

Factors Affecting Governors' Decisions to Issue Executive Orders

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Abstract

Executive scholars suggest that unilateral action is used for two reasons: to circumvent a hostile legislature and in response to delegation from the legislature as a means of expediting action. Extant research on unilateral action focuses on one governmental setting, limiting our understanding of how chief executives with different degrees of formal power use unilateral action and about how legislatures of varying capacity respond. We examine the use of executive orders in a cross-sectional context (the U.S. states), thus providing a more comprehensive perspective of where unilateral action fits in relation to other executive powers and why it is used.

Keywords

governors, unilateral action, executives, bargaining, executive orders

Governors frequently use executive orders to help shape policy. From 2004 to 2005, governors in the United States issued 3,456 executive orders (Ferguson and Bowling 2008). Executive orders are declarations to government officials and administrative agencies that have the force of law and do not require legislation to take effect. They may be overridden by either the legislature or the judiciary, but in practice, this does not happen often (Moe and Howell 1999; Howell 2003). However, they can be temporary in that policies enacted by executive order can easily be undone by the next governor (Dickinson and Gubb 2016).

The literature suggests that executives use such orders for two distinct reasons: to circumvent the legislature and in response to delegation from the legislature. In some circumstances, the governor, mobilized by expectations of policy leadership, may rely on executive orders when the legislative context makes it difficult or costly to achieve policy goals. Empirical research

suggests that the use of executive orders is driven by particular political conditions that affect bargaining between the executive and the legislature. Among the conditions enumerated in the literature are the presence divided government, legislative fragmentation, the presence of a Democrat in the executive office, the point of time in the executive term, low levels of popular support, and if campaigning for reelection (Howell 2003; Mayer 1999, 2002).

Comparative scholars suggest that in certain situations, executive orders may be preferred by the legislature (Carey and Shugart 1998;

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Pereira, Power, and Rennó 2005, 2008). Research suggests that legislators may welcome executive orders when conditions in the legislature make policy-making difficult and legislators believe that they and the governor share similar policy goals (Carey and Shugart 1998). When the legislature delegates authority, it agrees to not oppose the governor's use of executive orders.

Most prior studies of the use of executive orders focus on a single governmental setting, such as the relationship between the U.S. president and Congress, or a single state government over time. This literature tends to identify the political conditions that affect bargaining between the executive and the legislature in that specific setting (Crisp 1998; Howell 2003; Huber 1998; Mayer 2002; Parrish 1998; Pereira, Power, and Rennó 2005; Power 1998; Reich 2002; Rubio and Goretti 1998; Sala and Kreppel 1998; Schmidt 1998). This focus on a single governmental system produces an incomplete picture of how chief executives with different degrees of formal power use executive orders and about how legislatures that vary along dimensions of capacity respond.

This study fills this gap by examining the use of executive orders across the U.S. states. A comparative state analysis shows how the institutional structure of the legislature, political conditions, and the varying formal powers of the executive affect governors' decisions to issue executive orders.

Theory and Hypotheses

The legislative process cements a policy into law. If a governor were guaranteed complete bargaining success and the legislature were assured that legislation would conform exactly to the majority party's policy preferences, both branches would prefer to formulate policy via the legislative process. Typically, however, bargaining with the legislature requires some compromise from the governor. Thus, governors can accept policies they view as less than ideal, but that are more likely to endure, or they can implement their ideal policies, knowing that they could be overturned when they leave

office. As a governor's expected success from negotiating with the legislature declines, he or she has less incentive to bargain and greater incentive to circumvent the legislature by issuing executive orders. Two main factors influence a governor's bargaining success: the institutional strength of the legislature and the institutional strength of the governor.

Powers of the Legislature

Some state legislatures are more formidable adversaries for the governor than others. Across the United States, the length of legislative sessions vary, as does the size and capacity of staff. The professionalism of the legislature greatly affects the balance of power between the executive and legislative branches in state government (Hamm and Moncrief 2013; Kousser and Phillips 2012). The professionalism of a legislature can be thought of on a continuum from citizen legislator at one end to professional legislator at the other. Professional legislators work full-time at the job and have more staff members than part-time or citizen legislators. Thus, they have a greater capacity to gather information and formulate policy, giving them a bargaining advantage. In addition, full-time legislatures can afford to be more patient when bargaining with the governor (Kousser and Phillips 2012). Citizen legislators, on the other hand, typically have full-time careers outside of the legislature. Most state legislatures fall somewhere in between these extremes. The more professional a legislature is, the more adept it will be at acting on its preferences and the less successful the governor will be at bargaining. Thus, if the legislature and governor have differing policy goals, a governor negotiating with a more professional legislature will have greater incentive to issue executive orders.

