Reexamining the Use of Unilateral Orders: Source of Authority and the Power to Act Alone

Jeremy D. Bailey

Associate Professor

Department of Political Science
University of Houston

Brandon Rottinghaus

Associate Professor

Department of Political Science

University of Houston

**Abstract**

Recent debate on the use of unilateral presidential directives suggests that a president’s ability to shape and act without the consent of Congress is largely unchecked by traditional institutional arrangements while others suggest presidents are more likely to be restrained by Congress. This article contributes to this debate by examining the source of authority used in unilateral orders. Because many unilateral powers are justified under either Congressional or presidential authority, there should be variation in when these orders are used. Using a new database of unilateral orders and a new theory, we reexamine when presidents use unilateral orders. We find that orders that invoke Congressionally-based sources of authority are used when Congress is stronger while those that are presidency-based are used when Congress is weaker. These findings allow us to be more precise about how presidential unilateral strategy is shaped by institutional forces.

 On March 24, 2010, Barack Obama issued Executive Order 13535, which applied the Hyde Amendment’s longstanding restriction on federal funds used for abortions to the policy executed under the Patient Protection and Affordable Care Act of 2010. Although issued unilaterally from the White House, this was not unilateral policymaking by the stroke of a pen. Rather, following the legislative debate on health care in the House, this order was part of a deal worked out with pro-life Democrats led by Michigan Representative Bart Stupak. The issuance of this executive order demonstrates the ability of the president to act decisively and cut through the collective action problem in Congress, but it also was just one step among many in a larger negotiation involving Congress and the President. In the text of his order, President Obama explicitly relied on congressional authority as justification for action, and, in the accompanying White House statement, Obama thanked “leaders on both sides of this issue to craft a consensus approach that allows the bill to move forward” (Malcolm 2010).

PresidentObama’s executive order about health care points to an underlying tension in the study of presidential power. On the one hand, Richard Neustadt argued that presidents have limited power and are “dependent on consent from other sharers” in government, specifically Congress (1990, x). Because the president “needs them” he must “bargain” with them, “buttressing his share with his resources in their eyes of personal reputation and of public standing” (Neustadt 1990, x). For Neustadt, presidential power was the power to persuade, and presidents do not “obtain results by giving orders” since having formal power is no guarantee of success (11). He described unilateral use of power as a “painful last resort” to be used expediently only after bargaining has failed (24). On the other hand, more recent interpretations of presidential use of power suggest that presidents are strategic actors who issue unilateral orders to bypass Congress (Neighbors 1964; Morgan 1970; Nathan 1983; Peterson 1990; Martin 1999). Challenging Neustadt’s conceptualization of presidential power, several scholars confront Neustadt’s view of a “weak” president which they argue is at odds with the formal powers presidents exercise when engaging in unilateral action (Howell 2003; Mayer 2009; Waterman 2009). Unilateral orders allow presidents to act alone in an “efficient and alternative manner” compared to the legislative process (Krause and Cohen 1997,462; Deering and Maltzman 1999). The institutional dynamic between Congress and the president encourages the president to pursue a unilateral strategyup to a point where Congress resists (Sala 1998; Mayer 2001; Howell 2005, 422). This scholarship has found that presidential use of unilateral actions is strategically useful for presidents faced with a political environment that forces them to share political powers (Moe and Howell 1999a; Mayer 2001; Howell 2003; Howell 2005; Krutz and Peake 2009). The unilateral president is strategically distinct from Neustadt’s “bargaining” president.

 But there are further challenges to explaining how presidents act with unilateral orders vis-à-vis the institutional dynamic in Congress. One challenge is the fact that, in practice, most unilateral orders are not wholly unilateral; instead the president draws on a shared (or mandated) source of authority to justify his “unilateral” actions (Warber 2006). All unilateral actions are subject to posthumous review by the other two branches, and some orders are subject to prior policy restraint since Congress initially limits the policy action that presidents can undertake (Shull 1997, 98). The relationship in this context, then, suggests that interbranch bargaining could be a part of the process of unilateral action. Another challenge is reflected in the diversity of the theoretical explanations and findings with respect to Congress. Some scholars argue that presidents should pursue evasive strategies in terms of their dealings with the legislature, where presidents should be more likely to issue orders when government is divided (Mayer 2001) or when the ideological distance between Congress and the president is greater (Deering and Maltzman 1999). Others suggest that the size of the majority party in Congress is the key variable (Howell 2003) rather than the ideological divisions between the Congress and the president (see Fine and Warber 2012).

These divergent results and continued debate provide an opportunity to rethink our approach to unilateral powers. We believe that unilateral power can be of two types: a president can use a unilateral order to circumvent Congress or to work with Congress (Deering and Maltzman 1999; Mayer 2001; Marshall 2010). We also believe it is likely that presidents behave differently in different circumstances. Accordingly, we suspect that the source of authority justifying each unilateral order can tell us a great deal about the president’s understanding of his own power (see Cooper 2002, 13). Our aim in this paper is to determine if there is a relationship between the source of the authority invoked by the presidents and the conditions under which presidents issue unilateral orders. Using a new database of over 5,000 unilateral orders (presidential proclamations and executive orders), we examine claims of authority to assess the challenge to Neustadt presented by the scholarship on unilateral power. To proceed, we first describe the puzzle of unilateral power. Then we develop a theory and expectations driven by how the president decides to cast his unilateral action. Finally, we explain the new data in depth and test these data with several multivariate count models. These findings expand our understanding of the use of unilateral powers within the context of the separation of powers (Howell 2005, 437).

