PRESIDENTIAL POWER AND JUDICIAL CONSTRAINT

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A DISSERTATION PRESENTED TO THE FACULTY OF PRINCETON UNIVERSITY IN CANDIDACY FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

RECOMMENDED FOR ACCEPTANCE BY THE DEPARTMENT OF POLITICS

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September 2013
Abstract

The existing literature on presidential decision-making focuses on his relationship to congressional actors, while largely ignoring the potential role of the courts. My dissertation examines how the president’s ideological relationship to the courts influences his use of extra-legislative powers.

In the first chapter, “A Formal Model of Signing Statements,” I build a formal model of how the president, Supreme Court, and Congress bargain over policy. Several predictions are derived. First, the president is more likely to issue a signing statement when he is ideologically close to the Court. Second, the president will only issue a signing statement when he knows the Court will side with his position. Finally, conditional on the president being close to the Court, he is more likely to issue a signing statement when ideologically proximate to Congress.

The second chapter, “Presidential Signing Statements and the Court: An Empirical Test of a Formal Theory,” finds empirical support for the model’s predictions. First, I find that as the president and Court become ideologically closer, the president is more likely to issue a signing statement. Second, the probability of a signing statement increases as he also becomes ideologically closer to Congress. Finally, the Court is more likely to rule in the president’s favor on challenged legislation when he has issued a signing statement.

In the third chapter, “The President, the Court, and Policy Implementation,” I develop a theory of how the president uses executive orders in conjunction with rulemaking. The theory predicts that when the president is ideologically distant from the courts, agencies will engage in less rulemaking because courts are more likely to overturn their actions. Additionally, presidents will increase the number of executive orders giving agencies more authority to act. Testing this theory, I find that when the president is ideologically distant from the Supreme Court and D.C.
Circuit, agencies engage in less rulemaking and the president issues more executive orders. Further, these results hold when examining environmental and labor policy. Finally, the results in New Jersey, a state that is institutionally similar to the federal system, but not in the dissimilar state of Texas.
Acknowledgements

This dissertation would not be possible without the assistance of several advisors, colleagues, friends, and family who provided me with guidance, support, advice, encouragement, and at times much needed distraction during my time in graduate school. I sincerely thank you all.

To begin, a special thanks to my advisor, Brandice Canes-Wrone, for her unfailing guidance since the first day of graduate school. Throughout classes, generals, dissertation writing, presentations, conferences, the job market, and academia in general, she has given me the most invaluable and spot-on advice in navigating through it all. Her thorough reads, plans of action, and hands-on involvement in my professional development kept me focused and taught me so much of what I know about this field. I am deeply grateful for the time that she has invested in me.

I also want to thank my other committee members, Chuck Cameron and Nolan McCarty, for their advising on this dissertation. I thank Chuck for his constructive skepticism and big ideas, which proved helpful in pushing me to improve every project. Additionally, I thank Nolan for carefully reading my papers and offering very sound, practical, and always useful advice. Individually and as a whole, my dissertation committee brilliantly guided me on how to feasibly write a dissertation that hopefully could make an interesting contribution.

Additionally, I thank audiences of the Graduate Research Seminar in American Politics, the Public Law Working Group, the 2012 conference on Theoretical and Empirical Approaches to the Administrative Presidency, “Chuck’s Kids”, and “History Club” at Princeton University for their helpful feedback and suggestions on various stages of this dissertation. Similarly, I thank audiences at the Midwest Political Science Association’s 2011 and 2012 annual meetings.
in Chicago, IL, the 29th annual meeting of the Society for Political Methodology in Chapel Hill, NC, as well as audiences at Dartmouth College, Emory University, the University of Illinois, the University of Michigan, the University of Pittsburgh, and Washington University in St. Louis. Finally, I must thank the members of the Dissertation Rescue Squad (DRS), for helping to salvage this dissertation at various moments of peril. Though they choose to remain anonymous, their contributions do not go unnoticed or unappreciated. May their work continue to help the ever-panicked graduate student.

In addition to my academic needs, I wish to thank those that cared for my general well-being. Particularly, I thank Michele Epstein and Danette Rivera for taking great care of me during my time at Princeton. They helped to navigate me through administrative concerns, while providing me with great conversation, laughter, free food, nurturing when needed, and care during unexpected hospital visits.

Next, in a rare moment of sincerity, there are a great many friends that I must recognize and thank. I first thank my coauthor and friend, Alex Bolton, for constantly being a sound board for every half-baked research idea that comes to mind and for always being on the same page. I look forward to our continued partnership on research ideas, papers, screenplays, and spontaneous songs. To my former work husband, Mike Barber, who I thank for our many conversations about research ideas, papers, anxieties, fears, and dreams. I also thank him for being our favorite target in the bullpen (what doesn’t kill you makes you stronger). Next, I thank Matt Barnes for being a friend to commensurate with and to share bad jokes (mostly his) and inappropriate laughter. Finally, I sincerely thank Yanilda Gonzalez for her friendship and constant encouragement. She provided me with a listening ear and a supportive shoulder through every crisis, issue, and insecurity that I had during graduate school.
Additionally, I must thank a whole list of friends and colleagues who contributed to maintaining my overall sanity in graduate school with their conversations and feedback about research in addition to their pep-talks, constant laughter, and great company. I thank Carolyn Abott, Scott Abramson, Deborah Beim, Peter Buisseret, Will Bullock, Ted Engelhardt, PJ Gardner, Yu-Chi Kuo, Erin Lin, Jason McMann, Alex Ruder, and Steve Snell.

Finally, I thank my parents, Joseph and Sharon Thrower, for their unfailing love, support, encouragement, prayers, and for always ensuring that I was well taken care of in every possible way. Not only have they provided guidance and strong examples of strength and character to their children, but also to their countless students over the past 35 years. I hope to become half the educators that the both of them have been.
# Table of Contents

Abstract i

Acknowledgements iii

List of Figures and Tables vii

Chapter 1: A Formal Theory of Presidential Signing Statements 1
  Introduction 2
  Background on Signing Statements 4
  The Basic Model 8
  Extension 1: The Presidential Discretion Parameter 15
  Extension 2: Proposal Benefits to Congress 18
  Predictions 24
  Conclusion 26
  Appendix 1A: Players’ Decision Rules 28
  Appendix 1B: Proofs of the Propositions 31

Chapter 2: Presidential Signing Statements and the Court: An Empirical Test of a Formal Theory 35
  Introduction 36
  Previous Research on Signing Statements 38
  Theory 39
  Empirical Model and Data 41
  Results of Main Analysis 45
  Results of Challenged Legislation Analysis 49
  Discussion 51
  Conclusion 54
  Appendix 56

Chapter 3: The President, the Court, and Policy Implementation 58
  Introduction 59
  Background 62
  Theory 67
  Data and Methods 77
  Agency Rulemaking 86
  Executive Orders 89
  Labor and Environmental Policy 93
  Limitations and Robustness Checks 96
  Discussion 98
  Conclusion 101
  Appendix 103

References 109
### List of Figures and Tables

#### Figures

<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1</td>
<td>Game Sequence of Basic Model</td>
<td>10</td>
</tr>
<tr>
<td>1.2</td>
<td>Basic Model – Example 1, $c &lt; p &lt; j$</td>
<td>12</td>
</tr>
<tr>
<td>1.3</td>
<td>Basic Model – Example 2, $j &lt; c &lt; p$</td>
<td>13</td>
</tr>
<tr>
<td>1.4</td>
<td>Basic Model – Example 3, $c &lt; j &lt; p$</td>
<td>14</td>
</tr>
<tr>
<td>1.5</td>
<td>Extension 1 – Example 1, $c &lt; p &lt; j$</td>
<td>16</td>
</tr>
<tr>
<td>1.6</td>
<td>Extension 1 – Example 2, $c &lt; j &lt; p$</td>
<td>17</td>
</tr>
<tr>
<td>1.7</td>
<td>Extension 2 Example</td>
<td>22</td>
</tr>
<tr>
<td>2.1</td>
<td>Scatterplots with OLS Line and Confidence Intervals</td>
<td>45</td>
</tr>
<tr>
<td>2.2</td>
<td>Signing Statements and Constitutional Objections by President-Court Partisan Alignment</td>
<td>46</td>
</tr>
<tr>
<td>2.3</td>
<td>Estimated Predicted Probability of the President Issuing a Signing Statement</td>
<td>48</td>
</tr>
<tr>
<td>2.4</td>
<td>Estimated Probability of the Court Ruling in Favor of the President’s Position</td>
<td>50</td>
</tr>
<tr>
<td>3.1</td>
<td>Number of Significant Final Rules, 1983 – 2008</td>
<td>86</td>
</tr>
<tr>
<td>3.2</td>
<td>Average Number of Final Rules per Year by Executive-Court Alignment, 1983 – 2008</td>
<td>87</td>
</tr>
<tr>
<td>3.3</td>
<td>Number of Significant Executive Orders, 1983 – 2008</td>
<td>89</td>
</tr>
<tr>
<td>3.4</td>
<td>Average Number of Executive Orders per Year by Executive-Court Alignment, 1983 – 2008</td>
<td>90</td>
</tr>
</tbody>
</table>

#### Tables

<table>
<thead>
<tr>
<th>Table</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1</td>
<td>Signing Statements and Objections by Presidential Term</td>
<td>5</td>
</tr>
<tr>
<td>2.1</td>
<td>The Probability of Issuing a Signing Statement, 1953 – 2008</td>
<td>47</td>
</tr>
</tbody>
</table>
2.2 The Effect of President-Court Distance on the Number of Signing Statements, 1953 – 2008

2.3 The Effect of Signing Statements on the Probability of the Court Ruling in the President’s Favor on Challenged Legislation

2.4 Rate of Signing Statements Issued Before and After Nixon Court Appointments

2.5 Rate of Signing Statements Issued Before and After George H.W. Bush Court Appointment

2.6 Rate of Signing Statements Issued During the Carter Presidency

2A.1 Description of Independent Variables for Main Analysis

2A.2 Description of Independent Variables for Legislation Challenged In Court Analysis

2A.3 Summary Statistics for CRE Regression

2A.4 Summary Statistics for Negative Binomial Regression

2A.5 Summary Statistics for Legislation Challenged in Court Logistic Model

3.1 The Effect of President-Court Distance of Significant Agency Rules

3.2 The Effect of Governor-Court Partisan Alignment on Final Rules In New Jersey and Texas

3.3 The Effect of President-Court Distance on Significant Executive Orders

3.4 The Effect of President-Court Distance on Significant Executive Orders, By Grant of Authority

3.5 The Effect of President-Court Distance on Significant Executive Orders, By Policy Domain and Authority Source

3.6 The Effect of Governor-Court Partisan Alignment on Executive Orders In New Jersey and Texas, 1979 – 2005

3.7 The Effect of President-Court Distance on Labor Policy

3.8 The Effect of President-Court Distance on Environmental Policy

3A.1 Description of Independent Variables
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3A.3</td>
<td>The Effect of President-Court Distance on Insignificant Executive Orders, 1983 – 2008</td>
<td>105</td>
</tr>
<tr>
<td>3A.4</td>
<td>The Effect of President-Court Distance on Significant Executive Orders and Pages in the Federal Register, 1953 – 2008</td>
<td>105</td>
</tr>
<tr>
<td>3A.5</td>
<td>The Effect of President-Court Distance on Economically Significant Final Rules</td>
<td>105</td>
</tr>
<tr>
<td>3A.6</td>
<td>The Effect of Congressional Variables on Significant Final Rules</td>
<td>106</td>
</tr>
<tr>
<td>3A.7</td>
<td>The Effect of Congressional Variables on Significant Agency Rules, 1983 – 2008</td>
<td>107</td>
</tr>
</tbody>
</table>
Chapter 1

A Formal Theory of Presidential Signing Statements
1. **Introduction**

On July 7, 1986, the Supreme Court declared the Gramm-Rudman-Hollings Balanced Budget Act of 1985 unconstitutional in *Bowsher v. Synar* (478 U.S. 714). The Court ruled that this act, which called for mandatory spending reductions to reduce the federal budget deficit, violated the separation of powers doctrine of the Constitution because it granted executive responsibilities to a congressional agent – the Comptroller General. While this ruling was inconsistent with the desires of Congress, it was in accord with the president’s position in his signing statement to the act. In this statement, President Ronald Regan declared:

> “In signing this bill, I am mindful of the serious constitutional questions raised by some of its provisions. The bill assigns a significant role to the Director of the Congressional Budget Office and the Comptroller General…Under the system of separated powers established by the Constitution, however, executive functions may only be performed by officers in the executive branch. The Director of the Congressional Budget Office and the Comptroller General are agents of Congress, not officers in the executive branch.”

This signing statement became central in determining the constitutionality of the Balanced Budget Act in *Bowsher v. Synar* and as Cooper (2002) argues was at “the heart of the Court’s ruling striking down the legislation” (217).

This case demonstrates the importance of the courts in determining whether a signing statement is consistent with the law. The courts can support the president’s position in interpreting legislation, often in direct conflict to Congress’s original provisions, and thus set policy where the president stated it in his signing statements. Conversely, the courts can side against the president’s statement and move policy away from his preferred outcome.

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2 In a footnote, the Court directly refers to the president’s arguments in this signing statement, stating: “In his signing statement, the President expressed his view that the Act was constitutionally defective because of the Comptroller General’s ability to exercise supervisory over the President” (*Bowsher v. Synar*, footnote 1).
As a result of this role, the preferences of the courts may be an important determinant of whether the president decides to issue signing statements. Political scientists have observed that some presidents have issued substantially more signing statements and objections than others. Most existing studies tend to focus on personal differences or the president’s relationship to Congress. Consequently, little is known about how the courts may shape the way presidents use signing statements. Moreover, a good deal of variation among presidents remains unexplained even after accounting for presidential-congressional relations.

I seek to further our understanding of signing statements by presenting a formal model that incorporates the Supreme Court as well as Congress. The model demonstrates when the president uses signing statements, given the possible constraints that he faces from the other branches, and how these statements influence policy outcomes. Overall, the model predicts that the president is more likely to issue a signing statement when his views are more ideologically consistent with those of the Court, because he expects the Court is less likely to overturn such a statement. Further, because the president is able to anticipate how the Court is likely to decide these cases, the model predicts that the Court is likely to rule in favor of the president’s position when legislation with a signing statement is challenged. Finally, contrary to several arguments in the literature, the president is more likely to issue a signing statement when his preferences are closer to those of Congress. When faced with an ideologically extreme Congress, it is often more beneficial for the president to veto legislation than move policy with a signing statement, particularly when constrained by statutory discretion. This predicted relationship is magnified when the president is relatively close to the Court.

I begin by providing a brief background of signing statements and related literature (Section 2). Next, I present the basic model and its predictions (Section 3). I then present various
extensions of the model (Sections 4 and 5), followed by a discussion of the models and their predictions (Section 6). Finally, I offer concluding remarks (Section 7).

2. **Background on Signing Statements**

2.1 *What are the Different Types of Signing Statements?*

Signing statements are official written pronouncements issued by the president, usually prepared by the Department of Justice, accompanying a bill he signs into law. They serve a variety of purposes, such as to state the president’s support or opposition of the law, garner attention to it, provide general comments, highlight its benefits or shortcomings, provide objections to certain sections, and provide agency instructions on how to implement it.

Former Attorney General Walter Dellinger (1993) identifies three types of signing statements based on their functions – labeled by scholars such as Kelley (2002) as rhetorical, political, and constitutional. Rhetorical statements are those that target a particular constituency, drawing positive or negative attention. Political statements are those used to interpret the law in such a way as to benefit a particular constituency. Finally, constitutional statements are those in which the president objects to certain sections of the bill based on the grounds that it violates a certain section of the Constitution. Recent attention to signing statements has focused on George W. Bush’s controversial use of constitutional signing statements.³ Because this type of statement is the most controversial and has the most potential to impact policy (Cooper 2005; Kelley and Marshall 2009; Ostrander and Sievert 2012), these are the statements that I focus on for the analysis in the next chapter.

³ Most notably, *Boston Globe* reporter Charlie Savage garnered this attention with a series of articles, beginning in 2006, on Bush’s use of these statements and objections.
Signing statements are not a new phenomenon but have been used by presidents since James Monroe. For most of the following 150 years, they were used infrequently and mostly rhetorically. As Table 1.1 demonstrates, modern presidents, beginning with Harry Truman, began using signing statements more frequently and raising more constitutional objections than did their predecessors.

<table>
<thead>
<tr>
<th>President</th>
<th>Years</th>
<th>Total Statements</th>
<th>Constitutional Statements</th>
<th>Percent Constitutional</th>
<th>Constitutional Objections</th>
</tr>
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<tbody>
<tr>
<td>Hoover</td>
<td>1929-1933</td>
<td>16</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Roosevelt I</td>
<td>1933-1937</td>
<td>21</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Roosevelt II</td>
<td>1937-1941</td>
<td>9</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Roosevelt III &amp; IV</td>
<td>1941-1945</td>
<td>14</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Truman I</td>
<td>1945-1949</td>
<td>47</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Truman II</td>
<td>1949-1953</td>
<td>60</td>
<td>2</td>
<td>3.33</td>
<td>2</td>
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<tr>
<td>Eisenhower I</td>
<td>1953-1957</td>
<td>88</td>
<td>3</td>
<td>3.41</td>
<td>4</td>
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<tr>
<td>Eisenhower II</td>
<td>1957-1961</td>
<td>57</td>
<td>5</td>
<td>8.77</td>
<td>7</td>
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<tr>
<td>Kennedy</td>
<td>1961-1963</td>
<td>36</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Johnson</td>
<td>1964-1969</td>
<td>177</td>
<td>6</td>
<td>3.39</td>
<td>8</td>
</tr>
<tr>
<td>Nixon</td>
<td>1969-1974</td>
<td>117</td>
<td>6</td>
<td>5.13</td>
<td>7</td>
</tr>
<tr>
<td>Ford</td>
<td>1974-1977</td>
<td>137</td>
<td>12</td>
<td>8.76</td>
<td>12</td>
</tr>
<tr>
<td>Carter</td>
<td>1977-1981</td>
<td>228</td>
<td>26</td>
<td>11.4</td>
<td>31</td>
</tr>
<tr>
<td>Reagan I</td>
<td>1981-1985</td>
<td>121</td>
<td>29</td>
<td>23.97</td>
<td>45</td>
</tr>
<tr>
<td>Reagan II</td>
<td>1985-1989</td>
<td>128</td>
<td>47</td>
<td>36.72</td>
<td>78</td>
</tr>
<tr>
<td>Bush41</td>
<td>1989-1993</td>
<td>228</td>
<td>123</td>
<td>53.95</td>
<td>284</td>
</tr>
<tr>
<td>Clinton I</td>
<td>1993-1997</td>
<td>166</td>
<td>30</td>
<td>18.07</td>
<td>61</td>
</tr>
<tr>
<td>Clinton II</td>
<td>1997-2001</td>
<td>217</td>
<td>55</td>
<td>25.35</td>
<td>118</td>
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<tr>
<td>Bush43 I</td>
<td>2001-2005</td>
<td>112</td>
<td>91</td>
<td>81.25</td>
<td>713</td>
</tr>
<tr>
<td>Bush43 II</td>
<td>2005-2009</td>
<td>50</td>
<td>42</td>
<td>84</td>
<td>429</td>
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<tr>
<td>Obama</td>
<td>2009-2010</td>
<td>14</td>
<td>5</td>
<td>35</td>
<td>21</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>2043</td>
<td>482</td>
<td>1820</td>
<td></td>
</tr>
</tbody>
</table>

Source: *The American Presidency Project* (Online by Peters G and Woolley JT). I coded a statement as constitutional if it raised an objection on the basis of a violation of the Constitution. Similarly, the number of objections is coded by the number of sections of the law the president objected to based on constitutional grounds.
Scholars argue that more recent presidents, since Ronald Reagan, have used signing statements in a more systematic and strategic way, in an effort to expand presidential power (Cooper 2002, 2005; Kelley 2006; Pfiffner 2008). As Table 1.1 shows, Reagan and George H.W. Bush began issuing more constitutional statements, while Bill Clinton issued fewer.

George W. Bush’s presidency has been most publically criticized for his questionable use of signing statements to increase presidential power. Bush far surpasses every previous president in his use of constitutional objections, with over 80% of his statements raising constitutional concerns while objecting to over 1100 sections. Conversely, Barack Obama, who was critical of previous abuse,⁴ has significantly decreased the number of signing statements and constitutional objections relative to previous presidents. This variation in statements and objections over time raises the question of why some presidents issue more than others; this paper suggests that one answer lies in the president’s relationship to the courts.

2.2 What are the Constitutional Concerns surrounding Signing Statements?

There are many constitutional concerns surrounding the president’s use of signing statements that would give reason for the courts to pay attention and possibly constrain its use. First, the president’s use of signing statements is often viewed as a violation of the separation of powers principle of the Constitution (Garber and Wimmer 1989). His objections, which are based upon his own legal and constitutional interpretations, are often seen as encroachments of the courts’ own constitutionally granted power to interpret the law.⁵ Also, the president’s use of signing statements to essentially nullify certain sections of the law can be viewed as an effective

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⁵Article III, section 1 of the Constitution vests all judicial power to the courts.
line item veto, a power that the Court ruled unconstitutional in *Clinton v. City of New York* (1996). Additionally, the president’s use of these statements is often viewed as unconstitutional because it encroaches on Congress’s lawmaking powers by altering the content of the legislation (Broomfield 2006).

Secondly, signing statements can raise constitutional questions regarding the president’s authority to expand his power. The president often uses vague language from the Constitution to justify his use of this questionable power. He frequently cites constitutional intrusions on presidential power as an objection, claiming the legislation violates such clauses as the Take Care Clause, the Presentment Clause, or threatens his constitutionally-granted role as commander-in-chief. He commonly argues that because of these violations, the sections of the law in question should be ignored or interpreted differently. But whether the Constitution intended to permit the president to exercise and expand his powers in this way raises oft-debated questions surrounding his use of signing statements, specifically questions of whether he has the authority or responsibility to state his objections to unconstitutional laws or to not enforce them (Buthman 2007; Cass and Strauss 2007; Crabb 2008; Garber and Wimmer 1989; Rappaport 2007).

Because of the many constitutional questions signing statements raise, courts have good reason to be interested in them. In fact, presidents want the courts to pay attention to their own interpretation of the law in their signing statements, often writing them in the hopes that the courts will side with their position in future litigation (Cooper 2002). The president’s desire to offer his own interpretation of the law for the court’s consideration is further evidenced by

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6 It was ruled unconstitutional because it violated the Presentment Clause (US Constitution, Article I, Section 7, Clauses 2 and 3), which outlines the procedure in which a bill is to become a law.
7 “…he shall take Care that the Laws be faithfully executed” (US Constitution, Article II, Section 3).
8 US Constitution, Article I, Section 7.
9 US Constitution, Article II, Section 2.
former Attorney General Edwin Meese’s successful campaign to publish signing statements in legislative histories.\textsuperscript{10} Whether signing statements are reliable sources of legislative history is a legally debated issue (Garber and Wimmer 1989; Popkin 1991; Skrodzki 2007), but the literature provides support that courts often do consider signing statements in legislative histories (Carroll 1997).

2.3 \textit{Theoretical Research on Signing Statements}

Political science research exploring the president’s use of signing statements tends to be mostly empirical and focuses on how the relationship between the president and Congress influences his or her use of signing statements. While there has been a growing body of empirical research focused on signing statements, theoretical research in political science has lagged behind. There has been a substantial body of legal literature focused on the legal and constitutional issues surrounding this power and a few political science studies that have discussed these issues (Cooper 2002, 2005; May 1998; Pfiffner 2008). Correspondingly, there exist a few theoretical models of signing statements, but they are focused on presidential-congressional relations (Cutrone 2008; Kelley and Marshall 2009) and do not consider the role of the courts.

