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Presidential Power in the Modern Era

WITH box cutters and knives, nineteen hijackers took control of four commercial jets on the morning of September 11, 2001, and flew the planes into the towers of the World Trade Center, the Pentagon, and Shanksville, Pennsylvania. The South and North Towers in New York collapsed at 10:05 and 10:28 A.M., respectively. Fires in the Pentagon burned for another seventy-two hours. In all, over three thousand civilians (including several hundred New York City fire fighters and police) died in the attacks. The greatest terrorist act in U.S. history sent politicians scrambling. Not surprisingly, it was the White House that crafted the nation's response, little of which was formally subject to congressional review.

In the weeks that followed, President Bush issued a flurry of unilateral directives to combat terrorism. One of the first was an executive order creating a new cabinet position, Secretary of Homeland Security, which was charged with coordinating the efforts of forty-five federal agencies to fight terrorism. Bush then created a Homeland Security Council to advise and assist the president "with all aspects of homeland security." On September 14, Bush issued an order that authorized the Secretaries of the Navy, Army, and Air Force to call up for active duty reservists within their ranks. Later that month, Bush issued a national security directive lifting a ban (which Gerald Ford originally instituted via executive order 11905) on the CIA's ability to "engage in, or conspire to engage in, political assassination"—in this instance, the target being Osama bin Laden and his lieutenants within al Qaeda, the presumed masterminds behind the September 11 attacks. On September 23, Bush signed an executive order that froze all financial assets in U.S. banks that were linked to bin Laden and other terrorist networks. In early October, when a bill to federalize airport security appeared doomed in the Senate, Bush threatened to issue an executive order accomplishing as much.

The most visible of Bush's unilateral actions consisted of retaliatory military strikes in Afghanistan. Though Congress never passed a formal declaration of war, in the fall of 2001 Bush directed the Air Force to begin a bombing campaign against Taliban strongholds, while Special Forces conducted stealth missions on the ground. Though these

commands did not come as executive orders, or any other kind of formal directive, they nonetheless instigated some of the most potent expressions of executive power.¹ Within a year Bush's orders resulted in the collapse of the Taliban regime, the flight of tens of thousands of Afghani refugees into Pakistan, the destruction of Afghanistan's social and economic infrastructures, and the introduction of a new governing regime.

It was Bush's unilateral decision to create a new court system, however, that generated the most public controversy. On November 13, 2001, the president signed an order allowing special military tribunals to try any noncitizen suspected of plotting and/or committing terrorist acts or harboring known terrorists. The trials need not be public, Bush declared, and might be held in the United States or abroad. The tribunals can hand down death sentences with only two-thirds support on the panel of five judges, of whom only a majority need be in attendance. Further, the order lifted many of the constitutional protections afforded most individuals accused of crime, such as a guarantee of a trial by a jury of one's peers. According to the order, suspected terrorists "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal." Bush effectively designed an entirely new court system to mete out justice in its efforts to hunt down and punish suspected terrorists, however they may be identified, and wherever they may be found.

During the proceeding weeks, denunciations of Bush's "sudden seizure of power"² ricocheted across the nation's editorial pages. Consider just a handful of the opinions expressed in the *New York Times*. William Safire protested that the "president of the United States has just assumed what amounts to dictatorial power to jail or execute aliens. Intimidated by terrorists and inflamed by a passion for rough justice, we are letting George W. Bush get away with the replacement of the American rule of law with military kangaroo courts." According to Safire, the order dismissed "'the principles of law and the rules of evidence' that undergird America's system of justice." By Anthony Lewis's account, the order represented an "act of executive fiat, imposed without even consulting Congress. And it seeks to exclude the courts entirely from a process that may fundamentally affect life and liberty." Several days later, Stephen Gillers condemned a "sham process that mocks [lawyers'] constitutional role in ensuring fair trials for their clients."³

Constitutional law scholars quickly followed suit. According to

Georgetown and Harvard University professors Neal Katyal and Laurence Tribe, the unilateral creation of military tribunals effectively blends executive, legislative, and judicial powers in one person in ways that are “ordinarily regarded as the very acme of absolutism.” Worse still, Bush’s actions were emblematic of an alarming trend in American politics—a propensity of presidents, especially during times of crisis, to unilaterally impose their will on the American public. As Katyal and Tribe note, “For the President to proceed on his own to alter the jurisdiction of the federal courts, redesigning the very architecture of justice, without any colorable claim that time is too short for Congress to act, is to succumb to an executive unilateralism all too familiar in recent days” (2002, 1260).

In January 2002, the United States began to ship captured members of al Qaeda and the Taliban to the U.S. Naval Base at Guantanamo Bay, Cuba. Public criticism proceeded unabated as pundits debated whether the rights and privileges generally afforded to prisoners of war, as detailed in the 1949 Geneva Convention, should extend to the roughly five hundred Afghani detainees. The United States’ closest ally, Britain, began to express concerns over the detainees’ legal status. The *London Guardian*, for instance, called upon the Bush administration “to process its prisoners as quickly as possible in line with the Geneva Convention. Those whose countries will accept them should in due course be returned there by agreement. Others will take more time, but the captives cannot stay indefinitely where they are.” By late spring of 2002, public support for Bush’s original order, measured both domestically and abroad, began to wane.

No matter, Bush carried onward. The U.S. military continued to interrogate its captives without settling their formal status, refusing even to release their names. Bush suspended the attorney-client privilege for certain suspects. He set additional restrictions on the right of detainees to appeal their cases. And critically, he never bothered to secure legislative authorization before taking any of these actions.⁴

Publicly, members of the Bush administration went to great lengths to stress the privileges and luxuries afforded to the detainees, noting that the military served culturally sensitive meals and that time was set aside daily for prayer and meditation. Bush also backtracked on some matters of dispute. To hand down a death sentence, Bush conceded, a panel’s ruling would have to be unanimous. Furthermore, trials would not be held entirely in secret; under specific circumstances, members of the press and public would be allowed to attend.

