

Unilateral Action and Presidential Power: A Theory

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In this article, the authors explore a basis for presidential power that has gone largely unappreciated to this point but that has become so pivotal to presidential leadership that it virtually defines what is distinctively modern about the modern presidency. This is the president's formal capacity to act unilaterally and thus to make law on his own. The purpose of the article is to outline a theory of this aspect of presidential power. The authors argue that the president's powers of unilateral action are a force in American politics precisely because they are not specified in the Constitution. They derive their strength and resilience from the ambiguity of the contract. The authors also argue that presidents have incentives to push this ambiguity relentlessly to expand their own powers—and that, for reasons rooted in the nature of their institutions, neither Congress nor the courts are likely to stop them.

What are the foundations of presidential power? Almost forty years ago, Richard Neustadt (1960) offered an answer that transformed the study of the American presidency. Neustadt observed that presidents have very little formal power, far less than necessary to meet the enormous expectations heaped on them during the modern era. The key to strong presidential leadership, he argued, lies not in formal power, but in the skills, temperament, and experience of the man occupying the office and in his ability to put these personal qualities to use in enhancing his own reputation and prestige. The foundation of presidential power is ultimately personal.

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Neustadt's notion of the personal presidency dominated the field for decades, but its influence is on the decline. The main reason is that it seems increasingly out of sync with the facts. The personal presidency caught on among political scientists at just the time that the presidency itself was rapidly developing as an institution and as studies of presidential leadership found themselves focusing on the "institutional presidency" (Burke 1992; Moe 1985; Nathan 1983). As time went on, it became clear that the field needed to adjust to a new reality, in which formal structure and power have more central roles to play (Moe 1993).

This adjustment was hastened by the rise of the "new institutionalism" in political science generally. Scholars across fields exhibited renewed interest in institutions of all kinds, new analytical tools were developed for the task, and the presidency became part of the revolution. To date, the new analytic work emerging from this movement has rarely focused on the presidency *per se* (for an exception, see Cameron 1999). But by including presidents as one of several key players—in models of political control of the bureaucracy (Ferejohn and Shipan 1990), for instance, or policy gridlock under separation of powers (Krehbiel 1998; Brady and Volden 1998), or the appropriations process (Kiewiet and McCubbins 1991)—scholars have taken the first steps toward a rigorous institutional theory of the presidency.

In this article, we will continue this line of inquiry and encourage its evolution into a new phase that focuses more directly on the presidency itself. Our point of departure is the same question that motivated Neustadt. What are the foundations of presidential power? The new institutional literature speaks to this issue by providing rigorous treatments of specific formal powers granted presidents under the Constitution. Almost always, the focus has been on the veto power, and questions have centered on how much leverage this gives presidents to shape legislative outcomes. Another is the appointment power, which offers presidents important formal means of engineering bureaucratic outcomes. Both are surely key parts of the larger picture of presidential power.

Our aim here is to highlight an institutional basis for presidential power that has gone largely unappreciated to this point but that, in our view, has become so pivotal to presidential leadership, and so central to an understanding of presidential power, that it virtually defines what is distinctively modern about the modern American presidency. This is the president's formal capacity for taking unilateral action and thus for making law on his own. Often, presidents do this through executive orders. Sometimes they do it through proclamations or executive agreements or national security directives. But whatever vehicles they may choose, the end result is that presidents can and do make new law—and thus shift the existing status quo—without the explicit consent of Congress.

The fact is, presidents have always acted unilaterally to make law. The Louisiana Purchase, the freeing of the slaves, the internment of the Japanese, the desegregation of the military, the initiation of affirmative action, the imposition of regulatory review—these are but a few of the most notable examples. Most presidential orders are far less dramatic, of course. But they are numerous and often important, and it

appears the strategy of unilateral action has grown increasingly more central to the modern presidency.

Why are presidents able to do these sorts of things? After all, the Constitution grants the lawmaking power solely to Congress, so wouldn't the courts step in to prevent presidents from making law on their own? And is it not likely that, when presidents seem to be acting unilaterally, they are really just exercising the discretion delegated them by Congress, and that major departures from the will of Congress would be overturned by new legislation? These are the kinds of questions a theory of unilateral action must address. They have to do, above all else, with the constitutional and statutory bases for the president's powers of unilateral action, with the president's incentives to use these powers, and with the incentives of Congress and the courts to stop him.

So far, these issues have not been well addressed. There is presently a small empirical literature on presidential lawmaking centered on executive orders. Some of this work is rooted in normative legal concerns—for example, about whether presidents have exceeded their rightful authority under the Constitution (Fleishman and Aufses 1976; Hebe 1972; Neighbors 1964; Cash 1963). In recent years, political scientists have shown interest in unilateral action by presidents, and a growing body of quantitative work is moving toward a more rigorous treatment of the subject (Mayer 1996, 1997; Cooper 1986, 1997; Cohen and Krause 1997a, 1997b; Krause and Cohen 1997; Deering and Maltzman 1998; Gomez and Shull 1995; Shanley 1983; Wigton 1991). As things now stand, however, this literature devotes little attention to theory. The facts are becoming better known, but how they fit together and why remains a mystery.

In this article, we want to take a few modest steps toward a better understanding of unilateral action by presidents. Our purpose is to set out a theoretical perspective that, while not formally developed at this point, contains what we think are the key elements that need to be taken into account and shows how they work together to generate expectations for the presidency.

What we offer is an institutional theory—with a twist. The twist arises because, unlike virtually all other institutional analyses, ours does not put the focus on specific formal powers or on the specific requirements of the law in explaining why presidents do what they do. All of these things remain quite relevant. But the central claim here is that the president's powers of unilateral action are a force in American politics precisely because they are *not* specified in the formal structure of government. We argue that, in sharp contrast to the veto, appointments, and other enumerated powers—the lynchpins of other institutional analyses—this important aspect of presidential power derives its strength and resilience from the ambiguity of the formal structure. We also argue that presidents have strong incentives to push this ambiguity relentlessly—yet strategically and with moderation—to expand their own powers and that, for reasons rooted in the nature of their institutions, neither Congress nor the courts are likely to stop them. The result is a slow but steady shift of the institutional balance of power over time in favor of presidents.

We are currently involved in a research project to collect comprehensive data on presidential orders, as well as on how Congress and the courts have responded to them. Results are a ways off at this point, but our ultimate aim is to put these theoretical ideas to the test. For now, we will simply present the ideas themselves and hope that readers find them interesting and worth pursuing.

