

Legislative Capacity and Executive Unilateralism

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Abstract

This paper develops a theory of presidential unilateralism in which both ideological divergence with Congress and legislative capacity influence the president's use of executive orders. We argue that when Congress is less capable of constraining the executive, the president will issue more executive orders during periods of divided government. Conversely, in periods of high legislative capacity, the president is less likely to issue executive orders when faced with an opposed Congress. Based on an examination of institutional changes, we identify years prior to the mid-1940s as characterized by low congressional capacity and the subsequent period as characterized by high capacity. Testing the theory between 1905 and 2013, we find strong support for these predictions and demonstrate that legislative capacity conditions the role of ideological disagreement in shaping presidential action. Overall, this paper deepens our current understanding of the dynamics of separation of powers politics and the limits of executive power.

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Introduction

The expansion of presidential power has been a central concern in American politics since the eighteenth century. In particular, the use of unilateral actions has fueled fears of an increasingly unconstrained president sidestepping Congress and undermining the separation of powers system. A recent *New York Times* article highlighting President Obama's reliance on executive orders recognizes this as typical behavior of presidents facing opposition congresses:

“...the Obama administration's pattern reflects how presidents usually behave, especially during divided government, and appears aggressive only in comparison to Mr. Obama's having been ‘really skittish for the first two years’ about executive power”¹

Yet, despite this common media narrative, the political science literature finds that the president is actually constrained by Congress, issuing fewer executive orders under divided government (Fine and Warber 2012; Howell 2003; Young 2013). However, this counterintuitive finding emerges in studies focusing on the “modern” presidency, despite the prevalent use of unilateral tools since the nineteenth century and throughout American history. Furthermore, changes in American political institutions, namely the growth of the administrative state beginning in the late nineteenth century and increases in legislative capacity in the twentieth century, suggest that the relationship between ideological disagreement and unilateralism may not be constant over time. Consequently, these post-WWII empirical patterns may not hold in all historical periods. Yet, there is little systematic evidence about

¹Savage, Charlie. April 22, 2012. “Shift on Executive Power Lets Obama Bypass Rivals,” *The New York Times*.

how presidents have historically used executive orders in policymaking.²

To address this question, we develop a new theory of executive order use that hinges on both the ideological alignment of the president and Congress as well as changes in legislative capacity to limit executive action through statutory discretion and oversight. When congressional capacity is low, the president can more effectively circumvent a hostile Congress through unilateral action. In these times, he issues more executive orders when his preferences diverge from the legislature. However, when legislative capacity is high, the president is less able to bypass Congress and issues fewer executive orders under divided government. The latter prediction (less executive orders under divided government) is consistent with previous findings, while the former (more orders under divided government) is directly counter to them.

We identify periods prior to the mid-1940s as characterized by low congressional capacity and the years following as periods of high capacity, based on institutional changes in Congress. Testing our theory in these identified periods, we find strong support for our main hypotheses. In particular, we find that presidents issue more executive orders under divided government prior to 1945. However, this relationship reverses after 1945, consistent with our theory. We further demonstrate that over time, the effect of divided government is conditional on legislative resources, particularly expenditures and committee staff sizes. These results are a significant departure from our current understanding of unilateral politics, demonstrating that previous theories of presidential policymaking are time-dependent and conditioned by congressional capacity. More broadly, they have implications for the development of inter-branch relations and policymaking in the United States and other separated systems.

²Notably, however, Cooper (2002) and Dodds (2013) provide important theoretical and descriptive contributions in this area.

The remainder of the paper proceeds as follows. We first discuss background on executive orders and the related literature. Then, we present our theory of legislative capacity and unilateral actions. Next, we empirically test its hypotheses, followed by a closer analysis of the theory’s mechanisms. Finally, we offer concluding remarks.

Background

An executive order is a unilateral directive issued by the president to executive branch officials and agencies on how to implement the law. They are generally viewed by the courts as having the force of law, unless they clearly and explicitly violate the Constitution or an existing statute (Cooper 2002). They can be used for a variety of purposes, such as to respond to economic or international crisis, to implement a law, or to create and implement policy initiatives.

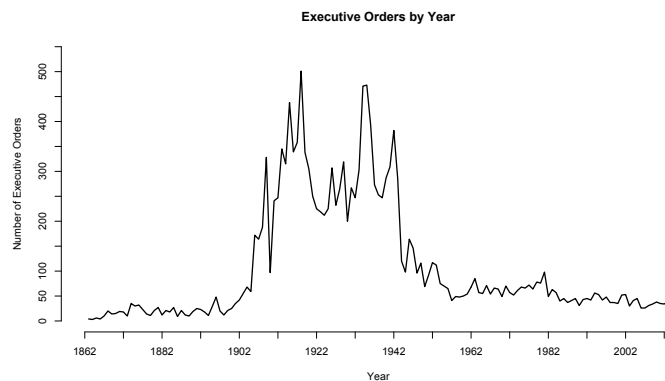


Figure 1: Executive Orders Issued Per Year Between 1862 and 2010

Presidents can use executive orders to significantly impact policy. The ability of the president to shape policy with executive orders comes through discretion derived specifically from some statutes or the interpretation of vague language in other statutes and the Constitution (Cooper 2002; Howell 2003; Mayer 2001). While presidents can base their authority to issue executive orders on either statute or the Constitution, the majority appear to rely on specific statutes (Rudalevige 2012).

The first recorded executive order was issued by President Lincoln in 1862. However, they were not frequently used until the beginning of the 20th century, as shown in Figure 1. The largest peak of order issuance occurred during the 1930s, reflecting a period of large government growth during the Great Depression. Their use has gradually decreased ever since, although with variation across time. Systematic records of executive orders were not maintained until 1905, the year in which the State Department requested that agencies submit all records of presidential orders to a newly created repository. All executive orders submitted by this year and subsequent orders issued were assigned numbers. On the other hand, those orders not submitted by 1905 are considered unnumbered. Following the passage of the Federal Register Act of 1935, executive orders have been published annually in the *Federal Register*. The *CIS Index to Presidential Proclamations and Executive Orders* reports both numbered and unnumbered executive orders, though there is wide consensus that there is no substantive difference between the two (see Mayer 2001). Accordingly, we choose to report all executive orders, including numbered and unnumbered, in Figure 1 and in later empirical analyses.³

The empirical research devoted to explaining this variation in executive order use has focused primarily on presidencies in the modern era. As a result, little attention has been given to the historical uses of executive orders, even though their peak usage occurred prior to WWII. A central question in this research is whether the president uses executive orders to bypass a hostile Congress or if Congress instead constrains presidential use of this unilateral tool. These analyses, however, have yielded somewhat mixed results. Some studies find that divided government (Deering and Maltzman 1999; Mayer 1999; 2001; Mayer and Price 2002) or the seat share of the president's party in Congress (Krause and Cohen 1997;

³Note there are no substantive differences in the results we report in this paper when excluding or including unnumbered orders. See the Supporting Information for a discussion of the robustness of our results with different plausible counts of executive orders.

2000) has an insignificant or inconsistent impact on the use of executive orders. Conversely, others find that divided government as well as the size and strength of the majority party in Congress are related to significant decreases in orders (Bailey and Rottinghaus 2014; Fine and Warber 2012; Howell 2003; 2005; Young 2013). Relatedly, some studies find that the president's legislative success significantly increases executive orders (Krause and Cohen 1997; Shull 2006; Young 2013) and others find the president's seat share in Congress significantly increases orders (Gleiber and Shull 1992). Finally, previous studies find that the president also issues more executive orders when his public approval is low (Mayer 1999; 2001; Shull 2006), when the executive branch is large (Krause and Cohen 1997), during his final month in office (Mayer 1999; 2001), during international crises (Young 2013), and on foreign policy issues (Marshall and Pacelle 2005). While these studies explore the impact of ideological and political factors in influencing executive order use, they do not examine the role of institutional capacity in conditioning these relationships. We explore this topic in the next section.

Congressional Capacity, Discretion, and Executive Orders

Overview of the Theory

As previously discussed, the key concern in the unilateral policymaking literature is whether the president is constrained by an ideologically-opposed Congress. Though conventional wisdom and the media portray an unconstrained president, many studies actually find the opposite – that modern presidents issue fewer executive orders under divided government. Howell (2003) offers a formal model of the president's strategic use of executive orders as one explanation for this counterintuitive finding. In this model, following an executive order, Congress can pass legislation to alter or reverse it. Thus, presidents will decrease order use when faced with an ideologically opposed Congress more likely to retaliate. Additionally, the president is limited by how far he is permitted to move policy with an executive order

by an exogenously determined discretion parameter, based on authority given to him by the Constitution and previous statutes. Thus, while the president can use executive orders to obtain more favorable outcomes, he is limited by the threat of being overturned by the courts if he exceeds his granted discretion.⁴

Building off Howell's theory, we also argue that presidential use of executive orders is dependent on both the ideological position of Congress and the discretion he is given. However, we argue that this discretion is not exogenous, and it is not constant over time. Instead, we argue that changes in congressional capacity to constrain the president impact the level of discretion he is granted to move policy with executive orders.

The following sections present our new theory of executive orders and legislative capacity. In the development of this theory, there are two questions that we seek to address. First, how do grants of discretion impact the president's use of unilateral tools? Second, how have institutional changes in Congress's ability to write low-discretion laws and to conduct effective oversight affected patterns in presidential behavior?

