Agencies by Presidential Design

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Scholars have largely ignored one of the most important ways in which presidents influence the administrative state in the modern era, that is, by creating administrative agencies through executive action. Because they can act unilaterally, presidents alter the kinds of administrative agencies that are created and the control they wield over the federal bureaucracy. We analyze the 425 agencies established between 1946 and 1995 and find that agencies created by administrative action are significantly less insulated from presidential control than are agencies created through legislation. We also find that the ease of congressional legislative action is a significant predictor of the number of agencies created by executive action. We conclude that the very institutional factors that make it harder for Congress to legislate provide presidents new opportunities to create administrative agencies on their own, and to design them in ways that maximize executive control.

The administrative state is the nexus of public policy making in the modern era. While Congress writes the laws, administrative agencies do the work of translating vague and often conflicting legislative provisions into concrete public policy. To understand what the federal government does, one must understand the bureaucracy—which agencies constitute it, how these agencies are structured, and who controls them.

Until recently, the literature on the federal bureaucracy proceeded under the assumption that Congress created all administrative agencies or, at least, directed their creation through delegation and oversight. The congressional dominance literature, the most sophisticated body of work in political science on bureaucratic oversight, forcefully argues that Congress retains final say over which agencies are created, what functions they serve, and how they are designed (Bawn 1997; Epstein and O'Halloran 1999; Horn 1995; Macey 1992; McCubbins, Noll, and Weingast 1989).

Recently, renewed interest has been directed toward presidents and the influence they wield over the federal bureaucracy. In particular, scholars have begun to consider how presidents appoint and remove employees, reorganize the bureaucracy, and manipulate budgets to augment their control over agencies within it (see, e.g., Arnold [1986] 1998; LeLoup 1980; Nathan 1983; Snyder and Wein-

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gast 2000; Waterman 1989; Wood and Waterman 1994). This research, however, has focused exclusively on agencies that are already up and running. Therefore, it has proceeded without recognizing that prior to any appointment, budget proposal, or outlay of funds, the president has a tremendous amount of say over which agencies are created and how these agencies are designed (Moe 1989; Moe and Wilson 1994; Zegart 1999).

Much of this influence comes from his position as party leader and the power to veto legislation. Presidents, however, hold a trump card that many scholars have overlooked. When they cannot convince Congress to build an administrative agency that they want, presidents can, and often do, strike out on their own. Since the end of World War II, presidents have unilaterally created over half of all administrative agencies in the United States. Using executive orders, department orders, and reorganization plans, presidents have established administrative agencies that would never have been created through legislative action, and almost always, presidents design these agencies in ways that maximize their control over them.

We analyze the 425 administrative agencies established between 1946 and 1995. We find that presidents exercise significantly more control over those agencies that they create through a unilateral directive than those agencies that Congress and the president establish through legislation. We also find that congressional strength is inversely related to unilateral activity. When Congress is strong (defined by the relative cohesion of its members' preferences), presidents create fewer administrative agencies, and when Congress is weak, they create more. These findings suggest that the very institutional factors that undermine Congress augment presidential influence and control.

This article is divided into five sections. The first section shows that agencies created by administrative action are much less insulated from political manipulation than agencies created by legislation—thereby greatly expanding the president's control over them. The second section examines how Congress uses its budgetary powers to restrict the president's freedom to unilaterally create administrative agencies. The third section specifies when presidents will create administrative agencies on their own. Using quantitative data collected on agencies created in the United States between 1946 and 1995, the fourth section tests the proposition that unilateral activity increases as Congress's capacity to legislate decreases, and vice versa. The final section then concludes.

How Presidents Use Their Unilateral Powers to Influence the Bureaucracy

Over the past half-century, presidents have constructed over 240 administrative agencies through executive orders, orders issued by department secretaries or agency heads, and reorganization plans. These agencies represent a solid majority of the listings in the *United States Government Manual*

(*USGM*).[1] To justify these actions, presidents generally look to some combination of constitutional powers, vague statutes, or expressed delegations of authority. Many of these agencies are among the most important created in the modern era. Among the agencies created by executive order, the National Security Agency and the Peace Corps are clear standouts.

The president's political appointees also create agencies by executive action. While less directly attributable to presidential action, these agencies nonetheless are created within the purview of the White House and are designed by executive actors who usually share the president's concern for centralization, hierarchy, and political control.[2] Since 1946, department orders are responsible for creating fully 40% of all new agencies listed in the *USGM*. Highlights include the Welfare Administration, the Defense Intelligence Agency, and the Bureau of Alcohol, Tobacco, and Firearms.

Until 1983, when the Supreme Court struck down the legislative veto,[3] Congress frequently gave presidents and their subordinates reorganization authority (Fisher 1998). Typically, presidents submitted reorganization proposals to Congress, and, unless Congress took positive steps to alter or negate them, the proposals automatically took effect after a specified period of time. While certainly weaker forms of unilateral activity (rather than having to enact new legislation to overturn a reorganization plan, Congress needed only to pass a one-house veto, a two-house veto, or a joint resolution), reorganization plans nonetheless granted presidents important discretion over the design of administrative agencies. These plans created the Department of Health, Education and Welfare; the Environmental Protection Agency; the Drug Enforcement Agency; and the Federal Emergency Management Agency.

A Different Kind of Federal Agency

As one might expect, agencies created by the president alone (or by those acting on his behalf) are less important than agencies that Congress and the president build together. As Table 1 shows, roughly 58% of agencies initiated unilaterally have their own line in the budget, compared to 71% of agencies created legislatively. While *Congress and the Nation* included 59% of federal agencies created by legislation in its index, suggesting some baseline level of significance, it cited only 42% of agencies created by executive order, 22% created by department order, and 63% created by a reorganization plan.[4]

[1] The *USGM*, which is put out by the National Archives and Records Administration, catalogues the most important agencies in the federal government.

[2] Of course, the degree to which the president's appointees are responsive to presidential concerns varies partly depending upon the saliency of the issue.