The Constitution as an Incomplete Contract

When the Founders designed and negotiated the Constitution, they essentially agreed on an incomplete contract for governing the nation. This contract avoids specifying precisely what decisions must be made under all current and future contingencies. Instead, it sets up a governing structure that defines the official actors—the president, the Congress, the courts—allocates powers and jurisdictions among them, structures incentives (if implicitly), specifies certain procedures for decision making, and, in general, provides a framework of rules that allow the nation's leaders to make public decisions and deal with whatever contingencies may arise.

Within this framework, it was inevitable that the three branches would engage in a struggle for power in the making of public policy (Corwin 1984). Indeed, the design was premised on it and took advantage of it. The whole idea was that divided and shared powers among the key actors would promote a rivalry conducive to the public good—for ambition could be made to check ambition, and no one actor could gain dominance over the others. The result would be a stable republic and the avoidance of tyranny. The framework would constrain and channel the struggle for power.

It was also inevitable, however, that there would be a struggle for power over the framework itself. The Constitution sets out the entire design of American government in just a few brief pages and is almost entirely lacking in detail. It does not define its terms. It does not elaborate. It does not clarify. While some of the powers it allocates are straightforward—the president's power to veto legislation, for instance—many of the others, including powers that are quite fundamental, are left wholly ambiguous. The actual powers of the three branches, then, both in an absolute sense and relative to one another, cannot be determined from the Constitution alone. They must, of necessity, be determined in the ongoing practice of politics. And this ensures that the branches will do more than struggle over day-to-day policy making. They will also engage in a higher order struggle over the allocation of power and the practical rights to exercise it.

Throughout the course of American history, this higher order struggle has been reasonably well contained. No single actor has dominated, decisions have been made for the nation, and the same formal Constitution has prevailed. Nonetheless, the reality of the governing structure has changed substantially over the years, to the point that the Founders would barely recognize the system that now governs our nation. Who has power, and how that power gets exercised, looks dramatically different today than it did two hundred years ago. The struggle has transformed it.

This transformation has affected all three branches in many ways, and the story is a much bigger one than we can tell or try to explore here. What we want to show, in the analysis that follows, is simply that there is a logic to this political struggle, and that this logic helps explain why presidents have been able to develop and expand their powers of unilateral action—powers that the Constitution nowhere explicitly grants them.

Ambiguity and Presidential Imperialism

If this analysis were mainly about legislators, we would begin by embracing a standard theoretical assumption: that legislators are motivated by reelection. This is simple, and it does a good job of explaining legislative behavior (Mayhew 1974). But what motivates presidents? Reelection obviously cannot explain the behavior of (modern) presidents during their second terms, since they cannot run again. And even in their first terms, presidential behavior seems to be driven more centrally by other things.

A truly accurate characterization of what motivates presidents would be complicated, of course, and somewhat different for different historical periods, for the incentives of institutional actors are partly a function of the Constitution and partly a function of the (changing) society it governs. Broadly speaking, however, it is fair to say that most presidents have put great emphasis on their legacies and, in particular, on being regarded in the eyes of history as strong and effective leaders. They have a brief period of time—four years, perhaps eight—to establish a record of accomplishments, and to succeed they must exercise as much control over government and its outcomes as they can. For this they need power—which, as Neustadt (1960) reminds us, is the foundation of presidential success. Whatever else presidents might want, they must at bottom be seekers of power.

For the most part, this has always been true. But it has especially been true since the turn of the century. One reason is that, as strong parties have weakened, presidents have gained stature and flexibility as entrepreneurial political leaders—and, in consequence, they have had both the incentives and the opportunities to shape their own political fates and to seek the power to do it. During this same period, moreover, the public began to demand positive governmental responses to pressing social problems and to hold the president—as the symbol and focus of national leadership—responsible for the successes and failures of government. As presidential scholars have long noted, these demands and expectations are overwhelming, and they far outstrip the president's actual power to get results, which gives them still greater incentives to develop and expand their power in whatever ways they can (Lowi 1985; Moe 1985).

The ambiguity of the governing structure gives them plenty of opportunities to do just that. This is so even for enumerated powers that seem on the surface to be quite specific. The president is granted the powers of commander in chief of the armed forces, for instance. But does this mean he can send troops into another country

without a declaration of war by Congress or that he can act to destabilize unfriendly regimes in foreign nations? On these sorts of details, the Constitution is silent, giving the president ample room to maneuver. Similarly, the president is granted the right, subject to Senate approval, to enter into treaties with other nations. But can he unilaterally enter into international “agreements” that need not be submitted to the Senate at all? Again, the Constitution does not say, and the president can move in, if he wants, to claim these powers for himself.

While there is ambiguity even in enumerated powers, the Constitution is especially ambiguous on the broad nature and extent of presidential authority. In sweeping language, it endows the president with the “executive power” and gives him responsibility to “take care that the laws be faithfully executed,” but it does not say what any of this is supposed to mean. Because these phrases are so widely applicable to virtually everything the president might contemplate doing, their inherent ambiguity “provide(s) the opportunity for the exercise of a residuum of unenumerated power” (Pious 1979, 38)—and thus for presidents to lay claim to what is not explicitly granted to them. The Founders, we should note, were well aware of this eventuality. Those (including Madison) who favored a limited executive argued for spelling out the president’s authority in detail, while those (such as Hamilton) who favored a strong executive wanted language that was ambiguous. On the language issue, the latter mostly won. But both were right about its implications for power.

The president is in an ideal position to take advantage of this ambiguity. To begin with, although he is charged with executing the laws passed by Congress, he is an independent authority under the Constitution and thus has an independent legal basis for taking actions that may not be simple reflections of congressional will. He is not Congress’s agent. Any notion that Congress makes the laws and that the president’s job is to execute them—to follow orders, in effect—overlooks the essence of separation of powers. The president is an authority in his own right, coequal to Congress, and not subordinate to it.

The president’s base of independent authority, in fact, is enormously enhanced rather than compromised by the executive nature of the job:

First, because presidents are executives, the operation of government is in their hands. As an inherent part of their job, they manage, coordinate, staff, collect information, plan, reconcile conflicting values, and respond quickly and flexibly to emerging problems. These activities are what it means, in practice, to have the executive power, and they give presidents tremendous discretion in the exercise of governmental authority. The opportunities for presidential imperialism are too numerous to count. When presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power.

