

Presidential Policymaking in the Face of Congressional Sanctioning

Meredith McLain

Vanderbilt University

August 23, 2022

Abstract

Do presidents freely issue unilateral directives to evade an obstructionist Congress, or are they constrained by their legislative opponents? Though conventional wisdom purports evasion, scholars actually find consistent evidence of presidential restraint. This literature almost exclusively focuses on executive orders, rather than the myriad of other unilateral directives at the president's disposal, and thus offers an incomplete picture of how effective Congress is at constraining unilateral policymaking. Accordingly, I develop a new theory of how presidents adjudicate between different types of directives based on the trade-offs related to their traceability, presidential incentives, and Congress's ability to retaliate based on available information. I argue that presidents rely on more traceable unilateral directives when facing ideologically aligned congresses that are less likely to retaliate. But they use less traceable directives, like unpublished memoranda, to evade legislative opponents, but at the expense of credit claiming opportunities and bureaucratic compliance. Using an original dataset of executive orders, published memoranda, and unpublished memoranda issued between 1981 and 2020, I find empirical support for the theory. Overall, this study demonstrates how presidents can overcome legislative checks by controlling the traceability of their unilateral activities.

1 Introduction

To commemorate the 25th anniversary of the Clean Water Act in 1997, President Bill Clinton announced his Clean Water Action Plan, which called on Congress to re-authorize the Act and further strengthen protections against the adverse effects of farmland run-off on Gulf Coast ecosystems.¹ Yet his new plan was resisted in the House and the Senate, both of which were controlled by Republicans. Though the House did reauthorize the Clean Water Act, it actually provided much less stringent protections than the original Act. Clinton vowed to veto the bill, but it failed to pass in the Senate.

Legislation, however, is not the only way that presidents can influence public policy. Clinton could act unilaterally using tools that direct agencies on how to implement policy, such as executive orders and memoranda. Yet no executive order was issued, nor was any other unilateral directive published in the *Federal Register*, to implement the Clean Water Action Plan. Instead, Clinton signed an unpublished memorandum directly criticizing Congress for its inaction by saying, "The Action Plan was coupled with a challenge to the Congress to reauthorize and strengthen the Clean Water Act, but Congress has yet to act on this challenge." At the same time, it directed agencies to address the farmland run-off and water quality standards that failed to pass in the Act's re-authorization.² While this memorandum implemented a key portion of the president's environmental policy agenda, the president did not publicize the memoranda. Without the President claiming credit for the policy, the directive was difficult for other actors to trace. As a result, the memorandum was never mentioned in a major newspaper, including the *New York Times*, *Washington Post*, or *The Wall Street Journal*, nor was it found in the Congressional Record at the time.

Presidents beyond Clinton have long relied on unilateralism to achieve their policy goals, leading many politicians and political observers to believe that more directives are used to bypass an obstructionist Congress. Contrary to this conventional wisdom, however, scholars

¹<https://clintonwhitehouse4.archives.gov/WH/New/html/19980219-22980.html>

²<https://www.presidency.ucsb.edu/documents/memorandum-clean-water-protection>

find that presidents actually issue *fewer* unilateral directives during divided government (Howell 2003; Chiou and Rothenberg 2014). Though the vast majority of this literature focuses exclusively on executive orders, recent scholarship finds that the same pattern holds for memoranda published in the *Federal Register* (Lowande 2014). Scholars have often attributed this finding to Congress’s ability to effectively constrain presidential unilateralism, though the mechanisms underlying such constraint are left mostly unexplored. The extant literature, moreover, does not consider how legislative constraints may vary based on the type of unilateral tool that is being employed. As demonstrated by the example above, presidents can successfully implement policy change with less traceable tools, like unpublished memoranda, which might limit the information that Congress needs to credibly sanction the president.

Accordingly, this paper develops a new theory of how presidents strategically use different types of unilateral directives based on the trade-offs surrounding their varying degrees of traceability, defined as how easily political actors can link a policy outcome to a bureaucratic directive issued by the president. Highly traceable directives, such as those published in the *Federal Register* or publicized by the White House, allow presidents to credit claim and facilitate bureaucratic implementation. But at the same time, they increase the information that Congress has to retaliate against them. Though less traceable directives like unpublished memoranda, remain under the political radar, which limits opportunities for credit claiming and increases the risk of bureaucratic non-compliance, they likewise decrease the likelihood of legislative constraints. Thus, the theory predicts that presidents will rely on less visible directives when Congress has the most incentive to constrain unilateralism, such as when there is significant inter-branch policy disagreement. But when they align with legislators, presidents can engage in more public forms of unilateralism to likewise reap the electoral and bureaucratic benefits of such actions.

To test this prediction, I use a dataset of all executive orders, as well as published and unpublished memoranda, issued in a policy area in every year between 1981 and 2020.

Consistent with previous studies, I find that presidents issue fewer executive orders and published memoranda as their partisan opposition increases in Congress. Yet contrary to the literature, presidents rely more greatly on less visible unpublished memoranda when facing legislative opposition than when faced with an aligned Congress. Altogether, the analysis supports my theoretical expectations that presidents strategically manipulate the visibility of unilateralism to evade Congress.

By limiting the focus to executive orders, previous studies have only provided an incomplete picture of whether, when, and how Congress can constrain executive unilateralism. Though a few recent studies (e.g., Lowande 2014, Kaufman and Rogowski n.d.) examine executive memoranda, they exclusively focus on published ones and thus miss nearly 500 unpublished policy memoranda issued since Ronald Reagan was president (1981-1989). Recent scholarship that pools these various directives into one analysis likewise overlooks the differences between them that might lead to diverging presidential strategies based on their trade-offs (e.g. Kaufman and Rogowski n.d.). Thus, unlike previous literature, this study provides a theory of when presidents strategically choose one unilateral tool over the other. Furthermore, this study sheds light on one of the most central and enduring questions surrounding unilateral policymaking. That is, can presidents engage in unilateralism to bypass Congress, or are they constrained by their legislative opponents? Here, this study offers an explanation for *when* legislative checks on unilateralism are most effective based on the directives traceability and the information needed for constraint.

2 Background

Presidents have vast powers to influence public policy. Perhaps most famously, they can influence the content of legislation through vetoes (e.g. Cameron 2000), agenda setting and proposal powers (e.g. Rudalevige 2002; Cohen 2012), and public appeals (e.g. Kernell 1986). Rising polarization and the increasing prevalence of divided government, however, has made

it exceedingly difficult for presidents to achieve their legislative agendas (Binder 2003; Lee 2015). Instead, greater scholarly and public attention has been given to the ways presidents can unilaterally influence policy through their control over the executive branch and policy implementation (e.g. Mayer 2001; Howell 2003; Chiou and Rothenberg 2014). Notably, unilateral directives allow presidents to direct bureaucratic policy implementation without direct congressional approval. The remainder of this section describes the differences between the various types of directives at the president's disposal.

2.1 Definitions

Although political observers are most familiar with executive orders, presidents have access to a wide range of other tools that allow them to unilaterally direct policy implementation. I broadly refer to these terms as bureaucratic directives, which provide agencies instructions on how to implement and interpret the law.³ While 'directive' might imply written instruction, I use the term to describe a wide variety of formal and informal tools.⁴

Bureaucratic directives have important differences that influence presidents' strategies when deciding which to use. One key characteristic of directives is traceability, given its implications for how well external actors can respond to them. First introduced by Arnold (1990) to characterize the public's awareness of legislators' actions and their resulting outcomes, I use the term traceability in this context to describe how easily an external actor (e.g. the media, Congress, the public, the bureaucracy) can link a policy outcome to a presidential action.⁵ Presidents are distanced from less traceable bureaucratic directives and,

³I will use the term 'bureaucratic directive' and 'unilateral directive' interchangeably.

⁴I am specifically dealing with directives issued by the presidents, not those issued by agencies, such as agency memoranda.