Theory

We begin by laying out the assumptions underlying our theoretical argument. First, consistent with previous literature (e.g. Krebbiel 1998), we assume that both the president and Congress are primarily motivated by ideology when bargaining over policy outcomes and seek to move policy as close to their ideal policies as possible. Our second assumption is that presidents face non-trivial transaction costs when issuing an executive order, due to the often lengthy bargaining time with agencies when drafting orders (Rudalevige 2012).

⁴Additionally, Deering and Maltzman (1999) develop a strategic model of executive orders based on ideology and the anticipation of congressional retaliation, while Krause and Cohen (1997) theorize on how changes in the institutionalization of the presidency over time correspond to changes in executive orders.

Third, we assume that the executive branch has an informational advantage over Congress regarding how policies result in outcomes, due to its expertise in often specialized areas.

Fourth, we assume Congress will give more discretion to the president when the two actors are ideologically aligned (Epstein and O'Halloran 1999). While Congress would like to delegate to the more informed executive, it must consider the possible loss in utility from presidents who wish to implement a distant policy. Thus, when Congress faces an ideologically-opposed president, it is less likely to delegate in order to minimize policy losses. Conversely, presidents aligned with Congress are more likely to implement favorable policies and will therefore receive greater discretion.

Next, following Howell (2003), we assume that the president will not move policy further than what his granted discretion allows in order to avoid being overturned by the courts. Previous court cases have demonstrated the federal judiciary's ability to overturn executive orders that have exceeded statutory and constitutional limits (e.g. *Youngstown v. Sawyer*, 1952). As such, to avoid costly court challenges and possible policy loss, the president wishes to adhere to the limits of his discretion.

Finally, consistent with Huber and Shipan (2002), we assume that Congress's ability to write legislation that constrains the president is limited by its capacity. In particular, when congressional capacity is low, the cost of writing a statute that considerably constrains the president is more difficult. For instance, if Congress lacks staffers that can research policies and draft long pieces of legislation, then it is not feasible for it to write constraining legislation, even when faced with an ideologically-opposed president.

Given these assumptions, we turn our attention to how changing capacity and discretion relate to unilateral politics. First, when Congress is low in capacity, it faces high costs to writing statutes that limit the executive, leaving much discretion to the president and the bureaucracy in implementing the policy. Even though ideologically distant congresses may want to write more constraining laws, it is not feasible given their capacity constraints. To maximize ideological gains, the president is likely to use executive orders to move policy

closer to his preferred position. He stands to gain the most from moving policies passed by ideologically-opposed congresses. Thus, in periods of low legislative capacity, the president issues more executive orders when Congress is ideologically distant.

Conversely, during periods of high legislative capacity, it is less costly for Congress to write constraining legislation. Thus, it can limit the discretion it grants to ideologically opposed presidents and give greater discretion to aligned presidents. As before, the president issues an executive order when the ideological gains outweigh the costs of issuing the order. A president ideologically opposed to a high capacity Congress receives limited discretion and therefore refrains from issuing an executive order. Yet, when faced with an aligned Congress, he is given more discretion to move policy. Thus, we expect that during periods of high congressional capacity, the president issues more executive orders when Congress is ideologically allied.

In the remainder of this section, we examine the development of Congress's capacity during the twentieth century. We argue that the Congress of the mid-1940s looked very different than it did at the beginning of the twentieth century. A series of institutional changes in the first half of the twentieth century enhanced congressional access to policy information as well as the staff capacity of the institution.

Low Congressional Capacity Periods

The end of the nineteenth century featured a massive growth in the size and complexity of the American administrative state. The number of federal employees boomed from just 50,000 in the 1870s to over 500,000 in the 1920s. The federal budget grew ten times in the same period (Schick 1983). In addition to sheer size, the scope of the functions carried out by the federal government increased dramatically. The federal government embraced new responsibilities during this period, ranging from food inspection to conservation to the increased regulation of business.

This growth in executive branch complexity, however, was not matched by commensurate

growth in Congress. Congressional staff size and committee staff growth were negligible until the 1940s (See Figure 3). In 1914, the committee staffs of the Senate and House combined numbered only slightly more than 300. Today, there are over 3,000 committee staffers. The members' personal staffs were even smaller, and in some cases non-existent. In 1914, there were only 72 Senate (non-committee) staffers. In 2005, there were nearly 4,000 (Ornstein et al. 2014). Staff members, particularly committee staffers, play an important role in the drafting of statutes, development of policies, and congressional oversight of the executive (Aberbach 2001; Malbin 1980; Manley 1968).

The ability of Congress to gather independent information about policy and truly constrain the executive was further hindered by the fact that prior to the Legislative Reorganization Act of 1946 Congress typically "borrowed" expert staff directly from the federal bureaucracy (Galloway 1955). We argue that this lack of resources, relative to the task of legislating for and overseeing a quickly growing executive branch, hampered the ability of Congress to write legislation that could seriously constrain the executive. As Schick (1983, 158) writes:

"Perhaps the most decisive factor in the loosening of legislative constraints was the growth of the national government and its administrative structure...As the number of expense items grew, the individual line items receded in importance; as the number of administrative appointments increased, congressional involvement diminished; as international trade expanded, it became steadily more difficult to decide all tariff rates in laws; as the number of pensioners and their claims multiplied, Congress sought relief from pressure for special acts."

Consistent with our theory, it appears that presidents, particularly at the turn of the twentieth century, recognized and took advantage of Congress's loosening grip on the increasingly complex administrative state. In particular, President Theodore Roosevelt's second term is cited by many as the beginning of a resurgent executive energy (Skowronek

1982). Roosevelt himself expressed his willingness to use unilateral actions to “get around” Congress, writing in his autobiography:

“The most important factor in getting the right spirit in my Administration . . . was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. . . Under this interpretation of executive power I did and caused to be done many things not previously done by President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power” (Roosevelt 1913, 197–198).

Thus, Roosevelt apparently saw opportunities for executive expansion in the paucity of detailed constraints from Congress. Many argue that he played an important role in institutionalizing the use of unilateral power, which continued for presidents through Franklin D. Roosevelt (see, for example, Dodds 2013). Teddy Roosevelt’s actions set a precedent for future presidents, as evidenced by the spike in executive orders following his presidency and continuing into the 1930s (see Figure 1.)

In sum, Congress, in the face of a large, complex, and expanding administrative state in the late nineteenth and early twentieth centuries, was a low capacity legislative institution. It was unable to write low discretion laws that effectively constrained presidents and the federal bureaucracy. Presidents in this era viewed executive orders as an effective means of circumventing Congress. Although executive orders are costly, presidents during this time were able to offset these costs with high policy gains. Thus, in the early twentieth century, when congresses of all ideological stripes faced difficulties writing constraining legislation, we expect that the number of executive orders issued should increase as the ideological distance between Congress and the president increases – which is greatest under divided government. This leads to our first hypothesis:

Hypothesis 1: During periods of low legislative capacity (prior to the

mid-1940s), the president issues more executive orders under divided government.

High Capacity Periods

Though slow to start, Congress eventually began to adapt to the burgeoning American administrative state and developed institutions that allowed it to generate policy-related information independent of the executive branch. This information, combined with the increasing staff capacity beginning in the mid-1940s, made it much less costly for Congress to write constraining legislation and to more effectively oversee the executive branch.⁵ In particular, the creation of the General Accounting Office (now the Government Accountability Office) and the Legislative Reference Service (known today as the Congressional Research Service), in addition to the passage of the Federal Register Act and the Administrative Procedures Act gave Congress access to independent information that could be used in designing policies and statutes. This increased capacity fundamentally altered interbranch relations at

⁵One might argue that an increased reliance on oversight may lead Congress to give the president more discretion because it can monitor his actions. We argue that in high capacity eras while Congress may give more discretion overall, Congress still gives less discretion and performs more oversight under divided government. A couple of studies support this argument. First, Huber and Shipan (2002) argue that one legislative constraint on the executive – the legislative veto – is used more often under divided government, finding empirical support for this claim. Second, Epstein and O’Halloran (1999) find that direct congressional oversight of the executive is negatively correlated with executive delegation. Particularly, they find that Congress gives less discretion under divided government, but also performs more oversight in these periods.

the dawn of the “modern” era.

Created by the Budget and Accounting Act of 1921, the original purpose of the General Accounting Office GAO was to monitor and audit agencies. In creating the GAO, Congress sought to move these responsibilities from a Cabinet department (Treasury) to a more independent agency insulated from presidential control.⁶ Central to Congress’s motivation for creating the GAO was the need for independent information, because it lacked the informational ability to control how agencies used their appropriated money (Trask 2011). Notably, the Bureau of the Budget, which increased the capacity of the presidential office, was created at the same time. We discuss the implications of this in greater detail in the empirical analysis. Additionally, the Congressional Research Service (CRS), first known as the Legislative Research Service beginning in 1946, was created to provide independent information to the legislature (Brudnick 2011). Since its creation, the CRS has served as an important source of information for members of Congress on a wide range of issues and its studies have informed the formulation of myriad statutes.

In addition to the creation of these institutions, two important pieces of legislation were passed that also contributed to the increase of Congress’s capacity to constrain the executive. First, the Federal Register Act of 1935 required the Government Printing Office to publish all executive orders, proclamations, and agency rules. Prior to 1935, presidents were able to issue thousands of directives without the immediate knowledge of Congress, leaving the legislative branch unaware and ill-equipped to deal with the growing administrative state and to react to presidential policymaking. The passage of this act informed Congress of the actions of the executive branch, allowing it to more effectively oversee and constrain executive policymaking (Howell 2005).