3. \textbf{The Basic Model}

This basic model provides a simple framework and clear predictions, giving insight into when the president issues signing statements given constraints from the Court and Congress. Subsequent extensions of this basic model add more political constraints – including a discretion

\textsuperscript{10} Kelley (2007) argues that the inclusion of signing statements in legislative histories was intended to serve as a vehicle to communicate to the appropriate agencies which provisions of legislation were unconstitutional – for the purposes of influence and coordination.
parameter for the president and proposal utility for Congress. Such extensions yield more precise predictions that are still consistent with the underlying intuition of this basic model.

3.1 Policy Space

This model builds off previous reversion point spatial models involving the president (such as Romer and Rosenthal (1978), Ferejohn and Shipan (1990), and Krehbiel (1998)). Policies are contained within a unidimensional policy space, \( x \in X = \mathbb{R} \), which can be interpreted as a continuum of liberal to conservative policies. This space contains an exogenous status quo policy \( q \), which represents previous policy prior to any decision-making. Let \( x' \) represent the final policy outcome following the final stage of the game.

3.2 Players’ Preferences

The three players—the president, Congress, and the Court—have single-peaked preferences over policy outcomes and \( p, c, j \) are their respective ideal points that represent their most preferred policies. The single-peaked utility functions are represented by \( u_i = -|x - i| \), where \( i \in \{p, c, j\} \). Let \( j(q) = 2j - q \) represent the point in which the Court is indifferent between \( j(q) \) and the status quo. Also, let \( A_j(q) = [q, j(q)] \cup [j(q), q] \) represent the set of policies the Court prefers to the status quo. I use similar notation for the preferred sets of Congress and the president.\(^{11}\)

3.3 Sequence of the Game

The sequence of the game is depicted in Figure 1.1. First Congress chooses whether or not to propose a bill \( b \). If it does not propose a bill, then the status quo \( q \) is retained. If Congress proposes \( b \), then the president can either veto and thus revert policy back to \( q \), sign the bill as it

\(^{11}\) Specifically, let \( c(q) = 2c - q \) and \( p(q) = 2p - q \) represent the points in which Congress and the president, respectively, are indifferent to the status quo. Additionally, let \( A_c = [q, c(q)] \cup [c(q), q] \) and \( A_p = [q, p(q)] \cup [p(q), q] \) represent the set of policies in which Congress and the president, respectively, prefer over the status quo.
is presented ($x = b$), or sign the bill with a signing statement $s$. After the president signs a bill, the Court reviews the policy. It can overturn the policy resulting in the outcome $q$, uphold the policy amended to $s$, or restore the policy to where Congress originally set it with $b$.

Figure 1.1: Game Sequence of Basic Model

3.4 Behavior

Players make decisions based on both the maximization of their own utility functions and the possible decisions of the other players. In other words, players wish to choose policies that are the closest to their ideal point such that the other players will not overturn them. The equilibrium concept is subgame perfect Nash and let $x^*$ represent the equilibrium outcome. The Court decides how to rule on policy reviews based on whether the signing statement, the original bill, or the status quo is located closer to its ideal point. If $s$ is closer to $j$ than $b$ and $q$, then the Court upholds the law with the signing statement. If $b$ is closer to $j$ than $s$ and $q$, then the Court restores the policy to where Congress originally set it in the bill. Otherwise, the Court overturns
the entire law because neither the bill nor the statement is more beneficial to it than the status quo.

The president decides whether or not to issue a signing statement based on the location of his ideal point and the bill, relative to the Court’s ideal point. If \( p \) is closer to \( j \) than \( b \) and \( q \), then the president always issue a signing statement at \( p \). This is because he knows the Court always upholds his signing statement because it prefers \( s = p \) over both the bill and the status quo. If he cannot obtain a signing statement at his ideal point, the president can also issue \( s \) at other locations if it is closer to both \( p \) and \( j \) than it is to \( b \) and \( q \). Otherwise he either signs the bill or vetoes it, based on whether \( b \) or \( q \) is closer to \( p \).

Finally, Congress decides whether to propose a bill and where to propose it based on how the Court will rule on challenges, where the president could possibly move policy with a signing statement, and which possible outcome is closest to Congress’s preferred policy. If Congress can propose a bill that results in an outcome closer to \( c \) than \( q \), considering the actions of the president and the Court, it proposes \( b \) such that it maximizes its own utility. However, if this is not possible, it chooses to not to propose \( b \), allowing \( q \) to remain the policy. The appendix provides a summary of the decision rules of each player.

3.5 Equilibrium Outcomes

Based on the players’ strategies, equilibrium outcomes can be found by using backwards induction. These outcomes are also based on the configuration of the ideal points of Congress, the president, and the Court, \( c, p, j \) respectively. I demonstrate each outcome with examples under these different configurations, depicted in Figures 1.2 – 1.4, but the full proof is located in the appendix. I find the equilibrium outcomes by assuming the orderings of \( c < p < j, \ j < c < p, \ and \ c < j < p \). However, these results hold and are symmetrical for all configurations.
In Figure 1.2, where $c < p < j$, Congress is indifferent between proposing any bill to the left of $p$ ($b < p$) because the president always issues a signing statement at $s = p$. This becomes the policy outcome because the Court prefers the statement to any policy that Congress prefers to propose. Congress does not propose any policy to the right of $p$ because it results in an outcome that is less beneficial to Congress (further from its ideal point $c$) than $s = p$. As a result, Congress always prefers to propose any policy $b < p$. Under these circumstances, the president always issues a signing statement at $s = p$ because the Court prefers $p$ to $b$ and $q$, thus upholding the statement. Therefore, the policy outcome is $x^* = p$.\(^{12}\)

Figure 1.2: Basic Model – Example 1, $c < p < j$

\[ b \quad s = x^* \]

---

In Figure 1.3, where $j < c < p$, Congress must propose $b = p(q)$ to prevent the president from vetoing the bill, which results in an outcome that is less beneficial to Congress. If Congress proposes $b = c$, the president vetoes the bill because he prefers $q$ to $b$. The outcome

\[ ^{12} \text{Note that this example considers the situation when } p \in [j(q), q]. \text{ If } p \notin [j(q), q], \text{ the president does not issue a signing statement because he is unable to move policy in such a way that the Court prefers and that is closer to his own ideal policy.} \]
results in a policy of $x = q$, which is further from Congress’s ideal policy. Consequently, Congress proposes $b = p(q)$, because it prefers $p(q)$ to $q$. The president does not issue a signing statement because it cannot issue one that he prefers more to the bill that the Court would approve. The president also does not veto the bill because it is indifferent between $q$ and $p(q)$. The Court upholds the bill, because it prefers $p(q)$ to $q$ and thus the policy outcome is $x^* = p(q)$.

Figure 1.3: Basic Model – Example 2, $j < c < p$

In Figure 1.4, where $c < j < p$, Congress must propose $b = j$ in order to obtain the best possible outcome that the Court would approve over a signing statement. For example, if Congress proposes $b = c$, the president issues a statement at $j(c)$ that is more beneficial to the president than the bill. The Court prefers $j(c)$ to $c$ and therefore upholds the statement because it is closer to $j$ than the bill and the status quo. This outcome is less beneficial to Congress than if it just proposes $b = j$. Similarly, the president issues a signing statement in such a way to any other bill Congress proposes to the left of $j$. As a result, Congress proposes $b = j$ because this is the
closest policy to its ideal point that the Court does not overturn. The president cannot issue any statement in which the Court more prefers; he also does not veto the bill because he prefers \( j \) to \( q \). The Court upholds the bill and the final outcome is \( x^* = b = j \).

Figure 1.4: Basic Model – Example 3, \( c < j < p \)

\[
\begin{array}{cccccc}
q & c & j & j(c) & p & j(q) \\
\hline
b = x^* \\
\end{array}
\]

The intuition from these examples holds more generally. In summary, the president issues a signing statement when the following conditions hold:

1. The Court prefers \( s \) to both \( b \) and \( q \). Otherwise, the president could veto to obtain \( q \) or sign as presented to obtain \( b \).
2. The president prefers \( s \) to both \( b \) and \( q \).
3. \( b \neq p \).

Congress proposes a bill that induces a signing statement, only if the following conditions hold:

1. The Court prefers \( s \) to \( q \).
2. Congress prefers \( s \) to \( q \).

Formally, the equilibrium outcome \( x^* \) is given by the following proposition:

**Proposition 1.** The president only issues a signing statement, resulting in \( x^* = p \), when his ideal policy is in between that of Congress and the Court (\( c < p < j \)); but this only occurs when he is close to both Congress (\( p \in A_c(q) \)) and the Court (\( p \in A_j(q) \)).
The proof of Proposition 1 is provided in the appendix.

4. Extension 1: The Presidential Discretion Parameter

While the Basic Model provides a solid foundation, it fails to place restrictions on the president’s use of signing statements. Realistically, the president is not unlimited in his powers but faces other political constraints. This extension introduces a discretion parameter in order to limit how far the president can move policy with a signing statement.

4.1 Discretion

Most of the assumptions and game sequence for Extension 1 are identical to those under the Basic Model. What differentiates this extension is that it includes a discretion parameter $d$. Similar to how it is conceptualized by Epstein and O’Halloran (1999) and Howell (2003), this parameter specifies how far the president is permitted to move policy away from the original bill with a signing statement. This parameter is exogenously set and cannot be reduced by the other actors in the model. It could be given specifically by strict language in previous statutes and the Constitution or by the interpretation of broad or vague language.

In the previous model, the president was unrestricted and could move policy as far as he wished. Formally, the president could issue a signing statement at any location in the policy space such that $s \in X = \mathbb{R}^1$. This often allowed the president to move policy to his preferred position with a statement (where $s = p$). Now, under this extension, the president is restricted in issuing signing statements such that $s = b \pm d$. In other words, the president can only issue statements that can move policy, in either direction, by the distance of $d$ from the proposed bill. This discretion parameter restricts the president’s power and allows Congress to play a more important role in the model.
4.2 Behavior

The addition of the discretion parameter alters many of the equilibrium decision rules and outcomes from the previous model. The Court’s decision remains identical to the previous model. However, the president must now base his decision on how far he can move policy with his signing statement. He issues a statement if he can move policy closer to his ideal point from the bill and if this statement is preferred by the Court over the proposed bill and the status quo. He also only issues a statement if it is closer to $p$ than $q$. Congress must now anticipate how far the president can move policy with a statement according to $d$ and proposes a bill accordingly. Often, Congress proposes a bill that is either $d$ away from where it prefers to set policy, in anticipation of a signing statement that would move the bill by $d$.

4.3 Equilibrium Outcomes

Figure 1.5: Extension 1 – Example 1, $c < p < j$

\[ b = c - d \quad x^* = s \]

Based on these decision rules, the equilibrium is demonstrated with examples depicted in Figures 1.5 and 1.6. In Figure 1.5, where $c < p < j$, Congress knows that the president issues a
signing statement to move policy closer to his ideal point on any bill to the left of \( p \) (\( b < p \)).

Knowing that the president can only move policy by \( d \), Congress proposes a bill at \( b = c - d \), in order to obtain its most preferred outcome. Following the bill, the president issues a signing statement at \( c \), where \( s = b + d = (c - d) + d = c \). The Court upholds the statement since it is closer to \( j \) than both \( c - d \) and \( q \). Thus, the final outcome is \( x^* = c \).

Figure 1.6: Extension 1 – Example 3, \( c < j < p \)

\[
\begin{align*}
\text{b=p(q)-d} & \quad \text{x*=s} \\
\end{align*}
\]

In Figure 1.6, where \( c < j < p \), Congress knows that the president vetoes any policy that is not in the interval \([p(q), q]\), because it is further from \( p \) than \( q \). Thus, \( p(q) \) is the closest outcome Congress can obtain to \( c \) that the president does not veto. However, if Congress proposes \( b = p(q) \), the president issues a signing statement to move policy closer to its ideal point but further away from Congress.\(^{13} \) With this information, Congress proposes a bill at

\(^{13}\) When \( p(q) + d < j \), the president will issue \( s = j \). When \( j < p(q) + d < p \), the president will issue \( s = p(q) + d \) only if \( p(q) + d < 2j - p(q) \), where the Court is indifferent between \( 2j - p(q) \) and the bill at \( b = p(q) \). Otherwise, the president will issue \( s = 2j - p(q) \). When \( p(q) + d > p \), the president will issue \( s = p \), only when \( p < 2j - p(q) \). Otherwise, the president will issue \( s = 2j - p(q) \). Such conditions will be further discussed in the next extension.
\( b = p(q) - d \). Following the bill, the president issues a statement at \( p(q) \), where \( s = b + d = (p(q) - d) + d = p(q) \).\(^{14}\) The Court upholds the statement because it prefers \( p(q) \) to \( p(q) - d \) and \( q \). Thus, the final outcome is \( x^* = p(q) \).

Formally, \( x^* \) is given by the following proposition:

**Proposition 2.**

(a) When the president’s ideal policy is in between that of Congress and the Court (\( c < p < j \)), the president issues a signing statement only if he is close to the Court (\( p \in A_j(q) \)). In these situations, if Congress is close to both the president (\( c \in A_p(q) \)) and the Court (\( c \in A_j(q) \)), then \( s = c = x^* \). Otherwise, \( x^* \in \{q, j(q)\} \) based on which policy maximizes Congress’s utility.

(b) When the Court’s ideal policy is in between that of Congress and the president (\( c < j < p \)), the president issues a signing statement only if the Court is close to his ideal point (\( j \in A_p(q) \)). In these situations, if Congress is close to both the president (\( c \in A_p(q) \)) and the Court (\( c \in A_j(q) \)), then, \( s = c = x^* \). Otherwise, \( x^* \in \{q, p(q)\} \) based on which policy maximizes Congress’s utility.

(c) When Congress’s ideal point is in between that of the Court and the president (\( j < c < p \)), the president never issues a signing statement.

The proof of Proposition 2 is located in the appendix.

5. **Extension 2: Proposal Benefits to Congress**

While the previous extension is beneficial in restricting how far the president can move policy with a signing statement, it still has its limitations. For example, the model does not consider the possibility that Congress extracts other benefits from proposing a bill at its ideal point. This is important in considering why – despite its awareness of the other actors’ subsequent decisions – Congress sometimes still chooses to propose at its ideal position,

\(^{14}\) Since the president is indifferent between \( p(q) \) and \( q \), he could either veto the bill or issue a signing statement. Congress prefers \( p(q) \) over \( q \). To ensure an outcome of \( p(q) \), Congress could issue a bill at \( b = p(q) - d + \varepsilon \) so that the president prefers the bill to the status quo and thus issues a signing statement instead of a veto.
regardless of whether it results in a final outcome that is less beneficial than proposing another policy more advantageous to bargaining with the president and the Court. The next section considers the addition of proposal benefits to Congress to help account for this occurrence.

5.1 Proposal Utility

In this extension, the assumptions, game sequence, and discretion parameter remain unchanged from Extension 1. However, what differentiates this extension from the previous one is the introduction of proposal utility for Congress. In this model, Congress receives utility from both the distance of the policy outcome to its preferred policy, as represented in the previous model, and also from the distance of its proposed policy to its preferred policy. In other words, Congress gains utility both from a final outcome that is close to its ideal point and from proposing a policy close to its ideal point. Congress’s new utility of a policy outcome $x$ is represented by:

$$u_c(x) = -a \cdot |x - c| - (1 - a) \cdot |b - c|, \text{where } a \in [0,1]$$

In this equation, $a$ and $1 - a$ represent the weights that Congress places on the outcome and the proposed bill portions of its utility, respectively. In other words, this is essentially how much value Congress places on its ideological distance from the policy outcome and its distance from its proposed bill. In the Basic Model and Extension 1, $a$ implicitly equaled one because Congress placed all its value on the proximity of the policy outcome to its ideal point. However, in this model, Congress places a portion of that value on the proximity of the bill to its ideal point.

I denote $u_c(x, b)$ as the utility Congress gains from proposing $b$, considering what the policy outcome will be following that proposal. For example, $u_c(x, b = c)$ represents the utility Congress gains from proposing a bill at its ideal point $c$, where $x$ represents the final policy outcome following that proposal, such that:
As a body consisting of members primarily motivated by reelection (Mayhew 1974), the value that Congress places on its proposal could reflect the benefits it gains from engaging in position taking.\textsuperscript{15} If we conceptualize Congress’s ideal point as not only reflecting its own policy preferences but also the preferences of its constituents,\textsuperscript{16} then proposing a bill at its ideal point could demonstrate to its constituents that it is actively advocating for their interests – which can be helpful in persuading voters to reelect its members. This is important because members can easily be held accountable due to the high visibility of their actions in Congress.\textsuperscript{17} Thus, Congress may sometimes prefer to propose a bill at its ideal point if it places a high value on position taking for reelection purposes. It may place a greater value on its proposal in some situations and not others, depending on factors such as which issues constituents are likely to incorporate into their vote choice, the intensity of voter preferences, and the salience of the issues (Arnold 1990). For these reasons, including proposal benefits to Congress in this extension offers an account of how reelection goals can influence its decision as to where to propose policy.

5.2 Behavior

Since the utilities of the Court and the president remain unchanged, their decision rules are identical to those presented in Extension 2. However, because the utility of Congress is different, its decision rule changes and thus results in a change in the equilibrium outcomes. Ideally, Congress would want to minimize the distance between the outcome, its ideal point, and

\[
u_c(x, b = c) = -a \cdot |x - c| - (1 - a) \cdot |c - c| = -a \cdot |x - c|
\]

\textsuperscript{15} Mayhew (1974) identifies position taking as one of three reelection activities of members of Congress, defining it as “the public enunciation of a judgmental statement on anything likely to be of interest of political actors” (61).

\textsuperscript{16} Arnold (1990) provides support for this conceptualization, arguing that members account for the preferences of their constituents when proposing policy.

\textsuperscript{17} For example, Mayhew (1974) argues that the way members of Congress vote on roll calls can be an important form of position taking.
the bill. This would occur when all of these were equal, when \( x = b = c \). However, because of the role of the other players who wish to maximize their own utilities, this rarely occurs. Instead, Congress must weigh which is more important – the outcome or the bill.

Based on the linearity of its utility function, Congress’s decision on where to propose a bill is based on which part of the utility it values more. If it values its proposal more, it proposes \( b = c \). However, if it more values the final outcome, it proposes whatever bill leads to an outcome closest to its ideal point, mirroring its proposals under Extension 1.\(^{18}\) Finally, if it gains the most utility from not proposing any legislation,\(^{19}\) then it chooses not to propose a bill and \( q \) remains the final policy. Since the decision rules and equilibrium outcomes are unchanged from Extension 1 when Congress gains the most value from the final outcome portion of its utility and since the equilibrium outcome is always \( x^* = q \) when Congress gains the most utility from not proposing, I will focus on the cases when Congress most values proposing \( b = c \) for the remainder of this section.

5.3 Equilibrium Outcomes

Figure 1.7 provides an example that demonstrates the equilibrium outcomes. The first part of this example (top panel) is identical to the first example of Extension 1 (Figure 3a), where \( c < p < j \). Congress proposes a bill at \( b = c - d \), prompting the president to issue a signing statement, such that \( s = b + d = (c - d) + d = c \). The Court upholds \( s \) because it is closer to \( j \) than \( b \) and \( q \). Thus, the outcome is \( x^* = s = c \). Under Congress’s previous utility, proposing \( b = c - d \) maximizes its utility because the final policy outcome is at its ideal point such that:

\(^{18}\) For the situations in Extension 1 where Congress was indifferent between not proposing \( b \) and proposing \( b < q \), Congress now chooses to propose \( b = c \) in Extension 2 because of the proposal benefits in its utility. However, the outcomes remain unchanged.

\(^{19}\) Formally, when Congress chooses not to propose legislation, its utility is \( u_c(q) = -|q - c| \).
However, with position taking incentives, its utility for proposing $b = c - d$ is now:
\[
\begin{align*}
  u_c(x, b = c - d) &= -|x - c| - |c - b| \\
  &= -a * |c - c| - (1 - a) * |c - b| \\
  &= -(1 - a) * |d|
\end{align*}
\]
This is not maximum utility, since it does not equal zero, and thus we cannot assume that $b = c - d$ is the best possible proposal Congress can make to maximize its utility; however this maximizes the final outcome-based portion of its utility. Congress could propose $b = c$ to maximize the proposal portion of its utility, such that:
\[
  u_c(x, b = c) = -a * |s - c| - (1 - a) * |c - c| = -a * |s - c|
\]

Figure 1.7: Extension 2 Example

The location of $s$ can vary depending on how much discretion the president is given. The bottom panel of Figure 6 depicts two regions in which the president can move policy using a signing statement, when Congress proposes $b = c$. If discretion can move policy in region 1, where $c + d < p$, the president issues $s = c + d$ to move policy as close to $p$ as possible. If discretion
can move policy in region 2, where \( c + d \geq p \), the president is given enough discretion to issue \( s = p \). Therefore, Congress’s utility for proposing \( b = c \) can be either:

\[
u_c(x, b = c) = -a \cdot |(c + d) - c| = -a \cdot |d|, \text{ when } c + d < p
\]

or

\[
u_c(x, b = c) = -a \cdot |p - c|, \text{ when } c + d \geq p
\]

Focusing on the case when Congress chooses to propose its ideal policy, we must check the conditions in which Congress maximizes its utility by proposing \( b = c \). This occurs when both conditions hold: 1. \( u_c(x, b = c) > u_c(x, b = c - d) \) and 2. \( u_c(x, b = c) > u_c(q) \). Thus, for the preceding conditions to hold, when \( c + d < p \), the following must be true:

1. \(-a \cdot |d| \geq -(1 - a) \cdot |d| = a < \frac{1}{2}\)

2. \(-a \cdot |d| \geq -|q - c| = a < \frac{|q - c|}{|d|}\)

When \( c + d \geq p \), the following must be true:

1. \(-a \cdot |p - c| \geq -(1 - a) \cdot |d| = a < \frac{|d|}{|p - c| + |d|}\)

2. \(-a \cdot |p - c| \geq -|q - c| = a < \frac{|q - c|}{|p - c|}\)

When these statements are true, Congress proposes \( b = c \). The president then issues \( s = c + d, \text{ when } c + d < p \) or \( s = p, \text{ when } c + d \geq p \). The Court upholds and the final outcome is \( x^* = s \).

Formally, \( x^* \) is given by the following proposition:

**Proposition 3.** When Congress maximizes its utility by not proposing a bill, \( x^* = q \). When Congress maximizes its utility by proposing a bill not exclusively at its ideal point, the outcomes are identical to those under Extension 1.

The following describes the outcomes under which Congress maximizes its utility by only proposing its ideal policy, which is more likely to occur as the value of \( a \) decreases. Congress
always proposes $b = c$ and the location of $x^*$ depends on the amount of discretion the president is given to move policy away from $c$ with a signing statement.

(a) When the president’s ideal policy is in between that of Congress and the Court ($c < p < j$), the president issues a signing statement only if he is given enough discretion to move policy close enough to the Court ($c + d \in A_j(q)$). In these situations, as $d$ increases, he moves policy closer to $p$, such that $x^* = c + d$ (if $c + d < p$) and $x^* = p$ (if $c + d \geq p$). Otherwise, $x^* = q$.

(b) When the Court’s ideal policy is in between that of Congress and the president ($c < j < p$), the president issues a signing statement only if he is given enough discretion to move policy close enough to his ideal policy ($c + d \in A_p(q)$). In these situations, as $d$ increases, he moves policy closer to $p$, where $s = x^* \in \{c + d, j(c), j(q), p\}$ based on which policy maximizes his utility given the value of $d$, such that the Court prefers $s$ over $b = c$ and $q$. Otherwise, $x^* = q$.

(c) When Congress’s ideal point is in between that of the Court and the president ($j < c < p$), the president never issues a signing statement.

The proof of Proposition 3 is located in the appendix.

