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**Kenneth R. Mayer: With the Stroke of a Pen**

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# One

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## Why Are Executive Orders Important?

He'll sit here, and he'll say "Do this! Do that!"  
*And nothing will happen.* Poor Ike—it won't be a  
bit like the Army. He'll find it very frustrating.  
(Harry Truman on Eisenhower, cited in Richard  
Neustadt, *Presidential Power*)

IN JANUARY 1995 President Bill Clinton, House Speaker Newt Gingrich (R-Ga.), and Senate Majority Leader Bob Dole (R-Kan.) met to discuss how the United States should respond to a rapidly deepening economic crisis in Mexico. Faced with the prospect of a complete meltdown of the Mexican economy, Clinton secured the support of Dole and Gingrich for legislation to fund \$40 billion in loan guarantees for the Mexican government.<sup>1</sup> Despite the support of congressional leaders, former presidents George Bush and Gerald Ford, and Federal Reserve Board chairman Alan Greenspan, rank-and-file legislators objected to the loan guarantees as a Wall Street bailout. Prospects for approval evaporated when a group of prolabor Democrats, still smarting from the 1993 ratification of the North American Free Trade Agreement, formed an unlikely alliance with conservative isolationist Republicans to oppose the plan. By January 20 the GOP leadership declared the legislation dead.<sup>2</sup>

In response Clinton unilaterally authorized \$20 billion in loan guarantees on his own authority, relying on a little-noticed program called the Exchange Stabilization Fund, or ESF. Many members of Congress were outraged, arguing that the ESF, created in 1934 to allow the U.S. government to protect the dollar in international currency markets, was never intended for such a use.<sup>3</sup> Yet Congress could not stop the president.<sup>4</sup> Clinton, though humiliated by the Republican sweep in the 1994 elections and weakened by mass defections within his own party, was still able to commit to a multibillion dollar program without any meaningful interference.

On August 17, 1998, Clinton testified before a grand jury, empaneled by Independent Counsel Kenneth Starr, about his relationship with White House intern Monica Lewinsky and the question of whether he had lied under oath in the civil lawsuit against him filed by Paula Jones. Although Clinton had for months denied any sexual relationship with Lewinsky,

he was forced to admit that he had, in fact, engaged in what he called “inappropriate, intimate conduct” with her. The admission (which Clinton repeated in a nationally broadcast television speech that night), ignited a firestorm. His opponents called for his resignation and impeachment, and many of his supporters were furious that he had misled them for months. Clinton’s presidency appeared to be teetering on the brink of an abyss.

Three days later, on Thursday, August 20, the U.S. Navy fired dozens of cruise missiles at a terrorist training camp in Afghanistan and a chemical facility in the Sudan suspected of manufacturing nerve gas. Although some congressional Republicans gently raised questions about the *Wag the Dog*-like timing of the strikes (referring to the popular 1997 movie in which a president stages a fake war against Albania in order to divert attention from his sexual affair with a teenager), few offered anything more than tepid criticism. At a time when conventional wisdom believed that Clinton was certain to resign or be impeached, American military forces launched attacks on his word. Clinton also issued an executive order that froze any U.S. assets belonging to Osama bin Laden, whom the United States charged was behind the embassy bombings.<sup>5</sup>

### Executive Orders and Executive Initiative

These chronicles of presidential decisiveness and unilateral action are at odds with the prevailing scholarly view of presidential power. Among political scientists the conventional wisdom is that the president is weak, hobbled by the separation of powers and the short reach of his formal legal authority. Presidential power, far from being a matter of prerogative or legal rule, “is the power to persuade,” wrote Richard Neustadt in the single most influential statement about the office in the past fifty years.<sup>6</sup> Yet throughout U.S. history presidents have relied on their executive authority to make unilateral policy without interference from either Congress or the courts. In this book, I investigate how presidents have used a tool of executive power—the executive order—to wield their inherent legal authority. Executive orders are, loosely speaking, presidential directives that require or authorize some action within the executive branch (though they often extend far beyond the government). They are presidential edicts, legal instruments that create or modify laws, procedures, and policy by fiat.

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 adminis-

trative and regulatory processes, determining how legislation is implemented, and taking whatever action is permitted within the boundaries of their constitutional or statutory authority. Even within the confines of their executive powers, presidents have been able to “legislate” in the sense of making policy that goes well beyond simple administrative activity. Yale Law School professor E. Donald Elliot has argued that many of the thousands of executive orders “plainly ‘make law’ in every sense,”<sup>7</sup> and Louis Fisher finds that despite the fact that the Constitution unambiguously vests the legislative function in Congress, “the President’s lawmaking role is substantial, persistent, and in many cases disturbing.”<sup>8</sup>

A short review confirms that executive orders can have profound consequences. In 1939 President Franklin Roosevelt used an executive order to establish the Executive Office of the President (EOP), the touchstone of modern presidential leadership;<sup>9</sup> Clinton Rossiter concludes that this step may have “saved the Presidency from paralysis and the Constitution from radical amendment.”<sup>10</sup> Other Roosevelt executive orders were clearly inimical to civil liberties and democratic values, most notably his February 1942 order that authorized the internment of thousands of Japanese Americans during World War II.<sup>11</sup>

Presidents have resorted to executive orders to implement many of the nation’s most dramatic civil rights policies. These include Harry S Truman’s integration of the armed forces<sup>12</sup> and Dwight D. Eisenhower’s calling the Arkansas National Guard into active military service in Little Rock, Arkansas, in order to enforce a court order to integrate Central High School.<sup>13</sup> The American Council on Race Relations reported in 1948 that Truman’s military desegregation orders “demonstrate that in government the area of administration and executive authority is equal in importance to legislation and judicial decision” in fostering equal opportunity and civil rights.<sup>14</sup>

Within the civil rights community the executive order became a powerful symbol of presidential commitment to racial equality. Shortly after John F. Kennedy’s inauguration, Martin Luther King, Jr., urged the new president to use his executive authority to combat racial discrimination, citing the historical practice of presidents’ issuing civil rights executive orders “of extraordinary range and significance.”<sup>15</sup> It was through an executive order that “affirmative action” became part of the national consciousness, after President Kennedy used the term in an executive order establishing a Presidential Committee on Equal Employment Opportunity, and thereafter President Lyndon Baines Johnson referred to it in a follow-on order that made eligibility for government contracts conditional upon the implementation of adequate affirmative action programs.<sup>16</sup>

Through executive orders, presidents have almost single-handedly created the federal government's classification system for national security information, as well as the personnel clearance process that determines whether individuals will have access to that information. Though purely administrative in nature, these rules and procedures have produced dramatic violations of individual rights and civil liberties, and they have given the president decisive advantages in disputes with Congress over the course of American foreign policy. University of Wisconsin historian Stanley Kutler, in his 1997 book on President Richard M. Nixon's White House tapes, traced the origins of Watergate to Nixon's obsession with the leak of the Pentagon Papers, the infamous top-secret study of America's involvement in Vietnam.<sup>17</sup> The extent of presidential control over information has, according to political scientist Robert Spitzer, served as a "key source of presidential ascendancy" in the post-World War II political environment.<sup>18</sup>

President Truman seized the nation's steel mills in 1952 with Executive Order 10340,<sup>19</sup> a consequential step in itself that became more important when it resulted in the twentieth century's most important judicial statement on the limits of presidential power, in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).<sup>20</sup> With the order the government took possession of eighty-six of the country's steel mills, representing well over 80 percent of the industry's capacity.

