

**Judging the Margins:
Executive Orders in the U.S. Courts of Appeals**

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Abstract:

It is rare for the courts to directly challenge an executive order, ruling it null and void. Instead, the court defines presidential power at the margins, setting the parameters for unilateral power. This paper examines the U.S. Courts of Appeals treatment of cases involving presidential executive orders from 1943 to 2013. It tests a set of political and case specific hypotheses to determine when the court upholds or constrains executive action. The results indicate that political variables matter, proving a more comprehensive understanding of the courts treatment of executive orders.

Introduction

Since President Obama took office in 2009, he issued 196 executive orders (EO) covering a wide range of issues, from labor relations (*EO 13495*) to commerce and foreign affairs (*EO 13599*). However, President Obama's executive order use represents a downward trend in the executive's use of this presidential tool. Presidents are issuing less executive orders in real numbers but their content contains more significant, and sometimes controversial, policies (Mayer 2001). Many believe the media is supposed to provide a check on the use presidential power, but this is rarely the case when it comes to the use of executive orders. Instead, the administration tends to control the message presented to the people (Major 2014) and little change occurs in the implementation of an executive order because of media attention. Similarly, Congress can rarely overcome the presidential veto and pass legislation overturning an executive order (Moe & Howell 1999). This leaves it to the courts to serve as the most viable and authoritative check on the use of executive power. This essay focuses on cases involving executive orders in the U.S. Courts of Appeals and seeks to better understand the relationship between the presidential and judicial branches. By examining a wider range of cases and including additional case variables, I argue the U.S. Courts of Appeals does serve as a check on the president by defining the margins of power.

This essay proceeds as follows. First, I highlight that our understanding of the courts role in constraining this important presidential tool is limited. Next, I argue for an expanded case set that allows the court to define executive power at the margins. I then

develop testable hypotheses that lead to the court issuing opinions of deference or constraint. Finally, I present the data to test these hypotheses, examine the results, and discuss avenues for future research.

Direct Challenges to Presidential Power

Presidential use of executive orders is often viewed as contentious. The Constitution does not explicitly grant the president the power to issue executive orders. However, when the president does issue one, it carries the full weight of law (Cooper 2002). This implied power has grown since the founding as president's regularly use it "...take Care that the Laws be faithfully executed..." (Article II, section 3). The absence of an explicit grant of authority leads legal scholars to study the constitutionality of individual executive orders (Rosenberg 1981; Neighbors 1964). While studies of individual orders and court cases are important to the development of constitutional law, it is difficult to draw generalizations about how the Court handles executive orders as a class of cases.

Critical of legal studies examining individual cases, Ducat & Dudley (1989,103) "...address the void in our empirical knowledge of judicial-executive relations by uncovering patterns of deference and constraint as federal district judges react to exercises of presidential power." They focus on the president's relationship with judges overseeing the case--are the president and judge of the same party, did the president appoint the judge, is the judge overseeing an exercise of power committed by the sitting president. Findings indicate district court judges impose limited constraint on the president. In fact, judges are likely to support the president's exercise of power,

especially when the president is popular, it is a foreign policy issue, or when the judge was appointed by the president.

Ducat & Dudley's (1989) findings are limited because they only examine the U.S. District Courts. Yates & Whitford (1998) replicate their study at the Supreme Court level. Presidential popularity and foreign policy issues remain a significant indicator that Supreme Court Justices will defer to the president. However, judicial appointment no longer has an impact. Instead, they find liberal Justices more likely to rule against the president in an attempt to constrain the growing executive. While this is counter-intuitive, Yates & Whitford (1998) argue in the post-Watergate era liberal judges have been more likely to constrain executive power.