6. Predictions

Predictions can be derived from the equilibrium outcomes and decisions from the models. Although the results and propositions become slightly more complicated with each extension, there are a few generalizable predictions across the models. First, the models show that the president only issues signing statements in situations where he and the Court are relatively close ($c < p < j$ and $c < j < p$). In fact, in these scenarios, the president is more likely to issue a signing statement as he and the Court move ideologically closer ($p \in A_j(q)$ or $j \in A_p(q)$).

Because the president is able to anticipate how the Court will rule on signing statements if legislation is challenged, he will not issue a statement that the Court is likely to overturn. This may result in less favorable outcomes or threats to his reputation. Since the Court is more likely
to side with the president’s position when they are ideologically aligned, the president is also likely to issue more statements during these times. Therefore, the first prediction states:

**The President-Court Alignment Prediction**: The president is more likely to issue a signing statement when he is ideologically aligned with the Court than when they are not aligned ideologically.

Further, since the president is likely to only issue signing statements when faced with an ideologically friendly Court, we should expect the Court to likely uphold the president’s position in court challenges. This logic leads to the second prediction from the model:

**The Court Upholds Prediction**: When legislation with a signing statement is challenged, the Court will likely uphold the president’s position.

Additionally, in situations where the president is relatively close to the Court \((c < p < j \text{ and } c < j < p)\), he is more likely to issue a signing statement as he becomes ideologically closer to Congress. When faced with an ideologically distant president, Congress may be less likely to propose a bill in the first place if it thinks the president could move policy too far to the extreme with a signing statement, particularly when the president has enough discretion. Similarly, it may be more beneficial for the president to veto a bill passed by an ideologically extreme Congress if he is unable to more favorably move policy with a signing statement because of limited discretion. Thus, the third prediction states:

**The President-Congress Alignment Prediction**: Conditional on the president being ideologically aligned with the Court, he is more likely to issue a signing statement when also ideologically aligned with Congress.

In addition to these generalizable predictions, the final extension where Congress has proposal utility offers two additional notable predictions. First, as demonstrated in Proposition 3, if the president is not given enough discretion to move policy close enough to his preferred
policy with a signing statement, he instead chooses to veto. Further, as the president is given more discretion, he is more able to move policy closer to his ideal location with a signing statement. Thus, the fourth prediction states:

*The Discretion Prediction:* The president is more likely to issue a signing statement as he is given greater discretion.

Finally, in this extension the president is more likely to issue a signing statement when Congress prefers proposing a bill at its ideal policy more than proposing an alternative bill (as $a$ decreases) – allowing the president more opportunities to move policy with a signing statement. However, this only holds in situations in which the president is likely to issue a signing statement (when $c < p < j$ and $c < j < p$). Specifically, this final prediction states:

*The Proposal Utility Prediction:* As Congress places a higher value on its proposal, the president is more likely to issue a signing statement.

7. **Conclusion**

In this paper, I presented a formal model of how presidents issue signing statements in the face of constraints from both Congress and the Court. This model contributes to the larger body of political science research on signing statements, which has consisted primarily of empirical studies that examine how the president’s relationship with Congress influences his use of signing statements. The model yields many predictions, including that the president is more likely to issue a signing statement when he is ideologically close to the Court, when he has more discretion in his ability to move policy from the legislation enacted by Congress, and when Congress places a high value on proposing its preferred policy. The model also predicts that the president is more likely to issue a statement when he is ideologically close to Congress, but this holds only when he is already relatively close to the Court.
The theory provokes several subjects for future research. First, the model could be enhanced by offering additional extensions to include incomplete information, benefits to the president for issuing a signing statement at his ideal point, and an endogenous discretion parameter that would allow Congress to alter the amount of discretion the president is given—but for a cost. Such extensions could more realistically reflect the dynamics of bargaining over policy by imposing additional constraints on the actors. Second, case studies examining different circumstances of the president’s relationship with the Court and Congress, as well as their responses to his signing statements, could provide support for the theory and predictions of the model. Finally, these predictions will be empirically tested in the following chapter.
Appendix 1A – Players’ Decision Rules

Basic Model

Court:

If \(|j - s| < |j - b|\) and \(|j - s| < |j - q|\),
    then uphold the law with the statement \((x' = s)\)
If \(|j - b| < |j - s|\) and \(|j - b| < |j - q|\),
    then restore the law to the original bill \((x' = b)\)
Otherwise, overturn the law and restore the status quo \((x' = q)\)

President:

If \(|j - p| < |j - b|\) and \(|j - p| < |j - q|\), then issue a statement at \(s = p\)
If \(|j - b| < |j - p|\) and \(|j - b| < |j - q|\), then issue a statement \(s = j(b)\);
    but only if \(|p - j(b)| < |p - b|\) and \(|p - j(b)| < |p - q|\)
Otherwise
    1. veto if \(b \notin A_p(q)\)
    2. sign if \(b \in A_p(q)\)

Congress:

For \(c < p < j\)
    When \(p \notin A_c(q)\), do not propose \(b\)
    When \(p \in A_c(q)\),
        1. If \(c \in A_j(q)\), then propose \(b = c\)
        2. If \(c \notin [j(q), q]\), then propose \(b = j(q)\)
        3. If \(c \notin [q, j(q)]\), then do not propose \(b\)

For \(j < c < p\)
    Propose \(b = c\), when both conditions hold:
        1. \(c \in A_p(q)\)
        2. \(c \in A_j(q)\)
    Propose \(b = p(q)\), when \(j < c < p(q) < p < q\)
    Propose \(b = j(q)\), when \(q < j < j(q) < c < p\)
Do not propose \(b\) in the following situations:
        1. \(j < c < q < p\)
        2. \(j < q < c < p\)

For \(c < j < p\)
    Do not propose \(b\) in the following situations:
        1. \(q < c < c(q) < j < p\)
        2. \(c < q < j < p\)
        3. \(c < j < q < p\)
    Propose \(b = p(q)\), when \(c < j < p(q) < p < q\)
    Otherwise propose \(b = j\)

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20 When \(c < q < p < j\) and \(c < p < q < j\), Congress is actually indifferent between not proposing \(b\) and proposing \(b < q\). In both situations, the final outcome is \(q\) because either the president vetoes or the Court overturns \(b\). Since it is indifferent, I assume Congress chooses not to propose \(b\).

21 In both of these situations, Congress is actually indifferent between not proposing \(b\) and proposing \(b < q\).

22 In situations 2 and 3, Congress is actually indifferent between not proposing \(b\) and proposing \(b < q\).
Extension 1
Court: Same as Basic Model

President:

*Issue* $s$ *if the following conditions hold:

1. $|p - s| < |p - b|$  
2. $|p - s| < |p - q|$  
3. $|j - s| < |j - b|$  
4. $|j - s| < |j - q|$  

where $s \in [b - d, b + d]$ s. t. max $u_p(s)$

$s = b + d$, if $b + d < p$ and $b + d < j(b)$

$s = j(b)$, if $b + d > j(b)$ and $j(b) < p$

$s = p$, if $b + d \geq p$ and $j(b) \geq p$

*Otherwise:*

If $|p - b| < |p - q|$, **sign** $b$

If $|p - q| < |p - b|$, **veto**

Congress:

For $c < p < j$

When $c \in A_p(q)$, propose $b = c - d$

When $c \notin A_p(q)$,

1. Do not propose $b$ in the following situations:

   a. $c < q < p < j$

   b. $c < p < q < j$

2. Propose $b = j(q)$, when $c < p < j(q) < j < q$

3. Propose $b = j(q) - d$, when $c < j(q) < p < j < q$

When $j < c < p$

Propose $b = c$, if both conditions hold:

1. $c \in A_p(q)$

2. $c \in A_j(q)$

Otherwise:

1. Do not propose $b$ in the following situations:

   a. $j < c < q < p$

   b. $j < q < c < p$

2. Propose $b = j(q)$, when $q < j < j(q) < c < p$

3. Propose $b = p(q)$, when $j < c < p(q) < p < q$

When $c < j < p$

Propose $b = c - d$, if both conditions hold:

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23 Let $j(b) = 2j - b$ represent the point in which the Court is indifferent to $b$.

24 If the president cannot issue a statement in which he prefers more than the bill and status quo and in which the Court will most prefer, then the president chooses to either sign the bill or veto it – based on whether the bill or the status quo is closer to his preferred policy.

25 Note that in all of the proofs $c$ is always to the left of $p$ ($c < p$). Proofs are symmetrical for $p < c$.

26 In both of these situations, Congress is actually indifferent between not proposing $b$ and proposing $b < q$. This holds for the rest of this decision rule for not proposing $b$. 
1. $c \in A_p(q)$
2. $c \in A_f(q)$

*Otherwise:*

1. Do not propose $b$ in the following situations:
   a. $c < q < j < p$
   b. $c < j < q < p$
2. Propose $b = p(q)$, when $c < j < p(q) < p < q$
3. Propose $b = p(q) - d$, when $c < p(q) < j < p < q$

**Extension 2**

Court and President: Same as Extension 1

**Congress:**

*Propose $b = c$ if both conditions hold:*

1. $u_c(x, b = c) > u_c(x, b \neq c)$
2. $u_c(x, b = c) > u_c(q)$

*Propose $b \neq c$ s.t. max $u_c(b)$ if both conditions hold:*

27 In this case, follow Congress’s decision rule from Extension 1.

1. $u_c(x, b \neq c) > u_c(x, b = c)$
2. $u_c(x, b \neq c) > u_c(q)$

*Otherwise, do not propose $b$*
Appendix 1B – Proofs of the Propositions

Proof of Proposition 1. All proofs of the propositions are by backwards induction considering all configurations of ideal points $c, p, j$, the status quo $q$, and indifferent points $c(q), p(q), j(q), j(b)$.

For $c < p < j$
When $p \notin A_c(q)$, the Congress chooses not to propose $b$ and $x^* = q$. This is because Congress cannot propose any $b$ that it prefers to $q$ such that the president does not veto (when $c(q) < c < q < p < j$), because he prefers $q$ to $b \in [c(q), q]$, or does not issue a signing statement at $s = p$ (when $q < c < c(q) < p < j$), because the Court prefers $p$ to $b \in [q, c(q)]$ and $q$.

When $p \in A_c(q)$, $x^* \in \{q, j(q), p\}$, depending on Congress’s relative location to the Court and $q$. If $p \in A_j(q)$, Congress is indifferent in proposing any $b < p$. This is because the president prefers to move policy with $s = p$ and can do so because the Court will prefer $p$ to $b < p$ and $q$. Thus, the law is upheld at $x^* = s = p$. If $p \notin [q, j(q)]$, Congress does not propose $b$ and $x^* = q$. This is because Congress cannot propose any $b$ and the president cannot issue any $s$ they more prefer over $q$, such that the Court prefers it to $q$. Similarly, if $p \notin [j(q), q]$, Congress proposes $b = j(q) = x^*$.

For $j < c < p$
When $c \notin [q, j(q)]$, $x^* = j(q)$ because Congress cannot propose any other $b$ closer to $c$ that the Court prefers to $q$. Similarly, when $c \notin [j(q), q]$, $x^* = q$. When $c \in A_j(q)$, $x^* \in \{q, p(q), c\}$, depending on Congress’s location relative to the president and $q$. If $c \in A_p(q)$, $x^* = c$ because the Court and the president prefer $b = c$ to $q$. If $c \notin [q, p(q)]$, $x^* = q$ because Congress cannot propose any $b$ closer to $c$ that the president prefers to $q$. Similarly, if $c \notin [p(q), q]$, Congress proposes $b = p(q) = x^*$. In this configuration, the president cannot issue any $s$ such that the Court prefers it to $b$.

For $c < j < p$
When $j \notin A_c(q)$, $x^* = q$ because Congress cannot propose any $b$ that is closer to $c$ that the Court prefers to $q$. When $j \in A_c(q)$, $x^* \in \{q, p(q), j\}$, depending on the Court’s relative position to the president and $q$. If $j \in A_p(q)$, $x^* = b = j$ because Congress cannot propose any other $b$ closer to $c$ in which the president does not move policy closer to $p$ with $s$ in such a way that the Court prefers $s$ to $b$. If $j \notin [q, p(q)]$, $x^* = q$ because Congress cannot propose any $b$ closer to $c$ that the president prefers to $q$. Similarly, if $j \notin [p(q), q]$, Congress proposes $b = p(q) = x^*$.

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28 For the Basic Model and Extension 1, in situations where Congress chooses not to propose $b$ because the president will veto anything it proposes, it is actually indifferent between proposing any $b$ and not proposing. However, I assume when faced with this decision, it does not propose $b$. This indifference is dealt with in Extension 2, where Congress has proposal benefits in its utility.

29 In the decision rules, I assume that when Congress is indifferent between a set of bills, it prefers to propose its ideal point. This indifference is dealt with in Extension 2, where Congress gains benefits from proposing $b$ close to $c$. 
Proof of Proposition 2.

For \( c < p < j \)
When \( c \in A_j(q) \), \( x^* = c \). In this situation, Congress knows the president has the ability to move policy closer to \( p \) with \( s \), such that the Court prefers \( s \) to \( b \) and \( q \), but only by the amount of \( d \) president is exogenously given. Knowing this, Congress proposes \( b = c - d \), the president issues \( s = b + d = (c - d) + d = c \), and the Court upholds \( s \).

When \( c \in A_j(q) \), \( x^* \in \{q, j(q)\} \), depending on the relative location of Congress, the Court, the president, and \( q \). If \( p \not\in [j(q), q] \), \( x^* = b = j(q) \) because Congress and the president cannot move policy any closer to their respective ideal points that the Court prefers to \( q \). Similarly, if \( p \not\in [q, j(q)] \), \( x^* = q \). Finally, if \( p \in [j(q), q] \), \( x^* = j(q) \). Congress knows the president is able to move policy with \( s \) closer to \( p \) by \( d \). Thus, it proposes \( b = j(q) - d \). The president issues \( s = (j(q) - d) + d = j(q) \) and the Court upholds it.

For \( j < c < p \)
Identical to Proposition 1 proof for \( j < c < p \).

For \( c < j < p \)
When \( c \in A_p(q) \), \( x^* = c \). For similar reasons as under \( c < p < j \), Congress proposes \( b = c - d \), the president issues \( s = c \), and the Court upholds. When \( c \not\in [q, p(q)] \), \( x^* = q \) because Congress cannot propose any \( b \) that the president prefers to \( q \). Similarly, when \( c \not\in [p(q), q] \), Congress proposes \( b = p(q) = x^* \).

Proof of Proposition 3. When \( \max\{u_c(x)\} \) occurs when Congress does not propose \( b \), such that \( u_c(q) > u_c(x, b) \), where \( u_c(q) = -|q - c| \), then Congress does not act and the status quo remains the policy outcome, \( x^* = q \). When \( \max\{u_c(x)\} \) occurs when Congress proposes any \( b \), not just at his ideal policy, such that \( u_c(x, b) > u_c(x, b = c) \) and \( u_c(x, b) > u_c(q) \), then the equilibrium outcomes and the proof are identical to that under Proposition 2. The remainder of this proof deals with the case in which Congress \( \max\{u_c(x)\} \) occurs when it proposes \( b = c \), such that \( u_c(x, b = c) > u_c(x, b) \) and \( u_c(x, b = c) > u_c(q) \). The equilibrium outcomes are determined by the decision rules of the president and the Court as well as the amount of \( d \) the president is given. Conditions are found for the previous inequalities to hold, specifying when Congress proposes \( b = c \).

For \( c < p < j \)
When \( (c + d) \not\in A_j(q) \), \( x^* = q \). The president is unable to move policy from \( b = c \) with \( s \) such that the Court prefers \( s = c + d \) to \( q \). Thus, either the president can veto or sign the bill such that the Court overturns it.

We must check the conditions under which Congress maximizes its utility by proposing \( b = c \), where \( u_c(x, b = c) = -a|q - c| - (1 - a)|c - c| = -a|q - c| \), by comparing the utilities of its alternate decisions. When \( (c + d) \not\in [q, j(q)] \), Congress can propose \( b = q - d \) in anticipation of \( s = q \) where \( u_c(x, b = q - d) = -a|q - c| - (1 - a)|q - d - c| \) or it can not propose \( b \). For Congress to propose \( b = c \) both conditions must hold:
1. \(-a|q - c| > -|q - c|
2. \(-a|q - c| > -(1 - a)|q - d - c|\)

\[\begin{align*}
0 & > -(1 - a)|q - d - c| \\
\end{align*}\]

Since \(0 < a < 1\), both of these conditions are always true. When \((c + d) \notin [j(q), q]\), Congress could propose \(b = j(q) - d\), where \(u_c(x, b = j(q) - d) = -a|j(q) - c| - (1 - a)|j(q) - d - c|\), or it can not propose \(b\). For Congress to propose \(b = c\) both conditions must hold:

1. Same as above.
2. \(-a|q - c| > -(1 - a)|j(q) - c| - (1 - a)|j(q) - d - c|\)

\[\begin{align*}
\alpha & < \frac{|j(q) - c|}{|j(q) - c| + |j(q) - d - c|} \\
\alpha & < \frac{30}{|q - c| + |d|} \\
\end{align*}\]

Thus, this condition must be true for the results to hold.

When \((c + d) \in A_j(q), x^* \in \{c + d, p\}\), depending on the amount of \(d\) the president is given to move policy; the president always issues \(s\) as close to \(p\) as possible such that the Court prefers \(s\) to \(c\) and \(q\). If \(c + d < p\), the president issues \(s = c + d\) because that is the closest he can move policy to \(p\). As before, we must check conditions for Congress to maximize its utility by proposing \(b = c\), where \(u_c(x, b = c) = -a|c + d - d| - (1 - a)|c - c| = -a|d|\) as opposed to \(b = c - d\), where \(u_c(x, b = c - d) = -a|c - c| - (1 - a)|c - d - c| = -(1 - a)|d|\), or to not propose any \(b\). Using the above logic, these conditions hold when the following is true:

\[\begin{align*}
\alpha & < \frac{1}{2} \text{ and } \alpha < \frac{|q - c|}{|d|}. \\
\text{If } c + d & \geq p, \text{ the president is able to move policy to its ideal point, } s = p. \\
\end{align*}\]

Again, we must check conditions for Congress to maximize its utility at \(b = c\), where \(u_c(x, b = c) = -a|p - c|\), as opposed to proposing \(b = c - d\) or not proposing. For these conditions to hold, the following must be true: \(\alpha < \frac{|d|}{|p - c| + |d|} \text{ and } \alpha < \frac{|q - c|}{|p - c|}\).

For \(j < c < p\)
The equilibrium outcomes are identical to those under Proposition 1 and 2. Conditions for Congress proposing \(b = c\) are always true.

For \(c < j < p\)
When \((c + d) \notin A_p(q), x^* = q\). The president is unable to move policy closer to \(p\) than \(q\) with \(s\) and thus vetoes. For the conditions for Congress to propose \(b = c\) to hold, \(\alpha < \frac{|p(q) - d - c|}{|q - c| + |d|}\) must be true.

When \((c + d) \in A_p(q), x^* \in \{c + d, j(c), p, j(q)\}\), depending on the amount of \(d\) the president is given to move policy; the president always issues \(s\) as close to \(p\) as possible such that the Court prefers \(s\) to \(c\) and \(q\). Following the reasoning in \(c < p < j\), the president issues \(s = c + d = x^*\) if all of the following hold: 1. \((c + d) \in A_j(q), 2. c + d < j(c), 3. c + d < p;\) for

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This step follows from the triangle inequality.
Congress to maximize its utility proposing $b = c$, the following must be true: $a < \frac{1}{2}$ and $a < \frac{|q-c|}{|d|}$. The president issues $s = j(c) = x^*$ if all of the following hold: 1. $(c + d) \in A_j(q)$, 2. $c + d \geq j(c)$, 3. $j(c) < p$; the following must be true: $a < \frac{|d|}{|j(c)-c|+|d|}$ and $a < \frac{|q-c|}{|j(c)-c|}$. The president issues $s = p = x^*$ if all of the following hold: 1. $(c + d) \in A_j(q)$, 2. $c + d \geq p$, 3. $j(c) \geq p$; the following must be true: $a < \frac{|d|}{|p-c|+|d|}$, $a < \frac{|q-d-c|}{|p-c|+|d|}$, and $a < \frac{|q-c|}{|p-c|}$. The president issues $s = j(q) = x^*$ if all of the following hold: 1. $(c + d) \notin A_j(q)$, 2. $c + d \geq j(q)$, 3. $j(q) < j(c)$ and $j(q) < p$; the following must be true: $a < \frac{|q-d-c|}{|j(c)-c|+|d|}$ and $a < \frac{|q-c|}{|j(c)-c|}$. 
Chapter 2

Presidential Signing Statements and the Court: An Empirical Test of a Formal Theory
1. Introduction

On May 2, 2011, the Supreme Court granted a writ of certiorari for a case that challenged the U.S. State Department’s denial of a request to change Menachem Zivotofsky’s birthplace from Jerusalem to Israel in his passport. His parents claimed that the State Department’s denial of their request was in conflict with the Foreign Relations Authorization Act, Fiscal Year 2003, which specifically directs the State Department to grant such requests of American citizens. Notably, while the denial of Zivotofsky’s request was inconsistent with this directive from Congress, it was consistent with the president’s position in his signing statement to the act. In this statement, President George W. Bush declared:

“Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.”

Bush stated that the section directing the State Department was unconstitutional, claiming that it threatened the president’s power to conduct foreign affairs. He also maintained a commitment to the existing U.S. policy that did not recognize Jerusalem as a part of Israel, thus implying his intention to disregard this section.

Although both the district court and the court of appeals for the District of Columbia dismissed this case based on the political question doctrine, both courts agreed with the

31 His parents were American-born citizens.
33 District Judge Gladys Kessler provides a definition of the political question doctrine for this case: “Cases present a political question if, among other things, there is a ‘textually demonstrable constitutional commitment of the issue to a coordinate political department’ Baker v. Carr…Thus, if an issue is committed by the Constitution to either the Executive Branch or Legislative Branch, it is outside the Court’s jurisdiction” (Zivotofsky v. Secretary of State, 2004).
president’s position in his signing statement, arguing that the president has the ability to decide passport policy based on his sole constitutional authority to recognize foreign sovereigns. The future court decisions on this case will ultimately clarify the president’s power and authority in this area. As such, this case demonstrates the potential importance of the courts in determining whether a signing statement is consistent with the law. The courts have the potential to support the president’s position in interpreting legislation, often in direct conflict to Congress’s original provisions, and can thus set policy where the president stated it in his signing statements. Conversely, the courts can side against the president’s statement and move policy away from where he prefers to set it.

As a result of their potential role, the position of the courts may be an important determinant of whether the president decides to issue signing statements. Political scientists have observed that some presidents have issued substantially more signing statements and objections than others. Most existing studies tend to focus on personal differences or the president’s relationship to Congress (Kelley 2008, 2010; Kelley and Marshall 2009, 2010; Berry 2009; Ostrander and Sievert 2009). Consequently, little is known about how the courts may shape the way presidents use signing statements. Moreover, a good deal of variation among presidents remains unexplained even after accounting for presidential-congressional relations.

In this paper, I empirically test predictions from a formal model that explores how the president strategically issues signing statements in the face of both the Supreme Court and Congress (Thrower 2013). Examining the influence of the president’s ideological distance to these actors on his use of signing statements on all legislation between 1953 and 2008, I find that the results are highly supportive of the model. Consistent with the predictions, I find that as the

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34 On March 26, 2011 the Supreme Court decided that this case does not present a political question and remanded it back to the lower courts for a ruling (Zivotofsky v. Clinton, 132 S.Ct. 1421 (2012)).
president becomes ideologically closer to the Court, he is more likely to issue a signing statement. This is because the Court is more likely to side with his position in a possible challenge to legislation. Contrary to previous research, I find that this probability also increases as he becomes ideologically closer to Congress. Additionally, the president is more likely to issue a signing statement when he is given more discretion in legislation. Finally, I examine Supreme Court cases involving challenges to statutes during this same time period and find that the presence of a signing statement increases the probability that the Court rules in the president’s favor. These findings are also consistent with the model’s predictions and further demonstrate the president’s strategic use of these statements to influence the Court’s decisions.

