Executive Orders and Presidential Power

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This article reassesses the current paradigm of the presidential studies literature that holds that presidents have limited capacity to act unilaterally or make policy decisions on their own. I explore how presidents have used executive orders as a way of implementing significant policies unilaterally. Using an event-count analysis, I find that the frequency of executive orders varies with substantive changes in the president’s political environment. This evidence of a substantive component to order frequency shows that presidents can rely on their formal powers to make important policy decisions.

Introduction

The standard conception of the presidency is that the office is constrained by the separation of powers and general weakness of the chief executive’s formal powers. Yet presidents have, throughout U.S. history, used their executive authority to make policy on their own without interference from either Congress or the courts. This article investigates how presidents have used one particular unilateral tool—the executive order. An executive order is a presidential directive that requires or authorizes some action within the executive branch. Presidents have used executive orders to establish policy, reorganize executive branch agencies, alter administrative and regulatory processes, affect how legislation is interpreted and implemented, and take whatever action is permitted within the boundaries of their constitutional or statutory authority.¹

This research is supported by the Graduate School at the University of Wisconsin and by the National Science Foundation (SBR-9511444). The Gerald R. Ford Foundation and the Harry S. Truman Library Institute also provided support for research at the respective presidential libraries. I am grateful for advice from David Canon, Chuck Jones, John Kessel, Lyn Ragsdale, Bert Rockman, Mary Stuckey, and Stephen Wayne. Patrick Murphy provided his usual invaluable research assistance.

¹Presidents use a variety of tools to engage in “ordinance making” (Hart 1925, 17), “executive lawmaking” (Corwin 1948, 149), or “presidential legislation” (Fleishman and Aufses 1976, 5): the major classes are executive orders, proclamations, memoranda, administrative directives, determinations, and regulations. Of these, executive orders combine the highest levels of substance, discretion, and direct presidential involvement (Fleishman and Aufses 1976, 5).
The importance of executive orders can be inferred from even a few cases that had profound consequences:

- Establishment of the Executive Office of the President (Roosevelt, Executive Order 8248, September 8, 1939)
- Internment of Japanese-Americans during World War II (Roosevelt, Executive Order 9066, February 19, 1942)
- Integration of the armed forces (Truman, Executive Order 9981, July 26, 1948)
- Requirement that government contractors implement affirmative action policies in employment practices (Kennedy, Executive Order 10925, March 6, 1961; Johnson, Executive Order 11246, September 24, 1965)
- Requirement that major government regulations be justified by cost-benefit analysis (Reagan, Executive Order 12291, February 17, 1981)

A president can declare a national emergency by executive order, a step that authorizes a broad range of unilateral actions. Orders need not have such sweeping effect to be important, as actions that lack broad impact can still be extraordinarily important to particular interest groups or constituencies. Executive orders regularly provoke congressional hearings and studies, as legislators examine the appropriate limits of the president’s independent power (U.S. Congress 1948; 1957; 1974; 1982; 1995).

Executive orders even enter public discourse from time to time, and presidents use them as a symbol of their intention to act decisively. Two 1996 Republican presidential contenders promised to issue executive orders as their first presidential acts if they were elected: Senator Phil Gramm (R-TX), to end the policy of affirmative action in government contracting; Pat Buchanan, to reinstate previous bans on fetal tissue research and abortions at overseas medical facilities (Berke 1995, C10).

Research on Executive Orders and Formal Presidential Powers

Despite the importance of executive orders, only a handful of studies have considered their use and significance. With few exceptions (Cooper 1986; Fisher 1993; Krause and Cohen 1997), the existing political science literature is either descriptive (Schramm 1981; Shanley 1983) or addresses the consequences of particularly important orders (Cooper and West 1988; Morgan 1970). Similarly, the public administration literature “virtually ignores executive orders and proclamations” (Cooper 1986, 234). Questions about executive orders have proven far more interesting to legal scholars than to political scientists (Cash 1963; Cross 1988; Fleishman andAufses 1976; Jack 1986; Neighbors 1964; Rosenberg 1981; Sunstein 1981; Tauber 1982).

Although the legal literature is extensive, there are limits to what such investigations can tell us about broader patterns of presidential behavior. Most legal
studies address narrow questions surrounding the constitutional issues that executive orders often raise (Cooper 1986, 234); they typically do not tie executive orders to the theoretical issues that advance our substantive knowledge of the presidency, although there are important exceptions, including Sunstein (1981) and Fisher (1991). Edwards and Wayne (1994, 448) note that “the legal perspective, although it requires rigorous analysis, does not lend itself to explanation. . . . Although studies that adopt the legal perspective make important contributions to our understanding of American politics, they do not answer most of the questions that entice researchers to study the presidency.”

The legal scholarship, though, recognizes executive orders as an important instrument of presidential power: Shane and Bruff (1996, 131) argue that “presidents use executive orders to implement many of their most important policy initiatives, basing them on any combination of constitutional and statutory power that is thought to be available”; Fisher recognizes that “the President’s lawmaking role is substantial, persistent, and in many cases disturbing” (1993, 59).

In contrast, the political science literature portrays executive orders as useful only for routine and minor administrative tasks. Schramm concluded that executive orders “do not, as a rule, present public objectives or provide high level policy. . . . [T]he executive order is an administrative mechanism limited in its scope and possibilities” (1981, 155–61). Similarly, Light argued that executive orders “offer a very limited and temporary alternative for policy initiatives” (1991, 117). Peterson recognizes that presidents can often use their statutory authority to get at least part of what they want when Congress is uncooperative, but concludes that “the potential for unilateral action of this kind is limited” (1990, 88).

