

PRESIDENTIAL POWER IN THE PRE-FDR ERA

by

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(Under the Direction of Jamie L. Carson)

ABSTRACT

This dissertation explores the rise of the modern American presidency through the combination of three factors: unilateral presidential behavior, congressional delegation, and judicial discretion. The first substantive chapter explores the rise of the unilateral presidency prior to FDR and the factors that structured the development of unilateral presidential behavior. The second substantive chapter investigates the motives members of Congress had to delegate budgetary powers to the presidency in the case of the Budget and Accounting Act of 1921. The third substantive chapter structures a theory of judicial discretion of presidential power using federal court case opinion from the founding forward.

INDEX WORDS: Presidency, Separation of Powers, Presidential Power, Unilateral
 Presidency, Congressional Delegation, Judicial Discretion

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Chapter 1

Introduction

Presidents Cleveland, Roosevelt, Taft, and Wilson (not yet a president at the time of his commentary) each wrote at length on the nature of presidential power, justifying their conceptions of presidential power, carving out what they believed to be true constitutional constraints on presidential behavior (Cleveland; Roosevelt; Taft 1916; Wilson 1908). The conclusions reached were by no means uniform, but certain themes persist throughout the writings: the importance of public opinion, the incomplete but increasingly necessary control over the executive bureaucracy, and the role the president was increasingly playing as the leader of a nation and of his party. The dynamic nature of the debate suggests a more systematically evolving presidency during the time period rather than one merely punctuated by the occasional presence of strong presidents. To quote Wilson just prior to his presidency, “Greatly as the practice and influence of presidents has varied, there can be no mistaking the fact that we have grown more inclined from generation to generation to the President as the unifying force in our complex system, the leader of both his party and the nation” (1908, 60). This quote conveys more than a momentary shift; it recognizes a lasting evolution in the American political system with the presidency in a central role. In this project I contribute to revelations about the American presidency during this crucial transitional period.

For this dissertation, I recast the story of the rise of the modern, unilateral American presidency. All presidents prior to FDR were not prehistory to the modern executive branch; they were presidents with real powers who, on occasion and increasingly over time, exercised those powers. I do not adopt the commonly held view that the modern presidency materialized from the challenges of the Great Depression and World War II, nor do I take the presidency of Franklin Delano Roosevelt as the first and greatest presidential answer to the challenges of modern American government. In this project I focus instead on the pre-FDR period and, to some extent, call into question what benchmarks like institutionalization really mean for the presidency when so much is left still to be discovered and understood (Ragsdale and Theis 1997). This project examines a rich period in American political history that contains, I argue, the seeds of modern presidential power sown and cultivated by all three branches of the federal government. The rise of the modern presidency is not a story merely of opportunistic presidential behavior. It is also a story of increasing congressional delegations of power—driven by public pressure, electoral reforms, and a government struggling to meet its workload—as well as continued and increasing acquiescence to presidential power by the federal courts. In short, revealing the modern presidency requires telling a story comprising action from the President, Congress, and the Supreme Court, and anything short of that renders a presidential story unfinished.

To adopt a crude but useful analogy, imagine a triangle representing the full scope of presidential power. Each side, for its length and the angles it helps to form, represents a meaningful contribution to the shape and size of that triangle, symbolizing the efforts of the federal courts, Congresses, and presidents over time. As presidents may tend to push outward on one side, expanding the area of presidential power within the triangle, Congress or the Supreme Court may be compelled to respond by pushing their own sides inward, constraining the overall area of presidential power. On the other hand, political circumstances may arise that compel the Court or Congress to hold steady or even push outward on their own sides, fostering the expansion of presidential power without any clear power grab by a president.

The fundamental argument of this project is that the expanded powers of the modern American presidency have not simply been served by ambitious presidents working under opportune circumstances. Instead, each branch of government contributed over time in fundamental ways to the accumulation of presidential powers, a hefty portion of which took place in and immediately around the Progressive Era, a period too often neglected as scant on data or rife with episodic and idiosyncratic presidential behavior. I argue the period may instead represent the genesis of the modern presidency in a number of systematic ways I hope to highlight and systematically examine.

In this dissertation I focus on the period beginning with the post-Reconstruction era that Mark Twain and Charles Dudley Warner coined as the Gilded Age and continue through the Progressive Era (Twain and Warner 1873). During this span Congress confronted a rapidly expanding workload with rising war pensions, a booming economy, and exploding postal service requests. Big business, led by the oil and railroad industries, invited both regulation and corruption in federal government. To call the Progressive Era volatile would surely be appropriate; it was an age of rapid change across many layers of American society. But such a label would mask the lasting, systemic effects the era had on American politics and our scholarly ability to discern them. In this dissertation I zero in on the changes this particular period exacted upon the office of the American presidency. I argue, in short, that institutional (federal courts, Congress, and executive agencies) and behavioral (ambitious, entrepreneurial presidents) inputs induced shifts towards greater presidential power and that those shifts did not occur in a vacuum. The burgeoning American economy and a concomitant expanding government workload provided the necessary context. Presidential ambition, federal court discretion, and congressional delegation all played key roles in the rise of the modern presidency. With respect to the political environment, a story told in the *Autobiography of Theodore Roosevelt* (1913) illustrates some problems that compelled the transformation:

An office in charge of an Indian agency made a requisition in the autumn for a stove costing seven dollars, certifying at the same time that it was needed to keep the infirmary warm during the winter, because the old stove was worn out. Thereupon the customary papers went through the customary routine, without unusual delay at any point. The transaction moved like a glacier with dignity to its appointed end, and the stove reached the infirmary in good order in time for the Indian agent to acknowledge its arrival in these words: "The stove is here. So is spring."

With this story Roosevelt intended to reflect reality at the turn of the century; the great problems of the day were routinely pinned on the growing job and administrative inefficiencies of the federal government. Both the president and Congress recognized the government's inability to meet all the demands of an exploding economy and its effects on America's evolving society. Members of Congress acknowledged the increasing pressure they received from the public resulting from the unmet obligations of the federal government. Congress responded by investigating the governments administrative practices in the Cockrell and Dockery-Cockrell Committees of the 1880s and 1890s, respectively, only to ignore the lions share of each committees subsequent recommendations (Kraines 1951; Kraines 1954).

The rise of presidential power dovetailed logically with the pursuit of more effective government administration. Improved efficiency, centralization, and the adoption of good business practices became a major theme of federal government commissions and some of the earliest pursuits of political science (Ford 1918; Kraines 1951; Pinkett 1965; Kraines 1970). The historical record seems to suggest that both Congress and the president experienced a slow and steady epiphany on the growing need for better governing practices. The congressional inquiries of the 1880s and 1890s met resistance within Congress itself when recommendations and subsequent bill introductions circumvented the normal committee system, violating normal jurisdictional channels.

Nine principles were outlined in 1905 by the Keep Commission for the pursuit of effective government, and the essential point, highlighted by Theodore Roosevelt in his autobiography, acknowledged and pilloried what political scientists commonly know as path dependence (Roosevelt 1913). Reform became a pursuit of best modern business practice, the assertion being made that the existence of any method, standard, custom, or practice is no reason for its continuance when a better is offered (1913, 232). Path dependent processes were to be discarded for newer and better practices when innovative and efficient alternatives were possible. The Keep Commission received its charge from the president, its work was unpaid, and its recommendations were received by Congress with much chagrin (Pinkett 1965; Dodds 2013). Congress responded brusquely, denying funding to any and all future commissions not expressly approved by Congress (Pinkett 1965; Dodds 2013). Administrative reform was evolving from a governmental necessity into a robust separation of powers battle.

Administrative and fiscal economy thus became vital pursuits by the first decade of the twentieth century, to the extent that the president and Congress struggled over which branch should hold the power of administrative reorganization. Each attempt by presidents even to investigate government administrative practices earned a strong congressional rebuke (Pinkett 1965; Ford 1918). Congress had investigated administrative reform prior to the presidential commissions, but had largely ignored the results of its own inquiries. The tension both within Congress and between Congress and the president on the administrative front may thus be part of the broader transition to a more modern American presidency. At the same time Congress and the president quibbled over control of the executive bureaucracy, presidents—beginning largely, though not exclusively, with Theodore Roosevelt—begin engaging in more unilateral behavior. The systematic study of the unilateral presidency for the period of this study has largely been ignored because of data constraints. With this dissertation (and the new data I provide) we can hopefully reveal a meaningful story about why presidents began using more unilateral action, whether or not those actions were significant and relevant to policy changes, and whether any changes in the pre-FDR use of unilateral

action (beginning especially with Theodore Roosevelt) were indeed systematic in effecting change in the modern American presidency.

The remainder of this chapter unfolds in the following manner. The first section deals with Chapter 2, on the rise of unilateral presidential action prior to FDRs presidency. The second section explains Chapter 3, dealing with Congresss major delegation of power to the president through the Budget and Accounting Act of 1921. The third and final section explains Chapter 4, on judicial discretion for congressional delegation and unilateral action.

1.1 Chapter 2: The Pre-FDR Unilateral Presidency

In the first substantive chapter of the dissertation I explore the rise of the modern presidency through presidential unilateral action, applying oft-ignored historical evidence and testing a new dataset of policy-specific executive orders from a period previously only studied by aggregate order counts. Studies of unilateral action—especially those with policy-specific treatments—have focused almost exclusively on the presidency in the post-FDR era, washing away all the prior changes occurring to the office of the presidency, suggesting if not stating outright that previous presidents behaved in ways largely inconsequential to the evolution of the office they held. The reasoning behind this deletion ranges from a lack of data (pre-FDR data in particular) to the lack of institutionalization in the office of the presidency and the relative instability of changes in presidential behavior prior to Franklin Roosevelt. I argue that the consequence of changes in presidential behavior prior to FDR are significant and impossible to ignore, and that a useful contribution in the study of the American presidency can be made by investigating the systemic and impactful changes within the pre-FDR period.

The motivation to write this chapter—indeed, a fair bit of the motivation for the subject of this dissertation—can be explained by the simple graph accompanying this section in Figure 1.1. The graph depicts the raw count of executive orders over time from 1789 to

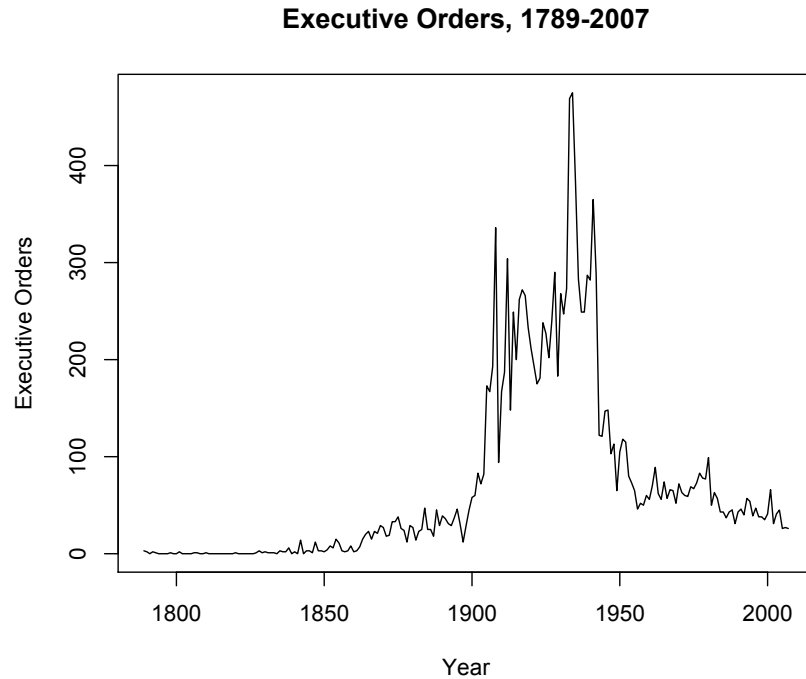


Figure 1.1: All Executive Orders, 1789-2007

Note: This figure shows the limited value of understanding executive orders only in the post-FDR context. Much of the dynamic activity is occurring, in fact, in years prior to FDR. Studying the post-1940s period of decay avoids examination of the nearly meteoric rise of executive order usage that seems to begin in the Progressive Era.

2007. There is no subdivision of orders here by policy or importance; a ceremonial order celebrating a fallen war hero counts the same as President Truman's order to desegregate the U.S. military in this graph. Nonetheless, it does not take much time or thought to notice some distinct breaks and trends in the long time series. The most noticeable and intense spike in order activity occurs within the presidency of Theodore Roosevelt just after 1900. This spike yields a rising trend that does not abate until after World War II. After World War II presidential use of executive orders decreases significantly, although the running mean of the series seems to be permanently higher than what it was before the prolonged spike ever

began. Presidential scholars, interestingly enough, tend to ignore this enormous change in executive orders altogether, focusing instead on the trends beginning with Franklin Roosevelt and moving forward. Explanations range from a lack of policy-specific data on the orders to a dearth of significant orders in the pre-World War II period (Howell 2003; Mayer and Price 2002). I demonstrate that the spike in executive orders beginning around 1900 contains nothing more than insubstantial administrative grunt work. The work in this chapter is thus meant to investigate what seems to be an obvious shift in both the data time series and in qualitative, historical accounts of the American presidency.

I choose to evaluate the unilateral presidency through the lens of the executive order for a number of reasons. First, executive orders are widely held to be the most significant form of unilateral action available to presidents, so we might say they represent the essence of unilateral presidential action (Howell 2003). They have the ability to change policy directly within the executive branch, which often can filter out into policy change beyond. Second, they were historically acknowledged both within and beyond government as a tool of governance for which to be accounted; in 1907 the State Department began collecting and numbering executive orders back to Abraham Lincoln (Lord 1943). The data collection process for executive orders thus began well over a century ago. While orders have certainly gone missing that were not counted by the State Department, the missingness of the data may relate systematically more to time than to some other systematic explanation. The very definition of an executive order is also sometimes unclear, but at least more than any other tool of unilateral action, the executive order has been classified and reckoned in a way most suitable for a study in contemporary political science (Lord 1943; Dodds 2013).

From the moment the Constitution was ratified presidents have benefited from contextual advantages over the other branches. Presidential scholars emphasize the importance of the informal, amorphous characteristics of presidential power (Howell 2003; Cooper 2002). Because of the centralized, pyramidal structure of decision-making in the executive branch, and because of the nature of the information available to the president and only the president,

it has nearly always been the executive branch that has had the advantage in manipulating ambiguities in the Constitution (Moe and Howell 1999; Mayer and Price 2002; Howell 2005). Unilateral behavior, then, is a natural presidential response to constitutional context.

Unilateral presidency theory confronts the Neustadt definition of presidential power in a number of ways. For Neustadt (1990), persuasion is the crux of presidential power. Presidents are successful by way of their informal, individual qualities. Great presidents pull opinion and policy in their direction magnetically, creating influence and extracting concessions from members of Congress. A resort to formal or unilateral command signals weakness of leadership. As time passes and scholarship accumulates, Neustadt's view of presidential power has largely given way to a less individualistic view. Most presidential scholars now assert institutional theories of the presidency have overtaken the behavioral, president-centered models offered by the flock of scholars shepherded by Neustadt (Ragsdale and Theis 1997; Krause and Cohen 2000; Howell 2003). Some institutional arguments focus on the ability of president to direct and manage the executive branch (Vaughn and Villalobos 2009; Walcott and Hult 2005). For unilateral action the role of bureaucracy is crucial, especially for unilateral acts like directives and executive orders. Such studies have important implications for the execution of policy. Congressional delegation of powers could have given rise to both the increase in unilateral executive behavior and the necessity of the establishment of new bureaucrats to accommodate a president's new policy powers.

Since the days of constitutional ratification, the presidency has indeed proven to be an adaptive, expansive institution. Much of the growth of the institutional presidency has developed relatively late in Americas history (Ragsdale and Theis 1997). As scholarship across many disciplines suggests, the potential for the evolution of the presidency seems to have been there all along. Coupled with the ambiguities of constitutional language, the structure of the executive branch fostered a presidency brimming with latent power (Corwin 1953; Cooper 2002; Howell 2003). The question, perhaps, then is: what took the modern and increasingly unilateral presidency so long to develop?

As Woodrow Wilson observed in 1908, presidential power has expanded and contracted from occupant to occupant. Political science scholars today focus largely on institutional explanations for changes in the shape and role of the executive branch. My approach here is to take a systematic study of unilateral executive behavior to see whether broad changes in presidential behavior and power developed earlier than what most studies today suggest. Beyond a variety of quantitative techniques used to study the presidency as an institution, formal theory is being used to model the dynamics of inter-branch competition between Congress and the president (Deering and Maltzman 1999; Howell 2003; Cameron 2000; Bender and Meirowitz 2004). Scholars now increasingly pay attention to the president's ability and willingness to act unilaterally, circumventing the bargaining process that constrains Neustadt's definition of presidential power (Neustadt 1990).

The qualities of the presidency that allow or even encourage unilateral behavior do not just include enumerated constitutional duties or the nebulous sections of Article II that have been fashioned into expansive implied powers. The very structure of the executive branch, with its power vested in a single actor, encourages presidents to behave with decision, activity, secrecy and dispatch (Federalist 70 [Hamilton], 1788). Given the well-documented growth of the presidential bureaucracy over time, the executive branch remains a uniquely streamlined, pyramidal decision-making body in American government. This, of course, has its limits. The executive bureaucracy can limit the president's ability to achieve desired outcomes by agency loss. It can prove difficult to radically alter policy within the executive branch when the bureaucracy attains the ability to run smoothly without much presidential interference; this was observed even by presidents during the Progressive Era when the structure and complexity of the executive bureaucracy was relatively light and simple (Taft 1916).

Unilateral action is no guarantee that a president will receive a most desired policy outcome. To that point even presidents of the pre-institutionalized presidency agree (Wilson 1908; Roosevelt 1913; Taft 1913). Within the context of the Progressive Era we find presidents openly admitting to the bureaucratic limitations of the presidency that we assign

to the modern, post-FDR version of the office. Some unilateral action arises by way of congressional delegation, while some is true initiative by presidents making a first move. I argue that much of the early unilateral presidency arises in the context of prior congressional delegation; Chapter 4, discussed later, strongly suggests this. Nonetheless, presidents also strike out on their own during the pre-FDR era, without any congressional authorization at all. The analysis of executive orders in this chapter is a mixture of both delegations of power and of presidential takings. Much of my work in this substantive chapter relies on a new dataset that I have coded from the Works Progress Administration's (WPA) series of studies on executive orders (Lord 1943). I have coded all known executive orders from both the unnumbered and the numbered series of executive orders (1862-1938) from the WPA volumes edited by Clifford Lord. I have coded the orders not only by year but by individual order and by policy. These new data are one of the fundamental innovations I offer the study of unilateral presidential behavior. By exploring the earliest numbered executive orders by policy I can gain leverage on numerous research questions previously untouched by quantitative studies in political science. First, the new data disabuse the notion held by many presidential scholars that most early unilateral presidential behavior is inconsequential, or at the very least insignificant from a policy perspective (Howell 2003). Second, the data can speak to important questions on the contemporary presidency, such as whether the partisan constraints on unilateral presidential behavior hold across time.

The research of this chapter reflects a desire to understand the unilateral presidency as a relatively late bloom in America's political history. Scholars have worked assiduously to show growth in presidential power and the unilateral presidency from the context of the Great Depression forward. Few, though, have entertained thoughts of testing the unilateral presidency earlier, if only for the lack of useful data. I test the systematic unilateral presidency from Franklin Pierce to Herbert Hoover so as to discover critical developments in presidential power and unilateral presidential behavior. Evidence suggests that partisan patterns of constraint differed in the pre-FDR period.

1.2 Chapter 3: Congressional Delegations of Power

In the second substantive chapter of the dissertation I investigate the increasing willingness of Congress to delegate its constitutional powers to the president. I treat the theory of delegation broadly but focus specifically on one case of delegation worthy of special attention, the decision by Congress to delegate the budget proposal power to the president through the Budget and Accounting Act of 1921. This case invites scrutiny because of the central constitutional power—Congress’s control of the federal government’s purse strings—compromised by the delegation. If congressional delegation is a key component of the rise of the modern presidency, then this most conspicuous of delegations must be investigated to discover, if possible, both the individual and collective motivations for severing the proposal power from Congress and delegating it to the president. As I show in Chapter 3, the terms of the delegation were of utmost importance to both Congress and the president.

While it remains something of an open question today how much control the budgetary proposal affords the president, in 1921 the decision to delegate budgetary proposal authority represented a potentially monumental delegation of power at the time of the vote. The Budget and Accounting Act is only one of many congressional delegations of power to the president, but as the budgetary power affects all policies in all departments, the choice Congress made to delegate the first move in the budgetary process earns special scrutiny in this dissertation. I examine the electoral factors that led to the passage of the Budget and Accounting Act based on a balance of qualitative and quantitative evidence. I first explore the political environment developing around the problems of administrative efficiency and government spending between the 1880s and 1920s. Four commissions, the first beginning in 1887, took place within a 25-year period to investigate administrative practices and inefficiencies, signaling the consistent and increasing priority of administration in federal government. The first two commissions were initiated by legislators, while the last two were initiated by presidents. Then I analyze the veto override vote for the 1920 Budget Bill and the general electoral environment for members of the House from 1880 to 1920.

