

A TRANSACTION COST APPROACH TO UNILATERAL PRESIDENTIAL  
ACTION

A Dissertation

by

MINER PEEK MARCHBANKS III

Submitted to the Office of Graduate Studies of  
Texas A&M University  
in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

December 2005

Major Subject: Political Science

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## ABSTRACT

A Transaction Cost Approach to Unilateral

Presidential Action. (December 2005)

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Chair of Advisory Committee: Dr. B. Dan Wood

Presidents have two major assets at their disposal when seeking to alter policy: executive orders and legislative action. There are certain advantages and disadvantages to each course. Although presidency scholars have focused extensively on presidential efforts in the legislative arena, little attention has been paid to how a president affects policy through direct action. Because executive orders have been under-researched, there has been a dearth of theory development that adequately explains when presidents will act unilaterally through executive orders and when they will instead seek legislative avenues to policy change.

This project develops a parsimonious theory grounded in the transaction costs framework that explains how a president chooses between seeking congressional action versus acting unilaterally through executive orders to accomplish policy change. The theory holds that when presidents desire policy change, they balance the transaction costs executive orders and legislative action present, selecting the course that presents the greatest benefit after accounting for the transaction costs present.

After outlining the theory, I test my predictions using an original data set. Each executive order from 1946 to 2004 was read and examined for policy content. Unlike most prior studies of presidential use of executive orders, this study only includes orders

that affect policy in the data analyses. The series of empirical tests provide support for my theory: Presidents consider the transaction costs that executive orders and the pursuit of legislation pose and take the action that maximizes their utility when seeking policy change

For my best friend, Kelli

## ACKNOWLEDGEMENTS

Completing a task such as this is never a job that is done by oneself. Over the course of completing this dissertation I have amassed debts to a host of individuals.

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William West will never know how important he has been in my development as a student. Since he moved to the Bush School shortly before my arrival in the graduate program, I was unable to take any seminars from him. However, the classes I took from him as an undergraduate instilled the desire to study politics generally, and more specifically how the other institutions interact with the bureaucracy. Without his classes as an undergraduate, I would probably be a lawyer today. I would likely have a greater income, but I would be much poorer in spirit.

Roy Flemming has been a tremendous asset to this dissertation. He has asked probing questions and followed them up with useful comments. I would also like to thank him for serving on my committee on such a short notice. Though he was on the committee for a short time, he helped a great deal.

George Edwards has been an inspiration to me. He always has cast a critical eye, forcing me to always think through every portion of this work. I am certain that I have

not met his standard of work, but am as certain, that this dissertation is better for him having served on my committee. I wish he were able to serve for the duration of the project

Last, and by no means least, I would like to thank Dan Wood. Throughout this process Dan has been a mentor, father figure, and most importantly a friend. Without his help I would not have made it to this point in my career. He has taught me how to tackle complex questions, always holding firm to my role as a scientist. I would like to thank him for taking a chance on me and for all the help he has given me over the years. If I am half the scholar that he is, half the teacher that he is, and half the mentor that he is, I will certainly be the best professor in any department I find myself. I have learned from the best.

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## CHAPTER I

### INTRODUCTION

Of a particular policy enacted during the Reagan administration, George H.W. Bush's White House Counsel remarked that it is "one of the most far reaching government changes made by the Reagan administration" (Gray 1989, 221, quoted in Mayer 2001, 6). Considering which policy could earn such a label, one might think of "Reaganomics" and the massive tax cuts of the early 1980s. One might also think of the nuclear arms negotiations and treaties with the Soviet Union. Instead, what this official referenced is Executive Order 12291 (Reagan 1981). With this order, President Reagan forced all "major" regulations promulgated by the bureaucracy to be justified by cost-benefit analyses and submitted to the Office of Management and Budget. Instantly, the president gained unprecedented control over the regulatory process.

One striking feature of this policy change is that the implementation occurred without the consent of Congress. The president was able, "with the stroke of a pen" to alter the political landscape. Surely, were the president forced to negotiate with the legislature to create a means for executive review of regulatory policies, the result would not have been nearly as advantageous as the executive order was.

While not all executive orders are as important as Executive Order 12291, major policy changes created unilaterally are not at all uncommon. The following represent

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This dissertation follows the style of the *American Political Science Review*.

merely a sample of instances where presidents have utilized executive orders in important ways:

- President Harry Truman issued Executive Order 9981, thereby integrating the armed forces in 1948
- President Dwight Eisenhower placed the Arkansas National Guard under Federal control and ordered the Secretary of Defense to utilize troops to ensure compliance with judicial orders concerning the integration of Little Rock, Arkansas schools in 1957 with Executive Order 10730.
- With Executive Order 11063, President John Kennedy prohibited racial discrimination in housing owned by the government or in property developed or maintained through federally subsidized grants or loans in 1962.
- President Gerald Ford banned the practice of assassinations in 1976 through Executive Order 11905.
- Jimmy Carter issued pardons to those who evaded the Vietnam draft in 1977 with Executive Order 11967 and Proclamation 4483.
- In 2001, President George W. Bush directed agencies to “coordinate a comprehensive departmental effort to incorporate faith based...organizations in Federal programs” in Executive Order 13198.
- President George W. Bush created the Office of Homeland Security in 2001 with Executive Order 13228.

Clearly, presidents utilize executive orders to make significant policy changes.

Before presidential unilateral action acquired the term “executive orders,” President

Jefferson carried out the Louisiana Purchase through what is essentially an executive order (Mayer 1999, 7).

### **HISTORY OF EXECUTIVE ORDER USE**

Presidents in the United States have used executive orders since the beginning of the nation. In the early days of the republic, however, there was not a formal system in place to catalogue presidential directives. In fact, prior to the twentieth century there was no attempt to report executive orders (Church 1974, 2). Because of this lack of historical data, there is no way of definitively determining which presidential directives would be treated as executive orders today.

In the early years, presidents were free to issue directives in as public or private a manner as they desired. Some early directives were as simple as presidential endorsements on the margins of maps. Others were more formal documents, including formulaic prose and the impression of the national seal (Church 1974, 2). This lack of formality resulted in early executive orders penned by individuals other than the president. In fact, of the first thirty-three orders in the numbered series, the Secretary of State signed seven (Keenan and Williams 1974, 23).

The process of tracking, cataloging and reporting executive orders has, for most of the nation's history, been an arcane process. In 1895, the Government Printing Office (GPO) housed a documentary catalog of each executive order deposited on a single sheet. However, there was no clear method for publication beyond the GPO (Keenan and Williams 1974, 28).

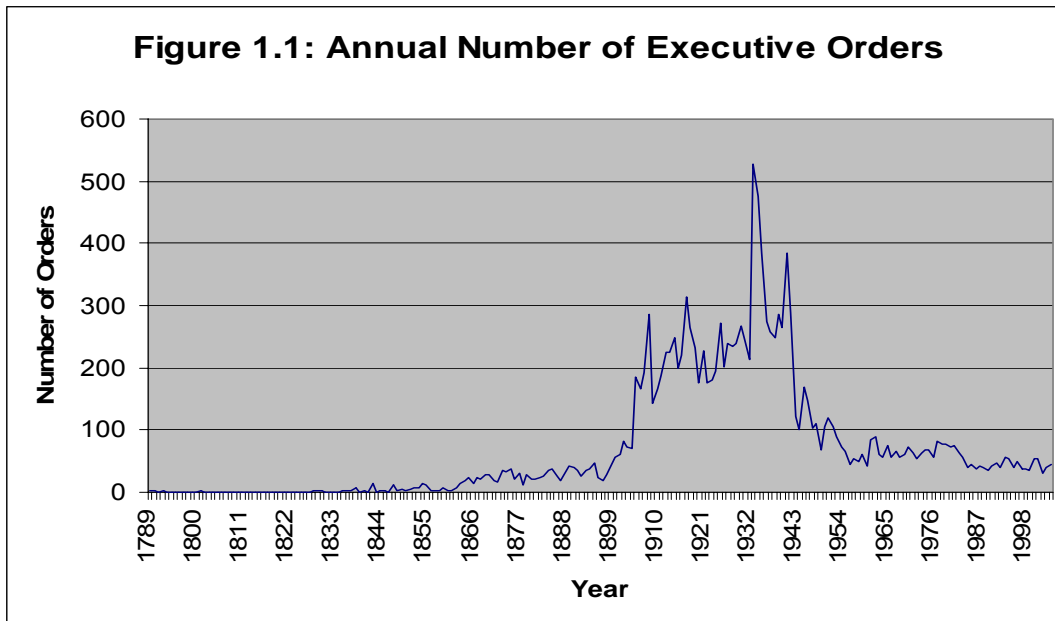
The Department of State began enumerating each executive order it was aware of, beginning the series with President Lincoln's order of October 20, 1862 (Keenan and Williams 1974, 26). Many orders, however, never made it into the State Department's numbered series. Though there is no certainty as to the number of orders missing, estimates put the number between 15,000 and 50,000 (Church 1974, 2).

In 1935, the process for publicizing executive orders became clearer. The *Federal Register Act of 1935*, 44 U.S.C. 1501 et seq. requires that presidents submit all executive orders and proclamations that are applicable to anyone outside of the government for publication in the *Federal Register*. However, if a president does not label an order as either an executive order or proclamation, it may escape publication. The designation is up to the president, but failure to publicize the order removes the order from being applicable to citizens who are not employees of the government (Church 1974, 3-4).

As Figure 1.1 shows, there has been a great deal of variation in the use of executive orders over time. There are few orders reported prior to the twentieth century. A portion of the discrepancy, however, is likely due to the poor reporting procedures that were in place prior to 1935.

The removal of the requirement for an executive order issuance when a president desired to exempt an employee from mandatory retirement explains some of the additional differences in the time-series. Carter caused this change by delegating the president's authority to exempt Federal employees to the Office of Personnel Management. At other times before Carter's delegation of authority, presidents would





exempt whole classes of employees to avoid issuing individual exemptions to employees (Mayer 2001, 74-75). Individual employees who were not a part of the broad exemptions, individual executive orders were required to exempt them from the mandatory retirement requirements.

### **LEGAL FOUNDATION OF EXECUTIVE ORDERS**

Executive orders, properly issued, have the full force of law. When a president issues an order based upon powers granted the office through either the Constitution or delegated by Congress, the courts view the order as a reflection of the president's legal authority [*Independent Meat Packers Association, et al v. Butz* 526 F.2d 228 (8<sup>th</sup> Cir., 1975); *Jenkins v. Collard* 145 U.S. 546 (1891); *Marks v. Central Intelligence Agency* 590 F.2d 997 (D.C. Cir., 1978); Mayer 1999, 58; cases cited in Mayer 1999, 241 fn 122].

In this section, the foundation of presidential authority to act unilaterally is discussed, including some of the major judicial cases and laws.

Article II of the Constitution charges the president to “take care that the laws are faithfully executed.” To accomplish this directive, presidents must be able to order agencies to take actions that are in concert or furtherance of statutes. This constitutional charge, then, provides the president, through implication, with the right to issue binding orders to the executive branch (Keenan and Williams 1974, 32-33).

Congress can also grant the president authority to issue executive orders. Often, the legislature explicitly gives the president the authority. For instance, in 5 U.S.C. 3323a the legislature granted the president the authority to act through executive order to exempt certain employees from mandatory retirement when in the nation’s best interest (noted in Keenan and Williams 1974, 34). Furthermore, by issuing the *Federal Register Act of 1935*, 44 U.S.C. 1501 et seq. requiring that presidents publish executive orders, Congress essentially conceded that the president possessed the authority to issue such orders.

When Congress delegates policy-making authority to the president, the executive may have a wide range of options for influencing the policy. The available options are often termed “residual decision rights” and represent the areas where presidents can move policy toward their preferences without violating the letter of the law. Presidents are often able to use these residual decision rights to move policy in ways that Congress likely never anticipated (Mayer 1999, 49; Moe and Wilson 1994, 14-15).

The courts have long held that presidents cannot issue executive orders in areas where Congress has spoken with clarity. *Little v. Barreme*, 6 U.S. 170, 179 (1804) represented the first legal challenge of a presidential directive. President John Adams had authorized the seizure of any ship sailing to or from French ports. However, Congress had only authorized the commandeering of boats holding France as a destination. Captain George Little, implementing President Adams's order, seized a Danish ship that had departed from France. The Court concluded that the president overstepped his discretion in issuing the order, for Congress had issued a more restrictive statute. Through this case, the Court established the precedent that law always trumps an executive order when the two conflict (Howell 2003; Mayer 1999).

Perhaps the most eloquent report of the foundation of presidential power is penned by Justice Robert Jackson in his concurring opinion in *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952) where he states:

“Presidential Powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress...

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate...If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power...
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his independent powers, but

there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at his lowest ebb, for then he can rely only upon his constitutional power minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling Congress from acting upon the subject. Presidential claims to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system” (635-663; quoted in Mayer 1999, 37).

According to Jackson’s framework, there are times when presidents possess clear authority to act. For instance, the president has the authority to alter court martial procedures using authority granted the office by the Uniform Code of Military Justice and the president’s constitutional role as commander-in-chief of the armed forces. There are also policy areas under Jackson’s framework where presidential action is prohibited.

Presidents have no authority to unilaterally alter social security policy. While presidents would certainly relish the power, this is a policy area dictated by legislation.

Jackson's second characterization, the "zone of twilight" is where presidents are best able to garner additional authority. When Congress fails to react to a presidential power grab, they are essentially ceding that authority to the president. Thus, presidents are able to "ratchet" up their authority, making only positive advances (Moe and Wilson 1994, 28). The Court has held that congressional acquiescence to unilateral action essentially grants the president the power to take similar action in the future [*AFL-CIO v. Kahn*, 618 F. 2d 784, D.C. Circuit. Cited in Mayer 2001, 47-48; Cooper 2002, 34-35; *Haig v. Agee*, 453 U.S. 280 (1981), cited in Cooper 2002, 34; Mayer 2001, 48].

### **IMPORTANCE OF EXECUTIVE ORDERS FOR POLITICAL SCIENCE**

Unilateral action represents a major component of presidential power. Without fully understanding how presidents utilize this important tool, presidency scholars will be unable to conceptualize how presidents make policy and how they use the instruments at their disposal to their advantage (or disadvantage). By focusing largely on the behavioral aspects of presidential power and on the president's veto power, scholars have learned much about presidential policy-making; however, by studying the use of executive orders, our knowledge of the presidency will expand.

Unilateral action should not be of interest only to students of the presidency; rather, it should be of interest to all scholars of American political institutions. Many studies of American politics examine the policy-making process. Furthermore, many of the studies focus on the relationship between other institutions and Congress (Arnold

1979; Bond and Fleisher 1990; Cameron 2000; Edwards 1980; 1986; 1989; Edwards and Barrett 2000; Fisher 1993; Krehbiel 1998; West 1995; Wood and Waterman 1994).

Without understanding how presidents utilize all the tools at their disposal, scholars will be unable to fully appreciate and model the relationship that exists between the president and the other institutions of American government.

Furthermore, the study of unilateral action is applicable to other areas of political science as well. For instance, state and local scholars can apply theories of presidential unilateral action to similar actions taken by governors, commissioners and mayors. In a comparative context, the study of unilateral action can be focused on the executives of foreign nations. Pereira, Power and Rennó (2005) who study presidential decrees in Brazil take such an approach.

Since many executive orders pertain to foreign affairs, the study of unilateral action also has value for international relations scholars. Additionally, since unilateral action bypasses the traditional method of policy-making and since second-term presidents are not facing a future election, there are normative concerns with the use of executive orders for political theory scholars to contemplate. Public administration researchers undoubtedly recognize the importance of executive orders. Presidents are able to greatly alter the behaviors and outputs of agencies through unilateral action.

Since unilateral action is a tool enabling presidents to alter policy, the study of executive orders is of value to public policy scholars as well. This is true for scholars concentrating on the policy process more generally, since executive orders are a key factor in policy-making. However, scholars specializing in specific policies are

interested in the use of executive orders, for their use can dictate the outcomes of a given policy. Morgan (1970) recognized this, concentrating her work on the ways presidents altered civil rights policies through the issuance of executive orders.

### **IMPORTANCE OF EXECUTIVE ORDERS FOR DEMOCRATIC THEORY**

More important than issues for political science, executive orders raise fundamental questions concerning democratic theory. In crafting the Constitution, the founders sought to create a government intentionally fragmented in accord with Montesquieu (1914).<sup>1</sup> Individual powers were granted the three branches of government so that the each institution would check the power of the other institutions. In the words of Federalist 51, “Ambition must be made to counteract ambition” (Madison [1788] 1982, 262).

Under the constitutional framework developed, the power to create law lay squarely on the shoulders of Congress. Accounting for the wishes of the executive is the president’s right to veto legislation deemed unacceptable. The courts possess the authority to review the laws and speak to their constitutionality (Hamilton [1788] 1982b). However, it is fair to say that the Constitution placed the role of legislating squarely on the shoulders of Congress.

The role of executing the policies of the government is in the hands of the president. By placing such power in an individual, the framers sought to improve the effectiveness of the office, and thus the effectiveness of the government. According to Federalist 70, “a feeble Executive implies a feeble execution of the government. A

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<sup>1</sup> Montesquieu’s work originally circulated in 1748.

feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government”

(Hamilton [1788] 1982a, 355)

If presidents are able, by decree, to make commands that carry the weight of law, then the office of the executive possess both the power to implement law and to make law. Such a proposition lies outside the generally understood intent of the Constitution. Federalist 51 instructs us “that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own” (Madison [1788] 1982, 261).

Executive policy-making encroaches upon the domain of the legislature. Because of this, executive orders raise serious concerns for democratic theory. Especially serious are the concerns if presidents are able to utilize executive orders in the largely *carte blanche* fashion implied by much of the current literature (Cooper 2002; Howell 2003; Mayer 1999; 2001). Rousseau warns, “It is not good for him who makes the laws to execute them” (1762). However, executive orders place the president as both the creator of law and the one responsible for its implementation

However, if presidents consider and account for the policy wishes of Congress and the Courts (through respect for the Constitution and statutes) then the concerns become less serious. For then presidents are not acting as a monarch, but are instead constrained by the policy wishes of the other institutions. In order to consider how executive orders relate to democratic theory and the systems of checks and balances



established in the Constitution, it is imperative that we know how presidents use them and whether the president considers the policy wishes of Congress when utilizing them.

### **PLAN OF THE DISSERTATION**

Unilateral action by the president represents an important component of both public policy and presidential power. Without fully understanding how the tool is used, scholars will never be able to fully comprehend the concept of presidential power. Furthermore, given the importance of unilateral action to the making of policy, increasing knowledge concerning the utilization of presidential directives is integral to comprehending the policy-making process in the United States.

Despite the importance of unilateral action, there is a dearth of theory concerning when a president will act unilaterally to make policy. A need for such a theory to advance our understanding of presidential policy-making is apparent. Through the course of this dissertation, I will advance a theory that predicts when presidents rely on unilateral action when seeking policy change. I then subject the theory to empirical testing.

Chapter II reviews the major literature on unilateral action by the president. A lack of theory characterizes most past work. Many studies do not even attempt to develop theory, but are instead either exploratory or descriptive. Additionally, inappropriate dependent variables often characterized these works. Scholars routinely use a count of all executive orders, which include orders that do not make policy, or use only “significant” executive orders, which ignore the vast majority of executive orders. Each approach has shortcomings to be discussed later.

Chapter III introduces the theory of presidential policy-making used in this dissertation. A transaction costs framework is utilized to explain when a president will act unilaterally with executive orders versus seeking legislative action to generate a policy change. Economists developed the transaction costs framework to explain when a firm will produce its own goods or buy them from a contractor. However, the framework is easily applied to political matters. Political scientists are beginning to recognize its attractiveness and many have successfully incorporated the framework into their research (Bawn 1995; Epstein and O'Halloran 1999; Globerman and Vining 1996; Huber and Shipan 2000; Ostrom, Schroeder and Wynne 1993; Potoski 1999; Wood and Bohte 2004).

Chapter IV subjects the theory of executive action to empirical tests. This project introduces a new dataset constructed by analyzing each executive order and coding it based upon its policy substance. Only those orders that make policy are included in the analysis. The results of the analysis provide strong support for the theory outlined in chapter III. To ensure that the results are not an artifact of improper methodology, advanced time-series methods are used to test the theory. Again, the results support the transaction costs based model of presidential policy-making.

Chapter V subjects the theory to further testing by looking at particular subsets of the data. One sub-sample includes executive orders that are concerned with policy areas where presidents are routinely assumed to possess higher levels of discretion. The other sub-sample contains the remaining orders. The sub-samples are then used to conduct tests similar to those in chapter IV. This approach ensures that the results are not being

driven by one type of policy. Like the results in chapter IV, the analysis continues to support a transaction cost interpretation of unilateral action by the president.

## CHAPTER II

### LITERATURE REVIEW

The previous chapter gave a brief introduction into how presidents unilaterally alter policy through executive orders. Until recently, most of the scholarship on executive orders consisted of legal research, focusing primarily on presidents' authority to alter policy through unilateral action (Cash 1965; Fleishman and Aufses 1976; Neighbors 1964).

Over the past decade, political scientists have witnessed a surge of new research on presidential uses of executive orders. In this chapter, I outline some of the more important works that focus on presidential use of unilateral actions. Though not exclusively, the works primarily are from the 1990s forward, and the tendency among these works is not to generate theory of when a president will act unilaterally to alter policy versus seeking legislative changes to a given policy.

Morgan (1970) led one of the earliest forays into theory development concerning presidential use of executive orders. Her book was largely a historical study of presidential use of executive orders in the realm of civil rights. The decision calculus for unilateral action, according to her exposition is as follows. First, presidents determine whether they wish to take *any* action at all (78). While this is elementary and obvious, presidents may see a problem, but decide that governmental action is either unnecessary or not prudent. The president's personal values, ideological beliefs and view of the nature of the problem influence the determination of how to act. The president's belief in the role of the executive is also important. Presidents, such as Eisenhower, who hold

to the philosophy of executive restraint should be less likely to act unilaterally, but will instead work with Congress to search for a solution.

Morgan also postulates that there must be some public demand for a national solution to a problem before a president will act. She states that this demand comes, in large part, from interest groups. In determining potential policy goals, the president will attempt to balance the demands of competing interest groups to produce a policy that alienates the fewest citizens.

Once a president decides to take action, deciding whether to act unilaterally via an executive order or by recommending legislation to Congress that addresses the issue is the next action required. The president considers four items in making this determination. First, the president considers how important the issue is. There is little need to spend political capital on rectifying an issue of minor importance.

Second, the president considers whether the potential solution can be accomplished solely through administrative action. If the problem is such that legislation is *necessary*, then there is little reason to pursue unilateral action.

Third, a president must consider the chances of success in the legislative arena. When a president has little chance of success with Congress, the executive order may be the only tool available to affect the given policy.

Last, the president must consider what effect the action will have on other programs supported by the administration. Because of the symbiotic relationship that exists between the executive and Congress, a president must consider how the proposals will affect the relationship with the legislature. If an executive order will cause hostility

between the president and Congress, the president may be well advised to avoid action so that success in other endeavors is more likely.

Though Morgan's work was concerned with the civil rights, the theory she developed is applicable to other policy areas as well. Even though the theory was developed in an ex-post fashion, it provided a good first step in the development of theory surrounding unilateral executive action.

Wigton (1996) added to Morgan's analysis by examining presidential use of executive orders in a variety of issue areas. Among the findings of his limited case study is that presidents can utilize executive orders for altering the policy landscape in such a manner as to prevent a change through legislation.

Another point Wigton makes is that the use of executive orders does not create a permanent change in an issue. He notes the continual change in abortion policy that has taken place through executive orders. Any future presidents that disagree with abortion policies made by executive order are free to revoke any of the orders at any time.

This lack of permanence, however, can be an asset. When dealing with a complicated issue, the president can utilize the executive order to make flexible changes in policy and is free to change them when necessary without waiting on the slow processes of Congress.

Wigton notes that executive orders are best suited for policy areas that are complex and non-salient. In such areas, presidents can craft an order specifically addressing a situation. Alterations can be made to the policy as changes in the political

environment warrant. Salient policies, however, are more difficult to change unilaterally.

Wigton's study dovetails nicely with Morgan's (1970) work in that it does not rely on one issue area. However, there is little or no new theory. Rather, it is more of a historical/legal analysis. Through this study, one can see that the executive order is a tool that benefits presidents and executive orders are not equal substitutes for legislation.

Consistent with this theme, Light (1991) postulates that executive action is the second resort for presidential policy-making. Using a brief examination of quantitative patterns of use and many quotes from administration officials, he concludes that presidents prefer to have their policies enacted via legislation. One Nixon official is quoted as saying, "it (administrative action) was about all we could do" (116). He concludes that executive orders can be used as a means to alter the policy landscape rapidly, when legislative action would simply take too long.

Light also states that executive orders can be used as short-term solutions. After issuing an order, the president can attempt to move toward legislation in an effort to make the policy change permanent and to give the policy more stature. According to one Department of Health, Education and Welfare officer quoted by Light, "Executive action is easier to fight and easier to undermine. The career civil service is not inclined to agree with executive action if the executive action doesn't agree with them" (118). Thus, a president would be well advised to seek policy change through legislation as doing so will increase the permanence of the policy change and make bureaucratic implementation of the policy more likely.

Executive orders are not the focus of Light's study. There are no more than five pages dedicated to the topic. However, his point concerning executive orders being a tool of second resort is worth note. Presidents likely do not prefer unilateral action to favorable legislation. However, when legislative action becomes too difficult, they will utilize executive orders to alter policy.

King and Ragsdale (1988) examine patterns in the use of executive orders and conclude that executive orders are only used to make incremental changes. They also observe that the "type and frequency of executive orders issued by any new president is thus predominantly a function of the plural institution of the presidency already in place" (124).

Glieber and Shull (1992) are probably the first to examine executive orders quantitatively. Their study lacked a coherent theory. However, they did test several propositions. For example, they found that presidents with more allies in Congress are more likely to utilize executive orders than their counterparts who have fewer supporters. They also conclude that, "neither presidential preferences nor political resources explain much variance in the use of executive orders" (458). They postulate that this is caused by the random need to implement legislation and unsystematic political situations that require a reaction from the president.

Krause and Cohen (1997) also conducted an early quantitative analysis of presidential use of executive orders. Their examination is largely a foundational one to see how common factors in the political environment affect the use of executive orders. An important finding of their study is that as presidents become more successful in the



legislative arena, they become more likely to issue executive orders. The authors conclude that this result likely indicates that the president will utilize executive orders in order to strengthen legislation that has passed Congress (470).

Another interesting finding of Krause and Cohen is that party support in the House is positively related to use of executive orders while party support in the Senate is negatively related to use of unilateral action. They conclude (unconvincingly) that this difference may be accounted for by the stricter party rule and simple majority control present in the House versus the Senate (472). A more likely explanation for this result is that congressional support presents conflicting influences on how presidents make their decisions to issue executive orders. As Congress becomes more opposed to presidents' legislative agendas, presidents are more likely to desire unilateral action. However, at such a time, they are less able to take unilateral action without facing a harsh reaction from Congress, potentially overturning the orders. The differing House and Senate results are likely capturing different influences, with the House variable reflecting the increased discretion afforded presidents who have high levels of support, and the Senate coefficient reflecting the decreased need to act unilaterally when they possess increased support in Congress.

Surprisingly, the authors find no relationship between popularity of the president and use of executive orders. However, they do find a positive relationship between the "misery index" and use of executive orders. The authors postulate that this relationship is due to an effort by the president to take action to reverse the negative effects of a sagging economy (472).

Krause and Cohen's study is a quality step into quantitative analyses of unilateral presidential action. However, the study was largely exploratory and devoid of theory. Since a theory was not initially postulated, one might be skeptical of the results. In addition, the dependent variable in this study is annual counts of executive orders. One should be hesitant to assume that there is not significant variation occurring within each year that affects the president's likelihood of utilizing executive orders.

Also, the authors rather than focus solely on orders that make policy the authors include orders that do not make policy in their analysis. They did remove orders that took cultural actions and those of a ceremonial nature (Krause and Cohen 1997, 466). However, there are still actions that do not make policy included in their dataset such as orders that deal with routine administrative concerns. As such, this is more of an examination of how presidents use executive orders in general, rather than an examination of how presidents utilize executive orders to alter policy.

Taking heed of Krause and Cohen's results showing that presidents are no more likely to issue executive orders when the legislative route is difficult, Deering and Maltzman (1999) devise a study to determine why. According to their theory, a president is likely to issue an executive order when the legislative route is more difficult, but not if there is an increased likelihood that the order will be overturned. Consistent with their expectations, they find that when presidents are unpopular, they are led toward using executive orders due to the increased difficulty they will have in getting legislation passed.

Likewise, when presidents face a Congress with an ideologically opposed median member [measured using Poole and Rosenthal's (1997) W-NOMINATE scores] they are more likely to issue executive orders rather than pursue legislation.

Another interesting finding of Deering and Maltzman is that the more likely an order is to be overturned (measured by the W-NOMINATE distance from the 2/3 veto override position), the less likely a president is to use executive orders. This finding, in conjunction with their other findings, is important in that it shows that presidents do utilize executive orders to work around a difficult legislature. However, presidents are cognizant of potential legislative reactions to the order and will avoid issuing an order if there is a high likelihood Congress will overturn the order through legislation.

The Deering and Maltzman study is a step in the direction of understanding unilateral executive action by the president. However, their annual aggregation likely misses significant variation, and their model is probably underspecified since they do not include variables of interest such as recession or end of term effects. Also, as with other studies, there is no effort to remove non-policy orders from the analysis, making the results irrelevant to presidential efforts to alter policy through unilateral action.

One important point from the Deering and Maltzman study is that presidents are strategic when issuing executive orders. They do not issue orders when they feel that Congress will overturn the action. As such, they do not have the ability to alter policy by fiat, but instead must consider the reactions of Congress to their orders.

Krause and Cohen (2000) utilize presidential use of executive orders as a dependent variable to test their theory of the development of the institutional presidency.

According to their theory, presidents exploited the advantages of the growing administrative state until the presidency was fully institutionalized in the late 1960's. After, this point, they are largely constrained by the institutional nature of the office and are constrained by the political environment.

Their empirical tests support the declining use of executive orders through time. The tests found that from 1939-1996 the "misery index" and presidential dummy variables are significant predictors of annual counts of executive orders issued. This same relationship holds when the sample is reduced to 1939-1968, the era the authors refer to as the "institutionalizing presidency era." During this time, they postulate that presidents acted in an opportunistic fashion when issuing executive orders and are not bound by the constraints posed by factors such as House and Senate party margins and bureaucratic growth.

When the timeframe 1969-1996 is examined, the authors find that misery index, bureaucratic growth and presidents in their first year are significantly related to the use of executive orders. They conclude that these variables are indicative of variables that constrain presidential behavior. Presidents are simply responding to changes in the political environment when issuing executive orders.

Krause and Cohen's (2000) study is an initial step in developing a theory of how the institutionalization of the presidency constrains a president and when/how presidents exploit the institutionalization to their favor prior to the constraints era. However, their theory lacks generality in that it does not explain when presidents will decide to issue an executive order.

Furthermore, like Krause and Cohen (1997), the dependent variable for the analysis is annual counts of executive orders. This is a needless upward aggregation of data that eliminates significant variation and may mask important effects.

In addition, like Krause and Cohen (1997), this study includes a host of orders that do not make policy. There is no effort to remove orders that are of a ceremonial nature or otherwise do not create policy (Krause and Cohen 2000, 96 fn11). As such, one cannot assume that the results from this analysis reflect how presidents make policy through executive orders.