Still, on most matters Bush gave little ground. The administration refused to capitulate to demands that the captives be granted POW status and, in due course, returned to their countries of origin. To the

contrary, Secretary of Defense Donald Rumsfeld repeatedly insisted that the military planned to hold the nameless captives “indefinitely” and that the war on terrorism could proceed for the better part of a decade. As of this writing, the U.S. federal courts have dismissed every case brought before them that directly challenged the detention of prisoners from the Afghan conflict, insisting that they lacked any jurisdiction over military bases in Cuba.⁵ Congress, too, continues to stand idly by, holding hearings but never taking formal action to either release the detainees or resolve their formal status as prisoners of war.

A war on terrorism obviously gave the president license to exercise his unilateral powers. Bush is not unique in this regard. Throughout the history of the Republic, the public, Congress, and the courts have looked to the president to guide the nation through foreign and domestic crises. And with few exceptions—Hoover?—presidents have met the call.

National crises, however, are not the only opportunity presidents have to unilaterally dictate public policy. Before there was a war on terrorism, Bush unilaterally instituted a wide array of important policy changes. During the first months of his administration, he issued an executive order that instituted a ban on all federal project labor contracts, temporarily setting in flux Boston’s \$14 billion “Big Dig” and dealing a major blow to labor unions. He later required federal contractors to post notices advising employees that they have a right to withhold the portion of union dues that are used for political purposes. Bush created the White House Office of Faith-Based and Community Initiatives, which was charged with “identify(ing) and remov(ing) needless barriers that thwart the heroic work of faith-based groups.” In August 2001, he set new guidelines on federal funding of stem cell research.

Many of Bush’s actions overturned Clinton orders passed in the waning days (and, in some instances, hours) of the Democrat’s administration. As soon as he took office, Bush instructed the Government Printing Office to halt publication in the Federal Register of any new rules “to ensure that the president’s appointees have the opportunity to review any new or pending regulations.”⁶ The new administration then issued a sixty-day stay on regulations that were published in the register but had not yet taken effect. Shortly thereafter, Bush undid a number of Clinton environmental orders that extended federal protections to public lands, tightened restrictions on pollution runoff in rural areas, established new pollution-reporting requirements for manufacturers of lead compounds, and decreased the percentage of arsenic allowed in drinking water. In addition, Bush rein-

stituted the ban on federal funding for international agencies that provide abortion counseling, a ban that Clinton had lifted eight years prior.

To effect policy change, Clinton relied just as heavily on his unilateral powers. For much of his tenure, Clinton confronted Republican majorities in Congress who repeatedly killed his legislative initiatives. The list is long, with health care and tobacco legislation ranking near the top. But rather than concede defeat, Clinton “perfected the art of go-alone governing” (Kiefer 1998). After losing major legislative battles, Clinton repeatedly rebounded with a series of steady, incremental reforms, each unilaterally imposed.

Bill Clinton is often perceived as a weak President—a lame duck dogged by scandal, thwarted at many turns by a hostile Republican Congress. . . . But the perception of weakness is belied by a largely unnoticed reality. Mr. Clinton is continually stretching his executive and regulatory authority to put his stamp on policy. He has issued a blizzard of executive orders, regulations, proclamations and other decrees to achieve his goals, with or without the blessing of Congress. (Pear 1998, K3)

Nor did this activity decline in the waning years of his administration. Instead, Clinton “engaged in a burst of activity at a point when other presidents might have coasted. . . . Executive orders have flown off Clinton’s desk, mandating government action on issues from mental health to food safety” (Ross 1999). Rather than wait on Congress, Clinton simply acted, daring his Republican opponents and the courts to try to overturn him. With a few notable exceptions, neither did.

Though Republicans effectively undermined his 1993 health care initiative, Clinton subsequently managed to issue directives that established a patient’s bill of rights, reformed health care programs’ appeals processes, and set new penalties for companies that deny health coverage to the poor and people with preexisting medical conditions. During the summer of 1998, just days after the Senate abandoned major tobacco legislation, Clinton imposed smoking limits on buildings owned or leased by the executive branch and ordered agencies to monitor the smoking habits of teenagers, a move that helped generate the data needed to prosecute the tobacco industry. While his efforts to enact gun-control legislation met mixed success, Clinton issued executive orders that banned numerous assault weapons and required trigger safety locks on new guns bought for federal law enforcement officials.

While Congress considered impeaching him, Clinton still managed to issue executive orders that expanded the government’s role in fighting software piracy, established agencies to declassify all infor-

mation held by the United States relating to Nazi war criminals, and increased sanctions against political factions within Angola. And during the waning months of his presidency Clinton turned literally millions of acres of land in Nevada, California, Utah, Hawaii, and Arizona into national monuments. Though Republicans in Congress condemned the president for “usurping the power of state legislatures and local officials” and vainly attempting to “salvage a presidential legacy,” in the end, they had little choice but to accept the executive orders as law.⁷

Clinton and Bush are not aberrations. Throughout the twentieth century, presidents have used their powers of unilateral action to intervene into a whole host of policy arenas. Examples abound:

- During World War II, Roosevelt issued dozens of executive orders that nationalized aviation plants, shipbuilding companies, thousands of coal companies and a shell plant—all clear violations of the Fifth Amendment’s “taking” clause. The courts overturned none of these actions.
- With executive order 9066, Roosevelt ordered the evacuation, relocation, and internment of over 110,000 Japanese Americans living on the West Coast.
- In 1948, Truman desegregated the military via executive order 9981.
- After congressional efforts to construct a program that would send American youth abroad to do charitable work faltered three years in a row, Kennedy unilaterally created the Peace Corps and then financed it using discretionary funds.
- Johnson instituted the first affirmative action policy with executive order 11246.
- Preempting Congress, Nixon used an executive order to design the Environmental Protection Agency not as an independent commission, as Congress would have liked, but as an agency beholden directly to the president.
- By subjecting government regulations to cost-benefit analyses with executive order 12291, Reagan centralized powers of regulatory review.
- In 1992, George Bush federalized the National Guard and used its members to quell the Los Angeles riots.