One key to this chapter and to the dissertation more broadly is the political and economic environment. A rapidly expanding government workload during the post-Civil War period yielded an increasingly inefficient federal government, which yielded increasing public pressure to improve government services that were flagging. If public pressure rose to levels significant enough to threaten members of Congress electorally, then we might find compelling evidence of motivations for Congress to delegate pieces of its core constitutional powers away to the president. The Budget Act helped to establish the modern, institutional presidency (Ragsdale and Theis 1997), solidifying presidential control over the bureaucracy of the executive branch and establishing bureaucratic structures like the Bureau of the Budget that survive today. I explore the potential effects of Progressive Era electoral reforms on legislators' decision-making in the arena of appropriations. My research suggests that increasing attention was paid to budgeting through the lens of administrative efficiency, which ultimately may have contributed to the adoption of the presidential budget system.

The Budget and Accounting Act of 1921 served to reorganize the budgeting and spending procedures of the federal government. After years of investigations into government economy and administrative efficiency and the conduct of a war pushing federal debt to record levels, members of Congress perceived both the need and the advantage of centralizing the budgeting process through the White House (Kiewit and McCubbins 1991; Stewart 1989). An inherent tension attended Congress's willingness to delegate increasing budgetary authority to the president. The need for administrative and budgetary control compelled members of Congress to centralize the budgeting process both inside (through internal reorganization) and outside (through delegation) (Schickler 2001; Bovitz, Carson, and Collens 2012). The 1921 act created the Bureau of the Budget (BOB)—the forerunner of the Office of Management and Budget (OMB)—and gave the president the power of central clearance over executive agency requests, which had to be processed through the BOB. Perhaps most importantly, the act gave the president the power to propose the federal budget.

Reorganization within Congress sapped many legislative committees of jurisdictional power as the Appropriations Committee once again took control over the internal appropriations process. Recently revealed evidence suggests that members of Congress voted to centralize the appropriations process because of the competing electoral incentive of fiscal responsibility (Schickler 2001; Bovitz, Carson, and Collens 2012). Such a story is consistent with Congress's choice to delegate the budget proposal authority to the president in hopes of improving efficiency and economy in the federal budget. It is also consistent with members of Congress providing themselves with a scapegoat in the event that fiscal and administrative efficiency could not be recaptured.

In the chapter I examine the congressional delegation of the budget in two ways. First, I investigate the electoral factors that informed the most telling vote related to budget proposal delegation, the 1920 override vote following President Wilson's veto. The final Budget Act vote of 1921 is uninformative because it is nearly unanimous. Thus, a first key to the analysis of the vote is determining what compelled members of Congress to vote yay on the override. Next, I look more systematically at electoral conditions related to the era in which the Budget and Accounting Act was passed. The focal point will be the evaluation of public pressure being placed on members of Congress to fix the administrative inefficiencies of the federal government. I look to the public petitions reported by Congress as evidence of this pressure. At the beginning of the period of study we might find blame falling largely upon members of Congress for these administrative failings. Some systematic accumulation of this blame may then help to identify motivations for members of Congress to delegate increasingly meaningful slices of power to the president.

1.3 Chapter 4: Judicial Discretion of Presidential Power

Many of the powers held by the modern presidency were not afforded clearly by the Constitution itself but were amassed piecemeal over two-plus centuries of practice. The first substantive chapter of the dissertation will cover the federal court's role in carving out presidential authority and power in historical context, identifying meaningful cases that restricted or expanded presidential power and investigating how court opinions may or may not have affected the contemporary exercise of presidential power. A significant amount of federal court activity occurred regarding presidential power in the Progressive Era (*In re Neagle* 1890; *In re Debs* 1895), and much discussion in this chapter will spring from the seminal cases of the period. The Supreme Court signals a major transition in this period with the opinion written in *In re Debs* (1895), connecting the president's execution of his occupational duties not to any constitutional passage but to pursuit of the national interest (Corwin 1953). This opinion signals a shift away from previous defenses of presidential action based on ambiguous but original constitutional foundations like the Vesting Clause that opens Article II or the Take Care clause.

Supreme Court cases related to the separation of powers are rare; they belong to the category of political questions historically avoided by the Court. Given the scarcity of relevant cases, it would prove difficult to try and systematically analyze 150-year patterns in federal case history involving issues of delegation or unilateral action. Instead, I paint the relevant federal court case history in rich, qualitative colors in pursuit of the judicial discretion afforded presidents in issuing unilateral directives.

I make the case that the Supreme Court (and by extension the lower federal courts) has maintained some semblance of consistency in opinions regarding presidential assertions of power or congressional delegations of power. Recent scholarship tracing these cases has identified broad consistency within many of the relevant federal court decisions (Dodds 2013). I will elaborate on case history relevant to both delegations of power and unilateral takings, separately when possible. Crucial federal court decisions within the time period of

this study underscored implied powers of the presidency and Congress's right to delegate power to the president under the intelligible principle test (In re Neagle 1890; In re Debs 1895; J.W. Hampton Jr. & Co. v. U.S. 1928). It is instructive that the implied powers of the presidency and the delegation powers of Congress are finally sorted out by the Supreme Court within the relatively brief period of time that is the focus of this dissertation.

I take the following approach in the chapter. First, I introduce the basic constitutional issues accompanying the office of the presidency commonly acknowledged by the scholarly community at large (Corwin 1953; Cooper 2002; Moe and Howell 1999; Howell 2003). Then I trace and synthesize the case history related to presidential power through the vehicles of congressional delegation and unilateral executive action. I treat the discussion of these two strands of case history separately in some cases, but in many instances of unilateral executive behavior involve some previous delegation of authority. The intention is to create separate sets of constitutional logic for congressional delegation and unilateral executive actions, even if the cases being discussed are one and the same.

Most cases in the chapter deal more directly with the constitutionality of unilateral presidential directives. Many of those cases, though not all, include some prior delegation of authority. Constitutional issues directly related to congressional delegation of power did not rise to the Supreme Court's docket until the early part of the twentieth century. This does not mean that no delegations of power occurred; rather, it means that very few cases of congressional delegation rose to a level that presented a challenge to legal and constitutional principles of the time. A few key cases dealt with delegation scattered throughout the nineteenth century, but often the issue was dodged as a political question or the delegation was not of such heft to warrant consideration by the federal courts (Brig Aurora v. United States 1813). The legal maxim *delegata potestas non potest delegari*, or no delegated powers can be further delegated, had not been challenged fully enough to warrant the Supreme Court's attention until 1928 (J.W. Hampton Jr. and Co. v. United States 1928). Why did the issue gain traction in the 1920s to the extent that the Supreme Court finally had to making a

ruling? Why did the Court wait so long to rule on what now seems such a vital component of American politics and the balance of power between Congress and the president? I will argue and it almost seems it must be the case that Congress began delegating increasingly meaningful slices of its legislative power in increasingly difficult economic, social, and political circumstances. The achievement of some critical mass of congressional delegation may have, in turn, compelled the Supreme Court to hear more cases of congressional delegation. This first substantive chapter will investigate this issue thoroughly.

The broader point of the judicial chapter is to draw lessons from federal case history that matter to the development of presidential power. I examine cases as they develop over time to establish a logic in the development of what I call the “judicial discretion” of presidential power, inspired in part by the notion of discretion in the formal model of unilateral presidential action presented in Howell (2003). I identify the factors from each decision that affect the federal court’s determination of discretion afforded a president in unilateral action. Such factors include, but are not exclusive to, whether a lawful delegation of power from Congress has been made, whether that delegation is made specifically to the President of the United States or some inferior executive officer, or whether a president engaged in a unilateral act against the will of Congress or in a context of congressional silence. Each case involves some combination of these factors and bears some weight upon the evolving discretion afforded a president with respect to unilateral action.

In cases related to presidential power, whether they have related to delegations by Congress or takings by the President, the Supreme Court has more often than not favored the President. From the legislative power encoded in Article I (sections 1 and 8 in particular) and the ambiguities of Article II the presidency has accumulated powers through delegations and takings, respectively. In some combination, and under those constitutional motivations, Congresses and presidents have acted to fashion a growing list of implied and inherent powers expanding the boundaries of executive power extensively (Howell 2003; Dodd 2013). To understand the genesis of this accumulation of presidential powers, then, we must then begin

with a treatment on the Constitutional Convention and the earliest presidential administrations. The judicial chapter contains a brief but thorough constitutional introduction prior to the analysis of congressional delegation and unilateral executive behavior. The constitutional section of the chapter will prove pivotal because, as was discussed earlier in this section, by 1895 the Supreme Court begins validating presidential behavior not just by references to the constitution but by references to an even more amorphous national interest (*In re Debs* 1895). A treatment on constitutional origins will thus serve to highlight the great differences in presidential power recognized and endorsed by the Constitution (via the Supreme Court) between 1789 and the period of this study.

1.4 Conclusion

When looking to identify potential constraints against the latent power of the presidency, we must survey the other branches of government, which this dissertation does. Both Congress and the Supreme Court have their opportunities to constrain unilateral presidential behavior. Congress benefits from its position as the lawmaking branch, and as the substantive chapter on federal court cases will show, unilateral presidential action receives heightened scrutiny when it conflicts with explicit congressional instructions. Historically the Supreme Court has generally deferred to the president when adjudicating on separation-of-powers issues and unilateral action. From the earliest years of the republic the Supreme Court has also recognized Congress's legislative power to constrain presidential action. The Courts decision in *Youngstown Sheet and Tube v. Sawyer* (1952) framed its perspective powerfully and succinctly; absent explicit congressional law to the contrary, the presidents powers are not limited to the literal passages of Article II. Unilateral action is no guarantee that a president will receive a most desired policy outcome. To that point even presidents of the pre-institutionalized presidency agree (Wilson 1908; Roosevelt 1913; Taft 1913). Within the context of the Progressive Era we find presidents openly admitting to the bureaucratic

limitations of the presidency that we assign to the modern, post-FDR version of the office. Some unilateral action arises by way of congressional delegation, while some is true initiative by presidents making a first move. One of the first questions I hope to answer regards the balance of first-move advantages between unilateral action and delegated power. It is entirely possible that congressional delegation of powers allows for unilateral action to take place. Scholars remain unsettled—and rightfully so—as to whether unilateral action precedes or follows congressional delegation. This dissertation gathers three institutional threads of evidence and strings them together to reveal what I argue is the beginning of the contemporary American presidency. Presidents alone did not expand the power of the office they occupied. Congress alone did not give away the power necessary to explain the transition. The Supreme Court alone did not exercise constitutional judgment enough to explain the flexible and dynamic power that the office of the presidency now holds. A more complete story about the genesis of the modern presidency, with a full array of appropriate characters, requires an investigation of action from all three branches of the federal government. I argue that significant changes in all three patterns of behavior occurred within the same 40 or so years, from the Gilded Age to the Progressive Era.

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Chapter 2

The Pre-FDR Unilateral Presidency

On January 22, 2009, President Barack Obama declared his intent to close the controversial detainment center at Guantanamo Bay, Cuba via executive order. As one of the key pieces of Obama’s campaign policy agenda in national security, the executive order met with staunch resistance from Republicans who warned of dire national security implications. Visions of accused terrorists loosed upon American soil moved public opinion and fortified bipartisan congressional resistance to the closure of the facility. As late as summer 2015, talks continued between Republicans and Democrats to strike a deal allowing the closure of detention facilities. Lost in these partisan and institutional conflicts, however, was the irony that, after Guantanamo Bay was received via treaty in 1903 for coal and naval purposes, Guantanamo Bay’s military reservation—and the detention center eventually built upon it in 2002—was established via executive order over one hundred years prior (Lord 1945, 194).

Obama’s declared intent to use unilateral powers earned partisan and occasional scholarly alarm. In January 2014, Senator Ted Cruz (R-TX) warned of President Barack Obama’s unilateral minimum wage raise for federal workers as evidence of a “persistent pattern of lawlessness” (*Wall Street Journal*, January 28, 2014). In September of that same year, Bruce Ackerman declared President Obama’s military offensive against ISIL (Islamic State), which had begun in August without explicit prior Congressional approval, a “decisive break in the American constitutional tradition” (*New York Times*, September 11, 2014). Taken literally, these accounts portray a presidency changing in fundamental ways, with unprecedented

expansion of power and institutional change. The inheritance of distrust for monarchical tyranny is clear in these examples; Americans maintain a vigilant skepticism of expanding presidential power.

The unilateral presidency, of course, is no new phenomenon, and neither are the attendant critiques of presidential abuse of power. In fact, unilateral presidential behavior and acerbic retorts of abuse date back to George Washington and the Neutrality Proclamation. From notable but rare early cases like the Neutrality Proclamation, unilateral presidential behavior developed through the Civil War and beyond, becoming roughly institutionalized by the late nineteenth century (Dodds 2013; Bolton and Thrower 2015). This all happened while Congress inherited an explosive workload in the post-Civil War years and reform-minded presidents increasingly asserted their independent authority over the executive branch (see Cleveland 1913; Roosevelt 1913). However, we know little about the systematic rise of the unilateral presidency, or to what extent it existed at all prior to the FDR era.

From political parties and primary elections to congressional committees, the Senate filibuster, and unilateral presidential tools like executive orders, many policy outcomes in American government derive from institutions and processes not found in the Constitution. These phenomena took root in the practice of governing and developed into the political institutions we know and study today. Limiting our purview to the post-FDR era invites misunderstanding of both what the unilateral presidency is today and what it used to be. What could be more informative about the unilateral presidency than its institutional origins? If path dependency is a viable theoretical foundation, with early choices being crucial to institutional development, then examination of the pre-FDR era is paramount to revelations and new insights about both presidential power and the unilateral presidency.

I contribute to our understanding of the unilateral presidency here by developing a new data set, coding historical executive orders by policy area. With these data I reexamine longstanding debates in presidency scholarship on the fundamental influences and constraints of the unilateral presidency. I also develop a theory in which I argue that, in the earliest stages

of the American presidency, institutional accumulation of authority and power was likely as important as partisan concerns relative to Congress. This is consistent with Howell (2013), who argues that modern presidents need to accumulate as much power as possible to do their job effectively. I argue that presidents were doing more than responding to the constraints of partisan politics. Instead, during a key transitional period in the presidency, presidents protected the institutional accumulation of power provided by unilateral behavior. I find that ideology played a key role in unilateral executive behavior, while measures of partisanship had inconsistent effects on the issuance of executive orders. National conditions were key drivers of presidential behavior during the period as well. I also find that institutional power may have provided another important motivation regarding the evolution of presidential power in the pre-FDR era.

2.1 Executive Orders & Historical Background

Executive orders direct members of the executive branch to execute law in a particular manner (Cooper 2002). They represent a unilateral presidential tool of policymaking that far more often than not have the effect of law (Dodds 2013; Cooper 2002; Howell 2003). Historical executive orders have been used for a wide range of changes in policy.

Like orders of the modern era, historical executive orders range by policy. Often they take on an administrative or executive character, and occasionally they provide a single-shot shift in policy. An unnumbered order from the spring of 1801 was summarized by the Historical Records Survey of the Works Progress Administration in the following way: “Government officers, appointed by the President and their subordinate employees instructed not to attempt to influence the votes of others nor take part in electioneering during general or state elections” (Lord 1943). Such nominal attempts to curb political influence via executive order resurfaced later, as well. In July of 1886 an order was issued forbidding the use of an official position for political influence through political activity (1943, 121).

Some historical executive orders had a distinctly administrative purpose. One peculiar order from 1893 said the following: “Job seekers and well-wishers denied interviews ‘which have been bewildering in volume, perplexing and exhausting in their iteration, and impossible of remembrance’ with the President” (1943, 155). The relatively routine nature of this order contrasts significantly with an order issued by President McKinley in the midst of the Spanish-American War calling for the Treasury Secretary to “examine existing Spanish revenue laws for the Philippine Islands, and to recommend regulations for the imposition of taxes and duties through the War and Navy Secretaries in ports under American occupation” (1943,169). Other notable orders exist, including both the naval petroleum reservation order and the land transfer that activated the infamous Teapot Dome scandal (Noggle 1957).

In managing executive agencies, presidents have issued executive orders altering civil service rules and operating rules in territories and commitments abroad, as well as orders overriding appointments, reinstatements, and retirement rules for specific individuals. In the management of the federal government’s resources, executive orders have been used to establish military reservations, Native American reservations, bird reservations, national parks, and more. To more ceremonial purposes, executive orders were issued for federal employees to participate in what would become Memorial Day well before it became a national holiday. From highly salient orders, such as the one that triggered the Teapot Dome scandal, to commonplace orders affording federal workers time off to mourn the passing of prominent public figures, executive orders have been issued to various ends. With certainty we can say that not all executive orders are alike.

Executive orders were first systematically accounted for when the State Department initiated formal reporting requests to executive branch departments on executive orders beginning in 1905. The orders discovered in this request were numbered, including the retroactive numbering of available historical orders. In the 1940s, within the seemingly endless workload of FDR’s Works Progress Administration (WPA), the known universe of surviving executive orders were indexed, listed, and published in books edited by Clifford Lord. From these

volumes we know that the first numbered order acknowledged by the State Department was issued in 1862. At the same time, however, the WPA also indexed and listed the known series of unnumbered executive orders left out of the State Department's initial count. In the unnumbered series we find executive orders dating back to 1789, though consistent counts for orders do not start occurring until the 1820s and 1830s. The account of executive orders represented by the numbered and unnumbered series compiled by the WPA represents the executive branch's institutional memory of the unilateral presidency in the era of FDR. I have chosen to analyze the products of these two volumes, as they continue to represent the preponderance of our raw information about executive orders in the pre-FDR period.

The combined totals of the numbered and unnumbered series from Chapter 1 motivate the analysis for Chapter 2. The peak of unilateral executive activity exists during the FDR years, during the extreme crises years of the Great Depression and World War II. The remarkable changes in the executive order series prior to the FDR period, however, are notable. The dynamics of the series suggest significant changes in unilateral presidential behavior prior to the critical period of FDR's presidential leadership which scholars characterize as the advent of the modern presidency. If the sample provided by the Lord series is representative of the unilateral presidency in the pre-FDR period, then a more thorough examination of historical unilateral presidential behavior is needed.

The dataset I offer here breaks down the series of executive orders seen in Figure 1 by policy. Policy changes have implications for both the type of executive orders issued at time t and the structural elements of the political and economic conditions that affect order issuance. The coding scheme provided here passes over the debate about executive order significance because even the accumulation of minor executive directives, seemingly trivial over the long run, may signal a broader shift in policy and preferences of presidents and cabinet-level officials. Moreover, following chief legal principles common to American legal tradition, such orders establish rather extensive trails of precedent that become difficult, if not impossible, for the other branches of government to ignore (Dodds 2013). In the field of

the unilateral presidency, one prime example of this is *Midwest Oil v. United States* (1915), when the Supreme Court explicitly recognized the non-statutory authority of presidents to issue executive orders in the policy arena of land and natural resources. The Court equated Congressional silence with acquiescence and, ultimately, approval of presidential unilateral authority in land policy. The opinion even provided descriptive statistics as to the number and type of land orders presidents had issued without statutory approval from Congress.

2.2 Unilateral Presidency & Theory

If the unilateral presidency was born between the words and lines of the Constitution, was its birth intentional? Article II provides so little explicit direction on the subject that it motivates arguments both for and against the constitutional unilateral presidency. The “Vesting” Clause, the “Take Care” Clause, and the “Commander-In-Chief” Clause have all been brandished at various points in presidential history to proclaim constitutional authority for unilateral action (Corwin 1953). Terms such as “implied powers” and even broader “inherent” powers—by construction nowhere to be found in the words of the Constitution—have also burrowed their way into defenses of presidential behavior.

Studies of the unilateral presidency carry the constitutional argument forward to the modern presidency, quite often without ever paying heed to the behavior of presidents after Washington or prior to Franklin Roosevelt not named Lincoln or Jackson. For example, scholars investigate the effects of divided government, finding overwhelmingly—though not conclusively—that presidents issue executive orders more often during unified government. Yet, these results apply only to a period studied with a particularly high proportion of years of divided government. This shortcoming of rigorous modern studies applies just as well to the effects of other key factors of presidential behavior such as partisanship or ideology.