I begin by providing a brief background of the empirical literature explaining signing statement variation (Section 2). Next, I review the model from the previous chapter (Section 3). I then describe the data and empirical model to test its prediction (Section 4), followed by a presentation of the results (Section 5 and 6), discussion (Section 7), and concluding remarks (Section 8).

2. Previous Research on Signing Statements

Political science research exploring the president’s use of signing statements tends to mostly empirically examine how the president’s relationship between with congressional actors influences his or her use of signing statements. These studies have produced mixed results. Some studies find that divided government increases the probability that the president issues a signing statement (Berry 2009; Kelley 2008; Kelley and Marshall 2009, 2010), but other studies find that divided government has mixed or no effects (Cutrone 2008; Ostrander and Sievert 2012).

In addition to the literature on the influence of Congress, there is a growing body of research that explores how other political factors influence the president’s use of these
statements. Many studies find that significant legislation increases the probability of issuing a signing statement (Berry 2009; Kelley 2008, Kelley and Marshall 2009, 2010a, b; Ostrander and Sievert 2012), while others find that bills concerning appropriations and foreign policy or defense issues tend to increase the probability of a statement or constitutional challenge (Cutrone 2008; Evans 2011; Ostrander and Sievert 2012; Rice 2010). Finally, some studies find that presidents are more likely to issue statements or challenges when more sections of the bill attempt to place restrictive requirements on the president (Berry 2009; Evans 2011; Rice 2010).

3. Theory

While there has been a growing body of empirical research examining signing statements, there are few theoretical studies. Thrower (2013) offers one of the only studies offering a formal model of signing statements that includes the president, Congress, and the Supreme Court. In this model, these actors bargain over a uni-dimensional space for their ideal policy outcomes. Players have single peaked utility functions, basing their decisions on how close resulting outcomes are to their ideal points given the actions of other players.

The sequence of the game proceeds as follows. Congress chooses whether or not to pass a bill.\(^\text{35}\) If a bill is passed, the president can either veto, sign the bill as it is, or sign it with a signing statement. If the president vetoes, policy returns to the status quo. If he signs without a statement, policy remains where Congress has set it in the bill. If the president issues a signing statement, he can move policy from the bill to where he chooses it. The Court reviews every law passed and can either uphold the policy where the president set it, restore policy to the original bill, or overturn the policy back to the status quo.

\(^{35}\) If Congress does not pass a bill, the outcome remains at the status quo.
The equilibrium outcomes are found with backwards induction, considering how players will behave by maximizing their own utilities (See Thrower 2013 for propositions and proofs). The model yields a few testable predictions. First, because the president does not want to be overturned by the Supreme Court, he is more likely to issue a signing statement when he knows the Court is likely to uphold it if legislation is challenged. This is more likely to occur when he is faced with an ideologically friendly Court. Thus, the first prediction states:

*The President-Court Alignment Prediction*: The president is more likely to issue a signing statement when he is ideologically aligned with the Court than when they are not aligned ideologically.

Further, since the president can anticipate when the Court is likely to side with his signing statement in a challenge to legislation, we are likely to observe the Court always upholding the president’s position. Based on this logic, the second prediction states:

*The Court Upholds Prediction*: When legislation with a signing statement is challenged, the Court will likely uphold the president’s position.

Similar to the president and Court, Congress also prefers policies that yield outcomes closer to its ideal point than the status quo. It will not pass a bill that it knows will induce a policy further from its ideal policy than the status quo. Thus, if it anticipates that the president will move policy further from the status quo with a signing statement, Congress can choose not to pass a bill. Similarly, the president may prefer to veto in situations where Congress is so ideologically extreme that he cannot issue a signing statement in such a way that he would prefer and that the Court would uphold. As such, the third prediction states:

*The President-Congress Alignment Prediction*: Conditional on the president being ideologically aligned with the Court, he is more likely to issue a signing statement when also ideologically aligned with Congress.
Finally, in the model’s extensions, Thrower considers the possibility that the president is restricted in how far he is able to move policy with a signing statement by including a discretion parameter (see Epstein and O’Halloran 1999; Howell 2003). If the president is not given enough discretion, he may not be able to induce a more favorable policy outcome with a signing statement in which the Court would uphold. Relationally, the president is also more likely to induce his most preferred policy outcome when he has been granted more discretion. Thus, the final prediction states:36

The Discretion Prediction: The president is more likely to issue a signing statement as he is given greater discretion.

4. Empirical Model and Data

4.1 Main Test of Predictions

To test the predictions of the formal model, I use a Correlated Random Effects (CRE) logit model to estimate the probability of the president issuing a signing statement on every law passed between 1953 and 2008. This model allows the intercepts to vary by president, helping to account for the unobserved effects of individual presidents that are often difficult to measure. In particular, the CRE model relaxes the standard random effects model assumption that the covariates are uncorrelated with the president-varying intercepts. This assumption may be unrealistic given that many of the covariates, such as the president’s distance to Congress and the Supreme Court, vary with each presidential administration. The CRE relaxes this assumption by including president-averaged covariates in the model (Wooldridge 2002; 2010).

36 Thrower (2013) discusses another prediction yielded from her final extension of the model that includes proposal utility to Congress. This prediction states that the president is more likely to issue a signing statement when Congress places a higher value on proposing a policy near its ideal point. This prediction will not be tested in this paper, but future work could explore variables such as electoral success, election years, issue salience, and approval ratings to test this prediction.
Thus the main empirical model is given as follows:

$$\text{Pr}(Y_i = 1) = \logit^{-1}(\alpha_j + X_i \beta + \gamma \bar{X}_j)$$

$$a_j \sim N(a, \sigma^2)$$

where $i = 1, \ldots, n$ represents an index for each bill

where $j = 1, \ldots, 10$ represents an index for each president

$X_i$: $d(\text{President, Court}), d(\text{President, Congress}), \text{Presidential Authority, Significant Legislation}$, $\text{Foreign&Defense Legislation, } d(\text{President,Court}) \ast d(\text{President, Congress})$

$\bar{X}_j$: Covariates averaged by president

The dependent variable is an indicator for when the president issues a signing statement with the legislation passed. I collected information about signing statements from The American Presidency Project at the University of California, Santa Barbara. From the 17,631 laws passed between 1953 and 2008, the president issued a signing statement on 1900 of those laws (about 11% of the time). Additionally, I determined whether or not the statement raises an objection based on constitutional grounds, coding 484 of them as constitutional signing statements. Since these are the most controversial type of signing statements, I expect the results to hold most strongly for these statements.

The main independent variable of interest, $D(\text{President, Court})$, is the ideological distance between the president and Supreme Court, measured by the absolute distance between their ideal points. The president’s ideal point is measured by Poole’s (2000) DW-NOMINATE and the median justice is measured by Cameron and Park’s (2009) Nominate-Scaled Perception scores. Additionally, I measure the president’s absolute distance to the averaged medians of the

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37 http://www.presidency.ucsb.edu/.
38 Alternatively, I ran the analysis using alternative ideal point estimates – including the Bailey scores (2007), the Martin-Quinn scores (2002), and the Segal-Cover scores (1989) – as well as alternative measures of President-Court alignment – including an indicator for when the president and the majority of the Supreme Court are of the same party and the percentage of Supreme Court justices of the same party as the president – and found substantially similar results.
House and Senate ($D(\text{President, Congress})$), both measured by DW-NOMINATE. To fully test the President-Congress Alignment Prediction, I include an interaction between the president’s distance to the Court and his distance to Congress.

I also include a measure of discretion granted to the president ($\text{Presidential Authority}$). Though this variable is exogenous in the model, previous literature suggests that the president is able to move policy further when granted with greater discretion from Congress (Moe and Howell 1999). To measure discretion granted to the president, I include a variable coded as 1 if Congress has given the president authority to act in the legislation and 0 otherwise. As additional control variables, I include indicators for whether the legislation is significant ($\text{Significant Legislation}$)\textsuperscript{39} and whether the legislation is related to foreign policy or national defense ($\text{Foreign-Defense Legislation}$) – both previously found to significantly increase the probability of a signing statement (Berry 2009; Cutrone 2008; Evans 2011; Kelley 2008, Kelley and Marshall 2009, 2010a, b; Ostrander and Sievert 2012; Rice 2010). Descriptions of the variables and summary statistics are found in the appendix.

For supplemental analysis, I use a negative binomial to measure how the president’s relationship to the Court influences the number of signing statements he issues per year. Further, I am particularly interested in measuring the number of constitutional objections per year, which can vary greatly by each signing statement and each president. I measure this dependent variable, $\text{Constitutional Objections}$, by counting the number of sections objected to on constitutional grounds in each signing statement.

\textsuperscript{39} Based on Mayhew’s (1991) list of significant legislation
4.2 Test of The Court Upholds Prediction

To explore presidential signing statements and court decisions, I collected a list of cases in which the constitutionality of legislation passed between 1953 and 2008 is challenged in court. Of these 224 cases, 89 of them involve legislation in which the president has issued a signing statement (25 constitutional). With these data, I can then examine how the presence of a signing statement impacts the probability of the Court’s ruling. The dependent variable, Ruling in President’s Favor, is an indicator for whether or not the Court sides with the president’s position in its ruling. In the absence of a signing statement, this variable is coded as 1 if the Court upholds a law the president has not vetoed or if it invalidates a law that has been passed over a presidential veto; it is coded as 0 if it invalidates a law the president has signed or if it upholds a law that was passed over a presidential veto. In the presence of a signing statement, I code this variable as 1 if the Court sides with the positions advocated in the signing statement and 0 if the Court opposes the positions the president has advocated. By this measure, the Court has ruled in the president’s favor about 73% of the time (164 cases).

The main independent variable of interest, Presence of Signing Statement, is an indicator for whether or not the challenged legislation was passed with a signing statement. Additionally, I include variables controlling for the ideological distance between the Court and the enacting president \((D(Court, Enacting President))\) as well as the distance between the enacting president and enacting Congress \((D(Enacting President, Enacting Congress))\). Additional control variables include the age of the legislation \((Age)\), an indicator for Solicitor General involvement \((Solicitor\).

---

40 To assemble this list, I conduct Westlaw searches of Supreme Court cases using various combinations of related words or root words, such as “constitution,” “unconstitution”, “law”, “statute”, and “legislation.” I then read through the cases and only include cases in which the Court is ruling on the constitutionality of the law. For consistency, I omit cases that involve legislation passed prior to 1953. With this restriction, the range of years of court cases span from 1956 until 2011.
41 Invalidation of a law includes legislation the court deems unconstitutional either partially or in its entirety. This occurred in 77 of the cases (34% of all cases).
General), an indicator for significant legislation (Significant Legislation), and dummy variables for the chief justice.

5. Results of Main Analysis

5.1 Preliminary Analysis

Figure 2.1 shows the scatterplots of the number of signing statements per year and the President-Court distance measure. The first panel shows a positive relationship between all signing statements and distance. However, when examining the more controversial constitutional signing statements, I find the expected negative relationship between constitutional statements and President-Court distance.

Figure 2.1: Scatterplots with OLS line and Confidence Intervals

Figure 2.2, which shows the number of signing statements by President-Court partisan alignment, reveals the same patterns. While there appears to be no significant difference between the total number of signing statements by President-Court alignment, there is a large and significant difference when examining constitutional signing statements. The president tends to
issue significantly more constitutional signing statements and objections when he is of the same party as the Court than when they are from opposing parties, in support of the main prediction of the model.

Figure 2.2: Signing Statements and Constitutional Objections by President-Court Partisan Alignment

5.2 CRE Regression Results

To more rigorously test the model’s predictions, I present the CRE regression results in Table 2.1. Consistent with The President-Court Alignment Prediction, the president’s distance to the Supreme Court has a negative and significant impact on the probability of issuing a signing statement. In other words, as the president and Court become ideologically closer, the probability that he issues a signing statement increases. As expected, this effect is stronger for constitutional signing statements (column 2) – the most controversial type of statement – and weaker, though still significant, for non-constitutional signing statements (column 3).

Similarly, the president’s distance to Congress also significantly decreases his probability of issuing a signing statement, contrary to previous research but consistent with the President-
Congress Alignment Prediction. Additionally, when Congress gives the president statutory authority, he is more likely to issue a signing statement. Finally, consistent with previous findings, the president is more likely to issue a signing statement on bills related to foreign policy or national defense.

Table 2.1: The Probability of Issuing a Signing Statement, 1953 - 2008

<table>
<thead>
<tr>
<th></th>
<th>All Signing Statements</th>
<th>Constitutional Statements</th>
<th>Non-Constitutional Statements</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>-5.224 (0.845)***</td>
<td>-8.976 (2.15)***</td>
<td>-4.350 (1.041)***</td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>-4.352 (0.903)***</td>
<td>-5.197 (1.344)***</td>
<td>-3.912 (1.249)***</td>
</tr>
<tr>
<td>D(President, Court) * D(President, Congress)</td>
<td>7.153 (1.402)***</td>
<td>10.883 (2.521)***</td>
<td>5.725 (1.811)***</td>
</tr>
<tr>
<td>Presidential Authority</td>
<td>0.314 (0.067)***</td>
<td>0.747 (0.112)***</td>
<td>0.057 (0.080)</td>
</tr>
<tr>
<td>Significant Legislation</td>
<td>1.664 (0.124)***</td>
<td>1.406 (0.210)***</td>
<td>1.491 (0.136)***</td>
</tr>
<tr>
<td>Foreign-Defense Legislation</td>
<td>1.132 (0.085)***</td>
<td>1.864 (0.128)***</td>
<td>0.569 (0.107)***</td>
</tr>
<tr>
<td>President-Averaged Intercept</td>
<td>-2.102 (2.302)</td>
<td>-16.989 (6.023)***</td>
<td>4.438 (2.146)**</td>
</tr>
<tr>
<td>RE Intercept Std. Dev.</td>
<td>0.394</td>
<td>1.031</td>
<td>0.347</td>
</tr>
<tr>
<td>Number of Observations</td>
<td>17631</td>
<td>17631</td>
<td>17631</td>
</tr>
<tr>
<td>Number of Groups</td>
<td>10</td>
<td>10</td>
<td>10</td>
</tr>
</tbody>
</table>

Coefficients of Correlated Random Effects Logistic Regression Model reported with standard errors in parentheses. President-averaged covariates included by not shown.*p < .10, **p < .05, ***p < .01, two-tailed test

In order to better interpret these results, I examine the predicted probabilities estimated from the model. Figure 2.3 shows the estimated probability of issuing a signing statement when varying the president’s distance to the Court and Congress while holding all other covariates at their means. When the president is perfectly aligned with the Supreme Court, all else constant, there is about a 0.2 probability that the president issues a signing statement. As his distance to the Court increases, his likelihood of issuing a signing statement decreases. This relationship is magnified when the president is perfectly aligned with Congress, as shown by the steeper slope. In fact, when he is aligned with both the Court and Congress, there is about a 0.6 probability of issuing a signing statement. However, this relationship reverses when fixing the president’s distance to Congress at 1 – in other words, when they are completely misaligned. Thus, this
provides support for the President-Congress Alignment Prediction in that the president’s distance to Congress significantly decreases his likelihood of issuing a signing statement, conditional on him being located close to the Court.

Figure 2.3: Estimated Predicted Probability of the President Issuing a Signing Statement

5.3 Negative Binomial Regression Results

Table 2.2 shows the negative binomial regression results, by signing statement type. When examining all signing statements, these results show that the president’s distance to the Court significantly decreases the number of signing statements issued per year – consistent with the main prediction. This effect is strongest when examining constitutional statements and objections and disappears when counting the number of non-constitutional signing statements. Additionally, the president’s distance to Congress also significantly decreases the number of constitutional signing statements and objections he issues per year – lending further support to the President-Congress Alignment Prediction.
6. Results of Challenged Legislation Analysis

In order to empirically test the Court Upholds Prediction, I analyze the impact of signing statements on court decisions in Table 2.3. The regression results show that when the president issues a signing statement, the Court is significantly more likely to rule in favor of his preferred position. Further, the results also suggest that the Court considers the president’s positive arguments in support of the legislation, not just his objections, when reviewing policy.

Similarly, Figure 2.4 shows that the predicted probability of the Court ruling in the president’s favor decreases as they become ideologically distant. The probability of a favorable outcome for the president is even greater when there is a signing statement accompanying the
legislation. In fact, the Court is about 10% more likely to rule in the president’s favor when he has issued a signing statement.

Table 2.3: The Effect on Signing Statements on the Probability of the Court Ruling in the President’s Favor on Challenged Legislation

<table>
<thead>
<tr>
<th></th>
<th>(1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signing Statement Issued</td>
<td>0.612 (0.357)*</td>
</tr>
<tr>
<td>D(Court, Enacting President)</td>
<td>-2.09 (0.857)**</td>
</tr>
<tr>
<td>D(Enacting President, Enacting Congress)</td>
<td>-4.8 (1.37)***</td>
</tr>
<tr>
<td>Age</td>
<td>-0.028 (0.078)</td>
</tr>
<tr>
<td>Age²</td>
<td>0.0003 (0.003)</td>
</tr>
<tr>
<td>Solicitor General</td>
<td>0.552 (0.467)</td>
</tr>
<tr>
<td>Significant Legislation</td>
<td>-0.543 (0.387)</td>
</tr>
<tr>
<td>Burger</td>
<td>1.78 (0.762)**</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>1.2 (0.804)</td>
</tr>
<tr>
<td>Roberts</td>
<td>1.11 (1.7)</td>
</tr>
<tr>
<td>Intercept</td>
<td>2.43 (0.833)***</td>
</tr>
<tr>
<td>N</td>
<td>224</td>
</tr>
</tbody>
</table>

Logistic Regression coefficients reported with standard errors in parentheses.
*p < .10, **p < .05, ***p < .01, two-tailed test

Figure 2.4: Estimated Probability of the Court Ruling in Favor of the President’s Position
7. Discussion

Overall, the empirical results confirm the predictions of the theoretical model, demonstrating that the Supreme Court is an important determinant in the president’s decision to issue a signing statement. First, the results support the main prediction of the model, showing that the president is more likely to issue a signing statement as he and the Court become closer in ideology (the President-Court Alignment Prediction). This finding supports the claim that the president wants the Court to consider his interpretation of the law when it reviews statutes. The president is less likely to issue a signing statement when it knows the Court is unlikely to side with his position in the statement.

Furthermore and consistent with previous literature that suggests that the Court makes decisions based on ideology, court opposition to the president is more likely to occur when they are ideologically opposed (Ducat and Dudley 1989; Segal and Cover 1989; George and Epstein 1992; Epstein and Knight 1998; Yates and Whitford 1998). Based on its ideology, the president can anticipate how the Court will rule in cases involving legislation and thus avoids issuing statements when faced with an ideologically hostile Court that is unlikely to side with his position. As a result of this anticipation, when the Court reviews legislation with a signing statement, the model predicts that we are more likely to observe the Court ruling in favor of the president’s position. The empirical results support this prediction, showing that the presence of a signing statement on challenged legislation increases the probability that the Court rules in a manner favorable to the president (the Court Upholds Prediction).

Finally, in a challenge to the conventional wisdom, I find that the president is more likely to issue a signing statement when he is ideologically close to Congress, particularly when he is also ideologically aligned with the Court – consistent with the President-Congress Alignment
Prediction and contrary to previous research. Presidents do not issue signing statements exclusively as a tool to bypass a hostile Congress. Instead, Congress acts as a constraint to the president’s ability to move policy. As the model suggests, the president is limited by the amount of discretion he is given to move policy, which is often determined by congressional statutes. Thus, it intuitively follows that Congress gives the president less discretion when their preferences are not aligned (Epstein and O’Halloran 1999). Further, in these cases, the president may obtain a more beneficial outcome by vetoing the legislation rather than using a signing statement.

In accordance with this argument that the president is limited by discretion, the empirical analysis shows that the president is more likely to issue a signing statement when Congress gives him explicit statutory authority (the Discretion Prediction). Additionally, I find that the president is more likely to issue a signing statement on bills related to foreign policy or national defense. Further, these are the policy areas over which the president is often given more discretion by Congress and deference by the courts (Wildavsky 1966; Genovese 1980; Cooper 2002; Canes-Wrone et al 2008).

One potential concern of studies involving presidential policymaking is that the findings could be driven by changes in individual presidents. However, the empirical analyses in this chapter dissolve these concerns. First, the CRE model addresses this issue by allowing the intercepts to vary by president, thus accounting for the idiosyncrasies of individual presidents that could influence variation in signing statements. Second, I run the analysis with fixed effects for individual presidents and find that the results from the main analysis also hold with this alternative model specification. In sum, with both of these empirical models, I find that individual presidents are not driving the variation in signing statements.
To further demonstrate that changes in individual presidents are not the sole influence of signing statements, I examine changes in the rates that individual presidents – Richard Nixon and George H.W. Bush – issued signing statements before and after Supreme Court appointments within their term (Tables 2.4 and 2.5). Both Nixon and Bush made appointments to the Supreme Court midway through their presidencies that greatly shifted the ideology of the Court towards their own conservative ideologies. In each case, these presidents issued significantly more signing statements following the shift in Court ideology.

Table 2.4: Rate of Signing Statements Issued Before and After Nixon Court Appointments

<table>
<thead>
<tr>
<th></th>
<th>All Statements</th>
<th>Constitutional Statements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre January 6, 1972</td>
<td>0.057</td>
<td>0.002</td>
</tr>
<tr>
<td>Post January 6, 1972</td>
<td>0.107</td>
<td>0.005</td>
</tr>
<tr>
<td>p-value</td>
<td>0.0003</td>
<td>0.3057</td>
</tr>
</tbody>
</table>

Nixon (0.462) presidency lasted from January 20, 1969 to August 4, 1974. On January 6, 1972, conservative justices Lewis Powell (0.292) and William Rehnquist (0.601) replace liberal justices Hugo Black (-0.482) and John Harlan II (-0.222) on the Supreme Court.

Table 2.5: Rate of Signing Statements Issued Before and After George H.W. Bush Court Appointment

<table>
<thead>
<tr>
<th></th>
<th>Total Statements</th>
<th>Constitutional Statements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre October 9, 1990</td>
<td>0.134</td>
<td>0.063</td>
</tr>
<tr>
<td>Post October 9, 1990</td>
<td>0.208</td>
<td>0.117</td>
</tr>
<tr>
<td>p-value</td>
<td>0.0007</td>
<td>0.0011</td>
</tr>
</tbody>
</table>

Bush (0.457) presidency lasted from January 20, 1989 to January 20, 1993. On October 9, 1990, Conservative justice David Souter (0.307) replaces liberal justice William Brennan (-0.302) on the Supreme Court.

Further, I contrast these results to changes in signing statement issuance during the Carter administration (Table 2.6), the only president in the empirical analysis who did not make any Supreme Court appointments during his term. There is no dramatic increase in the rate of signing statements from the first half of his term to the second half. Taken together, this analysis

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43 This rate is number of signing statements issued as a proportion to the number of legislation passed.  
44 The ideology of the presidents and justices are reported in parenthesis by NOMINATE and NOMINATE-Scaled Perception scores, respectively, ranging from -1 (liberal) to 1 (conservative).
indicates that the variation in signing statements is not solely due to changes in individual presidents, but to actual changes in the composition of the Court. It also provides further evidence that shifts in Court ideology towards the president’s own ideology result in the use of more signing statements.

Table 2.6: Rate of Signing Statements Issued During the Carter Presidency

<table>
<thead>
<tr>
<th>Year Range</th>
<th>Total Statements</th>
<th>Constitutional Statements</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977 – 1978</td>
<td>0.179</td>
<td>0.019</td>
</tr>
<tr>
<td>1979 – 1980</td>
<td>0.194</td>
<td>0.023</td>
</tr>
<tr>
<td>p-value</td>
<td>0.488</td>
<td>0.6355</td>
</tr>
</tbody>
</table>

Carter made no appointments to the Supreme Court.