While the majority of unilateral directives may not resonate quite so loudly in the telling of American history, a growing proportion involve substantive policy matters. Rather than being simply “daily grist-of-the-mill diplomatic matter,” presidential directives have become instruments by which presidents actually set all sorts of consequential domestic and foreign policy (Paige 1977). As Peter Shane and Harold Bruff argue in their casebook on the presidency, “presidents [now] use executive orders to implement many of their most impor-

tant policy initiatives, basing them on any combination of constitutional and statutory powers that is thought to be available" (1988, 88).

Between 1920 and 1998, presidents issued 10,203 executive orders, or roughly 130 annually. As might be expected, presidents issued more civil service orders than orders in any other policy arena. On average, presidents issued thirty-three such orders, most of which dealt with the management of government personnel. This proportion, however, declined precipitously after World War II, when executive orders were no longer used to perform such trivial administrative practices as exempting individuals from mandatory retirement requirements.

Outside of those orders relating directly to the civil service, each year presidents issued on average thirty-two orders in foreign affairs, another eight on social welfare policy, sixteen on regulations of the domestic economy, and fully thirty-three that concerned the management of public lands and energy policy, though the number in this last category has declined markedly over the past few decades. The majority of orders, it seems, have substantive policy content, both foreign and domestic.⁸

These figures only concern executive orders, which represent but one tool among many that presidents have at their disposal. When negotiating with foreign countries, presidents can bypass the treaty ratification process by issuing executive agreements; not surprisingly, the ratio of executive agreements to treaties, which hovered between zero and one in the nineteenth century, now consistently exceeds thirty (King and Ragsdale 1988). If presidents choose to avoid the reporting requirements Congress has placed on executive orders, they can repackage their policies as executive memoranda, determinations, administrative directives, or proclamations. And if they prefer to keep their decisions entirely secret, they can issue national security directives, which neither Congress nor the public has an opportunity to review (Cooper 2002).

The U.S. Constitution does not explicitly recognize any of these policy vehicles. Over the years, presidents have invented them, citing national security or expediency as justification. Taken as a whole, though, they represent one of the most striking, and underappreciated, aspects of presidential power in the modern era. Born from a truly expansive reading of Article II powers, these policy mechanisms have radically impacted how public policy is made in America today. The president's powers of unilateral action exert just as much influence over public policy, and in some cases more, than the formal powers that presidency scholars have examined so carefully over the past several decades. As Kenneth Mayer notes,

Working from their position as Chief Executive and Commander in Chief, Presidents have used executive orders to make momentous policy choices, creating and abolishing executive branch agencies, reorganizing administrative and regulatory processes, determining how legislation is implemented, and taking whatever action is permitted within the boundaries of their constitutional or statutory authority. (2001, 4–5)

If we want to account for the influence that presidents wield over the construction of public policy, we must begin to pay serious attention to the president's capacity to create law on his own.

“Presidential Power Is the Power to Persuade”

The image of presidents striking out on their own to conduct a war on terrorism or revamp civil rights policies or reconstruct the federal bureaucracy stands in stark relief to scholarly literatures that equate executive power with persuasion and, consequently, place presidents at the peripheries of the lawmaking process.

Richard Neustadt sets the terms by which every student of American politics has come to understand presidential power in the modern era. When thinking about presidents since FDR, Neustadt argues, “weak remains the word with which to start” (1991 [1960], xix). Presidents are much like Shakespearean kings, marked more by tragedy than grandeur. Each is held captive by world events, by competing domestic interests and foreign policy pressures, by his party, his cabinet, the media, a fickle public and partisan Congress. To make matters worse, the president exercises little control over any of these matters—current events and the political actors who inhabit them regularly disregard his expressed wishes. As a result, the pursuit of the president's policy agenda is marked more by compromise than conviction; and his eventual success or failure (as determined by either the public at the next election or historians over time) ultimately rests with others, and their willingness to extend a helping hand.

The public now expects presidents to accomplish far more than their formal powers alone permit. This has been especially true since the New Deal, when the federal government took charge of the nation's economy, commerce, and the social welfare of its citizens. Now presidents must address almost every conceivable social and economic problem, from the impact of summer droughts on midwestern farmers to the spread of nuclear weapons in the former Soviet Union. Armed with little more than the powers to propose and veto legislation and recommend the appointment of bureaucrats and judges, however, modern presidents appear doomed to failure from the very

beginning. As one recent treatise on presidential “greatness” puts it, “modern presidents bask in the honors of the more formidable office that emerged from the New Deal, but they find themselves navigating a treacherous and lonely path, subject to a volatile political process that makes popular and enduring achievement unlikely” (Landy and Milkis 2000, 197).

If a president is to enjoy any measure of success, Neustadt counsels, he must master the art of persuasion. Indeed, according to Neustadt, power and persuasion are synonymous. The ability to persuade, to convince other political actors that his interests are their own, defines political power and is the key to presidential achievement. Power is about bargaining and negotiating; about brokering deals and trading promises; and about cajoling legislators, bureaucrats, and justices to do things that the president cannot accomplish on his own. As Matthew Dickinson notes, “Neustadt’s core argument in *Presidential Power* is that a president’s bargaining exchanges with other actors and institutions constitute the primary means by which he (someday she) exercises influence” (2000, 209). The president wields influence when he manages to enhance his bargaining stature and build governing coalitions; and the principal way to accomplish as much, Neustadt claims, is to draw upon the bag of experiences, skills, and qualities that he brings to the office.