In addition to the professionalism of the legislature, two other main political and institutional arrangements are likely to influence the use of executive orders: whether the legislature and the governor are from the same party, and the margin of seats held by the governor's party (i.e., how fragmented the government is). Comparative studies have shown that when the

legislature and executive are of the same party but the legislature is unable to get its desired policy passed due to lack of capability (time, staff, etc.), legislators may accede to the use of executive orders (Carey and Shugart 1998; Volden 2002; Mainwaring and Shugart 1997; Pereira, Power, and Rennó 2005). Under these conditions, the legislature may delegate authority to the governor, sitting by supportively while the governor uses an executive order to move policy in the direction of the unified party. The legislature is likely to only delegate to the governor when both branches are of the same political party.

The prior research on the use of executive orders and legislative conditions leads to the first three hypotheses:

Hypothesis 1: The governor will issue more executive orders when the government is divided and the legislature is more professional.

Hypothesis 2: The governor will issue more executive orders when the legislature is of the same party and less professional.

Hypothesis 3: The governor will issue more executive orders when the legislature is of the same party and highly fragmented.

Powers of the Governor

Structural attributes of the executive branch can also affect gubernatorial issuance of executive orders. Each state has its own constitution that grants the governor formal powers, varying substantially across the states. Formal powers are likely to influence the governor's expected success in bargaining with the legislature. As with the legislature, fragmentation in the executive branch may play a role in the use of executive orders. Many states elect multiple officials to executive positions in state government and give them autonomy from the governor. In California, for example, citizens elect eight separate statewide executive officers. Thus, not only must the governor bargain with the legislative branch to achieve policy goals,

he or she must also contend with independent actors within the executive branch who have their own policy goals (Ferguson and Bowling 2008). To better control the bureaucracy, the governor may be tempted to use executive orders when there is fragmentation in the executive branch.

A long line of research on the effects of variation in executive formal power indicates that stronger governors are more likely to achieve their political goals than weaker governors (Barrilleaux and Berkman 2003; Ferguson 2003; Morehouse and Jewell 2004). Governors with less formal power, realizing that they have little hope of getting their preferred policies enacted via ordinary laws, may decide to circumvent the legislative process by issuing executive orders (Cox and Morgenstern 2002). Conversely, governors with more formal power are better able to manage the bureaucracy, making the use of executive orders less profitable (Rudalevige 2012). Since a higher level of formal power gives the executive more influence when interacting with both the legislature and the bureaucracy, a stronger governor would likely prefer to bargain with the legislature, so that the resulting policy will be more durable and to avoid discord that might affect future interactions.

The prior findings on executive power lead to the fourth hypothesis:

Hypothesis 4: The governor will issue more executive orders when he or she has less formal power.

Research Design

Dependent Variable

The dependent variable in this study is the number of significant, policy-relevant executive orders a governor issues. Not all executive orders are equal. Some are only symbolic and others routine. Simply counting the total number of executive orders issued by a governor does not adequately measure unilateral executive action because some executive orders are not policy relevant. Other executive orders, while arguably policy relevant, are of relatively

Table 1. Functional Categories for Executive Orders.

Implementation of a federal mandate
Establishment of programs within agencies
Allocation or transfer of state funds
Reorganization of state agencies or departments
Procedural directives for programs or agencies
Creation of a state commission
*Creation of councils, boards, or task forces
*Rescinding or amending prior orders
Disaster relief or procedures
Lowering flags to half staff
Appointments to state and local positions
Authorization of state designated holidays
Pardons
Extending or reaffirming prior order
Other

Note: The categories were developed by Ferguson and Bowling (2008). All executive orders in categories in bold print are assumed to be both significant and policy relevant. Orders in categories in standard text and not prefaced with an asterisk are assumed to be either insignificant or not policy relevant; such orders are excluded from our empirical analysis. Categories marked with an asterisk are ambiguous in that they may contain both orders that are significant and policy relevant and orders that are not.

minor consequence. To distinguish executive orders, the authors obtained the text of all executive orders issued by governors from nearly all states between 2010 and 2013 by visiting state websites and calling state offices. Next, they divided the orders into fifteen functional categories listed in Table 1.¹ All executive orders from six of these categories are considered significant *and* policy relevant. Similarly, all executive orders in seven of the categories are classified as either not policy relevant or of minor consequence.

This leaves two categories (indicated with an asterisk in Table 1) that are ambiguous: they may contain both orders that are significant and policy relevant and orders that are not.² Given the difficulty of determining the status of individual orders in these two categories, the empirical analysis is conducted twice. In the main analysis, each executive order in the two asterisked categories in Table 1 is treated as

Table 2. Coefficient Estimates for Event Count Model Predicting the Number of Significant, Policy-Relevant Executive Orders Issued by a Governor.