This neglect of executive orders, and the downplaying of their importance, is largely attributable to the tendency among scholars of the presidency to concentrate “on questions about the personalities, power, and leadership of specific presidents. . . . [T]o the extent that discussions of the office were offered, they were couched in the language of individual incumbents’ power and leadership” (Ragsdale 1996, 2). Studies of the president’s formal legal powers are less attractive to political scientists than studies informed by behavioral approaches, and are considered descriptive rather than analytic. While the presidency literature has not ignored institutional considerations, institutions and formal powers “were regarded as the framework within which presidential action took place—the backdrop to a far more exciting political drama” (Thomas and Pika 1996, 6). As a result, students of the presidency spend little time thinking about law, and students of law spend little time thinking about politics. “Too often,” notes Louis Fisher, “law and politics are viewed as isolated sectors of public policy” (1991, xii). The consequence is a literature that minimizes the connections between the president’s formal powers and broader explanations of presidential activity.
Politics, Formal Powers, and the Presidency

Executive orders have legal force only when they are based on the president's constitutional or statutory authority (Fisher 1991, 109). Yet, presidents take an expansive view of their own power when it suits them, and use executive orders to expand the boundaries of their authority. The courts typically stay out of the president's way, upholding executive orders even when the they are "of—at best—dubious constitutional authority . . . [or] issued without specific statutory authority" (Fleishman and Aufses 1976, 5). Between 1789 and 1956, state and federal courts overturned only 16 executive orders (Schubert 1957, 361–65); Youngstown Sheet and Tube v. Sawyer (343 U.S. 579, 1951), which overturned Truman's seizure of the nation's steel mills, is undoubtedly the most famous. More recently, the federal courts overturned a 1995 Clinton executive order barring federal contractors from hiring permanent replacements for striking workers, in Chamber of Commerce v. Reich (74 F. 3d 1322, 1996). This is the exception, though, and in practice presidents have wide latitude in issuing orders.

At the same time, however, presidential exercise of authority through executive orders depends on political and institutional context (King and Ragsdale 1988, 121–24). Presidents cannot (and do not) issue one order after another and expect immediate and unquestioned obedience. In deciding whether to issue substantive orders, even when their authority is clear, presidents consider how opponents might respond, the likely degree of compliance, and the costs and benefits of issuing an order as opposed to relying on some other strategy (such as legislation or litigation).

Executive orders thus provide an important window into presidential power: they are a unique hybrid, as they constitute a potential reservoir of independent authority, but one that presidents do not use without regard to circumstance or consequence. A better grasp of their use will reveal much about the strategic balance of power between Congress and the presidency, how presidents react to potential roadblocks to their agendas, and the importance of administrative procedures and organizational forces in the policy process.

Another Look at Executive Orders: Patterns of Usage, and Hypotheses

In figure 1, I plot the monthly frequency of executive orders issued since January 1936. Several features stand out: a sharp rise and subsequent drop-off in orders between 1939 and early 1943; a surge from 1945 to 1948 and another from 1951 to 1952. From there, the monthly series settles down in a roughly stationary pattern, with periodic spikes indicating high levels of presidential activity in some months.

The 1939–43 rise in order issuance stems from the administrative preparations for and conduct of the war effort, combined with the exercise of sweeping emergency powers delegated by Congress. Between July 1939 and June 1942 Roosevelt issued 286 executive orders related to the war (U.S. Office of War Information
1942). By using executive orders to create organizations within the Executive Office of the President, and by taking advantage of temporary emergency powers, Roosevelt was able to vastly expand the scope of independent presidential authority, and he exercised the powers in large part through executive orders.

The number of orders fell after 1942 when a change in civil service procedures eliminated the need for trivial personnel orders. By law, the president could, by executive order, exempt certain civil servants from mandatory retirement. The dramatic rise in the number of eligible employees prior to World War II required an increasing number of these orders, and the administrative costs became unmanageable. In March 1942 Roosevelt granted automatic exemptions to entire classes of government employees, and the number of such orders fell immediately. Order frequency increased in 1945, when Truman rescinded many wartime orders and managed the process of demobilization (U.S. Bureau of the Budget 1946, 491–501).

Orders rose once more during the Korean War as the president again had to manage the move to a wartime footing. The number of orders dropped to current levels when Eisenhower assumed office in 1953, with a modest acceleration under Kennedy (1961–63), and a consistent drop after 1981.

An event-count/time-series analysis confirms the substantive importance of executive orders. If executive orders are an important element of executive authority, then the way presidents use them should vary in predictable and
systematic ways as a function of a president’s overall political and strategic situation. If, on the other hand, executive orders are not used to make policy, then they should be issued independently of political context. The existing literature on executive orders has not reached a consensus about the factors behind their use. For example, while Gleiber and Shull (1992) and Fleishman and Auñés (1976) argued that presidents will rely more heavily on executive orders when they face opposition in Congress, Krause and Cohen (1997) concluded that legislative *success* prompts presidents to issue more orders. At the same time, both Krause and Cohen and Gleiber and Shull found that orders are inversely related to presidential partisan strength in Congress.

One way to resolve these uncertainties is to step back and consider executive orders as an indicator of executive flexibility and initiative in policymaking. This allows me to derive hypotheses by drawing not only upon the existing literature on executive orders, but also on the insights of recent work on the presidency that argues that what presidents seek is control over institutions and processes (Moe 1993). I suggest that executive orders will vary according to the following general conditions.