[3] *INS v. Chadha*, 462 U.S. 919.

[4] In part, these differences are due to source bias. *Congress and the Nation* focuses explicitly on congressional affairs and covers presidential acts only when they receive some measure of attention within Congress. It is no surprise then that agencies created by legislation receive more coverage than do agencies established by executive or department orders.

TABLE 1

Agency Creation, 1946–1995

	AGENCIES CREATED BY . . .			
	Legislation	Executive Order	Secretarial Order	Reorganization Plan
Number of agencies created:	180	43	172	30
Indicators of agency importance:				
Percent with line in budget:	70.8%	41.9%	48.5%	86.7%
Of those with line, mean budget request:	$4.10 billion	$174 million	$2.50 billion	$2.14 billion
Percent mentioned in *Congress & Nation*	59.2%	41.9%	22.1%	63.3%
Average number of years agencies lasted:[a]	17.6	8.8	12.1	18.6
Function of agency:				
Foreign Affairs	20.1%	37.2%	20.9%	20.2%
Social Policy	17.3	4.7	15.7	20.2%
Regulation of Economy	4.5	20.9	11.0	0.0%
Other	58.1	37.2	52.4	59.6%
Total	100.0%	100.0%	100.0%	100.0%
Proximity of agency to president:				
Located in EOP	10.1%	48.8%	0.0%	16.7%
In Cabinet	45.8	18.6	83.7	30.0
Independent Agencies	12.9	25.6	13.4	43.3
Independent Commissions	19.0	7.0	2.9	10.0
Government Corporations	12.2	0.0	0.0	0.0
Total	100.0%	100.0%	100.0%	100.0%
Restrictions on agency appointments:				
Fixed term appointments:	31.2%	0.0%	0.0%	10.0%
Agency headed by board or commission:	44.7%	41.9%	5.3%	20.0%
Limitations placed on qualifications of potential applicants to agencies:	41.3%	25.6%	2.4%	13.3%
Party balancing requirements:	11.7%	0.0%	0.0%	6.7%

[a]These data do not account for the censoring problem associated with agencies that continued after 1997 (the cutoff date for these data). The values presented here, therefore, do not represent the absolute number of years these agencies survived. They do, however, suggest the relative length of time agencies created by legislation, executive order, and secretarial order survived.

Agencies created by administrative action are generally smaller than agencies created through legislation. In 1992 dollars, the average initial budget for a unilaterally created agency is $2.0 billion. The average budget for a legislatively created agency, by contrast, is $4.1 billion.[5] In addition to the greater resources devoted to them, agencies created by legislation tended to have significantly longer life spans than those created by an executive or department order. The average duration of legislative agencies is 17.6 years; for agencies created by executive order, just 8.8 years; and for agencies established by department order, 12.1 years.

What presidents may lose in the size or significance of agencies they create unilaterally, however, presidents gain back in the control they exercise over them. To maximize their influence over administrative operations, presidents rarely placed agencies in distant sections of the federal bureaucracy. Fully 67% of agencies created by executive order and 84% of agencies created by department order are placed either within the EOP or the cabinet, as compared to only 56% of agencies created legislatively.

Presidents also were less likely to create agencies governed by independent boards or commissions. Rather, agencies created through executive action almost always reported directly to the president. Independent boards or commissions, which dilute presidential control, governed only 13% of all agencies created unilaterally, as compared to 31% of agencies created through legislation.

Presidents rarely placed limitations on who they could appoint to their agencies. A total of 40% of agencies created through legislation had some form of qualifying restrictions for appointees, as compared to only 8% of unilaterally created agencies. In addition, presidents almost never imposed party-balancing limitations on agencies they created on their own, though Congress required as much from 12% of the agencies it established through legislation.

Presidents also enjoyed significantly more discretion to fire heads of unilaterally created agencies. Not a single federal agency created by executive order or department order between 1946 and 1995 had fixed terms for political appointees. Political appointees served for fixed terms in only three agencies created through reorganization plans. By contrast, over one third of all agencies designed through legislation had fixed-term appointments.

Isn't Congress Really in Charge?

Proceeding with independent constitutional authority and authority delegated over time, presidents can make policy "with the stroke of a pen" and effectively avoid the many institutional obstacles (multiple committees and cham-

[5]These figures may be overstated. Figures are only available for agencies that have their own lines in the budget. Agencies without lines in the budget are generally smaller than those with lines. Only 52% of executive-created agencies, and 71% of statutorily created agencies, have a line in the budget.

bers, anonymous holds, filibusters) that plague the legislative process (Howell forthcoming; Mayer 2001; Moe and Howell 1999; Moe and Wilson 1994). Presidents often exploit the difficulties of legislative action by unilaterally setting policies that at least one-third of Congress supports, making it virtually impossible for Congress to deliver a counterproposal that can overcome a presidential veto.

Congress nonetheless holds a key strategic advantage. Should the president establish a particularly controversial agency, members of Congress can simply cut off funding. In this instance, non-action on the part of Congress is functionally equivalent to outward opposition. Unless the president secures funding for an agency he unilaterally creates, eventually the agency will die.

The need for budgetary appropriations certainly limits what presidents can accomplish unilaterally. But the president's influence does not disappear entirely. Three reasons explain why. First, the legislative process is significantly more difficult to navigate than the appropriations process. Passing appropriations, for instance, usually requires only a simple majority, as compared to a supermajority for most legislation (Krehbiel 1998). Therefore, there is a range of actions that presidents can take on their own that Congress will fund, even though these actions could not survive the legislative process.