Both studies present insight into presidential-judicial relations but group all exercises of presidential power together. With executive orders growing in prominence, a more rigorous and isolated treatment of this tool is needed. Howell (2003) moves in this direction by focusing specifically on executive orders and the courts treatment of them. Contrary to the early studies that only look at one level of the federal court system, Howell's results indicate presidential success varies at different levels when focusing on executive orders. At the district and appellate levels, Howell finds the president is likely to win constitutional and statutory challenges to executive orders. It is only at the Supreme Court level that a constraining effect is apparent. Howell reasons the difference in presidential success at different levels of the federal court system is a product of the separation of powers. The courts rely on the president to enforce their rulings against him. At lower levels, the president has little incentive to comply. When a

case reaches the Supreme Court, there is greater pressure on the president to comply because the increased stature of the Court and the public attention the case is likely to receive.

The ability of the courts to reign in executive power is important to the functioning of our separated system of powers. These studies provide greater insight in their ability to do so by moving beyond examining the constitutionality of individual exercises of presidential power. However, these studies take a limited view on how the courts treat executive orders as a body of law. The next section argues why greater attention needs to be paid to executive orders in the court if we are to better understand the courts role in constraining executive power.

Defining the Margins of Executive Orders in the U.S Courts of Appeals

Howell (2003) provides the most comprehensive treatment of executive order challenges in the U.S. federal court system by focusing on cases that challenge the constitutional or statutory grounds of executive orders. While this is an important area for explaining the relationship between the executive and judicial branch, it is limited. This treatment discredits a wide range of cases important to the courts ability to constrain the executive, cases of compliance and administration of the executive branch.

These cases do not reach the level of high politics, pitting one branch of government against the other. However, it does present opportunities for the court to define the reach of executive power. It does not require the court to explicitly challenge presidential power by overturning an executive order, but allows the court to constrain

presidential power at the margins. Treating executive orders as a body of law, and examining their role in U.S. Courts of Appeals cases, provides a new look on the courts role in checking the use of this presidential policy tool.

For instance, nearly every president issues an executive order defining procedures and regulations agencies must follow to classify documents. These orders are of significant importance because reporters and individuals regularly submit Freedom of Information Act (FOIA) requests for various documents that agencies can withhold under the authority of the executive order. In most cases, the court defers to the agency, allowing them to withhold documents. However, the court also defines the limits of an agencies' ability to do so. In *Summers v. Department of Justice* (1998), the court held agencies have the authority to withhold documents, but the executive order does not give agencies unlimited discretion in determining what can be classified. Judge Sentelle, writing for the court, held agencies still have to explain the national security risk associated with releasing the information. The court is not challenging the president directly, it recognizes the legitimate use of executive power but defines its limits at the margins.

When the court constrains executive orders at the margins it provides insight into an important aspect of presidential-judicial relations currently neglected. Constraining power at the margins is a check on presidential power. It limits the reach of a current order but also establishes a body of law defining the limits the president must issue future orders within. It is important to include all cases involving executive orders, not just constitutional and statutory challenges because these cases present the court with

opportunity to constrain the executive at the margins without directly confronting the president on an abuse of power. For instance, in *Cones v. Shall* (2000) executive order 12839 required agencies to reduce their workforce, which the court held is within the president's power. However, the court said this power is not absolute and layoffs must be merit based and not discriminatory. The *Cones v. Shall* case illustrates the need to include a wider range of cases. Following Howell's constitutional or statutory requirement for inclusion would miss this case and under value the court's role in constraining executive power. To better understand the courts treatment of executive orders I examine U.S. Courts of Appeals cases involving executive orders from 1943 to 2013. This time frame produces 560 cases with written opinions. This paper uses a random sample of 226 cases as a first cut through the data.

The intermediate level of the court system is an appropriate place to begin an investigation for several reasons. Most importantly, only a few cases reach the Supreme Court, and when they do, they mirror Howell's (2003) constitutional and statutory challenges. This makes the Courts of Appeals the final arbiter in the majority of cases where executive power is defined. This not only provides a larger sample of cases to draw from, but in most instances the Courts of Appeals are defining the relationship between the executive and judicial branches. Second, political variables are more prevalent at the appeals level than the district level (Sunstein et al. 2006).

