

The Weakest Power: A Theory of Strategic Unilateral Executive Authority

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Throughout my lifetime, I have grappled with the idea of the president, from naturally thinking that was what I was going to be when I grew up, to the ways in which presidents wield their power—admittedly a much more recent interest of mine. In remembering both the Obama and Trump administrations, there is seemingly very little in terms of similarities, yet at the root of each of their presidencies was a movement within the government as a whole towards a much more polarized and contentious political landscape. Under the Obama administration, especially through his second term, we witnessed the rise of the Tea Party Republicans who pushed the ideological boundaries of the GOP further to the right resulting in the slowdown of congressional agendas and increasing gridlock by the day. The same trend happened when more liberal ideas espoused by politicians like Sen. Bernie Sanders or Rep. Alexandria Ocasio-Cortez became mainstream within the Democratic Party thus pushing it further to the ideological left. While these two most recent examples are particularly illustrative, America's politics have become increasingly polarized going back decades, not mere years, with Congress following the trend of the country at large.

With Congress and the electorate becoming increasingly polarized, I wondered how the president fit into the power dynamic and whether their role became any more important as the years have gone on. Looking back to the George W. Bush's first term as president, the role of the executive was clear: respond to the crisis that was 9/11 and terrorism more broadly. This response garnered bipartisan support in Congress contributing to relatively limited use of unilateral executive power, especially when compared to the Clinton administration. Using executive orders here as a measure of executive power is a wholistic, concrete way of accounting for a president's unilateral actions since other tools like signing statements or presidential proclamations are narrower in scope and are harder to track. As we moved into the Obama

administration though, bipartisan support became harder to come by, but there was still an overall decrease in the number of executive orders issued, combined with greater approval by the public. Seemingly, both presidents were strategically strong, at least for one of their terms, but as we turned to the Trump administration, I saw that there wasn't much in terms of support from the polarized Congress nor mass approval by the public. Just as might be anticipated, we saw more executive orders issued in his one term than any presidential term since Jimmy Carter. This dynamic sets up the puzzle around executive power and the strategic position of the president. Seemingly the weaker a president is in their relationship with Congress and the public, the more inclined they are to use their executive authority. It seems reasonable to assume that presidents with a less polarized Congress in which they could garner support, or a voting public which approved of the job they are doing, would be in a stronger position to execute their Constitutionally defined role without having to resort to their self-derived power. On the other hand, if a president facing a gridlocked Congress or low public approval wishes to impose their preferred policy without the ability to go through (or desire to bend to the will of) Congress, they likely have no alternative than to act unilaterally, and be more likely to issue an executive order.

The executive order is one tool in a president's extensive arsenal for exercising their power over not only individual government agencies, but, at times, over the country as a whole. There is much debate over the exact definition of executive orders since the Constitution does not actually address the issue in the Article II vesting clause, instead leaving the nature of this form of executive action up to the interpretation of the president and the approval of the courts. In their most straightforward sense executive orders are simply directives or actions given by the President to a specific part of the government ordering a specific action to be taken.¹ When they

¹ Congressional Research Service, (2014)

are founded on the authority of the President derived from Article II or an existing statute, they have the same force and effect of law, but are not laws themselves.² Executive orders are just one of four very similar presidential documents, the others being proclamations, signing statements, and administrative memoranda—proclamations being used for more ceremonial announcements while administrative memos are used to handle the administrative branch functions of the president. Signing statements do not necessarily follow the same form as the other three, but can still be used to make a president's position clear upon signing a new law. Over the course of recent history, signing statements have taken on a new meaning as they have been used as pseudo-executive action, though not to the same explicit extent as executive orders.³ The American Bar Association asserts that executive orders are not legislation, as they do not go through the processes of Congress, but that they can make government actors or agencies act in a specific fashion, akin to the way they would be obligated to under traditional legislation, with the same force of law.⁴

While executive orders themselves do not go through the traditional channels of Congress, they are subject to all other government actions, which means they are litigable by the courts, subject to congressional budget bills, and can be halted within the administrative state.⁵ Over the course of American history, there has not been a single president who has not issued an

² Congressional Research Service, (2014)

³ Signing statements came under fire in 2006 after the American Bar Association's Blue-Ribbon panel found that recent uses of signing statements under presidents Clinton and W. Bush violated the separation of powers between Congress and the presidency. Some of the signing statements alluded to the president's refusal to execute or follow through with enacting certain parts of a new law. Other encroachments on Congressional power came from presidents reinterpreting parts of new laws to mean what they preferred rather than what Congress intended. The ABA panel urged the President to use their veto power in cases where they would prefer to change the new law, instead of issuing line-item changes, while urging Congress to require that a president issue the basis and authority for whatever changes they make via a signing statement. Alas, though signing statements have been of increasing utility in a president's toolbelt, they are outside the purview of this research. (American Bar Association, 2006)

⁴ American Bar Association, (2021)

⁵ Ibid. (2021)

executive order, thus solidifying the legitimacy of the authority they possess to do so.⁶ In addition to a president's power to use an executive order, presidents are also the only person who has the authority to outright overturn, revoke, or modify an order—that is, while Congress can make it difficult to carry out, and the courts can make an order illegal, neither branch of government can take an executive order off the books without specific new legislation or court action.⁷ With this in mind, presidents have used executive orders in such a wide variety of cases, ranging from routine administrative duties, citing their authority from a congressional statute, to more polarizing topics such as the establishment of internment camps in WWII.⁸ The origins of executive orders date back to the founding of the country and have been accepted as lawful and just displays of executive authority, with varying degrees of success, ever since. Perhaps the two milestones in executive order issuance come from George Washington and Abraham Lincoln. Washington issued the first executive order which instructed various executive departments to report “a full, precise, and distinct general idea of the affairs of the United States” back to the president.⁹ Lincoln, meanwhile issued the first numbered executive order, thus beginning the modern convention of sequentially tracking each order. This first numbered executive order was perhaps not a major landmark policy, although it stands unique in the historical context of the time: it established a provisional court in Louisiana under the control of the union, despite the state's secession a year earlier.¹⁰

⁶ CRS, (2014)

⁷ Federal Judicial Center, (2021)

⁸ Exec. Order No. 9066, 7 Fed. Reg. 1407 (February 25, 1942)

⁹ NYU Law Review, (2017)

¹⁰ Executive Order 1 (1862)

Unilateral Executive Action and Presidential Power

There are varying approaches to how we can understand executive power with numerous ways in which the president can act upon this power using tools ranging from bargaining with Congress, to the unilateral veto, with options of executive orders and proclamations in between. Bargaining, which will be detailed further later in the paper, has already been thoroughly studied by Richard Neustadt in his research surrounding the power of political persuasion. In addition to bargaining, presidents also can try to garner public support in order to influence others in positions of power to bend to the will of the people—the will of the people being the preferred policy of the president by way of going public. Perhaps neither bargaining nor going public are needed to give a president power or influence since it could just come as a result of the way they fit into their predecessor’s shoes. If a new president comes into office to continue the agenda of a very successful former president with widespread support of their agenda, they will not have a need to go public or bargain with Congress near as much. But what happens when bargaining breaks down, public support is difficult to win, or there simply is no room for deviation from a given policy direction? One answer is that unilateral executive action fills the gap.

The most prevalent form of unilateral executive action comes in the form of executive orders, a combination of the “highest levels of substance, discretion, and direct presidential involvement.”¹¹ Executive orders are directives issued by presidents to officers of the executive branch requiring them to take an action, stop a certain type of activity, alter policy, change management practices, or accept a delegation of authority under which they will henceforth be responsible for the implementation of law.¹² These orders often impact functions solely within

¹¹ Howell, 16

¹² Cooper, 16

the confines of the government; however, it is not at all uncommon for them to be used as legislative tools by the executive. The broad scope of executive orders makes them an extremely useful tool in a president's desk, but also sets up plenty of opportunity for questioning their legitimacy, especially when it comes to constitutional separation of powers.

Andrew Rudalevige suggests that executive orders are a key part of a president's unilateral arsenal, but he falls short of equating orders with being a source of unilateral solely-executive power. Rudalevige takes the stance that most executive orders aren't solely the work of the president, thereby undermining the assumption that the executive can use them to implement exactly the policy they desire.¹³ Rudalevige's research points to the entire executive branch as the source of the policy put forth in executive orders. Using Clinton's E.O. 13045¹⁴ as an illustrative example, Rudalevige shows how an executive order which seemingly imposed the president's will was actually a product of an executive agency, in this case, the EPA. Rather than being brainstormed and drafted by the president, the idea and its construction were widely syndicated throughout the executive branch before being officially drafted by the president.¹⁵ All of this is to suggest that executive orders generally aren't exclusive tools of the president to impose their will; rather, they are means and indeed a powerful mechanism by which a president can force others to do what they might not otherwise do.¹⁶ Executive orders, in this reading, are a way that presidents can exert their authority over others instead of their being assured that their preferred policy outcome is going to be implemented with 100% certainty. While a president can singlehandedly issue an executive order to implement their preferred policy objective, they are

¹³ Rudalevige (2012), 156

¹⁴ Executive Order 13045 was issued in an effort to better protect children from environmental risk factors. The order created a system in which agencies must present the potential environmental, health, or safety impact on children from the desired change in their regulations. While the executive order was spearheaded by the EPA, non-executive branch actors were upset over the lack of input from Congress and public-interest groups.

