The Limits to Power without Persuasion

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Research on executive action often assumes that presidents face an either/or decision between issuing an administrative order and seeking legislation. This premise, however, ignores differing structural characteristics of administrative and legislative policy vehicles. This article will argue that, rather than see administrative actions as equivalent to legislation, presidents understand the distinct advantages and disadvantages each policy instrument brings and act accordingly. Using data linking executive orders (EOs) and presidential legislative proposals, as well as a case study of the creation of the Department of Homeland Security, we show that when presidents issue more EOs, they do not issue fewer legislative proposals. In fact, presidents sometimes follow up on significant EOs with proposals to enshrine them in statute. Our research supports viewing EOs as a tool in the legislative toolbox rather than a challenge to the legislative process.

Within the last two decades a number of researchers (Chiou and Rothenberg 2013; Cooper 2002; Howell 2003, 2005; Krause and Cohen 1996; Mayer 2001; Rottinghaus and Maier 2007; Rudalevige 2010; Savage 2007; Warber 2006) have sought to document presidents’ capacity to make policy administratively, via executive orders (EOs), national security directives, proclamations, signing statements, and other nonlegislative means. Much of this research suggests that presidents, by pursuing policy administratively, can avoid the need to bargain with Congress via the legislative process.
process. That is, they can produce policy “unilaterally,” with a “stroke of the pen” (Mayer 2001).

The implicit (and often explicit) assumption underlying many of these studies is that presidents face a choice: they can either pursue a policy objective by submitting a legislative proposal to Congress or they can “proceed on their own” through administrative means (Howell 2003, 96; Mayer 2009; Moe and Howell 1999, 132). But how do presidents choose? What factors determine whether they proceed legislatively or administratively? Previous research (Deering and Maltzman 1999; Howell 2003, 2005) suggests that the decision turns in large part on the degree to which Congress is able to legislate, either on the president’s behalf, or against his policy objectives. Thus, Will Howell shows that when Congress has a strong majority party, as measured by the number of seats it possesses and its ideological cohesion relative to the minority party, presidents will be less likely to pursue policy objectives through administrative means such as executive orders. This is because, in the case of a sympathetic Congress, presidents can achieve their objectives via legislation. And if a strong majority party does not share the president’s policy preferences, it can overturn his administrative directives. However, when Congress is ideologically fragmented or lacks a strong majority party, it has less capacity to legislate on his behalf, or to block him.

Significantly, most of this prior research primarily addresses one side of the either/or decision; it documents the logic for why presidents issue administrative directives but does not demonstrate whether these same reasons also explain when presidents submit legislative requests to Congress. Howell does show that a Congress dominated by a large and ideologically cohesive parties is more likely to produce nontrivial legislation (Howell 2003, 96-99). However, looking at the nontrivial legislation Congress produces does not necessarily tell us whether that legislative output fulfills the president’s policy goals. To more accurately assess the either legislation or administrative action hypothesis, then, scholars need to compare presidents’ use of administrative directives, such as executive orders, with their legislative requests to Congress. When do presidents request legislative action from Congress and when do they opt to pursue policy objectives via administrative action?

This article presents an initial effort to answer that question. We show that administrative directives and legislation are not, as some previous research suggests, equivalent methods by which presidents can make policy, and presidents do not view them as such. Instead, presidents choose which policy instrument to use based in part on its particular structural attributes.

As a policy-making mechanism, administrative directives, such as executive orders, provide important advantages to presidents. Most notably, they allow presidents to capitalize on their first-mover status to make policy quickly and efficiently. But EOs cannot appropriate money or remake existing law, and they are susceptible to tampering by
future presidents, which makes them less durable. Moreover, because these directives are based on existing statute or other formal grants of power, they tend to change policy in a more limited fashion than does legislation. To enact broad and lasting policy change on important issues, then, presidents prefer to work with Congress via the legislative process.

In some instances, particularly during periods of crisis, presidents may initially pursue significant policy change via direct administrative action. But rather than a means to bypass Congress, as previous research suggests, these substantively important unilateral acts are often meant to put down an initial policy marker pending eventual congressional action; presidents act administratively in the expectation or even hope of further legislation action, or to prod Congress to act. In short, administrative directives can, under some circumstances, serve as a first step in a multistep policy process that culminates in legislative action by Congress.

Presidents, we suggest, understand the distinct advantages and disadvantages offered by each policy instrument and act accordingly. Most notably, except when speed is paramount, presidents prefer to pursue their most significant policy goals through legislation rather than administrative means.

Our argument unfolds as follows. Building on previous research, in the next section, we examine the circumstances under which presidents during the post–World War II period are likely to issue executive orders and when they will propose legislation. Consistent with prior research, we find that when congressional majorities are small and ideological cohesion in Congress is weak, presidents are increasingly likely to issue executive orders. However, there is no statistically significant relationship between the strength of congressional parties and the number of legislative proposals the president submits to the body. Moreover, the number of proposals sent to Congress in each period dwarfs the number of policy-making executive orders signed, indicating that presidents seeking significant policy change prefer to work through the legislative process.

To explain these somewhat unexpected findings, we examine the establishment of the Department of Homeland Security (DHS) during George W. Bush’s presidency. In the crisis conditions existing in the immediate aftermath of the 9/11 terrorist attacks, Bush moved quickly via executive order to establish a Homeland Security Council (HSC) administered by a White House–based assistant for homeland security. While his EO was being implemented, however, several bills were introduced in Congress designed to put homeland security organization on a more durable statutory footing. Ultimately Bush was able to bargain successfully with Congress to pass legislation establishing a cabinet-level DHS on terms largely agreeable to him.

Although a single case study, Bush’s experience creating the DHS suggests to us that although EOs and legislation serve somewhat different roles in the policy process because of their different structural attributes, under some circumstances they can be used in complementary fashion to achieve the president’s important policy objectives. Executive orders, we hypothesize, offer advantages in speed of action, symbolic impact, and flexibility of terms, while legislation—although slower to reach fruition—tends to be more durable because passage typically requires political coalition building. As a consequence, particularly in response to a crisis, and for symbolic reasons, presidents
sometime proceed first through administrative means, but then seek to secure these ini-
tial policy gains through legislation.

How often does this occur? In the penultimate section, we present a new data set
linking executive orders to subsequent presidential legislative proposals during the period
1947-2003, from the start of Harry Truman’s administration through George W. Bush’s
first term. This data set differs from previous efforts that link executive orders to subse-
quent actions by Congress (e.g., Howell 2003, who traces congressional attempts to revoke
or codify executive orders) or that identify executive orders issued in response to pending
legislation, either to support or preempt its enactment (Belco and Rottinghaus 2014). We
identify twenty orders for which presidents then submitted legislative proposals, either to
codify the orders’ authority or to expand it. For an important subset of policies, then, EOs
are best understood as the president’s first step in a bargaining process with Congress.

