Legislative Constraints, Ideological Conflict, and the Timing of Executive Unilateralism

July 15, 2019

Abstract

Whether executives can use unilateral actions to circumvent legislative preferences is a central question in separated systems. Although presidents and governors certainly have incentives to engage in this behavior, US federal policymaking studies offer little evidence of it. In this paper, we argue there are contexts in which executives can nonetheless use unilateralism to evade legislatures. We explore how intervals between legislative sessions can create such opportunities, depending on inter-branch policy disagreement and legislatures' special session powers. During inter-session breaks, executives issue more executive orders under divided government relative to unified, but only when legislatures lack control over special sessions. Executives facing legislatures with such powers cannot exploit these breaks. We find strong empirical support for this argument in the US states from1993 to 2013. This study has implications for understanding the institutional roots of executive power, while contributing to a growing literature on the strategic timing in policymaking.

Word Count: 9,712

Restraining executive power is a central objective of separation of powers systems. Even as these systems have developed and changed over time, one central question remains at the forefront of scholarly inquiry and public discourse: do executives actually face strong constraints from legislatures or are they able to exert their powers without fear of reprisal? In few contexts is this question as salient as in the case of executive unilateralism. When presidents or governors disagree with legislatures over public policy, they can seemingly use unilateral actions, like executive orders, to bypass the statutory process to obtain more favorable outcomes.

This so-called "evasion hypothesis" is an account of unilateral power that is pervasive among the media, public, and many politicians themselves. Yet, political scientists largely fail to find support for it, with most empirical results depicting presidents as relatively constrained by legislative preferences, issuing fewer executive orders during divided government (Chiou and Rothenberg 2014; 2017; Fine and Warber 2012; Howell 2003; 2005; Young 2013). Despite the extensive literature on the topic at the federal level, few studies examine gubernatorial unilateralism. The evidence that does exist in these contexts suggests that state governors face similar types of legislative constraints as presidents, though to varying degrees (e.g., Barber, Bolton and Thrower 2019; Cockerham and Crew Jr. 2017).

Executives may temper their actions in the face of legislative opposition in anticipation of the various ways legislatures can retaliate. First, they can pass new legislation that overturns these actions or that punishes executives in other ways, such as blocking their policy agendas or decreasing their power. Second, legislatures possess a number of non-statutory powers not subject to the same collective action concerns as legislation, such as oversight, advice and consent, and legislative vetoes, that can impose costs on executives who use unilateral actions to make majorities worse off (Chiou and Rothenberg 2014).

Studies of executive unilateralism, mostly focused on the federal level, largely take the political opportunities of legislatures to constrain executive power through statutory and non-statutory mechanisms as fixed. Consequently, scholars cannot directly assess the impact of these constraints on executive incentives given a lack of variation. What happens when such opportunities are more

varied? Like presidents, governors can also influence policy through unilateral directives. Unlike Congress, however, the policymaking capacity of state legislatures, i.e. the political opportunities and powers afforded to them to perform their key functions, is much more variable both across states and over time (Barber, Bolton and Thrower 2019). Some state legislatures mirror Congress in possessing strong formal powers and low barriers to action, while others are substantially more circumscribed in their ability to challenge governors directly.

One particularly salient feature of policymaking capacity for state legislatures is whether or not they are actually in session, which is fundamental for challenging gubernatorial policy mandates. States differ a great deal in how long their legislatures meet. Some legislatures conduct business year-round, while others meet every other year or for short periods. States legislatures also differ in their power to call themselves into session and determine the agendas of special sessions. The Arkansas and Texas legislatures, for instance, cannot call special sessions. In many cases, this power is reserved for governors who can use it to their advantage. Minnesota Governor Mark Dayton, for example, sent the legislature a list of policy demands it had to promise to address before he would call it back into session.[1] These rules, however, can change over time within a single state. Following Utah Governor Herbert's refusal to call a special session for legislators to set the rules for an upcoming special election (instead setting them himself), lawmakers passed a proposed constitutional amendment (HJR 18) that would allow them to call special sessions on topics beyond veto overrides.[2] In other states such as Idaho, Kentucky, and Michigan, legislatures are unable to determine the issues that are considered, even if a special session of the legislature is convened.

This variation inevitably has implications for the degree to which legislatures can act to con-

[1] `http://theuptake.org/2017/05/30/gov-dayton-vetos-legislatures-funding-to-force-special-session-on-his-terms/`. Accessed June 19, 2019.

[2] `https://www.sltrib.com/news/politics/2018/02/23/another-slap-in-governor-legislature-power-struggle-proposal-to-allow-lawmakers-to-call-themselves-into-special-sessions/`. Accessed July 2, 2019.

front executive power and, consequently, affects executive calculations about *whether* and *when* they can use unilateral strategies to evade legislatures. Indeed, public observers and lawmakers frequently identify abbreviated legislative sessions as an important driver of enhanced executive power in the states. Two reporters lamented the current imbalance between the executive and legislative branches in Nevada, arguing that the legislature's "short session...pushes off a significant amount of power to Nevada's full-time governor and lobbyists who roam the halls of the Legislature."[3] Political commentator Paul Burka wrote of Texas Governor Rick Perry's controversial expansion of executive power through his use of executive orders, attributing it to the legislature's inability to retaliate due to its limited sessions: "The legislative branch can try to fight back. It can pass a law overturning an executive order. It can cut appropriations for the governor or his pet projects. It can investigate…The Senate can refuse to confirm gubernatorial appointments…But the bottom line is that the Legislature can take action for 20 weeks every two years, and the governor can take action for 52 weeks every year. The governor has the advantage if he wants it…Keep an eye out on the items in his legislative wish list that fail to pass: They could reappear as the subject of executive orders."[4]

These examples suggest ways in which the timing and legislative control over regular and special sessions may serve to check executive power. We argue that when legislatures are in session, they have greater opportunities to constrain executives through activities like those discussed above. This is particularly salient when these two branches of government disagree over policy (e.g. during divided government), because in those circumstances governors have incentives to use unilateral actions to circumvent legislative preferences. If legislatures are in session, governors should be more reticent to employ these actions in this way for fear of retaliation. When session is out, however, governors can act unilaterally with less fear of legislative reprisal. All of this,

[3] `https://thenevadaindependent.com/article/public-careers-private-lives-part-time-lawmakers-must-navigate-inevitable-conflicts`. Accessed June 19, 2019

[4] `https://www.texasmonthly.com/politics/more-power-to-him-2/`. Accessed June 19, 2019.

we argue, depends on legislatures' power to call special sessions and to set the agenda. If legislatures can dictate the terms of their special sessions in these ways, they have more opportunities to retaliate against unilateral action; thus, governors should consistently act in a restrained manner whether the legislature is in session or not. If legislatures lack these powers, governors can evade legislative opponents during divided government when sessions are adjourned.

We evaluate these arguments using data on all gubernatorial executive orders issued monthly between 1993 and 2013. We find broad support for our argument, showing that legislatures can prevent executive evasion when they are in session and when they can independently govern their special sessions. We supplement our findings by demonstrating that unilateral activity significantly increases following the adjournment of sessions, but only in states where legislatures are unable to control special sessions. Thus, governors appear to "wait out" these legislatures when engaging in unilateralism knowing that legislators are less capable of retaliating once they leave the capital.

On the whole, we demonstrate the importance of legislative policymaking capacity in executive unilateralism during inter-branch conflict. By leveraging state-level variation in policymaking capacity, this study contributes to a literature that largely takes these political opportunities for granted, allowing us to explore the underlying mechanisms behind legislative constraint of executive power, both at the state level and potentially in contexts where there is less variation in session length and timing (such as at the federal level). In doing so, we delineate environments in which unilateralism may or may not be curtailed. Furthermore, we offer one of the only studies to examine the timing of unilateral actions, rather than just their frequency. As we show, both are ultimately important for understanding the dynamics of executive power vis-à-vis legislative constraints. In this way, we also contribute to a small, but growing literature in political science on how policymakers can use strategic timing to advance their policy interests in a diverse array of contexts (e.g. MacDonald and McGrath Forthcoming; Meredith 2009; Potter 2017). We demonstrate that when policymaking actions occur can be just as important as their prevalence for understanding the balance of power between the branches of government.

1 The Political Dynamics of Timing

The exigencies of modern policymaking demand relatively high levels of delegation to executive branch officials. Governance and policy development are complex tasks for legislatures, which are general-issue rather than specialist institutions. Uncertainty about the link between policy choices and outcomes is a prime motivation for legislatures to delegate policymaking authority to a more-expert executive branch (Epstein and O'Halloran 1999; Huber and Shipan 2002). Chief executives can use this authority to guide implementation in ways that benefit them, potentially at the expense of a legislative majority's preferences.

If legislatures are unable to control executive actors after delegating, their role within the separation of powers system is undermined and executive power may flourish. This concern is particularly salient in the context of unilateral directives that instruct agencies on how to execute the law (Cooper 2002). Unhampered by the same degree of collective action problems legislatures face, executives can use these directives to skew policies toward their own preferred outcomes relative to what might emerge from the statutory process (Moe and Howell 1999). This power gives them strong incentives to act unilaterally, particularly when up against legislatures with policy preferences in opposition to their own. Despite this intuition, most studies on executive unilateralism find the opposite to be true. Executives appear constrained in their use of unilateral actions, issuing fewer during periods of divided government (e.g., Chiou and Rothenberg 2017; Howell 2003). Why is this the case?

Scholars generally argue that executives face costly punishments if they use their delegated authority to unilaterally shift policies away from legislative preferences and thus avoid doing so (Chiou and Rothenberg 2017). Legislatures with greater *policymaking capacity*, that is, the political opportunities to influence the policymaking process through formal and informal avenues, can counter executive actions through both statutory and non-statutory means (Barber, Bolton and Thrower 2019).

In the statutory process, legislatures may seek to directly alter or reverse the policy content of unilateral directives (Bailey and Rottinghaus 2013). This is unlikely to occur, however, because

strategic executives can shift policies into the gridlock interval to prevent this type of direct legislative subversion (Howell 2003; Krehbiel 1998). Attempts to pass laws curtailing executive power will likewise run headlong into an executive veto. Therefore, alternative means for retaliating against unilateral action outside the statutory process may be a more promising avenue for legislatures with only marginal majorities. These types of responses require neither supermajorities nor gubernatorial consent, thus allowing legislatures to impose costs on executives without passing a law. Non-statutory responses can include increased oversight of executive branch actions that can erode a chief executive's public approval, refusals to act on executive priorities that are less salient to the legislature, and legislative vetoes of agency regulations (Barber, Bolton and Thrower 2019; Chiou and Rothenberg 2017; Huber, Shipan and Pfahler 2001; Kriner and Schickler 2016). Such punishments are detrimental to an executive's policy agenda and can impose substantial costs on them. If executives perceive these costs are likely, unilateral strategies that make legislatures worse off become relatively less attractive. In sum, legislatures with sufficiently high policymaking capacity can credibly punish executives for unfavorable unilateral actions. If policymaking capacity is lacking, however, then executives have strong incentives to evade hostile legislatures through unilateralism.