Finally, the overall empirical analysis shows that presidents since at least the Eisenhower administration have strategically issued signing statements. This differs from much of the presidency literature that focuses on recent presidents and that tends to argue that Reagan was the first president to act strategically in an effort to increase presidential power (Cooper 2002, 2005; Kelley 2006; Pfiffner 2008).

8. **Conclusion**

This paper tests a theory of the president’s decision to issue a signing statement conditional on his or her relationship to the Supreme Court. While earlier work explores the impact of Congress on presidential signing statements, the potential impact of the courts has largely been ignored. The theory accordingly produces several novel predictions, all of which receive substantial empirical support.

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45 Further, I find that the empirical results hold when restricting analysis to pre-Reagan years and post-Reagan years.
First, I find that the president is more likely to issue a signing statement when he and the Supreme Court are ideologically aligned. In addition, he is more likely to issue a signing statement when also aligned with Congress, contrary to previous research. Finally, this paper suggests that signing statements influence the Court’s decision-making in challenges to legislation and, correspondingly, that the president tends to issue signing statements it knows the Court is likely to support. Overall, the analysis demonstrates that the Court is an important influence in the president’s decision to issue a signing statement.

Further, this study raises the question of how else the courts influence presidential decision-making. Signing statements are just one of the many ways in which the president can influence policymaking. While scholars recognize the many constitutional and legal concerns surrounding the president’s use of many extra-legislative policy tools, the literature still tends to largely focus on presidential-congressional interactions. In addition to signing statements, the president may consider the actions of the courts when deciding how to exercise other means of power. This possibility calls for the re-examination of previous theories of presidential decision-making and may yield fruitful avenues for future research.
Appendix

Table 2A.1: Description of Independent Variables for Main Analysis

<table>
<thead>
<tr>
<th>Variable Names</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>Absolute distance between the ideal points of the President (DW-NOMINATE) and the Supreme Court Median (Cameron and Park)</td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>Absolute distance between the ideal points of the President and the House-Senate averaged median (DW-NOMINATE)</td>
</tr>
<tr>
<td>Presidential Authority</td>
<td>Coded as 1 if the president is given explicit authority in the legislation and 0 if the president is not given explicit authority in the legislation</td>
</tr>
<tr>
<td>Significant Legislation</td>
<td>Coded as 1 if the legislation is considered significant (Mayhew) and 0 if the legislation is not significant</td>
</tr>
<tr>
<td>Foreign-Defense Legislation</td>
<td>Coded as 1 if the legislation is related to foreign affairs or defense and 0 if the legislation is not related those areas</td>
</tr>
</tbody>
</table>

Table 2A.2: Description of Independent Variables for Legislation Challenged in Court Analysis

<table>
<thead>
<tr>
<th>Variable Names</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Presence of Signing Statement</td>
<td>Coded as 1 if the president issued a signing statement on the challenged legislation and 0 if he did not issue a signing statement</td>
</tr>
<tr>
<td>D(Court, Enacting President)</td>
<td>Absolute distance between the ideal points of the President (DW-NOMINATE) at the time the challenged legislation was passed and the Median of the Supreme Court (Cameron and Park) that reviewed the challenged legislation</td>
</tr>
<tr>
<td>D(Enacting President, Enacting Congress)</td>
<td>Absolute distance between the ideal points of the President and the House-Senate averaged median (DW-NOMINATE), both at the time the challenged legislation was enacted</td>
</tr>
<tr>
<td>Age</td>
<td>Year legislation was challenged minus (-) the year the legislation was passed; i.e. this is the age of the legislation when it was challenged</td>
</tr>
<tr>
<td>Solicitor General</td>
<td>Coded as 1 if the Solicitor General was involved in the court case – either as a party or through the submission of an amicus brief; 0 if no Solicitor General involvement</td>
</tr>
</tbody>
</table>

Table 2A.3: Summary Statistics for CRE Regression

<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Median</th>
<th>Min</th>
<th>Max</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signing Statement</td>
<td>0.107765</td>
<td>0.310092</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Constitutional Statement</td>
<td>0.027452</td>
<td>0.1634</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Non-Constitutional Statement</td>
<td>0.08031</td>
<td>0.271785</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>D(President, Court)</td>
<td>0.390103</td>
<td>0.246928</td>
<td>0.257</td>
<td>0.003</td>
<td>0.788</td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>0.422008</td>
<td>0.159958</td>
<td>0.474</td>
<td>0.1105</td>
<td>0.654</td>
</tr>
<tr>
<td>Presidential Authority</td>
<td>0.142873</td>
<td>0.349954</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Significant Legislation</td>
<td>0.018377</td>
<td>0.134313</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Foreign-Defense Legislation</td>
<td>0.055187</td>
<td>0.228351</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>
Table 2A.4: Summary Statistics for Negative Binomial Regression

<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Min</th>
<th>Median</th>
<th>Max</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signing Statement</td>
<td>33.25</td>
<td>21.62511</td>
<td>5</td>
<td>28</td>
<td>92</td>
</tr>
<tr>
<td>Constitutional Statement</td>
<td>8.57143</td>
<td>9.937728</td>
<td>0</td>
<td>4.5</td>
<td>43</td>
</tr>
<tr>
<td>Non-Constitutional Statements</td>
<td>24.68</td>
<td>18.800</td>
<td>1</td>
<td>20.5</td>
<td>80</td>
</tr>
<tr>
<td>Constitutional Objections</td>
<td>32.23214</td>
<td>64.91057</td>
<td>0</td>
<td>7</td>
<td>340</td>
</tr>
<tr>
<td>D(President, Court)</td>
<td>0.399179</td>
<td>0.219805</td>
<td>0.065</td>
<td>0.302</td>
<td>0.729</td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>0.446643</td>
<td>0.185543</td>
<td>0.102</td>
<td>0.458</td>
<td>0.708</td>
</tr>
<tr>
<td>Presidential Authority</td>
<td>1.607143</td>
<td>2.42471</td>
<td>0</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>Significant Legislation</td>
<td>6.107143</td>
<td>3.166177</td>
<td>1</td>
<td>6</td>
<td>16</td>
</tr>
<tr>
<td>Foreign-Defense Legislation</td>
<td>5.196429</td>
<td>3.620244</td>
<td>1</td>
<td>4</td>
<td>14</td>
</tr>
<tr>
<td>Kennedy</td>
<td>0.053571</td>
<td>0.227208</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Johnson</td>
<td>0.089286</td>
<td>0.287736</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
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<td>0.312094</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Ford</td>
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<td>0.187256</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Carter</td>
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<td>0.25987</td>
<td>0</td>
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</tr>
<tr>
<td>Reagan</td>
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<td>0.353094</td>
<td>0</td>
<td>0</td>
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</tr>
<tr>
<td>Bush41</td>
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<td>0.25987</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
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<td>0.353094</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
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<td>0.353094</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 2A.5: Summary Statistics for Legislation Challenged in Court Logistic Model

<table>
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<tr>
<th>Variable</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Median</th>
<th>Min</th>
<th>Max</th>
</tr>
</thead>
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<tr>
<td>Ruling in President's Favor</td>
<td>0.7321429</td>
<td>0.4438346</td>
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<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Signing Statement</td>
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<td>0.4904395</td>
<td></td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>D(Court, Enact. President)</td>
<td>0.3749533</td>
<td>0.2408075</td>
<td>0.295</td>
<td>0.003</td>
<td>0.755</td>
</tr>
<tr>
<td>D(Enact. President, Enact. Congress)</td>
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<td>0.1649505</td>
<td>0.525</td>
<td>0.1105</td>
<td>0.6405</td>
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<td>Age$^2$</td>
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<td>298.6115</td>
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<td>0.4015654</td>
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<td>0</td>
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</tr>
<tr>
<td>Significant Legislation</td>
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<td>0.5010998</td>
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Chapter 3

The President, the Court, and Policy Implementation
1. **Introduction**

Between 2005 and 2010, the number of prescription medication shortages in the United States nearly tripled from 61 to 171. The medications in short supply included life-supporting and life-sustaining drugs, such as Methotrexate and Doxil, both used to treat various forms of cancer. Many of these critical shortages were the result of sudden production discontinuances by manufacturers. The federal government has long sought to mitigate the effects of such shortages, and in 1997 Congress amended the Food, Drug, and Cosmetic Act (FDCA) to require that manufacturers provide notice six months prior to discontinuing certain life-saving drugs. However, the FDCA failed to grant the FDA the necessary authority to enforce the Act’s provisions. As a result, manufacturers often ignored the requirement, leaving doctors and patients caught unaware.

The FDA’s inability to enforce the FDCA was due in large part to recent court decisions that have questioned the FDA’s ability to act under the FDCA. For example, in *FDA v. Brown and Williamson Tobacco Corp* (529 US 120 (2000)), the Supreme Court ruled that the FDA was not granted the authority to regulate tobacco products. To address the problem of dangerous medicine shortages, President Barack Obama issued Executive Order (EO) 13588 on October 31, 2011, which broadened the reporting requirement of the FDCA and granted the FDA additional enforcement authority:

“…the FDA shall use all appropriate administrative tools to interpret and administer the reporting requirement in 21 U.S.C. 356c, to require drug manufacturers to provide

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47 The FDCA was originally passed in 1938 to give the FDA authority to regulate food, drugs, and cosmetics. The Food and Drug Modernization Act of 1997 (21 U.S.C. §356C) amends the FDCA with this reporting requirement.

48 In 2011, the Preserving Access to Life Saving Medications Act was introduced as bills H.2245 and S.296, but has not yet passed both chambers.

49 Also see *Young v. Community Nutrition Institute*, 476 US 974 (1986)
adequate advance notice of manufacturing discontinuance that could lead to shortages of drugs that are life supporting or life sustaining, or that prevent debilitating disease.”

On December 19, 2011, in accordance with the authority granted to it by EO 13588, the FDA issued an interim final rule (76 F.R. 78530) that requires drug manufacturers to report both temporary disruptions in supply in addition to permanent discontinuances:

“Discontinuance means any interruption in manufacturing of a drug product described in paragraph (b)(3)(iii)(a) of this section for sale in the United States that could lead to a potential disruption in supply of the drug product, whether the interruption is intended to be temporary or permanent.”50

In the months following President Obama’s executive order and the FDA’s rule, the FDA reported an increase in the number of notifications and prevented shortages,51 which suggests that the president’s actions were an effective strategy in dealing with the drug shortage crisis.

Obama’s strategy in dealing with this crisis demonstrates how presidents can influence policy outcomes through various means of policy implementation. Further, this example demonstrates how presidents can use executive orders to give agencies additional legal authority to act, particularly given the possibility that agency actions are more easily challenged in court than executive orders. Despite the fact that the president can favorably influence policy even in the face of unfriendly courts, presidential policy implementation remains understudied by political scientists. Further, much of the existing literature tends to focus on how the president’s relationship with Congress influences his actions, while neglecting his relationship with the courts. This lack of attention on the courts seems surprising given the many legal and constitutional questions surrounding executive actions that can be challenged in court. To narrow this gap in our knowledge, this paper develops and tests hypotheses on how the president’s ideological position relative to that of the courts influences his decisions on how best to

50 See 21 C.F.R. § 314.81(b)(3)(iii)
implement policy through executive orders and agency rulemaking. To test these hypotheses, I use federal macro-level data, issue-specific federal data on environmental and labor policy, and state-level data in New Jersey and Texas.

The results of my analysis suggest that when the president is ideologically distant from the Supreme Court and the D.C. Circuit Court, he issues more executive orders while federal agencies engage in less rulemaking. These results hold for macro-level analysis as well as for separate analyses of labor and environmental policy. The results also hold when examining policymaking in New Jersey, a state with institutional similarities to the federal system. However, the theory does not hold when examining the institutionally dissimilar state of Texas. Overall, the results suggest that during periods when the courts are more likely to strike down agency actions, presidents use executive orders to provide additional authority for agencies to act, thereby enhancing the executive branch’s ability to implement policy. Executive orders are difficult to challenge in court and they are generally viewed by the courts as a legitimate legal source of authority for agencies, thus serving as an appealing supplement to other forms of policy implementation.

In the following section, I provide background on executive orders and agency rulemaking (Section 2). Drawing on the theoretical literature, I then present hypotheses predicting when the president will make use of these tools given his ideological position relative to the courts (Section 3). Next, I describe the data I use to empirically test the hypotheses (Section 4). Then, I present the results of my analysis of federal and state rulemaking (Section 5) and executive orders (Section 6). Additionally, I present an empirical analysis of labor and environmental policymaking (Section 7) and then discuss further limitations and robustness.
checks (Section 8). Finally, I offer a discussion of the findings (Section 9) and concluding remarks (Section 10).

2. Background

2.1 Executive Orders

At the federal level, an executive order is a unilateral directive issued by the president to executive branch officials and agencies, providing instruction on how to implement the law. Executive orders serve varied purposes, from orders of mundane executive branch maintenance to orders of national security. For example, presidents issue executive orders to declare public holidays and create official seals. At the other extreme, presidents have used executive orders to respond to foreign and economic crises, such as President Jimmy Carter’s 1981 order freezing Iranian assets in the final days of the Iran hostage crises.

Presidents have the potential to influence policy outcomes through executive orders by providing instruction to agencies, creating and altering policies, or restructuring rulemaking processes. The executive order issued by President Obama to the FDA, described in the introduction, is one example of how a president can use an executive order to instruct an agency on how to implement existing policy. Presidents can also use orders to create policies or initiatives. Notable examples include Lyndon Johnson’s executive order (EO 11246) prohibiting discriminatory employment practices and George W. Bush’s order (EO 13199) establishing faith-based and community initiatives. Additionally, some executive orders even set regulations themselves, such as Richard Nixon’s order (EO 11821) imposing a freeze on prices and wages.

Finally, presidents can use executive orders to restructure agency rulemaking processes by establishing centralized review of new regulations. For example, Gerald Ford required
agencies to submit an “inflation impact statement”\textsuperscript{52} on each major proposed rule (EO 11821). Similarly, Carter required agencies to publish semiannual agendas of any significant rule under review or development (EO 12044). Most significantly, Ronald Reagan issued EO 12291 in 1981, which provided the president with greater control over agencies’ rulemaking. Among its many requirements, EO 12291 mandated that agencies send a draft of all proposed and final rules to the Office of Management and Budget (OMB) for approval before they could be published in the \textit{Federal Register}. This executive order and similar ones have allowed the president to influence policy by acting as a de facto gatekeeper, permitting the rules he supports to become law but blocking others.

While presidents have used executive orders for many purposes, their use has varied over time. Most studies that attempt to explain the variation in how frequently presidents issue executive orders focus on the president’s relationship to Congress. Specifically, some scholars have hypothesized that presidents issue more orders to bypass a hostile Congress, while others theorize that Congress constrains the president’s use of executive orders by limiting his authority. However, the analyses of these hypotheses have produced mixed results. Many studies find an insignificant or inconsistent impact of divided government (Deering and Maltzman 1999; Mayer 1999, 2001; Mayer and Price 2002) and the seat share in Congress of the president’s party (Krause and Cohen 1997; 2000) on the number of total and significant orders. Thus, there is scant evidence to support the theory that presidents use executive orders to circumvent Congress in the policy-making process.

On the other hand, there is evidence suggesting that an opposing Congress can limit the president’s use of executive orders. Howell (2003) finds that divided government and the size of

\textsuperscript{52} These were reports that ensured that the inflationary impact of the proposed rule was in accordance with guidelines from the Office of Management and Budget.
the majority party significantly decrease the number of significant executive orders. Other
scholars find that the president’s legislative success significantly increases the total number of
orders (Krause and Cohen 1997). Finally, some studies find that the president issues more
significant executive orders when his public approval rating is low (Mayer 1999, 2001), during
his last month in office preceding an administration change of the opposing party (Mayer 1999,
2001), and when the executive branch is large (Krause and Cohen 1997).

2.2 *Agency Rules*

A rule is a statement issued by an agency as a way to “implement, interpret, or proscribe
law or policy” (Administrative Procedures Act, 5 U.S.C. §551) in response to statutory grants of
authority from Congress. Rules can be promulgated in any policy area legislated by Congress
and can influence private individuals, groups, businesses, as well as the government itself.
Congress may provide specific requirements on how the law can be implemented, such as in the
case of the 1998 Department of Transportation (DOT) Appropriations Act, which grants no
discretionary authority to the DOT in setting average fuel economy standards. Conversely,
Congress might give agencies broad discretion to implement statutes, allowing agencies to
prescribe policies based on general goals or guidelines. For example, the Secretary of
Agriculture has broad discretion under the Agriculture Adjustment Act to regulate crop markets.
Additionally, agencies often have the opportunity to interpret the law, particularly in changing or
unanticipated circumstances. The Federal Trade Commission (FTC) and Environmental
Protection Agency (EPA) must often adapt regulations to changing structures in industry and
may so do because the statutes granting them authority are flexible.

The Administrative Procedures Act (APA) of 1946 establishes agency rulemaking
procedures. Following a grant of statutory authority from Congress, agencies are required to
publish a notice of proposed rulemaking (NPRM) in the Federal Register allowing public comments. Agencies may incorporate recommendations and then must submit a final rule to the Office of Information and Regulatory Affairs (OIRA) for review, as required by EO 12291. If approved, final rules are published in the Federal Register and codified in the Code of Federal Regulations (CFR).

There are few empirical studies that seek to explain variation in the frequency and content of rulemaking over time and, as with executive orders, most of it focuses on congressional influences. O’Connell (2008) offers the most complete study of rulemaking, analyzing ten agencies between 1983 and 2002. She finds that notices of proposed rulemaking (NPRMs) decrease during a president’s first year in office and when there is a party change in Congress. Additionally, she finds that Republican presidents significantly decrease completed regulatory actions, while presidents of both parties tend to significantly increase completed rules in their final year in office. Other studies find that the courts’ ideology influences the actions of particular agencies (Wood and Waterman 1993; Howard and Nixon 2002; Canes-Wrone 2003). However, none has offered a systematic study of the courts’ influence on rulemaking.

2.3 Policy Implementation and the Courts

Federal policymaking is, of course, a process involving all three branches of government. It is surprising then that the political science literature has mostly ignored the influence of the courts on rulemaking and executive orders, particularly given the legal and constitutional debate over whether the president or an agency has the authority to move policy. Both agency rules and executive orders can be challenged in court, although the former is easier to challenge than the latter. Given the possibility of a court challenge, it seems plausible that the position of the courts might influence the methods presidents use to implement policy.
In general, the courts have viewed executive orders as legally binding pronouncements that are equivalent to law, so long as the president’s authority to issue the order is based on a legitimate constitutional or statutory grant (Mayer 2001). While the president can claim authority to issue executive orders from legislative acts that govern specific policy areas, he commonly invokes his inherent powers under Article II of the Constitution. These vague claims of authority based on such constitutional provisions can be the source of challenges to executive orders because of their ambiguity (E.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)). Similarly, agency rules are also seen as legally binding as long as the agency has provided a reasonable interpretation of the enacting statute as a basis for its action.\textsuperscript{53} However, what is deemed as a reasonable interpretation has been the subject of litigation (E.g. Edward J. DeBartolo Corp v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 (1998) and Whitman v. American Trucking Association, 531 U.S. 457 (2001)).

While judicial review of agency actions is well established under the APA, executive orders are more difficult to challenge. Furthermore, presidential actions – including executive orders – cannot be reviewed under the APA (E.g., see Dalton v. Specter, 511 U.S. 462 (1994)). Similarly, it is difficult to obtain standing to challenge an executive order and the president often includes sections that deny any intention to create or alter private rights, in an effort to avoid judicial review (Mayer 2001). Between 1983 and 2008, there were 306 Supreme Court cases involving a challenge to agency actions (about 2\% of all agency rules during this period), with the Court ruling in the agency’s favor 69\% of the time.\textsuperscript{54} In contrast, there were only 2 Supreme


\textsuperscript{54} To compile a list of agency actions challenged in the Supreme Court, I used the Supreme Court Database (http://scdb.wustl.edu/) to include all cases in which an agency was a party, based on the methods of Smith (2007). I included only cases in which a preceding agency action was central to the case. Between 1946 and 2010, 961 cases challenged agency actions, with the court ruling in favor of the agency 70\% of the time. Between 1983 and 2008, the Court ruled in favor of executive agencies (72\%) more than independent agencies (66\%).
Court cases involving a challenge to an executive order (about 0.1% of all executive orders during this period), with the Court upholding both executive orders.

As these statistics show, executive orders differ from agency rulemaking in the likelihood that they will face judicial challenge or ultimately be overturned. To what extent is the president influenced by constitutional and legal considerations when considering which method of policy implementation to employ in a given situation? How does the court’s ideology influence agency rulemaking and the president’s use of executive orders? How does the president use executive orders to supplement rulemaking in the face of an ideologically hostile court? I now turn to an examination of these questions.

3. Theory

The following sections develop a new theory of presidential use of agency rulemaking and executive orders. The theory makes clear predictions as to when presidents will rely on rulemaking or executive orders given the ideological position of the courts (The Authority-Expanding Hypotheses). Although the literature is consistent with its expectations of the courts’ impact on rulemaking, it is less developed and more conflicted on executive orders. Thus, I also present alternative hypotheses regarding the impact of the courts on the use of executive orders.

3.1 The Authority-Expanding Hypotheses

General Assumptions

Before stating the main hypotheses, I first present a general set of assumptions. The first general assumption, common in the literature (e.g. Cameron 2000; Howell 2003), is that the president is a strategic actor who seeks to obtain his preferred policy preferences. The second assumption is that agencies are responsive to the wishes of the president when issuing new rules. As such, the president's preferences can serve as a proxy for agency actions. This assumption is
based in part on the president’s ability to block actions not aligned with his preferences through centralized rule review. Additionally, the president may politicize his agencies by appointing ideologically congruent agents (Moe 1985; Lewis 2008). Finally, the president can exert control over executive agencies, given his removal and budgetary powers over them. The final general assumption is that presidents and agencies wish to win challenges in court. This is plausible given the costs of litigation – in money, time, and resources. Additionally, a loss in court could threaten their credibility and bring negative attention.

**Agency Rulemaking**

The first hypothesis concerns agency rulemaking and requires two additional assumptions. First, rules are relatively easy to challenge in court, given the clear judicial review procedures established in the APA. The second assumption is that justices rely on their political ideology to make decisions in cases concerning challenges to agency rules. This assumption is grounded in empirical research. Scholars have shown that deference to agencies is not the standard for courts (Merrill 1992); rather, justices vote based on ideological factors (Cohen and Spitzer 1996; Revesz 1997, 2001; Miles and Sunstein 2006). Further, Smith (2007) finds that justices are more likely to rule in favor of the agency when he or she is ideologically aligned with the president. Given these assumptions, the president and federal agencies should be able to anticipate when the courts are likely to strike down agency actions. Knowing this, the agency can preemptively alter its behavior accordingly. Thus the first hypothesis states:

**Agency Rulemaking:** As the president and the courts become more ideologically distant, agencies engage in less rulemaking.

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55 This assumption is supported by empirical research on judicial decision-making (George and Epstein 1992; Epstein and Knight, 1997; Segal and Cover 1989). Particularly, a justice’s ideology and party is influential in how he or she rules on cases regarding presidential power (Ducat and Dudley 1989; Yates and Whitford 1998). Empirical research suggests this assumption also holds for the D.C. Circuit (e.g. Revesz 1997; 2001).
Both the theoretical and empirical literature on agencies provides support for this hypothesis. Many theoretical models finds that agencies have the potential to move policy outcomes closer to their preferred policies when implementing the law and can more easily do so when they are ideologically close to the courts (Ferejohn and Shipan 1990; Eskridge and Ferejohn 1992; Ferejohn and Weingast 1992). Similarly, empirical evidence suggests that the ideology of the courts has influenced the activities of specific agencies (Wood and Waterman 1993; Howard and Nixon 2002; Canes-Wrone 2003).