Our findings indicate the need for scholars to dig beneath the aggregate numbers
and look more closely at the substance of legislative and executive orders and the context
in which they are issued. Although in many instances administrative procedures are uni-
lateral, it is also true that a significant portion are subsequently amended or even revoked
by presidential action. Moreover, a few of the most important EOs are best viewed as part
of the congressional bargaining process. This interpretation suggests that, rather than
offering a “direct challenge to the strategic presidency” (Mayer 2009, 429), presidents’
use of administrative directives, such as executive orders, is consistent with prior research
(Jones 2005; Neustadt 1990) regarding how presidents must bargain to achieve policy
goals. Even in the realm of unilateral administrative action, it appears that presidents can-
not always escape the constraints imposed on them by operating in a system of separated
institutions sharing powers.

The Policy Process: EOs or Legislative Requests?

When do presidents pursue policy change through administrative means, and when
do they rely on the legislative process? And are these approaches equivalent means of
achieving policy goals, as some scholars suggest? Will Howell (2003, 2005) provides one
of the more thoroughly developed explanations for why presidents issue executive orders
2005 journal article present a model that posits an inverse relationship between a presi-
dent’s likelihood to issue significant executive orders and Congress’s ability to produce
legislation. That is, the more fragmented the Congress, the less likely it can either legis-
late on the president’s behalf or act in response to a president’s effort to make policy via
administrative means. To measure congressional fragmentation, Howell looks at both the
relative size of the congressional majority and the ideological cohesion of the congres-
sional parties (2003, 85-96). In an initial test of his thesis, Howell compiles a list of sig-
nificant EOs for the period 1945-1998 and regresses that against his measures of

2. In the 2005 article Howell defines significant executive orders as those mentioned in a front-page
article in the New York Times.
congressional fragmentation (including divided government), while controlling for a variety of fixed effects (for individual presidents, their term in office, and the time period within the president’s term). In the 2005 article, Howell fine tunes the initial data set of executive orders and tweaks the regression methodology, but his basic conclusion is unchanged: when Congress is fragmented and less capable of legislating, presidents issue more significant executive orders.3

Subsequent research has raised important challenges to Howell’s interpretation of his results and to the unilateral politics thesis more generally. Using a more robust sample of executive orders, Chiou and Rothenberg show that, because of congressional constraints, presidents have less discretion to issue EOs than much of the unilateral politics literature suggests; as they write, “[p]residents generally don’t employ EOs to move the status quo without tacit approval by congressional parties” (2013, 655). Belco and Rottinghaus (2014) demonstrate that, in some instances, presidents exercise administrative power not to evade the legislative process, but rather to support their party members’ legislation. Rottinghaus and Warber (2015) note that administrative directives, such as presidential proclamations, are often better understood not as efforts to bypass Congress so much as attempts to bolster public support with key constituencies. Collectively, this research indicates that administrative directives, such as executive orders, are not always instances of presidents making policy without persuasion. Instead, they are, in some cases, better understood as an extension or modification of the legislative process.

To test whether executive orders are best viewed as alternatives to legislation, we begin our analysis where Howell leaves off, by using his coding methodology to extend the coverage of significant executive orders to account for the eight years of George W. Bush’s presidency.4 Based on Howell’s coding scheme, we estimate that Bush issued an additional sixteen significant EOs. Interestingly, given his reputation for unilateral action, Bush was less than half as likely to issue significant EOs compared to his predecessors.5 He averaged about two significant executive orders per year, compared to almost five, on average for his ten immediate predecessors. All told, presidents Harry Truman through George W. Bush issued on average about 9.5 significant executive orders per two-year congressional term.

Counts of Events in Unequal Observation Periods

Having extended our count of significant EOs, we turn next to analyzing the factors that determine when they are issued. In his 2005 analysis, Howell aggregates significant

3. Howell’s initial (2003) analysis utilized a combination of court opinions, the Congressional Record, and the New York Times to identify significant EOs issued by presidents from 1945 through 1983. For the period 1983-1998, his analysis relied on predicted values of EOs. In his subsequent analysis (2005), however, he was able to utilize the New York Times exclusively to identify 228 significant EOs for the period 1945-2001. This second data set is the one we extend through 2008, using Howell’s methodology of relying on New York Times coverage to identify significant EOs during Bush’s presidency. Howell (2005) employs negative binomial regression, rather than the Poisson models used in 2003, to account for overdispersion in the count data, with substantively similar results.

4. We first ran Howell’s model using his data and were able to replicate his findings.

5. Those perceptions relied on more than simply Bush’s issuance of EOs of course; they were also a function of his use of other administrative methods such as signing statements. See, for example, Charlie Savage (2007).
EOs on a quarterly basis by year and regresses these counts against two different measures of party strength in Congress, while controlling for divided government, the average number of articles on the *New York Times*’s front page,\(^6\) and for the fixed effects of presidents, their term year in office, and the quarter-year in which the EOs were issued. Aggregating by quarter, or any other fixed interval of time, such as a year or a congressional term, necessitates compromises in calculating the corresponding parameter values, because presidential terms and congressional sessions are offset in time, with presidents inaugurated on January 20 and new congressional sessions beginning January 3. Equal observation periods will, therefore, include some observations in which either the president or congressional variables are not constant. Consider the case of a presidential transition. The quarter that begins January 1 and ends March 31 includes two presidents, the outgoing lame duck and the incoming president, and one Congress. Shifting quarters to start with the inauguration on January 20 means that the previous quarter, now October 20 through January 19, contains a single president but two congressional terms, necessitating a misspecification of the key majority size variable.\(^7\) A similar coding issue, in which two presidents fall within the same quarter, occurs with the two unexpected transitions in the post–WWII presidency: the transition from John F. Kennedy to Lyndon Baines Johnson following Kennedy’s assassination on November 22, 1963, and the transition from Richard Nixon to Gerald Ford following Nixon’s resignation on August 8, 1974.

Howell’s approach in both cases is to assign each calendar quarter to one president. His analysis attributes those EOs issued during the January 3–January 19 period by the lame-duck president but, under the new Congress, to the newly elected incoming president. As it turns out, only two presidents in our study—Harry Truman and Jimmy Carter—issued significant executive orders during this lame-duck period. And neither Kennedy nor Nixon issued any significant executive orders during the quarters that they share with their successors. However, attributing the full quarter to a single president assumes that they would have issued an equal number of significant orders had they been in office for the full three-month period.

We correct these oversights by generating unique observations for every distinct pair of presidential and congressional variables and including a parameter to account for the unequal observation intervals that this approach creates.\(^8\) This exposure parameter, the number of days in an observation period, allows us to compare observations of different lengths, which, intuitively, should have different expected numbers of orders, all else equal. We are essentially modeling a rate—the number of significant orders issued per day—rather than a count, to make comparison possible between observations of different lengths.

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6. This variable controls for the decline in the average number of articles shown on the *New York Times*’s front page during 1949-2008, which might otherwise bias the results.

7. Even aggregating by larger periods, such as a Congress, will generate observations in which two presidents are included, resulting in a misspecification of presidential fixed effects.