¹⁵ Rudalevige, 143

¹⁶ Ibid. 157

also used as a bargaining chip with agencies and Congress in order to push the respective group in a given policy direction rather than issuing said policy outright. From Rudalevige's perspective, the president has the power to pressure others to impose their will through executive orders, but they have no guarantee that what they wish to be enacted will actually *be* enacted or followed through to the letter.

The constitutionality of executive orders has often been called into question, especially when considering the power of the president to legislate from the oval office. There is no clause in the Constitution which vests the power to issue such unilateral orders, let alone a single mention of executive orders as a whole.¹⁷ Despite the lack of an explicit mention, presidents have been issuing these orders since the very foundation of the country starting with George Washington issuing a proclamation of neutrality in the war between England and France in 1793.¹⁸ Since then, presidents have used the Article II vesting clause to derive the power to ensure the faithful execution of laws and for the president to serve as an executive more broadly; however, there has been no further clarification on the limits of executive power codified in the Constitution. As a result, many executive orders haven't been challenged under constitutional pretexts. Rather, much of the legal action brought against presidential orders have been in relation to the statute from which the president derives the power to issue a particular order.¹⁹ Instead of pointing to the Constitution to derive their executive authority, presidents often cite individual laws in force, which offer substantial interpretative latitude. An example of a combination of both sources of authority comes in the Obama-era Executive Order 13616 in which the opening lines read: "By the authority vested in me as President by the Constitution and

¹⁷ Cooper, 23

¹⁸ Warber, 3

¹⁹ Cooper, 22

the laws of the United States of America, including section 301 of title 3, United States Code, and in order to facilitate broadband deployment [...] it is hereby ordered as follows.”²⁰ In addressing the Constitution and the statute to delegate power, the president derives power from both sources of authority.

The constitutional argument rises naturally out of this process as the validity of the executive order relies on the validity of the law upon which it is based. A law is considered valid so far as it lies within the constitutional authority of Congress and does not violate the Constitution while the courts add that it must not violate any non-delegation doctrine in order to be a fair basis for an executive order. So long as these criteria are met, there is very little legal recourse for striking down an executive order on statutory grounds. Even still, there have been numerous attempts to describe the legal jurisdiction of executive orders with the most useful coming from Justice Rehnquist’s summary of Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube v. Sawyer*, (343 U.S. 579, 1952).

“When the president acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress;” these powers which offer the widest latitude and place the burden of persuasion against them upon those who challenge them. When a president acts without congressional approval, they may enter a zone of “legal twilight” where legislative authority may be concurrent between the branches and where challenging power relies on a full examination of congressional “inertia, indifference, or quiescence” and the circumstances of the president’s use of executive authority. Lastly, when the president acts against the will of Congress,

²⁰ Executive Order 13616

the only way to sustain a declaration of authority is to prevent Congress from acting against an order.²¹

This constitutional limitation on executive authority gets extremely difficult to enforce simply because of the multitude of ways a president has to derive the authority to issue executive orders. The combination of the language in the Constitution itself with the text of Title 3, Section 301 of the U.S. Code, allowing presidential delegation of power, referenced above, makes for a robust authorization for the president to act unilaterally with very little grounds to intervene by Congress.

Executive Orders in Context: Theories of Presidential Power

Executive authority in a broader sense is accounted for by various theories on presidential leadership and the ways in which presidents wield their power. Before exploring the use of any executive authority power, it is imperative to understand the context in which a president is leading; how they were elected, the situational power dynamic over which they are presiding, and the ability for them to bargain with other groups or branches of government. Three leading theories of presidential power by Samuel Kernell, Stephen Skowronek, and Richard Neustadt each paint a different but complementary picture of these dynamics. Neustadt explains how presidents derive power from their ability to bargain with Congress and other power brokers within the government in order to effectively implement their policy agenda. Kernell argues that existing popularity is necessary to lead, while Skowronek advances the idea that only an ability to fit into the existing power dynamic and politics of their age is needed for success. Regardless,

²¹ Cooper, 22, *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981)

executive orders are used for imposing authority in both agreeable and challenging power circumstances.

Neustadt's theory of executive power outlined in his book, *Presidential Power and the Modern Presidents* (1990), rests on the idea that power is derived from the ability to persuade others to act according to a leader's will or ideals. The power of persuasion, from a president's perspective, is the power to "convince [non-executive institutions] that what the White House wants of them is what they ought to do for their sake and on their authority."²² Persuasion for Neustadt is not simply a matter of presidents convincing other players of the merit of their policy preferences, but using the tools and powers of the executive branch as leverage to bargain and persuade other parties that it is in their interests to adopt the president's position. The theory implies that a president is expected to do much more than their Article II powers allow, and that the only way they can effectively govern is to bargain within the executive branch and with Congress. Even though the individual policy outcomes can be the same between Congress and the President, "the means can matter quite as much as the ends; they often matter more, and there are always differences of interest in the means."²³ Since Congress and other entities have leverage they can use over the president, Neustadt argues that there needs to be some bargained agreement between each of the parties involved in order to ensure the president's will is present in whatever final action is taken.

According to this argument, there are four factors, partisan animosity, presidential expectations, congressional expectations, and foreign policy, all of which can challenge a president's ability to bargain, especially when it comes to Congress.²⁴ In today's political

²² Neustadt, 30

²³ Ibid. 40

²⁴ Ibid. 40, 50-53

environment it is reasonable to expect that the increasing animosity and disagreement between political parties will influence a president's power with greater frequency. Whereas it becomes much easier to negotiate when both sides agree with each other, modern political parties have become polarized to a point where there are so many points of contention that it is nearly impossible to bargain on even mildly partisan issues. Throwing the president's will and opinion into the mix, regardless of which party they belong to, creates further tension, especially if the president's opinion furthers the conflict between the two parties in Congress.²⁵

An additional, two-part complication to presidential bargaining comes with the increased expectations for the president at the time.²⁶ The first prong comes from public opinion, and the expectation that the president should execute the will of the majority of the population at all times—"what other men expect of the president becomes a cardinal factor in his ability to persuade."²⁷ The more the public expects, the more it becomes a one-way persuasion, with the president lacking any leverage, especially in an election year. The second prong comes through congress and their ability to burden the president with menial, "clerkly" tasks, without doing which, the president loses the favor of congress, and then essentially becomes a lame duck without rapport.²⁸ With both of these prongs, the more that the executive's role is laid out for them, the less power presidents have to act on their own politics or ideals, and the less leverage they have to insert their ideas into the government as a whole.

The last place where bargaining power is reduced revolves around foreign policy and is more nuanced. The executive has historically held more power when it comes to foreign affairs, given that the State Department is a part of the executive branch, and that political parties

²⁵ Neustadt, 157

²⁶ Ibid. 52

²⁷ Ibid. 52

²⁸ Ibid. 94

originally would have seen their role as ending at national borders in order to have a unified message on the world stage.²⁹ Coupling these reasons with the Constitutional commander-in-chief clause which gives the president singular authority over the armed forces, and a lead role in the negotiation of treaties and the appointment of ambassadors, we arrive at what should be a dominant position over foreign affairs. Over time, however, as parties have become more polarized, the ability for the president to have a definitive say in politics and policies regarding foreign affairs has diminished along with their ability to bargain with Congress and other executive branch actors on issues both foreign and domestic. While the president still has the final say in matters of foreign affairs, the noise from Congress can undermine a president's desired policy or their actions. In conclusion, a president derives their power from their bargaining ability with other parts of government, but there are many ways in which this bargaining power is weakened which leads to a weaker executive.

A complementary theory of executive power, one that places greater emphasis on the president's ability to gain the public's ear and steer the public agenda, comes from Samuel Kernell's theory of "going public" which he details in a book of the same name. Under Kernell's theory, a president requires existing popularity in order to maintain any sense of power, and needs this power in order to be elected and garner support in Congress.³⁰ Conversely, the theory also bestows the power of direct appeal to the public in order to pressure other bodies to bend to the will of the president, such as a case of tax cuts as we saw during the Trump administration. The issue with going public, though is that it is limited to "outsider" politicians, or those who do not have many or any loyalties to outside groups or organizations since the whole idea of going public is to get as many people on your side—the more people that have already taken a side,

²⁹ Neustadt, 289-301

³⁰ Kernell, 11

the fewer there are to join you.³¹ In addition to garnering public support, outsider presidents are often ill-prepared to bargain their way through Washington making the decision to “enlist popular support with a television appeal an easy choice.”³² This issue also shows one of the positive changes that has brought about this theory: the individual rather than the institutional mindset. Going public may be much easier now in an age of individualists since an executive can rile up the public and other individualists to form coalitions against a few other individuals in order to get their way.³³ Still though, Congress is still mired in institutionalism and much of the power to “go public” is diminished and replaced with bargaining. Since institutionalism lends itself to bargaining and lending favors back and forth, going public generally works on issues which lie outside the legislative branch and can be generally accepted by the general population such as issues of jobs and the greater economy.³⁴ So, then, going public is a useful theory of power, though it has limited application simply do to the unique background and outlook a president needs to have in order to successfully go public.