**Presidential Party**

If orders are a useful policy tool, then presidents with a more active view of executive power should be more likely to use them than presidents less inclined to aggressively pursue a policy agenda. While political party is not a perfect proxy for activism, Democratic presidents have historically been more inclined to favor expansive government policies than Republican presidents, and so presumably would be more likely to issue orders for substantive policy purposes. Kennedy established the Peace Corps by executive order, and FDR began the practice of using orders to promulgate civil rights policy emphasized by successive Democratic presidents (although Eisenhower and Nixon did so as well). Even though Republicans took a more sympathetic view of a strong executive during the Reagan and Bush years, this was based more on their view that Congress had encroached on proper executive branch powers, especially in foreign affairs (Olson 1989); it did not reflect anything approaching an activist governing philosophy in the traditional sense. Although Gleiber and Shull (1992, 453) suspected that liberal presidents would issue more orders than conservative presidents, they found only a very weak relationship. They argued that since all presidents need to use executive orders to implement legislation and achieve other necessary goals, their use “may be more uniform across presidents.”

So the first expectation about the frequency of orders is that *Democratic presidents will issue more executive orders than Republican presidents.*

**Beginning- and End-of-Term Effects**

Presidents, when they take office, usually try to place their immediate stamp on executive branch processes and policies. Executive orders are an excellent
way to do this, since they allow presidents to alter organizational relationships and administrative routines. Despite Krause and Cohen’s (1997) conclusion that there is no pattern to executive order frequency over a president’s term, presidents have issued numerous significant orders early in their administrations. Clear examples of this practice are Reagan’s Executive Order 12291, which he issued three weeks into his first term, and Clinton’s Executive Order 12836, issued in his second week, revoking two Bush-era orders that were unpopular with labor unions (Novak 1992, 2764). The incentive to make changes will be greater when party control of the White House has changed, as incoming presidents distinguish themselves from their predecessors and “hit the ground running” (see Pﬁffner 1996 on presidential transitions generally).

If presidents use executive orders at the beginning of their terms, they may well do the same at the end, to put a legacy in place. Outgoing presidents can use executive orders to obligate their successors by making appointments, establishing new departmental rules, and carrying out implementation tasks. The new president could reverse course, but this would entail issuing new executive orders that revoked the earlier ones (which is yet another reason to suspect a beginning-of-term effect). Again, this pattern should be especially marked when a president is leaving office to a successor of the opposite party, because it is then that the pressure to complete action is highest.

Even a cursory investigation uncovers a robust pattern of last-minute orders issued on a president’s final days in office. During the last few months of the Ford administration, the White House processed executive orders without going through the normal review channels. Normally, executive orders must be cleared through both OMB and the Office of Legal Counsel in the Department of Justice. Yet, this process was skipped for a number of orders that administration officials wanted to issue prior to January 20, 1977. Ford, who issued seven orders his last full day in office, reflected a pattern that was far from unique. Carter issued 22 orders in his last week, and 10 on his last day.

Carter’s final orders highlight the unilateral authority they can reflect. All 10 of the orders Carter issued on January 19, 1981, addressed the agreement with Iran to secure the release of the American hostages held there since November 4, 1979. Negotiations had continued throughout the campaign and into the transition period with little support from the incoming administration. On his last full day in office, Carter announced that the Iranian government had agreed to release the hostages in return for the release of Iranian assets frozen in the United States, and the establishment of an arbitration process to settle private claims against Iran. Legal scholars speculated that any agreement that had such a sweeping impact on private interests would require legislation to carry out, but Carter implemented the agreement relying wholly on the executive power.

The records of Ford’s Domestic Council, for example, contain numerous examples of orders that were pushed through under substantial time pressure at the end of his term, without the standard reviews (Folder, Domestic Council Files, 1/18–19/77, Box 72, Robert T. Hartmann Files 1974–1977, Gerald R. Ford Library).
(Whittle 1981, 166). Carter’s authority to unilaterally make and carry out the executive agreement with Iran and issue the implementing executive orders was upheld by the Supreme Court in *Dames & Moore v. Regan* (453 U.S. 654) (Taubner 1982).

Carter issued these last-minute orders as a lame-duck president who had been humiliated in a landslide defeat. Even so, he was able to write the final chapter of “one of the most dramatic exercises of presidential power in foreign affairs in peacetime in United States history” (Koh 1990, 122), with no interference from Congress, the courts, or even the new president.

A second set of expectations about executive orders is that presidents will issue orders more frequently at the beginning and end of their terms, especially when party control of the White House has switched or will switch.

**Congressional and Public Support**

Since executive orders are a unilateral presidential tool, presidents might use them to compensate for congressional opposition. Fleishman and Aufses (1976, 6) argued that “in some cases executive orders are as much a reflection of presidential weakness, as of presidential strength. In other words, Presidents may decide to legislate by executive order when they have failed to move desired bills through Congress.” This theme arises from histories of the civil rights orders, which maintained that Democratic presidents used executive orders because they knew that Congress would refuse to pass legislation (Morgan 1970). Presidents may also use executive orders to preempt legislation or undercut Congress in other ways. When faced with the certain prospect of legislation imposing sanctions on South Africa in 1985, President Reagan successfully fractured a veto-proof coalition of Democrats and moderate Republicans by imposing weaker sanctions by executive order. In doing so, he “managed to avoid a major legislative defeat and the further embarrassment of an almost inevitable veto override” (Bond and Fleisher 1990, 67), although Congress overrode Reagan’s veto of sanction legislation the following year. Presidents have restructured the intelligence community through executive orders, in part to undermine congressional efforts to reorganize the community via statute (Smist 1994, 79).