**The Decision to “Go Alone”**

Proclamations and executive orders allow the president to make policy with the stroke of a pen. Harry Truman used an executive order to desegregate the U.S. military even though Congress, in the words of Mayer (2001, 191), “was in no hurry” to enact such legislation. In 1992, George H. W. Bush relied on an executive order to establish a fetal tissue bank in order to prevent Congress from overriding his veto of legislation preventing executive officials from banning research funding without approval from an ethics board (Vawter 1993). Likewise, George Washington explicitly chose not to consult Congress before his Neutrality Proclamation. Indeed, it was because Washington had acted first and alone (or, as Alexander Hamilton put it, “establish[ed] an antecedent state of things that ought to weigh in the legislative decisions” (Pacificus No. 1 in Frisch 2007, 15)) that provoked opposition to Washington’s foreign policy. Moreover, Lincoln’s Emancipation Proclamation easily ranks as the most important of all policy proclamations in U.S. history, yet Lincoln looked to his power as Commander in Chief, not a delegation from Congress, to emancipate slaves based on what he believed to be a military necessity.[[1]](#footnote-1) Finally, in 1945, Harry Truman issued two proclamations asserting control over continental shelf areas near the coastline and establishing fishery zones to protect them, but Congress took until 1953 and 1976 to enact similar legislation. Unilateral orders are sometimes unilateral in fact, where presidents act first and alone.

The vast majority of unilateral orders, however, derive from power delegated by Congress. Presidents typically issue orders within a specific policy boundary outlined by Congress, often showing that specific conditions have been met to invoke additional the powers employed (Cooper 1986, 240). For example, the Antiquities Act of 1906 delegated authority to the president to proclaim federal land that needed to be protected for scientific or archeological value in part because the president had more information and institutional capacity to act (Leshy 2001). Further, unilateral actions may require some prior coordination between the president and Congress regarding the implementation of policy. For instance, the Trade Reform Act of 1974 established a shared relationship, allowing the president to make determinations about the economic trade status of goods (O’Halloran 1994, 96). Even though Congress granted this authority to the president, Congress still maintained control over policy outcomes through ex-ante and ex-post controls. When unilateral authority is subject to Congressional approval, presidents often develop and implement policies in the way conceived by Congress (Shull 1997; Epstein and O’Halloran 1999). Accordingly, in these cases, unilateral action is not precisely unilateral.

This is to say that unilateral orders can reflect cooperation and bargaining between the president and Congress. One way is for Congress to delegate the power to the president in advance. For instance, Congress sometimes relies on presidential proclamations to trigger foreign policy legislation. During the lead-up to the War of 1812, for example, Congress gave James Madison the power to determine whether trade with England and France should be resumed, depending upon Madison’s understanding of ongoing diplomacy with each (Wood 2009, 665-69). Although Madison’s proclamations “made” policy, they were shared in the sense that they exercised precisely the power that Congress wanted exercised.[[2]](#footnote-2) Another example of a delegated unilateral power is James Madison’s 1810 proclamation ordering the military occupation and governance of West Florida, territory whose ownership had been disputed by the United States and Spain since the Louisiana Purchase. At first glance, this would seem to be a classic example of a unilateral action: as Madison’s leading biographer put it, this was “government by proclamation,” seemingly antithetical to Madison’s republican belief in executive deference to Congress (Ketcham 1971, 501). But, in fact, the power had been delegated by Congress in an 1804 law, and Madison believed his actions were desired by Congress (Madison to William Pinkney, 30 Oct 1810, in Hunt, 1908, 121; see also 112).

To be sure, not all unilateral power is shared. An order based on delegated authority can be also be unilateral in practice even if, as a matter of law, it is subject to the discretion of Congress. Because many orders require executive interpretation to begin, the legal imperative is on the White House to make determinations and initiate action (Howell 2005, 421), and acting “first” is an important advantage since overturning such determinations requires majorities in Congress that may be difficult to muster (Moe and Howell 1999). Bill Clinton, for example, appealed to statutory authority when he issued an executive order changing labor law, against the wishes of the Republican majority in Congress (Mayer 2001, 8). Another example is Theodore Roosevelt’s 1907 proclamation setting aside sixteen million acres of land as national forest. According to Roosevelt (Roosevelt 1926), Senator Charles Fulton (R-Oregon) “secured an amendment providing that the President could not set aside any additional national forests in the six northwestern states” to agricultural appropriations legislation (395). Because Roosevelt wanted to neither veto the whole bill nor abide by the restrictions of the amendment, he issued a proclamation. Roosevelt connected this action with his now well-known argument that the president is the steward of the people: because “the laws were often insufficient,” it “was necessary to use what law was already in existence, and then further to supplement it by Executive action” (397). In similar examples, Mayer (2009) shows that “broad grants [of authority], ambiguity and the potential for swift action are a compelling combination” (432).

But these examples suggest a bigger problem: unilateral power, like executive power itself, is difficult to categorize with precision. The president might use a unilateral tool to cooperate with Congress or the president might use a unilateral tool to get around Congress. This reflects what Harvey Mansfield (1989) has called the “ambivalence” of executive power. As Mansfield put it, the word *executive* has two meanings. One the one hand, the executive serves to carry out the will of the legislature (clerk) or persuade the legislature to pass laws to his liking (bargainer), but, on the other, the executive must enforce that will (law enforcer) and therefore must exercise its own discretion. The same is true with regard to unilateral power. As Mayer recently (2009) concluded, “We do not yet fully understand the dynamics of how presidents take Congress into account when they resort to unilateral action” (168). Proffered alone, neither the “power to persuade” nor the power to act by the “stroke of a pen” can describe the whole of unilateral power.