Second, because presidents are executives, they have at their disposal a tremendous reservoir of expertise, experience, and information, both in the institutional presidency and in the bureaucracy at large. These are critical resources the other branches can never match, and they give presidents a huge strategic advantage—in the language of agency theory, an information asymmetry of vast proportions—in

pursuing the myriad opportunities for aggrandizement that present themselves in the course of governmental decision making.

Third, and finally, there is a key advantage that is often overlooked. Because presidents are executives, and because of the discretion, opportunities, and resources available to them, they are ideally suited to be *first movers* and to reap the agenda powers that go along with it. If they want to shift the status quo by taking unilateral action on their own authority, whether or not that authority is clearly established in law, they can simply do it—quickly, forcefully, and (if they like) with no advance notice. The other branches are then presented with a *fait accompli*, and it is up to them to respond. If they are unable to respond effectively, or decide not to, presidents win by default. And even if they do respond, which could take years, presidents may still get much of what they want anyway.

The bottom line, then, is that the Constitution's incomplete contract sets up a governing structure that virtually invites presidential imperialism. Presidents, especially in modern times, are motivated to seek power. And because the Constitution does not say precisely what the proper boundaries of their power are, and because their hold on the executive functions of government gives them pivotal advantages in the political struggle, they have strong incentives to push for expanded authority by moving into grey areas of the law, asserting their rights, and exercising them—whether or not other actors, particularly in Congress, happen to agree.

This does not mean that presidents will be reckless in their pursuit of power. Should they go too far or too fast, or move into the wrong areas at the wrong time, they would find that there are heavy political costs to be paid—perhaps in being reversed by Congress or the courts, but more generally by creating opposition that could threaten other aspects of their agendas. It is a matter of strategy. Presidents have to calculate, *ex ante*, the costs as well as the benefits of any attempt to expand their power and take action when the situation looks promising. They have to pick their spots. But they will constantly be on the lookout, ready to move, and quite capable of moving if that is what they decide to do.

A Simple Spatial Model

Spatial models are a standard tool for exploring struggles among political actors over policy and power. Such models are difficult to use in this case, because some of the most important features of the problem (discussed at length in the sections below) cannot readily be taken into account. Nonetheless, we think it is useful at this point to consider very briefly a simple model that helps illustrate the kind of leverage presidents can gain from acting unilaterally.

Take a look at Figure 1. We have assumed that policies can be arrayed along a single dimension and that players have ideal points along this continuum. The president's ideal point is at *P*, and Congress is treated as a one-house body whose median legislator's ideal point is at *C_m*. The president can veto congressional legislation, but

FIGURES 1a and 1b. The Legislative Advantages of Unilateral Action.

his veto will only be upheld if he can attract the support of one-third of Congress—represented, in the figure, by all members to the right of V, the ideal point of the legislator who can be termed the *veto pivot*.

In this simple scenario, consider what happens when policy is generated according to classic constitutional rules: Congress makes the laws, the president gets to veto. See Figure 1A. If the original status quo were at SQ₁, Congress would simply pass new legislation imposing C_m as the new policy, and the president—although he would like a further shift to the right—would have to accept this outcome. Both would be better off, and Congress would actually get its ideal point. Now compare what happens when the president is able to take unilateral action, as depicted in Figure 1B. Here, the president can act on his own to move policy from SQ₁ all the way to V, and this new policy would be an equilibrium outcome. Congress would like to move policy back toward C_m, but any move in that direction would be successfully vetoed by the president. Thus, the power of unilateral action allows the president to achieve legislative outcomes much closer to his ideal point, while Congress is correspondingly worse off.

Note that the president does not get everything he might want. For he would really prefer to move policy all the way to P. He cannot do so, however, because Congress—with the support of the veto pivot—will be able to stop him if he tries to shift policy to the right of V. Thus, unilateral action does not give the president *carte blanche*. He is still constrained by Congress, and he must be content with a measure of moderation.

To get a different angle on all this, suppose that the original status quo is SQ₂, a policy close to the president's ideal point. Under the classic model, in which Congress legislates and the president can only veto (Figure 1A), Congress would enact a new

policy SQ_2^* much closer to its own ideal point. The president loses from this shift in policy and would like to veto it. But because Congress has strategically chosen it such that the veto pivot is just indifferent between SQ_2^* and SQ_2 , the president cannot mobilize enough support to stop Congress from making the change. The president does, in fact, have some power here: were it not for his ability to veto, Congress would have moved policy all the way to C instead of stopping at SQ_2^* . Nonetheless, the equilibrium outcome gives Congress a beneficial shift in policy, and the president loses ground.

If the president had the power to act unilaterally in this same situation, as depicted in Figure 1B, things would turn out much more favorably. He would not have to accept Congress's shift in policy from SQ_2 to SQ_2^* and could take action on his own to move the status quo from SQ_2^* to V—using his veto to prevent any movement away from this point. V would be the equilibrium outcome (as it was in the earlier case of unilateral action). And although the president would still lose some ground as policy moves from the original SQ_2 to V, unilateral action allows him to keep policy much closer to his ideal point—and farther from Congress's ideal point—than would otherwise have been the case. He clearly has more power over outcomes when he can act unilaterally.

This is a simple model that leaves out key aspects of the power struggle. Congress, for instance, can write restrictive statutes in an effort to limit the president's ability to act unilaterally, and the courts can declare a president's actions illegal if he goes too far. If these were put to effective use—a big if, as we will see—they would obviously introduce additional constraints on the president that need to be recognized. Far and away the most important factor omitted from this model, however, and indeed from virtually all spatial models, would have the effect of expanding the scope for presidential power considerably. This is that Congress is burdened by collective action problems and heavy transaction costs that make it extremely difficult for that institution to fashion a timely, coherent response to presidential action or even to respond at all. Until spatial models can incorporate these fundamental features of Congress, they will systematically overstate Congress's capacity for taking strategic action—and understate presidential power.

We have to be wary, then, of putting too much stock in simple models. Still, the one we have employed here does help to illustrate two points that are quite central to our theoretical argument. The first is that unilateral action can make a big difference in determining what presidents are able to achieve—and this is why they value it and want more of it. The second is that, even when they can act unilaterally, they are constrained to act strategically and with moderation. They cannot have everything they want.