8. Following Howell and a desire to make use of the most fine-grained data possible, we start with quarter-year observations but include additional observations for lame-duck periods and the transitions between Kennedy and Johnson and Nixon and Ford. The exposure parameter, explained briefly above and detailed in Appendix S1 in the online Supporting Information, accounts for the unequal lengths of observation intervals.
lengths (King 1989, 124). This approach is presented in more detail in Appendix S1 in
the online Supporting Information. With these changes, we utilize the adjusted model and new data to assess the relationship between the size, in percentage of total seats, of the majority party in Congress on presidents’ propensity to issue significant EOs.

Measuring Executive Order Significance

Another potential criticism of this approach, however, is that relying solely on front-page coverage by the New York Times is not an optimal way of identifying significant executive orders. As an additional robustness check on our findings, therefore, we redo the analyses using a different set of significant EOs based on research by Chiou and Rothenberg (2013). Utilizing nineteen sources as raters in a hierarchical item response theory (IRT) model, they construct continuous significance scores for all executive orders issued in the period 1947-2003 (Chiou and Rothenberg 2013). In order to focus our analysis on only the most significant EOs so as to be comparable with previous research, we examined three subsets—the top 10%, 5%, and 1% of these EOs based on the significance scores assigned by Chiou and Rothenberg. Of these three categories, the top 10% comes closest in number to the New York Times list of EOs. However, although there is some overlap between the two data sets (correlation = 0.64), Chiou and Rothenberg’s method for identifying the 10% most significant EOs picks up a significant number that the New York Times omits, while excluding others that it includes. As a further robustness check, we also utilize Warber’s (2006) hand-coded measure of orders containing policy content, a broader categorization that includes about 38% of orders issued from 1945 to 2005. Descriptive statistics for each of the EO significance measures, our measure of legislative proposals (described below), and key independent variables are included in Table 1.

Results

As shown in Table 2, consistent with Howell’s findings, majority party size is a significant predictor of presidents’ use of EOs. Holding the other variables at their means, an increase of the size of the majority party by one standard deviation from its mean value, that is, from 57% to 61.5%, predicts a decrease in the number of significant executive orders issued per two-year congressional session by about 3.5, from 7.7 to 4.2. This result is consistent with Howell’s findings that when congressional majorities are small and

9. In implementing this regression in STATA, we use nbreg with the exp() option, which includes the log of the observation interval time as a parameter with its coefficient constrained to 1. The resulting negative binomial regression coefficients represent the linear change in the logged rate of executive order issuance (the logged number of EOs per day) for a one unit change in the regressor value.

10. One could also isolate significant EOs using a fixed threshold value on the significance scale. This is the approach Chiou and Rothenberg take. Rerunning our models with several threshold values generates substantively similar results to those presented here.
parties ideologically fragmented, presidents make greater use of executive orders. The tweaking of the model to address discrepancies in presidents’ time in office and the inclusion of data from George W. Bush’s presidency do not appear to substantially change these institutional and political dynamics.

We come to substantively similar results when regressing the count of EOs using Chiou and Rothenberg scores against the same regressors. Columns 2, 3, and 4 in Table 2 contain the results for the 10%, 5%, and 1% most significant EOs. Once again an increase in majority party size is associated with a decrease in the number of significant EOs issued, controlling for the fixed effects of term year, time in office, and individual presidents. Figure 1 provides a visual representation of the predicted number of EOs as a function of increasing majority party size while controlling for the other variables in the model. Clearly, the underlying relationship between the two variables is robust to different methods for identifying significant EOs.

Predicting the Issuance of Legislative Proposals

The underlying premise of the administrative presidency thesis, however, is that EOs are not issued in a policy vacuum, but instead provide an alternative to proceeding legislatively through Congress. Indeed, Howell finds that the same congressional factors that help predict a greater tendency for presidents to issue EOs are negatively correlated with the production of nontrivial laws. As noted above, however, a focus on congressional legislative outputs tells us only about Congress’s capacity to act but not whether it is acting on the president’s preferred legislative agenda.

11. The variable signifying a president’s lame-duck status proves to be a statistically significant independent predictor of presidents’ tendency to issue significant EOs, but this is largely capturing the actions of Jimmy Carter, who issued nine significant executive orders during the period January 3-20, 1981.

12. Although not shown here, these results are robust to alternative estimates of policy-making executive orders. For example, when Warber’s (2006) count of policy-related EOs is substituted for significant EOs, the same substantive results hold.

13. Figures depict the predicted number of orders issued during a period equal to the weighted average of the observation intervals, or about eighty-seven days.

| TABLE 1 |
| Descriptive Statistics |
| N | Mean | Std. Dev. | Min. | Max. | Years Available |
| New York Times Front-page EOs | 266 | 1.14 | 1.50 | 0 | 9 | 1945-2009 |
| Top 10% Significance (Sig.) EOs | 238 | 1.47 | 1.60 | 0 | 11 | 1947-2003 |
| Top 5% Sig. EOs | 238 | 0.74 | 1.11 | 0 | 10 | 1947-2003 |
| Top 1% Sig. EOs | 238 | 0.15 | 0.71 | 0 | 10 | 1947-2003 |
| Legislative Proposals | 226 | 34.67 | 49.45 | 0 | 286 | 1949-2002 |
| Majority Size | 266 | 0.57 | 0.05 | 0.50 | 0.68 | 1945-2009 |
| Divided Government | 266 | 0.60 | 0.49 | 0 | 1 | 1945-2009 |
| Observation Interval (Days) | 266 | 87.48 | 14.51 | 19 | 92 | 1945-2009 |

N = the number of observation intervals, either quarter or lame-duck period; EO = executive order.
To better gauge the factors influencing a president’s decision whether to act administratively or legislatively, scholars need to compare the use of executive orders with a president’s decision to request legislation from Congress. To do so, we draw on a database created by Andrew Rudalevige (2002) that lists the presidents’ messages to Congress, and the policy proposals contained in those messages, for the years 1949-2002. Table 1 shows summary statistics for proposals in each observation interval.

Note that presidents are much more likely to pursue legislation through Congress than they are to rely on significant executive orders to achieve policy objectives. On average, the eleven presidents studied here issued about fifty-five messages, containing 130 legislative proposals, per year. The greater use of legislation may reflect the limits of executive orders in making policy; as noted above, they cannot be used to enact policy that requires federal spending unless Congress has appropriated the money, and they cannot change existing laws. As we discuss below, moreover, legislation may offer additional benefits in terms of durability and political support.