Executive Orders
The second hypothesis concerns executive orders and requires three additional assumptions. One, I assume that executive orders are relatively difficult to challenge and overturn in court. As previously mentioned, this is because executive orders are not reviewable under the APA and it is difficult to obtain standing. In addition, many scholars argue that the courts try to avoid cases involving questions of presidential power (Pious 2006). This aversion may stem from reluctance on the part of judges to rule against their appointing president (Dahl 1957). Judges may also fear the president will refuse to enforce unfavorable decisions, thus threatening their credibility (Moe and Howell 1999). For these same reasons, many scholars also argue that judges typically defer to the president’s position except when his action has explicitly violated a congressional act (Howell 2003; Mayer 2001).

The second assumption is that executive orders can be costly for the president, and so presidents limit their use. Cooper (2002) offers several sources of these costs. First, excessive usage of executive orders can send mixed signals to other governmental officials and thus cause tension and confusion. Second, Congress can possibly deny funding to implement these orders.

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56 Some ways they can do this include avoiding political doctrine questions, restricting court jurisdiction, and claiming that the dispute is moot, not ripe, not a controversy, etc.
Third, excessive use of executive orders can result in negative attention and criticism of presidential abuse of power, while also giving the impression of discordance within the executive branch. Finally, executive orders are often revoked or substantially amended by subsequent presidents; thus, many policy changes through executive order may not be lasting.\(^5\)

The final assumption is that the courts view executive orders as a valid basis of authority for agency actions. Mayer (2001) acknowledges that courts generally accept the president’s prerogative to choose the instrument he wishes to carry out his executive duties. Those instruments include agency actions and executive orders. Similarly, Cooper (2002) argues that if the president is granted the authority by the Constitution or congressional legislation to implement policy in a specific area, then executive orders are a legitimate source of authority for federal agencies to make substantive rules that have the force of law.

Based on the assumptions that executive orders are difficult to challenge in court and that justices generally defer to the president, executive orders can be an appealing tool in policymaking, especially when the courts block other channels (Cooper 2002). Specifically, when agency actions are likely to be challenged or struck down, presidents can rely on executive orders to give authority and instruction to agencies, thus bolstering the validity of their actions in court. Thus, the second hypothesis is stated as follows:

**Executive Orders:** *As the president and the courts become more ideologically distant, he issues more executive orders.*

Taken together, the Authority-Expanding Hypotheses suggest that presidents often use executive orders as a supplement to rulemaking when attempting to influence policy. When the president is ideologically close to the courts, he can allow more policy implementation to occur through agency rulemaking, with little fear that the rules will be overturned by the courts.

\(^5\) Also see Mayer 1999 and 2001
Relying on agency rulemaking is preferable to issuing executive orders in this situation because executive orders are costly, as described above. However, when the president is ideologically distant from the courts, he relies less on rulemaking to obtain his preferred outcomes because those rules are more likely to be overturned by an ideologically opposed court. Instead, presidents may choose to rely more heavily on executive orders as an avenue for policy implementation in order to invest the agencies with more authority to act. This makes executive orders an appealing option when the president wishes to avoid litigation. While presidents do not wish to use executive orders in every situation, they may serve as an effective tool to supplement agencies’ authority in many situations where the court is likely to be more hostile towards agency actions.

3.2 Examples of the Authority-Expanding Hypotheses

The following section provides two examples of when presidents have issued executive orders to augment agency authority in the face of the court challenges. These examples provide support of the Authority-Expanding Hypotheses.

Example 1: Executive Order 12291

In February 1981, President Reagan issued EO 12291, thereby granting the OMB the authority to review rules promulgated by agencies and the power to reject rules that were inconsistent with the administration’s goals. This order expanded the OMB’s authority considerably, beyond the limits prescribed in previous congressional legislation (Raven-Hansen 1983). 58 While Ford and Carter established forms of centralized review for major agency rules, Reagan expanded this process by making OMB review mandatory for all rules. In addition, this executive order allowed the OMB to influence the rulemaking process without public notice,

58 Notably, the Paperwork Reduction Act of 1980
which contravened the rulemaking procedures established by the APA. The Reagan administration chose to issue an executive order rather than attempt to pass the legislation through Congress because it believed that Congress would refuse to grant it such expansive authority over agencies (Mayer 2001).

Because courts have found that presidential actions cannot be reviewed under the APA,59 this order allowed Reagan to preempt possible legal challenges. As an additional precaution against legal challenges, Reagan included a provision denying the creation of a private right to action.60 Subsequent courts have cited this provision as evidence that agency compliance with EO 12291 is not subject to judicial review.61 Courts have also generally supported agencies’ authority to act in compliance with this order (Center for Science in the Public Interest v. Department of Treasury, 797 F.2d 995 (1986)) or have chosen not to rule on its constitutionality (Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (1986)). Overall, Reagan used EO 12291 successfully to expand the authority of the OMB and reduce legal challenges, consistent with the Authority-Expanding Hypotheses. Further, Reagan faced an ideologically divided Court at the time when he issued this executive order. Thus, consistent with the theory, he used this order to expand an agency’s authority in the face of a potentially unfriendly Court.

Example 2: The Interpretation of the National Environmental Policy Act of 1969

As a second illustration of a president’s use of executive orders to expand agency authority, I examine President Carter’s use of executive orders relating to the National Environmental Policy Act (NEPA) of 1969,62 a congressional act requiring federal agencies to

60 Specifically, the provision claims that: “This Order is intended only to improve the internal management of the Federal Government and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person” (EO 12291).
62 42 U.S.C. § 4322(2)(C)
prepare an environmental impact statement (EIS) for all of their actions affecting the environment. NEPA was unclear on whether it applied to actions outside of the United States. This lack of clarity resulted in several lawsuits where outside interests accused agencies of non-compliance with this ambiguous requirement – though none definitively settled the issue.63

President Carter believed that NEPA should apply to actions abroad, consistent with his foreign policy and national security objectives. In an effort to avoid further litigation, President Carter issued EO 11991 in 1977 to give the Council of Environmental Quality (CEQ) the authority to issue regulations requiring agencies to implement NEPA’s EIS requirements for actions abroad. Courts have recognized the CEQ’s authority to issue regulations and interpret NEPA in this manner, based on the president’s executive order (e.g. Andrus v. Sierra Club, 422 U.S. 347 (1979)). However, because some agencies still opposed this interpretation, Carter issued another executive order in 1979 (EO 12114) interpreting NEPA’s EIS provision in a slightly different manner, as a compromise between opposing agencies.64

With this step, Carter also sought to avoid litigation and possible statutory efforts from Congress that could conflict with his own interpretation. Specifically, these executive orders attempt to avoid lawsuits involving agencies by giving them authority to promulgate regulations based on the president’s interpretation of the law. These orders base authority on the president’s own constitutional powers and not on NEPA, by explicitly denying the creation of private rights of action and by creating procedural protections (Mayer 2001). Courts have upheld the agencies’ authority to issue regulations based on the authority of this executive order (e.g. Greenpeace U.S.A. v. Stone, 1991).

63 E.g. see Sierra Club v. Coleman, 421 F.Supp 63 (1976)
64 Carter’s new order still required agencies to consider the impact of their actions to the environment on areas outside of the United States, but now divided federal actions into different categories, provided for exemptions, and required additional types of reporting documents. See Klick (1994) for further discussion.
This example demonstrates the president’s ability to issue executive orders as a means to provide authority and instruction to agencies on how to issue regulations, particularly when agency actions are being challenged in courts. Without the executive order, agencies were frequently being challenged in lawsuits. Following the executive order, there were fewer lawsuits and the cases that were brought were decided more favorably toward the agencies. This pattern is consistent with the Authority-Expanding Hypotheses. Also consistent with the theory is the fact that during his time in office, President Carter was faced with an ideologically opposed Supreme Court. Thus, he was more likely to fear court opposition to agency actions and more likely to rely on executive orders as a source of additional authority for agencies.

Although there is initial evidence to support my main hypotheses, competing theories suggest other plausible relationships between the ideology of the courts and presidential policymaking. I provide a description of these hypotheses below. This paper makes an important contribution to the literature by conducting an analysis that will mediate among these competing hypotheses.

3.3 The No Effect Hypothesis
Similar to the Authority-Expanding Hypotheses, the No Effect Hypothesis is based on assumptions from the literature that argue that executive orders are difficult to challenge and overturn in court due to obstacles in obtaining standing and a desire to avoid issues of presidential power (Dahl 1957; Moe and Howell 1999; Mayer 2001; Pious 2006). However, this literature does not posit executive orders as a tool when other paths of policymaking are blocked by the courts. Thus, these scholars might not expect the court to have any influence on presidential decision-making.

The No Effect Hypothesis: *The president’s ideological position to the courts has no impact on the number of executive orders he decides to issue.*
3.4 The Alignment Hypothesis
This hypothesis is based on Howell’s (2003) influential model of executive orders, which takes into account the president, pivotal congressional actors, and the judiciary. While Howell makes predictions only about how Congress influences the president’s use of executive orders, he does recognize that the president also considers the courts in this decision and will not issue an order if it will be overruled in court. Further, in a subsequent empirical test, Howell finds that the president is more likely to win federal court challenges to executive orders when he is of the same party as the majority of the deciding court.

Based on Howell’s model and his findings, we can make two assumptions for this hypothesis. First, both the president and court are strategic actors that seek to obtain their policy preferences, as assumed in the Authority-Expanding Hypotheses. A second assumption, which differs from the Authority-Expanding Hypotheses, is that every executive order will be reviewed in court, as is the case in Howell’s model. Based on these assumptions and on Howell’s findings, the Alignment Hypothesis states:

The Alignment Hypothesis: As the president and the courts become ideologically closer, he issues more executive orders.

3.5 The Authority-Based Hypotheses

In the same empirical test, Howell finds that the president is more likely to win a court challenge to an executive order when the order is based on a clear statutory grant of authority. This is consistent with Justice Robert Jackson’s Youngstown criteria, which states that statutory grants of authority give the president the greatest authority to act and justices should respect this authority. On the other hand, Jackson believes that justices must use their discretion in

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65 “Whenever presidents contemplate unilateral action, they anticipate how Congress and the judiciary will respond…rarely will presidents issue a unilateral directive when they know that other branches will subsequently reverse it” (Howell, 27).
determining the validity of presidential action if there is no clear statutory grant, a situation he
deems the “zone of twilight.” Thus, when the law is unclear as to the president’s authority,
justices may rely more heavily on their ideological preferences to make decisions. As a result, a
president who does not wish his orders to be overturned should be hesitant to issue executive
orders based on unclear statutory authority if the courts are ideologically distant. The
implications can be summarized as follows:

Vague Authority: As the president and the courts become ideologically closer, he issues
more executive orders based on vague claims of authority.

Specific Authority: The president’s ideological distance from courts has no impact on the
number of executive orders that are based on recent and specific claims of statutory
authority.

3.6 The Two-Presidencies Hypotheses

Finally, scholars have long argued that deference is given to presidents on foreign policy
issues. Consistent with Wildavsky’s “Two Presidencies” (1966) argument, Canes-Wrone,
Howell, and Lewis (2008) find that presidents have greater influence on foreign policy than on
other policy areas. This argument may also be applied specifically to the court’s attitude towards
presidential power in making foreign policy. In United States v. Curtiss-Wright Export Corp,66
the Court declared the president as the “sole organ of the nation in its external relations, and its
sole representative with foreign nations,” thus setting a precedent for allowing greater
presidential power over foreign policy. Scholars have recognized the courts’ tendency to defer to
the president in foreign policy areas (Cooper 2002). Because the deference does not extend to
domestic policy issues, some scholars suggest that conflicts between the courts and the president

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66 299 U.S. 304 (1936)
occur most often on issues of domestic policy (Genovese 1980). Based on this logic, the president’s relative position to the courts should matter most when he is issuing domestic policy-related executive orders. In sum, the Two-Presidencies Hypotheses states:

**Domestic Policy:** As the president and the courts become ideologically closer, he issues more domestic policy-related executive orders.

**Foreign Policy:** The president’s ideological distance from courts has no impact on the number of foreign policy-related executive orders he issues.

4. **Data and Methods**

To test the hypotheses regarding agency rulemaking and executive orders, I analyze multiple datasets. I first use the federal macro-level data on significant agency rules and executive orders to conduct a broad test of the hypotheses. The second test uses federal level data within two individual issue areas, labor and environmental policy, to offer a more narrowly focused test of the hypotheses. I select these issue areas because they are likely to affect many individuals, thus making them potentially contentious and highly litigated areas. Furthermore, these issues are politically salient, with consistent rulemaking over time.

The final tests consist of state-level analyses of policymaking in New Jersey and Texas. Because New Jersey state government has many institutional similarities to the federal system, the hypotheses described above should hold in New Jersey as well. Thus, the analysis of New Jersey provides powerful confirmation of the results at the federal level. In contrast, Texas’s state institutions are quite different from those of the federal government and New Jersey; thus, I do not expect the hypotheses to hold in this analysis. Texas, then, offers a placebo test of the

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68 See Ravesz (1997)
hypotheses. If the same pattern holds in Texas as in New Jersey and the federal government, it will suggest that the mechanisms that underpin may not be correct.

New Jersey serves as a reasonable choice for a state test of the hypotheses because of its similarities to the federal system. Its governor is one of the most powerful in the nation, as she is the only state-wide elected executive official in New Jersey\textsuperscript{69} and has complete control over the executive branch through appointments. In another similarity, the governor has the power to make lifetime appointments to the seven-member State Superior Court.\textsuperscript{70} Both cabinet and judicial appointments are subject to confirmation by the New Jersey Senate. Additionally, the governor has informal powers of rule review through the Office of Administrative Law, an agency within the Department of Treasury that reports directly to the governor, similar to the function of OIRA.

New Jersey gubernatorial executive orders are similar to presidential ones in that they are legally binding and can be used to implement the law and direct agencies.\textsuperscript{71} Consistent with these institutional similarities between New Jersey and the federal system, the New Jersey courts have upheld the governor’s authority to issue executive orders and have recognized her ability to make substantive law through these orders.\textsuperscript{72} The courts have typically deferred to the governor in executive order challenges\textsuperscript{73} and have also avoided examining their legality (Herman 1999).\textsuperscript{74}

Unlike New Jersey, Texas has one of the weakest governors in the United States. He can only make limited and staggered appointments to the executive branch and many of the most

\textsuperscript{69} Since November 2009, the lieutenant governor of New Jersey has also been elected.
\textsuperscript{70} New Jersey governors must make retention appointments, seven years following the justice’s initial appointment. Justices have a mandatory retirement age of 70.
\textsuperscript{71} The New Jersey governor derives power to issue executive orders from Article V, section I, paragraph 11 of the New Jersey State Constitution, which states: “The Governor shall take care that the laws be faithfully executed.” The governor can also gain authority to issue executive orders from state legislation.
\textsuperscript{72} E.g. – Kenny v. Byrne (1976) and Tormee Construction, Inc v. Mercer County Improvement Authority (1995)
\textsuperscript{73} E.g. – Worthington v. Fawer (1982) and County of Gloucester v. State (1993)
\textsuperscript{74} E.g. – Markert v. Byrne (1977), Last Chance Development v. Kean (1990), and George Harms Construction Co. v. New Jersey Turnpike Authority (1994)
important executive branch officials, including the attorney general and lieutenant governor, are not appointed by the governor but are instead elected by the people. State judges are also elected rather than appointed. Notably, the Texas Supreme Court serves 6-year terms with a mandatory retirement age of 75.

While Texas governors do have the power to issue executive orders to direct agencies in implementing the law, agencies are not legally compelled to follow an order and the courts can review agency actions without also considering the executive orders that grant authority for the action (Beal 2010). Additionally, executive orders in Texas are often used to carry out legislative mandates and thus the legislature can often limit the power of the governor (Bernick and Wiggins 1984). Finally, there are no formal executive review procedures of agency rules.

The remainder of this section describes the data for these empirical analyses.

4.1 Dependent Variables: Significant Executive Orders and Agency Rules

In my evaluation of structural influences on executive orders, I define the relevant dependent variable as “significant” executive orders per year. Many presidential executive orders are ceremonial or involve mundane civil service maintenance, and I do not expect that these “insignificant” orders exhibit meaningful variation. They should therefore be excluded from the analysis. The executive orders I am interested in are those that relate to policy implementation and could therefore be politically contentious and garner the attention of the courts. However, previous scholars’ codings of significant executive orders are problematic.

Howell (2003) offers two different measures of “significance”: 1. Executive orders are significant if mentioned in either the appendix of the Congressional Record or in at least two

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75 The Texas governor derives power to issue executive orders from Article IV section 10 of the Texas Constitution: “He shall cause the laws to be faithfully executed…”

76 Also see Houston Tap & Brazoria Ry. Co. v. Randolph, 24 Tex. 317 (1859)
federal court case opinions; 2. Orders are coded as significant if mentioned in the New York Times. These measures are problematic because they may include orders that are not significant to the courts, such as ones establishing medals. His measures could also omit controversial orders related to public policy that could interest the court but not other political actors.

Mayer (2001) codes an order as significant if it meets at least one of the following criteria: mention in congressional committee hearings, mention in national press, mention in law review literature, mention in a non-routine presidential statement, mention in federal litigation, or if it establishes or reorganizes agencies with substantive duties. This method may be less likely to omit an important executive order, but still faces the problem of including orders that may not be significant enough to draw attention from the courts.

In order to address these issues, I devise my own coding scheme that combines the best aspects of previous methods. I code an executive order as significant if it meets at least 2 of the following criteria:

1. Mention in the Congressional Record
3. Mention in the Public Papers of the President
4. Mention in at least 2 law review articles
5. Mention in at least 2 federal court opinions

Additionally, I omit executive orders that are purely ceremonial. These criteria allow me to assemble orders that are viewed significant as by multiple actors, including the media and major political actors (the president, Congress, and the courts), as well as orders made salient to the

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77 Consistent with Howell’s method, this mention must be within 15 years of when the order was first issued.
78 For criteria 2 and 3, mention must be within a year of the order’s issuance.
79 Criteria 4 and 5 were conducted through Westlaw searches; order mention must be within 15 years of its issuance.
80 Such orders include creation of seals, flags, conference of civil service status, and retirements.
public. This coding procedure targets those executive orders that are most likely to be controversial and hence are the ones that the courts care most about.\footnote{One potential concern of this coding scheme could be the possible endogeneity caused by including mention in federal court cases as a criterion for significance. I include this criterion to ensure that the sample is not excluding orders that the court is interested in but that other actors may not give attention to, a problem in other coding schemes. As a robustness check, I also code significance of orders by using only the first 4 criteria, excluding the court case mention, finding that 94\% of the same orders are significant. Additionally, I run the same empirical analysis (as presented in the next section) with this alternative coding scheme and find the same substantive results as with the primary coding scheme.}

Due to constraints in measuring agency rulemaking, I focus my analysis on orders issued between 1983 and 2008. The year 1983 is a reasonable starting point because the Reagan administration is often credited as the first to systematically and strategically wield various presidential tools in an effort to expand presidential power (e.g. Cooper 2002; Pfiffner 2008; Kelley 2002). In the appendix, I present results of an analysis of orders issued between 1953 and 2008 at the federal level and the results are substantively similar.

Between 1983 and 2008, of a total of 1091 executive orders issued, I code 403 as significant (about 37\% of all orders), an average of about 16 significant orders per year.\footnote{Additionally, out of the 1091 executive orders, about 31\% were mentioned in the \textit{Congressional Record}, 29\% were mentioned in at least one of the newspapers, 32\% were mentioned in the \textit{Public Papers of the President}, 38\% were mentioned in at least 2 law review articles, and 15\% were mentioned in at least 2 federal court opinions.} Additionally, to test the alternative hypotheses, I categorize the significant orders by policy area and source of authority. Of the significant orders, 170 were related to foreign policy (42\%) and 233 were related to domestic policy (58\%). Fifty-five orders were based on recent claims of statutory authority (14\%) and 348 were based on vague claims of authority (86\%).\footnote{Consistent with Howell’s coding, I code an executive order as claiming a recent, specific source of authority if it cites a specific statute enacted during his administration. Conversely, orders are coded as based on a vague claim of authority if it fails to claim any source of authority or if it mentions a statute enacted prior to the present administration, the Constitution, or simply “statutes” as its source of authority.} Finally, 31 significant executive orders relate to labor policy and 32 executive orders relate to environmental policy, each area representing about 8\% of all executive orders.
Finally, for the analysis of New Jersey, I count the number of non-ceremonial\textsuperscript{84} New Jersey gubernatorial executive orders, collected from the New Jersey Digital Legal Library at Rutgers University.\textsuperscript{85} Between 1979 and 2005,\textsuperscript{86} out of a total of 750 gubernatorial executive orders issued, 626 were non-ceremonial (about 83\% of all orders), an average of about 23 non-ceremonial orders per year. Similarly, I count the number of Texas gubernatorial executive orders, collected from the Texas Tech University School of Law Digital Repository\textsuperscript{87} and the Texas Register. Unlike New Jersey, Texas executive orders are generally not used for ceremonial purposes and thus do not need to be coded for significance. Between 1979 and 2005, there were 323 executive orders issued in Texas, an average of about 12 orders per year.

Next, I construct a dependent variable that measures the amount of federal rulemaking activity per year. To do so, I rely on rules that agencies\textsuperscript{88} must submit to OIRA for review before publication in the Federal Register.\textsuperscript{89} In order to gauge which rules are being promulgated, I focus on final rules that OIRA deems as consistent, or in other words approves for publication.\textsuperscript{90}

Between 1983 and 1993, when Reagan’s EO 12291 was in effect, agencies were required to submit all proposed and final rules to OIRA for review. To identify significant rules during this period, I could the number of final rules deemed consistent and published in the Regulatory Plan, an annual report that agencies are required to submit to OIRA on their most important

\textsuperscript{84} Examples of ceremonial orders include directions to fly flags at half-staff and holiday designations.
\textsuperscript{85} http://njlegallib.rutgers.edu/
\textsuperscript{86} I begin the analysis in 1979 because this is when the New Jersey Office of Administrative Law began operation. I end analysis in 2005 because of constraints in the data available for the partisan composition of the state courts.
\textsuperscript{87} http://repository.law.ttu.edu/handle/10601/231.
\textsuperscript{88} This includes cabinet departments and independent agencies, but not independent regulatory agencies.
\textsuperscript{89} Data on agency rule reviews are found on OIRA’s website at: reginfo.gov.
\textsuperscript{90} When OIRA reviews a rule, it can approve it for publication in the Federal Register – either deeming it “consistent with change” or “consistent without change” – or it can not approve it and either return, suspend, or withdraw the rule. Approved proposed rules are published in the Federal Register and open for public comment for a fixed period of time.
regulations. Then, on September 30, 1993, Clinton issued EO 12866, which narrowed the scope of rules that had to be submitted for review to significant ones. Thus, for the period between 1994 and 2008, I count all rules deemed consistent by OIRA. The change in the federal rule review procedure in late 1993 makes it difficult to capture rule significance in a consistent way over time. The advantage of the measure that I use to code for significance is that it provides a way to filter pre-1994 rules for significance in a manner similar to that imposed by Clinton’s executive order. The appendix provides analysis of alternative rulemaking measures, including pages in the federal register and economically significant rules, and finds similar results.

Using this measure, of the 18,565 final reviews that were reviewed between 1983 and 2008, 12,477 of them were significant—averaging to about 480 significant agency rules per year. Further, I count the number of significant rules promulgated each year during this period by the Department of Labor (DOL) (443 significant) and the Environmental Protection Agency (EPA) (886 significant) as the dependent variables for the issue area analysis.

In the state-level analyses, the dependent variables are the number of final rules promulgated each year, as printed in the New Jersey Register and the Texas Register. Between 1979 and 2005, 16,515 final rules were promulgated in New Jersey (an average of about 612 final rules per year) and 34,477 in Texas (about 1,277 per year).

