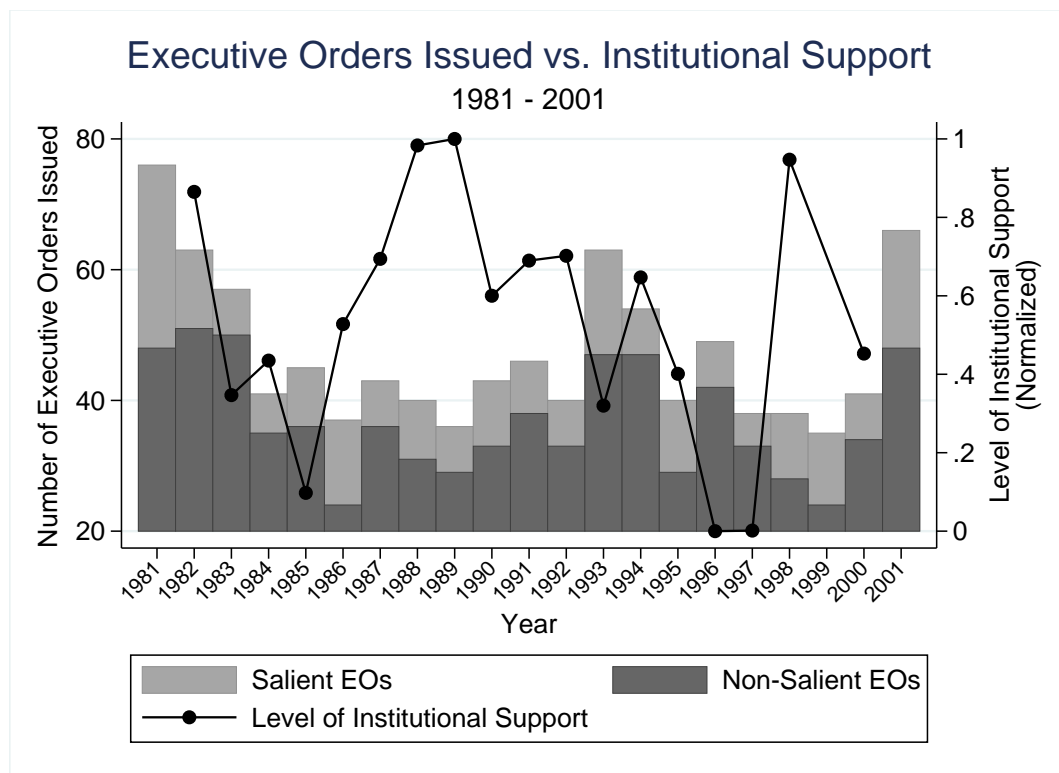
1.5.1 Dependent Variables

Empirical works predicting the exercises of presidential unilateral power typically use some form of count model analysis or models involving categorical dependent

⁵We acknowledge that the U.S. Supreme Court and the presidency are distinct institutions. Presidents, for instance, are subject to electoral constraints, whereas Supreme Court justices are not. However, the logic on how public opinion should matter in relation to decision making is transferable, despite the differences in institutional structure. Since the current focus is on institutional/diffuse support, rather than support for specific policies (or court decisions), the important question is whether actors in the respective institutions care about the overall institution as a whole. In this particular instance, the answer is yes for both the presidency and the Court.

variables (Howell, 2003, 2005; Howell and Lewis, 2002; Mayer, 2001). We follow this convention and use the numbers of executive orders issued in a given year as the dependent variable. This is consistent with existing works in the unilateral presidency literature (Fine and Warber, 2012; Howell, 2003, 2005). Figure 1.1 presents a graph of the three dependent variables used in the analyses, as well as the primary explanatory variable.

Figure 1.1: Number of Executive Orders Issued Annually



This figure presents the distributions of the dependent variables and the institutional support measure.

The first dependent variable is the total number of executive orders issued by the president in a given year. Using data provided by the Policy Agendas Project, and augmented by presidential executive orders data in (Ragsdale, 1998), this variable measures the total number of executive orders issued annually from 1981 to 2001.⁶

⁶Due to data limitations imposed by our primary independent variable, we re-

To assess whether there is a distinction between salient and non-salient unilateral directives, we include separate measures for those executive orders that were reported by a media outlet and those that were not. The second dependent variable is the total number of salient executive orders as coded by Howell (2003, 2005). Via a series of coding sweeps, Howell (2003, 2005) was able to determine the number of executive orders that were reported on the front page of the *New York Times*.⁷ The third dependent variable measures the total number of nonsalient executive orders, i.e., orders not reported by the *New York Times*. This variable is the difference between the total number of executive orders issued annually and the total number of salient executive orders.

1.6 Explanatory Variables

1.6.1 Institutional Support

How do we measure presidential institutional support? Ideally, one would have survey data similar to those that exist in the judicial and the comparative literature.⁸ The survey questionnaire would ask respondents to express their level of support for the institution. Absence such data, however, we must be creative in generating measures of presidential institutional support. Specifically, we exploit the information contained within the feeling thermometer question asked by the American National

stricted our analyses to observations that fall between 1981 and 2001.

⁷For detailed coding scheme, see Howell (2003).

⁸ For example, in their study of public attitudes toward various American political institutions, Hibbing and Theiss-Morse (1995) conducted a nationwide survey in 1992 and used both an approval question and a feeling thermometer question to gauge public support for the person and the institution, respectively. The specific wording of Hibbing and Theiss-Morse's (1995) survey question to assess institutional support was: "Now, I've asked you to rate some people in government, but sometimes when we talk about parts of the government in Washington, like the Supreme Court, the presidency, and the Congress, we don't mean the people currently serving in office, we mean the institutions themselves, no matter who's in office. These institutions have their own buildings, historical traditions, and purposes laid out in the Constitution. I'd like to know how warm or cold you feel toward these institutions, not the people currently in office." Unfortunate for us, data do not exist longitudinally.

Election Studies (ANES).

In contrast to asking the public to express whether they support or disapprove of the president's current job performance, which suggests largely policy-related agreement with the president's actions, a feeling thermometer can arguably contain more information. Consider this simple exercise: what does it mean to feel "warm" or "cold" toward a person (or an institution)? Of course, one potential answer is whether you agree with that person's (or institution's) opinions or arguments (or policies beliefs). However, one's warmth toward others could also derive from other shared similarities beside policy beliefs. To extend the analogy to institutions, one's overall feelings toward the institution itself also contribute to how warm one feels toward that institution.⁹

If a feeling thermometer picks up policy agreements, we can then use it to generate the diffuse support variable. Using data from the ANES, the diffuse support variable is generated from the residuals that are left over after regressing the feeling thermometer measure on a series of variables that explain policy agreements with the president. Specifically, we first regress the feeling thermometer on: (1) Party identification; (2) Education level; (3) Region; (4) Gender; (5) Race; (6) Religion; and (7) Presidential Approval Ratings.¹⁰ In other words, we try to account for explanations of

⁹ As another example, consider what usually happens when the President of the United States walks into a room. The first reaction of the occupants inside are to stand up, if sitting, and acknowledge the president's entrance. This is usually the case regardless of partisanship. When this happens, the acknowledgement is due more so to the office of which the current president represents than to one's specific alignment with the current president's policies.

¹⁰ One may object to using the residuals to construct new explanatory variables to be used in some other models. In response, consider a typical definition of a commonly-used model fit statistic: R^2 . According to Greene (2012), the R^2 is bounded between 0 and 1 and measures the proportion of the total variation in the dependent variable that is explained by the variations in the independent variables in the model. By extension, the residuals consist of the information contained in the dependent variable *not* explained in the model. This is what we exploit when creating a measure for presidency institutional support. Stated differently, the random noises that we assume the model residuals to represent are not truly random. The residuals are random noises with respect to our model *only*; in other words, the residuals do not impact the results of our model. Moreover, the residuals can be substantively important. They are what we cannot explain with the variables in our model.

policy agreements with the president and strip them out of the feeling thermometer. Consequently, what is left of the feeling thermometer represents diffuse support plus some noise. Next, to convert the residuals of the individual-level feeling thermometer measure in the ANES into an aggregate measure of diffuse support, we first squared the residuals from the feeling thermometer and then divide the residuals squared by the total number of respondents in the ANES surveys. As the feeling thermometer residuals prior to squaring have a mean of zero and standard deviation of one, simply summing the residuals will produce a diffuse support value of zero; therefore, I squared the residual for each respondent prior to summing the feeling thermometer residuals for each ANES year.¹¹ Also, since the total number of respondents for each ANES survey differs from year to year, we divide the sum of the feeling thermometer residuals squared by the total number of respondents for that ANES year. Last, we normalize the variable to be between 0 and 1.

Unfortunately, ANES did not conduct a survey in 1981, 1999, and 2001. This reduces the number of years, and thus the total number of observations in the subsequent analyses, in the dataset from 21 to 18. Table 1.1 provides summary statistics on the diffuse support measure, as well as the dependent variables and some important control variables. Last, in case the influence of institutional support on unilateral actions has a plateauing effect, we also included a squared institutional support variable in the analyses.

1.6.2 Control Variables

Unlike the formal law-making process, unilateral actions like the executive orders or signing statements are not permanent; that is, the next president can reverse the action by issuing a new executive order. This could be one potential explanation why

¹¹ Alternatively, rather than first squaring the residuals prior to summing, we can instead add to each residual some constant value, such as 1 or 5. Extensive robustness checks using these alternative institutional support measures show not substantive different to results shown later.

Table 1.1: Descriptive Statistics

	N	Mean	Std. Dev.	Min	Max
Total EOs	21	47.19	11.51	35	76
Salient EOs	21	10.24	5.23	5	28
Non-Salient EOs	21	36.95	8.60	24	51
Institutional Support Approval	18	.54	.31	0	1
Ideological Difference (<i>House</i>)	21	0.74	0.14	0.35	0.86
Policy Change Potential (<i>House</i>)	21	14.49	6.56	3.92	21.42
Ideological Difference (<i>Senate</i>)	21	0.70	0.16	0.32	0.95
Policy Change Potential (<i>Senate</i>)	21	9.05	2.78	0.22	12.61

*This table presents the summary statistics for the dependent variables and some important independent and control variables.

presidential approval levels do not apply to unilateral actions. Presidents often act unilaterally when they are in a position of weakness in relation to Congress. Thus, if presidents have high approval ratings that facilitate getting bills through Congress, they would most likely forgo unilateral action and seek policy changes via legislations (Ouyang and Waterman, N.d.).

In addition to presidential approval, the model also accounts for potential explanations for presidential unilateral actions suggested by Howell (2003, 2005): ideological difference between the president and chambers of Congress and congressional gridlock (Ouyang and Waterman, N.d.). The ideological difference variables between the president and the House of Representatives and the Senate are generated from DW-NOMINATE scores by Poole and Rosenthal (Poole and Rosenthal, 1984, 1985, 1997). Specifically, we calculate the ideological difference variables by taking the absolute value of the difference between the president's ideology score and the chamber median. For instance, to calculate the ideological difference variable for Reagan in 1981 and the House, we first subtract the chamber median ideological score from Reagan's ideological score. We then take the absolute value of that difference in scores between Reagan and the House median.

The second set of control variables measures congressional gridlock in the House and the Senate. Following Brady, Cooper, and Hurley (1979), we measure gridlock using the Legislative Potential for Policy Change (LPPC). To calculate the LPPC for the House and the Senate, I multiply the percentage of the majority party in the House and the Senate, respectively, by the degree of cohesiveness within the majority party in the chamber and subtract from it the percentage of the minority party multiplied by the cohesiveness within the minority party.¹² Lastly, following the convention in the unilateral presidency literature, we include indicator variables for divided government, presidential and midterm election years, and the Reagan and G.H.W. Bush administrations.

1.6.3 Model

With the dependent variables set as the number of executive orders issued annually, the appropriate empirical model of analysis is an event-count model. Strictly speaking, the extremely small sample size—18 years of executive orders from 1981-2001—make inferences challenging.¹³ However, King (1988) shows that event count models can provide unbiased estimates of the parameters of interest, even with sample sizes as small as 10 observations. Strictly speaking, small sample sizes in event-count models do not bias the coefficients; they do, however, increase the inefficiency in the model, leading to greater standard errors and decrease the model’s ability to show statistically significant results. Discussed more fully in the appendix, we estimate the model using negative binomial as diagnostics tests show overdispersion in the data. In addition to the primary explanatory variable of interest—the level of institutional support—the model controls for: (1) presidential approval ratings; (2) the

¹² $LPPC (House/Senate) = \left[\frac{\% \text{ majority party (House/Senate)} * \text{majority party cohesiveness (House/Senate)}}{\% \text{ minority party (House/Senate)} * \text{minority party cohesiveness (House/Senate)}} \right]$.

¹³ Although there were 21 observations in the initial dataset, missing data for years 1981, 1999, and 2001 reduce the final number of observations in the analyses down to 18.

ideological difference between the president and the House of Representatives; (3) the House of Representatives' legislative potential for policy change; (4) the ideological difference between the president and the Senate; and (5) the Senate's legislative potential for policy change. The model also includes as control variables indicators for divided government, presidential election year, and midterm election years. Last, the model controls for president-specific effects with indicator or dummy variables for the Reagan and the G.H.W. Bush administrations, respectively.

1.7 Analysis and Results

Table 1.2 presents the results of the analyses where the dependent variable is the total number of executive orders issued annually. We fitted three models.¹⁴ The House Model fits a model consistent with existing accounts of presidential unilateral actions, including the congress variables for the House only. The Senate Model fits a similar model, with Senate variables. Model 3 combines both the House and the Senate variables and our primary independent variable, presidential institutional support. Model fit statistics show that The Current Model fits the data better and is the preferred model.

Though not the primary focus of this paper, the differences that exist between the House and the Senate models reflect the inconsistencies in the unilateral literature. Deering and Maltzman (1999), for instance, find that as the ideological distance between the president and the House and the Senate, respectively, increases, presidents issue more executive orders. Conversely, though Fine and Warber (2012) also find presidents to issue more executive orders when confronted with growing ideological distance with the Senate, this is only true with major policy executive orders. Using ideological distance between the president and the Senate to explain the num-

¹⁴ We also conducted a series of robustness checks of our model. Results remain robust to a variety of different model specifications. See appendix for results of robustness checks.

Table 1.2: Impact of Institutional Support on the Total Number of Executive Orders Issued Annually (1981 - 2001)

<i>Explanatory Variables</i>	House (1)	Senate (2)	Current (3)
Institutional Support			-0.611*** (.158)
Support × Support			0.412 (0.259)
Approval	0.001 (0.005)	-0.005 (0.009)	-0.003 (0.004)
Divided Gov't	3.448*** (0.903)	-0.597*** (0.061)	-0.274 (2.221)
Presidential Election Year	-0.021 (0.103)	-0.019 (0.131)	-0.122*** (0.023)
Midterm Election Year	-0.127 (0.082)	-0.047*** (0.014)	0.063 (0.061)
Reagan Administration	1.106*** (0.260)	-0.033 (0.131)	0.958*** (0.295)
Bush (G.H.W.) Administration	0.213*** (0.042)	-0.031 (0.122)	1.296*** (0.569)
Ideological Difference (House)	-9.778*** (2.370)		3.832 (7.240)
Legislative Potential for Policy Change (House)	0.029*** (0.008)		-0.048 (0.041)
Ideological Difference (Senate)		0.687 ^t (0.360)	-5.155** (2.558)
Legislative Potential for Policy Change (Senate)		-0.034 (0.024)	0.131*** (0.033)
# of Executive Order _{t-1}	0.004 (0.003)	0.005 (0.006)	-0.003 (0.006)
Constant	6.797*** (0.699)	4.249*** (0.973)	4.047*** (1.147)
N	20	20	18
AIC	133.302	134.071	114.915
BIC	137.285	138.054	114.586
Log Likelihood	-62.651	-63.035	-52.958

Note: Negative binomial estimated. The dependent variable is the total number of executive orders issued annually by the president. ^t <.1; *p<.05; **p<.01; ***p<.001 (Two-Tailed Tests). Huber/White/sandwich robust standard errors adjusted for clustering within presidential administrations reported in parentheses.

ber of symbolic and routine executive orders, or all published executive orders, Fine and Warber (2012) find that presidents issue fewer executive orders as ideological

distance with the Senate grows. Resolving this important debate is beyond the scope of this paper.

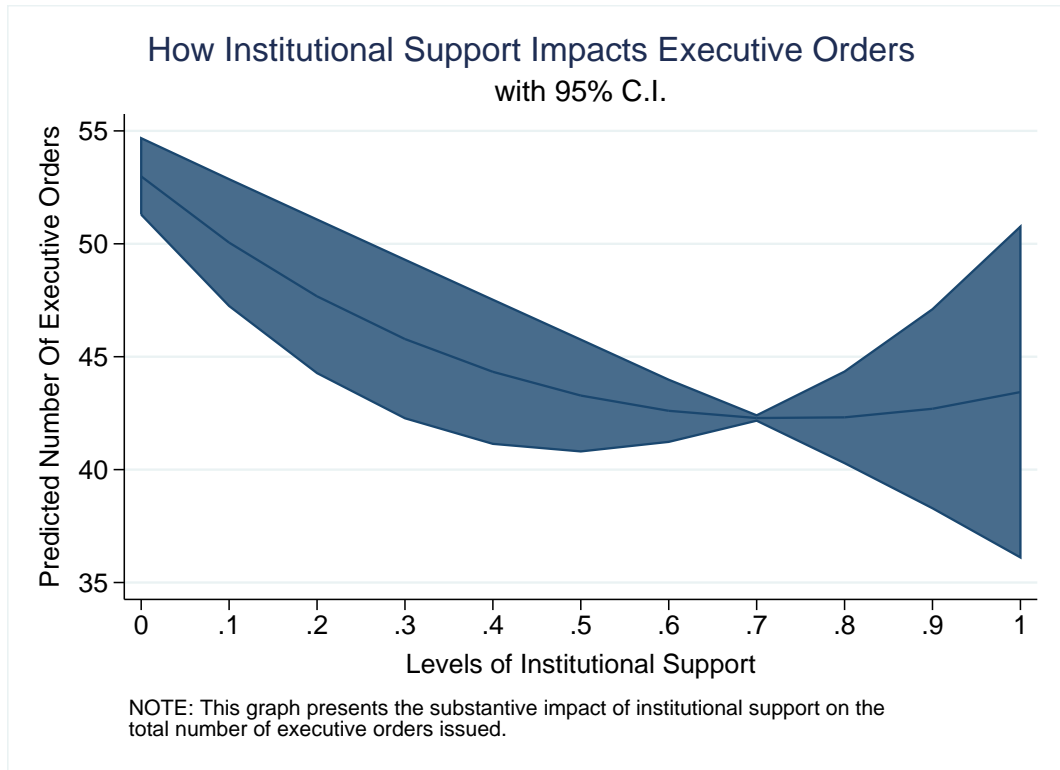
Returning to our principal focus, we show in Model 3 that the House and the Senate exhibit different dynamics on the extent to which presidents act unilaterally. When accounting for both the ideological distance between the president and the House and the Senate, respectively, we find that only the Senate ideological distance significantly impact the total number of executive orders issued.¹⁵ More importantly, Model 3 supports our hypothesis. Institutional support impacts the extent to which presidents act unilaterally. How substantial is this constraint?

To assess the substantive impact, Figure 1.2 presents the substantive effects of institutional support on the total number of executive orders issued annually, while holding all other variables at their respective means. The substantive impact shows a quadratic structure. Supporting our hypothesis, presidents issue more executive orders at low levels of institutional support. As the level of institutional support increases, the number of executive orders issued decreases. Eventually, the decrease in the number of executive orders issued meets a threshold, change direction, and begins to increase as the level of institutional support reaches the upper bound in the dataset. At high levels of institutional of institutional support, presidents also issue more unilateral directives.

The threshold constraining mechanism is substantial. On average, presidents issue 53 executive orders when the level of institutional support is 0. When institutional support reaches .8 in the dataset, presidents issue 42 executive orders; a

¹⁵ As Fine and Warber (2012) note, including ideological distance variables for both the House and Senate induce multicollinearity in the model. However, as discussed more fully in the appendix, multicollinearity can sometimes be desirable (Conlisk, 1971), especially if one can expect the House and the Senate to have the theoretic capacity to impact presidential decision-making separately and distinctly. Moreover, multicollinearity in the model only reduces the model's ability to find statistical significant results. To that end, the presence of multicollinearity, along with significant results, means that the model can only underestimate the true impact of institutional support on unilateral actions.

Figure 1.2: Substantive Impact of Institutional Support on Executive Orders



*This figure presents the substantive impacts of institutional support on the total number of executive orders issued annually.

difference of 11 executive orders. Considering that presidents issue on average 47 executive orders in total annually, 11 executive orders would represent 23.4% or almost one quarter of executive orders issued annually, an important substantive impact.

1.7.1 Robustness Tests

To ensure that our findings do not result from various modeling decisions, we conducted a series of tests to assess robustness. Table 1.3 presents the results of those robustness tests. In short, our results are robust to various model specifications.

Model 1 presents the results of the negative binomial regression model with just two independent variables: the presidential institutional support variable and the $t - 1$ lagged value of the dependent variable, to account for the time-serial nature of the dependent variable. Model 2 adds presidential approval to the previous model. Model 3 adds another control variable for divided government. Model 4 adds a series of dummy variables for: (1) presidential election year; (2) a dummy for midterm election year; (3) a control (dummy) for the Reagan administration years; and (4) a control for G.H.W. Bush administration years (Fine and Warber, 2012). Model 5 adds congress variables previously found to be important in the unilateral presidency literature: the ideological difference between the House chamber and the president; the legislative potential for policy change in the House; the ideological difference between the Senate chamber and the president; and the legislative potential for policy change in the Senate (Fine and Warber, 2012; Howell, 2003). Model 6 adds a squared term for the presidency institutional support variable.

Table 1.3: Robustness Tests

	(1)	(2)	(3)	(4)	(5)	(6)
Institutional Support	-0.108** (0.044)	-0.095** (0.047)	-0.084** (0.034)	-0.133** (0.061)	-0.204*** (0.052)	-0.611*** (0.158)
Support \times Support						0.412 (0.259)
Approval		-0.006 (0.008)	-0.003 (0.007)	-0.004 (0.007)	-0.002 (0.003)	-0.003 (0.004)
Divided Gov't			-0.238*** (0.056)	-0.275** (0.107)	0.620 (1.363)	-0.274 (2.221)
Presidential Election Year				-0.042 (0.108)	-0.099*** (0.027)	-0.122*** (0.023)
Midterm Election Year				0.013 (0.033)	0.026 (0.080)	0.063 (0.061)
Reagan Administration				0.086 (0.078)	0.962*** (0.232)	0.958*** (0.295)
Bush (G.H.W.) Administration				0.076*** (0.016)	0.993*** (0.334)	1.296** (0.569)
Ideological Difference (House)					0.444 (4.279)	3.832 (7.240)
Legislative Potential for Policy Change (House)					-0.031 (0.025)	-0.048 (0.041)
Ideological Difference (Senate)					-3.633** (1.497)	-5.155** (2.558)
Legislative Potential for Policy Change (Senate)					0.104*** (0.021)	0.131*** (0.033)
# of Executive Order _{t-1}		0.009*** (0.003)	0.006 (0.005)	0.005 (0.006)	-0.001 (0.006)	-0.003 (0.006)
Constant		3.461*** (0.176)	3.936*** (0.480)	4.099*** (0.425)	4.567*** (0.640)	4.047*** (1.147)
Ln α		-6.983 (10.711)	-17.472*** (1.132)	-17.793*** (0.772)	-29.135 (0.000)	-18.170*** (0.514)
N	18	18	18	18	18	18
AIC	123.386	124.151	119.174	118.058	110.596	111.915
BIC	125.167	126.822	121.845	120.729	112.377	114.586
Log Likelihood	-59.693	-59.076	-56.587	-56.029	-53.298	-52.958

1.7.2 Salient vs. Non-Salient Executive Orders

Is there a distinction between the impact of institutional support on salient vs. non-salient unilateral actions? Table 1.4 reports the results of two negative binomial models, where the dependent variables are the total number of salient executive orders presidents issue annually as reported by the *New York Times* and the total number of non-salient executive orders that were not reported, respectively. The Salient Model (Model 4) in Table 1.4 presents the results of the negative binomial model when the dependent variable is the total number of executive orders issued that was reported in the *New York Times*. The Non-Salient Model (Model 5) reports the results where the dependent variable is the total number of non-salient executive orders. Results support our expectations regarding salient vs. non-salient unilateral directives. Institutional support impacts unilateral actions in markedly different ways, depending on whether the action is salient.

Table 1.4 reports the varying influence of institutional support on salient vs. non-salient unilateral actions. While institutional support do indeed constrain non-salient unilateral actions, the effect is in the opposite direction with respect to salient executive orders. Toward higher levels of institutional support, presidents are more likely to issue more salient executive orders. Elsewhere, scholars have noted that actions by an institution will track public opinion and public support for that institution only when the actions will not be politically salient (Casillas, Enns, and Wohlfarth, 2011). Results from Model 4 thus are consistent with prior literature on institutional support and actions by that institution.