Marshall and Pacelle (2005) utilize annual counts of executive orders as a dependent variable to test Wildavsky's (1966) "two presidencies" thesis. They propose that if, as Wildavsky predicts, presidents possess greater levels of discretion in foreign policy matters, then there should be differences in how presidents determine whether to issue executive orders to affect foreign versus domestic policies.

Among Marshall and Pacelle's (2005) findings is that the president's party share of congressional seats is unrelated to the issuance of foreign policy directives. However, they find there is a relationship between the president's party strength in Congress and the issuance of executive orders to affect domestic policy. They conclude that this points toward increased discretion afforded presidents in the foreign policy realm. Compositional changes in Congress do not affect presidential prospects for legislative success in foreign policy, and, as such, presidents are not led towards executive orders to make changes in foreign policy at the exclusion of statutory changes.

Marshall and Pacelle's (2005) study puts an interesting twist on studies of unilateral action. The key point is that presidential discretion affects the president's proclivity for unilateral action. Presidents make their determinations on how to act based upon how they expect other institutions to react and the discretion those institutions allow the president.

However, their analysis did not advance a general theory of when presidents will issue executive orders. Rather, they test a theory of differing presidential discretion across policy types. Furthermore, Marshall and Pacelle's (2005) study utilizes annual counts of executive orders. Again, such aggregation ignores a large amount of variation that is present in the data within years. Monthly counts are a more natural metric that will allow for more variation in both the independent and dependent variables. If a significant portion of the variation that occurs within a year really occurs within a few select months, annual aggregation can miss important relationships. Furthermore, spurious findings are more likely as variation that occurs in an independent variable at one month may be linked to variation in the dependent variable that occurs in another month. In addition, the data include a host of executive orders that do not create policy. This masks effects due to policy. Therefore, one cannot be confident that they are revealing true patterns of presidents' propensity to act unilaterally in domestic and foreign policies.

Cooper (2002) is more of a textbook analysis, which gives extensive coverage to the many tools of unilateral action. He devotes individual chapters to executive orders, presidential memoranda, presidential proclamations, national security directives and

presidential signing statements. His work is largely of a descriptive and normative nature. He dedicates much attention to tracing when and how presidents utilize the tools at their disposal to alter the policy landscape.

After tracing the legal issues surrounding executive orders and detailing the process used by presidents to issue orders, Cooper describes what presidents can accomplish by issuing executive orders. Cooper continues his analysis by outlining some of the advantages of using executive orders. First, executive orders can be used to rapidly alter policy. There are several instances where presidents would want to take action quickly. For example, executive orders can be used as an effective component of an administration's transition strategy. He notes that the Reagan administration did a good job of surveying existing executive orders prior to arriving in office and quickly issued orders to affect policy. Executive orders allow a new administration to act quickly since they do not require coordinated action with the legislature.

The speed of unilateral action is also useful in reactions to emergencies. Cooper notes the success that Roosevelt had by closing the banking system and making changes in response to economic hardships (2002, 69). Legislative action simply cannot compete with the speed of executive orders.

Cooper also notes that executive orders are useful at directing action from the executive branch. Drawing on the role as "chief executive," the president can force changes in the administrative branch through unilateral action. However, presidents are not able to force changes that exceed their statutory requirements. Where the legislature has spoken, with clarity, the president must listen.

Another advantage of executive orders that Cooper mentions is that they allow presidents to take action in areas that need attention and where Congress is unwilling to act. He notes that Truman was able to desegregate the military at a time when Congress was not poised to act to reduce discrimination in America.

Despite the many advantages that executive orders present, Cooper also notes that there are disadvantages that flow from their use. Presidents have often declared emergencies to justify their unilateral action when there is really no rationalization for the declaration of an emergency. Cooper states that such action undermines the president's credibility, an important asset to any politician.

Even when presidents are on firm ground in declaring an emergency, special care should be taken because, "experience over time suggests that emergency actions frequently leave messes to be cleaned up after the fact that can be troublesome in instances where the emergency actions did not contemplate these future normalization issues" (Cooper 2002, 72). Orders can remain in force long after the emergency passes due to the difficulty of pinpointing the true end of an emergency or from simple neglect of revoking out of date orders.

Cooper also notes that executive orders can cause a degradation of intergovernmental relations. Executive orders, like legislation, can deal with issues that affect state and local government. However, because unilateral action is not contemplated in an open forum like legislation, there exists a possibility for lower levels of government to be caught off guard. If action taken is not favorable to state and local governments, relationships can be damaged.



Another problem Cooper notes is that presidents may face blame for policy-gone-bad with executive orders. If presidents push for regulation through an agency rather than through executive order, any problems that arise from the policy can be blamed on the agency. However, when the president makes the regulation, there is no one to shift the responsibility to.

Next, Cooper notes that there may be intra-cabinet hostilities caused by executive orders. If cabinet officials are not included in the drafting of the order they may feel the president is “doing an end run around (them)” (2002, 74). Further, if presidents do not utilize members of the administration on advisory committees, hostilities may arise. If an investigative commission is created without utilizing the involvement, permanence and expertise of the administrative agencies, presidents can be sending a clear signal about how they feel about those working for them (2002, 74-5).

While presidents are able to rapidly alter policy through the utilization of executive orders, one important downside to unilateral action that Cooper notes is that future presidents can remove these changes with equal speed. There is little permanence to policy change made unilaterally. He notes that thirteen of the twenty-two non-Iran hostage related orders issued by Jimmy Carter following his 1980 defeat were repealed, superseded or amended by his successor, Ronald Reagan (Cooper 2002, 77-78).

In addition to the many disadvantages presidents face when using executive orders, Cooper also notes some disadvantages of a more normative nature for the nation as a whole. First, executive orders undermine the administrative law process. This process was created to ensure that important governmental actions are taken only after

following an open and just process. The creation of executive orders is anything but open and participants in the process include only those whom the president desires. One ironic point Cooper makes is that presidents act unilaterally to side-step the tedious administrative law process, but this process is tedious, in large part, due to the many requirements placed on agencies by executive orders (2002, 75).

Cooper also expresses concern that executive orders can create bad public policy. This is, of course, a concern. However, it is a concern that can be applied to all methods of policy-making. Because executive orders are, or at least can be, made through the deliberation of only one person, there may exist a greater likelihood that the policy may have been made without considering the potential negative consequences of the change.

Cooper's (2002) work is a good review of how presidents act unilaterally to alter the policy landscape. He thoroughly analyzes how presidents have used executive orders in the past. The work is a *must* in providing a background for students of unilateral action. It gives a concrete understanding of how executive orders and other tools of unilateral action can and have been used and the legal foundations of the tools. However, the study does not establish a theoretical framework explaining when a president will act unilaterally versus acting through the legislature.

Mayer (2001) moved toward this end by positing that executive orders can be explained using a neo-institutional framework. His analysis begins by highlighting anecdotes where presidents have utilized executive orders to alter policy. He then notes that presidency scholars have long focused on the behavioral aspects of presidential power at the relative exclusion of the institutional factors that relate to a president's

authority. Because of this, researchers concentrated on “the president’s ability to lead public opinion, strike deals with congressional leaders, manage press relations, mobilize constituencies, and conserve political capital” (2001, 12).

He attributes the neglect of the formal aspects of presidential power to Neustadt’s (1960) seminal work. By making the focus of presidential power the executive’s ability to persuade others to the administration’s position, questions of how a president’s legal authority, such as the ability to act unilaterally, affects the powers within the office became less interesting to political scientists. Thus, legal scholars primarily addressed these questions.

Legal scholars, Mayer notes, focus primarily on the constitutional issues surrounding unilateral action when studying executive orders and rarely ground their studies to a broader theoretical framework. As Edwards and Wayne (1997) state, “The legal perspective, although it requires rigorous analysis, does not lend itself to explanation...although studies that adopt the legal perspective make important contributions to our understanding of the American politics, they do not answer most of the questions that entice researchers to study the presidency” (448, quoted in Mayer 2001, 15).

Mayer’s central argument is that presidents care about the formal basis of executive power. Presidents receive important authority from statutes and the Constitution. The presidency’s institutional setting bolsters this authority. This enlarged power frequently allows presidents to take the first step on policy matters when they so choose (2001, 10). This study, then, is an attempt to evaluate how presidents utilize one

of the legal tools of executive power, the executive order, to further their authority (2002, 4).

After tracing much of the legal basis behind the use of executive orders, Mayer introduces the new institutional economics (NIE) framework, which is very similar to the principal-agent framework. This framework, when used to study public organizations, is used to examine how the organizations are arranged to create the benefits sought by the creators of the organization (2002, 23). According to this framework, presidents seek control over policy and process (2002, 24). Because of the intrinsic significance of the administrative process and institutions to the outcome of policy, presidential-legislative conflict over the structures of institutions is of greater importance than the routine bargaining over individual policy issues. How institutions are organized and maintained and how policy is implemented take priority (2002, 24).

According to the NIE and Mayer, “the politics of the presidency is about getting control of the institutions that create and implement policy” (2002, 24). Mayer relates the bulk of his study to this statement. The common theme that he finds in significant executive orders is that presidents have used unilateral action to control policy, create and sustain institutions, mold the policy agenda, maintain relationships with important constituencies and manage their overall standing (2002, 28).

Mayer’s (2001) study is devoted mainly to case studies of how presidents have utilized executive orders to shape policy in different areas. The first area that he examines is the institutional presidency. He examines a host of orders that presidents have issued to create institutions and to gain control of existing institutions. In particular,

he examines how presidents have gained control of the budget process and seized more power in the regulatory process through unilateral action. In regards to the budget process, Mayer concludes:

The presidential budget and growth of BoB power illustrates the pattern: societal and political pressures serve as the impetus for a new government capability; Congress and the president compete over the question of control; the president prevails and uses the new capability in unanticipated ways to develop even more power, and Congress can do little to stop him. Over time, the new powers-once so controversial-become institutionalized as a routine and accepted part of the presidency (2001, 121).

He draws a similar conclusion after examining the evolution of presidential regulatory control. He concludes that the increased control that presidents possess is the result of an evolutionary process with each successive president extending and adjusting what previous administrations have done (2001, 137).

Mayer also examines presidential control of foreign affairs through executive orders. He conducts studies of how presidents have acted to alter the classification process (i.e. top-secret information) and the organization of the intelligence community. In this area, he finds a pattern consistent with the institutional analysis where the power of the chief executive gradually evolves through the exploitation of any statutory ambiguity. Over time, this gradual evolution of power leads to presidential dominance of the policy (2001, chapter V).

Mayer also examines how presidents have influenced civil rights policies through executive orders. He asserts that presidential initiative comprised a key role in widening the reach of civil rights policies through a series of increasingly forceful presidential actions. These actions helped drag the legislature and the courts along (2001, 185).

Of particular note is the discussion of affirmative action policies, or the granting of preferences to minorities and women in employment or education decisions. Ronald Reagan entered office an ardent opponent to governmental affirmative action policies. There was little doubt that he possessed the right to reverse all of the affirmative action policies that were made by his predecessors through executive orders. However, there were many political obstacles constraining him from doing so. Mayer points to the inability of the president to control this policy as one of the problems of creating policy or institutions through executive order. Once created, institutions can resist serious attempts to create meaningful change. He notes that this is a central premise of the new institutional economics framework (2001, 208).

In an effort to determine if presidents utilize executive orders to alter policy, Mayer (2001) also builds upon his (1999) empirical work. He begins by detailing the methods used to record executive orders. Next, Mayer reports on the patterns that exist in the subject matter and importance of executive orders. To accomplish this task, he draws a random sample of all executive orders issued between March 1936 and December 1999. The random sample consisted of 1,028 orders (2001, 79). He then codes each of these orders based upon policy type and based upon its significance. To

code significance he utilizes a host of criteria, including press or congressional attention and agency creation.

He finds a dramatic decrease in the percentage of executive orders that attend to land matters and civil service issues. This has occurred while there has been a sizeable increase in the percentage of executive orders that deal with domestic and foreign policies and management of the executive branch.

His findings for significant orders are interesting. Presidents have issued approximately fourteen significant executive orders each year since 1970. While there is a noticeable decline in the reduction of significant orders following the 1940s (attributed to the end of World War II), there is a sizeable increase in the issuance of significant executive orders since the 1960s. From this, Mayer concludes that presidents have increased their usage of executive orders to affect policy over the past few decades (2001, 86). However, consistent with Krause and Cohen (2000) his time series graph of executive orders shows a decrease in the trend of issuance of significant executive orders. Following the 1970s, presidents appear to be exhibiting a downward trend in their issuance of executive orders. Mayer does not make note of this, and the trend is not great, but to conclude that presidents are utilizing executive orders more from this evidence is shaky at best. Given the increased scrutiny of the presidency following Watergate and Vietnam, there is reason to believe that this downward trend could be the result of less discretion being available for presidents due to heightened attention to their actions.

Mayer also examines how the political environment influences the president's propensity to issue executive orders. He holds that if presidents use executive orders to alter policy, then their use should vary based upon the situations presidents find themselves. However, if they are only used for routine matters, then there should be little variation in their use based upon the political environment (2002, 87).

He uses an event count model where the dependent variable is the monthly count of executive orders issued (excluding orders that addressed specific pieces of land or removed mandatory retirement restrictions for individuals). Among his findings is that presidents issue substantially more executive orders in their last month when the new president is from the opposite party. Mayer concludes that this is evidence that executive orders do have a strong policy element. Otherwise, there would be little reason for a president to issue last-minute orders (2001, 97). There is no significant change in the last month of office for presidents that are not preceding a party change.

He also finds that presidents issue more executive orders as they become less popular. Mayer holds that executive orders present a way for weak presidents to seek policy change in the face of other institutional figures that are poised to stand up to an administration that is perceived as weak (2001, 90).

Mayer also finds that Republican presidents issue fewer executive orders than their Democrat counterparts do. This comports with his hypothesis that Democrats issue more executive orders than Republicans based upon their historical inclination for expansive government (2001, 88).



One finding that surprises Mayer is that presidents issue more executive orders under unified government. Instead of including a dummy variable for unified government, he instead compares the Clinton, Eisenhower and Truman administrations and their use of executive orders while they were experiencing unified government and when they served during divided government.

Mayer (2001) is an important contribution to the study of unilateral action. He seeks to ground the study of executive orders in a coherent theoretical framework. However, as with all prior work his framework does not develop a theory of when presidents will act unilaterally instead of through the legislature. Rather, it is a framework that posits presidents will seek control of institutions in their efforts to control policy. Thus, the study represents an advance in the development of an overall theory of presidential policy-making; but is limited for understanding the specific causes of presidential behavior when taking unilateral action.

Furthermore, the theory is tested primarily through case studies. This approach has the advantage of allowing an in-depth analysis of how a theory relates to certain events. However, there is limited generalizability to this method. One cannot be certain that conclusions would vary based on who is doing the analysis and various possible interpretations of the record.

Another shortcoming of the Mayer study is that the quantitative chapter was not a test of theory; rather it was an examination of whether presidents do alter policy through executive orders. A more appealing analysis would be rooted in a theory that explains when presidents will act unilaterally.

Furthermore, the data used in the Mayer study contains many orders that are trivial and do not affect policy. He did eliminate orders that dealt with public land and orders that exempted individuals from mandatory retirement; however, he included orders that take actions such as ordering flags at half-staff, forming advisory committees with no policy-making authority and taking care of routine executive branch matters. By including non-policy orders in the analysis, one cannot be certain that the results reflect a president's proclivity to act unilaterally to alter policy.

Mayer and Price (2002) extend the analysis a bit further. In this study, the authors utilize Mayer's sample of significant executive orders from his 2001 text. They conduct Poisson regression on the annual counts of significant orders issued. Among their core results, the authors find that as presidents become more popular they issue fewer significant executive orders. These presidents are better situated to maneuver through the complicated political environment by leveraging their popularity into legislative success.

Again, Mayer and Price's analysis does not develop a theory to explain when presidents will issue executive orders rather than pursue legislation. Instead, they show that "presidents rely on executive orders to implement significant domestic and foreign policies" (2002, 368). Executive orders, thus, can be viewed as surrogates for legislative changes.

Interestingly, Mayer and Price's (2002) dependent variable is unique. They randomly selected executive orders and examined the selected orders for policy significance. The dependent variable is the count of significant orders for each year.

However, there is no discussion as to how reliable the estimates are for each, only how reliable the number is for the entire series (including ten years prior to the sample used in their analysis). Their estimates should be much less accurate for the yearly counts than for the count of the overall sixty-year span because each year has a smaller sample taken than the sample taken in the overall sample. Because of this, one cannot be certain that the counts in each year are fully representative.

A better method would be to examine each order and code the order based upon its policy substance. Not only does this allow for a more accurate count of the orders issued in a given period that create policy, one could aggregate by month rather than by year. Mayer and Prizes' estimates would simply be too inaccurate if aggregated at the monthly level.

Howell (2003) recognizes the paucity of theory in the study of unilateral action and develops a "unilateral politics model" of executive action. Similar to the work in this dissertation, Howell seeks to explain when policy change will occur through unilateral versus legislative action.

Howell's (2003) model builds upon earlier work by Moe and Howell (1999a; 1999b). It also borrows heavily from Krehbiel's (1998) game theoretic model of pivotal politics. Indeed, the only deviation from Krehbiel's game theoretic model is that the president can move first in an effort to make policy by issuing an executive order, or other unilateral directive, to change the status quo of a policy before Congress has a chance to act on the policy. The option of acting first allows the president to more closely match the final policy to the administration's preferences.

Howell's work is the first to propose a theory that explains presidential uses of executive orders. As such, the study represents a major improvement in explaining presidential use of executive orders. However, the theory is deficient in several areas. First, his theory makes predictions that are unlikely at best. For instance, Howell predicts that under certain circumstances a president will issue an executive order moving policy *further* away from the preferred outcome in hopes that Congress will overturn the order and move the final policy closer to the president's wishes (39). This is one example of game theory making counter-intuitive predictions that are counter-intuitive for a reason: they are unlikely to occur in the real world. Any president that has an order overturned by Congress loses prestige within the institution. As Howell eloquently states, "executive power is inversely proportional to legislative strength. Presidential power expands at exactly the same times, when and precisely the same places that, congressional power weakens...for it is the check that each places on the other that defines the overall division of power" (2003, 100).

A president that has an order overturned by Congress is likely losing power relative to the legislature. Even if the president took the action purposefully, members of Congress are more likely to be emboldened to act in the future against unilateral directives after having tasted success. The power the president loses does not only affect the ability to utilize executive orders, but to act on legislation as well. Defeat can be embarrassing and harm the leverage presidents have in dealing with Congress in the future. Egger and Harris (1963) outline the turbulent relationship that exists between the executive and legislative branches:

If, as it is alleged, nature abhors a vacuum, it is equally true that politics abhors equilibrium. Two great energy systems, each with powers of aggression and defense, each active in areas which vitally involve the interests of the other, and neither able to operate without some degree of concurrence from the other unavoidably become involved in a contest as to which shall receive the superior accommodation at any particular time (43).

Each executive loss that occurs tips the balance of power towards the legislature. For example, Edwards (1980) describes how Lyndon Johnson felt that a legislative loss, particularly in the early years of his administration, would be damaging to his professional reputation and future legislative success (135). Surely having an order overturned would damage a president's reputation as well. This reputation is important to the future success of the president (Neustadt 1960). Future negotiations with Congress may be more difficult as the president may be less able to resort to unilateral action in the face of an emboldened legislature.

While the possibility exists that presidents consider taking such bold action as moving policy away from their preferences in order to generate congressional reaction moving the policy closer to their wishes, such action is unlikely for the reasons listed above. In his text, Howell did not give a single example of such a case. Given the thousands of orders issued over the past two centuries, if such a prediction reflected reality, finding an example should not prove difficult. Given the lack of even an anecdote to support his argument and the fact that such action would be counter-

productive for the president for the reasons listed above, this portion of the model is unrealistic.

A second flaw in Howell's game theoretic model is the assumption that policy change made through unilateral means is equal to that made through legislative means. There is little debate left among political scientists that presidents do alter policy through executive orders. Examples abound of presidents using unilateral action to make policy. However, such policy change does not have the permanence that traditional legislation possesses.

A president who cares about the duration of a policy change should seek legislative change, for such changes are more difficult to alter. Any future president wishing to modify policy crafted through unilateral action need only issue a new executive order moving the policy to the desired point. However, a president wishing to change policy made through legislation must obtain at least a majority in each House to side with the administration's position (another ten percent in the Senate to invoke cloture). Such action can be difficult and concessions are likely to be required to obtain such a majority. Under any circumstance, altering an executive order is easier for a president than securing legislative change to a policy. As such, *ceteris paribus*, presidents likely prefer legislative change to unilateral directives to accomplish their policy goals. Howell's game theoretic model does not account for this imbalance. By treating unilateral action as an equal of legislation, the model surely differs from reality where obvious differences are present.

Another part of Howell's study that is deserving of a second look is the asserted power of the presidency. He examines the success presidents have experienced when members of Congress mount challenges to executive orders. At first glance, the data are compelling in showing that presidents are rarely overturned when they issue executive orders. Since 1971, Congress has only overturned four executive orders. The conclusion Howell draws from these data is that the legislature is ill equipped to constrain presidential use of executive orders. However, this conclusion is simplistic and probably wrong. Rather, such data can be interpreted another way: presidents seek to anticipate the reactions of members of Congress to unilateral directives. Realizing that a successful legislative challenge would be embarrassing and damaging to future negotiations with Congress, they avoid issuing orders that are likely to be overturned. The four instances of congressional action overturning a president indicate that when a president misjudges the available discretion, the legislature will react by overruling the president.

Howell notes that a striking feature of the bills overturning executive orders is that they "involved relatively unimportant matters" (116). While this is not in dispute, he notes that one of the main reasons Congress is at a disadvantage relative to the president in reacting to executive orders is that members "take on those issues that most affect their reelection prospects, and pay considerably less attention to the rest...on those issues that attract little interest within Congress, the president is afforded a residuum of discretion" (109). As such, one would expect that those orders overturned would be more prolific. However, presidents likely give greater consideration before issuing high

profile orders. In such instances, they likely deliberate at length on the probable reaction of Congress to the order. As such, these orders should be *less* likely to be overturned.

To conclude after an examination of the data that Congress is unable to rein in the president due to a dearth of actual instances of congressional action is to conclude that neither the president nor Congress is capable of rational action. A president that is acting rationally will not issue an order that will provoke a congressional backlash. At the same time, rational members of Congress will not sit idly by while a president unilaterally moves policy away from their desired positions. If one concludes that these politicians are unable to act rationally then the entire model is suspect, for all predictions of the model hinge upon rational actors playing the game.

Another flaw in Howell's analyses is the dependent variable used in the empirical analysis. Howell recognized that all previous large-n studies of executive orders utilized a count of all, or nearly all, executive orders issued within a given time frame. For instance, Krause and Cohen (1997) examined an annual count of executive orders issued as a dependent variable. Mayer (1999; 2001), on the other hand, analyzed a monthly count of executive orders. While such studies may reveal a pattern of presidential use of executive orders, the pattern is of little value, because one cannot be confident that it reveals how a president utilizes executive orders to affect *policy*. Presidents issue executive orders to accomplish a great number of objectives: honoring a deceased public official, delegating authority to subordinates or setting holidays for bureaucrats. While orders accomplishing these objectives may have policy ramifications, a president issuing such order is likely doing so without any objectives



other than fulfilling the role of head of state incumbent upon the office. Inclusion of such orders into a study seeking to explain presidents' proclivity to alter policy unilaterally can mask important realities, as patterns found may simply be patterns of non-policy orders. At the same time, if these orders do not co-vary with the policy orders, empirical patterns that do exist may be missed.

Because of the flaws inherent with using a total count, Howell creates a new dependent variable, "significant" executive orders. Howell codes orders as significant if they were "mentioned in either the appendix of the *Congressional Record* or in the federal court opinions of at least two different cases" within fifteen years of the orders issuance (2003, 80-81). To account for the years 1986-1998, where orders had not yet been present fifteen years, he utilized mentions in the *New York Times*. Using OLS regression on the data from 1969-1985, where data are available from the *New York Times*, *Congressional Record* and court opinions, he generates predicted values of significant executive orders for 1986-1998 based upon the number of times executive orders were mentioned in the *New York Times* in a given year. While such an approach is a step forward from the "total count" method utilized in the past, there are several shortcomings to this approach.

First, and foremost, the dependent variable is not an appropriate test of his theory. According to his theory, large policy changes will usually be made through legislation, not executive orders. Executive orders, Howell's theory predicts, will consist of matters of "lower to intermediate importance" (2003, 48-49). Of course, there are exceptions; presidents have utilized executive orders to make important policy

changes. However, if the theory predicts matters that have less importance characterize the policy content of executive orders, the dependent variable in the analysis should include these policy matters. Furthermore, an analysis that only includes “significant” orders misses a substantial amount of policy generated by the president.

Another potential flaw in Howell’s analysis is the level of aggregation in the dependent variable. Howell’s aggregates his data by congressional term. This ignores a great deal of variation that occurs over time. A more logical aggregation would be monthly or even annual counts. This is especially true when one introduces control variables into the model. For instance, there is a great deal of variation that can occur in the unemployment rate over a two-year period. Treating the entire congressional term the same misses this variation. In addition, war was coded as a dummy variable. If the nation is at war anytime during the term, this approach characterizes the whole term as if a war were present.<sup>2</sup> For periods such as the Vietnam War era when entire congressional terms experienced wartime posture, this does not present a problem. However, conflicts such as Desert Storm/Shield did not span an entire term, making this level of aggregation problematic.

The level of aggregation can influence the analysis and results as well. Howell notes that when he analyzed the data annually, a dynamic process is present, leading him to conclude that a linear Poisson autoregressive model may be more appropriate (2003, 210-11 n11). Granted, such models are more labor intensive to compute; however, one should not aggregate up until the dynamic process is eliminated. Instead, every effort

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<sup>2</sup> 37% of the terms were coded positive on the “war” variable. However, Howell does not state what periods were coded as war periods.

should be made to analyze data as close to the natural data generating process as possible.

Further, Howell was missing data from 1986-1998. To bring his data set into the maximum time frame, he utilizes predicted values of the dependent variable for these years. To create the predicted values, Howell uses OLS regression to predict the values for the number of significant executive orders occurring during a congressional term based upon the total number of orders mentioned in the *New York Times* during that period.

There are two problems with this procedure. First, employing regression analysis on a series that is partially non-stochastic is inappropriate. It does not take into account the deflated standard errors that occur due to using already predicted data. Second, due to the nature of the predicted values there is a mix of count and non-count data. Under this circumstance, simple OLS regression is inappropriate. When OLS is used to analyze an integer dependent variable, estimates can be biased, inconsistent and inefficient (Long 1997, 217). In such an instance, Poisson or negative binomial regression would be more appropriate. Yet, some of Howell's data is non-integer making a mixed estimator more appropriate.

A simple "inter-ocular" examination of Howell's predicted values in relation to the overall time-series in his Table 4.1 suggests that there may be some level of bias in the estimates (p. 84). There is a noticeable increase in the values of the dependent variable once predicted values are used that one would not expect using the history of the time-series as the only predictor. Given that there is not a corresponding increase in

the number of total orders issued during this time; the likely culprits are biased estimators.

Without Howell's data, I cannot state with certainty that utilization of proper methodology would alter the predicted values. However, given the fact that OLS estimators often possess bias in the presence of integer dependent variables and that the predicted values appear questionable, one must question whether the utilization of these data is appropriate.

Because Howell's model was tested using improper data, one cannot assign a great deal of confidence to his results. The selection of a dependent variable requires great care, for the wrong data often produce the wrong answers.

Nevertheless, Howell's (2003) study is a noticeable improvement in scholarship on unilateral action by the president. He seeks to ground the study of presidential action in theory and to test that theory with empirical data. Where should one go from here? Howell himself suggests the path forward in the study of presidential use of executive orders and unilateral action.

He notes that his study has ignored the *transaction costs* facing the president in choosing between executive orders and legislative action (Howell 2003, 49). Further, he states, "as future scholars find ways to introduce transaction costs to formal models of lawmaking, our estimation of the president's power to act unilaterally should only increase" (2003, 51).

By incorporating transaction costs into a theory of unilateral action, the produced theory should do a better job of explaining when a president will turn towards unilateral

action, as doing so incorporates the very costs that shape a president's decision regarding policy change. Such an improvement will greatly improve the theoretical foundation of the study of unilateral action.

In the next chapter, I outline a theory of presidential policy-making where a president balances the transaction costs associated with legislative action and executive orders in deciding which path to take to affect policy.

Another improvement that necessary is the creation of a new dependent variable. As alluded to earlier, the use of executive orders affect a great deal of policy, most frequently at lower levels of government. By focusing solely on "significant" orders, as Howell (2003) does, one misses a plethora of policy changes made by the president.

Furthermore, Howell notes that radical policy change will usually occur through legislation while unilateral action will be concerned with minor policy change. This is likely the case, as presidents will not routinely have the discretion to make drastic changes without the formal consent of Congress.<sup>3</sup> Because of this, any examination of presidential proclivity for utilization of executive orders must incorporate all orders that make policy

Also, if one simply uses an overall count of the orders issued by the president, as Krause and Cohen (1997) and Mayer (1999; 2001) do, one includes a host of orders that have little, if any, policy relevance. This option is even more problematic than using

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<sup>3</sup> Exceptions, of course, abound. Presidents can, on occasion, make sizeable policy shifts without the consent of Congress. President Reagan's Executive Order 12291 is one example. In this order, Reagan was able to provide a great deal of executive oversight to the regulations promulgated by agencies. However, the usual nature of significant policy change is through legislation.

only “significant” orders as one may make conclusions after examining data that in reality reflect nothing more than variation in ceremonial or administrative orders.

To account for the flaws present in the dependent variable of previous studies, a new dependent variable is needed. To be acceptable, all orders that create policy should be included, while those that do not affect policy must be excluded. While this is not a simple task, it is essential to explaining why presidents use executive orders rather than legislation in making policy.

## **CONCLUSIONS**

This literature review suggests two shortcomings in past work on presidential use of executive orders. There is a lack of good theory and empirical analysis in most past work. Howell’s (2003) study marks a vast improvement over prior work. However, as noted above, his theory and analysis also have serious limitations. In the next chapter, I construct a theory of presidential policy-making that predicts when a president will seek policy change through legislation or through unilateral action. Unlike previous work, this theory is generalizable to different policy types.

The theory is developed from the transaction costs framework. This framework has been used with success in other areas of political science. For example, it has been used to describe when Congress will delegate authority to the executive branch rather than writing detailed legislation. The choice made by the president can be viewed as a similar decision. Presidents can either make policy change themselves or push for changes to be made by another branch, in this case Congress. There are relative advantages and disadvantages to each tactic. The theory developed in the next chapter

predicts how presidents make decisions between each type of action when seeking policy changes.

Another limitation of past research is that most have used an easy to construct but improper dependent variable. Most studies include a count of nearly all executive orders issued in a given period (usually monthly or yearly) as the dependent variable. Such an approach results in the inclusion of many orders that have little, if any, policy relevance. When this method is used, one can only have confidence that the results show how presidents use executive orders broadly, as opposed to how presidents use executive orders to affect policy.