**The Source of Authority and Justification of Action**

One practical way to begin thinking about this issue is to consider the decision-making process of presidents. Specifically, a president must decide whether to cast that action as unilateral or shared when they justify their order. Presidents know that their orders will be part of the public record and eventually be scrutinized by citizens, political officials and the courts. This is particularly true of orders that give rise to legal controversies: because there are winners and losers –individuals who will be arrested, lose land, be deported, or be denied access to courts—presidents are certain that the legal and political basis of their orders will be examined and contested. The decision to go first and alone, and then resolutely appear to be acting first and alone, is not a trivial one. We argue that the decision to appeal to Congressional statute or not in justifying a unilateral order will vary according to the president’s understanding of his freedom to act. This freedom could be a function of law in the sense that a (restricted) delegation of authority from Congress requires the president to cite the law each time he exercises the delegated power (Epstein and O’Halloran 1999). Or, this freedom could be a function of the institutional balance in the sense that the president, as Howell (2003) has shown, considers the likelihood that Congress will intervene. Both of these senses of freedom are connected to the relative political power of the branches. This is to say that the looking at the decision regarding source of authority allows us to isolate the occasions when the president himself describes power as shared or unilateral.[[3]](#footnote-3)

Citing Congress would seem to be the most likely path. We live under the rule of law, and a president, like any executive, knows that he cannot go unilateral all the time. This is because the charge “the president is acting unilaterally again” offers a convenient critique for opponents, allowing them to criticize the method without having to win on the merits of the policy. An example of this is the common critique of Vice-President Richard Cheney’s approach to executive power. According to Jack Goldsmith (2007), the former head of the Office of Legal Counsel, Cheney consistently advised George W. Bush to avoid reliance on Congress completely, and, in Goldsmith’s opinion, this strategy ultimately backfired. Had President Bush cultivated congressional support, the argument goes, he would have been more successful in building the muscular executive Cheney wanted because Congressional backing is less circumspect than relying solely on executive power. Goldsmith’s conclusion is important because it shows that the decision to go alone is a matter of both persuasion and command. It is also supported by no less than Robert Jackson’s famous “practical grouping” of presidential power in *Youngstown Sheet and Tube Co. et. al. v. Sawyer*, 343 U.S. 579 (1952). When the president acts under authority delegated by Congress, in addition to his constitutional authority, presidential power is at its maximum and most safe from judicial oversight. Franklin D. Roosevelt anticipated this logic in his executive order for the internment of Japanese Americans: he knew that the action would be welcomed by Congress, and it is Congress’s approval that was key to the Supreme Court’s acquiescence in *Hirabayashi v. United States* 320 U.S. 81 (1943) and *Korematsu v. United States* 323 U.S. 214 (1944).

This would be the end of the story if it were not the following empirical finding: presidents do not always cite congressional authority. Why? There are several potential reasons why a president might choose to go alone in this way. Some are practical. There might not be a law to cite such that sufficient legal authority is provided; or finding the right law could take time (and perhaps even deliberation with the legislative branch) and the president may wish to move quickly. But there are also strategic considerations. Presidents might lack the ability or desire to bargain, or to appear to bargain, with Congress. Moreover, presidents might believe that their own legal authority is clear and as a result wish to protect the historical prerogatives of the executive branch (Mayer 2001). Accordingly, presidents might not want to rely on Congressional authority when they think they can or should go alone. These considerations might be particularly important during the second term. From the perspective of the retention of executive power, a simple gesture now might become a binding precedent in the future.

**Expectations of Unilateral Presidential Strategy**

Broadly, we should see differences in the findings based upon the president’s understanding of his political freedom to act. We argue that presidential unilateral strategy will vary based upon institutional realities, specifically related to the relative political strength of each branch. We expect that presidents will appear to cooperate (cite statute) under conditions different than those when they appear to go it alone (rely on presidential authority). Given our theory above and prior findings associated with the unilateral presidency, in this section we identify when presidents are likely to cite each type of authority in an order.[[4]](#footnote-4) First, presidents will evoke the authority of Congress in an order (usually legislation through statute but also rule or regulatory changes or joint resolutions) when they consider themselves less free to act because of fear of being challenged or overturned. That is, presidents should be more likely to issue unilateral orders citing Congress when the majority party in Congress has large and cohesive majorities.

Explaining this, presidents are cognizant of Congressional political power and cast their justification for unilateral action in ways that will lessen the likelihood that Congress will object. Under these conditions, it is also possible presidents will consult and compromise with Congress—or at least wish to keep that appearance. If so, this kind of unilateral activity would seem to indicate a step toward Neustadtian bargaining and away from unilateral command. When presidents believe they have less authority in a policy domain in which they are considering using unilateral action, they are more likely to consider the political strength of Congress (Howell and Kriner 2008). Put another way, we suggest that the president will appeal to Congress (statute) when Congress’ ability to make law is heightened such as when there are more members of the majority party and they are more unified. The logic underlying this argument is simple: when presidents are concerned about possible limitations presented by Congress, presidents will be more likely to cast their actions as consistent with Congressional authority (see Gomez and Shull 1995). Specifically, the larger the size of the majority party in Congress and the larger and more unified the majority party, the more likely the president is to issue orders based on statute.

On the other hand, presidents should rely on their own authority to act when they have more freedom or desire to act without presumed Congressional consent. That is, presidents are more to likely to rely on their own authority when the majority party is smaller and fragmented (Howell 2003). Indeed, Howell and Kriner (2008) summarize this line of reasoning and argue “because presidents can issue executive orders in lieu of laws and executive agreements in lieu of treaties, they are able to institute policies that materially alter the doing of government. Rather than working at the fringes of the policymaking process, or instituting policies preferred by supermajorities within Congress, presidents use their unilateral powers to considerable and independent effect” (107). In short, when presidents use what they consider their own authority to act, and refrain from citing Congressional authority, we should find that they do so when they believe they have the authority to act and or the opportunity to strategically exercise their political advantage.