⁵Traceability should not be confused with visibility. A policy outcome can be highly visible, but difficult to trace back to a presidential action. For example, during the Reagan administration, the President directed the sale of arms to Iran to illegally fund an anti-communist rebel group in Nicaragua (Contra) via informal communication with top intelligence personnel. While the issue of government support for rebel groups, specifically the Contras, was a highly salient and visible issue, with Congress passing multiple bills on the issue, the use of informal communication allowed the President to distance himself from the scandal. After an extensive investigation, a number of high level, former intelligence officials were charged, but the President avoided criminal prosecution. In this case, the difficulty tracing executive policy implementation back to the

thus, more easily able to redirect the blame for any unpopular outcomes that result from them. Meanwhile, presidents are closely connected to more traceable bureaucratic directives and thus, it is easier for presidents to credit claim for policy outcomes associated with the directive.⁶ Figure 1 shows the spectrum of bureaucratic directives, arranged from the most to the least traceable.⁷

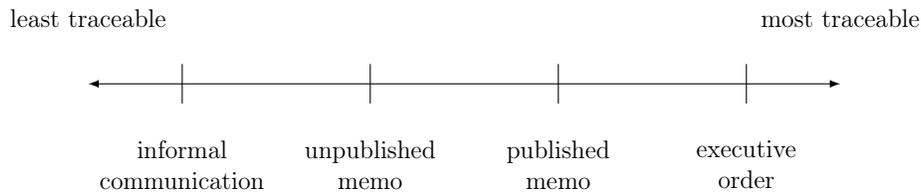


Figure 1 – Traceability Spectrum

One important characteristic of traceability is whether political actors actually know if the president issued a directive and its content. Importantly, the Federal Register Act requires presidents to publish executive orders in the *Federal Register*. In contrast, presidents are not required to publish presidential memoranda in the *Federal Register*, however, in some cases presidents choose to publish select memoranda. As such, I have divided memoranda into two categories, published memoranda and unpublished memoranda. In addition to publishing directives in the *Federal Register*, presidents themselves can publicize their bureaucratic directives via signing ceremonies, public statements, and press releases. As Figure 2 demonstrates, on average, presidents are more likely to publicize executive orders than published or unpublished memoranda. Since 1980, presidents have mentioned 18% of executive orders, 10%

President protected him from legal ramifications.

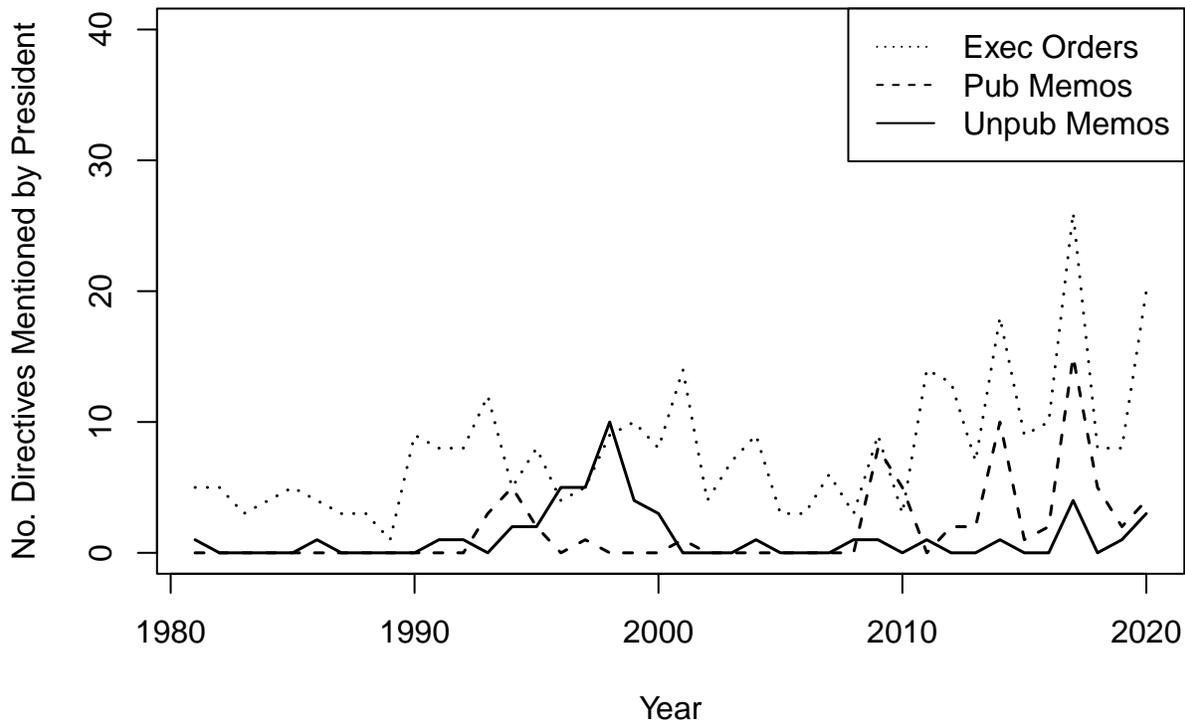
⁶While there are other important differences between types of directives that I will discuss in the following sections (e.g., legality, media coverage), for simplicity, I consider bureaucratic directives on a one-dimensional spectrum based on their level of traceability.

⁷Scholars have also examined other presidential policy tools, such as signing statements (i.e. Ainsworth, Harward, Moffett, and Rice 2014) and proclamations (i.e. Williams 2020), however these tools are not unilateral bureaucratic directives. While signing statements provide direction to bureaucrats concerning the implementation of legislation, this tool is not classified as being unilateral as the president can only issue a signing statement in response to legislation passed by Congress (Cooper 2014). While proclamations are unilateral directives, they are not issued to the bureaucracy, but to the public (Cooper 2014). Further, there are a number of other understudied unilateral directives, such as Presidential Determinations and National Security Directives. However, I do not include these types of directives as they are used exclusively to influence foreign policy.

of published memoranda, and 9% of unpublished memoranda in speeches, signing ceremonies, and written statements.⁸

Since executive orders are required to publish and the most likely to be publicized by

Figure 2- Directives Mentioned by the President by Type



presidents, they are the most traceable directives. Published memoranda are just below orders in terms of traceability as they are published in the *Federal Register*, but less likely to be publicized by the president. Unpublished memoranda are below published memoranda, as they are neither published in the *Federal Register* and are less likely to be publicized by the president. While actors are not able to immediately identify unpublished memoranda via the *Federal Register*, they can often find unpublished memoranda in the *Public Papers of the President* at some point after their issuance. The ability to eventually discover unpublished directives makes them more traceable than direct communication (e.g., phone calls, emails,

⁸Executive orders are also associated with increased media coverage, however, this is an indicator of the visibility of directives rather than the traceability.

face-to-face meetings). Direct communication between the president and agencies are the least traceable type of directive as there is no public record connecting the president with the directive, and they are rarely publicized by the president.

While some directives are inherently more traceable than others, the president can increase the traceability of a directive. By issuing a press release or holding a signing ceremony to announce the directive, presidents can directly claim credit for the directive, and increase its traceability.⁹ The following subsections describe the historical development of directives, their characteristics, and how they differ from each other.

2.2 Executive Orders

Executive orders are the most traceable of all directives and, as a result, the most well-studied unilateral tool (e.g. Howell 2003; Mayer 2001; Rudalevige 2021). As such, the term "executive order" is often used by the media, members of Congress, and the public to describe any unilateral directive, especially executive memoranda. Almost every president has issued at least one directive that has been classified as an executive order. Yet modern orders look quite different from early ones, some of which were only identified by the inclusion of language such as 'Approved' or 'Let it be done.' It was not until 1873 that President Grant established a uniform structure for executive orders, which included the requirement that they be signed by the president, rather than just an agency head. Today, President Kennedy's Executive Order 11030 provides the basis for the structure, approval, and publication process for modern executive orders.¹⁰ Today, orders begin with the authority under which presidents act, the creation or alteration of a policy, and a statement indicating the order should not be

⁹In some cases, external actors can increase the traceability of a directive without presidential consent. For example, Congress might discover the use of a less traceable directive via oversight hearings as bureaucrats discuss presidential initiatives. However, the discovery of these directives is extremely difficult without presidents publicizing them. In many cases, this is simply a function of dumb luck rather than strategic congressional oversight.

¹⁰President Kennedy's order is based off an earlier executive order issued by President Hoover, which developed a process for crafting orders. Further, Presidents Johnson, Carter, Reagan, and most recently, George W. Bush have all issued executive orders implementing minor alterations to Kennedy's executive order; but the basic structure has stayed the same since 1962 (Cooper 2014).

implemented in a way as to conflict with existing law.

Even with the establishment of a consistent structure in 1873, executive orders were not systematically cataloged until 1905, when the State Department requested that all agencies submit them. In 1907, the Department established a system for numbering executive orders, beginning with the earliest orders they were sent through those being actively issued. However, the State Department did not share its catalog with outside actors, including Congress or the Supreme Court. The information asymmetry created between the executive branch and the other political institutions is exemplified by *United States v. Smith* (1909). In this case, government prosecutors charged five Texas oil producers with violating the production limits imposed by a Roosevelt executive order. After advancing to the Supreme Court, government attorneys realized the provision at the core of the case was not actually part of President Roosevelt's executive order.

