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# 1

## “On My Own”?

### EXECUTIVE ORDERS AND THE EXECUTIVE BRANCH

THE NEWS BROKE just before five o'clock on Friday afternoon, a week and a few hours after President Donald J. Trump had taken the oath of office. It was January 27, 2017, and the new president had just signed Executive Order (EO) 13769, grandly titled “Protecting the Nation from Foreign Terrorist Entry into the United States.”

The order was the intended implementation of Trump’s campaign pledge to enact a “total and complete shutdown of Muslims entering the United States” until vetting procedures had been enhanced. (Or at least, as Trump put it in December 2015, “until our country’s representatives can figure out what the hell is going on.”)<sup>1</sup> Citing the Immigration and Nationality Act and the “authority vested in me as President by the Constitution,” EO 13769 prevented various populations “of particular concern” from entering the United States, effective immediately: anyone arriving from seven nations in the Middle East and North Africa for at least 90 days, and all refugees, regardless of their country of origin, for at least 120 days. Syrian refugees fleeing the civil war there were barred indefinitely. Case-by-case exceptions were allowed for refugees claiming religious-based persecution, giving priority to Christian applicants from Muslim-majority countries, but the maximum number of refugees that could be admitted to the United States in 2017 was more than cut in half. The stated goal was to “protect [American] citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.”<sup>2</sup> The president soon took to Twitter to tout his “Homeland Security travel ban” and told reporters that Americans “want

to see people that can love our country come in, not people that are looking to destroy our country.”<sup>3</sup>

That, of course, was only the start of the story. As word of the EO’s release spread, so did public anger: thousands of protesters flooded more than a dozen airports from Los Angeles to New York, from Portland, Oregon, to Portland, Maine—as well as city squares, university quadrangles, and even the street in front of the Trump International Hotel in Washington, D.C.<sup>4</sup>

There they met “chaos, confusion, and bureaucratic heartburn,” as CBS White House correspondent Major Garrett put it.<sup>5</sup> White House staff and Department of Homeland Security (DHS) lawyers struggled to come to agreement over what the EO actually meant and thus how it should be implemented.<sup>6</sup> The directive had gone into effect with hundreds of affected travelers already in the air and thousands of others at departure gates—but federal Customs and Border Patrol personnel were given no notice of its issuance. Nor did they receive advance guidance regarding its demands, which might have clarified, for example, whether the ban affected U.S. permanent residents holding green cards or travelers already issued valid visas. Iraq’s government, working with the United States to battle the Islamic State terrorist group, howled in protest at being included in the measure; by contrast Saudi Arabia, home of most of the 9/11 terrorists cited in the EO as a rationale for its issuance, was *not* included. In short, it seemed the new administration itself had failed to figure out “what the hell is going on.”

It became clear that the order had been formulated by “a handful of Trump political appointees” working in the White House with little expertise in the complications the policy invoked.<sup>7</sup> Sen. Lindsey Graham reportedly told the president that it appeared that “some third grader wrote it on the back of an envelope.”<sup>8</sup> An array of relevant government agencies were purposefully cut out of the drafting process;<sup>9</sup> the DHS inspector general concluded that the department “and its components had no opportunity to provide expert input in drafting the EO. Answers to critical questions necessary for implementation were undefined when the EO issued.”<sup>10</sup> In December 2018, former DHS secretary John Kelly acknowledged that “I had very little opportunity to look at” the drafts of the order.<sup>11</sup> (Blain Rethmeier, who worked on the DHS transition team, put it more colorfully: “[Kelly] got handed a shit sandwich the first week on the job.”)<sup>12</sup>

Legal questions arose quickly as well: for instance, could an executive order actually bar permanent residents from reentry? Did the EO represent an impermissible religious test in operation? The acting attorney general (Trump’s

nominee to the post had not yet been confirmed) had not been consulted—and only learned of the EO’s existence when her deputy read about its issuance on the *New York Times* website.<sup>13</sup> At first the Department of Justice (DOJ) denied all knowledge of the order; later it transpired that the acting head of DOJ’s Office of Legal Counsel (OLC) had quickly reviewed it and issued a one-sentence statement saying the EO was “approved with regard to form and legality” (though in fact attorneys there had “strenuously objected that it needed further review”).<sup>14</sup> The acting attorney general disagreed with OLC and decided the Justice Department would not defend the EO in court. She was immediately fired, and charged by the White House with “betrayal.” But a series of judges soon took a similar view and blocked implementation of the order.<sup>15</sup>

As it struggled to deal with the aftermath, the administration issued reams of conflicting statements, then dropped EO 13769 altogether: on March 6, the president issued a second, revised executive order. Six months later, on September 24, a quite different version was promulgated, this time formatted as a proclamation. It was that third iteration of the “ban” that was ultimately upheld by a divided U.S. Supreme Court in late June 2018, eighteen months after the first version was issued.<sup>16</sup> By then, yet another EO had been issued allowing a trickle of refugees to enter the United States once more.<sup>17</sup>

The travel ban saga—the fact of the order, its substance, and the reaction to it—highlights two key elements of this book.

The first is simply that executive orders matter. President Trump’s signature set in motion important and immediate alterations in U.S. government policy. More generally, EOs are a mechanism through which the president can exercise delegated statutory authority or constitutional powers, potentially producing consequential substantive change across a wide range of policy arenas. As increased partisan polarization makes legislative action ever harder to achieve, the importance of unilateral directives to presidential policymaking rises apace. And even though EOs are directly aimed at shaping the behavior of government employees, their impact on the public may be significant. It is no wonder presidents have long agreed with Clinton White House aide Paul Begala when it comes to unilateral action: “Stroke of the pen—law of the land. Kind of cool.”<sup>18</sup>

Second, and far less intuitively: the executive *branch* matters to executive orders. Pundits often present such directives as literally unilateral, as do presidents: George W. Bush, for instance, told a group of supporters in 2004 that

“Congress wouldn’t act, so I signed an executive order. That means I did it on my own.”<sup>19</sup> But (as discussed in a moment) he did not. The “stroke of a pen” is cool—but it is also the culmination of the input, influence, and frequently even instigation of the wider bureaucracy. As a result, we can recast the issuance of executive orders as a function of presidential management.

