The President, the Court, and Policy Implementation

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In contrast to research focused on presidential–congressional relations, this article explores the ways in which the president strategically accounts for the courts when deciding how to best influence policy implementation. I argue that as the courts become more ideologically distant from the president and thus more likely to strike down administrative actions, agencies engage in less rulemaking while the president issues more executive orders to supplement agencies' authority to act. An empirical analysis of federal macro-level data as well as issue-specific data on labor and environmental policy yields support for the theory's hypotheses.

Keywords: presidential power, executive policymaking, separation of powers, courts

Between 2005 and 2010, the number of prescription medication shortages in the United States nearly tripled from 61 to 171 (Hamburg 2011; Office of the Press Secretary 2011). 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 Food and Drug Administration (FDA) the necessary authority to enforce the Act's provisions.

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* (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, 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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> 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.

In particular, this order directs the FDA to use additional tactics to require compliance from manufacturers. Shortly after, the agency issued an interim final rule (76 F.R. 78530) in accordance with the authority granted to it by EO 13588. In the months following, the FDA reported an increase in the number of notifications and prevented shortages (Hamburg 2012).

Obama's strategy in dealing with this crisis demonstrates how presidents can use executive orders to give agencies additional legal authority to act. Yet, 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. Furthermore, much of the existing literature tends to focus on how the president's relationship with Congress influences executive action, while neglecting his or her relationship to the courts. While there is a rich body of research examining judicial review of administrative actions, very little work is devoted to how the anticipation of court rulings shape executive branch decision making.

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/her decisions on how to most effectively implement policy. When faced with ideologically distant courts, agencies decrease their rulemaking for fear of being overturned. At the same time, the president issues more executive orders giving agencies additional authority to act. Because the courts generally view executive orders as a legitimate source of authority for agencies (Mayer 2001; Cooper 2002), these orders serve as an appealing supplement to other forms of policy implementation. In particular, executive orders strengthen the authority of agencies in order to decrease the likelihood that their actions are overturned in court. To test these hypotheses, I use federal macro-level data and issue-specific data on environmental and labor policy.

Overall, the results of the analysis strongly support the theory. When the president is ideologically distant from the Supreme Court and the D.C. Circuit Court of Appeals, 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. In sum, 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. It also illustrates the president's ability to strategically employ multiple tools in choosing how to best influence policy. Further, this study demonstrates the importance of the courts in presidential decision making, in contrast to a body of literature that largely focuses on executive–legislative relations. This has implications for enriching our understanding of separation of powers politics and multi-institutional policy making.

The remainder of the article proceeds as follows. The first section provides background on executive orders and agency rulemaking. Drawing on the theoretical literature, the following section presents hypotheses predicting when the president will make use of

these tools given his ideological position relative to the courts. Next, I describe the data to test the hypotheses. Then, I present the results of the analysis of rulemaking and executive orders. This is followed by an empirical analysis of labor and environmental policy making. Finally, I offer a discussion and concluding remarks.

Background

Executive Orders

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. 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 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 policy initiatives or processes, such as George W. Bush's order (EO 13199) establishing faith-based and community initiatives or Richard Nixon's order (EO 11821) imposing a freeze on prices and wages.

Finally, presidents can use executive orders to restructure agency rulemaking procedures by establishing centralized review of new regulations. 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 for approval before they could be published in the *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 or she supports to become law but blocking, restructuring, or delaying others.

While presidents have used executive orders for many goals, their frequency has varied over time. Most studies seeking to explain variation in the frequency of executive order issuance focus on the president's relationship to Congress. 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 orders. However, other studies find that divided government significantly decreases significant executive orders (Bailey and Rottinghaus 2014; Fine and Warber 2012; Howell 2003; 2005; Young 2013) or that this relationship depends upon the capacity of Congress to constrain the executive (Bolton and Thrower 2016). Similarly, some scholars find increased executive order use when the president's legislative success increases (Krause and Cohen 1997; Shull 2006; Young 2013) or when his or her seat share in Congress increases (Gleiber and Shull 1992). Finally, studies find that the president issues more significant executive orders

when his public approval is low, during his final month in office preceding an opposition administration, amidst international crisis, on foreign policy related issues, and when the executive branch is large (Krause and Cohen 1997; Marshall and Pacelle 2005; Mayer 1999; 2001; Young 2013). While there are some studies examining judicial review of presidential actions (Ducat and Dudley 1989; Howell 2003; Yates 2002; Yates and Whitford 1998), few examine how the president strategically considers the courts—and not just Congress—when issuing these orders.

Agency Rules

A rule is a statement issued by an agency as a way to "implement, interpret, or prescribe law or policy" (Administrative Procedures Act [APA] 1946) in response to broad or specific statutory grants of authority. The APA establishes agency rulemaking procedures. Following a grant of authority from Congress, agencies are required to publish a notice of proposed rulemaking 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*.

There are few empirical studies that seek to explain variation in the frequency of rulemaking over time and, as with executive orders, most of it focuses on congressional influences. O'Connell (2008) finds that proposed rulemaking decreases 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 increase completed rules in their last year in office. Similarly, Yackee and Yackee (2009) find that both proposed and final rules decrease under divided government and in the final months of a presidential administration that is to be succeeded by an opposing party.