For the same reasons, presidents who have low levels of public approval may be more likely to resort to executive orders. Doing so offers a way of getting around other institutional actors who might be emboldened in their opposition to what they perceive as a weak White House, and also provides presidents with a method of position taking, framing policy questions, or delivering on promises made to key constituencies.

The existing literature provides inconclusive support for these expectations. As noted above, researchers have reached contradictory results on the relationship between congressional support and executive order frequency. Krause and Cohen (1997) find no statistically significant relationship between popularity and
order frequency, although the regression coefficient has the expected sign. On the other hand, Cooper (1986, 235) argued that presidents are likely to use executive orders "as instruments of expediency to circumvent administrative law," behavior that would be consistent with a tendency to rely on orders to compensate for a lack of public and congressional support.

The final set of expectations about executive orders is that presidents will tend to issue more when (a) they lack strong support in Congress, and (b) when they experience low levels of popular support.

The Data and Model

The data for analysis are monthly totals of executive orders issued from April 1936 to December 1995. Monthly data on the number of executive orders from 1936 to 1987 are from the Congressional Information Service (1987). Data from 1988 to 1994 are from the annual index of the Federal Register, and 1995 data are from the Weekly Compilation of Presidential Documents. I omitted orders that exempted individuals from mandatory retirement or orders that addressed a specific tract of public land area. Mandatory retirement orders were identified by inspection, and public lands orders from an annual codification in the Register.

Since the number of executive orders issued in any month can only take non-negative integer values, with an average of 6.2 per month between 1937 and 1995, an event-count model is the appropriate method of analyzing the series. I expect the event-count series to be overdispersed, because each event (the occurrence of one executive order) increases the probability of observing another event in any given time period: executive orders are commonly issued in groups, external events that spur order issuance may well be responsible for multiple orders, and presidents often revise specific orders several times by issuing additional orders. Consequently, I use a negative binomial event-count model (King 1989).

The negative binomial model used here incorporates the formula in Greene (1997, 939–40), whose parameterization includes a dispersion parameter \( \alpha \), in addition to the coefficient vector \( \exp (x \beta) \), to account for the positive contagion in the order sequence. The dispersion parameter is assumed to be \( \alpha > 0 \). In the Poisson model, which requires independence between the individual events, \( \alpha = 0 \). Poisson processes are thus a special case of the negative binomial where the dispersion parameter is 0, a result which permits checking the validity of the negative binomial specification using a likelihood ratio test (as a double-check of the estimated values of \( \alpha = 0.04 \) in the tables).\(^3\) The test statistic is shown in the

\(^3\) The test statistic is \( \lambda_{LR} = 2(L - L^*) \), with a \( \chi^2 (1) \) distribution. \( L \) is the log-likelihood of the negative binomial estimation, and \( L^* \) the log likelihood of the same model estimated as a Poisson process—the equivalent of estimating the negative binomial model with the constraint \( \alpha = 0 \) (see Judge et al. 1985, 216–17).
tables as the “LR Test against Poisson,” and clearly indicates that the negative binomial specification (indicating positive contagion) is correct. King (1989) offers a detailed description of the negative binomial model, although his parameterization differs slightly from Greene’s.

The coefficient vector in the negative binomial model is

\[ \mu_i = \exp (x_i \beta) \]

where the dependent variable is Orders \(_i\) and

\[ x_i \beta = b_0 + b_1 \text{Orders}_{t-1} + b_2 \text{Orders}_{t-3} + b_3 \text{Orders}_{t-12} + b_4 \text{Party Change} \]

\[ \text{First Year} \]

\[ \text{Last Month} \]

\[ \text{Last Month} \]

\[ + b_5 \text{No Party Change} + b_6 \text{Party Change} + b_7 \text{No Party Change} + b_8 \text{Campaign} \]

\[ \text{Truman} \]

\[ \text{Truman} \]

\[ \text{Eisenhower} \]

\[ + b_9 \text{No Campaign} + b_{10} \text{Unified Govt.} + b_{11} \text{Divided Govt.} + b_{12} \text{Unified Govt.} \]

\[ \text{Eisenhower} \]

\[ \text{Clinton} \]

\[ \text{Clinton} \]

\[ + b_{13} \text{Divided Govt.} + b_{14} \text{Unified Govt.} + b_{15} \text{Divided Govt.} + b_{16} \text{FDR} \]

\[ b_{17} \text{JFK} + b_{18} \text{LBJ} + b_{19} \text{Ford} + b_{20} \text{Carter} + b_{21} \text{Reagan} + b_{22} \text{Bush} \]

\[ \text{Presidential} \]

\[ + b_{23} \text{Popularity} + \sum_{i=0}^{23} w_i^a X_{t-i}^a + \sum_{i=0}^{23} w_i^b X_{t-i}^b + \sum_{i=0}^{23} w_i^c X_{t-i}^c + \sum_{i=0}^{23} w_i^d X_{t-i}^d \]

Where

Orders \(_t\) = the number of executive orders issued in month \(_t\) from April 1936 to December 1995, excluding public lands orders and orders exempting individuals from civil service rules

Orders\(_{t-1}\); Orders\(_{t-3}\); Orders\(_{t-12}\) = lagged values of the dependent variable, with lags of 1, 3, and 12 months

First Year Party Change = 1 during the first year of a new administration, when party control has changed from previous administration; 0 otherwise

First Year No Party Change = 1 during the first year of a new administration when party control has not changed from previous administration; 0 otherwise

Last Month Party Change = 1 during last month of outgoing president’s term, when the incoming president is from the other party; 0 otherwise
Last Month No Party Change
= 1 during last month of outgoing president’s term, when incoming president is from same party; 0 otherwise