Studies of the American presidency are ultimately about the sources and sinks of power. From where does the president’s power originate? How does it grow? What makes it winnow

away? And to where does it disappear? In a broad departure from Neustadt's (1990) vision of presidents confined to persuasion in a context of bargaining, many presidency scholars now examine unilateral presidential behavior as an alternative route to power and policymaking (Howell 2003; Mayer 1999; Deering and Maltzman 1999). Major arguments center on the role of the strategic context of divided government (Fine and Warber 2012), whether various subsets of "significant" orders are the appropriate target of consideration (Mayer and Price 2002; Howell 2003; Chiou and Rothenberg 2014), and whether and to what extent policy moves in the president's direction through unilateral behavior (Chiou and Rothenberg 2014).

When examined as a whole, studies of the unilateral presidency have presented a complex series of findings. Generally, party support in Congress tends to be associated with more issuance of executive orders (Gleiber and Shull 1992), although the evidence is not uniform across studies (Krause and Cohen 1997). Divided government is most often associated with a decrease in executive orders, but not exclusively so. Most of these studies explore both ideological and partisan effects on the unilateral presidency, but do so only in modern studies in the shadow of FDR's presidential legacy.

One vein of recent scholarship has turned to questioning the power provided by unilateral presidential behavior, making Neustadt-like claims about the limits of power within the realm of the unilateral presidency. For some, unilateral behavior is not the exploration of presidential powers as an escape from the bargaining context or a response to failed bargaining. Instead, the unilateral presidency can represent acquiescence to Congress (Chiou and Rothenberg 2014) or even the preexisting preferences of the executive bureaucracy (Rudalevige 2012). Yet, recognition of limits to executive action were recognized well prior to the contemporary period. Not only do executive orders sometimes reflect the preferences of executive branch officials, unilateral action is no guarantee that a president will receive a most desired policy outcome. To that point even presidents of the pre-institutionalized presidency agree (Wilson 1908; Roosevelt 1913; Taft 1913). Theodore Roosevelt spoke of this in his autobiography, saying that "nothing could have been done in [his] Administration if it had

not been for the zeal, intelligence, masterful ability, and downright hard labor of these men in countless positions under [him]” (1913, 225). Roosevelt went on to say that, once bureaucrats in the executive branch had developed expertise relative to their jobs, they suggested the “right thought” and “right order to give” regarding those jobs. Thus, within the context of the Progressive Era we find presidents openly admitting to the bureaucratic limitations of the presidency that we assign to the modern, post-FDR version of the office.

Yet, those pre-FDR presidents also argued, to varying degrees, about the increasing scope of presidential power. I argue that the unilateral presidency remains powerful even when the president’s preferences are weak, absent, or altogether unknown. Executive orders activate as a legal executive branch policymaking tool once they bear the president’s signature. If the president has preferences, the complete power of the unilateral presidency is activated on his or her behalf. If the president’s preferences are weak or absent altogether, the president may still exert power through a veto-like, gatekeeping authority within the executive branch. Too many executive orders to count have involved the recommendation of a cabinet secretary followed by a president’s approval; the infamous land transfer of the Teapot Dome oil reserves is a prime example. Counterfactually speaking, a president could just as easily have denied said cabinet secretary’s preferences as expressed by the executive order. In fact, there is a likely universe of potential executive orders that were never activated because presidents chose not to endorse them. To borrow congressional language from Cox and McCubbins (2005), while the president does endorse the recommendations of cabinet secretaries often in the form of executive orders, he also wields a kind of negative agenda control over the executive branch that is another form of power altogether.

In the debate about unilateral presidential behavior and its contribution to presidential power, one crucial component escapes us: its systematic origin. Few systematic studies currently exist that explore unilateral presidential behavior prior to FDR’s administration and the passage of the Federal Register Act of 1936 (Warber 2006). The reasons for this are related to data availability on both sides of the regression. On the one hand, we cannot yet

account for the job approval of a president prior to the 1940s, which most scholars argue remains a vital measure of whether presidents have the option or need to act unilaterally. This, I would argue, is an insufficient concern about studying the historical presidency given the variables we do know. On the other hand we cannot be sure that our sample of executive orders is sufficiently representative to warrant a more historical examination. Yet, we do have a systematic account of executive orders that began in 1907, when the State Department began numbering executive orders and collecting them retroactively. We also have an unnumbered series of orders collected and indexed along with the numbered series by the Works Progress Administration during the 1940s. These data still represent most of what we know about the unilateral presidency to date, and they remain under-explored. Furthermore, they represent the executive branch's own institutional knowledge and memory about unilateral presidential behavior at the very point of FDR's modernization of the presidency.

In the period between the Civil War and FDR, the United States experienced profound economic and political transformations. The economy grew at unprecedented rates, led by booming oil and railroad economies, and the attendant workload of Congress grew apace. Meanwhile, institutional transformations in congressional elections changed the relationships between political parties, candidates, and the electorate. The executive branch changed as well. As Reconstruction introduced a form of relative equilibrium to the United States at home, the nation's commitments abroad expanded significantly through the acquisition of territories and the Spanish-American War. At the same time, presidents and Congress engaged in institutional struggles over control of the executive bureaucracy. Inquiries into problems in executive administration initiated by both congresses and presidents—no fewer than four official commissions in the span of twenty-five years—crystallized the struggle about control over administration, which was seen as increasingly inefficient. The country was changing fast, and the federal government was scrambling to rise to the challenge.

Given the context considered above, we should expect structural factors affecting presidential behavior to differ in the pre-FDR and post-FDR eras. As the federal government evolved to meet the demands of a rapidly moving world, institutional arrangements and partisan arrangements experienced attendant changes. We might expect less evidence of institutional struggle between presidents and congresses as the unilateral presidency first becomes institutionalized. At the same time we should see presidents protecting the institutional accumulation of power in the presidency, regardless of party. Key exogenous factors such as the state of the economy and involvement in war should also drive presidential behavior as presidents increasingly become—and increasingly view themselves as—leaders of the nation (Roosevelt 1913; Cleveland 1913; Wilson 1908). These expectations should differ somewhat from the contemporary, post-FDR era in which institutional and partisan constraints upon unilateral behavior may have evolved and responded to the explosive rise in unilateral behavior under FDR. The combination of increased institutionalization of unilateral behavior and what some scholars have called FDR’s overuse of unilateral authority may have increased congressional attention to unilateral presidential behavior as evidenced by the passage of the Federal Register Act (Fisher 2014).

2.3 Analysis of the Pre-FDR Unilateral Presidency

The variables I use to examine the pre-FDR period investigate institutional and partisan elements of the political system alongside exogenous changes in the economics and politics of the series. The combination of variables below give us the opportunity to see what factors were associated with unilateral presidential behavior prior to FDR. Given the findings of studies on the modern, post-FDR era, any systematic differences in the pre-FDR period should demonstrate an evolving unilateral presidency.

2.3.1 Variables

Dependent/Outcome Variable. The outcome variable for this analysis is executive orders by president-year. Typical studies of the unilateral presidency account for executive orders by year, and since the period of study is typically a post-FDR period, it is common to equate president-years with calendar years. For an historical, pre-FDR study, however, using calendar years would introduce no fewer than four months of measurement error to any presidential term because the congressional-presidential calendar began in March, not in January. For the full period of this analysis Congresses began in March, and so the dependent variable for executive orders is in units of president-years, which range from March of one year through the February of the following year. The executive orders in the dependent variable here exclude ceremonial orders, following the practice of recent analyses (Bolton and Thrower 2015).

Divided Government One of the primary variables in any analysis of the unilateral presidency is whether the president shares party status with both houses of Congress. Given that this variable has been found to be significant by various studies in contrary directions, and given the theoretical importance of a president potentially bypassing a hostile Congress in favor of unilateral policymaking, divided government remains a key explanatory variable in any unilateral presidency study.

Administration Change This variable measures whether the president-year represents the first year of a new presidency. New presidents from the opposing party should, in theory, issue more executive orders than incumbent presidents or new presidents from the same party as their predecessor. Most contemporary studies find that the beginning of new presidential administrations from new parties see an increase in executive orders as a partisan form of revocation of the previous president's policy.

Ideological Distance This variable measures the difference between the ideology of the president and the Senate median on the first dimension of DW-NOMINATE. If an ideologically distant Congress represents a constraint upon the president's ability to make policy, then we should see fewer executive orders as the president's ideology separates from the Senate median.

Party Support This variable measures the average party support of the president in both houses of Congress. It is intended to take account of the president's overall support in Congress, which should, in theory, affect a president's willingness to go unilateral.

War This variable presents a dummy for war years. Given the period of study, war years include the Civil War and World War I. The Spanish-American War is also tested as a robustness check. Even though it lasted scarcely three months, the Spanish-American War had lasting effects on American involvement abroad and the administrative workload for presidents.

Economy This variable is measured as the change in GDP per capita from one year to the next as measured in constant (1990) dollars. Drastic changes in the economy should have an effect on presidential behavior, resulting in the issuance of more orders.

2.3.2 Dynamic Count Analysis of Executive Orders

The series of executive orders used in this analysis were listed and indexed by a team under the auspices of FDR's Works Progress Administration. To date, with one exception (see Bolton and Thrower 2015), none of these orders have been examined systematically, either for significance or policy patterns. With respect to Bolton and Thrower, a subset of these orders are examined. Here I present the the full Clifford Lord series of numbered and unnumbered orders and, borrowing Lyn Ragsdale's (2014) categories of policy, code the combined series

of executive orders. Ragsdale codes contemporary, post-FDR orders by policy, and using these categories allows for comparisons between pre-FDR and post-FDR presidents.¹ These data should enrich detail in the study of the unilateral presidency, providing a policy-specific, systematic context for one of the most meaningful executive orders of any presidential era. The data represent what I call the “institutional memory” of the unilateral presidency.

TABLE 2.1: NUMBERED & UNNUMBERED EXECUTIVE ORDERS, 1853-1932

Policy Area	Percent	N
Personnel/Agency	48.57%	3,738
Resource/Environment	44.34%	3,413
Gov't Economy Management	2.78%	214
Ceremonial	2.34%	180
Defense	1.01%	78
Total	—	7,696

Note: Categories of orders accounting for less than one percent of the total were omitted from the table. These include the categories of trade and diplomacy, federalism, welfare and civil rights, and foreign aid.

These data warrant description. First, Table 2.1 shows the predominant types of orders issued during the period of president-years between 1853 and 1932. The data have been coded according to president-years because, for the entire period of this study, administrations and congresses began in the beginning of March. Looking at Table 1 we see the two predominant categories of executive orders issued during the period: personnel-agency orders and resource-environment orders. A subdivision of the resource-environment series into subcategories finds groups of orders related to national forests, Native Americans, and the management of territories and resources related to America’s newly acquired international territories. Over 20 percent relate to the territorial control of Alaska, Hawaii, the Philippines, and the Panama Canal Zone. Moreover, the resource orders issued on territories abroad occur at a very precise period in American history, around the time of the Spanish-American War.

¹Ragsdale’s policy categories are the following: trade and diplomacy, foreign aid, defense, government management of the economy, ceremonial, resources and environment, and personnel and agency.

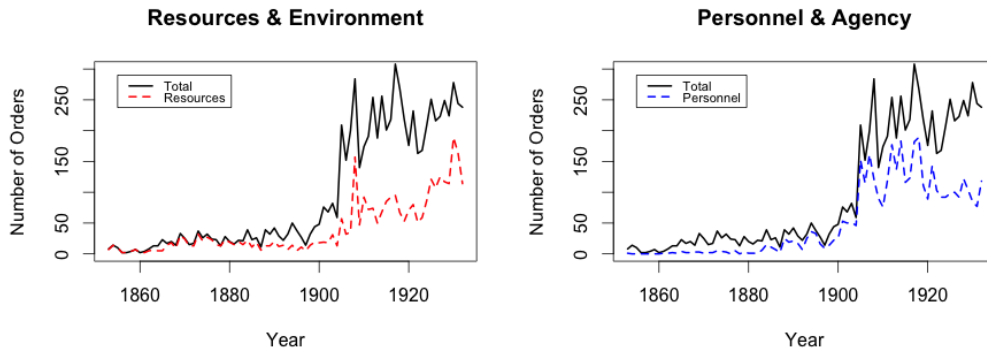


Figure 2.1: Orders by Main Policy Types, 1853-1932

Note: Known executive orders clearly begin with a preponderance of resource and environment orders. Meanwhile, personnel and agency orders take off only after the passage of the Pendleton Act in 1883.

An initial exploration of the data, pictured in Figures 1.1 and 2.1, is warranted here. First, because the full series is such a long one, we might see the dynamics of the time series evolve or even disappear based on how we choose to truncate the series. Regarding presidential executive orders—or any time-arranged measurement of the unilateral presidency—this would be especially important to understanding dynamics when a large range of the series has gone largely unexplored. I compare the dynamics of the series based on truncations at various points in time.

Sample autocorrelation functions demonstrate how choice of sample has an effect upon appropriate time series treatment. To start, I use a sample that incorporates the Civil War and the potential effects it may have had on the series. For this first sample I incorporate the two presidencies prior to the Civil War and continue through to the end of the pre-FDR period in 1932. For the second sample I chose a theoretically interesting cutoff point that might have some meaning to the power of the presidency. In this case I chose to start the series in 1898, a year in which the United States gained many overseas territories in the Spanish-American War. Given the broadly accepted two presidencies thesis, we might

expect a different, more robust presidency in this period, which in turn should affect the type and count of executive orders issued (Wildavsky 1966). Looking at Figure 2.2, the longer series beginning in 1853 demonstrates persistent memory, indicating a non-stationary or nearly non-stationary series. Appropriate treatment of the dynamics in the series will thus be sensitive to the portion of time series analyzed.

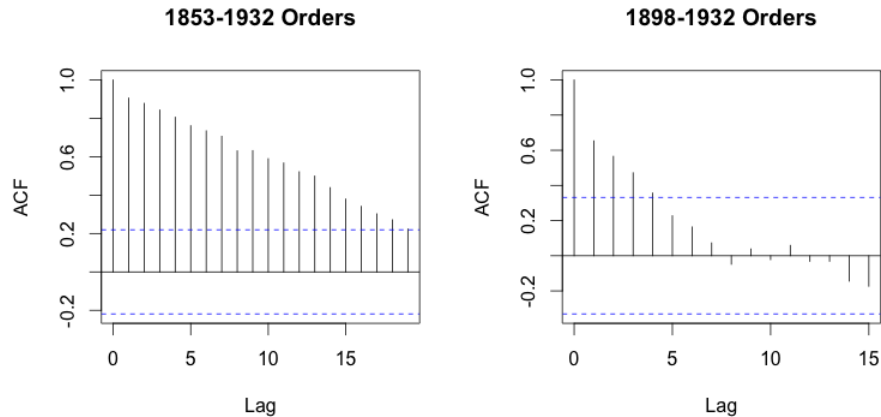


Figure 2.2: Sample Executive Order ACF Plots

Note: This figure shows the importance of awareness regarding time sample and the appropriate treatment of the dynamics in the unilateral presidency.

A standard choice for event count models, based on the distribution of counts, is the Poisson model. The Poisson is appropriate when the parameter λ is equivalent to both the mean and the variance. Quite often in the case of political studies, however, the mean and variance do not match. When overdispersion (underdispersion) exists, the negative binomial offers a more appropriate estimator. As such, the negative binomial is used almost exclusively by scholars of the unilateral presidency. And while it maintains the advantage of holding appropriate assumptions about the distribution of count data, it also inadequately accounts for the dynamics present in unilateral presidential behavior. A preponderance of studies attempt to address this by including a lagged dependent variable in the negative binomial model (Howell 2003; Deering and Maltzman 1999). As has been shown, however,

the coefficient on the lagged dependent variable does not translate to an autocorrelation coefficient, but instead to a linear exponential growth rate (Brandt et al. 2000; Brandt and Williams 2001). Thus, the only “dynamics” present in the estimation is a trend.

A more appropriate model should account both for distributional assumptions and true dynamics. Among the best candidates we include the state-space models known as Poisson Autoregressive Models (PAR) and Poisson Exponentially Weighted Moving Average Models (PEWMA). Each of these estimators allows the researcher to employ more appropriate assumptions about the distribution of the outcome variable(s) of concern while properly attending to the specific dynamic elements of the series. Generally, the appropriate choice depends upon how stationary the series of study seems to be. Autocorrelation functions and stationarity conditions help us to determine which model is most appropriate (see Brandt and Williams 2001, 170-172). Given the nature of the two series presented in Figure 2.2, both the PEWMA and the PAR are useful estimators in the following analysis. The longer, persistent series will be estimated as a PEWMA process, while the shorter series will be estimated as a PAR(1) process.

The PEWMA class of models apply to series that are not stationary, and the stationary series alternate to the PEWMA is the Poisson Autoregressive model, or PAR. These models allow for appropriate assumptions about the data-generating (DGP) process for the outcome variable while accounting for dynamics in a more meaningful way. The PEWMA and PAR models differ in the updating of the running mean through the transition equation, which is estimated in both cases using a kalman filter. In the PAR model the running mean is updated with a linear AR process, while the PEWMA updates the running series mean with an exponentially weighted moving average.

The PAR takes the following form:

$$y_t|m_t \sim P(m_t) \tag{2.1}$$

$$m_t = \sum_{i=1}^p \rho_i Y_{t-i} + \left(1 - \sum_{i=1}^p \rho_i\right) \exp(X_t \delta) \tag{2.2}$$

$$m_t|Y_{t-1} \sim G(\sigma_{t-1} m_{t-1}, \sigma_{t-1}), m_{t-1} > 0, \sigma_{t-1} > 0 \tag{2.3}$$

Equation 1 represents the measurement equation of the standard Poisson distribution, which reflects the data-generating process for the outcome variable, executive orders issued in a president-year. Equation 2 represents the transition equation, which accounts for the dynamics inherent to the series. The transition equation is a weighted combination of the past values of Y_t and exponentiated covariates; the stronger the influence of past values of Y_t , the weaker the effects of covariates. Equation 3 represents the conjugate prior distribution, which is constructed using observed data. The PEWMA model is also based on the Poisson distribution and is structured similarly, but differs from the PAR model in the transition equation and the conjugate prior.

The interpretation of a PAR(p) is not as intuitive as in the typical count model case, whether one is interpreting Poisson or negative binomial coefficients. We do not look at coefficients when we discuss PAR models. Instead, we discuss the long-run multiplier, which involves estimating the effect of a one-standard deviation change in a regressor on the count. The PAR model's estimated effects in the short run and long run differ as a result of its account for changes in covariates over time and their dynamic effects. These long run effects can be compared to effects from other count models and will highlight the differences between standard Poisson or negative binomial estimation techniques and the more appropriate accounting of dynamics offered by PAR models.

Table 2.2: PAR(1) Models, 1898-1932

	<i>Dependent variable:</i>		
	Total Executive Orders		
	(1)	(2)	(3)
Ideological Difference	0.758** (0.363)	0.747** (0.326)	0.405 (0.337)
Divided Government	0.023 (0.094)	0.113 (0.085)	-0.006 (0.085)
Party Switch	0.048 (0.129)	0.118 (0.113)	0.063 (0.108)
Party Support	0.568 (0.669)	0.720 (0.615)	0.424 0.551
War		0.491*** (0.090)	0.513*** (0.088)
$\Delta\%GDP$			-0.316*** 0.070
ρ	0.584 (0.048)	0.523 (0.051)	0.518 (0.047)
Constant	4.889 (0.130)	4.738 (0.371)	4.978 (0.337)
<i>Df</i>	29	28	27
Log Likelihood	-334.895	-322.820	-311.5288
Akaike Inf. Crit.	679.790	657.640	637.0577
<i>Note:</i>	*p<0.1; **p<0.05; ***p<0.01		

The PAR restricted model in column one of Table 2.2 shows that ideological difference is associated with increases in the issuance of non-ceremonial executive orders. This finding runs counter to the typical notion that political resistance from Congress (usually measured, instead, by partisanship) reduces a president's willingness to go unilateral. Other political variables do not have significant effects, however. When we include a war variable, the results in Column 2 show that war is a positive, significant predictor of executive order issuance. Including 1898 as a war year does not affect these results in any way. Finally, in the fully specified model, war and economy are the only significant predictors of change in the mean count of executive orders for the period. These results are consistent with the widely held finding that presidents have greater powers in the context of national crises and war. Once again, most political variables are insignificantly related to executive order issuance.

Table 2.3 shows results from the PEWMA model of the longer series. The low ω value estimated by the PEWMA model indicates significant variance in the mean count of y across time; a value of 1 for ω would indicate no dependence on prior values of the dependent variable and the PEWMA would reduce to a Poisson estimation. Modeling for a more persistent time series, we see that only the coefficient on ideological difference remains significant and in the expected direction. All other coefficients become indistinguishable from zero, including the effect of divided government, arguably the most important variable in studies on the unilateral presidency. Controlling for ideology, the effects of divided government wash out given what seems a more appropriate treatment of the dynamics inherent to executive orders and the unilateral presidency.