Intentionally or not, Neustadt set off a behavioral revolution. Subsequent generations of scholars posited skill, personality, style, and reputation as the ingredients of persuasion and thus the keystones of political power (Barber 1972; George 1974; Greenstein 2000; Hargrove 1966; Pfiffner 1989). Self-confidence, an instinct for power, an exalted reputation within the Washington community, and prestige among the general public were considered the foundations of presidential success. Without certain personal qualities, presidents could not hope to build the coalitions necessary for action. Power was contingent upon persuasion, and persuasion was a function of all the personal qualities individual presidents bore; and so, the argument ran, what the presidency was at any moment critically depended upon who filled the office.

By these scholars’ accounts, a reliance on formal powers actually signals weakness. What distinguishes great presidents is not a willingness to act upon the formal powers of the presidency but an ability to rally support precisely when and where such formal powers are lacking. As Neustadt argues, formal powers constitute a “painful last resort, a forced response to the exhaustion of other remedies, suggestive less of mastery than of failure—the failure of attempts to gain an end by softer means” (1991 [1960], 24). Presidents who veto bill after

bill (think Ford) do so because their powers to persuade have faltered. The presidents who effectively communicate (Reagan) or who garner strong professional reputations (Roosevelt) stand out in the eyes of history.

Although the notion of the personal presidency dominated the field for decades, its influence is on the decline. The principal reason is that it no longer matches up with the facts. The personal presidency became a popular theoretical notion just as the American presidency was experiencing tremendous growth and development as an institution: in its staffing, its budget, and the powers delegated to it by Congress. As time went on, it became increasingly clear that the field needed to take more seriously the formal structures and powers that define the modern presidency.

If the personal presidency literature is correct, executive power should rise and fall according to the personal qualities of each passing president. Presidential power should expand and contract according to the individual skills and reputations that each president brings to the office. The constituent elements of the personal presidency may be important. Prestige and reputation may matter. But if we are to build a theory of presidential power, it seems reasonable to start with its most striking developments during the modern era. And these developments have little to do with the personalities of the men who, since Roosevelt, have inhabited the White House.

By virtually any objective measure, the size and importance of the “presidential branch” has steadily increased over the past century (Hart 1995). According to Thomas Cronin, “for almost 150 years the executive power of the presidency has steadily expanded” (1989, 204). Edward Corwin echoes this sentiment, arguing that “taken by and large, the history of the Presidency is a history of aggrandizement” (1957, 238). How can such trends persist if presidential powers are fundamentally personal in nature? It cannot be that the caliber of presidents today is markedly higher than a century ago, and for that reason alone presidents have managed to exert more and more influence. Does it really make sense to say that successful twentieth-century presidents (e.g., the Roosevelts or Reagan) distinguish themselves from great nineteenth-century presidents (e.g., Jackson, Polk, or Lincoln) by exhibiting stronger personalities? And if not, how can we argue that the roots of modern presidential power are fundamentally personal in nature? While Neustadt may illuminate short-term fluctuations at the boundaries of presidential influence—skill in the art of persuasion surely plays some part in political power—he cannot possibly explain the general growth of presidential power.

During the past twenty years, scholars have revisited the more formal components of presidential power. Work on the institutional pres-

idency has regained the stature it held in political science during the first half of the twentieth century (Bond and Fleisher 1990, 2000; Burke 1991; Hargrove 1974; Jones 1994; Moe 1985, 1999; Nathan 1983; Peterson 1990). This work is far more rigorous than the personal presidency literature and, for that matter, the institutional literature's earlier incarnations (Corwin 1957; Rossiter 1956). A science of politics is finally taking hold of presidential studies: empirical tests now are commonplace; theoretical assumptions are clearly specified; and hypotheses are subject to independent corroboration. Perhaps more important than its methodological contributions, though, the institutional literature has successfully refocused scholarly attention on the office of the presidency and the features that make it distinctly modern: its staff and budget, the powers and responsibilities delegated to it by Congress, and the growth of agencies and commissions that collect and process information within it.

Nothing in the institutional literature, however, fundamentally challenges Neustadt's original claim that "presidential power is the power to persuade" (1991 [1960], 11). Scholars continue to equate presidential power with an ability to bargain, negotiate, change minds, turn votes, and drive legislative agendas through Congress. Not surprisingly, the president remains secondary throughout this work. He continues to play second fiddle to the people who make real policy decisions: committee members writing bills, congressional representatives offering amendments, bureaucrats enforcing laws, judges deciding cases.

To legislate, to build a record of accomplishments about which to boast at the next election, and to find their place in history, presidents above all rely upon Congress—so the institutional literature argues. Without Congress's active support, and the endorsement of its members, presidents cannot hope to achieve much at all.

Under the American system, you [the president] need [congressional] votes all the time and all kinds of votes; votes for and against bills, votes for and against amendments, votes to appropriate funds, votes not to appropriate funds, votes to increase the budget, votes to cut the budget, votes to enable you to reorganize the executive branch, votes to strengthen you (or not to weaken you) in your dealings with administrative agencies, votes to sustain your vetoes, votes to override legislative vetoes, votes in the Senate to ratify the treaties you have negotiated and to confirm the nominations you have made, votes (every century or so) in opposition to efforts to impeach you. (King 1983, 247)

The struggle for votes is perennial; and success is always fleeting. Should Congress lock up, or turn away, the president has little or no recourse. Ultimately, presidents depend upon Congress to delegate

authority, ratify executive decisions, and legislate when, and where, presidents cannot act at all.

Almost uniformly, the institutional literature measures presidents' power by their ability to drive through Congress a legislative agenda (Bond and Fleisher 1990, 2000; Goldsmith 1974; Haight and Johnston 1965; Light 1999; Peterson 1990; Rudalevige 2002; Spitzer 1993; Wayne 1978). The signature of strong presidents is a high legislative success rate in Congress, of weak presidents, the sight of legislative proposals repeatedly dying in committees and on floors. While its form is no longer personal in nature, presidential power very much remains tied to persuasion and bargaining.