A third relevant theory of presidential power comes from Stephen Skowronek’s argument that executive power can be derived from the way in which a president fits into the power environment of the time. According to Skowronek, presidents can be classified in two ways; first, their support or opposition towards a given regime or establishment and second, how powerful or weak that regime or establishment is, or as Skowronek puts it, how much of a “battering ram” the administration is.³⁵ This theory is perhaps the most speculative of the three, since it does not project far into the future, or really even give guidance, but rather provides a

³¹ Kernell, 38-46, §Outsiders in the White House

³² Ibid. 44

³³ Ibid. 45

³⁴ Ibid. 123, 236

³⁵ Skowronek, 28

framework for viewing how successful executives garnered their power and support. In this framework, presidents possess three options for inserting themselves into the existing environment: articulation, disjunction, and preemption. A president who articulates is one who tries to fit in with a strong, established regime to flow off the inherent support present with a dominant regime and continue their policies and leadership. One such example of an articulating president is Lyndon Johnson, known for coming into the presidency with a unified government and continuing much of the policymaking that JFK had been working on before his assassination.³⁶ Alternatively, a disjunctive president comes into a weakening or failing party with a vision to rebrand or rebuild it to both capitalize on the built-in supporters, but also to ingrain their own policies and vision for the future of the party. For instance, Skowronek cites Jimmy Carter as an unsuccessful version of a disjunctive president, pointing to his inability to garner support among Democrats and reinvent the party, resulting in the end of the Democratic rule in Congress.³⁷ A more recent example of a disjunctive president may be Donald Trump. Among Republicans he took the “autopsy” of the failed 2012 campaign, built upon the existing Republican support, and enfranchised many far-right voters by reinventing a “trumpism”-based Republican Party. Lastly, a preemptive president opposes an established, strong order or regime, and uses the negative sentiment for the status quo to gain support for their own platform.³⁸ While Richard Nixon is perhaps the most preemptive of the presidents, with his aggressive style and assertive use of presidential power, it can definitely be argued that Trump was also a preemptive president by opposing all that the Democratic party stood for, despite not always having a consistent or clear political platform of his own. Skowronek argues that “reconstructive”

³⁶ Skowronek, 325-360

³⁷ Ibid. 361-406

³⁸ Ibid. 44

presidents such as Jefferson, Jackson, Lincoln, and Roosevelt all exhibit traits of disjunctive and preemptive presidents as they all formed new coalitions and redefined their parties. In Skowronek's theory, a president derives their power from the way in which they fit into the existing framework but does not arrive at one particular conclusion as to which one is most successful.

The next few sections will detail various approaches of looking at executive orders as they relate to the power of the presidency. These sections will relate to the approaches I use to frame my tests and help walk through how I derived each part of my hypothesis. Each of the approaches which I will test later in the paper are derived from the three theories of executive power outlined above. The intersection of these theories is where my theory that the most strategically weak presidents wield the most power is based. The following sections will conduct an analysis of some of the existing theories based on data used in previous studies of executive orders, in addition to data which I will be using in my analysis in order to better contextualize my theory. Data used in my analysis is comprised of yearly executive order issuance data matched with annualized scores of public and congressional approval of the president, and the approval ratings of each political party. Other data presented in the coming sections has been pulled from existing literature and serves as a lens through which to piece together my theory. In considering a theory of executive authority in which presidents use their authority to overcome a weak position it is important to take into account how electoral factors, party control, political time, and their approval ratings affect how they use their power, combined with the effects of congressional gridlock and polarization.

The next section will walk through some of the history of executive orders and how their use has changed over time, before getting into the time period that I will be using for my

analysis. I have chosen to restrict my dataset to the post-Cold War presidents as it eliminates the period of unrest which required a large degree of executive interaction, in addition to the inconsistency in how executive order data was compiled prior to the 1990s. Using the numbers and types of executive orders from the post-Cold War period, coupled with data surrounding congressional gridlock, electoral cycles, and popularity, I will illustrate how presidents are actually able to exude strength through their executive power, despite strategic weakness. Each section following the next will conduct an analysis on one of the approaches to executive power by looking at existing theory and literature in the context of where my theory aims to take the approach. The three theories are accounted for through each of the sections and will make the case for how my own theory is derived from the approaches to executive power.

Executive Orders – Their Time and Place in Presidential Power

While executive orders are not the only tool that presidents have to implement policy, they are a preeminent source for unilateral executive authority. The patterns of their use can be extremely useful in understanding the real nature of a president's power. In light of the existing theories of presidential power, the heavy use of unilateral executive authority seems to be a mark of a weak president given the many other avenues they can pursue to accomplish their goals. If presidents do not have the strength or popularity to bargain with Congress, it can be hypothesized that they are more inclined to issue executive orders to bypass the congressional process altogether. The same is hypothesized to be the case that when presidents want to boost their popularity or that of their party—they will resort to executive orders if they cannot garner support through conventional channels. Overall, a president's ability to govern through

conventional means is theorized to be inversely correlated with their issuance of executive orders, at least based in the principle that a weak president must use unilateral power to appear stronger and implement their preferred policies.

Though the argument of constitutionality has long hung on the use of executive authority, there has not been a case which has universally stopped the long-standing ability for a president to issue executive orders. This begs the question, then, of when executive orders have been used in the past, rather than having law or rule go through the conventional process outlined in the Constitution. William G. Howell argues that presidential actions aren't influenced by their leadership style so much as the policy positions presidents take relative to Congress, the courts, and the rest of the executive branch.³⁹ Furthermore, stemming from the theories of presidential power, unilateral executive actions are often limited by the President's ability to impose their policy preferences "in concert with, or over the objection of, other political actors."⁴⁰ This dynamic boils down to rational choice between bending to the will of everybody else or instituting one's own will over that of others, at the risk of losing political favor or being served a court case to reverse an executive action. While the use of executive actions, especially executive orders, varies with the position of the president relative to everybody else, there is also a strong consideration for a simple strategic use of action to further a president's agenda without being bogged down in congressional gridlock or being confined to the will of many, when one specific policy action is desired.

It is logical to suppose, then, that presidents will issue executive orders to bypass the traditional channels of passing laws not just when they need to use their emergency authority, but also when they simply wish to avoid Congress. A president may wish to bypass Congress due to

³⁹ Howell, 25

⁴⁰ Ibid., 25

general gridlock or overly polarizing or partisan issues, which may jeopardize the speed of, or completely eliminate the chance of a law getting passed. It could be the case that a president has very specific policy objectives which may not be shared by members of Congress, or priorities which do not align with members' either. Perhaps Congress is just generally gridlocked due to divisive leadership which refuses to present bills which do not bend to the will of the majority leadership, or that the parties in power in Congress do not align with that in the White House. It could very well be the case that the president is not a strong leader with a good rapport in Congress, which Skowronek would suggest makes passing laws agreeable to the president much harder. It could be nothing to do with other government actors, rather, the president could be unpopular with the general public which renders their ability to push their preferred policy through the 'referendum' of the people through elections and representative government to be nearly moot. Regardless of what the case may be, the more gridlocked or polarized Congress becomes, existing theory suggests that a president is more likely to issue executive orders.

Executive orders have been used as independent actions since Washington' was president but have since emerged as less of an administrative tool and much more of a legislating force. Though the 19th century, executive orders were used for administrative procedures— some concerning the disposition of public lands, government salaries, federal holidays, and the like. The total number of orders has certainly grown over the subsequent century but the administrative function has remained a significant portion of the number issued.⁴¹ Table 1 details the number of executive orders issued during each two-year Congress under each President that I'm studying. Additionally, the House and Senate majorities are given to better frame the political context in which the president at the time had to operate.

⁴¹ King and Ragsdale, 122

Table 1: Executive Orders issued by Congressional Term

<i>President</i>	<i>Congress</i>	<i>House Majority</i>	<i>Senate Majority</i>	<i>Number of EOs</i>
<i>G. H. W. Bush</i>	101st	Democrat	Democrat	74
<i>G. H. W. Bush</i>	102nd	Democrat	Democrat	86 +6 under 103rd
<i>B. Clinton</i>	103rd	Democrat	Democrat	111
<i>B. Clinton</i>	104th	Republican	Republican	89
<i>B. Clinton</i>	105th	Republican	Republican	76
<i>B. Clinton</i>	106th	Republican	Republican	76 +12 under 107th
<i>G. W. Bush</i>	107th	Republican	Democrat	85
<i>G. W. Bush</i>	108th	Republican	Republican	86 +2 under 109th
<i>G. W. Bush</i>	109th	Republican	Republican	51
<i>G. W. Bush</i>	110th	Democrat	Democrat	62 +5 under 111th
<i>B. Obama</i>	111th	Democrat	Democrat	74
<i>B. Obama</i>	112th	Republican	Democrat	73
<i>B. Obama</i>	113th	Republican	Democrat	51
<i>B. Obama</i>	114th	Republican	Republican	71 +7 under 115th
<i>D. Trump</i>	115th	Republican	Republican	92
<i>D. Trump</i>	116th	Democrat	Republican	114 +11 under 117th

The main expansion of executive order issuance occurred in the two Roosevelt's and Hoover administrations. Under Theodore Roosevelt, the main theme of the executive orders remained administrative in nature, however with a larger government after the turn of the century, there was much more of a government to oversee. For example, some of Teddy Roosevelt's orders dealt with national parks, resources, and public lands however they didn't directly create policy,

rather, they apportioned and delegated power like previous administrations, just at a higher rate. Subsequent presidents continued the trend of more executive orders following the mainly administrative use pattern up until Herbert Hoover and Franklin Roosevelt expanded the institution to include many presidential policy initiatives.⁴² Hoover continued the administrative use of executive orders while FDR used them to introduce important policies such as rules under the National Industrial Recovery Act and to create government bodies such as the Civilian Conservation Corps or the Office of Economic Stabilization. While perhaps not always introducing direct policy actions, the ability of the president to expand the purview of the government, in addition to expanding the president's oversight through executive orders has grown exponentially since the first executive orders issued under Washington.