With Executive Order 12291,<sup>21</sup> President Ronald Reagan tried to wrest control over federal regulatory activity from executive branch agencies. The order gave the Office of Management and Budget (OMB) the right to review proposed regulations to ensure that they were justified by cost-benefit analysis and in line with the president's broader agenda. This order, which extended earlier and less successful efforts by presidents Nixon, Ford, and Carter to contain regulatory expansion, "brought agencies under presidential control as never before,"<sup>22</sup> and in doing so spurred a "minor revolution" in constitutional theories of presidential authority over administration.<sup>23</sup> George Bush's White House counsel, C. Boyden Gray, noted that Executive Order 12291 was "considered revolutionary at the time . . . and has earned the reputation as one of the most far-reaching government changes made by the Reagan Administration."<sup>24</sup>

A president can declare a national emergency by executive order, a step that authorizes an immense range of unilateral warrants, including—theoretically—the power to restrict travel, impose martial law, and seize property, transportation networks, and communications facilities.<sup>25</sup> And even orders that lack such sweeping effect can still be extraordinarily important to particular interest groups or constituencies, who seek substantive or symbolic redress for their concerns. Congress, in an attempt to protect its own prerogatives, regularly probes the appropriate limits of

the executive's independent power through investigations of particular executive orders.<sup>26</sup>

Technically, although the term was not in use at the time, the Louisiana Purchase was carried out by an executive order.<sup>27</sup>

Presidents and their staffs consider executive orders an indispensable policy and political tool. In the wake of the 1994 congressional elections that gave the Republicans control of both chambers for the first time in four decades, Clinton White House officials predicted a renewed emphasis on "regulations, executive orders, and other presidential tools to work around Capitol Hill, much as Ronald Reagan and George Bush did when the House and the Senate were in Democratic hands."<sup>28</sup> In 1998, as Clinton headed for impeachment, his advisors noted that he would resort to executive orders and other unilateral actions to show that he remained capable of governing. In a statement that both summarized the White House position and served to provoke congressional Republicans, advisor Paul Begala outlined the strategy to *New York Times* reporter James Bennett: "Stroke of the Pen . . . Law of the Land. Kind of cool."<sup>29</sup>

Executive orders often become part of public discourse as both a symbol of energy in the executive and a sign that government is running amok. Contenders for the 1996 Republican presidential nomination promised to issue executive orders as their first presidential acts: Phil Gramm to end the policy of affirmative action in government contracting, Pat Buchanan to reinstate previous bans on fetal tissue research and abortions at overseas medical facilities.<sup>30</sup> In the early phase of the 2000 Democratic presidential primary, former senator Bill Bradley (D-N.J.) and Vice President Al Gore sparred over whether the Clinton White House had been sufficiently aggressive in using executive power to end racial profiling. In a February 2000 debate, Bradley promised to issue an executive order barring racial profiling by the federal government. When Gore promised that he, too, would use the president's power to end profiling, Bradley countered in what would become one of the campaign's testier—and more memorable—exchanges of the primary season:

MR. BRADLEY: Last month, at the debate in Iowa, when Al said the same thing, that he would issue an executive order, I said, why doesn't he walk down the hall now and have President Clinton issue the executive order? Now, Al, Al said that I shouldn't give President Clinton lectures. I am not giving President Clinton lectures. I am questioning why you haven't done that or why you haven't made this happen in the last seven and a half years.

MR. GORE: First of all, President Clinton has issued a presidential directive under which the information is now being gathered that is necessary for an executive order. Look, we have taken action. But, you know, racial profiling practically began in New Jersey, Senator Bradley. Now, the mayor, the mayor,

the African-American mayor of the largest city in New Jersey said that he came with a group of African-American elected officials or contacted you to see if you would help on this, and that you did not. Did you ever call or write or visit with respect to racial profiling when they brought it to your attention?<sup>31</sup>

The phrase “stroke of a pen” is now virtually synonymous with executive prerogative, and it is often used specifically to refer to the president’s ability to make policy via executive order. *Safire’s Political Dictionary* defines the phrase as “by executive order; action that can be taken by a Chief Executive without legislative action.” Safire traces the political origins of the phrase to a nineteenth-century poem by Edmund Clarence Stedman, but it was in use long before this, at least as a literary metaphor signifying discretionary power or fiat. The phrase became most widely known during the 1960 presidential election campaign, when Democrats made an issue of Eisenhower’s refusal to issue an executive order banning discrimination in housing and federal employment. Kennedy promised to do so, committing himself to ending discrimination by executive order. During the second Kennedy-Nixon debate on October 7, 1960, Kennedy continued his criticism. “What will be the leadership of the President in these areas,” he asked, “to provide equality of opportunity for employment? Equality of opportunity in the field of housing, which could be done in all federal-supported housing by a stroke of the President’s pen.” After several delays Kennedy issued the fair housing order in November 1962. I discuss this and other civil rights orders in more detail in chapter six.<sup>32</sup>

Martin Luther King, Jr.’s postelection exhortation to the new president to use his executive power to combat discrimination, went further. “It is no exaggeration,” King wrote, “that the President could give segregation its death blow through a stroke of the pen. The power inherent in Executive orders has never been exploited; its use in recent years has been microscopic in scope and timid in conception.”<sup>33</sup> The clarity of Kennedy’s pledge and his use of the pen metaphor would eventually prove embarrassing. When Kennedy repeatedly delayed issuing the antidiscrimination executive order he had promised, civil rights groups reminded him of his words by mailing him pens by the thousands.

Executive discretion cuts both ways, of course, and opponents of a particular case of presidential initiative will view these pen strokes quite differently. After President Clinton issued an executive order that barred government contractors from hiring permanent replacement workers,<sup>34</sup> congressional Republicans were in no mood to congratulate him on either his energy or his dispatch. On the House floor the next day, Representative Bill Barrett (R-Neb.) condemned the president for overturning fifty years of labor law “with the stroke of a pen.”<sup>35</sup>

Observers who are even less sympathetic cast executive orders in an altogether sinister light, seeing in them evidence of a broad conspiracy to create a presidential dictatorship. The common theme of these complaints is that the executive order is an example of unaccountable power and a way of evading both public opinion and constitutional constraints. In the more extreme manifestations, executive orders are portrayed as an instrument of secret government and totalitarianism. The president says “Do this! Do that!” and not only is it done, but the government, the economy, and individual freedom are crushed under the yoke of executive decree.

Truman is said to have issued a top-secret executive order in 1947 to create a special government commission to investigate the alleged flying saucer crash in Roswell, New Mexico (the air force says no such order exists, but not surprisingly the proponents of the UFO-order theory don’t believe it).<sup>36</sup> When John F. Kennedy issued a series of executive orders authorizing federal agencies to prepare studies of how they would respond to national emergencies, some saw this as evidence that the government was getting ready to take over the economy and establish a totalitarian regime.<sup>37</sup> The Justice Department in 1963 complained of an “organized campaign to mislead the public” about these orders. The department had presumably grown tired of responding to members of Congress, who referred letters from constituents expressing outrage and alarm over the dictatorship that was right around the corner.<sup>38</sup>

Although the rate at which Clinton issued executive orders dropped after the Republicans won congressional majorities in 1994, critics still accused him of using the prerogative power to turn the presidency into a dictatorship. One review of Clinton’s use of executive orders concluded that the president had relied on his decree authority to “act dictatorially without benefit of constitutional color.”<sup>39</sup> In his 1997 State of the Union Address Clinton announced his “American Heritage Rivers” initiative, in which federal agency officials would help communities find and apply for environmental grants (the program’s details were fleshed out in a series of proposed rules, culminating in Executive Order 13061, issued in September 1997).<sup>40</sup> The program did not commit any funds, create new environmental regulations, change any laws, or impose any requirements at all on local governments or the private sector.<sup>41</sup> Still, conservative property-rights groups claimed it was “a massive conspiracy to extend federal, and perhaps foreign, control over the nation’s 3.5 million miles of rivers and streams, over watersheds, even over private riverfront property.”<sup>42</sup> Representative Helen Chenoweth (R-Idaho) denounced the initiative as a “flight from democracy,” and attempted (unsuccessfully, so far) to stop the program both legislatively and through the courts.<sup>43</sup> During 1995 Senate hearings held in the aftermath of the Oklahoma City bombing, John



Trochman, head of the Militia of Montana, complained that “the high office of the Presidency has been turned into a position of dictatorial oppression through the abusive use of Executive orders and directives, thus leaving Congress stripped of its authority. When the President overrules Congress by Executive order, representative democracy fails.”<sup>44</sup>

Despite the apparent importance of executive orders, the political science literature has paid scant attention to them. This position is especially clear within the subfield of presidency studies, which has been dominated by a research paradigm that emphasizes the president’s leadership skills and strategic acumen, not the legal basis of presidential power, as the keys to political success. With few exceptions,<sup>45</sup> existing research on executive orders either has been descriptive or has addressed the consequences of particularly important orders.<sup>46</sup> Similarly, the public administration literature “virtually ignores executive orders and proclamations.”<sup>47</sup>

More to the point, most of the studies that do exist have minimized the significance of executive orders, viewing them as useful only for routine administrative tasks. The executive order is “limited in its scope and possibilities”;<sup>48</sup> “not customarily viewed as a viable tool for major policy initiatives”;<sup>49</sup> and “a very limited and temporary alternative for policy initiatives.”<sup>50</sup> Mark Peterson argues that although presidents can often use their statutory authority to get at least part of what they want when Congress is uncooperative, “the potential for unilateral action of this kind is limited.”<sup>51</sup>

The examples offered here of significant executive orders suggest that this is too limited a view of executive power. My argument is, put simply, that the formal basis of executive power matters to presidents. Both the Constitution and statute endow the president with important and practical legal powers, and the institutional setting of the presidency amplifies these powers by enabling presidents to make the first move in most policy matters, if they choose to do so. By themselves and as a broader indicator of executive authority, executive orders constitute a potent source of presidential power. To cite only one of a number of connections between the two, some of the most important institutions of the president’s increasing administrative capacity—including the Bureau of the Budget and its successor, the Office of Management and Budget; the Central Intelligence Agency; the President’s Committee on Equal Employment Opportunity; and the Executive Office of the President—have origins traceable to, or have had their powers significantly expanded by, specific executive orders. It is no accident that the first president to make extensive use of executive orders, Theodore Roosevelt, was also responsible for elucidating the modern “stewardship” notion of presidential power; nor that Franklin Roosevelt, whose administration marked the development of the modern institutional presidency, issued far more orders than any other president.