Consider, by way of example, the work on the "two presidencies" hypothesis. In 1966, Aaron Wildavsky proposed that there are two presidencies, one foreign, the other domestic. In the former, presidents dominate policy making; in the latter, Congress does.

Since its publication, Wildavsky's argument has received considerable attention, much of it critical (Edwards 1986, 1989; Fleisher and Bond 1988; Pepper 1975; Sigelman 1979; Zeidenstein 1981). Still, there remains one point that all parties agree upon, if only tacitly. Presidents are powerful to the extent that they can influence the legislative process; the ability to turn congressional votes, amend bills, and push policies through committees and chambers is the mark of success. This theoretical assumption lays the foundation for all of the empirical work on the two-presidencies hypothesis. Every scholar attempts to answer the same question: whether presidents' foreign policy initiatives enjoy a greater measure of congressional support than do domestic initiatives.

Like the rest of the institutional literature, this work examines presidential success *in* Congress rather than presidential success *versus* Congress (Lindsay and Steger 1993). Scholars rely exclusively on roll call votes and variations of presidential success scores to determine whether presidential success in Congress varies across policy domains. The president, it is supposed, exercises and defines his power through deliberations with Congress. What presidents do outside of these deliberations, presumably, either perfectly reflects the underlying wishes of congressional majorities or lacks substantive importance.

Empirically motivated institutional studies are not alone in this regard. Game theoretic models, for the most part, also gauge executive power by the president's ability to influence legislative affairs. Indeed, to the extent that presidents play any role whatsoever in most models of lawmaking, they almost always act as a veto player. These models do an excellent job of delineating the precise conditions under which the president's power to veto legislation impacts public policy

(Cameron 2000; Krehbiel 1998; Matthews 1989; McCarty 1997). Not surprisingly, however, presidents appear remarkable only because they are so feeble. As represented in these models, presidents appear only slightly more important than members of Congress who can credibly threaten to filibuster a bill. Rather than having to assemble a super-majority of sixty in the Senate, enacting coalitions now must occasionally win the votes of sixty-seven. The technical impact of the president within these models of lawmaking is to replace the three-fifths cloture point with the two-thirds veto override player as the veto-pivot—not exactly the stuff of a modern, ascendant presidency.

While they provide important insights into the strategic uses of the veto power, these models remain almost completely Congress-centered. As such, they largely ignore the ability of presidents to set policy on their own. The fact of the matter is that presidents have always made law without the explicit consent of Congress, sometimes by acting upon general powers delegated to them by different congresses, past and present, and other times by reading new executive authorities into the Constitution itself.

Presidents regularly effect policy change outside of a bargaining framework. Because of his unique position within a system of separated powers, the president has numerous opportunities to take independent action, with or without the expressed consent of either Congress or the courts. Sometimes he does so by issuing executive orders, proclamations, or executive agreements; other times by handing down general memoranda to agency heads; and still other times by dispensing national security directives. The number of these unilateral directives, and of opportunities to use them, has literally skyrocketed during the modern era (Moe and Howell 1999a, 1999b). While presidents freely exercise these powers during periods of national crises, as the events following September 11th have made clear, they also rely upon executive orders and executive agreements during periods of relative calm, effecting policy changes that never would survive the legislative process. And to the extent that presidents use these “power tools of the presidency” more now than they did a century ago, the ability to act unilaterally speaks to what is distinctively “modern” about the modern presidency (Cooper 1997, 2002).

Rather than hoping to influence at the margins what other political actors do, the president can make all kinds of public policies without the formal consent of Congress. While the growth of the presidency as an institution (its staffs, budgets, departments, and agencies) augments presidential power, it is the ability to set policy unilaterally that deserves our immediate and sustained attention.

This book critically examines how the power of unilateral action,

which the Constitution nowhere mentions and even lackluster presidents can exercise, augments the chief executive's influence in the push and scuffle of public policy making. As such, this book represents an important break from our previous understanding of presidential power. Modern presidential power does not strictly involve persuasion as Neustadt insists and the institutional literatures assent. The lessons of legislators' successes do not apply, in equal measure, to the presidency. Bargaining does not define all aspects of presidential policymaking. Rather, modern presidents often exert power by setting public policy on their own and preventing Congress and the courts—and anyone else for that matter—from doing much about it.

Thinking about Unilateral Powers

From the beginning, it is worth highlighting what makes unilateral powers distinctive. For the ability to act unilaterally is unlike any other power formally granted the president. Two features stand out.

The most important is that the president moves policy first and thereby places upon Congress and the courts the burden of revising a new political landscape. Rather than waiting at the end of an extended legislative process to sign or veto a bill, the president simply sets new policy and leaves it up to Congress and the courts to respond. If they choose not to retaliate, either by passing a law or ruling against the president, then the president's order stands. Only by taking (or credibly threatening to take) positive action can either adjoining institution limit the president's unilateral powers.

While it has yet to apply the lesson to the presidency, the formal literature on agenda setting and coalition formation pays fair tribute to the strategic advantages associated with moving first (Baron 1991, 1996). By moving first, and anticipating the moves of future actors, legislators of all stripes and in very different political systems influence the kinds of policies governments produce. Indeed, an entire public choice literature argues that if preferences are multidimensional—that is, preferences cannot be represented along a single, usually liberal-conservative, continuum—then it is possible to manipulate the agenda so that any conceivable public policy can be enacted (McKelvey 1976). But gains to the president are twice over. While agenda setters in Congress only propose bills, the president moves first and creates legally binding public policies. And he does so without ever having to wait on coalitions subsequently forming, committee chairs cooperating, or party leaders endorsing.