Since the expansion of executive order use in the 1930s, the focus has shifted to five main policy areas (see Table 2) which have covered the majority of orders issued in the past century.⁴³ Civil rights and social welfare have become one principal issue after the creation of the Fair Employment Practices Commission in 1943 and throughout the Civil Rights Movement enforcing desegregation. In addition, defense, foreign trade, economic management, and natural resources have all become areas where presidents have heavily pursued unilateral executive action with few deviations for orders issued for agricultural or foreign aid issues.⁴⁴ The executive orders issued under the category of personnel or agency requests speak to Rudalevige's point regarding the executive themselves not being the only beneficiary of unilateral power.⁴⁵ Analyzing the usage patterns through the mid-to-late 1900s by policy issue, as seen in Table 2, raises the question of exactly why presidents choose to act on the issues they do. Carter and

⁴² King and Ragsdale (1988), 122

⁴³ Ibid. 123

⁴⁴ Ibid. 123

⁴⁵ Rudalevige (2012), 157

Reagan were known to dramatically increase the share of economic and trade executive orders while the importance of defense and natural resources has seemingly declined since Truman. In other words, the question is: how do presidents choose which policy areas they focus on for executive orders?

Table 2: Executive Orders by Policy Type, 1949-1984⁴⁶

<i>Policy Area</i>	<i>Frequency</i>	<i>Percent of Total</i>
<i>Foreign Trade/Diplomacy</i>	345	13.9
<i>Foreign Aid</i>	21	0.8
<i>Defense</i>	377	15.2
<i>Social Welfare/Civil Rights</i>	229	9.3
<i>Gov't/Economic Management</i>	366	14.8
<i>Natural Resources/Environment</i>	337	13.6
<i>Agriculture</i>	34	1.4
<i>Ceremonial</i>	120	4.8
<i>Federalism</i>	13	0.5
<i>Personnel/Agency Requests</i>	633	25.5

While issuing executive orders can become a complex process within the executive branch⁴⁷, the motivations for issuing them generally fall into (and between) a finite number of categories: subversive, alternative, and administrative. The first comes if the executive wishes to

⁴⁶ King and Ragsdale (1988), 168

⁴⁷ It is not simply a single individual writing up an executive order. According to King and Ragsdale, “executive orders represent the interests of [the president] as they combine with the priorities of the presidency.” (King and Ragsdale, 124) There are issues of coordination within the executive branch, and with Congress which make executive action increase in complexity. Increasingly in recent administrations, the executive office of the president is only one piece in the executive branch puzzle further complicating the subject and subsequent drafting of executive orders between the president and executive agencies.

implement legislation that is otherwise non-supported in Congress and can result from a “highly energized, controversial legislative environment.”⁴⁸ This policy adoption is generally the most divisive of the uses since it subverts the will of Congress or at least undermines whatever the majority consensus is which prevents the preferred policy from being enacted through conventional means. The second category revolves around an alternative form for the implementation of laws which have been passed by Congress *and* are the preferred policies of the president.⁴⁹ For example, under the first years of the Clinton administration, many executive orders were issued to enact laws which had passed through Congress but were unsupported by the previously Republican administrations. These previous two categories are motivations for much more controversial executive orders since they fall under more substantive policy areas while the following motivation is more focused on the general purview of the government. According to Steven Shull the third category considers administrative motivation to issue executive orders— oftentimes concerning the reorganization or expansion of the executive branch or government more broadly.⁵⁰ Unfortunately there is no existing catalog of executive orders organized by their perceived motivation since very few orders would fall definitively into one category over another. While these three categories are simplifications, they are helpful in setting up a framework which allows us to correlate motivations with objective measures such as congressional partisanship or national ideological polarization and approval, therefore enabling the use of measures of partisan polarization to explore their relationship with the executive order issuance trends.

⁴⁸ Shull, 33

⁴⁹ Ibid. 33

⁵⁰ Ibid. 34

Presidential-Congressional Relations and Executive Orders

The following section will detail the use of executive orders within the context of circumventing Congress and making policy in ways which can avoid the traditional legislative process. While there is data to support my analysis in this section, I am unable to include it in a meaningful way in my final theory. The way in which I account for the “administrative presidency” in my theory is through a combination of congressional gridlock and public approval since both are touched upon in previous research done on the power of the president. In the coming paragraphs though, I will tie existing data and analysis surrounding the issuance of executive orders in light of congressional gridlock into my own theory which suggests that presidents will increase their issuance of executive orders as gridlock and polarization increases.

Little research has been done into the relationship between executive order issuance and congressional support of the president, with some existing literature suggesting that presidents use executive orders to create an “administrative presidency” when Congress does not support the presidential agenda.⁵¹ Alternatively, other studies have revealed a positive relationship between support and executive order issuance, with correlations as high as 0.48 meaning that theoretically, almost 50% of a president’s decision on whether to issue an executive order comes down to whether they have Congressional support or not.⁵² Regardless, this relationship is perhaps the principle opening in the literature to learn more about the issuance pattern of executive orders. Instead, much work has gone into examining executive orders by issue—disproportionally into the area of civil rights, and found that presidents have generally had

⁵¹ Durant 1992, Nathan 1983, and Waterman 1989

⁵² Gomez and Shull 1995

considerable discretion in the field.⁵³ Through the Civil Rights Era, the southern conservative-led Congress was unfriendly and unlikely to take the lead on policies regarding civil rights, thereby requiring the presidents of the time to take executive action in order to enact change. In this situation, executive orders were used to adopt policy and also serve as a prelude to demanding further action from Congress. Civil rights issues also show how presidents do not always issue orders when they lack support from Congress, rather, the rate changes in the face of congressional support *and* personal preferences or administrative leadership. For example, Kennedy issued fewer orders than average, thanks in part to strong leadership within his administration overseeing legislative priorities and congressional relations, while Clinton demurred from legislatively advocating for change, but issued the second largest annualized average number of civil rights orders of any president.

Another factor which influences executive order issuance is the fragmentation of Congress. Much like the support or animosity between Congress and the President, congressional fragmentation also results in an easier or more difficult path for a bill to become law. A study by William Howell hypothesized that the more factionalized Congress becomes, the more a president will use executive orders as a result of the decreased efficiency of, and responsibility to Capitol Hill. According to the results of Howell's study, this hypothesis holds very strongly, especially when looking at the strength of parties. As parties grow or become more unified presidents are less likely to issue executive orders as congressional gridlock is expected to decrease.⁵⁴ In addition to gridlock affecting issuance, the same study was able to show that presidents issue more orders during periods of unified government than divided government. According to Howell's results, when Congress and the president are divided, "presidents issue on

⁵³ Shull, 98

⁵⁴ Howell, 85

average four fewer significant executive orders each Congress,” a -22% difference from a unified government.⁵⁵ Both of these results give us the insight that unilateral executive power is limited, not only by Congress, as we’ve seen, but also by the courts who have the power to overturn executive orders on constitutional or other legal grounds. We’ve seen this dynamic unfold or completely flip on its head in other countries, too— in places like England, Japan, or France, executives cannot act unilaterally due to the strength of the courts and the will of the parliament.⁵⁶ Coming out of the dynamic is also the strength of an executive order to be able to hold over time. The stronger the body(ies) which can overturn these actions, the smaller these unilateral actions generally are, though the strength of the other parties can vary over time or appear different from their actual power.⁵⁷ Seemingly, then, the issuance of executive orders depends on not only the leadership in the administration regarding the issue or existing legislation but also factors such as congressional approval of the president or the overall level of gridlock in Congress at the time.

Electoral Politics, Elections, and Executive Orders

There are many additional studies which have been conducted on other factors influencing executive order issuance, yet very few, such as timing, gridlock, polarization, and approval which appear consistently throughout the existing literature.⁵⁸ There are the aforementioned ideas that issuing executive orders is a factor of congressional approval or agreement and that orders can vary by topic, which lead to the other factors, oftentimes coming

⁵⁵ Howell, 89

⁵⁶ Carey and Shugart 1998

⁵⁷ Howell, 99

⁵⁸ Warber (2006), Shull (2006), Howell (2003)

out of a combination with these two ideas. Perhaps the most-often cited influencer is a combination of the party controls or ideologies of Congress along with the ‘political time’ aspect where presidents issue varying numbers of executive orders depending on the year within their term. Election years are generally the focus of this idea, with the theory being that presidents will try to help their party win congressional seats in midterm cycles and will attempt to help their reëlection or solidify their legacy in presidential election years.⁵⁹ Surprisingly, though only one part of the theory holds— looking at data from Adam Warber’s research into executive power, presidents actually issue fewer executive orders on average during presidential election years and only slightly more than average during midterm years.⁶⁰ Furthermore, presidents issue far fewer policy-focused orders (as opposed to routine administrative or symbolic orders) during election years than they normally would. Midterms seem to bump up order issuance by 2-3% on average though the focus seems to shift from policy enactment to routine administrative orders by the same margin.⁶¹ This baseline of data from Warber accounted for presidents who fall far before the period I am studying, thus only giving us a cursory understanding of what to expect from post-Cold War administrations. These dynamics become clear in Table 3 where the types of executive order are broken down by year under each president.