Second, in many instances a new agency has been up and running for months before Congress considers whether or not to appropriate additional funding. The new agency is presented as a fait accompli supported by the administration, employees within the agency, and friends in Congress. The Peace Corps is a prime example. In the 1950s Senator Hubert Humphrey (D-MN) and Representative Henry S. Reuss (D-WI) first proposed the idea of sending volunteers overseas to help develop particularly impoverished regions in the world. Humphrey and Reuss introduced legislation in 1960 to study the practicality of such a program. Republicans, however, rejected the proposal as a "juvenile experiment," and Richard Nixon claimed that its volunteers would just be seeking to escape the draft. Once in office, though, Kennedy bypassed the legislative process and created the Peace Corps by executive order. Congressional Republicans decried his actions, arguing that the Peace Corps was too expensive and of little value and that its creation by executive order represented an abuse of presidential power. But by the time Congress formally moved to grant a statutory basis for the Peace Corps, the Corps had 362 Washington employees and 600 volunteers at work in eight countries (Whitnah 1983). Congress, then, had little choice but to continue funding, else fight the interest groups that had grown up around the fledgling organization.

Finally, because the larger budget process shields them, presidents retain significant discretion over the design of administrative agencies. Given the enormous size of the budget, Congress must pick its battles. If it reexamined every line and challenged every spending item, Congress could not possibly complete the budget every year. Consequently, many agencies, even those opposed by a majority in Congress, are funded year in and year out through the momentum and cover provided by larger budget battles (Kaufman 1976). Of course, presidents will not unilaterally create agencies that offend a large number of congressional representatives, knowing ex ante that Congress will decline their budgetary requests. In this sense, we primarily observe equilibrium-type behaviors. But a basic insight holds: presidents create all kinds of administrative agencies that Congress would not establish through legislation, secure in the knowledge that funding will be forthcoming.[6]

When Do Presidents Unilaterally Create Federal Agencies?

Frequently, the agencies presidents create through executive orders, department orders, and reorganization plans enjoy widespread support within Congress. In these instances, the power to act unilaterally does not appear to alter the federal bureaucracy—for absent presidential action on the matter, Congress presumably would create a roughly equivalent agency through legislation.

Presidents, however, often create agencies that enjoy enough support within Congress to secure their eventual funding, but not the backing required to enact legislation that would establish the agencies in the first place. In these instances, presidents exert influence by creating agencies that Congress remains incapable of constructing on its own. Here, the mark of presidential influence is the unilateral creation of an agency that otherwise would not exist.[7]

Consider the history of the Fair Employment Practices Commission (FEPC) and its subsequent incarnations in the 1940s and 1950s. At a time when Congressional action on the matter was unthinkable, Roosevelt created the first federal agency devoted to combating racial discrimination (Morgan 1970). Responding to demands made by the National Association for the Advancement of Colored People and the Urban League, Roosevelt established the FEPC with Executive Order 8802. Aware of Congress's inability to pass any civil

[6] Overt conflicts over funding executive-created agencies are rare and usually are resolved in negotiations prior to presidential actions. But when Congress has attempted to de-fund a presidential agency, presidents have responded by creating new agencies to perform similar functions. In response to President Reagan's subjection of all new regulations to cost-benefit analysis beginning in 1981, Congress attempted in 1986 to cut the funding of the responsible agency, the Office of Information and Regulatory Affairs (OIRA). After extracting what they believed to be concessions from OMB and the White House, Congress relented. Ambiguities in the agreement, however, led to continued conflict between the legislative and executive branches over the regulatory review practices of the OMB. President Bush consequently transferred OIRA's functions to Vice-President Quayle's Council on Competitiveness. In 1992, the House voted to delete funding for the salaries of staffers on the council, but the Senate restored the funds when President Bush threatened a veto (see Fisher 1998, 36–9).

[7] See Howell (forthcoming) for a formal presentation and proof of this proposition. Howell also shows that under certain circumstances, presidents have strong incentives to preempt congressional action by setting policies (or, in this context, creating administrative agencies) that they oppose in order to undermine stronger legislative versions of the policy (agency).

rights initiative, liberal or conservative, Roosevelt then bypassed the formal appropriations process and used discretionary monies to fund the FEPC (Nathan 1969).

The FEPC ensured that all training and vocational programs in the defense industries were "administered without discrimination because of race, creed, color, or national origin." EO 8802, however, did not establish standards of discrimination and failed to allocate direct enforcement powers. While the FEPC was to "receive and investigate complaints of discrimination in violation of the provision of this order," it was not given any formal powers to prosecute. Consequently, the order's importance largely derived from its symbolic value.

The following year Congress introduced several bills that attempted to deal with these deficiencies. Representative Vito Marcantonio of New York introduced legislation (HR 7412) that would have made the FEPC a statutory agency, with the added power to issue cease and desist orders. Being subject to judicial review, these orders lend critical enforcement powers to the FEPC. Marcantonio's bill, however, never even made it out of committee.

It was only because the president retained the power to act unilaterally that the federal government managed to create a civil rights agency. While the FEPC was relatively weak, it nonetheless carved out a role for the government to protect civil rights. The subsequent four presidents each built upon the foundation laid by Roosevelt, creating additional agencies with stronger and stronger enforcement powers (Truman's Fair Employment Board within the Civil Service Commission, Eisenhower's Committee on Government Employment Policy, Kennedy's Committee on Equal Employment Opportunity, and then Johnson's Equal Employment Opportunity Commission). In each instance, the alternative to the agencies that presidents created through unilateral action was not an agency designed through legislation: rather, it was no agency at all.

To claim that the president does Congress's bidding when he creates an administrative agency is to miss a fundamental point about how presidents use their unilateral powers. All else equal, presidents would prefer to establish administrative agencies with legislation, if only because these agencies are more durable over time. Presidents frequently establish agencies on their own not because Congress wants them to, but because Congress is mired in gridlock.[8] Thus, on the whole, we should expect presidents to exercise their unilateral power most often when Congress is least capable of legislating. In this sense, unilateral activism is inversely proportional to legislative strength.

[8] Of course, in this case the president was responding to the demands of powerful interest groups. One alternative view is that the president's actions simply reflect the underlying interests of powerful interest groups. We cannot test this important claim here, but note that in previous empirical analyses of White House contacts with interest groups, Peterson (1992) concludes that the number that maintain an active relationship with the White House is small and the president's relationship with these groups is most often motivated by attempts to mobilize support for *his* program, rather than the other way around.