In making this argument about the importance of executive power, I recognize that our “separated system” puts both formal and informal limits on what presidents can do.<sup>52</sup> Presidents come to office in widely varying electoral and political contexts that shape their ability to transform their formal powers into action. Checks and balances were built into institutional structures of the federal government from the beginning, and presidents reeling from a prolonged recession, facing united majority party opposition in Congress, or mired in an unpopular war will find little solace in the powers specified or implied in Article II of the Constitution.

Nevertheless, in most circumstances presidents retain a broad capacity to take significant action on their own, action that is meaningful both in substantive policy terms and in the sense of protecting and furthering the president’s political and strategic interests. Some of this authority, particularly in regulatory affairs, has been delegated to the president by Congress,<sup>53</sup> but presidents have also simply assumed many policy-making powers, especially in national security and foreign policy matters.<sup>54</sup> Although the courts do step in to block presidential action on constitutional grounds (with *Youngstown* the most notable case), the general pattern has been more one of judicial deference to executive action than of assertiveness.<sup>55</sup>

My argument about the importance of executive orders builds upon the notion, elaborated by Richard Pious, that “the key to an understanding of presidential power is to concentrate on the constitutional authority that the president asserts unilaterally through various rules of constitutional construction and interpretation.”<sup>56</sup> The case I build for refocusing on the president’s formal powers makes use of emerging threads within presidency scholarship that place renewed emphasis on the constitutional and statutory bases of presidential power. In addition, presidency scholars are now debating whether the office is best approached through a study of the *presidency* as an institution, with formal rules and structures, or by looking at the characteristics of individual *presidents*. A study of executive orders can make a contribution to this debate.

### Executive Orders and the Evolution of the Presidency Literature

If executive orders are such an important element of presidential power, why have political scientists paid so little attention to them? The answer to this question reveals a great deal not only about how political scientists view the presidency but also about the relationship between the legal and political sources of presidential power.

Political scientists have for three decades held that the most interesting aspects of the presidency involve questions of political leadership and

strategy, not the constitutional origins of presidential legal authority. The key to understanding the presidency is, in this view, the informal powers of the office: the president's ability to lead public opinion, strike deals with congressional leaders, manage press relations, mobilize constituencies, and conserve political capital. In large part, students of the presidency have tacitly declared the study of law to be nonpolitical, and hence less interesting than the "real" stuff of presidential activity. Institutions, formal powers, and questions of constitutional or statutory interpretation, even when considered important, have been "regarded as the framework within which presidential action [has taken] place—the backdrop to a far more exciting political drama."<sup>57</sup>

In the presidency literature, the distinction between the legal and the political was magnified by the influence of Richard Neustadt's landmark 1960 book *Presidential Power*.<sup>58</sup> Neustadt argued that presidential power lies not in the office's legal authority, but rather in the personal and strategic skill of individual presidents. In a system of "separate institutions sharing power," presidents get what they want not through command or legal authority, but through the ability to persuade others that what the president wants is what is in their own interest.

The "Neustadtian" perspective in *Presidential Power*—what I will refer to as the behavioral paradigm—came to dominate presidency studies as few books have dominated any field of scholarship. It transformed presidential studies, and became all the more influential because of two broader forces that shaped public and academic receptivity to the argument. First, Neustadt's views found support in normative prescriptions of how the president *should* behave. The "power to persuade" model of an activist presidency fit with the notion of the president as a *leader*, at the center of the give and take of political bargaining. FDR and Truman were examples of how to do the job right, Eisenhower an example of how not to behave. This activist approach was well suited to the dynamism and energy of John F. Kennedy, who as president displayed a visible interest in Neustadt's book. The argument also meshed with the notion that the public would be best served via active presidential leadership. The president, as the only elected official with a national constituency and as the embodiment of the national will, was the proper locus for the influence (as distinct from power) to carry out that will.

Second, *Presidential Power* served to demarcate a shift away from traditional avenues of presidential scholarship. Prior to *Presidential Power*, the literature on the presidency focused on the theory and practice of the president's formal legal powers. This body of work reached its pinnacle in Edward Corwin's *The President: Office and Powers*, which was first published in 1940 and appeared in updated editions until 1957.<sup>59</sup> Corwin sought to understand presidential power as conceived by the Framers,

explicated in the Constitution, and interpreted through case law. The ambiguities in the original constitutional vestments made the boundaries of presidential power fluid and raised the possibility that the presidency was a “potential matrix of dictatorship,”<sup>60</sup> but throughout Corwin was concerned with the relationship between presidential power and the legal grants of authority. As Corwin himself introduced the book, it is “primarily a study in American public law.”<sup>61</sup>

Neustadt changed this emphasis. The first edition of *Presidential Power* appeared at the same time that political science was in the midst of the “behavioral revolution” movement, which emphasized explanation over description in the study of political phenomena. The new approaches placed more emphasis on predicting and explaining actual behavior than on static analysis of institutional or procedural context, and fundamentally changed the way that political scientists looked at the world. Within this shift, *Presidential Power* marked a key transition in presidency studies and became the model of how to analyze the office, institution, and person of the presidency. As Joseph Bessette and Jeffrey Tulis describe it:

Around the time that the last edition of *The President: Office and Powers* was published (1957), Corwin’s work was both substantively and methodologically at odds with far-reaching developments in scholarship on American politics. One of these was the increasing extent to which political scientists were turning their attention away from formal rules and procedures to focus instead on actual political behavior, which, it was argued, was little influenced by laws and constitutions. In the field of presidential studies this new orientation was given its most articulate and influential expression in Richard Neustadt’s *Presidential Power: The Politics of Leadership*. . . . The whole thrust of [Neustadt’s] analysis was to move us away from formal authority in explaining actual presidential power, for distinctions of the sort employed in constitutional analysis seemed to him to have no effect on presidents.<sup>62</sup>

After Neustadt, scholars turned away from the study of the president’s legal powers as the behavioral model deposed the legal model as the dominant paradigm of presidency studies.<sup>63</sup> Political scientists looked not to the Constitution or statutes to understand presidential behavior, but to the foundation of informal presidential power: public prestige and attempts to lead public opinion, professional reputation and style, congressional relations and legislative strategies, decision-making styles, temperament, bargaining skill. *Presidential Power* served as a springboard for decades of research that viewed the presidency in personal rather than legal terms, with a concentration “on questions about the personalities, power, and leadership of specific presidents.”<sup>64</sup>

Among political scientists, the power of the argument that legal and constitutional powers were central to the presidency waned as the behav-

ioral model took hold. There were some departures from this trend—Richard Pious did argue, in the late 1970s, “the fundamental and irreducible core of presidential power rests not on influence, persuasion, public opinion, elections, or party, but rather on the successful assertion of constitutional authority,”<sup>65</sup> and Louis Fisher continued to emphasize a public law approach to understanding presidential action—but they were clearly the exception. As recently as 1993 legal scholar Henry Paul Monaghan identified Pious’s argument as “a rare dissent among political scientists as to the importance of constitutional law.”<sup>66</sup> Political scientist Robert Spitzer argues that political science has, “to a great extent . . . yielded the field of constitutional law to lawyers.”<sup>67</sup>

Although Vietnam and Watergate prompted a new wave of interest in the president’s formal powers, with renewed concern about the normative question of how far the executive power should reach, most of these analyses were written by law professors.<sup>68</sup> Historians, too, began to look critically at what they saw as the expansion of presidential power, with some faulting Neustadt for conceptualizing presidential power as something distinct from its constitutional roots, and others criticizing the tendency to study presidential power apart from normative ideas about the purposes of that power.<sup>69</sup> The most widely known work in this tradition was Arthur Schlesinger’s *Imperial Presidency*, which argued that the presidency had become too powerful, with presidents able to commit to disastrous policies under cover of secrecy and insulation.