Congress: Delegation and Constraint

Now let us return to the kinds of theoretical concerns that are not so easily captured in these models. In our earlier section on ambiguity, we concluded by noting

that presidents are greatly advantaged by the executive nature of their jobs. While there are good reasons for this, it might seem that such a conclusion is premature—and indeed that, far from being a boon to presidential power, the fact that presidents are executives is ultimately their Achilles's heel. For even though they have independent authority under the Constitution and are not properly Congress's agents, they are still required to “take care that the laws be faithfully executed.” And this means, presumably, that Congress can constrain presidential behavior through the statutes that it writes.

It is true, of course, that what presidents can and cannot do is shaped by the statutes they are charged with executing. And Congress has the right to be quite specific in designing these laws, as well as the agencies that administer them. If it wants, it can specify policy and structure in enough detail to narrow executive discretion considerably, and thereby the scope for presidential control. It can also impose requirements that (if the courts agree) explicitly limit how presidents may use their enumerated powers—as it has done, for instance, in protecting members of independent commissions from removal and in mandating civil service protections for most government personnel.

Yet statutory constraint cannot be counted on to work especially well as a check on unilateral action by presidents. In the first place, legislators may actually prefer broad delegations of authority on many occasions, granting presidents substantial discretion to act unilaterally. This can happen, for instance, (1) when their policy goals are similar to those of presidents; (2) when they are heavily dependent on the expertise and experience of the administration; (3) when they want to avoid making conflictual decisions within the legislature and thus find it attractive to “shift the responsibility” to the executive; (4) when Congress, as a collective institution, really does not have specific preferences and can only decide on the broad outlines of a policy; (5) when, in complex policy areas with changing environments, it is impossible to design a decent policy that promises to meet its objectives unless substantial authority is delegated to the executive; and (6) when certain policies require speed, flexibility, and secrecy if they are to be successful (Moe 1990; Epstein and O'Halloran 1999). Most of these conditions, we should point out, are more likely to be met in foreign than domestic policy, so there is good reason to expect broad delegations to be more common in that realm.

When delegations are broad, presidential powers of unilateral action are at their greatest. One might be tempted to think that they are also innocuous in their effects on the balance of institutional power—for, as long as presidents stay within the broad bounds set by statute, they are simply following the will of Congress, and all is as it should be. This would be something of a misconception, though. The key issue is: who actually has power to make policy for the nation? And in these cases, that power would rest overwhelmingly with presidents, for with broad delegations of authority, they would be the ones making virtually all the key choices about the content, meaning, and consequences of policy. Whether or not presidents stay within congressional boundaries, then, delegation itself puts expanded powers into their hands that shift the institutional balance in their favor.

Congress will not always want to delegate broadly, however. Often, in fact, legislators are likely to see the value in putting statutory restrictions, perhaps highly restrictive ones, on what presidents can do. Presidents, after all, have broad national constituencies, are less susceptible to pressures from special interest groups, are concerned about their historical legacies as strong national leaders, and in general have different political stakes in policy than parochially oriented legislators do—and the coalitions behind particular pieces of legislation, especially on domestic issues, will often have good reason to fear that presidents might use any discretion delegated them in unwanted ways. If so, they will want to constrain the president's powers of unilateral action through narrow and strategically crafted delegations (Moe 1990; Epstein and O'Halloran 1999).

This is not so easily done, though. Legislators have to reckon with the fact that presidents are pivotal players in the legislative process. Presidents can veto any piece of legislation they want, and if they do, it is exceedingly difficult for Congress to override them. (Empirically, only about 7 percent of presidential vetoes have been overridden; see Cronin and Genovese 1998). Since everyone is aware *ex ante* of how consequential the veto can be, presidents will have a major say in shaping the content of legislation—and as they press their demands, they will be highly sensitive to how legislation stands to affect their own formal power. Among other things, they will push hard for provisions that give them as much discretion as possible, and they will seriously discourage provisions that limit their prerogatives.

Even when restrictions are included in final bills, Congress faces the problem of making them stick in practice. A president will not be easy to control once governing shifts to his bailiwick. In part, this is due to the same problem that owners face in trying to control the management of a private firm, for managers—like presidents and their agencies—have expertise, experience, and operational leverage that allow them to engineer outcomes to their own advantage. Although expected to faithfully execute the laws, managers have a very substantial capacity to shirk. The problem that Congress faces, however, is even more severe than this classic economic analogy can suggest. The president possesses all the resources for shirking that the corporate manager does, but his position is far stronger, precisely because he is not really Congress's agent. He is not a subordinate, but a coequal authority. As a result, Congress cannot hire him, cannot fire him, and cannot structure his powers and incentives in any way it might like—yet it is forced to entrust the execution of the laws to his hands. From a control standpoint, this is a nightmare come true.

Finally, whatever the discretion contained in specific pieces of legislation, and whatever opportunities for shirking they open up, it is crucial to recognize that the president is greatly empowered by the sheer proliferation of statutes over time. In part, the reasons are pretty obvious. When new statutes are passed, almost whatever they are, they increase the president's total responsibilities and give him a formal basis for extending his authoritative reach into new realms. At the same time, they add to the total discretion available for presidential control, as well as to the resources contained within the executive.

Less obviously, though, the proliferation of statutes creates substantial ambiguity about what the “take care” clause ought to mean in operation, ambiguity that presidents can use to their great advantage (Corwin 1973, 1984). While it may seem that the burgeoning corpus of legislative requirements would tie the president up in knots, the aggregate impact is liberating. For the president, as chief executive, is responsible for all the laws, and inevitably the laws turn out to be interdependent and conflicting in ways that the individual statutes themselves do not recognize. In the aggregate, what they require of him is ambiguous. The president’s proper role, as would be true for any executive, is to rise above a myopic focus on each statute in isolation, to coordinate policies by taking account of their interdependence, and to resolve statutory conflicts by balancing their competing requirements. All of this affords him enormous discretion to impose his own priorities on government unilaterally and to push out the boundaries of his own power—claiming all the while that he is faithfully executing the laws.

Even though presidents are mere executives, then, charged with taking care that the laws be faithfully executed, Congress cannot be expected to use statutory constraints with great effectiveness in restricting the expansion of presidential power.