In the second PEWMA model, including war as a variable reduces the effect of ideological difference to insignificance just below the .1 level. Divided government, party switch, and party support remain insignificant with the inclusion of a war variable. War is significant and positively related the issuance of executive orders, a finding consistent with most studies suggesting that presidents exercise more power and are afforded more power during wartime. The political variables, however, wash out, suggesting that the strength of partisan or ideo-

logical concerns may not be consistent across time. National conditions may, in fact, be just as or more important as any political considerations.

The third column of Table 2.3 shows the model controlling for changes in the economy over the period. Results support the findings from Column 2 of Table 2.3. War remains a significant, positive predictor of executive order issuance. Of note, however, is the significant and negative effect the economy has on order counts. This suggests that presidents issue more executive orders when the economy has suffered from one year to the next. This model is also consistent with the model in Column 2 in that political variables largely wash out. These findings differ significantly from contemporary studies, which almost universally find significant effects with their various measures of partisanship. The period of this study seems to differ in strong ways. Ideology and partisanship may have played less of a role in the rise of presidential power and the constraint of unilateral behavior than changes in America's national security and the health of America's economy. Consistently across the models we see no effect of changing parties upon the office of the presidency, suggesting that new presidents from new parties are no more likely to issue more orders revoking the policies of their predecessors or establishing their own policy footprints.

In Figure 2.3, I plot shock effects for changes in war status and the economy on presidential issuance of executive orders. The first panel of Figure 2.3 shows the cumulative effect of one year of the United States going to war, holding other variables constant at their appropriate mean, median, or mode. The left-hand panel of Figure 2.3 shows the dynamic effect of the onset of 1 year of war on executive orders issued by the president. The right-hand panel shows the cumulative effect of shock of a one-year 10% decrease in the nation's GDP on the number of executive orders issued by the president in the following years. Each graph in the figure demonstrates the instantaneous impact of the variable followed by its decaying temporal effect.

Table 2.3: PEWMA Model(s), 1853-1932

	<i>Dependent variable:</i>		
	Total Executive Orders		
	(1)	(2)	(3*)
Ideological Difference	-0.646* (0.368)	-0.589 (0.361)	-0.457 0.381
Divided Government	-0.039 (0.094)	0.026 (0.097)	0.034 (0.105)
Party Switch	-0.043 (0.089)	-0.011 (0.088)	-0.049 (0.099)
Party Support	0.244 (0.580)	0.566 (0.596)	0.709 (0.693)
War		0.248** (0.121)	0.237* (0.135)
Δ GDP*			-0.284*** (0.079)
ω	0.143 (0.020)	0.150 (0.022)	0.137 (0.026)
<i>Df</i>	76	75	74
Log Likelihood	-354.034	-351.943	-284.936
Akaike Inf. Crit.	716.082	713.885	581.871
<i>Note:</i>	*p<0.1; **p<0.05; ***p<0.01		

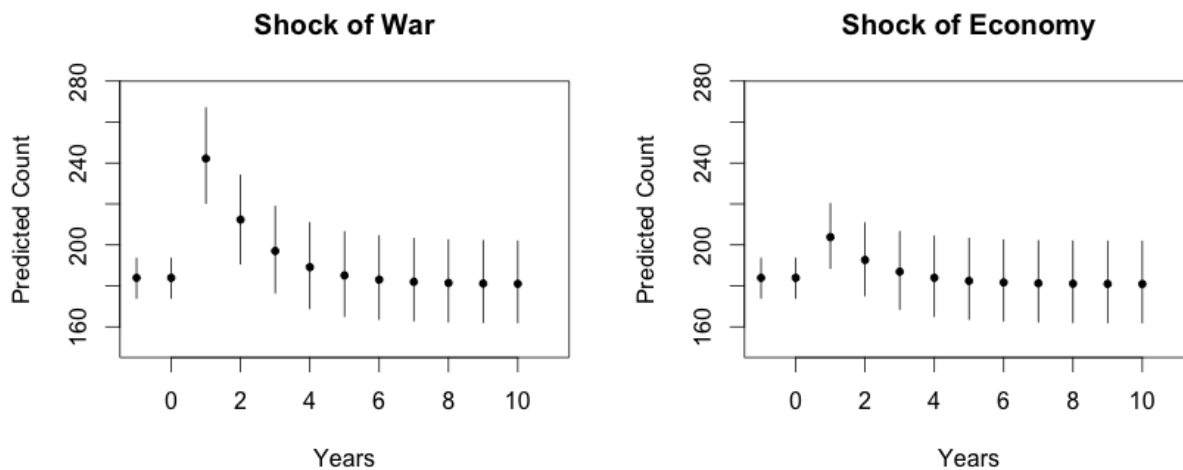


Figure 2.3: Dynamic Effects of War and Economy, PAR Models

2.4 Policy and Partisanship

Previous studies, focusing almost exclusively on the post-FDR era, assert that partisanship plays a key role in constraining unilateral presidential behavior. The results shown in the previous section call this assertion into question, at least as it applies to the *complete* history of the unilateral presidency. Moreover, since the origins of systematic unilateral presidential behavior are the real target of this study, the results suggest that the original constraints upon unilateral presidential behavior were institutional rather than partisan. In this section I examine the results related to partisanship more closely.

Certain subsets of executive orders lend themselves to partisan struggles for policy and power. Take, for example, executive orders that revoke previous orders. In the post-FDR context, it is broadly demonstrated by numerous studies that new presidents revoke key executive orders issued by presidents of the opposing party. Contemporary presidential candidates commonly make promises to repeal bills and to revoke executive orders with

which they disagree. In 2014 Rand Paul was quoted at a New Hampshire event: “The first executive order I would issue would be to repeal all previous executive orders” (*The Hill*, September 12, 2014). While it is likely the quote was given at least partially tongue-in-cheek, Paul’s quote is the logical extension of a contemporary phenomenon: partisans making institutional claims about presidential power.

If the evidence here shows that partisan orders did not occur regularly in the pre-FDR era, then we must ask why. There are at least two potential answers to the question. First, presidents may have refrained from revoking partisan orders as a means of protecting unilateral behavior as a tool of presidential power. Second, and perhaps more likely, presidents in the pre-FDR era may not have issued many executive orders that would be characterized as inherently partisan. A deeper look at the pre-FDR executive orders can help provide some evidence as to whether either of these claims hold merit.

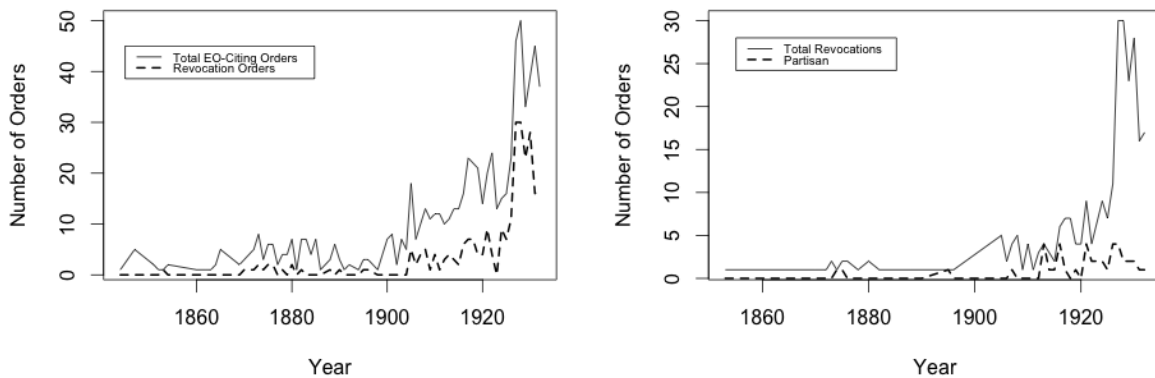


Figure 2.4: Revocation Orders and Partisanship

Of the known pre-FDR executive orders recorded and catalogued by the WPA, 745 executive orders cited previous executive orders directly, which represents just under 10 percent of the entire pre-FDR series. The first known executive order to cite another order was issued in 1844, creating the Fort Barrancas military reserve out of a naval reserve in Florida, which

was still a territory at the time. Of those 745 orders, 264 revoke previous orders, usually in their entirety. Roughly 35% of pre-FDR orders citing other orders did so for the purpose of revoking them. The remaining executive orders that cite other orders involve some form of amendment of the cited order.

In Figure 2.4, I show two plots of the total number of orders across the study that cite and “revoke” other executive orders, respectively. The first plot shows a substantial rise in executive orders that cite other executive orders. Clearly the raw number of revocations rises over time in concert with the rise of overall executive order usage shown in Figure 1.1. Also shown in Figure 2.4 is the subset of revocations that were partisan in nature. I operationalized “partisan executive order” as any order that revoked an order from that president’s opposition party. Defining partisan orders this way captures a numbers of orders that are not inherently partisan, but such a definition biases against my claim that executive orders were not partisan in any systematic fashion in the pre-FDR era.

If revocation executive orders were not partisan in the pre-FDR era, what were they? Largely, it seems, they were a function of the president’s workload and the type of orders that were most commonly issued. Recall that the two dominant categories of executive orders in this era were resource-environment orders and personnel-agency orders. The same can be said of the subset of executive orders that revoked prior orders. One hundred fifty-six revocation orders involved resource and environment policy, 59% of the total revocation orders. Ninety-eight revocation orders involved personnel and agency policy, or about 37% of all revocation orders. These percentages differ from those in the total series, suggesting that revocations were about presidential and executive branch workload, especially as it related to the management of federally owned lands. Revocation orders in the pre-FDR era seem to confirm the results offered by the models presented in Section 2.3. Exploring these revocation orders yields two key takeaway points. First, partisanship was unlikely to be a major constraint upon the unilateral presidency in the pre-FDR era, at least with respect to presidential behavior. Presidents did not systematically revoke orders issued by president

of the opposite party. Another potential explanation for this phenomenon is that executive orders during this era were inherently less partisan. Second, a hefty portion of unilateral presidential behavior seems to have arisen largely as a function of executive branch workload. These results do not call into question the latent power of unilateral presidential actions. Instead, they reveal a story about the systematic rise of unilateral action.

2.5 Conclusion

On October 17, 1905, President Theodore Roosevelt issued Executive Order 362, which authorized the removal of executive branch officials for “inefficiency or incapability without trial, and summary dismissal for misconduct in the presence of the President or department heads.” Such an order had meaning and significance for the execution of policy, if not the kind of significance unilateral presidency scholars have come to know. The unilateral presidency has been reviewed thoroughly as a modern phenomenon, and every study gives at least cursory review to its constitutional foundations. Yet, much of the known unilateral behavior for the roughly 150 years between the American founding and FDR has been neglected by even the most rigorous of modern studies.

In part, this is due to a sense that the sample might insufficiently represent the population of orders at a time when reporting requirements did not exist. The Clifford Lord numbered and unnumbered series together offer a representative sample of unilateral presidential behavior from an oft-ignored period vital to our understanding of both the historical and the contemporary American presidency. I advance the study of the unilateral presidency by examining the pre-FDR period with policy-specific coding as a companion to aggregate analysis.

True systematic examination of the unilateral presidency requires a more complete analysis of the historical use of executive orders. This study moves presidential scholarship in that direction. Previous studies have neglected the unilateral presidency of the pre-FDR era for

missing explanatory variables or data concerns, but these limitations spurn the study of the already-robust unilateral presidency that predated FDR. I provide new policy-coded data on executive orders from 1853 to 1932, advancing the historical study of the unilateral presidency and bypassing the significant orders debate for what I believe to be an equally useful system of understanding unilateral executive orders. My analysis of the evidence suggests some surprising relationships. In a period characterized by many qualitative and historical scholars as one of a rapidly evolving presidency, we find consistent evidence that war and economy have effects on presidential decisions to go unilateral. Perhaps just as important, evidence suggests that institutional power played a role in presidential behavior, given that new presidents of different parties were not likely to issue executive orders to revoke orders of their predecessors.

Between Progressive Era (and Gilded Age) presidents asserting the power of their office more systematically and Congress demonstrating increasing willingness to delegate power in the face of increasingly difficult work, we begin to see at least circumstantial evidence of a systematic shift in the nature of presidential power. To the question of whether presidents took this power or Congress gave it away, this paper leaves answers to future analysis. Nonetheless, it is shown that new presidents of a different party do not issue more orders, contrary to the findings of most contemporary studies. Divided government, meanwhile, played a negligible role in constraining executive order issuance in the pre-FDR era. This raises questions about unilateral presidential behavior in the pre-FDR period and why constraints typical of the post-FDR period may have been absent. I also call into question the notion that partisanship is one of the primary determinants of unilateral presidential behavior, at least in the pre-FDR period. Institutional concerns may have driven executive behavior as much as partisan concerns. These results indicate an institutional accumulation of power resulting either from presidents issuing fewer partisan orders or from presidents less willing to overturn or rewrite the orders of their predecessors.

A great part of the unilateral presidency may have arisen from growth in the job of the president. From the acquisition, expansion, and management of territory to the administration of a growing executive branch forced to respond to broader forces such as war and a dynamic, expanding economy, presidents took action and behaved as the nation required. Some of these actions were the results of delegated powers, others the results of presidents taking power as needed (Howell 2013). The analysis here raises some key questions about the application of findings in the contemporary presidency to the dynamic changes that took place prior to FDR.

The unilateral presidency of the pre-FDR period differed in meaningful ways from the post-FDR period. Institutional power played a key role in presidential behavior alongside partisan and ideological concerns. This differs from most modern studies that emphasize the role of partisanship more heavily. Presidents of the transitional period between the Civil War and FDR may have experienced institutional motivations differently, when the office of the presidency was accumulating power in new ways. Presidents may have acted to protect the growing institutional power of the presidency in ways that occasionally transcended partisanship.

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Chapter 3

Congressional Delegations of Power

On April 16, 2012, a series of hearings began on Capitol Hill investigating a Government Services Administration (GSA) conference in Las Vegas costing roughly \$830,000.¹ The lurid details of the gathering exposed extreme overpayments for services like mind reading and clowning, bicycle supplies, and commemorative coins. Amidst ballooning government deficits, high unemployment, and the momentum of a presidential campaign just underway, the unfolding story of spending and corruption did little to inspire confidence in voters about the effectiveness of federal government. That the GSA was at the center of the scandal was more than a little ironic. Over 100 years prior, inquiring into the inefficiencies of government administration, the 1906 Keep Commission had recommended the establishment of a central supply and services agency, the forerunner to the GSA, for the expressed purpose of *improving* the cost effectiveness of government (Kraines 1970).

The Keep Commission was part of a series of inquiries into the administration of federal government that began in the 1880s. Four commissions investigated administration with the goal of improving bureaucratic efficiency as demand for government services rose in the dynamic post-Civil War years. By the end of the fourth commission in the series—President Taft’s Commission on Economy and Efficiency—a debate both within and between the executive and legislative branches was well underway as to the proper administrative remedy and source in government (Ford 1918). After the massive deficits incurred over the

¹<http://www.cnn.com/2012/04/17/politics/gsa-hearing/>

execution of World War I, the time was ripe for significant administrative and budgetary reform. In this context the Budget and Accounting Act of 1921 was passed, establishing the Bureau of the Budget and affording the president the power to provide an initial budget estimate to Congress.

Members of Congress work tirelessly toward the goal of reelection (Mayhew 1974). To that end we would expect a jealous defense of every political advantage offered by the Constitution that might serve to promote legislators' policy and electoral goals. Through Article I Section 7, Congress enjoys an explicit constitutional advantage in power over the president in making policy through legislation. Moreover, Congress has an especially powerful advantage over the president in its control of the purse strings. Yet, in the 1921 Budget and Accounting Act, Congress furnished the president with the opportunity to initiate the budgetary process, seemingly curtailing the House's exclusive power over appropriations. The puzzle is obvious and invites the following question: what motivated Congress to delegate the first-mover advantage in the budgetary process to the presidency?

The purpose of this chapter is to explore potential motivations for members of Congress (MCs) to delegate budgetary powers to the presidency in the case of the Budget and Accounting Act of 1921. What factors contributed to legislators essentially giving away the first-mover advantage in the budgetary process? The act became a watershed moment in a long process of establishing the modern, institutional presidency (Ragsdale and Theis 1997). I explore the potential effects of Progressive Era electoral reforms on legislators' decision-making in the arena of appropriations and budgeting. I argue that increasing attention was paid to budgeting through the lens of administrative efficiency, which ultimately may have contributed to the adoption of the presidential budget system. Four commissions took place within a 25-year period to investigate administrative practices and inefficiencies. The first two were initiated by legislators, while the last two were initiated by presidents. The research presented here suggests that the federal government's inability to manage the post-Civil War workload, coupled with rising public pressure, may have instigated the series of

inquiries which eventually led to the adoption of the executive budget. As part of this project I have coded twenty years of public petitions made to Congress to gain some insight into the degree of public pressure being leveled against members of Congress. Initial results of the analysis suggest that the reporting of petitions made by citizens, citizen groups, and state legislatures was associated with electoral success during the Progressive Era.

Much of the following analysis relates to the underlying electoral environment leading up to the adoption of the executive budget. A curious aspect of the Budget and Accounting Act of 1921 must be considered: it was a near-unanimous vote (334-3). There is such little variation in the vote as a whole that we cannot estimate a model to predict individual legislator votes with any hope of discovering a meaningful relationship between votes. The final passed version of the Budget and Accounting Act of 1921 was not the first attempt to create a national budgeting system in the United States. I would also argue it is not even the appropriate vote on which to focus. Instead, the vote most deserving of our attention may have come in the previous Congress in 1920. I look specifically to the override vote in June 1920 after Wilson's veto of the budget bill passed that year.

Legislation for the establishment of a national budgeting system had first been passed in the previous Congress, only to be vetoed by President Wilson on 5 June 1920. Wilson vetoed the bill because of a provision allowing Congress to appoint and remove the Assistant Comptroller and Comptroller General. Congress missed a veto override by a mere nine votes in the House. The president's exclusive power to remove executive branch officials would later be upheld by the Supreme Court in *Myers v. United States* (1926), ending a constitutional struggle over removal powers of executive branch officials that began in 1789 when Vice President Adams had to break a tie vote in the Senate over the president's sole authority to remove executive officers. The removal authority was also the focus of Grover Cleveland's book, *The Independence of the Executive*, published posthumously in 1913. President Wilson thus vetoed the 1920 Budget Bill in protection of the executive branch in a long-cycle struggle with Congress over a constitutional power. This does not

change the fact that Congress wished to delegate the budget proposal authority to the president, or that the President would have otherwise willingly accepted it. The budget bill vetoed in 1920—with the notable and important exception related to the comptroller general—is almost exactly the bill that became the Budget and Accounting Act of 1921. I show later how the form of the final passed budget bill, and the conditions of the delegation, were offered somewhat reluctantly. Greater leverage on the broader research question can be gained by studying the 1920 bill and the veto override vote that followed.

What might have induced a congressional delegation of this magnitude? From a rational choice perspective we would expect legislators to undertake a cost-benefit analysis when considering delegating such a power (Epstein and O'Halloran 1999, Kiewit and McCubbins 1991). What were the substantial benefits to delegating, or costs to not delegating, the first move in the appropriations process to the president? Electoral factors are considered as well as the potential effects of institutional changes in Congress. Progressive Era electoral reforms were occurring almost simultaneously with congressional and presidential inquiries into federal administrative inefficiencies. Increasing public pressure was also affecting electoral outcomes and thus, likely, legislative behavior. Each of these factors is considered in the analysis that follows.

3.1 Electoral Reforms and Pressure on Congress

In the late nineteenth century ballot and primary reforms served to atomize the U.S. Congress. State-administered, consolidated, secret ballots wrested significant institutional powers away from parties in the electoral process (Rusk 1970). Where behavior was once driven largely by considerations of party service and patronage, increasingly the electoral connection served individuals candidates more at the expense of parties. Where parties had once maintained tight control over the candidates running for office, the ballots used at the polls, and the physical centers of voting (Bensel 2003), the adoption of the Australian ballot effectively

reduced party control. This allowed for modest increases in split-ticket voting across states, particularly in the North during the Progressive period and depending on the new ballot types adopted (Rusk 1970).

Around the same time of ballot reform, states began introducing measures allowing for the popular election of state and federal party nominees (Ansolabehere et al 2010). Reformers hoped for new levels of competition to replace the false elections provided by party bosses and the regional dominance of individual parties. Direct primaries worked to cut against the dominant influence of partisanship in voter behavior by allowing other forms of political disagreement to work themselves out electorally *within* parties as well as without (Campbell et al 1960, Ansolabehere et al 2010). By the end of World War I about two thirds of all states had instituted mandatory direct primary laws, producing modest but significant increases in electoral competition across many state and federal elections. It is noteworthy, however, that House races were affected less than Senate races. It is also noteworthy that the rise in competitive elections was rather brief. Nevertheless, the period of study here, from the 1880s to 1921, saw very real effects from nomination reforms. Well prior to the adoption of the Budget and Accounting Act, state legislatures across the country were debating the costs and benefits of direct primaries (Aylesworth 1908). Members of Congress, of course, were well aware of the advancing tide of state-level legislation on direct primaries (Ware 2002).