Scholarly accounts of unilateralism generally take these legislative opportunities to retaliate against (and ultimately deter) unilateral action for granted. One particularly important aspect of such policymaking capacity absent from the literature is the time legislatures are actually in session. The execution of nearly all of the statutory and non-statutory responses to unilateralism outlined above generally requires legislatures to be convened. Passing bills necessitates a legislative meeting. Legislators must sit at the rostrum and question witnesses at an oversight hearing. Legislative vetoes demand affirmative action by the chamber or committees. Theories of unilateralism built around the post–WWII era generally assume this problem away given that Congress is highly professionalized. The US states feature much wider variation in legislative capacity. By considering these contexts, we can better understand the conditions necessary for constraint or evasion at both the federal and state levels.

Legislative sessions are considered either "regular" (i.e., occurring at pre-specified times, either by constitutional or statutory mandate) or "special" (i.e., irregularly timed, typically arising in response to policy developments). In regular sessions, legislatures have the ability to engage in the activities discussed above that challenge executive power. However, the potency of legislatures' special session powers – their ability to call special sessions and determine the agendas of these sessions – is varied. These limitations have important implications for the degree to which legislatures can hold executives accountable for their unilateral activity and, consequently, for executive calculations about both whether and *when* to unilaterally change policies. In general, three types of features surrounding the timing of legislative sessions may arise that inhibit legislatures' ability to challenge executives.

First, some part-time legislatures meet infrequently or have short sessions. When a legislature is out of session, it will not have the ability to immediately respond to unilateral actions through statutory or non-statutory means. This incapacity is further compounded if legislators are employed beyond the state capital. Outside employment may take precedence when the legislature is out of session, especially given the financial resources it provides legislators who are often underpaid. Thus, legislators' alternative occupations increase the opportunity costs of calling special sessions and further hampers their ability to collectively respond to executive action (Kousser and Phillips 2012). Moreover, in states that sporadically meet, the legislative agenda is likely to be more crowded with a variety of pressing policy issues that may arise between sessions. Brief sessions thus likewise raise the opportunity costs of addressing any given unilateral directive issued by the governor when the legislature comes back into session, even if majorities find them objectionable. As such, governors are further incentivized to evade these legislative opponents because the probability of retaliation is relatively lower.

Second, even if legislatures want to convene special sessions in response to executive action, many face legal and constitutional barriers in doing so. For instance, fifteen state legislatures in 2018 did not have the ability to call special sessions. These restrictions can empower executives during inter-session breaks.

Third, some legislatures are unable to control their agendas once they come into special session. Instead, these sessions are focused on only one or a few issues, most often dictated by the governor. In states like Kentucky, for instance, governors are solely charged with determining the agendas of special sessions (Council of State Governments 2018). In these cases, external agenda controls hinder the capacity of legislatures to confront executive power.

These limitations on legislative special session powers have incentive effects for executives' calculations about the use of evasive unilateral strategies. To demonstrate, first consider contexts in which legislatures cannot call themselves back into session or control their agendas during special sessions. We argue the effect of partisan division between the two branches of government depends on the timing of legislative sessions in these contexts. When the legislature is adjourned and lacks special session powers, we expect patterns consistent with evasion (i.e., more executive unilateralism in divided government relative to unified). Here, governors have strong motivations to unilaterally move policy during divided government to achieve more favorable policy outcomes than what they would otherwise obtain through the normal lawmaking process. Understanding that oppositional legislatures without special session powers lack opportunities to respond when out of session, governors will have relatively less hesitation in issuing unilateral actions that make legislative majorities worse off relative to the status quo. If the legislature is in session during divided government, however, it can more readily retaliate against these orders through statutory and non-statutory sanctions. As such, we expect the effects of divided government to be dampened during legislative sessions as governors seek to "wait out" the legislature.

Likewise, the effect of whether a legislature is in session on executive unilateralism will also depend on inter-branch partisan alignment. Under unified government, governors will largely issue orders that are in line with the preferences of the legislative majority. Thus, there is little incentive for executives to strategically time unilateral actions around legislative sessions because the fear of retaliation is abated. Therefore, we expect no relationship between session timing and executive unilateralism under conditions of unified government. During divided government, however, executives want to time their orders to avoid legislative sessions and evade adversarial legislatures.

They can effectively do so because legislatures with limited special session powers are inhibited in responding to unfavorable executive actions. As such, we expect the effect of session timing to matter a great deal during divided government. In particular, chief executive should pen significantly fewer unilateral directives when legislatures are in session relative to when they are not.

Taken together, this logic leads us to our first hypothesis:

If legislatures lack the power to control special sessions:

- **H1a - Executive Evasion: When the legislature is out of session, executives issue more unilateral actions during divided government relative to unified government. This effect should be null when the legislature is in session.**
- **H1b - In-Session Constraint: During divided government, executives issue fewer unilateral actions when the legislature is in session relative to being out of session. During unified government, whether or not the legislature is in session has no effect on unilateral actions.**

Now consider legislatures that possess special session powers. In these contexts, we do not expect the same interactions between session timing and partisan division as described above. Here, if a chief executive unilaterally shifts policy away from legislative preferences, then legislatures can expeditiously respond by reconvening. The evasion strategy is costlier in these contexts and therefore less desirable from the perspective of the executive, all else equal. Thus, the timing effects of legislative sessions on unilateralism will not be evident when legislatures possess special session powers. Similarly, while executives have incentives to evade when legislatures are out of session, they will only act on these impulses when legislatures lack special session powers. When these legislative powers exist, the evasion strategy becomes relatively unattractive to executives, regardless of the timing of sessions, because the legislature has the ability (and in those cases, the will) to retaliate. As such, the effect of inter-branch policy disagreement will not depend on whether or not the legislature is in session, or vice-versa.

Thus our second hypothesis states:

H2 - Legislative Constraint: If legislatures can control special sessions, the effects of divided government will not depend on session timing. Similarly, the effects of session timing will not depend on partisan division.

2 Background

2.1 Executive Orders

To evaluate our argument, we examine the timing of gubernatorial executive order issuance in the US states. Executive orders are written directives that give instructions to executive branch officials on how to implement and interpret the law. Governors draw on a variety of sources to legally justify their use of executive orders. In some states, this power is granted by statute or the constitution. Other governors rely on inherent constitutional powers or the nature of their office as a source of authority for their actions. Orders serve a variety of executive functions. On the more inconsequential end, chief executives use them for ceremonial functions, such as lowering flags or declaring a holiday. They can also be used for mundane administrative tasks, like declaring the closure of state offices on holidays, making technical corrections in previous orders, or extending the life of advisory councils.

Executive orders are also used for more substantive administrative purposes, however. In states such as Georgia, governors use them to exercise their appointment powers. Governors also rely heavily on executive orders to structure and control the broader executive branch. Notably, they can create, reorganize, extend, and terminate a variety of bureaucratic governing bodies such as agencies, commissions, councils, and task forces. In this way, executive orders serve an important role for chief executives seeking to control the bureaucracy and its policy outputs.

Governors also frequently use orders to create new programs, initiatives, policies, or guidelines on important issues in their states. For example, in 2018, Ohio Governor John Kasich signed

an executive order (2018-04K) authorizing the testing of autonomous vehicles and delineating guidelines for their operation. The order simultaneously created the Ohio Autonomous Vehicle Pilot Program to assist municipalities in working with local auto tech companies. A similar, though less detailed, order was issued by Washington Governor Jay Inslee in 2017 (EO 17-02). Sometimes these orders also establish agencies or administrative structures to implement them. For instance, Governor Ben Nelson created the Nebraska Transportation Industry Task Force to oversee the newly-designed Transportation Efficiency Project in 1995 (EO 95-3). Orders are also commonly used to delegate or transfer authority to agencies, allocate funds for new or existing projects, and alter or reverse previous policies and orders.

Executive orders have been used by presidents since 1820 for similar purposes. There is more uncertainty surrounding how long governors have employed executive orders due to inconsistencies in publicly available sources. While some states, such as Iowa and Washington, have recorded executive orders dating back until the late nineteenth and early twentieth centuries, others do not have public records of orders until the early 2000s, even if the tool existed prior (e.g. Arkansas, New Mexico, and Georgia). The majority of states have accessible records of executive orders beginning in the early/mid 1990s, which is where we begin our data analysis.

Table 1 lists the mean, standard deviation, minimum, and maximum number of substantive executive orders (as defined and elaborated upon in the next section) issued for each state in our dataset, along with the available years. Overall, there is significant variation within and between states in order usage. The monthly average ranges from 0.29 orders in North Dakota to 6.9 orders in Kentucky. The maximum number of observed monthly orders is as high as 34 in Michigan, 49 in Louisiana, and 69 in Kentucky. Likewise, the standard deviation within state ranges from 0.58 (Wyoming) to 14.26 (Kentucky).