Following the logic laid out earlier regarding when presidents are likely to issue significant executive orders, if the either/or hypothesis is correct we expect to find a positive relationship between congressional party size and the size of the president’s

<table>
<thead>
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<th>Table 2 The Issuance of Significant Executive Orders</th>
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<tr>
<td>(1) New York Times Front Page Significance (Sig.)</td>
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<tr>
<td>Divided Government</td>
</tr>
<tr>
<td>Lame Duck</td>
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<tr>
<td>New York Times Size</td>
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<tr>
<td>(New York Times Size)²</td>
</tr>
<tr>
<td>Constant</td>
</tr>
<tr>
<td>ln(alpha)</td>
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<tr>
<td>Fixed Effects Included for Year of Term</td>
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<td>Quarter within Year</td>
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<td>President</td>
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<td>N</td>
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Negative binomial regressions estimated. The dependent variable in (1) consists of the total number of nonceremonial executive orders mentioned on the front page of the New York Times between 1945 and 2008. The dependent variable in (2), (3), and (4) consists of the top 10, 5, and 1 %, respectively, of executive orders as determined by Chiou and Rothenberg’s (2013) significance scores. Robust standard errors clustered on president in parentheses. *** p < .01, ** p < .05, * p < .1.
legislative agenda. Simply put, when Congress is able to act legislatively without fear of opposition, presidents should be more likely to pursue their policy objectives through legislative means. As Table 3 indicates, however, that does not seem to be the case. In both a model containing only majority size and divided government and the full model controlling for time and presidential fixed effects, we find no statistically significant relationship between party strength in Congress and the president’s legislative agenda.\(^{14}\)

It appears, then, that presidents are more likely to utilize policy-related EOs when Congress is less likely to produce legislation. But the opposite logic does not hold true for presidents’ decision to issue legislative proposals; larger parties do not increase the likelihood that presidents will pursue a larger legislative agenda. Instead, as Figure 2 shows, the factors that influence presidents’ decision to issue significant EOs seem to have no discernible relationship to presidents’ choice to pursue policy through Congress.

Discussion

A potential criticism of this comparison is that we are comparing apples to oranges, in that executive orders represent completed policy while legislative proposals represent a president’s wish list issued at the beginning of a bargaining process. As we demonstrate in the following sections, this distinction between finished and initial policy is overstated, given the subsequent bargaining that occurs over executive orders. Even if we grant this distinction, however, the either/or hypothesis suggests that presidents will choose between issuing an executive order or engaging with Congress. The signed executive order and the expressed legislative proposal are the two points at which the president

\(^{14}\) Even a model regressing legislative proposals on majority size alone fails to reach the standard 0.05 level of statistical significance. A significant coefficient for majority size only appears when we regress the number of proposals on the set of parameters that includes time controls but not presidential controls. In models without time controls and models that additionally control for president, majority size is not significant.
may enter this process. In explaining how he identified the list of presidential proposals, Rudalevige notes, “Each item [in the Public Papers] is ... sponsored by the president, in writing, and associated with him personally; he is to this extent committed to its substance and passage” (2002, 68). One could make an identical claim for executive orders signed by the president.

A more justified criticism of the two measures is that the set of legislative proposals contains all proposals whereas the set of executive orders examined has been culled to contain only those with significant policy content. As such, the proposal data may contain more noise, the result of the president’s clerkship rather than a considered use of power (Neustadt 1990). Nonetheless, some prioritization has already occurred by focusing only on the legislative proposals from the Public Papers of the Presidents, as opposed to a more liberal count that included bills introduced directly by executive branch departments or by members of Congress themselves that had presidential support. The policy proposals we analyze here, as Rudalevige explains, bear the presidents’ personal imprimatur.

Moreover, further attempts to isolate significant proposals generate no additional responsiveness to the congressional variables. Neither limiting the proposals to those contained in the State of the Union address, or to those identified by Rudalevige as originating in the White House or Executive Office of the Presidency (which might serve as a proxy for importance to the president) produces stronger statistical results. In contrast, broadening the caliper of significance for executive orders, as by using Warber’s (2006) more comprehensive list of policy orders, generates substantively similar results.

<table>
<thead>
<tr>
<th>TABLE 3</th>
<th>The Issuance of Legislative Proposals, 1949-2002</th>
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<tr>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td>Majority Size</td>
<td>2.52</td>
</tr>
<tr>
<td></td>
<td>(1.54)</td>
</tr>
<tr>
<td>Divided Government</td>
<td>−0.33</td>
</tr>
<tr>
<td></td>
<td>(0.21)</td>
</tr>
<tr>
<td>Lame Duck</td>
<td>−0.89*</td>
</tr>
<tr>
<td></td>
<td>(0.50)</td>
</tr>
<tr>
<td>Constant</td>
<td>−2.19**</td>
</tr>
<tr>
<td></td>
<td>(0.92)</td>
</tr>
<tr>
<td>ln(alpha)</td>
<td>0.48**</td>
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<td></td>
<td>(0.24)</td>
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Fixed Effects Included for:
- Year of Term: No, Yes
- Quarter within Year: No, Yes
- President: No, Yes
- N: 226

Note: Negative binomial regressions estimated. The dependent variable is the number of legislative proposals issued by the president in each period. Standard errors in parentheses. *** p < .01, ** p < .05, * p < .1.
Why, then, do the factors that are associated with presidents’ decisions to issue EOs not also explain when they pursue policy change legislatively? A possible explanation—one familiar to an older generation of scholars but which has largely been ignored in the more recent literature discussing the administrative presidency—is that legislation and executive orders are distinctly different policy instruments. To understand those differences, consider the creation in 2002 of the DHS.

The Creation of the DHS

In the aftermath of the 9/11 terrorist attacks, President Bush and members of Congress stood united on the need to reform the nation’s sprawling, highly fragmented, and largely uncoordinated national security bureaucracy. There was less agreement, however, on how to do so. The president preferred to superimpose a small coordinating staff, located in his own White House Office, on the existing national security structure. Congress, in contrast, sought to construct an entirely new cabinet-level DHS composed of some of the forty-six existing agencies with missions linked at least in part to homeland defense.

Bush moved first, capitalizing on the traditional boost in political support afforded any president in the aftermath of a national crisis. Just nine days after the attack, during a nationwide address before a joint session of Congress, he announced his intent to create a White House–based homeland security office, to be headed by former Pennsylvania Governor Tom Ridge. Ridge, supported by a small staff, would be charged with overcoming the compartmentalization, turf wars, and conflicting missions that then characterized the national security bureaucracy. Members of Congress, fearing that another attack could

15. Our account of the creation of the DHS draws primarily on studies by Draper (2007), Kettl (2007), and Mycoff and Pika (2008), supplemented by journal and news articles.
occur at any moment, and without a fully developed legislative alternative, initially acquiesced to Bush’s plan. But members made it clear that, Bush’s action notwithstanding, they would pursue legislation to create a cabinet-level department dealing with homeland security.

On October 8, 2001, President Bush signed EO 13228, establishing the Office of Homeland Security (OHS) and the Homeland Security Council (HSC), “within the Executive Office of the President . . . to be headed by the Assistant to the President for Homeland Security” (Bush 2001, 51812). In establishing both the OHS and HSC by executive order, Bush hoped to accomplish several objectives. Most importantly, of course, the use of an executive order allowed him to move more quickly in developing a comprehensive national strategy for protecting the nation’s borders and to prevent another terrorist attack without waiting for congressional action. Moreover, by placing these entities within the EOP, under the coordinating authority of a personal White House assistant with a West Wing office, Bush was administratively better positioned to control that process. The creation of a small coordinating office, rather than a new large cabinet department, also fit more neatly with his small-government principles.