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91 The Regulatory Plan has been published in the Federal Register as a part of the Unified Agenda, a semi-annual report of agency regulatory and deregulatory activities, since 1983.
92 The executive order defines a significant regulatory action as a rule that is likely to have one or more of the following effects: 1. Has an annual impact of the economy of at least $100 million; 2. Interferes with another agency’s action; 3. Alters the budgetary impacts of entitlements, grants, user fees, loan programs or the rights of the recipients; 4. Raises a novel policy or legal issue.
93 There were 8,066 significant final rules between 1983 and 1993 (rules appearing in the Regulatory Plan) out of 12,833 reviewed rules and 4,411 (significant) final rules between 1993 and 2008 (which are significant).
4.2 Independent Variables

To capture the main independent variable of interest at the federal level, I measure the president’s ideological proximity to the Supreme Court as the absolute distance between the ideal points of the president and the median justice of the Court using Poole’s (2000) DW-NOMINATE for presidents and Cameron and Park’s (2009) Nominate Scaled Perception (NSP) scores for justices \((D(President-Court))\).\(^{94}\) Additionally, I use an indicator variable of their partisan alignment, coded as 1 when a majority of the Court was appointed by presidents from the same party as the current president and 0 otherwise (\(President-Court Split\)). Since many agency actions are reviewed in the United States Court of Appeals for the District of Columbia (D.C. Circuit),\(^{95}\) I measure the president’s alignment with this court as well. \(President-D.C. Circuit Split\) is coded as 1 if the majority of active judges were appointed by presidents of the opposing party of the sitting president and 0 if the majority were appointed by the same party. As another measure of ideological alignment, I use the percentage of judges appointed by a president from the same party as the sitting president (\(Percent \ D.C. \ Judges \ from \ President’s \ Party\)).

In my analysis, I include additional independent variables to control for other factors that could influence the frequency of executive orders and agency rules. I measure the ideological distance between the president and Congress by taking the average of the absolute distance between the president and the median House member and the absolute distance between the

\(^{94}\)Cameron and Park’s estimates are scaled into the DW-NOMINATE space.

\(^{95}\) See Revesz (1997; 2001)
president and the median Senate member ($D(\text{President, Congress})$). To measure the effect of time, I include a time trend variable ($\text{Trend}$ is coded as 1 in 1983, 2 in 1984, etc).

Additionally, consistent with the argument that presidents issue more executive orders in times of crisis (Howell 2003; Cooper 2002; Mayer 2001), I include an indicator variable for instances of war ($\text{War}$). This variable is coded as 1 during the Persian Gulf War (1990 – 1991) and the beginning of the wars in Afghanistan and Iraq (2001 – 2003). I also include an indicator for change in administration ($\text{Administration Change}$), as I expect to find that presidents who enter office following an opposing administration issue more executive orders (Howell 2003). Finally, I include an indicator variable for the end of a presidential term ($\text{End Term}$) in the event that outgoing presidents push agencies to complete regulations (O’Connell 2008).

For the state analysis, the independent variables of interest are indicator variables for the partisan division between the governor and the majority of the Superior Court of New Jersey as well as the Texas governor and the majority of the Supreme Court of Texas ($\text{Governor-Court Split}$). This variable takes the value of 1 when the governor and court are from different parties and 0 otherwise. Additionally, I control for the partisan alignment between the governor and the New Jersey Legislature ($\text{Governor-Legislature Split}$), the partisanship of the governor ($\text{Democratic Governor}$), and time ($\text{Trend}$). The appendix provides definitions and summary statistics for all variables.

96 These are also measured by DW-NOMINATE. The results in the empirical analysis do not substantively change when using just the distance between the president and the senate or the distance between the president and the house as alternative measures.
97 I also run models using decade dummy variables as a measure of time and the results are substantially similar.
98 Additionally, I run the analysis with other controls that were thought to possibly have an impact – such as the unemployment and inflation rates (plus an index of the two), presidential approval, and an indicator of an election year, the size (and change in size) of the executive branch, and number of legislation passed (total and significant) – and find that these variables have no significant impact and their inclusion does not substantively change the results of the analysis presented in empirical section.
99 Data on party composition of the state supreme court is provided by Langer (2002).
5. **Agency Rulemaking**

5.1 *Preliminary Analysis*

The top panel of Figure 3.1 depicts the number of significant agency rules over time, with each president’s average ideological distance to the Supreme Court in parenthesis. The greatest period of agency rulemaking occurs during the Reagan and George H.W. Bush presidencies, periods when the president was ideologically close to the Court. Furthermore, the number of rules increases when moving from the Reagan to the GHW Bush years, which corresponds to the fact that GHW Bush was even closer to the Court than Reagan. Additionally, as the courts became more conservative under the GHW Bush presidency, and thus closer to his ideology, agencies issued more rules. When Clinton assumed office in the face of an ideologically opposed court, the number of rules promulgated decreased dramatically. While the amount of rulemaking never recovered to pre-Clinton levels, it did slightly increase under the GW Bush presidency, as the Supreme Court became more conservative.

**Figure 3.1: Number of Significant Final Rules, 1983 – 2008**

![Graph showing the number of significant final rules over time with Reagan, Bush41, Clinton, and Bush43 labeled with their respective ideological distances.]

Figure 3.2 charts the average number of rules promulgated by executive agencies in the federal government, New Jersey, and Texas, according to whether the executive is from the same party as the majority of the relevant Supreme Court. The same pattern holds here as above: more
rulemaking occurs when the executive is ideologically aligned with the court. In the federal
government this difference is significant at the 95% confidence level and holds under president-
DC Circuit alignment, as well. Although the differences in amount of rulemaking are not
statistically significant for New Jersey or Texas, the direction of the pattern is the same.

Figure 3.2: Average Number of Final Rules per Year
by Executive-Court Alignment, 1983 – 2008

5.2 Regression Analysis

To further test the hypotheses, I use negative binomial regressions to explore the
relationship between the president’s distance to the courts and the number of rules issued each
year between 1983 and 2008. Because the dependent variables are counts, it is appropriate to use
a negative binomial for the empirical test. I choose this model instead of a Poisson because of the
overdispersion of the dependent variables. Likelihood ratio tests between the two models reveal
that the negative binomial model is the more appropriate model. However, the results are
substantially the same when using OLS and Poisson regressions.

Table 3.1 shows that the president’s ideological distance from the Supreme Court has a
negative and significant impact on rulemaking. In other words, as the Court and president
become more distant in their ideology, agencies engage in less rulemaking. Similarly, when the
president is ideologically divided from the D.C. Circuit, agencies issue fewer rules. Finally, when presidents reach their final year in office, agencies significantly increase rulemaking.

Table 3.1 – The Effect of President-Court Distance on Significant Agency Rules

<table>
<thead>
<tr>
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<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>-0.781 (0.202)***</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>President-Court Split</td>
<td></td>
<td>-0.391 (0.111)***</td>
<td></td>
<td></td>
</tr>
<tr>
<td>President-DC Circuit Split</td>
<td></td>
<td></td>
<td>-0.412 (0.132)***</td>
<td></td>
</tr>
<tr>
<td>Percent DC Judges from President's Party</td>
<td></td>
<td></td>
<td></td>
<td>2.352 (0.342)***</td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>-0.343 (0.442)</td>
<td>-0.314 (0.462)</td>
<td>-0.339 (0.624)</td>
<td>-0.897 (0.522)</td>
</tr>
<tr>
<td>Administration Change</td>
<td>0.141 (0.428)</td>
<td>0.127 (0.434)</td>
<td>-0.012 (0.488)</td>
<td>0.053 (0.372)</td>
</tr>
<tr>
<td>End of Term</td>
<td>0.472 (0.128)***</td>
<td>0.484 (0.140)***</td>
<td>0.379 (0.162)**</td>
<td>0.412 (0.138)***</td>
</tr>
<tr>
<td>War</td>
<td>0.129 (0.212)</td>
<td>0.149 (0.220)</td>
<td>0.111 (0.130)</td>
<td>0.097 (0.116)</td>
</tr>
<tr>
<td>Trend</td>
<td>-0.050 (0.012)***</td>
<td>-0.052 (0.012)***</td>
<td>-0.063 (0.009)***</td>
<td>-0.078 (0.007)***</td>
</tr>
<tr>
<td>Intercept</td>
<td>7.096 (0.332)***</td>
<td>6.927 (0.339)***</td>
<td>7.225 (0.373)***</td>
<td>6.298 (0.327)***</td>
</tr>
<tr>
<td>N</td>
<td>26</td>
<td>26</td>
<td>26</td>
<td>26</td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis.
* p < .10, ** p < .05, ***p < .01, two-tailed test

Table 3.2 shows that a New Jersey governor who is ideologically opposed to the Superior Court significantly decreases state agency rules. However, the governor’s relationship to the courts does not significantly impact rulemaking in Texas. Thus, for both federal and New Jersey rulemaking, the results support the Agency Rulemaking portion of the Authority-Expanding Hypotheses.

Table 3.2 – The Effect of Governor-Court Partisan Alignment on Final Rules in New Jersey and Texas

<table>
<thead>
<tr>
<th></th>
<th>New Jersey</th>
<th>Texas</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governor-Court Split</td>
<td>-0.131 (0.043)***</td>
<td>-0.100 (0.141)</td>
</tr>
<tr>
<td>Governor-Legislature Split</td>
<td>0.047 (0.044)</td>
<td>0.125 (0.175)</td>
</tr>
<tr>
<td>Democratic Governor</td>
<td>-0.064 (0.043)</td>
<td>0.216 (0.220)</td>
</tr>
<tr>
<td>Trend</td>
<td>-0.005 (0.005)</td>
<td>0.037 (0.008)***</td>
</tr>
<tr>
<td>Intercept</td>
<td>6.584 (0.121)***</td>
<td>6.417 (0.303)***</td>
</tr>
<tr>
<td>N</td>
<td>27</td>
<td>27</td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis.
* p < .10, ** p < .05, ***p < .01, two-tailed test
6. Executive Orders

6.1 Preliminary Analysis

Figure 3.3 shows the number of significant executive orders over time, with each president’s average distance from the Supreme Court indicated in parentheses. The highest numbers of executive orders issued in a year occur during Clinton’s presidency,\(^\text{100}\) which also corresponds to the period in which the president is the furthest from the Court (Clinton is also more ideologically distant from the D.C. Circuit than the other presidents in the comparison). After Clinton left office, the number of executive orders declined under GW Bush, comparable to the comparatively low levels under Reagan and GHW Bush.

Additionally, when examining the average number of executive orders by executive-court alignment, Figure 3.4 shows that presidents tend to issue more executive orders when they are not from the same party as the majority of Supreme Court justices. Similarly, governors of New Jersey tend to issue more executive orders when they are not partisanly aligned with the Superior Court. However, there is no difference in the number of executive orders issued by the

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\(^{100}\) Mayer (2001) attributes some of the decline in executive order use during Clinton’s presidency as a response to the Monica Lewinsky scandal.
governor of Texas. Thus, both figures provide suggestive evidence for the Executive Order portion of the Authority-Expanding Hypotheses.

![Figure 3.4: Average Number of Executive Orders per Year by Executive-Court Alignment, 1983 - 2008](image)

6.2 Regression Analysis

To further test the hypotheses, I present regression analysis of president-court distance on the number of significant executive orders. As the first column of Table 3.3 shows, the president’s distance from the Supreme Court has a positive and significant impact on the number of orders. In other words, the further the Court is ideologically located from the president, the more executive orders he issues, lending support to the Executive Order portion of the Authority-Expanding Hypotheses. Similarly, the president also issues more orders when he and the majority of the Court and D.C. Circuit are from opposing parties (Columns 2 and 3).

In order to more closely examine the mechanism behind the executive order hypothesis, that presidents use executive orders to give agencies more authority when the courts are ideologically distant, Table 3.4 divides the sample of significant orders into those that give agencies authority (Column 1) and those that do not (Column 2). Consistent with my theory and the Authority-Expanding Hypotheses, I find that as the president’s distance to the Supreme

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101 Between 1983 and 2008, the president issued 206 significant executive orders that grant agencies more authority and 197 significant orders that do not grant agencies additional authority. Both rates average about 8 per year.
Court increases, he issues more significant executive orders granting additional authority to agencies. However, the president’s relationship to the Court has no impact on orders that do not bolster agency authority.

Table 3.3 – The Effect of President-Court Distance on Significant Executive Orders

<table>
<thead>
<tr>
<th></th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>0.813 (0.247)***</td>
<td>0.432 (0.129)***</td>
<td>0.299 (0.161)*</td>
<td>-1.207 (0.808)</td>
</tr>
<tr>
<td>President-Court Split</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>President-DC Circuit Split</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percent DC Judges from President's Party</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>-0.770 (0.490)</td>
<td>-0.796 (0.485)</td>
<td>-0.813 (0.692)</td>
<td>-0.593 (0.761)</td>
</tr>
<tr>
<td>Administration Change</td>
<td>0.351 (0.096)***</td>
<td>0.357 (0.092)***</td>
<td>0.479 (0.148)***</td>
<td>0.439 (0.183)***</td>
</tr>
<tr>
<td>End of Term</td>
<td>0.346 (0.179)*</td>
<td>0.341 (0.173)*</td>
<td>0.380 (0.231)</td>
<td>0.336 (0.217)</td>
</tr>
<tr>
<td>War</td>
<td>0.402 (0.174)***</td>
<td>0.399 (0.168)***</td>
<td>0.284 (0.211)</td>
<td>0.248 (0.205)</td>
</tr>
<tr>
<td>Trend</td>
<td>0.007 (0.007)</td>
<td>0.009 (0.007)</td>
<td>0.017 (0.011)</td>
<td>0.023 (0.013)</td>
</tr>
<tr>
<td>Intercept</td>
<td>2.531 (0.320)***</td>
<td>2.697 (0.293)***</td>
<td>2.586 (0.459)***</td>
<td>3.178 (0.537)***</td>
</tr>
<tr>
<td>N</td>
<td>26</td>
<td>26</td>
<td>26</td>
<td>26</td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis. * p < .10, ** p < .05, ***p < .01, two-tailed test

Table 3.4 – The Effect of President-Court Distance on Significant Executive Orders by Grant of Authority

<table>
<thead>
<tr>
<th></th>
<th>Agency Authority</th>
<th>Non-Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>1.185 (0.286)***</td>
<td>0.282 (0.523)</td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>-0.826 (0.428)*</td>
<td>-0.681 (1.017)</td>
</tr>
<tr>
<td>Administration Change</td>
<td>0.381 (0.170)***</td>
<td>0.315 (0.159)*</td>
</tr>
<tr>
<td>End Term</td>
<td>0.224 (0.256)</td>
<td>0.467 (0.462)</td>
</tr>
<tr>
<td>War</td>
<td>-0.086 (0.409)</td>
<td>0.751 (0.264)**</td>
</tr>
<tr>
<td>Trend</td>
<td>0.005 (0.013)</td>
<td>0.010 (0.01)</td>
</tr>
<tr>
<td>Intercept</td>
<td>1.856 (0.341)***</td>
<td>1.827 (0.662)**</td>
</tr>
<tr>
<td>N</td>
<td>26</td>
<td>26</td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis. * p < .10, ** p < .05, ***p < .01, two-tailed test

To test the alternative hypotheses, I analyze executive orders by policy area and by claims of authority (Table 3.5). I find that the president’s distance from the Supreme Court significantly increases the number of orders related to domestic policy and ones based on vague claims of authority, but has no impact on the number of foreign-policy related orders or ones
based on recent and specific claims of statutory authority. These results partially support the Two-Presidencies Hypotheses and the Authority-Based Hypotheses in that the president’s relationship to the courts does not affect foreign policy orders or specific authority orders. However, the vague authority hypothesis and domestic policy hypothesis are not supported. Rather, the results are also consistent with the Authority-Expanding Hypotheses in that executive orders concerning domestic matters and those based on vague sources of authority increase when the president and the courts are ideologically distant.

Table 3.5 – The Effect of President-Court Distance on Significant Executive Orders, by Policy Domain and Authority Source

<table>
<thead>
<tr>
<th></th>
<th>Domestic</th>
<th>Foreign</th>
<th>Vague Source</th>
<th>Specific Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>1.028 (0.527)*</td>
<td>0.365 (0.571)</td>
<td>0.853 (0.233)**</td>
<td>0.587 (0.904)</td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>-0.117 (0.775)</td>
<td>-1.347 (0.885)</td>
<td>-0.861 (0.521)</td>
<td>-0.171 (2.198)</td>
</tr>
<tr>
<td>Administration Change</td>
<td>0.811 (0.189)**</td>
<td>-0.326 (0.293)</td>
<td>0.403 (0.142)**</td>
<td>-0.302 (1.099)</td>
</tr>
<tr>
<td>End of Term</td>
<td>0.348 (0.475)</td>
<td>0.197 (0.375)</td>
<td>0.231 (0.173)</td>
<td>0.823 (0.548)</td>
</tr>
<tr>
<td>War</td>
<td>0.197 (0.393)</td>
<td>0.562 (0.385)</td>
<td>0.451 (0.249)*</td>
<td>0.039 (0.710)</td>
</tr>
<tr>
<td>Trend</td>
<td>0.011 (0.014)</td>
<td>0.006 (0.016)</td>
<td>0.008 (0.007)</td>
<td>0.002 (0.022)</td>
</tr>
<tr>
<td>Intercept</td>
<td>1.464 (0.534)**</td>
<td>2.228 (0.579)**</td>
<td>2.402 (0.312)**</td>
<td>0.410 (1.253)</td>
</tr>
<tr>
<td>N</td>
<td>26</td>
<td>26</td>
<td>26</td>
<td>26</td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis. * p < .10, ** p < .05, ***p < .01, two-tailed test

The two alternative hypotheses that are not supported are the No Effect Hypothesis and the Alignment Hypothesis, which predict that the president’s ideological proximity to the Court will have no effect on the number of executive orders or will increase the number, respectively. These hypotheses are mutually exclusive with the Authority-Expanding Hypotheses, and the results presented here have shown that the president issues more orders when he is ideologically divided from the courts.

Table 3A.2 in the appendix shows that the president’s distance to the Court has no significant impact on the number of insignificant executive orders. This result suggests that the president is only concerned about the courts when issuing his most important executive orders.
Additionally, the results suggest that presidents of an opposing party from the previous administration tend to issue more orders in their first year. Instances of war significantly increase executive orders, but this effect disappears when examining subsets of the orders.\textsuperscript{102}

Finally, when I examine gubernatorial executive orders in New Jersey (Table 3.6), I find that the governor’s alignment with the Superior Court significantly affects executive orders in the manner predicted by the Executive Order portion of the Authority-Expanding Hypothesis. The fact that the results hold when examining independent data from a different level of government shows that the policymaking theories with explanatory power at the federal level extend to similar but independent arenas. In contrast with New Jersey, the Texas governor’s relationship with the state supreme court does not significantly increase executive orders. This highlights the importance of institutional structures in strategic policymaking.

<table>
<thead>
<tr>
<th>Table 3.6 – The Effect of Governor-Court Partisan Alignment on Executive Orders in New Jersey and Texas, 1979 – 2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Jersey</td>
</tr>
<tr>
<td>Governor-Court Split</td>
</tr>
<tr>
<td>Governor-Legislature Split</td>
</tr>
<tr>
<td>Democratic Governor</td>
</tr>
<tr>
<td>Trend</td>
</tr>
<tr>
<td>Intercept</td>
</tr>
<tr>
<td>N</td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis.

* p < .10, ** p < .05, ***p < .01, two-tailed test

7. Labor and Environmental Policy

Overall, the analysis in the previous two sections strongly supports the Authority-Expanding Hypotheses. As the president becomes ideologically distant from the Supreme Court, he tends to issue more executive orders and decrease his reliance on rulemaking by agencies.

\textsuperscript{102} I also gathered data from the International Crisis Behavior Project (http://www.cidcm.umd.edu/icb/) and used the number of international crises the US is involved in per year, the days of crises, and an indicator for crisis as alternative variables, finding they had no significant impact or did not substantially change the results.
Taken together, the findings are consistent with the claim that the president uses executive orders to supplement agency rulemaking when faced with an opposing court. However, because these results are at the macro-level, the question remains as to whether presidents actually use executive orders within specific policy domains as one would expect if the Authority-Expanding Hypotheses are correct. In the remainder of this section, I analyze the impact of president-court distance on orders and rules for two specific issue areas, labor and environmental policy, in order to focus on the president’s decision-making in implementing policies in more narrow domains.

7.1 Labor Policy

First, I examine the number of labor-related executive orders and the number of rules by the Department of Labor (DOL). Between 1983 and 2008, there were a total of 31 significant labor-related executive orders (about 8% of all significant orders) and 443 significant final rules from the DOL (about 4% of all significant rules).

<table>
<thead>
<tr>
<th></th>
<th>Labor-Related EOs</th>
<th>Dept. of Labor Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>D(President, Court)</td>
<td>2.41 (1.126)**</td>
<td>-1.530 (0.603)**</td>
</tr>
<tr>
<td>President-DC Circuit Split</td>
<td>1.500 (0.448)**</td>
<td>-0.595 (0.288)*</td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>0.306 (1.799)</td>
<td>0.035 (0.631)</td>
</tr>
<tr>
<td>Administration Change</td>
<td>0.711 (0.800)</td>
<td>-0.668 (0.443)</td>
</tr>
<tr>
<td>End of Term</td>
<td>1.342 (0.336)**</td>
<td>0.614 (0.311)*</td>
</tr>
<tr>
<td>War</td>
<td>1.200 (0.753)</td>
<td>0.046 (0.174)</td>
</tr>
<tr>
<td>Trend</td>
<td>-0.038 (0.051)</td>
<td>-0.006 (0.035)</td>
</tr>
<tr>
<td>Intercept</td>
<td>-1.152 (1.506)</td>
<td>3.138 (0.423)**</td>
</tr>
<tr>
<td>N</td>
<td>26</td>
<td>26</td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis.
* p < .10, ** p < .05, ***p < .01, two-tailed test

Table 3.7 shows that, consistent with the previous analysis, as the president’s ideological distance to the Supreme Court and D.C. Circuit increases the number of labor-related, so does

103 I isolate those executive orders related to functions under the Department of Labor and exclude those relating to areas falling under the arena of the Office of Personnel and Management.
the number of executive orders, while the number of DOL rules decreases. Both results are statistically significant.

7.2 Environmental Policy

Second, I focus on the number of significant executive orders related to environmental policy as well as the number of significant rules from the Environmental Protection Agency (EPA). Between 1983 and 2008, the president issued 32 executive orders related to environmental policy (about 8% of all significant orders) and there were 886 rules promulgated by the EPA (about 7% of all significant rules).

<table>
<thead>
<tr>
<th>Table 3.8 – The Effect of President-Court Distance on Environmental Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Environmental-Related</strong></td>
</tr>
<tr>
<td><strong>EOs</strong></td>
</tr>
<tr>
<td>D(President, Court)</td>
</tr>
<tr>
<td>President-DC Circuit Split</td>
</tr>
<tr>
<td>D(President, Congress)</td>
</tr>
<tr>
<td>Administration Change</td>
</tr>
<tr>
<td>End of Term</td>
</tr>
<tr>
<td>War</td>
</tr>
<tr>
<td>Trend</td>
</tr>
<tr>
<td>Intercept</td>
</tr>
<tr>
<td>N</td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis.
* p < .10, ** p < .05, ***p < .01, two-tailed test

Table 3.8 shows that the greater the president’s ideological distance from the Supreme Court and D.C. Circuit, the more environmental orders he issues, while the EPA issues fewer rules. These results are statistically significant. For both policy areas examined here, when the president is distant from the courts, he relies less on DOL and EPA rulemaking and more on executive orders to bolster the authority of these agencies to implement policy.
8. Limitations and Robustness Checks

While the empirical analysis and case studies provide considerable evidence for the Authority-Expanding Hypotheses, there are some limitations to the data and analysis. One limitation is the lack of variation in some of the measures. First, the time period between 1983 and 2008 is limiting in that it covers only 26 years and 4 presidencies. The appendix provides analysis of policymaking since 1953, which more than doubles the dependent variable in the analysis. Table 3A.4 confirms that the results hold when earlier presidencies are included, showing that as distance between the president and Supreme Court increases, more executive orders are issued. While analysis of agency rules prior to 1981 is more difficult due to the lack of centralized data on rulemaking and due to the many changes to rulemaking over time, I use pages in the federal register as an alternative measure of rulemaking. Tables 3A.4 and 3A.5 show that rulemaking decreases as the president-Court distance increases.