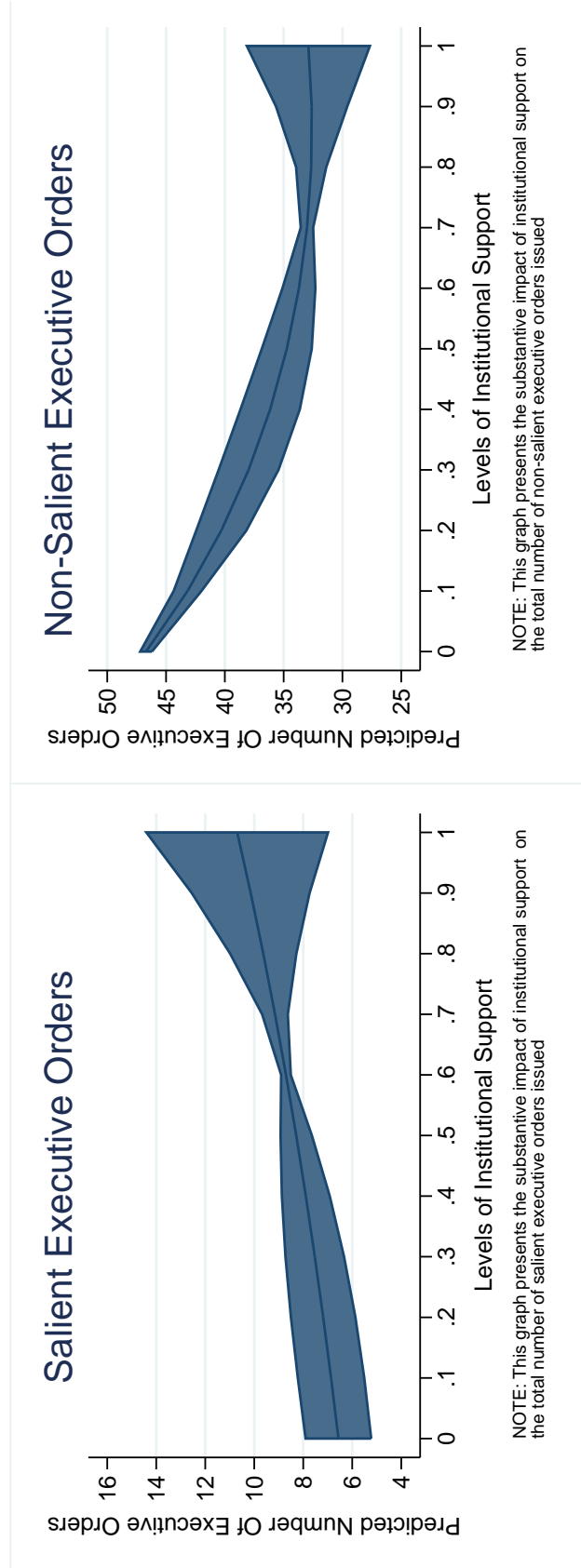
We present in Figure 1.3 the substantive impact of institutional support on the salient and non-salient executive orders, respectively, while holding at their respective means all other variables. As with results from earlier, institutional support impacts presidential unilateral actions considerably. With respect to non-salient executive orders, when institutional support is at 0, presidents issue an average of 47 executive

Table 1.4: Varying Impacts of Diffuse Suppose on Salient vs. Non-Salient Executive Orders

<i>Explanatory Variables</i>	Salient (4)	Non-Salient (5)
Institutional Support	0.444** (0.155)	-0.834*** (0.219)
Support × Support	0.045 (0.337)	0.483 (0.294)
Approval	-0.008 (0.009)	-0.001 (0.006)
Divided Government	1.715 ^t (1.011)	-0.442 (2.835)
Presidential	-0.306 (0.271)	-0.075 (0.089)
Midterm	0.159 (0.196)	0.033 (0.107)
Reagan Administration	2.018*** (0.123)	0.812* (0.325)
Bush (G.H.W.) Administration	2.063*** (0.233)	1.162 (0.706)
Ideological Difference (<i>House</i>)	1.967 (3.177)	3.648 (9.381)
Legislative Potential for Policy Change (<i>House</i>)	-0.050* (0.024)	-0.046 (0.053)
Ideological Difference (<i>Senate</i>)	-9.687*** (0.621)	-4.280 (3.262)
Legislative Potential for Policy Change (<i>Senate</i>)	0.137*** (0.041)	0.135 * ** (0.051)
# of Executive Order _{t-1}	-0.030*** (0.006)	0.003 (0.007)
Constant	5.633*** (0.550)	3.256* (1.583)
N	18	18
AIC	79.801	110.392
BIC	81.582	113.063
Log Likelihood	-37.901	-52.196

Note: Negative binomial estimated. The dependent variable in Model 1 is the total number of salient executive orders issued annually that were reported by the *New York Times*. The dependent variable in Model 2 is the total number of executive orders issued annually that were not reported by the *New York Times*. Models also account for presidential fixed effects. ^t <.1; *p<.05; **p<.01; ***p<.001 (Two-Tailed Tests). Huber/White/sandwich robust standard errors adjusted for clustering within presidential administrations reported in parentheses.

Figure 1.3: Substantive Impact of Institutional Support on Salient vs. Non-Salient Executive Orders (with 95% C.I.)



orders. As institutional support increases, the number of non-salient executive orders issued decreases to 32 when the level of institutional support reaches the threshold level of .8. The difference of 15 non-salient executive orders when levels of institutional support is between 0 and .8 is considerable. Presidents issue an average of non-salient executive orders annually; 15 executive orders would represent 40.5% of non-salient executive orders issued annually. As level of institutional support continues beyond .8, presidents issue more executive orders.

Looking at salient executive orders, Model 4 in Table 1.4 and Figure 1.3 tell a markedly different story. Compared to non-salient executive orders, institutional support has a fairly linear impact on the number of salient executive orders issued annually. The difference in the number of salient executive orders issued between the lowest level of presidential institutional support and the highest level is 5 executive orders, or approximately 50% of salient executive orders issued annually.

Thus, as expected, institutional support is conditional on the salience of unilateral directives. The opportunity for presidents at times to stand against public pressure and issue salient unilateral directives is precisely the core argument why presidential unilateral actions should generally reflect public opinion. Presidents wish to build up and maintain sufficient reservoirs (i.e., institutional support) to use when contemplating unilateral and even controversial issues and solutions (Easton, 1965*a*; Casillas, Enns, and Wohlfarth, 2011). For example, consider President Truman's decision to integrate the military via Executive Orders 9980 and 9981. While Truman is credited in contemporary accounts as taking the first critical step in ensuring racial equality in the military, Truman unilateral decisions were not well-received at the time (Foster, 2008). One notable opponent was the Army Chief of Staff General Omar Bradley, who "... remarked that the Army 'was not place for social experiments'" (Foster, 2008). What then allowed Truman's decision to integrate the military to withstand political and social pressures? Part of the explanation is that the institu-

tion of the presidency possesses sufficient reservoir, which allows the occupant in the Oval Office (i.e., Truman) to act against political, social, and public pressures.

1.8 Conclusion

Scholars studying presidential unilateral powers have learned much about the uses of unilateral actions. Examining presidential unilateral actions within various political contexts, prior studies identify two circumstances when presidents are likely to act unilaterally. First, presidents will exercise their unilateral powers—i.e., executive orders, signing statements, executive agreements, executive proclamations, national security directives, or executive memoranda—when a large ideological gap exists between the president and Congress (Howell, 2003, 2005; Howell and Lewis, 2002). Issuing unilateral directives when the president and Congress differ ideologically thus are strategies that presidents can adopt to implement policy changes. Second, prior work suggests that presidents are also more likely to act unilaterally when Congress may be poised to enact policy changes that the president opposes (Howell, 2003, 2005; Howell and Lewis, 2002). In these cases, the purpose of presidential unilateral actions is that of moderation. By preempting proposed congressional actions, presidents can induce more moderate policy shifts than those preferred by Congress.

Consistent with existing accounts of presidential unilateral actions, we find that the ideological differences between the president and the House and the Senate do indeed impact the number of executive orders presidents issue (Deering and Maltzman, 1999; Fine and Warber, 2012; Howell, 2003, 2005; Howell and Lewis, 2002). However, whereas existing works limit attention mostly to the U.S. Senate, we find that the House and the Senate, respectively, exhibit different dynamics on presidential unilateral actions.

More importantly, we demonstrate that institutional support does constrain the extent to which presidents act unilaterally. As scholars show, while presidents sit at

the apex of the executive branch and therefore are the titular head of the numerous bureaucratic entities that purport to carry out presidential directives, presidents face numerous challenges to policy implementation and regularly take steps to overcome bureaucratic inertia (Howell, 2003, 2005; Howell and Lewis, 2002; Lewis, 2003, 2008):

Having issued a directive, presidents do not sit idly by, hoping that bureaucrats will step forward and advance their policy goals, languishing in thought that they probably will not. Instead, presidents often follow up with additional orders and rule changes, directing specific personnel to fulfill specific tasks within specific agencies (Howell, 2005).

While presidents use unilateral directives to further impact bureaucratic responsiveness, they operate within the constraints imposed by public opinion and public support for the institution. In short, while unilateral directives—e.g., executive orders, signing statements, proclamations, etc.—offer presidents opportunities to make public policies unilaterally, presidents must take pain to carefully cultivate and maintain a reservoir of institutional support with which to use to stand against various political and public pressures, if necessary. The means to the maintaining such a reservoir are to use unilateral actions strategically. Presidential unilateral directives should generally reflect public sentiments, except in the cases of special and extenuating circumstances that presidents feel the necessity to go against political and public pressures, as in the case of Truman and the integration of the military.

In addition to the unilateral presidency literature specifically, and the broader literature in political science, results above also have implications for works in law and in popular literature. One current debate concerns the impact of increasing unilateral actions on democracy and the American political process. Some have even suggested that the increasing uses of unilateral directives by American presidents has resulted in a “cult of the presidency” (Healy, 2008). The current project adds to this debate by

noting that the public is never far from the president’s mind. Specifically, before one can definitively describe the impact of presidential unilateral actions on the political system, one first must fully ascertain the relation between unilateral directives and the public more broadly.

1.9 Appendix

1.9.1 Checking Validity of Institutional Support Measure

Table 1.5: Institutional Support and Lagged Values of Presidential Approval

# of Lagged	Corr. Coef.
0	0.06
1	-0.05
2	0.28
3	0.40

To confirm that the diffuse support measure actually measures what it intends to, and not just random noises, we assess the correlation between the diffuse support measure and lagged values of presidential approval. As Easton (1965*b*) suggests, though diffuse support and specific support are fundamentally two distinct concepts, one should expect specific support at time t to ultimately filter into diffuse support—i.e., agreements with one presidential administration’s policies should eventually filter into higher levels of support for the institution in general. Table 1.5 confirms. Admittedly a crude validation attempt, Table 1.5 suggests that however that the diffuse support measure is capturing some aspects of diffuse support. Given diffuse support and specific support are two distinct concepts, we should expect little correlation between the constructed diffuse support measure and presidential approval. As Table 1.5 shows, diffuse support is barely correlated with presidential approval when both are at time t . Furthermore, though we expect little to no correlation with diffuse support and presidential approval, we expect diffuse support to more strongly corre-

late with lagged values of presidential values. Diffuse support becomes more strongly correlated with lagged values of presidential approval. At time $t-3$, the correlation coefficient between diffuse support and presidential approval increases to .40. Again, while this is an admittedly crude attempt to validate the constructed diffuse support measure, it does instill some confidence that the diffuse support measure is capturing some aspects of what Easton (1965*b*) meant by diffuse support.

1.9.2 “The Multicollinearity Problem”

As mentioned above, the decision to examine separately the effects of the House and the Senate on presidential executive orders potentially induce multicollinearity in our models. This may be a fair criticism. The correlation between the House ideological difference and the Senate ideological difference is high at .792 with a p-value $< .001$. Likewise, the House legislative potential for policy change and the Senate legislative potential for policy change are also highly correlated at .498 with a p-value $< .05$. However, while these variables are highly correlated, they are not problematic insofar as they result from an unlucky sample. Similar to Bartilow and Voss’s (2009) arguments regarding democracy measures, we expect measures of the House and Senate to be highly correlated because “...they are not theoretically distinct” (115). To some degree, we expect correlations between the House and the Senate variables because the representatives and senators are often put in office by the same electorate at election times. Thus, despite the collinearity between the House and the Senate variables, by allowing the House and the Senate, respectively, to express different dynamics on how presidents use executive orders, separating congressional measures of legislative potency into those for the House and those for the Senate is sound theoretically and eliminates omitted variable bias.

We gain further confidence in allowing for multicollinearity in the analyses presented above in that, at times, multicollinearity is desirable (Conlisk, 1971; Gold-

berger, 1991). As Goldberger (1991) notes, “Multicollinearity may make the estimates of individual β_j s imprecise, while facilitating the precise estimation of particular combinations of the elements of β ” (250). Conlisk (1971) discusses further why researchers may be interested in linear combinations of β . Suppose that there are two goods β_1 and β_2 , “suppose further that the economist is interested primarily in the total marginal propensity to consumer $\beta_1 + \beta_2$ and secondarily in the separate [marginal propensity to consumption’s] β_1 and β_2 ” (Conlisk, 1971, 396). The parallel to Conlisk’s (1971) economic example where the interest is actually on the β s combined and only secondarily on the β s individually is the distinction we made above regarding the House and the Senate variables. While it would be hard to clearly differentiate between the House and Senate variables as they are not “theoretically distinct,” it should be obvious that some amount of collinearity between the House and Senate variables should be expected, and welcomed, as little can be done in one chamber of the legislature without the summary consent of the other. In regard to presidential executive orders, for maximum effectiveness, any response from Congress as a reaction to presidential unilateral actions must take place with the consent of both chambers. Thus, multicollinearity in the analyses above is not so much a “problem” as they are actually desirable.

Chapter 2 Judicial Influences and the Unilateral Presidency: A Dynamic Model of Executive-Judicial Interactions

Abstract

What impact, if any, does the court have on presidential unilateral power? Questions relating to the expansion and exercise of executive power remain a perennial concern in political science. Existing studies of presidential unilateral actions tend to focus on the relations between the president and Congress. However, to date, the literature has not yet assessed empirically executive-judicial relations. This is surprising, considering the varied studies that show the importance of judicial-executive relations. We offer a dynamic model to represent the relationship between the president's desire for and uses of unilateral authorities and the court's ability and capacity to check executive power. Simulations result in three predictions. First, presidents will prefer unilateral actions when the court imposes fewer constraints on the executive. Second, decreased capacity for unilateral action does not entirely undo the ability or the desire for unilateral behavior. Last, shifts in executive behavior and unilateral activism are the strongest under those scenarios where the court has greater capacity to expand unilateral authority.

2.1 Introduction

What impact, if any, does the court have on presidential unilateral power? Questions relating to the expansion and exercise of executive power remain a perennial concern in political science. During the height of the Korean conflict, President Harry Truman issued Executive Order 10340 on April 8, 1954, directing then Secretary of Commerce Charles Sawyer to seize and nationalize the nation's steel industry. Concerned by the implications of a steel shortage on domestic development, national security, and the ongoing conflict on the Korea peninsula, Truman's decision was a response to the failed collective bargaining negotiations between the steel industry and the steel worker's union. History would ultimately immortalized Truman's decisions, and the

associated controversies, in the Supreme Court case *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579.

Though many point to Truman and the Steel Seizure case as a clear example of presidential expansionism and aggrandizement that was subsequently struck down by the U.S. Supreme Court (Corwin, 1953; Devins and Fisher, 2002), the case also illustrates when the executive branch neglects to account for the preferences of the justices on the Supreme Court. Further, the Truman case demonstrates the importance of court influence on unilateral decision-making. In particular, I argue that, when considering the use of unilateral directives to make public policies, the court potentially has considerable influence on the president's decision to issue unilateral directives.

Existing studies of presidential unilateral actions tend to focus on the relationship between the president and Congress (Howell, 2005; Deering and Maltzman, 1999; Fine and Warber, 2012). Many scholars note that as the president's legislative position in Congress weakens, presidents are more likely to issue executive orders to bypass the legislature (Deering and Maltzman, 1999; Howell, 2003, 2005; Howell and Lewis, 2002; Mayer, 2001). Other works find similar relations regarding both signing statements (Cooper, 2005; Kelley and Marshall, 2010) and proclamations (Belco and Rottinghaus, 2009; Rottinghaus and Lim, 2009; Rottinghaus and Maier, 2007). However, to date, the literature has yet to assess empirically executive-judicial relations. This is surprising, considering the varied studies which show the importance of judicial-executive relations (Scigliano, 1971; Whittington, 2007).

Understanding executive-judicial relations is important. Though courts generally avoid involvement in challenging executive decisions, and typically rule in favor of presidential actions, the absence of observable interactions does not mean that political actors account for the preferences of the opposing actor(s). Consider, for instance, the adjustments of federal administrative decisions to account for con-

gressional preferences. Wood and Waterman (1991) refer to this as “anticipative responses.” Congress does not have to engage in continuous, potentially costly oversight of the federal bureaucracy to ensure that bureaucratic outputs are consistent with legislative preferences as administrators themselves recognize the potential backlashes that may result from straying too far from congressional preferences. Cameron (2000) finds this to also be the case with respect to presidential veto bargaining and congressional legislations. In short, that direct executive-judicial confrontations are rare does not also imply a similar absence of political influence.

To assess the potential impact of the court on presidential unilateral action, We offer a dynamic model to represent the interaction between the president’s desire for and uses of unilateral authority and the court’s ability and capacity to check executive powers. Simulations result in three predictions. First, presidents will prefer unilateral action when the court imposes fewer constraints on the executive. Second, decreased capacity for unilateral action does not entirely undo either the ability or the desire for unilateral behavior. Last, shifts in executive behavior and unilateral activism are the strongest under those scenarios where the court has greater capacity to expand unilateral authority.

This paper advances the unilateral presidency literature both theoretically and methodologically. While existing works shed considerable light on how congressional factors influence unilateral behavior, we know little about the potential impact that the court has on presidential unilateralism. This paper links the courts literature with that on the unilateral presidency to advance a formal model of executive-judicial interactions. Methodologically, I introduce a modeling strategy common in international relations and the biological sciences to the study of the presidency. Presidents do not operate and make decisions in a political vacuum. Instead, the process is frequently endogenous, as interactions between the executive and other political actors are better characterized as sets of action-reaction dynamics.

The manuscript proceeds in several parts. First, I begin with a brief review of the unilateral presidency literature. Then, I offer a discussion why modeling approaches common in ecology and international relations can be used to model executive behavior. Third, I present a discussion of the formal model, by linking general theoretical arguments to mathematical representations. I then present a number of simulations to illustrate the over-time patterns in judicial-executive interactions and unilateral powers. Based on these analyses, I derive hypotheses based on numerical simulations of the model.

2.2 The Significance of Presidential Unilateral Powers

Presidents typically have considerable discretion in making unilateral decisions. Although presidential scholars have traditionally emphasized the weak formal powers of the presidency, recent works on unilateral power suggests that the Oval Office is anything but weak (Cooper, 2002; Fine and Warber, 2012; Mayer, 2001). By unilateral power, we mean those first-actor policy authorities which the executive possesses (e.g, executive orders, signing statements, proclamations, etc.) that are not explicitly enumerated in the Constitution. For example, Howell (2003) shows how the shrinking and expansion of the legislative gridlock interval results in opportunities for the president to make policies by executive fiat. In fact, numerous scholars see the recent increase in the uses of unilateral power as potentially “. . . emblematic of an alarming trend in American politics—a propensity of presidents, especially during times of crisis, to unilaterally impose their will on the American people” (Howell, 2003, 3).

Presidential scholars agree that unilateral actions has wide-ranging policy implications. A brief survey of major presidential unilateral decisions by executive order in recent decades confirms that executive unilateral action often has profound policy consequences. President Franklin Roosevelt, for instance, established the Executive Office of the President in 1939 via an executive order. During World War II, Roosevelt

ordered the evacuation, relocation, and internment of Japanese-Americans. President Lyndon Johnson, with Executive Order 11246, instituted the nation's first affirmative action policy. Nixon established the Environmental Protection Agency via an executive order. More recently, in the aftermath of the terrorist attacks on September 11, 2001, President George W. Bush created a new federal bureaucracy, the Office of Homeland Security, to coordinate the efforts of federal agencies to combat terrorism.

While the aforementioned examples may be unique or extraordinary cases, scholars do not dispute that unilateral power elevates the executive's policymaking authority, often at the expense of other institutional and political actors. Further, while existing research sheds considerable light on the nature of presidential unilateral decision-making, one important gap remains. What systematic influence does the court exert on unilateral authority? In the following section, we present a dynamic model of executive-judicial interactions. we begin with a discussion why dynamic modeling is appropriate.

2.3 The Benefits of Dynamic Models

2.3.1 Learning from Population Ecology

What can modeling techniques from biological sciences tell us about modeling the ebb and flow of presidential power? To answer this question, consider the following S-shaped curve. Figure 2.1 depicts a typical population growth model in ecology, which illustrates how a species' population evolves over time.

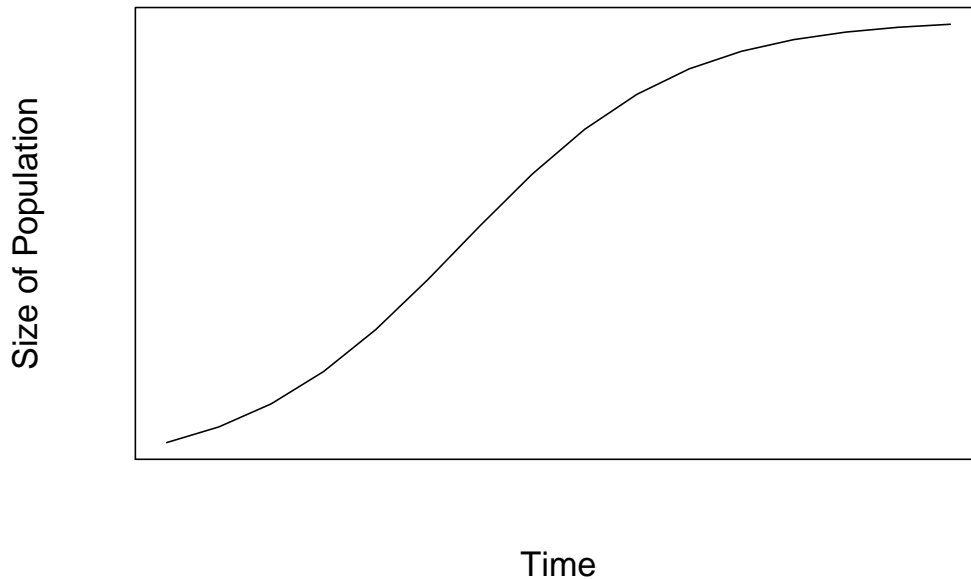
The equation that generates this figure is:

$$\frac{ds}{dt} = \alpha s \left(1 - \frac{s}{K}\right) \quad (2.1)$$

where:

- $\frac{ds}{dt}$ is the change in the size of the species' total population over time;

Figure 2.1: The Population Growth Model



- α is a positive constant which represents the instantaneous rate of change;
- s is the size of the population at time t ; and
- K is known as the carrying capacity, or the maximum size of the population that available resources can, in the long run, sustain.

To better see how this equation models population growth, we can re-write Equation 2.1 as:

$$\frac{ds}{dt} = \alpha s - \frac{\alpha}{K} s^2 \quad (2.2)$$

Equation 2.2 reveals that how a species' population changes over time is a function of just two components. The first, αs , is responsible for natural growth, i.e., births and deaths. The second, $\frac{\alpha}{K} s^2$, represents all other mechanisms which cause the population to diminish. The two components compete for dominance in Equation 2.2. Initially, when the size of the population is small relative to the total capacity that the environment can sustain, the first term has greater influence. However, as population size increases over time and approaches the carrying capacity, the influ-

ence from the second term becomes more prominent. In short, this simplified model suggests that a species' population will grow naturally over time until it reaches the maximum level that resources can sustain over time.

Extending this analogy to the study of the unilateral presidency, various presidency scholarship note that growth in presidential power may be similarly governed. The development over time of both the institution of the presidency and how specific presidents learn to govern once in office appears to fit within this simplified process of power growth. Arguably, with respect to unilateral power, the institution experienced three transitional phases in its development: power potential,¹ transitional growth,² and power maturity³ (Kadera, 2001).⁴ Initially, the institution (and each president) undergoes a learning phase whereby it attempts to understand and to explore both the scope and boundary of its influence.⁵ Then, in the transitional stage, the institution's ability to act experiences rapid growth as its strategies begin to mature and the bureaucratic structure, which help presidents to carry their decisions, form.⁶ Last, the institution (and each administration) reaches maturity. In this stage, both the institution and each specific administration has fully exploited the capacity to make decisions unilaterally; as a result, growth levels off and possibly even declines.