Campaign
= 1 in January–October of presidential election year, when incumbent president is running for reelection; 0 otherwise

No Campaign
= 1 in January–October of presidential election year, when incumbent president is not running for reelection; 0 otherwise

FDR, JFK, LBJ, Ford, Carter, Reagan, Bush
= 1 during each president’s administration, respectively; 0 otherwise

Truman Unified Govt.
Eisenhower Unified Govt.
Clinton Unified Govt.
= 1 during periods of each administration when president’s party controlled Congress (unified government); 0 otherwise

Truman Divided Govt.
Eisenhower Divided Govt.
Clinton Divided Govt.
= 1 during periods of each administration when opposition party controlled Congress (divided government); 0 otherwise

Presidential Popularity
= 6-month moving average of presidential approval rating, as measured by the Gallup Poll, beginning in January 1949. Monthly presidential popularity ratings for 1949–1994 were taken from Ragsdale 1996, table 5-3, using interpolation to calculate missing values when no poll was conducted in a given month, and averages when a month included multiple polls. 1995 ratings were taken from the Gallup Poll Monthly. The 6-month moving average calculation does not carry over from one president to the next; values for the first 5 months of a new president’s administration were calculated using the formula:

\[
Moving\ Average_j = \frac{\sum_{i=1}^{j} Popularity_i}{j}, \quad j = 1, \ldots, 5
\]

\(X^a, X^b, X^c, X^d\)
= intervention effects (see below)

\(w^a, w^b, w^c, w^d\)
= weights for the lagged values of \(X^a, X^b, X^c, \) and \(X^d\), respectively
I used the `nbreg` command in Intercooled STATA 4.0 to derive the coefficient estimates.

**Estimating Intervention Effects**

The last four terms of \( \mu_i \) (the terms with the \( X \)'s and \( w \)'s) constitute an Almon polynomial distributed lag estimation of the impact of four discrete events that had strong effects on the number of orders issued. These events are (1) the German invasion of Poland in September 1939, which led Roosevelt to declare a limited state of emergency and begin preparations for war; (2) the Japanese attack on Pearl Harbor in December 1941; (3) the German surrender in May 1945, which accelerated the demobilization process; and (4) the start of the Korean War in June 1950. Each of these events had an immediate and large effect on order issuance, with the impact trailing off over approximately the following two years. As I argue above, presidents often react to crises by utilizing delegated emergency powers, consolidating their administrative authority, and implementing extraordinary measures. Executive orders have historically been a key mechanism for this activity, and presidents issued unusually large numbers of orders in the buildup to World War II, postwar demobilization, and in the early stages of the Korean War. Since these events have little to do with politics per se, failure to account for them could result in seriously flawed coefficient estimates.

Each intervention effect is coded as 1 in the month of the shock, with the assumption that the effect of the shock dissipated over a two-year period. In estimating the effect the external shocks had on the number of orders, I assume that presidents reacted swiftly to each by immediately issuing executive orders, and that the effect of the shock wore off slowly over a two-year, or 24-month, period. I estimated the lag weights using an Almon lag, which approximates the true lag structure by fitting a polynomial curve to the data (Judge et al. 1985, 356–63). Choosing a two-year lag structure was admittedly arbitrary, but it presents a reasonable fit with the plotted data, and in any case the estimates for the substantive variables were unchanged by using different lag structures. Moreover, the lag structures for the interventions are substantively unimportant on their own; the critical thing is to control for their effects so that they do not contaminate the other variables in the event-count model.

Because the \( X \) variables are modeled as dummy variables that take the value 1 at a single time only, the weight structure becomes simple; the 96 coefficients in the lagged variables can be expressed with only 10 variables as follows:

\[
\sum_{i=0}^{23} w_i^a X_{i-1}^a = a_0 + a_1 i + a_2 i^2 \\
\sum_{i=0}^{23} w_i^b X_{i-1}^b = b_0 + b_1 i + b_2 i^2 \\
\sum_{i=0}^{23} w_i^c X_{i-1}^c = c_0 + c_1 i \\
\sum_{i=0}^{23} w_i^d X_{i-1}^d = d_0 + d_1 i
\]

where the \( X \)'s and \( i \)'s = 0 for all periods that are not part of the two-year lag following each intervention. For each set of coefficients, the variable \( i \) is the
number of lags between the intervention and the current period. I incorporated into the model new variables based on the right-hand-side expression.\textsuperscript{4}

**Results**

The results of the estimation procedure for the entire series appear in table 1. The negative binomial specification is correct according to a likelihood ratio test of the negative binomial model compared with the alternative and more restrictive Poisson specification.

The coefficients for the entire series, 1936–95, are shown in column 1 in table 1. The estimates show unambiguously that the frequency of executive orders varies with the president’s political environment. Different presidents issued orders at significantly different rates, with Republicans typically less likely to issue orders than Democrats; \textit{Nixon} is the omitted variable, so the other presidents are placed relative to his administration. The coefficients for the Reagan (−0.228) and Bush (−0.328) administrations are large and in the expected negative direction, and the coefficients for all Democratic presidents except Clinton are positive, although only the coefficient for the Kennedy administration, \textit{JFK}, (0.268) shows a significant relationship. In event-count models the effect of an independent variable with coefficient $\beta$ is $\beta \theta$, where $\theta$ is equal to the expected value of the dependent variable (King 1988, 857). Between 1936 and 1995, presidents issued an average of 6.2 executive orders per month; setting $\theta$ to this value produces an estimate of $6.2 \times -0.228 = 1.4$ fewer orders per month for Reagan and 2.1 fewer for Bush, or about 17 fewer orders annually for Reagan, 25 fewer for Bush.