From the start, however, members of Congress viewed Ridge’s position with skepticism. They questioned whether he possessed the administrative tools, such as budget authority, to effectively coordinate the dozens of agencies involved in homeland security. Kettl notes that Bush’s EO creating the OHS uses the word “coordinate” more than thirty times, but does not use “command” or “control” even once (Kettl 2007, 49). At the same time, however, legislators refused to grant Ridge stronger administrative authority. As a presidential assistant not subject to Senate confirmation, Ridge was not directly accountable to Congress. Members also worried that Ridge might use his authority to upset traditional ties between agencies and congressional oversight committees. For these reasons, legislators in both chambers were already drafting bills designed to put the OHS on statutory footing with cabinet-level status, headed by a secretary subject to Senate confirmation.

Congressional fears were not without merit. Ridge soon found himself engaged in a series of turf battles with other agencies as he sought to put his imprimatur on homeland security policy. Lacking budget control or any authority to command, however, Ridge fell back on using his office as a bully pulpit in an effort to persuade agencies to follow his lead. Meanwhile, Bush resisted efforts by Congress, beginning in March 2002, to compel Ridge to formally testify on behalf of the administration’s initial $37.7 billion homeland security budget request. The president argued that, as a presidential assistant, Ridge was not required to formally meet with members of Congress. Instead, Ridge offered to meet informally to brief select legislators.

By late April 2002, however, with positions in Congress hardening, it appears that Bush recognized the need to concede to lawmakers’ desire to create a cabinet-level homeland security department. Toward that end, Bush quietly informed Speaker of the House Dennis Hastert and Senate Majority Leader Dick Armey of his intentions and appointed his own legislative drafting team, headed by his chief of staff Andrew Card and including Ridge, Office of Management and Budget Director Mitch Daniels, and White House counsel Alberto Gonzalez. In order not to prematurely incite jurisdictional disputes, they met secretly for ten days in late April and early May to draft legislation creating the new
department (Mycoff and Pika 2008, 154). At the same time, according to Bush biographer Robert Draper, White House aides did all they could “to discourage similar legislation being offered” by Congress (2007, 170).

Despite Bush’s aides’ efforts, a bipartisan group of legislators on May 2 introduced bills in both the Senate and the House to create the DHS. Rather than sign on to these congressional initiatives, however, Bush instead sought to position himself at the front of the parade by unveiling, in a June 6, 2002, nationwide address, his own plan to reorganize the national security bureaucracy. He asked “Congress to join me in creating a single, permanent department with an overriding and urgent mission: securing the homeland of America, and protecting the American people” (Bush 2002).

Under Bush’s plan, border and security-related agencies, but not intelligence-gathering agencies, would be combined into a single homeland security department. According to Mycoff and Pika, “The Congress welcomed the president’s proposal because it gave them virtually everything Congress wanted and then even more” (2008, 151). However, although Bush proposed an outline for establishing what would become the third largest cabinet department, in terms of personnel, he did not submit actual legislation. It was left to Congress to fill in the details.

Initial deliberation over Bush’s proposal began in the Republican-controlled House, under the direction of a bipartisan select committee created expressly to turn the president’s outline into legislation. Despite the bipartisan composition, however, the ensuing debate inevitably took on a partisan tone as both parties jockeyed for position in anticipation of the upcoming 2002 congressional elections. At the same time, the sweeping governmental reorganization, by threatening to disrupt existing relations between executive branch agencies and congressional oversight committees, accentuated the institutional rivalry between the president and Congress. Nonetheless the Republican-controlled House was able to pass a bill on July 26, 2002, that largely comported with Bush’s legislative preferences.

In the Democrat-controlled Senate, however, debate moved more slowly, in part because of partisan divisions regarding how much managerial authority to grant the president over personnel working in the new DHS. Bush personally lobbied federal employees to support his request for greater personnel control, arguing that it was essential “to be able to reward excellence and ensure accountability for individual performance” (quoted in Mycoff and Pika 2008, 159). To Democrats, however, Bush’s insistence on “management flexibility” was rhetoric designed to obscure the reality that he was seeking the power to fire or transfer government employees. Debate over this issue continued for more than two months until it finally became clear that the Senate would not pass legislation before the upcoming midterm elections. In those elections, Republicans gained three House seats and two in the Senate, which put both chambers once again under Republican control. With the president’s hand now strengthened, the Republican-controlled Senate passed legislation, by a 90-9 vote, which included language much closer to the

16. Other staffers were brought in on a “need-to-know basis” to advise on portions of the plan (Mycoff and Pika 2008, 154).

17. Democrats had gained majority control in the Senate when Vermont Republican James Jeffords declared himself an independent and began caucusing with Democrats in 2001.
president’s position on personnel matters. The Senate bill was then ratified by the House on a voice vote and shortly thereafter signed into law by Bush.

The creation of the DHS, we argue, provides possible clues regarding the relative roles of executive orders and legislation on the most important policies presidents pursue. Substantively, Bush’s initial decision to establish a White House-based OHS and a HSC through executive order facilitated his need to act with dispatch in the aftermath of 9/11. With the threat of another terrorist attack, Bush could not afford to wait for congressional action. But it also served his administrative needs, by allowing him to exert direct control over the development of a comprehensive antiterrorist policy.

In the long run, however, Bush’s position, as laid out in the initial executive order, was neither institutionally nor politically sustainable. Institutionally, the original executive order simply did not provide Ridge with sufficient authority to fulfill his mission. Language in the executive order authorizing Ridge to “coordinate” the actions of the national security bureaucracy meant little without the corresponding statutory authority to exercise budgetary or personnel control. Politically, Congress would not accept a presidential appointee exercising authority over so many agencies responsible for a combined budget larger than that of many cabinet departments without being subject to greater congressional oversight.

With the benefit of hindsight, it is clear that the initial executive order creating the OHS was simply the first step in a more than year-long bargaining process with Congress that eventually culminated in the creation of a statutorily based DHS. Bush undoubtedly would have preferred the continuation of a White House–based office of homeland security more responsive to his immediate direction, but he eventually bowed to the reality that he would need to work through Congress via the legislative process to put the OHS on a more durable institutional and political footing (Mycoff and Pika 2008, 147–48).

Executive Orders and Legislation in the Bargaining Process

How illustrative is the DHS case study of the role of executive orders and legislation in policymaking more generally? In his 2003 study, Howell finds evidence that Congress rarely overturns specific executive orders through the legislative process. However, our examination of the data suggests a more complex story, one that appears inconsistent with the either executive order or legislative action dichotomy. Consider the sixteen executive orders issued by Bush during his eight years in office that were deemed important enough to be mentioned in a front-page article of the New York Times. It is true that only two were overturned or essentially superseded by subsequent congressional legislation. However, a third executive order dealing with energy policy was amended via legislation designed to enhance Congress’s oversight authority of the relevant executive branch.

18. As noted above, the OHS’s functions were in large part transferred to the DHS. Efforts by Bush to strengthen the Central Intelligence Agency director’s coordinating capacity via executive order were overturned when Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004. We use the set of orders cited on the front page of the New York Times here because Chiou and Rothenberg scores were only available through 2003.
agencies. A fourth, dealing with freezing suspected terrorists’ financial assets, was incorporated into the USA PATRIOT Act, incorporated Bush’s efforts via executive order to freeze suspected terrorists’ financial assets, although the statute went far beyond the executive order in scope and substance.