⁶Indeed, President Wilson vetoed the first legislation creating the GAO because, he argued, it infringed on his removal power by dictating that the Comptroller General, who leads the GAO, could be removed only by a concurrent resolution of Congress.

Additionally, the Administrative Procedures Act (APA) of 1946 imposed serious constraints on the federal bureaucracy, most notably, by requiring formal notice and comment periods before many major administrative actions. Administrative procedures have the effect of slowing bureaucratic actions, giving Congress time to act in the case of significant interest group or constituent complaints about an agency action which might arise during the comment period (McCubbins, Noll and Weingast 1987). Thus, in this way, comments serve as another source of congressional information, both about the proposed policy and constituent opinion.

Finally, in order to utilize this information in a way that leads to the drafting of low-discretion laws, Congress requires an ample staff. As previously discussed, staff sizes were relatively small through much of the first half of the twentieth century. Staff sizes did not begin to increase until the early- to mid-1940s (See Figure 3). Indeed, prior to the Legislative Reorganization Act of 1946 (LRA), only two committees had staffs that were considered to be “expert” and enjoyed low turnover (Dechert 1966). The Act mandated that each committee should have up to four “professional” staff members, and resulted in a near-doubling of the number of committee staff between 1946 and 1950 (Galloway 1955). The legislation was a bipartisan effort to counter the enormous growth of the executive branch, particularly during the Great Depression and World War II (e.g. Schickler 2001). The committee reports for the LRA make clear that the legislation was an attempt to “modernize” Congress in the face of a burgeoning executive branch, noting:

“Congress has long lacked adequate facilities for the continuous inspection and review of administrative performance. We often delegate the rule-making power . . . without making any provision for follow-up to see if administrative rules and regulations are in accord with the intent of the law” (on the Organization of Congress 1946).

In sum, we argue that throughout the first half of the twentieth century, Congress recognized its informational disadvantage and sought to lessen the legislative-executive imbalance

with regard to policy-relevant information. Four institutions in particular – the CRS, the GAO, the Federal Register Act, and the APA – all contributed to the ability of Congress to generate information necessary to develop detailed policies and statutes that would constrain the executive branch. These new informational institutions, in combination with increasing staff sizes in the 1940s, helped Congress transform into a high-capacity legislative institution. As a result, it could write legislation capable of effectively constraining the executive branch and overseeing its implementation of policy. These developments allowed Congress to constrain ideologically-opposed presidents who rely on discretion for issuing executive orders. Thus, this leads to our second hypothesis:

Hypothesis 2: During periods of high legislative capacity (after the mid-1940s), the president issues fewer executive orders under divided government.

Empirical Analysis of Unilateral Regimes

Data and Variables

Dependent Variables. The key dependent variable in the analysis is the count of executive orders (both numbered and unnumbered) by year between 1905 and 2013, obtained from the *CIS Index to Presidential Executive Orders & Proclamations*. In order to isolate the policy-related directives, we exclude the executive orders used for ceremonial purposes. Such examples include orders creating flags or seals. While some studies of executive orders devise coding schemes to isolate “significant” orders (Howell 2003; Mayer 2001), others examine only non-ceremonial orders, finding similar empirical results (Krause and Cohen 1997). Following this research, we also focus on non-ceremonial executive orders.

Divided Government. Our main independent variable of interest is an indicator for divided government. Years are coded as being under divided government if the president and the

majority party in either the Senate or House of Representative are of different parties. We also control for a number of other factors that could influence executive order use over time.

War. We include a control variable for instances of war, based on previous arguments that greater deference is given to the president on foreign policy issues or in times of war (Canes-Wrone, Howell and Lewis 2008; Cooper 2002; Howell, Jackman and Rogowski 2013; Marshall and Pacelle 2005; Wildavsky 1966). Thus, controlling for this variable should account for increases in executive order use related to the war effort, particularly seen during WWI and WWII.⁷

Administration Change and Lame Duck Years. Additionally, we control for beginning and end of term effects, based on arguments that presidents issue more executive orders during these times (Mayer 2001). The “administration change” variable is coded as a binary indicator for whether the year marks the first year of a presidential administration following an outgoing administration of the opposing party. The “lame duck” year is coded as 1 in the final year of an outgoing president’s term.

Inflation. We include a control variable for the inflation rate in a given year. In economically hard times, presidents may wish to bypass Congress to take quick action. Indeed, Presidents Nixon and Carter issued several high-profile unilateral directives to address flagging economic conditions. Previous studies find that the president issues more executive orders during times of economic distress, particularly under high inflation (Krause and Co-

⁷Following Cohen (2012) and Howell, Jackman and Rogowski (2013) we code the following periods of war in US history (coded as 1): American combat involvement in World War I (1917-1918) and World War II (1941-1945), Korean War (1950-1953), Vietnam War (1964-1975), Gulf War (1990-1991), and the period of heaviest fighting during the Afghanistan and Iraq Wars (2001-2003).

hen 1997; 2000).⁸

Spending as a Percent of GDP. We also include a measure of federal spending as a percent of GDP. This variable is meant to control for the growth of the federal government over time. As the size and scope of the federal government grows larger, the president has more opportunities to use executive orders.

Time Trend. Finally, we include a linear time trend in all of the models to account for any effects of time on the number of executive orders issued each year. Note, the results of the analysis do not change with the exclusion of this control variable.⁹

Break Points

As an initial test of whether presidents' unilateral behavior has undergone changes based on developments in congressional capacity, we identify two different time periods based on our theoretical expectations: 1905-1944 and 1945-2013. Although the first recorded executive order was issued in 1862, we choose to begin our analysis in 1905. This date is appropriate for two reasons. First, as described above, executive orders were not systematically accounted for by the federal government until President Roosevelt mandated that they be cataloged by the State Department in 1905. Thus, we are most confident in obtaining accurate yearly counts of executive orders after this repository was created. Second, executive orders issued prior to the Roosevelt presidency tended to be more ceremonial and less substantively broad, frequently focused on alterations to the civil service. Dodds (2013) describes how the executive order became regularized as a policy tool during the Roosevelt administration, and his example in

⁸Note that the results are substantively the same whether we use inflation or other economic indicators, such as unemployment, growth in GDP, or indicators for recessions. Data for inflation was collected from www.measuringworth.com.

⁹Summary statistics for all variables are reported in the Supporting Information.

this regard was followed by subsequent presidents. Given that our theory is meant to explain the use of executive orders as a policy tool, we believe it is best to focus on periods in which it is understood as such and its use is institutionalized. For these reasons, we believe that 1905 is a suitable starting date for our analysis.

As discussed above, we argue that the mid-1940s should be associated with a shift in executive unilateral behavior given the changes in capacity that we identify. Therefore, we chose to break the time series at 1945 and conduct the analysis separately on the periods 1905-1944 and 1945-2013. The latter time period also corresponds to previous work on executive orders, which often takes 1945 as the starting point for the analysis (see, for example, Howell 2003). Thus, our division at 1945 provides an important contrast to the results from the modern presidential era upon which most scholars of unilateral politics have focused. Note that none of the results that we report below are dependent upon the choice of 1945. In the Supporting Information, we offer the results of our analysis using a variety of other break years in the mid-1940s, none of which change the substantive conclusions of this analysis. Furthermore, in our direct test of the capacity mechanism in Section 5, we remove this break from the analysis, which should obviate concerns that our conclusions are based on this particular modeling choice.

Time Period Analysis

With these identified time periods, we present an analysis of executive order use in both of these periods using negative binomial regressions with president fixed effects. This analysis allows us to properly deal with the overdispersion of the dependent variable.¹⁰ Additionally, the inclusion of fixed effects allows us to control for any possible differences in executive order

¹⁰Likelihood ratio tests between the Poisson regression and the negative binomial regression reveal that the latter is the more appropriate model. However, the results are also substantively similar when using Poisson and OLS regressions.

use by individual presidents, which previous studies have demonstrated can be significant (e.g. Krause and Cohen 2000). We report robust standard errors clustered by presidential administration.

Table 1: The Effect of Divided Government on Executive Orders

Variable	Period 1	Period 2
Divided Government	0.44** (0.11)	-0.11* (0.06)
Inflation	0.00 (0.01)	0.03** (0.01)
Spending as % GDP	-0.03** (0.01)	0.01** (0.00)
War	0.40** (0.12)	0.14** (0.05)
Lame Duck	0.32** (0.11)	0.11* (0.05)
Administration Change	0.05 (0.23)	-0.07 (0.08)
Trend	-0.04 (0.04)	-0.03* (0.01)
Intercept	7.44** (1.37)	6.52** (1.37)
Period	1	2
Years	1905–1944	1945–2013
<i>N</i>	40	69
President Fixed Effects	✓	✓

Negative binomial regression coefficients with standard errors in parentheses and presidential fixed effects (not shown). The effect of divided government in the first time period is positive, suggesting that presidents issued more executive orders in the face of ideological disagreement with Congress. In the second time period, however, this effect is reversed. Significance codes: * $p < 0.05$, ** $p < 0.01$, two-tailed tests.

Table 1 shows the results of this analysis in each time period. We find strong support for our theory during the first period. Between 1905 and 1944, we find that divided government significantly increases executive orders. More specifically, a shift from unified to divided government during Period 1 is associated with a 55% increase in the number of executive

orders issued in a given year. This effect is illustrated in Figure 2.¹¹ As previously argued, the years prior to the mid-1940s are characterized by low congressional capacity and thus associated with a time in which the president is able to bypass hostile congresses with executive orders.