Although the start of a new president’s term has no demonstrable effect on the number of orders issued (the coefficient does, however, have the expected positive sign), the end-of-term effects are dramatic: presidents who are leaving the office to successors of the opposition party issue nearly six additional orders ($6.2 \times 0.931 = 5.77$) in the last month of their term, nearly double the average level. This is the largest effect in the model except for the intervention coefficients corresponding to the beginning and end of World War II. There is no corresponding increase in order frequency when presidential turnover does not involve a shift in party control. This is persuasive evidence that executive orders have a strong policy component, as otherwise presidents would have little reason to issue such last-minute orders.

Presidents who are campaigning for reelection issue more orders than they would otherwise; although the coefficient for the campaign effect is insignificant, in election years where the president is not running for reelection the frequency

\textsuperscript{4}I chose the order of the polynomial based on the minimum degree that produced statistically significant results. Because each variable took nonzero values only for the hypothesized 24 periods of the intervention and lagged effects, multicollinearity was a severe problem. The correlation between $a_0$ and $a_1$, $b_0$ and $b_1$, etc., was .87; between the first- and second-order variables it was .97.
**TABLE 1**

**Event-Count Results—Dependent Variable Orders,**

<table>
<thead>
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<tbody>
<tr>
<td>Orders,一体</td>
<td>-.0085*</td>
<td>-.0068</td>
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<td></td>
<td>(.0048)</td>
<td>(.0076)</td>
</tr>
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<td></td>
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<td>.0128*</td>
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<td></td>
<td>(.0047)</td>
<td>(.0076)</td>
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<td>F. Roosevelt</td>
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<td></td>
<td>(.1404)</td>
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<tr>
<td>Truman</td>
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<td>-.0333</td>
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<td></td>
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<td>(.1222)</td>
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<td>Truman Unified Govt.</td>
<td>.0119</td>
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<td>(.1108)</td>
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<tr>
<td>Truman Divided Govt.</td>
<td>.0933</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(.1468)</td>
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<tr>
<td>Eisenhower Unified Govt.</td>
<td>.2529***</td>
<td>.2519**</td>
</tr>
<tr>
<td></td>
<td>(.1156)</td>
<td>(.1187)</td>
</tr>
<tr>
<td>Eisenhower Divided Govt.</td>
<td>-.1310</td>
<td>-.1406</td>
</tr>
<tr>
<td></td>
<td>(.0944)</td>
<td>(.1187)</td>
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<tr>
<td>Kennedy</td>
<td>.2681**</td>
<td>.2653**</td>
</tr>
<tr>
<td></td>
<td>(.1075)</td>
<td>(.1116)</td>
</tr>
<tr>
<td>Johnson</td>
<td>.0287</td>
<td>.0170</td>
</tr>
<tr>
<td></td>
<td>(.0902)</td>
<td>(.0912)</td>
</tr>
<tr>
<td>Ford</td>
<td>-.0110</td>
<td>-.0216</td>
</tr>
<tr>
<td></td>
<td>(.1147)</td>
<td>(.1169)</td>
</tr>
<tr>
<td>Carter</td>
<td>.1650*</td>
<td>.1767**</td>
</tr>
<tr>
<td></td>
<td>(.0838)</td>
<td>(.0897)</td>
</tr>
<tr>
<td>Reagan</td>
<td>-.2279***</td>
<td>-.2338***</td>
</tr>
<tr>
<td></td>
<td>(.0818)</td>
<td>(.0825)</td>
</tr>
<tr>
<td>Bush</td>
<td>-.3279***</td>
<td>-.3503***</td>
</tr>
<tr>
<td></td>
<td>(.1069)</td>
<td>(.1091)</td>
</tr>
<tr>
<td>Clinton Unified Govt.</td>
<td>-.0985</td>
<td>-.1028</td>
</tr>
<tr>
<td></td>
<td>(.1232)</td>
<td>(.1243)</td>
</tr>
<tr>
<td>Clinton Divided Govt.</td>
<td>-.4630***</td>
<td>-.4748***</td>
</tr>
<tr>
<td></td>
<td>(.1796)</td>
<td>(.1809)</td>
</tr>
<tr>
<td>1st year, party change</td>
<td>.0481</td>
<td>.0413</td>
</tr>
<tr>
<td></td>
<td>(.0723)</td>
<td>(.0743)</td>
</tr>
<tr>
<td>1st year, no party change</td>
<td>-.0496</td>
<td>-.0039</td>
</tr>
<tr>
<td></td>
<td>(.1005)</td>
<td>(.1067)</td>
</tr>
<tr>
<td>Last month of term, party change</td>
<td>.9306***</td>
<td>.9279***</td>
</tr>
<tr>
<td></td>
<td>(.1441)</td>
<td>(.1468)</td>
</tr>
<tr>
<td>Last month of term, no party change</td>
<td>.2732</td>
<td>.2437</td>
</tr>
<tr>
<td></td>
<td>(.4932)</td>
<td>(.4962)</td>
</tr>
<tr>
<td>Campaign</td>
<td>-.0575</td>
<td>-.1022</td>
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<tr>
<td></td>
<td>(.0642)</td>
<td>(.0703)</td>
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### TABLE 1 continued

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<thead>
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<th>Independent Variable</th>
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<th>(2)</th>
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<tr>
<td>No campaign</td>
<td>−.2325**</td>
<td>−.2349**</td>
</tr>
<tr>
<td></td>
<td>(.1108)</td>
<td>(.1116)</td>
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<tr>
<td>Presidential approval rating</td>
<td>−.0057***</td>
<td>−.0054**</td>
</tr>
<tr>
<td></td>
<td>(.0022)</td>
<td>(.0026)</td>
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*Almon Polynomial Lag Coefficients*