While there is a substantial body of research examining judicial review of administrative actions (Carruba and Zorn 2010; Caruson and Bitzer 2004; Cohen and Spitzer 1996; Cross and Tiller 1998; Crowley 1987; Humphries and Songer 1999; Johnson 2014; 2015; Miles and Sunstein 2006; Revesz 1997; 2001; Sheehan 1990; 1992; Smith 2007; Willison 1986; Wright 2010; Yates 2002), Solicitor General influence (Black and Owens 2011; 2012a; 2012b), and executive branch enforcement of court rulings (Hume 2009; Spriggs 1996; 1997; Wagner 2012), there are only a handful of empirical and qualitative studies that examine how the threat of judicial review can influence administrative behavior (Canes-Wrone 2003; Howard and Nixon 2002; Melnick 1983; Seidenfeld 2002; Wood and Waterman 1993). However, none has offered a systematic study of the courts' influence on rulemaking.

Policy Implementation and the Courts

Federal policy making 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 executive branch decision making, particularly given the legal and constitutional debate over whether the president or an agency has the authority to move policy. This has implications for not only how courts decide challenges to executive actions, as widely examined by the existing research, but also for the strategic use of these administrative actions in anticipation of judicial review—a currently understudied area. 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 (Cooper 2002).[1]

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, s/he commonly invokes inherent powers under Article II of the Constitution. Because these claims of authority are arguably vague, they can be the source of challenges to executive orders (e.g., *Youngstown Sheet & Tube Co. v. Sawyer* 1952). However, it is difficult to challenge executive orders in court (Cooper 2002; Mayer 2001). Presidential actions—including executive orders—cannot be reviewed under the APA (*Dalton v. Specter* 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). Furthermore, many argue that the courts want to avoid issues of presidential power and will generally defer to the president (Mayer 2001; Howell 2003). While the courts are more willing to review and overturn an executive order that clearly violates the Constitution or existing statutes, scholars suggests that presidents will carefully construct orders to avoid such explicit violations in order to escape the wrath of the courts (Howell 2003).

Similar to executive orders, 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 (*Chevron, USA, Inc v. Natural Resources Defense Council* 1984). However, what is deemed as a reasonable interpretation has been the subjection of litigation (e.g., *Whitman v. American Trucking Association* 2001). Unlike executive orders, agency rules are more easily challenged in court due to the explicit procedures of judicial review established under the APA.

As a result, agency rules are frequently challenged in federal court and often overturned. Between 1983 and 2010, there were 316 Supreme Court cases involving a challenge to agency actions, with the Court ruling in the agency's favor 69% of the time.[2] In contrast, there are far fewer executive orders challenged and overturned. During the same time period, there were only two Supreme Court cases involving a challenge to an

1. Also, note that the courts too can influence policy outcomes with the judicial review of statutes and executive branch actions (e.g., Howell 2003; Melnick 1994).

2. 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 (see Smith 2007). I included only cases in which a preceding agency action was central to the case. Even though this winning percentage is nontrivial, there is still a perception by agencies and scholars that all rulemaking is at risk of being challenged (Seidenfeld 2002).

executive order (about 0.005% of all significant 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 (Cooper 2002). 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.

The Authority-Enhancing Theory

General Assumptions

Before stating the main hypotheses, I first present a general set of assumptions. The first general assumption is that the president is a strategic actor who seeks to obtain his preferred policy preferences (e.g., see Cameron 2000). 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, through OIRA, to act as a gatekeeper for agencies' rules. With centralized review, OIRA has the ability to alter or block rules that are inconsistent with the preferences of the president (Copeland 2009). Thus, while agencies may have differing ideologies, the president can shape their rulemaking so that the final outcome reflects his own policy goals (Cooper and West 1988; Shapiro 2011). Additionally, the president may politicize agencies by appointing ideologically congruent agents who are likely to implement policy consistent with the administration's goals (Moe 1985; Lewis 2008). Finally, the president can exert control over cabinet and some independent agencies, given his removal and budgetary powers over them. Thus, he can punish agencies for behavior that is inconsistent with his preferences. The final general assumption is that presidents and agencies wish to avoid court challenges and, if not evaded, win in court. This is plausible given the costs of litigation—in 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 judicial review procedures established in the APA—as previously discussed (Cooper 2002). The second assumption is that justices rely on their political ideology to make decisions in cases concerning challenges to agency rules. This assumption is supported by empirical research showing ideology as a major factor in judicial decision making (George and Epstein 1992; Epstein and Knight 1998; Segal and Cover 1989; Segal and Spaeth 2002). Particularly, a justice's ideology and party is influential in how s/he 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).