Individual elected officials thus began incurring more of the costs and the benefits, both of which were related to the added electoral restraints resulting from the partial separation from their party shields. Classic reelection-seeking behaviors like advertising, position-taking, and credit-claiming likely grew in importance as individual candidates became the focus of voter attention (Mayhew 1974, Katz and Sala 1996). Parties could no longer control the electoral process itself, nor could they effect complete control over the nomination of their own candidates.

These electoral reforms did not occur in a vacuum. In the post-Civil War period, America experienced incredible economic growth; GDP (in 2005 U.S. Dollars) surged from \$105

billion in 1865 to \$141 billion in 1875, to \$230 billion in 1885, and to \$339 billion in 1895. Railroad lines were built at a breakneck pace, to the extent that too much investment and too many railroad lines helped to invite the Panic of 1893. Westward expansion required the issuance of titles for the settlement of new lands. With so much work to do and so much growth in the American economy, administration of federal government became increasingly difficult. Bureaucratic delay became a common experience. Electoral reforms thus arose in the context of what we might call a growing gap between voter demand and government supply of services. Peering into the breach, members of the federal government began looking for solutions to these administrative shortcomings.

3.2 Budgetary Reform: Competing Commissions, Efficiency, and Pressure

I borrow from another type of evidence in support of the theory here: congressional commissions. In the aftermath of the Civil War the federal government had difficulty keeping apace with its commitments to war pensions, railroad regulations, and the rapid expansion of western settlements (Kraines 1951). Government services were turning sluggish and inefficient, and citizen complaints were increasingly reaching both Congress and the print media. This was the era of the Court of Claims and the rise of private petitions to members of Congress.

As the federal government showed signs of increasing inefficiency in the late nineteenth century, legislative investigations into the executive branch were taken to effect meaningful changes in administration. Lead by a Senator from Missouri with experience in the Appropriations Committee, a Senate inquiry commenced. From 1887 to 1889 the Cockrell Committee explored executive department inefficiencies, assuming all along “accountability of administration to the legislature,” rejecting executive authority over administration (607). The Committee’s ultimate recommendations were not unlike those that might emanate from

a corporate inquiry: lower wages, no pensions, and more efficiency per worker. Agencies and departments were not treated as parts of a hierarchical organization, but rather as separate units with unique mandates.

The years following did not invite confidence that the government was improving in its ability to govern in a rapidly changing world. The financial panic in 1893, increasing government debts, and persistent administrative incompetence invited another legislative inquiry into administrative practices. This time the effort was led by a joint commission called the Dockery-Cockrell Committee in the 53rd Congress. The joint commission investigated the very issues of administration, revenue, and public credit that had compelled the formation of the previous Cockrell Committee. One simple yet effective means of accomplishing these goals was to provide a full historical account of the laws establishing the executive branch and its agencies. According to Kraines (1954, 421), this type of historical, legislative reckoning had never before been performed by either political branch on the executive branch. Can we take some meaning from this finding? I argue two possibilities that make this account meaningful. First, it suggests, at least, that the executive branch had taken on an organizational structure complex enough to invite an account in the first place. Second, such an account underscores the *congressional* desire for administrative reform, reflecting Congress's oft-presumed authority over executive agencies and their appropriation requests in the nineteenth century.

The recommendations flowing from the Dockery-Cockrell Committee reflected those mapped out by the previous Cockrell Committee. But the Dockery-Cockrell Committee did not merely recommend; it produced legislation and proposed that legislation on the floors of the House and Senate, at first, bypassing the customary committee referral process (425). The Dockery-Cockrell Committee uncovered numerous problems related to administrative efficiency and bureaucratic ineptitude. The Post Office, for example, was found suffering rapidly declining revenues (especially in comparison to private express companies), duplicate records too numerous to count, and rising delays in service to the public (Kraines 1954,

424). Public complaints, in turn, mounted proportional to delays of service. In the case of the Post Office, the commission recommended a bill to Congress to remedy many of the ailments aforementioned and circumvented the committee system completely. This flouting of the committee role instigated a robust institutional debate on the Senate floor about the role committees play in the legislative process. The debate became as much a constitutional debate as an institutional one. The bill in the Senate was referred to the Committee on Post Offices and Roads, which reported the bill without amendments (426).

Ultimately the recommendations were substantively similar to those offered by the first Cockrell Committee and made few sweeping changes in the administrative process as it stood. Congress was finished initiating inquiries into administrative practices, but the process of inquiry had just begun. Some ten years after the Dockery-Cockrell Commission, another inquiry into administrative efficiency was initiated (Pinkett 1965, Kraines 1970). This time the effort did not originate in Congress. The Keep Commission, established in 1905 at the behest of President Theodore Roosevelt, investigated the organizational and financial inefficiencies of departments and agencies within the executive branch.

Roosevelt's team uncovered a series of scandals and inefficiencies. The very first scandal involved the Government Printing Office (GPO) and the purchasing of stock in a company that received a no-bid contract for a large-scale government purchase of typesetting machines (Pinket 1965, Kraines 1970). The commission requested the firing of the head of the GPO and President Roosevelt agreed, terminating the Public Printer's employment. The Public Printer responded by challenging the president's authority to fire him, appealing to Congress. The president split the difference on the GPO issue, reasserting his authority to fire the Public Printer while allowing the typesetter contract to go forward. This would be only the first in a series of confrontations between President Roosevelt and Congress as a result of the Keep Commission. The recommendations from the Keep Commission were slightly more aggressive in nature than those of the previous congressional commissions. The key recommendation from the commission, as identified by Theodore Roosevelt himself, was a

clarion call to resist what political scientists today know as *path dependence* (Roosevelt 1913). The principle was written thus: “The existence of any method, standard, custom, or practice, is no reason for its continuance when a better is offered” (232). The Keep Commission’s principles urged improvement of administrative practices in government in the face of deeply entrenched methods, standards, customs, and practices. It is notable that the “accepted way” of doing things in federal government was already receiving critical attention in an era typically identified as lacking many of the trappings associated with the contemporary executive branch (Ragsdale and Theis 1997).

Perhaps most importantly, Roosevelt assembled and initiated the commission without any prior appeal to Congress. Even with Republicans controlling both the House and the Senate, Roosevelt could not muster enough support for Congress to consider the commission’s recommendations. Furthermore, Congress attached a rider to a 1909 appropriations bill specifically in response to Roosevelt’s efforts (Ford 1918). In the future no president would be able to form a commission for the purpose of investigating administration without expressed approval *and* funding from Congress to conduct commission inquiries. It is at least fair to say that Congress did not react favorably to Roosevelt’s efforts to look into administrative efficiency. Efforts for reform had met resistance from within Congress earlier when the customary legislative process had been bypassed. In the case of the Keep Commission, however, the struggle was of the separation-of-powers variety. Rogue investigations of administrative reform without congressional imprimatur would not be tolerated. President Taft would soon revisit the need for administrative reform, adopting a different tack, yet yielding similar results.

Almost immediately after President Taft assumed office he made an appeal to Congress to undertake yet another inquiry into the administrative processes of the federal government. Whether forced by Congress’s previous appropriations rider or simply having learned from Roosevelt’s error, appealing first to Congress earned Taft the congressionally approved and funded Commission on Economy and Efficiency in 1910. The commission’s appointees

and charge were similar to those of the Keep Commission and, to a lesser extent, to the prior congressional commissions. President Taft's determination to change how budget estimates were submitted (centrally in one budget through the president) earned few friends in Congress (Glenn 1958). By offering an executive-organized and executive-initiated budget which Congress could and did reject, President Taft built on Roosevelt's executive initiative in the control over executive administration and gave oxygen to the idea of the president as first mover in the budgeting process. The series of administrative reform commissions began in the 1880s with a simple account of what jobs were being executed inefficiently, where the money was going, and who was responsible. By 1910 the concept of administrative reform had snowballed, yielding constitutional arguments within Congress and separation of powers arguments between the political branches.

Taft's commission both crystallized the notion of an executive-led budget proposal and raised the stakes for the deficit-spending blame game. In June of 1913, Appropriations Committee Chair John Fitzgerald (D-NY) made a fairly protracted speech on the House floor connecting the history of appropriations changes in the House to the current debate on establishing a budget system (Congressional Record, June 24, 1913). Fitzgerald's proposal was to reconsolidate appropriations in the Appropriations Committee, taking back authority from the eight committees that were preparing independent appropriations estimates and bills for consideration. Fitzgerald outlined how the current appropriations problems were as much the fault of the executive branch as the eight separate committees receiving budget estimates, claiming that it had been a "continual struggle on the part of Congress to compel the executive departments to furnish the necessary data to enable the Congress to make proper appropriations" (Congressional Record, June 24, 1913, 2156). The Book of Estimates from the executive departments was an unwieldy document, difficult for any Treasury Secretary to either edit or endorse. Meanwhile, Fitzgerald dusted off quotes from numerous members of Congress on the dangers of dividing the labor of appropriations. Fitzgerald's proposal did not succeed in the House, and it was the last time that a proposal was made to

solve the spending puzzle through a reorganization of House committees and a consolidation of spending authority back into the Appropriations committee. In the next set of proposals House members would try to give away budget proposal authority on their own terms.

The budget bill that eventually reached President Wilson's desk in 1920 did retain an important degree of political control for Congress; the comptroller general and the assistant comptroller general were to be removable by Congress. Wilson promptly vetoed the bill, promising to sign the bill if the appointment and removal provisions on the comptroller and assistant comptroller were removed. Congress moved to the override vote on the 1920 bill and narrowly failed to override President Wilson's veto. Members of Congress were then faced with some important decisions. Reorganizing House committees in order to fix the appropriations process had already proven to be a futile effort. Delegating authority to the president on Congress's terms was a separation of powers struggle that Congress seemed destined to lose. The spending problems were destined to continue, and Congress had no one else to take the blame. The next move was instructive of the motivations of *some* members of Congress. The Chair of the Appropriations Committee in 1920, James Good of Iowa, fashioned an ingenious, if doomed, proposal in the aftermath of the veto override failure. Good proposed the identical bill with one exception: the *Supreme Court* would have the power to appoint and remove the comptroller general and assistant comptroller general. After a lengthy discussion of the questionable constitutional logic of this notion, the proposal was tabled, never to be heard from again.

Congress was unable to solve the budget problem with a committee-based solution or a delegation on its own terms, and it was a short walk from Taft's Commission recommendations to the Budget and Accounting Act signed in 1921. International events and American involvement in World War I tabled most concerns over budgetary efficiency, but by the end of the war budgets were more concerning than before the war ever started. It seems relatively clear from historical evidence that at the time of the passing of the Budget and Accounting Act the science of efficient government budgeting was a high priority both for President

Harding and for those in Congress supporting the measure. On 6 May 1921 the *New York Times* quoted bill sponsor James Good (R-IA): “The kind of men the President wants are those who have been making a study of state budgets and of national expenditures—not men who have been able to control a ward or a county or a state politically, but men who are students of economics.” By December of 1921, as the Budget Act had passed and the BOB had been in operation for five months, there would be little question as to the posture of the president regarding his newly stamped budgetary authority. From 6 December 1921 the *New York Times* quotes the first Bureau of the Budget (BOB) Director Charles Dawes: “It is to be expected that since the preliminary estimates have been made under pressure by the Executive for proper retrenchment, it will not be necessary, as heretofore, for Congress to make radical cuts upon the estimates of the budget with any uncertainty as to what will be the result as it affects efficiency. The President of the United States, when he sends the budget to Congress, is presumed to send it with all the reductions in expenditures which can be effected without undue impairment of governmental business processes.”

3.3 Congressional Delegation of Powers

To the extent that passed bills almost always require the spending of money, virtually all pieces of legislation affect governmental budgets. Thus, providing the president and his new Bureau of the Budget with the first-mover advantage in budgeting also provided the president with a tool to influence other legislation that may not even fall into the category of appropriations. The budgetary powers held by Congress should have been one of the last to have been handed off to the president, unless some electoral advantages were perceived. In the language of principle-agent theory, delegation yields both costs and benefits that are particularly thorny for a principal with internally divided loyalties (Kiewit and McCubbins 1991). Complicating an analysis of the Budget Act is the possibility that members of

Congress knew that the BOB would serve not just the president but also the presidency as a type of neutral pursuit of the public good (169). Moreover, the cost-benefit analysis of delegation depends on some understanding of what exactly is being delegated.

There is some scholarly debate about exactly what role the president had played in appropriations *prior* to the adoption of the Budget Act of 1921. Fisher (1975) and Kiewet and McCubbins (1991) assert that the presidential role in the budgeting process has been understated. A more active president on the budgetary front would render the Budget and Accounting Act in a substantially different light. Moreover, there were partisan considerations of policy. Republicans largely adopted a platform of fiscal austerity and, prior to the establishment of the permanent income tax in the Sixteenth Amendment, used high tariffs as a means of raising revenue. The account offered by Kiewet and McCubbins, however, does not account for the *origin* of the administrative reform movement in the Senate, which was begun by a Democrat, Francis Cockrell. Kiewet and McCubbins suggest that the structure of new budgetary reforms would not limit Congress's ability to affect the process at the early stages of the game, if only because it would be almost inconceivable to stop the flow of communication between MCs and the appropriate bureaucratic agency.

Stewart (1988, 1989) explains the process of budgetary reform in the language of "fragmentation" and "centralization." By the time we reach the 1880s, legislators generally divided into those that electorally favored or belonged to specialized policy committees and those that served on the "control" committees whose interests were to centrally coordinate and reduce spending. Policy committees support "fragmentation," the subdivision of the broader budgets increase of their own budgets and, without central authority limiting spending, lead to a continuous increase in aggregate spending. Stewart's theory does seem to support the origin of administrative inquiries into administration in the 1880s; Francis Cockrell was a member of the Appropriations Committee. It does not adequately explain how that inquiry (a) would transition from legislative to executive authority in the budgetary arena, or (b) why a near consensus was reached by 1921 on the need for budgetary reform. Centraliza-

tion, however, is perhaps the key theme in the House debates over the need for a budgeting system that improves economy and efficiency in the operation of the federal government. It certainly is the theme adopted in the two presidential committees and the impetus for Taft's recommendation that the budget process begins with coordination of the executive agencies specifically spearheaded by the President of the United States.

TABLE 3.1: U.S. GOVERNMENT, 58TH-67TH CONGRESSES

Congress	President	House	House %	Senate	Senate %
57th ('01-'03)	R	R	56.0	R	61.6
58th ('03-'05)	R	R	53.6	R	61.1
59th ('05-'07)	R	R	67.1	R	65.6
60th ('07-'09)	R	R	57.0	R	67.8
61st ('09-'11)	R	R	56.0	R	65.2
62nd ('11-'13)	R	D	58.4	R	52.7
63rd ('13-'15)	D	D	66.9	D	53.3
64th ('15-'17)	D	D	52.9	D	58.3
65th ('17-'19)	D	<i>D</i>	49.1	D	58.9
66th ('19-'21)	D	R	55.2	R	51.6
67th ('21-'23)	R	R	69.4	R	61.5

Epstein and O'Halloran (1999) discuss the broader outlines of congressional delegation outside the confines of the budgetary process. Though their analysis is conducted in a time period in which the delegation of study here is already a *fait accompli*, some of the findings should prove useful for analysis, if only to test the robustness of their findings. Looking at Table 3.1 we see that the Taft Commission and the Budget Act were both undertaken during periods of united government, as Epstein and O'Halloran would have predicted. Meanwhile, a version of the budget bill presented to President Wilson in 1920 was vetoed as unconstitutional because of its assertion of *congressional* power to remove presidentially appointed officials in the new budget bureau. The failed bill and the veto occurred under divided government, which also fits with the Epstein and O'Halloran model. All but three no votes in the 1920 Budget Bill were Democrats. This might suggest some solidarity with a Democratic president. The Congressional Record does not seem to reflect this, however. Much of the

debate in advance of the 1920 bill centers on how much power the president had prior to the vote and how much power the president had in coordinating executive agency requests. Most House members who spoke on the floor ahead of the vote explained that the president had, in fact, very little authority to coordinate budget requests under the present system. The conversation, instead, was between the Secretary of the Treasury, various executive agencies, the Speaker of the House, and the relevant House committees. Prima facie the 1920 Budget Bill seems a thoroughly partisan vote. Did the minority party simply vote in defense of President Wilson and against the congressional check on the president's appointment and removal powers? This is surely possible, but deserves further inquiry. Some Democrats did cross over to vote in favor of overriding Wilson's veto.

3.4 Electoral Motivations

The veto override vote will reveal which members of Congress were especially motivated to pass a budget bill, but it is not the whole story. Underlying economic and political conditions should have structured the decision-making of members of Congress if spending is truly a primary power of Congress. The Progressive Era ushered in profound economic and political changes, but which of those changes may have signaled an increase in the willingness of members of Congress to delegate authority to the president? The transition from jealously guarding Congress's spending authority to giving the president a fairly clean budget proposal authority did not happen overnight. It began, in fact, with a separation of powers struggle over which branch could even investigate government administrative efficiency. I expect to find partisan motivations for overriding President Wilson's veto; it should be largely Republicans who vote to override the president's veto. In addition there may be some members of Congress who are determined to get the 1920 version of the budget bill passed because they no longer want to carry the blame for more frequent ballooning deficits and

profligate spending. I suggest that, given the history behind the politics of spending in the House, members of the Appropriations Committee might carry extra motivation to get the veto override passed, given their prior failures to reconsolidate the appropriations process into one committee.

The Progressive Era brought an incredible transformation to the American political landscape. Technology fueled rapid advances in media, manufacturing, transportation, medicine, and warfare. Political innovations also peppered the period; ballot and nomination reforms and the adoption of both the Sixteenth and Seventeenth Amendments signaled the transition toward a political system more responsive to the electorate. All of these elements must be considered in a complete study of the factors contributing to the passage of the Budget and Accounting Act of 1921. For the underlying electoral environment I will focus largely on broader political and economic conditions, along with typical controls for congressional elections across time (Jacobson and Carson 2016).

3.5 Data and Methods

The data used for the following analysis come largely from Jacobson and Carson (2016). The outcome variable for the electoral models is the *Democratic share* of the two-party vote. *Quality advantage* refers to whether the candidate who won the office for that Congress had an advantage over her opponent in having previously held elective office; this variable is coded as 1 for a Democratic quality advantage, a 0 for no advantage, and a -1 for a Republican quality advantage. *Unity score* represents the percentage of votes for which an MC voted with her party on a unity vote. *Lagged Vote Share* is the lagged outcome of the output variable; this means, by construction, that every member of Congress analyzed in the electoral models is an incumbent. This theoretically makes sense, given that the point of the analysis is to assess the rewards and punishments of members of Congress and

their parties once they enter Congress. *Government deficit* represents the net difference in receipts and outlays for the federal government during the time period; the data come from the *Historical Statistics of the United States, 1789-1945*. *GDP Change in Percent* represents the estimated change in percent of GDP per capita from the previous year. This is a period when a transition is taking place in power, and it is still possible that Congress and not the President is primarily taking blame or credit for the state of the economy. *Petitions* are new data coded for this project; they are petitions reported by members of Congress on the House floor. These petitions come from one of three sources: individual citizens, groups and societies, and state legislatures. In this analysis all three categories are treated as one group. This, of course, may or may not be a limitation for the analysis.

The other analysis is a multilevel logit model on the 1920 override vote after President Wilson vetoed that version of the budget bill. First, we have a bill offered under the previous president that was vetoed. Almost identical to the act later passed under President Harding, the previous form differed only in a provision of dismissing politically appointed heads of the new budget organization. This difference induces a presidential veto and seems an explicitly interbranch struggle in nature under divided government. The analysis here is of the veto override vote, which should get at both partisan considerations and any heightened sensitivities that certain MCs might exhibit given their roles within the House. Certain committee members might be compelled to vote yes on the veto override, such as those members on the Appropriations Committee.

I have estimated a model to get at the basic factors motivating the House override vote on the 1920 Budget Bill. Partisanship, ideology, and seat safety are considered. Based on the history and theory provided, I anticipate that percent of the two-party vote will impact on whether a member of Congress voted for the 1920 Budget Bill. I control for the possibility that ideology influenced the decision of a member of Congress to vote for the new national budget system and for the party identification of the MC. The first model's variables represent the party, ideology, unity score, and two-party vote share of the House member, as well as

whether the MC was on the Appropriations Committee. The dependent variable is a simple binary coded 1 if an individual member of the House voted for the 1920 veto override. Party is a simple binary variable, with 1 representing Republican and 0 representing Democrat. *Ideology* is the first-dimension DW-NOMINATE score of the MC, and *Vote Margin* is the congressman's size of victory in the two-party vote in the congressional elections prior to the 66th Congress. *Presidential Vote* is the Democratic presidential vote in the district, meant to serve as a proxy for the underlying ideology of the district.