That leaves twelve significant executive orders on which Congress did not legislate, although in several instances bills were introduced to modify these orders. Of those twelve remaining executive orders, two dealing with presidential record keeping and military interrogations were directly contravened by President Barack Obama using his own executive authority. A third Bush order protecting Iraqi relief funds from legal action by creditors was also revoked by an Obama executive order, although this reflects the changing context of the Iraq situation more than it does a deliberate policy rebuke to Bush. Obama also revoked a fourth Bush executive order creating a corporate fraud task force but then used his executive authority to create a new task force with similar authority. Finally, in two instances Obama issued executive orders that clarified previous Bush orders pertaining to the creation and functions of a White House Office for Faith-Based and Community Initiatives by strengthening safeguards against the use of federal funds for religious purposes.

We see, then, that ten of Bush’s sixteen significant executive orders were the subject of additional action either by Congress or Bush’s successor President Obama. In five cases, Bush’s actions were largely negated, either by Congress or President Obama, or amended in ways designed to strengthen congressional authority. The line demarcating legislative and administrative action blurs even more, however, when we note that two of the remaining six executive orders, dealing with efforts to protect striped bass and to intervene in an ongoing airline labor dispute, were both issued pursuant to existing congressional statutes authorizing the president to take these actions. Although EO 13382 did not explicitly reference previous legislation, its effort to freeze the assets of those engaged in the proliferation of weapons of mass destruction (WMDs) is consistent with congressional intent as expressed in the 1992 Iran–Iraq Arms Non-Proliferation Act. A fourth Bush executive order establishing the Commission on Intelligence Capabilities was in part an attempt to preempt a potentially politically more costly investigation into prewar intelligence by Congress. Despite Bush’s efforts, however, Congress went ahead with its own investigation regarding the faulty intelligence on WMDs. In all four cases, then, it is hard to claim that these executive orders extended the president’s policy reach in ways that thwarted or were otherwise inconsistent with Congress’s policy objectives.¹⁹

Clearly, during the Bush years at least, the use of executive orders and legislation was rarely an either/or process. In some cases, executive orders provided the first step in a policy-making process that culminated in a legislative proposal by the president or at least legislative action by Congress even if not initiated by the president. In other instances, executive orders were issued pursuant to congressional legislation and intended to

¹⁹. Note that this focus on executive orders excludes other administrative methods by which presidents can establish policy. For example, on November 13, 2001, Bush issued a military order establishing military tribunals to try suspected terrorists. His order was subsequently amended legislatively in 2006 when Congress passed the Military Commissions Act.
fulfill congressional intent. And on more than one occasion, Bush’s executive orders were overturned by his successor.

As it turns out, Bush’s experiences are not unique among the post–World War II presidents. When we examine the fate of the 311 significant executive orders issued from 1947 to 2003 (which comprise the top 10% of Chiou and Rothenberg [2013] scores), we find—consistent with Howell’s (2003, 2005) research—that Congress revoked only about 3% of these orders. However, about 30% were revoked at the hands of a future president. All told, only 168, or slightly more than half of these significant orders were still on the books as of 2015 (see Table 4).

When we broaden our search to include all executive orders issued, the survival rates are even slimmer. Of the 2,087 nontemporary executive orders issued between 1945 and 1989 for which disposition information was available, almost 60% were revoked by a future president (46%) or by the president who issued the original EO (13%). Congress terminated an additional 7% (see Table 5).

These findings are consistent with other research showing that executive action is less durable than legislation. For example, David Lewis finds that legislatively created agencies have a “0.10 to 0.15 greater chance of surviving fifteen years and a 0.2 to 0.3 greater chance of surviving fifty years than agencies created by executive action” (2004, 396). Consistent with the DHS case study, then, presidents have good reason to doubt that their executive orders will be considered the final say in a given policy area.

Given the fragility of executive orders, as well as their limited scope relative to legislation, presidents seeking significant and lasting policy change will likely find more success working with Congress through the legislative process—even if their initial step is to issue an executive order, as occurred with Bush and the DHS. But how often do EOs provide a first step in a legislative policy-making process? To find out, we construct a new data set linking executive orders to subsequent presidential legislative proposals.

Note: Excludes orders that were explicitly coded as “temporary,” “executed and obsolete,” “tariffs,” and “public lands” in the Federal Register’s Executive Orders Disposition Tables. Dispositions were calculated as of October 2015. Executive orders surviving after October 2015 are right censored.

TABLE 4
Disposition of Top 10% Significant Executive Orders, 1947-2003

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Percent</th>
<th>Cumulative</th>
</tr>
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<tbody>
<tr>
<td>Revoked by Issuing President</td>
<td>41</td>
<td>13.18%</td>
</tr>
<tr>
<td>Revoked by Future President</td>
<td>93</td>
<td>29.90%</td>
</tr>
<tr>
<td>Revoked by Legislation</td>
<td>9</td>
<td>2.89%</td>
</tr>
<tr>
<td>Survived</td>
<td>168</td>
<td>54.02%</td>
</tr>
<tr>
<td>Total</td>
<td>311</td>
<td>100%</td>
</tr>
</tbody>
</table>

20. These data were compiled by searching the Executive Order Disposition Tables maintained by the Federal Register. We excluded orders explicitly coded as “temporary” and “executed and obsolete,” as well as orders dealing with tariffs and public lands, whose current dispositions were not available.

21. These figures are based on the status of orders as of 1989, so the proportion revoked is only likely to have grown over time.

Our starting point is the 10% most significant orders, as determined by Chiou and Rothenberg (2013) scores. Next, we searched the presidents’ legislative proposals, as compiled from the Public Papers of the President by Rudalevige (2002) and extended through the end of the George W. Bush administration, looking for substantive matches. The texts of the executive orders and legislative proposals in the potential list of matches were then read to confirm their relationship.

Executive order and legislative proposal pairings were included in our data set if the legislative proposal sought statutory support for an existing program or policy or expansion of that program through means not available in an executive order. We excluded cases in which an executive order and legislative proposal were issued in the same policy area, but on unrelated objectives. For example, President Clinton issued an executive order on “deficit control and productivity improvement in the administration of the federal government” (EO 12837) and subsequently asked Congress to create a deficit reduction trust fund for all new taxes proposed in the 1993 budget. Although both initiatives supported Clinton’s goal of deficit reduction, the legislative proposal did not attempt to preserve or expand the same policy created by executive order, so this was excluded. Similarly, Carter issued EO 12138, “Creating a National Women’s Business Enterprise Policy” in May 1979 and soon after submitted legislation for a Work and Training Opportunities Act. Although both initiatives dealt with women and work, the two programs were distinct.23

Finally, to be included in our data set, the executive order must precede or be issued concurrently with the legislative proposal in time, consistent with a process in which executive orders initiate legislative policy making rather than serving as a response to inaction or rejection from Congress.