Variable	Coefficient (with Standard Errors in Parentheses)
Circumvention variables	
Legislative professionalism	.573*** (.175)
Formal power	-.043*** (.022)
Legislative fragmentation	.023* (.012)
Delegation variables	
Unified × Legislative Fragmentation	.043*** (.015)
Unified × Legislative Professionalism	-.381** (.194)
Control variables	
Unified	-.830 (.505)
Time served	-.081*** (.029)
Explicit authorization	.617*** (.237)
January	.076 (.336)
Opposite	.190 (.147)
Intercept	1.318*** (.487)
N	191

Note: All quantities of interest—marginal effects and first differences—computed from the coefficients in Table 2 are calculated using the “negbinom” procedure in Zelig (Imai, King, and Lau 2015).

***p < .01.

**p < .05.

*p < .1.

neither significant nor policy relevant. In a supplemental analysis reported in the Online Appendix (insert link to Table 1 Supplement and Table 2 Supplement), each order in the two categories is assumed to be significant and policy relevant. The results of the alternative analysis are robust. States vary in the number of executive orders issued during the sample period, ranging from 0 to 16 per year, with a median of 3.³

Independent Variables

Formal power. To test whether a governor’s formal power affects the issuance of executive orders (Hypothesis 4), the model includes several variables that capture the costliness of bargaining with the legislature. First, the well-known index developed by Thad Beyle is used to capture the institutional power of the

governor. The variable is an aggregation of the scores assigned by Beyle for appointive power, control over the budget, tenure potential, veto power, and divided control of the executive branch. High values indicate a governor with more formal power (*Formal Power*).

Unified government. *Unified government* equals 1 if the leaders of both chambers and the governor are of the same party and 0 if the governor and at least one chamber are of different parties.

Legislative capacity. The two indicators of legislative capacity are *Legislative Professionalism* and *Legislative Fragmentation*. *Legislative Professionalism* is Karl Kurtz's categorization of legislative professionalism and is scored on a scale of 0–3, with 0 indicating a citizen legislature and 3 indicating a professional, full-time legislature. This scale is composed of factors such as whether the legislature is full or part time, session length, and compensation. Because legislative professionalism is interacted with *Unified Government* in the model, the single term captures the effect of legislative professionalism on the issuance of executive orders under divided government. Based on the hypotheses, this variable is expected to be positive.

The second indicator of legislative capacity, *Legislative Fragmentation*, captures the size of the majority party in the legislature. When interacted with *Unified Government*, this variable indicates the percentage of legislative seats that differ from the governor's party. Smaller values of *Legislative Fragmentation* mean that the legislature is in close to perfect unity with the governor's party, while larger values indicate that the legislature is almost evenly split between the governor's party and opposing parties.

Control Variables

The model includes several additional variables that could influence the number of significant, policy-relevant executive orders issued by a governor, all contained in the Book of States. At the state level, the governor's authorization

to issue executive orders may be constitutional, statutory, or implied. A governor whose power is explicitly granted through law or constitution is more likely to issue executive orders because use of this power will be less controversial. Governors may not be as quick to issue executive orders in states, where unilateral action is not explicitly condoned. The variable equals 1 if the power is explicit (*Explicit Authorization*).

While scholars debate when exactly the executive is the most influential during the political administration, they all agree that timing does matter (Crew and Hill 1995; Light 1991; Neustadt 1960). Therefore, the model includes the year in the governor's term (*Time Served*) because this is likely to affect the governor's strategic decision to use executive orders. It is also necessary to control for governors whose terms did not start in January (*January*) since this affected how the year in the governor's term was counted.

It is likely that a governor who is of a different party than his or her predecessor will issue more executive orders (*Opposite*). When there is a party change, the incumbent governor may be more likely to rescind or amend prior orders or make other adjustments to the status quo. For example, in 2008, the Republican governor of Rhode Island, Donald Carcieri, issued an executive order requiring executive agencies to use E-Verify. Shortly after taking office in 2011, Governor Lincoln Chafee, a Democrat, rescinded Governor Carcieri's executive order. This variable is coded as 1 if a governor is from a different party than his or her predecessor and in his or her first term and 0 otherwise.

Empirical Results

The best model for this data is negative binomial regression—rather than Poisson regression—because of evidence of overdispersion (i.e., the variance of the dependent variable exceeds its mean; Cameron and Trivedi 2013). Table 2 presents coefficient estimates for the model and standard errors clustered by state. When testing Hypotheses 1 and 4, the primary independent variables of interest are the

executive and legislative indicators of the costliness of bargaining (i.e., *Formal Power* and *Legislative Professionalism*). When testing Hypotheses 2 and 3, the independent variables are the two interaction terms that capture the capacity of the legislature under unified government.