Table 3: Executive Orders by Intention⁶²

<i>President</i>	<i>Year</i>	<i>Symbolic EOs</i>	<i>Routine EOs</i>	<i>Policy EOs</i>
<i>George H.W. Bush</i>	1989	0	8	23
<i>George H.W. Bush</i>	1990	0	15	28

⁵⁹ Warber, 74

⁶⁰ Ibid. 74

⁶¹ Ibid. 74

⁶² Ibid. 153-154

<i>George H.W. Bush</i>	1991	4	17	25
<i>George H.W. Bush</i>	1992	3	14	23
<i>George H.W. Bush</i>	1993	1	1	4
<i>Bill Clinton</i>	1993	0	15	42
<i>Bill Clinton</i>	1994	2	18	34
<i>Bill Clinton</i>	1995	0	12	28
<i>Bill Clinton</i>	1996	2	15	32
<i>Bill Clinton</i>	1997	0	8	30
<i>Bill Clinton</i>	1997	0	8	30
<i>Bill Clinton</i>	1998	1	8	29
<i>Bill Clinton</i>	1999	0	8	27
<i>Bill Clinton</i>	2000	2	2	37
<i>Bill Clinton</i>	2001	0	2	10
<i>George W. Bush</i>	2001	0	20	34
<i>George W. Bush</i>	2002	0	8	23
<i>George W. Bush</i>	2003	3	12	26
<i>George W. Bush</i>	2004	2	11	32

The only point at which the time theory appears accurate is the increase in issuance during a president's final year in office. While these results account for presidents at the end of both terms if they were a two-term president, (therefore overlapping with some of the presidential election year stats) they still demonstrate that on average, presidents will issue starkly more orders during the last year of their term than in the years leading up. The total average number of orders issued

increased from 60.9 to 69 from the years leading up to the last year, with policy-enacting orders increasing by nearly 20%.⁶³ It appears that this trend also holds up between parties, with Democrats shifting their last-year tendencies slightly more than Republicans. This trend holds over time which suggests that all further analysis of executive order issuance trends should use political time as a control. Therefore, in considering a theory of executive authority in which presidents use their authority to garner support among the electorate, it is important to take into account how electoral factors, party control, political time, and their approval ratings affect how they use their power.

Executive Orders and Going Public

While executive orders can be used as fast-track tickets for presidents to make policy without going through Congress, they can also be used as cogs in the machine of public approval and party politics. There is a constant tension between president and the Congressional delegations of the president's party, one which promotes the welfare, public approval, and ultimately, reelectability of both groups, depending on the successes of each of them individually. In order to promote this welfare for their Congressional colleagues, presidents may wish to exert their authority to issue executive orders in an effort to push their party's agenda and further solidify the support from their colleagues on Capitol Hill. Just as presidents will throw their endorsement behind a Congressional candidate during an election year, they may also use their authority to implement policy which is beneficial to the reelection efforts of their party. For much the same reason, presidents are also likely to issue executive orders to double down on

⁶³ Warber, 72

their own agendas, or to increase their own public approval prior to their reelection campaigns. Lastly, for a second-term president, general election years signal the end of their presidency which supposes that said president will wish to solidify their legacy. One way of doing this, especially if they have been a weaker president or have an agenda which is too polarizing for Congress, is to issue executive orders leading up to, and directly after a general election. It seems highly plausible that for the aforementioned reasons, presidents are more likely to issue more executive orders during election years. This question is the basis of one of the hypotheses which I will test in order to assess the power that presidents have despite strategic weakness, in this case, due to the “political timing” and popularity of their politics. Introductory assessments point to election years strongly affecting the issuance of executive orders which bodes well for the theory of executive power as a whole.

Executive Orders and Presidential Agendas

One of the final main reasons presidents issue executive orders, and one of the other factors influencing patterns of issuance, is to overturn existing policy or other executive orders which they do not like or agree with. In many cases presidents will revoke or supersede orders which have become obsolete, some just naturally with time, or others with changes of administration, which does not necessarily mean that they are following an ambitious, politically motivated charge, though it may lend insight into how executive orders can be more than just policy *making* tools.⁶⁴ Through the mid-20th century, presidents mainly issued executive orders revoking, superseding, or amending other executive orders which covered more routine,

⁶⁴ Warber, 55

administrative issues rather than those introducing new policy. Even still, the total number of executive orders overturned or otherwise altered remained relatively consistent through the 20th century until the Carter and Reagan administrations. These two administrations revoked, superseded, or amended an average of 98 executive orders every year, an increase of nearly 40% off the average.⁶⁵ This may seem, then, like a good chunk of a given president's executive orders are simply to amend previous ones, and that there really is no complexity in the pattern of issuance other than a president's own desires for the order of their administration. This is really not so, though, since one executive order can alter many. For instance, Reagan's EO 12553 eliminated 386 orders in order to clean house of those which were "obsolete or no longer needed to fulfill policy or administrative responsibilities."⁶⁶ While this order is just one example, the higher-than-average amendments or revocations of orders under those two administrations do not demonstrate greater use of executive power, since one order can streamline a whole system. Just as presidents can issue executive orders, they have the power to change or remove them, yet the trends surrounding the un-doing are not really correlated with the issuance as one might expect.

Just as executive orders can be issued at the end of a president's term to solidify their legacy, to subvert the will of Congress, or to help further the efforts of their party, no matter how divisive, they can also be used as the only tool to legally un-do or change existing executive orders. If an incoming president is of the opposite party of their predecessor, as has been the case lately, they may wish to un-do some of the executive action that was implemented which goes against their policy objectives. Alternatively, presidents taking office after a change of the Congressional majority away from their party may wish to implement their own policy through executive orders rather than channeling it through a newly "hostile" Congress. If the opposite

⁶⁵ Warber, 56

⁶⁶ Ibid. 56

happens and a president comes into power with a divided Congress, they may also wish to use their executive authority to set a tone for their party's agenda going forward by issuing executive orders. Regardless of the minutiae of the party politics, presidents entering a term after the majority parties in Congress have changed or, if their predecessor was a member of the opposing party, will issue more executive orders than a president entering into a similar party structure that existed before their election.

Thesis Statement on Executive Orders and Presidential Power

While much research done on the nature of executive orders and some of the patterns of their issuance, there is still a sizable gap in the research. Scholars have examined the way Congress responds to an executive order, but few have addressed the presidential response to Congress' actions on an executive order. Furthermore, there is little insight into the external factors outside the oval office which can heavily influence executive order issuance— whether it be from lobbyists to career civil servants in cabinet agencies, there is much more than just one brain working on an order. It is clear that a certain pattern exists to the issuance of executive orders, but as of now there is yet to be an up-to-date, all-encompassing account of how Congress, political time, political parties, and administrative efficiency have all affected the way that a president (and the whole executive branch) determines when and how to issue an order. To this point, research has only gotten up to Bill Clinton and it seems fitting to continue to the present, especially given this most recent administration of Donald Trump.

In light of the three main theories of presidential power, it seems like there are plenty of incongruities which make them incompatible with each other. While each theory, standing

independently, holds, at least given the presidential history and angle taken at the time when they were written, the vast literature on the way executive orders are used lends a different angle through which we can view presidential power. Executive orders seem to be used much more divisively than we may otherwise be led to believe and can show us the nature of unilateral executive authority as it is used by American presidents. Perhaps it is the weakest presidents, without the ability to “faithfully execute the laws,” who use this power the most, and in so doing, prove that presidential power is really more unlimited than we think.

Whereas Neustadt’s theory of power derived from bargaining holds in conventional circumstances, we see that through executive order use, presidents actually wield more power than we may see through their interactions with Congress. Rather than needing to bargain, presidents can simply issue executive orders when Congress is too polarized or gridlocked. When it comes to going public as per Kernell’s theory, we see that presidents do, in fact, derive their power from public approval. If they need to establish their agenda or help other members of their party enact parts of their agendas, the president has the authority to garner that public support by issuing those policies through an executive order directly. This tactic is especially useful during election cycles. With Skowronek’s theory of fitting into the power dynamic, a president also wields a fair bit of power, as they can bypass Congress if neither the house or senate majority match their own party, or if the president does not have a good rapport with members of Congress. No matter which way we look at it, presidents have the power to escape many situations they would otherwise be trapped in without the use of executive orders. It seems as though this unilateral power, not written in the Constitution, and wielded on flimsy grounds, is one of the most powerful tools a president has. Using this power, though, assumes that the conventional channels of making policy have failed—the way that the legislative process is

supposed to work has failed. In this sense, then it appears as though the most strategically weak presidents actually end up consolidating the most power in the executive branch in trying to supersede the institutions which prevent them from governing the way they please. In order to test this theory, the following hypotheses will be tested:

Presidents will likely use their executive authority when their strategic relationship with Congress is at its weakest, when they are unpopular with Congress, or when Congress is polarized to the point that gridlock prevents effective lawmaking. This proposition can be tested with the following hypothesis:

H1: The number of executive orders a president issues in a given year will be positively correlated with increases in the congressional polarization score (DW-NOMINATE), an increasing congressional gridlock score, and a decreasing score of congressional approval of the president.