This hypothesis builds on, but also departs from, the findings of Howell (2003) who argues that unilateral activity is related to the power of the majority party in Congress and to the size and unity of the Congressional majority. Howell’s president is more likely to use *any* unilateral power when the majority party is small and divided. That is, because presidents will want to appear to cooperate when they see that the party in Congress is strong, they will be more eager to “share” unilateral power. Yet, we argue when the majority party in Congress is small and divided, the president will be less careful to cover his action by citing Congressional authority and more willing to go it alone. This is the chief distinction between our expectations and Howell’s expectations. In summary, the type of order matters: presidents will act on their own authority when Congress is weaker but act with Congressional authority when Congress is stronger. When presidents desire to act “first and alone” in a strategic sense (Moe 1999; Mayer 1999), they are more likely to rely on their own or their Constitutional authority and avoid entangling Congress. Accordingly, we expect presidents to cite Congress when the majority party is large and unified but rely on their own authority when the majority party is small and divided.

**Data and Methods**

Executive orders and proclamations are the two most prominent unilateral orders where a president may invoke multiple sources of authority to justify a specific action. Even as scholars often include proclamations in the list of unilateral tools, there has been little scholarship about the conditions under which presidents issue proclamations. This omission is surprising, given the legal weight of proclamations. Proclamations carry the same force of law as executive orders – the difference between the two is that executive orders are aimed at those *inside* government while proclamations are aimed at those *outside* government (Cooper 1986). We coded every presidential proclamation issued from the 75th to the 110th Congress. Because there was no complete list of presidential proclamations, several sources had to be searched to generate this complete record of all proclamations: the *Codification of Presidential Proclamations Disposition Tables*, the *United States Statues at Large*, the United States *Federal Code*, the *CIS Information to Presidential Executive Orders and Proclamations*, the United States *Federal Register*, the *Public Papers of the Presidents* and the White House website of President Bush (43).[[5]](#footnote-5) We include only policy-based proclamations which we define as any proclamation directly affecting government process, structure or actions, including both international and domestic affairs. This search process yielded 1,408 policy-based proclamations from 1935 to 2009. A full list of the annual counts for each category is available in Appendix Table 1 in the Supplemental Information document uploaded to the website.

 We also coded the source of authority for executive orders from the 75th Congress to the 108th Congress (1935-2005). These data were assembled from the *American Presidency Project* and data from King and Ragsdale (1988) and Warber (2006). We examine executive orders from 1936 to 2004 for two reasons. First, executive orders became popular with presidents as a policy implementation tool beginning in this period. For instance, Franklin Roosevelt issued one of the first significant executive orders in 1939 establishing the Executive Office of the President (Mayer 2001, 5). Howell (2003) agrees and notes that only 2% of significant orders occurred between 1900 and 1945 (83). Second, this largely comports with the time frame other scholars have examined for executive orders over time (Mayer 1999; Krause and Cohen 2000; Mayer and Price 2002; Howell 2003; Warber 2006), making our study more directly comparable with previous work.[[6]](#footnote-6) The executive orders from this period yielded 3,493 executive orders.[[7]](#footnote-7) A full list of the annual counts for each category is available in Appendix Table 2 in the Supplemental Information document uploaded to the website.

Given our interest in the shared nature of presidential unilateral power, we coded the source of the authority that presidents used to justify the action taken for each proclamation and executive order.[[8]](#footnote-8) We examined the enabling clause of each order to decipher the source of authority cited for the action taken (unless other parts of the text were relevant to this end). We then coded each policy-based proclamation and executive order as to whether its text mentioned Congress (resolution, joint resolution or statute) (or not) or a presidential-based power (Article II of the Constitution, “executive authority”).[[9]](#footnote-9) Orders that invoked both sources of authority (“joint authority”) were also recorded but were counted as Congress-based justifications for purposes of analysis. It is possible that we do not capture orders where presidents misinterpret statutes, but we believe that understanding the decision by presidents whether or not to cite Congress in text of an order is an important first step in understanding unilateral power.

Because we are interested in examining the institutional dynamic between Congress and the president, and following similar models used by Howell (2003) and Mayer (1999), we focus on two variables that capture the relative “strength” of Congress: the average size of the majority party and the size and unity of the majority party.[[10]](#footnote-10) First, we employ a variable for the size of the majority (“Majority Size”) by averaging the size of the majority in each house for each Congressional session. Second, we calculate a ratio of the average size of the majority party (across both houses) multiplied by the unity of the majority party divided by the average size of the minority party multiplied by the unity of that party (“Size / Unity Ratio”).[[11]](#footnote-11) This variable is conceptually similar to Howell’s (2003) utilization of the LPPC scores from Cooper, Brady and Hurley (1977) in that it captures moments where the majority party is large, unified and “faces minimal opposition from the minority party” (86).

Finally, we include four control dummy variables to control for the times where presidents are likely to issue unilateral orders (Mayer 1999; Howell 2003). First, we include a dummy variable for moments where a president of a new party enters office (“New President”), starting with the first Congress over which they govern (coded “1” if yes and “0” if no). Second, if the United States is involved in an armed conflict, we include a dichotomous indicator for war (“War”). The war variable was coded “1” for the following conflicts: World War II (1941-1945), Korean War (1950-1953), Vietnam War (1964-1973), Persian Gulf War (1991-1992), Afghanistan War (2001-2009) and Iraq War (2003-2009). Third, if the year is the second half of the president’s term (“Second Half”), the variable was coded “1.” Fourth, if the year is in the president’s second term (“Second Term”), the variable was coded “1.”