To understand when the Courts of Appeals are likely to defer or constrain executive power, I argue two sets of variables require attention; political and case specific. Political variables examine the characteristics of the panel that are important

because they provide the most insight to presidential-judicial relations. U.S. Courts of Appeals judges are appointed for life and are supposed to be insulated from political pressures. However, politics does enter into judicial decision making because judges are appointed to uphold presidential policies. Ascending to the U.S. Courts of Appeals does not occur strictly based on merit. Being a sound legal scholar is an important requisite, but there is a large pool of equally qualified candidates. Once potential judicial appointees reach a certain level of competence additional criteria set them apart from their peers, namely ideological beliefs.

When presidents appoint judges, they do so in an attempt to secure their legacy. For example, President Obama is highly unlikely to appoint a conservative judge that will be in a position to overturn parts of the Affordable Care Act in the future. Instead, presidents appoint judges they believe will uphold their policies and defer to their use of executive power. When examining executive orders, the closer the judge is to the president in a temporal sense, the more apparent this relationship should be. When a judge is hearing a case involving the president that appointed them, the judge is more likely to uphold the presidents' use of executive orders (Howell 2003). However, judicial appointments outlast the appointing president's term. Presidents seek out candidates they believe will uphold their executive orders even after they leave office. For instance, *USA v. New Orleans Public Service, Inc.* (1977), an executive order by President Kennedy concerning affirmative action received attention 16 years after it was issued. The presence of a judge appointed by JFK and a fellow liberal judge appointed by

President Johnson led to the court upholding the executive order and securing presidential policies.

Equally important to upholding a president's personal use of executive orders, presidents expect judges to tow the party line--upholding executive orders issued by their party and constraining those issued by the opposition. When appointing a federal judge, presidents know they sit for life and seek candidates that are faithful to the party platform no matter who occupies the White House. While this is the expectation of judicial appointees, there is conflicting evidence. Ducant & Dudley (1989,106) argue liberal judges are more likely to support exercises of presidential power but fail to find significant results at the district court level. Conversely, Yates & Whitford (1998,542) find support for their argument that liberal justices in the Supreme Court seek to constrain the growth of the executive branch. Conflicting results are likely a product of examining different levels of the judiciary, where district court judges address issues of fact and Supreme Court justices handle the most pressing issues of executive overreach. This study takes the position of Ducant & Dudley, arguing liberal judges in the U.S. Courts of Appeals will be more likely to defer to the use of executive orders. This leads to three hypotheses testing the political implications of executive-judicial relations:

H1: The court will uphold executive orders issued by the president that appointed them.

H2: The court will defer to their party and constrain the opposition party.

H3: The more liberal the panel hearing a case involving an executive order, the more likely they are to defer to executive power.

Political variables are not the only issues likely to influence the decision to uphold or constrain executive power, details about the case also affect judicial decision making. The most commonly used set of case variables is issue and circuit (Ducat & Dudley 1989; Yates & Whitford 1998). Presidents issue executive orders across a wide range of issues, both foreign and domestic, which the court is likely to treat differently. According to Wildavsky (1966), the president can operate with more latitude in the foreign arena than the domestic one. He receives information on foreign policy not available to the public or courts. When the court hears a case involving a foreign policy executive order, the court is more likely to defer to the president, allowing him to exercise greater authority. Conversely, when the court hears a case involving a domestic policy executive order, there is more of an incentive to constrain and define the margins of executive power. There is an established body of law to draw from and a wider range of affected interest groups lobbying for particular outcomes.