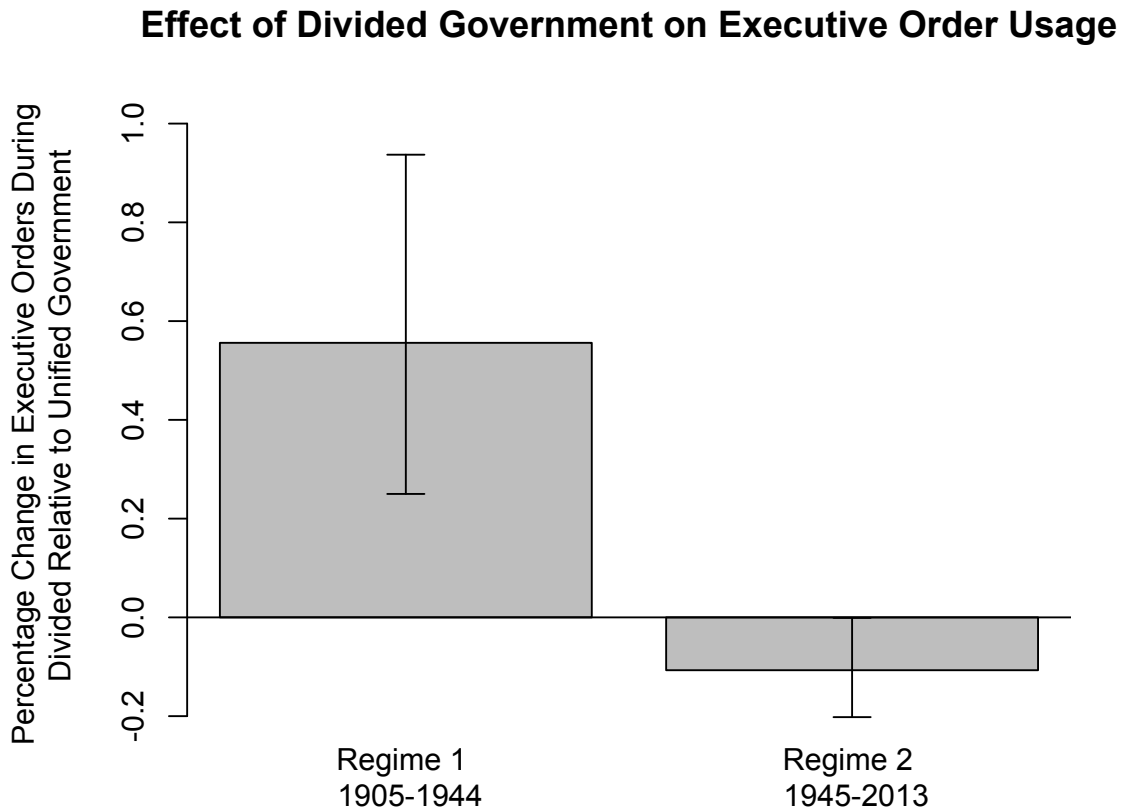


Figure 2: This figure graphs the percent changes in executive orders moving from divided to unified government with 95% confidence intervals.

Differing from the first period, but consistent with our theory and previous studies (e.g. Howell 2003), we find that divided government significantly decreases the president's use of

¹¹See Supporting Information for alternate measures of ideological distance as well as additional robustness checks specific to Period 1.

executive orders in the second period. Thus, between 1945 and 2013, a shift from unified to divided government is associated with a 10% decrease in the number of executive orders. In line with our theoretical expectations, this negative impact of divided government in the modern era reflects an increase in the capacity of Congress to constrain the executive through statutes and oversight. As previously discussed, this post-WWII period ushered in an era of increased congressional resources.¹²

In an alternative specification, we pooled the entire time period and interacted the divided government variable with a dummy variable indicating whether the year was in Period 1 or Period 2. Those results are nearly identical to those presented in Table 1. Furthermore, this model confirms that the effect of divided government is significantly different in the two time periods (the p -value of the interaction term is 0.01).

Finally, war and lame duck years are associated with significant increases in executive orders, consistent with previous theories of executive lawmaking. Additionally, higher levels of inflation and government spending correspond to more frequent use of executive orders, but only in the modern era.

In addition to the ideological alignment between the president and Congress, some scholars posit that the president is more likely to issue executive orders when Congress is less capable of passing legislation (Howell 2003). That is, when the threat of a congressional

¹²In the Supporting Information, we examine the results of this analysis using different break years (1943, 1944, 1946, and 1947). Divided government remains positive and statistically significant in Period 1 for all of these different break points. For Period 2, the effect is negative across all the different break years. More specifically, the estimated coefficient for divided government is significant at the 0.05 level for 1943, 1944, and barely misses conventional levels of statistical significance when using 1946 ($p = 0.113$) and 1947 ($p = 0.052$).

response to executive orders is diminished, particularly when Congress is ideologically fragmented, then the president can issue executive orders with less worry of subsequent retaliation. In order to examine this possibility, we include one of Howell's (2003) measure of fragmentation, the size of the majority party in Congress. In particular, we average the size of the majority party in the House of Representatives and the Senate. Using either chamber's majority size alone or both yields similar results.¹³

The results of this analysis are exhibited in Table 2. Notably, the effect of divided government remains significant and in the expected direction for each time period. Majority party size, itself, seems to have an insignificant impact in both periods. Overall, these results demonstrate that even when accounting for the internal fragmentation of Congress, as posited by previous scholars, the impact of divided government still significantly increases executive orders in Period 1 and significantly decreases them in Period 2, providing further support for our theory.

In the Supporting Information, we report the results of the analysis with a size-unity ratio as an alternative to majority party size. Following Bailey and Rottinghaus (2014), this variable captures the strength and cohesion of the majority party in Congress. Similar to the legislative potential for policy change (LPPC) scores utilized by Howell (2003) to test the legislative fragmentation hypothesis, the size-unity ratio is another variable used to measure Congress's ability to pass retaliatory legislation against the president. As Table 6 in the Supporting Information shows, this variable has an insignificant impact on the issuance of executive orders and does not substantively change the impact of divided government or the other control variables. Therefore, these results provide further support that Congress's ability to pass legislation does not change the impact of divided government across both time periods.

¹³We find similar results when we include various measures of polarization levels in Congress in the analysis as well, which may also proxy for ideological fragmentation.

Table 2: The Effect of Congressional Fragmentation on Executive Orders

Variable	Period 1	Period 2
Divided Government	0.40** (0.11)	-0.12* (0.06)
Majority Size	-0.98 (0.93)	-0.52 (0.54)
Inflation	0.00 (0.01)	0.03** (0.01)
Spending as % GDP	-0.03** (0.01)	0.01** (0.00)
War	0.34* (0.17)	0.13** (0.04)
Lame Duck	0.28* (0.14)	0.10 (0.05)
Administration Change	-0.09 (0.10)	-0.06 (0.07)
Trend	-0.04 (0.05)	-0.03* (0.01)
Intercept	8.01** (1.21)	6.66** (1.38)
Period	1	2
Years	1905–1944	1945–2013
<i>N</i>	40	69
President Fixed Effects	✓	✓

Negative binomial regression coefficients with standard errors in parentheses and presidential fixed effects (not shown). Even after controlling for ideological fragmentation in Congress, the effects of divided government are unchanged. Fragmentation does not appear to have a significant impact on executive order usage in either time period, though the sign is in the expected direction. Significance codes: * $p < 0.05$, ** $p < 0.01$, two-tailed tests.

In sum, this analysis of executive orders has revealed a significant amount of heterogeneity in presidential use of unilateral actions over time. While other studies have focused on the modern era and found that preference divergence between the president and Congress leads to a decrease in the number of executive orders, we find that the opposite relationship holds in the first half of the twentieth century. This suggests that the theories developed to explain modern uses of executive orders appear to be specific to that era and that there is significant variation in the role Congress plays in constraining presidential unilateral action over time.

In the next section, we seek to demonstrate that this time-dependence is indeed related to congressional capacity.

Testing the Mechanism

While the previous analysis provides strong evidence for our theory, it still leaves the question of whether changes in the impact of divided government on executive order use by time period are actually conditioned by changes in legislative capacity as we suggest. To further test this mechanism, we directly examine the extent to which the effect of congressional-presidential ideological divergence on executive order use is conditional on congressional resources.¹⁴ We argue that the growth of these resources contributed to Congress’s ability to constrain executive discretion through legislation and oversight. We examine two measures of congressional resources – legislative expenditures and committee staff size.

First, we use legislative expenditures as a measure of its resources. Growth in expenditures reflects an increase in the size and capacity of Congress and its development as an institution (Krause 2002). As seen in Figure 3, the changes in legislative expenditures over time correspond to the previously discussed changes in congressional capacity. In particular, expenditures were relatively stagnant before the mid-1940s. Subsequently, there was a marked increase following the passage of the Legislative Reform Act, one of the key institutional reforms in increasing Congress’s capacity during this time. We collected this data from the *Statistical Abstracts of the United States* for 1905–2013. All expenditure amounts are in 2009 dollars (billions).

¹⁴As a robustness check, we explore the alternative hypothesis that changes in presidential capacity could influence executive order use in the Supporting Information. We find that executive capacity does not significantly condition the effect of ideological disagreement with Congress on executive order usage.