Because we are interested in the frequency of an event, we employ several event count models. Count models take as the dependent variable the number of discrete times an event occurred (e.g., the number of times a particular kind of order was issued in a Congressional session and under what authority) with the assumption that the process generating the event is independent of time (*t*). This is appropriate for all of our series since the counts take a non-negative integer value (Cameron and Trivedi 1998). Linear regression models may result in inefficient and biased estimates for the count of events and it is “much safer to use models specifically designed for count outcomes” (Long and Freese 2006, 349). For the count models described below, we aggregate these into Congressional terms, from the 75th Congress to the 110th Congress. This allows our count model to comport with other models so the findings can be comparable (Deering and Maltzman 1999; Mayer and Price 2002; Howell 2003; Fine and Warber 2012). The trends in the data do not display any autoregressive elements.[[12]](#footnote-12) For example, the individual time-structured series for each ACF (Appendix Figures 1 and 2) reveal relatively low counts and no internal time dynamics, making a Poisson or negative binomial model appropriate in these series.[[13]](#footnote-13) A Poisson model models the probability of observing any observed count using the Poisson distribution (such as the non-statute proclamations or the Commander-in-Chief executive order series). The Poisson model is specified:

*u*i= E (*y*i | *x*i) = exp (*x*iβ1+ … +*x*iβn)

where each observation has a value of *u* and the observed count for observation *i* is drawn from a Poisson distribution with mean *ui* (Long and Freese 2001) and *n* is the total number of independent variables. A negative binomial model (which accounts for observed heterogeneity, or “overdispersion”) is modeled for any series where tests of the log likelihood ratio = α reveal positive and significant tests for overdispersion (such as statute-base proclamation or executive order series). Because “overdispersion” can artificially deflate standard errors, tests for such “overdispersion” are utilized to determine the appropriate model (tests use a log likelihood-ratio test that α=0). The negative binominal is specified:

*u*i= exp (β0 + β1*x*i1+ … + βn*x*in)

where n is the total number of independent variables. This captures the rate of overdispersion, where the variance is larger than the mean. The estimated results will be interpreted with respect to the percent change in E (*y* | *x*).

**Unilateral Powers as Shared Powers**

Figure 1 presents a graph of the collected orders by Congress separated by the source of authority they cite. What is most noticeable is that presidents cite Congress as the justification in the vast majority of unilateral orders. Of the 1,390 policy proclamations from the 75th Congress to the 110th Congress, nearly 98% cite a law passed by Congress (the 1,356 Congress-based orders include any order that references Congress). The same is true of executive orders. Figure 1 shows that in 2,083 of the total 3,493 executive orders from the 75th to the 108th Congress, 60 %, presidents are more likely to justify an executive order under the auspices of Congressional jurisdiction than their own authority (310) (the Congress-based orders include any order that references statute).[[14]](#footnote-14) The ratio of statute to non-statute is higher for proclamations, but both sets of orders reveal similar trends of the dominance of statutory-based orders. In practice, it seems, presidents prefer not to act wholly alone. Rather, presidents tend to issue orders that reflect attentiveness to Congress and the principle of the separation of powers.

 [ FIGURE 1 HERE ]

 What is also prevalent in Figure 1 is the degree of fluctuation in terms of what presidents cite in each order with respect to the source of authority. The expectations described above tend to fit the data well. For instance, the largest increase in statute-based executive orders comes during the 78th to 83rd Congresses (1943 to 1954), relative to the period following it, where the Democratic Party has large and cohesive majorities. Statute-based proclamations are also more frequently before the 83rd Congress, especially during the 73rd to 78th Congresses (1933 to 1944), than afterwards. In another example, Congressional majorities are less large and cohesive in the 88th to 94th Congresses 1963 to 1976) and Figure 1 reflects that presidents issue fewer statue-based orders during this period. On the other hand, there is a small rise during this period in executive orders relying on executive or Constitutional authority. Although only a simple ocular test of these relationships, there appears to be a simple correlation between the institutional dynamic and the number of each type of order issued by Congressional session.

**Testing the Theory**

 To briefly restate our expectations, we argue that presidents will evoke congressional authority or their own authority according to different political conditions. Specifically, presidents should act “alone” more frequently when they perceive that political conditions limit legislative action. That is, presidents will rely on presidential authority when the majority party in Congress is smaller and when the majority party is smaller and fragmented (in relation to the other party). On the other hand, presidents should issue more orders that evoke Congress when presidents are cognizant of potential Congressional political strength and when Congress is more able to make policy.[[15]](#footnote-15) Specifically, presidents will cite Congressional-based authority when Congress has larger majorities or when the majority party is larger and more unified. The key independent variables capturing the relative strength of the institutional balance are the average majority party size and the size and unity ratio.[[16]](#footnote-16)

The data from Table 1 demonstrate, as expected, variation in how and when presidents cite either statute or non-statute sources of authority for proclamations. The table divides the variables into separate models. For the size and unity ratio, while there is no effect for all proclamations or for statute-based proclamations, presidents are significantly less likely to issue a non-statute proclamation when Congress is stronger (the size / unity ratio is larger) (-2.3%). This corresponds to expectations. The second set of models in Table 1 examines the average size of the majority party. Again we see variation in how presidents justify their orders. Presidents issue *more* orders that cite statute when the majority size is larger (.72%) but *fewer* citing their own authority when average majority size is larger (-.06 %). However, in each case the effect is substantively small. Yet, that we find consistent positive relations between the capacity of the majority party to legislate and presidential reliance on Congress suggests that presidents are thinking about Congress, and perhaps even collaborating with Congress, as they issue unilateral orders. In the same way, that presidents are less likely to act on their own authority when majority size is higher speaks to the constraining role of Congress when it has relatively more ability to make law or to challenge presidential unilateral action.[[17]](#footnote-17)

 Table 2 segments the source of authority for executive orders into those based on Congressional statute, “presidential” authority or the “Commander-in-Chief” clause of the Constitution.[[18]](#footnote-18) Here we specifically examine the average size of the majority party as the key independent variable. Once we divide executive orders into specific sources of authority, we see again that not all unilateral activity is equal. Presidents issue fewer executive orders based on presidential authority when Congress is stronger (the size / unity ratio is larger) (-.56 %). This corresponds to expectations concerning the balance of institutional power. Namely, presidents are less likely to rely on their own authority when Congress is relatively stronger. Despite the amount of formal authority they might have under law or the Constitution, presidents are still cognizant of potential congressional reaction.