Neustadt has been subjected to some criticism, although none has undercut the long-running appeal of his argument. A few scholars have pointed out that Neustadt’s analytical framework is static, in that in his model presidents find themselves in a particular set of conditions that they have little say in constructing. In part this was because Neustadt was chiefly concerned with how presidents can be tactically effective given prior constraints. Such a perspective constrained the exercise of leadership by limiting presidents to a short-term view: “Neustadt’s presidents do not change the political system in any significant way. The political and institutional parameters of this system appear impervious to the exercise of presidential power; they are transformed by great external forces like economic depression or world war. . . . The assumption that a system is given and that presidents make it work more or less effectively is bound to render the requisites of success elusive, for in their most precise signification, presidents disrupt systems, reshape political landscapes, and pass to successors leadership challenges that are different from the ones just faced.”<sup>70</sup>

The enduring influence of Neustadt’s argument has meant that questions about the legal basis of presidential power generally and about executive orders in particular have proved far more interesting to legal schol-

ars than to political scientists. The legal literature on executive orders is both deep and broad.<sup>71</sup> Peter Shane and Harold Bruff argue in their casebook on the presidency that “Presidents use executive orders to implement many of their most important policy initiatives, basing them on any combination of constitutional and statutory power that is thought to be available. These orders thus often dwell in Justice Jackson’s zone of twilight, where authority is neither clearly present nor absent. Although interstitial, the programs involved may prove surprisingly durable.”<sup>72</sup> A 1997 administrative law casebook cautioned that executive orders, even when they lack the force and effect of law, “are compelling documents that agencies ignore at their peril.”<sup>73</sup>

Despite the extent of the legal literature, however, there are limits to what these investigations can tell us about broader patterns of presidential decision making. Most legal studies analyze the constitutional issues that executive orders often raise, and typically address the narrow questions of whether the president had the requisite authority to issue a particular order. This literature generally does not tie executive orders to the theoretical issues that advance our substantive knowledge of the presidency (although there are important exceptions). Spitzer attributes the limits of the legal literature to differences in training and outlook among political scientists and lawyers: “The two disciplines [law and social science] involve different emphases in training, intellectual style, and objectives. Lawyers are trained to be advocates; social science training, despite its limitations and flaws, emphasizes exploration.”<sup>74</sup> As a result, he concludes, much legal theorizing takes place in a rarified atmosphere divorced from political and historical context.

In any case, the perception remains strong that the legal model is not the best way to answer the most interesting questions about presidents. A leading textbook on the presidency puts it this way: “The legal perspective, although it requires rigorous analysis, does not lend itself to explanation . . . although studies that adopt the legal perspective make important contributions to our understanding of the American politics, they do not answer most of the questions that entice researchers to study the presidency.”<sup>75</sup>

Political science and legal scholarship on the presidency have thus gone in different directions, with the former concerned with the political and personal elements of presidential leadership, and the latter with the formal basis of presidential power. To Bessette and Tulis, “contemporary presidential scholarship is ill-served by this divergence between the legal and political approaches.”<sup>76</sup> Constitutional scholar Louis Fisher, one of a handful of scholars whose work has bridged the gap between the legal and political approaches, laments that “too often, law and politics are

viewed as isolated sectors of public policy . . . mere mention of a ‘legal’ dimension seems to stifle further discussion.”<sup>77</sup>

As characterized by adherents of the political paradigm, the legal approach to presidential power failed because it held to the notion that the law is a set of objective, external, and autonomous principles that provides definitive answers to questions of presidential power. Moreover, in the political behavior paradigm, the president either has the authority to act unilaterally or he does not, and most of the time he does not, so there is more to gain from studying the informal basis of presidential action—leadership, persuasion, agenda setting, congressional relations, public opinion, and so on—than there is in studying the legal sources of presidential power. Once the relationship between legal authority and presidential power is constructed this way, it is easy to conclude that legal questions are of little relevance to presidents as they pursue their strategic political interests.

The relationship between law and presidential power need not be tied down to either artificially anchored end of the law–politics spectrum. The reality is much more reciprocal: the law both constrains presidential actions and is shaped by them. The president has become, many have argued, far more powerful than the Framers could have envisioned, even though the constitutional provisions regarding the office “have not changed at all since they were ratified in 1787.”<sup>78</sup> This is not, however, because presidents have become better at finding ways around constitutional constraints. Instead, it reflects a more complicated dynamic between presidents and the law. The scope of the executive legal power is not fixed, but changes over time in response to evolving doctrines of constitutional interpretation, new institutional arrangements within the executive branch, congressional delegations of statutory authority to the president, history, and precedents established by individual chief executives. Given that the distribution of authority under separation of powers depends on legal interpretations with many characteristics of “common law constitutionalism,”<sup>79</sup> practice matters.

### Unilateral Executive Authority

*Presidential Power* stressed the weakness of the president’s legal authority, emphasizing the difficulties of acting unilaterally in a system of separated powers, institutional decentralization, and competition with other actors with their own independent sources of power.<sup>80</sup> This weakness is aggravated by the gulf between what the public expects of the presidency and what occupants can deliver, and the collapse of traditional political structures—especially political parties—that once gave stability and effi-

cacy to presidential leadership. The perceived disintegration of one presidency after another—Johnson (Vietnam), Nixon (Watergate), Ford (Nixon's pardon, recession), Carter (just about everything), Reagan (Iran-Contra), Bush (recession), and Clinton (impeachment)—has led to the conclusion that “the American political system now produces failed presidencies as the norm rather than the exception.”<sup>81</sup> The changes wrought by television and the proliferation of interest groups, the decline in U.S. international hegemony after the cold war, the confrontational style of media coverage of the presidency, congressional assertiveness, divided government, a bloated bureaucracy, and persistent budget deficits combine to place the presidency “under siege,” incapable of governing except under the most extraordinary circumstances.<sup>82</sup>

In stressing the formal weakness of the president, Neustadt argued that presidential orders, by themselves, lack the necessary practical authority to alter the behavior of others in government. Presidents cannot succeed by issuing commands; they succeed or (more commonly) fail because they are competent political brokers, not because of their formal powers. In fact, Neustadt argued that when a president gets his way by force, it is normally 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.”<sup>83</sup> An executive order or other legal device, as an instrument of formal authority, does not by itself cause action.

Is this a realistic view? This observation says less about the limits of formal powers than it may seem. In fact, we could make the same argument about legislation, that by itself as an instrument of formal authority it does not automatically cause action. The conclusion, however—that legislation is as a consequence neither material nor interesting—would be rejected immediately. Statutes by themselves do not alter individual behavior; behavioral change is a complex process of implementation by executive branch agencies, interpretation by the courts, enforcement by legal authorities, and acceptance by the public.

Presidents may try to exercise unilateral authority by appealing to “duty, pride, role-conception, conscience, interpersonal identification,” or to internalized values or even to loyalty.<sup>84</sup> In the 1990 edition of *Presidential Power*, Neustadt writes that “perceptions of legitimacy and sentiments of loyalty” played a more important role in shaping presidential power than he had earlier believed.<sup>85</sup> Although Neustadt is concerned with the impact these forces have on presidential power stakes—and he considers loyalty, in particular, to be an especially dangerous source of power because of the potential for a Watergate-like catastrophe—these forces play key roles in the president's ability to obtain control via noninstrumental persuasion. In arguing that commands are the only way that



presidents can get results without bargaining, the behavioral model of the presidency minimizes the degree to which “many presidential requests are acted upon without bargaining and without commanding,” based on “routine compliance.”<sup>86</sup>

Ironically, Neustadt cites the steel mill seizure as one of his three cases of presidential command, or instances where a presidential order produced a direct result. In his view, presidential commands, which he considered as evidence more of failure than of success, require among other things that those who receive an order from the president have “control of everything they need to carry it out [and] no apparent doubt of his authority to issue it to them.”<sup>87</sup> Actually, as the Supreme Court declared in *Youngstown*, the president did not have the authority to seize the steel mills. In this case, then, a secretary of labor—illegally, as it turned out—seized billions of dollars of private property, and the steel mill owners and workers both acquiesced to that seizure (initially, at least), on the basis of the president’s word. Is this evidence of presidential strength or weakness? Although Neustadt recognizes that what counts in these cases is whether the targets of an order believe it to be legal, he also suggests that formal powers may matter as well: “Perhaps legitimacy exerts a stronger influence the more distinct is its relationship to some specific grant of constitutional authority.”<sup>88</sup>

Making the argument that the law “matters” to the presidency is not, therefore, the same as arguing that presidential actions are completely determined and controlled by the plain language of the Constitution and statutes. We need not reject the notion that presidents attempt to persuade and bargain in order to argue that those attempts are structured and constrained by the law, or that the president’s ultimate authority is vested in the office’s legal and constitutional powers.