Congress: The Capacity to Act and Resist

What can we say, more generally, about how Congress is likely to respond to the presidential drive for power? For starters, we should note that, when scholars and journalists consider almost any issue that seems to pit Congress against the president, they tend to reify Congress—treating it as a unitary actor with its own objectives and concerns, just like the president. The president and Congress are portrayed as fighting it out, head to head, over matters of institutional power and prerogative, each defending and promoting its own institutional interests.

But this misconstrues things. Congress is made up of hundreds of members, each a political entrepreneur in her own right, each dedicated to her own reelection and thus to serving her own district or state. Although all have a common stake in the institutional power of Congress, this is a collective good that, for well-known reasons, can only weakly motivate their behavior. They are trapped in a prisoners’ dilemma: all might benefit if they could cooperate in defending or advancing Congress’s power, but each has a strong incentive to free ride in favor of the local constituency.

What is likely to happen in Congress, then, when presidents take unilateral action by issuing executive orders that shift the policy status quo? The answer is that legislative responses (if there are any) will be rooted in constituency. An executive order that promotes civil rights, for example, will tend to be supported by legislators from urban or liberal constituencies, because it shifts the status quo in their preferred direction, while members from conservative constituencies will tend to oppose it. The fact that this executive order might well be seen as usurping Congress’s lawmaking powers, or that it has the effect of expanding presidential power, will for most legislators be quite beside the point. Thus, if Congress tries to take any action at all in

responding to the executive order, the battle lines will be determined by the order's effects on legislative constituencies, not by its effects on Congress's power vis-à-vis the president. Even when presidents are clearly taking action to push out the boundaries of their power, therefore, Congress will not tend to vote or respond on that basis and will not, as a result, be able to defend or promote its institutional power very effectively.

While Congress is poorly equipped to defend its own interests, it is also debilitated by a still more general problem: as a collective institution, it is poorly equipped to take almost any kind of coherent, forceful action. A maze of obstacles stands in the way of each congressional decision. A bill must pass through subcommittees, full committees, and floor votes in the House and the Senate; it must be endorsed in identical form by both houses; and it is threatened along the way by filibusters, holds, machinations over rules, and other roadblocks. Every single veto point must be overcome if Congress is to act. Presidents, in contrast, need to succeed with only one to block, and thus preserve whatever status quo their unilateral action has created.

Because of all these veto points, and because of all the collective action problems arising from the parochial concerns of its many members, the transaction costs of congressional action are enormous. Coalitions must somehow be formed among hundreds of entrepreneurial legislators across two houses and a variety of committees, which calls for intricate coordination, persuasion, trades, and promises—and is continually vulnerable, all along the way, to renegeing and commitment problems. Owing to scarce time and resources, moreover, members must also be convinced that the issue at hand is more deserving than the hundreds of other issues competing for their attention.

Party leaders can help to cut down on these transaction costs, impose a modicum of order, and give Congress a certain capacity to act and even to guard its power. But party leaders are notoriously weak, and they are weak because their “followers” want them to be. Good leadership means promoting the reelection prospects of members by decentralizing authority, expanding their opportunities to serve special interests, and giving them the freedom to vote their constituencies (Mayhew 1974; Cox and McCubbins 1993). Overall, then, the veto-filled process of generating legislation remains incredibly difficult and costly and heavily weighted in favor of those who want to block. Disabling problems are rampant, and they are built into the collective nature of the institution. And because of all this, the best prediction for most issues most of the time is that Congress will take no action—especially if there is a strong and dedicated opponent, such as the president, who wants exactly that.

Congress's situation is all the worse because its collective action problems do more than disable its own will and capacity for action. They also allow presidents to manipulate legislative behavior to their own advantage, getting members to support or at least acquiesce in the growth of presidential power. One basis for this has already been established by political scientists: in any majority rule institution with diverse members, so many different majority coalitions are possible that, with the right manipulation of the agenda, outcomes can be engineered to allow virtually any alternative to win against any other. Put more simply, agenda setters can take advantage of

the collective action problems inherent in majority-rule institutions to get their own way (McKelvey 1976). This is an ideal setup for the promotion of presidential power.

Presidents can exercise two important kinds of agenda control in their relations with Congress. The first is now part of the familiar, textbook description of American politics: precisely because Congress is so fragmented, the president's policy proposals are the focal points for congressional action. The major issues Congress deals with each year, as a result, are fundamentally shaped by what presidents decide will be the salient concerns for the nation. While this kind of agenda power is of great consequence, a second kind may well be even more important for the institutional balance of power, yet it is rarely recognized as such. This is the agenda power that presidents exercise when they take unilateral action to alter the status quo. When they do this, they present Congress with a *fait accompli*—a new, presidentially made law—and Congress is then in the position of having to respond or acquiesce.

Note the key differences between these forms of agenda control. Under the first, presidential success ultimately requires an affirmative act by Congress, and thus that Congress go through all the laborious steps necessary to produce new legislation—which is typically very difficult, highly conflictual, time-consuming, and, in the final analysis, unlikely to happen. This is why modern presidents have incentives to shy away from the “legislative strategy” of presidential leadership (Nathan 1983). Even with all their resources, they can expect to have a hard time getting their programs through Congress.

On the other hand, the second form of agenda control, rooted as it is in unilateral action, gives the president what he wants immediately—a shift in the status quo and perhaps a new increment to his power—and depends for its success on Congress's not being able to pass new (and veto proof) legislation that would overturn or change it. Such a requirement is much more readily met, for it is far easier, by many orders of magnitude, to block congressional action than it is to engineer new legislation.

This is especially so when presidents get involved in the legislative process, as they ordinarily will. Presidents have tremendous resources to deploy on their own behalf. Their central position leaves them ideally situated to exercise leadership, make side payments, and cement deals. And to win, they merely need to block at one veto point, which is a relatively easy matter. Even if Congress is somehow able to manage an affirmative act of reversal, moreover, the president can still exercise his own veto—and sustain it by mobilizing just one-third of the members of one house to support him.

Usually, blocking will not even require all-out reliance on the president's arsenal. Many legislators will gladly line up behind the president. As we noted earlier in our civil rights example, legislators will evaluate the presidential shift in the status quo in terms of their constituency-based policy preferences, not in terms of the institutional power struggle. If the president has thought ahead, at least some and perhaps many of these legislators will find the new status quo preferable to the previous one, and they will act to prevent a reversal. In addition, for reasons that also (but less directly) arise from constituency, the president can likely count on support from many members of his own party. The combination of these two sources of support should

often be sufficient. If not, the president can rely on his firepower to attract additional legislators into the fold—legislators that, we should remember, are always ready to deal when something of value to their reelection is offered in payment. All things considered, then, presidents should lose these contests only rarely.