 [ TABLE 2 HERE ]

Table 3, which includes the “size / unity” scores as an alternative measure of the relationship between the president and Congress, shows again that presidents choose to cite Congress or their own authority according to different circumstances. Presidents issue more orders under statutory authority when the size / unity of the majority party is larger relative to the minority party’s size and unity (70 %). This suggests that presidents are more likely to appeal to Congress when Congressional majorities have a more influential say in the policy making process. Yet, as expected, presidents cite the “Commander-in-Chief” clause or general presidential authority under different conditions. Specifically, for the size / unity ratio, the results for both presidential citations (-11.8 %) and Commander-in-Chief citations (-6.1%) are negative and statistically significant. In sum, presidents issue fewer presidency-based orders when the majority in Congress is strong and unified.

Interestingly, cumulative results from both Table 2 and 3 demonstrate that presidents are not overly aggressive in using their own presidential authority, even when circumstances may call for it (such as when citing their Constitutional authority). Rather than being brazen wilders of unilateral power, presidents are generally less likely to use presidential authority or Commander-in-Chief justifications in their second terms, the second halves of their terms or when they are new to the office. Presidents are also less likely to issue orders citing presidential authority or Commander-in-Chief justifications (about 13 % less likely) when they are a new president of a different party than the outgoing president. Even so, if circumstances justify the action, presidents do use unilateral orders to fulfill their Constitutional roles. For instance, presidents issue more Commander-in-Chief orders (about 12% more likely) during war time (both Tables 2 and 3).

[ TABLE 3 HERE ]

**Discussion**

This article builds on our theoretical and empirical understanding of the use of unilateral powers. First, empirically, we introduce and analyze a new set of data on presidential proclamations and executive orders. Second, theoretically, we offer a way for scholars to be more precise about analyzing the way presidents exercise unilateral power. Given the complexity in the relationship between presidents and Congress, and given that most orders are based on some prior negotiation between Congress and the president, this emphasis on source of authority offers another step for scholars to continue to understand the place of unilateral power within a system that requires separated but shared powers. Most of the time presidents cite congressional authority to justify unilateral actions, but our analysis revealed not only do choose to go and remain alone in some instances but also that there is variance according to the size and unity of the majority party in Congress. Given the importance of this finding, we retested this finding with significant unilateral orders and found similar results (see Supplemental Information for a fuller discussion). These findings suggest that presidential strategy is shaped in some part by the composition of Congress but also subject to presidential prerogative.

We find mixed but largely supportive evidence for our expectations of how presidents use unilateral orders with respect to Congress. For both sets of orders, a simple distinction divided by source of authority demonstrates that presidents most often rely on Congress for their source of authority when issuing unilateral orders. This simple bivariate finding supports our theoretical assertions about the unique conditions under which presidents will issue a unilateral order given the differing sources of authority presidents may use to justify their actions. For presidential proclamations, presidents issue fewer non-statutory (presidential-based) proclamations when Congress is stronger but more statute-based proclamations when Congress is stronger. This supports part of Howell’s (2003) theory that presidents issue fewer orders but challenges his theory with respect to when presidents will pursue their own independent sources of power. For executive orders, the trends also largely split in predicted ways; presidents are more likely to issue statutory-based orders when presidents and confront large lawmaking majorities, but when presidents face a weaker Congress they invoke their own authority or Constitutional authority.

 **Conclusion**

As these findings imply, unilateral power is as complex as executive power itself. Presidents are both strategic actors who engage in independent executive action and participants in politically integrated activities with Congress for the purposes of enacting and implementing policy. Unilateral orders are not uniformly used for one selective purpose or the other, nor are all orders subject to the same type of political events. Instead, presidents change their strategy depending on the nature of the political environment they face. These concerns are not strictly political in origin, but also include a meaningful combination of the institutional conditions presidents face and the authority with which they have to act (see Mayer 2009, 431). This realization helps to sort out the competing explanations (and findings) about when presidents issue unilateral orders, and, as a result, helps resolve the debate about whether presidents function as powerful independent political actors or dependent executive clerks.

From this perspective, we make two primary contributions. First, we suggest that there should be variation in political conditions under which unilateral orders and that this variation should be related to the president’s usage of source of authority. We find this is true for both proclamations and executive orders. This finding bridges the study of unilateral politics (Mayer 2009, 442) by showing that presidents think politically and institutionally, even when they issue unilateral orders. Second, we also address the debate between Neustadt’s version of interbranch bargaining on one hand and studies of unilateral action on the other. The resolution we propose is really a compromise between these two positions, with presidents strategically altering their behavior in light of institutional and political limitations.

These contributions let us rethink our assumptions about the nature of presidential unilateral orders. To be sure, this is only a step in approaching unilateral orders from a different vantage point, but it tells us something about the way the president understands his own power and the role of Congress. At a minimum these findings reveal that, in addition to being strategic about their use of power, presidents are strategic in the way they cast their power. At a maximum, this suggests a linked interbranch process and the use of unilateral orders as the trigger. Although presidents may appear to act “first and alone,” the reality is often much different. Presidents often evoke statute, rely on Congressional consent or enact the will of Congress when issuing seemingly unilateral orders. Presidents and their lawmaking partners in Congress often agree on a delegation of power, the appropriate balance of the use of this power, the duration of that authority and the precise implementation of policy. But it is also true that unilateral directives are often simply the lynchpin that initiates a previously agreed upon arrangement. Presidents, in theory as others have suggested, are more likely to leverage their information and first mover advantages. The balance of institutional strength predicts the kind of presidential unilateral power.