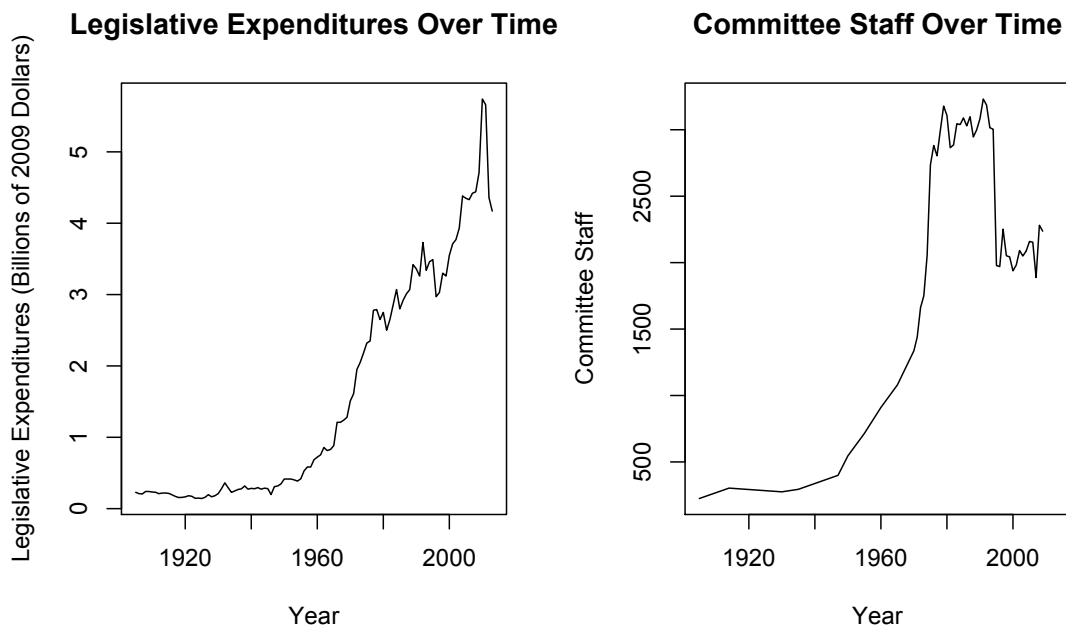


Figure 3: Congressional staff and legislative expenditures over time. Both staff sizes and expenditures remain stagnant until the mid-1940s, in line with our discussion in Section 3. Sources: Ornstein et al. (2014) and the *Statistical Abstracts of the United States*.

One potential criticism of the expenditure measure is that it includes some items that are not directly related to the legislative capacity of Congress, such as the expenses for the US Botanic Garden. Thus, in order to confirm the robustness of the results from the expenditures analysis we also consider a specific dimension of capacity – the size of committee staffs. Committees are thought to be the repository of policy expertise in Congress (e.g. Krehbiel 1992; Malbin 1980). The responsibility of developing this expertise and translating it into policy and legislation falls largely on staffers. We argue that the growth in committee staffs over time allowed Congress to write statutes that constrained presidents in their use of executive orders. Furthermore, larger staffs allowed Congress to learn policy information and incorporate it into legislation and oversight. In order to test this mechanism, we collected data on congressional committee staff sizes from 1905–2009 (Ornstein et al. 2014). Unfortunately, this data is not available on a yearly basis for some parts of the sample, particularly prior to the 1970s. For years in which there is no data, we employ a linear interpolation,

using data from adjacent years with recorded staff sizes.¹⁵ As with expenditures, staff sizes did not see large increases until after the passage of the LRA, as demonstrated in the left panel of Figure 3.¹⁶

With this data, we examine the extent to which the effect of ideological divergence is conditional on congressional capacity, as measured by legislative expenditures and staff size. As before, we use negative binomial regression models with presidential fixed effects. The key difference is that instead of breaking the data into time periods, we analyze the entire span of years in one pooled analysis to assess the extent to which the changes in legislative capacity condition the effect of divided government since that is our hypothesized mechanism for the differing results in each period. As such, the key variable of interest is the interaction between divided government and the natural logarithm of either legislative expenditures or the number of committee staffers. In addition to the previous control variables, we also include an indicator variable for the years after the passage of the LRA, which drastically increased staff resources.

¹⁵Data for the following years was interpolated: 1905-1913, 1915-1929, 1931-1934, 1936-1946, 1948, 1949, 1951-1954, 1956-1959, 1961-1964, 1966-1969.

¹⁶From this figure, one could question whether or not there should be another period identified beginning in the mid-1990s based on the relatively slight decrease in committee staff size around this time. While we do not have a theoretical reason to believe that executive action should differ in this later time period, we run the analysis on a subset of years between 1995 and 2013 as a robustness check. We find that divided government remains negative and significant during this time period and in the 1945-1994 period as well. Regardless, the analysis presented in this section accounts for any changes in legislative capacity (as we have operationalized it) throughout the entire time period.

Table 3: The Effect of Legislative Capacity on Executive Orders

	Legislative Expenditures	Committee Staff Size
Divided Government	1.03** (0.37)	1.68** (0.45)
Ln(Legislative Expenditures)	0.17 (0.23)	
Divided * Ln(Leg. Expenditures)	-0.14** (0.05)	
Ln(Committee Staff)		0.21 (0.31)
Divided * Ln(Committee Staff)		-0.24** (0.07)
Inflation	0.01 (0.01)	0.004 (0.004)
Spending as % GDP	-0.03** (0.01)	-0.03** (0.01)
War	0.28** (0.07)	0.28** (0.06)
Lame Duck	0.23** (0.06)	0.23** (0.06)
Administration Change	-0.01 (0.09)	-0.02 (0.09)
Post-LRA	-1.10** (0.22)	-1.13** (0.22)
Trend	-0.04* (0.02)	-0.04* (0.02)
Intercept	8.27** (2.14)	7.96** (2.49)
Years	1905-2013	1905-2009
<i>N</i>	109	105
President Fixed Effects	✓	✓

Negative binomial regression coefficients with standard errors in parentheses and presidential fixed effects (not shown). In both of these models, the estimated coefficients on the interaction terms are negative and statistically significant. This suggests that divided government is conditioned by legislative capacity. * $p < 0.05$, ** $p < 0.01$, two-tailed tests.

The results of the analyses with legislative expenditures are reported in Table 3. The interaction between expenditures and divided government Model 2 is negative and significant, providing support for our theory. Figure 4 illustrates this interaction effect. When expenditures are small, divided government significantly increases executive orders. As pre-

Effect of Divided Government at Different Levels of Legislative Expenditures

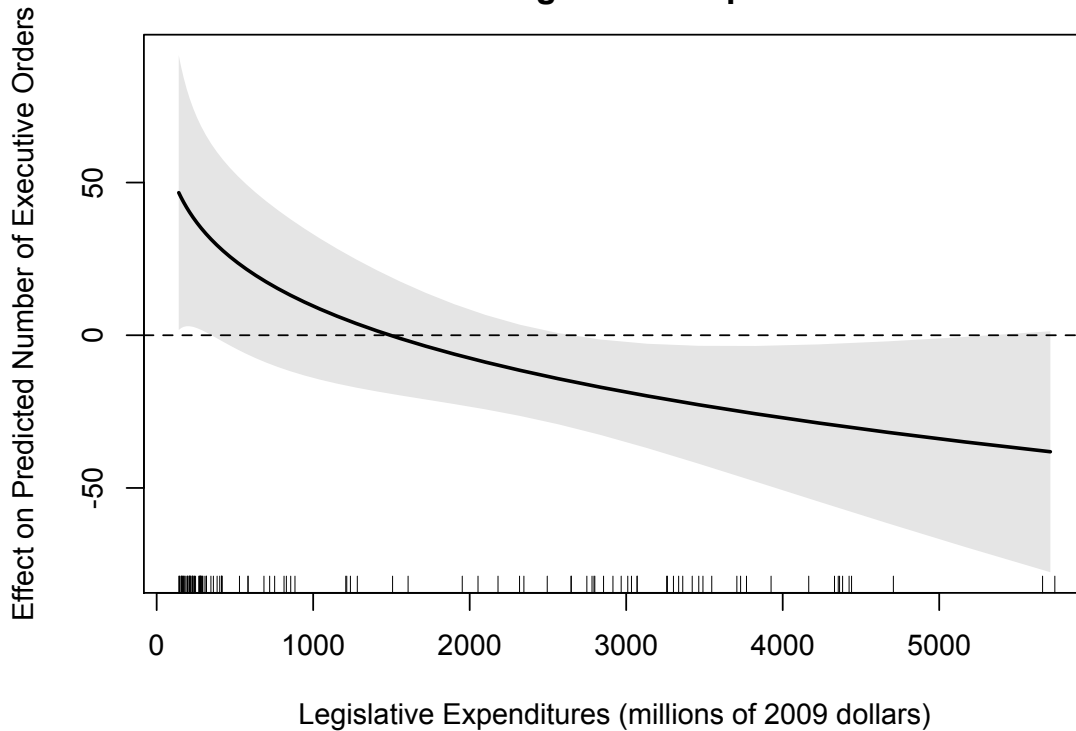


Figure 4: This graph plots the difference in the predicted number of executive orders moving from unified government to divided government as legislative expenditures increase. The shaded area corresponds to 95% confidence intervals around the effect. As can be seen, at low levels of expenditures, presidents are predicted to issue significantly more orders during periods of divided government. This effect is reversed, however, as the level of expenditures increases, with the president predicted to issue fewer executive orders during years of divided government. The tick marks along the x-axis correspond to observed levels of legislative expenditures in our data set.

viously argued, these are the times in which the president is less constrained by a Congress unable to effectively limit executive discretion. Thus, when faced with legislative opponents, the president can unilaterally bypass them with executive orders. However, as the capacity of Congress increases, as measured by expenditures, the influence of divided government on executive orders is dampened and actually becomes negative and significant. This is consistent with the hypothesis that the president becomes less able to use these orders in the face of an unfriendly Congress that has a greater capacity to constrain him.