¹Approximately the lower one-third portion of the S-curve.

²Roughly the middle one-third section of the S-curve.

³Approximately the upper one-third portion of the S-curve.

⁴Though scholars in international relations initially developed this typology to understand conflict occurrences and power transitions between nations (Organski, 1958; Tammen et al., 2000), the underlying theoretical logic appears readily applicable to the study of the presidency. First, power scholars in international relations recognize that policy interests are at the core of all disputes among actors (Tammen et al., 2000). Second, as later examples would illustrate, this three-part conception of development appears to mesh well with historical anecdotes in the study of the unilateral presidency.

⁵As an illustration, consider Genovese (2001) discussion of the Framers' debate at the Constitutional Convention. As Genovese (2001) notes, one explanation for why the Framers of the Constitution were deliberately vague about the specifics of powers and duties of the executive is their inherent trust in George Washington to define for future presidents the scopes of executive influence. In terms of unilateral powers, Washington did exactly that, issuing directives to proclaim U.S. neutrality in the British-French conflict and to take actions in response to the Whiskey Rebellion (Bailey and Rottinghaus, 2013).

⁶Here, think of the reliance that the Franklin Roosevelt administration placed on unilateral directives. Credibly, no president will exceed the level of unilateral activism demonstrated by the FDR administration.

In addition to the argument that the presidency underwent different transitional periods during its development, the importance of time cannot be overstated. In his synthesis of the American presidency, in addition to classifying various presidents into four broad political cycles—disjunction, reconstruction, articulation, and pre-emption, Skowronek (1997) notes the importance of being in the right place, at the right time. During periods of reconstruction leadership (where most 'great' presidents reside in Skowronek's (1997) classification scheme), for instance, Skowronek (1997) states that "... presidents who can effectively fuse power and authority in the reproduction of political order are those who come to office beyond all semblance of political order" (39). In other words, those who history immortalized as great presidents are often the same people who came along at the moment where their leadership are most desired and effective.

In short, a generalized, mathematical model of presidential power growth should capture two essential components. First, the model must be able to account for various developmental phases found to be important in institutional development, as well that of individual presidents. Second, a model of presidential power should encompass the over-time dynamics of the office. Later, we develop a formal, dynamic model to capture the ebb and flow of president's unilateral power. Specifically, we trace the development of unilateral power through the lens of the president's constitutional prerogatives, as he himself defines them, and how that impacts executive-judicial relations, and vice versa.

2.3.2 Tracing the Growth of Presidential Power: Why the Court Matters

In this section, we present an argument on why it is important to account for the judiciary when discussing executive power, especially how it applies to the president's unilateral power. Specifically, we argue that, due to level of ambiguity in the Constitution regarding the scope of executive power, presidents have considerable leeway in

defining, for themselves, the nature of their policy influence. Yet, the executive does not operate in a political vacuum. As a result, presidents must consider how other political actors will respond to their decisions in a separated system of competing influences (Jones, 2005). This is especially the case regarding unilateral power and where the courts are concerned with constitutional interpretation.

What did the Framers mean when they write that “the executive power shall be vested in [the] President...” or that “[the President] shall take care that the laws be faithfully executed,” as defined in Article II, Section 1 of the U.S. Constitution? By some accounts, the Vesting Clause and the Take Care Clause of the Constitution are mere designations of the office (Corwin, 1984). In other words, the Framers’ intent was only to specify, say, for the Vesting Clause, that the duties of the office reside with the executive, and not grant an expansive definition of the powers of the executive. Others, however, suggest a more expansive view of executive discretion (Calabresi and Yoo, 2008),⁷ including the Framers themselves. As McDonald (1994) notes, “...it seems evident that some of [the Framers], at least thought of executive power as contingent and discretionary: the power to act unilaterally..., power, that extends beyond the ordinary rules prescribed by the Constitution and the laws (181).” In practice, regardless of the Framers’ original intent, it is not surprising that presidents themselves see the advantages of exploiting the ambiguity, intentionally or not, inherent in the Constitution. As shown in the examples presented earlier, presidents have been very adept in translating the ambiguity of the Constitution into viable policymaking discretion.⁸

⁷In further defense of their arguments, proponent of broad executive power also point to the differing languages in the Constitution regarding the vesting clauses of the legislative and the executive branches, respectively. According to Article I, “[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives” (emphasis added). In contrast, the executive’s Vesting Clause does not include the phrase “herein granted.” Many argue that the (deliberate?) omission of “herein granted” suggests that the powers of the executive are not limited to only those explicit in the Constitution.

⁸Expansion of the executive’s unitary power using executive orders and signing statements arguably reached an apex during the George W. Bush administration. As Waterman (2009) notes, by the middle of 2005, the Bush administration had referenced the phrase “the unitary executive” a

That presidents now have wide discretion in policymaking authority, especially in regard to their unilateral power, is widely accepted in the literature. However, the executive cannot make unilateral decisions indiscriminately and without constraints. In cases where defining and exploring the boundaries of executive power are important, any model of executive power growth would be remiss if it does not account for another political actor that has a well-defined role in interpreting the meanings of the Constitution: the court.⁹

In offering a model of presidential power that concentrates on the degree of constitutional discretion the president asserts unilaterally, we follow in the footsteps of earlier scholars such as Pious (1979) by stating that while political factors such as presidential popularity, support in Congress, and electoral mandates are important in helping to explain the extent to which presidents will exercise unilateral authority, but they affect presidential power only at the margins. That is, none of these mechanisms are critical either to the uses of executive authority or how and where presidents set limits on their own authority. As noted in both academic and popular media, all presidents, regardless of political partisanship or their own conceptions of the role of government in public affairs, have an intrinsic desire to leave the Oval Office stronger than they found it (Gibbs and Duffy, 2012; Pious, 1979).¹⁰ In this regard, George W. Bush's words to Barack Obama during the transition period is illustrative. "We want you to succeed. . . Whether we're Democrats or Republican, . . . [a]ll of us who have served in [the Oval Office] understand that the office transcends the individual." In

total of ninety-five times across various unilateral directives.

⁹Typically, when one speaks of executive-judicial relations, the usual judicial actor in mind is the U.S. Supreme Court. Now, there is a smaller set of literature which examines interactions between the executive and courts lower in the judicial hierarchy. In this paper, we make no distinction between the Supreme Court and the lower courts. In this paper, the "court" refers to a nameless judicial actor which (1) engages in constitutional interpretation and (2) serves as a potential "check" to the expansion of presidential power.

¹⁰As Gibbs and Duffy (2012) describe it, all presidents are members of "The Presidents Club," an exclusive fraternity composed of 43 men that have occupied the Office of the President of the United States, each of whom is awared of trials and tribulations associated with being in the 'hot seat.'

essence, the notion that the office is greater than the accomplishments and failures of any single individual transcends across time and imbues each president with almost a duty-like focus toward expanding the powers of the office and leaving to his successor tools and authorities greater than he himself wielded.

By now, two themes have developed. First, the executive wants power. Expectations of the person in office are now such that even an executive who can marshal all of the resources of the office effectively may inevitably fail in the long run. A weaker counterpart has even a greater potential for failure. Second, though expanding the powers of the executive office may be at the forefront of a president's many goals, his desire and ability to do so is tempered by the court, whose ability to interpret the scope of executive power as (ill-)defined in the Constitution is arguably greater and more definite than that of the executive. In short, interactions between the executive and the court are inherently conflictual, as the actors compete for interpretive supremacy. Further, interactions are dynamic and endogenous. Presidents and the court do not act and make decisions in a vacuum. Instead, they react to each others actions in a continuous process. The question for a researcher is how to model this dynamic process. In the following section, we offer a dynamic model based on the earlier equation to assess (1) the growth in power over time and (2) the action-reaction dynamics of executive-judicial interactions.

2.4 The Modeling Process

How might we model the dynamic processes that are executive-judicial interactions? Consider the following extension of S-curve relationship depicted earlier in Figure 2.1. Bringing down Equation 2.1 from earlier, with the appropriate subscripts, and including another equation for the second actor, the equations that produce Figure 2.2 are:

$$\frac{dp_{\text{ActorA}}}{dt} = \alpha p \left(1 - \frac{p_{\text{ActorA}}}{K} \right) \quad (2.3)$$

$$\frac{dp_{\text{ActorB}}}{dt} = \alpha p \left(1 - \frac{p_{\text{ActorB}}}{K}\right) \quad (2.4)$$

where:

- p is the amount of power that each actor possesses.

Figure 2.2: The Population Growth Model - Two Competing Political Actors

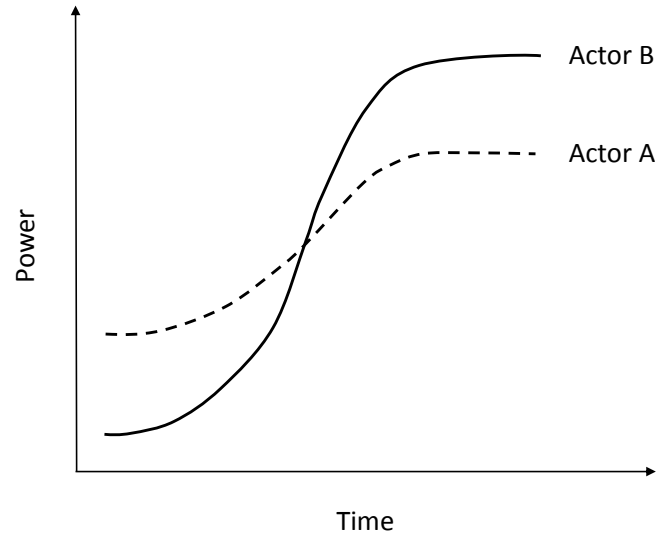


Figure 2.2 illustrates how two political actors may compete for power. Initially, both actors have relatively small amounts of power. Over time, as each's power base accumulates, power will increase, both in absolute terms and relative to each other. Last, as each actors fully exploit the amount of resources available, their power level reaches maturity and peaks. More specifically, Figure 2.2 shows that, initially, the amount of power that Actor B possesses is lower than that of Actor A. However, likely due to greater availability of resources, Actor B experiences higher growth rate than does Actor A. Over time and eventually, Actor B will enjoy greater leverage and power than Actor A. The point at which Actor B overtakes Actor A (i.e., where the lines cross) is known as the power transition point, the zone around it is where conflict between actors is most likely. Applying this model to executive-judicial dynamics, we begin the modeling process iteratively.

2.4.1 Modeling Unilateral Decisions

Presidents often invoke their unilateral authority when crafting public policies (Howell, 2003). If anything, considering that increasing gridlock in Congress implies that presidents will be less successful legislatively (Binder, 1999; Edwards, Barrett, and Peake, 1997; Howell et al., 2000), the trend toward making policy unilaterally is likely to increase.

Our baseline model of unilateral activity starts with two simple assumptions. First, unilateral directives offer presidents an expedient strategy to influence public policy. Comparing the months or even years that it may take a given proposed bill to become public law, a president can quickly shift the policy status quo with the stroke of a pen (Mayer, 2001). Second, current levels of unilateral activity are related to past levels of unilateralism. Presidents do not issue unilateral directives indiscriminately. Instead, their propensity to do so is contingent upon how active they (or their predecessors) were in the past. This is consistent with existing literature that demonstrates the presence of serial autocorrelation in the total number of unilateral directives issued monthly (Fine and Warber, 2012).

Working from these assumptions, I begin by specifying the growth in the level of unilateral activity as a function of the past levels of presidential unilateralism. Let:

$$\frac{dP}{dt} = \alpha_1 P \quad (2.5)$$

where:

- $\frac{dP}{dt}$ is the change in presidential unilateralism over time;
- P is the current level of unilateral activity ($P \geq 0$); and
- α_1 is a positive parameter that represents the instantaneous growth rate of unilateral activity.

In the basic model presented in Equation 2.5, the current level of unilateral activity, P , influences future levels of unilateralism, P' . α_1 is a positive parameter, which serves two purposes. Across different presidential administrations, it represents how well the current administration is able to channel the past experiences of previous presidencies into its decision calculus for unilateral action. Within a single administration, α_1 can be treated as a learning parameter. What sorts of reactions has the administration received in response to its previous uses of unilateral authority? If the reactions were positive, should the administration consider bolder uses of unilateral directives? Conversely, if the administration received a considerable backlash as a result of its use of unilateral authority, to what extent should the administration refrain from taking unilateral actions? In either case, the α_1 parameter translates current action into future decisions.

To illustrate the basic model in action, consider the uses of presidential proclamations to celebrate national holidays. Without failure, past presidents have all issued an executive decree to proclaim Thanksgiving Day as a day to "...recount the joys and blessings of the past year."¹¹ Further, as journalist Janet LaRue points

¹¹ Obama's 2012 Thanksgiving Day proclamation. <http://www.whitehouse.gov/the-press-office/2012/11/20/presidential-proclamation-thanksgiving-day-2012>

out, “[m]any presidential proclamations are strikingly similar in their expressions of humility, thanksgiving, dependence, confession, repentance, Every proclamation concludes with the same phrase used the . . . Constitution: ‘In the year of our Lord’.”¹²

The similarity in language and potentially policy orientation is not just limited to symbolic presidential proclamations. Consider also the president’s decision to sanction foreign states. On February 27, 2001, just one month after inauguration, President George W. Bush renewed Clinton’s sanctions against Cuba on the regulation of the anchorage and movement of vessels, previously issued on March 1, 1996.¹³ Though it is possible that the Bush administration already has a well-defined foreign policy agenda on Cuba just one month into the administration, the more likely explanation is that Bush was simply renewing an existing executive sanction, given that he has no pre-existing objections to it. Examples of decisions to renew sanctions declared previously by earlier administrations are readily available. In short, anecdotal evidence appears to support the assumption that past decisions will influence future behaviors, which introduces autocorrelation into any model of presidential unilateral action (See Ouyang and Waterman (N.d.)).

Because the president’s unilateral authority is not unlimited, I also set an upper bound to the level of unilateralism. This limit, K_P , represents the administration’s overall desire for unilateral action in relation to potential constraints against action. As such, it can be thought of as its carrying capacity (Edwards and Penney 1985; Mesterton-Gibbons 1989). The carrying capacity, a concept borrowed from ecology, is the maximum units that a given environment will support. Thus, once an admin-

¹²As an aside, LaRue also points out that, unlike his predecessors, Obama’s 2011 Thanksgiving Proclamation omitted any mentions of sin and forgiveness. LaRue, Janet M. “Obama’s Thanksgiving Proclamation Strikingly Different From Predecessors.” http://townhall.com/columnists/janetmlarue/2011/11/23/obamas_thanksgiving_proclamation_strikingly_different_from_predecessors/page/full

¹³Bush, George W. February 27, 2001. “Notice—Continuation of the National Emergency Relating to Cuba and of the Emergency Authority Relating to the Regulation and Movement of Vessels.” <http://www.gpo.gov/fdsys/pkg/WCPD-2001-03-05/pdf/WCPD-2001-03-05-Pg350.pdf>

istration reaches its carrying capacity, future actions will not yield any more changes in unilateral activity.¹⁴ As suggested in the dynamics presented in Figure 2.2, power cannot continue to increase in perpetuity. This is particularly the case when there are other political actors competing for the same powers.

Expansions of executive power cannot continue unabated with opposition from the court.¹⁵ Consider the wiretapping of certain top executives on the National Security Council during Richard Nixon's administration. In two cases, that of Morton Halperin and Anthony Lake, these wiretaps continue long after these officials left public service (Pious, 1979, 81). In June of 1973, Halperin filed suit against the Nixon administration. Though lawyers for the administration argued that the executive has certain prerogatives and inherent executive power to conduct such actions for national security purposes, the U.S. Court of Appeals (DC Circuit) ultimately ruled in favor of Halperin and condemned the Nixon administration for unlawful behavior.

While the Nixon wiretapping case certainly illustrates an instance where the judicial actor limited the expansion of executive power, we must be careful to not give it more credit than it deserves. In particular, the DC Court was careful even in its decision to check the executive. In this regard, several notes are important. First, the Court only awarded Halperin a nominal sum as compensatory damages, as opposed to the substantial amount that Halperin requested.¹⁶ Here, Pious's (1979) characterization of the case is illustrative and is worth quoting at length:

¹⁴Though one can model the administration's capacity for unilateral actions as a separate equation, I elected to not do so for two reasons. First, a focus on modeling carrying capacity will divert attention away from the principal purpose of this study, which is to examine the extent of judicial influences on presidential unilateral actions. The second reason is to ensure the tractability of the models. Because dynamic models are very flexible, a researcher must not try to model the world, but to ensure that only the critical components of the theoretical model are properly specified.

¹⁵Of course, for the court to challenge executive decisions, an aggrieved party must first appeal to the court for judgment. However, though there are costs associated with bring a suit against the current, or past, administration, the quality of the lawsuit matters not so much as the presence of one. Thus, all else being equal, it should not be hard to conceive that some party or parties felt themselves wronged by the president's decision.

¹⁶The court awarded Halperin a nominal sum of one dollar per liable defendant, hardly a substantial amount.

...the court took a middle ground. It did not wish to legitimize the prerogative to tap without a warrant, not did it wish to grant the president and his aides immunity from damages. On the other hand the court did not wish to adhere to a hard and fast rule.... The court's decision left it with maximum flexibility. ... In a different set of circumstances, a court might yet impose massive fines, especially since the court had now put the executive branch on notice that political use of taps would not be tolerated. While checks and balances had been imposed, the presidency was still free to act in legitimate espionage cases (83).

Second, and perhaps more telling, the Carter administration also joined in the appeal against the Halperin decision, indicating that such a ruling would have a debilitating effect on future president's good faith efforts to take actions on national security grounds.¹⁷ In summary, the court checked Nixon's unlawful wiretapping of top executive officials. More importantly, however, not only did the court retained the flexibility to check future presidential decisions, the executive's prerogative to use wiretaps "legally" and "... the issue of prerogative power remained open" (Pious, 1979, 83).

Bringing everything together then, the model of presidential unilateralism must also reflect a theoretical limit on the extent to which presidents can make policy unilaterally. Specifically, this cap on unilateral decision-making has two potential sources. First, when the president has exhausted all the tools in the unilateral toolchest,¹⁸ further expansion of executive power via unilateral tools seems unlikely.¹⁹ A second source of a cap on unilateral discretion results from the political environment. As noted earlier, though political factors such as presidential approval ratings and par-

¹⁷Though Halperin filed his initial lawsuit in June of 1973, the DC Court did not decide on the case until July 12, 1979, during the Carter administration.

¹⁸See, for instance, the discussions of the various unilateral tools that presidents have at their disposal in Cooper (2002) and Waterman (2010).

¹⁹This does not appear to be the case yet with unilateral power.

tisan support in Congress do not feature prominently in this paper, prior research do note the importance of such political environmental mechanisms as sources of constraints on executive action.²⁰ To reflect this limit on growth, we modify Equation 2.5 as follows:

$$\frac{dP}{dt} = \alpha_1 P \left(1 - \frac{P}{K_P} \right) \quad (2.6)$$

where:

- K_P is the administration's overall capacity for unilateral actions, $0 \leq P \leq K_P$.

According to Equation 2.6, the pattern of growth in unilateral activity is an S-shaped curve, similar in nature to that presented in Figure 2.1. At one extreme, administrations with very low levels of unilateral activity are unable to change quickly, likely due to presidential inexperience or a lack of administrative resources. However, administrations more active unilaterally also suffer slower growth as they approach the upper limits of unilateral potential, as room for growth is limited at the upper extremity of the S-curve.²¹ Stated differently, the model of policy unilateralism in Equation 2.6 suggests that power growth (or decline) results from two forces competing with one another for influence.²² First, how active unilaterally is the current administration with respect to past behavior? Second, where does the administration stand in relation to the total capacity of the institution for power growth via unilateral decrees?

The final piece of the unilateral politics model is the cost associated with court influence. Let C denote the amount of influence that the court has on how active

²⁰For instance, see Krause and Cohen (1997) and Fine and Warber (2012).

²¹Others have also noted the importance of the executive's capacity for unitary action. In fact, as Rudalevige (2012) notes, unilateral directives sometimes have very little to do with presidential preferences. In many cases, what are considered policy directives at the president's order are in fact frequently the results of what various federal agencies wanted to do in the first place. Credibly then, capacity for action (as well as the level of activity) is related to the divergence and variation in the policy preferences across the federal bureaucracy.

²²See earlier discussion regarding population growth models and Equation 2.2.

presidents will be unilaterally. Moreover, court constraint is relative to how active the administration has been in its pursuit of policies by executive fiat. Stated differently, the more decisions that the president makes via unilateral directives, the more opportunities there are for the courts to check the expansion of presidential power.

Bringing all of the parts of the model together gives us the complete equation for unilateral action:

$$P' = \alpha_1 P \left(1 - \frac{P}{K_P} \right) - \beta_1 (C \times P) \quad (2.7)$$

where:

- β_1 is a positive parameter associated with the instantaneous rate of change on the level of influence that the court has on executive decision-making.

Note that the relationship illustrated by $(C \times P)$ in Equation 2.10 parallels ecological models, in which shifts in a prey population are determined by an interaction between the number of prey and the number of predators. The dynamics in how the two populations change (i.e., the prey and the predator) depend on how the two species interact. For instance, if there are more predators in the wild than there are prey, the size of the predator population will shrink over time as there are not enough resources (i.e., food) to sustain a large number of predators.

Translate this logic to executive-judicial interactions, this suggests that, in addition to the mechanisms of unilateral activity already discussed in Equation 2.6, presidential unilateralism is also characterized by an action-reaction dynamic inherent in executive-judicial interaction. That is, court influence does not weigh linearly on executive decision-making. Instead, the extent to which the court matters depends, in part, on the level of unilateral activity, P . To shed more light on the theoretical mechanisms of court influence, we transition focus in the next section toward modeling judicial influences on executive unilateralism.

2.4.2 Modeling Judicial Constraints

As with modeling executive unilateralism, I begin the judicial equation with the similar assumption that present and future levels of court influence on the executive is related to past influences. Let C denote the constraints presidents face from the court. Thus:

$$\frac{dC}{dt} = \alpha_2 C \quad (2.8)$$

where:

- $\frac{dC}{dt}$ is the change in court influence over time;
- C represents the amount of influence that the court has on executive decision-making; and
- α_2 is a positive parameter representing the rate in which past values of court influence affect present and future levels of court influence.

As is the case for presidential unilateralism, the capacity or the desire to check the powers of the executive cannot continue without boundaries. At any given point, the court can only marshal a finite amount of resources to counter the expanding power of the executive branch. In other words, as with the unilateral politics model, the court equation also contains the equivalent of a carrying capacity term in population growth models. The court carrying capacity represents the theoretical upper boundary of the sum total amount of influence that the court can bring to bear on the executive.²³ Accordingly, we modify Equation 2.8 to take this into account:

$$C' = \alpha_2 C \left(1 - \frac{C}{K_C} \right) \quad (2.9)$$

²³As noted earlier, fully exploring the determinants important in how court capacity changes over time is beyond the scope of this paper. However, I do provide a discussion later regarding two theoretical mechanisms shown to be important in prior research.

where:

- K_C is the total capacity of the court to challenge the executive, $0 \leq C \leq K_C$.

What might influence either the amount of influence that the court imposes upon the executive, C , or the sum capacity of the court to act, K_C ? Prior studies offer two suggestions. The first concerns a prominent theory in studies of judicial behavior: the Attitudinal Model. Made prominent by the works of Jeff Segal and Harold Spaeth, the core argument of the Attitudinal Model is that the preferences of individual judges are critical important in explaining their behavior (Segal and Spaeth, 2002). This is true with respect to both how individual judges and justices vote on a particular case, but also where, collectively, judicial opinions derive.²⁴ Applying insights from the judicial behavior literature to that on presidential unilateralism, this implies that presidents face potentially greater constraints when preferences of the executive and the court diverge, especially from that of the median justice (Lauderdale and Clark, 2012; Moraski and Shipan, 1999).

The second component of court constraint involves the court's general reluctance to engage in political warfare with the executive. Commonly referred to as the Political Question Doctrine, this set of studies point to the fact that courts, across the judicial hierarchy, generally avoid involvement in political questions (Bickel, 1986; Strum, 1974). Foremost in judges' minds is institutional protection. As the court possesses neither the power of the purse nor of force, the court must rely on other political actors to uphold and to carry out its decisions. Becoming overly involved in settling questions relating to political disputes will detract from the court's reputation as a neutral arbiter of the law.

²⁴As a slight aside, note that the core principles of the Attitudinal Model does not mesh well with common textbook accounts of executive-judicial interaction. Such accounts largely note that the judiciary commonly defer to the executive. Where the executive and the courts mostly interact are in the reigns of the judicial appointment process.

Recent evidence indicates that this is indeed the case with respect to judicial-congressional relations. Building upon personal interviews with former Supreme Court justices and law clerks, Clark (2009) assesses the conditions under which hostility in Congress toward the Supreme Court influences the Court’s use of judicial review. Results suggest that the Court invalidates fewer congressional actions when hostility toward the Court is higher.