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## FIGURE 1

**Source of Authority by Congress**

## TABLE 1

**Count Models for Proclamations Source of Authority**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Source of Authority**

### \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 **Size / Unity Ratio Average Majority Size**

### \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

  **All** ♣  **Statute**♣ **Non- All** ♣  **Statute**‡ **Non-**

 **Statute**‡ **Statute**‡

### \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

### Majority Size \_\_ \_\_ \_\_ -.000 .020\*\*\* -.075 \*\*

 (.013) (.004) (.028)

###  % Δ [.72 %] [-.06 %]

### Size / Unity Ratio -.180 -.068 -.341 \*\* \_\_ \_\_ \_\_

 (.402) (.118) (1.01)

###  % Δ [-2.3 %]

### Second Term .131 .123 -.358 .030 .198 \*\*\* -.334

 (.220) (.070) (.436) (.184) (.072) (.436)

###  % Δ [6.9 %]

### Second Half .013 .044 -.336 .080 .138 \*\* -.362

 (.190) (.061) (.408) (.163) (.064) (.394)

###  % Δ [4.8 %]

### War -.208 -.203 \*\*\* .250 -.131 -.209 \*\*\* .432

 (.174) (.057) (.350) (.143) (.057) (.353)

###  % Δ [-7.2 %] [-7.3 %]

### New President -.075 -.062 -.470 .132 -.004 -.232

 (.267) (.088) (.546) (.217) (.087) (.510)

###  % Δ

**N (years) 38 38 38 38 38 38**

**LR Chi2 2.12 19.33 \*\*\* 15.5 \*\*\* 1.27 37.43 \*\*\* 7.54 \***

**Pseudo R2**  **.006 .031 .008 .003 .061 .075**

**Log Likelihood -161.3 -293.1 -42.44 -213.4 -284.0 -46.4**

**Ln(α) 270.1 \*\*\* 265.8 \*\*\* 0.02 992 \*\*\* 0.00 .180**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

NOTE: Dependent variable: “statute” or “non-statute” sources of authority, 73rd Congress to 109th Congress. Predicted change for significant coefficients is below the coefficient. ‡ Models are Poisson models. ♣ Models are Negative binomial count models. Changes are calculated through “prchange” in Stata 11. \*\*\* indicates statistical significance at p<.01 \*\* indicates statistical significance at p<.05. \* indicates statistical significance at p<.10.

## TABLE 2

**Count Models for Executive Orders and Source of Authority**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Source of Authority**

### \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**All EOs** ♣ **Statute** ♣ **President**‡ **C-in-C**‡

### \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

### Average Majority Party .015 023 .017 -.073 \*\*\*

 (.016) (.026) (.010) (.009)

###  % Δ [-0.56 %]

### Second Term -.392 \* -.446 -.484 \*\*\* -.246 \*

 (.219) (.296) (.140) (.107)

###  % Δ [-39.3 %] [-4.2 %] [-1.8 %]

### Second Half -.206 -.069 -.412 \*\*\* -.616 \*\*\*

 (.203) (.269) (.130) (.104)

###  % Δ [-3.6 %] [-4.7 %]

### War .074 -.193 .226 \*\* 1.65 \*\*\*

 (.183) (.247) (.115) (.120)

###  % Δ [12.6 %]

### New President -.459 -.365 -.485 \*\*\* -1.68 \*\*\*

 (.259) (.350) (.165) (.184)

###  % Δ [-12.9 %]

**N (years) 34 34 34 34**

**LR Chi2 5.41 \* 4.30 \* 25.54 \*\*\* 343.2 \*\*\***

**Pseudo R2** **.014 .012 .058 .404**

**Log Likelihood -179.1 -168.9 -205.3 -252.7**

**Ln(α) 757.1 \*\*\* 626.1 \*\*\* 193.2 \*\*\* 284.6 \*\*\***

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

NOTE: Dependent variable: count of executive orders for each category. Data are 75th Congress to 108th Congress. See text for details. ‡ Models are Poisson models. ♣ Models are Negative binomial count models. Predicted change for significant coefficients is below the coefficient. Changes are calculated through “prchange” in Stata 11. \*\*\* indicates statistical significance at p<.01 \*\* indicates statistical significance at p<.05. \* indicates statistical significance at p<.10.

## TABLE 3

**Count Models for Executive Orders and Source of Authority**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Source of Authority**

### \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**All EOs** ♣ **Statute** ♣ **President**‡ **C-in-C**‡

### \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

### Size / Unity Ratio 242 1.21 \*\* -1.39 \*\*\* -.713 \*\*\*

 (.488) (.615) (.308) (.253)

###  % Δ [70.2 %] [-11.8 %] [-6.1 %]

### Second Term -.380 \* -.367 -.635 \*\* -.286 \*\*

 (.226) (.289) (.140) (.111)

###  % Δ [-38.3 %] [-5.3 %] [-2.4 %]

### Second Half -.254 -.112 -.577 \*\*\* -.401 \*\*\*

 (.176) (.251) (.130) (.100)

###  % Δ [-4.8 %] [-3.4 %]

### War .068 -.161 .128 1.42 \*\*\*

 (.186) (.237) (.116) (.116)

###  % Δ [12.2 %]

### New President -.409 -.196 -.708 \*\*\* -1.58 \*\*\*

 (.270) (.350) (.170) (.186)

###  % Δ [-5.9 %] [-13.7 %]

**N (years) 34 34 34 34**

**LR Chi2 4.87 7.41 \* 44.88 \*\*\* 294.0 \*\*\***

**Pseudo R2** **.013 .191 .102 .346**

**Log Likelihood -8179.3 -167.3 -195.7 -277.3**

**Ln(α) 762.2 \*\*\* 558.8 \*\*\* 177.9 332**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

NOTE: Dependent variable: count of executive orders for each category. Data are 75th Congress to 108th Congress. ‡ Models are Poisson models. ♣ Models are Negative binomial count models. Predicted change for significant coefficients is below the coefficient. Changes are calculated through “prchange” in Stata 11. \*\*\* indicates statistical significance at p<.01 \*\* indicates statistical significance at p<.05. \* indicates statistical significance at p<.10.