These results also hold when using congressional staff size as a measure of capacity. Overall, this analysis provides support for the theory’s argument that legislative resources have a significant impact on the relationship between ideological divergence and presidents’ use of executive orders. As resources increase, Congress, through statutes, investigations, and other means, appears better able to constrain the unilateral actions of an ideologically-opposed president. Further, these results also demonstrate that the support for our argument is not dependent on the individual years chosen as breakpoints between periods, but is instead driven by changes in congressional capacity, and thus provides further empirical support for the theory.

Discussion and Conclusion

In this paper, we shed light on a central question in unilateral policymaking – is the president constrained by Congress in his use of executive orders? The answer to this question has important implications for understanding the limits of executive power more generally. While the media portrays an unconstrained president issuing executive orders to bypass an ideologically-hostile Congress, the political science literature yields the opposite finding in the modern era. To help resolve this fundamental question, this paper offers an alternative mechanism to explain executive order use in both modern and pre-modern periods. We demonstrate that changes in legislative capacity to limit executive discretion over time have influenced the way presidents have used unilateral actions. In short, executive power can be constrained; however, it requires a legislature with not only the will but also the ability to do so.

We find that divided government is associated with a decrease in the use of post-WWII executive orders. However, we demonstrate that this finding is exclusive to the modern era conditioned by the capacity of Congress. Consistent with our theory, yet counter to the findings and expectations of previous literature, we argue that between 1905 and 1944,

Congress's capacity to constrain executive power was limited. Thus, presidents were able to use unilateral actions to bypass a hostile Congress. However, following massive growth in congressional capacity in the mid-twentieth century, its ability to constrain the executive through statute and oversight also grew. These developments fundamentally altered the nature of congressional-executive politics during this period. With the growth of its capacity came the ability of the Congress to constrain the president's use of executive orders through limitations in statutory discretion and oversight.

Overall, this paper deepens our current understanding of separation of powers politics as well as the historical development of executive-legislative relations. We demonstrate how the use of presidential power has changed over time based on changes in legislative capacity. These findings suggest that existing theories of presidential power focused on the modern era may not necessarily apply to earlier time periods. Instead, it calls for the reevaluation of this literature to account for the changing separation of powers dynamics over time. Indeed, a better understanding of historical patterns of congressional-executive relations can illuminate not only historical periods but deepen our understanding of politics as it is practiced today.

The theory developed in this paper could be extended to explain the exercise of executive branch powers beyond executive orders. Here, we have examined one of the president's most visible tools, executive orders, but these are by no means the only way presidents exercise unilateral power. Memoranda, proclamations, signing statements, national security directives, and regulations all serve as vehicles for presidents to potentially circumvent the legislative process. Currently, we know little about how presidents use all of these tools as a part of a unified unilateral strategy. To be sure, all have different purposes (for example, proclamations are directed outside of the government while executive orders and memoranda are directed at internal governmental actors) and vary to the degree they can be cataloged (national security directives and memoranda are not always published, making it difficult to know when presidents use them and when they do not.) Nonetheless, the future of unilateral work may well focus on the complementarities of unilateral tools and the ways they combine

with other presidential strategies for interacting with Congress and directing agencies.

Further, given the rich variation in legislative capacity and gubernatorial powers across states as well as over time, future studies could also examine the implications of the theory on the subnational level. This theory could also apply to other of separation of powers studies that should consider how institutional capacity is critical to understanding policymaking, beyond just the focus on ideological divisions.

In sum, we demonstrate that policymaking is not solely dependent on the ideological relationships and conflicts between political actors. Instead, this relationship is conditional on the capacity of these actors to check one another. These concerns have animated debates in political philosophy and institutional design for centuries. In the United States, the framers of the Constitution deeply feared the aggrandizement of power in one branch or political actor and the potential abuses it could bring. Indeed, the separated system was designed to prevent the accumulation of power. As Madison writes in Federalist 51, “Ambition must be made to counteract ambition” (Rossiter et al. 1961). However, at various times throughout US history, this balance has been disrupted. This paper suggests that ambition alone is not enough to ensure these protections. Rather, institutions must also have the capacity to carry out these checking functions. This point has significant implications not only for the development of politics at the federal level in the United States but potentially for other countries with separated systems as well.

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A Supporting Information

A.1 A Closer Examination of Period 1

One concern that arises in the analysis of Period 1 is that there is not a lot of variation in the divided government measure during this time period. Indeed, only six years of this period feature divided government. In order to assess the robustness of our findings reported in the main text, we consider the effect of ideological distance between the president and the average of the House and Senate medians in a given year (as measured by DW-NOMINATE scores) as well as the effect of the size of the president’s party in Congress on presidents’ use of executive orders.

We begin by considering the ideological distance measure. There is far more variation in this measure than in the divided government measure – it changes every Congress and takes on unique values for each two-year period. Ideological distance is measured as the absolute distance in the DW-NOMINATE score of the president and the average estimated ideal point of the House and Senate medians. Our expectation is that the estimated coefficient will take on a positive sign. The results of the model using this distance measure as our operationalization of ideological incongruence are presented in the first column of Table 4. As shown, the effect of ideological distance during this period is positive and statistically significant. This provides further support for our previous results concerning the effect of ideological disagreement on executive order use during this time period.

The size of the president’s party in Congress also exhibits more variation than the divided government dummy. In order to construct this measure, we average the seat share of the president’s party in the House and the Senate for each Congress. We expect the estimated coefficient for this variable to be negative – i.e. as Congress is increasingly ideologically-aligned to the president, he issues fewer orders. Indeed, this is the case – the effect of increasing seat share is negative and significant, suggesting that presidents issue more executive orders when Congress is ideologically distant. These results allay potential concerns about limited

variation in divided government in this time period. Using a variety of measures that exhibit far more variation leads to identical substantive conclusions.

Table 4: Period 1– Alternative ideological Measures

Variable	Model 1	Model 2
Ideological Distance	1.83** (0.49)	
Presidential Party Seat Share		-2.41** (0.76)
Inflation	-0.00 (0.01)	0.00 (0.01)
Spending as % GDP	-0.04** (0.01)	-0.03** (0.01)
War	0.38** (0.12)	0.18* (0.12)
Lame Duck	0.28** (0.11)	0.26* (0.11)
Administration Change	0.03 (0.21)	0.06 (0.19)
Trend	-0.05 (0.05)	-0.04 (0.04)
Intercept	7.27** (1.39)	9.05** (1.52)
Period	1	1
Years	1905–1944	1905–1944
<i>N</i>	40	40
President Fixed Effects	✓	✓

Negative binomial regression coefficients with standard errors in parentheses and presidential fixed effects (not shown). * $p < 0.05$, ** $p < 0.01$.

In addition to issues related to ideological alignments, there are also issues that arise in Period 1 with respect to how executive orders are classified. Prior to the Federal Register Act, executive orders were not consistently referred to as such. In 1905, President Roosevelt ordered agencies to submit executive orders to a new collection maintained by the Department of State. This new repository was accompanied with a numbering system that went back in history and assigned numbers to executive orders. However, numbered orders are not a comprehensive list. In addition to the numbered orders, we include un-numbered orders

from the CIS Index to Presidential Executive Orders and Proclamations. The criterion that we used for including executive orders in our counts in the paper was whether the CIS Index listed the category as “executive orders.”

We examined the extent to which our results are driven by this decision. Fortunately, the results for divided government appear to be robust to these coding choices. In particular, if we use only numbered executive orders in the analysis, we still find that presidents issue more executive orders under divided government (beta = 0.61, standard error = 0.15, $p < 0.001$). Similarly, if we create a more liberal count that includes orders that are not explicitly listed as executive orders in the CIS Index but nonetheless may be plausibly counted (e.g. lighthouse land reservations, abandoned non-military land reservations, water and power site land reservations, or Codes of Competition), we still find that there are more executive orders issued under divided government than under unified government (beta = 0.76, standard error = 0.20, $p < 0.001$). Overall, despite the ambiguities inherent in counting executive orders prior to the Federal Register Act, we find consistent results across a variety of plausible measures, raising our confidence in the overall conclusions.

Finally, we also examine whether our results are sensitive to the way in which we operationalize economic woes. In the main models, we include the inflation rate in order to control for economic downturns. In Table 5, we present results with two other indicators of national economic health. The first is real growth in the gross domestic product. The second is an indicator variable for whether or not there was a recession in a given year (Cohen 2012). Neither of these alternative measures leads to changes in our conclusions about the effect of divided government. This gives us confidence that we have adequately controlled for the effect of economic shocks.