That empirical evidence suggests that the Court accounts for congressional opinions when issuing judicial opinion is not surprising. After all, Congress controls the very “purse” that Alexander Hamilton referred to in Federalist Paper # 78. By the same token, if the Court pays attention to the political actor with the power of the purse, it must also care about the executive who controls the “force,” or the actor in charge of carrying out the Courts’ opinion. In sum, how much the court cares about protection its own reputation or legitimacy also affect how much opposition presidents can expect from the court.²⁵

Collecting Equations 2.10 and 2.11, the system of differential equations for the model of judicial-executive interactions is:

$$\frac{dP}{dt} = \alpha_1 P \left(1 - \frac{P}{K_P}\right) - \beta_1 (C \times P) \quad (2.10)$$

$$\frac{dC}{dt} = \alpha_2 C \left(1 - \frac{C}{K_C}\right) \quad (2.11)$$

Note that both Equations 2.10 and 2.11 reflects a natural growth in power over time, $\alpha_1 P \left(1 - \frac{P}{K_P}\right)$ and $\alpha_2 C \left(1 - \frac{C}{K_C}\right)$, respectively. This is a general modeling strategy common in both international relations and ecology to account for differing groups competing for the same scarce resources, which in this application refer to power held by the executive and the court, respectively. The second component

²⁵A careful reader might note that the two mechanisms of judicial influence presented here appear to be competing interests. Indeed they are. If the desire to maintain institutional legitimacy is high, judicial ideological may have little influence on the level of resources that the court can imposed upon the executive. Similarly, if divergence in policy preferences between the executive and the court is higher relative to how much the court care about its own reputation, then the bulk of court influence on the executive derive mostly from judicial ideology.

in Equation 2.10, $-\beta_1(C \times P)$, models the action-reaction dynamics of executive-judicial interactions. To assess how this system of equations behaves under differing conditions, the next section presents the numerical results of this dynamic process.

2.5 Predictions

There are two strategies for solving formal models and deriving hypotheses: analytical and numerical. Analytical techniques are usually the first step. However, the complex nature of the equations in this work limits such an approach. Known analytical tools are insufficient to find the equilibria for the system of equations in Equations 2.10 and 2.11. This does not mean that the models have no solutions; in fact, we are able to see equilibria result when we perform simulations. Rather, it means that appropriate mathematical solution procedures have not yet been devised.

In order to derive deductions from the model, we therefore use numerical simulations.²⁶ For the simulations, we generated random values for the positive parameters using the random number generation program in *R*.²⁷ We then use these random values as the parameter values for α_1 , α_2 , and β_1 in subsequent simulations of the model.²⁸ The numerical routine uses the system of equations specified in Equations 2.10 and 2.11 to generate all subsequent values of $\frac{dP}{dt}$ and $\frac{dC}{dt}$. We plot the resulting values over time, giving us the trajectories of $\frac{dP}{dt}$ and $\frac{dC}{dt}$ as the two equations interact in the dynamic system. The differences in outcomes observed from these simulations allow for predictions to be made regarding the behavior of both the executive and the

²⁶In this regard, this is where dynamic modeling approaches depart from traditional empirical studies in political science. In a standard empirically-oriented paper, one would propose hypotheses, which derive from theoretical accounts of the phenomenon of interest. Next, the researcher would test whether the data gathered provide support for the hypotheses. Dynamic model approaches begin with the translation of theoretical accounts into mathematical formulas. Following, the researcher would solve the system of equations which represents the interests at hand (typically using numerical simulations) to derive deductions from how the system behaves under a variety of conditions.

²⁷These initial simulated values are: $P \approx 0.755$, $C \approx 0.133$, $\alpha_1 \approx 0.660$, $\alpha_2 \approx 0.302$, and $\beta_1 \approx 0.697$.

²⁸In addition to simulations presented later where we alter the initial conditions, we also conducted simulations by varying the parameters values. Results are in Appendix B.

court. Below, we discuss the patterns that emerged from a total of 65 simulations.²⁹

2.5.1 When the President Acts Alone

Though recent works in the unilateral presidency literature suggest that presidents often use executive directives to quickly influence public policy, it remains unclear why the court has any effect on the nature of presidential unilateralism. In this section, simulations suggest that while the executive's natural tendency is to rely on unilateral action, the court impacts the extent to which the president engages in policy unilateralism. Further, no matter how strong the president leans toward unilateral action, influence from the court is ever-present in deterring "too much" executive power.

2.5.1.1 Varying Levels of Unilateral Activity

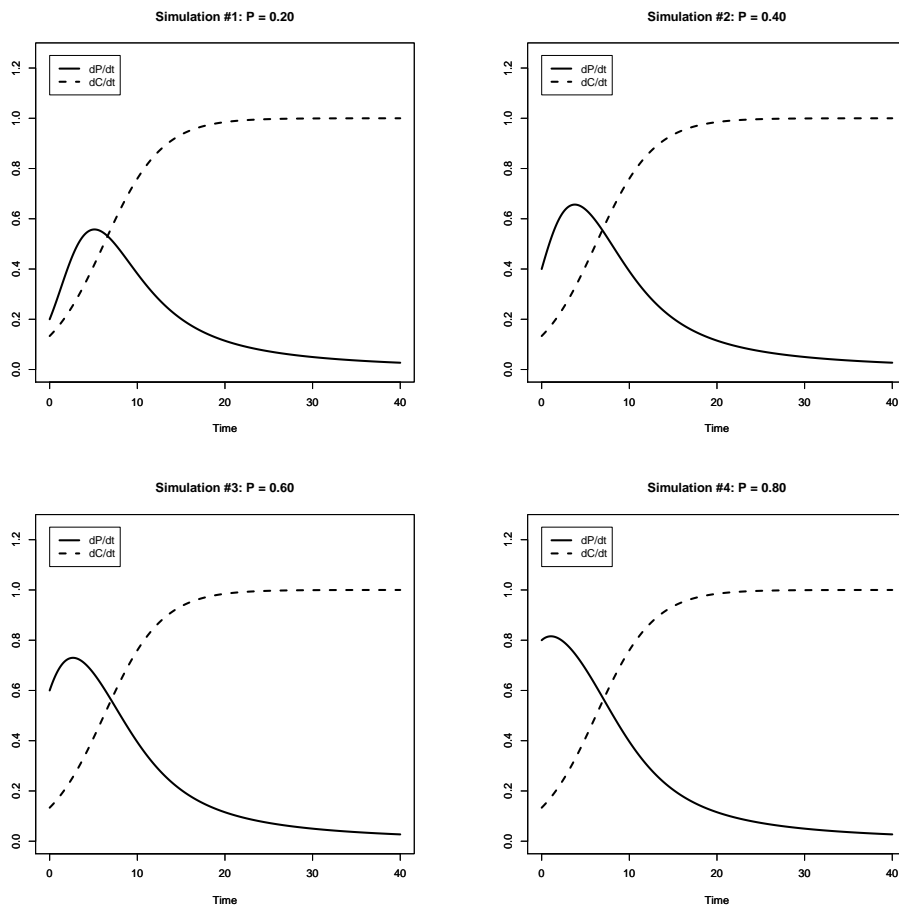
Our first deduction from the simulations is that the president's natural inclination is to use unilateral directives to influence public policy. This is consistent with existing literature on the unilateral presidency (Howell, 2003, 2005; Mayer, 2001; Waterman, 2009; Fine and Warber, 2012).

Figure 2.3 presents simulations of the model at four different initial values of P ($P = 0.2$, $P = 0.4$, $P = 0.6$, and $P = 0.8$). The solid line represents the change in policy unilateralism over time. The dashed line denotes how influences from the court changes over time. In each of the four scenarios, with the exception of the level of unilateral activity, all initial values and parameters are held constant. All else being equal, the question is how shifts in the level of presidential activity change the dynamics of executive-judicial relations.³⁰

²⁹There is no agreed upon standard for the minimum number of simulations required to test a model. As Kadera and Morey (2008) note, past published work present anywhere from a low of 15 to a high of 50 simulations. Moreover, unless the initial conditions are somehow biased, there is no grounds for assuming that more simulations would result in different conclusions.

³⁰As the behavior of how court influence changes over time does not change in all of the simulations where values of P and K_P are changed, respectively, the following discussion will focus primarily on the executive power equation (solid line).

Figure 2.3: Simulations for Initial Conditions where $C \approx 0.133$, $K_C = 1$, and $K_P = 1$



Note: This figure presents the results of the simulations of the system as represented by Equations 2.10 and 2.11. Parameters values are: $\alpha_1 \approx 0.660$, $\alpha_2 \approx 0.302$, and $\beta_1 \approx 0.697$.

First, note that court's influence (i.e., dashed line) increases over time in a manner not dissimilar to the examples presented in Figure 2.2. Second, the essential dynamics of the system, at least in this set of simulations, suggest that as court influence becomes greater, unilateral activity decreases. This is consistent with existing works on the unilateral presidency which indicate that presidents are less likely to take unilateral action when other political actors impose greater constraints on the executive (Fine and Warber, 2012). Third, in all four cases (most noticeable in Simulations #1-3), the executive exhibits an initial tendency to increase policy unilateralism. Eventually, however, the level of executive unilateralism reaches essen-

tially a tipping point, where it then begins to decline. Last, note that the amount of court influence eventually overtakes the level of unilateral activity. As noted briefly earlier, power and conflict scholars in international relations call this the power transition point (Kadera, 2001; Organski, 1958).³¹ Conflict between the executive and the court is most likely around this zone (Tammen et al., 2000).

In short, Simulations #1-4 illustrate the dynamics of executive-judicial relations at four different initial levels of policy unilateralism. Presidents will gravitate toward using unilateral directives where possible. However, as court influence in the system becomes more prominent, policy unilateralism will decrease over time. Thus,

Deduction 1: *Presidents will prefer unilateral actions when the court imposes fewer constraints on the executive.*

2.5.1.2 Varying Total Capacity for Unilateral Actions

If the executive's natural inclination is to rely on unilateral directives to make expedient shifts to the policy status quo (Howell, 2003), what happens when the president's total capacity for unilateral action changes?³² In particular, do changes in the capacity for policy alter the president's decision calculus for unilateral policy? Figure 2.4 presents the results of the simulations, varying the executive's total capacity for unilateralism, K_P .

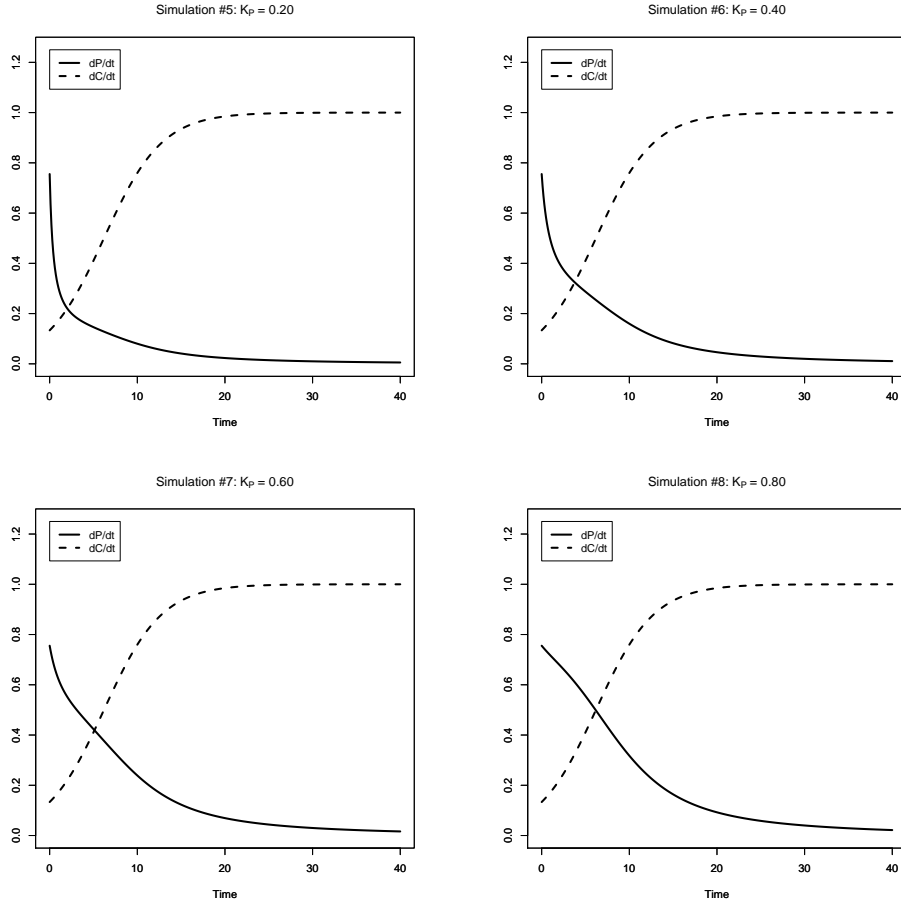
Figure 2.4 presents the simulations at four possible initial states of K_P ($K_P = 0.2$, $K_P = 0.4$, $K_P = 0.6$, and $K_P = 0.8$).³³ Again, the solid line represents the level of unilateral activity, as it changes over time, $\frac{dP}{dt}$, and the dashed line indicates $\frac{dC}{dt}$,

³¹It is called the power transition point as it denotes time at which the balance of power in the system is transitioning from one actor to the other. Conflict is more likely because now one actor is at least as influential as the other, and can therefore compete openly for dominance in the political environment.

³²Using empirical data on Supreme Court ideology and executive orders, we test the three deductions laid out in this section. Results are largely consistent with predictions from the simulations presented here. Results available upon requests.

³³As with previous graph, all initial conditions and parameters values are held constant, with the exception of the president's capacity for unilateral action, K_P .

Figure 2.4: Simulations for Initial Conditions where $P \approx 0.755$, $C \approx 0.133$, and $K_C = 1$



Note: This figure presents the results of the simulations of the system as represented by Equations 2.10 and 2.11. Parameters values are: $\alpha_1 \approx 0.660$, $\alpha_2 \approx 0.302$, and $\beta_1 \approx 0.697$.

or how court influence changes over time.

Two points worthy of note here. First, in Simulations #5-7 ($K_P = .2$ and $K_P = .4$), the initial level of unilateral activity is actually above the president's total ability for policy unilateralism. While the total carrying capacity for unilateral activity represents an upper boundary on the extent of executive discretion, it does not mean that presidents cannot temporarily exceed this boundary.³⁴ In any case, Simulations #5-7 do illustrate the executive's strong emphasis toward unilateral action. Even in

³⁴See, for instance, the Nixon administration's justification of "executive prerogative" and the use of wiretaps for political motives.

cases where the level of policy unilateralism exceeds the president’s capacity to do so, the movement, while decreasing, is not immediate but gradual. In other words, even when the president exceeds his “constitutional basis” for unilateral activity, behavior and the shift to rely less on unilateral directives changes only gradually over time.

Second, note the markedly different rates of decline in Simulations #5-6, compared to Simulations #7-8. In the first two cases (Simulations #5-6), the executive has greatly exceeded the office’s capacity for unilateral action (roughly 0.555 and 0.355³⁵, respectively). The further that the executive pushes beyond the capabilities of the office, the sharper the rate of decline in unilateral activity.

In conjunction, simulations by varying the executive office’s total capacity for policy unilateralism suggest that the amount of interpretative discretion that the executive possesses definitely matters. Greater discretion implies more policy wiggle room for the executive. Yet, decreased ability to move policy unilaterally does not mean that presidents are unable to do so. Thus:

Deduction 2: *The executive still leans toward unilateral actions even when the office has decreased capacity to do so.*

2.5.2 When the Court Constrains

The previous set of simulations indicate that the court is indeed influential in the president’s decision-making calculus concerning unilateral activity. In this section, we transition the focus to the court specifically. In particular, I ask how does the total capacity of the court changes judicial-executive relations regarding unilateral action.³⁶

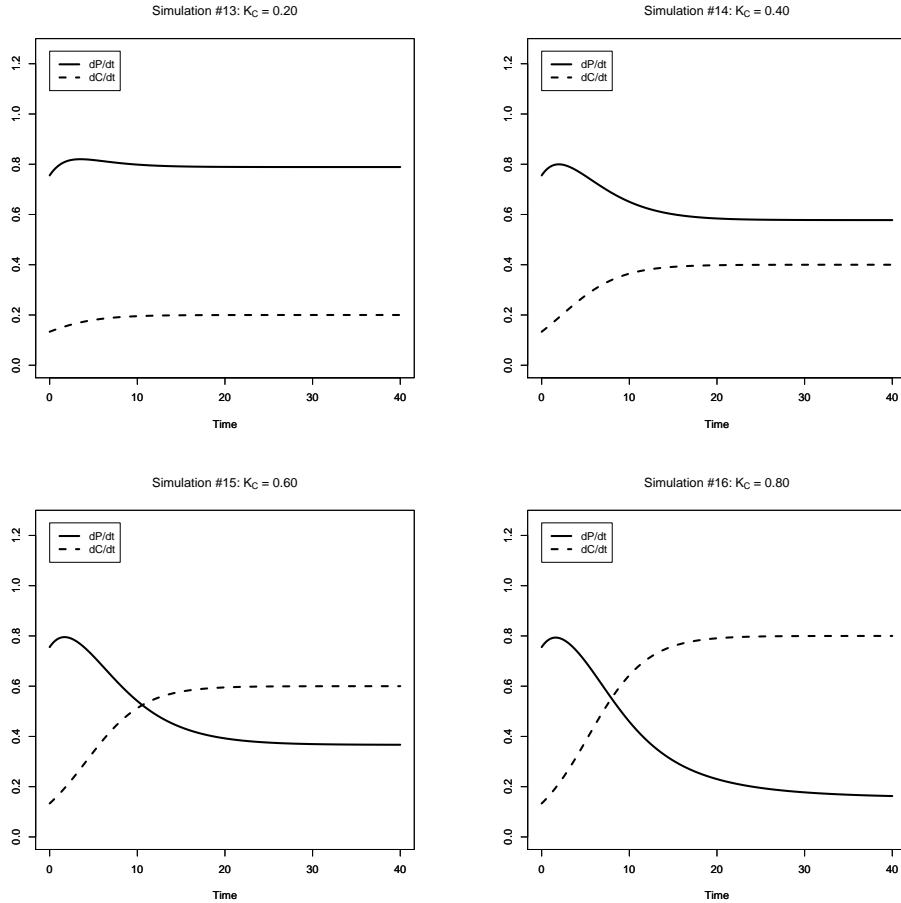
³⁵Calculated by $P - K_P$.

³⁶As with the policy unilateralism equation in the previous sections, we also conducted a series of simulations on how varying the levels of court influence impacts the dynamics of the overall system. As results are similar to those already presented in the previous section, with the exception being that, when the court has greater initial influence than the initial level of unilateral activity, executive-judicial conflict is not likely as the two lines do not cross at any point. Thus, in this section, I focus on the total capacity of the court to check the executive. For results of the simulations on how the system changes at varying levels of C , see Appendix A.

2.5.2.1 Varying Total Capacity To Check the Executive

The final prediction from the model deals with the influence of the court on executive unilateralism as the court's capacity to check executive power varies. Figure 2.5 presents the simulations at four different starting values for the court's total capacity of influence on executive power ($K_C = 0.2$, $K_C = 0.4$, $K_C = 0.6$, and $K_C = 0.8$). As with previous simulations, all other initial values and positive parameters are held constant ($C = .15$, $P = .55$, $K_P = 1$, $\alpha_1 \approx .660$, $\alpha_2 \approx .302$, and $\beta_1 \approx .697$).

Figure 2.5: Simulations for Initial Conditions where $P \approx 0.755$, $C \approx 0.133$, and $K_P = 1$



Note: This figure presents the results of the simulations of the system as represented by Equations 2.10 and 2.11. Parameters values are: $\alpha_1 \approx 0.660$, $\alpha_2 \approx 0.302$, and $\beta_1 \approx 0.697$.

Notice now how the shifts in court influence change over time, in comparison to all other simulations presented previously. The dynamics of executive-judicial relations change as the court's total capacity to check the executive, K_C , increases. Note first that when the court's ability to check the executive is low relative to the level of unilateral activity—i.e., Simulation #13 ($K_C = .2$) and Simulation #14 ($K_C = .4$), opportunity for conflict is minimal. In neither one of the scenarios depicted in Simulations #13-14 does the court possess sufficient capability to challenge the executive. However, note how the dynamics of the system alter as court's capacity increases.

Notice that when the court is considerably weaker than the executive (Simulation #13), presidents have little incentive to refrain from decisions by unilateral fiat. Compare now Simulation #13 with Simulation #14, note that even a relatively small uptick in court capability results in changes in executive behavior. Though the court still has inadequate resources to check the executive, presidents nonetheless respond accordingly, as if almost in anticipation of a future, more powerful court. Further, as the court's total capacity further increases (i.e., Simulations #15-16), the shifts in the patterns of policy unilateralism over time become more dramatic.

Combined, the simulation presented here indicates that executive-judicial interactions with respect to the president's unilateral discretion is not only characterized by the level of unilateral activity, but also by whether the court has the capacity to challenge the executive. Increased capacity suggests greater chances of executive-judicial conflicts. Thus:

Deduction 3: *Scenarios under which the court has greater capacity to check the executive result in greater changes in executive behavior and unilateral activism.*

2.6 Conclusion

In this chapter, we presented a mathematical model of the relationship between executive unilateralism and court influence. Influences from works in unilateral presidency, judicial behavior, international relations, and ecology impact the specification of the dynamics of executive-judicial relations.

Using numerical simulation techniques, we derive three hypotheses. First, presidents will prefer unilateral action when the court imposes fewer constraints on the executive. Second, decreased capacity for unilateral action does not entirely undo either the ability or the desire for policy unilateralism. Last, shifts in executive behavior and unilateralism activism are the strongest under those scenarios where the court has greater capacity to the expansion of unilateral authorities.

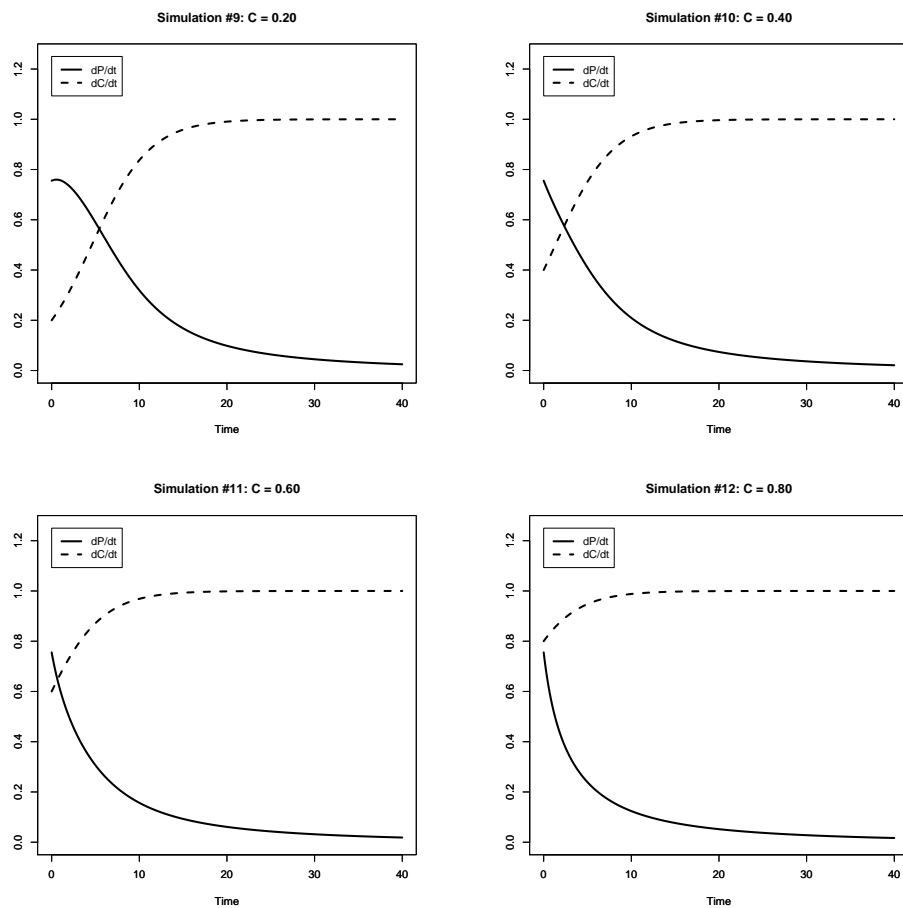
The model of executive-judicial relations serves as a foundation for understanding the dynamics of the interaction between the executive and the court. Still, there is room for improvement. Though simulation results shed light on how both the executive and the court respond dynamically to one another over time, the current construction of the models is simple. For instance, instead of using hypothetical values of the carrying capacity of the executive, K_P , and the court, K_C , we could model those effects directly. Similarly, my model does not account for the potential influence of the legislature on executive-judicial interactions. we leave these nuanced representations of reality for future work.