The other approach, taken by Howell (2003) and Mayer and Price (2002) is to utilize a count of those orders that are “significant” by some measure. This has an advantage in that it eliminates orders that do not make policy (supposedly, there is a possibility that an order that did not make policy was covered by the news media, i.e. a symbolic order, and thus was deemed significant). However, this route also removes a host of orders that do make policy. Furthermore, most major changes in policy are made by legislation while executive orders usually concern themselves with minor policy changes. By utilizing only “significant” orders, one is likely receiving a picture that differs from the reality of how presidents alter policy through executive orders.

Furthermore, annual counts are the lowest level of aggregation in these studies of significant orders. Such aggregation ignores a sizeable amount of variation that occurs in the political environment. For instance, presidential popularity exhibits a great deal of

variation from month to month; however, by aggregating at the annual level, forces one to ignore this additional information.

A more productive method of studying executive orders would be to examine each executive order and determine its policy substance. By doing this, one can eliminate all orders that do not make or alter policy and include those that do in the analysis. Then, one can aggregate these orders at the monthly level allowing one to capitalize on the variation that exists in the political environment.

Past research on executive orders has provided an initial foundation for the study of presidential behavior when issuing executive orders. The work in coming chapters builds on that foundation by presenting a coherent theory grounded in transaction costs and testing that theory with appropriate data.



### CHAPTER III

## THEORY BUILDING

As noted earlier, presidents have multiple options available for altering public policy. Among these are pursuing changes legislatively and acting unilaterally by issuing executive orders. The study of presidential policy-making requires a theory that explains how presidents choose between these options. In this chapter, I develop a parsimonious theory explaining how a president determines whether to pursue change through unilateral action or to attempt change through the legislature.

In developing the theory, I rely extensively on the transaction costs framework developed originally by Coase (1937) and reintroduced by Williamson (1975). The transaction costs framework is a useful instrument that allows a researcher to consider how various impediments, or “costs,” affect the decision, or “transaction,” an individual makes. The transaction costs framework is mostly used in the economic literature to explain the “build or buy” decision facing firms.<sup>4</sup> However, over the past several years,

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<sup>4</sup> The build or buy decision, also known as vertical integration or firm boundaries, is what a firm does with the realization that each production company must at some point stop making its own inputs. Imagine a continuum of production where some raw good is manipulated at various steps beginning as a raw product, and is turned into an intermediate product by a company. This intermediate product is then transformed into a finished good by some firm. Some companies will concentrate on only producing finished products while buying all raw and intermediate goods from others. Additional firms will take raw products and turn them into intermediate goods utilized by companies that only specialize in turning intermediate goods into finished products. Other companies approach full integration by beginning with raw products and producing a final product. However, even these firms will acquire some goods from others, for instance, their office supply products. The build or buy decision facing a firm, then, is simply the choice made by a company whether to produce the good within

the framework has been increasingly utilized in political science (Bawn 1995; Epstein and O'Halloran 1999; Globerman and Vining 1996; Huber and Shipan 2000; Ostrom, Schroeder and Wynne 1993; Potoski 1999). There are also several studies that, while not explicitly framed in transaction cost theory, are quite similar to the transaction costs framework (Balla 1998; Balla and Wright 2001; McCubbins 1985; McCubbins, Noll and Weingast 1989; Moe and Wilson 1994).

In this chapter, I will also review a sample of the work that has studied politics through a transaction costs approach. After examining political science literature that utilizes the transaction costs framework, I will discuss how it relates to unilateral politics and then develop a transaction costs based model that predicts when a president will pursue policy change through Congress versus striking out unilaterally and issuing an executive order.

## **THE TRANSACTION COSTS FRAMEWORK**

Now, let's define and discuss what the transaction costs framework means. Begin by imagining a world in which transaction costs do not exist. In such a world, individuals would be completely free to negotiate with each other to reach an optimal contract for the exchange of goods and resources. Consider a non-political analogy from Epstein and O'Halloran (1999). A given plot of land is more valuable when used to produce crops than when used to support cattle. In this scenario, if the rancher controls the land, a farmer may enter into a contract to lease or purchase the land from the

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the business or to purchase the good elsewhere (see Epstein and O'Halloran 1999, 38-40 for a concise discussion of the build or buy decision).

rancher. Alternatively, if the farmer already controls the property, a rancher will be unwilling to pay the farmer enough to surrender control of the property. With no transaction costs the land would be put to its most valuable use of farming, for the rancher would be unwilling to pay the farmer a high enough price to surrender control of the land or to use the property to support cattle as opposed to receiving rent from the farmer.

Under the ideal scenario, value determines allocations and the equilibrium price. However, transaction costs can distort this ideal arrangement. Many things can constitute a transaction cost. For instance, if the agreement entails the maintenance of a barn, but the property owner is unable to observe that the barn is being properly maintained then a transaction cost is present (a principal-agent monitoring problem). In such an instance, the property owner will have to either spend resources to observe the maintenance of the barn or accept the possibility that the barn may not be cared for. Either option produces less than ideal outcomes for the property owner. Alternatively, the renter may know that the land possesses a vast oil deposit and is thus willing to pay a higher rent. If the property owner is unaware of this, then the landowner is unable to obtain the maximum rent possible due to a transaction cost (asymmetric information). The lack of information causes a pricing outcome that differs from the equilibrium outcome if both individuals were aware of the oil deposit.

This analogy is a brief introduction to the transaction costs framework that examines a simple situation where transaction costs can creep in. More generally, a transaction cost is any cost that pushes an exchange away from the ideal relationship

where value fully determines allocations. One does not have to consider this definition long before realizing that it is an expansive definition applicable to a variety of situations.

While the preceding example pertained to economic exchange, the framework is also useful for studying politics. Politics is about “who gets what, when and how” (Laswell 1936). Therefore political science is, in large part, the study of allocations. The transaction costs framework seeks to determine how actors arrive at their decisions on allocations, and is thus useful to political scientists.

Consider the following example where members of Congress are faced with a vote on a farm bill. In a world with no transaction costs, members are free to vote their true individual preferences. Were such a world to exist, the resultant policy would reflect the desire of the pivotal member of the chamber.<sup>5</sup>

Such a world does not exist in reality. Members of Congress are often pulled in multiple directions and receive pressure from many sources. On any given issue, a member may have a personal opinion that differs from the majority attitude of the home district. There may be a mobilized minority among the constituents that cares intensely about the issue and desires a vote different from the majority opinion. In such an instance, the member faces potential transaction costs with any action taken. On the one hand, if the member sides with the majority, there is a risk of alienating a passionate portion of the voting block, as well as voting against personal beliefs. On the other

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<sup>5</sup> This could be the median member of Congress. It could also be the filibuster pivot point, or the member that whose support could lead to a veto override (Krehbiel 1998). The point is simply that the member whose inclusion leads to a winning coalition is the expected outcome.

hand, a member that votes against the majority, risks potential electoral defeat by giving a challenger an issue to use for priming the majority in upcoming elections. The manner in which constituents influence the voting behavior of members of Congress is not fully understood;<sup>6</sup> however, there is little doubt the potential transaction costs imposed by constituents alter the decisions of legislators.

The transaction costs do not end with the constituency; there are potential costs for going against the party. Party resources such as money and support can be of vital importance to a member and going against the party is not a decision that one should make light-heartedly (Aldrich and Rohde 2000).

Interest groups provide another potential source of transaction costs. Members of Congress need the contributions and endorsements of willing interest groups for success in the electoral arena. For nearly any issue, there is an interest group taking a keen interest in the decisions made by the members of Congress. These groups can wield their power to impose costs on errant legislators by withholding valuable resources such as endorsements, money and information (Schlozman and Tierney 1983).

The transaction costs framework is useful in determining how legislators navigate these potential impacts in making decisions on a given policy. If one were to simply factor in the policy “wishes” of legislators, then one would likely obtain a misleading prediction concerning the outcome of the policy in question. Only by explicitly acknowledging that there are potential costs for taking certain actions can one make a prediction that reflects reality.

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<sup>6</sup> See Hurley and Hill 2003; Miller and Stokes 1963 for parsimonious theories of constituency influence.

Rational choice analysts will often pay little attention to the costs facing an actor making decisions. Despite elaborate equations and spatial maps, there is often only a passing mention of the costs associated with individual decisions. Even when the costs are factored into a rational choice model, they are often included as a simple generic term. Transaction costs analysis seeks to study the effect these costs have on the decisions made by actors as opposed to ignoring the influence of such costs.

Krehbiel (1998) presents an example of rational choice work that does not factor in the transaction costs facing a political actor. He outlines an elegant theory using a spatial model and the preferences of various political actors to make policy predictions. While the argument is convincing, the model does not incorporate the transaction costs facing policy-makers. The assumption is that the preferences of the actors will drive the outcome, regardless of transaction costs.<sup>7</sup>

Howell (2003) builds upon Krehbiel's (1998) spatial model by incorporating the president's ability to act unilaterally through the issuance of executive orders. Like Krehbiel, the model is persuasive in many regards. However, Howell also ignores the presence of transaction costs. The resulting model predicts what will happen in the absence of transaction costs. While the predictions are still of some value, we do not live in such a world free of transaction costs. A better approach is acknowledging these

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<sup>7</sup> In Krehbiel's defense, under his theory, the preferences of individuals can be influenced by transaction costs, though this is not clearly noted. In this manner, transaction costs influence the outcome of policy. However, explicitly including the costs into a model and determining their influence on policy would be more advantageous.

transaction costs and attempting to incorporate them into a theory of presidential policy-making.

Taking Howell's model to its logical conclusion, the prediction would be that a president should always pursue policy change via executive orders or other unilateral action when there is enough discretion to do so. When presidents are indifferent between obtaining a like policy through unilateral action and legislative action they should pursue all possible policy change through executive orders in order to eliminate much of the uncertainty present in the legislative process. Even though a president can be confident that the administration's legislative agenda will garner a vote, barring unusual circumstances, when a president proposes legislation to Congress, passage is not certain (Edwards and Barrett 2000).

Even when ratification is certain, a president is unable to predict the exact format of the eventual bill. *Ceteris paribus*, under this model of policy-making, a president able to get *everything* desired through executive orders would be better advised to create policy solely through unilateral action.

When a president enters the legislative arena, compromise becomes necessary and the president is rarely able to guarantee that a submitted bill will pass in its initial form. There must be some reason that presidents choose legislative policy change over unilateral action. If the two paths were equal, then a president would always utilize executive orders (assuming that such action is legal) when pursuing policy change; for then the president would be able to get the exact policy outcome the administration desires.

Why, then, do presidents pursue legislation? What drives them to choose surrendering control of the outcome of a policy in large degree to the legislature? The answer is that there are transaction costs present in unilateral action.

Explicitly integrating the transaction costs facing individuals into models adds value by allowing for a more complete theory. The resulting theory is more realistic than the traditional rational choice models often criticized as devoid of reality.

### **TRANSACTION COSTS AND POLITICAL SCIENCE**

There is a common element running through most works that utilize the transaction costs framework (Epstein and O'Halloran 1999; North 1990; Williamson 1975; 1996; Wood and Bohte 2004). The transaction costs analogy usually involves framing decisions in the context of a contract. There should be a neutral third party to enforce the contract. Actors entering into contracts have multiple options. Also the framework assumes that actors are boundedly rational (Huber and Shipan 2000; Simon 1957).<sup>8</sup> The following pages discuss each of these characteristics and their relation to the study of politics

#### **Contract**

The contract holds a great deal of importance in the transaction costs framework. In this study, the U.S. Constitution is the contract that binds the behavior of the president and his relation with other actors. Though not explicitly stated, this is the implication of

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<sup>8</sup> Unlike traditional bounded rationality pioneered by Simon (1957), transaction costs do not assume that it is necessarily inadequate cognitive capacities that limit one's ability to maximize net value, instead there are transaction costs such as informational uncertainty that lead to one's inability to fully maximize net value.



most assumptions of models in political science, for the Constitution states the rules for making policy in the United States

The Constitution outlines how the differing branches are to work together to affect policy. Some of the requirements are direct. For instance, the founders wrote the constraint that a two-thirds super-majority of both houses of Congress has the ability to override a presidential veto in such a manner as to leave no doubt as to the framers' intentions.

Other parts of the Constitution give the branches discretion. For example, Congress has a great deal of latitude in its organization and operation. In forming its rules, Congress has created procedures and rules that have an influence on policy. For instance, the Senate created the filibuster within its rules. While this practice is absent from the Constitution, its presence has greatly altered the means by which laws are made in America (Krehbiel 1998).

Under the constitutional contract, the president has five options for influencing policy either explicitly or implicitly outlined. Maintaining the status quo is the first. While this generates the least level of conflict, it is also the option of least value to a president wanting policy change. By taking no action, the president essentially accepts that the current policy is better than any change after accounting for transaction costs. Seeking to maintain the status quo is not normally associated with presidential policy-making. However, the decision to do nothing does influence the outcome of policy, and therefore it is an important component of presidential policy-making.

Unilateral action is the second option available to the president. According to Cooper (2002), this can come in the form of national security directives, proclamations, or the subject of the next chapter, executive orders. The president can also utilize vague or incomplete portions of existing law to shift policy. By doing so, the president essentially utilizes the position as “chief administrator” to influence the implementation of policy.

A president who alters policy through unilateral action is contractually bound by two factors: the Constitution and existing law. With regard to existing law, the administration cannot violate the letter of the agreement between the president (even if it was a prior administration) and the enacting legislature (even if the composition of Congress is radically different from the enacting Legislature). With respect to the Constitution, the president must abide by all restrictions from due process or rights embedded in judicial decisions.

Unilateral action presents the president with a host of benefits relative to other options. The president is able to shift policy to a position more consistent with his own preferences. He may de-emphasize costs to particular political interests affected by the policy. Relatedly, unilateral action does not entail transaction costs from negotiating with Congress.

However, the president is not free to use unilateral action to move policy anywhere at all. The president runs the risk that other political actors will convince Congress to overrule the unilateral action through legislation (McCubbins, Noll and Weingast 1989). In addition, the policy must stay inside the bounds of existing law. If

presidents do not, they face the possibility of an embarrassing ruling from the courts overturning the change. This course of action, then, is not viable when the president desires a move in policy that is greater than existing law will allow.

Time imparts another unique advantage to unilateral action. Formally altering legislation is a time consuming process. Rarely is a president able to push through a legislative proposal in a short amount of time. However, by acting unilaterally a president is able to make the changes as soon as the administrative staff is able to draft and review an executive order. A president facing immediate political problems has little time to wait on Congress to make changes in law. At such a time, the president may be well advised to issue an executive order and alter the policy unilaterally.

There are, however, costs to unilateral action. As was mentioned previously, the president is constrained in how far policy can be moved through unilateral action. The president cannot move policy to any desired position, or there is the risk of reversal by the legislature or courts. The president must also work within the bounds of the existing law. If a president desires a change in policy that exceeds the allowances of current statutes, then the only option is to seek new legislation.

In addition, when acting unilaterally, the president faces the same statutory situation that existed before the action. Granted, the president took action that may have been unexpected by Congress and thus altered the status quo to favor the administration's desires. However, since the original statutory framework is left in place with the same amount of discretion, any successive administration will be free to overturn the unilateral action.

If a president desires a more permanent change in policy, then unilateral action is not the best avenue. For instance, President Reagan issued a ban on funding of foreign family planning organizations that counseled women on abortions or performed the procedure. This policy stayed in effect under the like-minded President George H.W. Bush administration. However, when President Clinton entered office in 1993 he issued an order reversing the Reagan order. The policy was again changed in 2001 when President George W. Bush reinstated the policy of his father and Reagan (Hall 2001). As this example shows, when there is not a change in the statutory agreement between Congress and the president, the long-term stability of the policy is in danger since any president is free to alter or remove any executive order from previous administrations.

Certainly, each of the presidents in the above example would prefer their favored policy were the permanent policy. However, these presidents likely did not possess the ability to coerce Congress into making permanent changes to the nation's policy towards international family planning. While unilateral action may not be the ideal solution in such circumstances, a temporary change in policy often serves a president better than no change at all.

The third option available to the president is seeking policy change through legislative action. This "textbook" approach requires the president to influence the legislative branch in an attempt to secure new law cementing a given policy. This process of implementing policy change has unique advantages and disadvantages relative to the other forms of altering policy.

Permanence is a big advantage of changing policy through legislation. Any future president desiring a change in policy initially made via legislation will have to muster at least a majority of both houses of Congress. Given the slow turnover within the two chambers (Parker 1989, chapter IV), such action is much more difficult. When long-term stability of the policy is of great importance, legislation is likely the best choice for the president.

Another benefit of legislative action is that fewer legal barriers to action exist. A president is constrained by current law and by the Constitution when acting unilaterally. In terms of legal restrictions, there are only Constitutional concerns to attend to when seeking legislative change. Of course, the president has a host of de facto limitations in regards to legislative action. A president must account for the wishes of members of Congress and the public at large. However, if the president desires a policy change outside the bounds of current law, legislative change may be the only route available.

One cost of legislative action is that the president is unable to craft an exact policy. The legislature has created chamber practices that make it difficult for the president to push legislation through unaltered. The committee system allows members to hold up legislation (Wilson [1885] 1956). The conference committee structure allows members of Congress to have an “ex-post veto” on legislation as well (Shepsle and Weingast 1987). The legislature also utilizes omnibus legislation to force the president into accepting some policies opposed by the administration in order to garner the passage of a more favored policy (Krutz 2001). In the face of divided government, the

majority party can exercise great power in blocking legislation, forcing a compromise, or even enacting their own legislation (Rohde 1991).

Even if there existed no institutional roadblocks to legislative action, the president would still be unable to craft a specific policy. To garner passage of legislation, the president must secure the votes of at least half of the members of Congress (at least ten percent more in the Senate must be unwilling to pursue a filibuster to block the legislation). Because of this, the president is faced with the realization that legislative action will likely result in a policy that is not the exact policy sought by the administration.

Further, due to the complex system and the multiplicity of interests, the president is routinely unsure as to what form a passed statute will take. This uncertainty is most pronounced when compared to the certainty that exists when a president issues an executive order. Because the president makes the policy, there is little doubt what form it will take.

The time involved in the legislative process is a further cost of congressional action. If a president faces a situation, such as a natural disaster, hostile attack, or an economic hardship, there may be little time to wait on legislative policy change. Such circumstances often require immediate action, something that only occurs in the rarest of situations within the Legislature.

The fourth option available to the president for making policy change is attempting to influence the bureaucracy. Because the federal bureaucracy is responsible

for implementing the policies of the government, if the president can successfully control the actions of agencies, then governmental policy can indeed be manipulated.

The president can attempt to influence the bureaucracy through centralization of administrative tasks (Cooper and West 1988; Moe 1985; West 1995). By limiting the discretion available to “street level” bureaucrats, the administration can more effectively control the outputs of the government. Past research also shows that the president can affect control over bureaucracies by utilizing the power to appoint like-minded individuals (Durant and Warber 2001; Golden 2000; Nathan 1983; Waterman 1989; Weko 1995; West 1985; Wood 1988; Wood and Waterman 1991; 1993; 1994). By doing so, the president can influence the outputs of administrative agencies. However, the president is limited in how far policy can be moved without formal policy changes such as occurs through legislation or executive orders. The law and the Constitution bind bureaucrats and they are not free to do whatever they please. In addition, the Executive Office of the President is much too small to effectively monitor all actions of the bureaucracy (West 1995). Therefore, presidents cannot be sure of the implementation of such policy changes.

While research has shown that presidents can effectively utilize appointees to control the bureaucracy, doing so is not a simple process. Many appointees serve at the pleasure of the president; others do not. In *Humphrey's Executor vs. The United States*, 295 U.S. 602 (1935) the Supreme Court ruled that Congress has the right to create appointed positions where appointees could not be removed by the president for political

purposes. If the president makes a poor initial selection in appointing such an official, there is little recourse to punish the errant administrator.

There are a limited number of qualified, willing individuals to serve in appointed positions for the president to choose from. Government service often does not pay what a comparable job in the private sector demands and the perks are much less than a job in the business community (Fesler and Kettl 1996). Also, given the sheer number of appointed positions, as many as three thousand, with over five hundred at top levels (Ingraham 1995, 104), the president is unable to properly screen each appointee for loyalty and ability (West 1995).

Even if the president were able to successfully screen appointees and select only those willing to faithfully execute the policies of the administration, there always exists a possibility that the appointee will leave prematurely. Wood and Marchbanks (2004) show that appointees typically serve only a short time, and are more likely to leave during times of economic prosperity. When appointees leave, the president loses loyalty to the administration and the president's desired policies. The loss of administrative competence and experience results in amateurs acting for the president (Fesler and Kettl 1996; Heclo 1977; Ingraham 1995).

Controlling the bureaucracy is possible. Through centralization and utilization of appointees, the president can sometimes influence public policy. However, achieving policy change through these means can be difficult, and at times may not be the most effective method. As with legislative change, policy change through administration can be slow and uncertain of matching the president's desired position. Moreover, like



executive orders, altering policy through the bureaucracy does not result in permanent policy change and can be overturned by a future administration. Therefore, pursuing policy change through the bureaucracy will typically have the transaction costs associated with the prior approaches without the advantages that come with them. As a result, it is likely not the preferred course for the president to create policy change.

The fifth option available to the president for altering policy is the pursuance of a court challenge to existing law. This option is perhaps the most difficult path for a president seeking policy change. To achieve change through the courts there must be a relevant case somewhere in the judicial venue. Then the president must convince the judiciary to hear the case. Finally, the president must achieve a favorable court ruling, typically showing that a pre-existing law is in some way errant. Such means are not likely to be an effective route for presidential policy-making. The courts do not bow to the president in choosing cases, and may not agree with the president in deeming the status quo errant. In addition, a judicial challenge can be a slow process, resulting in an outcome that does not match the president's desired policy position. Thus, change through judicial means is typically not a viable approach for most policy changes sought by the president.

Of the options that are implied or granted in the Constitutional contract for presidential policy-making, the legislative route and unilateral action are likely the ones most practical. While it may be useful to study the administrative and judicial presidencies, this dissertation will focus on presidential policy making through legislative change and unilateral action. In particular, I seek to determine when

presidents choose unilateral action through executive orders versus legislative action to pursue policy change.

Table 3.1 lists selected transaction costs associated with both legislative and unilateral action. The items in bold represent transaction costs included in empirical tests in the coming chapters.

**Table 3.1 Selected Transaction Costs for the President Associated with Unilateral and Congressional Action**

Legislation	Executive Orders
<b>Time Required for Passage</b>	<b>Limited Discretion</b>
<b>Inability to Set Policy</b>	Lack of Permanence
Uncertainty Regarding Outcome	

Items in bold represent transaction costs that will be tested in the coming chapters

### **Neutral Third-Party**

A second assumption of transaction cost analysis is that a neutral third party exists to enforce the contract. As was mentioned previously, the Constitution is the contract guiding the American political system. Under this document, the court system reigns as the arbiter of what adheres to the Constitution. This study, then posits the courts as the third party mediating between the executive and legislative branches. This is consistent with the approach of Epstein and O'Halloran (1999).

In theory, the courts are neutral; however, there is a high likelihood that judges have some level of bias. Judges, like any other citizens, have policy preferences. To assume that these individuals ignore these opinions when making a legal ruling is likely

naive. What is more probable is that justices act upon their own policy preferences when making a ruling. There is a great deal of research to support such a conclusion (Segal and Cover 1989; Segal and Spaeth 1993; 1996). The relationship may be complicated as well, with justices relying on a mix of their own personal ideologies and law and precedent (Songer and Lindquist 1996). The simple fact that the president appoints these justices and the Senate accepts them suggests that there is some level of ideology and partisanship underlying the behavior of judges.

Another variable that can limit the court's ability to act as a neutral arbiter is public opinion. Flemming and Wood (1997) show that individual justices do adjust their votes on cases in a manner that reflects public opinion, even after controlling for their ideologies (see also Mishler and Sheehan 1993). If the courts do indeed respond to the mass opinion of the public, then they are unable to fully serve as an unbiased arbiter to whether actions are in accordance with law, for until formally altered, the letter of the law is not responsive to the whims of the public. However, Flemming and Wood's findings indicate that justices only marginally change their views in light of public opinion. Thus, politicians must recognize that public opinion may enter in to the court's deliberations; however, it should not be the driving force behind judicial decisions.

Regardless of their ability to remain strictly neutral, the courts are the arbiters of the American political system. The probable bias that is present may be either beneficial or harmful to the president. A president may have more or less leeway on a particular issue with a given court. The uncertainty and bias caused by this lack of neutrality can be viewed as a transaction cost, limiting the ability of politicians to take the letter of the

law at face value. However, politicians are able to formulate expectations of what the courts will decide on a given case and can adjust their actions based upon these predictions. This expectation of judicial reaction, then, can be viewed as altering the available options for a president. The president holds certain beliefs as to what the court's reaction to potential actions taken by the administration will be and will take action after considering those beliefs.

### **Multiple Options**

Transaction costs analyses also assume that decision makers have multiple options when making decisions. Otherwise, there would be little value derived by utilizing the framework, as the actors would make the same decision regardless of the associated transaction costs. In this study, I assume the president can choose between altering policy through legislation or through unilateral action. The decision is made after weighing the transaction costs associated with each choice.

### **Bounded Rationality**

Utilization of the transaction costs framework assumes that individuals are boundedly rational (Huber and Shipan 2000; Simon 1957). This means that actors attempt to navigate an uncertain environment by making the best decisions that they can with limited knowledge and rationality. However, due to transaction costs, they will be unable to act in a manner that will always result in the maximum payoff. They will seek instead to maximize their expected payoff by trying to balance the projected costs with

the projected benefits of various courses of action. When doing so, they take the action that they expect will yield them the highest net value.

In regards to political actors that are boundedly rational, Huber and Shipan (2000, 26-27) provide a description of the transaction cost framework from a bureaucratic control perspective. Borrowing heavily from their criteria, the following points are relevant to boundedly rational policy actors:

1. Political actors are rational optimizers. That is, presidents, legislators, bureaucrats, or other political principals adopt strategies that maximize expected payoff.
2. Political actors are boundedly rational in a narrow sense. They face informational problems limiting their ability to achieve ideal outcomes, despite efforts to optimize.
3. Political actors are policy-oriented. That is, politicians want to implement legislation to obtain the best possible policy outcome.
4. Political actors face particular types of transaction costs in their efforts to optimally structure policy.
5. Political actors choose institutions that maximize net value, given the tradeoff between policy and transaction costs (Huber and Shipan 2000 26-27).<sup>9</sup>

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<sup>9</sup> These criteria have been changed to some extent, but portions are quotations from Huber and Shipan (2000, 26-27). The entire portion is treated as a direct quotation, though there is some changes made to the wording.

Bounded rationality is an important concept in transaction costs analyses.

Transaction costs affect not only the expected net values associated with unilateral and legislative action, but also the potential for error in arriving at an accurate estimation of payoff.

The expectation in this analysis, then, is that a president selects among the options available, either legislative or unilateral action, based upon a consideration of the transaction costs and benefits associated with each, selecting the one with the greatest expected net value. In essence, the president has a “build or buy” decision to consider. The build or buy decision facing the president is this: policy can be made unilaterally, or built. Conversely, the president can attempt to convince Congress that a policy change is prudent. In this scenario, the president is “buying” policy change for the president does not have complete control over the outcome of the policy, but rather seeks change through another organization and must face the realization that Congress may act in a manner that is not in the best interests of the administration.

The president then selects the option that holds the highest expected payoff relative to the other alternative. Due to limited knowledge, the president may sometimes be uncertain about the appropriate method of achieving policy change, but acts in the manner that expected to lead to the greatest net value.

Some general factors may affect the expected net value to the president of taking legislative action versus unilateral action. Among them is political efficiency. This derives from the ability to maximize public approval or re-election chances (or in the case of a second term president, the re-election chances of the party). A president caring

about public approval or the electoral chances of the party would be remiss in failing to consider the role each of the administration's decisions has on those chances. Policy that increases approval or electoral chances thus carries greater net value, *ceteris paribus*.

Public policy that is of importance to the president is another consideration that can affect net value. Most individuals have certain policies they care about and have favored positions for said policies; presidents are certainly no different. Unlike John Q. Public, however, presidents are in a position to act on their policy preferences and push for policy reflecting those goals. The resulting policy will generate outcomes that carry some benefit to the president. Legislation of more importance to the president carries greater potential net value, *ceteris paribus*.

A president also attaches importance to the historical legacy of actions. No president wants to go down in history as a poor steward of the nation. Because of this, a president has an incentive to work towards sound public policy that will benefit the nation (or at the very least, policies that the president *believes* will benefit the nation). Policy that expected to result in a better legacy will carry a higher net value than a policy that impugns the president's legacy, *ceteris paribus*.

## **POLITICAL SCIENCE RESEARCH USING A TRANSACTION COSTS**

### **FRAMEWORK**

The past several years have witnessed a growth in the use of the transaction costs framework within political science. What follows is but a sampling of that work. As evidenced, the framework provides a flexible and useful lens through which to view questions of a political nature.

Wood and Bohte (2004) utilize the transaction costs framework in examining the way Congress and the president design administrative agencies. According to their theory, current and future transaction costs affect the design of administrative agencies. Under some political conditions, Congress and the president design agencies insulated from future political control. Under other conditions, they design agencies to facilitate future political control. Indeed, the design of an agency determines transaction costs for future political actors seeking to alter or control policy. Specific predictions flowing out of their theory are that higher future transaction costs occur when there is a heightened degree of conflict between the president and Congress, higher electoral turnover, higher levels of coalitional conflict, and weak political parties (177).

Empirical tests support Wood and Bohte's core theory: when there is a greater likelihood that rival politicians in the future will desire to influence agency action, either through the presidency or through a new legislative make-up, there is a tendency towards incorporating additional transaction costs into the agency design. Additionally, when there is a political environment that is more difficult to legislate, such as weak parties, there will be fewer transaction costs incorporated into the agency design. These transaction costs might include broadening the agency leadership to multiple actors, imposing party requirements on those serving in a leadership role, or giving appointees longer terms.

One important note to take from this study is that Congress and the president are cognizant of present and future transaction costs. Not only are they aware of transaction



costs, but also they utilize these costs in designing administrative agencies so as to influence future efforts to change policy.

Another notable application of the transaction costs framework is Epstein and O'Halloran's (1999) analysis of determinants of legislative delegation of authority to the bureaucracy. They build upon Mayhew's (1974) popular assumption that members of Congress seek to maximize their electoral chances. Using this assumption, the authors postulate that when creating policy, legislators weigh the inherent transaction costs of detailing explicitly all factors of legislation with the potential transaction costs of delegating this authority to the executive branch.

By delegating to the executive, Congress lessens its workload and is able to capitalize on the expertise possessed by the bureaucracy. Additionally, by delegating, Congress avoids many of the inefficiencies created by the current committee system. Among inefficiencies noted by the authors are legislative delays caused by the system and the informational asymmetry present in the current structure (48-49). The entire Congress is unable to ascertain when a committee is forthcoming in regards to information surrounding a given policy. Because of this, there is always the possibility that a committee can mislead the body into enacting a policy that is not in the greatest interest of Congress as a whole. When there is a greater chance that committees are misleading the collective legislature, Congress is better off delegating authority to the bureaucracy.

Delegation, however, presents inefficiencies as well. Most notably, legislators must expend precious time monitoring the bureaucracy. There is no guarantee that the

agency will not act in a manner different than intended by Congress (49). When an agency is likely to shirk its responsibility to represent the legislature, Congress is better off enacting policy on its own. Epstein and O'Halloran utilize the transaction cost framework to explain how Congress balances these inefficiencies in order to create policy.