The travel ban may seem an odd way to make this point: after all, President Trump really did act by himself, with the help of a White House aide or two. Yet given the chaos that ensued, from runways to courtrooms, the travel ban highlights the sway of executive branch engagement as an exception that proves the rule. As *Politico* reported later, the “nonpartisan experts had not been consulted before the orders were drafted. . . . Typically, an executive order of such immense impact would have undergone weeks, if not months, of . . . interagency review. Instead . . . former NSC staffers say they were asked to review the travel ban and about half a dozen other draft executive orders in less than a day.”<sup>20</sup> The EO damaged the president, politically, because it was so poorly conceived and crafted, substantively. “If Trump really wanted to bar refugees or citizens from specific countries,” the careerists said, “they would have helped him do it in a smarter way.”<sup>21</sup> The version accepted by the Supreme Court more than a year later was much revised to reflect substantial bureaucratic input.

In the travel ban case, the influence of departments and agencies is visible as a photographic negative—that is, in the glaring legal and material errors its absence caused. As Sen. Lamar Alexander put it, “this vetting process needed more vetting.”<sup>22</sup> But more generally, agency involvement is harnessed in order to drive positive changes to the substance of an EO. For the Bush “equal treatment” order just noted, staff located in the new Office of Faith-Based and Community Initiatives worked closely with White House lawyers and domestic policy advisors as well as a range of other experts across the bureaucracy invited to comment by the Office of Management and Budget in a comprehensive departmental review process. The Justice Department weighed in on constitutional issues of church and state; the Labor Department advised on matters relating to employment discrimination. Agency feedback and push-back were brought on board as the EO took final form. “Nobody was wanting to miss a loop,” one Justice Department drafter noted later, given the importance of the order to Bush’s domestic policy program.<sup>23</sup>

Agency influence may be even more extensive than this. Often a department serves as an order’s originator—often to the president’s benefit, as we will see, but not always to the president’s pleasure. Even as criticism of EO

13769 grew, for instance, Trump repeatedly railed that DOJ's efforts to replace it were "bullshit," even tweeting angrily that "the Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to [the Supreme Court]."<sup>24</sup> Yet it is Trump's signature on that "watered down" version. And if that variant of agency authority is uncommon, bureaucratic politics more broadly are not. Those politics, and the agency sway they reflect, mean that draft EOs are almost always amended, frequently delayed, and sometimes abandoned entirely.

### Healthy Children and Logged Lobbyists

To make that point more concrete, let's consider a tale of two orders—or, more accurately, two tales that led to only one order.

Bill Clinton issued Executive Order 13045—"Protection of Children from Environmental Health Risks and Safety Risks"—on April 21, 1997.<sup>25</sup> The EO declared that children "may suffer disproportionately" from such risks, and thus, each federal agency was to "make it a high priority to identify and assess" them and to "ensure" they were addressed by "its policies, programs, activities, and standards." It created a task force (co-chaired by the Health and Human Services [HHS] secretary and by the administrator of the Environmental Protection Agency [EPA]) and also an "interagency forum" (convened by the Office of Management and Budget [OMB]) to track research regarding risks to children and produce an "annual compendium of the most important indicators" of their well-being.

Most critically, perhaps, the order added a new hook to the regulatory review function conducted by OMB's Office of Information and Regulatory Affairs (OIRA). Agencies still had to justify to OIRA why the benefits of a proposed regulation exceeded its costs, and then defend their "evaluation of the environmental health or safety effects of the planned regulation on children," and provide "an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency." As an aside, the new EO revoked a Reagan-era order requiring similar government-wide rulemaking attention to "family policymaking criteria," notably "the marital commitment."<sup>26</sup>

If surveyed solely from the point of issuance, EO 13045 has many attributes traditionally associated with unilateralism, suggesting a president imposing his will on the executive branch. The order created new, centralized processes to reflect presidential preferences and priorities. A predecessor's

actions were set aside. Bureaucrats complained about its burdens. Outside critics grumbled—a front-page *Washington Times* story quoted riled representatives of the Heritage Foundation and the Family Research Council, while then senator Jeff Sessions introduced a bill to overturn Clinton’s action—but could not gain much traction.<sup>27</sup> President one, agencies (and enemies) nil?

Yet if we pan out to include the formulation of the order in the analysis, the impact and influence of the wider executive branch quickly comes into view. That began at the beginning: in an August 12, 1996, memo to more than a dozen Cabinet and White House policy staff, EPA administrator Carol Browner noted that her agency would soon release a new *National Agenda to Protect Children’s Health from Environmental Health Risks*.<sup>28</sup> Since “protecting children from environmental health threats has been one of EPA’s highest priorities during the Clinton Administration,” Browner told her colleagues, one “opportunit[y] for additional action” was a “potential executive order” that would tighten the standards set by government regulation to make rules “protective enough of the potentially heightened risks faced by children.” By January 1997, the EPA—not a White House unit—had drafted such an order and sent it to OMB, which in turn sent it out for comment and review as part of its standard process of “central clearance.” (This process is discussed in great detail in chapter 3.) Some seventeen executive agencies and EOP staff offices became involved, as the EPA sought to “generat[e] support within the White House” for its text.

While agencies uniformly said they supported the idea of protecting children from environmental hazards, concerns with the draft order surfaced immediately. Various staffs raised a number of objections—most colorfully, suggesting the order put a “kick-me sign” on their own backs. That is, since the EO would have required them not only to evaluate the effects of the planned regulation on children but to explain if their proposal *failed* to protect children fully—and to justify why it was issued anyway—it effectively directed opponents to the best grounds for a lawsuit. How, for instance, the Department of Health and Human Services asked, was it supposed to say why tobacco remained a legal product? Banning cigarettes would clearly be better for children’s health.

A series of negotiations ensued over four months of meetings; “we have made significant drafting changes to accommodate concerns,” Domestic Policy Council (DPC) staffer Diane Regas told her boss, Elena Kagan, in March. Those concerns came from within the Executive Office of the President (EOP) as well as the wider bureaucracy; indeed, a Kagan memo to Clinton

chief of staff Erskine Bowles that same month noted that DPC, the National Economic Council (NEC), the Council on Environmental Quality (CEQ), and the Office of Science and Technology Policy (OSTP) were all involved. It was not until late March that Regas could note that “I think we have resolved all the kids e.o. issues *among W[hite] H[ouse] offices.*”<sup>29</sup> And “serious last-minute objections” from the agencies remained, even as the EPA continued to press key Clinton aide Bruce Reed for support. Kagan’s notes from an April 1 meeting transcribe EPA’s somewhat exasperated objections to Treasury’s “nervousness” and to others’ continued queries: “we’ve redone [the order] to address concerns. Weakened already.” Still, as it moved on, the draft order was amended repeatedly to be more and more tightly targeted. Agencies were to comply only “to the extent permitted by law and appropriate,” and independent regulatory agencies were merely “encouraged” to participate in the order’s implementation. The contentious section requiring agencies to identify better alternatives was tweaked to make the justification less defensive (and thus, not trivially, less work-intensive for bureaus).