Evidence exists that presidents often think in constitutional terms, although presidents vary in their attention to legal precedent. Jimmy Carter was particularly concerned about the legal aspects of presidential power, often placing more importance on legal issues than on strategic ones. He “made it known, very clearly, that if there was a legal question in a policy paper, he wanted to know whether the options were lawful or not lawful. . . . He knew that lawyers could ‘advocate’ any position, but he wanted his Attorney General to tell him what the correct legal answer was, and he was prepared to live by it.”<sup>89</sup> The head of the Office of Legal Counsel under Lyndon Johnson connected OLC’s review of executive orders to broader questions of the president’s legal authority: “The authority of the President to ‘make law’ by executive order does not exist in mid-air. It must find its taproot in Article II of the Constitution or in statutes enacted by the Congress. In some instances . . . a proposed executive order has been blocked on the ground that it exceeded the legal authority of the

President.”<sup>90</sup> The Office of Legal Counsel, according to Douglas Kmiec, who served in the OLC under Ronald Reagan, operates with an institutionalized conservatism when addressing questions of presidential authority, in the form of a “reluctance to sanction practices other than those that are so thoroughly established as to be beyond all legal question.”<sup>91</sup> In contrast, Oscar Cox, assistant solicitor general under Franklin Roosevelt, advocated a more aggressive approach to legal interpretation. In a speech in 1942 before the Society for the Advancement of Management in Washington, D.C., Cox argued that during emergencies there is a need for clever lawyers who can come up with flexible interpretations of the law that allow the government to do what it needs to do. Even within the constraints of “our law, our democratic processes, and the social and human values we are fighting to preserve,” according to Cox, “the fact remains that our legal framework allows far more latitude for administrative action than is popularly supposed.”<sup>92</sup>

When faced with opposition to their policies, particularly in cases where the authority to make the decision is in doubt, presidents will often fall back on constitutional arguments, tying their decision to a specific grant of power in an effort to establish the legitimacy of what they have done. While such appeals are often, no doubt, purely instrumental to the goal of obtaining public support, the fact that presidents make them signifies at a minimum the symbolic importance of the law. Although Truman’s 1952 executive order seizing the steel mills cited the president’s authority under “the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces,” Truman was less guarded in his initial public statements. In an April 17, 1952, press conference, Truman claimed a virtually unlimited prerogative authority, arguing that he had acted under an open-ended presidential authority to do “whatever was in the best interest of the country.” After realizing that this assertion seemed to leave open the possibility of limitless presidential power, even to take over the press if the president thought it necessary, Truman quickly backed away from his statement.<sup>93</sup> To combat the furor raised by the president’s initial claim, a few days later the White House released a letter Truman had written to a private citizen, in which he took the position that “the powers of the president are derived from the Constitution, and they are limited, of course, by the provisions of the Constitution, particularly those that protect the rights of individuals.”<sup>94</sup>

Such public justifications, as Bessette and Tulis point out, “are often dismissed by scholars as mere rhetoric, attempts to give a cover of legitimacy to actions which have their source in political calculations rather than constitutional analysis.”<sup>95</sup> Nevertheless, the perceived need to find some constitutional legitimacy may well condition the choices that presi-

dents make. “It follows,” they conclude, “that the written document may mold political behavior by forcing presidents . . . to give serious thought to the constitutional propriety of anticipated actions, even if they have no personal constitutional scruples per se.”<sup>96</sup>

Ultimately, the behavioral paradigm of presidential power goes too far in promoting the notion that constitutional and statutory provisions make little practical difference to presidents as they pursue their strategic interests. The emphasis in the legal literature on narrow questions of the constitutionality of particular presidential actions is one reason that political scientists have found legal arguments inapplicable to broader issues of presidential action. It may well be true that “most of what the president do cannot be explained through legal analysis” and that most examples of presidential activity “can only be understood in terms of informal or extraconstitutional powers.”<sup>97</sup> A few critical reviews of the behavioral model have pointed out, however, that even the president’s informal powers find their ultimate origins within some constitutional provision or grant of power. Neustadt’s model found its broadest application in studies of presidential-legislative relations, as scholars sought to identify the sources of presidential influence in Congress. Some aspects of this relationship are modern developments (particularly the expectation that presidents would prepare a comprehensive legislative agenda, which became common only in the twentieth century), but others can be traced back to specific constitutional provisions and are therefore grounded firmly in law (especially the veto, but also provisions that guaranteed presidential independence from the legislature):

As the specific language of the document written in 1787 has given rise to conflict between the political branches, so has it influenced its nature and scope. The Constitution’s qualified veto, for example, ensures that with rare exceptions Congress must make some accommodation to strongly held policy views of the president. Conversely, other constitutional provisions determine that presidents must generally give serious consideration to senatorial views of treaties and appointments. Although the Constitution does not lack ambiguity, it is clear enough on many specific points to define the area and fashion the weapons of congressional-presidential conflict . . . much of the “political” conflict between president and Congress occurs within a horizon of law.<sup>98</sup>

The importance of legal constraints on the presidency has been raised by those who have criticized Congress for relying on an overly legalistic approach to constrain presidential activism. Many conservative legal scholars charged in the 1980s that Congress responded to every instance of presidential activism with legislation that specified in increasingly exhaustive detail all that presidents could not do in foreign affairs, intelligence, or military procurement. The argument was that Congress was

engaging in legislative imperialism, encroaching upon the president's legitimate prerogatives for partisan purposes. The fact that this debate took place at all is instructive, because it implies the potential efficacy of legal constraints on the presidency. If presidential adherence to the law is merely an afterthought, or if the constraints Congress has tried to impose on the presidency are meaningless, there is no need for concern. Additionally, not everyone agrees that the president will usually win the institutional confrontations with Congress. Michael Horowitz, who served as counsel to the director and chief legal officer in the Office of Management and Budget under Ronald Reagan, concluded that his experience taught him that "Congress is a very potent institution and can do in the presidency. . . . Presidents often have to accommodate Congress because congressional power is real, and it shoots real bullets."<sup>99</sup> Even so, even those who identify excessive legalism as a problem see a solution in politics, not law: L. Gordon Crovitz and Jeremy Rabkin argue that to many, "the best solution [to excessive legal constraints] is to build up the political strength of the presidency, not to litigate the constitutional rights of the office."<sup>100</sup>

Just as the presidency literature divides legal issues from political questions, it also implicitly draws distinctions between politics (where the interesting questions lie) and administration (which is seen as a function of management and implementation, not substantive policy). Much of the literature holds fast to the notion that since executive orders are primarily an administrative tool, they do not have significant political or policy consequences. The implicit argument is that administration has less impact on external interests and encompasses questions separate from, and less important than, broader policy. Without question, though, even purely administrative decisions can have dramatic effects on the public, and students of public administration no longer accept the politics-administration dichotomy. The process by which the executive branch controls what information reaches the public or Congress—on its face largely a question of administrative practice, and one controlled almost exclusively through executive orders rather than through statutes—reaches far beyond agency boundaries. The classification and security clearance systems, and presidential claims of executive privilege, raise critical questions of democratic accountability, the separation of powers, and private rights and civil liberties.