Theory Testing

As a collective decision-making body, Congress almost always has a difficult time enacting new legislation. Coordination problems and multiple veto points make it extremely unlikely that any single legislative bill will be acted upon, much less enacted into law. The institution's capacity to legislate, however, is not fixed. Depending upon the composition of its membership, the prospects for lawmaking can vary dramatically. When members of Congress vehemently disagree over public policy matters, obstacles encountered along the legislative circuit will likely prove insurmountable. However, when a consensus prevails, members may effectively forge the governing coalitions needed to enact sweeping public policy changes.

This has immediate implications for presidential power. When members of Congress have a difficult time coming to agreement, presidents should enjoy a greater measure of discretion to strike out on their own and create agencies that would not survive the legislative process. When members of Congress are united and strong, however, presidents should have fewer opportunities, and fewer incentives, to exercise their unilateral powers. If the president creates an administrative agency that Congress opposes, its members can easily retaliate; but if an agency enjoys broad support in Congress, the president would do better to guide it through the legislative process and thereby secure its long-term prospects.[9]

This section examines the relationship between unilateral activity and Congress's capacity to legislate. To measure the former, we identified in the *USGM* all administrative agencies created in the United States between 1946 and 1995, excluding advisory commissions, multilateral agencies, and educational and research institutions. To qualify as new, each agency had to have a different name and set of functions from any previously existing agencies.[10] So, for example, the National Archives and Records Service (NARS), created in the General Services Administration in 1949, is included even though it retained much of the character of the National Archives Establishment, an existing independent agency. In addition to a change in location, the NARS assumed a new name and additional responsibilities over federal government records.

Figures 1A–1C graph the number of agencies created by executive action and legislation between 1946 and 1995. (Because administrative agencies often take as many as three years before appearing in the *USGM*, the timeline terminates

[9] Presidents can unilaterally dismantle agencies that prior presidents have created through an executive or secretarial order. To eliminate an agency created via legislation, however, the president must approach Congress.

[10] New administrative agencies are rarely created out of whole cloth, regardless of their size, function, or origin. They invariably combine existing personnel, resources, appropriations, and delegated functions into a new administrative unit.

FIGURE 1A

Number of Executive-Created Agencies, 1946–1995
(Including Reorganization Plans)

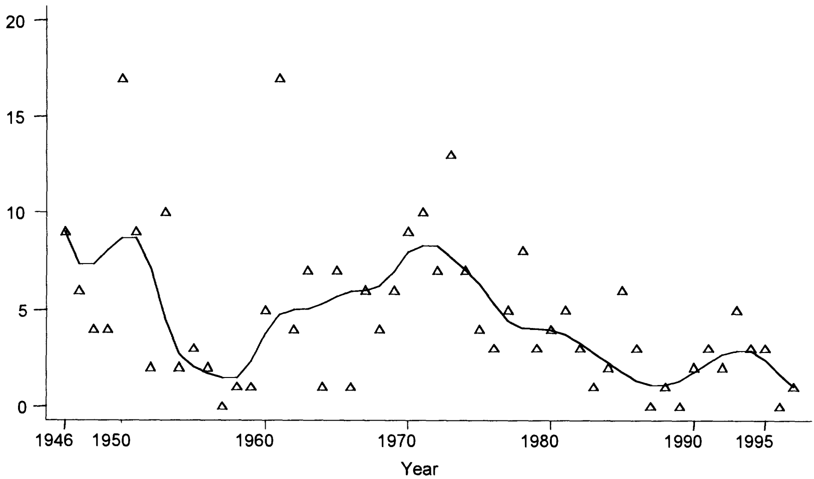


FIGURE 1B

Number of Executive-Created Agencies, 1946–1995
(Excluding Reorganization Plans)

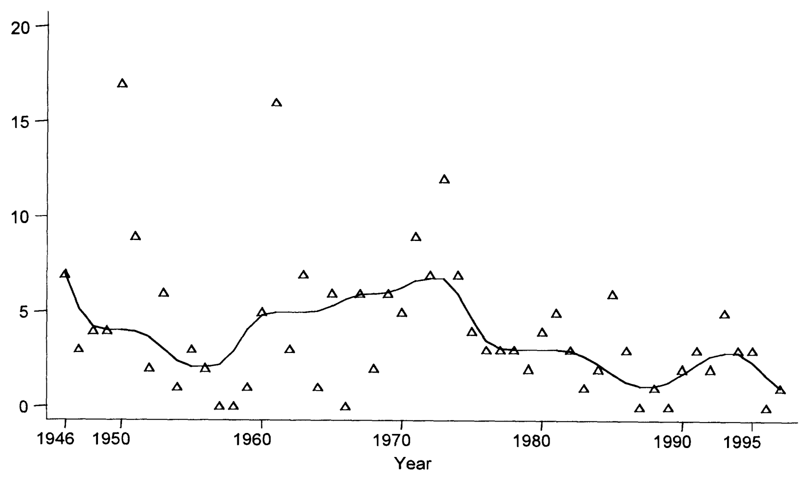
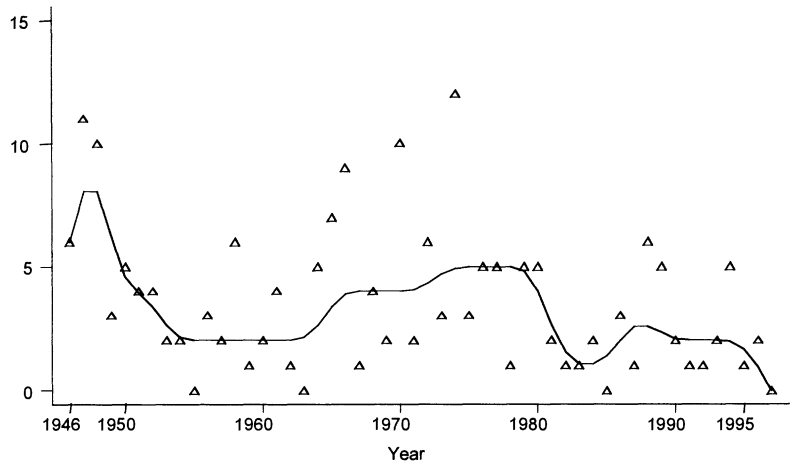


FIGURE 1C

Number of Agencies Created by Legislation, 1946–1995



at 1995.)[11] When including reorganization plans with executive and departmental orders, the number of agencies created unilaterally each year varies from zero to seventeen with a mean value of 4.63 and standard deviation of 3.90; when restricting the time series to agencies created by executive or departmental orders, the mean drops to 4.18 with a standard deviation of 3.64; finally, agencies created by legislation have a mean of 3.58 and standard deviation of 2.93.