After developing a theory that explains when Congress will make policy on its own and when it will delegate its authority, the authors test their theory with empirical data. They find that when committees are composed of individuals outside the congressional mainstream, Congress delegates more power to the executive. Conversely, when the minority party in Congress controls the bureaucracy, the legislature delegates the administrative state less authority. Contentious policy areas are another characteristic of delegated policies.

Epstein and O'Halloran's empirical tests support their general theory that Congress will delegate authority to the executive branch when doing so is more politically valuable than making the policy internally. This study dovetails nicely with the work in this dissertation. The authors explain when Congress will make policy on its own versus when it will delegate its authority to another branch. This dissertation predicts when a president will make policy unilaterally and when the administration will attempt to influence another branch to alter the policy.

Epstein and O'Halloran's study also can be seen as the starting point in studying unilateral action. When Congress decides whether to delegate to the executive branch, it is explicitly acknowledging that the President will be able to alter the expected

placement of the policy by administrative influence. Once Congress delegates power over a policy to the executive branch, then the president faces a decision of what to do with the policy. The administration can leave it untouched and accept the intentions of Congress, or utilize its discretion to move the policy into a direction that is more favorable to the administration. A third option is to attempt alteration of the policy formally through the legislature.

In this regard, the president is making a personal delegation decision. While legislative action is not truly delegation, the president does have a say in the outcome, the president does cede a great deal of the power inherent in the office when legislative action is called for. Like Congress, the president can also choose to alter the policy internally rather than delegate the authority. However, as in the legislature, doing so presents inefficiencies. As such, this dissertation is essentially an extension of Epstein and O'Halloran's framework to the presidency.

Another study using a transaction cost framework is Bawn (1995), which also seeks to explain Congressional delegation of authority to the bureaucracy. Though her work never explicitly mentions transaction costs, she does utilize the transaction cost of uncertainty to predict the policy moves of Congress. According to Bawn's theory, Congress balances its uncertainty about the preferences of an agency with its uncertainty regarding the policy consequences that will occur when the expertise of the bureaucracy is not utilized. Bawn's theory has not been not subjected to systematic empirical testing. However, she does examine two examples of policy decisions made by Congress and notes how the delegation decision made by Congress mirrors her theory.

As these three examples show, the transaction costs framework provides a useful lens through which to view the political world. Although the framework has been most widely used in economics, it is also a valuable tool for political scientists and is useful in the study of presidential policy-making.

### **TRANSACTION COSTS AND PRESIDENTIAL POLICY-MAKING**

As noted, a president usually must choose between acting in concert with Congress and acting unilaterally when seeking to change policy. There are inefficiencies inherent in either course. The inefficiencies can be viewed as transaction costs as they push the president away from the ideal policy location. With legislative action, the inefficiency is that the president likely will not obtain the preferred policy outcome. The administration will likely have to make some concession to win approval of the policy. This inefficiency is most evident when comparing to the potential policy outcome if the president were to act unilaterally. In a world of no transaction costs, the president is free to set the policy wherever it is most advantageous to the executive. In this regard, then, the distance of legislative action from the president's preferred policy outcome represents the inefficiency of legislative action.

The possibility that the legislature will write the law in such a manner that limits the president's discretion is a related transaction cost of choosing legislative action. Wood and Bohte (2004) show that Congress can create policy in such a way as to reduce the ability of an executive to affect policy outputs. Such action would decrease the net value of the change in policy and is a transaction cost that the president must consider before pursuing policy change through legislative action.

Another key inefficiency in seeking legislative action is that Congress often moves at a snail's pace. If there is any need for rapid action, the president will be hard pressed to pursue a legislative remedy. The speed of subordinates represents the only time constraint for the president when acting unilaterally. As soon as the executive branch creates an executive order and review it for legality, the president is free to make the policy change; this is obviously less tedious and more efficient than legislative action. The speed of the legislative route is, therefore, a transaction cost that presidents must consider.

With unilateral action, the primary inefficiency lies in the non-permanence of the policy. Any subsequent executive is free to remove any policy change made by unilateral action. However, if the president were to garner that change through legislative means, the policy would be much more difficult for a future president to revoke. No policy is immune to change; even the Constitution is amendable. Under any circumstance, though, legislation is much more difficult for a future president to alter than an executive order. Thus, a president would receive a higher net value by pursuing legislation rather than issuing an executive order if there is not much difference in the expected policy outcomes of the two processes.

At times, the president is unable to achieve a desired policy change through unilateral action. This occurs when the president lacks sufficient discretion to move the policy in the desired manner. If the president desires a change that is outside of the legal discretion, the only available options are to pursue change through the legislature or to issue an executive order that lies within the allowable parameters and accept the fact that

the resultant policy does not reflect the true wishes of the administration. In such an instance, if the president chooses unilateral action, the inefficiency is the difference between the desired policy and the policy made through the order.

How the president balances these inefficiencies in making a determination of policy action is the crux of the transaction costs analysis of presidential policy-making. Because these inefficiencies are present, the president must consider carefully the action taken and seek to maximize payoff by minimizing the transaction costs faced through each potential course. The president will take the action that produces the highest expected net value after accounting for present transaction costs.

### **The Model**

Using this framework, the assumption is that a president will act unilaterally when the expected net value of doing so is greater than the expected net value of acting through the legislature. We can formalize the framework and preceding discussion as follows. First, to embody the expected payoff of legislative action the following formula will be utilized:

$$V_L = P_L * T_L$$

Where:  $V_L$  = The expected net value of a bill that goes to the legislature.

$P_L$  = The expected net value of legislative action.

$T_L$  = The net value the president places on having the policy change being made in a more permanent manner.

This formula encompasses a president's desire for long-term policy change.

While the change may not be assured permanence, the president knows that any

following president will have a more difficult time changing the policy than if the change were made unilaterally where a new administration need only revoke the executive order.  $P_L$  represents the net value of legislation to the president after accounting for all of the benefits and transaction costs. The representation  $P_L$  also takes into account the fact that the president is not able to set policy at a given point, but must cede that authority to the legislature. This can be important, especially when the president faces a hostile Congress.

To represent the expected net value of unilateral action the following formula is utilized:

$$V_U = P_U * T_U$$

Where:  $V_U$  = The net value obtained by acting unilaterally.

$P_U$  = The payoff of the policy obtained by acting unilaterally without legislative modification. The president may not act beyond legal discretion.

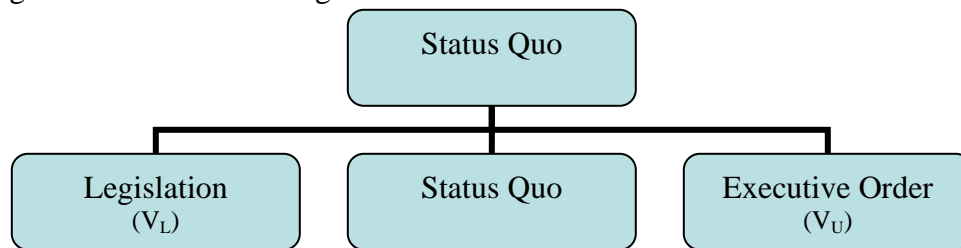
$T_U$  = The value the president places on being able to act quickly and without waiting on Congress.

This formula represents the president's desire to make specific changes to a given policy.  $P_U$  represents the net value to the president of unilateral action after accounting for all benefits and transaction costs. Important is the idea that the president cannot move the policy beyond legal discretion. This may be somewhat controversial as Howell (2003) contends that the courts do not do an adequate job of containing the president. Even if this is true, which is debatable, there is a limit to a president's

discretion. Presidents cannot act in any way they desire. The net value here is simply the most favorable point at which the president *can* alter the policy without facing a negative ruling from the courts or being overturned by Congress.

Also represented in the formula is the benefit the president receives by being able to act quickly. There are times, when national emergencies or economic hardships demand immediate attention. The president should receive a higher net value by acting immediately rather than waiting on Congress in these instances.

Figure 3.1 Decision Facing President



The president, then, faces a decision similar to that in Figure 3.1. For each policy, the president can accept the status quo, alter the policy unilaterally, or seek a legislative remedy. If neither legislative nor unilateral action improves upon the status quo then the president will elect to maintain the current policy. However, assuming that one of the potential changes improves the net value of the policy, the president will act unilaterally when the expected net value of doing so exceeds the net value surrounding legislative action. This will occur when:



$$V_U > V_L$$

or

$$P_U * T_U > P_L * T_L$$

With simple algebra, we see that this will also occur when:

$$P_U > (P_L * T_L) / T_U$$

Using this formula and comparative statics, one is now in the position to make predictions concerning when a president will act unilaterally for policy change as opposed to acting in the traditional fashion. First, a president will be more likely to act unilaterally the higher the net value of  $P_U$ . This will occur when there is a greater degree of discretion given the president under the current law because there is little benefit to a president in acting unilaterally when there is little discretion. Doing so essentially results in the maintenance of the status quo. However, when discretion is high, the president is likely able to pinpoint the exact policy position that is preferred by the administration. Whenever the expected policy location of legislative action falls within the discretionary area of the president, the net value of  $P_U$  is always at least as great as  $P_L$  since the president is able to pinpoint the exact policy when acting unilaterally, something that cannot be done through legislation.

Besides the legal boundaries of discretion, there also exists a de facto level of discretion. This is the range at which the president is able to change policy without facing a legislative override. A legislative override can come in two ways. The first way is by enacting legislation overturning the executive order. If Congress attempts to do so, it will likely need the support of a super-majority given the near certainty of a

presidential veto. Because of this, such action is not probable unless the president takes action that is considerably outside the political mainstream. However, the president must consider the possibility before taking unilateral action. When there exists a higher likelihood that Congress will overturn a potential executive order, the net value of  $P_U$  will be lower.

Another form of legislative override occurs when Congress refuses to fund a policy change made by the administration. Because Congress holds the purse strings it, does have the ability to “check” actions taken by the president. However, presidents have been able to use emergency funds and other discretionary sources of money to fund programs created by executive order. Again, the higher the possibility of a Congressional action that terminates funds for a policy, the lower the net value of  $P_U$  will be.

Another prediction that arises from this model is that a president will be more likely to prefer unilateral action when the expected policy outcome of congressional action differs from the executive’s favored policy position. The president is unlikely to desire legislative action when doing so produces mediocre gains to the administration, or worse, negative changes in the policy space. When such a situation arises, the president is better off acting unilaterally.

In addition, according to this model, presidents are more likely to pursue legislative remedies when there is greater importance attached to the permanence of the policy. When a president desires long-term change in policy, unilateral action is a poor choice. Any incoming president is free to revoke or amend any such action. Because of

this, policy generated by unilateral action has little permanence. Granted, legislation can be overturned, but not unilaterally and obtaining overriding legislation is difficult. Thus, a president placing a high net value on the longevity of policy should consider a legislative course.

Another prediction flowing from the model is that a president is more likely to act unilaterally when there is a desire for rapid alteration of policy. A president desiring swift change can achieve it without any delay when acting via executive orders. However, when acting through the legislature, rapid action is by far the exception rather than the rule. When moving towards quick action, then, executive orders are the superior tool.

The model is intentionally parsimonious. However, it does capture certain elements that a president must consider when determining what policy action to take. The model makes clear predictions concerning what will lead to a higher probability of unilateral action and what will lead to a greater likelihood of legislative action.

The transaction cost framework traditionally applied to the economic literature to study the “make or buy” decision facing companies, with a few modifications, fits well into the study of presidential policy-making and explains well the “legislate or dictate” decision facing the chief-executive. It is a framework that allows for clear predictions concerning how a president will pursue policy change.

Through the rest of this dissertation, I will test the predictions made by this model utilizing a series of empirical tests. By doing so, I will show that presidents are cognizant of their political environment and seek the most efficient manner of obtaining

policy change. They seek unilateral action, when the legislature is not poised to overturn such action and when legislative action would not result in policy that reflects the desires of the administration.

## CHAPTER IV

### TESTING THE THEORY

In the previous chapter, a theory was developed rooted in the transaction costs framework. This theory postulates that when seeking policy change, presidents weigh the costs and benefits of legislative action and unilateral action. After making this calculus, presidents take the action expected to deliver the highest payoff. The theory produces predictions of when presidents will be more likely to issue executive orders. In this chapter, I will review the specific predictions of the model, and then test these predictions utilizing an original data set derived from each policy relevant executive order from 1946 to 2004.

#### **PREDICTIONS FROM THE MODEL**

Recall that in the previous chapter introduced a simple model of presidential decision-making. The model is restated below:

The expected payoff of legislative action is:

$$V_L = P_L * T_L$$

Where:  $V_L$  = The expected net value of a bill that goes to the legislature.

$P_L$  = The expected net value of legislative action.

$T_L$  = The net value the president places on having the policy change being made in a more permanent manner.

The expected net value of unilateral action is:

$$V_U = P_U * T_U$$

Where:  $V_U$  = The net value obtained by acting unilaterally.

$P_U$  = The payoff of the policy obtained by acting unilaterally without legislative modification. The president may not act beyond legal discretion.

$T_U$  = The net value the president places on being able to act quickly and without waiting on Congress.

According to the transaction costs framework, the president will act unilaterally when the payoff of doing so exceeds the expectation surrounding legislative action. This will occur when:

$$V_U > V_L$$

or

$$P_U * T_U > P_L * T_L$$

With simple algebra, we see that this will also occur when:

$$P_U > (P_L * T_L) / T_U$$

In words, the president will act unilaterally when the net value of doing so is greater than the expected legislative outcome, even after the president accounts for the transaction cost of limited policy duration. When will this happen? Three propositions describe when a president will gravitate towards unilateral action.

One factor profoundly affecting a president's proclivity to act unilaterally is the expected net value of legislation. When a president is confident that the legislature will give the administration the bulk of its policy wishes, there is little room for improvement by taking unilateral action. Congress may be more willing to act in concert with the

president's wishes when there is a high level of ideological agreement between the two branches. When there is less disagreement between these two institutions, Congress has less cause to resist the policy proposals of the president. There may also be policy areas where Congress is more likely to yield to a president's wishes. Wildavsky (1966) argues that presidents experience greater success on foreign policy matters than they do for domestic issues. Despite limited support for Wildavsky's theory (see Bond and Fleisher 1990, chapter VI; Edwards 1985; 1989, chapter IV; Fleisher and Bond 1988), there may be times when the president should expect greater support from the legislature.

Conversely, if the legislature is poised to resist the president, there is little to gain by introducing a bill in Congress, for doing so will likely result in little benefit to the president, or worse: a policy that actually is less desirable to the president than the original policy. At such times, presidents are more likely to issue executive orders because acting through the legislature presents them with higher transaction costs. Since such presidents are unable to accomplish much through legislation, executive orders become an attractive alternative relative to Congressional action.

These presidents still face other transaction costs due to using the executive order. These transaction costs include limited discretion and the uncertain permanence of unilateral action. When acting unilaterally, presidents are constrained by statutory limits. They may not act in a manner prohibited by law. Furthermore, Congress can react to any unilateral action, overturning an executive order by legislation. Presidents must consider the likely congressional and judicial reactions to their executive orders. Because of this, they may not be able to accomplish all of their goals unilaterally due to

the limited amount of *de jure* and *de facto* discretion available. However, these transaction costs are always present, and when legislation proves to be especially difficult, presidents are more likely to accept the transaction costs associated with executive orders. This leads to proposition one.

*Proposition One:* As the expected net value of legislation decreases, legislative action becomes more costly, increasing the likelihood that a president will take unilateral action.

Another factor that should greatly influence the likelihood a president will act unilaterally is the urgency of the desired policy change. Nations are sometimes faced with problems requiring swift action. Whether dealing with terrorist threats such as the 9/11 attacks and the Oklahoma City bombing or with economic crises, the country routinely faces situations where leadership is sought and the president is the main focal point of the public's attention. At such times, rapid policy change may be needed if the situation is to be resolved adequately and the president is to escape without blame.

Congress is not known for its rapid deliberation. Even legislation passed in response to a crisis often takes more time relative to unilateral action. For instance, the "Patriot Act" (P.L. 107-56) is unusual in the speed at which it reached final passage after the immediate need felt following the terrorist attacks on September 11, 2001. However, this act did not gain legal status until October 26, 2001, more than six weeks after the attacks. If quick action is a requirement for the president, then legislation is fraught with the transaction costs resulting from delay.



Further, as a president enters the waning days of the administration's term, legislative delay may become unacceptable. Congress can simply "wait out" a president and block any legislation. Even if the president is able to convince the legislature that policy change is prudent, there may not be sufficient time for Congress to pass a bill before the president leaves office. Considering these limitations, the second proposition is the following.

*Proposition Two:* When a president desires rapid policy change, legislative action entails greater transaction costs leading to a greater likelihood that the president will act unilaterally to accomplish policy change.

The third factor that will influence a president's propensity to act unilaterally is the amount of discretion available to the president. When a president enjoys greater discretion, unilateral action is better able to mirror the favored policy of the administration. When there is little discretion available to a president, they are unable to accomplish policy change without legislative consent. However, presidents are typically only able to move policy to the edge of discretionary limits, which may differ from the president's preferred policy. During a period such as this, unilateral action is more costly than at other periods, as it does not provide the administration with as great a change as is desired. Given this, the third proposition is the following.

*Proposition Three:* As the amount of presidential discretion increases, the transaction costs associated with unilateral action decrease, making their use more likely.

In the remainder of the chapter, I will empirically test these three propositions that flow from the transaction costs model of presidential policy-making.

## **DATA**

Studying executive orders empirically presents unique challenges. Ideally, one would like to have data on each instance where presidents are deciding when/whether to make policy and the transaction costs facing the president. Unfortunately, such a data set is not likely to exist in the near future. However, if one focuses on the overall use of executive orders in a given period, then one can infer support for the model if there is an increase in use of executive orders when the model predicts an increase in the likelihood of acting unilaterally. To take such an approach, one must first decide what executive orders to include in the analysis. Mayer (1999, 2001) utilized a monthly count of virtually all executive orders.<sup>10</sup> While Mayer's work was instrumental in bringing the study of executive orders into the mainstream of political science, the utilization of all executive orders is problematic. While a president does influence policy on many occasions by utilizing executive orders, many orders call for action that is trivial and has no relevance to policy. Many executive orders are little more than narrow directives aimed at the bureaucracy. For instance, executive order 11884 designates the design of the seal of the vice-president (Ford 1975). By any objective standard, this is not an issue that the president is greatly concerned with, and has minimal, if any, policy substance.

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<sup>10</sup> Mayer (1999; 2001) eliminated all orders that dealt with exclusions from civil service rules for individual employees, and any order dealing with the use of federal lands (2001, 93).

Howell (2003) improved on Mayer's initial work by utilizing only what he termed "significant" executive orders rather than the complete count of executive orders. Since it purportedly eliminated the executive orders that had no policy relevance, Howell's work represented an enhancement over previous research. Unfortunately, his work also ignored a host of orders with policy relevance that did not meet his threshold of significance.<sup>11</sup>

Furthermore, presidents likely will make mostly minor changes in policy through unilateral action. Presidents routinely do not have the discretion to make major policy changes without the formal approval of Congress. Even Howell's (2003) work suggests that major policy change will occur through legislative change rather than through unilateral action. He states, "The model predicts that Congress and the president together, rather than the president alone will shift relatively extreme status quo policies...landmark laws usually take the form of legislation while policies of lower to intermediate importance fill the ranks of unilateral directives" (p. 47-48). Howell is correct. Presidents do not normally have the power to greatly alter most policies through executive orders, nor do they possess the legal discretion. Courts can overturn the action if the president does not have the formal discretion to act unilaterally. They also lack the *de facto* discretion, for Congress can overturn any policy change that goes against the super-majority wishes of the body.<sup>12</sup>

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<sup>11</sup> Since Howell does not include a list of all orders that are deemed significant, one can not categorize the nature of those orders that are not included in his analysis.

<sup>12</sup> There are examples of presidents making significant policy changes through unilateral action. For instance President Reagan greatly centralized the regulatory process through

Mayer's work included too many executive orders by including a large number of orders that were trivial and of no consequence. Howell's work included too few executive orders by omitting many with policy consequences. In order to strike a balance between these two extremes, beginning with the Truman administration I coded every executive order to the end of George W. Bush's first term.<sup>13</sup> After examining an order, a determination was made whether the order had policy substance. Anderson (2003) defines policy as a "purposive course of action followed by an actor or set of actors in dealing with a problem or matter of concern" (2003, 2). In this light, I treat any order that alters the current course of action of the nation as creating policy. This process was repeated for each order issued during the time frame.

Anderson's "definition focuses on what is actually done instead of what is only proposed" (2003, 2). Because of this, orders that create advisory committees are eliminated from consideration, unless the order grants the committee authority to make policy, or gives the committee authority to implement its recommendations.

In addition, since Anderson's definition is concerned with what is done rather than who is doing it, orders that delegate power to subordinates are not coded as making policy. Of course, when an order creates policy along with the delegation of authority,

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Executive Order 12291 (1981). However, most significant policy change occurs through statutory means rather than through unilateral action.

<sup>13</sup> The data set for this paper runs from April 1945 until 2004. I was unable to find one order, executive order 12681. While I continue to search for a copy of this order, in this particular study, I treat it as if it had no policy substance. The title of the order, "Exclusions from the Federal Labor-Management Relations Program" is identical to executive order 12559 and similar to several other orders. All of these orders dealt with implementation of a statute and did not create policy. Because of this, the exclusion of 12681 is not influencing the results.

the order is coded as making policy. The vast majority of delegations simply state that a given individual, usually a cabinet level secretary, shall possess a power that has been given the president by statute. Such delegation does influence on policy; however, the delegation does not make policy. Rather, it simply states who has the authority to act. Since it does not set the “purposive course of action” (Anderson 2003, 2) to be taken by the government it does not meet Anderson’s definition of policy.

After coding all policy relevant executive orders, the data were then aggregated by month to create a monthly count of executive orders creating policy.<sup>14</sup>

How do the new data compare to overall counts? A look at Figure 4.1 shows that the data do co-vary to some extent. The figure contains annual counts of total executive orders and only those orders that make policy. There is considerable fluctuation,

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<sup>14</sup> What to do when two presidents occupy the same month presents somewhat of a problem. I elected to solve the problem in the following manner. Whichever president is in office for the majority of the month is coded as holding office the entire month. The total count for the month is adjusted to reflect the number of orders the president would have issued had he been in office for the entire month and issued the orders at the same rate he did during the month according to the following formula:

$$T = \frac{O}{(D/M)}$$

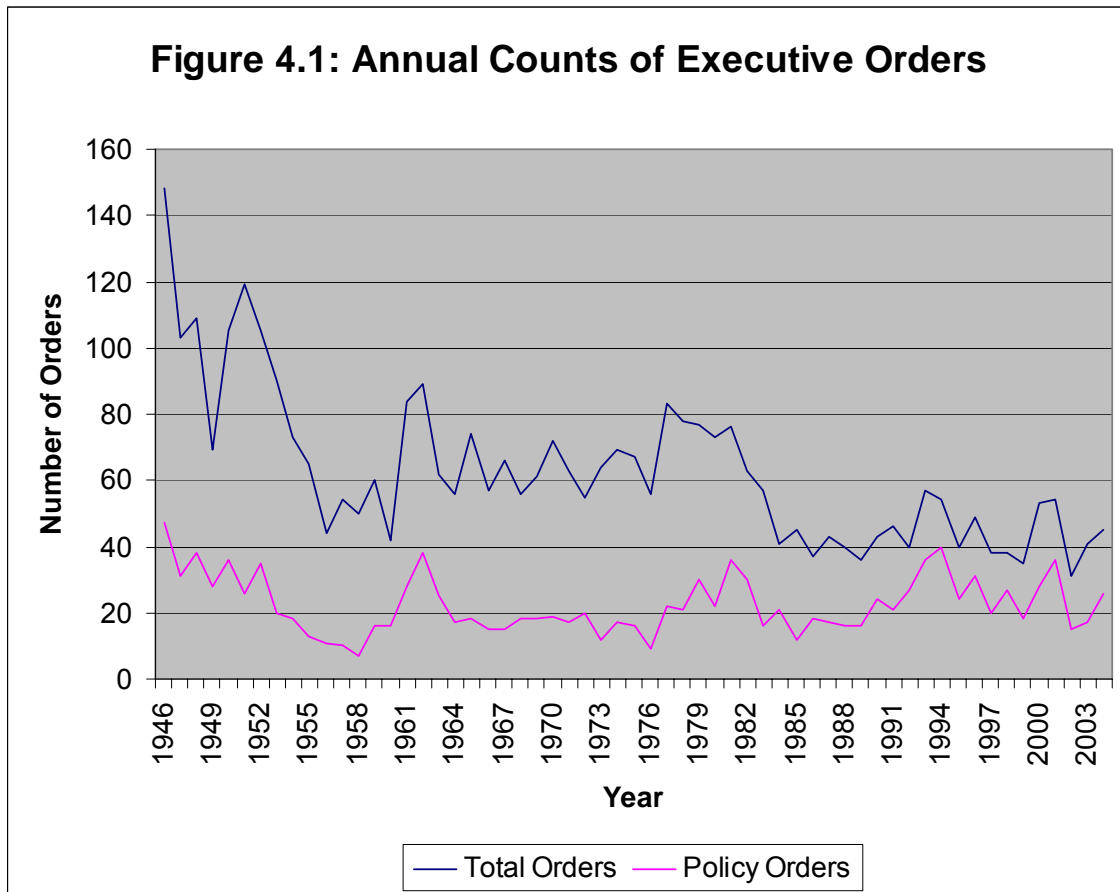
where T = to the total number of orders entered in the data set (rounded to

the nearest integer); O= the number of orders the president actually issued in the month; D= the number of days the president was in office during the month; and M= the number of days in the month. The orders issued by the president serving the smaller portion of the month are carried over into the next month for incoming presidents, or credited to the previous month for outgoing presidents and the month’s total is adjusted according to the

following formula: 
$$T = \frac{(O_p + O_w)}{\left[1 + \left(\frac{D_p}{M_p}\right)\right]}$$
 where T = to the total number of orders entered

in the data set (rounded to the nearest integer); O<sub>p</sub>= to the number of orders the president actually issued in the partial month; O<sub>w</sub>= to the number of orders the president actually issued in the whole month; D<sub>p</sub>= the number of days the president was in office during the partial month; and M<sub>p</sub>= the number of days in the partial month.

however, in the relationship between the total count of orders and the number of orders that make policy. The overall correlation between the two is .54, so there is a relationship. However, it is sufficiently weak to question earlier research.



Howell (2003) states that there has been an increase through time in the use of executive orders to make policy. According to his data, presidents issue more than three times as many “significant” orders each year in the post 1945 era than they did before. He contends that this increase reflects a broader pattern of an expansion of the power of

the presidency (2003, 83-85). Mayer (2001) also notes that there is an increase in the use of “significant” executive orders to make policy, leading him to conclude that executive orders have increased in importance over the past several decades (2001, 86)

Is there an increase in executive orders that alter policy over time? As the results in Table 4.1 show, presidents have shown a slight increase in executive orders to make policy. Presidents issued an average of 21.5 executive orders to create policy from 1946-1975, and an average of 23.3 orders that crafted policy from 1976-2004. However, the increase fails to reach statistical significance. This suggests that Howell and Mayer may have overstated the propensity of presidents to increasingly use executive orders.

**Table 4.1: Use of Executive Orders to Alter Policy Through the Years**

	<i>1946-1975</i>	<i>1976-2004</i>
Annual Avg.	21.50	23.31
Variance	93.29	60.58
n=	30	29
t -stat	-0.794	
df	55	
P(T<t) one-tail	0.215	
t-Test: Two-Sample Assuming Unequal Variances		

As a more rigorous test of an upward trend in the use of executive orders, the annual number of executive orders was regressed on a trend variable. As the results of Table 4.2 make clear, there is no statistically significant upward trend in the use of executive orders to make policy through time. The coefficient is, in fact, negative, though statistically non-significant.

Thus, contrary to the findings of Mayer (1999, 86) and Howell (2003, 83-5), one cannot conclude from these data that presidents are increasing their use of executive orders to make policy. By using datasets that failed to consider presidential policy making more broadly, these authors reached the erroneous conclusions that presidents have been increasingly prone toward use of executive orders through time. This is simply not the case; presidents have not been increasingly utilizing executive orders throughout time to alter policy.

**Table 4.2: Testing for a Trend in the Use of Executive Orders to Make Policy**

	Coef.	Std Error	p<
Trend	-0.01	0.0675311	0.86
Constant	22.73	2.271095	0.00

n=59    R-Squared = .001    F(1,57) = 0.03

One potential cause of the contrary findings of Mayer (2001) and Howell (2003) is the nature of their coding schemes. Each author used press coverage as an indication of significance. As technology has increased reporters have gained ready access to much more information and can, in turn, distribute the information more freely. Thus, their results may be due to greater press coverage rather than presidential actions.

Another potential cause for their differing results may be the increasing litigious nature of society. Each author utilized some form of judicial measures as an indication of the significance of executive orders. Howell codes an order as significant if it is mentioned in the opinions of two or more cases (2003, 80). Mayer treats an order as



significant if it leads to federal litigation (2001, 84). As our society moves towards increasing levels of legal action, an order has an increased opportunity of triggering a lawsuit, and thus a higher chance of being included in a judicial opinion. Given this, one would expect that any measure of significance derived by judicial mention would see an upward trend.

Because the dataset in this dissertation has been carefully constructed by examining every executive order since 1946, it allows a more appropriate test of presidential proclivity towards the use of executive orders to make policy. In addition, since most policy change that occurs through executive orders is at lower levels, this data set does not require that analyses focus on orders that are likely the exception rather than the rule.

## **HYPOTHESES**

Earlier I stated three propositions that flow from the transaction cost theory of unilateral action by the president. In this section, I outline five hypotheses used to test the three propositions and, in-turn, the presidential policy-making model developed in the previous chapter.

### **Proposition One**

Recall that proposition one stated that as the expected net value of legislation decreases, legislative action presents increased transaction costs, increasing the likelihood that a president will take unilateral action. What is needed, then, is a measure of what net value a president believes legislation will return to the administration. One possible measure is the DW-NOMINATE scores created by Poole and Rosenthal (1997).

The DW-NOMINATE scores create ideology measures for each member of Congress and the president using each person's votes or positions on individual pieces of legislation, finding the most likely array of ideology among the individuals given their votes (in the case of the president stated support or opposition to a bill, or the introduction of a bill by the president).<sup>15</sup> The measures are arranged with liberal members receiving negative values and conservative individuals receiving positive values.

Poole and Rosenthal also calculate an average winning DW-NOMINATE position of a bill that makes it through the House of Representatives. This represents the policy position on the DW-NOMINATE scale of the average passed bill. This value provides a measure of how liberal or conservative a president would expect a policy to be if changed through the legislature.

Knowing a president's DW-NOMINATE score and the expectation of what legislative action will produce, one can create a measure of how much a president must "cede" to the legislature in order to get a particular policy change through Congress by taking the absolute value of the difference between the president's DW-NOMINATE score and the average winning position of a policy in the House of Representatives. This measure represents the transaction costs a president faces by pushing for policy change through Congress. From this measure the first hypothesis is:

Hypothesis One: The greater the absolute value of the distance between the president's

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<sup>15</sup> Estimates for presidents prior to Eisenhower were made solely on the introduction of legislation by the president. Because of this, these past scores may not be as reliable as current estimates made from a president's stated opinion of legislation and bills introduced due to the decreased number of bills used to create the estimate.

House of Representatives DW-NOMINATE score and the DW-NOMINATE location of the average winning bill in the House of Representatives, the more likely a president is to issue executive orders.