2.7 Appendix

2.7.1 Varying C

How do differing levels of court influence alters executive and judicial behaviors? In this section, we present results of the simulations, varying the amount of constraints that presidents face on the court.

Figure 2.6: Simulations for Initial Conditions where $P \approx 0.755$, $K_C = 1$, and $K_P = 1$

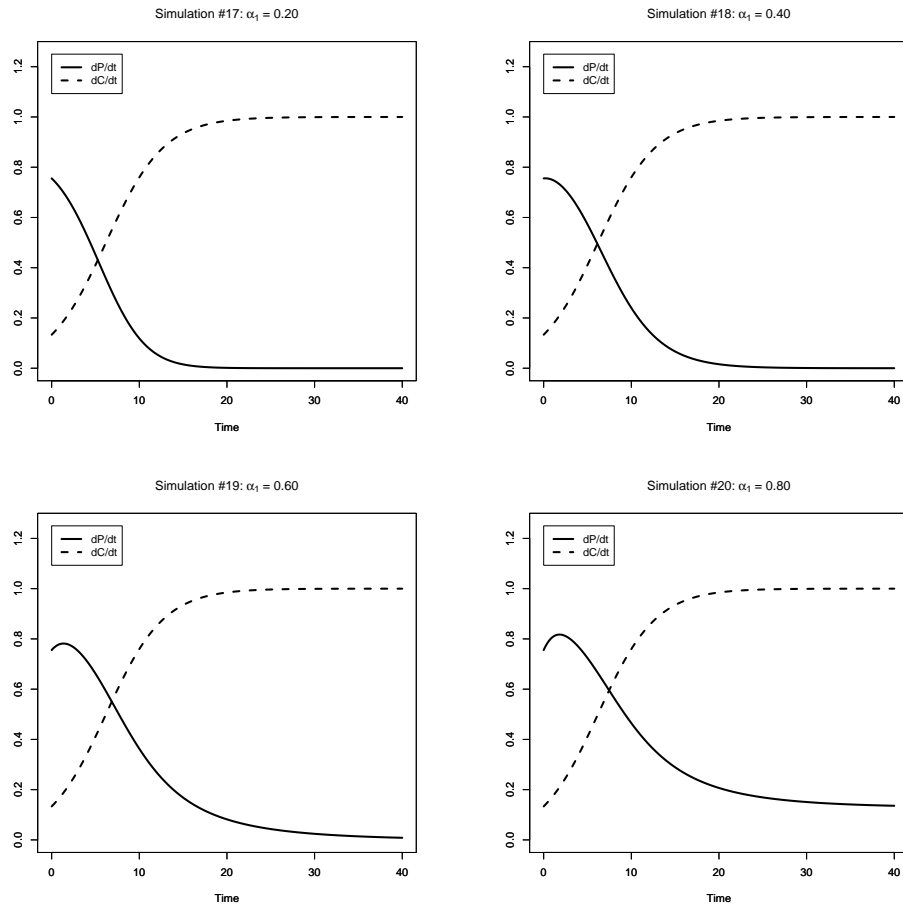


Note: This figure presents the results of the simulations of the system as represented by Equations 2.10 and 2.11. Parameters values are: $\alpha_1 \approx 0.660$, $\alpha_2 \approx 0.302$, and $\beta_1 \approx 0.697$.

2.7.2 Varying α_1

How does behavior in the system change if we alter the rate of change in policy unilateralism?

Figure 2.7: Simulations for Initial Conditions where $P \approx 0.755$, $C \approx 0.133$, $K_C = 1$, and $K_P = 1$

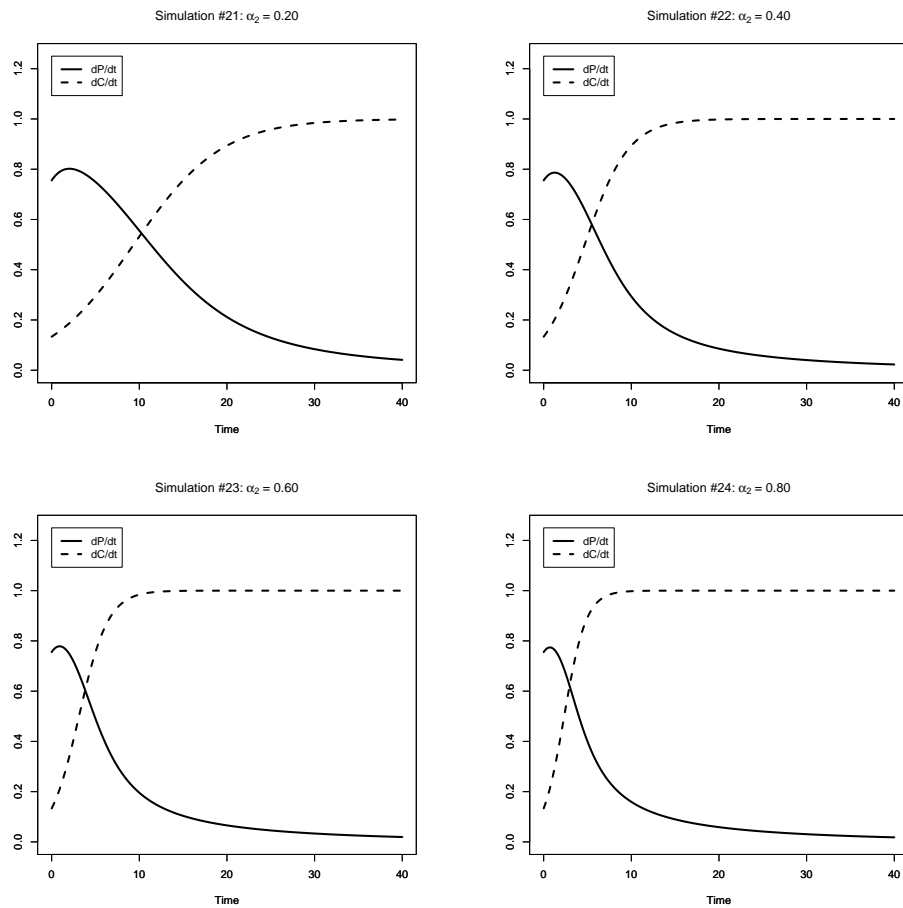


Note: This figure presents the results of the simulations of the system as represented by Equations 2.10 and 2.11. Parameters values are: $\alpha_1 \approx 0.660$, $\alpha_2 \approx 0.302$, and $\beta_1 \approx 0.697$.

2.7.3 Varying α_2

How does behavior in the system change if we alter the rate of change in court influence?

Figure 2.8: Simulations for Initial Conditions where $P \approx 0.755$, $C \approx 0.133$, $K_C = 1$, and $K_P = 1$

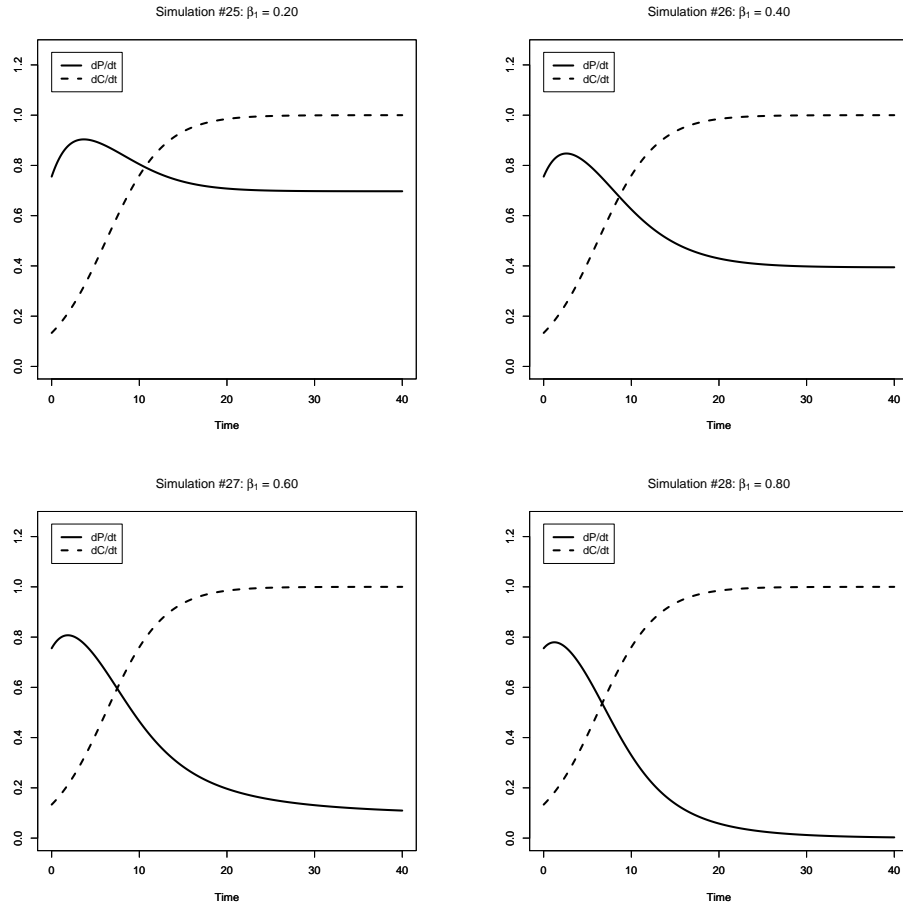


Note: This figure presents the results of the simulations of the system as represented by Equations 2.10 and 2.11. Parameters values are: $\alpha_1 \approx 0.660$, $\alpha_2 \approx 0.302$, and $\beta_1 \approx 0.697$.

2.7.4 Varying β_1

How does behavior in the system change if we alter the rate of change in executive-judicial interactions?

Figure 2.9: Simulations for Initial Conditions where $P \approx 0.755$, $C \approx 0.133$, $K_C = 1$, and $K_P = 1$



Note: This figure presents the results of the simulations of the system as represented by Equations 2.10 and 2.11. Parameters values are: $\alpha_1 \approx 0.660$, $\alpha_2 \approx 0.302$, and $\beta_1 \approx 0.697$.

Chapter 3 Unilateral Executive Power Over Time: A Machine Learning Approach

Abstract

To what extent do presidents use the many tools in the unilateral tool-chest? How have the uses of unilateral directives changed over time? Are there distinctions in terms of how the different unilateral tools are used? Scholars of presidential unilateral actions have examined with renewed interest the extent to which presidents issue unilateral directives to make public policy. Though insightful, existing works may be problematic given that they usually only examine a single type of unilateral action at a time, such as executive orders. Borrowing from machine learning strategies, we apply a novel text analytical method to examine a comprehensive dataset of unilateral actions. We also analyze executive directives using decision trees. These represent the first empirical analyses of all publicly-available executive unilateral directives. Specifically, we examine: (1) the extent to which the issue areas in which unilateral directives are used has changed over time and (2) what distinguishes one form of unilateral directive from another. We find that not only has the use of unilateral action in general increased over time, presidents have also considerably expanded the range of issue areas where they apply unilateral power. In addition, we find that while the performance of the economy best predicts the type of directives that presidents will issue, directives of different stripes share as many (if not more) commonalities with each other than they do differences. Results have implications for both the unilateral presidency and broader works in executive decision-making.

3.1 Introduction

In December of 2012, the nation watched in horror as the deadliest mass shooting at a school occurred at Sandy Hook Elementary School in Connecticut.¹ In the aftermath of one of the worst tragedies to happen at a school in the nation's history, the shooting renewed debates on gun control in the United States, including Obama's 23 executive

¹"Sandy Hook shooting: What happened?" CNN News. Link to Webpage.

actions directed, respectively, toward federal law enforcement,² the Department of Justice,³ and the Department of Health.⁴ Initially, media incorrectly reported that Obama had signed 23 executive orders designed to address gun violence and gun control.⁵ While parts of the media later corrected their reporting to reflect the three presidential memoranda that Obama issued,⁶ the confusion surrounding exactly what the president had done reflects broader questions in both the popular media and in academics. To what extent do presidents use the many tools in the unilateral tool-chest? How have the uses of unilateral directives changed over time? Are there distinctions in terms of how the different unilateral tools are used?

Scholars of presidential unilateral actions have examined with renewed interest the extent to which presidents issued unilateral directives to make public policy. For instance, Howell (2003) finds that presidents issue more executive orders when (1) policy disagreement with chambers of Congress increases and (2) when Congress may be poised to enact policies to which the executive disagrees. Though insightful, existing work may be problematic given that it usually only examine a single type of unilateral action at a time, such as executive orders.

Understanding how and where presidents utilize unilateral power is important for two reasons. First, one important component of presidential power is the scope of the executive's ability to make policies unilaterally. Thus, a better understanding of how presidents utilize executive power is critical to understanding the role of

²Obama, Barack. January 16, 2013. "Memorandum on Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System." [Link to Webpage.](#)

³Obama, Barack. January 16, 2013. "Memorandum on Tracing of Firearms in Connection with Criminal Investigations." [Link to Webpage.](#)

⁴Obama, Barack. January 16, 2013. "Memorandum on Engaging in Public Health Research on the Causes and Prevention of Gun Violence." [Link to Webpage.](#)

⁵Werner, Erica, and Julie Pace. "Obama Signs 23 Gun Safety Executive Orders Vows Tough New Laws." NBC Bay Area. [Link to Webpage.](#)

Ungar, Rick. "Here Are The 23 Executive Orders On Gun Safety Signed Today By The President." Forbes. [Link to Webpage.](#)

⁶Amira, Dan. "President Obama Didn't Sign Any Executive Orders Today." New York Magazine. [Link to Webpage.](#)

the executive in the political system. Second, decision-making by executive fiat has become more controversial recently. In the public domain, executive orders appear synonymous with unilateral action. This is not necessarily the case, however. As Dodds (2013) notes, there are upward of 27 different unilateral policy tools that the executive has at his disposal. Comprehending how unilateral executive decisions are related in broader context will promote further public discussions of the nature of executive power in general and the decision-making by executive fiat in particular.

Borrowing from machine learning strategies, we apply a novel text analytical method to examine a comprehensive dataset of unilateral actions. We also analyze executive directives using decision trees. These represent the first empirical analyses of all publicly-available executive unilateral directives. Specifically, we examine: (1) the extent to which the issue areas in which unilateral directives are used has changed over time and (2) what distinguishes one form of unilateral directive from another. We find that not only has the use of unilateral actions in general increased over time, presidents have also considerably expanded the range of issue areas where they apply unilateral power. In addition, we find that while the performance of the economy best predicts the type of directives that presidents issue, directives of different stripes share as many (if not more) commonalities with each other as they do differences.

We begin by providing an overview of the works in the unilateral presidency and conclude by noting why existing works fail to capture the potential strategies with which presidents employ unilateral power. We then analyze the most comprehensive compendium of unilateral directives data to date using approaches from machine learning. The analyses proceed in two parts. First, using topic models, we examine how implementation of unilateral power has changed over time, particularly with respect to the issue areas where presidents employ unilateral action. Second, we examine how the different types of unilateral directives are related to one another. We conclude with the discussion of the results and implications for broader works in

the unilateral presidency and executive decision-making.

3.2 Unilateral Politics: An Overview

The scope of executive power has expanded dramatically since the Founding. Decades ago, Neustadt (1990) spoke of the president's inability to command policy changes and famously reminded us that "presidential power is the power to persuade." The problem with this formulation of executive power is that more recent developments in American Politics—e.g., greater ideological division in Congress (Krehbiel, 1998) and higher likelihood of divided government (Cameron, 2000)—suggest that even the potential for presidents to lead and to enact public policies are now threatened. Facing greater legislative challenges in Congress, recent administrations now turn to unilateral action as a core component of their policymaking strategy.

The use of unilateral power is not new. By unilateral, we refer to:

... the president's formal capacity for taking unilateral action, and thus for making law on his own. Often presidents do this through executive orders.... But whatever the vehicles they may choose, the end results is that presidents can and do make new law—and thus shift the existing status quo- the explicit consent of Congress (Moe and Howell, 1999, 133).

A quick perusal of major executive actions in U.S. history will likely reveal major instances of decision-making by executive fiat. They include: (1) George Washington's Proclamation of Neutrality; (2) Abraham Lincoln's Emancipation Proclamation; (3) Harry Truman's executive order to desegregate the military; and (4) George W. Bush's executive order establishing the Office of Homeland Security in the aftermath of 9/11. In sum, presidents have already made use of unilateral power. Yet, it is not until unilateral action became a dominant strategy in executive policymaking that they draw significant attention from scholars.

One of the seminal works in this area, Howell's (2003) game-theoretical examination of executive orders spurred a line of studies which examine the determinants of executive orders usage. Marshall and Pacelle (2005), for instance, assess executive orders in relation to the two presidencies thesis. Among other results, they find that while the share of the president's party in Congress significantly affects domestic policy executive orders, no such effect exists for those orders that deal with foreign policy matters. Even more recently, Warber's (2014) work challenges the perception that the sole purpose of executive orders is to provide bureaucrats with public policy implementation instructions. In particular, Warber (2014) shows how presidents may be using executive orders for public outreach purposes, to target specific populations with policy.

Works in the unilateral presidency literature have also examined other forms of unilateral directives. These range from studies that focus on executive agreements (Prins and Marshall, 2009), presidential proclamations (Belco and Rottinghaus, 2009; Rottinghaus and Lim, 2009; Rottinghaus and Maier, 2007), signing statements (Crouch, Rozell, and Sollenberger, 2013; Cooper, 2005; Kelley and Marshall, 2009, 2010), and memoranda (Lowande, 2014).

Though insightful and yielding considerable insights on regarding the nature of unilateral executive decisions for each individual type of directive, by focusing on only one type of executive directive at a time, existing works are unable to parse out how different types of directives are related and how presidents may utilize them as strategic policy tools. For example, Cooper (2002) points out the difference between an executive order and a memorandum is in name only, calling presidential memoranda as executive orders by another name. Similarly, Lowande's (2014) recent article also speaks to this possibility. In particular, Lowande (2014) notes that given that the recent controversy associated with executive orders, presidents may be substituting presidential memoranda for executive orders. If presidents view and use

the various forms of executive directives differently than they are currently examined in the literature, we must revise our conception of unilateral actions as it relates to strategic policy decisions. We begin by topic modeling all publicly-available unilateral directives to assess how their usage has changed over time.

3.3 Topic Modeling of Unilateral Presidential Directives Using RText-Tools

In what topic areas do presidents issue directives? How has the use of unilateral directives changed over time? In this section, we attempt to offer the first systematic, empirical topic coding of unilateral presidential directives from the George Washington administration to the end of Barack Obama's first term in office. To date, while there have been attempts to code individual sets of unilateral directives, such as the Policy Agenda Project's coding of executive orders, they fall short of (1) coding of other forms of unilateral directives and (2) assessing the relationships among different types of directives. One of the more comprehensive attempts to date, Dodds (2013) qualitatively assesses the breadth and scope of unilateral decision-making with respect to the issues on which presidents make unilateral decisions. While Dodd's (2013) work represents the best attempt thus far to examine different types of executive directives in a singular work, it remains useful to examine executive unilateral directives quantitatively to better assess over time trends. In sum, by offering quantitative assessment of all publicly available unilateral directives from Washington to Obama, not only are we able to detect any noticeable trends in unilateral decision-making over time, but to offer scholars a more complete dataset of unilateral decision-making in general.

3.3.1 Data

Data on executive directives were collected in waves. First, we began by gathering all publicized executive orders, proclamations, and memoranda from the White House's

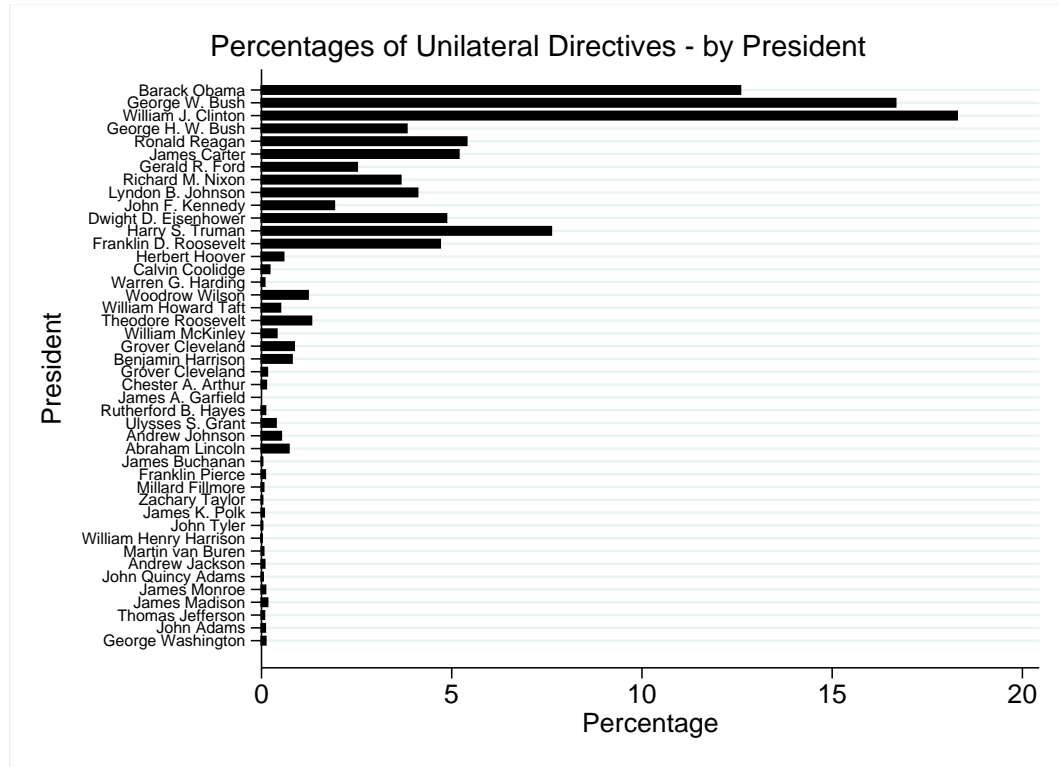
website and the *Federal Register*. Data available of these sources vary across administrations. For instance, online data from the White House is limited to Obama's directives, while the online version of the *Federal Register* contains only published directives dating back to 1993. We supplemented the unilateral directives dataset with those from the American Presidency Project. To ensure the completeness of our executive orders data, we merged our data with those by Warber (2006). In total, our dataset contains 15,307 individual unilateral directives and consists of: (1) signing statements; (2) memoranda; (3) proclamations; (4) presidential notices; (5) executive orders; (6) presidential determinations; and (7) statements of administration policy. In sum, our dataset comprises one of the most comprehensive compendiums of all publicly available unilateral executive directives issued from Washington to Obama.⁷

Figure 3.1 summarizes the distribution of the unilateral directives dataset by president. Not surprisingly, the majority of the data are from FDR onward. In particular, based on Figure 3.1, we see three distinct groups of trend. First, and prior to the FDR administration, record-keeping of executive decisions is questionable at best. Thus, while our dataset does contain unilateral decisions from Washington to Hoover, we remain skeptical regarding the totality of decisions in the early period. Second, we see a period from the FDR administration to George H.W. Bush where unilateral activity is high. Last, the administrations of Clinton, Bush II, and Obama stand out in contrast to earlier administrations. While we cannot speak to the exact reason for the dramatic increase in unilateral decisions beginning with the Clinton administration, it is without question that Clinton, Bush II, and Obama are more active unilaterally than their predecessors and that the usage of unilateral directives

⁷As various scholars have noted, some executive directives remain unknown to the public. Though the Federal Register Act (1935) requires presidents to publicize executive orders and proclamations. Various directives - executive orders, in particular - only became public knowledge years after they were issued. Some remain "hidden" to this day. Further, presidents are not required to publish memoranda in the Federal Register. For these reason, while we were able to record examples of unilateral executive decision-making as far back as the Washington administration, we cannot be certain of the completeness of the data prior to 1935. Nonetheless, our dataset still represent the comprehensive analyzed to date.

for policymaking has increased over time.