The results support all four hypotheses. Hypotheses 1 and 4 suggest that an executive will act unilaterally when bargaining with the legislature is costly. When the governor is relatively weak or when the legislature is strong and less incentivized to compromise, the governor will issue more executive orders.

Because *Legislative Professionalism* is interacted with *Unified* government, the estimated coefficient on the *Legislative Professionalism* term indicates the effect of *Legislative Professionalism* when the government is divided. The coefficient estimate is statistically significant at the .01 level. When the government is divided and the legislature is professional, the governor is more likely to circumvent the legislature by issuing executive orders. This finding supports Hypothesis 1. The predicted difference in the number of executive orders associated with a change from the minimum level of professionalism to the maximum level under divided government—when each other independent variable is at its central value—is 4.45. This first difference is statistically significant. Because this sample is dominated by observations with a relatively small number of orders, this finding seems substantial.

A governor's *Formal Power* also has a statistically significant effect on the use of executive orders, supporting Hypothesis 4. Moving from the minimum (10.5) to maximum (22) level of *Formal Power*, the governor issues 1.70 fewer significant, policy-relevant executive orders per year. This first difference is significant at the .05 level.

The results also support Hypotheses 2 and 3. The legislature will relinquish policy-making authority to the governor when it is of the same party as the governor and has less capacity (i.e., is less professionalized or more fragmented).

Consistent with the Hypothesis 2, the negative coefficient indicates that as the legislature

becomes less professional, the governor issues more executive orders under unified government. The interaction term is in the expected direction and significant at the .05 level.

The results strongly support Hypothesis 3, which predicts that governors issue more executive orders when the legislature is of the same party and is highly fragmented. When interacted with *Unified*, *Legislative Fragmentation* gives the percentage of legislative seats that differ from the governor's party. Low values indicate that very few seats differ from the governor's party. This indicator is in the expected direction and is significant at the .05 level. When the governor's party makes up a smaller portion of the legislature, legislators are more likely to delegate to the governor to achieve their preferred policy through an executive order. When the governor's party controls 50% of the legislature, the governor will issue 2.34 more executive orders than when his or her party controls 90.3% of the legislature (the maximum percentage of seats in the data set; significant at the .10 level). As *Legislative Fragmentation* increases, the governor issues more executive orders under unified government.⁴ In other words, as it becomes more cumbersome for the legislature to pass legislation under unified government, the governor is more likely to resort to executive orders.

Conclusion

This analysis illustrates the importance of considering the use of executive orders in a cross-sectional context. By considering the effect of various institutional arrangements on the use of executive orders, this analysis provides a more comprehensive perspective of where unilateral action fits in relation to other executive powers and why it is used.

American-based theories of unilateral action predict that executives will use unilateral action to usurp legislative power (Corley 2006). These scholars caution that extensive or easy use of unilateral action (specifically, executive orders) could lead to a breakdown in the balance of powers between the executive and the legislature (Genovese 2011; Cooper 2002;

Mayer 2009). However, the focus on one national system leaves us with an incomplete picture of how variable institutional arrangements affect the use of unilateral action. Without knowledge of how chief executives with different degrees of formal power utilize unilateral action, scholars cannot speak to the important question of how unilateral action fits into the broader “tool kit” of executive power.

Our results show that governors use executive orders both in response to legislative delegation and as a way to circumvent legislative authority. When it is costly for the governor to bargain with the legislature, he or she will use executive orders to circumvent the legislature. However, under unified government, legislatures are willing to delegate policy-making authority to the governor rather than be stymied by fragmentation or low professionalism.

The results from this analysis show that concerns about extensive use of unilateral action are overblown. First, stronger chief executives appear to use their formal power to bargain with legislatures rather than to threaten them with unilateral action. In addition, there are instances in which legislatures may favor the use of unilateral action.

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Supplemental Material

Supplementary material for this article is available online.

Notes

1. These categories were originally created by Ferguson and Bowling (2008). Ragsdale (2009), Warber (2006), and Fine and Warber (2012) develop alternative categorizations of orders based on their content. However, Ferguson and Bowling’s categories are the most comprehensive

and, unlike Ragsdale’s and Warber’s, are applied at the state level.

2. The creation of a state commission is treated differently than the creation of a council, board, or task force because a state commission is a fairly visible entity that is likely to be (1) in place for a longer period of time and (2) charged with an issue of statewide concern, while a council, board, or task force is likely to be shorter term and focused on narrower issues.
3. See Supplemental Figure 1 in the Online Appendix for a heat map illustrating distribution of executive orders across states.
4. See Supplemental Figure 2 in the Online Appendix for a graph of the marginal effect of *Legislative Fragmentation* on the use of executive orders under *Unified* government.

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