1. It is true that Lincoln’s order applied only to areas under Confederate control, but the proclamation was nonetheless important. [↑](#footnote-ref-1)
2. To Madison, Thomas Jefferson wrote that each of Madison’s determinations was a proper “extension of their [Congress’s] provision although to a case similar tho’ not the same,” adding that they were “not literally for[e]seen by the legislature” (Jefferson to Madison, 17 August 1809, in Smith 1995, 1600). [↑](#footnote-ref-2)
3. A Congressional report which chronicles the legal history of executive orders and proclamations makes a point to list the source of authority for each order in the final report. Staff of House Committee on Government Operations, 85th Congress, 1st Session, Executive Orders and Proclamations: A Study of a Use of Presidential Powers (Committee Print 1957). [↑](#footnote-ref-3)
4. We narrow our focus to variables that help define the interbranch relationship (e.g., party-based, ideological based and structural political variables). We did, however, run alternative models including other political variables. These are uploaded in the Supplemental Information document uploaded to the website. [↑](#footnote-ref-4)
5. These sources are all identified by government document librarians as the universe of sources for these data (see Bennett and Yannarella 1986). The most comprehensive is the Congressional Information Service guide which published a multivolume research guide. These include CIS Code 34 – Proclamations Relating to Public Lands (1813-1892), Code 35 – Proclamations Relating to Public Lands (1834-1907), Code 20 – Messages and Papers of the Presidents (1789-1899), Code 29 – Treaty Proclamations (1789-1983), Code 44 (Presidential pardons). These proclamations categories were made consistent from the 1789 to 1983, a list which we bring up to date using sources listed. [↑](#footnote-ref-5)
6. In contrast to executive orders, most important proclamations occurred in the early and middle presidential period, necessitating their inclusion at an earlier time period. [↑](#footnote-ref-6)
7. The executive orders in Figure 1 do not sum to the total number of orders as collected by Warber (2006)(5,392) because those orders in Table 1 were collected from the *American Presidency Project* (which is missing some of the orders, particularly during the presidency of Franklin Roosevelt). [↑](#footnote-ref-7)
8. A single coder was assigned the duty of sorting and coding the material. And, although the categorical nature of the citations made this process simple, a second coder evaluated the work of the first coder for accuracy. Cohen’s kappa (.878) was statistically significant at p<.001, suggesting significant agreement between the two coders. [↑](#footnote-ref-8)
9. Congressional authority is signaled by the president citing a joint resolution of Congress, a specific public law, a specific statute or the U.S. Code or “laws of the United States.” For example, President Wilson in Proclamation 1364 declared, “by joint resolution of the Senate and House of Representatives…it is provided by Section 4067 of the Revised Statutes.” A president’s authority is signaled by a president invoking his powers as president generally or his powers under the Constitution. For example, in Proclamation 233 President Grant declares, “By reason of all these considerations, I, Ulysses S. Grant, President of the United States…” [↑](#footnote-ref-9)
10. Although other variables are often included in other models evaluating the ways that presidents use unilateral tools, such as temporal period or presidential approval, we chose a reductive and parsimonious approach and one that was specific to the relations between the branches. We did, however, run alternative models including these (and other) variables. Most of the additional variables did not reach standard levels of statistical significance when included with the variables in the original model specification, but the key variables remained consistent. These results are available in the Supplemental Information document uploaded to the website. [↑](#footnote-ref-10)
11. “Unity” is coded as the percentage of time that the majority party voted together on legislation. Poole, Keith T. May 2010. DW NOMINATE Data. Website: <http://voteview.ucsd.edu/dwnl.htm>. The website notes by way of explanation, “The files below contain the party unity scores by Congress for every Democrat and Republican voting on at least 10 party unity votes in the Congress. A party unity vote is defined as one where at least 50 percent of Democrats vote against at least 50 percent of Republicans” (also see Poole 1998). [↑](#footnote-ref-11)
12. When events are not independent of one another, these count models are insufficient in that an event count model will be biased if the events counted are characterized by a dynamic, temporal process. One could utilize Brandt and Williams’ (2001) techniques to allow for an autoregressive character to the data (in this case, exponential increasing linear trends, or a random walk with drift) called the Poisson Exponentially Weighted Moving Average (PEWMA) (see also Harvey and Fernandes 1989). However, the dynamics from the autocorrelation functions do not demonstrate the need for controlling for autocorrelation since the dynamics suggest the absence of or weakly autocorrelated counts with respect to time. [↑](#footnote-ref-12)
13. Additional comparison of the goodness of fit for using the Poisson versus the Poisson Autoregressive model suggests that the Poisson is appropriate for these cases. [↑](#footnote-ref-13)
14. The remaining 1,100 executive orders cite both sources of authority. [↑](#footnote-ref-14)
15. The amount of legislative productivity may have an effect on the ability of the president to issue an order relying on statute. Although we considered including such a variable in the model, correlations between published legislative productivity (Grant and Kelly 2008) indexes and the annual counts of the number of orders issues was too high to justify inclusion in the model (total proclamations=.75; statute proclamations=.44; statute executive orders = .40). [↑](#footnote-ref-15)
16. Although we do not analyze divided government as a key variable in the tables below, the online appendix displays several models that test our hypotheses with divided government. The results again demonstrate that divided government is an inconsistent predictor of the likelihood of the issuance of unilateral orders. But, the findings are not inconsistent with our theory. [↑](#footnote-ref-16)
17. In the Supplemental Appendix uploaded to the website, Appendix Tables 3 and 4 run the models including divided government as a measure of institutional friction. The results for Appendix Table 3 (proclamations) and Table 4 generally conform to expectations in that the signs are in the expected directions as predicted in the text (presidents less likely to issue presidency-based orders when they are weaker relative to Congress). Of course, divided government measures a different type of interbranch interaction that do the measures of size and or size and unity of the majority party. [↑](#footnote-ref-17)
18. There are more categories here than for proclamations because executive orders are more diverse in terms of the source of authority cited. [↑](#footnote-ref-18)