This case and other frequent instances showcasing Congress's information disparity frustrated it to the point that it passed the Federal Register Act in 1936. This Act required that all executive orders, proclamations, and regulations be published in the *Federal Register*. Such regular publication of these policy actions would allow Congress to trace politics to executive branch actors, thus providing it with the information necessary for constraint. In the final institutional check on executive orders, the courts deemed them to have the force of law, so long as they do not violate the Constitution or existing statute.

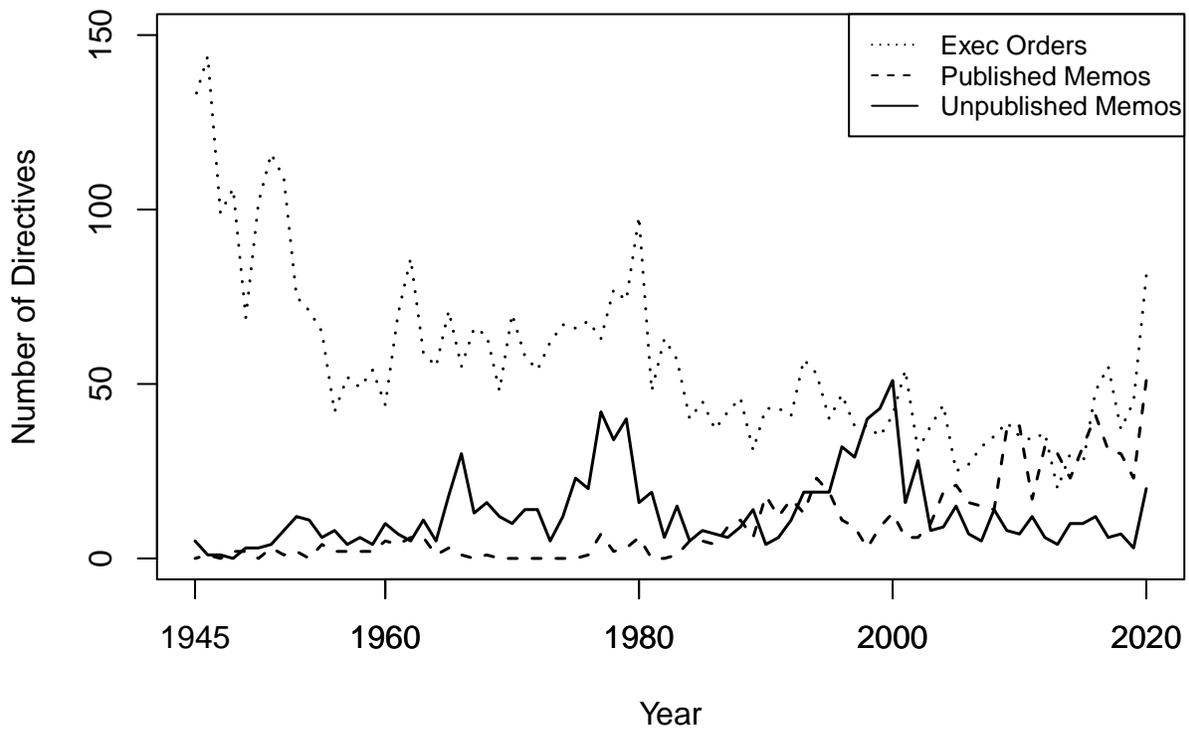
Presidents have used executive orders to accomplish a variety of goals. Many executive orders deal with administrative matters within the bureaucracy, including the order of succession within agencies and the rate of pay for federal employees. There are also many executive orders in which the president asks agencies, or creates task forces, to invest in information about a policy.¹¹ Executive orders can directly order policy change, through the instructions they give to agencies implementing the law. For example, President Biden

¹¹Beyond task forces, the president can also use executive orders to create new, permanent agencies. For example, President Carter used an executive order to establish the Federal Emergency Management Agency (FEMA), to respond to disasters. However, most task forces are instructed to disband after their assigned task is completed.

issued an executive order directing the Department of Justice to stop renewing contracts with privately owned prisons. Additionally, presidents do still favor executive orders during periods of crisis, such as economic recessions, periods of international conflict, and most recently, the COVID-19 pandemic.

While executive orders are the most readily studied unilateral action, presidents use executive orders far less frequently now than they did in the first half of the twentieth century. As Figure 3 indicates, the number of executive orders steadily decreased during the twentieth century, and has remained relatively constant since the 1990s. As executive order use has decreased, attention has shifted to executive memoranda.

Figure 3- Directives Overtime by Type



2.3 Executive Memorandum

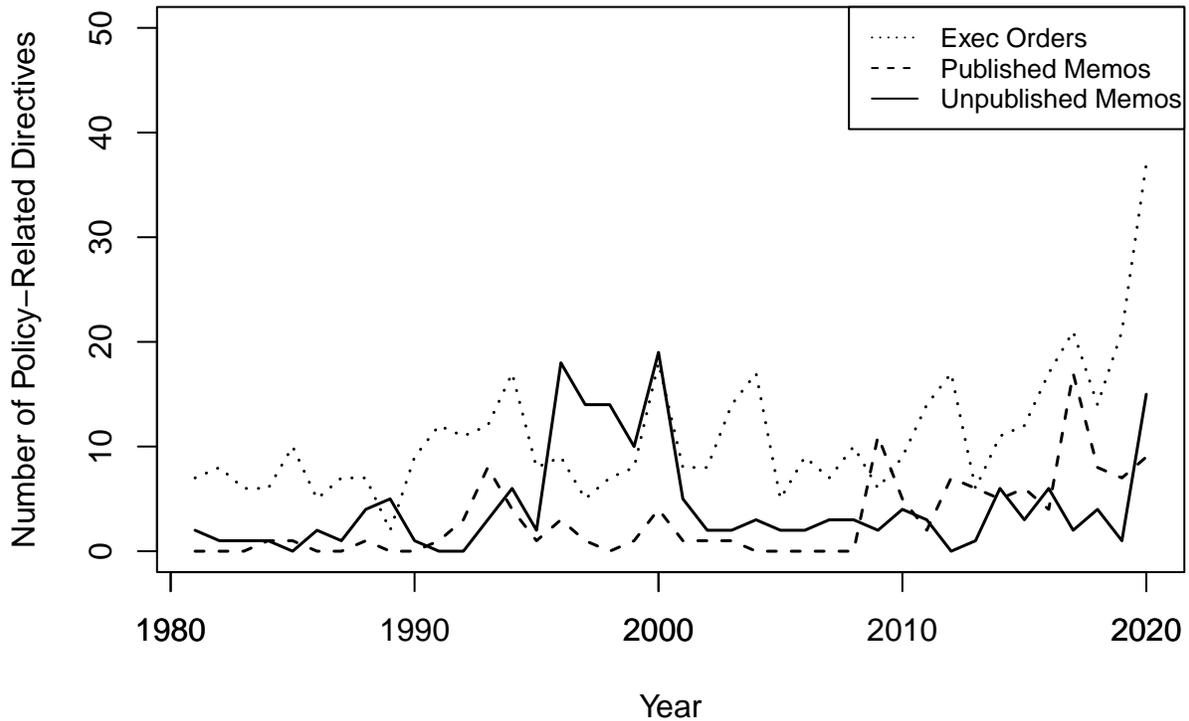
Executive memoranda serve the same function as executive orders, but they are not required to be published in the *Federal Register*. Their defining characteristic compared to other directives is the label "memorandum" placed by the White House on the document. This label was not consistently used until the early twentieth century, in contrast to executive orders that have a much longer history. Early to mid-century memoranda were used for limited purposes, such as to provide information about the status of a foreign nation, indicate dissatisfaction with legislation, or to make hortatory declarations.¹² President Reagan began using memoranda for more expansive policy purposes, like to issue binding pronouncements, initiate or direct regulation, delegate authority to agencies, and manage federal personnel. As demonstrated in Figure 2, President Clinton built upon his Republican predecessors and used executive memoranda even more extensively (Cooper 2014).

Similar to executive orders, memoranda are used for a variety of purposes, including delegating authority to agencies, altering the order of succession in agencies, and other administrative purposes; and in a variety of issue areas, including the foreign and domestic policy realms. As Figure 3 demonstrates, executive orders are generally used more often for policy implementation than either published or unpublished memoranda. However, there are multiple years where President Clinton issued more policy-related unpublished memoranda than executive orders. President Obama used published memoranda to implement policy at about the same rate as he used executive orders.