Similarly, presidential efforts to implement affirmative action and labor policy through executive orders have typically involved stipulations barring firms who refuse to abide by the government's policy from bidding for government contracts (see chapter two). In rejecting a Clinton administration effort to bar government contractors from hiring permanent replacement workers, a policy enacted through executive order, the Court of Appeals for the District of Columbia concluded that the order was

“quite far reaching,” and that it would discourage even nongovernment contractors from hiring replacement workers.<sup>101</sup>

The neglect of executive orders has led to a one-dimensional view of their use. Typically executive orders are viewed as a way for presidents to accomplish on their own what Congress refuses to give them. In fidelity to the Neustadtian argument that command is a sign of failure, Joel Fleishman and Arthur Aufses argue that “in some cases executive orders are as much a reflection of presidential weakness, as of presidential strength. In other words, Presidents may decide to legislate by executive order when they have failed to move desired bills through Congress.”<sup>102</sup> But even here there is no consensus. Other political scientists have argued that presidents will rely more heavily on executive orders when they succeed in Congress.<sup>103</sup>

Yet like executive power itself, executive orders do not lend themselves to simple classifications, either as to content or as to motive. At times, presidents have resorted to an executive order strategy because they had no alternative; at others, because it was the most effective way to get what they wanted. Presidents sometimes have issued orders as a way of getting around a Congress that would have surely refused to give them what they wanted. At other times, presidents have relied on executive orders to prevent congressional action, using their powers to preempt legislation and fill power vacuums. Sometimes presidents have issued orders to make a positive statement about policy; at other times they have issued orders under duress as a way to satisfy the immediate demands of important constituencies. How presidents choose to use them depends on context, the policy area, and prior expectations of executive responsibility.

### **Putting the Pieces Back Together: New Institutionalism and the Presidency**

Research on the presidency, I have argued in the preceding section, has mistakenly concluded that executive power generally and executive orders in particular are not important to presidents. The problem is largely attributable to the influence of the behavioral paradigm in presidency research, which has focused more on the personal elements of presidential leadership than on the legal basis of power.

But that is not the only problem. Presidency research has also been criticized for being less theoretical than other subdisciplines within political science, especially in comparison with the literatures on Congress or the bureaucracy. In a pointed 1993 review, Gary King called presidency studies “one of the last bastions of historical, non-quantitative research in American politics,” and argued that “although probably more has been

written about the presidency than all other areas of American politics combined,” a lack of theoretical development has interfered with the formulation and testing of systematic theories.<sup>104</sup> King, along with others, has also called for more basic descriptive work, observing that much of the effort expended by presidential scholars involves looking at “the interesting questions . . . [without taking] sufficient time to verify the prior empirical claims on which those questions stand.”<sup>105</sup> The conclusion that executive orders are not important to presidents is precisely this sort of speculation, one that has been widely held but is, I argue, empirically wrong.

One solution to the theoretical problems faced by presidential scholars is to rely on applications of what has become known as the “new institutional economics” as a way of organizing and explaining presidential behavior. The central questions of concern within the NIE literature are why economic institutions emerge and why they take the hierarchical form that they do. As applied to political relationships, NIE considers the interests of the parties involved in any economic or political transaction: the principal, who wishes to achieve a certain outcome, and the agent, the party with whom the principal contracts to produce the desired outcome. The key problem is how the principal can create an incentive structure so that the agent sees it as in his or her interest to act as the principal wishes.<sup>106</sup>

As applied to public (that is, government) organizations, the question is: how are they structured to produce the benefits desired by those who establish them? Political actors establish institutions for a reason—to provide benefits to important constituencies, to carry out imperative administrative and policy functions, to regulate—and politicians are attentive to the central problem of who has the right to define the mission and goals of an institution, and who shall control it. The theme of control permeates considerations of institutional structure: how politicians control bureaucrats, how bureaucrats control their subordinates, how citizens control politicians.

In this respect presidents are no different from any other political principal. What presidents need and work for, argues Terry Moe, is control over governing processes and policies, something they must have given the unique institutional and political situation they find themselves in. In an often-cited passage, he writes that “certain basic factors have structured the incentives of all modern presidents along the same basic lines. The president has increasingly held responsible for designing, proposing, legislating, administering, and modifying public policy. . . . Whatever his particular policy objectives, whatever his personality and style, the modern president is driven by these formidable expectations to seek control over the structures and processes of the government.”<sup>107</sup>

The NIE theory of the presidency—or what Thomas Weko calls “rational choice institutionalism”<sup>108</sup>—begins with the assumption that presidents seek control over policy and process, just as rational choice theories of Congress typically assume that legislators seek reelection. Given the importance of institutions and administrative processes to policy outcomes, the epicenter of presidential-legislative struggles is over institutional structure rather than the day-to-day bargaining over particular policy issues. Issues of organization, institutional maintenance, implementation, and processes take precedence.<sup>109</sup> The politics of the presidency is about getting control of the institutions that create and implement policy. Rational choice institutionalism permits a framework that more closely tethers presidential behavior to statutory and constitutional origins, at the same time that it introduces a dynamic element into the evolution of presidential power.

In the struggle for institutional control the president has two main advantages, both of which stem from the president’s unique legal powers. The first of these presidential advantages is the formal vestment of executive authority in the office, something far more important than most studies of the presidency have allowed. “The simple fact that presidents are the nation’s chief executives endowed by the Constitution and stature with certain formal powers, is of great consequence. For those powers enable them to make lots of important structural choices *on their own* without going through the legislative process. . . . They can organize and direct the presidency as they see fit, create public agencies, reorganize them, move them around, coordinate them, impose rules on their behavior, put their own people in top positions, and otherwise place their structural stamp on the executive branch.”<sup>110</sup>

The importance of executive power is enhanced by its inherent ambiguity, and by an increasing level of congressional delegation to the executive branch. Together, these give the president the ability to interpret his responsibilities flexibly and also to shape how statutes are implemented and enforced. In this way executive power is akin to what economists call residual decision rights, which in the private sector “are rights an actor may possess under a contract or governing arrangement that allow him to take unilateral action at his own discretion when the formal agreement is ambiguous or silent about precisely what behaviors are required.”<sup>111</sup> Since statutes inevitably leave discretion to the executive, often by design, the president has many opportunities to exercise this residual authority.

Moreover, efforts to check presidential power through legislative restrictions often have had the counterproductive effect of legitimizing the very powers that Congress has tried to limit. I treat this problem in more detail in chapter two, but two examples highlight the problem that Congress faces. When Congress tried to limit the president’s ability to

carry out covert intelligence operations by imposing reporting requirements in the Hughes-Ryan amendments to the Foreign Assistance Act and the Intelligence Oversight Act in 1980, it inadvertently provided legislative recognition of the president's covert operations authority. The mere fact that Congress required the president to report on such activities was read by the courts as a congressional recognition of the president's right to conduct them. "So once again," concludes Gordon Silverstein, "Congress' attempt to control the executive's actions in foreign policy only provided fresh and unprecedented explicit authorization for executive prerogative."<sup>112</sup>

A similar dynamic occurred in 1977 when Congress tried to limit the way in which presidents exercised emergency economic powers. Since 1917, when Congress passed the Trading with the Enemy Act (TWEA), the president has had the legal authority to regulate aspects of foreign trade in emergency or wartime circumstances. Over the years, presidents had relied on the act to give them an ever-expanding range of authority to exercise control over more and more; Congress played a part in the president's expanding authority by modifying the law to, for example, extend the president's authority to certain domestic situations as well (which it did in March 1933). Between 1933 and 1968, a congressional investigation found, presidents had issued dozens of executive orders and proclamations under the act, with some far removed from what was originally intended: examples included FDR's proclamations closing the nation's banks and prohibiting the removal of gold from the country, FDR's executive orders freezing the assets of enemy nationals, Johnson's executive order restricting capital transfers abroad, and a Nixon executive order continuing certain export restrictions.<sup>113</sup>

As part of a broader congressional effort in the mid-1970s to scale back the scope of the president's emergency powers, Congress enacted the International Economic Emergency Powers Act specifically to reduce the range of the Trading with the Enemy Act.<sup>114</sup> The IEEPA, among other things, required the president to consult with Congress, provided for congressional review, and set procedures for congressional termination of presidential emergency authorities. The most important change was in the president's ability to rely on emergency powers. While the Trading with the Enemy Act authorized the use of the specified powers during wartime or national emergencies (leaving it up to the president to define what, exactly, a "national emergency" was),<sup>115</sup> the IEEPA attempted to restrict the president's use of the act during peacetime. Under IEEPA, the president could only declare a national emergency when the nation faced an "unusual or extraordinary threat . . . to the national security, foreign policy, or economy of the United States."