The second important feature of unilateral powers is that the presi-

dent acts alone. There is no need to rally majorities, compromise with adversaries, or wait for some interest group to bring a case to court. Rather than depending upon Congress to enact his legislative agendas, the president frequently can strike out on his own, occasionally catching even his closest advisors off guard (recall Clinton's unilateral decision to bomb Iraq in the fall of 1998, the day before his scheduled impeachment hearing in the House Judiciary Committee). As the chief of state, the modern president is in a unique position to lead, to define a national agenda, and to impose his will in more and more areas of governance.

To be sure, the executive branch does not reduce to the president himself. Should they vehemently disagree with a president, subordinates can set up roadblocks, as Clinton learned early in his first term when he threatened to unilaterally lift the ban on gays in the military and subsequently bumped up against the fierce opposition of the Joint Chiefs of Staff (more on this in chapter 5). The relationship between a president who stands atop his governing institution and subordinates who ultimately are responsible to him, however, is fundamentally different from that of a legislator who stands on roughly equal footing with 534 colleagues across two chambers. Hierarchies reside in both the legislative and executive branches. In the former, party leaders and committee chairs exert disproportionate influence in the House and Senate. No single member, however, has the final word on which bills are introduced and which amendments are considered. In the executive branch, however, ultimate authority resides with a president who (fairly or not) is given credit or blame for the success or failure of public policies. While bureaucrats certainly retain a significant amount of discretion to do as they please, the lines of authority generally converge upon a single individual, the president.⁹

The ability to move first and act alone, then, distinguishes unilateral powers from all other sources of influence. In this sense, Neustadt is turned upside-down, for unilateral action is the virtual antithesis of bargaining and persuading. Here, presidents just act; their power does not hinge upon their capacity to "convince [political actors] that what the White House wants of them is what they ought to do for their sake and for their authority" (Neustadt 1991 [1960], 30). To make policy, presidents need not secure the formal consent of Congress, the active support of bureaucrats, or the official approval of justices. Instead, presidents simply set public policy and dare others to counter. For as long as Congress lacks the votes (usually two-thirds of both chambers) to overturn him, the president can be confident that his policy will stand.

The presidency literature's traditional distinction between formal

and informal powers does not contribute much insight here. Because the Constitution does not mandate them, powers of unilateral action cannot be considered formal. It is by reference to what presidents have done (or gotten away with) that these powers take form. But nor are these discretionary powers informal. They are not rooted in personal qualities that vary with each passing president. Rather, these powers emerge from specific institutional advantages within the office of the presidency itself: its structure, resources, and location in a system of separated powers. The promise of a sustained analysis of unilateral powers, then, is great. To the extent that presidents act unilaterally with increasing frequency and effect in the postwar era, an institutional theory of unilateral action enables scholars to see beyond Neustadt's original conception of presidential influence in the modern era.

The Tool Chest

John Locke first spoke of "prerogative powers." According to Locke, certain public officials ought to enjoy the "power to act according to discretion, for the publick good, without the prescription of the law and sometimes even against it" (1988 [1689], 237). These powers are necessary, Locke argued, because the designers of any constitution cannot foresee all future contingencies and therefore must permit certain discretionary allowances. "There is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe" (375). In order to meet new expectations, and serve the public when laws cannot, the president may act unilaterally, even when neither the legislature nor the Constitution has mandated appropriate powers.

Presidents in more modern times have manufactured a number of policy instruments that give shape and meaning to these prerogative powers. The most common include executive orders, proclamations, national security directives, and executive agreements. There are few hard and fast rules about how policies are classified, affording presidents a fair measure of liberty to select the instrument that best serves their objectives. Still, some basic distinctions generally apply.

Among all unilateral directives, "executive orders combine the highest levels of substance, discretion, and direct presidential involvement" (Mayer 2001, 35). Executive orders, for the most part, instruct government officials and administrative agencies to take specific actions with regard to both domestic and foreign affairs. "Executive orders are directives issued by the president to officers of the executive

branch, requiring them to take an action, stop a certain type of activity, alter policy, change management practices, or accept a delegation of authority under which they will henceforth be responsible for the implementation of law" (Cooper 2002, 16). But while presidents direct executive orders to subordinates within the executive branch, the impact of these orders is felt well beyond the boundaries of the federal government. Terry Eastland, who worked in the Justice Department during the Reagan Administration, cautions, "In theory executive orders are directed to those who enforce the laws but often they have at least as much impact on the governed as the governors" (1992, 351). Through executive orders, presidents have dictated the terms by which government contractors hire and fire their employees, set restrictions on where American citizens can travel abroad, frozen the financial holdings of private parties, reset trade tariffs, and determined the kinds of recreational activities that are allowed on public lands.

If executive orders are typically directed to officials within the federal government, presidential proclamations almost always target individuals and groups outside of the government. Because Article II of the Constitution does not endow the president with clear and immediate authority over private parties (as it does over the federal bureaucracy), it is not surprising that proclamations tend to be less consequential than executive orders, most involving ceremonial and commemorative affairs. There are, however, numerous exceptions, such as Nixon's 1971 proclamations and orders temporarily freezing all wages, rents, and prices as part of the national economic stabilization program; Ford's 1973 proclamation granting pardons to draft dodgers; and Carter's 1980 proclamations imposing new surcharges on imported oil.