Presidents entering their first term after a flip of parties, whether it be in the House, Senate, or Presidency, will issue more executive orders than presidents coming into the same power dynamic as their predecessor left behind. This theory will be tested with the following hypothesis:

H2: First-year issuance of executive orders will be greater than in the second year, following a change in parties, while third-year issuance will be greater than the fourth year, following a change in party control of either the House or the Senate.

As a consequence of a president's effort to go public and boost their own popularity and the popularity of their party, they will issue more executive orders during election years than they otherwise would at other points during their term. Additionally, the lower their approval ratings, the more they will need to use executive orders in an attempt to go public and renew their

popularity with the electorate. In order to evaluate this theory, the following hypothesis will be tested:

H3: Election years will see more executive orders than non-election years. The differences in issuance rates between presidents will be proportional to fluctuations in both their public approval ratings and the approval ratings of their party.

Data

The regressions for each hypothesis will be done on a dataset comprised of yearly executive order issuance data matched with annualized scores of public and congressional approval of the president, and the approval ratings of each political party. In addition, the political party environment is coded in for each year with indicator variables for the majority party for the House and Senate along with indicators for unified Congress, and a unified government. As Shull suggests, it would be very helpful to have the ability to break down executive orders into his three model categories; subversive, alternative, and administrative, however there is too much grey area when looking at orders in reality. As such, there is no effective way to categorize the executive orders and therefore no good way to assess the exact motive when looking at correlations between issuance and the independent variables.

Over time, metrics such as approval ratings have become much more sophisticated and are collected by more people, more often than they once were. In order to maintain continuity in reporting I will use annualized values from UCSB's American Presidency Project which compiles Gallup public approval polls from each polling cycle. I am also using Gallup polling data to assess the public's approval of the Democrat and Republican parties. I have chosen to

include both approval and disapproval ratings for both of the parties and the president in order to test for correlations in both scenarios since there is a margin of error and indecision in the polling which could lead to regressions being significant in one direction but insignificant in the other.

In addition to the public approval ratings, I am using Keith Poole and Howard Rosenthal's Voteview data which aggregates the votes of each member of Congress to assess their ideology and translate it into a numerical score. This score is then weighted and aggregated with all of the other member scores to form a NOMINATE score which serves as an indicator of the overall level of partisanship in a given chamber. The NOMINATE score reflects a -1 to +1 continuous measure of ideology where -1 would reflect an extremely liberal member, while a +1 measure would reflect an extremely conservative ideology. Voteview also compiles a dataset for congressional approval of the president which again looks at the roll call votes of each member and then compares the member's vote to the president's desired outcome. The outcome of this comparison is a proxy for Congress's general approval of the president and their desired policy choices.

Table 4: Summary Statistics for Congressional Parties, NOMINATE Scores.

<i>Variable</i>	<i>Obs</i>	<i>Mean</i>	<i>Std. Dev.</i>	<i>Min</i>	<i>Max</i>
<i>House Ideology Difference</i>	39	.7954131	.0690908	.6527008	.881175
<i>Senate Ideology Difference</i>	39	.7067376	.0733736	.6160986	.8392037
<i>Mean House Ideology</i>	39	.0285456	.0501588	-.0606848	.1041655
<i>Mean Senate Ideology</i>	39	.039133	.0441047	-.0323333	.10537
<i>House Support President</i>	32	52.72187	7.795397	36.5	64.5
<i>Senate Support President</i>	32	67.45625	8.516964	50.9	81.7

Table 5: Summary Statistics for Presidential Approval and Electoral Margins

<i>Variable</i>	<i>Obs</i>	<i>Mean</i>	<i>Std. Dev.</i>	<i>Min</i>	<i>Max</i>
<i>Presidential Approval</i>	40	50.20921	10.88221	30.09677	72.17778
<i>Presidential Disapproval</i>	40	43.7567	11.83861	18.44444	65.16129
<i>Electoral Margin</i>	8	.2723048	.1945023	.0092937	.5855019

Table 6: Summary Statistics for Political Party Approval (1996-2021)

<i>Variable</i>	<i>Obs</i>	<i>Mean</i>	<i>Std. Dev.</i>	<i>Min</i>	<i>Max</i>
<i>Democrat Approval</i>	32	49.38507	5.305659	40.66667	57.5
<i>Democrat Disapproval</i>	32	44.00662	6.435889	31	54
<i>Republican Approval</i>	32	42.99469	6.002354	34.25	54.66667
<i>Republican Disapproval</i>	32	50.38289	6.633831	36.16667	59

Tests and Results

Before regressing each of the hypotheses, exploring correlation tables affirms that the variables examined in this paper move in tandem with one another and in the expected positive or negative directions according to the theory. For the first hypothesis which examines the relationship between congressional gridlock and the issuance of executive orders I use executive order issuance per year as the dependent variable, subject to Sarah Binder's definition of gridlock which includes the percentage of each chamber that can be classified as moderate, the mean ideological difference between the chambers and an indicator variable for whether there is

unified government.⁶⁷ For this hypothesis, increasing executive order issuance is positively correlated with increasing ideological polarization in both chambers and an increase in the mean ideology between the chambers. Increasing executive order issuance is negatively correlated with the number of moderates and Congress' approval of the president. In light of the correlations between executive order issuance and each of the independent variables, the theory that congressional gridlock and approval of the president affects executive order issuance seems plausible.

For the second hypothesis which examines the dynamics around the flipping of political parties in Congress or the presidency, the principle dependent variable remains the number of executive orders issued in a given year, though I will also explore the effect of changing congressional majorities and the party of the president on the issuance of symbolic, routine, and policy executive orders. The independent variables for this hypothesis include the parties of the president and the majority in each chamber, the approval ratings of each party, and indicator variables for whether the government is led by one majority party and whether the any party flipped after an election. Since some of the principle independent variables for this regression are indicators, an analysis of correlations will be less meaningful than it was with the first hypothesis.

The third hypothesis, which is partially an extension of the second, examines the relationship between executive order issuance (the dependent variable) and presidential and party approval, election years, and the electoral margin (independent variables). Analysis of the correlations reveals that increasing executive order issuance is positively correlated with increasing presidential disapproval ratings and, checking for robustness, negatively correlated

⁶⁷ Binder (2000)

with increasing approval ratings. Additionally, increasing issuance is negatively correlated with the electoral margin from the last presidential election. From this analysis we see that this third hypothesis is also plausible given that executive order issuance is seemingly correlated with the theory of going public.

Table 7: Hypothesis 1, Congressional Gridlock

VARIABLES	(1) Ideological Diff	(2) Support of President	(3) Binder Gridlock
HIdeologyDiff	-476.1 (367.1)	-115.0 (311.0)	
SIdeologyDiff	-483.3 (616.4)	-284.2 (478.7)	
Interaction	638.8 (646.5)	195.0 (542.3)	
HSupportPres		2.119 (1.611)	
SSupportPres		1.518 (1.247)	
Interaction		-0.0287 (0.0243)	
HModerates			147.7** (61.19)
SModerates			-246.8* (130.4)
ChamberDiff			54.27 (122.5)
UniGov			6.882 (4.705)
Constant	399.5 (355.7)	106.4 (300.2)	66.95*** (18.56)
Observations	37	30	37
R-squared	0.108	0.293	0.187

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

When it comes to running regressions on the first hypothesis, the story becomes a bit more complicated. There is no universally agreed upon definition for congressional gridlock due to the wide number of variables which influence how gridlocked Congress is at any time. Using an OLS regression weighted for the number of executive that are issued in a given year as a percentage of the total number studied, I examine two different model specifications for different definitions of gridlock. The first uses an interaction of the difference between the mean ideologies of each party in each chamber, along with an interaction of the support of the president in each chamber.

Both the House and Senate coefficients are negative indicating that as the difference between the mean party ideologies grows larger (as the parties become more polarized) the number of executive orders issued will decrease. While this finding contradicts the theory, the coefficients on the House and Senate support of the presidents suggest that this specification is unrepresentative of the existing theory. Both coefficients on the support figures are positive indicating that as support for the president increases, the number of executive orders also increases. Based on Neustadt's work on the power of bargaining, this last figure around support is extremely unrepresentative of the underlying dynamics of executive power. In order to better capture the dynamics between Congress and the president's decision to issue an executive order, a second specification was necessary.

In the second specification I use Sarah Binder's empirical strategy for representing congressional gridlock: the percentage of each chamber that can be considered moderate, the difference between each chambers mean ideology, and an indicator for whether the government is unified under one majority party. Again, I use an OLS regression weighted for the relative

number of orders issued in a year to regress the number of executive orders issued on each of Sarah Binder's factors in congressional gridlock.

Clearly this specification gives results which are much more consistent with the theory. While in both the standard model and the one which interacts the House and Senate moderates the House returns a positive coefficient, indicating an increase in executive order issuance as the number of moderates increases, the coefficient on the Senate is larger in magnitude and negative, indicating that the net effect of both chambers is a decrease in executive orders as the number of moderates increases. Looking at the ideological difference between the chambers, the positive coefficient suggests that as the ideological distance between the two chambers increases, the number of executive orders issued is predicted to rise as well.