In a series of executive orders issued on his last day in office, Carter implemented an agreement with Iran to release assets frozen in the United States, as well as to suspend any private claims and terminate any legal proceedings against the Iranian government, in return for the release of American hostages held since November 1979. Despite Congress's clear intent in the IEEPA to limit presidential authority, the Supreme Court held in 1981 that the act authorized the resolution of the Iranian hostage settlement via executive order (in *Dames & Moore v. Regan*, 453 U.S. 654). Chief Justice William Rehnquist interpreted IEEPA not as a restrictive statute, but rather as a sign of "congressional acceptance of broad scope for executive action" in economic emergencies.<sup>116</sup> Harold Koh concludes, "in only one decade, the executive branch had succeeded in extracting from IEEPA the same sweeping delegation of emergency powers that Congress had expressly sought to remove from it after Vietnam."<sup>117</sup>

The second presidential advantage in the institutional setting is the ability to act first, leaving it up to other institutions to reverse what presidents have done. Whether presidents have effective plenary executive authority or not (an open question), there is no doubt that they can take action faster and more efficiently than either Congress or the courts. Congress as a collective organization takes definitive action through the legislative process, which is cumbersome, difficult to navigate, and characterized by multiple veto points. Even when Congress can create and sustain majorities at the subcommittee, committee, floor, and conference stages, the president can use the veto power to raise the bar from a simple majority to a two-thirds majority necessary to enact legislation over the president's objection. The president, at the same time, "has a trump card of great consequence in his struggle against Congress for control of government. He can act unilaterally in many matters of structure."<sup>118</sup> The president, in effect, can often make the first move in these disputes, forcing Congress to take positive action to undo what the president has created. Similarly, the judiciary can overturn executive actions (as it did in rejecting Clinton's 1995 replacement worker executive order), but must wait for controversies to come to it, and definitive resolution can take years. Moreover, even after the judicial decision, enforcement is a matter for the president.

The president's ability to win by default is, like his residual authority, reinforced by judicial doctrines that make it more difficult to challenge presidential action. The so-called *Chevron* rule determines how judges referee presidential-legislative disputes over statutory interpretation, and the rule provides clear advantages to the president. In *Chevron U.S.A v. National Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court ruled that an agency interpretation of a statute is "controlling unless Congress has spoken to the 'precise question at issue.'"<sup>119</sup> Once the president, through the executive branch, has interpreted a statute, Con-

gress can only override that determination through narrow, explicit legislation on the exact point in question. This requirement places a heavy burden on Congress in confronting unilateral presidential action, given that body's collective nature and inherent bias toward not changing the status quo.

There will of course be exceptions to this rule, cases in which Congress can effectively respond to and circumscribe presidential administrative discretion. Jessica Korn, in her study of the legislative veto, argues that political scientists, legal scholars, and journalists have made far too much of the *Chadha* decision (the 1983 Supreme Court decision that ruled one-house legislative vetoes unconstitutional, with the Court declaring that congressional reversals of executive branch decisions had to go through the normal legislative process) and have neglected the existence of perfectly adequate alternatives to the legislative veto for controlling agency activity.<sup>120</sup> She cites the experience of Reagan's secretary of education William Bennett, who was repeatedly "legislated over" when his administrative decisions ran afoul of the Democratic congressional majority.<sup>121</sup> The 1995 federal court decisions striking down Clinton's replacement worker order and the Supreme Court's 1983 rejection of the line-item veto show that there are limits to even congressional delegation and court deference to the President. And, as Steven Calabresi sees it, it is possible to push this argument too far; he is critical of those who see the combination of judicial deference, congressional delegation, and checks on congressional controls such as the legislative veto as justification for the claim that "newly created doctrines of deference, coupled with much more aggressive use of executive orders and signing statements, [have] led to a situation where the President is able to subvert our whole system of checks and balances by making laws which the Congress must reverse over the President's veto."<sup>122</sup>

Congress's success, though, is conditioned by its collective institutional structure. How then can we predict in which areas the president will be able to operate effectively, and in which he will either lose in direct confrontations or avoid clashes altogether? Silverstein's analysis of separation offers some help: in his view, legislators will more likely organize effectively when they are dealing with issues directly affecting their constituents. Congress, in other words, is most effective when it is acting as a representative institution, because it is more likely to respond to sustained electoral pressure than to vague concerns that the president is encroaching on its administrative or procedural prerogatives. On issues of institutional structure, in particular, and foreign policy, it will be far less able to check presidential authority.

The history of congressional efforts to overturn specific executive orders bears out this observation. Only twice since 1970—in 1972, when

Congress successfully blocked Nixon's effort to resuscitate the moribund Subversive Activities Control Board (by enacting an appropriations rider that prohibited the expenditure of funds to implement Executive Order 11605), and in 1998, when Congress prohibited Clinton from spending any funds to carry out an executive order on federalism—has Congress explicitly invalidated an executive order of any substance. Terry Moe and William Howell identified thirty-six congressional attempts to legislatively countermand executive orders between 1973 and 1997—during a period when presidents issued over 1,400 executive orders—and only one attempt was successful: in 1973, Congress changed the effective date of a Nixon order (E. O. 11777) that provided a pay raise for federal employees.<sup>123</sup> In 1981 John Noyes found only a handful of instances where Congress had explicitly overturned an executive order, with successes limited to presidential action on administration of the Panama Canal Zone, veterans' pensions, and government salaries.<sup>124</sup>

In 1998 Congress suspended one provision of Executive Order 12958, which had automatically declassified all documents more than twenty-five years old.<sup>125</sup> But the provision did not overturn any part of the order, and instead simply required the secretary of energy and the director of the National Archives to devise a plan that would minimize the chance that any "restricted data" would be inadvertently released. And the final version of the law was significantly weaker than the original legislation, proposed by Senator John Kyl (R-Ariz.) and passed by the Senate, which would have required a visual inspection of every page of every document prior to declassification. Archivist John Carlin argued that the Kyl provision would "completely nullify E.O. 12958."<sup>126</sup> In the end Congress opted for a much weaker law that temporarily set back the declassification process by a few months: Clinton submitted the required plan in January 1999, at which point the declassification effort continued.

There are cases in which presidents have backed down in the face of strong congressional resistance—as Clinton did in 1993 when he retreated from his campaign promise to end the ban on gay and lesbian military personnel by executive order<sup>127</sup>—but the general pattern is quite the opposite.

This theoretical perspective offered by the new institutional economics literature provides a way of making sense of the wide range of executive orders issued over the years, and is the centerpiece of my approach. The common theme I find in significant executive orders is control: executive orders are an instrument of executive power that presidents have used to control policy, establish and maintain institutions, shape agendas, manage constituent relationships, and keep control of their political fate generally.<sup>128</sup> Within the boundaries set by statute or the Constitution, presidents have consistently used their executive power—often manifested in executive orders—to shape the institutional and political context in which

they sit. There are, to be sure, limits on what presidents can do relying solely on executive orders and executive power, and presidents who push too far will find that Congress and the courts will push back. Yet the president retains significant legal, institutional, and political advantages that make executive authority a more powerful tool than scholars have thus far recognized.

This emphasis on control allows for a longer-term view than that generally taken by informal approaches to presidential leadership. I conclude that presidents have used executive orders to alter the institutional and political contexts in which they operate. The effects of any one effort in this regard may not be immediately apparent, and in many cases presidents succeed only after following up on what their predecessors have done. In this respect I view presidential leadership as both strategic and dynamic, a perspective that brings into sharper relief the utility of executive power to the presidency. I also differ with Neustadt on this score, as he looks at how presidents can be tactically effective within a particular structure context over which they have no control.

For analytic purposes, I divide the uses of executive orders into three levels. At the first level, presidents, relying on their formal and recognized legal powers, simply issue orders that they expect others to obey. Examples of these are the three cases of command Neustadt discusses: Truman's firing of MacArthur; Truman's seizure of the steel mills; and Eisenhower's use of the National Guard and U.S. Army to enforce the Supreme Court's school desegregation decision in Little Rock, Arkansas. In each of these cases, Neustadt argues, "the President's own order brought results as though his words were tantamount to action. He said, 'Do this, do that,' and it was done."<sup>129</sup> This is the sort of command authority that presidents can rarely wield, according to Neustadt. Clearly, though, there are many other examples, a large portion of which have taken the form of executive orders.