Robust, nonlinear smoothers reveal striking similarities between the three time series. In the years immediately following World War II, agency creation by both executive action and legislation steadily declined, only to rebound in the late 1950s and continue upward, albeit not monotonically, through the 1960s. Since 1974, however, all trend lines steadily decline, indicating that most of the growth of the modern administrative state occurred in the 1950s and 1960s.

Independent Variables: Congressional Weakness and Controls

There are a wide variety of ways to measure Congress's capacity to legislate. Some scholars argue that Congress is most effective when majority parties are strong and unified and/or minority parties are small and divided. The size of

[11] The Central Security Service, for example, was created in December 1971 and did not appear in the *USGM* until 1974. Similarly, agencies created in 1996 might not appear in the *USGM* until 1999 and those created in 1997, until 2000. The 1999–2000 *USGM* was published too late for the 1996 data to be included in this analysis.

congressional majorities, "party unity scores," and "legislative potential for policy change" indices represent a handful of the attempts made to assess congressional strength (Binder 1999; Brady, Cooper and Hurley 1979).

Each of these measures makes strong assumptions about the capacity of party leaders to guide policy initiatives through a long and difficult legislative process. Consequently, such measures equate party strength with congressional strength. Undoubtedly, considerable debate surrounds this claim (Krehbiel 1993). To minimize controversy, we gauge congressional strength not by tracking the size of party majorities, but instead by directly measuring the harmony of members' ideological orientations, both within and between chambers. As members' preferences disperse, coalitions should have a harder time enacting major policy changes; conversely, as preferences conform, the travails of the legislative process should attenuate.[12]

To calculate the variance of members' preferences, we use transformed W-Nominate scores that allow for intertemporal and cardinal comparisons (McCarty and Poole 1995; Poole 1998). We construct an index that consists of three components: the standard deviation of House Nominate scores, the standard deviation of Senate Nominate scores, and the distance between the median members within the two chambers. The first two components capture the ideological divisions within the chambers; the final captures the level of disagreement between the chambers. To build the index, we standardized and then summed each component. We then rescaled the index to range from zero to one.

Throughout most of the post-WWII era, the same political party held majorities in both chambers of Congress. Between 1980 and 1986, however, Republicans ran the Senate while Democrats held the House. It is possible that these party divisions introduced obstacles in the legislative process that are not captured by a measure of congressional weakness based upon chamber medians. We therefore constructed a second measure of congressional weakness that substitutes for the differences between chambers' medians the differences between majority party medians. The two measures track one another quite nicely throughout the post-WWII era (their correlation is .64), deviating from one another only during the early 1980s when Democrats controlled the House and Republicans, the Senate.

When estimating the impact of congressional weakness on unilateral activity, we control for divided government since Congress is likely to keep a tighter rein on executive unilateral activities when the president is from the opposite party, and we do not want to falsely attribute the estimated independent effect of ideological divergence between the branches of government to the estimated

[12] We also have constructed numerous party measures of congressional strength and assessed their ability to predict the number of administrative agencies presidents create annually. While the results vary somewhat depending upon which measure one uses, on the whole, the findings conform to those presented below.

effect of congressional weakness.[13] We also include fixed effects to eliminate false correlations based upon the uniqueness of individual presidents, their partisanships, or leadership styles. In addition, all models control for periods of war and the unemployment rate. Finally, to account for the cessation of reorganization plans after *INS v. Chadha*, we also include an indicator variable for post-1983 observations.[14]

Methods

To analyze the impact of congressional weakness on unilateral activity, we first estimate logistic regressions on all 425 agencies created between 1946 and 1995. The dependent variable is coded 1 if an agency is created by executive action and 0 if an agency is established via statute. The first model includes the measure of Congress's capacity to legislate based upon preference divergence within chambers and across chamber medians. The second relies upon the composite measure of congressional weakness based upon the differences between majority party medians in the two chambers.

The data confirm our expectations. Regardless of which measure we use, congressional weakness has a statistically significant and positive impact on the probability that an agency will be created by an executive action. Holding all other continuous variables at their means and dichotomous variables at their modes, moving from one standard deviation below the mean of the chamber-based congressional weakness measure to one standard deviation above corresponds with a 10 percent increase in the probability that an administrative agency will be created by executive action; for the party-based measure of congressional weakness, the shift corresponds with an 18 percent increase.

As one might expect, during periods of war, presidents are much more likely to create administrative agencies on their own. Unemployment rates, meanwhile, have negligible impacts on outcomes. The effects for divided government are particularly intriguing. On the one hand, presidents have a greater incentive to act unilaterally when the opposite party controls Congress. On the other, during periods of divided government, Congress may be less inclined to fund agencies that presidents unilaterally create. The findings in Table 2 sug-

[13] We have also estimated models using preference divergence between the president and one of the chambers of Congress instead of divided government. In addition, while we do not expect that the effect of congressional weakness is conditional upon divided government, we did estimate additional models with interaction terms. The estimated main effects of congressional weakness generated in all of these models confirm what is reported here; in these latter models, the interaction terms between divided government and congressional weakness are never statistically significant.