Our data set includes only legislative proposals contained in the president’s program as embodied in the Public Papers of the President. This excludes proposals made by members of Congress or executive agencies that may reference an executive order and are consistent with presidential priorities. Our intent in using this conservative approach is

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Cumulative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revoked by Issuing President</td>
<td>458</td>
<td>18.00%</td>
<td>18.00%</td>
</tr>
<tr>
<td>Revoked by Future President</td>
<td>964</td>
<td>37.88%</td>
<td>55.87%</td>
</tr>
<tr>
<td>Revoked by Legislation</td>
<td>156</td>
<td>6.13%</td>
<td>62.00%</td>
</tr>
<tr>
<td>Survived</td>
<td>967</td>
<td>38.00%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Total</td>
<td>2,545</td>
<td>100%</td>
<td></td>
</tr>
</tbody>
</table>

Note: EOs explicitly coded as “temporary,” “executed and obsolete,” “tariffs,” and “public lands” in the 1989 Codification of Presidential Proclamations and Executive Orders Disposition Tables produced by the Federal Register. EOs surviving after January 20, 1989 are right censored.

23. For similar reasons, we exclude pairings of executive orders and legislative proposals where the executive order establishes a commission that may subsequently recommend legislation. This is a different process than one in which an initial EO leads directly to specific legislation.
to identify only those instances in which presidents themselves make complementary use of executive orders and legislation to achieve policy objectives.\textsuperscript{24}

Using this coding, we identified twenty significant executive orders linked to subsequent legislative proposals during the period 1947 to 2003.\textsuperscript{25} This amounts to about 6\% of the 351 significant orders examined. Of the eleven presidents in our study period, only three—Truman, Johnson, and Carter—issued no legislative proposals linked to executive orders. The remaining eight each submitted legislative requests linked to at least one and up to six executive orders. The most active among them was Nixon, who issued legislative proposals related to six EOs on five distinct topics during his presidency.

As summarized in Table 6, the legislative proposals are of two general (and sometimes overlapping) types: those seeking to place existing programs on a statutory basis and those designed to expand the scope of existing programs. For the former, presidents often seek legislation to place policy on a stronger statutory footing, or to strengthen that policy in ways that cannot be accomplished by executive action alone. For example,

\begin{table}
\centering
\begin{tabular}{lll}
\hline
President & Policy Area & Type \\
\hline
Truman & None & – \\
Eisenhower & Disaster loans & Expansion \\
Kennedy & Food stamps & Expansion \\
 & Peace Corps & Statutory Authority \\
 & Equal Employment Opportunity & Expansion, Statutory Authority \\
Johnson & None & – \\
Nixon & Minority businesses & Expansion \\
 & Environment & Expansion \\
 & Energy & Expansion, Statutory Authority \\
 & Consumer protection & Expansion \\
 & Drug abuse & Statutory Authority \\
Ford & Intelligence & Statutory Authority \\
Carter & None & – \\
Reagan & Drug abuse & Expansion \\
 & Regulatory review & Statutory Authority \\
Bush 41 & Government ethics & Statutory Authority \\
 & Civil litigation & Statutory Authority \\
Clinton & Child support & Expansion \\
Bush 43 & Faith-based initiative & Statutory Authority \\
 & Homeland security & Expansion \\
\hline
\end{tabular}
\caption{Policy Areas Covered by Executive Orders and Subsequent Legislative Proposals}
\end{table}

\textsuperscript{24} The choice to begin with only the top 10\% of executive orders may miss some orders that lead to legislative proposals because the order fell below the admittedly arbitrary threshold of 10\%. Although this is a possibility, we consider the risk unlikely given the altogether small number of orders that lead to legislative proposals as well as the positive correlation between significance and this link. Moreover, our focus in this preliminary attempt is to show that this process exists. The fact that more orders could fit this pattern only further supports this result.

\textsuperscript{25} A table containing the complete set of executive orders and legislative proposals discussed here is included in Appendix S1.
George H. W. Bush’s EO 12674 established “principles of ethical conduct,” but required a legislative proposal for a “Government-wide Ethics Act,” which established the use of independent counsels; specified misdemeanor, civil, and felony penalties; and updated the Internal Revenue Code, in order to give the ethical principles any bite (Bush 1989). A more minimal example, Reagan’s request to strengthen central oversight of federal regulations (included in his budget message for fiscal year 1985) simply stated, “I believe it is time the policies and procedures of Executive Order 12291 were enacted into law” (Reagan 1984).

On other issues, presidents act initially via executive order to create a pilot program followed by a legislative request to expand the program. The initial pilot program may be directed at government officials or contractors, reflecting the president’s greater formal authority to manage the executive branch, while broadening the scope of the program usually requires legislative action. In this vein, Reagan issued an initial executive order to create a drug-free federal workplace but subsequently sought legislation for his Drug Free America Act.

Some proposals fit both categories. For example, Kennedy’s proposal on equal employment opportunity requested both statutory authority for his Committee on Equal Employment Opportunity as well as broader federal action on equal employment in government-involved areas not covered by the order, which established equal employment requirements for federal contractors.

Although limited in number, the cases in which executive orders beget legislative proposals illustrate how the two policy-making processes can serve different purposes. Executive orders offer presidents the virtue of acting quickly, either to respond to an immediate crisis or to alter the status quo to spur congressional action. Executive orders also provide symbolic advantages to presidents by allowing them to highlight that they can act quickly—often very early in their administration—on issues they deem particularly urgent to address. Nonetheless, the fact that the initial executive act is subsequently addressed through legislation is a reminder that these structural advantages alone do not supplant the need for the greater durability and broader scope that comes from acting through Congress.

The clearest evidence regarding the different roles played by executive orders and legislation are the six cases in our sample of twenty in which presidents issued an executive order and a related legislative proposal on the same day. In these cases, the executive orders are designed to address an issue immediately, with the explicit intent that they will be supplanted by legislation to follow. Nixon provides a clear explanation of this rationale in his message to Congress urging the creation of an office for drug abuse:

26. For example, President Kennedy issued his executive order initiating a food stamp program on his first full day in office, and President George W. Bush issued two orders establishing his Faith-Based Initiative only nine days into his presidency.

27. These examples are Nixon on minority business, energy, and drug abuse; Ford on intelligence; Reagan on drug abuse; and Bush on ethics reform. In other cases, legislative proposals followed mere days after the executive order was signed.
I urge the Congress to give this proposal the highest priority, and I trust it will do so. Nevertheless, due to the need for immediate action, I am issuing today, June 17, an Executive Order [11599] establishing within the Executive Office of the President a Special Action Office for Drug Abuse Prevention. Until the Congress passes the legislation giving full authority to this Office, a Special Consultant to the President for Narcotics and Dangerous Drugs will institute to the extent legally possible the functions of the Special Action Office. (Nixon 1971; emphasis added)

Nixon’s message highlights both the need for immediate action, for which his executive order is well suited, and the need for greater statutory authority, particularly as it pertains to the role of the Special Actions Office, than his initial order can provide.

Of course, with only twenty examples in our study, we should not overstate the frequency with which presidents utilize executive orders as a first step in the policy-making process—one they hope will culminate with legislative action. On the other hand, it is clear that in areas of high policy salience, presidents do sometimes utilize the two in complementary fashion.28 There are good reasons to do so, as indicated by the different fates of Nixon’s effort to create a drug control office and Reagan’s to strengthen control over regulatory review.