Measuring what a president should expect to “give up” by pursuing legislation, provides an adequate proxy of a transaction cost associated with legislative action, and will allow for a sufficient test of proposition one.<sup>16</sup>

### **Proposition Two**

As outlined previously, proposition two holds that when a president desires rapid policy change, legislative action imposes greater transaction costs leading to a greater likelihood that the president will act unilaterally to accomplish policy change.

Presidents frequently encounter situations that dictate rapid action. The transaction costs associated with legislative action may be too great to bear, as Congress simply takes too long in passing legislation.

One circumstance where presidents may desire rapid action is when they are faced with situations that may affect their prestige with the public at large. The public holds the president responsible for the state of the union. Whether right or wrong, the president receives the bulk of the credit when times are good and the lion’s share of the blame when the nation is troubled (Brace and Hinckley 1991; Norpoth 1996). Thus, a

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<sup>16</sup> Because of the difference in calculating Truman’s DW-NOMINATE score, I tested with and without the Truman administration. The results without the Truman administration do not perform quite as well, likely due, in part, to the lower degrees of freedom. However, the DW-NOMINATE based indicators of congressional difficulty are significant (at the  $p < .10$  level) on the test of the whole data set and in one of two of the split-sample tests (at  $p < .001$ ).

president can ill afford to sit idly by while the nation travels over rough political or economic waters. When the nation is experiencing economic hardships, the president would be well advised to pay special attention to the problem. Inattention, or even the perception of inattention, can lead to difficulty in the upcoming election for first-term presidents, and lowered prestige for both first and second-term presidents. One need only remember the 1992 election where President George H.W. Bush was lambasted for his handling of the economy to see the importance the economy has for a president's standing with the public.

One characteristic of a troubled economy is the presence of a recession. Recessions are usually defined as two or more consecutive quarters of negative growth in real gross domestic product. However, the National Bureau of Economic Research (NBER) publishes an alternative measure of recession (National Bureau of Economic Research 2005). This measure takes a picture of the economy as a whole and defines a recession as "a significant decline in economic activity spread across the economy, lasting more than a few months, normally visible in real GDP, real income, employment, industrial production, and wholesale-retail sales" (Hall, et al. 2005). The NBER measure provides a more complete picture of the economy, and is a more realistic measure of what citizens likely use in evaluating a president's performance. Average citizens are not likely to keep up with GDP, but they likely feel some of the variation in the other variables such as income and employment. An additional benefit of this measure is that it is reported monthly as opposed to quarterly so more variation is present.

Since the public holds presidents accountable for economic performance, presidents are mobilized to take action when the nation is in a recession, but likely desire more rapid action than Congress will produce. Considering this, I present the second hypothesis:

*Hypothesis Two:* When the nation is in a recession, as measured by the NBER, presidents are more likely to issue executive orders.

Another circumstance where presidents face transaction costs due to the slowness of legislative action relates to time in office effects. As a president enters the waning days in office, the opportunity to alter policies through legislation begins to wither. Quick action must be taken if the president is to succeed in securing policy change. Even if the president were able to persuade the members of Congress that change is prudent, the president may not have sufficient time to sign legislation before leaving office. During such times, congressional action imposes greater transaction costs; thus preventing it from being feasible. If such a president desires to be a part of changing the status quo, the only alternative left is to issue an executive order. Such action requires no cooperating action by any other individual or group, leaving the president free to take immediate action. Considering this, I propose hypothesis three:

*Hypothesis Three:* During a president's last month in office, the issuance of executive orders becomes more likely.<sup>17</sup>

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<sup>17</sup> The last month here, is not always a full month. Rather, for most presidents, it is the January in which they leave office. For, Richard Nixon, this is the July before he left office. John Kennedy was not coded as having a last month in office. Since he was unaware that it was his last month in office, there is no theoretical justification for listing it as his last month.

When a president is in the final days in office and the incoming administration is ushering in a party change, the president should become more protective of the policies created during the current administration. The incoming president may hold major differences on many policy areas from the previous executive. Of course, the new president has the ability to override any executive order issued by the outgoing president. However, political pressures may impose constraints on an incoming president resulting in some reluctance to overturn earlier actions, and thus the survival of last minute executive orders of the prior administration. A strategic president can issue the order in such a way as to make it difficult for the new administration to eliminate the order. For instance, a Democrat president with a desire for strong environmental policy can issue an order calling for safety standards for drinking water. The incoming Republican president may disagree with the policy, but going on the record in opposition of clean water can pose political problems. It may be advantageous for the Republican to leave the policy in place rather than overturning it.

Furthermore, when a new administration of a different party is forthcoming, inaction may pose additional costs, as the incoming president will likely not champion the same issues as the current administration when there are partisan differences. In such a case, if the current president does not cause a policy change, there may be little impetus for alteration for at least the next four years. Considering the transaction costs involved with legislative action, a president will likely move towards executive orders.

Thus, hypothesis four is:

*Hypothesis Four:* When there is an administration change forthcoming, the outgoing president will issue more executive orders in the last month in office when the new president is from the opposing party.<sup>18</sup>

The three hypotheses listed above test the second proposition that presidents attempt to avoid transaction costs due to significant delay in legislative action. Not only do they test a president's proclivity to act unilaterally based upon institutional factors such as end-of-term effects, but they also evaluate the political environment's effect on a president's decision. Together these tests should give a good picture of how a president is influenced by the need for swift action.

### **Proposition Three**

The third proposition that flowed from the model is that as the amount of presidential discretion increases, the transaction costs associated with unilateral action decrease, making their use more likely. Ideally, one would know how much discretion a president possesses for each policy area. Unfortunately, such data are unavailable, and outside the scope of this project. However, one can isolate particular times when a president should possess more discretion to act unilaterally.

One time when presidents should have greater levels of discretion is when the same party as the president controls Congress. Party labels provide voters with a

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<sup>18</sup> Rather than treat the last month in office the same for those who are preceding a party change and those who are not and adding an interaction to test for a difference, I chose to separate the last month in office first, and allow them to each have their own effect. This allows a more intuitive interpretation of the coefficients. Mayer (1999; 2001) takes a similar approach.

simplifying heuristic with which to make a decision on election day for most races, including congressional campaigns (Campbell, et al. 1960).

As the figurehead of the party, the success of the president can have a profound effect on the net value of associating with the party. Action by the president's party overturning an executive order would be embarrassing to the president and harm the administration's standing with the public. If the president's standing with the public is important to the electoral success of fellow partisans, one might expect that action overturning a president's order would harm members of the president's party electoral chances. If this is true, fellow partisans have less incentive to vote against the president when an executive order is in question. When the president's party controls Congress, there should be less likelihood that a vote will be taken on a bill that overrules an executive order and if the vote is taken, the president stands a greater chance of winning. Thus, presidents under unified government should have a greater level of discretion than presidents faced with a legislature controlled by the opposition party. Presidents that have this increased level of discretion face smaller transaction costs when acting unilaterally, making executive orders more attractive than they otherwise would be. Considering this, I present the fifth hypothesis:

*Hypothesis Five:* Under unified government, presidents will be more likely to issue executive orders.

Contrarily, one might predict that unified government would make presidents less likely to issue executive orders because they will be more likely to be successful in the legislative arena. However, what a president expects to receive out of legislation is



already included in the analysis through hypothesis one above. Because of this, any significant effect from unified government should be reflective of the increased discretion as opposed to legislative expectations.

### **Controls**

To ensure that findings are not spurious, certain controls also need to be in the analysis. One control is a dummy variable for the beginning of the president's term. All presidents inherit a status quo, which they had very little role in creating upon entering office. Even if a president was a key player in the legislature or the vice-president prior to arrival in Oval Office, the current collection of policies likely differs from the one desired by the president to some extent. Such presidents are likely to desire a higher degree of policy change than other presidents do.

Furthermore, a president entering office faces with the sum total of previous executive orders. A president desiring to alter these policies need only issue an order overruling it. If the president decides to take such action, there is no need waiting to overrule the order, for speedy action should prove to be more beneficial to the president as the desired change will be obtained sooner. For these reasons, presidents are likely to issue more executive orders during the first few months in office than at other times during their administrations.

Presidents are also likely to have (or at least believe they will have) increased legislative success during their first few months. Since Franklin Roosevelt's early days in office, there has been a perceived "honeymoon effect" where the president's agenda is assumed to have a greater chance of success. During such times, presidents may face

fewer transaction costs when seeking legislative action, making them more likely to pursue statutory change rather than executive orders. Given these factors, one should control for a president's first few months in office. There are two factors that can influence the likelihood of unilateral action, the "honeymoon effect," and the increased desire for policy change that likely occurs in the first few months and each affects the prediction differently. Because of this, I include a dummy variable representing a president's first three months in office. Since there are reasons to predict both a positive and negative relationship between the first three months and executive order usage, I withhold prediction concerning the direction of the coefficient.

The desire to issue new executive orders in the beginning of a presidential term may be different for presidents who are of a different partisan persuasion than the president they are replacing. Such presidents face a status quo that is likely more divergent from their preferences than a president whose inauguration does not represent a party change. Because of this, I separate the first three months in office variable by whether their administration marked a partisan change in the presidency.

Another factor that needs to be controlled for is a president's ideology. Presidents that are more extreme in their ideology may be more likely to seek policy change than do their more moderate counterparts. They may be more likely to desire longer-term policy change in an effort to cement their policy preferences. If this were the case, they would be more likely to accept the transaction costs associated with legislative action than moderate presidents would. However, they may also be more likely to desire exact change, making the transaction costs associated with legislative

action too great to bear. I make no predictions as to which is true since they influence a president's likelihood of issuing executive orders differently. However, there is reason to believe that a president's ideology alters a president's propensity to use executive orders. As such, I introduce the absolute value of Poole and Rosenthal's (1997) DW-NOMINATE scores into the model. Using this approach, presidents who are extreme in their ideological nature, whether conservative or liberal, receive higher values than do more moderate presidents.

The approach outlined above allows for a test that can lend support to the transaction costs model of presidential policy-making. Because it focuses on total use of executive orders rather than on individual policy decisions, however, it is not a direct test of the theory. Thus, one could view the transaction costs framework as a metaphor that guides the expectations of this study. The expected net value of legislation is included in the model through the DW-NOMINATE measure of congressional expectations, however individual pieces of legislation are not examined.

## **METHODS**

The dependent variable is a count of the number of executive orders creating policy issued during a given month. Because the dependent variable is a count, traditional methods are problematic due to their inefficiency, inconsistency, and biased results (Long 1997, 217; Greene 2003). By utilizing a method that accounts for the strictly discrete nature of the dependent variable, one can obtain more efficient results than would be obtained through OLS (Long 1997).

The Poisson regression model provides a useful starting point when modeling data of this type. However, the Poisson model imposes the restriction that the expected count equals the variance in the expected count. Given that the expected count may be heterogeneous with respect to time, this may be an unreasonable restriction. A popular method for relaxing this restriction is to utilize a negative binomial model. This model incorporates an overdispersion parameter that enables accounting for variances larger than the expected count. When this term is statistically zero, the negative binomial model reduces to the Poisson model (Long 1997, 231; StataCorp 383-388). When the true data generating process follows a negative binomial distribution and Poisson regression is used, estimates are still consistent, but are not efficient. Also, when the Poisson regression is used, there is a downward bias in the standard errors resulting in artificially large z-statistics (Long 1997). For this project, then, I will begin the test of the outlined model with negative binomial regression.

## **RESULTS**

Table 4.3 reports the results from this. As can be seen from the chi-square statistic for the alpha dispersion parameter, negative binomial regression is superior to the Poisson.

### **Proposition One**

As the results show, the transaction costs framework performed well in explaining presidential use of policy relevant executive orders. Each proposition of the model received support in the empirical tests. For example, the first hypothesis that the more presidents must give up in order to secure passage of legislation, the more likely

**Table 4.3 The Political Environment's Influence on Unilateral Action**

Dependent Variable = Monthly Count of Executive Orders that Create Policy				
Independent Variable	Coef.	Std. Error	Effect of Std. Dev. Change on Dep. Var	Effect of Max Change on Dep. Var.
Distance Between Cong. Expectations and Ideology	2.405***	.397	0.628	2.326
Recession	.209**	.088	----	0.290
Last Month Before Party Change	1.597***	.213	----	4.913
Last Month With No Party Change	0.260	.596	----	0.370
Unified Government	0.793***	.098	----	1.510
First 3 Months of Administration With Party Change	0.093	.186	----	0.122
First 3 Months of Administration With No Party Change	0.456*	.213	----	0.721
Ideology: Absolute Value of the H.R. DW-NOMINATE Score	-1.979***	.387	-0.442	-1.656
Constant	0.003	.134	----	----
Alpha	.204	.040		
LR test against Poisson	chi-square	1 d.f. = 48.6	p<.000	
AIC	2525.5		* Significant, p<.05	
Log-Likelihood	-1252.73		** Significant, p<.01	
N of Cases	717		*** Significant, p<.001	

For substantive interpretation, all continuous variables were held at their mean, dummies at zero

One tail test used for all variables except controls and constant

Negative Binomial Regression

they are to issue executive orders performed exactly as hypothesized, obtaining significance at any conventional level.

The expected value in negative binomial models is found by the following:

$\hat{Y}_i = \exp(x_i\beta + \varepsilon_i)$  (Long 1997, 230). Because the expected value is determined by exponentiating the observation's values and the coefficients, the effect of one variable is determined, in part, by the values of the other variables. Like logit or probit, one can make directional interpretations from the coefficients, but in order to draw substantive intuitions, one needs to account for the values of the other variables. Using the program XPOST (Cheng and Long 2000), one can estimate the effect that changes in an independent variable will have on the predicted count of observations, in this case executive orders issued, while holding all other variables at fixed values. Table 4.3 reports the substantive interpretations as well.

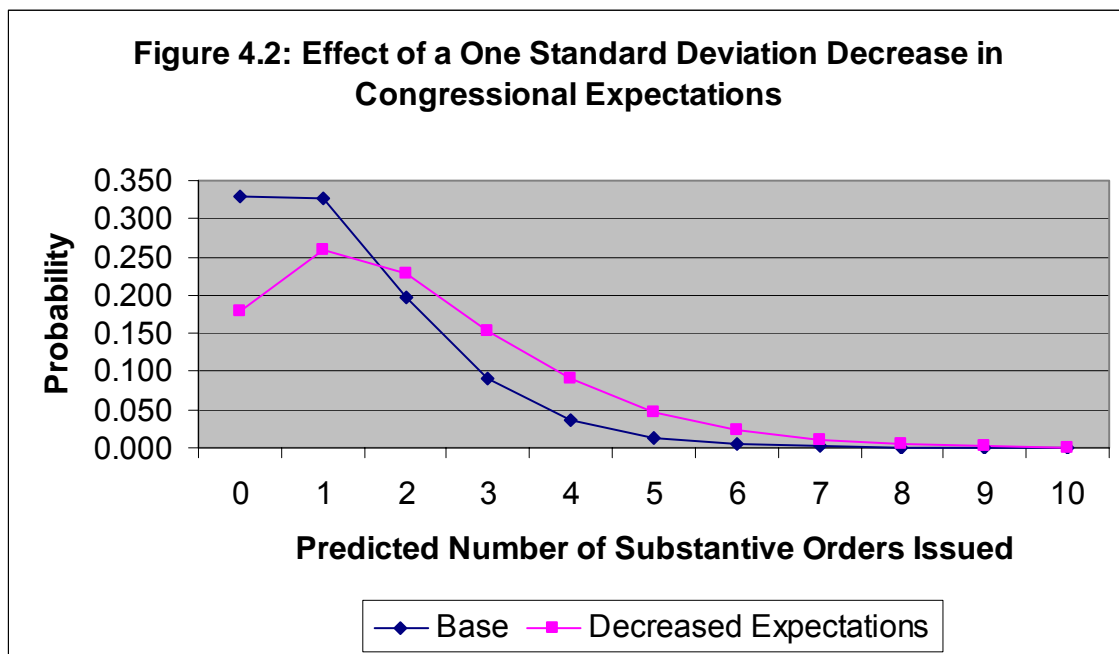
With ideology held at its mean value and dummy variables held at zero, a one standard deviation increase in the amount of policy concessions a president must make in order to secure passage of legislation results in an increased expectation of more than an additional 0.6 substantive orders issued each month. At first glance, this may seem like a small increase. However, consider that over a four-year term this increase results in an expectation of more than 30 additional orders. When viewed in this light, the findings are of substantive importance.

Figure 4.2 shows the effect that the increased transaction costs associated with legislative action has on the predicted number of executive orders. The x-axis represents the predicted number of substantive executive orders issued in a month, while the y-axis represents the probability associated with each possible number. The "base" line is representative of the probabilities with all continuous values held at their means and

dummy variables fixed at zero. The “decreased expectations” line represents the probabilities when there is a one standard deviation increase in the winning bill’s distance from the president’s preference.

As is evident, presidents are more likely to issue higher numbers of policy orders when Congress appears less willing to grant the president policy considerations. Such presidents have a 0.15 greater probability of issuing at least one substantive executive order during the month and are more likely to issue greater numbers as well.

Furthermore, when one examines the total possible change the difference becomes more pronounced. If one moves from the smallest amount a president had to give up to the greatest amount presidents must cede to garner passage of policy change there is an increase of more than two substantive orders issued each month. Considered over a four-year term, this leads to an additional 111 orders issued. Considering that



President George W. Bush only issued 173 total orders (non-policy orders included) during his first term, the transaction costs a president faces in Congress clearly influence the likelihood that executive orders will be utilized to create policy change.

Presidents faced with a Congress that is not likely to give them what they want apparently decide to mitigate their transaction costs by making policy change unilaterally through executive orders. This is consistent with the notion that presidents will be more likely to favor unilateral action when the transaction costs associated with legislation are greater. Proposition One is thus strongly supported.

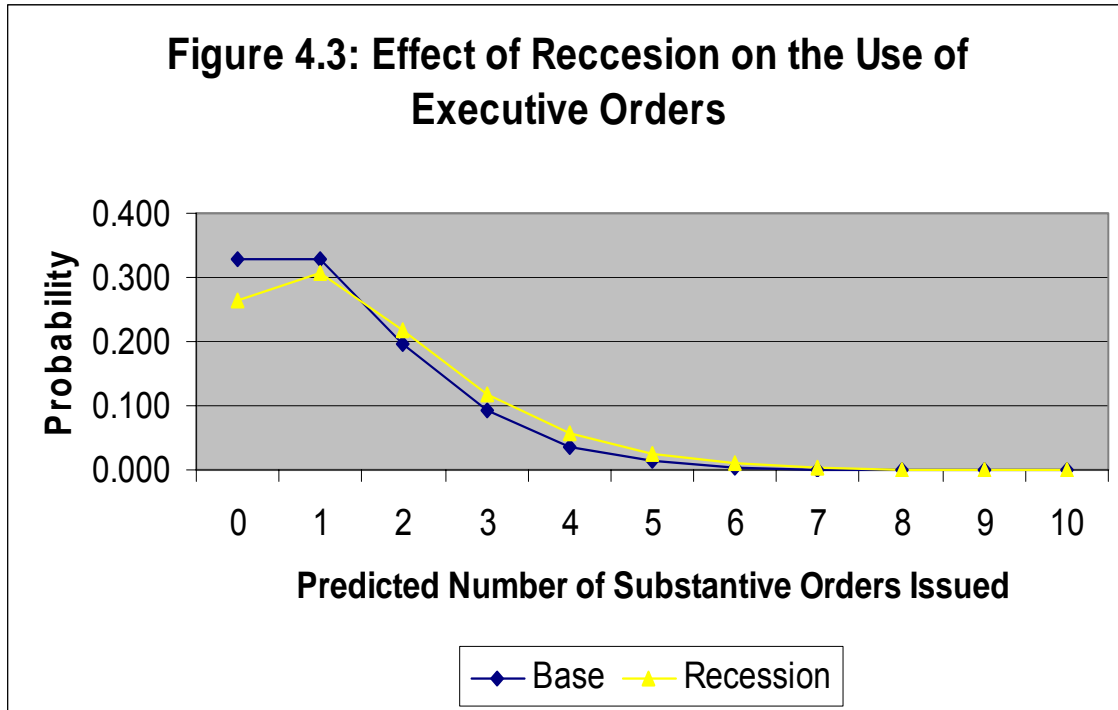
### **Proposition Two**

Proposition two, that presidents issue more executive orders when delay poses additional transaction costs, received support in the analysis as well. Two of the tests were statistically significant with the third showing that partisanship is also an important intervening variable. According to the analysis, presidents faced with recessionary conditions are significantly more likely to issue executive orders to alter policy than are presidents that face rosier economic times. With all continuous variables held at their means and other dummy variables held at zero, the difference between being in recession and not being in recession is an expectation of .29 additional orders issued each month.

As Figure 4.3 makes evident, there is a slight, but real increase in the probability that presidents will issue higher numbers of executive orders during economic hardships. There is an increased probability of .09 that presidents will issue at least two substantive



executive orders when the nation is in a recession. While this does not lead to an overwhelming increase in unilateral action, it does lead to a very real increase in the use of executive orders that should not be trivialized, especially when one considers that recessions typically last many months. The shortest recession in the data set lasted six months (January, 1980 to July, 1980). Thus, even the slight monthly increase in unilateral action during recessions leads to an escalation in the president's use of executive orders. In the six-month case, 1.7 additional orders are expected. The longest recessions in the data set were two separate recessions of sixteen months each (November, 1975 to March, 1975 and July, 1981 to November, 1985). During a sixteen-month recession one would expect to see an additional 4.6 substantive orders issued.



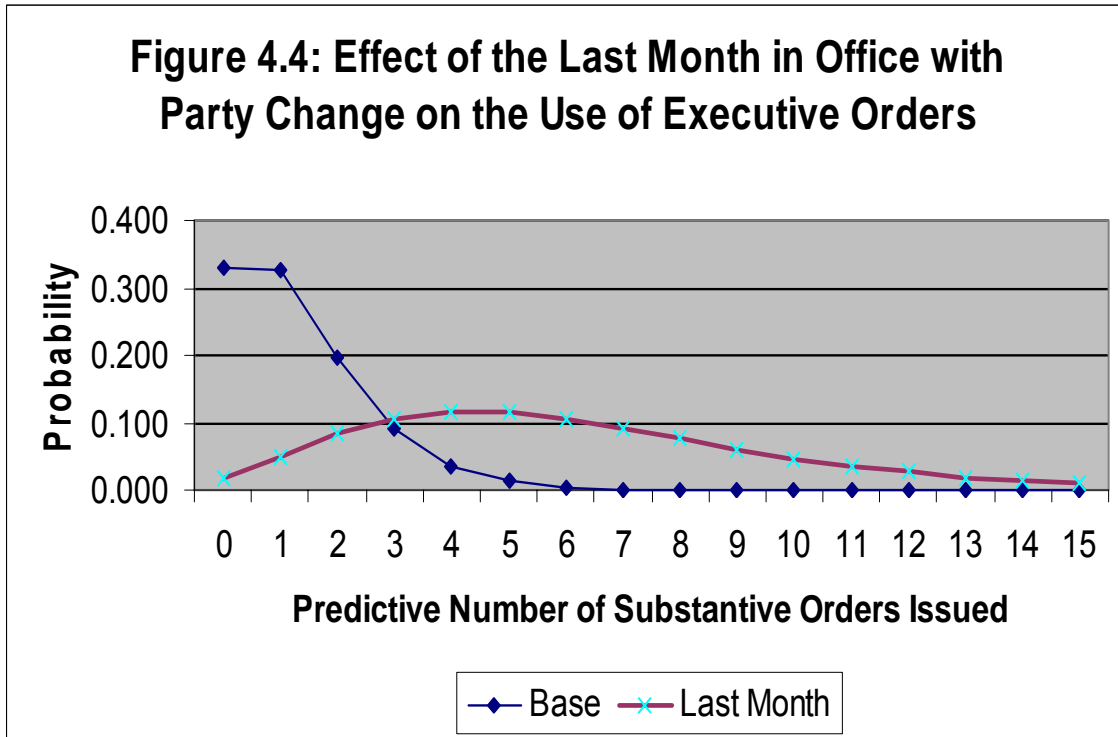
Thus, presidents attempt to avoid the transaction costs of slow legislative change during a recession. Working through Congress can be a gradual process, and this delay poses transaction costs for a president who often receives blame from poor economic conditions (Brace and Hinckley 1991; Norpoth 1996). Because of this, executive orders become an attractive alternative since they are not plagued by the transaction costs associated with delay.

Finally, consider the end of office effects. Presidents who are in their last month in office with no impending party change do not issue significantly more executive orders than do presidents who still have time left in their terms when no party change is forthcoming. The effect is in the direction predicted by Proposition two, but not statistically significant. However, this is not too surprising, as the incoming president likely holds similar beliefs and will likely seek to implement policy in line with the current president's preferences. In such a case, there is not an overwhelming need for rapid policy change.

However when the forthcoming president is from the opposing party, presidents are *much* more likely to move towards executive orders to cause policy change than they are at other times. A president in the last month in office is expected to issue nearly an additional five substantive orders when the incoming president is from the rival party. Furthermore, as Figure 4.4 shows, there is a substantial increase in the probabilities that these presidents will issue higher numbers of executive orders in their last month. There is an increased probability of 0.7 that a president will issue three or more substantive orders during such a period.

Presidents in their last month do not have time to wait on Congress; they simply cannot rely on the body to take swift action. For presidents wanting to alter policies, notably those who are facing a partisan change in the office, the transaction costs of legislative action are prohibitive, making executive orders an attractive option.

Overall, the tests of proposition two supported predictions from the transaction costs model. Presidents that are in the need of rapid policy change are more likely to issue substantive executive orders than are other presidents. This finding is in harmony with the notion that when quick change is required, working through the legislature poses transaction costs that make unilateral action an appealing alternative for securing the desired change.



### **Proposition Three**

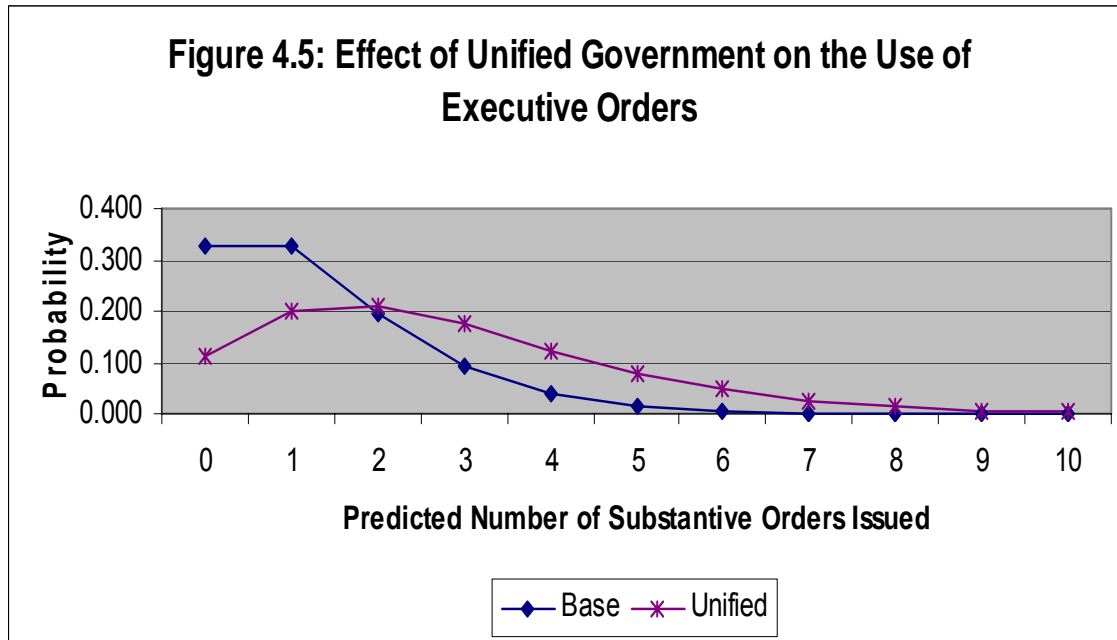
The empirical test of proposition three also performed well. Presidents that are a part of a unified government are significantly more likely to issue executive orders than presidents that are in a divided government. Recall that what a president expects to accomplish through the legislature is already included in the model and controlled for in the test of hypothesis one. Because of this, any variation caused by unification of government is attributable to changes in the level of discretion to act unilaterally. A president in a unified government would be expected to issue an additional 1.5 substantive executive orders each month. This is especially noteworthy when one considers that the average number of substantive orders issued each month is less than two.

If one translates these expectations to an entire four-year term, there would be nearly seventy-two more orders issued when the president is of the party that controls both Houses of Congress when continuous variables are held at their mean and all other dummy variables are held at zero. To show the magnitude of this finding, consider that an average four-year term sees only ninety-four substantive orders issued. Clearly, this finding carries great substantive importance.

Furthermore, consider Figure 4.5. This figure shows the probability of a president issuing given numbers of executive orders under divided government (Base) and unified government with all continuous variables held at their mean and all other dummy variables held at zero. As the figure makes plain, presidents are much more likely to issue greater numbers of executive orders under unified government. Presidents

have an increased probability of 0.35 of issuing three or more substantive executive orders when they are a part of a unified government rather than a divided government and all variables are held at their base.

One potential challenge to this finding is that in reality, presidents should be able to accomplish more in the legislature under unified government, making the transaction costs smaller in the legislature as well. This objection would be quite true were it not for the inclusion of the first hypothesis. What a president expects to accomplish through the legislature is already included in the model and controlled for. Because of this, any variation caused by unification of government is attributable to changes in the level of discretion to act unilaterally.



Presidents who have fellow partisans controlling Congress should be less likely to face legislative challenges to their executive orders. Considering this, there should be smaller transaction costs associated with unilateral action. During such a time, then, one should see an increase in the use of executive orders during this period. The test supports the third proposition: presidents are more likely to utilize executive orders to alter policy when they have more discretion available.

### **Controls**

While not the focus of the analysis, the coefficients associated with the control variables warrant some discussion. First, of particular note is that more ideological presidents are less likely to issue substantive executive orders than are their more moderate counterparts. A standard deviation increase in a president's ideology score, would lead to a decrease of more than 0.4 expected substantive executive orders issued each month. Moreover, a move from the most moderate president (Eisenhower), to the most ideological president (Reagan) would result in an expectation of more than 1.6 fewer substantive orders issued each month.

Likely, what is occurring here is that ideologues place additional weight on the longevity of policy change. Because of this, they are more willing to accept the transaction costs associated with legislative action because they associate a greater payoff to change that occurs through Congress rather than unilateral action.

The controls for a president's first three months in office had mixed results. When the president's inauguration represents a partisan change in the White House, there is not a significant effect on the president's proclivity for unilateral action.

However, when the new president represents a continuation of the party's control over the executive branch, there is an increased likelihood of executive order use to create policy.

When presidents are replacing a chief executive of the same party, they have an expectation of issuing an additional 0.721 substantive orders in each of their three months. This would represent just over two additional policy orders in their first ninety days in office.

Though this was not a test of the theory, the finding is interesting. One possible explanation is that presidents ushering in a party change desire massive alterations in the policy landscape. As has been noted elsewhere, great policy change is most often accomplished through legislation rather than unilateral action (Howell 2003). Fellow partisans are more likely to desire marginal changes. These modifications can likely be made through executive orders. Because of this, one might expect to see the observed relationship of new presidents issuing more executive orders to alter policy in their first year when they do not represent a partisan change in the office.