[14] We coded agencies created during the Korean War (1950–1953), the Vietnam War (1965–1975), and the Persian Gulf War (1990–1991) with a 1 and all other years with a 0. Average yearly unemployment is 5.67% with a low of 2.9% (1953) and a high of 9.7% (1982). The standard deviation is 1.58. We have estimated a number of models with additional controls such as approval ratings and trend terms. We have also estimated models omitting the fixed effects and including preference measures for the president. Each of these models confirms what is reported here.

TABLE 2

Agency Creation by Executive Action or Legislation, 1946–1995

	Including Reorganization Plans		Excluding Reorganization Plans	
	(1)	(2)	(3)	(4)
Congressional Weakness Measure Based Upon:				
Chamber medians	1.99***	—	1.84**	—
	(0.82)		(0.82)	
Maj party medians	—	1.87***	—	1.78**
		(0.79)		(0.80)
Controls				
Divided Gov (0,1)	−0.55*	−0.72**	−0.57*	−0.72**
	(0.40)	(0.40)	(0.43)	(0.42)
War (0,1)	1.44***	1.44**	1.49***	1.48***
	(0.37)	(0.37)	(0.38)	(0.38)
Unemployment	0.03	0.03	0.15	0.11
	(0.14)	(0.14)	(0.14)	(0.14)
Constant	0.10	0.23	−1.29	−1.08
(N)	424	424	394	394
Log Likelihood	−263.83	−263.95	−245.55	−245.86
χ^2 (14, 13 df)	51.03***	50.78***	51.90***	51.88***

Logistic regressions estimated. * significant at the .10 level, one-tailed test; ** significant at the .05 level; *** significant at the .01 level. For columns 1 and 2, the dependent variable is coded 1 if an agency was created by executive action (via an executive order, department order, or reorganization plan), and 0 if it was created by legislation. Columns 3 and 4 exclude agencies created by reorganization plan. All models control for fixed presidential effects.

gest that the latter concerns outweigh the former. During periods of divided government, presidents are much less likely to create administrative agencies through an executive order, departmental order, or reorganization plan.

The politics of reorganization plans probably differ from those of executive orders and departmental orders. As a robustness check, therefore, columns 3 and 4 omit those agencies created by reorganization plans (and along with them the post-1983 indicator variable). Nothing changes. Measures of congressional weakness continue to have a statistically significant and positive impact on the probability that agencies are created by executive action rather than legislation.[15]

[15] A likelihood ratio test of nested models indicates that including fixed effects is appropriate for all four models ($p < 0.00$). The only presidential indicators that were consistently significant or close to significant in the models were those for Kennedy (coeff.: 1.17, 1.95, 1.81, 2.20; s.e.: 1.07, 1.17, 0.77, 0.85) and Johnson (coeff.: −2.45, −1.69, −1.68, −1.38; s.e.: 1.09, 1.10, 0.68, 0.69). The base category is Clinton.

Rather than predicting the probability that any single agency is created by executive action or legislation, we might instead model the frequency with which presidents unilaterally establish administrative agencies. To do so, we estimate a series of simple Poisson regressions that include the same covariates as in Table 2. Poissons are a special case of negative binomial regressions in which the ancillary parameter (or dispersion parameter), α, equals zero. A likelihood ratio test of nested models suggests that we cannot reject the null hypothesis that α equals zero, making Poissons appropriate.[16]

Table 3 presents the estimates recovered from the event-count models.[17] Whereas before each observation represented an individual agency, now each observation represents the annual number of agencies created via an executive order, departmental order, or reorganization plan. All models are estimated with only 50 cases, so the standard errors are relatively large. Still, they perform quite well. We can reject the null hypothesis that they do not improve on a constant-only model ($p < 0.05$).[18]

As before, no matter which version we use, and whether or not reorganization plans are included in the analysis, congressional weakness has a statistically significant and positive impact on the number of executive agencies presidents create on their own. As members' preferences disperse, unilateral activity increases, and as they conform, activity decreases. A shift of one standard deviation of the weakness measures leads, on average, to an increase of between 0.4 and 0.8 executive-created agencies per year, or two to three agencies per administration. Comparing the weakest and strongest congresses, these models estimate annual differences of between 1.5 and 2 new agencies.[19]

Unlike the results from the logistic regressions, divided government no longer has a statistically significant effect on agency creation. The models, how-

[16] We have also estimated negative binomial regression models with the same specifications, as well as a General Event Estimator using Gary King's COUNT program to account for the possibility of under-dispersion. The results from these models are virtually identical to what Table 3 reports (King 1989a).

[17] A likelihood ratio test of nested models indicates that including fixed effects is appropriate for all four models ($p < 0.00$). The only presidential indicators that were consistently significant or close to significant in the models were those for Kennedy (coeff.: 0.58, 1.12, 1.10, 1.46; s.e.: 0.60, 0.64, 0.41, 0.45) and Johnson (coeff.: −1.01, −0.55, −0.54, −0.30; s.e.: 0.66, 0.67, 0.47, 0.49). The base category is Clinton.

[18] Given their small number of observations, estimates of parameter effects from these event-count models are more sensitive to specification and measurement issues. While numerous alternative measures of congressional weakness (e.g., size of congressional majorities) produce consistent results in the logistic regressions, they do not perform as well in the event-count models. In addition, the decision to include fixed presidential effects and control for divided government appears to be more consequential in the Poisson regressions.

[19] To explore the functional form of the relationship between congressional weakness and unilateral activity, we re-estimated the Poissons with logged terms. The results were inconsistent for the two measures of congressional weakness. The measure based upon majority-party medians appeared to have a nonlinear relationship, with effects concentrated at the extreme right end of the distribution, while the measure based on chamber medians appeared to have a linear relationship.