A second, related reason for the lack of variation in the data is due to the relatively few instances the president and Supreme Court change between 1983 and 2008. As a result, the president-Court distance measure varies infrequently. One way I have addressed this issue is by including an analysis with the president’s distance to the D.C. Circuit Court in place of the president-Supreme Court variable. This adds variation because the D.C. Circuit membership changes more frequently than the Supreme Court’s. Notably, the president-D.C. Circuit analysis produces similar results. Additionally, I have shown that the results hold in an analysis of policymaking in New Jersey. There is no reason to think that executive orders issued by the governor of New Jersey are correlated with executive orders issued by the U.S. president, thus this analysis provides independent corroboration of the results.
One final concern with this analysis is the measurement of agency rulemaking, specifically the change in OIRA review procedures under the Clinton administration with EO 12866. Given that the review process for rules changed in 1993, it makes sense to analyze the data prior to that time. As discussed in the preliminary analysis, changes in the number of rules corresponded to changes in the courts prior to the Clinton administration, with rules increasing as the courts moved closer to the president.\textsuperscript{104} These results support the Authority-Expanding Hypotheses. To address the fact that the review process changes in 1993, I run a new regression that includes a Post-1993 indicator variable for measures of the president’s distance to the D.C. Circuit. The same results hold. As an additional robustness check, I run the analysis with alternative measures of rulemaking, including pages in the Federal Register and the number of economically significant rules. Both of these variables were unaffected by Clinton’s EO in 1993 and therefore may be considered more consistent measurements. The results show that agency rulemaking declines as the president becomes more ideologically distant from the courts.

Finally, changes to rulemaking under the Clinton administration might reflect the administration’s desire to rely less heavily on policymaking through agencies, perhaps due to constraints from the courts. For example, in a report on government improvement,\textsuperscript{105} Vice President Al Gore recommended increased reliance on presidential directives in developing policies, in an effort to avoid political disputes.\textsuperscript{106}

\textsuperscript{104} Specifically, in 1993, there were 549 significant rules, a clear decrease from the 967 rules issued in the previous year under Bush41 and well under the pre-Clinton yearly average of 752.
\textsuperscript{105} The National Performance Review in 1993
\textsuperscript{106} See Cooper (2002) and Kagan (2001)
9. Discussion

9.1 Summary of the Findings

Overall, the analysis offers support for the Authority-Expanding Hypotheses. When the president is ideologically distant from the courts, he tends to issue more executive orders and while agencies engage in less rulemaking. Agency actions are easily reviewable in courts under the APA and, as previous literature has shown, an ideologically opposed court often rules against federal agencies. Thus, a president may be reluctant to rely heavily on agency rulemaking when an unfriendly court is likely to overturn agency decisions. Presidents can use OIRA as a gatekeeping mechanism to block rules that are not in line with their preferences or rules that the courts may strike down. The results support this logic, showing that agencies issue fewer rules when the courts are ideologically opposed to the president.

Instead, when the president is faced with an ideologically distant court, he issues more executive orders. This may seem counterintuitive at first, given the logic behind Howell’s (2003) findings that the courts are more likely to strike down orders when they are ideologically opposed to the president. However, executive orders are difficult to challenge and overturn in court due to issues of standing and deference to the president. Thus, they can be useful tools for a president who wishes to engage in policymaking but avoid litigation. Specifically, the president can issue executive orders to give authority to agencies and bolster the validity and legality of their actions, thus avoiding possibly challenges altogether or, in the event that a court challenge does occur, the order should increase the likelihood that the administration will win. The results support this claim, showing that when the president is ideologically distant from the court, he issues more executive orders. While I am not suggesting executive orders are a perfect substitute for rulemaking, they can serve a valuable purpose by increasing the agencies’ authority when
faced with oppositional courts. Although there are many more rules promulgated per year than there are executive orders issued, a single order can include multiple provisions affecting many agencies at a time and can influence many of their actions.

Notably, the results hold in my analysis of three different courts: the Supreme Court, the D.C. Circuit Court, and the New Jersey state Supreme Court. The D.C. Circuit hears a substantial number of cases involving agency rulemaking and executive orders; thus, it is unsurprising that this court influences the president’s choice of policymaking tool. The Supreme Court too hears agency rulemaking and executive order cases and, as the court of last resort, its ideology is expected to be important in presidential decision-making. Finally, an analysis of gubernatorial executive orders and state agency rulemaking in New Jersey provides further support for the Authority-Expanding Hypotheses, demonstrating the robustness of the theory and its applicability to executive-judicial interactions in institutionally similar states. However, the results do not hold in the state of Texas, where the governor is weak and justices are elected for limited terms. These results demonstrate the importance of institutional structures when evaluating theories of policymaking.

The analysis also lends support to half of the Two-Presidencies and Authority-Based Hypotheses while contradicting the other half. The results do show that the president’s ideological position relative to the Court does not significantly affect his use of foreign-policy related executive orders, supporting the second part of the Two-Presidencies Hypothesis. This lends support for the general “Two Presidencies” idea that the president is less influenced by

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107 In addition to the Cameron and Park NSP scores, I also ran the analysis using alternative ideal point measures and find that the results hold for the almost all of these measures — including the Bailey (2007) scores, the Martin-Quinn (2002) scores, and the Segal-Cover (1989) scores. The results for agency rulemaking hold with Epstein’s et al (2007) Judicial Common Space scores, but do not reach statistical significance for the executive order results. Additionally, the results hold when using the court means instead of medians. Finally, they hold when using the percentage of the president’s party on the Supreme Court.
other actors on foreign policy orders due to deference given to him in this area. However, the Alignment Hypothesis and domestic policy portion of the Two-Presidencies Hypothesis, which predict more executive orders when the president and courts are ideologically close, are clearly not supported. Similarly, the results show that the president’s position relative to the Court is most influential on executive orders that rely on vague sources of authority and has no impact on those orders claiming clear statutory authority, in support of the second part of the Authority-Based Hypotheses. Issues of presidential power are most contentious when his authority to act is unclear. Thus, orders from vague sources of authority are more likely to be challenged and overturned.

9.2 Re-examining the Role of Congress

One perhaps puzzling finding is the absence of a statistically significant impact of the president’s distance to Congress on the number of executive orders. Most of the literature on this topic theorizes that Congress should play an important role in the president’s use of executive orders. Consistent with previous literature, I use a variety of alternative measures to estimate the impact of the president’s relationship with Congress on his use of executive orders.

Table 3A.6 in the appendix shows that most of these alternative measures – divided government, the percentage of majority party seats, and the ideological distance between the House and Senate medians – all have an insignificant impact on the number of executive orders the president decides to issue. However, polarization – a measure of the distance between the party medians – has a strongly negative and significant impact on executive orders, suggesting that the president issues fewer orders when there is a high degree of polarization. This may seem counterintuitive, but is in fact is consistent with Howell’s findings that a hostile Congress can act as a constraint to the president’s use of executive orders, because it is less likely to give him
discretion to move policy. Additionally, the percentage of seats from the president’s party significantly increases the number of executive orders.

Similarly, when examining the impact of these congressional variables on rulemaking (Table 3A.7), I find that the number of significant rules significantly decreases as the size of the majority party decreases, the degree of polarization increases, and as the distance between the House and Senate increases. In other words, a hostile Congress appears to stifle agency rulemaking. In light of these results, further theorizing on the role of Congress in constraining agency rulemaking and presidential executive orders is needed. However, because the impact of the president’s relationship to the courts is consistently significant across all of these specifications, it supports the claim that the courts are indeed an important determinant in agency rulemaking and in the president’s decision to issue executive orders.

10. Conclusion

This paper illuminates an important structural feature of government that affects how the president decides to implement his policy preferences in the face of possible judicial constraints. When ideologically opposed to the president, courts are more likely to overturn agency actions. In these circumstances, the president scales back policy implementation through agency rulemaking. Conversely, he increasingly relies on executive orders as a supplemental source of authority for agencies whose actions may be easily overturned by an ideologically unfriendly court. Executive orders are more effective in these circumstances because they are difficult to challenge, courts are more hesitant to hear cases involving executive power, and courts are more likely to uphold the president’s position than an agency’s position unless there is a clear violation of statutory or constitutional authority. Courts view these orders as equivalent to law and as a
valid source of authority for agencies. For these reasons, executive orders can be an appealing supplement for policymaking when the courts are blocking agency actions.

The findings in this paper contribute to a larger body of research on the president’s strategic use of power that tends to focus on how Congress influences his decisions while placing less emphasis on the role of the courts in influencing his efforts to shape policy outcomes. But the courts are as an important consideration in the presidential decision-making process, given the many legal and constitutional questions that accompany both presidential and agency actions. This paper offers insight into how the courts impact this process. It also considers how the president can weighs different paths to policy implementation given different institutional constraints, particularly his position relative to the courts.
### Appendix

Table 3A.1 – Description of Independent Variables

<table>
<thead>
<tr>
<th>Variable Names</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>Absolute distance between the ideal points of the President (DW-NOMINATE) and the Supreme Court Median (Cameron and Park)</td>
</tr>
<tr>
<td>President-Court Split</td>
<td>1 if president and majority of the Supreme Court are from the same party; 0 if from opposing parties</td>
</tr>
<tr>
<td>President-D.C. Circuit Split</td>
<td>1 if the president and majority of the D.C. Circuit are from the same party (as measured by appointing president); 0 if from opposing parties</td>
</tr>
<tr>
<td>Percentage of D.C. Circuit Judges from the President's Party</td>
<td>The percentage of active judges that were appointed by presidents of the same party as the current president</td>
</tr>
<tr>
<td>Governor-Court Split</td>
<td>1 if the New Jersey (Texas) governor and majority of the New Jersey Superior (Texas Supreme) Court are from the same party; 0 if from opposing parties</td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>Absolute distance between the ideal points of the President and the House-Senate averaged median (DW-NOMINATE)</td>
</tr>
<tr>
<td>Governor-Legislature Split</td>
<td>1 if the New Jersey (Texas) governor and majority of the New Jersey (Texas) state legislature are from the same party; 0 if from opposing parties</td>
</tr>
<tr>
<td>Democratic Governor</td>
<td>1 if New Jersey (Texas) governor is a Democrat; 0 otherwise</td>
</tr>
<tr>
<td>Administration Change</td>
<td>1 if first year of new president of opposing party of previous president; 0 otherwise</td>
</tr>
<tr>
<td>End of Term</td>
<td>1 if last year of outgoing president; 0 otherwise</td>
</tr>
<tr>
<td>Trend</td>
<td>1 in the first year, 2 in the second year, etc</td>
</tr>
<tr>
<td>Dependent Variables</td>
<td>Mean</td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Total Executive Orders (EOs)</td>
<td>42</td>
</tr>
<tr>
<td>Significant EOs</td>
<td>16</td>
</tr>
<tr>
<td>Authority-Granting EOs</td>
<td>7.9</td>
</tr>
<tr>
<td>Non Authority-Granting EOs</td>
<td>7.6</td>
</tr>
<tr>
<td>Domestic EOs</td>
<td>9</td>
</tr>
<tr>
<td>Foreign EOs</td>
<td>6.5</td>
</tr>
<tr>
<td>Vague Authority EOs</td>
<td>13</td>
</tr>
<tr>
<td>Recent, Statutory Authority EOs</td>
<td>2.1</td>
</tr>
<tr>
<td>Significant Agency Final Rules</td>
<td>480</td>
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<tr>
<td>Pages in Federal Register</td>
<td>66830</td>
</tr>
<tr>
<td>Economical Significant Rules</td>
<td>41.3</td>
</tr>
<tr>
<td>New Jersey Non-Ceremonial EOs</td>
<td>23.19</td>
</tr>
<tr>
<td>New Jersey Final Rules</td>
<td>611.67</td>
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<tr>
<td>Texas EOs</td>
<td>11.6</td>
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<tr>
<td>Texas Final Rules</td>
<td>1214</td>
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<tr>
<td>Independent Variables of Interest</td>
<td></td>
</tr>
<tr>
<td>D(President, Court)</td>
<td>0.385</td>
</tr>
<tr>
<td>President-Court Split</td>
<td>0</td>
</tr>
<tr>
<td>President-D.C. Circuit Split</td>
<td>0.54</td>
</tr>
<tr>
<td>Percentage of D.C. Circuit Judges from the President's Party</td>
<td>0.53</td>
</tr>
<tr>
<td>NJ Governor-Superior Court Split</td>
<td>0.444</td>
</tr>
<tr>
<td>TX Governor-Supreme Court Split</td>
<td>0.333</td>
</tr>
<tr>
<td>Control Variables</td>
<td></td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>0.528</td>
</tr>
<tr>
<td>Trend</td>
<td>13.5</td>
</tr>
<tr>
<td>War</td>
<td>0.19</td>
</tr>
<tr>
<td>Administration Change</td>
<td>0.077</td>
</tr>
<tr>
<td>End of Term</td>
<td>0.15</td>
</tr>
<tr>
<td>NJ Governor- Legislation Split</td>
<td>0.44</td>
</tr>
<tr>
<td>NJ Governor Party (Democrat)</td>
<td>0.407</td>
</tr>
<tr>
<td>TX Governor-Legislature Split</td>
<td>0</td>
</tr>
<tr>
<td>TX Governor Party (Democrat)</td>
<td>0</td>
</tr>
</tbody>
</table>
Table 3A.3 – The Effect of President-Court Distance on Insignificant Executive Orders, 1983 – 2008

<table>
<thead>
<tr>
<th></th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>0.117</td>
<td>0.199</td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>0.053</td>
<td>0.455</td>
</tr>
<tr>
<td>Administration Change</td>
<td>0.192</td>
<td>0.253</td>
</tr>
<tr>
<td>End of Term</td>
<td>0.090</td>
<td>0.087</td>
</tr>
<tr>
<td>War</td>
<td>-0.032</td>
<td>0.102</td>
</tr>
<tr>
<td>Trend</td>
<td>-0.032</td>
<td>0.007***</td>
</tr>
<tr>
<td>Intercept</td>
<td>3.533</td>
<td>0.314***</td>
</tr>
<tr>
<td>N</td>
<td>26</td>
<td></td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis.
* p < .10, ** p < .05, ***p < .01, two-tailed test.

Table 3A.4 – The Effect of President-Court Distance on Significant Executive Orders and Pages in the Federal Register, 1953 – 2008

<table>
<thead>
<tr>
<th></th>
<th>Significant EOs</th>
<th>Federal Register</th>
<th>Logged FR Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>0.465 (0.230)**</td>
<td>-1.149 (0.300)***</td>
<td>-1.134 (0.216)***</td>
</tr>
<tr>
<td>D(President, House)</td>
<td>-0.661 (0.634)</td>
<td>0.220 (0.158)</td>
<td>0.2148 (0.198)</td>
</tr>
<tr>
<td>Kennedy</td>
<td>1.352 (0.189)***</td>
<td>-0.208 (0.120)*</td>
<td>-0.200 (0.107)*</td>
</tr>
<tr>
<td>Johnson</td>
<td>0.820 (0.219)***</td>
<td>-0.113 (0.167)</td>
<td>-0.105 (0.148)</td>
</tr>
<tr>
<td>Nixon</td>
<td>1.018 (0.162)***</td>
<td>0.829 (0.082)***</td>
<td>0.824 (0.076)***</td>
</tr>
<tr>
<td>Ford</td>
<td>0.853 (0.183)***</td>
<td>1.168 (0.127)***</td>
<td>1.178 (0.128)***</td>
</tr>
<tr>
<td>Carter</td>
<td>1.233 (0.192)***</td>
<td>1.881 (0.097)***</td>
<td>1.875 (0.073)***</td>
</tr>
<tr>
<td>Reagan</td>
<td>0.898 (0.262)***</td>
<td>1.102 (0.172)***</td>
<td>1.104 (0.108)***</td>
</tr>
<tr>
<td>Bush41</td>
<td>1.027 (0.248)***</td>
<td>1.127 (0.147)***</td>
<td>1.137 (0.125)***</td>
</tr>
<tr>
<td>Clinton</td>
<td>1.059 (0.180)***</td>
<td>1.998 (0.075)***</td>
<td>1.999 (0.080)***</td>
</tr>
<tr>
<td>Bush43</td>
<td>0.989 (0.223)***</td>
<td>1.498 (0.11946)***</td>
<td>1.506 (0.097)***</td>
</tr>
<tr>
<td>Intercept</td>
<td>1.888 (0.281)***</td>
<td>9.936 (0.184)***</td>
<td>9.924 (0.153)***</td>
</tr>
<tr>
<td>N</td>
<td>54</td>
<td>54</td>
<td>54</td>
</tr>
</tbody>
</table>

Negative binomial (Model 1 and 2) and OLS (Model 3) regression coefficients reported with robust standard errors in parenthesis.* p < .10, ** p < .05, ***p < .01, two-tailed test. Results for FR pages hold when including other controls (Administration Change, End of Term, and War) and when examining a shortened time period of 1983 – 2008. The significance of d(President, Court) on EOs disappears when including additionally controls, but remains when not including president fixed effects.
Table 3A.5 – The Effect of President-Court Distance on Economically Significant Final Rules

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>-4.854</td>
<td>1.098</td>
<td>***</td>
</tr>
<tr>
<td>D(President, Congress)</td>
<td>-0.576</td>
<td>0.432</td>
<td></td>
</tr>
<tr>
<td>Administration Change</td>
<td>-0.236</td>
<td>0.085</td>
<td>**</td>
</tr>
<tr>
<td>End Term</td>
<td>0.478</td>
<td>0.073</td>
<td></td>
</tr>
<tr>
<td>War</td>
<td>0.040</td>
<td>0.080</td>
<td></td>
</tr>
<tr>
<td>Republican President</td>
<td>-2.597</td>
<td>0.596</td>
<td>***</td>
</tr>
<tr>
<td>Trend</td>
<td>0.023</td>
<td>0.007</td>
<td>***</td>
</tr>
<tr>
<td>Intercept</td>
<td>7.289</td>
<td>0.880</td>
<td>***</td>
</tr>
<tr>
<td>N</td>
<td>26</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis. * p < .10, ** p < .05, ***p < .01, two-tailed test. Economically significant rules are defined as those rules that have at least a $100 million impact on the economy (similarly defined as a “major” rule under EO 12291). One advantage of this type of rule is that it has been consistently measured across time. However, one disadvantage is that there are relatively few of these issued per year (an average of about 41 per year).

Table 3A.6 – The Effect of Congressional Variables on Significant Executive Orders, 1983 – 2008

<table>
<thead>
<tr>
<th>Variable</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>0.850</td>
<td>0.742</td>
<td>1.114</td>
<td>0.787</td>
<td></td>
</tr>
<tr>
<td>Divided Gov't</td>
<td>-0.172</td>
<td>0.123</td>
<td></td>
<td>-0.230</td>
<td>-0.381</td>
</tr>
<tr>
<td>President's Party</td>
<td>2.684</td>
<td>(1.010)***</td>
<td>1.739</td>
<td>(3.282)***</td>
<td>-13.025</td>
</tr>
<tr>
<td>Percent Majority</td>
<td></td>
<td></td>
<td></td>
<td>0.916</td>
<td></td>
</tr>
<tr>
<td>Polarization</td>
<td>0.416</td>
<td>0.299</td>
<td>0.505</td>
<td>0.478</td>
<td>-0.381 (0.756)</td>
</tr>
<tr>
<td>Chamber Distance</td>
<td>0.321</td>
<td>0.180*</td>
<td>0.246</td>
<td>-0.003</td>
<td>0.232 (0.178)</td>
</tr>
<tr>
<td>Admin. Change</td>
<td>0.417</td>
<td>0.429</td>
<td>0.385</td>
<td>0.242</td>
<td>0.373</td>
</tr>
<tr>
<td>End of Term</td>
<td>0.007</td>
<td>0.004</td>
<td>0.016</td>
<td>0.007</td>
<td>0.197</td>
</tr>
<tr>
<td>War</td>
<td>2.248</td>
<td>9.263</td>
<td>0.016</td>
<td>0.007</td>
<td>0.013 (0.009)*</td>
</tr>
<tr>
<td>Trend</td>
<td>0.007</td>
<td>0.004</td>
<td>0.016</td>
<td>0.007</td>
<td>0.197</td>
</tr>
<tr>
<td>Intercept</td>
<td>0.016</td>
<td>0.016</td>
<td>0.016</td>
<td>0.007</td>
<td>0.013 (0.009)*</td>
</tr>
<tr>
<td>N</td>
<td>26</td>
<td>26</td>
<td>26</td>
<td>26</td>
<td>26</td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis. * p < .10, ** p < .05, ***p < .01, two-tailed test
<table>
<thead>
<tr>
<th></th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>D(President, Court)</td>
<td>-0.663</td>
<td>-0.686</td>
<td>-0.627</td>
<td>-0.461</td>
<td>-0.905</td>
</tr>
<tr>
<td></td>
<td>(0.193)***</td>
<td>(0.220)***</td>
<td>(0.167)***</td>
<td>(0.230)***</td>
<td>(0.233)***</td>
</tr>
<tr>
<td>Divided Gov’t Percent</td>
<td>-0.207</td>
<td>(0.120)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>President's Party Percent</td>
<td>-0.592</td>
<td>(1.932)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percent Majority Party</td>
<td></td>
<td></td>
<td></td>
<td>8.824</td>
<td>(2.46)***</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>-9.503</td>
<td>(4.193)**</td>
</tr>
<tr>
<td>Polarization Chamber</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>-2.629</td>
</tr>
<tr>
<td>Chamber Distance</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(1.219)**</td>
</tr>
<tr>
<td>Administration Change</td>
<td>0.001</td>
<td>0.150</td>
<td>0.0002</td>
<td>0.087</td>
<td>0.120</td>
</tr>
<tr>
<td></td>
<td>(0.326)</td>
<td>(0.401)</td>
<td>(0.243)</td>
<td>(0.324)</td>
<td>(0.318)</td>
</tr>
<tr>
<td></td>
<td>0.512</td>
<td>0.374</td>
<td>0.248</td>
<td>0.281</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>End of Term</td>
<td>0.196</td>
<td>0.135</td>
<td>0.184</td>
<td>0.025</td>
<td>0.163</td>
</tr>
<tr>
<td>War</td>
<td>(0.201)</td>
<td>(0.145)</td>
<td>(0.093)*</td>
<td>(0.162)</td>
<td>(0.086)*</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-0.052</td>
<td>-0.045</td>
<td>-0.022</td>
<td></td>
<td>-0.028</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trend</td>
<td>0.016</td>
<td>0.011***</td>
<td>0.008**</td>
<td>0.089</td>
<td>0.009***</td>
</tr>
<tr>
<td></td>
<td>(0.011)***</td>
<td></td>
<td></td>
<td>(0.058)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>7.074</td>
<td>7.130</td>
<td>12.121</td>
<td>6.994</td>
<td></td>
</tr>
<tr>
<td>Intercept</td>
<td>0.233***</td>
<td>(0.0874)***</td>
<td>1.678</td>
<td>(2.338)***</td>
<td>(0.115)***</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(1.444)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>26</td>
<td>26</td>
<td>26</td>
<td>26</td>
<td>26</td>
</tr>
</tbody>
</table>

Negative binomial coefficients reported with robust standard errors in parenthesis. * p < .10, ** p < .05, ***p < .01, two-tailed test
Cited Executive Orders108


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108 These executive orders can be found online by Gerhard Peters and John T. Woolley at The American Presidency Project, http://www.presidency.ucsb.edu/executive_orders.php
References