Additionally, scholars have shown that justices vote based on ideological factors when reviewing agency actions (Cohen and Spitzer 1996; Miles and Sunstein 2006; Revesz 1997; 2001; Sheehan 1990; 1992; Yates 2002). Further, Smith (2007) finds that justices are more likely to rule in favor of the agency when s/he 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 based on the ideology of the justices. Knowing this, the agency can preemptively alter its behavior accordingly. Because it seeks to avoid litigation, the executive branch can decrease rulemaking when it knows the courts are likely to strike down agency actions. Again, the president can ensure declined regulatory activity through his gatekeeping and control mechanisms over agencies. Thus, the first hypothesis states:

> *The Constrained Rulemaking Hypothesis*: As the president and the courts become more ideologically distant, agencies engage in less rulemaking.

Both the theoretical and empirical literature on agencies provides support for this hypothesis. Many theoretical models find 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), suggesting that the executive branch can indeed anticipate judicial behavior based on ideology.

Alternatively, one could argue that agencies may choose to adjust the content of their rules to avoid repercussions from an unfriendly judiciary. While this could be true, it does not preclude the possibility that agencies also decrease their volume of rulemaking. Yackee and Yackee (2009) argue that agencies reduce rulemaking under divided government partly because it becomes unclear to them whether their discretionary actions will be acceptable to conflicting political principals. Similar to this logic, agencies become more uncertain about the permissibility of their regulatory actions, which are based on claims of discretionary authority, when faced with ideologically opposed courts. Thus, I argue that agencies scale back the overall quantity of rulemaking to further decrease their chances of being punished by the courts. This reduction could be in addition to alterations to the substance of regulations. However, it may take agencies longer to comply with conflicting political actors in altering regulations or they may delay the writing of some rules to avoid conflict (Yackee and Yackee 2009), thus resulting in overall decreases in the amount of rulemaking.

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 (*Dalton v. Specter* (1994)) 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 1999a; 1999b). For these same reasons, many scholars also argue that judges typically defer to the president's position except when his/her action has explicitly violated a congressional act (Howell 2003; Mayer 2001).

The second assumption is that executive orders can be costly, and so presidents limit their use. Cooper (2002) offers several sources of these costs, including the possibility of negative attention, public criticism, and political backlash with the excessive use of orders. Additionally, executive orders are often revoked or substantially amended by subsequent presidents. As a result, many of the policy changes through executive order may not be lasting (Mayer 1999; 2001). Finally, the drafting of executive orders can be a lengthy and time-consuming process involving the coordination of several agencies within the executive branch (Rudalevige 2012). Thus, because executive orders are costly in terms of time and resources, in addition to the possibility of backlash and impermanence, presidents may not always want to rely on them.

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 both 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 policy making, especially when the courts block other channels (Cooper 2002). Specifically, when agency actions are likely to be struck down, presidents can rely on executive orders to give authority and instruction to agencies, thus bolstering the validity of their actions in court. As before, presidents can anticipate when agency actions are in the most danger of being overturned, and thus in need of an additional source of authority, based on the ideology of the courts. Thus, the second hypothesis is stated as follows:

> *The Enhancing Executive Order Hypothesis*: As the president and the courts become more ideologically distant, he issues more executive orders.

Taken together, the authority-enhancing 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. 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, the theory suggests that two changes occur. First, he relies less on rulemaking to obtain his preferred outcomes because those rules are more likely to be overturned by an ideologically opposed court. This is a particularly salient fear given the relative ease in which agency actions can be challenged in the courts. Thus, regulatory activity decreases to help reduce the probability of the courts overturning these actions.

Yet, agencies cannot completely cease rulemaking due to their crucial role in the functioning of government. As a result, presidents engage in a second activity to assist agencies in their remaining duties. Here, the theory predicts that presidents may choose to rely more heavily on executive orders, when faced with judicial opposition, in order to provide agencies with an additional source of authority to act and to guide policy implementation. Because the courts view executive orders as a legally binding source of authority for agencies, this policy tool provides another means for which agencies can decrease their likelihood of being overturned by the courts.[3] 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 augment agencies' authority in situations where the court is likely to be hostile toward administrative actions. Overall, the theory does not suggest that executive orders are a substitute for rules, but more of a supplement to agencies when rulemaking becomes more difficult because of ideological opposition from the courts.

Data and Measurement

To test the hypotheses regarding agency rulemaking and executive orders, I analyze multiple data sets. 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 and industries (Shapiro 1988), thus making them potentially contentious and highly litigated areas. Consequently, the actions of the agencies responsible for regulating these issue areas—the Environmental Protection Agency (EPA) and the Department of Labor (DOL)—are challenged regularly in court (Caruson and Bitzer 2004; Crowley 1987; Melnick 1983; Seindenfeld 2002; Willison 1986). Furthermore, these issues are politically salient with consistent rulemaking over time (see Revesz 1997).

3. Of the 316 Supreme Court cases involving a challenge to an agency action between 1983 and 2010, I isolate those cases that mention a specific rule and identify its source of authority. Cases involving regulations that cite an executive order yield higher success rates for agencies (76%) as compared to cases that do not reference an order (73%). These numbers, however, do not capture the possible effect of executive orders on avoiding challenges to regulations in the first place or the granting of certiorari by the Court.