## **ADVANCED METHODS**

As noted, the analysis above largely confirms the transaction costs based theory of presidential policy-making. However, the data that are examined in this study are time-series data. The analyses of time-series data often require special attention (Enders 1995; McCleary and Hay 1980). The observation at a given time period is often determined, at least in part, by the observations at a prior time period. For instance, a president that did not issue any orders in a previous month, may be more likely to issue a

greater number of orders in the current month due to the constant need presidents have to make policy.

Furthermore, presidents may have less need to issue executive orders following months where they issued an abnormally large number of orders. They may have accomplished a great proportion of the policy change that they were seeking during a certain period.

If the time-series does, indeed, possess some sort of dynamic property where observations at one period influence the observations at another period and traditional methods are used, the estimates will be inefficient (Brandt, et al 2000; Brandt and Williams 2000). Moreover, when one estimates a model without explicitly including the dynamic process, the model is misspecified unless the omitted dynamic variables do not Granger cause the conditional mean (Brandt and Williams 2000; White 1994).

Until recently scholars had little recourse but to accept the fact that their estimates were likely inefficient and their models misspecified. Fortunately, Brandt, Williams and colleagues (Brandt, *et al* 2000; Brandt and Williams 2000) have developed methods for dealing with event count models that demonstrate a dynamic time-series process. One of these methods is the Poisson autoregressive model [PAR(p)] introduced by Brandt and Williams (2000). This method allows researchers to model processes characterized by short memories and quickly revert to their mean. This method allows for a shock in one period to influence the next period [or however many periods are tested for, the (p) in PAR(p)].



When using this method one assumes that the series quickly returns to its mean level, absent any further shocks. This is likely what happens in presidential policy-making. When a president issues an abnormally small or large number of executive orders in a given month, the adjustments likely occur in the next few months. There is little likelihood that a shock in the beginning of a president's term where the president issued several more orders than usual will influence the use of executive orders several years down the road.

Estimating these models in the past would be nearly impossible, as their estimation requires large amounts of computing power. Even given the current speed of modern computers, one may spend multiple hours running these models. However, it is now feasible to use the methods, and one should not sacrifice the proper method for convenience. In this section, I report results from the PAR(p) model.

As shown in Tables 4.4 and 4.5, the PAR(p) results did not change the major findings of the negative binomial models. In fact, some of the findings have higher z-statistics than were reported in the negative binomial model. Table 4.4 represents a PAR(1) model, while Table 4.5 reports the findings of the PAR(2) analysis.

As the Wald test makes plain, the PAR(1) and PAR(2) models are clearly superior to the Poisson model. However, determining which model is superior and whether that model is better than the negative binomial is somewhat trickier. The best method is to rely on Akaike's Information Criterion (AIC). This method allows one to compare non-nested models to determine which model is superior to the other. Smaller AIC values are considered better. In addition, the model accounts for parsimony, with

**Table 4.4 The Political Environment's Influence on Unilateral Action, AR(1)**  
 Dependent Variable = Monthly Count of Executive Orders that Create Policy

Independent Variable	Coef.	Std. Error
Distance Between Cong. Expectations and Ideology	2.545***	0.464
Recession	0.248**	0.097
Last Month Before Party Change	1.876***	0.119
Last Month With No Party Change	0.411	0.595
Unified Government	0.849***	0.107
First 3 Months of Administration With Party Change	-0.042	0.229
First 3 Months of Administration With No Party Change	0.746***	0.160
Ideology: Absolute Value of the H.R. DW-NOMINATE Score	-2.188***	0.445
$\rho$	0.107***	0.033
Constant	0.026	0.033
Wald test against Poisson=	10.300	p<.01
AIC	2524.3	* Significant, p<.05
Log-Likelihood	-1253.14	** Significant, p<.01
N of Cases	717	*** Significant, p<.001

For substantive interpretation, all continuous variables were held at their mean, dummies at zero

One tail test used for all variables except controls, rho and constant

PAR(1) Regression

models penalized for each additional explanatory variable that is included (assuming that it does not make the model perform better).

**Table 4.5. The Political Environment's Influence on Unilateral Action, AR(2).**  
 Dependent Variable = Monthly Count of Executive Orders that Create Policy

Independent Variable	Coef.	Std. Error
Distance Between Cong. Expectations and Ideology	2.006***	0.463
Recession	0.324***	0.092
Last Month Before Party Change	1.934***	0.126
Last Month With No Party Change	0.364	0.649
Unified Government	0.928***	0.135
First Year of Administration With Party Change	-0.079	0.150
First Year of Administration With No Party Change	0.385**	0.122
Ideology: Absolute Value of the H.R. DW-NOMINATE Score	-1.634***	0.472
$\rho(1)$	0.133***	0.035
$\rho(2)$	0.059	0.041
Constant	-0.062	0.169
Wald test against Poisson=	23.60	p<.000
AIC	2446.99	* Significant, p<.05
Log-Likelihood	-1213.497	** Significant, p<.01
N of Cases	691	*** Significant, p<.001

For substantive interpretation, all continuous variables were held at their mean, dummies at zero

One tail test used for all variables except controls, rho and constant

PAR(2) Regression

When the AIC is utilized, the negative binomial model performs slightly better than the PAR(2) model, though not greatly, and the PAR(2) model is superior to the

PAR(1) analysis. The negative binomial has an AIC of 2515.7, the PAR(1) an AIC of 2519.23, and the PAR(2) an AIC of 2517.52.<sup>19</sup> Given the closeness of the values, one would not be misguided by utilizing either method. This is especially true given the significance of the autoregressive term that is present in the PAR(1) and PAR(2) models. According to this model, presidents are slightly more likely to issue policy orders when they have done so in the prior month. If one ignores this information, there is the possibility of obtaining spurious results.

The intuitive understanding of what the PAR(p) model is adding to the analysis is that even after accounting for the history of the time-series, the variables that represent transaction costs still explain variation in the president's propensity to alter policy unilaterally. The findings are robust to the method used, and as such, one can have confidence that they are not an artifact of either using an inappropriate method, such as OLS or the Poisson distribution or simply using "sexy" methods that many in the discipline often view as "voodoo" capable of generating any result that is desired (though nothing could be further from the truth).

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<sup>19</sup> The AIC for the negative binomial and the PAR(1) models mentioned here differ slightly from the ones reported in Tables 3 and 4 because when comparing models using the AIC one must ensure that the same sample is utilized. Because the PAR(2) model takes into account the first two observations in calculating the autoregressive terms, the sample is smaller by two and one than the samples used in the negative binomial and PAR(1) models respectively. Because of this, the negative binomial and PAR(1) models are recalculated on the smaller sample to ensure a proper comparison.

## **DISCUSSION**

The predictions of the transaction cost model of presidential policy-making were largely supported in this analysis. Not only did the model receive support with one method, but with three different statistical estimators.

One observation from the analysis is that presidents have less need to issue executive orders when they have the greatest freedom to act unilaterally. Presidents have lower transaction costs associated with unilateral action when they are a part of a unified government. There is less chance that Congress will take action overturning their orders when the body is composed of like-minded partisans. However, this is precisely the time when presidents are most likely to be successful in obtaining legislative change in-line with their policy desires. However, when presidents would most desire the ability to act unilaterally, when Congressional action will not accomplish favorable change, they likely will not possess the discretion needed to alter policy through executive orders.

Further, presidents appear to prefer legislation to unilateral action. If presidential preferences were for unilateral action over legislative change, then one would not expect to see a significant relationship between the use of executive orders to affect policy and what a president can expect from legislative action. If presidents preferred unilateral action to statutory change then the presidents would take unilateral action at all times when possible, and would be no less likely to take direct action when legislation is more promising.

If presidents prefer unilateral action to legislation, then only those areas where the president does not possess sufficient discretion to set the policy at the desired location would generate the results obtained here. At such a time, the president would weigh the expected policy outcomes of unilateral action versus Congressional action. This, of course, remains a possible cause of the above findings. Because of this, one cannot state with certainty that presidents do, *in fact*, prefer legislative change to unilateral action. However, that presidents prefer statutory change to unilateral action, *ceteris paribus*, is a more likely explanation for the results.

Furthermore, if presidents preferred unilateral action to accomplish policy change there would be little reason to expect the flurry of executive orders issued in the last month of a term when a party change is forthcoming. There would be no rationale for waiting to accomplish the policy change, for a president would receive a higher net value from the change by accomplishing the alteration sooner, thus obtaining the gains over a longer period of time.

However, if presidents prefer legislative change to unilateral action then it would be prudent to delay taking action while seeking a legislative remedy. Once the president reaches the end of the term and legislation becomes nearly impossible, then the president can issue an executive order producing the change.

There is one implication of presidents preferring one policy method to the other. Howell's (2003) model hinges upon the president's indifference as to whether the policy changes through statutory means or unilateral action. If this is not the case, and I do not believe it is, alterations are required of his model. Formal models are only as good as

their assumptions. Given the questionable nature of this assumption, the model itself is also in question.

Congress can, and does, present a constraint to the president's power to act unilaterally. If presidents were confident that all of their orders would stand up against legislative scrutiny, there would be little reason to pay attention to the composition of Congress. However, as the results show, presidents are *much* less likely to alter policy through unilateral action when the opposing party controls Congress. This is precisely when the legislature should be most poised to take action overturning executive orders. The conclusion that follows is that presidents account for the available discretion before issuing their orders.

Given this finding, one should not be surprised to see the dearth of congressional action that overturns presidential unilateral actions. As Howell (2003) notes only four executive orders have been amended or overturned by statutory means since 1972 (p. 114-115). This fact does not, however, point to congressional weakness as Howell assumes (chapter V). Instead, it suggests that presidents are able to predict the likely reactions of Congress to their orders and that they are rational actors that do not issue orders that are likely to be overturned.

The four instances where the legislature did take statutory action altering executive orders are representative of times that the presidents misinterpreted the likelihood that Congress would take action overruling the orders. In all likelihood, these presidents would not have issued these orders if they knew that Congress would take action against them. Presidents stand to lose power in relation to Congress. Howell

notes the power of the president “is inversely proportional to legislative strength. Presidential power expands at exactly the same times when, and precisely the same places that, congressional power weakens” (2003, 101). He is indeed correct in this assessment, and presidents likely see the wisdom behind these words. What benefit is gained by acting in a manner that would lead to an expansion of Congressional power? Knowing this, presidents will not issue orders that are likely to be overturned.

The analysis above points to the idea that presidents alter their behavior based upon the likelihood that Congress is poised to strike back. This casts a different light on most of the literature on unilateral action. The impression given by most authors in this area (Cooper 2002; Mayer 1999; 2001; Howell 2003) is that presidents can act in a relatively *carte blanche* fashion. However, my work suggests that this is a misunderstanding of the president’s power.

Presidential power with executive orders is not absolute, but checked by Congress (and most likely the courts as well). Furthermore, the president’s changes do not have the same permanence as policy alterations achieved through statutory modification. Any future president is free to return the policy to the prior status quo. Legislation, on the other hand, is more difficult to change, making it a more permanent route for changing policy than executive orders.

If presidents did not have the ability to act unilaterally, Congress would certainly be more powerful in relation to the president. The executive branch could make no formal alteration of policy without first obtaining the consent of Congress. However, one does not have to think hard to see the inefficiencies that would be present were this



true. The nation often faces crises that require immediate attention. Were Congress forced to take legislative action each time such an event occurred, the nation would be paralyzed by the slowness of the deliberative body.

Presidents do, in fact, increase their use of unilateral action when the nation faces turmoil. As the analysis above shows, when the country is in a recession the president is more likely to alter policy through executive orders. Of course, it would be advantageous to have all 535 members of Congress involved in the deliberations to alter the policy. However, Congress rarely, if ever, is capable of quick action. Were the president forced to wait on a legislative reaction to a problem, then the nation as a whole could suffer due to the delay in response to the issue at hand.

## **CONCLUSIONS**

The transaction cost theory of presidential policy-making outlined in the previous chapter produced three propositions. This chapter developed hypotheses to test each of these propositions. The hypotheses were then tested using a unique dataset with results supporting the theory.

Each executive order issued from the beginning of President Truman's administration to the end of 2004 was coded by determining if it altered policy using the definition proposed by Anderson (2003). Only orders that created or modified policy were included in final measure and analysis. This produced a better measure than previous studies that either included too many orders that were trivial or too few orders based on purported policy significance.

Earlier studies included total counts of orders (such as Krause and Cohen 1997; Mayer 1999; 2001) which included a host of orders with little policy relevance. Other studies (such as Howell 2003) included only “significant” orders. This was an improvement; however, it missed a great deal of presidential policy-making and did take into account that most “major” policy change occurs through statutory means. Executive orders are frequently a tool for smaller policy changes. Due to its inclusion of all presidential attempts at influencing policy by executive orders, the data set employed here allows for a more holistic approach to studying presidential use of executive orders to alter policy than previous studies. Because of the superiority of the data, one can be more confident that the findings from this study are more representative of reality than are previous studies.

Each of the propositions received empirical support. The analysis found support for the notion that presidents are more likely to act unilaterally when the expected net value of legislation is lower. The analysis also found support for the second proposition, that when a president desires rapid policy change, legislative action poses increased transaction costs leading to an increased likelihood that the president will act unilaterally to secure policy change. Also, when presidents are in their last month of office and the incoming president is of the opposing party, they feel an immediate need to alter policy and legislation poses transaction costs that are prohibitive. The third proposition, that as the amount of presidential discretion increases, the transaction costs associated with unilateral action decrease, making their use more attractive, and thus more likely, also

received empirical support. When presidents are participants in a unified government, they are less likely to have their executive orders overturned by Congress.

To ensure that the empirical support that the model received was not an artifact of non time-series methodologies being utilized, the analysis was repeated using the PAR(p) method introduced by Brandt and Williams (2000). The findings were robust to the change in methods, lending additional support to the transaction costs based model of presidential policy-making.

The transaction costs framework has proven useful in explaining presidents' likelihood of acting unilaterally. The theory produced the many hypotheses tested in this chapter and the theory is robust to those tests. Further, the theory adequately explains the surprising findings of past works that unified government leads to *increased* use of executive orders (see Mayer 1999; 2001). In addition, the analyses utilize a superior dependent variable that only includes executive orders that make policy. Because of this, one can be confident that the results reflect how presidents utilize executive orders to make policy

In the next chapter, I divide the sample to determine if the model is robust to different policy types. This will ensure that individual policy types do not drive the results in this chapter and that the theory is applicable across categories of policies.

## **CHAPTER V**

### **FURTHER TESTS OF THE THEORY**

Previous research, notably Marshall and Pacelle (2005), finds that presidents employ executive orders differently based upon the policy area in question. They find that the use of executive orders in matters of foreign policy is unrelated to the president's party's strength in Congress. Conversely, party strength is related to the use of executive orders in domestic policies. The authors conclude that this is due to the increased discretion presidents have in foreign policy over other policy areas. Presidents are not as tightly bound by Congress in foreign policy matters, and as such, are not led to executive orders as frequently to alter foreign policy.

Foreign policy is only one domain where presidents may have more discretion. Thus, it is possible that presidents utilize executive orders differently for other types of policies as well. For instance, as chief executive the president is responsible for overseeing the bureaucracy. Considering this, there should be greater discretion afforded the president to unilaterally craft policy dealing with bureaucratic matters than for policies affecting the nation as a whole.

Are the results reported in the previous chapter an artifact of those areas where presidents have greater discretion? Does presidential use of executive orders differ across policy domains? Is the theory generalizable across multiple policy domains?

To be adequate, a theory of presidential policy-making should be robust to changes in policy area. It should explain when a president will act unilaterally,

regardless of the broader discretion that presidents possess in certain areas. In this chapter, I test the transaction costs based model of presidential policy-making in areas where presidents should theoretically possess greater levels of discretion and in areas where they have less discretion.

## **DATA**

The same data set is utilized in this chapter as in chapter III. Each policy relevant order is coded as to policy type. This allows me to split the data and analyze by sub-samples to evaluate variations across domains and the generalizability of the theory.

As noted above, Marshall and Pacelle (2005) find that presidents utilize executive orders differently in foreign policy matters relative to domestic policy issues. They conclude that this is due to increased levels of discretion that executives have in foreign policies relative to other policy areas.

To ensure that the results in chapter III are not an artifact of policy areas where presidents have decreased levels of discretion and that the transaction costs based model of presidential policy-making explains the use of executive orders in all policy areas, I look at two subsets of the data. In the first subset, orders that are in areas where presidents are likely to have higher levels of discretion are included. For example, orders that directed solely at the bureaucracy and its employees comprise one category of orders included in this group. For instance, President Clinton's Executive Order 12834 (1993) outlining the ethics requirements of political appointees sets policy. However, since the policy deals with the administrative branch he should not expect as great a challenge to his authority to act unilaterally.

Another group of orders included in this subset is those dealing with the military. For instance, there is a host of executive orders setting the standards of court marshal for members of the armed forces. While this does set regulations for some citizens, civilians are unaffected by the policy. The president is able to draw on the constitutional charge of head of the military to issue the orders; so long as the issued regulations are not greatly controversial, wide latitude is present allowing the president broad freedom to set the policy as desired.

The last category of orders included in this subset is orders dealing with foreign affairs. Wildavsky (1966) argues that presidents are more successful pursuing their foreign policy concerns than their domestic policy goals. If this is indeed the case, then presidents should have more latitude in acting unilaterally in matters of foreign policy than in domestic matters. While the empirical tests of Wildavsky's theory have been less than convincing (see Bond and Fleisher 1990, chapter VI; Edwards 1985; 1989, chapter IV; Fleisher and Bond 1988), foreign policy remains a realm where the conventional wisdom holds that a president retains discretion to act. The perception of discretion is of most importance, for this is what presidents will use when calculating which action to take.

Furthermore, there is some hint that presidents will have more leeway in acting in matters foreign. In *United States v. Curtis-Wright*, 299 U.S. 304 (1936), the courts noted that the president is the "sole organ of the federal government in the field of international relations" (quoted in Howell 2003, 20). For this reason, the court held that Congress could delegate its authority to the president in matters of foreign policy

(Howell 2003). While presidents do not have limitless powers in foreign policy, they are likely to have some added discretion and, as such, executive orders dealing with foreign policy are analyzed in the sub-sample where presidents have greater discretion.

The remaining policy orders comprise the second sub-sample. Because of the nature of those orders removed, those that remain in this sub-sample are domestic orders not affecting the bureaucracy. These are orders where the president is less likely to possess large amounts of discretion.

## **HYPOTHESES**

The hypotheses tested in this chapter mimic the ones laid out in chapter IV, save that the analysis is run on two separate sub-samples. The propositions from the model in Chapter IV were derived using comparative statics. Using this approach one can make clear directional predictions by deducing what a change in each independent variable will have on the dependent variable. Because the model used is the same for these two samples, there is no reason to predict that they will perform any differently, the comparative statics are the same for the two sub-samples. Presidents should still weigh the transaction costs associated with policy change and make their decisions based upon which course of action provides the highest expected gain after accounting for those. While presidents will likely possess greater amounts of discretion in the first sub-sample, there is still variation in the amount of discretion present. Thus, the transaction costs that are present should still influence presidents and, as such, there should be little empirical difference between the findings of the two sub-samples.

If the transaction costs based theory of presidential policy-making is robust to these alternate tests, more confidence can accrue that presidents do indeed alter their proclivity for unilateral action based upon the transaction costs associated with the use of executive orders and the transaction costs linked to congressional action. However, if the findings are inconsistent with the predictions, then one must be suspicious of the earlier findings and left wondering whether the results are an artifact of simple luck.

## **RESULTS**

### **Increased Discretion**

#### *Proposition One*

As the results in Table 5.1 show, the transaction costs presidents face influences their proclivity to issue orders where they traditionally possess more discretion. Recall that proposition one held that as the expected net value of legislation decreases, legislative action becomes more costly, increasing the likelihood that a president will take unilateral action.

Consistent with the findings of the complete sample, congressional expectations play a key role in the likelihood presidents will issue executive orders even in policy areas where the president has higher levels of discretion. Like the analysis in Chapter IV, the substantive interpretations of all coefficients are included in Table 5.1. The mean value is used for the base on all continuous variables, while all dummy variables are held at zero. A standard deviation decrease in the expectations of Congressional action leads to an expectation of 0.34 additional substantive executive orders being



issued in policy areas where the president is assumed to have higher levels of discretion. This would lead to an expectation of nearly sixteen additional such orders being issued during a standard four-year term.

**Table 5.1. Discretionary Policy and Unilateral Action**

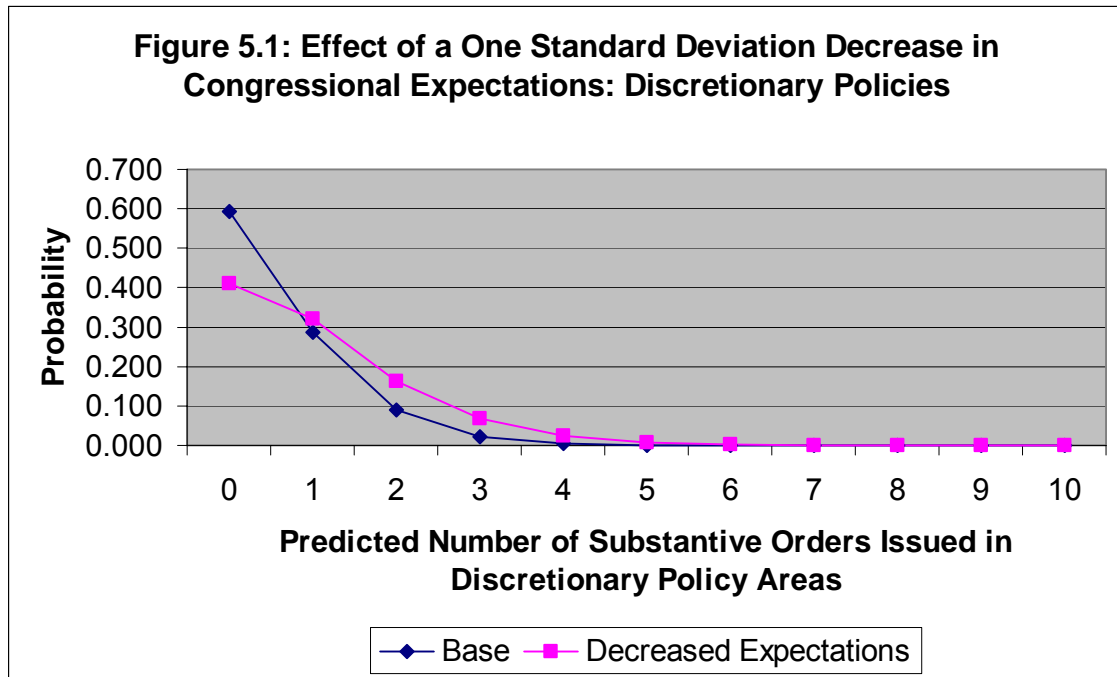
Dependent Variable = Monthly Count of Executive Orders that Create Policy

in Areas Where President is Believed to Possess Greater Levels of Discretion

Independent Variable	Coef.	Std. Error	Effect of Std. Dev. Change on Dep. Var	Effect of Max Change on Dep. Var.
Distance Between Cong. Expectations and Ideology	2.860***	0.595	0.338	1.283
Recession	0.205#	0.127	----	0.128
Last Month Before Party Change	1.760***	0.269	----	2.706
Last Month With No Party Change	0.569	0.698	----	0.431
Unified Government	0.643***	1.490	----	1.902
First 3 Months of Administration With Party Change	0.554*	0.231	----	1.740
First 3 Months of Administration With No Party Change	0.035	0.360	----	0.020
Ideology: Absolute Value of the H.R. DW-NOMINATE Score	-1.109#	0.544	-0.111	-0.387
Constant	-1.480***	0.211	----	----
Alpha	.292	.082		
LR test against Poisson	chi-square 1 d.f. = 22.81		p<.000	
AIC	1755.3		# Significant, p<.10	
Log-Likelihood	-867.638		* Significant, p<.05	
N of Cases	717		** Significant, p<.01	
			*** Significant, p<.001	

For substantive interpretation, all continuous variables were held at their mean, dummies at zero

One tail test used for all variables except controls and constant



As Figure 5.1 makes plain, there is a noticeable increase in the use of executive orders in response to decreased expectations associated with statutory action, even in policy areas where increased discretion exists. There is an increased probability of more than 0.18 that presidents will issue at least one such order when there is a one standard deviation decrease in congressional expectations. This finding stands in contrast to the findings of Marshall and Pacelle (2005). While these authors find that presidents do not respond to congressional opposition by issuing executive orders in areas where they have discretion, this analysis finds that presidents still respond to the transaction costs that are present in congressional action regardless of the policy type and the usual discretion afforded by that type of policy. The findings support proposition one: that

presidents react to increased transaction costs in the legislature by issuing more executive orders.

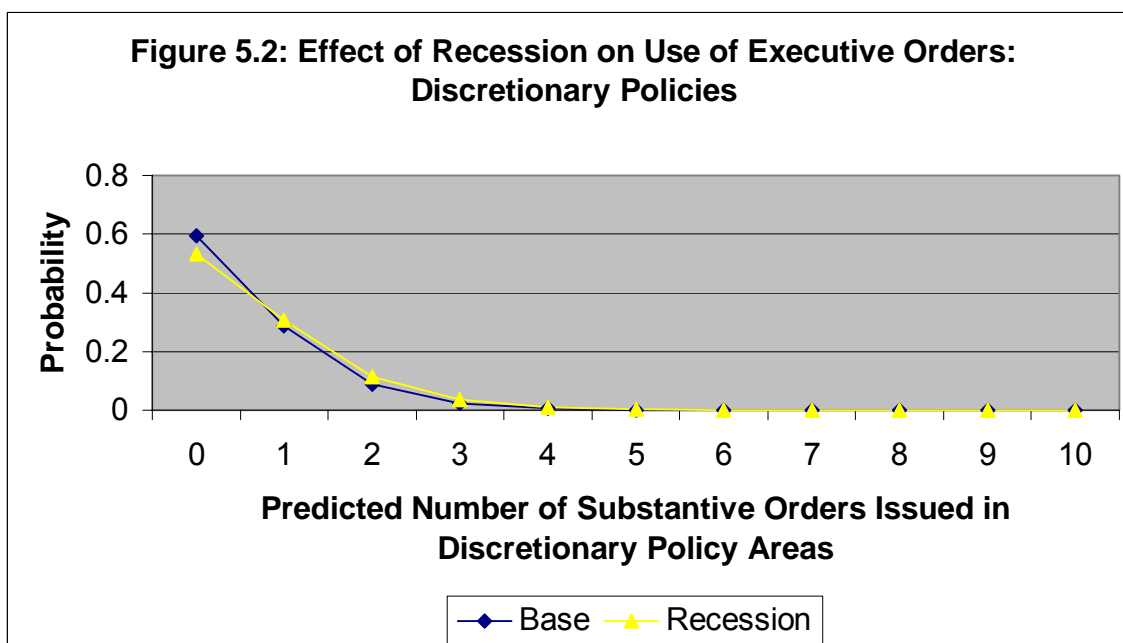
### ***Proposition Two***

Proposition two, outlined in Chapter IV, holds that when a president desires rapid policy change, legislative action possess greater transaction costs leading to a greater likelihood that the president will act unilaterally to accomplish that change. Recall that one measure of urgency is the presence of a recession; presidents will seek rapid policy change when the nation is in recession in hopes of correcting the economic woes of the nation.

When the nation is in a recession, presidents turn towards executive orders to alter policy in areas where they have higher discretion. This result is only significant at the  $p < .10$  level, however with a p-value of .053. During a recession, presidents are expected to issue an additional 0.128 such executive orders. While this is not a monumental increase in the use of executive orders, if one considers the two longest recessions that occurred during the sample, sixteen months (November, 1975 to March, 1975 and July, 1981 to November, 1985), one would expect to see approximately an additional two such orders being issued. As Figure 5.2 reflects, there is an increased probability of 0.06 that a president will issue one or more such executive orders when the nation is experiencing a recession. This represents a slight but real increase in the use of executive orders in response to economic crises.

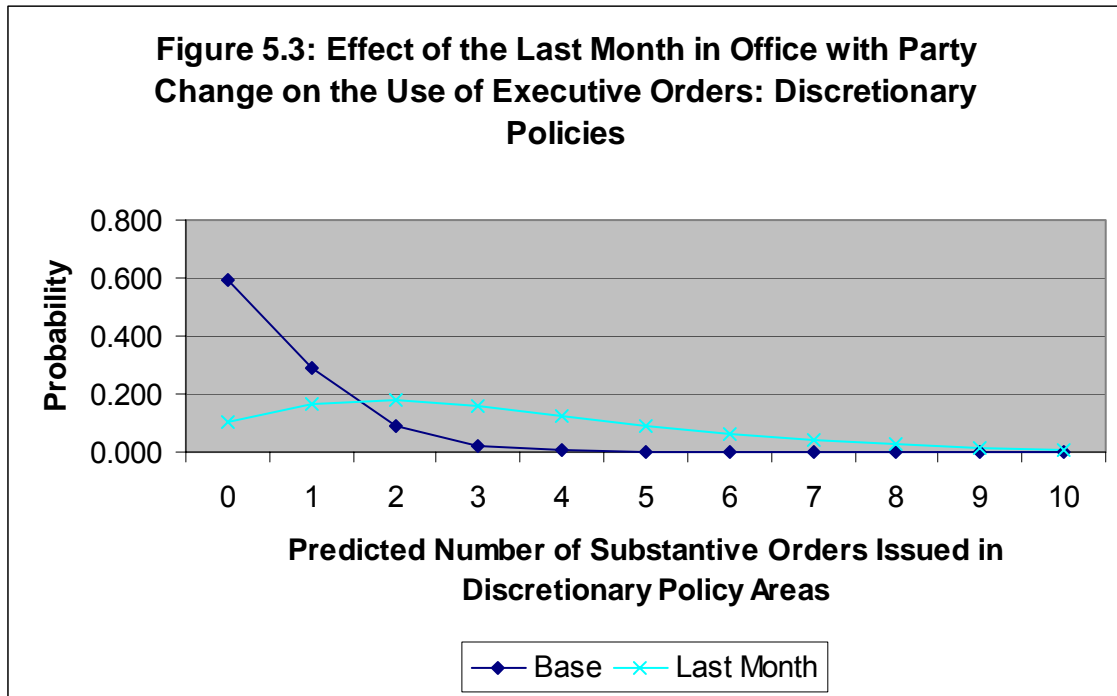
As presidents enter their final days in office, their opportunity for altering policies ceases as well. For a president desiring policy change, the transaction costs

associated with legislative delay make statutory changes nearly impossible in the waning days of an administration. As the results show, presidents are significantly more likely to issue executive orders during their last month in office, though only when the incoming president is not of the same party. This result is also consistent with the findings of the combined sample. Such a president is expected to issue an additional 2.7 orders in policy areas where additional discretion is assumed.