Beyond the 1937 Federal Register Act's publication requirements, presidents need not abide by any fixed requirements when developing, issuing, or circulating an executive order or proclamation. There are occasions, however, when presidents would prefer not to alert Congress, the courts, or the public as to their actions, and then presidents often turn to national security directives (also known as national security decision directives or presidential decision directives). Issued through the National Security Council, most national security directives remain classified, and hence beyond the purview of political opponents. While presidents presumptively use these directives to safeguard the nation's security, in practice presidents may repackage a particularly controversial executive order as a national security directive and thereby avoid the scrutiny of Congress and interest groups. As Phillip Cooper notes,

It is tempting to employ NSDs because they cloud actions the president wishes to take with the mantle of national security and hold out the threat of security laws for violation. Although it happens, it is more dangerous for employees to leak or discuss these devices, and Congress has difficulty getting into documents it cannot see. It is even tempting to use NSDs in ways that help the president domestically. (1997, 547)

Though precise figures are impossible to obtain, the General Accounting Office (GAO) estimated that from 1961 to 1988 presidents issued over one thousand national security directives. Of those the GAO was able to review, 41 percent directly affected military policy, 63 percent foreign policy, and 22 percent domestic policy.¹⁰ A sample of recently declassified national security directives includes orders to the CIA to support and recruit Nicaraguan Contras; the funding of covert operations to prevent nations from replicating the “Cuban model”; the authorization to execute preemptive and retaliatory strikes against confirmed and suspected terrorists; the establishment of new classified information rules for the National Security Agency; the approval of the invasion of Grenada in 1983. According to Harold Relyea, the content of national security directives “is not only imaginatively diverse, but also often highly controversial, if not dangerous. Indeed, they appear to be an attempt by the President to make a determination unilaterally about matters better decided with congressional comity” (1988, 108).

Even the advent of the Cold War can be traced back to a national security directive. Issued in April 1950, N.S.C. 68 emphasized the historical importance of the mounting conflict between the United States and Soviet Union. The document, drafted by the director of the State Department’s policy-planning staff, Paul Nitze, was a call to arms and defined the nation’s military and political objectives as it waged an ongoing struggle against the world’s only other superpower. Calling for a massive expansion of military capabilities, N.S.C. 68 concluded that

we must, by means of a rapid and sustained build-up of the political, economic, and military strength of the free world, and by means of an affirmative program intended to wrest the initiative from the Soviet Union, confront it with convincing evidence of the determination and ability of the free world to frustrate the Kremlin design of a world dominated by its will. . . . The whole success of the proposed program hangs ultimately on recognition by this Government, the American people, and all free peoples, that the cold war is in fact a real war in which the survival of the free world is at stake.¹¹

While it met some initial resistance within the Truman and Eisenhower administrations, N.S.C. 68, more than any other document, es-

established the guiding doctrine for successive presidents' Cold War foreign policy.

Executive agreements stand apart from these other directives. While executive orders, proclamations, and (to a lesser degree) national security directives all are unilateral counterparts to legislation, executive agreements provide presidents with an alternative to the treaty ratification process. Rather than having to secure the consent of two-thirds of the Senate before entering into a bi- or multilateral agreement with foreign nations, presidents can use executive agreements to unilaterally commit the United States to deals involving such issues as international trade, ocean fishing rights, open air space, environmental standards, and immigration patterns. While most of these agreements concern very specific (and often technical) matters, the sheer number issued during the modern era has increased at such an astronomical rate that collectively they now constitute a vital means by which presidents unilaterally affect public policy.

When setting public policy, presidents frequently issue combinations of these various policy directives. To force the integration of schools in Little Rock, Arkansas, Eisenhower simultaneously issued a proclamation and an executive order. Carter relied upon a series of executive orders and executive agreements to negotiate the Iran Hostage Crisis. Presiding over World War II, the Korean War, and the Vietnam War, Roosevelt, Truman, Johnson, and Nixon all issued a wide array of secretive orders, national security directives and otherwise. Presidents frequently use executive orders, secretarial orders, and reorganization plans to create administrative agencies and then turn to other kinds of unilateral directives—for example, administrative directives, findings and determinations, and regulations—to monitor their behavior. The ease with which presidents can mix and match these unilateral directives to advance their policy goals is considerable.

The Legality of Unilateral Powers

The first Court challenge to a presidential order, *Little v. Barreme* (1804), concerned the legality of a seizure of a Danish ship, the *Flying Fish*.¹² George Little, the captain of the *U.S.S. Boston*, had intercepted the ship at sea. At the time, Captain Little was complying with a John Adams presidential order that the Navy seize any and all ships sailing to or from French ports. Previously, however, Congress had only authorized the seizure of frigates sailing to French ports. Because the Danish brig was sailing *from* a French port and not *to* one (it was

headed from Jérémie to St. Thomas), the Court for the first time had to resolve a discrepancy between a presidential order and congressional statute.

In a unanimous ruling written by Chief Justice John Marshall, the Court declared that had Adams' order stood alone, the Navy's actions would be constitutional. Because Congress had enacted a more restrictive statute, however, the Court was forced to rule in favor of the Danish captain. "Congressional policy announced in a statute necessarily prevails over inconsistent presidential orders. . . . Presidential orders, even those issued as Commander in Chief, are subject to restrictions by Congress." Marshall subsequently ordered Captain Little to pay damages. More importantly, though, Marshall established the clear principle that when an executive order blatantly conflicts with a law, the law prevails.

During the rest of the nineteenth century, the federal courts considered a host of challenges to unilateral directives issued by presidents, most of which involved military orders.¹³ It was not until the 1930s that the Supreme Court formally recognized the president's power to act unilaterally. Three cases—*United States v. Curtiss-Wright* (1936);¹⁴ *United States v. Belmont* (1937);¹⁵ and *United States v. Pink* (1942)¹⁶—made the difference (Schubert 1973, 107).

Curtiss-Wright centrally involved the constitutionality of an executive agreement that forbade the sale of arms to countries involved in armed conflict. When it sold fifteen machine guns to the government of Bolivia, Curtiss-Wright Export Corporation was charged with violating the agreement. As part of its defense, the company argued that Congress had "abdicated its essential functions and delegated them to the Executive," and for that reason, the Court should overturn the executive agreement. Instead, the Supreme Court, in an oft-cited phrase, deemed the president the "sole organ of the federal government in the field of international relations" and upheld the constitutionality of this particular delegation of authority. Doing so, it formally recognized his legal right to issue executive agreements.