In contrast to executive orders, there is a greater ambiguity surrounding the legality of memoranda. While the Supreme Court has not ruled on the legal validity of executive memo-

¹²Presidential determinations present Congress and the public with information about the status of a foreign country, or an activity in the foreign policy realm. Memoranda of disapproval are "public veto statements." As opposed to a traditional veto, these memoranda allow presidents to rewrite portions of the legislation by issuing directives to alter the purpose of the statute, while using the veto to dispose of portions of the bill he does not support. Today, presidents use signing statements for these purposes. Hortatory declarations have the same purpose as presidential proclamations, but they are directed at executive actors as opposed to the public (Cooper 2014). The function of these tools is not to direct executive agencies on policymaking, thus they are excluded from my study.

Figure 4- Directives of Policy-Related Directives by Type



randa, the U.S. Eighth Circuit Court of Appeals suggested they are legally interchangeable with executive orders in *Lower Brule Sioux Tribe v. Deer* (1995). Further, congressional actors and the Office of Legal Counsel (OLC) consider executive memoranda to have the same legal authority as executive orders.¹³

Bureaucratic actors likewise appear to view memoranda as a valid tool to direct policy implementation, and there is at least anecdotal evidence of bureaucratic compliance. On March 9, 2009, for example, President Obama published an executive memorandum outlining priorities agencies should focus on to reduce waste under government contracts. In October 2009, the Deputy Director of the Office of Management and Budget (OMB) described in a hearing for the Subcommittee on Contracting Oversight the "three-pronged" approach that OMB was using to implement this memorandum. Reports from the National Aeronautics and Space Administration (NASA) provide evidence of the agency implementing the guidance from

¹³<https://crsreports.congress.gov/product/pdf/R/R46738>

the March memorandum and, subsequently, observing a decrease in their overall contracting budget.

There is similar anecdotal evidence for bureaucratic compliance with unpublished memoranda. For example, on September 24, 2015, President Obama issued the "Memorandum on the Establishment of the White House Legal Aid Interagency Roundtable."¹⁴ The memorandum directed eighteen agencies to come together under the leadership of the Attorney General and the Director of the Domestic Policy Council to share best practices for assuring that individuals have access to legal aid and that they can adequately utilize government resources. This roundtable has existed since 2015 within the Department of Justice, with 22 government agencies participating in semiregular meetings to discuss legal justice for disadvantaged groups.¹⁵ While there is anecdotal evidence of compliance, without the authority associated with publication, presidents might anticipate an increased risk of bureaucratic non-compliance as bureaucrats might mistakenly assume these directives hold less legal validity (Cooper 2014).

The limited extant literature on executive memoranda only considers those published in the *Federal Register* (e.g. Lowande 2014), finding their use mirrors that of executive orders. The main existing study claims that patterns in the use of executive memoranda mirror the trends observed in executive order use. Yet, unpublished memoranda comprise 44% of all executive memoranda and are not nearly as traceable as published memoranda. While unpublished memoranda can eventually be accessed via the American Presidency Project's *Public Papers of the President*, not all unpublished memoranda are immediately available here. The inability to access them immediately via the *Federal Register* delays political actors' access to information, placing them at the same informational disadvantage they were in before the *Federal Register* was created. This difference in traceability between published and unpublished memoranda has implications for the development and testing of theories explaining this variation.

¹⁴<https://www.govinfo.gov/content/pkg/DCPD-201500643/html/DCPD-201500643.htm>

¹⁵<https://www.justice.gov/olp/legal-aid-interagency-roundtable>

2.4 Direct Communication

Finally, the least traceable bureaucratic directives are informal, direct communications between the White House and the bureaucracy. These communications can come in a variety of forms, including emails, phone calls, or in-person conversations. As neither the public nor institutional political actors have access to emails and phone transcripts from members of White House staff, these informal conversations are impossible to directly observe.¹⁶ Although agency actions are observable, it is unclear whether they are the direct consequences of an informal presidential communication. Consequently, scholars do not generally study these mostly untraceable bureaucratic directives. For these reasons, the empirical analysis later in the paper will focus on directives connected to presidents via their signatures (i.e., executive orders, published memoranda, unpublished memoranda).

3 Theory

As the previous section demonstrated, presidents have a variety of bureaucratic directives at their disposal. Yet, the extant literature has focused almost exclusively on executive orders, and more specifically, whether Congress constrains presidential executive order use. Political actors frequently consider executive orders and other unilateral actions as a means for the president to bypass Congress when legislating is more difficult; namely, during divided government (Binder 2003). However, the extant literature does not support this assertion, with scholars finding that the president issues fewer executive orders during divided government (Howell 2003; Chiou and Rothenberg 2014). Scholars argue that this pattern results from the constraints presidents face from political actors. Congress has multiple methods to sanction presidents, including legislation, appropriations, and oversight hearings, in response to their use of unilateral actions (Howell 2003; Chiou and Rothenberg 2014).

¹⁶We might be able to indirectly observe direct communication via agency memoranda or presidential statements. However, it is difficult to definitively tie these to the president. Thus, they are not included in my analysis.

The Supreme Court can overturn unilateral actions that violate the Constitution or existing statutes (Howell 2003). More recently, political scientists have explored public perceptions of unilateral actions and how the public might act as a constraint on presidential unilateralism (Reeves and Rogowski 2015; 2016). However, presidents have policies they want implemented during divided government (Howell 2003; Cohen 2012), but struggle to enact (Binder 2003). While presidents might have an incentive to issue fewer highly traceable directives, such as executive orders, as the risk of congressional sanctioning increases, executive orders are not the only bureaucratic directive that the president can use to engage in policymaking (Cooper 2014). In the following theory, I argue that presidents will strategically choose directives based on their traceability in order to avoid congressional sanctioning, while implementing policy change.

3.1 The Benefits and Costs of Unilateralism

Presidents have two main goals that bureaucratic directives can help them achieve. First, they want to move policy closer to their ideal outcome. Directives provide presidents with a legally valid way to do so through agency instruction of policy implementation, without the direct approval of Congress (Howell 2003). Second, presidents seek re-election for themselves and members of their party. They can use bureaucratic directives to credit claim, thus demonstrating action on important policy areas to the public. As the most highly visible figure of their party, presidents' actions can determine the electoral fates of members of their party; and thus, I argue that they have similar electoral incentives during their first and second terms.

Though directives help presidents achieve their goals, they come with both internal and external costs. Bureaucratic directives require extensive input and oversight from bureaucratic agencies. Relevant agencies provide issue area expertise that informs the policy choice. Executive orders, specifically, must be reviewed by multiple agencies to ensure that they comply with existing statutes. While this review process is not standardized for

memoranda, there is evidence that some memoranda, specifically those that are associated with large monetary expenditures, go through a similar process (Rudalevige 2021). The executive branch must expend valuable resources crafting bureaucratic directives.

While there are internal costs associated with directives, there are also a number of external costs to using them. Congress provides one of the most powerful constraints on bureaucratic directives and relates to how other external actors might limit presidential power. For instance, the courts can overturn directives for exceeding their statutory authority, which is determined by the discretion that Congress gives to presidents through legislation. Alternatively, members of Congress might directly sanction presidents for using unilateral directives that conflict with their policy goals that are unpopular with their constituents. In the next section, I explore the various ways that Congress can sanction the president, and how such sanctions might affect the costs of unilateralism.

3.2 Congressional Sanctions

When responding to presidents' unilateral action, Congress can impose both statutory and non-statutory sanctions. The former includes Congress's ability to pass legislation that directly overturns directives or limits presidential power in other ways. It can likewise defund executive programs through appropriations, or otherwise impede the president's legislative agenda through overrides and agenda-setting. While some scholars have challenged the efficacy of these mechanisms (Moe and Howell 1999), others interpret the decrease in executive order use during divided government as evidence of effective congressional sanctioning (Howell 2003; Mayer 2001).

Most statutory sanctions require super-majority support in Congress, which presents a collective action problem that is difficult to overcome (Moe and Howell 1999). For example, to overturn a bureaucratic directive via legislation, Congress would need to have a veto-proof majority in both chambers of Congress. Yet even without super-majority support, Congress can still impede presidents' legislative goals through their agenda setting power as

Congressional leadership controls the agenda. Thus, Congress can avoid the collective action problem associated with legislating to indirectly respond to unilateralism.

Non-statutory sanctions can likewise be used to directly or indirectly respond to executive unilateralism. These kinds of sanctions are tied to the appointments and oversight processes; which are attractive since they do not require majority or super-majority consent. Senate leadership, for example, has the power to schedule confirmation votes for presidential political appointees, including federal judges and some bureaucrats. If the Senate refuses to confirm a position, the position will remain vacant. Vacancies reduce executive branch efficiency, slowing presidential policy implementation (Bolton, Potter, and Thrower 2015; O’Connell 2009; Kinane 2021; Piper and Lewis 2022).