The above finding is important in that it shows that presidents appear to favor legislation even in areas where they have greater abilities to act unilaterally. When there is not enough time left to pursue statutory change, they instead focus on changing the policies in the only way they can, through executive orders. As Figure 5.3 makes plain,

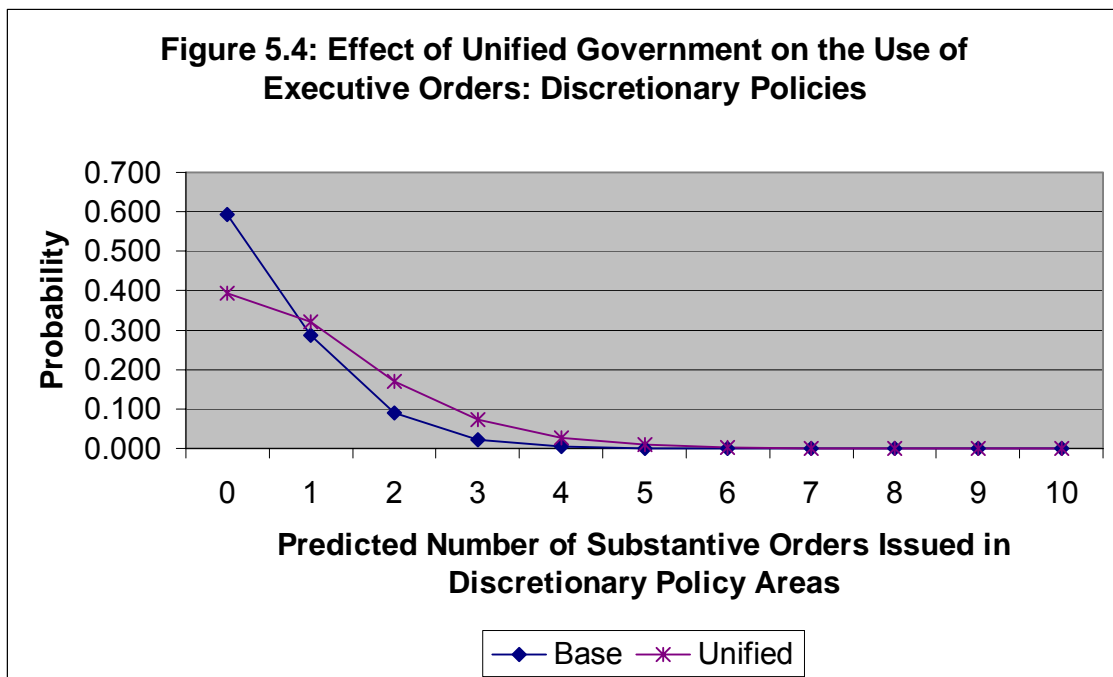
there is a substantive increase in the use of executive orders in the last month of office preceding party change. There is an increased probability greater than 0.6 that such presidents will issue two or more executive orders in discretionary policy areas.



Proposition two, that when legislative delay presents transaction costs, executive orders become more likely, received support in this portion of the analysis. Presidents issue more executive orders in discretionary policy areas when time is of the essence. This is true for both end-of-term effects and when the political environment demands rapid action.

***Proposition Three***

Recall that the third proposition holds that as the amount of presidential discretion increases, the transaction costs associated with unilateral action decrease, making their use more likely. The nature of this sub-sample is such that presidents have higher levels of discretion than in the following sub-sample; however, presidents can still have higher levels of discretion within those areas traditionally affording them greater freedom. Just as in the chapter IV analyses, the assumption is that a unified government affords the president higher levels of discretion, even in those policy areas generally ceded to the executive.



As the results show, presidents are indeed more likely to issue executive orders in discretionary policy areas under unified government. Presidents issue an expected 0.5 more executive orders in such policy areas when part of a unified government. Taken over a standard four-year term, this would represent an expectation of nearly an additional twenty-four such orders being issued.

Consider figure 5.4. As this graph shows, presidents exhibit a greater propensity for unilateral action when fellow partisans control Congress. Under unified government presidents have an increased probability of 0.20 of issuing at least one executive order in high discretion policy orders.

The likelihood of Congress stepping in and rebuking the president appears to greatly influence the issuance of executive orders by altering the net value the president associates with unilateral action. This also suggests that while there are areas where presidents have increased levels of discretion, this discretion is not limitless; they must consider the reactions of the other political branches. Thus, proposition three is supported by this analysis as well.

### ***Controls***

Some of the control variables are also worthy of mention. Contrary to the findings of the complete sample, presidents in their first three months in office issue more executive orders in discretionary policy areas than they do later in their terms, but only when replacing a president of the opposition party. These presidents are expected to issue an additional 0.42 such executive orders per month. Over the first ninety days, this translates into more than 1.2 additional orders. Though not a test of the theory, this

result is interesting. Apparently, previous presidents utilized the increased discretion available in these policy areas to move policies closer to their policy preferences. When a new president comes into office, that same discretion is available to move the policy closer to the policy preferences of the new administration.

Another interesting result is that more ideological presidents [again measured by the absolute value of the president's DW-NOMINATE (Poole and Rosenthal 1997)] are less likely to issue executive orders in discretionary policy areas. This result is only significant at the  $p < .10$  level, however. Apparently, ideological presidents are more willing to bear the transaction costs associated with legislation in order to secure long-term policy change.

As the preceding analysis shows, presidents alter their use of executive orders in policy areas where increased discretion is assumed based upon the transaction costs presented by legislative action and executive orders. The transaction costs based model of presidential policy-making receives support through this analysis.

### **Decreased Discretion**

#### ***Proposition One***

As the results in Table 5.2 show, presidents alter their use of executive orders to affect policy in low-discretion policy areas based upon the transaction costs associated with legislative change and unilateral action. Consistent with the predictions of proposition one and the findings of the entire sample, presidents respond to decreased expectations for legislative action by issuing more executive orders, even in those policy areas where they are not assumed to possess increased levels of discretion. A one



**Table 5.2 Non-Discretionary Policy and Unilateral Action**

Dependent Variable = Monthly Count of Executive Orders that Create Policy

in Areas Where President is Believed to Possess Lower Levels of Discretion

Independent Variable	Coef.	Std. Error	Effect of Std. Dev. Change on Dep. Var	Effect of Max Change on Dep. Var.
Distance Between Cong. Expectations and Ideology	1.914***	0.533	0.265	0.968
Recession	.165#	0.522	-----	0.119
Last Month Before Party Change	1.445***	0.309	-----	2.158
Last Month With No Party Change	-0.320	1.103	-----	-0.182
Unified Government	.891***	0.130	-----	0.957
First 3 Months of Administration With Party Change	-0.447	0.302	-----	-0.240
First 3 Months of Administration With No Party Change	.626*	0.277	-----	0.579
Ideology: Absolute Value of the H.R. DW-NOMINATE Score	-2.493***	0.522	-0.298	-1.177
Constant	-.105	0.174	-----	-----
Alpha	.418	.081		
LR test against Poisson	chi-square	56.42	p<.000	
AIC	1987.9		# Significant, p<.10	
Log-Likelihood	-983.94		* Significant, p<.05	
N of Cases	717		** Significant, p<.01	
			*** Significant, p<.001	

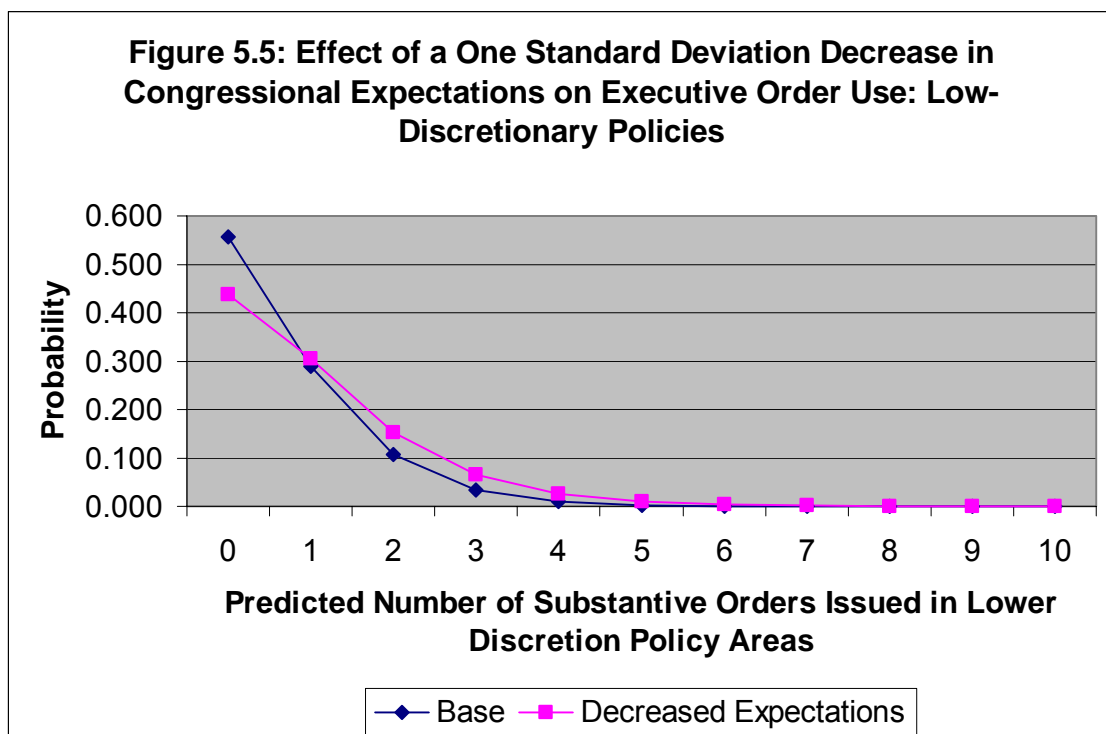
For substantive interpretation, all continuous variables were held at their mean, dummies at zero

One tail test used for all variables except controls and constant

standard deviation decrease in the net value associated with legislative action leads to an estimated 0.27 more orders issued in lower-discretion policy areas. This translates into

an increased expectation of nearly thirteen additional executive orders issued during a four-year term.

As is evident by Figure 5.5, there is a noticeable increase in the use of executive orders in lower discretion policy areas when presidents face a Congress that is unlikely to provide them with legislation meeting their preferences. A one standard deviation decrease in the expectations of legislative action leads to an increased probability of approximately 0.12 that the president will issue at least one such order during a given month.



Even in those areas where presidents are not assumed to possess high levels of discretion for unilateral action, they are more likely to issue executive orders to shape policy when legislative action presents increased transaction costs. At such times, presidents appear willing to accept the fact that cooperative action with Congress will not produce results that are as beneficial to them as unilateral action. This is consistent with the predictions of proposition one.

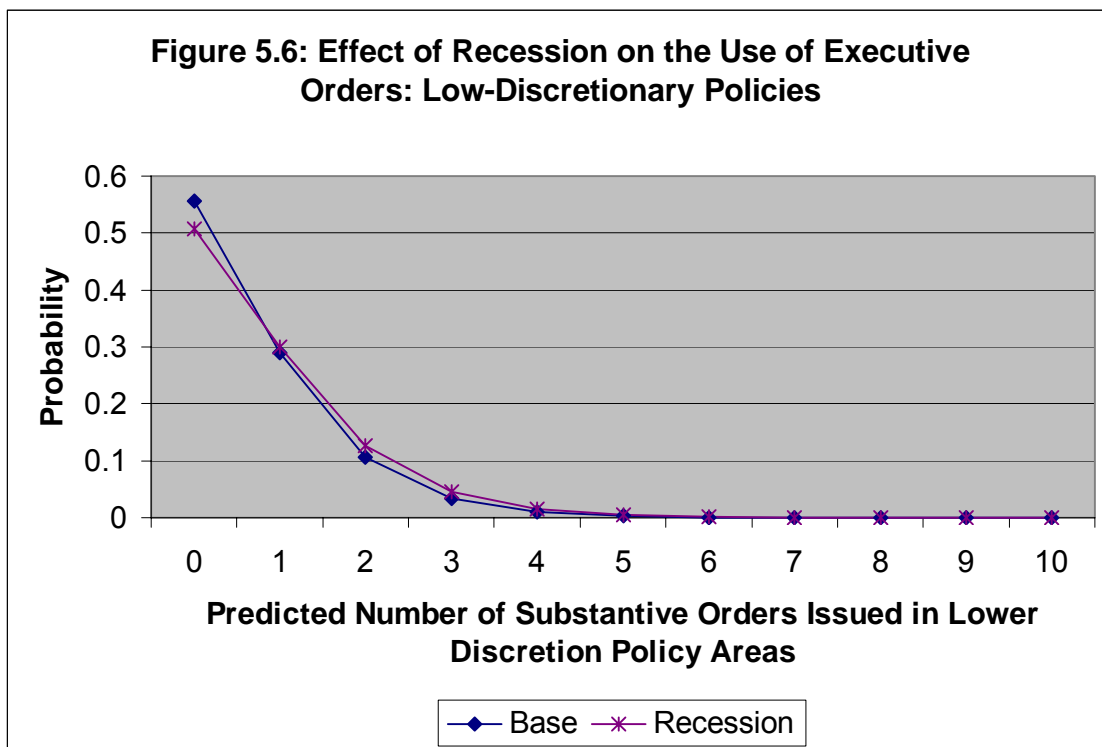
### ***Proposition Two***

When presidents desire rapid action, legislative action poses additional transaction costs making unilateral action more likely according to proposition two. As the results show, the presence of a recession does have an effect on the likelihood that a president will issue an executive order in a lower-discretion policy area, though the coefficient is only significant at the  $p < .10$  level. The presence of a recession leads to an expectation of 0.12 additional orders being issued each month. Considered over the longest recessions in the sample, sixteen months (November, 1975 to March, 1975 and July, 1981 to November, 1985), one would expect to find the issuance an additional 1.9 substantive orders.

As Figure 5.6 shows, there is a slight, but real increase in the likelihood that presidents will act unilaterally during recessionary periods. There is an increased probability of approximately 0.05 that presidents will issue at least one executive order during a recession versus non-recession periods.

Presidents that are entering their last month in office are more likely to issue executive orders than at other times in their administrations, but only when the incoming

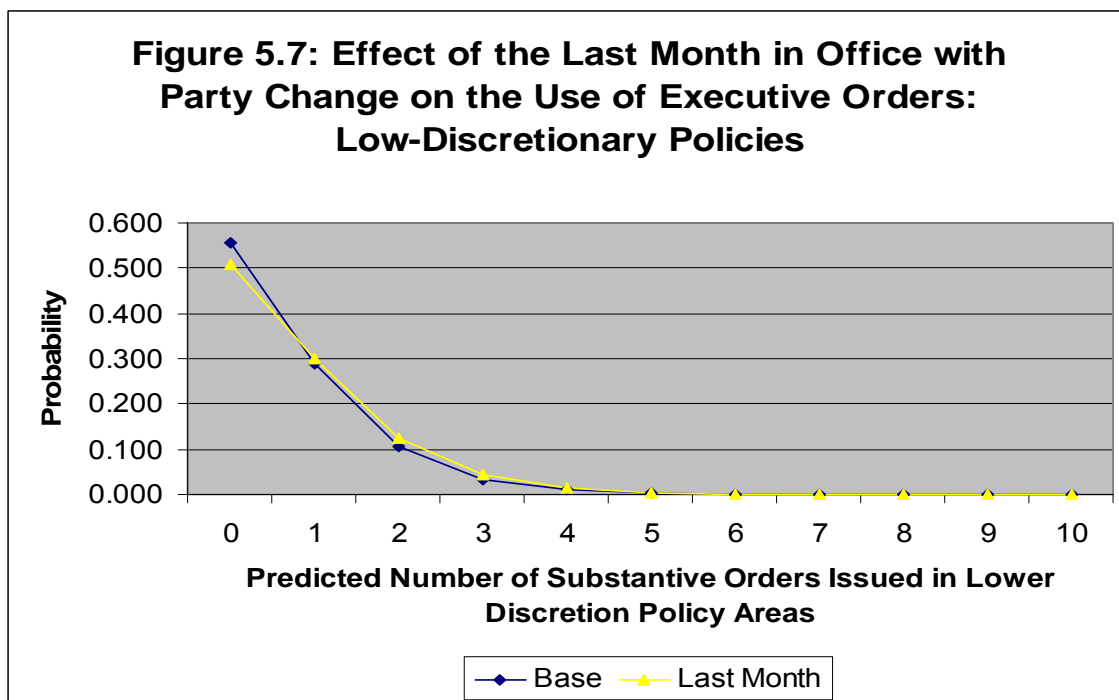
president is not a fellow partisan. Such presidents are expected to issue an additional 2.16 executive orders in lower discretion policy areas.



As Figure 5.7 illustrates there is a dramatic increase in the use of executive orders for outgoing presidents that are part of a party change in the White House. There is an increased probability of 0.49 that these presidents will issue two or more substantive executive orders in limited-discretion policy areas during their last month of office.

As presidents spend their final days in office, their opportunities for altering policy are concluding as well. Legislation is a time consuming process. For a president

who only has days remaining, the transaction costs associated with this process are prohibitive. At this time, executive orders are an attractive alternative that allows presidents to alter policy quickly. This is consistent with the predictions of proposition two.



### *Proposition Three*

Recall that proposition three holds that when presidents have more discretion to act unilaterally, the transaction costs associated with unilateral action are smaller, making executive orders more likely. The nature of this sub-sample is such that presidents have less discretion than they did in the previous sub-sample. However, they

are still able to have more or less discretion depending on the political climate at hand. This change in discretion should influence presidents' likelihood to act unilaterally.

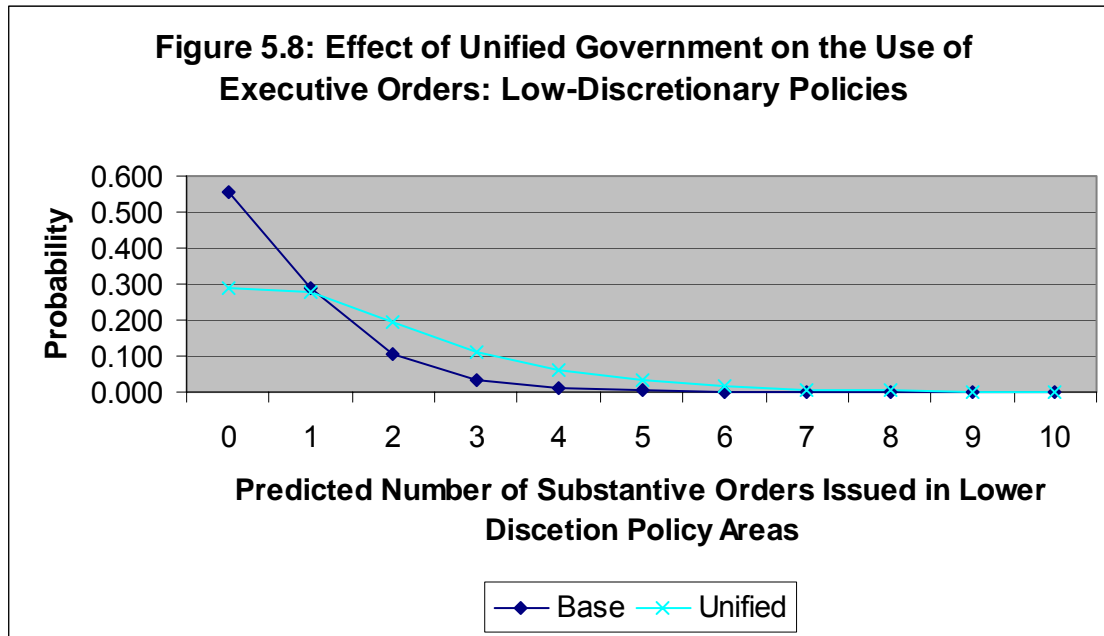
In this analysis, unified government stands as a measure of discretion available to the president. At such times, presidents should expect that legislative challenges to their orders are less likely than they would be under divided government. As the results show, presidents are significantly more likely to issue executive orders in lower-discretion policy areas when their party controls Congress than when confronted with divided government.

Presidents under unified government are expected to issue an additional 0.96 substantive executive orders in lower-discretion policy orders than presidents faced with divided government. Over a standard four-year term, this translates into nearly forty-six additional executive orders. Considering that the average number of lower-discretion policy orders issued per month is 1.1, this is a finding of great substantive importance.

As Figure 5.8 makes clear, there is a pronounced increase in the use of executive orders among presidents when the nation is under single-party rule. Such presidents have an increased probability of 0.28 of issuing two or more substantive executive orders in lower-discretion policy areas per month.

As the results show, presidents are cognizant of the potential reactions of Congress, and anticipating the legislature's reaction to unilateral action, only issue orders when confident that the order will not be overturned. This explains why Howell (2003) finds that Congress has only successfully overturned four executive orders since 1972. Presidents anticipate congressional reactions and avoid actions that will

embarrass the administration. Thus, presidents are aware of the *de facto* discretion that they possess to act unilaterally and this discretion influences their proclivity to issue executive orders, consistent with the third proposition.



### Controls

The results for two of the control variables also deserve mention. First, consistent with the combined sample, presidents are more likely to issue substantive executive orders in lower-discretion policy areas during their first three months in office, though only when they are continuing their party's hold on the office. These presidents are expected to issue an additional 0.58 such orders each month, or roughly 1.7 orders over the first ninety days.

Perhaps what is occurring with a party change is that the status quo in these policy areas is greatly different from the incoming president's preferences due to the prior president's ability to influence legislation through the veto power for at least four years (Cameron 2000). Given the limited discretion categorized by policy areas in this sub-sample, presidents likely lack the discretion to unilaterally move the policies close to the administration's wishes. They instead pursue legislative change.

A president replacing a fellow partisan likely faces a status quo more reflective of the president's wishes. Most desired changes are likely incremental and within the president's discretion to act. During such a time, executive orders may be sufficient to accomplish the desired changes.

Another finding worthy of discussion is that more ideological presidents are less likely to pursue executive orders to alter lower-discretion policies. A one standard deviation increase in presidential ideology leads to an expectation of 0.30 fewer substantive executive orders issued in lower-discretion policy areas. Considered over a standard four-year term, this would translate into fourteen fewer executive orders.

Surely, ideological presidents do not desire *less* policy change than their moderate counterparts do. Rather, a more likely explanation is that ideological presidents place a higher net value on the longevity that legislative change provides. While it is easier to alter policy through unilateral action than through Congress, future presidents may just as easily "re-alter" policy made through executive order. Ideological presidents probably care more about the duration of their policy changes than do



moderates, and as such are more willing to bear the transaction costs associated with legislative action.

### **Model Similarity**

Does the theory adequately explain the use of executive orders across policy types? The results have shown that the model does do a good job of predicting when a president will act unilaterally. An additional question that arises is: does the model perform any differently in the two samples? One standard test for the structural stability across sub-samples is the utilization of the Chow test (Chow 1960, Gujarati 1995, 263). This test allows an examination as to whether the coefficients are significantly different across models. The following formula determines the Chow:

$$F = \frac{(RSS_1 - RSS_2 - RSS_3) / k}{(RSS_2 + RSS_3) / (n_2 + n_3 - 2k)}$$

Where:

$RSS_1$	=	Residual sum of squares in the combined sample
$RSS_2$	=	Residual sum of squares in the first sub-sample
$RSS_3$	=	Residual sum of squares in the second sub-sample
$n_2$	=	Number of observations in the second sub-sample
$n_3$	=	Number of observations in the second sub-sample
$k$	=	The number of parameters in the model

Since residual sum of squares is not routinely reported in negative binomial regression, I computed predicted values based upon the coefficients and the values of the observations. I then sum the squared errors, essentially duplicating what the computation of the standard residual sum of squares in OLS regression. The following

are the results:  $RSS_1 = 2111.4$ ;  $RSS_2 = 867.7$ ; and  $RSS_3 = 1226.3$ . Utilizing this information, one receives a value of 1.309. This value is F distributed with degrees of freedom =  $(k, n_2 + n_2 - 2k)$  or in this case, (9, 1416). Given this, there is a p-value of 0.23. Thus, one cannot reject that the coefficients in the models are in fact different across sub-samples. This places Marshall and Pacelle's (2005) results in a light of skepticism. Further, it lends greater credence to the transaction costs model of presidential policy-making. The theory adequately explains when presidents will act unilaterally even when changes are made to separate the sample by policy type.

## **DISCUSSION**

Conventional wisdom holds that presidents possess greater freedom to act in certain policy areas (see Wildavsky 1966). This increased discretion leads presidents to utilize executive orders to affect policy differently based upon the policy area (Marshall and Pacelle 2005). To be adequate, a theory of presidential policy-making that explains presidential uses of executive orders should be robust to changes in the policy area. The transaction costs based model meets this standard. As the preceding tests show, presidents account for the transaction costs of both legislative and unilateral action before determining which route to pursue for affecting policy regardless of the broader level of discretion usually afforded the president in the policy area.

Simply because presidents possess increased discretion to act in a given policy area does not mean they are less desirous of securing the long-term policy change legislation provides. Rather, they continue to consider the transaction costs associated

with unilateral and legislative action, choosing the course that provides the largest net value.

## **CONCLUSION**

Overall, the split-sample tests support the transaction costs based model of presidential policy-making. In areas where presidents are believed to possess greater degrees of discretion, they account for the transaction costs that exist in the political environment. They exhibit this same pattern of behavior in areas where they possess less discretion. The split-sample tests are largely consistent with the test on the combined sample, leading to increased confidence in the transaction costs based model of presidential policy-making.

Taken in conjunction with the results from chapter IV, the transaction costs based model of presidential policy-making has considerable support. The model has been robust to changes in both methodology and different samples. This chapter has shown that isolated policy areas do not drive the results in Chapter IV, and that the theory is generalizable across policy areas.

## CHAPTER VI

### CONCLUSIONS

Since the early days of America, presidents have altered policy unilaterally through executive orders. Until recently, political scientists have ignored this important tool and the effect on public policy in the United States. Despite the recent attention executive orders have received, most work has been devoid of theory explaining when presidents gravitate towards this influential policy instrument. The lone exception, Howell (2003), employed a theory substantially borrowed from the earlier work of Krehbiel (1998), but the direct translation of that theory to presidential use of executive orders proved unrealistic.

This study develops a parsimonious theory rooted in transaction costs that explains when presidents will act through executive orders to alter policy versus seeking statutory change through the legislature. The goal of this work has been to fill a theoretical void and expand scientific knowledge through empirical testing.

Transaction cost theory is not new, but its application to unilateral action by the president is an innovation. Transaction costs have proven useful in the past for explaining when Congress will act on its own, writing explicit legislation, and when it will delegate its policy-making authority to the administrative branch (Epstein and O'Halloran 1999). The choice presidents face when seeking policy change is similar to that of Congress. They can either make the policy alone through the issuance of executive orders or they can seek legislative change. Since the president does not have

much control over the outcome of the policy when Congress tackles the issue (only a veto threat), this can be viewed as the president delegating to Congress the role of policy changer. Given the similarities of the decision process facing the president and that facing Congress, the use of transaction costs to explain when a president will act unilaterally is a sound approach.

The transaction costs based model of presidential policy-making produced several predictions of when a president will act unilaterally versus seeking legislative action to initiate policy change. The first prediction is that when congressional action presents additional transaction costs for the president, the use of executive orders becomes more likely. When presidents face congressional opposition to their policy wishes, they are less likely to achieve a policy change that they view as beneficial through statutory means. In such instances, unilateral change can produce policy change of benefit to presidents without requiring costly negotiations with legislators.

Secondly, the model predicts that when presidents desire a rapid change in policy, the transaction costs of legislation can be prohibitive, thus leading to an increased likelihood of executive orders usage. Congress does not work for the president. Because of this, a president cannot order the legislature to take action on a given matter.

Furthermore, Congress is a highly structured body. A bill must first pass through sub-committees, committees, floor votes, conference committees and another round of floor votes before the president is able to sign it into law. Under most circumstances, this process is time-consuming. Unilateral action, on the other hand, can be accomplished immediately. Action can be taken as soon as the president wishes. There

are standard operating procedures for a president to take before issuing an executive order; however, these were created by executive order and presidents can ignore them without penalty. As such, when a president desires rapid action, executive orders can be an attractive alternative to the delay caused by legislative change.

The model's third prediction is that as presidential discretion to act unilaterally increases the transaction costs associated with executive orders decreases, thus making their use more likely. When presidents possess increased levels of discretion, they are better able to pinpoint the exact policy that they desire through executive orders, making unilateral action more attractive relative to the probable policy outcome of legislative action, where presidents are virtually assured the produced policy will differ from their desires to some extent. However, presidents faced with less discretion, are less able to cause the specific policy changes they desire. If a president wishes to make a policy change that is outside of the discretionary bounds of unilateral action, legislation becomes more likely, as greater change is available through statutory alteration.

To test the predictions of the model, a new dataset was developed, compiled from every executive order from the beginning of the Truman administration to 2004. Each order was read, analyzed, and coded based upon policy content. The resulting data set has the additional advantage of not relying solely on a limited set of "significant" executive orders. Unilateral policy-making is characterized by many smaller policy changes, interspersed with occasional executive orders that make large changes. Ignoring most orders that make policy and concentrating solely on those generating

much change produces a misleading picture of how presidents affect policy through executive orders.

Using this dataset, the model was subjected to a variety of empirical tests. All predictions of the model withstood the scrutiny of traditional methods of empirical analysis. To ensure that the results were not due to the utilization of non-time-series methodologies, the model was further analyzed using the PAR(p) method proposed by Brandt and Williams (2000). This method allows one to control for the variation that occurs based upon the history of the time-series. When results are robust using this methodology, one can have increased confidence that the obtained results are non-spurious.

To further test the transaction costs based model of presidential policy-making, the dataset was divided into two sub-samples. One sub-sample included only policy areas where the president is assumed to possess high levels of discretion to act unilaterally. The other sub-sample included the remaining policy areas, ones where the president is not assumed to enjoy high levels of discretion. This action produces greater confidence that isolated policy types did not drive the results.

Marshall and Pacelle (2005) find that presidents utilize executive orders differently based upon the type of policy altered. However, an adequate theory of presidential policy-making will be able to predict presidential behavior regardless of policy area. The findings of this analysis were robust to the changes in policy type, giving additional support to the transaction costs based model of presidential policy-making.

Through various methods and sub-samples, one is lead to the strong conclusion that presidents weigh the different transaction costs of their actions before seeking policy change. When unilateral action presents additional transaction costs to presidents, the pursuance of legislative action becomes more likely. Conversely, when statutory change presents additional transaction costs, the president is more likely to make policy change unilaterally via executive orders.

### **OBSERVATIONS**

As has been noted, the theory outlined in the chapter III received support throughout this study. Through the course of this research, I have made several observations that bear note. First, as was noted in chapter IV, presidents are least able to act unilaterally when they would most like to. When Congress is least likely to overrule an executive order, they are also more likely to support the presidential prerogative on legislation. However, when presidents face opposition to their legislative agendas, they are likely to have lower levels of discretion. This can explain some of the differing findings that have occurred in previous studies in regards to congressional party control. Krause and Cohen (1997) and Marshall and Pacelle (2005) find that party strength in the Senate is negatively associated with executive order usage while House party strength is positively related to the use of executive orders. Other studies utilizing a measure of divided government, find that presidents issue more orders under unified government (i.e. Howell 2003; Mayer 1999; 2001. Unless one includes a variable for both legislative expectations and for expected discretion, one is likely to find conflicting results depending on the other variables in the model.



This is only the second attempt that I am aware of where a researcher has examined each executive order over a large time span.<sup>20</sup> During the collection of the data, one thing became apparent: the normal use of executive orders is to make little, if any, policy change. If an executive order were randomly selected for study, one would likely be unimpressed by the policy impact that the order has. In fact, there a large number of the orders make no policy changes at all. This observation does not mean, however, that presidents do not utilize executive orders to make major policy changes. Quite the contrary, presidents will, at times, utilize their ability to act unilaterally to make significant policy changes. For instance, with Executive Order 12291, President Reagan (1981) greatly altered the regulatory process in the United States. Without the consent of Congress, he required that all major regulations be justified with cost-benefit analyses and move through the Office of Management and Budget. This move has provided the president increased control of the regulatory process, and thus, the produced regulations. Executive Order 12291 is noteworthy, but not unique, as an example of significant policy change made unilaterally. Presidents relying upon executive orders to declare states of emergency, affect labor policies, and alter abortion policy are but a few examples.