TABLE 3

Unilateral Agency Creation, 1946–1995

	Including Reorganization Plans		Excluding Reorganization Plans	
	(1)	(2)	(3)	(4)
Congressional Weakness Measure Based Upon:				
Chamber medians	0.95**	—	0.82**	—
	(0.45)		(0.44)	
Maj party medians	—	1.26***	—	1.17**
		(0.51)		(0.51)
Controls				
Divided Gov (0,1)	−0.38	−0.43*	−0.29	−0.34
	(0.33)	(0.30)	(0.30)	(0.29)
War (0,1)	0.82**	0.84***	0.92**	0.94***
	(0.26)	(0.25)	(0.25)	(0.24)
Unemployment	0.07	0.05	0.16*	0.13*
	(0.09)	(0.09)	(0.09)	(0.09)
Post-1983 Indicator	−0.61*	−0.43	—	—
	(0.44)	(0.38)		
Constant	1.00	1.26	−0.10	−0.13
(N)	50	50	50	50
Log Likelihood	−106.34	−104.74	−102.57	−101.16
χ^2 (11,13 df)	86.21***	89.41***	81.37***	84.18***

Poisson regressions performed. * significant at the .10 level, one-tailed test; ** significant at the .05 level; *** significant at the .01 level. Models 1 and 2 include agencies created by executive order, departmental order, and reorganization plans; models 3 and 4 drop reorganization plans. All models control for fixed presidential effects.

ever, suggest that presidents create more agencies during wars and economic downturns. During periods of war, the president creates as many as 2.5 additional agencies per year. Similarly, increasing the yearly unemployment rate by two standard deviations leads to a jump of one agency created each year by executive action.

The models in Table 2 take as given the existence of an individual agency and then try to explain whether it is more likely that the agency will be created through executive action or legislation. These models therefore assume that the sample of agencies created mirrors the population of agencies proposed. In Table 3, meanwhile, the counterfactual to an agency created unilaterally is an agency created by legislation, or no agency at all. Unfortunately, nothing in the event-count models allows us to distinguish between these two possibilities.

To deal with these two kinds of censoring problems, we estimated seemingly unrelated Poisson regressions where the dependent variable in one equation was the annual number of administrative agencies created by legislation, and in the other, the number created by executive order, departmental order, or reorganization plan (King 1989b).[20] For the sake of simplicity, we present results just for the times series of executive-created agencies that includes reorganization plans and the measure of congressional weakness based upon majority party medians.[21]

The results are consistent with what is reported above.[22] The measure of congressional weakness continues to have significant and positive effects on the number of executive-created agencies each year. When Congress is weak, presidents create more agencies by executive action. While the coefficient on congressional weakness is negative in the statutorily created agencies equation, it is not significant.

Importantly, the ξ parameter is negative and statistically significant, highlighting the fundamental point that the two processes that generate administrative agencies (legislation and executive action) are negatively related. The more likely agencies are to be created by legislation, the less likely the president is to create agencies by executive action. The impacts of all of the control variables are statistically significant in both equations, and without exception the sign switches depending upon whether or not we are predicting the number of agencies created by legislation or executive action. While divided government has a negative effect on the number of executive-created agencies, its impact on agencies created by legislation is positive, and just the opposite holds for war and unemployment.

The results from Tables 2–4 suggest that as preferences within Congress diverge, Congress has a harder time enacting legislation; therefore, presidents enjoy a greater measure of discretion to strike out on their own and create administrative agencies unilaterally. Conversely, as congressional preferences coalesce, presidents exercise these powers less frequently.

Conclusion

When presidents unilaterally create an administrative agency and Congress willingly appropriates funding, how can we know for sure whether presidents have influenced, by any significant measure, what the agency does, or how

[20] We thank an anonymous reviewer for recommending this to us.

[21] Models that use as the dependent variable agencies created by secretarial or executive order only and models that use the measure of congressional weakness based upon chamber medians produce comparable results.

[22] A likelihood ratio test of nested models indicates that including fixed effects is appropriate for this model ($p < 0.00$). The presidential indicator coefficients from the executive-created agency equation that were significant were Kennedy (coeff.: 1.12; s.e.: 0.12), Johnson (−0.61; 0.13), Nixon (0.37; 0.12), Ford (−0.62; 0.14), Reagan (−0.43; 0.13), and Bush (−0.88, 0.14). The presidential indicator coefficients that were significant from the statutorily created agencies equation were Truman (0.91; 0.13), Eisenhower (−0.35, 0.13), Johnson (0.95; 0.13), Nixon (0.77; 0.13), Ford (0.42; 0.14), Carter (0.57; 0.13), Reagan (−0.43; 0.13), and Bush (−0.44; 0.14). The base category is Clinton.

TABLE 4

Modeling Executive and Legislative Agency Creation Simultaneously, 1946–1995

	Count of Statutory Agencies	Count of Executive Created Agencies
Congressional Weakness Measure Based Upon:		
Maj party medians	−0.01	1.10***
	(0.44)	(0.13)
Controls		
Divided Gov (0,1)	0.40***	−0.45***
	(0.10)	(0.10)
War (0,1)	−0.26**	0.86***
	(0.10)	(0.11)
Unemployment	−0.04*	0.05**
	(0.03)	(0.03)
Post-1983 Indicator	—	−0.37***
		(0.08)
Constant	1.06***	0.81***
(N)	50	50

Seemingly unrelated poisson regressions estimated. * significant at the .10 level, one-tailed test; ** significant at the .05 level; *** significant at the .01 level. $\xi = -0.82$***. The log likelihood for the model is -208.27 with a χ^2 of 61.34*** (14 df). All models control for fixed presidential effects.

well it does it? Is it not possible that presidents use these powers to create agencies that Congress would otherwise construct on its own?

Two empirical facts about the politics of agency creation suggest otherwise. First, agencies created by executive action are designed in ways that significantly strengthen the president's control over them. Agencies created through unilateral action are more likely to be placed in the cabinet and governed by administrators than by boards or commissions. When appointing people to these agencies, presidents select from a broader pool of prospects and assign them to positions with open terms.