Figure 3.1: Percentages of Unilateral Directives - by President



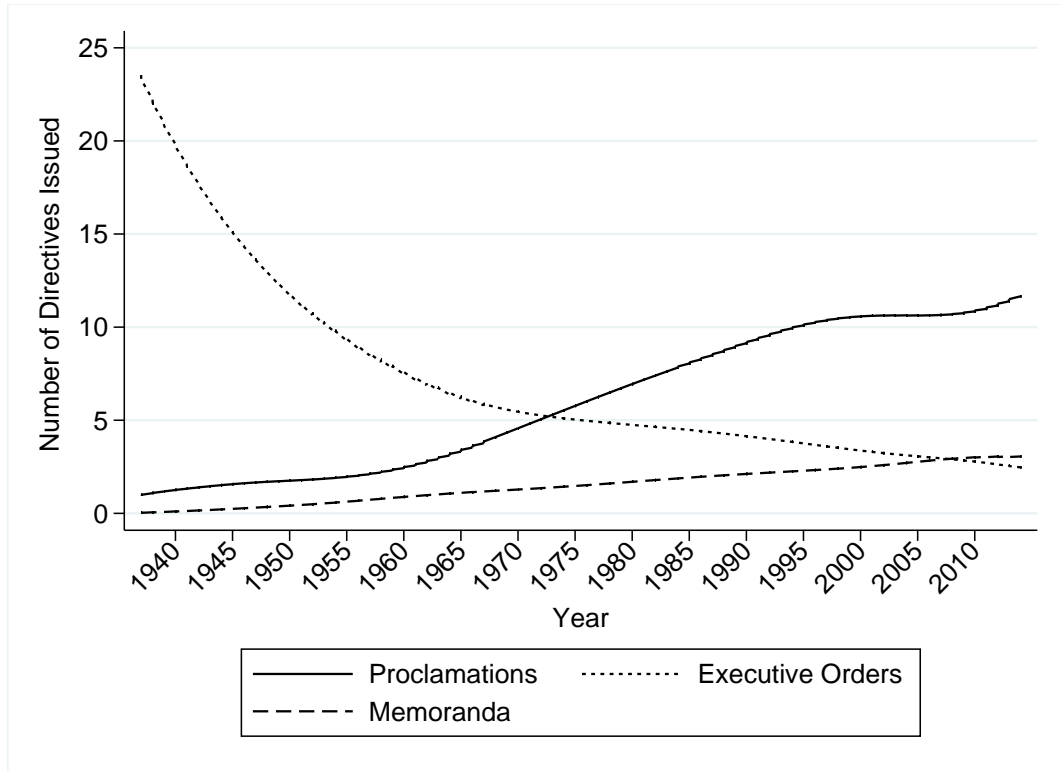
This figure presents the distribution of the unilateral directives dataset by president.

Figure 3.2 illustrates trends in three of the most numerous unilateral directives in our dataset: presidential executive orders, proclamations, and memoranda from 1935 to 2014.^{8 9} As the graph depicts, there are systematic differences in how each type of directives were employed over time. For executive proclamations, there is a gradual, almost linear, increase in the number of proclamations issued from 1937 onward. This gradually increasing pattern is similar for memoranda, albeit much less dramatic than proclamations. In contrast, the trend in executive order usage,

⁸For presentation reasons, we elected to only present three of the 7 types of unilateral presidential directives in the dataset. Primarily, Figure 3.2 serves to illustrate that a singular focus on any one of the many types of unilateral decisions potentially mask the true nature of how presidents employ unilateral power.

⁹We selected 1935 as the start date for the figure because we cannot be certain of the validity of the data prior to this date.

Figure 3.2: Trends in Monthly Executive Orders, Memoranda, and Proclamations Issued (1935 - 2014)



This figure illustrates the trends in monthly presidential executive orders, memoranda, and proclamations issued from 1935 - 2014.

after reaching its peak during the Franklin D. Roosevelt administration, declines geometrically over time.

In sum, Figure 3.2 shows that patterns in how presidents utilize executive orders, proclamations, and memoranda have changed over time. Most importantly, while it may be attractive to aggregate these directives and analyze them as the total number of unilateral actions over this period, Figure 3.2 indicates that such approaches will miss the nuanced nature of each individual type of unilateral directives. Now that we have briefly described our data and the trends in executive orders, memoranda, and proclamations, we proceed to topic coding, a discussion of the topic modeling procedures, and the software utilized.

3.3.2 The RTextTools Procedure

In this section, we provide an overview of RTextTools and its machine learning algorithms and procedures. Within the social sciences, scholars have employed content analytic strategies to yield valuable insights across various disciplines. Political scientists have used content analysis to extract important information concerning, for instance, the style and tone of Al-Qaeda leaders (Pennebaker and Chung, 2009) and policy positions (Laver, Benoit, and Garry, 2003; McGuire and Vanberg, 2005; Proksch and Slapin, 2009). However, manually coding hundreds, if not thousands, of text documents is prohibitively expensive, in terms of both time and resources required (Farganis and Wedeking, 2011).

Recently, scholars have developed a series of techniques to overcome the issue of hand-coding documents. To date, scholars have made considerable advances in both dictionary-based content analysis methods (Hart, 2001; Hart and Childers, 2004; Pennebaker and Chung, 2009; Slatcher et al., 2007) and supervised and unsupervised approaches (Hillard, Purpura, and Wilkerson, 2008; Hopkins and King, 2010; Quinn et al., 2010). With regard to text classification, supervised and unsupervised approaches allow researchers to classify various textual data into categories and/or proportions of the categories, at minimal costs. The challenge with existing methods,

however, is that they require from researchers substantial knowledge of statistics and computer programming.

To overcome these challenges, we use RTextTools, a new software that allows the use of supervised machine learning algorithms for classification without requiring researchers to have technical expertise in computer science and computer programming (Jurka et al., 2012). “...RTextTools is designed as a one-stop-shop for conducting supervised learning with textual data” (Jurka et al., N.d., 1). In short, RTextTools provides easy access to supervised machine learning for a novice user, while maintaining the capability for an advanced user to conduct more refined analyses.

Before discussing the specific procedures for using the software, we begin with a quick explanation of the format of the initial dataset and computing power required to conduct analysis using RTextTools. First and foremost, RTextTools accepts data from an Access, CSV, or Excel file, where at a minimum the initial data file matrix must be of size $N \times 3$ (N rows and 3 columns). Each row corresponds to a single text document; thus, one column within the initial dataset should contain the name of document of interest. Another column in the initial dataset should contain-at least for the portion of the total text documents used as the “training set” - the category classification to which each document belongs. Human coders manually code the text documents used as the “training set.” The last of the three minimum columns should contain the text used for the analysis. This can be the title of the documents of interest, segments of individual documents, or entire documents themselves. Turning now to the computing power required to run RTextTools, paraphrasing Jurka et al. (N.d.), users with a minimum of 4GB of memory on their computers can run RTextTools on medium to large-sized dataset (i.e., approximately 30,000 texts). For users with larger datasets, RTextTools is compatible with cloud computing services, such as Amazon EC2.

RTextTools implements the supervised machine learning procedure in a ten-

step process. However, if users are only interested in using RTextTools for text classification, and not in performance evaluations, one can skip steps seven through nine and go directly to the last step, exporting the results to a CSV file. To begin using RTextTools for text classification, one starts with the installation of the RTextTools package in the open-source software R. As with other R packages, RTextTools is available via the Comprehensive R Archive Network (CRAN) package repository. To install RTextTools, one uses the `install.packages()` command from within R 2.13+, as with any other CRAN packages.

Once RTextTools is installed in R, the user can then import data. Further, using the `tm` package, the user then generates a document-term matrix. At this point, several pre-processing options are available, including removing whitespace, removing sparse terms, removing stopwords, and stemming. Moreover, these procedures extend beyond the English language to languages such as Danish, Dutch, Finnish, French, German, Norwegian, Portuguese, Russian Spanish, and Swedish.

After the user pre-processes the texts and generates a document-term matrix, the matrix is then partitioned into a corpus, to include telling RTextTools the size and location of both the training set and the test set. For instance, if there were a total of 1,200 text documents in the initial dataset, and the training set is composed of the first 500 documents—i.e., the researcher had manually coded the first 500 documents with respect to the category that each document belongs—one would input into RTextTools the knowledge that documents 1 through 500 is the training set, and that documents 501 through 1,200 is the test set. Lastly, the user must tell RTextTools whether the test set is a “virgin” set. A virgin set means that the researcher has no prior knowledge of the documents within the test set—i.e., the researcher has not already classified into categories the documents within the test set. The purpose of the RTextTools, then, is to use the information contained within the training set to classify the “unknown” documents in the test set.

Now that the user has partitioned the matrix into a corpus, the fourth step would be to train the computer algorithms provided—Support Vector Machine (SVM); Supervised Latent Dirichlet Allocation (SLDA); BOOSTING; Bootstrap Aggregating (BAGGING); Random Forest (RF); Net-regularized Generalized Linear Models (GLMNET); Neural Network (NNET); Decision Tree (TREE); and Maximum Entropy (MAXENT)—on the corpus. Following the training step where the nine computer algorithms learn using the training set, the fifth step is to classify the documents in the test set. RTextTools will return the results of the classified data in a matrix, where the columns are the results based on each algorithm.

As with any content analysis methods where computer algorithms play significant roles in the analyses (Hillard, Purpura, and Wilkerson, 2008; Hopkins and King, 2010; Quinn et al., 2010), it is useful to interpret the results as well as to ascertain their validity. In Step 6, RTextTools provides a function to help users understand their data by “...return[ing] a container with three different summaries: by label (e.g., topic), by algorithm, and by document” (Jurka et al., N.d., 2). For users not particularly concerned with RTextTools’s performance compared to human coders, one can stop after completing Step 6.

To continue the last 4 procedures provided in RTextTools, and to assess performance evaluation, the user must have had coded and classified those documents in the test set. Step 7 allows users to evaluate individual algorithm accuracy using the following formula:

$$\text{RecallAccuracy} = \frac{tp}{tp + fn}, \quad (3.1)$$

where the true positive tp observations are the number of documents correctly classified and the false negative fn observations are the number of cases that are incorrectly classified.

Following the evaluation of the accuracy level for individual computer algorithms, the user can also assess whether ensemble agreement enhances accuracy. En-

semble agreement refers to whether multiple algorithms make the same prediction regarding the category to which a text document belongs. This step can be of particular importance, given that others have found that an ensemble approach performs better than any single algorithm (Hillard, Purpura, and Wilkerson, 2008). Further, as 90% intercoder reliability seems to be the gold standard in the social sciences, Collingwood and Wilkerson (2011) found that when four algorithms agree on the label of a text document, “. . . the machine label matches the human label over 90% of the time” (3). Given that a combination of different computer algorithms—i.e., an ensemble approach—provides higher accuracy, users could in theory prefer one algorithm over another to include in the ensemble. In that case, RTextTools provides a command to perform cross-validation regarding the accuracy of each algorithm. This allows users to ascertain the accuracy of each algorithm, as well as to choose, if necessary, the specific algorithms to include in the ensemble. To complete this discussion of the RTextTools procedures, the last step is to export the data. To continue further analyses of the data, one can export the results to a CSV file.

3.3.3 Model

In this section, we describe the setup of topic modeling conducted using RTextTools. All results shown below were conducted utilizing *term frequency inverse document frequency* variant of text analysis. In Table 3.1, we provide the topic codes used in the topic models, along with examples of directives that are in each issue area; these codes are adopted from the Policy Agendas Project. For the training set, we take advantage of the topic coding that already exists for executive orders, from the Policy Agendas Project. These data represent an excellent source for the training set. First, previously coded executive orders span the length of our dataset. Thus, we are able to account for the extent to which the wording of directives has changed over time. Second, presidents have used executive orders to address a myriad of issue areas. To

Table 3.1: Topic Classification Categories (with Examples)

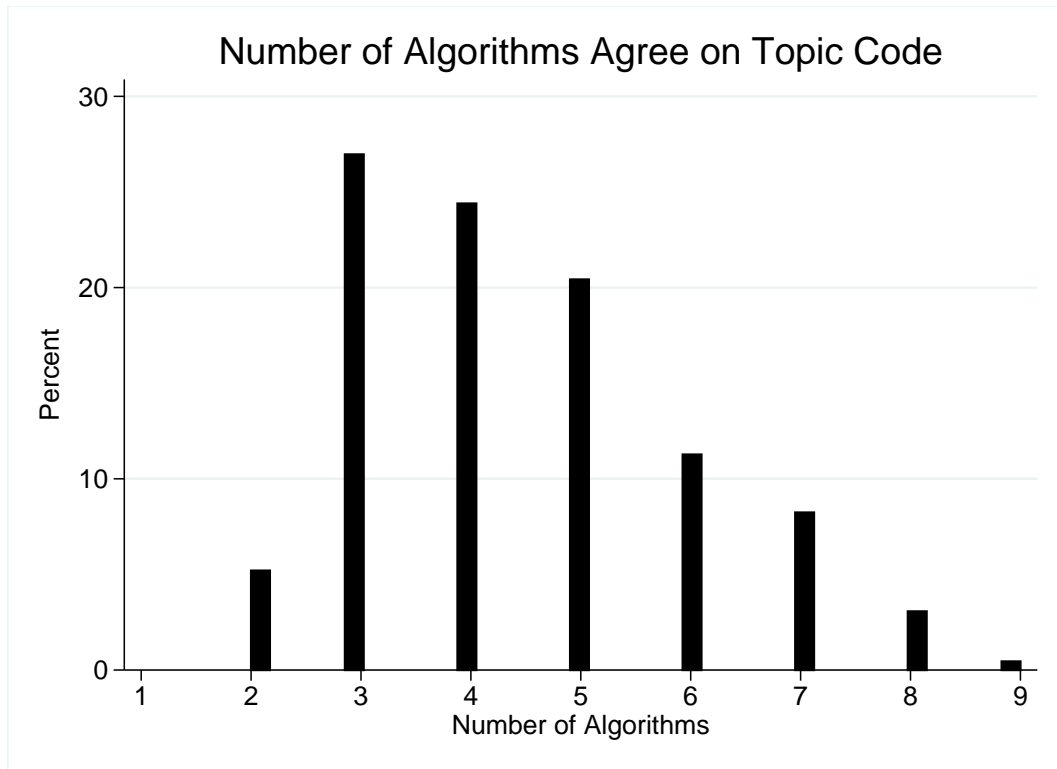
Code	Topic	Examples
1	Macroeconomics	Memorandum on Biofuels and Rural Economic Development
2	Civil Rights, Minority Issues, and Civil Liberties	Establishment a White House Council on Women and Girls
3	Health	Memorandum on Medicare Demonstration to Test Medical Homes in Federally Qualified Health Centers
4	Agriculture	Statement on Signing the Farm Security and Rural Investment Act of 2002
5	Labor, Employment, and Immigration	Notification of Employees Rights Concerning Payment of Union Dues or Fees
6	Education	Actions to Improve Low-Performing Schools
7	Environment	Memorandum on a 21st Century Strategy for America's Great Outdoors
8	Energy	Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use
9	Immigration	Assignment of Functions Relating to Arrivals and Departures from the United States
10	Transportation	Memorandum on Aviation Screening Technology and Procedures Review
11	Law, Crime, and Family Issues	Memorandum on the White House Task Force on Middle-Class Working Families
12	Social Welfare	President's Commission to Strengthen Social Security
13	Community Development and Housing Issues	Memorandum on Inventory of Federal Service Opportunities and Regulatory Barriers to Community and Other Service Activities
14	Banking, Finance, and Domestic Commerce	President's Advisory Council on Financial Capability
15	National Defense	Optimizing the Security of Biological Select Agents and Toxins in the United States
16	Space, Science, Technology, and Communications	Memorandum on Scientific Integrity
17	Foreign Trade	National Export Initiative
18	International Affairs and Foreign Aid	Memorandum on Foreign Assistance to Armenia, Azerbaijan, and Tajikistan
19	Government Operations	Proper Consideration of Small Entities in Agency Rulemaking
20	Public Lands and Water Management	Statement on Signing the Omnibus Public Land Management Act of 2009

This table lists the topic classification scheme for unilateral actions, with examples. *Sources:* Policy Agendas Project.

the extent that it is possible to assess beforehand, executive orders are indicative of the types of issues that presidents address via unilateral action. Last, we have done extensive validation of this data. By all indications, the executive orders will work well as the training data.

3.3.4 Results

Figure 3.3: Number of Algorithms Agree on Topic Code



This figure presents the level of ensemble agreement using RTextTools. Collingwood and Wilkerson (2011) find that when four algorithms agree on a label, the machine label matches human coders over 90% of the time. In addition, having three algorithms agree represents the best compromise between coverage and accuracy, approximately 85% for both.

In this section, we provide the results of the topic modeling using RTextTools. We begin with algorithm agreement. Figure 3.3 presents the ensemble summary of the nine algorithms, based on the analysis conducted in RTextTools. Overall, the results are very positive. As Collingwood and Wilkerson (2011) note, when four

algorithms agree on a label, the machine label matches human coders over 90% of the time. In addition, while a 4 algorithm agreement matches the 90% intercoder reliability coveted in the social sciences, having three algorithms agree represents the best compromise between coverage and accuracy. Approximately 96% of all directives in the test set have three or greater number of algorithms agreeing on the label. 70% of directives in the test set have four or more algorithms agreement on topic code.

Now that we established that topic modeling via RTextTools has performed sufficiently within established norms of accuracy, where and in what issue areas have presidents utilized executive directives? Figure 4 presents the results of RTextTools on unilateral directives.¹⁰ By far, presidents issue most directives to address concerns in government operations (code = 19) and in national defense (code = 15). Approximately one-third (36.80%) of all directives from Washington to the end of Obama's first term in office deal with government operations. These are largely mundane concerns with governing a large executive branch, including, for instance, a memorandum on regulatory coordination amongst federal agencies,¹¹ an executive order on the management of federal legal resources,¹² and a memorandum on assigning reporting functions to fulfill obligations under the Supplemental Appropriations Act of 2009.¹³

Closely following government operations unilateral directives is executive decisions regarding national defense. 30.55% of all directives address areas dealing with

¹⁰Because directives relating to government operations, national defense, and international affairs and foreign aid dominate Figure 3.4, we also provide a revised version of the figure in Appendix A, excluding these directives in these three areas. This figure illustrates a more refined version of the distributions of directives across different issue areas, while excluding the top three dominating topic areas.

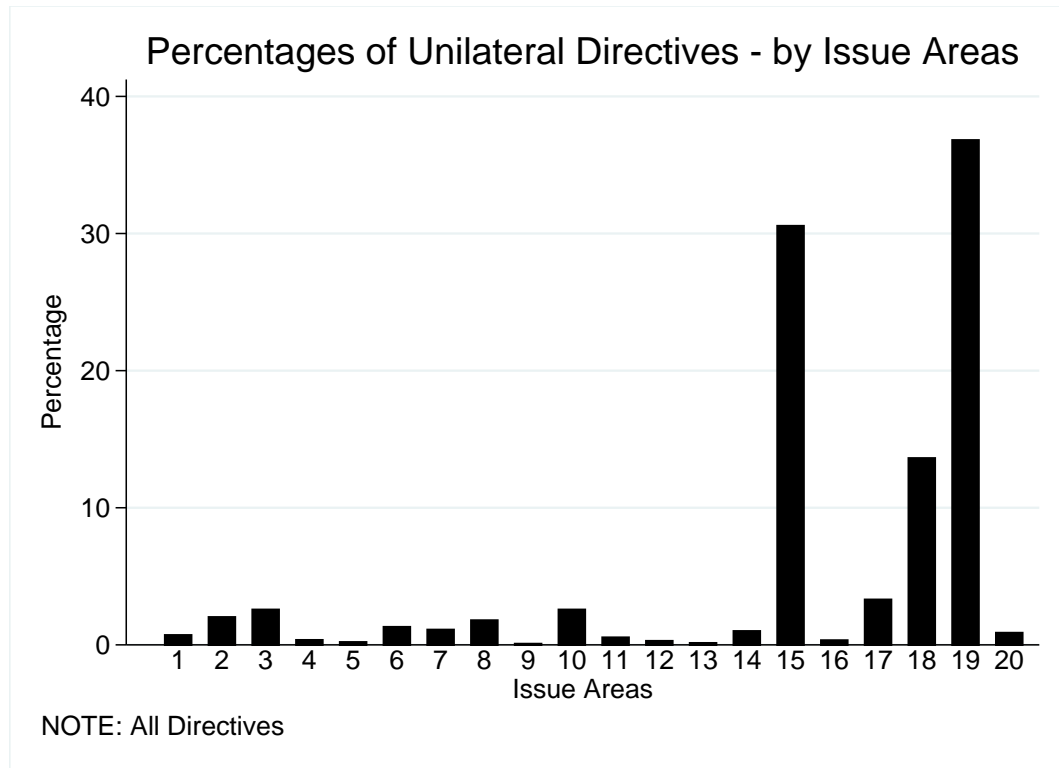
¹¹George Bush: "Memorandum on Regulatory Coordination," January 28, 1992. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. [Link to Webpage.](#)

¹²Jimmy Carter: "Executive Order 12146 - Management of Federal Legal Resources," July 18, 1979. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. [Link to Webpage.](#)

¹³Barack Obama: "Memorandum on Assignment of Reporting Functions Under the Supplemental Appropriations Act, 2009," July 17, 2009. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. [Link to Webpage.](#)

national defense. Examples include a memorandum addressing classified information regarding the Air Force’s base near Groom Lake, Nevada¹⁴ and Executive Order 10909, which amends Executive Order 10865, dealing with the safeguard of classified information within U.S. industries.¹⁵

Figure 3.4: Percentages of Unilateral Directives - by Issue Areas



This figure presents the results of RTextTools on unilateral directives. See Table 3.1 for list of topic categories. By far, presidents issue most directives to address concerns in government operations (code = 19) and in national defense (code = 15).

While we do not present the breakdown of unilateral directives by issue areas by president, we provide figures depicting this information in Appendix B. Two points are important. First, based on the results here and those in Figure 3.2, the use of

¹⁴George W. Bush: “Memorandum on Classified Information Concerning the Air Force’s Operating Location Near Groom Lake, Nevada,” September 18, 2001. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. [Link to Webpage.](#)

¹⁵Dwight D. Eisenhower: “Executive Order 10909 - Amendment of Executive Order 10865, Safeguarding Classified Information Within Industry,” January 17, 1961. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. [Link to Webpage.](#)

unilateral directives has definitely increased over time. Second, and more importantly, the scope of unilateral presidential decision-making has also increased. Many sources now point to Theodore Roosevelt as the administration whereby unilateral directives came into maturity as an important executive policymaking tool (Dodds, 2013). Though not able to directly confirm Dodds's (2013) assertion, we do however find some evidence for it. Theodore Roosevelt, though he may not have been the most unilaterally active of his era, certainly implemented policies across a whole host of different issue areas while in office. After a brief hiatus during the Harding and Coolidge administrations, the use of unilateral directives across multiple issue areas persists to this day.

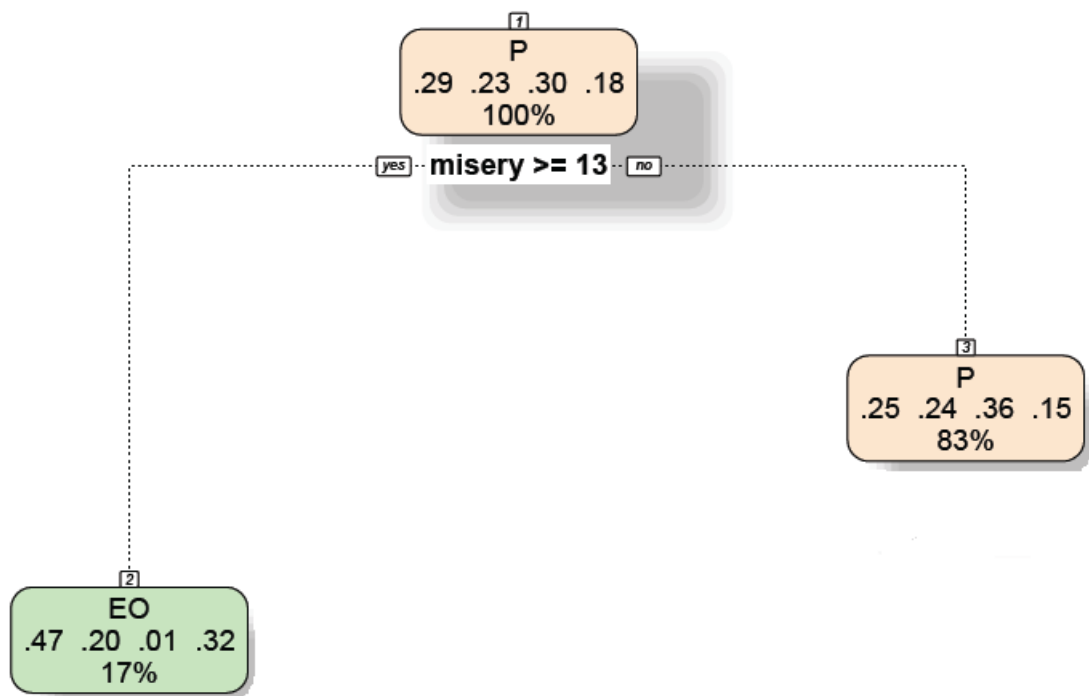
3.4 Stratifying Unilateral Presidential Directives Using Decision Trees: A Nuanced Exploration

As the last section illustrates, not only has there been a marked increase in the number of unilateral directives over time, presidents now apply their unilateral decision-making capabilities to an ever-widening range of policy areas. One question, however, still remains. Under what conditions do presidents issue such directives? Do presidents issue different types of unilateral directives under different political and environmental conditions? For instance, suppose the executive wishes to direct the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and other federal agencies to adopt certain policies regarding gun violence and gun control. Will the executive issue an executive order directing the ATF to do so, or, when facing a different set of circumstances, issue a presidential memorandum? In other words, what explains the types of unilateral directives issued?