The NIE framework, though, posits that presidents can achieve substantive results not simply by giving commands, but by creating and altering institutional structures and processes. At this second level, presidents use their executive authority to shape and alter the institutional landscape in which they reside. Many elements of the institutional arrangements of government, of course, are fixed by constitutional and statutory mandates, and the president cannot as a rule do much about them in the short term (although the history of the shift in the war powers from Congress to the president in the twentieth century is a sign that even constitutional grants of power are not static). Yet residual decision rights still give presidents some flexibility.

Orders in this second category are not "self-executing," inasmuch as the order itself does not lead directly to an immediate action translating presidential words into the desired outcome. Instead, the president creates

new processes that alter the organizational position, powers, and incentives of other actors, or that create new institutional structures with new actors; in effect, the president's order channels behavior in order to ultimately produce results.

Put simply, presidents use their authority to reorganize the executive branch and revise administrative processes. In doing so they by design make some policy and procedural outcomes more likely than others. Here is where the presidential advantage over Congress is at its greatest, as presidents have often made unilateral decisions of major import. Examples include Roosevelt's establishment of the Executive Office of the President in 1939, the establishment of wartime agencies during World War II, the various orders that organize government intelligence agencies, and Reagan's 1981 executive order requiring cost-benefit analysis and OMB review of major regulations. These orders fall squarely within the structure of rational choice institutionalism, as they involve cases where presidents have dedicated their efforts and expended scarce political capital to revise processes and institutions, something which if done wisely will spare them and future presidents the need to fight case-by-case political battles in the same areas. By altering institutional arrangements and the incentives that govern individuals, presidents can create structures that favor some outcomes over others.

Presidents will usually have to fight Congress for the right to exert this kind of control, and will sometimes lose, but most of the time they win because of the twin advantages that lie in their being able to move first and in Congress's need to take collective action to counter what the president has done. The dynamic, which has repeated throughout the past hundred years, is as follows: exogenous economic, political, and social pressures serve as the impetus for new government capabilities. The impetus can emerge through the obvious failure of the government to respond to what the electorate sees as pressing needs, the rise of new economic or social institutions that pose challenges to the government's existing administrative ability, through political entrepreneurs who propose new structures, or some combination. Past examples of this process include the initial development of federal government regulatory institutions and civil service organizations in the late nineteenth century and the institutions of the New Deal.

Once the institutions emerge, there is usually a struggle for control between the presidency and Congress over the new capabilities. Congress has at times asserted its control, as it has with the establishment of independent regulatory institutions (whose heads are removable by the president only for cause). Over time, though, successive presidents will often try new strategies to gain control over—or least limit the independence of—these new organizations and capabilities. Traditionally this competi-

tion has taken the form of an iterative game of presidential initiative (usually, though not always, in the form of executive orders) and congressional legislative response.

At the third level, presidents use their unilateral authority as a bargaining tool in an effort to shape the strategic context in which they operate. By taking symbolic stands, placing issues and policies on the public agenda, and providing political benefits to important constituencies, presidents can dramatically alter the strategic environment in which bargaining takes place. This type of authority comes closest to Neustadt's "persuasion" model of presidential power. Two recent examples are Clinton's 1995 order that barred government contractors from hiring replacement workers and a 1997 order prohibiting smoking in government buildings. In the first case Clinton was trying to mend the breach with organized labor that arose over his support of the North American Free Trade Agreement (which unions strongly opposed). Even though the president ultimately lost in the courts, he still gained considerable leverage by making the attempt. In the second case, the president's action was largely symbolic, and part of an effort to gain public credit by getting on the "right side" of an important public health issue.

My focus is on the second and third categories of presidential action. Although presidents face limits on their ability to mandate direct change—indeed, in a separated system the lack of such limits would be, as Montesquieu put it, the very definition of tyranny—the focus in the presidency literature on the limits of command has obscured the president's ability to use executive authority to gain control of institutions, processes, and agendas. Even within this more narrow area presidents are not free to do whatever they want, and in any case Congress or the courts may step in to reverse what the president has done. I argue, though, that the president will win more of these battles than he loses, as Congress fails to overcome the collective dilemma and institutional inertia that make quick and decisive action difficult. Before I turn to the task of analyzing how presidents have used this power in particular policy areas, though, it is necessary first to define with more precision what the law says about executive orders, and provide an accurate and systematic account of the patterns of overall use.

### *Plan of the Book*

In making the case that executive orders have played a critical role in the development and exercise of presidential power, I proceed as follows. In chapters one, two, and three, I explore the theoretical and descriptive aspects of executive orders. This chapter has analyzed what the political

science literature has had to say about the president's formal powers in general and executive orders in particular. As a discipline, political science has moved away from legal analysis as a way of attacking interesting questions about the presidency; our focus has been on the characteristics of individual presidents and their leadership and strategic skills. The lack of attention to executive orders is a consequence of this shift away from looking at the law as an important source of presidential power. I have also offered an application of recent theoretical developments in what has been called the "new institutional economics" into presidency studies. The NIE literature provides a framework that allows a fuller understanding of how presidents have used executive orders to enhance and expand their ability to control both policy and processes. Chapters two and three address the major theoretical and descriptive aspects of executive order use. In chapter two, I investigate the legal theory behind executive orders and other unilateral executive actions and place special emphasis on how courts have interpreted order usage. The thrust of my argument here is that since it has proved impossible to precisely define the scope of presidential power, the details of presidential exercise of that power is of great consequence. Thus a study of executive orders, as a symbol and instrument of executive power, can aid in understanding the reach of the president's practical authority. This chapter also addresses the evolution of how the federal government has disseminated and recorded executive orders and how presidents and their staffs have viewed them.

Chapter three concentrates on systematic description, with a statistical analysis of executive order issuance since the 1930s. My intent here is to identify some of the factors that motivate presidents to use executive orders, and thus gain some insight into the practical utility of orders as a policy and strategic tool. In this chapter I draw on the universe of all orders issued since 1935, as well as a more detailed analysis of a sample of 1,028 orders. Most of the analysis here should be accessible to readers familiar with basic quantitative techniques.

In chapters four, five, and six, I shift to detailed historical analysis of broad categories of orders, based on subject matter and presidential goals. In these chapters I make extensive use of primary documents from presidential libraries and the National Archives. Chapter four, focusing on the establishment and expansion of presidential controls over budget and regulatory policy in the twentieth century, addresses the use of executive orders as a tool of institutional construction. The history of the establishment and development of the Bureau of the Budget beginning in 1921 shows marked parallels with presidential attempts in the 1970s and 1980s to gain control of a rapidly developing federal regulatory power. Even though these two episodes are separated by five decades and took place in dramatically different presidential eras, the similarities suggest a common

impetus for presidential assertion of executive authority. Presidents from Taft through Reagan have used executive orders in their efforts to exercise control over budget and regulatory institutions.

Chapter five examines executive orders as a way of protecting presidents' prerogatives in foreign policy. In this policy area more than any other, presidents have used executive orders to preempt and undercut congressional involvement in what has become a field of presidential dominance. The organization of the intelligence community and the procedures for protecting classified information have been almost exclusively a function of executive orders rather than legislation, and presidents have relied on executive order strategies to block congressional action. Most studies of the president's authority in foreign affairs have focused on war powers (or the ability to control the disposition and use of the military in foreign conflicts, whether or not Congress has formally declared war). Presidents have also gained considerable control over the organizational and procedural facets of this power.

In chapter six, I explore the potential for executive orders as a way of circumventing Congress and obtaining results through executive action when legislative action is unlikely. Here the classic examples are the civil rights executive orders, a practice that Roosevelt started with his Fair Employment Practices Commission, which extends through implementation of preference programs in federal contracting, and which places the president directly within contemporary controversies over affirmative action. In this chapter I also consider the question of whether Congress has succeeded in efforts to invalidate executive order strategies through legislation designed to overturn specific orders.

Finally, in chapter seven, I return to the question of what legal and constitutional powers mean to the president. Here I argue that the divergence of behavioral and legal approaches to the presidency constrains our understanding of the office, and that the divergence itself is artificial. It is not necessary to place all of our eggs in one theoretical basket, and there is no reason why the presidency literature cannot integrate different approaches into a meaningful theoretical synthesis. Although no one will ever derive a "unified field theory" of presidential behavior, or a framework that can answer every question we may ask about presidents or the presidency, a renewed focus on the fundamental principles of presidential power—as derived from the Constitution and statutes that grant that formal power—can tell us things about the office and the individual in it that we will otherwise miss.