Dependent Variables: Significant Executive Orders and Agency Rules

In my evaluation of the influences on executive orders, I define the relevant dependent variable as the number of significant executive orders issued 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 most directly to policy implementation and could therefore 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 federal court case opinions or (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 nonroutine 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 two of the following criteria: (1) mention in the *Congressional Record*[4]; (2) mention in at least one of the following newspapers: *New York Times, Wall Street Journal*, and *Washington Post*; (3) mention in the *Public Papers of the President*[5]; (4) mention in at least two law review articles; (5) mention in at least two federal court opinions.[6] Additionally, I omit orders that are purely ceremonial, such as those creating flags or seals. These criteria allow me to assemble orders that are viewed as significant by multiple actors, including the media and major political actors, as well as orders made salient to the public.[7]

Due to constraints in measuring agency rulemaking, I focus my analysis on orders issued between 1983 and 2010. 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

4. This mention must be within 15 years of when the order was first issued (see Howell 2003).

5. For criteria 2 and 3, mention must be within a year of the order's issuance.

6. Criteria 4 and 5 were conducted through Westlaw searches; order mention must be within 15 years of its issuance.

7. One potential concern of this coding could be the possible endogeniety caused by including mention in federal court cases as a criterion for significance. As a robustness check, I run the analysis excluding this criterion and find that the results remain the same (see the online appendix).

2002; Pfiffner 2008). Between 1983 and 2010, of a total of 1,165 executive orders issued, I code 437 as significant (about 38% of all orders), an average of about 16 significant orders per year. In the online appendix, (https://static1.squarespace.com/static/578abb6a414fb5187fb42509/t/57f3e2a4bebafb2ca6eb1670/1475601060188/PSQ_Online-Appendix3.pdf) I analyze orders issued between 1953 and 2010 and discover similar empirical results.

Next, I construct a dependent variable that measures the amount of federal rulemaking activity per year. To do so, I rely on rules that executive and independent agencies must submit to OIRA for review before publication in the *Federal Register*.[8] In order to gauge which rules are being promulgated, I focus on final rules submitted to OIRA for approval.[9]

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 code the number of final rules published in the Regulatory Plan, an annual report that agencies are required to submit to OIRA on their most important regulations.[10] Then, on September 30, 1993, Clinton issued EO 12866, which narrowed the scope of rules reviewed to significant ones. Thus, for the period between 1994 and 2010, I count all final rules submitted to 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 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 online appendix provides analysis of an alternative rulemaking measure—economically significant rules—and finds similar results.[11] Using this measure, of the 16,798 final rules that were reviewed between 1983 and 2010, 12,848 of them were significant—averaging about 470 significant agency rules per year.[12]

Independent Variables

In order to measure the president's relationship to the courts, I specifically examine the Supreme Court. As the highest court of last resort, I argue that the president cares

8. See http://www.reginfo.gov. Note, independent regulatory agencies are not required to submit their rules to OIRA.

9. I repeat the analysis for proposed rules and by subsetting the data to all final rules deemed consistent (or approved) by OIRA, finding the same empirical results.

10. The Regulatory Plan has been published in the *Federal Register* as a part of the Unified Agenda, a semiannual report of agency regulatory and deregulatory activities, since 1983.

11. Even when isolating significant executive orders and rules, there are still some that are more significant than others. Additionally, there are some executive orders that can naturally lead to the issuance of subsequent orders. To ensure that such categories are not driving the results, I perform a number of robustness checks removing them from the analysis. I find that the main results still hold across all of these various tests. See the online appendix.

12. One potential concern of an analysis examining rules each year is the fact that there could be considerable variation in the time it takes a rule to be finalized. Yet, the president has the ability to control the speed and frequency of rulemaking by allowing OIRA to delay or block rules through its review. Further, in the online appendix, I directly consider those rules that take longer to promulgate, based on their complexity and corresponding agency. I find that even the most time -consuming rules respond to changes in the president's ideological distance to the courts, as the theory predicts. Moreover, the results also hold when excluding these rules from the analysis.

about the ideological composition of the Supreme Court given that it has the final say in ruling on executive action, potentially overturning the decisions of the lower courts. To capture the main independent variable of interest, I measure the president's ideological proximity to the Supreme Court with an indicator variable coded as 1 if the president and the majority of the Court are from opposing political parties and 0 if they are from the same party (*President–Court Split*)—following previous studies (Ducat and Dudley 1989; Howell 2003; Yates and Whitford 1998). Alternatively, I use the percentage of justices appointed by presidents of the opposing party of the sitting president as another measure of president–court alignment (*Percent of Justices of Opposing Party*). Finally, I use a measure of the absolute distance between the ideal points of the president and the median justice of the Court using Bailey (2007) scores (*D(President–Court)*). An advantage of using these particular ideal points is that both the president and Supreme Court are scaled on the same dimension. Additionally, these ideal points are estimated yearly, allowing variation in the main independent variable. Finally, these estimates span through my entire years of analysis between 1983 and 2010.[13]

Because many agency actions are reviewed in the United States Court of Appeals for the District of Columbia (D.C. Circuit),[14] 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 to 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 Opposing Party*).[15]

In the analysis, I include additional independent variables to control for other factors that could influence the frequency of executive orders and agency rules. Following previous literature (e.g., Howell 2003; Yackee and Yackee 2009), I control for the president's relationship with Congress by including an indicator for *Divided Government*, coded as 1 if the president and either the House or the Senate are from opposing parties and 0 otherwise. Alternatively, I measure the absolute distance between the president and the median of Congress, averaged across the House and the Senate, using Bailey scores. Consistent with previous research (Yackee and Yackee 2009), I include a time trend variable (*Trend* is coded as 0 in 1983, 1 in 1984, etc.) to control for the effect of time given that there is a decreasing trend in rulemaking and a slight increasing trend in executive orders during this period (see figures in the online appendix).