This does not mean that presidents can be cavalier about taking unilateral action. While it is exceedingly difficult for Congress to reverse a presidentially made law, the probability of its doing so will obviously depend on how the new law squares with legislative preferences. The greater the number of legislators who prefer the old status quo to the new one, and the more intensely they feel about it—which turns on how great a departure the president has made from their ideal points—the more likely it is that Congress will be able to overcome its collective action problems and reverse. All preferences, however, are not equally relevant here. While legislators may have preferences on every issue under the sun, they only have strong incentives to act on them when the issues are related to constituency. When presidents act unilaterally, then, legislative preferences are most likely to come into play to the extent that presidential action has an adverse effect on constituency interests, particularly if those interests are organized and powerful. The stronger the constituency connection—and, given that, the greater the departure of presidential action from what legislators want—the more motivated legislators will be to mobilize a reversal.

Because presidents know this *ex ante*, however, this is another way of saying that the issues on which they choose to act unilaterally, and the distances they choose to shift the status quo, need to be chosen strategically—and thus subject to legislative constraint. They have incentives, clearly, to favor unilateral actions that are only weakly related to constituency. And on these matters, they can afford to be quite bold in their departures from legislative preferences. They need to be more careful—and more moderate—when their actions have adverse effects on important constituency interests. While these conclusions apply generally to presidential incentives, an obvious implication is that presidents should find foreign policy a much more attractive sphere for taking bold unilateral actions, while in domestic policy they will be more prone to incrementalism and moderation.

Constituency and the corresponding incentives toward presidential moderation do not change the fact that, in the politics of unilateral action, presidents hold virtually all of the cards. When presidents act and Congress must reverse, presidents are heavily advantaged to get what they want. There is one crucial consideration, however, that we have yet to discuss and that gives Congress a trump card of far-reaching consequence. This is the fact that Congress has the constitutional power to appropriate money—which means that, to the extent that unilateral actions by presidents require congressional funding, presidents are dependent on getting Congress to pass new legislation that at least implicitly (via appropriations) supports what they are doing. When appropriations are involved, in other words, presidents cannot succeed by simply preventing Congress from acting. They can only succeed if they can get Congress to act—which, of course, is much more difficult and gives legislators far greater opportunities to shape or block what presidents want to do.

This is not a crippling constraint. The congressional appropriations process is built around logrolling and omnibus appropriations bills; and specific items, especially if they have powerful patrons, are likely to be funded (and funded routinely over the years) even if they could not attract majority support standing on their own. Thus, presidents do not have to get special legislation passed, should they need funding. They only need to see that their funding requests are successfully merged into the appropriations process, which is a good deal easier to accomplish. Moreover, many unilateral actions do not require legislative appropriations anyway. This is the case, for instance, when presidents impose new rules on the way government agencies interpret and implement policy—which is in fact a major way presidents make law. They can also create agencies or programs that are funded out of existing resources already available to the executive, and only later (after they have had a chance to expand their support) seek out funding from the legislature.

Nonetheless, the appropriations constraint remains very real. Presidents are obviously best off if they can take unilateral actions that do not require legislative appropriations, and they will have incentives to do just that. Similarly, presidents will obviously not want to initiate major new programs through unilateral action, for even if the courts were to regard egregious instances of presidential lawmaking as constitutional, their need for substantial budgetary outlays would inevitably single them out for special legislative attention and lead to a decision process that is no different than what would have occurred had presidents simply chosen to seek a legislatively authorized program from the beginning. When presidents do take unilateral actions that require legislative funding, both the actions and their funding requirements are likely to be moderate and to take legislative preferences into account.

In the final analysis, presidents still hold substantial advantages over Congress, due largely to the disabling effects of Congress's collective action problems and to the relative ease with which presidents can block any congressional attempts to reverse them. Presidents are well positioned to put their powers of unilateral action to use, as well as to expand the bounds of these powers over time. But they cannot simply do what they want. They are constrained by constituency and by the legislative power of appropriation. And largely for these reasons, they will proceed with moderation, with an eye to legislative preferences, and with biases that channel their behavior in certain directions.

The Courts

If Congress cannot stop presidents from expanding their powers, then perhaps the courts can. For presidents are exercising powers nowhere explicitly granted them by the Constitution, and the Supreme Court has every right to step in and prohibit them from doing these things. While we have argued that constitutional ambiguity works to the great advantage of presidents, allowing them to rush into grey areas of the law and claim new turf for themselves, the fact is that the Supreme Court has the right to say what the Constitution means—and thus to resolve any and all ambiguities. In a

given case, the Court can strike down a president's unilateral action as unconstitutional or as inconsistent with his executive responsibilities under statute. More generally, it can issue rulings that spell out in explicit, all-encompassing terms what the boundaries of presidential power are, and it can set these boundaries as narrowly as it likes.

But is this what we should expect the Court to do? Or is it possible that the Court would tend to do just the opposite by upholding presidential actions and promoting an expansive view of presidential power? To answer these sorts of questions, we need a theoretical basis for understanding how the Court is likely to approach issues of presidential power.

Supreme Court justices are appointed for life. They are not readily controlled by other political actors, are not beholden to political constituencies, and have substantial autonomy to chart their own courses. Thus, they may use judicial decisions to pursue their own ideologies or policy agendas. They may also act on their scholarly beliefs in the proper meaning of the law and the constitution. In either event, they are likely to care about the reputations they are building for themselves as respected public servants—their historical legacies. They are likely to care as well about upholding the reputation of the Court as a whole, for their own legacies are heavily dependent on the prestige of the institution. Because there are only nine justices, moreover, they are far better able than Congress to act on their common institutional interests.

In some sense, then, the judges on the Supreme Court can do what they want in resolving the ambiguities of presidential power. They have the autonomy to clamp down on presidents, if that is what their policy interests or legal philosophies or the integrity of the institution require. And they have the autonomy to do just the opposite, depending again on how they see the issue. Similarly, their autonomy allows them to safeguard the prestige of their institution by responding to public opinion and other aspects of the political environment. When presidents take unilateral actions that are distinctly unpopular, the Court can add to its prestige by declaring their actions illegal. And when presidents take unilateral actions that are popular, the Court can add to its own prestige by upholding him.