The results of the veto override model are reported in Table 3.2; the model includes random effects for both state and district.² The results of the veto override model, shown in Table 3.2, are telling. First, partisanship and ideology show an association of Republicans and conservatives with voting yay on the veto override. Second, and perhaps more telling, membership on the Appropriations Committee has a positive and significant association with voting yay on the veto override. This result is robust to a number of different specifications, including the addition of other committee memberships that might have compelled a yay or nay vote from a committee member.

It may be the case that registering a vote for a national budgeting system was seen as an important public vote for those especially sensitive to their electoral fortunes. Both party and vote share are insignificant. This indicates that a Republican was no more likely to vote for the bill than a Democrat (which simple descriptive statistics would demonstrate), and that a member's share of the two-party vote had little direct influence on the likelihood they were to vote for the bill. In some ways this result seems counterintuitive; electoral safety increased the likelihood of a vote for the bill. This may be an artifact of key variables still missing, however. Temporal and spatial relationships related to new balloting rules and direct primaries may have affected how sensitive members of Congress were to rising public pressure. Members of Congress more experienced in campaigning and winning elections after

²Three third-party candidates (one Union Labor member, one Prohibitionist, and one Independent Republican) were dropped from the model so as to render the party variable a simple binary. All three members abstained from the vote and dropping the observations did not affect the model results when abstentions were included.

Table 3.2: Multilevel Logit, 1920 Budget Veto Override Vote

	<i>Dependent variable:</i>	
	Override Veto Vote	
	(1)	(2)
Vote Margin	-0.014 (0.022)	-0.013 (0.023)
Party	0.025*** (0.004)	
Ideology		3.412*** (0.568)
Appropriations Committee	1.073* (0.581)	1.176* (0.610)
Presidential Vote	0.018 (0.018)	0.027 (0.019)
Unity Score	-0.032 (0.021)	-0.026 (0.021)
Constant	-2.541 (1.938)	0.106 (1.884)
Observations	280	280
Log Likelihood	-158.323	-155.923
Akaike Inf. Crit.	330.645	325.847
Bayesian Inf. Crit.	356.089	351.290

Note: *p<0.1; **p<0.05; ***p<0.01

Table 3.3: Electoral Models, 1880-1920

	<i>Dependent variable:</i>
	Democratic Vote Share
Quality Advantage	4.978*** (0.179)
Unity Score	-0.040*** (0.007)
Lagged Vote Share	0.389*** (0.011)
Gov't Deficit	0.0002*** (0.0001)
GDP $\Delta\%$	0.002*** (0.0003)
Constant	34.726*** (0.883)
<i>Between</i> Variance	30.07 (5.483)
<i>Within</i> Variance	65.11 (8.069)
Observations	6,344
Log Likelihood	-22,695.770
Akaike Inf. Crit.	45,407.550
Bayesian Inf. Crit.	45,461.590
<i>Note:</i>	*p<0.1; **p<0.05; ***p<0.01

Table 3.4: Electoral Models With Petitions, 1900-1920

	<i>Dependent variable:</i>
	Democratic Vote Share
Quality Advantage	5.075*** (0.268)
Unity Score	-0.023* (0.013)
Lagged Vote Share	0.606*** (0.016)
Gov't Deficit	0.0002*** (0.0001)
GDP $\Delta\%$	0.001*** (0.0004)
Petitions	-0.403*** (0.150)
Constant	22.106*** (1.383)
<i>Between</i> Variance	30.07 (5.483)
<i>Within</i> Variance	72.780 (8.531)
Observations	2,431
Log Likelihood	-8,682.264
Akaike Inf. Crit.	17,382.530
Bayesian Inf. Crit.	17,434.690

Note: *p<0.1; **p<0.05; ***p<0.01

reforms may have seen further electoral advantages in establishing a national budget system. Meanwhile, a more reasonable proxy of public pressure might help to pinpoint the temporal and spatial components of public pressure, as well as its intensity.

Tables 3.3 and 3.4 show estimations of electoral models including measures for economic conditions, government deficits, and public pressure through petitions. Random effects are reported. Currently the data on public petitions are only available from 1900, and so they are included in the random effects model reported in Table 3.4. Effects are all largely in expected directions. As expected, the quality advantage of having held previous office persists throughout this period, consistent with the findings of Carson and Roberts (2013) and Jacobson and Carson (2016). Too high of a unity score is punished in electoral returns as well, consistent with previous studies. In both models, deficit spending and improvements in the economy are associated with improved vote shares for Democrats. This could be the result of at least two factors. First, a number of years during Republican control of Congress experience volatile economic swings. Second, World War I occurs partially under Democratic control of Congress and the presidency, and those years may be outliers in deficit spending and economic growth. Finally, petitions are negatively associated with Democratic vote returns. The flip side of that result is that Republicans seem to have benefited during the period from petitions, and given that they dominate the twenty-year period, it could be that public pressure, and the Republican party's ability to respond to that pressure, produced electoral gains for the GOP during the period.

3.6 Conclusion and Discussion

By the time that committee restructuring was shown to be out of the question in 1913, and by the time deficit spending reached new records under the pressures of World War I, there was little question that some type of budget system would have to be passed. We

should not be surprised that party had an effect on the 1920 veto override vote; it was the last successful attempt to give the president budget proposal authority on terms Congress could dictate. The presidency switched parties in 1920, a presidential election year in which the incumbent Democrat, Woodrow Wilson, chose not to run. Republicans gained seats in Congress and made up the majority of those who voted yay on the veto override. It is possible that institutional protection was also part of the story in this rather unique episode of congressional delegation. Members of Congress may, in part, have recognized the inability to manage the administration of the executive branch and the broader functions of federal government in a context of debt and political crises both foreign and domestic. In an era when public debt was more often an anomaly of wartime than an accepted fact of governance, members of Congress were witnessing an erosion not just of public credit but of the very ability to effectively govern in a rapidly changing world.

The story unfolding in the congressional delegation of budgetary initiation seems to be one of public pressure. The pressures of postwar governance coupled with the rapid advance of transportation and manufacturing may have widened the gap between expectations and abilities with respect to the federal government. This disjoint, in turn, translated into public consternation. I measure public pressure through petitions reported by members of Congress. Given that the Progressive Era was one of great electoral reforms in which individual congressmen could no longer hide behind the party shield so easily, one might expect public pressure to produce legislative responses to concerns over administrative inefficiency. Such concerns were represented by the initial Cockrell and Dockery-Cockrell Committees, which signaled Congress's sensitivity to the administrative issues faced by the federal government and Congress's asserted authority in addressing the issue. After the 1890s we see a transition to presidential commissions on the same topic, demonstrating an advancing struggle between Congress and the presidency over control in executive administration.

Public pressure is a key ingredient to this story, as I have shown. One point that rises from the first cut of this research is that public pressure on the federal government may have

revealed itself in a few different forms. The form examined in this chapter, public petitions written to members of Congress, may have helped instigate the initial legislative attempts to explore administrative efficiencies and the need for both administrative and budgetary reform. Meanwhile, the effects of ballot and party nomination reforms, which did not reach systemic levels until around the time of the Budget and Accounting Act, may have provided the impetus for MCs to make real administrative change that (a) made an earnest attempt to alleviate previous administrative difficulties and (b) at least symbolically shifted the burden of managing an increasingly difficult budget onto the president, thus reducing the costs to legislators in the “budget game” at a time when the game was dominated by Congress. Finally, pressure was demonstrated through the report of petitions on the floors of both the House and Senate. These petitions came from individual citizens, groups and societies, and even state governments. In future iterations of this research I hope to investigate the differences between the origins of the petitions; it seems plausible, at least, that petitions from citizens or groups and societies would differ in both quality and effect from petitions offered by state governments.

Responsiveness to constituents may have motivated two separate stages of legislative action on administration and budgeting, with executive initiative also playing a substantial role. Kiewet and McCubbins (1991) may be right; the lack of presidential initiative in budgets prior to 1921 may have been misrepresented. If we accept this view as a premise to our study then the Budget Act takes on a subtler meaning. Rather than a point of clear historical divergence, the act may represent one of a series of variations across the history of presidential-congressional dynamics in the budgeting process. I would differ with Kiewet and McCubbins in one respect. Whereas *de facto* expressions of presidential involvement in the budgetary power are substantively different from *de jure*, statutory authority as the first mover gave the president a real advantage to affect the budget and economy of the federal government. This, at least, is what supportive members of Congress seemed to believe when debating on the house floor. The idea of budget centralization seemed to point directly to

the president as a way to promote economy and curb debt. Simultaneously, it seemed to be a way to shift blame from Congress and the Appropriations Committee and toward the president at a time when growing deficit spending was a fairly new and dangerous political phenomenon. This was said on the House floor on May 29, 1920, by James Good (R-IA), Chair of the Appropriations Committee and the House bill manager:

Under the present law I do not care how economical the President may be, our laws are so archaic that the President, acting as he is compelled to act under the present statutes, cannot enforce that degree of economy which the people of the United States have a right to expect.

It is a limitation of this research that MCs may have strategically delegated nominal first-mover budgetary power to the president while having some understanding that the power may or may not amount to much when the final appropriation votes are tallied. In this sense legislators may have delegated power convinced they were only awarding the president with the feeling of power, something to shift blame without attendant authority. Members of Congress cannot, after all, delegate the acting of voting itself to the president, and they are surely aware of this. Nonetheless, we can also reasonably assume that legislators knew the gravity of awarding *statutory* authority to the president in what was an exclusive high power of the House of Representatives. And given the reactions to the passage of the bill and the powers it assigned, there can be little doubt about the perceived transition that took place relative to the budgetary powers of the president. It remains to be seen, and I intend to discover, what the true, time-corrected causes of this instant of congressional delegation will be. What this research does for now, though, is expose some of the major steps that seem to have been taken along the road to the passage of the Budget and Accounting Act of 1921, as well as examine the electoral trends related to national conditions and public pressure that may have fed into congressional decision-making.

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Chapter 4

Judicial Discretion of Presidential Power

The most important factor in getting right the spirit of my administration...was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. – Theodore Roosevelt, *Autobiography*, 1913

The true view of the executive functions is, as I conceive it, that the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as necessary and proper to its exercise. Such specific grant must be either in the federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. – William H. Taft, *Our Chief Magistrate and His Powers*, 1916

Theodore Roosevelt and William H. Taft, successive presidents who served together under one party banner, wrangled publicly and acrimoniously over their views on the nature and scope of presidential power. The vigorous debate printed during the second decade of the 1900s was not limited to philosophical barbs traded between Presidents Taft and Roosevelt, though. Presidents Wilson and Cleveland—posthumously, in the case of Cleveland—published works on the nature and powers of the American presidency during the same four-year period (Cleveland 1913; Wilson 1913). Four presidents, three past and one future, felt compelled to comment on the powers entrusted to the office they occupied. This

presidential dialogue examined the limits and evolution of presidential power well prior to FDR's juggernaut presidency. That such a discourse took place spoke to the opacity with which the Constitution defined the office of the presidency and the variation with which presidents, Congresses, and courts have treated the office. Each president inherited a presidency amended not by the Constitution, but by the practical experience of politics. Those experiences—both in domestic and foreign affairs—helped the presidency to evolve, and the federal courts rendered judgments that defined acceptable, constitutional changes in presidential power. In this paper I focus on the federal judiciary's contribution to the evolution of the unilateral presidency.

Since at least 1871 the federal courts have explicitly recognized the legal authority of unilateral presidential action (*Armstrong v. United States* 1871). The history of federal court decisions on the unilateral presidency is scant, in no small part because of the deference afforded by the Supreme Court to the other branches of federal government over “political questions.” Often, cases that refer to unilateral presidential directives do not deal directly with their constitutionality (Dodds 2013). In the cases that do, however, a few common themes connect the courts' opinions. First, presidents have authority to issue unilateral directives that have the full force of law. Second, those directives are temporary if challenged by Congress, which is a rare condition across history. Third, a unilateral directive may be unconstitutional if Congress had considered or constrained the policy in question prior to the president issuing the directive. Fourth, many of these cases are conditional on context or policy category. Fifth, for much, but not all, of American history congressional delegations of power to the president have been uncontroversial. These guidelines, as developed by case history, form the beginning of a structure for what I call the judicial discretion of a president's unilateral powers, a key determinant of the boundaries of lawful unilateral presidential behavior.

4.1 A Theory of Judicial Discretion

Just as the Supreme Court was establishing its authority to determine the constitutionality of a federal congressional statute in *Marbury v. Madison* (1803), it was also making first judgments on the power of presidents to make policy on their own in *The Flying Fish Case* (1804). The power of the Supreme Court to evaluate the constitutional nature of congressional and presidential actions was not constitutional in literal terms, but was instead established by practice. Early separation of powers controversies, like George Washington's Neutrality Proclamation and the subsequent Neutrality Act, set precedents where political conflicts were left largely to the political arena for resolution. I examine the Court's rulings that affect the evolution of presidential power prior to FDR as they relate to both congressional delegations and presidential takings of power. Thus, judicial "discretion" of unilateral presidential power in a given policy arena is a dynamic evaluation of congressional laws, executive behaviors, and prior judicial determinations.

The federal courts have a unique capacity to cement expansions and contractions of presidential power through the interpretation of case law, which in a sense might be understood as a "last mover" advantage on controversies over presidential power and policy making. A separation of powers controversy over policy must first exist, meaning that some combination of congressional or presidential action must precede federal judicial discretion. A preponderance of unilateral presidential directives never produced a controversy that rose to the level of a federal court case, so many of the cases discussed in this chapter might either be viewed as exceptional or as a kind of class action case involving a certain type of unilateral directive. In other words, the review of federal court cases involving unilateral presidential directives involves an inherent selection bias. We might consider directives related to national security to be of the former variety and directives more administrative in nature to be of the latter. Distilling meaning from federal court cases about the judicial discretion afforded the presidency is difficult, and it is certainly not definitive in any measurable sense. Each case or set of cases represents a touchstone for what is true or untrue about judicial discretion at a

point in time. I argue, generally, that there are more similarities than differences in many of the federal cases that are discussed in this chapter.

Unilateral presidential actions are limited in three institutional ways. First, presidents limit executive power and unilateral action through their own behavior. Self-imposed limits in presidential action involve a political calculus inherent to the office; presidents do not want to be refuted or judged by their political peers or the public. Yet, presidents also want to maximize the power they have, given the obstacles to policymaking that they encounter. Presidents in the modern era commonly revoke executive orders from prior presidents, either as a function of partisanship or because political conditions rendered the original orders obsolete. Prior orders are also commonly amended, especially as they relate to land policy or personnel and agency issues. These are the limits to executive orders within the executive branch itself and are not the focus of this chapter.

Congress, in turn, expands or limits unilateral presidential behavior through its legislative power. The will of Congress is paramount in the making of law through Article I Section 8 of the Constitution, and unilateral presidential action has the capacity to confront the legislative primacy of Congress. Congress, though, has the capacity to limit a president's unilateral actions. Historically, congressional limits on unilateral presidential behavior focus on constraints contained within congressional delegations of power. Congressional delegation has the capacity to both expand and constrain unilateral presidential authority in a given policy arena. As I show throughout this chapter, congressional delegations of power are fairly uncontroversial for much of American history. It is not until the early twentieth century that the question of proper delegations of power even reaches the federal courts. This suggests that something about the political environment changed to the extent that Congress was willing to delegate more powers of a different type and the federal courts were forced to address the constitutionality of those delegations.

Finally, it is the job of the federal courts to determine constitutional questions with respect to these two sources of presidential power, and it is the purpose of this chapter to

trace the outlines of limits to presidential power as determined by the courts. The primary difficulty of such an analysis is the rarity of cases. Instead, I restrict the scope of this analysis to the most important cases and identify the direction of the shifts in discretion afforded presidents by the courts. I look for common elements in cases across time that might help to identify consistent themes in judicial discretion on presidential power. Judicial discretion, I argue, has the capacity to constrain both Congress and presidents relative to how they both contribute to unilateral presidential powers.

The period of study for this analysis is the pre-FDR era, which means I consider the evolution of judicial discretion of presidential power prior to the Federal Register Act of 1935, the Administrative Procedure Act of 1945, and federal case law of the post-FDR era. I discuss *Youngstown Sheet & Tube Company v. Sawyer* (1952), but only as a crystallization of post-FDR case law and to draw some comparisons between the pre and post-FDR periods. A study of this kind asks both the author and the reader to temporarily forget most of the evolution of separation of powers conflicts and federal case law after FDR's administration, to erase decades of history in the mind as if they had not yet happened, unlearning lessons of the post-FDR era. I intend to paint a picture of how judicial discretion of presidential power evolved from the beginning of the republic to the election of FDR. The target of this analysis is the discretion the Supreme Court afforded presidents in unilateral behavior when Franklin Roosevelt inherited the presidency.

What role have the courts played in expanding presidential power over the life of the republic? Scholars broadly accept the notion that the American presidency evolved from the founding period to the FDR era and that the accumulation of power in the presidency has occurred over time (Howell 2003). One elusive factor that has likely contributed to the rise of the modern presidency is the degree of discretion the courts have afforded to both Congress and the president in the giving and taking of powers, respectively. On these matters the Supreme Court has often turned a deaf ear, especially early in the republic, claiming conflicts to be "political questions" beyond the court's jurisdiction. In the following passages

I attempt to weave the important cases together to track the two paths of power accruing to the presidency and how the Supreme Court has crafted their constitutional boundaries.

Judicial discretion of presidential power is not static. It evolves, but I would argue mostly with consistency. As federal court cases on unilateral presidential power unfold over time, we find many consistencies in the court's opinions, perhaps more consistencies than differences. There is, in a sense, some irony that the development of federal court opinions on presidential power changes, like a glacier, almost imperceptibly over time.

To specify the composition of judicial discretion of presidential power, some simplifying assumptions must be made. I assume that public opinion does not feed directly into judicial decision making on presidential power. The period of study—from the founding period to the election of FDR—includes a hefty portion of time during which “public opinion” is extremely difficult to characterize. Congress was also largely considered the primary branch of government until the late nineteenth or early twentieth century and received most of the news coverage related to federal government in non-presidential election years (Kernell and Jacobson 1987). This is not to say that public opinion did not feed into notions of presidential power, even in the pre-FDR period. Instead, I make the assumption that public opinion informed both congressional and presidential behavior directly and that the best heuristic for public evaluations of both Congress and presidents is electoral outcomes. Essentially I argue that public opinion is endogenous to both congressional and presidential behavior. Public opinion is assumed to not feed directly into the decisions discussed here.

I treat the case history chronologically, mapping the evolution of U.S. court decisions relating to unilateral presidential actions, covering all manners of presidential behavior not previously authorized by Congress, whether they are considered extensions of legislative behavior or unilateral executive behavior. In the first section I discuss the rather sparse evolution of court opinion from ratification to the years prior to the Civil War. In the second section I discuss the Civil War years and their particular impact on court opinion relative to presidential Power. In the third section I discuss decisions from the post-Civil War years to

the decision in *Youngstown*. The section demarcations were chosen subjectively according to the availability of cases pertaining to the subject of presidential power.

4.2 Catching a Flying Fish: Early Silence in Executive Discretion

Few enumerated constitutional powers belong to the president; Article II is scant and ambiguous to boot. In fact, one of the president's clearest enumerated powers, the veto power, is tucked into the legislative process of Article I as the "Presentment Clause." Article II, meanwhile, paints the executive power in the broadest of strokes, where "the executive Power" is "vested in a President of the United States" and the "Take Care" clause asks the president to ensure the laws are "faithfully executed." Judges, lawyers, and scholars have spilled oceans of ink to discern the true meaning of these constitutional passages. The fact of the matter is that much of the debate on the presidency during the Constitutional Convention had less to do with the specific powers of the president and more with the structure of the office, the method of election, and the appropriate length of term (Farrand 2000). Meanwhile, from these clauses the American presidency has accumulated powers through delegations and takings. In some combination these actions have materialized a series of *implied* and *inherent* powers expanding the boundaries of executive power extensively. To understand the genesis of this accumulation of presidential powers, we must begin with a brief treatment on the Constitutional Convention and the earliest presidential administrations.

A fair portion of the First Congress was spent establishing the federal Court system, so it should come as no surprise that the Supreme Court remained silent for years on issues relating to congressional delegation and executive power. The Court suffered institutional weakness in the early years of the republic, unsure of its constitutional footing and its practical role in the new American republic. To wit, John Jay saw fit to decline an 1800 reappointment

to his position of Chief Justice on account of the Court's deficit of "energy, weight, and dignity" (Johnston 1893). The only case touching upon the president's powers prior to 1804 merely emphasized the president's lack of a role in the constitutional amendment process (*Hollingsworth v. Virginia* 1798). Still, President Washington and the first few Congresses began the dance between congressional delegation and presidential initiative.