13. I argue that the president's ideology serves as a reasonable proxy for administrative preferences given the degree of control he has over agencies through appointments, removals, and oversight. Further, this proxy can extend to both cabinet departments and independent (nonregulatory) administrations given their many similarities (Lewis and Selin 2012). As a robustness check, I analyze the data on cabinet and independent agencies separately, finding that the results remain robust for each type.

14. See Melnick (2005).

15. Alternatively, I use a measure of the ideological distance between the president and the median judge on the D.C. Circuit, using Judicial Common Space scores as ideal point estimates for these actors. I find that the results of the analysis hold when using this measure. See the online appendix: https://static1.squarespace.com/static/578abb6a414fb5187fb42509/t/57f3e2a4bebafb2ca6eb1670/1475601060188/PSQ_Online+Appendix3.pdf.

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 (*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 presidents who enter office following an opposing administration change (*Administration Change*), as I expect to find these presidents to issue more executive orders (Howell 2003). Finally, I include an indicator variable for the last year of a presidential term (*End Term*) in the event that outgoing presidents issue more executive orders (Mayer 2001) and push agencies to complete regulations (O'Connell 2008).[16]

Agency Rulemaking Analysis

To 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 2010.[17] Table 1 shows that the president's ideological distance from the Supreme Court, across all measures, has a negative and significant impact on rulemaking. As the president and the Court become more ideologically distant, agencies engage in less rulemaking, consistent with the Constrained Rulemaking Hypothesis. More precisely, a shift from unified partisan alignment to divided corresponds to 31% fewer rules. Similarly, the results indicate that a one-standard-deviation decrease in the president's co-partisans on the Court leads to an 11% decrease in agency rulemaking. Finally, a one standard deviation increase in the president's ideological distance to the Court corresponds to a 32% decrease in significant rules.[18]

Additionally, the analysis yields consistent results when examining distance to the D.C. Circuit. In particular, a shift from the president's alignment with the D.C. Circuit to partisan discord corresponds to a 27% decrease in the number of significant rules promulgated per year by executive branch agencies. Similarly, a one-standard-deviation increase in the *Percent D.C. Judges from Opposing Party* yields 13% fewer rules. Both of these effects are statistically significant and provide further support for the Constrained Rulemaking Hypothesis.

Not only do agencies issue fewer rules when they are ideologically opposed to the courts, but the analysis reveals that ideological conflict with Congress also significantly

16. The results hold when excluding the trend variable. I also run the analysis with other control variables such as presidential approval, the economy, the size of the executive branch, legislative productivity, and international crises; the main results still hold. Further, I do not include presidential fixed effects due to high collinearity. For instance, the Clinton dummy has a correlation of .73 with *D(President-Court)* and −.83 with *Percent of Justices of Opposing Party*.

17. I use a negative binomial model instead of a Poisson regression because of the overdispersion in the dependent variables. Likelihood ratio tests reveal that the negative binomial model is more preferable. However, the results generally hold when using ordinary least squares or Poisson regressions. Given that the error terms of these two regressions involving rules and executive orders as dependent variables could be correlated, I jointly estimate these two equations with a Seemingly Unrelated Regression model as a robustness check and find the results also generally hold.

18. These results hold when including a control for the party of the president and an indicator for the periods following EO 12866. See the online appendix.

TABLE 1
The Effect of President–Court Distance on Significant Agency Rules

	1	*2*	*3*	*4*	*5*
President-Court Split	−0.37 (0.12)**				
Percent Justices from Opposing Party		−0.79 (0.23)**			
President-DC Circuit Split			−0.31 (0.11)**		
Percent DC Judges from Opposing Party				−1.52 (0.46)**	
Divided Government	−0.32 (0.17)*	−0.32 (0.17)*	−0.27 (0.19)	−0.39 (0.17)**	
D(President, Court)					−1.79 (0.30)**
D(President, Congress)					−0.67 (0.30)**
Administration Change	0.18 (0.27)	0.23 (0.28)	0.12 (0.63)	0.19 (0.24)	0.25 (0.28)
End of Term	0.56 (0.12)**	0.50 (0.11)	0.46 (0.14)**	0.48 (0.11)**	0.50 (0.10)**
War	0.22 (0.19)	0.15 (0.19)	0.19 (0.14)	0.19 (0.13)	0.14 (0.14)
Trend	−0.06 (0.01)**	−0.07 (0.01)**	−0.07 (0.01)**	−0.07 (0.01)**	−0.05 (0.00)**
Intercept	7.03 (0.20)**	7.37 (0.20)**	7.16 (0.18)**	7.92 (0.31)**	8.68 (0.52)**
N	28	28	28	28	28

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

reduces rulemaking. This is consistent with previous literature that argues that there is decreased rulemaking under divided government due to both diminished legislative productivity and increased agency avoidance of opposing political principals (Yackee and Yackee 2009). As expected, I find that there is a significant decreasing trend in rulemaking over time. Finally, I do not find significant effects for administration change or midnight periods.