Congressional committees can likewise impede presidents’ policy and electoral goals through oversight activities. By calling bureaucrats away to the Hill, legislators distract the bureaucracy from policy implementation by diverting time and resources to prepare for, and attend, the hearing. These hearings not only influence the executive branch’s efficiency, but long term-investigations can negatively influence presidents’ public approval, and therefore their chances of re-election (Kriner and Schickler 2014; Lewis-Beck and Rice 1982). Consequently, the prospect of oversight might deter presidents from unilateral activities in order to avoid these costs.

While Congress can impose costs on the president through these various sanctions, it must have the capacity to do so. Congressional capacity refers to the ability of Congress to do its job, including drafting legislation, conducting oversight hearings, and confirming nominations (Bolton and Thrower 2021). Higher capacity congresses have access to greater resources, including high quality staff and legislative support organizations such as the Congressional Resource Service and the General Accounting Office (e.g. Clarke 2020; LaPira, Drutman, and Kosar 2020; Drutman and Teles 2015; Mills and Selin 2017). Importantly, these resources provide Congress with a key component of its capacity: information. The more information legislators have, the better equipped they are to engage in various policymaking activities to

constrain the executive branch and presidential unilateralism.

Though the extant literature mostly focuses on how staff can provide legislators with information, the traceability of the bureaucratic directive that the president selects influences the amount of resources Congress must expend to acquire information about it. Specifically, since direct communications and unpublished memoranda are not published in the *Federal Register*, information about the use of these directives is much more difficult for Congress to obtain. Congress will have to expend more resources to gain information about the use of less traceable directives than highly traceable directives. Thus, it is more difficult for Congress to sanction the use of less traceable directives than highly traceable directives. Congress's strategic use of resources will influence presidents' decision when choosing a directive.

3.3 Traceability and Unilateral Strategies

Although less traceable directives can limit Congress's ability to retaliate, they can also be costly to the president's goals for several reasons. First, they limit credit claiming opportunities by not allowing the public to attribute favorable policy change to the president. Credit claiming helps presidents and their party achieve their electoral goals (Mayhew 1974). Less traceable directives do not assist presidential goals in this way.

Further, less traceable directives might decrease bureaucratic compliance in two ways. First, these directives do not have the same standardized distribution process as more visible ones. The lack of a standardized process makes these directives harder for external actors to identify, and it can also leave executive branch actors without complete or accurate information regarding the president's intention. In this case, the agency might fail to enact the president's directive, or enact it improperly due to a lack of information (Edwards 1979).

The second means of non-compliance is a result of active bureaucratic resistance. Agencies have their own ideological dispositions (Richardson, Clinton, and Lewis 2018), and their own means by which to hinder presidential policy implementation (Potter 2019). If an agency does not agree with a presidential directive, then the president might anticipate an increased

risk of bureaucratic non-compliance. This risk is especially high for low traceability directives because external actors, such as Congress, the public, and interest groups, cannot act as an accountability mechanism to detect instances of bureaucratic non-compliance. Thus, less traceable directives, specifically, have an increased likelihood of not being implemented as the president intended.

In summary, bureaucratic directives can be used to advance the president's electoral and policy goals. Yet the scope of their benefits as well as the associated costs can differ based on the traceability of the directive being employed. Highly traceable directives might be more effective in advancing the president's electoral goals through public credit claiming opportunities, and their policy goals through more effective bureaucratic compliance. At the same time, their visibility puts them at a higher risk of congressional sanctioning. Less traceable directives are beneficial in advancing presidents' policy goals by better avoiding congressional sanctioning. Yet these directives limit presidents' electoral goals through fewer credit-claiming opportunities and increase the risk of bureaucratic non-compliance threatening the president's policy goals. Thus, presidents must consider these trade-offs when strategically deciding which types of directives to use. In particular, a key consideration is the likelihood that Congress would want to sanction the president based on the policy change that follow from the unilateral directive. When congressional sanctioning is likely, presidents will use less traceable directives in order to avoid the additional costs. But when Congress is less likely to sanction, presidents can use highly traceable directives to reap the additional credit claiming and bureaucratic compliance benefits.

Though Congress certainly has many incentives to sanction presidents, one key incentive is its policy preferences compared to the presidents. In particular, Congress is more likely to sanction presidents for unilaterally moving policy away from its ideal outcome, which is more likely to occur when their preferences are not aligned. Yet when the president and Congress share ideological preferences, Congress is less likely to sanction the president for unilateral actions because the policy change that follows from the directive is likely to be in

its favor. Hence, presidents will issue more traceable directives when their preferences align with Congress because of the decreased risk of sanctioning, but they will rely more on less traceable directives to achieve their goals when facing legislative opponents to reduce the information available to Congress, and thus, the likelihood of retaliation.

To summarize, there are two main factors that influence Congress's likelihood to sanction presidential bureaucratic directive use: 1) the preference alignment between Congress and the president and 2) the resources Congress must expend to engage in sanctioning. The president cannot control Congress's policy preferences and, thus, the preference alignment between the branches. The president can influence how easily Congress can access the information needed for sanctioning via the type of directive he chooses to use. Specifically, when the president uses a less traceable bureaucratic directive, he limits the information available to Congress about the directive. Here, Congress must expend greater resources to sanction the president, thus decreasing its likelihood. However, there are policy and electoral trade-offs that come with using less traceable directives, such that presidents will want to use them strategically. Specifically, their incentive to increase the cost of sanctioning will increase as their preferences diverge from Congress. Thus, as the distance between the president and Congress's ideal outcome increases, she will use more of the less traceable directives (e.g. unpublished memoranda, direct communications) and fewer of the more traceable directives (e.g. executive orders, published memoranda).

4 Data and Measurement

4.1 Dependent Variable

To test the theory, I collect data on all executive orders and memoranda issued between 1981 and 2020. I begin my analysis with the Reagan administration since he was the first president to systematically use memoranda interchangeably with executive orders (Cooper 2014). As previously discussed, executive orders are easily accessible via the *Federal Register*, due to

the publication requirement established by the Federal Register Act. Yet this requirement does not apply to executive memoranda, and presidents can select which ones to publish or omit. As such, I distinguish between published memoranda and unpublished memoranda when constructing the dependent variables. The former, like executive orders, are collected from the *Federal Register*.

To collect unpublished memoranda, I identify those memoranda found in the *Public Papers of the President* and cross-check those memoranda against those published in the *Federal Register*.¹⁷ Those memoranda found in the *Public Papers of the President*, but not found in the *Federal Register*, comprise my unpublished executive memoranda data set.

I read the text of all directives and code them by issue area, based on the Comparative Agenda Project's major topic codes. I omit all directives that are used for ceremonial functions, such as announcing the charity for the combined federal campaign or announcing the closure of executive departments and agencies for national holidays.

I count the number of executive orders, published memoranda, and unpublished memoranda in every issue area and year, using those counts as three separate dependent variables. Thus, the unit of analysis is issue area-year, which effectively increases the number of observations and allows us to control for policy-specific factors such as issue salience and presidential priority. Accordingly, I include fixed effects for each issue area to control for possible variations between issues.

Other studies of executive orders subset the data based on whether the orders are considered "significant," as determined by whether the order is mentioned in the *New York Times*. However, I argue that one of the attractive characteristics of unpublished executive memoranda is that they garner less media attention than other directives, such as executive orders, while still directing important policy changes. Thus, the traditional measures of significance are not very helpful in trying to identify significant directives across a wide range

¹⁷As discussed in the Background section, the president will frequently direct memoranda, even those not published in the *Federal Register*, to the *Public Papers of the President*. The president might begin including these memoranda during his administration, or after he has left office. There is not a set timeline for their inclusion into the presidential record.

of directives.

4.2 Independent Variables

The main independent variable is the preference divergence between the president and Congress, using two different measures. First, I use the traditional divided government measure used throughout the unilateral action literature (i.e., Howell 2003; Mayer 2001). Divided government is measured as 1 if the president is from the opposite party of at least one chamber of Congress and 0 otherwise (*Divided*). Second, I use the percentage of seats held by members of the opposition party in a House committee as an alternative measure, which allows for greater variation in preference divergence (*% Opposition Party*).¹⁸

I likewise control for other likely determinants of the president's decision to engage in unilateralism. As discussed above, the resources that are available to Congress might influence its ability to sanction the president, and thus affect executive unilateralism (Bolton and Thrower 2022). Thus, I include logged committee staff as a measure of congressional capacity ($\ln(\textit{Committee Staff})$).

Next, new presidents are more inclined to use unilateral directives to overturn the policies of previous administrations, particularly those of the opposing parties. Thus, following previous studies (e.g. Howell 2003), I include an indicator variable for the first year of a new administration after a party change (*Party Change*). Similarly, I control for the final year of an administration preceding a party change, as outgoing presidents might try to unilaterally push for policy change as they exit (e.g. Mayer 2001) (*End Term*).