Nixon’s executive order successfully secured statutory backing through Public Law 92-255, which established the Special Action Office legislatively. In contrast, Reagan’s EO 12291 strengthening centralized regulatory review never secured statutory authority, and as a consequence, the process it established has been modified substantially by successive presidents, each using their own executive orders.29 Presidents certainly try to achieve policy objectives when Congress does not act. This does not mean, however, that they would not sincerely prefer legislative enactment.

**Conclusion**

George W. Bush defended his executive order creating the Office of Faith-Based and Community Initiatives by saying, “Congress wouldn’t act, so I signed an Executive Order—that means I did it on my own” (Patterson 2008, 131). And yet he continued to ask Congress for legislative support, including in his final State of the Union address in 2008. Bush’s persistence in seeking to codify his order in statute is easy to understand. Executive orders are not legislation by another name. Instead, they have their own distinct advantages and disadvantages that help determine whether and when a president will seek to make policy “on my own.”

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28. There is some evidence of a small but statistically significant positive relationship between executive order significance, as measured by Chiou and Rothenberg (2013) scores, and the probability of generating subsequent legislative proposals. There is the possibility of reverse causation, however, as congressional citation is one of the raters in Chiou and Rothenberg’s IRT model, and Congress may be more likely to cite orders for which legislative proposals have subsequently been issued.

29. Clinton’s EO 12866 revoked EO 12291 in 1993, which substantially changed the regulatory oversight program at Office of Management and Budget, giving the Office of Information and Regulatory Affairs discretion to selectively audit significant regulations, dramatically reducing its workload. The program has been further modified by President Bush in 2007 (EO 13422), and President Obama in 2009 (EO 13497) and 2011 (EO 13563).
Our updated event-count analysis supports previous findings regarding the negative relationship between presidents’ issuance of significant executive orders and Congress’s ability to legislate. However, we find a lack of support when we use this model to explain presidents’ decision to pursue policy through legislation. This discrepancy, we believe, is because presidents are quite willing to utilize executive orders to make limited policy changes in the short term when Congress is less capable of acting. But they also understand that executive orders lack durability, in large part because they are easy targets for future presidents. To create lasting and substantial policies, then, presidents see little alternative to working with Congress to produce legislation.

The results of our aggregate data analysis, combined with a more detailed look at the Bush-era EOs and legislation, suggests the importance of analyzing the content of presidents’ administrative and legislative proposals as well as the context in which they occur. It may be that, for the most important policy proposals, the choice by presidents regarding which policy vehicle to use, and when to use them, turns in part on the different structural attributes of legislation and executive orders. With that in mind, we present several tentative research hypotheses.

First, where durability of policy is the main goal, defined as longevity and program capability, we suggest presidents will seek legislation. In contrast, where speed of implementation is more highly valued, presidents will turn to executive orders. As a corollary to the speed hypothesis, we surmise that a crisis is likely to increase the use of executive orders compared to legislation. Thus, in the immediate aftermath of 9/11, Bush’s need to strengthen homeland security led to the executive order establishing the HSC, even though this may not have been the most effective way to achieve the desired level of bureaucratic coordination. Certainly Ridge lacked the power to do much more than encourage greater cooperation among agencies.

Second, for major policies executive orders are less likely than legislation to represent the final stage of the policy process. That is, within a given policy area, legislation is more likely to follow the issuance of an executive order than vice versa. This was certainly the case with the DHS and with the policies detailed in section four.

Third, presidents are more likely to take symbolic action in the form of an executive order than by pressing for legislation. For example, Bush created the commission on pre-war WMD intelligence in part to demonstrate his commitment, as chief executive, to understanding why the intelligence community got the story so wrong. Symbolic policy means that the policy message is, at least initially, more important than the actual policy content. Executive orders afford the president the opportunity to take clear positions on policy issues, undiluted by the give and take of working with Congress, and to claim credit for the creation of policy.30

Although not studied here, campaign promises may provide another example of an area where positions may be initially more important than the substance of the EO. This

30. See Mayhew (1974, 52-73). Mayhew applies the terms credit claiming and position taking to the actions of members of Congress in pursuit of reelection.
would suggest presidents are likely to issue symbolic executive orders at the beginning of their terms.\(^{31}\)

Note that we do not mean to dismiss the importance of Congress’s partisan makeup in understanding presidents’ choice of policy vehicle, as it clearly conditions the number of significant executive orders issued by several measures. However, in some instances, the president’s use of executive orders is not an attempt to escape the bargaining framework. Sometimes it is an alternative vantage point from which to bargain.

The evidence we have provided by linking significant EOs and legislative proposals is an initial indication of the plausibility of our hypotheses, based on a review of 351 executive orders. However, from the start of 1945 through the end of 2008, Adam Warber (2006) counts almost 1,800 executive orders issued by eleven presidents that contain some policy content. Although it is a labor-intensive task, much more work needs to be done to systematically answer the questions of how often these orders become legislation and what role this plays in the president’s administrative and legislative strategy.

Future work should attempt to model, with formal and empirical rigor, why some executive orders prompt further legislative action. We suggest, loosely, that there is a spectrum of reasons for following this process, from needing to change the status quo to force the hand of Congress, to securing the preservation of a program that might easily be canceled by a future president, to responding to a crisis before a more complete legislative response can be created, or to model a program in the federal government that could eventually see wider adoption. These are only a few possibilities. The more general point is that in important policy areas, the limitations of executive orders are often too great to consider them the last word.

Future research should also attempt to understand the success of this approach. We have hypothesized reasons for which EOs are often preferred as an initial policy step: speed, symbolism, and credit claiming, in addition to the first-mover advantage they confer. Are presidents more successful in achieving their legislative goals when they have initiated the bargaining process by issuing an executive order? How often does Congress take up these measures? More generally, do presidents benefit from having altered Hamilton’s “antecedent state of things?” (Hamilton 1973). Work should also explore the consequences in the implementation of executive orders and bureaucratic responsiveness. In issuing an executive order and following it with legislation, presidents are signaling both the importance of the issue to their administration and the limits of their intermediate steps to address them. How do bureaucrats respond in these instances?

Pending further analysis, our findings should be viewed as an exploratory test of an alternative understanding of administrative action in the realm of significant policy—an understanding that places presidents’ choices more squarely within the conventional presidential bargaining paradigm. When viewed alongside legislation, the decision to pursue executive action to address the most important issues may be governed not by an innate desire to shun Congress (an unwise strategy in a system of shared powers) or as a way to move closer to an ideal point in a one-dimensional policy space. Instead—at least in some instances—the choice seems to turn on qualitative

\(^{31}\) On this point see Howell (2003, 85-100).
differences in the policy-making tools. Executive orders offer advantages in speed of implementation, symbolic impact, and flexibility in future bargaining. Legislation, in contrast, provides durability and a more substantial policy impact. Or so we suggest. We hope, however, that these preliminary hypotheses stimulate additional interest into this burgeoning research area.

References


Supporting Information

Additional supporting information can be found in the supporting information tab for this article.

Appendix S1. The Limits to Power Without Persuasion