Executive Order Analysis

To further test the hypotheses, I present analysis of president–court distance on the number of significant executive orders.[19] As Table 2 shows, the president's distance to the Supreme Court has a positive and significant impact on the number of orders.

19. Some scholars argue that presidential memoranda can be used in much the same way as executive orders (Cooper 2002; Lowande 2014). Yet, memoranda are not all published in the *Federal Register*, in contrast to all executive orders. Further, memoranda do not consistently cite a basis of legal authority for action as the vast majority of executive orders do, which could have implications for their validity in the eyes of the Court (Cooper 2002). As such, I choose to focus solely on executive orders in the main analysis. However, I replicate the analysis using memoranda as well as a combined measure of memoranda and executive orders as dependent variables, finding that the main results hold.

TABLE 2
The Effect of President–Court Distance on Significant Executive Orders

	1	*2*	*3*	*4*	*5*
President-Court Split	0.39 (0.14)**				
Percent Justices from Opposing Party		0.82 (0.27)**			
President-DC Circuit Split			0.26 (0.14)*		
Percent DC Judges from Opposing Party				0.75 (0.51)	
Divided Government	−0.12 (0.14)	−0.10 (0.14)	−0.18 (0.15)	−0.10 (0.16)	
D(President, Court)					0.71 (0.37)*
D(President, Congress)					−0.08 (0.39)
Administration Change	0.42 (0.12)**	0.38 (0.11)**	0.47 (0.12)**	0.45 (0.15)**	0.44 (0.15)**
End of Term	0.34 (0.16)**	0.39 (0.15)**	0.37 (0.20)*	0.31 (0.20)	0.32 (0.19)*
War	0.44 (0.14)**	0.50 (0.15)**	0.35 (0.14)**	0.28 (0.13)**	0.38 (0.16)**
Trend	0.01 (0.01)	0.01 (0.01)	0.01 (0.01)	0.01 (0.01)	0.00 (0.01)
Intercept	2.46 (0.18)**	2.09 (0.25)**	2.40 (0.22)**	2.10 (0.38)**	1.98 (0.61)**
N	28	28	28	28	28

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

The further the Court is ideologically located from the president, the more executive orders issued, in support of the Enhancing Executive Order Hypothesis. In particular, the results reveal that a shift from shared ideology between the president and Court to opposing leads to an increase in executive orders by 48%. Additionally, a one-standard-deviation increase in the number of justices in the president's opposition party corresponds to a 25% significant increase in executive orders issued per year. Finally, a one-standard-deviation increase in president–Supreme Court distance leads to a 39% increase in orders.

Similarly, the president's distance to the D.C. Circuit also significantly increases the number of executive orders issued per year, consistent with the Enhancing Executive Order Hypothesis. Specifically, a shift in shared partisanship to opposing between the president and this court leads to a 30% increase in orders. Consistently, increases in the number of partisan opponents on the D.C. Circuit are positively associated with order usage. Though its effect is insignificant, it remains in the expected direction.

Contrary to the rulemaking analysis, the president's distance to Congress does not appear to have any significant impact on executive orders. This serves as an interesting contrast to the existing body of research that primarily focuses on how the president

TABLE 3
The Effect of President–Court Distance on Executive Orders by Grant of Authority

	Authority Enhancing	*Non-Authority*
D(President, Court)	1.06 (0.53)**	0.17 (0.71)
D(President, Congress)	−0.13 (0.48)	−0.12 (0.47)
Administration Change	0.32 (0.30)	0.53 (0.17)**
End Term	0.25 (0.22)	0.42 (0.34)
War	−0.04 (0.29)	0.69 (0.24)**
Trend	−0.01 (0.01)	0.01 (0.01)
Intercept	1.23 (0.86)	1.53 (0.92)*
N	28	28

Negative binomial coefficients reported with standard errors in parenthesis. *$p < .10$; **$p < .05$, two-tailed.

issues this and other unilateral tools in relation to Congress.[20] These conflicting results may be due to the previous exclusion of the courts and differences in the time periods examined (see the online appendix). Finally, the beginning and end of the term as well as war significantly increase executive orders.

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 divides the sample of significant orders into those that give agencies authority and those that do not.[21] I code an executive order as authority enhancing if it gives authority to a specific agency (rather than the executive branch more broadly), if it authorizes or directs an agency to take an action, or if it instructs the agency to take an alternative or more expansive interpretation of the law. I do not code an order as authority enhancing if it does not mention any specific agency, if it simply delegates presidential authority to an agency, if it transfers functions from one agency to another, or if it specifies that the agency acts within its existing authority without any alternative interpretations of the law.