Despite this rich variation, few studies are devoted to explaining executive unilateral actions at the state level. Notably, Ferguson and Bowling (2008) provide important descriptive information on the use of executive orders across forty-nine states between 2004 and 2005, while Sellers (2017) links partisan explanations to the issuance of orders related to LGBT issues. Cockerham

Table 1: Executive Order Summary Statistics by State-Month

State	Mean	Standard Deviation	Min	Max	Years
Alabama	0.89	1.14	0	6	1996–2013
Arizona	1.42	1.55	0	8	1996–2013
Arkansas	0.77	0.81	0	3	2008–2010
California	0.96	1.24	0	8	1999–2013
Colorado	1.34	1.43	0	7	1997–2013
Connecticut	0.54	0.94	0	7	1996–2002, 2005–2013
Delaware	0.69	0.87	0	4	1997–2000, 2004, 2006–2013
Florida	2.08	2.94	0	19	1998–1999, 2002–2005, 2007–2013
Georgia	3.32	2.47	0	12	2003–2013
Hawaii	1.55	2.38	0	18	1998–2013
Idaho	1.04	1.35	0	8	1996–2013
Illinois	0.74	1.43	0	12	1996–2002, 2007–2013
Indiana	0.72	1.71	0	18	1999–2013
Iowa	0.41	0.66	0	5	1996–2012
Kansas	0.59	0.81	0	4	1996–2013
Kentucky	6.90	14.26	0	69	2012–2013
Louisiana	3.44	4.13	0	49	1996–2013
Maine	0.86	1.23	0	9	2003–2013
Maryland	0.67	0.95	0	7	1996–2013
Massachusetts	0.72	0.89	0	5	1995–2013
Michigan	1.77	4.10	0	34	2005-2013
Minnesota	0.54	1.00	0	7	1995-2013
Mississippi	0.34	0.63	0	3	1996-2013
Missouri	1.11	1.66	0	15	1996–2008
Montana	0.48	0.70	0	3	2000–2004
Nevada	1.10	1.67	0	11	2011–2013
New Hampshire	0.44	0.70	0	3	1997-2013
New Jersey	1.15	1.42	0	8	1996–2013
New Mexico	0.73	1.34	0	7	2011–2013
New York	0.99	1.43	0	10	1996–2013
North Carolina	1.18	1.44	0	9	1995–2013
North Dakota	0.29	0.62	0	3	1998–2013
Ohio	2.03	1.88	0	8	1999–2013
Oklahoma	0.98	1.32	0	11	1996–2013
Oregon	0.90	0.92	0	5	1997–2013
Pennsylvania	0.70	1.10	0	8	1996, 2000, 2002–2003, 2007–2013
Rhode Island	0.75	1.01	0	6	1996-2010
South Carolina	0.73	1.06	0	6	1993–2013
South Dakota	0.93	1.23	0	8	1996–2013
Tennessee	0.45	0.82	0	5	1996–2013
Texas	0.44	0.77	0	6	1993–2013
Utah	0.41	0.79	0	5	1993–2013
Vermont	0.57	0.85	0	4	1995–2009
Virginia	1.27	2.11	0	16	1997–2013
Washington	0.43	0.70	0	3	1993–2013
West Virginia	0.85	1.02	0	5	1996–2013
Wisconsin	0.71	0.97	0	7	1995–2013
Wyoming	0.31	0.58	0	3	1996–1998, 2004–2013

and Crew Jr. (2017) report a conditional relationship between divided government, legislative professionalism, and internal fragmentation on the effect of executive orders issued between 2010 and 2013. Barber, Bolton and Thrower (2019) demonstrate that various measures of policymaking capacity, such as polarization and regulatory review, moderate the impact of divided government. To our knowledge, no current studies consider how legislative sessions can impact executive unilateralism with respect to timing.

2.2 Legislative Sessions

State legislatures vary substantially in the amount of time that they meet in any given year. Some of this variation is due to differences across states in whether they have annual or biennial sessions (as discussed in the previous section). Furthermore, state legislatures differ greatly in the number of days they meet per session. For instance, in 2016, Wyoming met for twenty legislative days, California met for 246, while Montana, Nevada, North Dakota, and Texas did not meet at all (Council of State Governments 2017). Figure 1 shows the percentage of days per month that legislatures were in session, averaged across the fifty states. This percentage ranges from 28% in 1996 to 53% in 2011, with substantial variation from year to year. In many cases, the length of a regular legislative session is determined by statutory or constitutional provision. Currently, thirty-eight states have some sort of limitation on the length of their regular sessions, whether that be in absolute days (e.g. 120 calendar days in Colorado) or by requiring adjournment by a certain date (e.g. Missouri – May 30) (Council of State Governments 2018).

Thirty-five states allow legislatures to call special sessions. In many of the remaining cases, governors solely have the power to convene special sessions, which may also considerably influence the total time legislatures meet. Once in a special session, state legislatures may face additional constraints on the content of those sessions. Only thirty-nine legislatures have the ability to determine the subject of special sessions and eighteen states impose limitations to the length of time legislatures can meet in these sessions (Council of State Governments 2018).

These legislative powers have not been static over time. Figure 2 shows the percentage of state

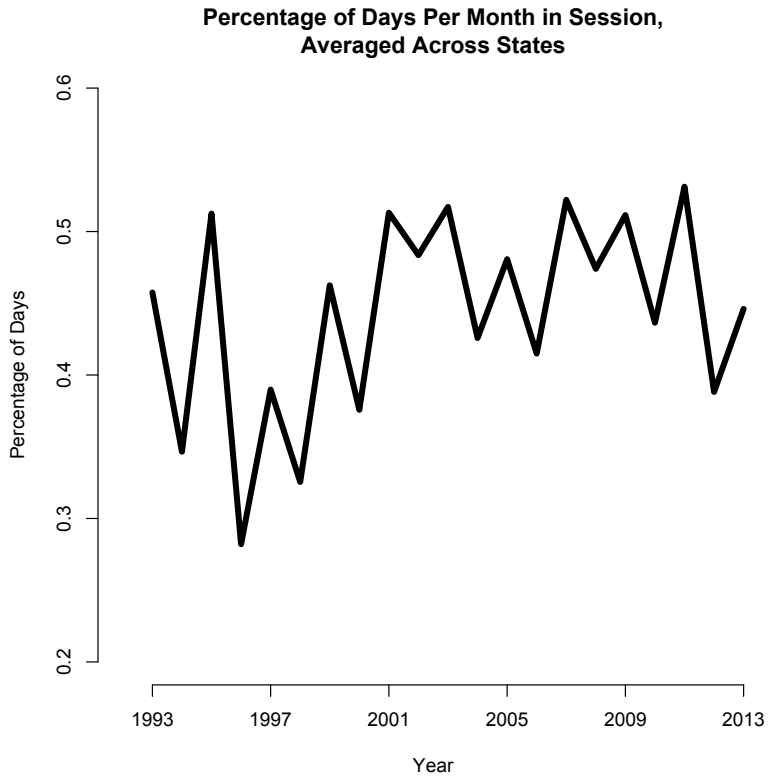

Figure 1: The percentage of days per month in a given year that legislatures were in session averaged across states.

legislatures between 1993 and 2013 that possessed the power to call special sessions, determine their agenda, or either one. In 1993, 76% of legislatures could call special sessions, while 62% could determine the agenda. These numbers declined throughout the 1990s, reaching a low in 2001 of 74% and 60%, respectively. This proportion increased throughout the 2000s, slightly declined, and then leveled out through the rest of the time series. At its height in 2004, 84% of state legislatures had either the power to call or determine the agenda in special sessions. Contrast that to its low in the late 1990s of 74%. During this time period, fifteen states changed these legislative powers in some way – eleven states altered the legislature's ability to call special sessions, nine states modified its power to determine the agenda, and five states did both. Furthermore, five states (Indiana, Iowa, Tennessee, Utah, Vermont, and Wisconsin) changed one of these powers and reversed course at some point within this twenty-year span.

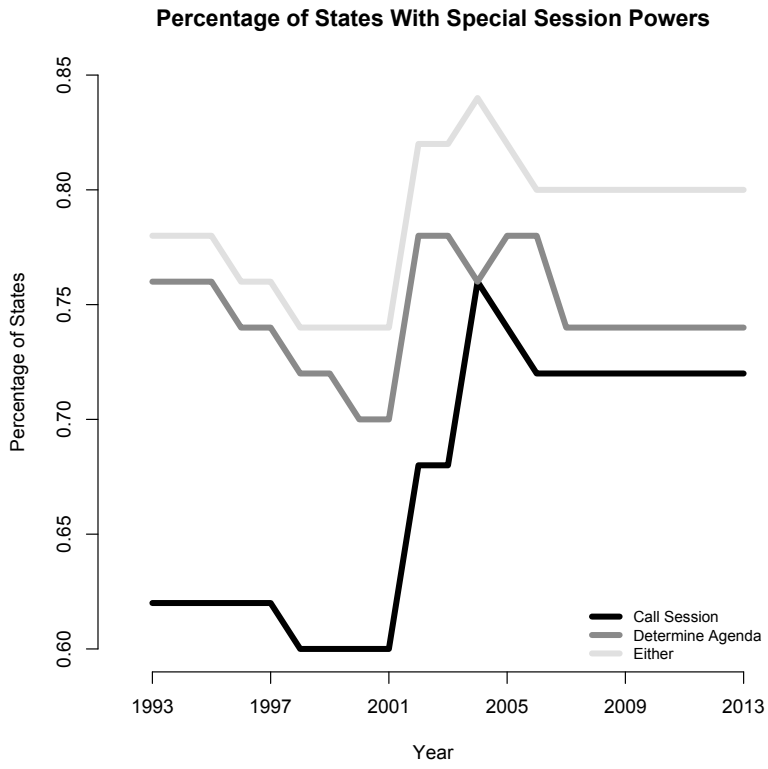

Figure 2: The percentage of states in a given year where legislatures possess the power to call special session, determine the agenda of special sessions, or possess either power.

Taken together, variation exists between states and over time in the amount of time they are actually in session. Despite its implications for policy outcomes, scholars largely do not examine legislative session length separate from aggregate measures of professionalism. However, the few studies that do consider it independently suggest that legislative session length operates differently and has different impacts than other resource-based measures of a legislature's institutional capacity, such as its expenditures or staff size. For instance, session length plays a central role in some studies of budgeting, which demonstrate that governors are less successful in receiving their requests when legislatures meet for longer periods of time (Kousser and Phillips 2009; 2012). Other studies emphasize the fact that the duration of legislative sessions often operates differently from other capacity-related variables, both conceptually and empirically (e.g. Bowen and Green 2014; Gamm and Kousser 2010; Rosenthal 1996; Woods and Baranowski 2006). In this paper, we do not

examine the impact of session length per se. Instead, we focus on the timing of sessions relative to executive action – a related, but distinct line of inquiry.

Previous work has generally not made connections between the exercise of unilateral power and the timing of legislative sessions, which can provide ample opportunities for governors to evade their ideological opponents. While most studies of state unilateralism include some measure of legislative capacity or professionalism, none to our knowledge explicitly examines the role of session timing or session length independent of other capacity measures or their interactions with ideological factors.