Next, presidents have long used unilateral directives to respond to economic and internal crises. As such, I measure the annual inflation rate (*Inflation*). I likewise control for instances of war (*War*). While Congress has not declared war since World War II, this control variable accounts for periods of prolonged foreign conflict, such as Operation Desert Storm (1990-91)

¹⁸I only use House committees, as the narrow margins between parties in the Senate does not allow for much variation between committees. See Appendix 8.2 for more information about which committees I matched with each major topic code.

and the Global War on Terror (2001-03). Finally, I include presidential fixed effects to account for unobserved variations between presidents, such as leadership style (Howell 2003; Mayer 2001).

5 Main Results

To examine the relationship between congressional sanctioning and presidential unilateralism, I estimate a series of negative binomial regression models. Table 1 measures preference divergence as the percentage of presidential opposition in House committees, while in Table 2 uses divided government. For both tables, each column corresponds to a different type of directive: executive orders (column 1), published memoranda (column 2), and unpublished memoranda (column 3).¹⁹

Recall that the theory predicts that presidents should be more (less) constrained by legislative opponents when issuing high (low) traceability directives. Thus, we expect a negative coefficient on opposition party size and divided government for executive orders and published memoranda, but a positive coefficient for unpublished memoranda. The empirical results in Tables 1 and 2 are consistent with this prediction.

More specifically, an increase in opposition party representation on committees is associated with a significant decrease in executive order use, where each additional member of the opposition party on a committee is associated with a 73% decrease in executive orders. This result is consistent with previous studies, which find that presidents issue fewer executive orders as the opposition party gains power in Congress (Mayer 2001; Howell 2003). Further, presidents issue fewer published memoranda as the opposition party gains power within Congress, where a one unit increase in the size of the opposition party is associated with 76% fewer published memoranda. The statistical power of this finding, however, is less than what is observed with executive orders. That said, this negative relationship is consistent

¹⁹While there are multiple model specifications that can be used to examine count data, negative binomial regressions are better suited for over-dispersed data, which might be a cause for concern in this case.

Table 1 – The Effect of the Size of the Opposition Party on Unilateralism, by Directive Type

	Executive Orders	Published Memos	Unpublished Memos
% Opposition Party	-1.37** (0.49)	-1.7** (0.83)	3.44** (0.94)
ln(Committee Staff)	0.05 (0.1)	0.48** (0.18)	0.03 (0.16)
End Term	0.36** (0.07)	0.4** (0.13)	0.24* (0.12)
Party Change	0.13 (0.09)	-0.22 (0.15)	0.02 (0.19)
Inflation	0.01 (0.02)	-0.14** (0.04)	0.12* (0.07)
War	0.38** (0.1)	-0.22 (0.19)	0.44* (0.25)
Presidential Fixed Effects	✓	✓	✓
Issue Area Fixed Effects	✓	✓	✓
Constant	1.05* (0.57)	-2.88** (1.03)	-5.29** (1.06)
N	800	800	800

Note: Coefficients are from negative binomial regression models with robust standard errors in parentheses.

Excludes ceremonial directives.

Only includes data from Reagan through Obama.

*p < .1

**p < .05

with Lowande’s (2014) findings. Yet, he does not examine unpublished memoranda, and thus is not accounting for the approximately 550 unpublished memoranda issued since the Reagan administration. As I expected, there is a significant, positive relationship between unpublished memoranda and the size of the opposition party. Particularly, a one unit increase in the opposition party, corresponds to a 2896% increase in unpublished memoranda. As congressional and presidential preferences diverge, presidents issue significantly fewer executive orders and published memoranda, but instead rely more on unpublished memoranda.

When using divided government as a metric of preference divergence in Table 2, the coefficient for executive orders is no longer statistically significant, but the coefficient is still

Table 2 – The Influence of Divided Government on Unilateralism by Directive Type

	Executive	Published	Unpublished
	Orders	Memos	Memos
Divided	−0.05 (0.07)	−0.43** (0.12)	0.56** (0.13)
ln(Committee Staff)	0.08 (0.1)	0.47** (0.18)	0.01 (0.16)
End Term	0.32** (0.07)	0.46** (0.13)	0.24** (0.12)
Party Change	0.21** (0.09)	−0.28** (0.13)	−0.03 (0.18)
Inflation	0.01 (0.02)	−0.14** (0.04)	0.1 (0.06)
War	0.39** (0.1)	−0.08 (0.18)	0.19 (0.24)
Presidential Fixed Effects	✓	✓	✓
Issue Area Fixed Effects	✓	✓	✓
Constant	0.1 (0.43)	−3.51** (0.78)	−3.51** (0.79)
N	800	800	800

Note: Coefficients are from negative binomial regression models with robust standard errors in parentheses.

Ceremonial directives are excluded.

*p < .1

**p < .05

negative, as predicted.²⁰ Consistent with my theory, divided government is associated with a significant reduction in published memoranda use. Specifically, a shift from unified to divided government is associated with a 33% decrease in published memoranda. This result is consistent with Lowande’s (2014) finding that presidents issuing fewer published memoranda during divided government; but as I previously discussed, unpublished memoranda do not follow this trend. Instead, a shift from unified to divided government is associated with a 73% increase in unpublished memoranda use.

Most of the control variables align with my expectations. The impact of congressional

²⁰The extant literature finds a negative, statistically significant relationship, but these studies use data going back to the Truman administration (e.g. Howell 2003; Mayer 2001). My more limited time frame might explain the difference.

committee staff on unilateral directives is only statistically significant for published memoranda; as the amount of congressional committee staff increases, presidents issue more published memoranda. Presidents also issue significantly more directives in the last year of their term, consistent with the findings in previous studies of executive orders and published memoranda (e.g. Howell 2003; Lowande 2014). Presidents use more executive orders and unpublished memoranda after a presidential party change occurs, but they issue fewer published memoranda. This negative relationship is not consistent with previous studies but, again, these studies also include a different time frame (e.g. Howell 2003; Mayer 2001). The negative, insignificant coefficient on party change for published memoranda is consistent with the existing literature (Lowande 2014); and the coefficients for inflation and war also align with my expectations based on previous research (Howell 2003; Lowande 2014).

6 Testing the Mechanism: Alternative Measures of Traceability

Overall, the empirical findings in Section 5 are consistent with the theoretical prediction that presidents are most constrained by legislative opponents when issuing high visibility directives. Specifically, I found support for this prediction using one way to measure visibility—that is, separating out directives (executive orders, published memoranda, and unpublished memoranda) based on the label applied by the president and their publication in the *Federal Register*. Yet, there are other ways to group these directives, based on their publication and mentions in other public sources. This section provides additional tests of the theory by examining two alternative measures of traceability: (1) pooled analysis of directives published and not published in the *Federal Register*; (2) analysis of executive orders before and after their publication was mandated by the Federal Register Act.

6.1 Importance of Publication in the *Federal Register*

In the main models, I separated directives by type (i.e. executive order and executive memoranda) and publication (i.e. published and unpublished memoranda). While executive orders traditionally receive more media coverage, congressional attention, and promotion by the president, they have one important characteristic in common with published memoranda: they are published in the *Federal Register*. In my theory, I argue that publication plays a key role in determining how effective Congress is in constraining presidential unilateralism. Regardless of label, presidents should anticipate more congressional sanctioning when using more traceable, published directives, compared to less traceable, unpublished directives. To demonstrate the importance of the information provided by publication, I pool all the directives from the original dataset and divide them based on whether they were published in the *Federal Register* or not. If publication does allow Congress to constrain presidential unilateralism more effectively, then we should observe presidents publishing fewer directives as their preferences diverge from those of Congress.

Table 3 presents results from regression models where the dependent variables are the number of directives published in the *Federal Register* (i.e. executive orders and published memoranda) (columns 1 and 3) and the number of directives not published in the *Federal Register* (i.e. unpublished memoranda) (columns 2 and 4). To measure preference divergence, I use the incidence of divided government in columns 1 and 2, and the percentage of congressional House committee seats from the opposing party of the president in columns 3 and 4.