One example of an executive order coded as authority enhancing is an order issued by President Clinton addressing procurement policy for contractors. In EO 12933, he grants the Secretary of Labor expanded authority to enforce the policy through a variety of possible actions:

> The Secretary of Labor is responsible for investigating and obtaining compliance with this Executive order. In such proceedings the Secretary shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost.

20. One potential concern of measuring the ideological distance between political actors is that it does not account for the relative position of one actor with respect to the other two—which could capture additional institutional constraints. As a robustness check, I use an alternative measure of how constrained the Court is in relation to both the president and Congress in the online appendix. Consistent with the theory, this analysis finds that when the Court is constrained, agencies issue more rules and presidents issue fewer executive orders.

21. Between 1983 and 2010, the president issued 219 significant executive orders that granted agencies authority and 218 significant orders that did not grant agencies authority.

On the other hand, President George W. Bush explicitly directs the Secretary of Commerce to act within his existing authority when enforcing policy related to the fish conservation in EO 13449. He instructs the Secretary to only recommend to him for consideration any actions that may not be in the secretary's authority. Thus, this is not an example of a nonauthority enhancing order:

> . . . the Secretary of Commerce shall. . .take such actions within the authority of the Secretary of Commerce as may be appropriate to carry out the policy set forth in section 1 of this order; and recommend to the President such actions as the Secretary may deem appropriate to advance the policy set forth in section 1 that are not within the authority of the Secretary.

Consistent with the authority-expanding hypotheses, I find that as the president's distance to the Supreme Court increases, he issues more significant executive orders granting additional authority to agencies. In particular, a one-standard-deviation increase in *D(President, Court)* leads to a 72% increase in executive orders issued per year. Yet, the president's relationship to the Court has no significant impact on orders that do not bolster agency authority, offering further support for the theory's mechanism.[22]

Policy Area Analysis

Overall, the analysis in the previous two sections strongly supports the theory. As the president becomes ideologically distant from the Supreme Court and the D.C. Circuit, he tends to issue more executive orders and decreases his reliance on rulemaking by agencies. Taken together, the findings are consistent with the claim that the president uses executive orders to supplement agency rulemaking when faced with an opposing judiciary. 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 theory were 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. I select these two issue areas because they are highly politically salient areas in which agencies have consistently promulgated regulations and presidents have regularly issued related executive orders. In addition, these issue areas have seen steady litigation over time.[23]

Labor Policy

First, I examine the number of labor-related executive orders and the number of rules by the DOL. Between 1983 and 2010, there were a total of 35 significant labor-

22. These same results hold when also using *President–Court Split* and *Percent of Justices of Opposing Party* as alternative measures. Further, I find that the president's distance to the courts does not have a significant impact on insignificant executive orders, thus validating the theory and coding scheme for significant orders (see the online appendix).

23. The results hold when excluding orders and rules related to labor and environmental policy, demonstrating that these issue areas are not driving the results.

TABLE 4
The Effect of President–Court Distance on Labor Policy

	Dept. of Labor Rules		*Labor-Related EOs*	
	1	*2*	*1*	*2*
Percent DC Judges from Opposing Party	−2.13 (0.67)**		5.13 (1.67)**	
Divided Government	−0.57 (0.22)**		0.78 (0.57)	
D(President, Court)		−2.52 (0.41)**		3.19 (1.01)**
D(President, Congress)		−0.75 (0.42)*		0.02 (0.90)
Administration Change	−0.56 (0.23)**	−0.46 (0.29)	1.28 (0.40)**	1.04 (0.49)**
End of Term	0.66 (0.15)**	0.59 (0.16)**	1.34 (0.41)**	1.44 (0.33)**
War	0.18 (0.13)	0.05 (0.13)	0.58 (0.54)	1.08 (0.62)*
Trend	−0.05 (0.01)**	−0.00 (0.01)	0.03 (0.02)	−0.04 (0.03)
Intercept	4.83 (0.45)**	5.63 (0.62)**	−4.07 (1.32)**	−2.87 (1.59)*
N	26	26	26	26

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

related executive orders and 480 significant final rules from the DOL. Consistent with the previous analysis, Table 4 shows that as the president's ideological distance to courts increases, the number of labor-related executive orders increases, while the number of DOL rules decreases. These results are statistically significant. Hence, a one-standard-deviation increase in *Percent D.C. Judges from Opposing Party* leads to about a 15% decrease in rules and a 2,906% increase in orders issued per year. Likewise, for every one-standard-deviation increase in *D(President, Court)*, rules decrease by 35% and orders increase by 885%. Similar to the previous analysis, divided government appears to significantly decrease DOL rulemaking, but has no significant impact on the issuance of labor-related executive orders. Finally, administrations tend to issue significantly more rules and executive orders at the end of the presidential term, while issuing fewer rules and more orders at the beginning of the term.