3 Data

3.1 Dependent Variable

We rely on a dataset collected by Barber, Bolton and Thrower (2019) on the use of executive orders between 1993 and 2013 in forty-nine states.[5] We augment this data by determining the dates on which each order was issued. Doing so allows us to evaluate the relative timing of both legislative sessions and executive action. We limit our analysis to policy-relevant executive orders, which are best-explained by the theory. We omit orders related to ceremonial functions (e.g., lowering flags to half staff, naming highways, commemorations) and routine administrative tasks (e.g., salary increases, pardons, scheduling special elections) from the analysis. We also disregard orders related to appointments and removals of public officials, because they are not consistently used across states for this purpose. Finally, we omit orders pertaining to disaster relief, given that their issuance is more closely tied to events outside of the governor and legislature's control. Overall, this leaves a total of 11,109 policy-oriented executive orders in our analysis.

Our dependent variable is the number of policy-oriented executive orders issued in every state

[5]We omit Nebraska because its non-partisan unicameral legislature presents difficulties in testing our theoretical arguments about divided government.

for each month between 1993 and 2013. Thus, our unit of observation is state-month-year.[6] On average, governors issued 0.98 executive orders per month. This number is comparable to presidential unilateral activity. Chiou and Rothenberg (2017) find that, depending on the significance measure, presidents issued between 0.04 and 1.55 significant executive orders per month between 1946 and 2003.

Given that the dependent variable is a count, we employ negative binomial regressions.[7] We include fixed effects for the issuing governor in each state to account for the idiosyncrasies of individuals that may influence their tendency to issue executive orders. These fixed effects also control for unobserved differences between states, including the attitudes, norms, and practices related to unilateral actions and sessions as well as invariant features of legislative professionalism.[8] Additionally, we include month-year fixed effects to account for various factors or trends that may influence all states in any given month-year. We cluster standard errors at the state-year level.[9]

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[6]Some state-years had executive orders with missing dates. In some cases, we were able to infer the month in which it was issued based on its assigned number in relation to other orders with dates. Where such deductions could not be made, we chose to drop those state-years to avoid miscounting. We do not believe that this missingness correlates with our variables or interest or outcomes and thus should not impact our substantive conclusions. The following state-years are dropped for these reasons: Vermont (pre-2010), Michigan (pre-2004), Montana (pre-2005), Wyoming (2000-01), Delaware (2004, 2008), Illinois (2003-06), Alaska, Connecticut (2003-04), Delaware (2001-03, 2005), Florida (2000-01, 2006), New Hampshire (1996), New Jersey (1994), Pennsylvania (1997-99; 2001; 2004-06), Wyoming (1994, 1999, 2002-03).

[7]Table 10 in the supporting information (SI) includes results from zero-inflated models (page 12).

[8]Models with state fixed effects yield similar results (see SI Table 2, page 4).

[9]The results are robust to clustering at alternative levels as well. See SI Tables 4–6, pages 6–8.

3.2 Main Independent Variables

Our main independent variables are measures for the timing of legislative sessions, divided government, and special session powers. First, *In Session* is assigned the value of "1" in every month that the legislature is in either regular or special session and "0" otherwise. In other models, we use separate measures for each session type to determine whether one or the other is driving the dynamics we observe in the empirical analysis. Accordingly, *Regular* is coded as "1" when the legislature is in regular session ("0" otherwise), while *Special* is coded "1" when it is in special session ("0" otherwise). This data was collected from the Book of the States.[10] We expect patterns of constraint in unilateralism to be most prevalent in regular sessions. When legislatures cannot control their special sessions, these powers are typically given to the governor instead. Governors who can call special sessions or determine their agendas are unlikely to do so for the purposes of executive constraint. In these cases, such constraint must occur in regular sessions, where legislatures can more freely pursue retaliatory measures against the executive. The difference between session types should not be relevant when legislatures have special session powers, as implied by the theoretical argument, since they can use both to act against executives. Separating out regular and special sessions allows us to examine this conjecture.

We measure executive-legislative conflict with an indicator for *Divided Govt.*, which is coded as "1" when the governor is from the opposing party of either chamber of the legislature. We obtain this information from the dataset introduced by Klarner (2003) and update it to accommodate the years of our study.[11]

Next, we code *Special Session Power* as "1" if the legislature has the ability to either call a

[10]We alternatively use the percentage of calendar days the legislature is in session in a given month and find equivalent results (SI Table 9, page 11). In a few cases, we were unable to ascertain the dates of legislative sessions for some state-years from the Book of States. These observations are thus omitted from the analysis.

[11]The models exclude third party governors. We add them to the analysis in SI Table 8 (page 10) coding their terms as divided government.

special session or set the agenda in special session and "0" otherwise. While these two powers are mostly paired in states (i.e., if a legislature can call a session, they can control the agenda), neither necessarily implies the other. Some states allow only governors to call special sessions but permit legislatures agenda-setting abilities (e.g., Minnesota). Others allow legislatures to convene these sessions without giving them the authority to control the agenda (e.g., Georgia). Having either power allows the legislature to play a retaliatory role.[12]

We subset our analyses on *Special Session Power*, while also interacting *Divided Govt.* with *In Session* (as well as *Regular* and *Special* in alternate analyses) to test the conditional relationships between these three variables. This interaction term is the key test of our empirical hypotheses.[13]

3.3 Control Variables

We also include control variables that could confound the results.[14] First, governors commonly use executive orders to respond to natural disasters (Ferguson and Bowling 2008). Although we omit disaster-related orders, such crises could augment executive power (e.g., Howell, Jackman and Rogowski 2013). To control for this possibility, we employ the number of federally-determined disasters declared by the Federal Emergency Management Agency for each state-month-year (*Natural Disaster*). Second, Rottinghaus (2015) argues that presidents and governors tend to issue more executive orders in the wake of political scandal. We utilize his data of the number of scan-

[12]In SI Table 11 (page 13), we examine each power separately to determine if one or the other is driving the dynamics we report. We find similar dynamics as those reported here for both powers.

[13]Note that the results are substantively identical in comparable models where we include triple interactions, instead of subsets. We focus primarily on subsetted models for ease of interpretation and because there is relatively little within-governorship variation in session powers, but we reference results related to triple interaction models as appropriate.

[14]Note that the inclusion or exclusion of these particular controls does not materially affect the results. Models omitting them produce substantively identical conclusions (see SI Table 1, page 3).

dals occurring in each state-month-year (*Scandal*). Finally, governors often rely on unilateralism to respond to economic shocks (Krause and Cohen 1997; 2000). Thus, we control for monthly state unemployment collected from the Bureau of Labor Statistics.

We also account for the power or resources of both the governor and legislature. Governors with greater institutional powers may not need to rely on unilateral tools (Barber, Bolton and Thrower 2019). Legislatures with greater resources could be more capable of constraining unilateralism irrespective of session lengths (Bolton and Thrower 2016; Cockerham and Crew Jr. 2017). With respect to the former, we use a modified version of the Beyle (2008) index of *Gubernatorial Institutional Power*, which includes gubernatorial tenure potential, appointment powers, budgetary powers, and veto powers.[15] We measure the institutional resources available to legislators by using factor analysis to create a score based on the logged number of permanent staff, the logged number of special staff, and the logged salary for each legislature by year, given the high levels of correlation between each of these variables (*Resource Capacity*).[16] Including this measure ensures that our focus on session timing is not tapping into any other aspects of state legislative professionalism that might be driving the results.

Governors with positive relationships with the public tend to be better positioned when bargaining with the legislature (Kousser and Phillips 2012), which could influence unilateralism. Measures of gubernatorial approval are not available across our time frame, so we use the governor's vote share in the previous election as a proxy (*Previous Govn'r Vote*). We also include the Democratic presidential vote share in the previous election as a proxy for the state's liberalism and demand

[15]We average these four indices and exclude other factors not consistently measured over time, such as organizational power and election procedures, and exclude governor party given its overlap with our other variables of interest. Beyle (2008) provides data for the following years in our dataset: 1988, 1994, 1998, 2000, 2001, 2002, 2003, 2005, and 2007. We use linear interpolation to fill gaps between years. SI Table 7 (page 9) also shows that the results are robust to dropping 1993, which is problematic for the Beyle index (Krupnikov and Shipan 2012).

[16]The analysis is robust to including these variables separately (SI Table 3, page 5).

for governmental action (*Pres. Dem. Vote Share*). Governors may also be more reticent to act unilaterally before elections given increased public scrutiny. We therefore include an indicator for a gubernatorial election year (*Governor Election*).

Next, some states can hold their sessions over one year or two years based on statutory or constitutional provisions. Differences in these institutional rules can influence the windows legislatures have to constrain executive unilateralism in regular or special session and the frequency of their meetings. To control for this possibility, *Two-Year Session* is coded as "1" if the state legislature's session is held over two years and "0" if it is held annually. This data was gathered from the Book of the States. Finally, we include an indicator for a governor's final years in office *Last Year*), coded as "1" if the governor is in her last term and cannot run for reelection because of term limits, and "0" otherwise. This variable should capture the possibility that governors, similar to presidents, may adjust their behavior at the end of their term based on changing incentives, such as their lame duck status or desire to run for higher office (Kousser and Phillips 2012).

4 Results

Table 2 contains our key results. Models 1 and 3 subset the analysis based on instances when legislatures do not possess special session powers, while Models 2 and 4 display results for the times when they do. We begin by examining the Executive Evasion and the In-Session Constraint Hypotheses. To review, we expect these dynamics will manifest when legislatures lack special session powers.

Specifically, the Executive Evasion Hypothesis predicts that executives will issue more executive orders under divided government relative to unified when the legislature is not in session and lacks special session powers. To test this idea, we interact *In Session* with *Divided Govt.* in Model 1 and find strong support for this hypothesis. The coefficient for divided government is positive and significant, suggesting that governors issue more executive orders relative to unified government – but only when the legislature is not in session. When legislatures are convened, this effect

is substantially dampened, as indicated by the negative and significant interaction term.

Figure 3 visually displays the substantive effects of divided government when legislatures lacking special session powers are in and out of session. When session is out, governors issue 1.13 more executive orders per month under divided government. Given that on average governors issue 0.98 executive orders per month, this represents a doubling in unilateral activity under these conditions. When the legislature is in session, however, there is not a statistically significant difference between gubernatorial behavior in unified versus divided government. These findings are consistent with the argument that governors have incentives to evade legislatures, but strategically time their unilateral activities to avoid the possibility of legislative sanction.