A few meaningful battles were waged over separation of powers issues, especially regarding executive privilege and Washington's Proclamation of Neutrality (Rozell, Pederson, and Williams 2000). Formal requests of information from Congress during Washington's tenure all pertained to foreign affairs. Congress first requested records from the president after General St. Clair's failed military campaign against native Americans on the boundaries of the Northwest Territory (Ohio). After conferring with his cabinet, President Washington established a basic standard for determining the balance of help and harm to public welfare the delivery of such communications would yield. In the case of St. Clair's mission, Washington provided all requested documents, having determined it would do no harm to the public good. Later in Washington's tenure, during the Senate debates over the ratification of the Jay Treaty, the House of Representatives requested all documents pertaining to John Jay's treaty negotiations. Washington denied the request, asserting both executive privilege and decrying the constitutional impropriety of the House's attempted involvement in the treaty process. Again, it is likely that the fledgling Court was too weak to speak on the issue directly, given concerns of being ignored by a president whose actions would be required to see the Court's decision implemented.

During the Adams administration an incident on the open seas gave the Supreme Court its first consideration about the constitutional balance between congressional delegation of power and unilateral executive action, and John Marshall's opinion in *Little v. Barreme* (1804) (the "*Flying Fish*" case) embraced all the elements of a separation of powers battle. A 1799 act passed by Congress authorized the seizure of American ships bound for French ports as an effort to control American merchants during an undeclared naval war

with France. President John Adams, meanwhile, issued instructions via the Secretary of the Navy expanding the seizure to ships either to *or from* French ports. The Dutch *Flying Fish* was seized leaving a French port on the mistaken assumption that the ship was American. This error would have no bearing on the Court's decision whatsoever. Instead, the discrepancy between presidential and congressional instructions on seizure would capture all of the Court's constitutional attention. Marshall wrote:

It is by no means clear that the president of the United States whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose...have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.

Marshall thus indicated that absent Congressional action the president might retain some "undefined residuum of power," to borrow a phrase coined later by President (and Supreme Court Justice) William H. Taft in 1916. If Congress had not first considered the specific policy within the legislative process, then the president had the capacity to act and instruct subordinates precisely as was done in a constitutionally upheld fashion. Marshall also stated the clear limitation, however. In the case before the Court, Congress had "obviously contemplated a seizure within the United States," and had circumscribed the nature of such a seizure to American vessels seeking French ports. The *Flying Fish Case* thus identifies two factors for judicial discretion of unilateral presidential power. First, the president may act unilaterally in support of Article II obligations. Second, Congress may consider and constrain unilateral presidential action. These two fundamental guidelines persist rather consistently through 150 years of federal court opinions on presidential unilateral power, resurfacing in various forms across the time period of this study.

If the *Flying Fish* case represented the opening salvo for the Supreme Court on cases of congressional delegation and presidential initiative, then the opinion is remarkably instructive of the tension that followed. In this case, Congress gave the president a power and

he (through the Secretary of the Navy) stretched that power further than the delegation allowed. If Congress had given no such power, however, Marshall indicated it was possible the president could have lawfully taken such action. The notion of presidential action with congressional silence is a precursor to Justice Jackson's "zone of twilight" penned in his concurring opinion in *Youngstown Sheet and Tube Company v. Sawyer* (1952). Further similarities may exist and shall be discussed in later sections of the paper. It should be noted that the president's power in congressional silence rests here within his commanding role in foreign and military affairs, as Marshall clearly stated in the quoted passage above. Later the Court will probe the meaning of congressional silence and presidential action in domestic affairs (yes, as related to a quasi-war abroad), revisiting the same core issues Marshall discussed in the *Flying Fish* case of 1804.

The Supreme Court's early silence on issues of congressional delegation and executive initiative suggests both an institutional weakness and a desire for the accumulation of precedent. A number of meaningful separation of powers issues unfolded during Thomas Jefferson's administration, though the Supreme Court remained silent on all of them (*Little v. Barreme* was decided during Jefferson's presidential tenure, though the controversy occurred under the direction of President Adams). Jefferson maintained a strong and often successful administration, yet he deferred often to Congress on constitutional issues, especially those pertaining to funding (Casper 1995). Experience gave Jefferson the opportunity to act unilaterally with broad support from Congress during the period of the Louisiana Purchase. Congress's legislative endorsement – in the form of funding the negotiation phase to the tune of \$2 million – could not be considered as a proper delegation in the sense that it preceded President Jefferson's pursuits; Congress provided the money because of how well independent negotiations were being reported.

The federal courts dealt with executive orders again in *Gilchrist v. Collector* (1808). Again, the case and the order in question concerned ships, coastal commerce, and violations of an embargo related to the quasi-war with France. Directions were issued by Congress to

customs collectors for the seizure of vessels, and President Jefferson gave direction on the conditions under which seizures should take place. The circuit court ruled that Jefferson had no right to direct customs collectors on seizures, given that congressional statute had provided direction specifically to customs collectors. The *Gilchrist* decision thus reemphasized the guidelines of the *Flying Fish* case with one added restriction on presidential power. Presidents could not direct lower executive branch officials if those officials had been specifically directed by congressional statute.

Other early orders and proclamations received federal court attention. In fact, *one* of James Madison's proclamations received *three* separate court rejections. Madison issued this particular proclamation on August 9, 1809, related to the determination of commercial relations with Great Britain (Dodds 2013). The controversy revolved around the Non-Intercourse Act of 1809, which allowed the President to suspend a trade embargo with Great Britain on evidence that policies hostile to American shipping had ceased. Madison issued a proclamation doing just that, as it turns out, with limited information. Upon learning that Great Britain had, in fact, continued unfavorable policies toward American shipping, Madison issued another proclamation on 9 August, reinstating embargo conditions. According to opinions in *The Orono* (1812), *President's Proclamation Declared Illegal* (1812), and *The Wasp* (1812), President Madison did not have the authority to reinstate embargo conditions, given that congressional instructions only authorized the president to suspend or lift the embargo. Justice Story's opinion in *The Orono*, which carried over in the other two cases, argued that the president had neither statutory nor prerogative power to reinstate embargo conditions. It is the prerogative portion of the argument that is new to the development of judicial discretion here; Story maintained that Madison had no executive power to interdict commercial relations with nations. Congressional statute and the Constitution were both constraints upon unilateral executive behavior, both feeding into the determination of judicial discretion of presidential power.

Congress would eventually delegate in 1810 the authority for Madison to revive embargo conditions against France or Great Britain, exactly as he had attempted to do in 1809. Madison issued a proclamation to that end, an action that would eventually be the subject of five separate federal court cases. Both Madison's proclamation and Congress's delegation were found to be constitutional.

One Madison order received two dissonant opinions. The order directed the seizure of property and was found to be constitutional in one case—even without a delegating congressional statute—because it was delivered in the aftermath of a congressional declaration of war and complied with the law of nations (*The Emulous* 1813). In another case, regarding the very same order from Madison, the majority opinion determined that the seizure of property should have been predated by statutory authority for property seizures (*Brown v. United States* 1814). This Madison directive represents perhaps the first instance of the federal courts displaying inconsistent opinions on one unilateral presidential directive across cases. The dissent in *Brown* offered a fairly strong case for the president's authority based on other delegations related to the war and the president's executive authority even without a congressional delegation. Later on, two more maritime unilateral directives from James Madison produced competing opinions on presidential unilateral authority (*The Thomas Gibbons* 1814; *Gelson v. Hoyt* 1818). War-related directives, we see, received a fair amount of judicial scrutiny.

This pre-Civil War period, though marked largely by judicial silence, provided a number of guidelines for determining judicial discretion of unilateral presidential power. Presidential acts with congressional silence were limited only by clear violations of the separation of powers. Presidential acts attending prior congressional legislation were considerably more constrained, subject to the expressed limitations of the delegating statute. Disagreement on the case level did occur, especially in the 1810s and 1820s. Justices engaged in their own debate about what constituted the lawful unilateral presidency, almost exclusively related to maritime orders and national security. As I will highlight later in this chapter, the bound-

aries forming around the notion of judicial discretion of unilateral presidential authority bear a fairly striking resemblance to Justice Jackson's opinion in the landmark post-FDR *Youngstown* case.

Other cases on unilateral directives touched on subjects not directly related to national security. A number of cases over the pre-Civil War period touched on the president's power to issue unilateral directives related to public land, a category which represented a sizeable minority of pre-FDR executive orders. The first of these related to President Jefferson's management of land from the Louisiana Purchase and continue through the early twentieth century to President Taft's management of land for naval reserves that would later become part of the Harding Administration's Teapot Dome scandal (*Livingston v. Dorgenois* 1813; *Wilcox v. Jackson* 1839; *Grisar v. McDowell* 1867; *United States v. Midwest Oil* 1915). With one exception, the president's authority to manage federal lands was consistently and completely upheld (*Lorimer v. Lewis* 1843). Cases related to national resources almost universally upheld the president's power to issue unilateral directives. The consistent opinion of the federal courts across time was that resource management in the federal government related directly to the president's powers in both executive and administrative functions.

What do we make of the general absence of controversial (in the legal sense) delegations or takings of power prior to the Civil War? We might observe that Congress felt little necessity to delegate the *legislative* class of powers to a degree worthy of the Supreme Court's attention. What does this mean? Perhaps members of Congress felt capable handling the legislative workload in the context of a smaller American republic. Perhaps, however, the republic was simply in the budding stages of institutional development. With each branch still feeling out its proper role, and with precedent being key, it is possible that behavior was constrained by the dominant example of President Washington and the first Congress.

4.3 Civil War: Extraordinary Decisions on Executive Discretion

The crucible of the Civil War tested America's separation of powers wholly and in crisis the "parchment barriers" of the Constitution proved no match to presidential initiative. Admitting circumstances of extraordinary nature, Lincoln proclaimed martial law, blockaded Southern ports, conducted unauthorized conscription, and suspended habeas corpus in pursuit of total war. And when the Maryland Circuit Court determined Lincoln's suspension of habeas corpus to be an unconstitutional taking of explicitly congressional power, the ruling went unheeded by all of the constitutional branches of federal government (*Ex Parte Merryman* 1861). Another suspension of habeas corpus, issued for a class of citizens evading the draft and considered disloyal, was overturned in *Ex Parte Benedict* (1862). In fact, federal courts ruled against Lincoln's suspension of habeas corpus seven times, all of which were essentially ignored. Later, in 1863, Congress went so far as to underwrite President Lincoln's habeas corpus move with the Habeas Corpus Suspension Act. In a most severe crisis President Lincoln led, and Congress justified his unilateral decision in the aftermath with the endorsement of law. Extreme conditions expanded judicial discretion considerably in Lincoln's case.

In *The Prize Cases* (1863), Lincoln's move to blockade southern ports in the spring of 1861 led to the seizure of ships in violation. The state of war, Justice Grier wrote, did not come by way of invitation, nor did it wait for acceptance or approval. The state of war was considered a condition which came to existence upon the first warring act. In matters of war, whether with respect to foreign nations or rebellion within the Union, the president was bound to "meet [war] in the shape it presented itself, without waiting for Congress to baptize it with a name." Lincoln's blockade and subsequent seizures were deemed appropriate measures in the context of war. The president's action received subsequent approbation from Congress.

The Supreme Court sustained many of Lincoln's war decisions, but not many with respect to the writ of habeas corpus; seven different federal cases found the suspension of habeas corpus unconstitutional. In *Ex Parte Milligan* (1866) the Court upheld Congress's ability to both endorse and limit President's ability to suspend habeas corpus. Milligan, a civilian citizen of Indiana, was arrested by an army commander, tried, and convicted of conspiracy and inciting insurrection by a military commission. The 1863 law Congress had passed authorizing *ipso facto* Lincoln's suspension of habeas corpus also attached certain limitations, including the circumstances under which military commissions could be used. The federal court system in Indiana continued operating unimpeded during the Civil War and throughout Milligan's arrest, trial, conviction, and sentencing, and the majority found the the military commission to be unconstitutional in the trial of a non-military American citizen. From the Civil War era we learn that judicial discretion is considerably expanded during a time of war, but even then, presidential unilateral authority has constraints related to due process.

4.4 Evolving Separation of Powers after the Civil War

In the immediate aftermath of the Civil War, President Andrew Johnson made waves with respect to unilateral directives that received the attention of the federal courts. The first case, (*Mississippi v. Johnson* 1867), involved the state of Mississippi asking the federal courts to prevent Johnson from executing parts of congressionally authorized Reconstruction. The president was deemed to be immune from the judicial process or injunctions requiring him to act. A related case found that a proclamation determination of the removal of restrictions on trade with southern states was determined legal as soon as the ink had dried (*Lapeyre v. United States* 1873). A number of cases involved President Johnson's famous "Christmas Proclamations" of 1868, in which the president pardoned confederate participants in the Civil War. In the first case related to Johnson's Christmas Proclamations, the opinion definitively

recognized the legally binding nature of executive orders and proclamations and affirmed that the courts had to recognize their legal status (*Armstrong v. United States* 1871).

This would not be the last case to deal with Johnson's Christmas proclamations. Many years later a federal case dealing with the confiscation of Confederate property reemphasized the legal nature of Johnson's proclamations (*Jenkins v. Collard* 1892). The opinion of the Supreme Court found that proclamations might be so law-like as to be considered extensions of the laws to which they were related. Yet another opinion years later validated the Christmas Proclamations further, extending the validity of Johnson's orders by saying that congressional action was not even needed to strengthen the validity of the orders (*Lincoln v. United States* 1914). The cases related to Johnson's Christmas Proclamation speak to the explicitly legal status of unilateral presidential directives. Judicial discretion in this period was very wide with respect to post-war arrangements, the resumption of trade, pardoning former Confederates, and determining when a state of hostilities had begun or had ended. These cases affirmed the legally binding status of unilateral presidential directives as extensions of the law itself, with or without congressional authorization.

A couple of directives during the post-war period were found to be unconstitutional, and the logic of the decisions was more about the letter of the law and following protocol. Two cases involved the reappointment of dismissed military officers; not unlike the decision in *The Orono*, the courts found that the dismissal of military officers was constitutional and consistent with the president's plenary power to dismiss executive officers, but that the unilateral reappointment of said dismissed officers was not (*McElrath v. United States* 1880; *Blake v. United States* 1881). These cases are consistent with respect to the judicial discretion of unilateral presidential authority; explicit statutory authority must be respected in the appointment and removal powers. Meanwhile, in *United States v. Lee* (1882), the Supreme Court invalidated the post-war seizure of Robert E. Lee's property, but did so more because of a failure to follow statutory protocol than because the confiscation act was invalid. Statutory guidelines were key guidelines again in the determination of judicial discretion of

unilateral presidential authority. One case contributed to the nearly two-century separation of powers battle over appointment and removal powers of executive officers, and the other restricted the means by which a president could take the property of individuals.

Toward the end of the nineteenth century the United States entered an age when presidents assumed more “inherent” powers as expressed by the federal courts (*In re Neagle* 1890). The general interest of the nation was being tied to presidents as leaders and as the principal promoters of peace and stability. Two cases involving no prior congressional delegation illustrate the changing role of the president and the evolution of court opinion. In the first case, *In re Neagle* (1890), the court determined that the president and his attorney general had the right to assign federal marshal security to protect Supreme Court Justice Stephen Field in the name of “all the protection implied by the nature of government under the Constitution.” In 1895, the Supreme Court upheld President Cleveland’s dispatch of federal troops to break up the Pullman Railway strike without congressional authorization of any kind. The standard developing here was the preservation of the general peace and the president’s inherent responsibility under his ambiguous Article II responsibilities. Judicial discretion was beginning to open up to arguments of inherent powers related to national peace and the general welfare of the country, a justification which continues to produce arguments about presidential power to this day. Somewhere within the inherent powers to promote the general peace and welfare lies a limit on the judicial discretion of presidential power. Admittedly, this is perhaps the toughest boundary to define.

4.5 Limits on Congressional Delegation

Statutory delegation from Congress dilates presidential authority to act unilaterally; this much is clear from the case history presented so far. Judicial discretion thus swings towards the president when Congress endorses the president’s unilateral power in a given policy

arena. It is then up to the president to remain within the parameters of the congressional delegation according to a determination by the federal courts. Noticeably absent in the case history, though, is any determination of whether Congress behaved in a constitutional manner over countless occasions when delegating certain powers to the president. It is likely that congressional delegations were most often narrowly tailored to a specific function and thus were in no way controversial. Federal cases related to unilateral presidential power prior to the twentieth century touched upon delegation as incidental to unilateral directives, but those cases did not focus upon constitutional questions related to the act of congressional delegation. It is worthy, once more, to note that federal court decisions on congressional delegations first appear around the same time as the passage of the Budget Act of 1921.

In the early 1920s Congress entertained the notion of allowing the president to set tariff (duty) rates for the purposes of protecting the competitive edge of American industry. The Tariff Act of 1922 armed the president with a corpus of investigators to collect facts and determine necessary rate adjustments and delegated to the president's discretion the ability to set duty rates to levels deemed appropriate. The controversy surrounded the ability of Congress to pass part of its mandate to the president. In *J.W. Hampton & Co. v. United States* (1928) the Supreme Court established the *intelligible principle* test by which Congress could delegate legislative powers to the president. With reasonable, discernible guidelines provided, the majority reasoned that Congress could delegate otherwise legislative powers to the president.

The Supreme Court also left its imprint on the appointment and removal powers in the 1920s in *Myers v. United States* (1926), settling a debate that had persisted since the passage of a Congressional act in 1876 giving the Senate advice and consent powers over the *removal* of postmasters appointed by the president. Justice Taft's opinion rejected Congress's assertion of removal powers over executive appointments, but it was not simply a rejection of an act of Congress contravening the Constitution. Taft took the opportunity to write at length about removal powers both under the Articles of Confederation and their consid-

eration during the Constitutional Convention. Congress, of course, retained the power of removal under the Articles of Confederation as the single institution of federal government. At the Constitutional Convention, however, delegates excluded removal powers of executive officials from the Senate's check upon the presidency. Subsequently Congress passed a law in 1789 establishing the first executive departments and giving the president the sole power of removal of officers heading the department. Between the Constitution's omission of the Senate's removal power and the affirmation conveyed by congressional statute—passed by a Congress populated with a number of the delegates to the Constitutional Convention—Taft and the majority found the president's exclusive removal powers of executive branch officials well supported. Taft's evidence raises a compelling question: was congress's 1789 act not a delegation of the president's removal powers, but instead an affirmation of the relevant Constitutional passage in Article II, Section 2?

In the post-Black Tuesday era of unified Democratic government FDR attained significant powers to execute both foreign and domestic policy in pursuit of the public welfare, and Congress delegated a number of these powers to mixed results. In *U.S. v. Curtiss-Wright Corporation (1936)* FDR indicted companies engaging in the illegal sale of arms in a conflict between Paraguay and Bolivia over the Gran Chaco territory situated between them. Though the majority opinion, delivered by Justice Sutherland, asserted the president's nearly complete command over foreign policy and thus power to execute the indictments, the context of the decision included a congressional act—a joint resolution, in this case—allowing the president to forbid arms sales in the conflict at his discretion. Sutherland's opinion tends to focus on the president's robust powers in the field of foreign policy, though there was an explicit form of congressional endorsement for presidential action.

President Franklin Roosevelt and a Democratic Congress pushed major legislation to revive the sunken American economy. The National Industrial Recovery Act of 1933 (NIRA) represented a key piece of FDR's New Deal program, furnishing the president with significant regulatory powers over working conditions, prices, and collective bargaining rules. Two

significant cases arose from the sweeping delegation of powers contained in NIRA, both of which applied the *intelligible principle* test established in *J.W. Hampton*. In *Panama Refining Company v. Ryan* (1935), the “Hot Oil Case,” the Court determined that Congress had delegated the power to regulate (and thus prevent) surplus oil sales without any reasonable guidelines and thus the relevant portions of NIRA were unconstitutional. In *Schechter Poultry Company v. United States* (1935) the Court unanimously found Congress’s delegation of regulatory powers in the food industry failing the intelligible principle test established in *J.W. Hampton*. It is notable that each of the three major cases on congressional delegation were decided in close temporal proximity to the onset of the Great Depression; *J.W. Hampton* was decided the year prior, while the *Panama* and *Schechter* cases were decided some six years in. Major political and economic pressures invited members of Congress to delegate significant powers—largely, in these cases, *legislative* powers—out of pressures to achieve the government’s critical workload and potentially shift blame to the executive branch if the federal government could not succeed in reviving the American economy.

Seemingly all preceding issues pertaining to unilateral executive action fed into the Supreme Court’s review of President Truman’s seizure of steel mills during the (undeclared) Korean War. The apex of Supreme Court adjudication on executive power is delivered in *Youngstown Sheet and Tube Company v. Sawyer* (1952). The majority opinion, delivered by Justice Black, underlines the constitutional parameters of the case from the outset; the president’s powers to seize the steel mills must either have come from (1) the Constitution or (2) an act of Congress. Clearly, industrial seizure was not an executive power enumerated in the Constitution, but could such a power be inherent or implied from explicit executive powers? The Defense Production Act of 1950 had authorized broad presidential power over industries vital to national defense, including contracts and orders, allocation of industry resources, and under certain conditions, control over civilian economies. The majority opinion in *Youngstown* points squarely at the lack of congressional delegation as a definitive limit to presidential power. Congress, Justice Black said, could have ordered such a seizure of private property

to continue industry, but the president, even in “wartime,” could not in this case exercise such authority. Black equates the seizure in this case to lawmaking, a process in which the president serves to veto or accept finished bills.