The only regression coefficient that does not corroborate Neustadt's theory is on unified government. The positive coefficient here suggests that more executive orders will be issued under unified government rather than divided government. While this figure contradicts Neustadt's theory, it does support Howell's research that found a 22% decrease in executive order issuance under divided government. The sample size was small due to my research being limited to the post-cold war era, though Binder's definition of gridlock still managed to find statistically significant coefficients. In combination with the correlation analysis on this hypothesis, the findings from the regressions appear to support my theory.

Table 8: Hypothesis 2, Changes in Party

VARIABLES	(1) Republican Disapproval	(2) Republican Approval
PartyChange	13.64* (6.826)	13.97** (6.699)

UniGov	0.749 (6.631)	0.185 (6.510)
RPartyDisapproval	-0.685 (0.577)	
RPartyApproval		0.920 (0.575)
DPartyDisapproval	0.336 (0.592)	0.343 (0.532)
Constant	47.32* (24.24)	-26.95 (41.85)
Observations	32	32
R-squared	0.167	0.200

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

For the second hypothesis which examines the issuance of executive orders after changes in the majority party of either chamber or of the president, I use an OLS regression to test the relationships between executive orders and party changes. In the first specification I use the disapproval rates of each party as a proxy for the overall popularity of the party, and therefore as a measure of the pressure each faces to improve their performance, passing popular laws. In addition to the measure of disapproval, I use an indicator variable to show if the majority party in either chamber or the presidency has flipped, along with an indicator for whether the government is operating under one majority party.

The coefficient on the main independent variable, the change in party, is positive and significant, indicating that if there is a change in party after an election, the president is predicted to issue about 13 more executive orders in the next year than they would have under the outgoing majority arrangement. Being under unified government predicts that there will be an ambiguous

change in the issuance of executive orders, given the massive standard error and the coefficient near zero. As disapproval of the Democrat Party increases, the positive coefficient predicts that executive order issuance will increase as well. The only real concern in the regression output is the negative coefficient on the disapproval of the Republican Party. A negative coefficient predicts that as disapproval increases, the number of executive orders issued will decrease. In order to test the validity of this unexpected result, I created a second model specification using the approval rating of the Republican Party to see if a positive coefficient would confirm the negative coefficient using the disapproval rating.

In the second specification, all of the variables carried over from the first, excepting the change from Republican disapproval to approval. The coefficient on the changing party indicator remained positive and became even more statistically significant while those on the Democrat approval and unified government variables maintained their signs. The Republican Party approval coefficient came up positive, suggesting that as approval increases, the issuance of executive orders will increase as well. Given the result of both specifications with regard to the Republican Party, it seems as though the theory that presidents will issue executive orders in order to boost the popularity of their party or as a result of a changing majority doesn't hold up, though this is explored further with the third hypothesis.

Table 9: Hypothesis 2, Change in Party by Executive Order Type

VARIABLES	(1)	(2)	(3)
	Symbolic	Routine	Policy
PartyChange	0.149 (0.849)	7.942 (4.407)	2.941 (7.811)
UniGov	2.075* (0.925)	-0.708 (4.801)	-0.0883 (8.510)

RPartyDisapproval	-0.0531 (0.0734)	0.158 (0.381)	-0.306 (0.676)
DPartyDisapproval	-0.138 (0.148)	0.337 (0.769)	-0.445 (1.363)
Constant	8.000 (7.270)	-11.59 (37.74)	57.67 (66.90)
Observations	11	11	11
R-squared	0.557	0.434	0.053

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

The second test of the second hypothesis involves breaking down the types of executive orders issued into their relative substance and importance. Looking at the sample size, it is difficult to find statistically significant results using proxy data to test the theory, though the regression coefficients still tell us a story about how executive order issuance varies over time. After a change of majority party in either chamber or the presidency, executive order issuance is predicted to increase, though most of the increase will be accounted for by routine or policy driven orders. When the government is unified under one majority party, a president is predicted to issue fewer routine and policy orders and resort to using their executive authority for symbolic actions. Lastly, when it comes to public approval of the political parties, presidents are predicted to only increase their issuance of routine executive orders, while issuing fewer symbolic and policy-driven orders. Again, despite the small sample size driving a lack of statistical significance, the signs on each of the coefficients seem plausible for supporting the theory.

The third and final hypothesis revolves around timing, specifically how election years affect the issuance of executive orders. I used a different specification for Democrat and

Republican presidents to simplify the control variables and make them more logical for each party. In doing so, the sample size for each regression is smaller, but the results are more meaningful. For a Democrat president I regressed the number of executive orders issued in a given year on the president's approval rating, the approval rating of the Democrat Party, and the disapproval rating of the Republican party, with the principal independent variable being an indicator variable for whether the year is an election year. For Republican presidents the specification is mostly the same, but the party approval ratings are flipped; the approval rating of the Republicans and the disapproval rating of the Democrats.

Table 10: Hypothesis 3, Election Years

VARIABLES	(1)	(2)
	Democrat Pres	Republican Pres
PApproval	-0.0877 (1.390)	0.837 (0.625)
DPartyDisapprove	-0.356 (1.377)	
RPartyApprove	0.195 (0.699)	
Election	17.30** (6.889)	13.36 (10.25)
RPartyDisapprove		0.867 (1.154)
DPartyApprove		-1.678 (1.286)
Constant	33.89 (144.4)	30.78 (108.2)
Observations	17	15
R-squared	0.391	0.296

Standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

For presidents in both parties, election years are predicted to increase executive order issuance over non-election years, with statistically significant results for Democrats, and strongly positive results for Republicans, even within one standard deviation. With regard to presidential approval ratings, Democrat presidents are predicted to decrease their executive order issuance as they become more popular, with the inverse being true for Republicans. The standard error for the Republicans assumes that the prediction that they will increase their executive order issuance with popularity will likely be true, however the Democrats prediction has much more uncertainty regarding direction. When it comes to public approval of each party, the regression doesn't serve a great purpose in evaluating the theory, but the addition of the variables into the regression as controls help validate the importance of election years while also illuminating a trend between the parties. For Democrat presidents, as disapproval of their party and approval of the Republican agenda increase, a president is predicted to issue fewer executive orders. Republicans, too, facing increasing party disapproval and increasing approval of the Democrats are also predicted to decrease their issuance of executive orders.

For each of the three hypotheses, sample sizes were an issue, however for the main independent variables, especially in conjunction with correlations analysis, each of the tests arrived at regression coefficients which can support, or at least partially confirm the theory set out in this research.

Analysis/Assessment of the Theory

In light of the correlation and regression analysis of the three hypotheses, there is a solid body of evidence, even with a small sample, which can help evaluate the theory that presidents

can actually derive policymaking power regardless of their strength as a politician. Each of the hypotheses will be evaluated in order from weakest to strongest. Together, the increase in executive order issuance surrounding election years, changes in party dynamics within political time, and in times of great congressional gridlock all point towards a strategically weak executive who is in a position to use their executive authority to appear strong.

H3: Election Years

The hypothesis surrounding election years arrives at the least conclusive answer, though it still provides evidence to support the theory, at least partially. My adaptation of Kernell's theory of going public centers on the premise that presidents will issue more executive orders during election years in an effort to bolster their own, and their party's polling numbers by making policy which is favorable to public opinion. Despite the ambiguity around the popularity regression coefficients, the coefficients on the election year variable predict a definite increase in executive order issuance. While the hypothesis was based on the expectation that public opinion would drive the increase in issuance, the proxy variables couldn't definitively explain such a trend. Still, the correlation analysis around executive order issuance, presidential and party approval rates point to a positive relationship between disapproval and increased issuance. In taking the regression results for election years, coupled with the ambiguous results around popularity from the regressions and positive correlations, it seems as though the theory surrounding a president's use of executive orders to "go public" remains intact. If nothing else, the idea that presidents use executive orders as political tools is confirmed simply by the fact that their issuance will increase around elections, whether it is out of a desire to help their party or to solidify their legacy.

H2: Political Time and Party Dynamics

The second hypothesis surrounding Skowronek's political time and power dynamic theory is moderately strong despite using proxy variables for the changing attitudes towards the political parties. The main variable around the changing of a majority party in Congress or the flip of the president's party still strongly confirms the theory that a president will issue more executive orders when the party dynamic or political environment changes, with statistically significant results for both tests. While the controls for the approval of each political party didn't bring up a conclusive result, much like the first hypothesis, they did lend some insight into the behavior of each party. Taking the second and third hypotheses in conjunction with one another, it seems like the Republican party is a bit more aggressive with their executive order issuance since, regardless of the approval rating of their party, they will issue an increasing number of executive orders after changes in majority party or during election years.

With the second hypothesis, though, the main variable once again strongly supports the theory with the explanatory or control variables being where the regression falls short of explaining the causes of the theory. Skowronek was correct in his theory that presidents adapt to the environment in which they are leading the country—something that is supported by the regressions for this hypothesis, though the mechanism, the desire to overlap Kernell's theory of going public by using the approval of the party as a control, remains ambiguous like the third hypothesis. Still, the regressions from the second test of the second hypothesis illuminate what types of executive orders are issued when parties flip, which can fill in the gaps left by the ambiguity of the first test. As theorized, policy and routine executive orders are predicted to be issued more often after changes in congressional majorities than symbolic executive orders, leading to the conclusion that presidents will try to adapt the political environment they inherited, or which they had occupied, into what they want in terms of their policy agenda.