In this section, we address these questions by analyzing all publicly-available unilateral directives from 1973-2012 using decision trees. A decision tree is a predictive modeling tool commonly used in machine learning to explore the relationship

between a target variable and a set of input variables, or features. It can be used to visually and explicitly model decisions and the decision-making process. For our purposes, we use a type of decision tree called classification trees, which are used when the target (dependent) variable consists of only finite number of values.¹⁶ For each directive decision, we predict the most commonly occurring type of directives in the region to which it belongs. The unit of analysis is a directive.

Figure 3.5: Example Decision Tree



This figure depicts an example decision tree. The three important components of a decision tree are: (1) internal codes; (2) branches; and (3) terminal codes (or branches).

Applying decision trees to unilateral presidential directives is useful and relevant for several reasons. First, tree-based methods are simple and easy to interpret, even for a novice. Consider the following example. Figure 3.5 depicts a visual representation of a decision tree¹⁷ of predicting types of unilateral directives using one input

¹⁶In the case here, our target variable consists of four possible values, each representing: (1) signing statements; (2) memoranda; (3) proclamations; and (4) executive orders.

¹⁷Visually, there are three main components: (1) terminal nodes (or leaves); (2) internal nodes

variables, the economic misery index. To begin, the first split of the dataset occurs at the top of the tree. In this instance, and since this is the first split, the first internal node contains 100% of the dataset, where 29% of the total data are comprised of executive orders, 23% are memoranda, 30% are proclamations, and 18% are signing statements. At each node, the predictive model will predict the most likely class, based on the distributions of the classes at that node. In the case here, since proclamations represent the highest proportion of all four types of unilateral directives at this node, the model predicts proclamation as the most likely prediction. Based on the splitting rule, the algorithm branches the data into two terminal nodes. The left node represents all directives that were issued when the economic misery index is greater than or equal to 13; 17% of all directives fall into this category where the most likely category is executive order.¹⁸ In contrast, the model would predict that presidents issue most proclamations when the misery index is less than 13.¹⁹

Second, many argue that decision trees more closely resemble human decision-making processes than do other classification methods.²⁰ For instance, various works in psychiatry and medical sciences indicate that heuristics decision-making are not only surprisingly accurate but also mimic real-world decisions (?). In an environment where the executive must make timely decisions under constant duress, heuristics become important when making critical decisions under time and information constraints. As ? note, "...people tend to rely on heuristics that can make better and faster decisions than complex, information-greedy strategies" (86-87). In sum, because decision trees make splitting decisions one input variable at a time, decision trees are useful because they are considerably easier to interpret than other methods

(where the splits occur); and (3) branches (the segments that connect the nodes). Trees are typically drawn upside down, in the sense that the leaves are at the bottom of the figure.

¹⁸This terminal node contains 17% of the dataset, where 47% of the data are comprised of executive orders, 20% are memoranda, 1% are proclamations, and 32% are signing statements.

¹⁹This terminal node contains 83% of the dataset, where 25% of the data are comprised of executive orders, 24% are memoranda, 36% are proclamations, and 15% are signing statements.

²⁰For an extended discussion, see Section 8.1 in (Gareth et al., 2013).

and better mimic real-world decisions.

3.4.1 Data

The explanation most commonly provided in the literature regarding why presidents use unilateral action is that it depends on whether there is unified or divided government. Yet the theoretical implications of divided government are quite confusing. One would expect that during periods of divided government presidents would have greater incentives to act unilaterally than they would during unified government, when the power to persuade is at its highest point. Yet Howell's (2003) analysis of the unilateral presidency indicates that executive action actually decreases during periods of divided government. Many other studies report conflicting evidence on this point. Some of this variation in findings may be explained by the measures that are employed. Some studies employ a dummy variable to represent the presence or absence of divided government, while others use the actual seats controlled by the presidents or the opposition's party in the House and/or the Senate. Theoretically speaking, the problem with each of these measures is that the effects of divided government have changed over time.

Let's take an historical example to demonstrate this point. From 1957 to 1959 the seat split in the House of Representatives was 234 Democrats, 199 Republicans and 2 Independents. With Eisenhower, a Republican in the White House, this meant that the opposition party Democrats controlled 35 more seats than the Republicans. Between 2013 and 2015 the split in the House was 201 Democrats and 234 Republicans.²¹ With Barack Obama, a Democrat in the White House, the opposition Republicans controlled 33 more seats than the Democrats. If we use either a dummy variable or seats controlled by the two parties, these two situations appear to

²¹These numbers are approximate because the number of seats can change during a Congress' two-year session, as some members depart for various reasons and are replaced by new members, often of another political party.

be comparable. Yet, Eisenhower had far greater success in passing legislation than did Obama - (Eisenhower 52.9 percent Congressional Quarterly success score; since we do not yet have data for 2013-2015, Obama's CQ rating for 2011-2012 is instructive: in 2012 Obama "won only 15.5 percent of House call votes on which he expressed a position" (Bond, Fleisher and Cohen, Forthcoming). On the other hand, during his first two years in office Obama's success rate as measured by Congressional Quarterly was 96.7 in the Senate and 94.4 in the House,²² higher scores than even Eisenhower achieved (an 89.2 percent combined CQ score) during his first two years under unified government. So how did the political dynamic change over time?

One obvious answer is that the two parties are now far more ideologically divergent than they were in the late 1950s. In the House, Eisenhower had the ability to reach across the aisle for conservative Democratic votes, while Obama had difficulty attracting any Republican votes at all. Likewise, during Obama's first two years in office strict party line voting, particularly on major issues, was prevalent. With majorities in the House and the Senate, Obama was able to pass many of his legislative initiatives.

The political situation in the Senate has changed perhaps even more so than in the House. While from 1957-1959 Eisenhower confronted Democratic control of the Senate by a narrow margin (49 to 47), Obama in 2013-2015 had a Democratic majority (53 to 45, with 2 Independents, both generally siding with the Democrats). Yet, despite the apparent seat advantage, it was actually more difficult for Obama to secure the Senate's approval because of the increased threat of a filibuster by the political opposition. During Eisenhower's presidency cloture votes occurred just 0.2 percent of the time. Under Obama cloture-related votes occurred 33.5 percent of the time (Bond, Fleisher and Cohen, Forthcoming). Eisenhower could still negotiate with conservative Democrats to pass legislation he preferred, while Obama's ability to

²²<http://www.brookings.edu/blogs/up-front/posts/2010/01/13-obama-congress-binder>

negotiate was negligible. As this example demonstrates, divided government may be a poor proxy measure for a presidential interaction with Congress because it cannot account for changes in the nation's political dynamics over time.

While we acknowledge the various problems associated with the measure, divided government remains an important variable in our models. Yet, the fact that different studies suggest that the divided government has both a negative and a positive impact on the presidential propensity to issue unilateral action suggests that it is important to uncover a more exacting influence of divided government on executive unilateralism. We do so by including two separate measures of divided government in the models: (1) a binary variable coded 1 if the presidency and the House is controlled by different political parties and (2) a binary variable coded 1 if the presidency and the Senate is controlled by different political parties. Our intent is to capture the differing influences in which the House and the Senate, respectively, impacts unilateral executive decision-making.

In addition to divided government, we also examine the potential influences of various president-specific explanations. Presidential ideology is another alternative explanation for variations in unilateral action over time. Presidents with more ideological views may find it more difficult to negotiate and compromise with members of Congress. Hence, presidents who have more extreme ideological views (either left or right) should find it more difficult to pass legislation and should have greater incentives to act unilaterally. Thus, we include two separate measures to capture presidential ideology: (1) the Common Space ideology score and (2) a binary variable coded 1 if the executive is a member of the Democratic Party.

We also include other president-specific characteristics found to be important in studies of unilateral actions. They include: (1) presidential approval ratings; (2) economic misery index; (3) a binary variable to denote a president's second term in office; (4) a binary variable coded 1 if it is the president's first year in office; and (5) a

binary variable to capture a president's first six months in office. Ideally, presidential approval ratings and the economic misery index will represent environmental opportunities to make policies unilaterally. The binary variables denoting the president's second term, first year in office, and first six months in office, respectively, will capture any unilateral directives intended to reverse the policies of his predecessors, as well as any new administration policies.

3.4.2 Model

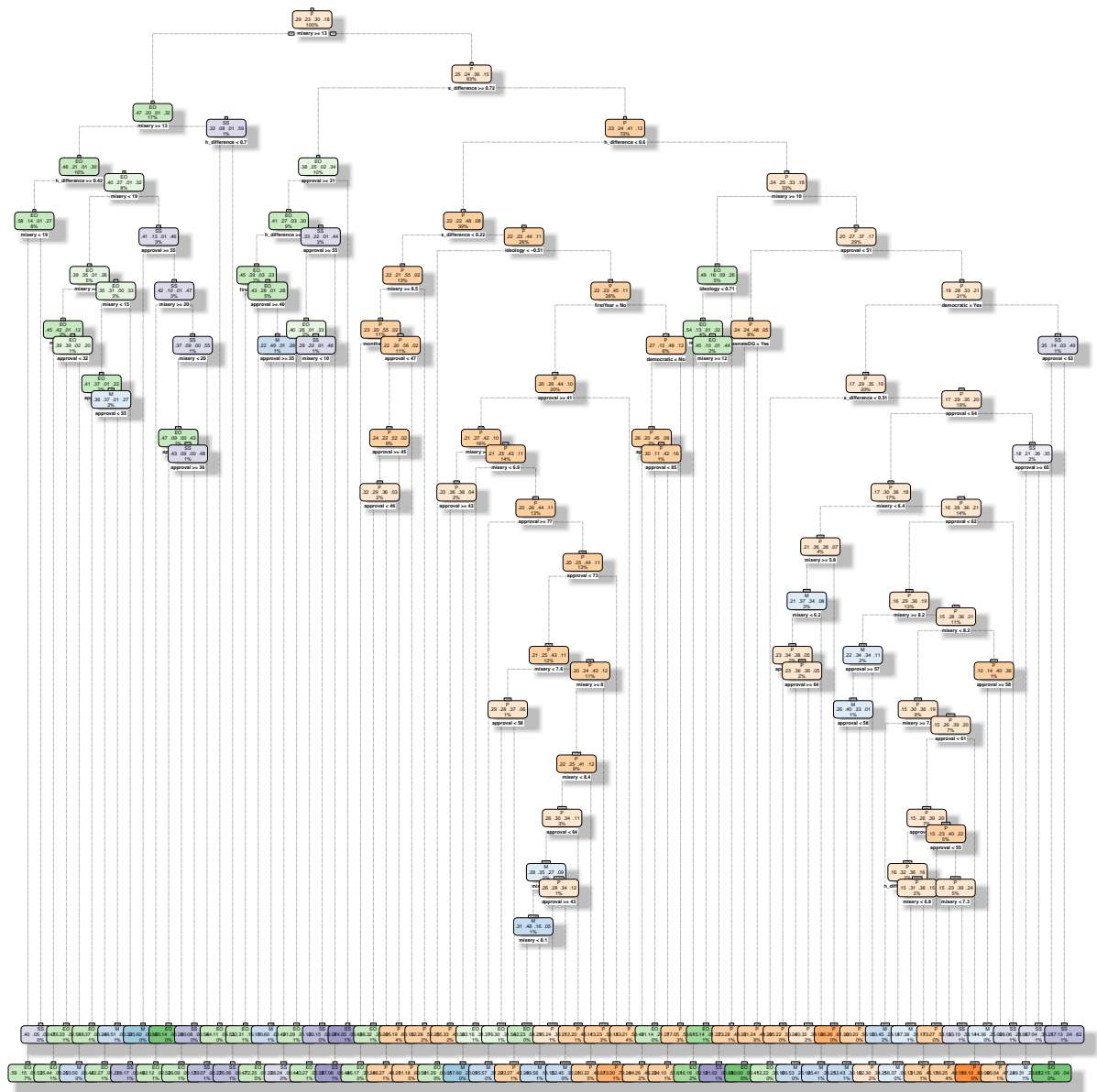
In the following section, we fit a decision tree for the unilateral presidential directives data. The primary variable of interest (or the dependent variable) is type of unilateral directives. The input variables are: (1) divided government (House); (2) divided government (Senate); (3) first six months in office; (4) second term in office; (5) democratic president; (6) presidential ideology; (7) presidential approval; (8) economic misery index; (9) ideological difference between the executive and the median member in the House; and (11) ideological difference between the executive and the median member of the Senate. We begin by fitting an initial tree. We then validate the results of the initial model using the complexity parameter and the cross validation error. Last, we fit the final pruned model based on the results of the validation process to create an optimal decision tree. All analyses are conducted using R and the `rpart` package.

3.4.3 Results

Figure 3.6 shows the results of pruned decision tree in graphical form. Counting both internal nodes where the splits occur and the terminal nodes (i.e., the end of a branch, or leaf), there are a total of 259, 415 nodes! While an in-depth discussion of every node and leaf in the decision tree is beyond the scope of this project, we are, however, able to infer several general statements about unilateral decision-making,

based on the structure of the tree and the relationships among the input variables.

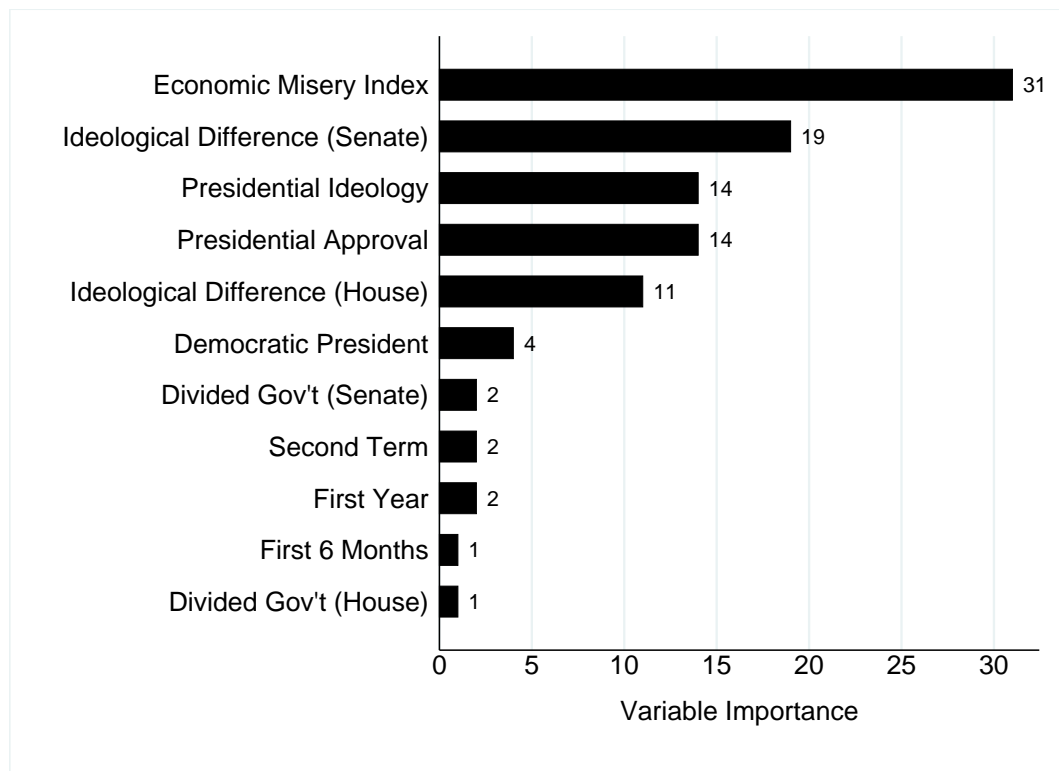
Figure 3.6: Full Decision Tree - Unilateral Presidential Directives



This figure presents the graphical version of the pruned decision tree.

First, of the 11 input variables, the most important is the economic misery index. A function of both the unemployment rate and the inflation rate, the misery index refers to economic and social costs of the nation. Higher values of the misery index translate into greater deterioration of the nation's economy. As many of the internal nodes near the top of the tree illustrate, the primary variable for many of the early splits of the data is the economy misery index. Thus, based on the initial split of the data, the bulk of unilateral directives issued from 1973 - 2012 occurred when the economy is performing poorly.

Figure 3.7: Variable Importance Plot



This figure illustrates the relative importance of the input variable in the pruned model. The most importance input variable is the economic misery index, followed by ideological difference between the executive and the median member in Senate (Common Space), presidential ideological (Common Space), and presidential approval (Gallup). Variable importance scores sum to 100.

To put the relative importance of the economic misery index on the executive's unilateral decision-making in greater perspective, Figure 3.7 illustrates the relative

importance of each input variable on the final pruned model. The variable importance score reflects each variable's contribution in classifying the target variable as either the primary or as the surrogate splitter variable. Variable importance is the sum of the goodness of split measures for each split for which it was the primary variable, plus the goodness of split times the adjusted agreement value for all splits in which the variable was a surrogate. Variable importance for all variables sums to 100.

As Figure 3.7 shows, the most important variable in the construction of the decision tree and the predicting of the types of unilateral directives is the economic misery index, with an importance score of 31. The second most important variable is the ideological division between the president and the median member in the U.S. Senate (Variable Importance Score = 14), followed closely by Common Space presidential ideology score (Variable Importance Score = 14), approval ratings (Variable Importance Score = 14), and the ideological difference between the executive and the median member in the House of Representatives (Variable Importance Score = 11). While the two divided government and the various time in administration measures are important, they are relatively weak compared to the rest of the input variables.

Lastly, while the above results tell us much about the nature of unilateral executive decision-making and the relative importance of many variables, we would like to provide an additional layer of caution about predicting the type of unilateral directives that the executive will issue. Prediction is hard! Though model validation indicates that the decision tree model fits the data well, there remains a substantial level of "misclassification." While the model is able to accurately predict the type of directives in many cases, it fails dramatically in others. To illustrate this dilemma visually, consider Figure 3.8.

Figure 3.8 presents a scatterplot of the directive's score on the first two components from a Principal Components Analysis, along with a 50% and a 95% confidence ellipses. We conducted a Principal Components Analysis of the 11 input variables on

the type of unilateral directives, and then predicted the each observation's location on the first two components.²³ The ellipses represent 50% and 95% of observations, respectively. The black squares and oval lines represent all executive orders. The green triangles and oval lines indicate presidential proclamations. The red circles and oval lines denote presidential memoranda. And the blue points and oval lines represent signing statements. The center of the ovals is marked by a plus sign, of the corresponding color.

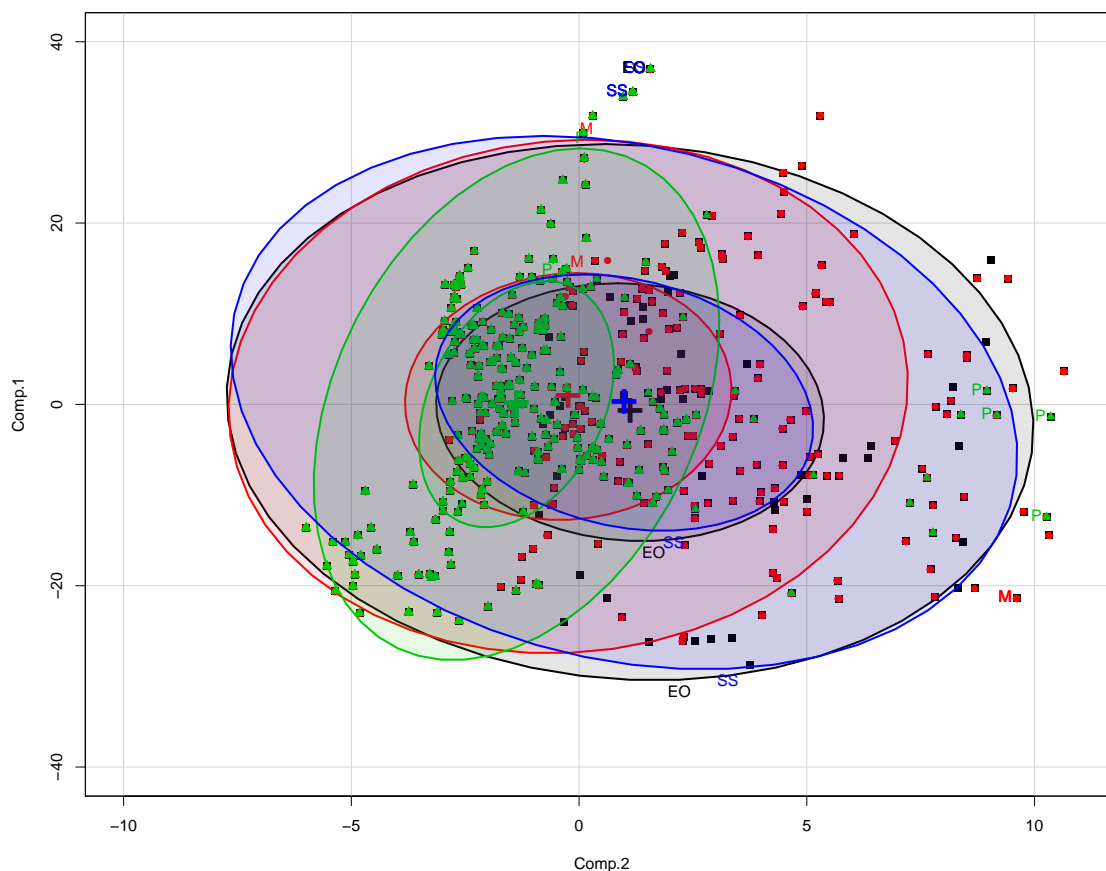
Several results stand out. First, we are glad to see that there is considerable overlap between executive orders and presidential memoranda. This is consistent with recent literature suggesting that memoranda may be replacing executive orders as unilateral tools as public awareness of executive orders has increased (Lowande, 2014). Elsewhere, Cooper (2002) also refers to presidential memoranda as executive orders by a different name. In sum, we find that both executive orders and presidential memoranda are issued under largely similar environmental conditions, suggesting the potential for presidents to issue a memorandum when they want the public to pay less attention to their potentially controversial decisions.

Second, the centers of each of the four ovals are near each other, indicating that the bulk of unilateral directives were issued under similar environmental conditions. This is especially the case for signing statements and executive orders.

We are somewhat surprised by the degree of overlap between executive orders and signing statements. Executive orders are proactive forms of unilateral directives, i.e., the president can issue executive orders directly, without consulting with, for instance, Congress. In contrast, signing statements are more reactive. They occur only when the executive wishes to respond formally to components of legislation he signed into law. One potential explanation for this phenomenon is that both executive orders and signing statements occur somewhat at random. That is, presidents cannot

²³Eigenvalues indicate that there are two principal components in the model.

Figure 3.8: Principal Components Analysis - with Confidence Ellipses



This figure presents a scatterplot of the directive's score on the first two components from a Principal Components Analysis, along with a 50% and a 95% confidence ellipse overlays. The black squares and oval lines represent all executive orders. The green triangles and oval lines indicate presidential proclamations. The red circles and oval lines denote presidential memoranda. And the blue points and oval lines represent signing statements. The center of the ovals is marked by a plus sign, of the corresponding color.

control the exact timing in which they must make unilateral decisions via executive orders. Similarly, presidents do not have full control of what and when legislation appears on their desk for signature into law.

Last, we note that shape, size, and direction of presidential proclamations differ substantially from that of other unilateral directives. This suggests that, of the four types of unilateral decisions we consider, proclamations are the most different, with

the caveat that the differences are of degrees and not necessarily by kind. This is consistent with the knowledge that proclamations now largely deal with ceremonial issues across a myriad of different topic areas. In sum, prediction of the exact form that the executive's unilateral decision will take is difficult. Nonetheless, given the extent of the overlap between the different directives, we are still able to extract valuable information regarding what may distinguish one form of directive from another.

3.5 Conclusion

Scholars have analyzed unilateral executive decisions in considerable detail. While insightful, we claim that existing works may be problematic given the singular focus of only examining a single type of unilateral action at a time. Understanding how different directives are related to one another allows us to better assess how presidents employ unilateral power and to promote greater public discussion regarding the nature of executive power in general and decision-making by executive fiat in particular.

Borrowing from machine learning strategies, we apply recently developed technique in text analysis and decision trees to examine the most comprehensive single compendium of unilateral action to date. The use of unilateral action in general has increased over time, both in terms of sheer volume and across issue areas. Broadly speaking, based on the available data at hand, we detect three distinct groups of presidents. From the administration of George Washington to that of Herbert Hoover, given the incomplete nature of the data, we are skeptical to make any strong conclusions regarding how unilateral power is utilized. Second, we see a period from the FDR administration to George H.W. Bush where unilateral activity is high. Last, the administrations of Clinton, Bush II, and Obama stand out significantly in contrast to earlier administrations. In addition, we find out that while the performance of the economy best predicts the type of directives that presidents will issue, directives, of different stripes, share as much (if not more) commonalities with each other than

they do differences. In particular, the best predictor of the type of directives that presidents will issue is the economic misery index, an indicator of national economic performance.