The Court offered up *six* concurring opinions with its *Youngstown* decision, yielding a less-than-coherent statement on executive power. Justice Frankfurter limited his opinion to the narrowest constitutional issue, avoiding altogether the claim of inherent presidential power in the “Executive,” “Take Care,” and “Commander-In-Chief” clauses. Precedent in prior delegations of seizure power actually *highlighted* the choice not to delegate in Taft-Hartley. Upon this point and no other did Frankfurter render his opinion. Justice Douglas focused on the effects of a seizure in determining the power to make a seizure, where the taking of private property would have required compensation and, thus, the raising of revenue. Given Congress’ exclusive power to raise revenue in Article I Section 8, Douglas considered the taking and compensating powers to be inseparable.

For theoretical clarity Justice Jackson’s concurring opinion deserves special attention, delineating the conditions affecting judicial discretion afforded to presidents in their exercise of powers. Jackson crystallized the modern understanding of unilateral presidential behavior mirroring and expanding Justice Marshall’s seemingly offhand comment in the *Flying Fish Case*. Justice Marshall’s comments had been delivered in the context of the use of the navy to seize American vessels violating foreign policy in the context of war. Justice Jackson spoke of the president’s power to seize American property in pursuit of policy objectives related to an undeclared war in Korea. Jackson outlined the broad parameters of presidential behavior key to determining constitutionality. The president’s powers are strongest with the wind of congressional support at his back. Acting against clear congressional mandate, the president’s powers are at their “lowest ebb.” In the case of congressional silence, the president operates in a “zone of twilight” and remains essentially subject to case-by-case determination by the Court. Research here indicates that “zone of twilight” cases are the rarest of cases involving executive power.

Key to the court's opinion was the legislative history of the Taft-Hartley Act of 1947, which included the consideration of an amendment indicating Congressional preferences on the president's ability to undertake seizure of war industries. The amendment would have allowed government seizure of war-making industries in just such a case. No prior act of Congress had explicitly authorized such a seizure, and the debates behind the Taft-Hartley Act took what had been congressional silence on the issue and transformed it to *active denial* of such a delegation of power to the president. Justice Black's opinion equates omission of an allowance with categorical rejection. Once again, a court's decision boiled down to one of delegation. This time, however, judicial discretion of presidential authority tightened because the Court considered not just the prior bill in question but its legislative history.

4.6 Conclusion

Cases after *Youngstown* have continued to specify the proper boundaries of presidential power, whether they have related to unconstitutional delegations of power (*Clinton v. New York* 1998), extensions of executive privilege (*United States v. Nixon* 1974), appointment and removal powers (*Morrison v. Olson* 1988), or others. But the establishment of the modern presidency was solidified in *Youngstown*, and in those opinions we find a close approximation to many of the opinions on the judicial discretion afforded presidents in unilateral directives. Presidents clearly have discretion from the courts when Congress is silent, but they wield even more power to act unilaterally when armed with a proper congressional delegation. In policy arenas that approximate a more administrative function, such as the management of lands, presidents seem to enjoy expanded judicial discretion, even in the context of congressional silence.

One limit, then, of presidential power is the limit of acceptable congressional delegations. Delegation through prior legislative action is the broad norm, informing federal court deci-

sions on executive power from the *Flying Fish Case* forward. Yet all delegations may not all fit into one neat typology. Timing and context, for example, presents serious complications. Unilateral presidential actions having received posterior approbation from Congress have earned no attention from the Court; there was simply no controversy. The Neutrality Act of 1794 following President Washington's 1793 proclamation represents a powerful early example.¹ At least one post hoc delegation, the Habeas Corpus Suspension Act, endorsed presidential action while broadly circumscribing that action. Congressional delegations of power followed by presidential actions are where the Courts have rendered most of their decisions on separation of powers. Often, as with *Youngstown*, incidents that presented a purely unilateral face were, in fact, expansions or outright violations of a truly delegated power. Major instances of unilateral presidential action without congressional input seem to have occurred most often in a context of crisis.

Focusing on Court decisions has drawbacks, however; it necessarily limits analysis to congressional or executive actions resulting in justiciable controversies. Supreme Court opinions alone cannot adequately isolate and codify every move by Congress or the president that yields no case. True, many of the cases reviewed here incorporate uncontroversial congressional delegations or presidential takings into their logic, but does this mean such instances are all the cases that matter? One might argue that instances of congressional and executive behavior feeding into the expansion of presidential power only matter if they occur on these boundaries of constitutional behavior. In other words, if during the adjudication of controversies justices of the Supreme Court find certain cases of congressional and executive action worthy of allusion, then perhaps this serves as a meaningful threshold for congressional and executive actions *influential to judicial discretion*. And it is the rolling definition or value of judicial discretion that is the goal of this chapter.

¹Washington's proclamation did engender constitutional debate, but not within the context of the fledgling Supreme Court. James Madison and Alexander Hamilton took to print in the famous *Pacificus-Helvidius* debates, instead.

From a rigidly constitutional point of view, however, one might argue that each and every act by Congress or the president has represented some variation from original constitutional design. By construction, though, the analysis here cannot speak to acts beyond the attention of the Supreme Court. I clarify some behavior of the earliest presidents and Congresses so as to paint an appropriate picture of the Court's initial forays into matters of executive power and congressional delegation. Focusing on Supreme Court decisions, in this case, gives us the "full population" of the federal judicial branch's observations on the evolution of presidential power (if we choose to ignore lower federal court decisions as Lincoln did in 1861).

The goal of this research is to pinpoint the discretion Courts have allowed presidents to accumulate their powers. The evidence from Supreme Court decisions leads to a few key observations. First, early court cases on presidential power often involved some form of congressional delegation and turned on a president's proper usage of delegated power. Second, the notable exceptions of court decisions on unilateral action all seem to have occurred within a context of extreme economic or political crisis. In actions more closely related to the administrative-executive functions of the president, the federal courts almost universally upheld unilateral presidential directives, even without prior congressional approval. And finally, the degrees of congressional delegation seem to have shifted from the specific to the general over time, leading to the Court's defense of a constitutional boundary of delegated powers beginning in the 1920s. The work here reveals patterns in Supreme Court decisions material to the rise of the modern unilateral presidency.

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Chapter 5

Conclusion

Barack Obama's 2014 State of the Union speech, and the reactions to it, underscored a fact of contemporary American politics: the partisanship of presidential power. Words like "monarchy" were thrown around as if over two centuries of political practice had somehow brought the United States back into the old English fold. Scholars and politicians locked horns over the import of Obama's message and his subsequent use of unilateral directives. For many conservatives, everything the president did was "unprecedented" and "dictatorial," flouting the will of the people and their representatives in Congress (*Wall Street Journal*, 28 January 2014). By January 2015 the word "dictator" had become the fourth most common word used to describe Barack Obama by survey respondents of a Pew Research Center poll (*The Washington Post*, 20 January 2015). A constitutional crisis was surely afoot.

This dissertation demonstrates that no constitutional crisis is coming, at least with respect to the unilateral presidency. Such hyperbolic responses are part of the modern partisan game in American politics. Republicans and Democrats take turns on the propriety of unilateral presidential actions according to the shallow political calculus of the day and the party of occupant of the White House. Support the minority party in Congress but own the presidency? Unilateral presidential behavior is a favored option for you. Control at least one of the two houses of Congress? You likely have a healthy distaste for unilateral presidential action or any robust portrayal of presidential power. One of the more enlightening elements of this dissertation is that partisanship with respect to unilateral presidential behavior was

not nearly so intense in the pre-FDR period. Generally speaking, the battles were as much about the institutional separation of powers as anything else.

5.1 A Brief Review

As Chapter 2 points out, partisan struggles over unilateral presidential power do not consistently hold over time. In fact, neither does the unilateral presidency. This dissertation shows an evolution of the unilateral presidency and presidential power during a period contemporary scholars tend to neglect. I would argue, in fact, that the most interesting bit of the change in the institutional presidency occurred prior to the administration of Franklin Delano Roosevelt. The period of study of this dissertation is wildly interesting. The nation was changing rapidly. The federal government was struggling to keep up. And congresses and presidents were struggling over how to handle all the change.

Presidents of the nineteenth century were a bit “behind the eight ball” with respect to policymaking. The constitutional “first” branch, Congress, was generally the more powerful branch across the time period, received the most media attention, and prevailed over almost every aspect of the legislative process (Kernell and Jacobson 1987; Jacobson and Carson 2016). Strong presidents—the Jacksons and the Lincolns—were peculiar, either a function of personality or of historical context and necessity. Most presidents of the period were considered glorified clerks who doled out patronage at election time (Kernell and Jacobson 1987).

Toward the end of the nineteenth century it was clear that a systematic evolution was underway. The mechanical, clerical functions of the executive branch began taking on new levels of meaning and policy import. Control over the executive branch also elevated to a major separation of powers struggle. The fight to control the administrative bureaucracy and over the removal powers over all levels of executive officers was evident throughout the period (Cleveland 1913; Roosevelt 1913). The removal powers fight even made its way

into the interbranch tussle over the adoption of the national budget system (Kraines 1970; Pinkett 1965).

Presidential power changed for at least three reasons, per the discussion in previous chapters. Presidents increasingly saw fit to engage in unilateral behavior, according to both the needs and the opportunities presented by a changing nation and an evolving occupational mandate. Unilateral presidential actions, captured in this dissertation through the issuance of executive orders, ranged from trivial clerical actions to highly salient policy moves. Also, Congress found increasing reasons to delegate powers to the president. Early in the period of this study the delegations made by Congress were not controversial enough to warrant the attention of the federal courts, but by the 1920s the Supreme Court had to determine what was considered constitutionally permissible delegations by Congress. And finally, the federal courts afforded presidents a certain discretion over unilateral presidential actions.

Presidential power, for a hefty portion of American history, was a latent power, rarely tapped. Over the period between the Civil War and FDR's first administration, presidential powers increasingly transitioned from latent powers to active powers. The graphs related to executive order usage across time shown in Chapter 2 demonstrate a clear pattern of increased activity on the part of presidents. Is this activity merely administrative in nature and in connection to a growing, changing nation? I argue that cannot be the whole story. As I show in Chapter 2, mundane, administrative executive orders are mixed into the aggregate numbers along with policy relevant, highly salient orders. The administrative presidency and the more powerful, policy-oriented presidency seem to be growing in concert during the Progressive Era.

Franklin Delano Roosevelt did not invent the modern presidency. I argue, instead, that Franklin Delano Roosevelt reaped the powers of the presidency which had been sewn by presidents before him during the Progressive Era. Louis Fisher argued that FDR embarrassed both the presidency and the nation by overplaying his presidential hand. This may or may not be true. Where, though, did FDR learn of the powers and the expectations of the

presidency? The Constitution's ambiguous Article II language is a necessary but insufficient condition to explain the full bloom of the FDR presidency. To complete the picture for the inheritance of the FDR-era presidency, we must look at the behavior of the presidents who came before him.

Chapter 2 shows a unilateral presidency in transition well prior to the FDR era. As the primary instrument of unilateral presidential action, executive orders became consistent as early as the 1840s and 1850s but saw far more systematic use in the 1880s and 1890s, culminating in a stepwise increase around the time of Theodore Roosevelt's administration. In the chapter I explore various patterns in executive order usage prior to FDR's administration, revealing that partisan constraints on unilateral presidential actions were not the same in the pre-FDR era as we know to exist in the post-FDR period. The rise of war and economic conditions are the key factors that drive the issuance of executive orders during the period from the Civil War to the end of the Hoover administration. Presidents protect the unilateral powers they inherit; they rarely revoke executive orders as a rule, and they do not revoke the executive orders of prior presidents from a different party. These findings contrast significantly from the modern, post-FDR period, when partisanship is generally viewed as an important constraint on a president's willingness to "go it alone" (Howell 2003). These findings suggest that the presidency of FDR was a kind of treatment effect, ushering in an era of partisanship with respect to the exercise of presidential power.

I contribute a new data set of over 10,000 historical executive orders in Chapter 2 from both the numbered and unnumbered series of the Works Progress Administration in the 1940s (Lord 1943). I coded these orders by policy to gain traction on issues related to the unilateral presidency that scholars of the contemporary presidency do not typically address.

Chapter 3 examines congressional delegations of power and the passage of the Budget and Accounting Act of 1921. The power of the purse is a primary constitutional power of Congress. Chapter 3 investigates the motivations for Congress to have given away its first-mover advantage in spending. Efficiency in government and a lack of control over the

appropriations process were primary motivators for change. Congress tried to control the transition as best it could. By the time the idea of establishing a national budget system had become an unavoidable political outcome, Congress could not make the internal changes necessary to keep the budget proposal authority away from the president. Congress also lost some of the ability to give away the budget proposal authority to the president on its own terms.

The story of congressional delegation of the budget proposal involves workload, elections, and public pressure. Post-Civil War governance became excessively difficult, characterized by the widening gap between expectations and abilities with respect to the federal government. This disjoint, in turn, translated into public consternation. I measure public pressure through petitions reported by members of Congress. Given that the Progressive Era was one of great electoral reforms in which individual congressmen could no longer hide behind the party shield so easily, one might expect public pressure to produce legislative responses to concerns over administrative inefficiency. Such concerns were represented by the initial Cockrell and Dockery-Cockrell Committees, which signaled Congress's sensitivity to the administrative issues faced by the federal government and Congress's asserted authority in addressing the issue (Kraines 1951; Kraines 1953). After the 1890s we saw a transition to presidential commissions on the same topic, demonstrating an advancing struggle between Congress and the presidency over control in executive administration. A separation of powers fight thus arose around the ability even to investigate administrative inefficiency.

Chapter 4 traces the judicial discretion afforded presidents to engage in unilateral policymaking. The chapter takes federal court cases across history and extracts guidelines for understanding judicial discretion over unilateral presidential powers. I do not expound on every case known to touch upon the subject of the unilateral presidency. Instead, I cover the range of cases that highlight what I argue to be the relevant strains of constitutional thought on unilateral presidential powers. The unilateral directives covered in the judicial chapter range from administrative orders in resource land management to highly salient and

controversial orders like Lincoln's directives suspending the writ of habeas corpus during the Civil War.

The judicial chapter contains a brief constitutional introduction, important because, after a little over a century of case history, the Supreme Court begins validating presidential behavior not just by references to the Constitution but by references to national interest (*In re Debs* 1895). The evidence from Supreme Court decisions leads to a few key observations. First, early court cases on presidential power often involved some form of congressional delegation and turned on a president's proper usage of delegated power. Second, the notable exceptions of court decisions on unilateral action all seem to have occurred within a context of extreme economic or political crisis. In actions more closely related to the administrative-executive functions of the president, the federal courts almost universally upheld unilateral presidential directives, even without prior congressional approval. And finally, the degrees of congressional delegation seem to have shifted from the specific to the general over time, leading to the Court's defense of a constitutional boundary of delegated powers beginning in the 1920s. The work here reveals patterns in Supreme Court decisions material to the rise of the modern unilateral presidency.

The broader point of the judicial chapter is to draw lessons from federal case history that matter to the development of presidential power. I examine cases as they develop over time to establish a logic in the development of what I call the "judicial discretion" of presidential power, inspired in part by the notion of discretion in the formal model of unilateral presidential action presented in Howell (2003). I identify the factors from each decision that affect the federal court's determination of discretion afforded a president in unilateral action. Such factors include, but are not exclusive to, whether a lawful delegation of power from Congress has been made, whether that delegation is made specifically to the President of the United States or some inferior executive officer, or whether a president engaged in a unilateral act against the will of Congress or in a context of congressional silence.

5.2 Why Do We Care?

What does this dissertation offer the contemporary world of American politics? What truths can be told about the twenty-first century president from an examination of a period of presidential behavior a century old and more? Presidential power arguably reached a maximum during FDR's administration under two separate but overlapping crises, but for the most part FDR did not imagine or manufacture new powers in the context of the Depression and World War II. We debate publicly, often bearing our partisan colors, over whether this or that president in contemporary times has violated laws and the Constitution over his or her "imperial" unilateral behavior. We do so often embarrassingly uninformed about the history of the unilateral presidency and what it means. When we do look to history to inform our perspectives on contemporary presidential politics, we typically restrict ourselves to very recent history. Most often, in fact, FDR is the beginning of presidential history in this respect. In the rare case that a scholar or informed citizen looks to the era before FDR, they almost universally reference a founding president or Abraham Lincoln.

If someone were to ask if this is a study in history, or perhaps why to examine historical political science, I would politely reject the question out of hand. The brand of political science represented by this dissertation is *not* simply historical political science as such. I might accept the label American political development for this dissertation, if properly and specifically understood. But the purpose of this dissertation is dual: to learn about the past and to reflect upon the political present with that knowledge. The word "bridge" comes to mind when I attempt to characterize this study. I attempt in this dissertation to build bridges from the present to the past so that we may learn more about both. This dissertation is *comparative* from a *temporal* perspective. I examine unilateral presidential behavior of the past in order to make claims about what its nature was, but I also do so implicitly to gain a better grasp of the unilateral presidency today. The same can be said of my examinations of congressional delegations of power and judicial discretion, at least as they relate to presidential power.

Political scientists can become short-sighted, as a group, if we update our knowledge according only to the most recent data available. At times, discovered data antecedent to what's "known" or contemporary are what provide the most valuable insights on important political phenomena. Political institutions evolve over time because human beings animate them, and it is the different stages of institutions that we learn about the actors that created the institutions as well as the potential directions they could take. This dissertation helps to reveal the direction in which the unilateral presidency was cast from an institutional perspective.

In the twenty-first century presidents and Congresses push and pull over the limits of political power. This is not necessarily new; in fact, separation of powers struggles, as demonstrated by all three substantive chapters of this dissertation, are as old as the republic. The conflicts in separation of powers, though, evolve as the boundaries of powers between branches shift. I have made the argument in this dissertation that changes in presidential power—and interbranch struggles over those changes—occurred at a peculiarly high rate prior to FDR in the period we broadly characterize as the Progressive Era.

5.3 Conclusion

This dissertation is a study in the separation of powers and how the unilateral presidency fits into that institutional dynamic. Presidential powers were evolving significantly in a period that contemporary political scientists pass over too often. The period between the Civil War and the presidency of Franklin Delano Roosevelt was one of extraordinary change, not just for the American economy or for the American people. It was also a period of extraordinary change in America's political institutions. I present this dissertation as a study of how all three institutions of America's federal government contributed to changes in the power of the presidency and the rise of the unilateral presidency as an institution. Even presidents

of the period like Grover Cleveland, who believed generally in a small role for the federal government in society at large, protected the powers of the president against Congress in constitutional issues like the removal powers of executive officers (Cleveland 1913). Other presidents of the period saw the presidency as an office from which work should be done to promote the general welfare of the American people as much as the Constitution and statutory limitations would allow (Roosevelt 1913; Wilson 1908).

The rise of the unilateral presidency during the Progressive Era is very much a part of the story. Presidents began maximizing the power available to them through the administrative component of their constitutional charge. They also used the unilateral presidency to move policy in meaningful ways when necessary. Congress, too, aided the rise of presidential power during the Progressive Era by delegating increasing amounts of authority to the president. The federal courts largely upheld unilateral presidential behavior, endorsing the legally binding nature of unilateral directives and constraining unilateral presidential behavior in fairly rare cases or when in direct conflict with congressional statute.

This dissertation should be viewed as a bridge between the past and the present. It contains the seeds of the modern presidency rooted in the pre-FDR era. It contains key transitions in congressional behavior. It contains remarkably consistent themes in federal judicial decisions on what constitutes lawful unilateral presidential action, but it also shows evidence evolution in judicial decisions according to a rapidly changing United States.

Upon a complete reading of this dissertation, one should come to a few conclusions not just about the American presidency, but about contemporary American politics. First, the use of a word like “dictator” in connection to the American president should be met either with disbelief or outright derision. Second, one must understand the polarized, partisan context in which such words are being used about contemporary presidents. Presidents of the past have availed themselves of unilateral directives often, and at times with monumental policy implications. In the pre-FDR era, at least prior to the twentieth century, presidents did not have to worry much about trouble over unilateral directives coming from the public

sphere. Even denunciations from Congress and the federal courts were fairly rare. As I have shown, presidents accumulated powers related to unilateral directives slowly and seemed to protect them from one president to the next, even as party of the presidency changed. It took the behavior of all three branches of the federal government to create the powerful presidency that Franklin Delano Roosevelt inherited, and that realization is a main purpose for this dissertation.

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