For years, scholars have examined how presidents influence the bureaucracy by making strategic appointments, removing insubordinates, and proposing and reassigning budgets. Missing, however, has been an appreciation that these powers vary dramatically depending on how each administrative agency is designed. When it legislates, Congress often imposes restrictions that effectively insulate agencies from the president. When striking out on their own, however, presidents structure agencies in ways that significantly increase the amount of control they subsequently can exercise over them. In this sense, the president's power to create agencies precedes, and largely defines, all of his other mechanisms to oversee the bureaucracy.

The empirical tests presented here consistently suggest that Congress is not in the driver's seat. Its members do not dictate when or how presidents unilaterally create administrative agencies. On the contrary, presidents create more agencies when Congress is relatively weak, and hence is less capable of expressing its preferences or punishing the president should he contravene its members. Rather than using their unilateral powers to fulfill the expressed wishes of Congress, presidents appear to exercise these powers precisely when these wishes are individually most divided and collectively least coherent.

The ability to act unilaterally, we believe, stands out as one of the most important characteristics of the modern presidency. By strategically employing these unilateral powers, presidents have managed to create a broad array of administrative agencies that perform functions that congressional majorities oppose. Modern presidents, and those working under them, have unilaterally created a solid majority of the administrative agencies that currently operate in the federal bureaucracy. While the typical agency created through a unilateral directive is smaller than that created by legislation, many nonetheless rank among the most important in the federal bureaucracy. We hope that scholars will continue to examine the precise conditions under which presidents can exercise their powers of unilateral action and assess the influence that they afford.

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References

Arnold, Peri E. [1986] 1998. *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905–1996*. Lawrence: University Press of Kansas.

Bawn, Kathleen. 1997. "Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System." *Journal of Law, Economics, and Organization* 13(1): 101–26.

Binder, Sarah. 1999. "The Dynamics of Legislative Gridlock, 1947–96." *American Political Science Review* 93(3): 519–34.

Brady, David, Joseph Cooper, and Patricia Hurley. 1979. "The Decline of Party in the U.S. House of Representatives, 1887–1968." *Legislative Studies Quarterly* 4(3): 381–407.

Epstein, David, and Sharyn O'Halloran. 1999. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*. New York: Cambridge University Press.

Fisher, Louis. 1998. *The Politics of Shared Power: Congress and the Executive*, 4th ed. College Station: Texas A&M University Press.

Horn, Murray J. 1995. *The Political Economy of Public Administration: Institutional Choice in the Public Sector*. New York: Cambridge University Press.

Howell, William G. N.d. *Power without Persuasion: A Theory of Direct Presidential Action*. Princeton University Press. Forthcoming.

Kaufman, Herbert. 1976. *Are Government Organizations Immortal?* Washington, DC: Brookings Institution.

King, Gary. 1989a. "Variance Specification in Event Count Models: From Restrictive Assumptions to a Generalized Estimator." *American Journal of Political Science*. 33(3): 762–84.

King, Gary. 1989b. "A Seemingly Unrelated Poisson Regression Model." *Sociological Methods and Research* 17(3): 235–55.

Krehbiel, Keith. 1993. "Where's the Party?" *British Journal of Political Science* 23(April): 235–66.

Krehbiel, Keith. 1998. *Pivotal Politics: A Theory of U.S. Lawmaking*. Chicago: University of Chicago Press.

LeLoup, Lance T. 1980. *Budgetary Politics*. Brunswick, OH: King's Court.

Macey, Jonathan. 1992. "Organizational Design and Political Control of Administrative Agencies." *Journal of Law, Economics, and Organization* 8(1): 92–110.

Mayer, Kenneth. 2001. *With the Stroke of a Pen: Executive Orders and Presidential Power*. Princeton, NJ: Princeton University Press.

McCarty, Nolan M., and Keith T. Poole. 1995. "Veto Power and Legislation: An Empirical Analysis of Executive and Legislative Bargaining from 1961 to 1986." *Journal of Law, Economics, and Organization* 11(2): 282–312.

McCubbins, Mathew, Roger Noll, and Barry Weingast. 1989. "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies." *Virginia Law Review* 75(2): 431–82.

Moe, Terry M. 1989. "The Politics of Bureaucratic Structure." In *Can the Government Govern?*, eds. John E. Chubb and Paul E. Peterson. Washington, DC: Brookings Institutions Press.

Moe, Terry M., and William G. Howell. 1999. "The Presidential Power of Unilateral Action." *Journal of Law, Economics, and Organization* 29(4): 850–72.

Moe, Terry M., and Scott A. Wilson. 1994. "Presidents and the Politics of Structure." *Law and Contemporary Problems* 57(2): 1–44.

Morgan, Ruth P. 1970. *The President and Civil Rights: Policy-Making by Executive Order*. New York: St. Martin's Press.

Nathan, Richard P. 1969. *Jobs and Civil Rights: The Role of the Federal Government in Promoting Equal Opportunity in Employment and Training*. Washington, DC: Government Printing Office.

Nathan, Richard P. 1983. *The Administrative Presidency*. New York: John Wiley.

Peterson, Mark. 1992. "The Presidency and Organized Interests: White House Patterns of Interest Group Liaison." *American Political Science Review* 86(3): 612–25.

Poole, Keith. 1998. "Estimating a Basic Space from a Set of Issue Scales." *American Journal of Political Science* 42(July): 954–93.

Snyder, S. K., and Barry Weingast. 2000. "The American System of Shared Powers: The President, Congress, and the NLRB." *Journal of Law, Economics, and Organization* 16(2): 269–305.

Waterman, Richard W. 1989. *Presidential Influence and the Administrative State*, 1st ed. Knoxville: University of Tennessee Press.

Whitnah, Donald R. 1983. *Government Agencies*. Westport, CT: Greenwood.

Wood, B. Dan, and Richard W. Waterman. 1994. *Bureaucratic Dynamics: The Role of Bureaucracy in a Democracy*. Boulder: Westview.

Zegart, Amy Beth. 1999. *Flawed by Design*. Stanford, CA: Stanford University Press.

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