In the end, then, it was something of an understatement to note (as the decision memo sent to the president did, on April 11, 1997) that “the proposed Executive Order . . . has been the subject of extensive discussion with affected agencies.” Even then, several departments continued to press reservations, and Clinton listened: in approving the order, he requested still more conciliation to their objections. “Might want to ease burden a bit,” the president scrawled in the margin, lessening the scope of the analysis of the alternative routes not taken. Yet another revision thus ensued before the order was formally issued.

At least that order *was* issued. Jimmy Carter, by contrast, had promised in 1976 to give America a “government as good as its people”; in the post-Watergate world that meant opening up his administration to new levels of accountability.<sup>30</sup> In February 1977 he asked his top domestic aide, “What can we do without legislation to maximize openness in government?”

Among the answers was to require all federal agencies to keep a public log of all their contacts with outside groups and individuals. Good government groups were strongly in favor of logging—“this is a chief item on the Common Cause agenda,” White House domestic policy czar Stu Eizenstat told the president. Carter approved the idea in March and was promised it could be “implemented within one month.”<sup>31</sup>

It was not. After White House lawyers worked with their counterparts at the Department of Justice to draft an executive order on the topic, Carter



counsel Doug Huron passed the draft along to OMB for review. “This is a priority item,” Huron emphasized, directing that it be ready for presidential signature in two weeks.<sup>32</sup> But four weeks later, an OMB attorney told Huron the order faced stiff opposition inside the administration. OMB had sent the draft out for comment to any executive branch entity with an interest in its substance, which given the order’s topic meant more than sixty agencies and bureaus. Forty had responded to date—and the comments “were overwhelmingly opposed to the issuance of the proposed order.”

Not surprisingly, as with the Clinton EO, agencies said they supported the president’s aims. No one was willing to say they opposed transparency in government: “The goals of this proposed executive order are above reproach,” EPA administrator Douglas Costle assured OMB. But it didn’t take long for reproach to breach the surface. The Department of Transportation’s response was typical: “While the Department believes that the proposed order attempts to accomplish worthy objectives, we find it so problematic that we oppose it strongly.” Agencies said the order was administratively burdensome, unenforceable, and far too broad, trading immense record-keeping costs for speculative benefits; the prospect of love from good government liberals did not sway their calculations. “The sum total of the comments suggest that serious reevaluation of the basic concept of the proposed order is necessary,” OMB summarized for the White House, warning that simply revising the text “may prove to be a costly error.” Three pages of questions for the president followed, designed to prompt additional thought about the order’s goals and worth.

The White House tried to salvage the order, and discussions continued for close to a year, into early 1978. But internal memos at OMB continued to report that “the latest prognosis is that this proposal has too much opposition.” Ultimately the Carter domestic policy staff drafted a memo to the president. “After reviewing the agencies’ comments,” they wrote, “we recommend *against* issuing this Order.”

White House aide Rick Neustadt let OMB know that Carter was being told to “bag the idea.” The immediate reply was succinct. In its entirety: “We have the following comments: 1. Hooray!”<sup>33</sup>

OMB sent the order to the inactive file in June 1978, and a subsequent plea by Common Cause to reopen the question was unsuccessful.

Are these narratives typical? The empirical evidence presented in subsequent chapters suggests they are—that EOs, even those that originate in the White House, are subject to extensive review by and negotiation with the wider

executive branch; that around six of every ten executive orders issued by the president are crafted preponderantly by departments and agencies instead of by centralized staff; and that a surprising number of proposed EOs, including some dear to the president, are never issued at all. The bureaucracy provides resources for unilateralism, and also shapes and bounds its use. OMB's caution to Carter is notable: that issuing a directive he desired might be so "costly" as to undermine him. We are perhaps used to that sort of warning coming from Congress or even the courts, to the point where wise presidents will calculate the anticipated reactions of the other branches of government to a potential order.<sup>34</sup> But we have rarely placed the executive branch in that category. This book argues that we should.

Doing so complicates what we mean by "unilateralism" in the first place, if policymaking is pluralistic. It has implications for presidential power: indeed, is it "power" if an agency carries out an order it had asked to be given in the first place? But most crucially, we need to think about executive orders as a question of presidential *management* rather than simply of command. This approach draws on another tradition of scholarship that considers presidential administration as a "two-way street," centered on the interaction and even negotiation between so-called principals and agents.<sup>35</sup> Executive orders provide an excellent if perhaps unexpected test of the reach of that thesis.

From the president's end of the metaphor, we need to consider the managerial costs of policy formulation. In a divided and diverse executive branch, these might vary by policy area, by agency expertise, or by other characteristics and contexts that shape the relative costs and benefits of formulating policy in the White House versus delegating that task to the wider bureaucracy. Either approach can be rational from the perspective of minimizing the transaction costs of producing presidential policy. This doesn't mean presidential preferences always or often lose, merely that additional information may amend those preferences or clarify where, within a range of options superior to the status quo, the net benefits of change are highest. Agencies, from their end of this byway, have divergent incentives and resources of their own. They seek to advise and may even initiate that policymaking process, shaping presidential options and providing substantive input—or may resist it.

This book traverses both the top-down and bottom-up frames these suggest. It defaults to the president's perspective, in considering how presidents develop institutions to protect themselves against both agency manipulation and White House staff ignorance, and when they will have to surmount enhanced hurdles of time and information as they construct their policy

portfolio. But even from that vantage it recognizes that bargaining complements command as a key dimension of executive orders—and, indeed, that bargaining with the bureaucracy may serve the president far better than does coercive command. Far from seeking to degrade executive expertise, presidents should invest in managerial strategies that take advantage of it.

To begin elaborating these claims, we turn first to consideration of what executive orders are, and how they have been studied so far, before previewing the argument to come.