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 EPA. Between 1983 and 2010, the president issued 35 executive orders related to environmental policy and there were 1,090 rules promulgated by the EPA. Table 5 shows that the greater the president's ideological distance from the courts, the more environmental orders he issues and the fewer rules the EPA finalizes. Specifically, every one-standard-deviation increase in the president's distance to the Supreme Court corresponds to a 31% decrease in EPA rules and a 1,424% increase in executive orders related to environmental policy. Similarly, a one-standard-deviation increase in *Percent D.C. Judges from Opposing Party* yields 14% fewer rules promulgated per year. While the president's alignment with the D.C. Circuit

TABLE 5
The Effect of President–Court Distance on Environmental Policy

	EPA Rules		*Environmental-Related EOs*	
	1	*2*	*1*	*2*
Percent DC Judges from Opposing Party	−1.74 (0.47)**		2.35 (1.99)	
Divided Government	−0.18 (0.13)		0.47 (0.53)	
D(President, Court)		−1.66 (0.33)**		3.65 (1.22)**
D(President, Congress)		−0.65 (0.24)**		0.90 (1.39)
Administration Change	0.02 (0.18)	−0.06 (0.14)	0.67 (0.83)	0.41 (0.64)
End of Term	0.14 (0.09)	0.25 (0.11)**	0.04 (0.75)	0.05 (0.93)
War	−0.25 (0.21)	−0.21 (0.22)	−0.71 (0.89)	−0.29 (0.99)
Trend	−0.05 (0.01)**	−0.02 (0.01)**	0.07 (0.04)*	0.03 (0.04)
Intercept	5.27 (0.32)**	5.95 (0.48)**	−2.35 (1.57)	−4.46 (0.22)**
N	26	26	26	26

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

increases the number of executive orders issued per year, this effect is not quite statistically significant.[24]

For both policy areas examined here, when the president is distant from the courts he decreases DOL and EPA rulemaking while increasing the use of executive orders to bolster the authority of these agencies to implement policy in these areas. Note that these results hold when examining the president's alignment to both the Supreme Court and the D.C. Circuit. Thus, this analysis provides further support for the theory's hypotheses.[25]

Discussion and Conclusion

Overall, the analysis offers support for the authority-enhancing theory. When the president is ideologically distant from the Supreme Court and D.C. Circuit, s/he tends to issue more executive orders and 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.

24. The effect of the president's alignment to the D.C. Circuit, however, is statistically significant for rules and executive orders in both policy areas when using Judicial Common Space scores.

25. One could question whether these traditionally liberal issue areas are biasing the results. In particular, do regulations under Clinton increase because he is a liberal president who wishes to expand policy making in these areas? On the contrary, the Clinton administration issued fewer EPA and DOL regulations than his Republican counterparts. This contradicts explanations of liberal bias in these regulatory areas; yet it is consistent with the theory, because Clinton faced greater opposition from the courts. Additionally, I repeat the analysis for the conservative policy area of commerce and find that these main results also hold (see the online appendix).

The results support this logic, showing that agencies issue fewer rules when the courts are ideologically opposed to the president. This reduction in rulemaking helps agencies decrease the chances that the courts will overturn their actions.

At the same time, agencies cannot completely bring all of their regulatory activity to a halt. To assist agencies in carrying out their duties in implementing policy, presidents can issue executive orders. Specifically, when faced with ideologically distant courts, the president issues more executive orders, which the courts view as a legally valid source of authority for agencies. Thus, these orders can be useful tools for a president who wishes to engage in policy making but avoid litigation. Consequently, executive orders help agencies to further decrease the likelihood that their actions will be overturned in court. Specifically, the president can issue executive orders to enhance the authority of agencies and bolster the validity of their actions, thus avoiding possible challenges altogether or increasing the likelihood that the administration will win. While I am not suggesting executive orders are a substitute for rulemaking, they can serve as a valuable supplement by increasing agencies' authority when faced with oppositional courts.

Additionally, this article offers an examination of policy making when weighing the possibility of the president using multiple executive policy tools, in contrast to the singular focus of most other studies. This depicts a more realistic picture of the more varied and multidimensional choices that presidents face when deciding how best to implement policy, given constraints from both Congress and the courts. Further, this article demonstrates that the courts are as an important consideration in the presidential decision-making process, particularly given how they treat various policy tools differently. This contributes to a larger body of research on the president's strategic use of power that tends to focus on relations with Congress while placing less emphasis on the role of the courts in influencing his/her efforts to shape policy.

Yet, one perhaps puzzling finding in this article is that the president's relationship to Congress does not have a significant impact on the number of executive orders issued per year. Previous studies find that presidents tend to issue fewer executive orders and agencies engage in less rulemaking under divided government, due to an increased risk in congressional retaliation and perhaps a decrease in statutory discretion (Howell 2003; Yackee and Yackee 2009). However, these studies do not account for the influence of the courts on the use of these policy tools. As this article demonstrates, when studying executive–congressional conflict, it is important to also study how courts adjudicate such conflicts and how the anticipation of possible judicial decisions impacts the behavior of other political actors. Thus, this study advances us toward developing multi-institutional theories of policy making that consider how all three branches of the government interact, not just two at a time. This has implications for furthering our understanding of separation of powers politics, interbranch bargaining, and policy making.

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