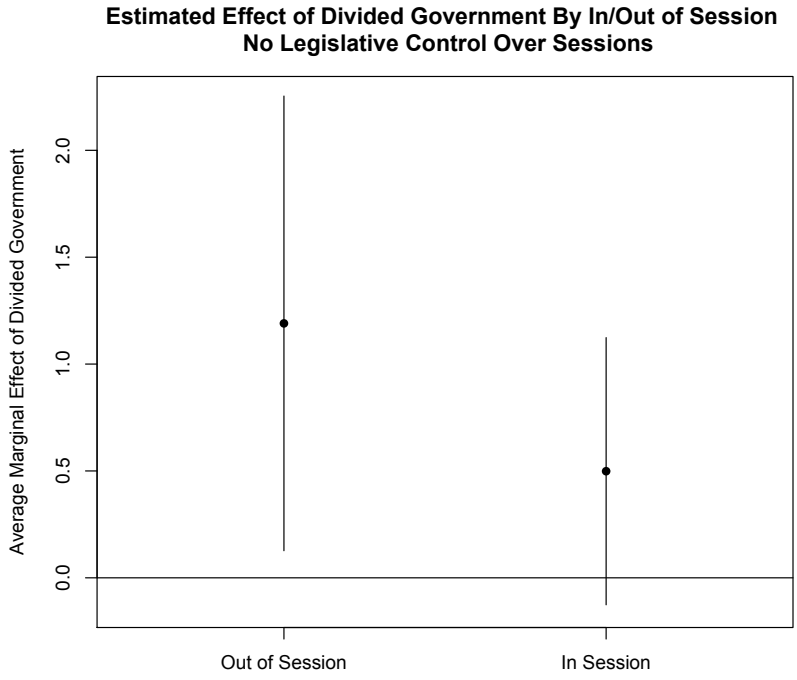


Figure 3: Marginal effects of divided government when the legislature is in and out of session, conditional on no legislative special session powers.

The interaction in Model 1 also provides a test of the In-Session Constraint Hypothesis. Here, we argue that during divided government, governors issue significantly fewer executive orders when legislatures lacking special session powers are convened. Governors facing legislative oppo-

Table 2: The Timing of Executive Order Issuance

	Model 1	Model 2	Model 3	Model 4
In Session	-0.0603	0.0305		
	(0.113)	(0.0540)		
Regular			-0.170	0.0440
			(0.127)	(0.0560)
Special			0.372***	-0.0104
			(0.144)	(0.0866)
Divided Govt	1.081***	0.0455	1.187***	0.0391
	(0.359)	(0.0794)	(0.348)	(0.0790)
In Session x Divided Govt.	-0.457**	-0.0377		
	(0.187)	(0.0740)		
Regular x Divided Govt.			-0.371*	-0.00809
			(0.197)	(0.0752)
Special x Divided Govt.			-0.133	-0.0770
			(0.217)	(0.118)
Natural Disaster	0.0441	0.0741	0.0664	0.0737
	(0.108)	(0.0489)	(0.108)	(0.0490)
Scandal	0.385**	-0.0388	0.370*	-0.0364
	(0.196)	(0.0705)	(0.191)	(0.0706)
Unemployment	0.0629	0.0164	0.0258	0.0170
	(0.0836)	(0.0340)	(0.0832)	(0.0340)
Governor Instituional Power	-1.244*	-0.410*	-1.406**	-0.411*
	(0.726)	(0.212)	(0.715)	(0.213)
Previous Govn'r Vote	0.763	-1.316**	1.274	-1.311**
	(1.025)	(0.513)	(1.014)	(0.514)
Pres. Dem. Vote Share	-0.814	0.855	-1.145	0.878
	(2.983)	(1.173)	(2.840)	(1.176)
Last Term	0.0634	-0.0360	0.0255	-0.0352
	(0.183)	(0.0789)	(0.179)	(0.0790)
Governor Election	-0.0382	-0.166***	-0.0468	-0.168***
	(0.131)	(0.0532)	(0.131)	(0.0533)
Resource Capacity	0.181	0.598***	0.236	0.602***
	(0.348)	(0.175)	(0.322)	(0.175)
N	1,742	7,325	1,742	7,325
Governor FE	✓	✓	✓	✓
Month-Year FE	✓	✓	✓	✓
Special Session Powers	No	Yes	No	Yes

Negative binomial coefficients and standard errors clustered by state-year in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

nents who cannot manage special sessions will exercise unilateralism modestly while the legislature is in session, because of the increased likelihood of retaliation. Instead, chief executives wait until the legislature is adjourned to engage in evasive action. Under unified government, however, we do not expect an effect of legislative sessions on unilateralism given that these two branches of government are more likely to agree on policy; there is therefore little incentive for governors to evade or strategically time their actions in the same way.

We find strong support for this hypothesis. In particular, the estimated coefficient for *In Session* (which corresponds to its effect under unified government) is quite small and the estimated standard error is relatively large. However, the sizeable, statistically significant, and negative interaction term suggests that governors under divided government restrain their unilateralism when legislatures are in session.

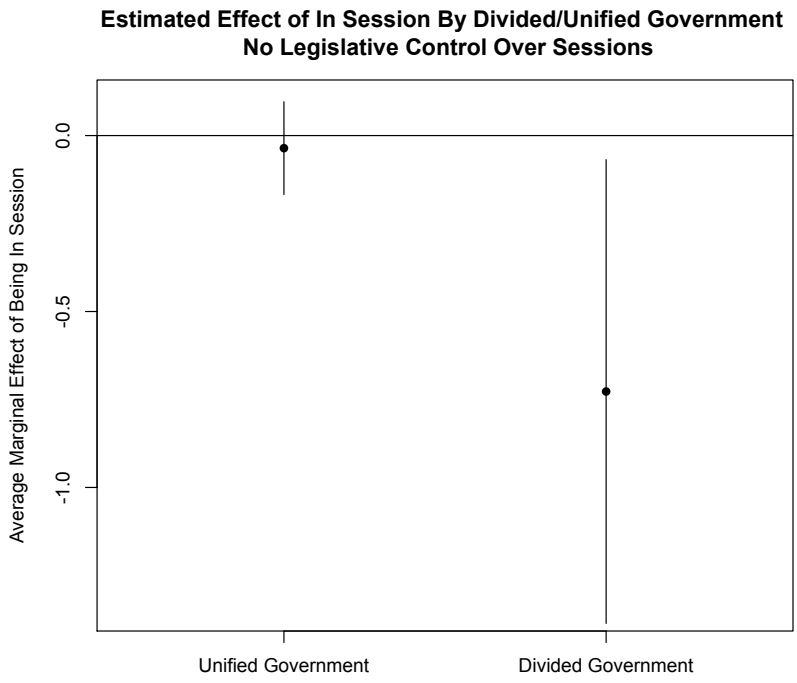


Figure 4: Marginal effects of being in session during divided government and unified government, conditional on no legislative special session powers.

Figure 4 presents the estimated marginal effects of being in session under unified and divided

government when legislatures cannot dictate the terms of their special sessions. In particular, under divided government, governors issue 0.71 fewer executive orders per month when the legislature is in session versus out of session. Though seemingly a small effect, it is substantial given that governors are, on average, issuing slightly fewer than one executive order per month. As expected, being in session does not have a statistically significant impact on order issuance when executive-legislative preferences are aligned under unified government. Overall, when examining cases where legislatures do not possess special session powers, we find that governors have significant opportunities for evasion between sessions but show patterns of constraint when legislatures are actually at work.

The analyses in Model 1 combine instances when the legislature is in regular and special sessions. Given our argument, however, one might expect that these results will be driven by the former. If legislatures lack special session powers, they will not really be able to use these sessions to constrain executive unilateralism. Legislatures may still have some vehicles to counter the governor, for example, by publicizing unpopular executive actions. But because special sessions are primarily governor-driven when legislatures lack these powers, the effects in Model 1 should more greatly manifest for regular sessions. The analysis in Model 3 use separate indicators for whether the legislature is in regular or special session in a given month for the same subset of states used in Model 1 (i.e., when legislatures lack special session powers). As we suspected, the results clearly demonstrate that the effects in Model 1 are driven by regular sessions, providing additional evidence for our theoretical argument.

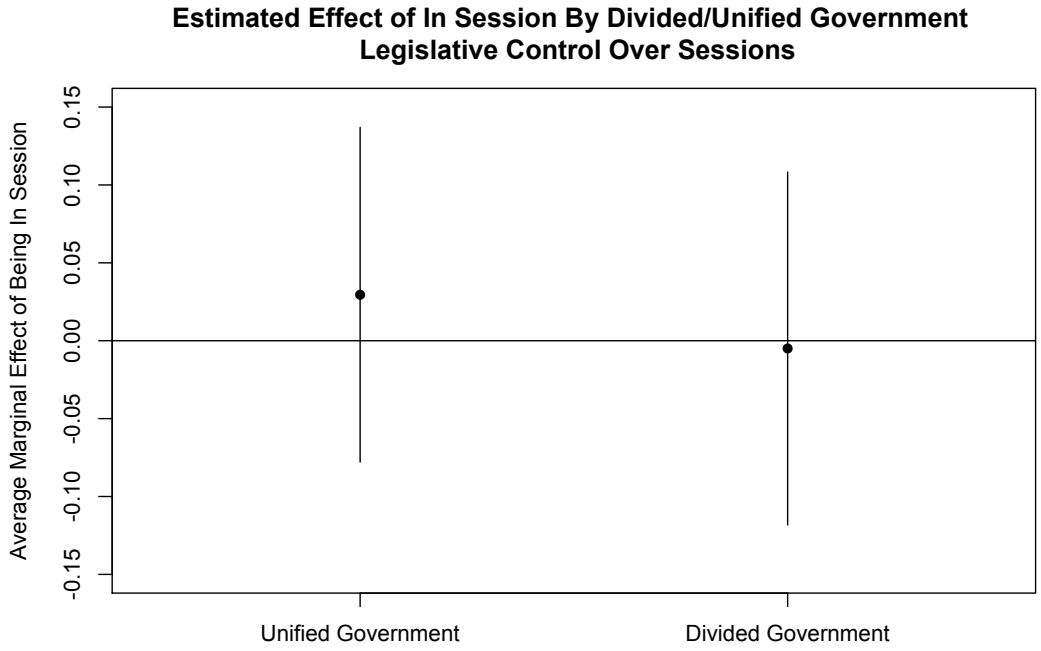
Next, we evaluate the Legislative Constraint Hypothesis (H2). We argue that among the subset of observations in our dataset where legislatures actually possess the power to call special sessions and/or determine the agendas of those sessions, governors will lack the opportunities to use the timing of unilateral action to strategically evade legislatures. Therefore, we expect that in these cases the occurrence of sessions will not influence executive order issuance, regardless of whether it is unified or divided government. We test this hypothesis in Model 2. As shown, neither the estimated coefficient for *In Session* nor the interaction term are statistically different from zero.