My analysis suggests that as presidents' support in Congress decreases, they issue significantly fewer directives in the *Federal Register* and significantly more unpublished directives. Specifically, a shift from unified to divided government is associated with a 12% decrease in published directives, but a 73% increase in unpublished directives. Similarly, a unit increase in the size of the president's opposition in Congress is associated with a 77% decline in published directives and a 2896% spike in unpublished directives. These models

Table 3 – Influence of Publication on the Use of Directives

	Divided Government		Percent Opposition	
	In FR	Not in FR	In FR	Not in FR
Preference Divergence	−0.14** (0.07)	0.56** (0.13)	−1.42** (0.47)	3.59** (0.92)
ln(Committee Staff)	0.2** (0.09)	0.02 (0.16)	0.17* (0.09)	0.04 (0.17)
End Term	0.35** (0.07)	0.22* (0.12)	0.37** (0.07)	0.22* (0.12)
Party Change	0.14* (0.08)	0.02 (0.17)	0.08 (0.09)	0.08 (0.19)
Inflation	−0.01 (0.02)	0.1 (0.06)	−0.01 (0.02)	0.12* (0.07)
War	0.27** (0.09)	0.16 (0.24)	0.23** (0.09)	0.42* (0.25)
Presidential Fixed Effects	✓	✓	✓	✓
Issue Area Fixed Effects	✓	✓	✓	✓
Constant	−0.27 (0.41)	−3.55** (0.79)	0.61 (0.54)	−5.44** (1.06)
N	800	800	800	800

Note: Coefficients are from negative binomial regression models with robust standard errors in parentheses.

Ceremonial directives are excluded.

*p < .1

**p < .05

provide further evidence of the importance of traceability. When Congress can easily trace directives to presidents, it is better able to constrain their actions. When presidents face congressional opposition, they rely more greatly on less traceable directives as a way to influence policy under the radar.

6.2 Impact of the *Federal Register* on Executive Orders

As previously discussed, Congress passed the Federal Register Act in 1936. The Act created a public repository for executive branch documents, where presidents were required to publish all executive orders and presidential proclamations. Before the passage of the Act, Congress faced an information deficit regarding executive branch actions. As a result, Congress passed

the Federal Register Act to ensure it had access to more information about executive actions, allowing it to better constrain the president. In this analysis, I divide executive orders into those that were published before and after the Federal Register Act to explore the importance of the *Federal Register* and Congress's access to information on the president's decision to act unilaterally via executive order.²¹ Before the passage of the Act, I expect the preference divergence between the president and Congress to have no effect on the president's use of executive orders. After the passage of the Act, Congress would have access to more information about presidential unilateral actions, and thus, I expect presidents would issue fewer executive orders as their preferences diverge from Congress's. The extent to which there is a difference in congressional constraint before and after the passage of the Act demonstrates how important publication in the *Federal Register* is for Congress to be able to effectively constrain presidential unilateralism.

Table 4 uses executive order data from the State Department from 1905 to 2020 to examine the importance of the *Federal Register*. I do not expect presidents to be constrained before the creation of the *Federal Register* (columns 1 and 3), but do expect to observe a negative relationship after the creation of the *Federal Register* (columns 2 and 4). As in the previous models, I measure preference divergence through the traditional divided government metric (columns 1 and 2) and the percentage of either chamber of Congress controlled by the opposite party as the president (columns 3 and 4). I include the same control variables from the main model, except for logged committee staff. Instead, I use logged legislative expenditures to control for congressional capacity for this longer time period.

As expected, presidents were not constrained by Congress when issuing executive orders prior to their mandated publication in the *Federal Register*. The coefficients on divided government and percent congressional opposition before the *Federal Register* are both statistically insignificant, with the latter even being positive. But after the passage of the Federal Register Act, presidents decreased their usage of executive orders in the face

²¹I do not examine executive memoranda in these models as executive memoranda use was inconsistent in the early-to-mid-twentieth century.

Table 4 – Influence of the *Federal Register* on Executive Order Use

	Divided Government		Percent Opposition	
	Pre-FR 1905-35	Post-FR 1936-2020	Pre-FR 1905-35	Post-FR 1936-2020
Preference Divergence	−0.04 (0.15)	−0.1 (0.07)	0.45 (0.88)	−1.96** (0.68)
Logged Leg Exp	0.63 (0.61)	−0.23* (0.13)	−0.04 (0.48)	−0.4** (0.14)
End Term	0.24** (0.12)	0.3** (0.06)	0.24 (0.13)	0.29** (0.07)
Party Change	−0.09 (0.26)	0.03 (0.08)	−0.01* (0.14)	−0.04 (0.1)
Inflation	0.01 (0.02)	−0.03** (0.005)	−0.02 (0.02)	−0.02** (0.009)
War	0.38 (0.26)	0.1 (0.08)	0.45 (0.28)	0.17 (0.11)
Presidential Fixed Effects	✓	✓	✓	✓
Issue Area Fixed Effects	✓	✓	✓	✓
Constant	1.44 (3.31)	4.64** (0.73)	2.97 (3.51)	8.4** (0.89)
N	620	1700	620	1700

Note: Coefficients are from negative binomial regression models with robust standard errors in parentheses.

Ceremonial directives are excluded.

*p < .1

**p < .05

of legislative opponents. Though the coefficient is negative for both measures of preference divergence, it is only significant for the percent opposition measure. Thus, presidents' use of executive orders became much more constrained by Congress once their visibility increased due to the publication requirement in 1936.

7 Conclusion

Political scientists, political pundits, and members of Congress find themselves in constant discussion over whether unilateral actions provide the president with undue power. Facing increasing resistance from Congress, unilateralism seems to provide presidents with the perfect

opportunity to create policy without interference. Despite this conventional wisdom, scholars repeatedly find that presidents actually use these tools less often during divided government, perhaps to avoid congressional sanctioning (Howell 2004; Chiou and Rothenberg 2014). Congress, however, must have the institutional capacity to impose sanctions, like legislation, appropriations, and oversight hearings, on the executive branch (Bolton and Thrower 2021). While Congress can enhance its own resources through staffing and funding, presidents can also increase the resource burden Congress faces through their choice in bureaucratic directive. I explain when presidents have the incentive to increase costs for Congress by decreasing its access to information. While existing studies of unilateral actions focus on executive orders, I consider the various unilateral policymaking tools presidents have at their disposal and explore how the characteristics of each tool influence the amount of information Congress has about their use. Specifically, presidents can use less traceable directives that make it more difficult for Congress to gather information about presidents' unilateral policy actions, and thus, sanction them. When presidents anticipate increased congressional sanctioning (e.g. during periods of divided government), they will issue more of the least traceable directives (e.g. unpublished memoranda) and fewer of the most traceable directives (e.g. executive orders, executive memoranda).

By expanding the study of directives beyond executive orders, I find that presidents are not always constrained by their legislative opponents when acting unilaterally. Instead, they can strategically select less visible directives to influence policymaking in the face of anticipated congressional constraints. Specifically, presidents use more unpublished memoranda— which are not published in the *Federal Register* or immediately known by political actors— during divided government. Unlike previous studies, I find that Congress is only able to constrain executive unilateralism if it has adequate information about these actions. Thus, allowing presidents to circumvent Congress through the increased use of less traceable directives during divided government.

However, Congress is not the only actor that can impede presidents from unilaterally in-

fluencing policy. Indeed, the bureaucracy is responsible for implementing unilateral directives. With this responsibility comes the power to decide how directives are implemented. Some recent research explores the role of the bureaucracy in crafting unilateral actions, specifically executive orders (Rudalevige 2021), and the bureaucracy's strategic use of their rulemaking authority to disrupt presidential goals (Potter 2019). However, bureaucratic compliance with unilateral actions is understudied (Kennedy 2014). In future research, I plan to examine how the risk of bureaucratic non-compliance influences presidents' choice in bureaucratic directive.

Beyond institutional constraints, the public might also impact executive unilateralism, particularly given presidents' electoral incentives and opportunities for credit claiming. Specifically, the traceability of directives influences the amount of information the public has and thus, its ability to sanction the president. Further, public support for presidential unilateral actions can provide presidents with leverage with Congress. Thus, the public can play an important role in presidential decision-making. Furthermore, presidential decision-making does not occur in a vacuum. Institutions and the public influence presidential decisions, especially regarding bureaucratic directive use, and must be considered in tandem.