The Court is inherently something of a wild card, therefore, and cannot be counted on to give presidents whatever they want. Presidents can engineer Congress's decisions by manipulating its collective action problems. But they cannot interfere with or participate in Court decisions in the same way, and are vulnerable as a result to exercises of judicial autonomy. Nonetheless, even within the judiciary there are fundamental forces working to the advantage of presidents, encouraging the Court to uphold presidential actions and promote an expansive view of presidential power. The Court may sometimes be a problem for presidents, even on important issues, but on the whole it is far more likely to support and legitimate the kind of imperialism presidents are naturally inclined to practice.

Two basic factors tend to give the Court an orientation favorable to presidents. The first is that presidents appoint all members of the Court. It is conventional wisdom that presidents appoint justices whose ideologies and legal philosophies are consistent with their own (or are perceived to be, *ex ante*) and thus that presidents who

are Republican or Democratic, conservative or liberal, tend to make different types of appointments to the Court. This only makes sense given the incentives of presidents to promote their own agendas and exercise their own brand of leadership. It is also perfectly plain, however (although it is less often recognized in the literature), that presidents of all ideological and partisan stripes have a common interest at stake in these appointments as well, namely, an interest in putting individuals on the Court who will uphold and promote the power of the presidency.

This is not so hard to do. All potential nominees for the Court have track records and reasonably well-developed reputations. Their prior judicial decisions, articles, speeches, and public actions, together with what is known about them informally via acquaintances and friends, give presidents a great deal of information about their intellectual orientations and thus about their likely behavior on the Court. These reputations are imperfect, but presidents are still in a position to make well-informed selections. Thus, they clearly have the opportunity as well as the motive to screen out individuals who favor a restrictive view of the presidency, and to promote the candidacies of individuals who—in addition to having compatible ideologies and philosophies—are thought favorable to presidential power.

When presidents make nominations to the Court, the Senate has to concur. Won't the Senate tend to reject candidates who take a favorable stance toward presidential power? The answer is generally no. Again, Senators are primarily oriented by reelection and thus by the way issues affect their state constituencies. They are only weakly motivated by concerns about the balance of institutional power. In evaluating judicial nominees, they will be responsive to constituency pressures and therefore to the implications that a candidate's philosophy or ideology might have for important policies of relevance to their state support coalitions. For the most part, issues of presidential power are not part of their calculus and will not get in the way.

The weakness of the appointments strategy is that it is ultimately based on an unenforceable contract. For once an appointee assumes office, presidents lose all control over him, and he can use his autonomy to pursue on an intellectual trajectory that confounds prior expectations—as Earl Warren did after his much-regretted appointment by President Eisenhower. Despite this imperfection, however, the appointments strategy stands to work well for presidents on average. They have the freedom to pick pro-presidential types for the bench, they have good information on which to base their picks, and, as these justices proceed to make their own decisions, they can be expected to behave “according to type” most of the time. This is enough to tilt the Court in the president's favor.

In addition to appointments, there is also a second (and perhaps more important) factor that works to the president's advantage with the Courts. This one is rooted in the basic design of separation of powers: under the Constitution, the Court is not empowered to enforce its own decisions but must rely on the executive branch to enforce them. While the Court is said to be an independent branch of government, then, its power and prestige are profoundly dependent on the executive. The decisions that it renders, however well reasoned or legally significant in the abstract, are meaningless slips of paper unless they are put into effect, and they can only be put into

effect if the executive is willing to implement them. If the executive refuses to cooperate—or more likely, if it purposely acts very slowly, ineffectively, or in ways that alter or distort judicial intent—the policy pronouncements of the Court threaten to be empty, and its integrity and social standing as a political institution are put seriously at risk (Corwin 1984).

It has long been recognized by legal scholars that the Court cannot simply act on principle and let the chips fall where they may, for this sort of strategy would ultimately prove self-destructive (e.g., Bickel 1962). Judges have incentives to be pragmatic and to exercise a kind of self-restraint that is suited to the precarious position they find themselves in. Among other things, this means that they have incentives to choose their cases and fashion their decisions not just with reference to what is “right,” given their philosophies or ideologies, but also with reference to whether and how well these decisions are likely to be enforced by the executive—which turns on the interests of the executive and on a range of political factors that can shape those interests. It is of great relevance, obviously, if the executive is opposed to a decision and not inclined to implement it effectively (or at all). It is also relevant if the public is opposed, for not only would this tend to damage the Court’s standing in itself, but it would also give the executive political reasons not to implement the law with any zeal. As a general matter of strategy, then, the Court should have incentives to take these sorts of factors into account and craft its decisions accordingly. Judicial decisions should therefore be attuned to politics—and to the executive.

When the Court is dealing with issues of a local nature, it can take advantage of divisions within the executive to promote enforcement. With an issue like school desegregation, for instance, the Court may not have confidence that local school boards or police will carry out its decisions, but it may have greater confidence that, if the latter do not, then state or federal executives—with different constituencies and different interests—will step in and see that the law is implemented. When it deals with issues affecting the presidency, however, its strategic situation is less favorable. There is no higher executive authority than the president, so no other executive is going to come riding to the Court’s rescue to force the president into action. The president, moreover, is in charge of the entire federal executive branch and thus has a major say in how all the Court’s decisions are enforced at that level. Thus, the Court has a double problem. If it decides against the president on an issue the president cares about, he may evade compliance. And if it decides against the president on lots of issues—and is, in some sense, anti-president in its general rulings over time—the president could well become anti-Court in his general enforcement responsibilities throughout the executive branch, threatening the entire edifice of Court decisions (Strum 1974).

The Court has reason, then, to be friendly to presidents. And this means, above all else, being favorable to them on the issues they care most about: those involving presidential power and its exercise. They do not, moreover, have the same incentive to be friendly to Congress on issues of institutional power or to preserve some sort of balance between the two branches. While Congress does have certain leverage over the Court—it can change its size, for instance, or change its jurisdiction—legislators

do not have the same intense concern about institutional power that presidents do and are unlikely to retaliate against the Court on these grounds. If they tried, the president would still be in a position to veto, and public outrage would probably stop them before the president had to anyway. Congress does not have a club over the Court's head. The president does.