### Executive Orders as Presidential Administration

The fact that presidential unilateral directives—and in particular, executive orders—are important in their own right needs little justification at this point. Since the 1930s, the American national state has expanded dramatically in size and responsibility. The trajectory takes us through the New Deal, Great Society, and regulatory expansion of the 1970s, as well as World War II, Korea, the Cold War, the War on Terror, and the COVID-19 pandemic. The fiscal 2020 budget as adopted exceeded \$4.5 trillion, funding more than a thousand distinct programs administered by fifteen Cabinet departments containing close to two hundred subunits, along with dozens of stand-alone agencies of different types.<sup>36</sup> The coronavirus stimulus bills passed in the spring of 2020 then doubled that spending figure even while adding complex new programs and demanding their immediate implementation.

Meanwhile, the dramatic rise of partisan polarization in Congress across the postwar period, especially since the 1990s, made lawmaking—never easy—practically impossible. The last *six* years of the Obama administration barely managed the passage of as many public laws as the two years of the 80th Congress that Harry Truman denounced as “do-nothing.” The number of recorded votes in the Senate—which include nominations and treaties, unlike the House—was lower in 2016 than in any year since 1957. Even the brief return of unified government in 2017–18 barely moved the needle of legislative productivity.<sup>37</sup>

These developments enhanced both presidents’ motive and their opportunities to achieve their policy preferences through their control of bureaucratic behavior. They sought to achieve what in 2001 Elena Kagan (by now a law professor) called “presidential administration,” while evading legislative gridlock.<sup>38</sup> As Richard Nathan noted, “In a complex, technologically advanced society in which the role of government is pervasive, much of what we would

define as policymaking is done through the execution of laws in the management process.”<sup>39</sup> As far back as 1946, a Bureau of the Budget memo titled “The President’s Management of Public Policy” stressed the White House’s responsibility “not only for managing the administration of the Executive agencies, but their policy as well.”<sup>40</sup>

Executive orders were one of many presidential tools for doing just that. The toolbox was large enough, in fact, that observers tracked an “imperial” presidency during the Vietnam and Watergate era and then a “new” imperial presidency after the September 11, 2001, terrorist attacks.<sup>41</sup> Such debates raged around George W. Bush’s claims of presidential prerogative; again around Obama’s aggressive interpretation of statutory discretion, most notably regarding immigration and environmental protection; and again when Trump took the same approach but to opposite ends, declaring a state of national emergency in early 2019 to unlock funding for his desired border wall and claiming “total authority” over pandemic response in 2020. Even before then the Trump White House had long touted executive action as a straightforward metric of presidential power. Its evidence that Trump had “accomplished more in his first 100 days than any other President since Franklin Roosevelt” was that the president had issued more executive orders during that time period than any newly elected president since 1933.<sup>42</sup>

None of these presidents were shy in praising executive action, often as a substitute for stalemated efforts to pass new legislation. “Since Congress can’t get its act together on HealthCare,” Trump tweeted, “I will be using the power of the pen to give great HealthCare to many people—FAST.”<sup>43</sup> In 2014 Barack Obama pledged to use his own “pen to sign executive orders and take executive actions and administrative actions that move the ball forward,” building on his declaration before the 2012 election that “we can’t wait for an increasingly dysfunctional Congress to do its job. . . . [W]e’re just going to go ahead and act on our own.”<sup>44</sup> Bush’s similar boast of acting “on my own” was noted above. Rahm Emanuel, then an aide to Bill Clinton, noted in 1998 that “sometimes we use [an executive order] in reaction to legislative delay or setbacks. . . . [Y]ou’re willing to make whatever progress you can on an agenda item.”<sup>45</sup>

### *Executive Orders*

Executive orders “do not dwell amid the comfortable certainties of administrative law.”<sup>46</sup> The Constitution does not mention a presidential power to issue unilateral directives. Yet every president—even William Henry Harrison, who

died after barely a month in office—has done so.<sup>47</sup> As a way of implementing statute in ways that hew to presidential preference, executive orders have been utilized from the Washington administration forward as an implication of the constitutional “executive power” vested in the president.

In 1957, a House committee studying the matter defined executive orders as

directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law. . . . Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly.<sup>48</sup>

Phillip Cooper expanded this somewhat: “executive orders,” he wrote, “are directives issued by the president to officers of the executive branch, requiring them to take an action, stop a certain type of activity, alter policy, change management practices, or accept a delegation of authority under which they will be responsible for the implementation of law.”<sup>49</sup>

This covers a lot of potential ground. Executive orders are hardly uniformly consequential, as will be discussed in detail, but they have been used for everything from the internment of tens of thousands of American citizens of Japanese descent to the attempted nationalization of the steel industry to the reshaping of public sector employment. They often have spillover effects beyond the public sector. By changing how stringently cost-benefit analysis is applied to regulatory review, or what conditions are written into the half-trillion dollars’ worth of contracts the federal government annually negotiates, presidents can shape a plethora of private decisions.<sup>50</sup> Thus, as Kenneth Mayer argued in his seminal 2001 book on the topic, “executive orders have played a critical role in the development and exercise of presidential power”; and compared to the many other kinds of presidential directives that exist, “executive orders combine the highest level of substance, discretion, and direct presidential involvement.”<sup>51</sup>

Indeed, although the absolute number of EOs issued per year has diminished somewhat over time (see Figure A1.1 in the appendix to this chapter), studies find an upswing in the number of “significant” orders issued by presidents over time. Mayer’s research, sampling more than one thousand orders from 1936 to 1999, found that about one in seven orders were significant overall. But as a proportion of the total, significant orders jumped to 22 percent in the 1970s and to 28 percent by the 1990s, up from between 9 and 16 percent in

prior decades.<sup>52</sup> William Howell, measuring significance somewhat differently over a longer time frame (1900 to 1998), also found the annual number of significant orders trended upward as the century wore on.<sup>53</sup> By 1999, House Majority Leader Richard Arney (R-TX) was accusing Bill Clinton of “running roughshod over our Constitution. . . . With a stroke of his pen, he may have done irreparable harm to individual rights and liberties.”<sup>54</sup> Barack Obama was attacked as “a dictator,” and so was Donald Trump.<sup>55</sup> But if “complaints about dictatorship” is a meaningful metric, EOs have been consequential throughout the whole era of the modern presidency. A 1941 volume pondered the question of Franklin Roosevelt’s purported “wicked enchantments” over the office in *Roosevelt: Dictator or Democrat?* (deciding upon the latter).<sup>56</sup> The Kennedy White House, for its part, received so many accusations of tyranny in connection with its efforts to plan for nuclear emergencies and civil defense (“these moves have all the earmarks of a dictator in action”) that it was forced to develop a form letter defending the president (“these assertions are absolutely incorrect,” one version read).<sup>57</sup> In 1975, a presidential staffer sent members of Congress a similar template they could use to answer letter-writers expressing “concern with the seemingly broad power exercised by the President through Executive orders. . . . Whatever the polemics of the time,” the White House suggested telling constituents, “executive orders are the means whereby the President properly exercises the authority and responsibility vested in him by the Constitution and Congress.”<sup>58</sup>