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<thead>
<tr>
<th>Coefficient</th>
<th>Value</th>
<th>Value</th>
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<tr>
<td>$a_0$</td>
<td>.5491**</td>
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</tr>
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<td></td>
<td>(.2290)</td>
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<tr>
<td>$a_1$</td>
<td>−.0281</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(.0397)</td>
<td></td>
</tr>
<tr>
<td>$a_2$</td>
<td>.0029</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(.0015)</td>
<td></td>
</tr>
<tr>
<td>$b_0$</td>
<td>1.3598***</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(.2217)</td>
<td></td>
</tr>
<tr>
<td>$b_1$</td>
<td>−.1299***</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(.0409)</td>
<td></td>
</tr>
<tr>
<td>$b_2$</td>
<td>.0029*</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(.0017)</td>
<td></td>
</tr>
<tr>
<td>$c_0$</td>
<td>1.0341***</td>
<td>.6836***</td>
</tr>
<tr>
<td></td>
<td>(.2525)</td>
<td>(.1977)</td>
</tr>
<tr>
<td>$c_1$</td>
<td>−.0467***</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(.0130)</td>
<td></td>
</tr>
<tr>
<td>$d_0$</td>
<td>.6330***</td>
<td>.6836***</td>
</tr>
<tr>
<td></td>
<td>(.1879)</td>
<td>(.1977)</td>
</tr>
<tr>
<td>$d_1$</td>
<td>−.0238**</td>
<td>−.0213*</td>
</tr>
<tr>
<td></td>
<td>(.0121)</td>
<td>(.0123)</td>
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| Constant    | 1.8722      | 1.8931      |
| Log likelihood | −1668.1     | −1266.6     |
| Observations | 708         | 560         |
| Pseudo-$R^2$ | .128        | .058        |
| est. $\alpha$ | 0.04        | 0.04        |
| LR test against Poisson | $\chi^2(1) = 21.78$ | $\chi^2(1) = 11.67$ |
|             | $p < 0.001$ | $p < 0.001$ |

Standard errors in parentheses

* $p < 0.1$; ** $p < 0.005$; *** $p < 0.01$

Of orders drops. In comparison, then, presidents issue more orders in the last year of their term when they are campaigning than they do when they are not campaigning: approximately 1.4 per month, or 14 over the course of the January–October election-year period. This fits well with the notion that executive orders allow presidents to shape the public agenda and maintain ties with important constituencies during campaigns.
Presidential popularity has a large and significant effect on the frequency of orders. As presidents become less popular they tend to issue more orders, a result consistent with the hypothesis that executive orders provide a way for presidents to act on their own without relying on other institutions or actors. Again, using the 6.2 monthly average for the complete series, each 10-point drop in a president's 6-month moving average popularity rating results in approximately one additional order every three months, or four per year; a 30-point drop spurs one additional order per month. Monthly popularity ratings, in contrast to the 6-month moving average, had no effect on order frequency, indicating that presidents respond more to sustained changes in popularity rather than to short-term variation. Presidents use executive orders as a compensatory strategy to make policy decisions when their public standing declines.

To insure that the popularity effects are not an anomaly due to the measurement beginning in 1949 (since the popularity variable is set to 0 before then), I reestimated the model for the January 1949–December 1995 period. The results, shown in column 2 of table 1, confirm that the relationships are robust: all of the coefficients that had a statistically significant impact over the complete series had a comparable effect in the truncated series; in fact, several became larger. Not only is the effect of popularity not an artifact, but the other relationships in the model cannot be attributed to the extraordinary impact of World War II.

Estimating the impact of divided government produces a surprising result. Simply testing for differences between presidents under divided and unified government is no different than testing for differences between Democratic and Republican presidents because of the consistent Democratic control of Congress: between 1936 and 1995, Democratic presidents enjoyed unified control 29 years out of the 30 they served; Republicans, by contrast, faced divided government 25 of 27 years.

Instead, I look for differences among those presidents who faced both divided and unified government during their terms. For Truman, divided government had no impact on the number of orders he issued; both coefficients are small, the same sign, and indistinguishable from zero. Both Clinton and Eisenhower, however, issued more executive orders when they had majorities in Congress, in contrast to what the conventional wisdom predicted. Working with the coefficients from column 1 in table 1, Eisenhower issued more than 1.5 more orders per month (6.2 × .253) when the Republicans controlled Congress in 1953 and 1954, compared to the remainder of his terms when the Democrats had majorities in both chambers. For Clinton, the relationship is even stronger: nearly three fewer orders per month after the Republican 1994 midterm sweep. This is a particularly intriguing result, since in the wake of the 1994 elections Clinton White House officials predicted a renewed emphasis on “regulations, executive orders, and other presidential tools to work around Capitol Hill, much as Ronald Reagan and George Bush did when the House and the Senate were in Democratic hands” (Jehl 1994).
The conflicting effects of popularity and divided government present something of a puzzle. If, as I hypothesize, presidents use executive orders to compensate for political weakness in other areas, why does low popularity stimulate more orders while weakness in Congress does not?