Furthermore, the magnitude of the coefficients is extremely small as compared to Model 1. These results provide strong evidence in favor of the Legislative Constraint Hypothesis, which suggests that evasion is not as desirable a strategy for governors when legislatures maintain control over their sessions.[17] Moreover, the results of Model 4, separating the effects of special and regular sessions, show the same patterns. Figures 5 presents the marginal effects plots for Model 2 (when legislatures possess special session powers). The lack of statistical and substantive significance displayed in the plots speaks strongly in favor of the Legislative Constraint Hypothesis.

Unilateralism is also correlated with a few of the control variables. Interestingly, governors with high institutional powers tend to issue fewer orders, consistent with findings reported by Barber, Bolton and Thrower (2019). This suggests the possibility that in contexts where governors possess other institutional advantages, they can rely less to unilateralism to direct policies in beneficial ways. Legislative resource capacity corresponds to higher rates of executive order use, though this may be contingent on ideological conflict (Bolton and Thrower 2016). Finally, governors tend to issue fewer orders during election years. This is in line with arguments that executives may avoid unilateral strategies during periods where there is greater scrutiny of their actions.

In sum, even when controlling for these possible cofounders, we find strong support for our theoretical hypotheses. When legislatures lack absolute control over when and whether they meet outside of regular sessions, governors see ample opportunities for using unilateral action in ways that are consistent with the evasion hypothesis. However, if they have the power to call special sessions or set their agendas, governors are more reticent to act unilaterally and unable to use strategic timing to bypass legislatures.

[17]Note that these differences in the estimated interaction coefficients across Models 1 and 2 are themselves statistically significant in models with a triple interaction between divided government, whether the legislature was in session, and whether the legislature has special session powers. The estimated coefficient for the triple interaction is 0.39 ($p = 0.052$).



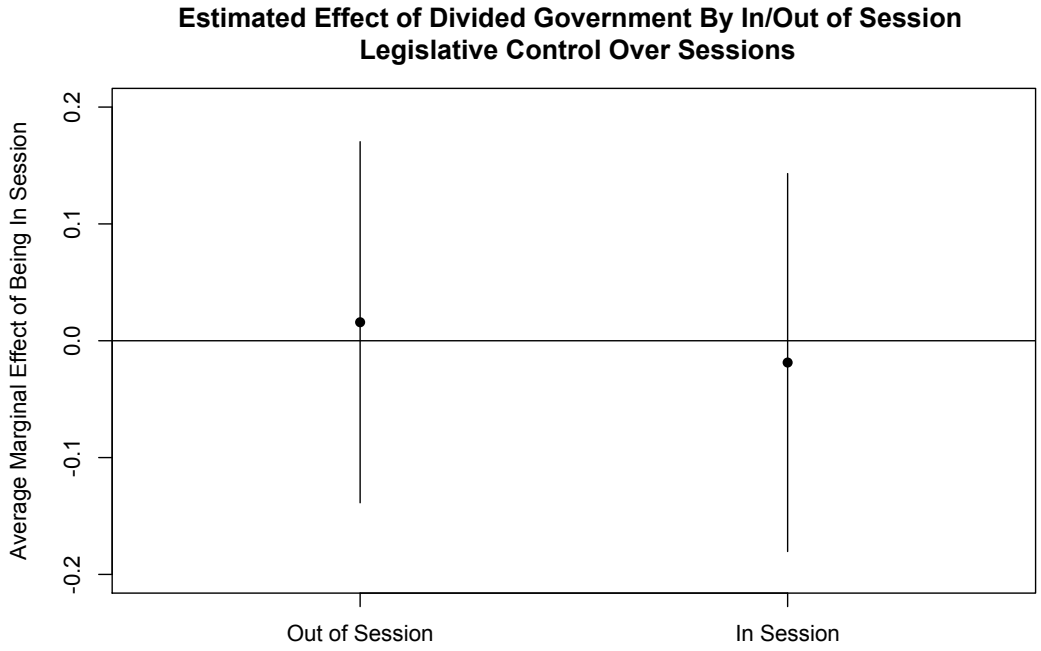


Figure 5: Marginal effects for models where states have legislative special session powers.

4.1 Do Governors "Wait Out" Sessions?

One potential implication of our argument is that governors should be likely to "wait out" legislative sessions before issuing executive orders when the legislature lacks special session powers. In other words, if governors are strategically timing their unilateral actions, then unilateral activity should increase in the months immediately following legislative sessions. To examine this possibility, we create dummy variables indicating whether a given month is the first one since a session ended, the second, the third, and then greater than the third. Our expectation for the effects of these variables differs based on whether or not a legislature has special session powers. In the absence of these powers, if governors are "waiting out" legislative sessions we should observe a spike in unilateral actions in the months immediately following the session, with the volume of actions eventually flattening. However, in states where legislatures have special session powers, then these dynamics should not manifest. That is, governors will issue just as many orders in the months when legislatures are in session and out of session, no matter how recent the session.

Indeed, the results of this analysis demonstrates that governors in states where legislatures lack session powers do appear to issue greater numbers of orders in the months immediately following the session. The same is not true of governors in states where legislatures hold these powers. Figure 6 illustrates these dynamics. As shown in the left panel, in states where legislatures lack special session powers, the estimated number of executive orders increases 34% and 41% during months one and two after a session ends, respectively. Both effects are statistically significant increases relative to the in-session unilateralism rate. The predicted effects in months three and beyond are not statistically different from the in-session rate.

Furthermore, we investigated whether these effects were the same or not in divided and unified government. They are primarily driven by divided government, in line with our general theoretical argument. Indeed, none of the counter variables is significant during periods of unified government in models including interactions between the indicators for months out of session and divided government. However, we estimate statistically significant interactions during divided government for the first two months after sessions end, suggesting that the dynamics in Figure 6 are primarily

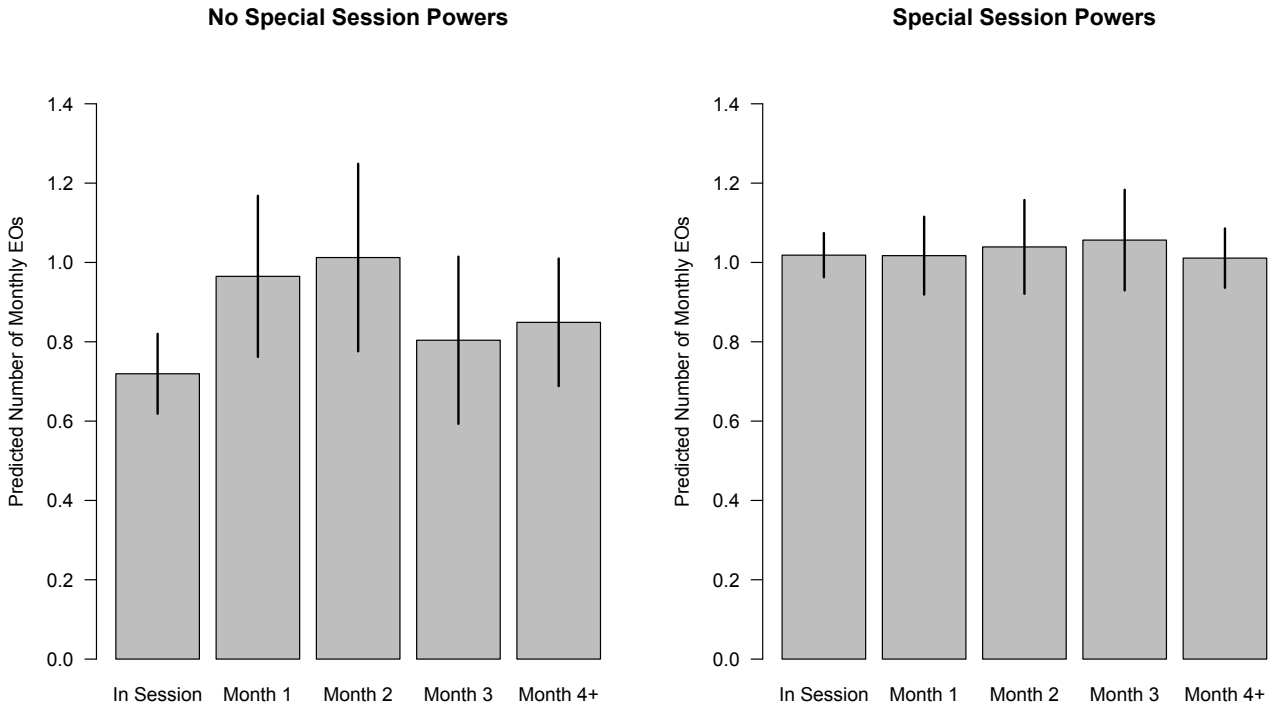


Figure 6: Gubernatorial unilateralism after sessions end, for states with and without legislative special session powers.

driven by governors "waiting out" sessions during divided government when they know the legislature cannot readily reconvene to respond. These same dynamics are clearly absent in the right panel of Figure 6, which displays the predictions for the states where legislatures possess special session powers. Here, the predicted volume of unilateralism is statistically indistinguishable whether the legislature is in session or not. Taken together, these results largely bolster our theoretical arguments. Governors who face legislatures lacking control over their special sessions concentrate their unilateral activity in the months immediately following session adjournment, thus providing some additional evidence that these chief executives engage in the strategic behavior described in the theory.

5 Conclusion

Whether or not legislatures can constrain executive policymaking is a central question for evaluating the role of unilateralism in a separated system. Political observers and scholars tend to view legislatures as ineffective restraints on executive power. The broad scope of unilateral powers fuels fears that executives will assert these powers to undercut legislatures and their preferences in the policymaking process. Yet, there is relatively little empirical support for this evasion hypothesis. Executives certainly have strong incentives to use unilateral strategies to move policies in their favor and potentially at the expense of legislative majorities. So, how do legislatures restrain executives in this way?