### *Executive Orders and Political Science*

Contemporary political science caught up somewhat slowly to this empirical reality. To be sure, studies of “the ordinance-making powers of the president” appeared as early as the 1920s, tracking the newly activist administrations of Theodore Roosevelt and Woodrow Wilson.<sup>59</sup> By the late 1940s Edward Corwin’s seminal textbook on the presidency observed that “executive interpretations of statutes flower. Nowadays they give rise to proclamations, orders, ordinances, rules, regulations, ‘directives’—what have you? . . . In a word, to *executive lawmaking*.”<sup>60</sup> But the behavioral revolution that swept political science after World War II centered on House roll calls and Gallup approval ratings; it had a harder time with presidential management of the executive branch. Richard Neustadt’s hugely influential approach to *Presidential Power*, first published in 1960, took as his starting point the fact that presidents under the Constitution were not powerful but weak. As such, he wanted to explore

how they could prevail in influencing government outcomes. Though Neustadt agreed that formal powers were a key bargaining resource for presidents, he warned that high-profile dictates could highlight failure as much as achieve success; his focus was on the “skill and will” and public prestige divergent “men in office” could deploy to persuade others in government to carry out their wishes.<sup>61</sup> Others built on this new direction while neglecting its institutional foundation: one result was a research field often emphasizing what Terry Moe would scathingly characterize as “the personal presidency,” where power was contingent on the attributes of individuals and their negotiating acumen.<sup>62</sup>

Moe and others argued for a renewed focus on the institutional authorities available to any president, regardless of their personality, and the incentives and constraints for presidential behavior these implied. After all, he argued, “institutionalization was and is at the core of the modern presidency.”<sup>63</sup> As study of the “institutional presidency” and variants of a “new institutionalism” gained momentum, special emphasis fell on the role of executive action. A flurry of literature ensued, notably in the late 1990s, with executive orders as the key empirical element used as a proxy for presidential unilateralism.

The trajectory of this scholarship is discussed in the next section, but it is worth noting that the theoretical underpinnings of unilateral action follow from the same first principles identified by Neustadt: from the presidential weakness tied up in the American constitutional system of intertwined branches of government that grants each the standing to check their counterparts. Instead of focusing on bargaining as a way around this weakness, scholars such as Moe and Howell argued for another route. For presidents, they pointed out, unilateralism promises a tractable way of transforming preferences directly into public policy, implementing change via decisive leadership rather than through tedious parliamentary procedure.<sup>64</sup>

That approach echoes Alexander Hamilton’s founding-era observations about the president’s place in the new Constitution. In *Federalist* #70, Hamilton argued that “unity”—having a single chief executive, rather than the plural presidency some had pressed for—was “conducive to energy” in the executive and thus a “leading character in the definition of good government.” Unity would empower “decision, activity, secrecy, and dispatch.” Presidents would be able to make quick, authoritative choices, discreetly if necessary—something far more difficult for the multitudinous members spread across the two chambers of the legislative branch. A few years later, serving as Treasury secretary, Hamilton defended the Washington administration’s decision to

stay neutral in the ongoing war between France and England. Congress was “free to perform its own duties according to its own sense of them,” he said, should it be able to agree on a course of action. But in the meantime the president had leeway “to determine the condition of the Nation.” In so doing, “the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions.”<sup>65</sup>

Better yet, such tactics are frequently successful in affecting that National condition. Research shows that executive orders are rarely overturned by Congress or by the courts, giving presidents latitude to shape policy outcomes in important ways. As a result, as Mayer argues, “in most cases, presidents retain a broad capacity to take significant action on their own, action that is meaningful both in substantive policy terms and in the sense of protecting and furthering the president’s political and strategic interests.”<sup>66</sup> In short—as Howell enduringly put it—presidents can assert “power without persuasion.”<sup>67</sup>

Executive orders are hardly alone in their basic function. Despite the tendency of reporters, scholars, and even presidents to use “executive order” as a generic fill-in for any administrative edict—the Deferred Action for Childhood Arrivals (DACA) program, for the record, was established by departmental guidance memo—there is a wide range of tools with similar effect.<sup>68</sup> An incomplete 2008 listing compiled by the Congressional Research Service identified twenty-seven different types of presidential directive.<sup>69</sup> However, there is no reason the theoretical framework of this book could not be applied to these as well. And it is already clear, as noted, that in the aggregate executive orders are invaluable vehicles for carrying significant policy substance and indicating direct presidential involvement. Later chapters detail Office of Management and Budget exertions to ensure that only items appropriate to and worthy of issuance as executive orders take that form. As a Trump administration official told reporters on Air Force One in 2017, “The best thing that you can do in the realm of administrative action is an executive order. . . . [A]n executive order is a very muscular way of getting the agencies to begin [a policy] process.” Indeed, he went on, “there is no higher statement of executive direction than the form of an executive order.”<sup>70</sup>

## The Chief Executive and the Executive Branch

Yet if researchers have verified that executive orders matter, they have paid far less attention to how the executive branch matters to those orders. To be sure, despite the singularity implied by the very word “unilateralism,” no scholar



would argue that the president literally acts alone in issuing directives. Studies of the presidency often stress the staffing resources presidents have amassed over time, to the point of creating a “presidential branch” of government.<sup>71</sup> Still, research in the field has not turned its attention to the complicated institutional reality of the executive branch itself as it applies to the use and formulation of executive orders.