One possibility is that the dynamic between the presidency and Congress is too complex to be fully accounted for by a simple relationship between party differences and institutional collisions. Split party control may make bipartisanship more difficult, but does not make it impossible, as Mayhew (1991) noted in his argument that divided government does not hinder significant lawmaking activity (although see Edwards, Barrett, and Peake 1997 for an alternate interpretation). Jones (1994, 212) found numerous examples of legislative activity where the president retained the initiative on legislative proposals under divided government, either because the issues in question were deemed too important to be left to partisan wrangling, or because opposition was suppressed by the belief that the president had a mandate. Obviously partisanship plays a role, but Jones concludes that “when it comes to making laws in Washington, it is never done solely in the White House, it is sometimes done largely on Capitol Hill, and it is normally done with a substantial amount of cross-institutional and cross-partisan interaction through elaborate sequences featuring varying degrees of iteration” (1994, 273).

Unified government, in any case, does not eliminate the role executive orders play in presidential–congressional disputes (and Jimmy Carter demonstrated that even party majorities on the Hill do not always count for much). Clinton’s early experience with his campaign promise to issue an executive order ending the military’s ban on gay and lesbian service members is a telling example. There was no question that Clinton had the necessary authority to issue the order ending the ban immediately, because it was and remains a matter of internal Department of Defense policy and thus under the president’s direct control (Spoeri 1994). Nevertheless, Clinton backed down in the face of congressional and military resistance. The White House worried that issuing the order would further undermine Clinton’s already tenuous relationship with the military services, and provoke Congress into enshrining the ban in statute (Towell 1993). President Kennedy faced the same sorts of questions about his 1960 campaign promise to issue an executive order banning discrimination in federal housing programs. Because of concern that the order would alienate key southern legislators, it was delayed several times, and finally quietly issued in November 1962 (Schlesinger 1965, 482; see also Morgan 1970, 70).

The polynomial and lag specifications proved to be reasonable approximations of the actual series behavior. Using the estimates for the effect of World War II, or the β coefficients from column 1, the immediate estimated impact of Pearl Harbor on executive order issuance was \([1.36 - 0.13 + (0.003)^2] \times 6.2 = 7.6\) additional executive orders per month (again, using the formula \(\beta \theta\), with \(\theta\) set to the mean value of orders over the entire series, 6.2; \(\beta\) is the coefficient estimate,
1.23 in this case). However, the number of executive orders issued in the months leading up to December 1941 was decidedly higher than the overall average of 6.2 orders per month: over the two years prior to Pearl Harbor, Roosevelt had issued an average of nearly 15 executive orders per month. Although $\theta$ is normally set to the overall average of the dependent variable, it is also appropriate to set it at different levels if we have a prior belief that the expected value will be higher at some times than others; the same coefficient $\beta$ will have different effects depending on the starting point of the dependent variable (King 1988, 857). If I make the reasonable assumption that, other things being equal, the expected number of orders in December 1941 would have been 15, I estimate that Pearl Harbor and the U.S. entry into World War II is then responsible for $15 \times 1.23 = 18.45$ additional orders that month, a figure close to the actual increase from 15 to 35 between November and December 1941.

The analysis confirms some prior expectations about executive orders: Democratic presidents issue more than Republican presidents; presidents issue more at the end of their terms, when they are running for reelection, and when they lag in public opinion polls. Presidents turn to executive orders as a governing and policy tool when they need administrative flexibility and agenda control. Surprisingly, divided government has the opposite of the anticipated effect, as presidents issued more when they had congressional majorities, and fewer when the opposition party was in control.

**Conclusion**

Executive orders are important to presidents, and their use reflects much more than simple administrative routines or random noise. Presidents use them to make substantive policy, exercise emergency powers, strengthen their control over executive branch agencies and administrative processes, emphasize important symbolic stances, and maintain their electoral and governing coalitions. Their use varies in predictable ways in accordance with substantive changes in political context.

The president's power to make policy through executive orders has grown along with, and has reinforced, the expansion of executive branch responsibilities. Some of this authority has been delegated to the president by Congress, but presidents have also simply assumed unilateral policymaking powers, especially in national security and foreign policy matters (Koh 1990; Fisher 1995). The expansion of the executive branch and the institutionalization of the presidency has provided the president with increased power over policy implementation and administrative procedures. One proponent of this "Administrative Presidency" thesis is Moe (1985, 1993, 1995; see also Nathan 1983; Durant 1992), who argues that presidents have a substantial reservoir of authority that allows them to make many substantive decisions on their own. Even within the narrower confines of their executive authority, presidents can make significant policy choices.
“They can organize and direct the presidency as they see fit, create public agencies, reorganize them, move them around, coordinate them, impose rules on their behavior, put their own people in top positions, and otherwise place their structural stamp on the executive branch” (Moe 1993, 366).

In this formulation, discretionary executive power is akin to residual decision rights, which in the private sector “are rights an actor may possess under a contract or governing arrangement that allow him to take unilateral action at his own discretion when the formal agreement is ambiguous or silent about precisely what behaviors are required” (Moe and Wilson 1994, 14). Fleishman and Aufses note that “it is in this ‘zone of twilight’ that presidents will be most tempted to make policy through an executive order. As [Justice] Jackson observed, ‘. . . congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility’” (1976, 24, citing Jackson’s concurring opinion in Youngstown [343 U.S. at 637]).

Studies of presidential power should include a broader understanding of the president’s formal powers. The notion that studying the president’s constitutional authority will not produce useful or interesting findings is shortsighted, and it obscures important elements of the institution. A president’s willingness to exercise that authority is conditioned on broader strategic considerations, to be sure, but that does not diminish the powers available. Even within the constitutional constraints of the separation of powers, presidents can use executive orders to alter and adapt government structure, processes, and policies. A president’s ability to effect major policy change on his own is in many instances less dependent on personality or powers of persuasion than on the office’s formal authority and the inherent characteristics of governing institutions.

Manuscript submitted 16 May 1997
Final manuscript received 21 October 1997

References


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