Overall, the sheer confirmation of Skowronek's theory of political time and fitting into the power dynamic contributes to the overall theory of presidents deriving power from sources outside of their traditional role as chief executive.

H1: Congressional Gridlock

The first hypothesis surrounding congressional gridlock is not only the strongest, but also does the most to support the theory put forth in this paper. The idea that presidents are at their weakest came to me when I was thinking about presidential-congressional relations and how an uncooperative Congress can severely hamper a president's agenda. With that in mind, providing evidence that a gridlocked Congress can push a president to issue an increased number of executive orders will solidify the validity of my theory. Given the various definitions of gridlock explored above, piecing together evidence in support of my theory will require both the correlation analysis and the regression results. When looking at the correlation results, it seems reasonable that executive order issuance is positively correlated with increasing polarization within a chamber and negatively correlated with the support of the president within a chamber. Taking these results in tandem with the regression using Sarah Binder's definition of gridlock we can see that, though imperfect, congressional gridlock does lead to presidents issuing more executive orders. While the test evaluating the importance of unified government returned a positive coefficient which doesn't support part of the theory, the rest of the regression results point in the same direction as my theory. Overall, as the number of moderates decrease and as the ideological difference between the chambers increases presidents will issue more executive orders, due to the difficulty of passing their agenda through a gridlocked or polarized Congress.

While there are many parts to evaluating the theory, some which support it and others which contradict it, the theory that presidents can implement their desired policy and can still be

a successful chief executive, despite strategic weakness either in the polls, in the politics of the government, or in Congress remains intact. The third hypothesis helps confirm that presidents try to appeal to public approval either for their own polling, or that of their party, during election years, by using executive orders to overcome whatever lack of support they are facing. While it could not definitively show that presidents issue more executive orders during election years *because* of a lack of support, it still shows how election years affect the strategic implementation of executive orders. The second hypothesis was able to provide evidence that presidents react to whatever political environment they are living in at a given time. Again, this hypothesis could not definitively identify the exact circumstances in which a president will choose to issue an executive order to implement their desired policy but it does provide evidence that presidents will use executive orders to overcome changes to the political status quo. The first hypothesis is the most successful in providing evidence to support the theory that even when presidents are strategically weak in Congress, they can circumvent the conventional path for lawmaking and issue executive orders at will. In this sense—the sense in which presidents are predicted to issue more executive orders when they can't get through Congress, the theory that weak presidents are actually extremely strong is supported by the results of the statistical tests.

Implications and Future Study

While the results of my regression analysis support the idea that presidents can use their executive power to overcome strategic disadvantages to implementing their preferred policy, they are inconclusive when it comes to identifying some of the mechanisms forcing presidents to wield their executive power. This research has illuminated just some of the ways that provoke

presidents to issue more executive orders and can serve as a base for future research into the strategic nature of the presidency. It has created a lens through which we can address some of the motivations for using unilateral executive action and is a great jumping off point for looking into some of the details of the nature of executive power. I would have liked to address the different types of executive orders, or intentions of each of the executive orders issued during election years to better identify the strategies presidents adopt or to get at the rationale behind issuing the orders they do.

Going forward, studying a larger dataset would help with issues of statistical significance by providing a larger sample size with which to conduct regressions. Additionally, since presidents vary so widely across time, a larger sample size would accommodate for some of the outliers such as Donald Trump's above average issuance or George W. Bush's use of signing statements rather than executive orders. Categorizing executive orders by policy area would also allow further study to focus on the policy areas presidents use to pull themselves out of strategic ruts. Rather than use the total number of executive orders as the dependent variable, one could use individual policy executive orders to evaluate these strategies. The main point of warning going forward with this topic is around finding relevant and measurable proxy variables to evaluate human decisions and attitudes. This was perhaps one of the main struggles with my research as trying to find identifiable proxies for a president's motivation to issue an executive order was near impossible.

Beyond statistical analysis, future research would benefit from more qualitative study of presidential power in providing insights on when executive orders are turned to as a source of unilateral executive authority. Rather than just looking at statistics, which are intrinsically problematic due to limited sample size and the difficulties of gathering appropriate data,

qualitative case studies that examine factors on why presidents issue executive orders can reveal patterns – or their absence. Overall, we can generally conclude that presidents do issue more executive orders around elections, with a gridlocked congress, or after changes in majorities, but statistical analysis presented here also suggests that there are not always clear patterns.

Therefore, many of the reasons presidents issue executive orders may be accounted for by the unique circumstances of each presidency. By more carefully examining the details of each presidency, there could be general lessons we can draw from how executive orders are used as a tool of unilateral executive power.

Overall, the use of correlations to support regression results which lack statistical significance is not as robust of a research technique as using a large sample size, but it still is helpful in creating a narrative to defend my theory. The value in the regressions and correlations here is not that it answers all questions about the way presidents use their executive authority, rather it is just the tip of the iceberg when it comes to figuring out how presidents can use the circumstances around their leadership to validate or necessitate the use of executive orders. At the end of the day presidents have minds of their own, Congress is made up of members with individual wills, and the public shows their approval or disapproval of the government in various ways which makes the technique for furthering this research forever improvable, even if limitlessly complicated. This paper is meant to begin that journey. More data accounting for more variables and a longer time span may help, but the core questions surrounding presidential power are framed in existing theory.

Conclusion

To finally, definitively answer the question of whether strategic weakness makes a president more inclined to use their power, more study would be needed, but to tie this paper up with a bow, it really does seem like it is the most strategically weak presidents who can end up being the most powerful executives. The most obvious example from the period of my study is Donald Trump, a one-term president, lacking a unified Congress, having won his election by losing the popular vote, and by having some of the worst public approval ratings in history. Despite all of these things, he managed to accomplish just about as many policy objectives in office as any other president. He truly is the exemplar of my theory, for better or worse—a strategically weak president who is able to use his executive power to implement policy choices that otherwise couldn't be made. While attributing all of Trump's political success to the power of the executive order would be a mistake—Trump was a politician who held never-before-seen political power over much of his party, it would also be a mistake to say that he would have been just as successful without the executive order.

Aside from executive orders, this paper was exploring executive power as a whole using executive orders only as a proxy. Even by just looking at executive orders, the picture of American politics we see today is so much different than what we would have seen at our nation's founding. The framers of the Constitution envisioned a government built on checks and balances with a specific branch intended to create laws, one to judge their legality, and one to execute the laws. What we see today is vastly different. While checks and balances remain in place, the unilateral power of the executive has changed the political calculus in the US, especially considering how the rest of the government has changed around the presidency. We've seen Congress become ever more polarized which makes the process of passing laws increasingly difficult. To combat this, the president has had to find new ways of garnering

support and passing their agenda. As this paper set out to demonstrate, they are able to do this through unilateral executive action, whether it be garnering support during election years, or bypassing a gridlocked Congress.

Is this to say the framers failed in preventing an all-powerful executive from taking over America and issuing policy left and right? Short answer, no. As I theorize, it is only when presidents are truly in positions of weakness that they resort to using their power. It seems only natural that going forward this will continue to be the case. While it would be great to study how presidents use executive power in their lame duck sessions, or in the first 100 days of their presidency, it appears as though they will use their executive authority to begin their agenda in contrast to their predecessor, or to solidify their legacy when Congress has no allegiance to the outgoing president. Other than these circumstances, or in periods of severe congressional gridlock, it is much easier to pass laws the conventional way, and the policy that ends up being enacted is held in a less controversial light since it was done the way the framers intended.

Going forward, as Congress continues to become increasingly polarized, it is hard to say if presidents will have to resort to executive authority more often, but simply looking at the beginning of the Biden administration, we catch a glimpse of what that future might look like. Paying homage to Skowronek, President Biden dispensed with the existing power dynamic and wished to take his presidency in the opposite direction from where Trump left off. Within the first three days of taking office, Biden issued 20 executive orders and has gone on to issue 20 more by the time May 1 hit. Many of these have been aimed at reversing Trump administration actions, in addition to providing relief during the COVID pandemic, but accounting for all of that, they still follow the pattern of Skowronek's original theory. Since the initial wave, the rate at which they have been issued has slowed dramatically, suggesting that Biden will use

conventional channels to enact his agenda, leaving his unilateral executive authority for times of desperate need.

The final question remains—whether presidents who use their executive authority are weak presidents. According to this research and the theory it supports, presidents are generally at their weakest when they do use their power to issue executive orders. This also does not rule out the idea that presidents can use their executive authority when they are forced to by outside circumstances, generally crises, which require immediate attention, but even these situations imply that a president couldn't enact whatever policy is needed in an acceptable time frame, whether it be due to gridlock, or unpopularity. While this paper does not definitively prove whether presidents can garner support from their use of their executive power, logic would suggest that if they can garner support, they would be using that power only because they are weak enough to not have any other avenues to bolster their polling numbers. There is much to speculate on, and much more research that can be done, but it really does seem like weak presidents can use the powers of the office to some of the strongest presidents, despite the situations they lead in.

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