What, then, should we expect the Court to do when presidents take unilateral action to further their own political leadership, and when they are challenged by antagonists who claim they have no legal right to do what they are doing? In general, we should expect the Court to uphold the presidency and its rights to act, at least most of the time. But this is not always straightforward, given all the other factors—intellectual, philosophical, political—that come into play in these decisions, and given the Court's interest in maintaining its independence and integrity. How can the Court support presidents and still honor its other concerns? Among other things, it can do the following:

1. The Court can simply avoid deciding many issues that arise about institutional power, arguing that these are matters that the president and Congress have to resolve on their own. This protects the Court from the risk of alienating presidents. It is also an indirect way of giving presidents what they want, because Congress is not equipped to win this kind of struggle.
2. The Court can issue rulings favorable to presidents, but justify its decisions by appearing to give due deference to the legislature. More specifically, it can argue that presidential action under statutory law must be consistent with what Congress is presumed to want, and then proceed to construct a rationale by which this criterion is met. In fact, this is easy to do without compromising presidential interests. For Congress's collective action problems, combined with the zillions of statutes already on the books, make it entirely unclear what the institution's "will" is—and this gives the Court tremendous scope for arguing that, almost whatever presidents are doing, it is consistent with the "will of Congress."
3. The Court can decide against presidents when, perhaps as a result of unwise *ex ante* political calculations, presidents take actions that are highly unpopular with the public, Congress, and opinion leaders. This is unlikely to occur very often if presidents play their cards right. But it is functional in the grander scheme of things, because it allows the Court to enhance its own prestige, demonstrate its independence, and still decide in favor of presidents most of the time.

1. There are, of course, institutional approaches to the presidency that fall outside of rational choice and already take a much broader view of the foundations and exercise of presidential power. The most notable of these is Skowronek (1993), which essentially takes a historical-contextual approach. While we cannot explore these matters here, the question for the field is whether these alternative approaches are likely to generate more powerful theories than rational choice is, once rational choice theorists really tackle the subject in earnest.

The Supreme Court is not the whole story, of course. All challenges to presidential action will start out, and most will end, in the lower federal courts—and judges at these lower levels will have somewhat different incentives. They will not be as concerned about the prestige or integrity of the court system as a whole, and, as numerous as these judges are, they cannot be expected—just as legislators cannot—to take concerted action to protect their institutional interests. Nonetheless, all lower judges are presidential appointees and thus can be subjected to pro-presidency selection criteria. And they still have to be concerned about the enforceability of their orders should they rule against the president. More important still, they are part of a hierarchy: they are expected to make decisions that conform to principles enunciated by the Supreme Court, and their decisions are likely to be overturned if they get out of line. This is particularly true on issues of real salience to the Court, as issues of presidential power surely are. Thus, there is a reasonable basis for thinking that the pro-presidency bias will not just be restricted to the Supreme Court, but will be reflected (if imperfectly) in decisions throughout the federal court system.

Let's be clear. The Court is capable of limiting the president's powers of unilateral action, and indeed is more threatening in this regard than Congress is. The Court has substantial autonomy and coherence as an institution, and it may choose to act against him. Nonetheless, the best bet—owing largely to the president's control over appointments and to the court system's profound dependence on the executive for the enforcement of its rulings—is that the courts will ordinarily be supportive and refrain from imposing serious limits on presidential expansionism.

Conclusion

In this article, we have tried to develop a novel perspective on presidential power. It is thoroughly institutional, and thus a clear departure from the long-dominant approach in the presidency field, which sees the president as an individual whose skills, personality, and experiences profoundly shape his success in office. Yet it is also different from most of the institutional analyses that have been applied to the presidency thus far, particularly those coming out of the rational choice school that is increasingly dominating the new institutionalism. For among these works, the presidency has not been the central institutional concern. And when presidents have turned up in their models, the focus has been on the impact of specific formal powers, almost always the veto.

It is time, we think, for institutionalists in the rational choice tradition to begin developing a genuine theory of the presidency, one that sees presidents as institutional leaders whose powers are much more broadly based—and that understands presidential power not simply in terms of the apparent requirements of formal

structure but also in terms of the profoundly important ambiguities of structure that provide much of the dynamic behind American institutional politics (and, we suspect, institutional politics generally).¹

There is, of course, much about the presidency that needs to be understood. But the feature of the modern presidency that gives it so much driving force in politics, and that distinguishes it most clearly from the presidency of earlier times, is its capacity for unilateral action—a feature that has so far gone unappreciated and virtually unstudied, even within the mainstream of the presidency field. Our aim here has been to develop a theory of this important aspect of presidential power and, in so doing, to help lay the foundation for a broader institutional theory of the presidency.

Shorn of its details, the argument we offer here is pretty simple. Presidents have incentives to expand their institutional power, and they operate within a formal governance structure whose pervasive ambiguities—combined with advantages inherent in the executive nature of the presidential job—give them countless opportunities to move unilaterally into new territory, claim new powers, and make policy on their own authority. Congress has only a weak capacity for stopping them, because its collective action problems render it ineffective and subject to manipulation. The Supreme Court is capable of taking action against presidents, but is unlikely to want to most of the time and has incentives to be sympathetic.

This does not mean that presidents are unchecked in their quest for power. They can only push Congress or the Court so far before these institutions react, so there are constraints on how far presidents can go. They will moderate their actions accordingly. Moreover, presidents are political animals, and this is an important check in itself on what they are willing to do. Generally speaking, they want to take actions that are popular, and they know that bold action in one realm of policy could have political repercussions that undermine the presidential agenda in other realms. Thus, even if presidents figure they can take unilateral actions that will go unchecked by Congress or the Court, they may often decide not to move on them or to take much smaller steps than their *de facto* powers would allow.

The grander picture, then, is not one of presidents running roughshod over Congress and the Court to dominate the political system. Rather, it is a picture of presidents who move strategically and moderately to promote their imperialistic designs—and do so successfully over time, gradually shifting the balance of power in their favor.

We believe this theoretical perspective has merit, and we think it is broadly consistent with the best evidence available on the subject (reviewed in Moe and Howell 1999). But we do not pretend to be making some sort of definitive statement. We are moving ahead to formalize and elaborate on the theory (see Howell 1999), and we are in the process of collecting and analyzing a historical data set on presidential orders and on congressional and judicial responses to them. This is very much a work in progress, then, and we hope that it will be received as such. What we hope, above all else, is that the arguments we have presented here will help stimulate new theory and

research on the presidency—particularly on the president's powers of unilateral action, which are too important to overlook any longer.

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