8 Appendix

8.1 Summary Statistics

Table 5 – Summary Statistics for All Variables

Variable	Minimum	Median	Mean	Maximum
Executive Orders	0	2	3.58	35
Published Memoranda	0	0	1.81	41
Unpublished Memoranda	0	0	1.17	26
Divided Government	0	1	0.75	1
% Opposition Party	0	0.56	0.54	1
Logged Leg. Exp.	7.82	8.22	8.21	8.66
End Term	0	0	0.25	1
Party Change	0	0	0.125	1
Inflation	-0.36	2.84	2.93	10.38
War	0	0	0.125	1

8.2 Issue Area to House Committee

Table 6 – CAP Major Topic Code to Corresponding House Committee

CAP Major Topic	House Committee
Macroeconomics	Budget
Civil Rights	Oversight and Government Reform
Health	Oversight and Government Reform
Agriculture	Agriculture
Labor	Education and Labor
Education	Education and Labor
Environment	Energy and Commerce
Energy	Energy and Commerce
Immigration	Judiciary
Transportation	Transportation and Infrastructure
Law and Crime	Judiciary
Social Welfare	Ways and Means
Housing	Financial Services
Domestic Commerce	Energy and Commerce
Defense	Armed Services
Technology	Science, Space, and Technology
Foreign Trade	Financial Services
International Trade	Foreign Affairs
Government Operations	Oversight and Government Reform
Public Lands	Natural Resources

8.3 Alternative Unit of Analysis

The unit of analysis for most studies of unilateral actions is year. As discussed in the body of the paper, there are numerous reasons to use issue area by year as the unit of analysis, including that it provides me with more observations allowing for more precise estimates. However, I also replicate the models from previous studies with a year level unit of analysis and the divided government measure (e.g., Mayer 2001; Howell 2003). Table 5 provides the results for these year models.

Table 7 – Year Regressions: Divided Government Measure

	Executive Orders	Published Memos	Unpublished Memos
Divided	-0.03 (0.1)	-0.43** (0.18)	0.42** (0.22)
Logged Leg Exp	0.15 (0.5)	0.5 (0.75)	-0.34 (1.05)
End Term	0.22** (0.09)	0.42** (0.13)	0.17 (0.21)
Party Change	0.24** (0.12)	-0.26** (0.13)	0.28 (0.2)
Inflation	0.003 (0.03)	-0.11 (0.08)	0.06 (0.08)
War	0.29** (0.1)	-0.05 (0.3)	0.05 (0.47)
Presidential Fixed Effects	✓	✓	✓
Constant	2.56 (4.0004)	-1.77 (6.03)	3.66 (8.41)
N	40	40	40

Note: Coefficients are from negative binomial regression models with robust standard errors in parentheses.

Ceremonial directives are excluded.

*p < .1

**p < .05

The coefficient for executive orders remains negative and insignificant. Presidents issue significantly fewer published memoranda during divided government, which aligns with the results presented in the paper. The coefficient on unpublished memoranda remains positive

and significant.

8.4 Alternate IV Measures

The measures of congressional-presidential preference alignment used in the paper are chamber level measures, while the dependent variable is at the committee level. To capitalize on the committee level variation in the dependent variable, I run a robustness check using the distance between the committee chair’s DW-Nominate score and the president’s DW-Nominate score. Due to data limitations, I was only able to construct this measure through the Obama administration.

Table 8 – NOMINATE Model

	Executive Orders	Published Memos	Unpublished Memos
Distance b/w Com & Pres	−0.1 (0.11)	−0.51** (0.18)	0.28 (0.2)
Logged Leg Exp	0.38 (0.35)	0.9 (0.57)	−0.74 (0.72)
End Term	0.22** (0.06)	0.27** (0.1)	0.12 (0.13)
Party Change	0.18* (0.1)	−0.19 (0.16)	−0.12 (0.2)
Inflation	0.02 (0.02)	−0.11** (0.04)	0.12* (0.06)
War	0.36** (0.11)	−0.3 (0.19)	0.29 (0.27)
Presidential Fixed Effects	✓	✓	✓
Issue Area Fixed Effects	✓	✓	✓
Constant	−2.58 (2.82)	−8.64* (4.62)	2.69 (5.82)
N	720	720	720

Note: Coefficients are from negative binomial regression models with robust standard errors in parentheses.

Excludes ceremonial directives.

Only includes data from Reagan through Obama.

*p < .1

**p < .05

Using this measure of alignment, only the coefficient for published memoranda remains significant. However, the coefficients for executive orders and unpublished memoranda still move in the expected direction, but are statistically insignificant. This shift in the significance might partially be due to the omitted data. Overall, I do not feel that the results undermine those presented in the paper.

9 Works Cited

- Binder, Sarah A. 2003. *Stalemate: Causes and Consequences of Legislative Gridlock*. Washington, D.C.: Brookings Institution Press.
- Bolton, Alexander, Rachel Augustine Potter, and Sharece Thrower. 2015. "Organizational Capacity, Regulatory Review, and the Limits of Political Control." *The Journal of Law, Economics and Organization* 32(2): 242-71.
- Bolton, Alexander and Sharece Thrower. 2021. *Checks in the Balance: Legislative Capacity and the Dynamics of Executive Power*. Princeton: Princeton University Press.
- Cameron, Charles. 2000. *Veto Bargaining: Presidents and the Politics of Negative Power*. Cambridge: Cambridge University Press.
- Chiou, Fang-Yi and Lawrence S. Rothenberg. 2014. "The Elusive Search for Presidential Power." *American Journal of Political Science* 58(3): 653-68.
- Clarke, Andrew J. 2020. "Congressional capacity and the abolition of legislative service organizations." *Journal of Public Policy* 40(2): 214-35.
- Cohen, Jeffrey E. 2012. *The President's Legislative Policy Agenda, 1789-2002*. Cambridge: Cambridge University Press.
- Cooper, Phillip J. 2014. *By the Power of the President: The Use and Abuse of Executive Direct Action, 2nd ed.*. Lawrence, Kansas: University Press of Kansas.
- Drutman, Lee and Steven Teles. 2015. 2015. "A New Agenda for Political Reform." *The*

Washington Monthly 47(3-5): 23.

Edwards III, George C. 1979. "Problems in Presidential Policy Implementation." in *The Presidency: Studies in Policy Making*, eds. Stephen A. Shull and Lance T. LeLoup ((Brunswick, OH: King's Court, 1979)

Howell, William G. 2003. *Power without Persuasion*. Princeton: Princeton University Press.

Kaufman, Aaron R. and Jon C. Rogowski. 2020. "Interbranch Conflict and Executive Action." (Working Paper) Retrieved from <https://scholar.harvard.edu/rogowski/research>

Kernell, Samuel. 1986. *Going Public: New Strategies of Presidential Leadership* Washington D.C.: CQ Press.

Kinane, Christina M. 2021. "Control without Confirmation: The Politics of Vacancies in Presidential Appointments." *American Political Science Review*.

Kriner, Douglas L. and Eric Schickler. 2014. *Investigating the President: Congressional Checks on Presidential Power* Princeton: Princeton University Press.

LaPira, Timothy M., Lee Drutman, and Kevin R. Kosar. 2020. *Congress Overwhelmed: The Decline in Congressional Capacity and Prospects for Reform*. Chicago: University of Chicago Press.

Lee, Frances E. 2015. *Insecure Majorities: Congress and the Perpetual Campaign*. Chicago: University of Chicago Press.

- Lewis-Beck, Michael S. and Tom W. Rice. 1982. "Presidential Popularity and Presidential Vote." *Public Opinion Quarterly* 46(4): 434-37.
- Lowande, Kenneth S. 2014. "After the Orders: Presidential Memoranda and Unilateral Action." *Presidential Studies Quarterly* 44(4): 724-41.
- Mayer, Kenneth R. 1999. "Executive Orders and Presidential Power." *Journal of Politics* 61(2): 445-66.
- Mayer, Kenneth R. 2001. *With the Stroke of a Pen: Executive Orders and Presidential Power* Princeton: Princeton University Press.
- Mayhew, David R. 1974. *Congress: The Electoral Connection*. New Haven: Yale University Press.
- Mills, Russell M. and Jennifer L. Selin. 2017. "Don't Sweat the Details! Enhancing Congressional Committee Expertise Through the Use of Detailees." *Legislative Studies Quarterly* 42(4): 611-36.
- Moe, Terry M. and William G. Howell. 1999. "The presidential power of unilateral action." *The Journal of Law, Economics, and Organization* 15(1): 132-79.
- O'Connell, Anne Joseph. 2009. "Vacant Offices: Delays in Staffing Top Agency Positions." *Southern California Law Review* 82: 913-1001.
- Piper, Christopher and David E. Lewis. 2022. "Do Vacancies Hurt Federal Agency Performance?" *Journal of Public Administration Research and Theory*

Potter, Rachel Augustine. 2019. *Bending the Rules: Procedural Politicking in the Bureaucracy*. Chicago: University of Chicago Press.

Richardson, Mark D., Joshua D. Clinton, and David E. Lewis. 2018. "Elite Perceptions of Agency Ideology and Workforce Skill." *The Journal of Politics* 80(1): 303-8.

Rudalevige, Andrew. 2002. *Managing the President's Program: Presidential Leadership and Legislative Policy Formation*. Princeton: Princeton University Press.

Rudalevige, Andrew. 2021. *By Executive Order: Bureaucratic Management and the Limits of Presidential Power*. Princeton: Princeton University Press.