Instead it has emphasized the importance of external actors, notably Congress and the judiciary. Indeed, while in 1997 Steven Shull and Brad Gomez could note that “few propositions and almost no general theories guide empirical research on presidential actions like executive orders,” a wave of systematic research was already cresting to fill that void.<sup>72</sup> It centered first on tallying EOs, and then on teasing out the factors that might spur their issuance.<sup>73</sup> How many were issued, and under what circumstances? The answer was usually linked to a president’s political environment on Capitol Hill and beyond. Did divided government, for instance, lead to more, or fewer, EOs? Did levels of presidential approval make a difference? How about the timing of an impending election? Some studies suggested increased presidential support in Congress led to more EOs, perhaps in recognition of the lower likelihood such directives would be overturned by statute. Others posited the opposite, arguing that EOs were not needed when legislation could be obtained instead; thus, it was divided government that prompted order issuance.<sup>74</sup>

While early research normally utilized a straightforward count of issued EOs, that assumed each order was an equivalent observation. Yet not all EOs are of equal substantive importance. Even as he issued orders limiting immigration and imposing economic sanctions, for instance, Donald Trump also approved a new seal for the National Credit Union Administration and changed the name of the President’s Council on Physical Fitness and Sports to the President’s Council on Sports, Fitness, and Nutrition.<sup>75</sup> Nor do all EOs serve the same purpose. Some promote routine administrative maintenance or shape advising structures. Some are aimed at substituting presidential preferences for legislators’, stoking interbranch conflict—but others implement newly passed legislation, promoting interbranch cooperation. Recognizing these nuances, recent scholarship examines the text and subject matter of EOs by policy area,<sup>76</sup> by substantive significance,<sup>77</sup> by political objective,<sup>78</sup> and by their varied connections to the legislative process.<sup>79</sup> The role of public opinion in potentially constraining unilateral action has also received sustained attention.<sup>80</sup> Still other work has drawn on the wider range of presidential directives, at least tentatively considering when presidents might choose one such vehicle

rather than another and when the conditions identified as relevant to EO issuance might hold for other directives.<sup>81</sup>

Another important advance was the addition of theory to fact: thinking through hypotheses that went beyond the multivariate measurement of orders and contexts to identify a core rationale for when presidents were more likely to issue orders and the scale of change those orders might rationally attempt. Building on the “pivotal politics” model developed by congressional scholars, Howell’s breakthrough was to “clearly specify a set of joint conditions under which presidents will forgo the legislative route and exercise their unilateral powers instead.”<sup>82</sup> Presidents should be able to anticipate the odds of their actions being overturned by those with the power to do so. Thus, the distance between the relative policy preferences of presidents and key legislators (that is, those at the “pivots” controlling Congress’s ability to pass legislation or override a veto) and the dispersion of legislative preferences (since that affects Congress’s ability to create the needed bipartisan coalition) predicted the likelihood of presidential action and the size of the policy space in which presidents could operate. That is: “the ability of presidents to act unilaterally depends on other institutions’ abilities to stop them.”<sup>83</sup>

Calculating those other institutions’ abilities brings us back to the president’s structural advantages vis-à-vis other branches of government, and thus to the key assumptions built into theories of unilateral action in the first place. There are two. Hamilton’s observation regarding the president’s ability to “establish an antecedent state of things” is here translated into the “first-mover advantage.” Presidential action forces other political actors—Congress, the courts—to respond to a new state of play. But they, in turn, are burdened by difficult questions of collective action. The legislative branch is made up of more than five hundred individuals divided into separate chambers with myriad veto points. The courts cannot react to a presidential initiative unless a lawsuit is brought in a timely way by someone with standing to sue, a suit that must traverse several levels of judicial hierarchy before a final decision is reached. In either branch, many people must act for reality, rather than rhetoric, to change.

Hence the second key feature bolstering unilateral action: that “the president acts alone.”<sup>84</sup> The presidency and the executive branch as a whole may be assumed to behave as a single, unitary actor, eliminating the transaction costs associated with the multilateral decision making fundamental to Congress. As Terry Moe argues, unlike legislators, “presidents are not hobbled by these collective action problems and, supreme within their institution, can simply make authoritative decisions about what is best.”<sup>85</sup> As such, any issued order reflects

presidential preferences, more or less purely enacted into action. Howell puts it this way: the theory “does not differentiate the president from the White House staff from members of the Executive Office of the President from civil servants in the executive branch, generally” and “attributes unilateral policy changes to the president alone.”<sup>86</sup> In this telling EOs are born of an immaculate conception.

That is a reasonable assumption given the questions fundamental to the field so far. Indeed, it is worth stressing that the concept of a unitary executive detailed here *is* an assumption, extended for the purposes of gaining empirical traction. It is not meant as the ideological-verging-on-theological justification offered by some scholars and many more pundits and executive branch officials.<sup>87</sup> Nor is it intended as descriptive reality. Instead, it is stylized fact: a construct that provides theoretical and empirical leverage over presidential decision making, where its value lies in its predictive power.<sup>88</sup> It helps answer key questions about when (and how far) we should expect presidents to take administrative action rather than seek legislative policy change. But it means that for studies centered on the political context of executive order issuance, on the external incentives for and constraints on presidential unilateral action, the backstory—the process inside the executive branch through which an order comes to be—is simply not the interaction of interest.

Yet that process is very much worth unpacking, substantively and theoretically. A long scholarly trail leads to a view of the executive branch as a “they,” not an “it.” The broader study of bureaucratic politics, still a strong presence in the public administration literature, approaches the executive branch as inherently pluralistic—as (in Hugh Heclo’s framing) an “executive mélange.”<sup>89</sup> In short, even presidents may have collective action problems.

In 1971, Graham Allison’s pioneering *Essence of Decision* made clear how that mattered. His famous case study—or rather studies—of the Cuban Missile Crisis began by assuming the government was a unified rational actor. As such, the United States and Soviet Union were single entities with clear, hierarchical preferences assessing the costs and benefits of various options and making choices that maximized their net expected utility. But while many aspects of the Cuban Missile Crisis could be explained using that framework, Allison found that important developments and details remained baffling. “For some purposes,” Allison noted, “governmental behavior can usefully be summarized as action chosen by a unitary, rational decision maker: centrally controlled, completely informed, and value maximizing.” But a government is not an individual, he went on. Rather, it “consists of a conglomerate of semi-feudal,

loosely allied organizations, each with a substantial life of its own.”<sup>90</sup> A fuller understanding of what happened over the “thirteen days” required fleshing out the story by viewing it through additional lenses that brought into play the internal organizational dynamics of bureaucratic policymaking and the intra-governmental politicking in which political actors engaged.