In *United States v. Belmont*, the Supreme Court extended this right to executive orders. When Russia reneged on debts owed to the United States in the 1930s, President Roosevelt seized Russian financial assets held in American banks. Arguing that Roosevelt's actions violated New York State law, a Russian investor asked the Court to overturn the executive order and to award compensation for his losses. The Court, however, refused. Doing so, it equated an executive order with federal law and reaffirmed its preeminence over state law.

The Supreme Court extended this reasoning to executive agreements in *United States v. Pink*, which again involved the seizure of

Russian assets in American banks. This time, however, the focus concerned an exchange between the president and the Russian government known as the Litvinov Assignment. In a letter to Roosevelt, People's Commissar for Foreign Affairs Maxim Litvinov relinquished certain Russian claims to assets of Russian companies in New York banks. Roosevelt subsequently acknowledged the reassignment of property claims. In *Pink*, the question before the Court centered on the legal authority of this exchange. Ultimately, the Court ruled that because executive agreements have the same status as treaties, and because both override state laws, the plaintiffs could not use New York State law to try to recover their lost assets.

Collectively, *Curtiss-Wright*, *Belmont*, and *Pink* firmly established the president's authority to issue directives involving "external affairs." Their distinction between foreign and domestic policy, however, subsequently blurred. And for good reason. The list of exceptions to any definition of "foreign" or "domestic" policy is sufficiently long as to make the definitions themselves unworkable as elements of jurisprudence. "The original constitutional understanding that in domestic affairs Congress would make the law and presidents would see to its enforcement had never worked in practice and by the early 1990s it had largely been abandoned" (McDonald 1994, 314). The courts now fully recognize the president's power to issue executive orders and agreements that concern both foreign and domestic policy. Indeed, powers of unilateral action have become a veritable fixture of the American presidency in the modern era.

Writing Public Policy

Much can happen between the issuance of a presidential order and its implementation. Opportunities for shirking abound. Administrative agencies may read their mandates selectively; they may ignore especially objectionable provisions; they may report false or misleading information about initiatives' successes and failures. As we have already noted, the executive branch assuredly does not reduce to the president himself. Bureaucrats enjoy a fair measure of autonomy to do as they please.

Demanding a policy change does not make it so. As Neustadt himself forcefully argued, orders handed down from on high are not always self-executing (1991 [1960], 10–28). In 1948, for instance, Truman issued an executive order demanding the desegregation of the military, but decades passed before the outcome was finally realized. Presidents are engaged in a constant struggle to ensure compliance

among members of the executive branch, and to advance the realization of their policy interests. Presidents appoint high-ranking officials who share their worldview, and whenever possible, presidents try to rally the support of their subordinates. This has important consequences for our understanding of presidential power; for when it comes to the implementation of public policy (whether enacted as a federal statute or issued as a unilateral directive), the power modern presidents wield very much depends upon their ability to persuade.

This book, though, is principally concerned with how policy is made, not with how it is carried out. For how laws are written (if they are written at all) matters greatly. As chapter 3 shows, Truman ordered that the military be desegregated at a time when congressional action on the matter was unthinkable. His ability to act unilaterally had an immediate and profound impact on the growth and development of federal civil rights policy. Further, it set in motion societal changes much earlier than would have occurred had the president's only opportunity to exercise power been to persuade Congress to act on his behalf.

This book sets presidential policy-making aside from the traditional legislative process; for while presidents must build and sustain coalitions to pass laws, they can unilaterally issue policy directives over the vocal objections of congressional majorities. As one political observer instructs, "Forget Capitol Hill deliberations and back-room negotiations with industry titans. No need for endless debate and deal-making. For a president, an executive order can be as powerful as a law—and considerably easier to achieve."¹⁷ In the political fight over the content of public policy, presidents regularly exert power without persuasion. This book shows how.

Institutional Foundations

Unilateral powers are always available to all presidents. That does not mean, however, that all presidents will choose to use them with equal frequency. Some, for example Eisenhower, may not take advantage of these powers for lack of a clear domestic agenda; others, such as Clinton, may back off from threats to exercise them because they fear the political fallout. An examination of unilateral powers is not entirely inimical to the kinds of personal concerns Neustadt and his successors highlight.

Nonetheless, this book focuses on the institutional factors—the ideological composition of Congress and the courts, divided government, presidential elections, budgetary processes, delegated author-

ity—that affect presidents’ ability to exercise their powers of unilateral action. Just as the skills and dispositions of individual presidents vary with each administration, so, too, does the institutional environment within which each must operate. The relative importance of these realms is in dispute, as they shall likely always be. I, for one, am basically agnostic on the matter. But to the extent that institutions are more tractable than personalities, and the defining characteristics of the modern presidency are institutional rather than personal, an institutional approach appears more promising than previous efforts to specify and empirically measure the personal foundations of presidential influence.

To account for this institutional environment, we really need only ask a single question: how well can Congress and the courts constrain a president who has incentives to continually, albeit strategically, press out on the boundaries of his power? This gets to the heart of the matter. The limits of unilateral powers are as wide or narrow as Congress and the courts permit. Presidents may opt not to exercise their unilateral powers to the maximum extent possible—there will certainly be occasions when Congress and the courts afford a president more discretion than he chooses to utilize. This, however, is a separate matter. My concern is the fundamentally institutional question (what *can* the president do) rather than the more personal one of what he will *choose* to do in different circumstances.

When do presidents have the strongest incentives to set policy unilaterally? When will they be able to do so? Do these occasions always coincide? When can Congress rein in an imperial president? Will its members necessarily want to? How are the courts likely to respond to the president’s use of these powers? These are the kinds of considerations a theory of direct presidential action must address. They take center stage in the chapters that follow.