Table 5: Period – Alternative Economic Indicators

Variable	1905-1944	1905-1944
Divided Government	0.43** (0.12)	0.42* (0.16)
Recession Indicator	0.11 (0.15)	
Real GDP Growth		-0.01 (0.01)
Spending as % GDP	-0.03** (0.01)	-0.03** (0.01)
War	0.47** (0.08)	0.50** (0.11)
Lame Duck	0.41** (0.10)	0.30** (0.09)
Administration Change	-0.07 (0.19)	-0.09 (0.10)
Trend	-0.05 (0.03)	-0.05 (0.03)
Intercept	7.61** (1.06)	7.75** (0.85)
Period	1	1
Years	1905–1944	1905–1944
<i>N</i>	40	40
President Fixed Effects	✓	✓

Negative binomial regression coefficients with standard errors in parentheses and presidential fixed effects (not shown). * $p < 0.05$, ** $p < 0.01$.

A.2 Robustness to the Exclusion of Certain Types of Executive Orders

In this section, we examine whether the results reported in Table 1 are robust to the exclusion of two different types of executive orders – those pertaining to the civil service and to land withdrawals. We focus on these two types of orders given that they are used inconsistently throughout the time period in question (Mayer 2001). With respect to civil service executive orders, one concern that arises is that in 1930, Congress passed a law that imposed a mandatory retirement age on federal employees. However, this requirement could be waived by a president through an executive order. This practice largely subsided, however, in 1942 when President Roosevelt issued a blanket exemption for all presidential appointees (Mayer 2001). In addition to being used inconsistently throughout the time periods we examine, civil service issues tend to be focused on individuals. While it is certainly true that personnel and personnel policies can have enormous impacts on policies (see, for example, Lewis 2008), we nonetheless would like to be sure that these types of orders are not driving the results we report, particularly in Regime 1 when civil service orders were most prevalent.

The second class of orders that we remove are those related to land. Mayer (2001) describes how prior to the Truman administration, withdrawals of land were carried out through executive orders. However, during the FDR and Truman administrations and generally thereafter, this power was delegated to the Secretary of the Interior or handled in proclamations (though land-related executive orders are still issued today). Though these land executive orders were often contentious and politically salient, because they are used inconsistently throughout the timeframe of our study, we also test whether the effects we estimate in the paper hold with and without land executive orders. These concerns are particularly salient for Period 1, during which land executive orders were most common.

In Figure 5 we plot the estimated negative binomial coefficients and 95% confidence intervals from models in which we exclude different classes of executive orders. In particular, for

each regime, we estimate five models, with the following types of executive orders excluded: (1) mandatory retirement orders; (2) land-related executive orders, including withdrawals; (3) all civil service orders; (4) mandatory retirement and land orders; and (5) all civil service and land executive orders. As can be seen, the results are substantively unchanged from those reported in the main text of the paper.

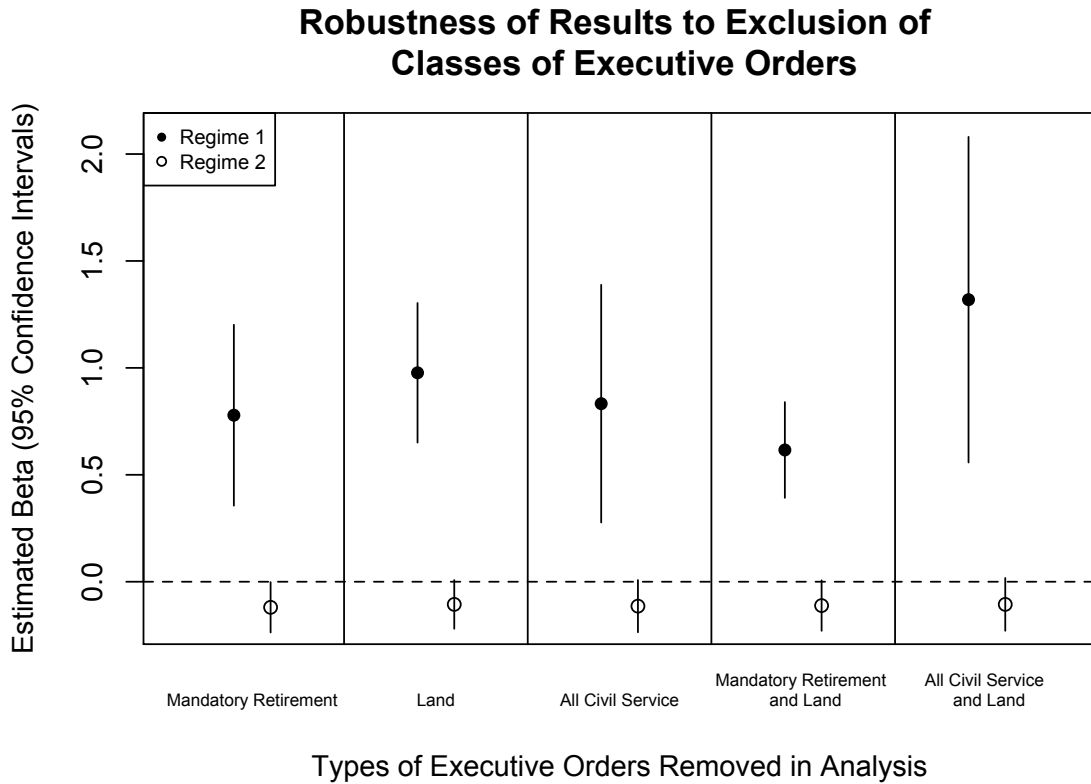


Figure 5: This figure plots the estimated negative binomial coefficients from models with different classes of executive orders excluded.

A.3 Alternative Break Years

In this section, we examine whether our results are sensitive to the choice of 1945 as the year to separate our initial analyses. Our goal is not to establish that 1945 itself is a year in which the balance of the separation of powers suddenly was altered; rather, our intention is to demonstrate that the patterns in executive order usage during divided government that we observe in the period prior to and during the reforms of the first half of the twentieth century are fundamentally different.

To that end, we re-estimate our model, using 1943, 1944, 1945, 1946, and 1947 and possible break points for the analysis. We plot the estimated negative binomial coefficient for divided government as well as 95% confidence intervals for both Periods 1 and 2 in Figure 6. As can be seen, the findings that we report for the 1945 breakpoints are robust to these different possible years. The estimated coefficients for divided government retain their same sign and approximately the same magnitude. Furthermore, with the exception of the estimate for Regime 2 and breakpoint 1946, all are statistically significant, with p values of 0.05 or less.

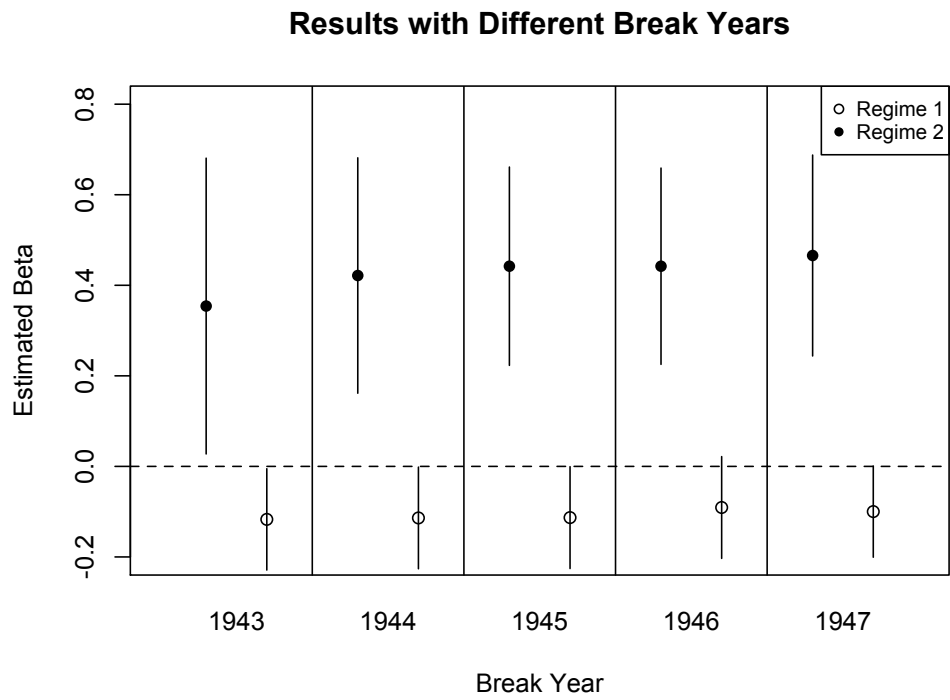


Figure 6: This figure plots the estimated negative binomial coefficients and 95% confidence intervals from models with different break years.

A.4 Size Unity Ratio

Another potential variable of interest is fragmentation in Congress. It could be the case that presidents are able to take advantage of situations in which party unity is low. Indeed, some previous work has found this to be an important factor in structuring presidents' use of executive orders (see, for example, Howell 2003 and Bailey and Rottinghaus 2014). In order to gauge the impact of this variable in our dataset, we calculated the size-unity ratio (Bailey and Rottinghaus 2014) for each Congress. This variable is substantively similar to the LPPC scores used by Howell (2013). The size unity ratio is operationalized as:

$$\frac{\text{Majority Size} \times \text{Majority Party Unity}}{\text{Minority Party Size} \times \text{Minority Party Unity}}$$

Substantively, the variable corresponds to the extent to which the parties in Congress are unified in their voting. A decrease in the ratio corresponds to a theoretically reduced ability for majority parties to pass legislation that responds to the president's use of an executive order. Thus, this test is another way of evaluating the same question as the majority size analysis – does the ability of Congress to respond to executive orders structure presidents' choices in issuing executive orders? The majority size and unity rates (defined as the rate at which the party voted together on legislation that divided the parties) were collected from voteview.com and majority and minority statistics were averaged across houses, following Bailey and Rottinghaus (2014). We examine the impact of this variable in the models reported in Table 1. The model estimates are reported in Table 6.