We argue that legislatures' ability to constrain executive power depends on their opportunities to challenge and impose costs on executives in the policymaking process. We focus on one important component of legislative policymaking capacity: the timing of legislative sessions. When legislatures are powerless to call or set the agenda of special sessions, they face greater impediments in responding to executive actions that they do not prefer to the status quo. This has important implications for the incentives of executives to engage in unilateralism. In particular, when legislatures lack special session powers, executives will act in a constrained manner during regular sessions but will unilaterally bypass legislatures when session is out. This should be particularly true during periods of divided government, when executives have the greatest desire to "wait out" legislative sessions to engage in evasive strategies. On the other hand, if legislatures possess the power to control their special sessions, these timing effects should not manifest. In these cases, executives can expect to face relatively greater risks of reprisal if they pursue unilateral policies that make legislative majorities worse off, whether or not the legislature is in session. We find strong support for our arguments using a unique dataset on the timing of unilateralism.

These results further our understanding about the role of legislative policymaking capacity in influencing executive branch policymaking behavior. By examining executive power through the lens of legislative capacity, we gain a better sense of the institutional sources of variation in executive influence over policy. These results also highlight the importance of using the US states

to study questions of executive power. While many scholars have speculated about the mechanisms that underlie patterns of constraint when examining presidential unilateralism at the federal level, many of the proposed mechanisms are time-invariant at the federal level. The subnational level provides opportunities to understand these dynamics.

In the supplementary materials, we also examine executive order timing at the federal level to determine whether it conforms with our general expectations. The Constitution (Article II, Section 3) empowers the president to call special sessions, but Congress still retains the implicit ability to determine its rules, agenda, and operations in special session. In our coding scheme, this would be indicative of some special session legislative powers, and thus we would not suspect the timing effects to manifest. This is especially true given that congressional sessions in the modern era tend to be relatively long and Congress adjourns sine die only for relatively short periods. Table 12 (page 14) in the supporting information reports the expected null results, conforming to our broader theoretical argument and empirical results.

Finally, this study calls attention to the importance of timing of executive policymaking rather than just its frequency. The abundance of the policymaking literature focuses on the latter. But, as this paper demonstrates, the strategic decisions behind when political actors choose to influence policy can be just as important to understanding separation of powers dynamics. Relatively few studies examine strategic timing in executive policymaking (see Potter 2017, for an exception), and the ones that do have not yet considered executive unilateralism. These actions are an important facet of US policymaking whose timing can more easily be manipulated given the degree of control chief executives have over their issuance and the lack of collective action problems or procedural burdens they face as compared to legislatures or regulatory processes. Thus executive unilateralism provides an ideal testing ground for examining strategic motivations behind the timing of policymaking actions.

Overall, our results suggest that institutional features of a separated system – in this case, provisions concerning legislative sessions – can play an important role in shaping the opportunities that executives maintain for employing unilateralism to advance their policy agendas. Where leg-

islatures can assert themselves in the policy process, such as through the ability to call and control special sessions, executive power may be cabined. Importantly, these results demonstrate that separation of powers is not a sufficient condition for inducing this kind of constraint. Instead, the variety of institutions that delineate the bounds of authority within a separated system play an important role in structuring the balance of power between a legislature and executive.

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Supporting Information for “Legislative Constraints, Ideological Conflict, and the Timing of Executive Unilateralism”

July 15, 2019

Contents

A Descriptions of Robustness Checks

This appendix contains additional model specifications and robustness checks that replicate Models 1 and 2 in Table 1 of the main manuscript. Across all of these different methods of examining the dataset, we find consistent substantive findings. The tables below contain the following results:

- Table 1 includes results from models that omit the controls discussed in the paper, including only the fixed effects that we use in the main text. In both models, the results are consistent, suggesting that the inclusion or exclusion of any of the control variables is not driving the results of analyses.

- Table 2 employs state rather than governor fixed effects. Although the state fixed effects models do not simultaneously account for governor and state-specific unobserved differences, it does have the benefit of providing more variation of the independent variables within states. The results of both models are consistent with those reported in the main text. These models also control for the party of the governor (*Republican Governor*) given that the removal of the gubernatorial fixed effects removes controls for individual characteristics of the governor.

- Table 3 includes an alternative operationalization of legislative capacity. Instead of using the factor score as in the main text, these results include all three measures separately within the same regression model.

- Tables 4, 5, and 6 feature different methods of clustering standard errors in order to be sure that we are not overstating the certainty in the regression estimates in the main text. Table 4 clusters by election cycle (i.e. two year periods between legislative elections), Table 5 clusters by governor, and Table 6 clusters standard errors by state. In all cases, the key results reported in the main text remain statistically significant.

- Table 7 drops all observations in 1993 in order to account for concerns that parts of the Beyle index of gubernatorial institutional power were recorded differently after 1993.

- Table 8 includes third party governors in the analysis. In this case divided government is always coded as "1" during these periods.

- Table 9 presents an alternative operationalization of whether or not the legislature is in session. While in the analyses in the main text we use a binary indicator for whether or not the legislature is in session, the models here use the percentage of days the legislature is in session in a given month in order to operationalize the concept.

- Table 10 presents results from zero-inflated negative binomial models with constant inflation (given no theoretical expectations about why states might have zero executive orders in a particular month). The specifications are otherwise the same.

- Table 11 examines whether the effects reported in the table are different if we examine each of the legislative session powers separately rather than the operationalization in the main text. Models 1-2 compare the dynamics of timing in cases when the legislature cannot and can

call special sessions, respectively. Models 3-4 examine subsets where legislatures cannot and can determine the agenda, respectively. We see the dynamics from the main text replicated when examining each of the special session powers independently. We take this as support for the operationalization of special session powers in the main text (i.e. coded as "1" if a state-month-year has either one of these powers).

- Table 12 displays the results of a regression that examines whether the dynamics in the main text also apply at the federal level from 1946–2016. To do this, we carry out a similar analysis, analyzing the number of monthly non-ceremonial executive orders issued by the president. While there are obviously differences in data and variables when moving from the state level to the federal level, we attempt to carry out as close as possible analysis with respect to the control variables included in this model. As in the main text, our key independent variables are an indicator of divided government and an indicator for when Congress is in session.[1] The models also include an indicator for months in which the US is engaged in armed conflict as defined by the Congressional Research Service (see CRS Report RS21405, "U.S. Periods of War and Dates of Recent Conflict"). We also include indicators for the monthly unemployment and inflation rates to account for economic conditions. Monthly presidential approval collected from the American Presidency Project is also included in the models. As in the main text, we also control for years in which a presidential election is being held. The models also include a factor score of the number of committee staff and legislative branch expenditures to account for congressional resources (collected from the Brookings Institution's *Vital Statistics on Congress*). Finally, the models also include presidential fixed effects. As discussed in the main text, we do not expect that the timing and ideological effects should manifest at the federal level given that Congress does possess some special session powers. The insignificant interaction term estimated in Table 12 provide support for this idea.

[1]Only one short special session of Congress occurred during this period, so we do not separate out session types.

B Robustness Check Tables

Table 1: Robustness: No Controls

	Model 1	Model 2
In Session	-0.168	-0.00477
	(0.110)	(0.0528)
Divided Govt	0.934***	0.0245
	(0.305)	(0.0793)
In Session x Divided Govt.	-0.381**	-0.00457
	(0.185)	(0.0732)
N	1,970	7,938
Governor FE	✓	✓
Month-Year FE	✓	✓
Special Session Powers	No	Yes

Negative binomial coefficients and standard errors clustered by state-year in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

Table 2: Robustness: State Fixed Effects

	Model 1	Model 2
In Session	-0.0900	0.0319
	(0.113)	(0.0579)
Divided Govt	0.301*	-0.0940
	(0.182)	(0.0630)
In Session x Divided Govt.	-0.342**	-0.0282
	(0.171)	(0.0736)
Natural Disaster	0.0466	0.0805
	(0.107)	(0.0494)
Scandal	0.345**	0.0520
	(0.136)	(0.0670)
Unemployment	0.0492	0.0115
	(0.0683)	(0.0270)
Governor Institutional Power	-1.107**	-0.254***
	(0.532)	(0.0824)
Previous Govn'r Vote	0.364	-0.711*
	(0.800)	(0.374)
Pres. Dem. Vote Share	-1.880	1.856**
	(2.056)	(0.804)
Last Term	-0.210**	-0.248***
	(0.107)	(0.0566)
Governor Election	-0.0302	-0.233***
	(0.130)	(0.0587)
Resource Capacity	0.609**	0.408*
	(0.286)	(0.229)
Republican Governor	-0.0933	-0.275***
	(0.134)	(0.0545)
N	1742	7325
State FE	✓	✓
Month-Year FE	✓	✓
Special Session Powers	No	Yes

Negative binomial coefficients and standard errors clustered by state-year in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

Table 3: Robustness: Alternative Operationalizations of Resource Capacity

	Model 1	Model 2
In Session	-0.0669	0.0310
	(0.113)	(0.0541)
Divided Govt	0.870**	0.0462
	(0.357)	(0.0793)
In Session x Divided Govt.	-0.450**	-0.0377
	(0.185)	(0.0739)
Natural Disaster	0.0508	0.0734
	(0.108)	(0.0491)
Scandal	0.429**	-0.0395
	(0.201)	(0.0704)
Unemployment	0.0288	0.0178
	(0.0859)	(0.0344)
Governor Institutional Power	-1.456*	-0.380*
	(0.755)	(0.214)
Previous Govn'r Vote	0.470	-1.374***
	(1.070)	(0.520)
Pres. Dem. Vote Share	-0.203	0.943
	(3.435)	(1.183)
Last Term	0.0913	-0.0338
	(0.177)	(0.0799)
Governor Election	-0.0276	-0.166***
	(0.125)	(0.0534)
Ln(Session Staff)	0.425**	0.0744
	(0.195)	(0.101)
Ln(Permanent Staff)	0.105	0.270**
	(0.135)	(0.121)
Ln(Salary)	-0.207	0.138***
	(0.191)	(0.0426)
N	1742	7325
Governor FE	✓	✓
Month-Year FE	✓	✓
Special Session Powers	No	Yes

Negative binomial coefficients and standard errors clustered by state-year in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

Table 4: Cluster by Election Cycle

	Model 1	Model 2
In Session	-0.0603	0.0305
	(0.108)	(0.0529)
Divided Govt	1.081***	0.0455
	(0.275)	(0.0788)
In Session x Divided Govt.	-0.457**	-0.0377
	(0.196)	(0.0758)
Natural Disaster	0.0441	0.0741
	(0.104)	(0.0515)
Scandal	0.385*	-0.0388
	(0.223)	(0.0706)
Unemployment	0.0629	0.0164
	(0.0822)	(0.0334)
Governor Institutional Power	-1.244**	-0.410**
	(0.587)	(0.162)
Previous Govn'r Vote	0.763	-1.316***
	(1.116)	(0.488)
Pres. Dem. Vote Share	-0.814	0.855
	(2.791)	(1.317)
Last Term	0.0634	-0.0360
	(0.169)	(0.0799)
Governor Election	-0.0382	-0.166***
	(0.144)	(0.0541)
Resource Capacity	0.181	0.598***
	(0.342)	(0.185)
N	1,742	7,325
Governor FE	✓	✓
Month-Year FE	✓	✓
Special Session Powers	No	Yes