These sequential complications serve as a useful template for this book’s consideration of presidents and executive orders. In this telling the process of issuing a unilateral directive becomes less purely—or at least differently—unilateral as our lens widens. Scholars agree that “the boundaries of unilateral powers are fundamentally institutional in nature.”<sup>91</sup> But thus far, the pivot points that define the range of policies the president might enact have been set by other branches of government. We need to take seriously the notion that presidential action can be bounded not just by legislators or judges but also by actors within the executive branch itself. The ultimate form of a given executive order may reflect agency needs, or the outcome of intrabran­ch negotiation, rather than pure *ex ante* presidential preferences. In some cases agencies might even seek to foist orders on the president, rather than vice versa. But of course allowing agencies to write an order may be a perfectly rational decision on the part of presidents who might not have strong preferences as to its specific form or who need to gather knowledge of what will work best to achieve their ends. They may desire to take action in a broad area, to change the status quo, but find it “cheaper” to opt for an alternative proffered by an agency or arrived at collaboratively.

The key point is that presidents do incur transaction costs as they engage the process of issuing directives that match their political, administrative, and substantive preferences. To minimize those costs, they will have to manage unilateral action and its complications—as it turns out, in ways that reflect the ways they manage interbranch relations. Indeed, managing the formulation of an executive order presents clear parallels to managing the formulation of a legislative proposal.<sup>92</sup>

As that suggests, this new approach complements and even compliments existing work. For instance, recent scholarship takes note of the relatively few significant executive actions actually taken, relative to the presidential advantages hypothesized in so doing: “the true puzzle,” Dino Christenson and Douglas Kriner posit, “is the relative *paucity* of major unilateral actions, not their frequency.” They argue that domestic public opinion is a key factor in suppressing the issuance of EOs.<sup>93</sup> But executive politics are a plausible additional constraint. Indeed, as in the Carter case presented above, presidents

may find the costs of a given EO exceed its benefits and discard it—either because they discover information that sours them on its issuance or because bureaucratic friction makes it untenable. More broadly, as Howell presciently noted in *Power without Persuasion*, “directives regularly rise from below,” and thus “future work should examine how administrative agencies can leverage their informational advantages to shape executive orders . . . to suit their individual interests. While the president has considerable discretion over whether or not to sign off on these directives, he does not always have complete control over their content.”<sup>94</sup>

The handful of in-depth studies of individual EOs likewise indicate that the substance of orders often flows from coalition building, both outside the executive branch and within it.<sup>95</sup> Kenneth Mayer made clear in *With the Stroke of a Pen* that EOs may “percolate up from executive agencies” and that drafting frequently takes into account “comment and suggestions from affected agencies” in a process that can take years to navigate. His discussion of EO 12114, in which Jimmy Carter directed federal agencies to calculate the environmental impact of their actions abroad, tracks the long and often contentious negotiations between the White House and key bureaucratic actors over its issuance.<sup>96</sup> In a review of the broader literature Mayer therefore suggested that “we might make more progress looking at what happens before a president takes unilateral action, rather than after.”<sup>97</sup>

## Presidential Management and Presidential Power

This book does just that. It takes the origins and development of executive orders seriously and systematically. It considers the sorts of informational transaction costs that different combinations of agencies and policy areas might impose on presidential management of administrative action—and how presidents seek to minimize those costs. To do so, it uses painstakingly compiled archival data to explore the sources and formulation of executive orders over the course of nearly seven decades. Study of a sample of more than five hundred EOs shows their issuance follows extensive consultation across the executive branch and even within the White House; it finds that presidents often cajole, rather than command, departments and agencies in pursuit of an order in a given form. These new data allow us to examine how long it takes orders to be constructed and what slows or speeds that process. And, for the first time, we can look systematically at what stops them from being issued at all.

None of this means presidents are powerless. Far from it. They have clear legal and constitutional advantages in dealing with other executive branch

actors. A bureau cannot get an EO issued that the president ultimately refuses to sanction. But it does mean that even in policy produced “by executive order,” presidents face a management challenge linked to the broader challenge of administering the executive branch. Many models of presidential-bureaucratic relations assume a principal-agent template, with the president as boss and policy demander, seeking to prevent bureaucratic shirking. But if executive orders may originate from the bottom up, we need to complicate those models to reflect the “two-way street” between principal and agent—here, agency—brought earlier. As George Krause argues, “In reality, the nature and degree of success of these authoritative relations will rest upon some level of agreement between relevant political and bureaucratic actors.”<sup>98</sup>

How are these agreements reached? As explored in the rest of the book, we can perhaps conceive of a presidential policy market where the president must decide what executive orders to issue and whether to “make or buy” each. That is, should a given EO be a White House creation? Or should it be crafted in the agencies—in this case themselves perhaps the “first mover” in proposing EOs, selling their wares and requesting presidential attention to their priorities? The choice rests on the relative price of competing products: What will it cost, politically or policy-wise, to issue a given order? Are agencies trying to sell the president a pig in a poke, to achieve something that will benefit their agenda but not hers? On the other hand, are White House staffers unaware of substantive grenades their order might explode? Again, the president is often at an informational disadvantage in such dealings. I will argue below that the creation of the enduring “central clearance” process run by OMB since the 1930s is a structural approach to counteracting that imbalance.

Another test is whether different characteristics of EOs—or of the agencies that influence their substance—are associated with different loci of policy formulation. What kinds of EOs are most likely to be created by centralized staff? Conversely, what order or agency characteristics seem to grant agencies more sway in the formulation process? If my focus here has merit, the answer should be tied less to external political circumstances and more to the complex contingencies of managing the executive branch.

## The Plan of the Book

The rest of the book expands and tests these arguments. The next chapter builds on the brief discussion above to explore the strands of public administration scholarship stressing the organizational complexity of the executive

branch and the difficulty of imposing centralized leadership upon it. It considers the transaction costs involved in managing the executive branch—and seeks to situate presidents as they both respond to the administrative products of the agencies and create their own within the Executive Office of the President. The notion of contingent centralization, used in other research on policy formulation, is adapted here to the president’s decision to “make or buy” a given executive order. What characteristics of an order, or an agency, shape presidential decisions about where to formulate an executive order? When will EOP intervention be most required; when will agencies be given freer rein? The vantage is largely presidential here in asking how presidents can lower their managerial transaction costs. But that frame allows for agencies to have influence over the provision of information and thus scope to shape presidents’ cost-benefit analysis.