As with most studies, our current work raises as many, if not more, questions as it answers. We are particularly interested in those cases where the predictive decision tree model “misclassifies.” What makes this subset of, say, executive orders, distinct from other executive orders? We suspect that one potential explanation for this phenomenon is the domestic vs. foreign policy divide. Elsewhere, Marshall and Pacelle (2005) find that determinants impacting president’s ability to influence policy-making in Congress differ considerably between domestic vs. foreign executive orders. Generalizing from their results, it is conceivable that there are fundamental differences in presidential decision-making calculus when the executive contemplates domestic vs. foreign unilateral directives.

Another potential suggestion is the major vs. minor unilateral directives distinction. Not all unilateral decisions are created equally. As Howell (2003) notes, “. . . distinguish[ing] significant from insignificant orders. . . is of crucial importance, for the vast majority of executive orders, like laws, concern rather mundane affairs. . .” (78-79). It is entirely plausible that adding this extra layer of complexity to the analyses presented here will yield additional insights regarding how and when presidents set policy.

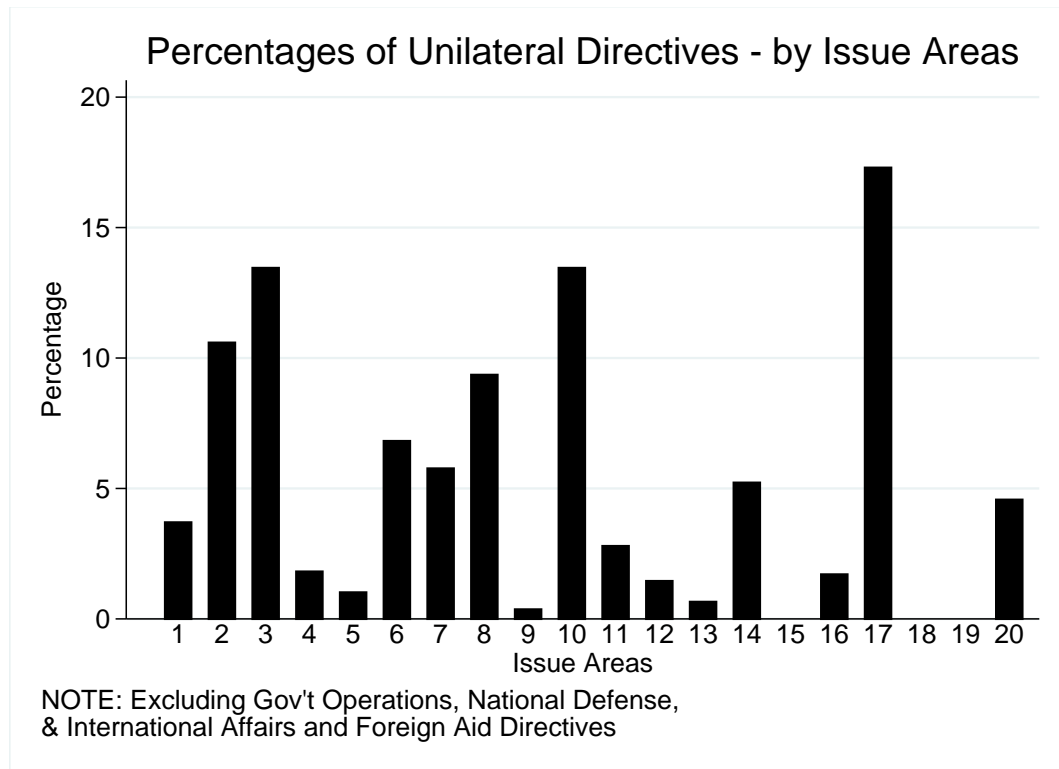
While examining these distinctions between domestic vs. foreign and major vs. minor unilateral directives are beyond the scope of this project, we hope to pursue these questions in the near future. As it currently stands, our project advances the unilateral presidency literature in two important ways. First, we note that it is important to consider both how uses of unilateral power have changed and the areas where presidents employ unilateral decisions. Second, and more importantly, we show that there are important differences and similarities across types of unilateral

directives. Future research on this topic should consider the nature of unilateral presidential directives and how the different types of directives can affect presidential behavior.

3.6 Appendix

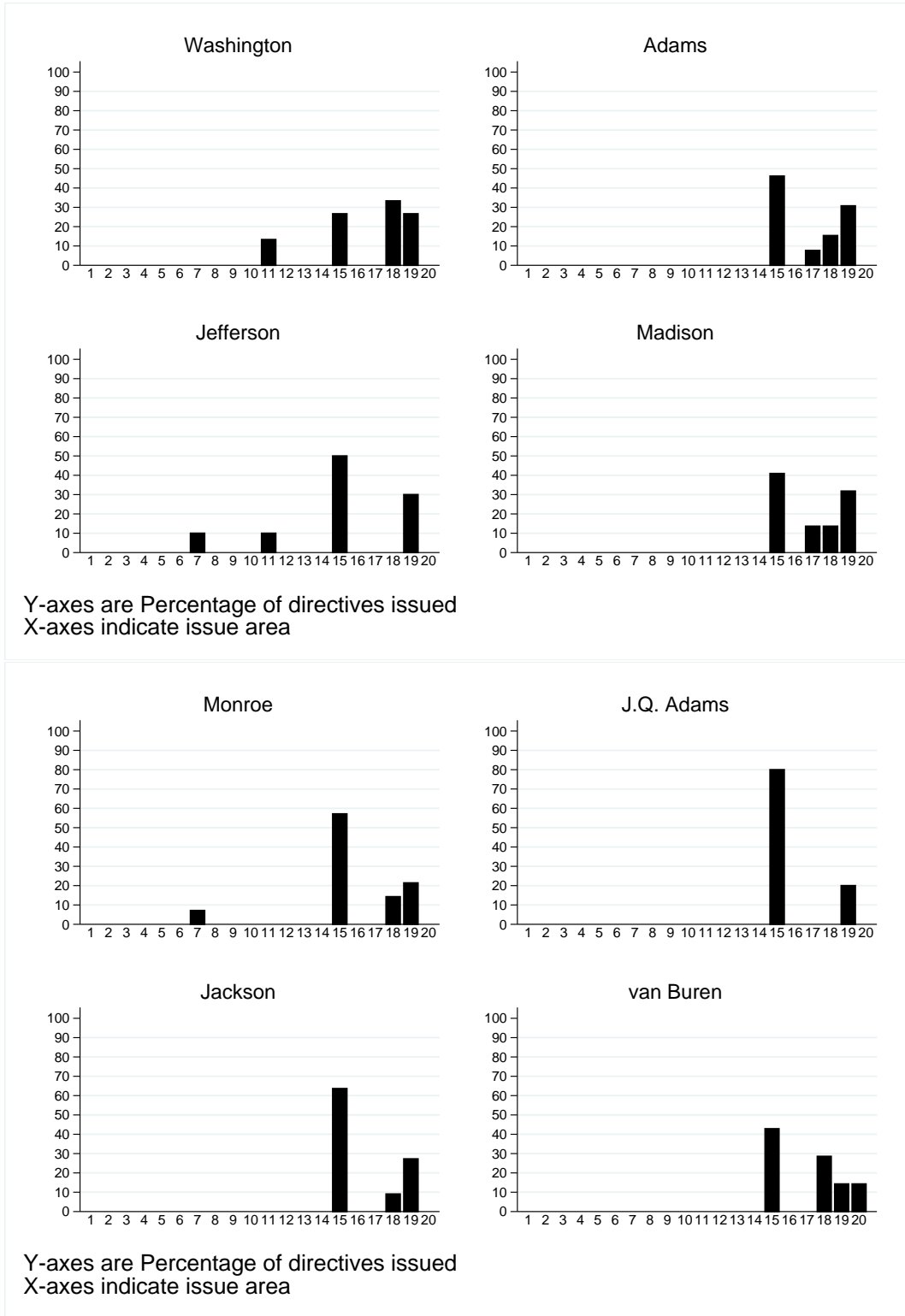
3.6.1 Percentage of Directives across Issue Areas - Excluding Government Operations, National Defense, & International Affairs and Foreign Aid

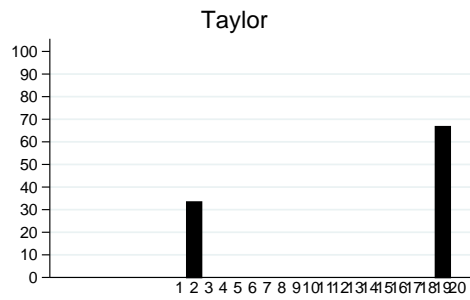
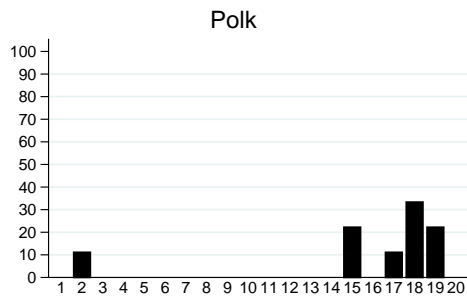
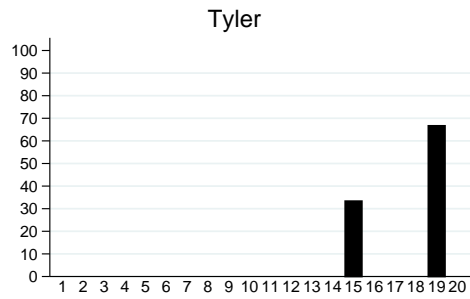
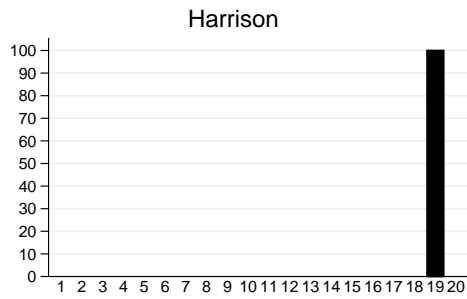
Figure 3.9: Percentage of Directives across Issue Areas - Excluding Government Operations, National Defense, & International Affairs and Foreign Aid



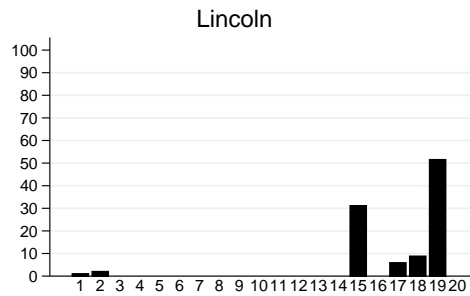
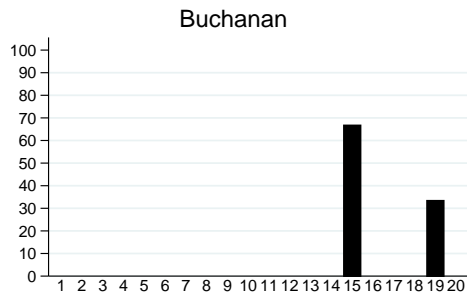
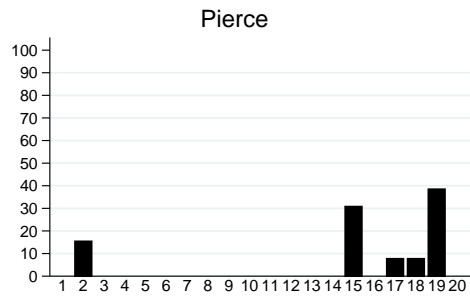
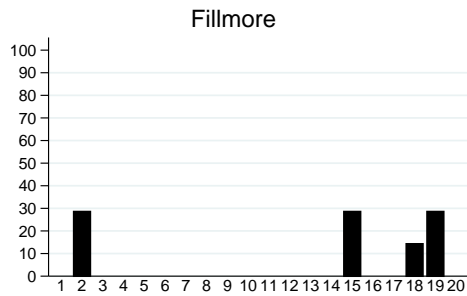
This figure presents the results of RTextTools on unilateral directives, excluding all directives relating to government operations (code = 19), national defense (code = 15), and international affairs and foreign aid (code = 18). See Table 3.1 for list of topic categories.

3.6.2 Unilateral Directives over Time - By President

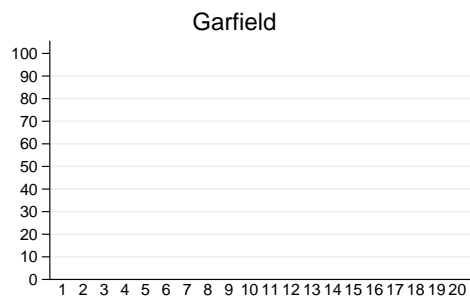
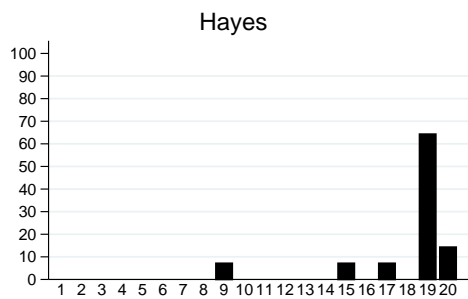
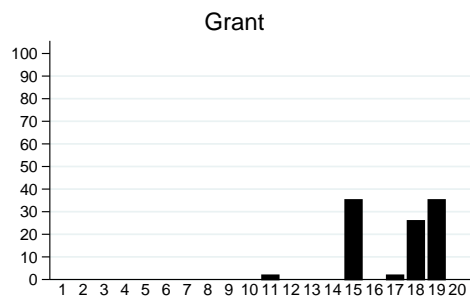
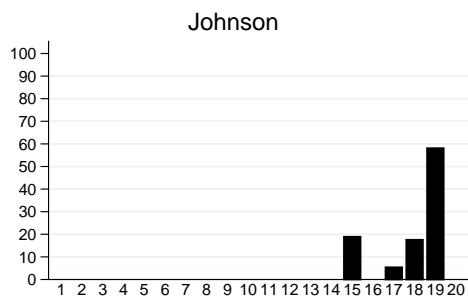




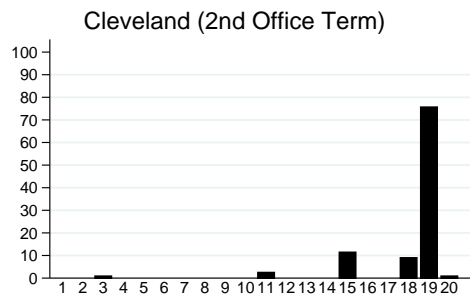
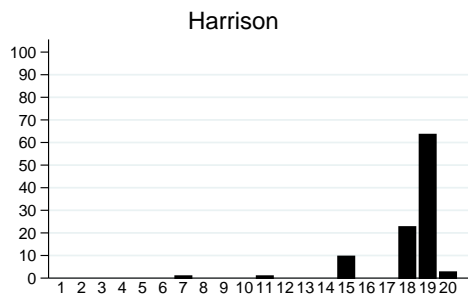
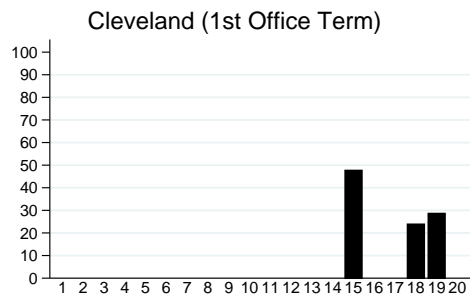
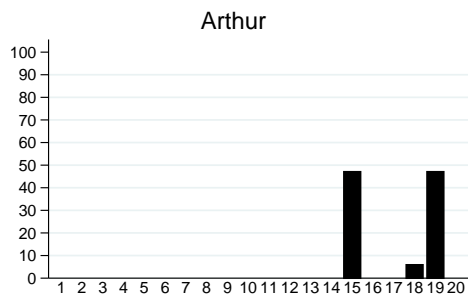
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X-axes indicate issue area



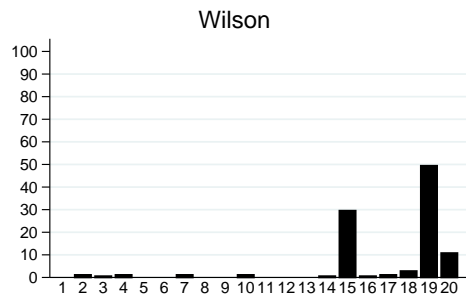
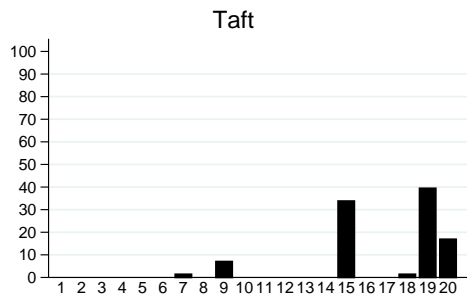
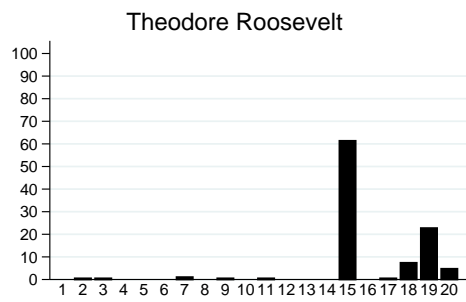
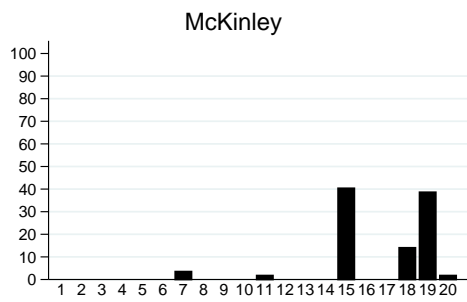
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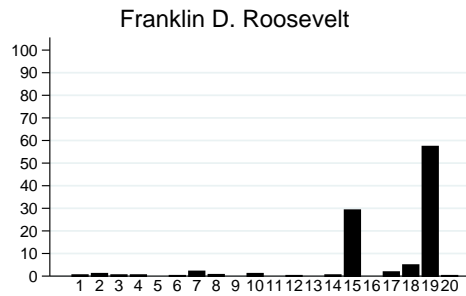
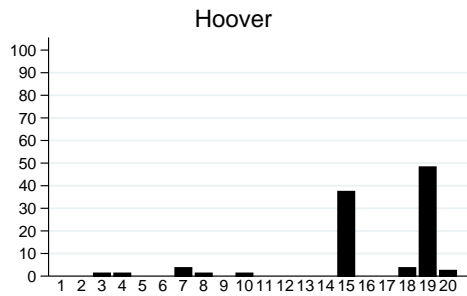
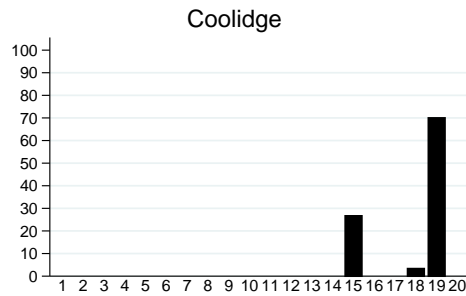
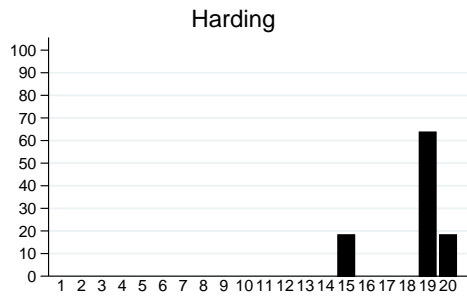
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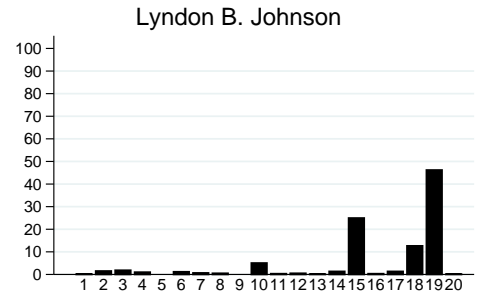
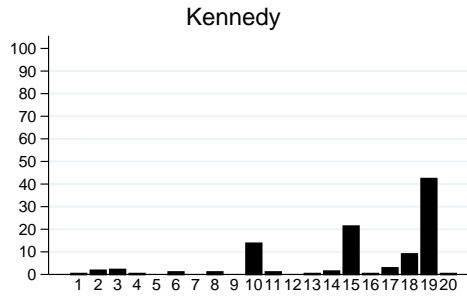
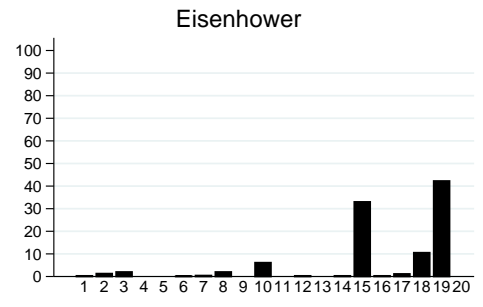
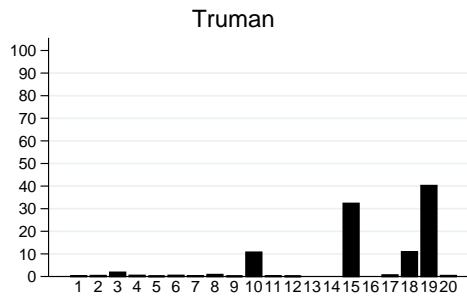
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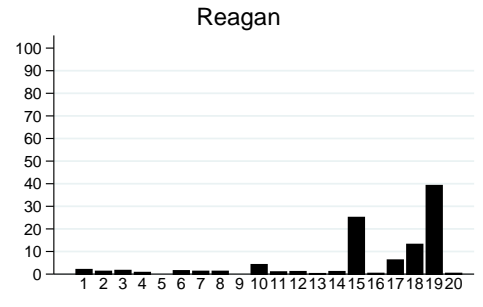
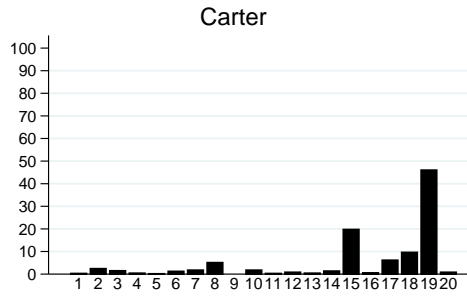
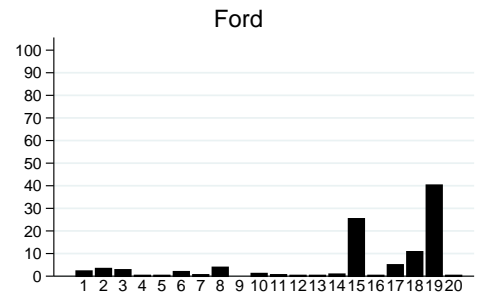
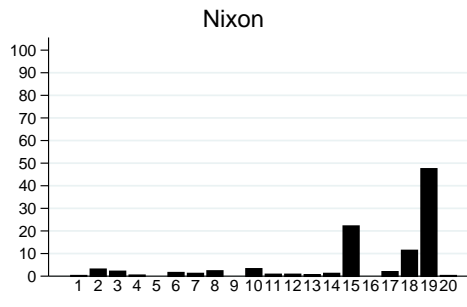
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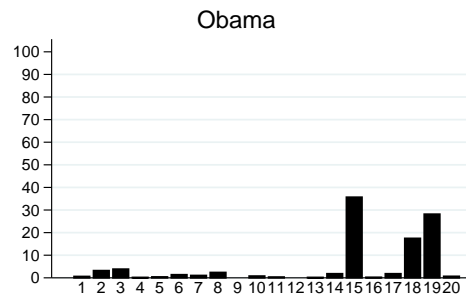
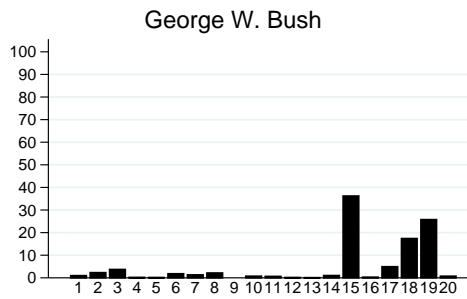
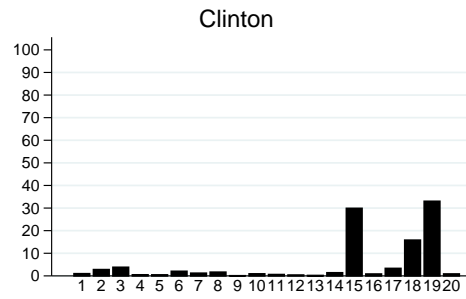
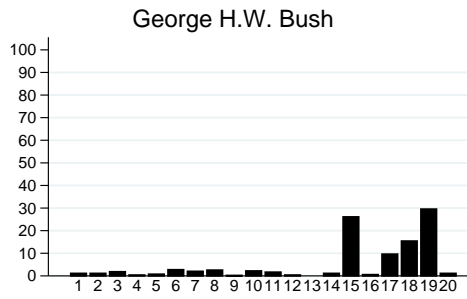
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Y-axes are Percentage of directives issued
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Y-axes are Percentage of directives issued
X-axes indicate issue area



Y-axis are Percentage of directives issued
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Awards & Grants

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