Negative binomial coefficients and standard errors clustered by governor in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

Table 5: Cluster by Governor

	Model 1	Model 2
In Session	-0.0603	0.0305
	(0.114)	(0.0625)
Divided Govt	1.081***	0.0455
	(0.217)	(0.0832)
In Session x Divided Govt.	-0.457**	-0.0377
	(0.217)	(0.0805)
Natural Disaster	0.0441	0.0741
	(0.110)	(0.0591)
Scandal	0.385**	-0.0388
	(0.156)	(0.0650)
Unemployment	0.0629	0.0164
	(0.106)	(0.0403)
Governor Institutional Power	-1.244**	-0.410**
	(0.629)	(0.185)
Previous Govn'r Vote	0.763	-1.316***
	(1.019)	(0.502)
Pres. Dem. Vote Share	-0.814	0.855
	(3.114)	(1.447)
Last Term	0.0634	-0.0360
	(0.173)	(0.0930)
Governor Election	-0.0382	-0.166***
	(0.149)	(0.0614)
Resource Capacity	0.181	0.598**
	(0.357)	(0.233)
N	1,742	7,325
Governor FE	✓	✓
Month-Year FE	✓	✓
Special Session Powers	No	Yes

Negative binomial coefficients and standard errors clustered by governor in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

Table 6: Cluster by State

	Model 1	Model 2
In Session	-0.0603	0.0305
	(0.110)	(0.0611)
Divided Govt	1.081***	0.0455
	(0.226)	(0.0835)
In Session x Divided Govt.	-0.457*	-0.0377
	(0.250)	(0.0711)
Natural Disaster	0.0441	0.0741
	(0.105)	(0.0665)
Scandal	0.385*	-0.0388
	(0.199)	(0.0711)
Unemployment	0.0629	0.0164
	(0.100)	(0.0446)
Governor Institutional Power	-1.244*	-0.410***
	(0.743)	(0.102)
Previous Govn'r Vote	0.763	-1.316***
	(0.568)	(0.480)
Pres. Dem. Vote Share	-0.814	0.855
	(1.756)	(1.476)
Last Term	0.0634	-0.0360
	(0.172)	(0.110)
Governor Election	-0.0382	-0.166***
	(0.128)	(0.0642)
Resource Capacity	0.181	0.598***
	(0.317)	(0.194)
N	1,742	7,325
Governor FE	✓	✓
Month-Year FE	✓	✓
Special Session Powers	No	Yes

Negative binomial coefficients and standard errors clustered by state in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

Table 7: Dropping 1993

	Model 1	Model 2
In Session	-0.120	0.0253
	(0.118)	(0.0556)
Divided Govt	1.008***	0.0198
	(0.384)	(0.0801)
In Session x Divided Govt.	-0.391**	-0.0321
	(0.196)	(0.0759)
Natural Disaster	0.0588	0.0826*
	(0.109)	(0.0492)
Scandal	0.429*	-0.0613
	(0.225)	(0.0702)
Unemployment	0.0372	0.0179
	(0.0849)	(0.0344)
Governor Institutional Power	-1.323*	-0.420*
	(0.755)	(0.227)
Previous Govn'r Vote	0.646	-1.229**
	(1.014)	(0.510)
Pres. Dem. Vote Share	-1.478	0.603
	(3.076)	(1.164)
Last Term	0.162	-0.0232
	(0.199)	(0.0793)
Governor Election	-0.0249	-0.151***
	(0.134)	(0.0528)
Resource Capacity	0.179	0.628***
	(0.360)	(0.177)
N	1,670	7,133
Governor FE	✓	✓
Month-Year FE	✓	✓
Special Session Powers	No	Yes

Negative binomial coefficients and standard errors clustered by state-year in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

Table 8: Analyses Including Third-Party Governors

	Model 1	Model 2
In Session	-0.0603	0.0260
	(0.113)	(0.0540)
Divided Govt	1.081***	0.0456
	(0.359)	(0.0789)
In Session x Divided Govt.	-0.457**	-0.0420
	(0.187)	(0.0735)
Natural Disaster	0.0441	0.0674
	(0.108)	(0.0487)
Scandal	0.385**	-0.0413
	(0.196)	(0.0702)
Unemployment	0.0631	0.0101
	(0.0836)	(0.0336)
Governor Institutional Power	-1.245*	-0.422**
	(0.726)	(0.206)
Previous Govn'r Vote	0.768	-1.376***
	(1.026)	(0.515)
Pres. Dem. Vote Share	-0.835	1.155
	(2.984)	(1.168)
Last Term	0.0632	-0.0240
	(0.183)	(0.0790)
Governor Election	-0.0380	-0.164***
	(0.131)	(0.0531)
Resource Capacity	0.185	0.594***
	(0.345)	(0.174)
N	1,742	7,470
Governor FE	✓	✓
Month-Year FE	✓	✓
Special Session Powers	No	Yes

Negative binomial coefficients and standard errors clustered by state-year in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

Table 9: Alternative Operationalization: Percentage of Calendar Days in Session

	Model 1	Model 2
Percent In Session	-0.0970	0.0143
	(0.146)	(0.0618)
Divided Govt	1.018***	0.0531
	(0.371)	(0.0761)
Percent In Session x Divided Govt.	-0.491**	0.0133
	(0.220)	(0.0806)
Natural Disaster	0.0367	0.0729
	(0.106)	(0.0480)
Scandal	0.388**	-0.0623
	(0.194)	(0.0691)
Unemployment	0.0539	0.0140
	(0.0845)	(0.0332)
Governor Institutional Power	-1.321**	-0.379*
	(0.592)	(0.208)
Previous Govn'r Vote	0.920	-1.412***
	(1.054)	(0.504)
Pres. Dem. Vote Share	-1.118	1.167
	(2.805)	(1.110)
Last Term	0.0463	-0.0131
	(0.174)	(0.0751)
Governor Election	-0.103	-0.165***
	(0.141)	(0.0498)
Resource Capacity	0.308	0.682***
	(0.216)	(0.174)
N	1,836	7,644
Governor FE	✓	✓
Month-Year FE	✓	✓
Special Session Powers	No	Yes

Negative binomial coefficients and standard errors clustered by state-year in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

Table 10: Zero-Inflated Negative Binomial Regression Models

	Model 1	Model 2
In Session	0.0565	0.0305
	(0.130)	(0.0540)
Divided Govt	1.297***	0.0455
	(0.387)	(0.0794)
In Session x Divided Govt.	-0.648***	-0.0377
	(0.222)	(0.0740)
Natural Disaster	0.0307	0.0741
	(0.113)	(0.0489)
Scandal	0.320	-0.0388
	(0.205)	(0.0705)
Unemployment	0.0982	0.0164
	(0.0808)	(0.0340)
Governor Institutional Power	-1.006	-0.410*
	(0.935)	(0.212)
Previous Govn'r Vote	0.884	-1.316**
	(1.212)	(0.513)
Pres. Dem. Vote Share	0.328	0.855
	(3.959)	(1.173)
Last Term	-0.0763	-0.0360
	(0.191)	(0.0789)
Governor Election	-0.0855	-0.166***
	(0.134)	(0.0532)
Resource Capacity	0.246	0.598***
	(0.357)	(0.175)
N	1,742	7,325
Governor FE	✓	✓
Month-Year FE	✓	✓
Special Session Powers	No	Yes

Negative binomial coefficients and standard errors clustered by state-year in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

Table 11: Separate Effects of Legislative Powers

	Model 1	Model 2	Model 3	Model 4
In Session	-0.0394	0.00872	-0.0137	0.0531
	(0.0937)	(0.0559)	(0.0957)	(0.0561)
Divided Govt	0.353*	0.0433	0.878***	0.0669
	(0.183)	(0.0828)	(0.267)	(0.0880)
In Session x Divided Govt.	-0.256*	-0.0228	-0.457**	-0.0664
	(0.141)	(0.0790)	(0.190)	(0.0762)
Natural Disaster	0.0939	0.0682	0.119	0.0482
	(0.0879)	(0.0495)	(0.0936)	(0.0504)
Scandal	0.175	-0.0404	0.124	-0.0355
	(0.159)	(0.0729)	(0.181)	(0.0725)
Unemployment	0.0702	0.00928	0.0754	0.0189
	(0.0659)	(0.0354)	(0.0811)	(0.0358)
Governor Institutional Power	-0.841	-0.396*	-0.844	-0.444**
	(0.579)	(0.212)	(0.668)	(0.207)
Previous Govn'r Vote	-0.437	-1.194**	0.929	-1.220**
	(0.973)	(0.540)	(1.094)	(0.507)
Pres. Dem. Vote Share	-0.306	1.314	-0.802	0.828
	(2.192)	(1.220)	(2.912)	(1.179)
Last Term	0.0490	-0.0484	0.0266	-0.0478
	(0.156)	(0.0812)	(0.151)	(0.0810)
Governor Election	0.0297	-0.172***	-0.0531	-0.169***
	(0.111)	(0.0556)	(0.118)	(0.0547)
Resource Capacity	0.273	0.481	0.180	0.625***
	(0.193)	(0.318)	(0.358)	(0.174)
N	2,654	6,413	2,078	6,989
Governor FE	✓	✓	✓	✓
Month-Year FE	✓	✓	✓	✓
Special Session Powers	Cannot Call	Can Call	No Agenda Power	Agenda Power

Negative binomial coefficients and standard errors clustered by state-year in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.

Table 12: The Timing of Executive Order Issuance at the Federal Level

	Model 1
In Session	0.0639
	(0.0890)
Divided Govt	0.272
	(0.187)
In Session x Divided Govt.	0.0503
	(0.125)
War	0.129**
	(0.0584)
Unemployment	-0.00349
	(0.0265)
Approval	0.00487
	(0.00416)
Resource Capacity	-0.626
	(0.763)
N	816
Pres FE	✓

Negative binomial coefficients and standard errors clustered by state-year in parentheses. Significance codes: $*p < 0.10$, $**p < 0.05$, $***p < 0.01$.