The results show that the estimated effect of the size-unity ratio is insignificant in both time periods. The effect of divided government, however, still appears to play an important role in both periods. Executive orders increase during Period 1, however, they appear to decrease during Period 2, although the estimate is less precisely estimated with the presence of this additional variable ($p = 0.053$). The sum of these results suggests support for our earlier conclusions of the congressional majority party size analysis. It does not appear that

the ability of Congress to overturn executive orders mutes the effects of other ideological variables such as divided government.

Table 6: The Effect of Size Unity Ratio on Executive Orders

Variable	Model 1	Model 2
Size Unity Ratio	-0.09 (0.10)	-0.09 (0.07)
Divided Government	0.44** (0.11)	-0.11 (0.06)
Inflation	0.00 (0.01)	0.02** (0.01)
Spending as % GDP	-0.03** (0.01)	0.01** (0.00)
War	0.38** (0.13)	0.13** (0.05)
Lame Duck	0.32** (0.11)	0.10* (0.05)
Administration Change	0.03 (0.22)	-0.07 (0.08)
Trend	-0.05 (0.05)	-0.03** (0.01)
Intercept	7.86** (1.63)	6.56** (1.25)
Period	1	2
Years	1905–1944	1945–2013
<i>N</i>	40	69
President Fixed Effects	✓	✓

Negative binomial regression coefficients with standard errors in parentheses and presidential fixed effects (not shown). * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, two-tailed tests.

A.5 Dynamics of Executive Orders

Some scholars have suggested that empirical analyses of unilateral actions ought to take account of the dynamics of executive orders through the use of lagged dependent variables or moving average models. In particular, Mayer (1997) and Krause and Cohen (2000) employ lags in order to account for potential effects of past executive order issuance on current. In order to assess the robustness of our reported results to these potential dynamic relationships, we included a one-year lag in the model for each regime. The results, reported in Table 7, show minimal dynamic effects, with statistically insignificant and small estimated effects of lags in all specifications. Furthermore, the divided government estimates retain their size, direction, and level of significance.

Table 7: Dynamic Effects in Executive Order Usage

Variable	Model 1	Model 2
Executive Orders _{<i>t</i>-1}	0.0003 (0.001)	-0.001 (0.001)
Divided Government	0.41** (0.15)	-0.13* (0.06)
Inflation	0.00 (0.01)	0.03** (0.01)
Spending as % GDP	-0.03** (0.01)	0.01** (0.00)
War	0.36** (0.13)	0.13* (0.05)
Lame Duck	0.29* (0.14)	0.13* (0.05)
Administration Change	0.07 (0.24)	-0.07 (0.08)
Trend	-0.03 (0.05)	-0.04** (0.01)
Intercept	7.02** (1.69)	7.22** (1.49)
Period	1	2
Years	1905–1944	1945–2013
<i>N</i>	40	69
President Fixed Effects	✓	✓

Negative binomial regression coefficients with standard errors in parentheses and presidential fixed effects (not shown). * $p < 0.05$, ** $p < 0.01$, two-tailed tests.

A.6 Presidential Capacity

One potential concern with our main analysis is that it does not account for changes in the capacity of the president to develop and issue executive orders. Indeed, much of the time period examined is associated with the increasing institutionalization of the presidency, particularly following the Brownlow Committee’s exhortation for assistance to the president. Perhaps the most significant development was the creation and expansion of the Executive Office of the President (EOP), which includes organizations such as the Office of Management and Budget (formerly the Bureau of the Budget) and the White House Office that assist the president in coordinating executive branch activities as well as policy development and implementation (Dickinson 1999; Hart 1994; Jones 2005).

A theory focused on presidential capacity might predict that as the resources of the institutional presidency grows, the president should be more likely to take unilateral action when faced with an ideologically-opposed Congress. However, as seen in Figure 1, the number of executive orders decreases sharply in the 1940s shortly after the creation of the EOP. Thus, it is not clear that changes in the institutional capabilities of the presidency actually have a significant impact on aggregate numbers of executive orders.

Nonetheless, we examine the extent to which *presidential* capacity affects the issuance of executive orders and whether the ideological effects examined above are similarly conditional on the capacity of the president. To measure presidential capacity, we collected the expenditures related to the office of the presidency from the *Statistical Abstracts of the United States*, between 1905 and 2013. Prior to the establishment of the EOP, this number represents the aggregated presidential expenditures, and following 1939, it represents EOP expenditures. Similar to the previous analysis, we use the same set of controls, empirical model, and all amounts are converted to 2009 dollars (hundreds of millions).

Model 1 in Table 8, displays the effect of executive expenditures on the number of executive orders issued annually. The direct effect of expenditures is insignificant. Furthermore, the interaction between divided government and logged executive expenditures is also sta-

Table 8: The Effect of Presidential Capacity on Executive Orders

	Model 1	Model 2	Model 3
<i>Presidential Capacity</i>			
Ln(EOP Expenditures)	0.01 (0.04)	-0.02 (0.05)	-0.00 (0.05)
Divided * Ln(EOP Exp.)	-0.07 (0.04)	-0.04 (0.04)	-0.07 (0.04)
<i>Legislative Capacity</i>			
Ln(Committee Staff)		0.19 (0.29)	
Divided * Ln(Comm. Staff)		-0.20* (0.10)	
Ln(Legislative Expenditures)			0.11 (0.21)
Divided * Ln(Legislative Exp.)			-0.09 (0.05)
<i>Other Variables:</i>			
Divided Government	0.08 (0.07)	1.44* (0.59)	0.70* (0.33)
Inflation	0.01 (0.01)	0.01 (0.01)	0.01 (0.01)
Spending as % GDP	-0.01 (0.01)	-0.03** (0.01)	-0.03** (0.01)
War	0.15* (0.06)	0.25** (0.07)	0.25** (0.07)
Lame Duck	0.25** (0.08)	0.22** (0.08)	0.23** (0.07)
Administration Change	-0.06 (0.08)	0.00 (0.09)	0.01 (0.08)
Post-LRA		-1.13** (0.20)	-1.09** (0.20)
Trend	-0.06* (0.03)	-0.03 (0.03)	-0.03 (0.03)
Intercept	10.21** (2.91)	7.18* (3.01)	8.08** (2.76)
Years	1905-2013	1905-2009	1905-2013
<i>N</i>	109	105	109
President Fixed Effects	✓	✓	✓

Negative binomial regression coefficients with standard in parentheses and presidential fixed effects (not shown). * $p < 0.05$, ** $p < 0.01$, two-tailed tests.

tistically insignificant, suggesting that presidential capacity does not condition the effect of divided government. Furthermore, the sign on this interaction is actually negative, which would suggest that as presidents gain more resources they issue fewer executive orders during divided government. This gives us confidence that presidential capacity is not significantly driving the results we report. In Models 2 and 3, we add in the measures of legislative capacity to Model 1. Note that there is a large correlation between legislative resources and EOP expenditures, so some concerns about collinearity may arise in these models. Nonetheless, we see the interaction between committee staff sizes and divided government is negative and significant, even after including the EOP expenditures. The interaction between divided government and legislative expenditures is still negative, though it is less precisely estimated with the addition of the EOP expenditures variables ($p = 0.067$). Overall, we believe these results suggest that presidential capacity does not significantly condition the effect of divided government.

A.7 Summary Statistics

The table below gives descriptions and summary statistics for the key variables used in the analysis.

Variable	Description	Mean	Median	Std. Deviation	Minimum	Maximum
Executive Order	The number of non-ceremonial executive orders issued	140.22	70.00	123.70	20	501.00
Divided	Coded as 1 if the President and either the House or the Senate are from opposing parties; coded as 0 otherwise.	0.43	0.00	0.50	0.00	1.00
Inflation	The inflation rate	3.18	2.66	4.86	-10.68	20.49
Spending as % GDP	Federal spending as a percentage of GDP	15.85	18.42	8.78	2.10	47.93
War	Coded as 1 for the wartime years noted in the text; coded as 0 otherwise	0.26	0.00	0.44	0.00	1.00
Lame Duck	Coded as 1 if it is the last year of an outgoing president's term; coded 0 otherwise.	0.06	0.00	0.23	0.00	1.00
Administration Change	Coded as 1 if it is the first year of a president's term, when the outgoing administration was from the opposing party; coded 0 otherwise.	0.10	0.00	0.30	0.00	1.00
Trend	0 in 1905, 1 in 1906, 2 in 1907, etc.	54.00	54.00	31.61	0.00	108
Post-LRA	Coded as 1 in years after 1946	0.43	0.00	0.50	0.00	1.00
Ln(Legislative Expenditures)	The logged amount of legislative expenditures (tens of millions)	6.69	6.53	1.24	4.95	8.65
Ln(Committee Staff)	The logged number of staffers on congressional committees in a given year.	6.67	6.57	0.96	5.41	8.08
Ln (Exec. Office Expenditures)	Post-1939: Logged EOP expenditures Pre-1939: Logged presidential expenditures (hundreds of millions)	4.67	4.73	2.14	1.48	7.69

Summary statistics. All variables are collected on an annual basis. All dollar amounts are 2009 dollars.

A.8 Supporting Information References

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