Presidents have the ability to make significant and meaningful policy without consultation or compromise with any other individual or political branch. This does not mean, however, that presidents have *carte blanche* to make any policies they desire. Congress does have the ability to reign in presidents that stray too far. Besides the

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<sup>20</sup> To my knowledge, Warber (2002) is the only other study.

power to limit appropriations funding an order, killing the directive by starvation, Congress also has the ability to overrule an executive order. Such action would be embarrassing to presidents in an era where presidential prestige is coveted.

To be sure, there are only a handful of examples of Congress successfully taking action to overturn executive orders. According to Howell (2003) there are only four instances of Congress legislatively voiding an executive order since 1972 (2003, 114-115). However, presidents being rational actors who seek to avoid being overturned by Congress can also explain this observation. If presidents are able to predict what actions Congress will find unacceptable and avoid such actions, then one would expect to find very few examples of congressional action overturning executive orders. This explanation seems more credible than the conclusion that Congress is unwilling to strike out a president that bites off more than the legislature is willing to chew.

This proposition received support in the empirical chapters of this dissertation. Presidents issue fewer executive orders under divided government *ceteris paribus*. At such times, presidents face a higher likelihood that a hostile Congress will overturn their orders. Presidents consider this limited discretion and alter their behavior to account for the increased likelihood that Congress will strike back. Such an explanation is more likely, receives empirical support, and is more in line with the “textbook” approach to United States government where political branches share powers in a system of checks and balances.

The account presented here is somewhat gloomier for the president than other studies of unilateral action present. However, I do believe that presidents are far better

off being able to act unilaterally than they otherwise would be where they to be stripped of the power. Through unilateral action, presidents are able, at times, to set the policy exactly as they wish without negotiations. They are also able to take action in an immediate fashion. Neither the exactitude nor the timeliness is likely to result when policy changes are accomplished through legislation. Any tool conferring upon a politician the ability to alter policy without the consent of another is advantageous. Executive orders provide the president with said ability, but it is not a limitless power.

### **NORMATIVE ISSUE**

While executive orders produce many notable normative issues, one stands out: they are not subject to the constitutional rules of policy-making and thus violate the separation of powers. This is indeed an issue that can and should cause alarm.

However, there are some benefits for the nation arising from executive orders. First, executive orders allow the government to take rapid, coordinated action at times when delay would lead to sub-par outcomes. For instance, in the aftermath of the September 11 attacks, the Bush administration took legal action more rapidly than Congress. Granted, the policy changes were not deliberated by Congress and were not subject to the usual checks and balances, but in times of emergency, delay may not be acceptable.

Furthermore, presidents are constrained by the wishes of Congress. An executive order that makes policy changes in excess of the super-majoritarian wishes of the legislature faces a likely statutory challenge, one that is likely to result in the overturning of the unilateral action. In essence, then, there is a system of checks and balances in place for executive orders.

An additional benefit of executive orders is that they allow Congress to write statutes that are not explicit. If the legislature were forced to write down every detail for the implementation of a policy, the body would be hamstrung, spending the bulk of its time debating a single policy. In addition, Congress would lose the expertise that the bureaucracy affords. The legislature is better able to use its time efficiently, and capitalize on the expertise of the administrative branch by stating their goals for a policy and allowing the bureaucracy to implement those goals, (see Epstein and O'Halloran 1999 for a complete discussion on the pros and cons of legislative delegation). Since the president is the head of the bureaucracy, the position has the ability to influence the implementation of policies through executive orders.

### **Possible Solutions**

If one is convinced that the normative drawbacks of executive orders outweigh the benefits of their use, a few tacks can be taken to deal with the issue. The first is for Congress to write explicit laws. Though this approach would bestow on Congress a much more powerful role in the creation of policy, as was mentioned above, this approach is not beneficial to the legislature, nor is it of advantage to the nation. If no power is to be delegated to the administrative branch, then all levels of discretion must be removed from policies. Such an approach can work well in policy areas such as Social Security formulas; the legislature can direct the amounts to be paid retirees. However, who qualifies for Social Security disability benefits? Creating a definition that removed all levels of discretion from street-level bureaucrats would be a Herculean task.

Many other policies, such as natural disaster relief, by their nature elude concrete definitions and would not benefit from explicit congressional dictates.

If Congress wishes to provide for such a policy, the most efficient route is to articulate its goals and allow the bureaucracy to implement those goals to the best of their abilities, and conduct oversight. If, later, Congress believes that the bureaucracy's implementation did not match their wishes, legislators can take action, either amending the law (this of course may require a 2/3 super-majority to override a presidential veto) or withholding appropriations. Though explicit legislation would help alleviate some of the normative concerns of executive orders, there are too many problems associated with that choice, making it an unattractive option.

Another approach would be to institute a legislative veto system for executive orders. Under this system, presidents would have to submit all executive orders to Congress. The legislature would then have a set period, for instance thirty days, where they could overturn the order with a majority vote of either chamber. To allow for the advantage of rapid action that executive orders possess, the system could allow orders to be in effect until, and unless, the order receives a legislative veto.

The legislative veto system would allow Congress to speak when it feels that the president is taking action contrary to its intentions. Unilateral action could not proceed against the majority wishes of either house of Congress. Each action taken by the president would, in effect, be new legislation since it receives the consent of the majority of both houses and is, by its nature, approved by the president. The only difference is that it would not have to meet the cloture requirements of the Senate.

Implementing this plan, however, could prove difficult. In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the Supreme Court found that legislative vetoes are unconstitutional because they are an encroachment on the executive's authority to utilize the authority delegated by Congress and thus a violation of separation of powers (p. 922, 954). Further, the Court held in *Chadha* that the legislative veto is essentially making law without the approval of the president (or the 2/3 veto override), and thus unconstitutional (p. 921). Due to this, there are constitutional issues concerning the legislative veto.

A constitutional amendment may be necessary to keep such a legislative veto from facing a constitutional challenge. Furthermore, the law would need to be written in such a way as to not allow presidents to utilize non-executive order methods of unilateral action such as national security directives and proclamations to cause policy change without being subject to the legislative veto.

The legislative veto helps alleviate the normative concerns of presidential action without congressional consent. It also allows the nation to capitalize on the advantages executive orders present. However, as the *Immigration and Naturalization Service v. Chadha* case evidences, the method is not without its own problems. Overall, though, the method presents many more advantages than disadvantages, and if implemented through constitutional amendment can eliminate the constitutional concerns.

The remaining course of action is the most likely: do nothing new. Executive orders have been present since the beginning of the nation, their use likely will not lead to the downfall of the United States and its values. While executive orders do lead to

policy-making without the approval of Congress, they do not allow for policy-making without influence from the legislature. The simple threat of having an executive order overturned by Congress is enough to cause presidents to alter their actions. This is not to say that Congress is not at a disadvantage relative to presidents where executive orders are concerned. The body must muster a two-thirds super majority in the face of a certain presidential veto to override an executive order. However, if a president strays too far, the legislature can, and likely will, strike back.

Likely, the nation will continue on its current path, with legislation made through the “textbook” process and presidents possessing the tool of unilateral action. Given that executive orders are a significant component of policy-making in the United States, political scientists need to understand more about how presidents utilize them. This project has developed a concise theory of presidential policy-making and subjected that theory to empirical scrutiny. To gain a better understanding of unilateral action, there is a variety of paths for future research.

## **FUTURE RESEARCH**

One approach that would be beneficial is to subject the transaction costs based model of policy-making to analyses using a case study approach. This project utilized large-n quantitative analyses to test the theory. This type of analysis provides generalizability. However, case studies allow for an in-depth analysis of how a theory explains isolated events. One approach is not superior to the other, but when one uses both approaches and the theory is robust, there is increased confidence that the theory adequately describes reality.

The ideal case study would require access to presidents and to the inner-circles of their administrations, for few outsiders are aware of how presidents and their closest advisors arrive at decisions on policy matters. One approach that could allow for “pseudo-access” is to conduct elite interviews with former and current top administration officials. These insiders are more likely to possess knowledge of how presidents make decisions between unilateral and legislative action. Ideally, one would gain interviews with former presidents, but other top-level officials would provide valuable insight into presidential decision-making. One potential source of interviewees would be those officials in the Office of Management and Budget that review and prepare most executive orders. Given that this is a theory of how presidents make decisions, access would be an integral component of an adequate case study.

Experimentation is another avenue that can provide a test of the theory. Once used mostly in the psychology field, experiments have recently been useful for theory testing in political science. For instance, Chin, Bond and Geva (2000) provide a unique test of whether money buys access to members of Congress, finding that constituents are more likely to gain access to members than are political action committee members.

Though limited in their external validity, experiments are excellent in regards to internal validity; with careful planning, one can be sure that the results are indeed a test of the theory. With creativity, one could design an experimental test of the transaction costs based model of presidential policy-making. By altering the transaction costs subjects receive and by monitoring their actions, one can see how individuals respond to transaction costs and how those costs affect decision-making.



An additional avenue would be to examine how presidents use other tools of unilateral action and whether the transaction costs based model of presidential policy-making adequately explains the presidents' use of these tools. Cooper (2002) examines the varying tools of unilateral action including executive orders, proclamations, national security directives, and legislative signing statements. There has not been much theory development or testing for use of these other tools.

Furthermore, other areas of political science may benefit from the application of the transaction costs framework. As this dissertation has shown, it provides a clear conceptual guide to the decision-making process of individuals. It is also fruitful in explaining the decision-making process of political bodies as well (Epstein and O'Halloran 1999). For international relations scholars, the framework could be useful in predicting when nations will seek to form strategic alliances. In this case nations face a "build or buy" decision in that they can seek to work towards their own security by building up its own military strength (build) or they can seek to utilize the perceived strength of another nation to ensure their security (buy). Judicial scholars can utilize the framework to explain when courts will review an appeal of a lower court's decision. Courts can either respect the ruling of the lower court (buy) or hear the appeal and make their own decision (build).

## **CONCLUDING REMARKS**

Presidential use of unilateral action is an important component of policy-making in America. How presidents utilize executive orders presents fundamental questions for

students of policy and the presidency. This dissertation contributes to the literature in this area by showing when presidents will turn towards this tool to alter policy.

More importantly, however, are the implications of this study for democratic theory. The American system has separation of powers as its foundation. This system finds eloquent support from the founders of the nation (see *The Federalist Papers*) and from philosophers (Montesquieu 1914; Rousseau 1762). At first glance, presidents are able to make policy in a *carte blanche* fashion. This idea receives support, at least by implication, in other works on executive orders (Cooper 2002; Howell 2003; Mayer 1999; 2001).

However, this work has shown that the president considers the policy wishes of Congress before acting unilaterally. While this is not the strict separation of powers established in the Constitution, it is less alarming than if presidents routinely made policy without even the consideration of the policy leanings of the other branches.

The scenario presented here, is the one predicted by Federalist 51 in that ambition does check ambition (Madison [1788] 1982). The president is acting in an effort to garner as much power as the office allows. Congress, on the other hand, acts in a constraining fashion, keeping the president from seizing complete control. The body allows the executive to make marginal changes in policy while saving the bulk of major changes for itself. Given that the executive order allows the president to take swift action when the country needs it, and that the tool does not allow the president to dominate Congress, its presence should not be cause for great concern.

## REFERENCES

- AFL-CIO v. Kahn*, 618 F. 2d 784, D.C. Circuit.
- Aldrich, John H., and David W. Rohde. 2000. "The Consequences of Party Organization in the House: The Role of the Majority and Minority Parties in Conditional Party Government." in *Polarized Politics: Congress and the President in a Partisan Era*, ed. Jon R. Bond and Richard Fleisher. Washington D.C.: Congressional Quarterly Press, Pp. 31-72.
- Anderson, James E. 2003. *Public Policymaking*. 5<sup>th</sup> ed. Boston: Houghton Mifflin Company.
- Arnold, R. Douglas. 1979. *Congress and the Bureaucracy: A Theory of Influence*. New Haven: Yale University Press.
- Balla, Steven J. 1998. "Administrative Procedures and Political Control of the Bureaucracy." *American Political Science Review* 92 (September): 663-673.
- Balla, Steven J., and John R. Wright. 2001. "Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy." *American Journal of Political Science* 45, (October): 799-812.
- Bawn, Kathleen. 1995. "Political Control Versus Expertise: Congressional Choices about Administrative Procedures." *American Political Science Review* 89 (March): 63-73.
- Bond, Jon R., and Richard Fleisher. 1990. *The President in the Legislative Arena*. Chicago: University of Chicago Press.
- Bond, Jon R., Richard Fleisher, and B. Dan Wood. 2003. "Effect of Public Approval on

- Presidential Success in Congress.” *Journal of Politics* 65 (February): 92-110.
- Brace, Paul, and Barbara Hinckley. 1991. “The Structure of Presidential Approval: Constraints within and Across Presidencies.” *Journal of Politics* 53 (November): 993-1017.
- Brandt, Patrick T., and John T. Williams. 2000. “A Linear Poisson Autoregressive Model: The Poisson AR(p) Model.” *Political Analysis* 9 (Spring): 164-184.
- Brandt, Patrick T., John T. Williams, Benjamin O. Fordham, and Brian Pollins. 2000. “Dynamic Modeling for Persistent Event-Count Time Series.” *American Journal of Political Science* 44 (October): 823-843.
- Bush, George W. 2001. “Executive Order 13198.” *66 Federal Register* 8497; January 31, 2001. Washington, D.C.: Government Printing Office.
- Bush, George W. 2001. “Executive Order 13228.” *66 Federal Register* 51812; October 10, 2001. Washington, D.C.: Government Printing Office.
- Cameron, Charles M. 2000. *Veto Bargaining: Presidents and the Politics of Negative Power*. Cambridge: Cambridge University Press.
- Campbell, Angus, Philip E. Converse, Warren E. Miller, and Donald E. Stokes. 1960. *The American Voter*. Chicago: University of Chicago Press.
- Carter, Jimmy. 1977. “Executive Order 11967.” *42 Federal Register* 4393; January 24, 1977. Washington, D.C.: Government Printing Office.
- Carter, Jimmy. 1977. “Proclamation 4483.” *42 Federal Register* 4391; January 24, 1977. Washington, D.C.: Government Printing Office.
- Cash, Robert. 1965. “Presidential Legislation by Executive Order.” *University of*

*Colorado Law Review* 37:116.

- Cheng, Simon, and J. Scott Long. 2000. "XPost: Excel Workbooks for the Post-estimation Interpretation of Regression Models for Categorical Dependent Variables." Indiana University Typescript.
- Chin, Michelle L, Jon R. Bond, and Nehemia Geva. 2000. "A Foot in the Door: An Experimental Study of PAC and Constituency Effects on Access." *Journal of Politics* 62 (May): 534-549.
- Chow, Gregory C. 1960. "Tests for Equality between Sets of Coefficients in Two Linear Regressions." *Econometrica* 28 (3): 591-605.
- Church, Frank. 1974. "Report." in US Congress. Senate. 1974. *Executive Orders in Times of War and National Emergency*. 93<sup>rd</sup> Cong., 2<sup>nd</sup> Session. Sen. Rept. Pp. 93-1280.
- Clinton, William J. 1993. "Executive Order 12834." *58 Federal Register* 5911; January 22, 1993. Washington, D.C.: Government Printing Office.
- Coase, Ronald. 1937. "The Nature of the Firm." *Economica* 4 : 386-405.
- Cooper, Joseph, and William F. West. 1988. "Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules." *Journal of Politics* 50 (November): 864-895.
- Cooper, Philip J. 2002. *By Order of The President: The Use and Abuse of Executive Direct Action*. Lawrence: University of Kansas Press.
- Deering, Christopher J., and Forrest Maltzman. 1999. "The Politics of Executive Orders:

- Legislative Constraints on Presidential Power.” *Political Research Quarterly* 52 (December): 767-783.
- Durant, Robert F., and Adam L. Warber. 2001. Networking in the Shadow of Hierarchy: Public Policy, the Administrative Presidency, and the Neoadministrative State. *Presidential Studies Quarterly* 31 (2): 221-244.
- Enders, Walter. 1995. *Applied Econometric Time Series*. New York: John Wiley and Sons.
- Edwards, George C. III. 1980. *Presidential Influence in Congress*. San Francisco: W.H. Freeman and Company.
- . 1986. “The Two Presidencies: A Reevaluation.” *American Politics Quarterly* 14 (July): 247-263.
- . 1989. *At the Margins: Presidential Leadership of Congress*. New Haven: Yale University Press.
- Edwards, George C. III, and Andrew Barrett. 2000. “Presidential Agenda Setting in Congress.” in Jon R. Bond and Richard Fleisher eds. *Polarized Politics: Congress and the President in a Partisan Era*. Washington D.C.: Congressional Quarterly Press. Pp. 109-133.
- Edwards, George C. III, and Stephen J. Wayne. 1994. *Presidential Leadership: Politics and Policy Making*. 3<sup>rd</sup> ed. New York: St. Martins Press.
- Egger, Rowland, and Joseph P. Harris. 1963. *The President and Congress*. Westport: Greenwood Press.
- Eisenhower, Dwight D. 1957. “Executive Order 10730.” *22 Federal Register* 7628;

- September 25, 1957.* Washington, D.C.: Government Printing Office.
- Epstein, David, and Sharyn O'Halloran. 1999. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers.* Cambridge: Cambridge University Press.
- Federal Register Act of 1935,* 44 U.S.C. 1501 et seq.
- Fesler, James W., and Donald F. Kettl. 1996. *The Politics of the Administrative Process,* 2d ed. Chatham, NJ: Chatham House Publishers.
- Fisher, Louis. 1993. *The Politics of Shared Power: Congress and the Executive.* Washington, D.C.: Congressional Quarterly Press.
- Fleisher, Richard, and Jon R. Bond. 1988. "Are There Two Presidencies? Yes, But Only for Republicans." *Journal of Politics* 50 (August): 747-767.
- Fleishman, Joel, and Arthur Aufses. 1976. "Law and Orders: The Problem of Presidential Legislation." *Law and Contemporary Problems* 40 (3): 1-46.
- Flemming, Roy B. and B. Dan Wood. 1997. "The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods." *American Journal of Political Science* 41 (April): 468-498.
- Ford, Gerald R. 1975. "Executive Order 11884." *40 Federal Register* 47469; October 9, 1975. Washington, D.C.: Government Printing Office.
- Ford, Gerald R. 1976. "Executive Order 11905." *41 Federal Register* 7703; January 31,, 1976. Washington, D.C.: Government Printing Office.
- Gleiber, Dennis W., and Steven A. Shull. 1992. "Presidential Influence in the Policymaking Process." *Western Political Quarterly* 45 (June): 441-467.

- Globerman, Steven, and Aidan R. Vining. 1996. "A Framework for Evaluating the Government Contracting-Out Decision with and Application to Information Technology." *Public Administration Review* 56 (November): 577-586.
- Golden, Marissa Martino. 2000. *What Motivates Bureaucrats*. New York: Columbia University Press.
- Gray, C. Boyden. 1989. "Special Interest Regulation and the Separation of Powers." in L. Gordon Crovitz and Jeremy A. Rabkin, eds. *The Fettered Presidency: Legal Constraints on the Executive Branch*. Washington, D.C.: American Enterprise Institute.
- Greene, William H. 2003. *Econometric Analysis*. Upper Saddle River, New Jersey: Prentice Hall.
- Gujarati, Damodar N. 1995. *Basic Econometrics*. New York: McGraw-Hill, Inc.
- Haig v. Agee*, 453 U.S. 280 (1981).
- Hall, Mimi. 2001. "Bush ends overseas abortion funding." *USA Today- Online*. 01/23/2001. Accessed December 30, 2004.  
<http://www.usatoday.com/news/washington/2001-01-22-abortion.htm>
- Hall, Robert, Martin Feldstein, Jeffrey Frankel, Robert Gordon, Christina Romer, David Romer, and Victor Zarnowitz. 2005. "NBER's Recession Dating Procedure." Accessed May 31, 2005. <http://www.nber.org/cycles/recessions.html>
- Hamilton, Alexander. [1788] 1982a. "Federalist No. 70." in Gary Wils ed. *The Federalist Papers*. New York: Bantam Books. Pp. 354-361.
- [1788] 1982b. "Federalist No. 78." in Gary Wils ed. *The Federalist*



- Papers*. New York: Bantam Books. Pp. 392-399.
- Heclo, Hugh. 1977. *A Government of Strangers*. Washington, D.C.: Brookings Institution.
- Howell, William G. 2003. *Power Without Persuasion: The Politics of Direct Presidential Action*. Princeton, New Jersey: Princeton University Press.
- Huber, John D., and Charles R. Shipan. 2000. "The Costs of Control: Legislators, Agencies, and Transaction Costs." *Legislative Studies Quarterly* 25 (February): 25-52.
- Humphrey's Executor vs. The United States*, 295 U.S. 602 (1935).
- Hurley, Patricia A., and Kim Quaile Hill. 2003. "Beyond the Demand-Input Model: A Theory of Representational Linkages." *Journal of Politics* 65 (May): 304-326.
- Immigration and Naturalization Service v. Chada*, 462 U.S. 919 (1983).
- Independent Meat Packers Association, et al v. Butz* 526 F.2d 228 (8<sup>th</sup> Cir., 1975).
- Ingraham, Patricia W. 1995. *The Foundation of Merit: Public Service in American Democracy*. Baltimore, Maryland: Johns Hopkins University Press.
- Iyengar, Shanto, and Donald R. Kinder. 1987. *News That Matters: Television and American Opinion*. Chicago: University of Chicago Press.
- Jenkins v. Collard* 145 U.S. 546 (1891).
- Keenan, Hugh C., and Grover S. Williams. 1974. "Executive Orders: A Brief History of Their Use and the President's Power to Issue them." in US Congress. Senate. 1974. *Executive Orders in Times of War and National Emergency*. 93<sup>rd</sup> Cong., 2<sup>nd</sup> Session. Sen. Rept. Pp. 93-1280.

- Kennedy, John F. 1962. "Executive Order 11063." *27 Federal Register 11527*; November 24, 1962. Washington, D.C.: Government Printing Office.
- King, Gary, and Lyn Ragsdale. 1988. *The Elusive Executive: Discovering Statistical Patterns in the Presidency*. Washington, D.C.: CQ Press.
- Krause, George A., and David B. Cohen. 1997. "Presidential Use of Executive Orders, 1953-1994." *American Politics Quarterly* 25(October): 458-81.
- Krause, George A., and Jeffery E. Cohen. 2000. "Opportunity, Constraints, and the Development of the Institutional Presidency: The Issuance of Executive Orders, 1939-96." *Journal of Politics* 62(February): 88-114.
- Krehbiel, Keith. 1998. *Pivotal Politics: A Theory of U.S. Lawmaking*. Chicago: University of Chicago Press.
- Krutz, Glen S. 2001. *Hitching a Ride: Omnibus Legislating in the U.S. Congress*. Columbus: Ohio State University Press.
- Laswell, Harold. 1936. *Politics: Who Gets What, When, and How*. New York: McGraw Hill.
- Light, Paul C. 1991. *The President's Agenda: Domestic Policy Choice from Kennedy to Regan*. Revised Ed. Baltimore: The John Hopkins University Press.
- Long, J. Scott. 1997. *Regression Models for Categorical and Limited Dependent Variables*. Thousand Oaks, California: Sage Publications.
- Madison, James. [1788] 1982. "Federalist No. 51." in Gary Wills ed. *The Federalist Papers*. New York: Bantam Books. Pp. 261-265.
- Marks v. Central Intelligence Agency* 590 F.2d 997 (D.C. Cir., 1978).

- Marshall, Bryan W., and Richard L. Pacelle Jr. 2005. "Revisiting the Two Presidencies: The Strategic Use of Executive Orders." *American Politics Research* 33 (January): 81-105.
- Mayer, Kenneth R. 1999. "Executive Orders and Presidential Power." *Journal of Politics* 61 (May): 445-66.
- , 2001. *With the Stroke of a Pen*. Princeton: Princeton University Press.
- Mayer, Kenneth R., and Kevin Price. 2002. "Unilateral Presidential Powers: Significant Executive Orders, 1949-1999." *Presidential Studies Quarterly* 32 (June): 367-386.
- Mayhew, David R. 1974. *Congress: The Electoral Connection*. New Haven: Yale University Press.
- McCleary, Richard, and Richard A. Hay. 1980. *Applied Time Series for the Social Sciences*. Beverly Hills, California: Sage Publications.
- McCubbins, Mathew D. 1985. Legislative Design of Regulatory Structure. *American Journal of Political Science*. 29 (November): 721-48.
- McCubbins, Matthew, Roger Noll, and Barry Weingast. 1989. "Structure and Process, Politics, and Policy: Administrative Arrangements and the Political Control of Agencies." *Virginia Law Review* 3: 243-77.
- Miller, Warren E., and Donald E. Stokes. 1963. "Constituency Influence in Congress." *American Political Science Review* 57 (March): 45-56.
- Mishler, William, and Reginald S. Sheehan. 1993. "The Supreme Court as

- Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions.” *American Political Science Review* 87 (March): 87-101.
- Moe, Terry M. 1985. “The Politicized Presidency.” in John E. Chubb and Paul Peterson, eds. *The New Direction in American Politics*. Washington: Brookings Institution. Pp. 235-271.
- Moe, Terry M., and William G. Howell. 1999a. “Unilateral Action and Presidential Power: A Theory.” *Presidential Studies Quarterly* 29 (December): 850-872.
- , 1999b. “The Presidential Power of Unilateral Action.” *Journal of Law, Economics and Organization* 15 (April): 132-179.
- Moe, Terry M. and Scott A. Wilson. 1994. Presidents and the Politics of Structure. *Law and Contemporary Problems*. 57: 1-44.
- Montesquieu, Charles de Secondat. 1914. *The Spirit of Laws*, trans. Thomas Nugent. London: G. Bell & Sons, Ltd.
- Morgan, Ruth P. 1970. *The President and Civil Rights: Policy Making by Executive Order*. New York: St. Martins Press.
- Nathan, Richard P. 1983. *The Administrative Presidency*. New York: Wiley.
- National Bureau of Economic Research. 2005. “Business Cycle Expansions and Contractions.” Accessed May 31, 2005. <http://www.nber.org/cycles>.
- Neighbors, William. 1964. “Presidential Legislation by Executive Order.” *University of Colorado Law Review* 105 (37): 105-18.
- Neustadt, Richard E. 1960. *Presidential Power*. New York: John Wiley & Sons.
- Norpoth, Helmut. 1996. “Presidents and the Prospective Voter.” *Journal of Politics* 58

(August): 776-792.

Ostrom, Elinor, Larry Schoeder and Susan Wynne. 1993. "Analyzing the Performance of Alternative Institutional Arrangements for Sustaining Rural Infrastructure in Developing Countries." *Journal of Public Administration Research and Theory: J-PART 3* (January): 11-45.

Parker, Glenn A. 1989. *Characteristics of Congress: Patterns in Congressional Behavior*. Englewood Cliffs, New Jersey: Prentice Hall.

Pereira, Carlos, Timothy J. Power and Lucio Rennó. 2005. "Under What Conditions Do Presidents Resort to Decree Power?: Theory and Evidence from the Brazilian Case." *Journal of Politics* 67 (February): 178-200.

Poole, Keith T. and Howard Rosenthal. 1997. *Congress: A Political-Economic History of Roll Call Voting*. New York: Oxford University Press.

Potoski, Matthew. 1999. "Managing Uncertainty Through Bureaucratic Design: Administrative Procedures and State Air Pollution Control Agencies." *Journal of Public Administration Research and Theory: J-PART 9* (October): 623-639.

Reagan, Ronald W. 1981. "Executive Order 12291." *46 Federal Register* 13193; February 19, 1981. Washington, D.C.: Congressional Printing Office.

Rohde, David W. 1991. *Parties and Leaders in the Postreform House*. Chicago: University of Chicago Press.

Rousseau, Jean Jacques. 1762. *The Social Contract*. Trans. G. D. H. Cole. Accessed October 20, 2005. <http://www.constitution.org/jjr/socon.htm>

Schlozman, Kay Lehman, and John T. Tierney. 1983. "More of the Same: Washington

- Pressure Group Activity in a Decade of Change.” *Journal of Politics* 45 (May): 351-377.
- Segal, Jeffrey A. and Albert D. Cover. 1989. “Ideological Values and the Votes of U.S. Supreme Court Justices.” *American Political Science Review* 83 (June): 557-565.
- Segal, Jeffrey A. and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press.
- . 1996. “The Influence of *Stare Decisis* on the Votes of United States Supreme Court Justices.” *American Journal of Political Science* 40 (November): 971-1003.
- Shepsle, Kenneth A., and Barry R. Weingast. 1987. “The Institutional Foundations of Committee Power.” *American Political Science Review* 81 (June): 84-104.
- Simon, Herebrt A. 1957. *Administrative Behavior*, 2<sup>nd</sup> ed. New York: Macmillan.
- StataCorp. 2001. *Stata Statistical Software: Release 7.0*. College Station: Stata Corporation.
- Truman, Harry S. 1948. Executive Order 9981.” *13 Federal Register* 4313; July 28, 1948. Washington, D.C.: Government Printing Office.
- Truman, Harry S. 1952. Executive Order 10340.” *17 Federal Register* 3139; April 10, 1952. Washington, D.C.: Government Printing Office.
- United States v. Cutis-Wright*, 299 U.S. 304 (1936).
- Warber, Adam L. 2002. *Presidential Lawmaking by Decree*. Ph.D. diss. Texas A&M University.

- Waterman, Richard W. 1989. *Presidential Influence and the Administrative State*. Knoxville: University of Tennessee Press.
- Weko, Thomas J. 1995. *The Politicizing Presidency: The White House Personnel Office, 1948-1994*. Lawrence, KS: University of Kansas Press.
- West, William F. 1995. *Controlling the Bureaucracy: Institutional Constraints in Theory and Practice*. New York: M.E. Sharpe.
- White, Halbert. 1994. *Estimation, Inference and Specification Analysis*. Cambridge: Cambridge University Press.
- Wigton, Robert C. 1996. "Recent Presidential Experience with Executive Orders." *Presidential Studies Quarterly* 26 (Spring): 473-484.
- Wildavsky, Aaron. 1966. "The Two Presidencies." *Trans-Action* 4: 7-14.
- Williamson, Oliver. 1975. *Markets and Hierarchies: Analysis and Antitrust Implications*. New York: Free Press.
- 1996. *The Mechanisms of Governance*. New York: Oxford University Press.
- Wilson, Woodrow. [1885] 1956. *Congressional Government*. Reprint. New York: Meridian Books.
- Wood, B. Dan. 1988. Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements. *American Political Science Review* 82 (March): 215-34.
- Wood, B. Dan, and John Bohte. 2004. "Political Transaction Costs and the Politics of Administrative Design." *Journal of Politics*. 66 (February): 176-202.
- Wood, B. Dan, and Miner P. Marchbanks III. 2004. "What Determines How Long

Political Appointees Serve?" Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago.

Wood, B. Dan, and Richard W. Waterman. 1991. "The Dynamics of Political Control of the Bureaucracy." *American Political Science Review* 85 (September): 801-828.

----- 1993. "The Dynamics of Political-Bureaucratic Adaptation." *American Journal of Political Science* 37 (May): 497-528.

-----1994. *Bureaucratic Dynamics: The Role of the Bureaucracy in a Democracy*. Boulder, Colorado: Westview Press.

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