Two chapters then lay out different aspects of the data used. Chapter 3 provides some background on the collation of executive orders generally, then details the creation of the institution of “central clearance” in the Office of Management and Budget. Central clearance has served as both a proactive and protective process for presidents since the 1930s, especially after OMB (then known as the Bureau of the Budget) moved into the Executive Office of the President from the Treasury Department in 1939. It matches well with the kind of “governance structure” an information-seeking president might rationally construct in order to evaluate and winnow proposals for executive action.<sup>99</sup> These come at him from all directions, as chapter 4 shows: it lays out the data set of EOs created for this book, drawn from archival sources spanning the Roosevelt to George W. Bush administrations. It provides comprehensive data regarding the making of those orders and a scheme coding their relative centralization. In so doing it answers a basic empirical question: How are executive orders actually formulated? The most frequent answer is, with lots of participation by different agencies.

The next chapters take a more systematic approach to these descriptive statistics, from either end of the “two-way street” running between president and agency. Chapter 5 returns to the question of the conditions that underlie decisions to use a centralized EO versus a decentralized one. For presidents seeking to minimize their managerial transaction costs, what matters in that calculation? Do the same factors that influence the decision to issue an executive order (the focus of the literature in this area to date) affect the manner in which that order is formulated? According to the approach taken here, characteristics specific to individual orders and the agencies linked to them should

instead be the primary influences over how presidents manage the process of policy development.

Chapter 6 examines to another aspect of that management. It turns out that the average executive order takes some seventy-five days to move from draft proposal to the *Federal Register*, with huge variation around that figure. What affects that timing? What makes an EO take longer to issue? What characteristics of orders and agencies, of interagency interaction and requirements of the management process itself, are associated with delay? Quantitative analysis, elaborated by case studies, helps us explore these questions for the first time as the duration of the formulation process is tested as a proxy for executive collective action problems.

Finally, of course, some proposed EOs are never issued at all. Chapter 7 presents a new data set of more than two hundred executive orders never signed by the president. However that is interpreted—as good management or as gridlock—something that could have been done “with the stroke of a pen” was not. Here, too, quantitative and archival analysis pair to help us understand why. The results highlight the fact that unilateral action has costs, which at some point outweigh the benefits. Those costs may be rung up in Congress, or the courts, or by public opinion. But as the exploration here shows, they may also be imposed by the executive branch.

That leads to the concluding chapter, which summarizes the overall findings and pushes them toward related topics in sore need of additional study. This book examines what happens before an executive order is issued, but we know little about what happens afterward. Do executive orders actually get implemented? How might the formulation process—and the path dependence imposed by past EOs—matter to that? Another topic for future research is the plural nature of the Executive Office of the President itself, qualitatively evident in the cases above (and many others to follow) but quantitatively far less tractable. How do divisions within the president’s closest staff units affect the notion of centralization?

The conclusion is also a chance to explore the question of bureaucratic capacity and autonomy as it runs up against presidential desires to control that bureaucracy—a claim bolstered by electoral legitimacy. Presidential hostility to the permanent government is hardly new, of course. But the Trump administration’s amplification of that contention—with frequent, personal attacks on agencies and even individual civil servants on the one hand, and “resistance” to presidential preferences on the other—raised its salience, and its stakes. The argument of this book rests in part on the value presidents



derive—substantively but also politically—from astute management of a bureaucracy that can provide expert advice on solving pressing national problems. Undermining its ability to do so is therefore counterproductive.

In the end, the cases traced at the outset of this introductory chapter are only slightly extreme examples of everyday reality: presidents use executive orders to manage the executive branch, but that requires they manage the process of issuing executive orders themselves. Exploring these questions matters, not least in understanding the complexities of “a world of extraordinary administrative complexity and near-incalculable presidential responsibilities”—and how presidents can best achieve their preferences in that environment.<sup>100</sup> They can help us understand how the executive branch both underwrites and bounds presidential unilateralism. In doing so, it helps us consider what unilateralism means, and how that matters for presidential power itself.

## Appendix

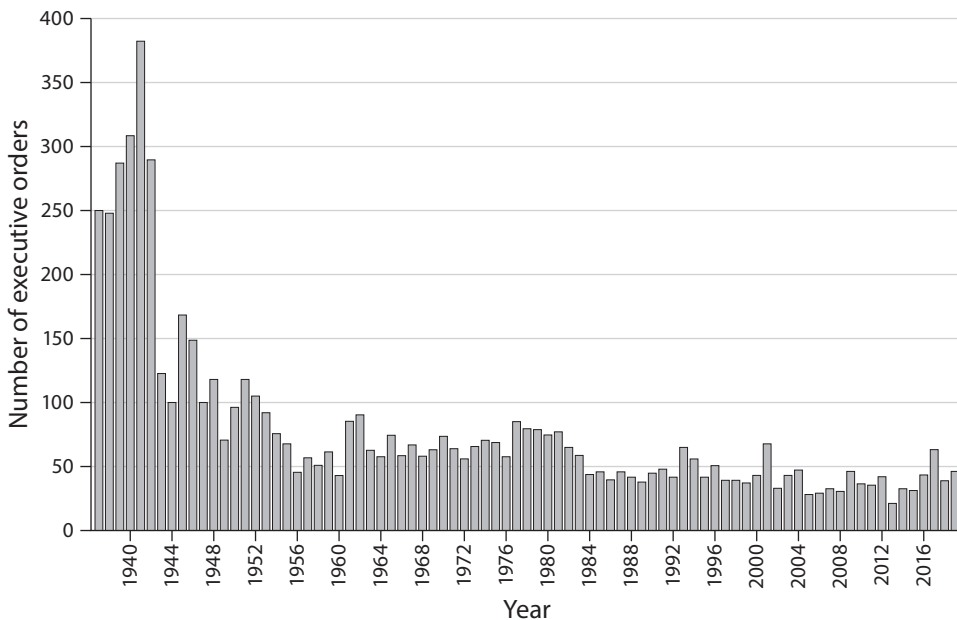


FIGURE A1.1. Executive Orders Issued by Year, 1937–2019.

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