Groups can lobby judges but their preferred outcome is not guaranteed (Baum 2006), but being involved in the case gives experienced groups the best opportunity to secure a favorable outcome. Not all groups are created equal, some have more resources and experience available to them (Galanter 1974). The status of the litigants is an important piece to explaining the courts treatment of executive orders for two reasons. First, experience is a key to explaining a litigant's success in the court. Repeat players, those that continually find themselves before the court, have the necessary experience and relationships with the court to increase their chances of securing favorable outcomes. Songer et al. (1999) find the most common and successful repeat

player is the United States government. Because executive orders are a means to alter executive agency action in a way that conforms to presidential preferences, agencies should be the most commonly involved litigant. As an agent of the president, executive agencies have an incentive to defend the president's actions in pursuit of achieving his policies. Their recurring appearance in the court provides agencies with the necessary experience to defend the president's executive order. Second, the court has an incentive to uphold an executive order when an agency is involved. It allows the court to avoid directly challenging another branch of government. When an agency is not involved, the court has greater freedom to define the reach of an executive order and set a precedent to follow in the future. The issue involved and the litigant status provide two testable hypotheses:

H4: The court is more likely to defer to the president on foreign policy executive orders and constrain executive orders dealing with domestic issues.

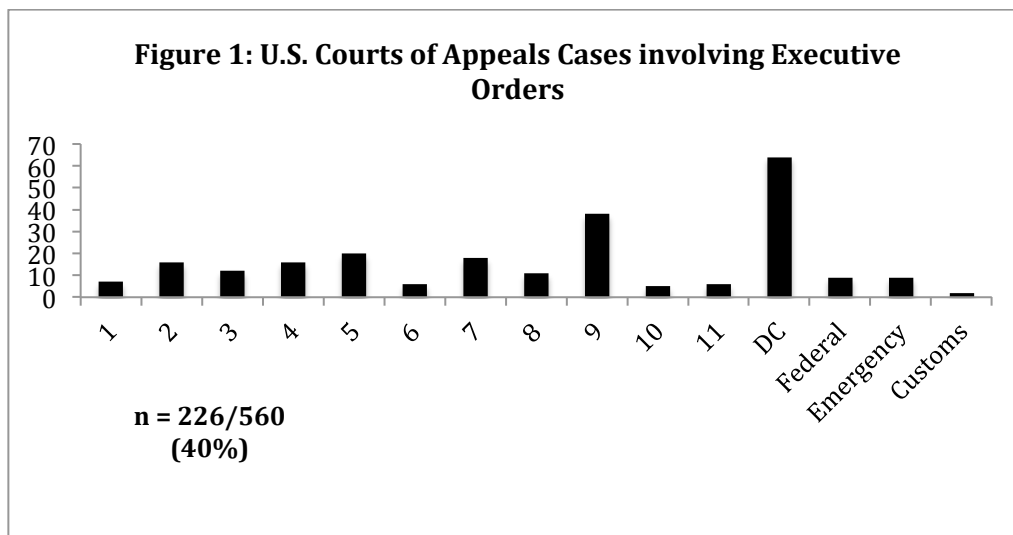
H5: When the USA is present as a litigant, executive orders are more likely to be upheld.

Finally, the circuit where the case is heard should have an impact on the court's propensity to uphold or constrain executive power. Both the DC Circuit and the Federal Circuit are of particular interest. Both circuits hear the largest volume of cases involving administrative procedures. Because executive orders are tools for the president to control agency actions, it is likely these cases will involve issues executive power. Over 30% of cases involving executive orders are heard in these two circuits (Figure 1). The high volume should drive the panel to constrain the limits of executive orders for two reasons. First, constant interaction with executive orders allows the court to develop a

comprehensive understand of the limits of executive power. The court will know when, and how to constrain executive power. Second, being presented with a higher volume of cases allows the court to choose cases ripe for defining the limits of executive power.

Therefore:

H6: The court is more likely to constrain executive power in when cases are heard in the DC or Federal Circuits.



Data

U.S. Courts of Appeals cases with a written decision from 1943-2013 are used to examine the courts propensity to constrain executive power. A WestLawNext search is conducted with the term “Exec Order”. This allowed for the abbreviation of executive to be included but also searched for the full term. This search yielded 1,247 cases. Next, each case is searched for the term “order”, making sure a specific presidential executive order was mentioned at least twice. The term order was used because in some cases a specific executive order is referred to initially and then subsequently referred to as the

'order'. This yielded 560 court cases with a written decision. The analysis in this paper is based on a random sample of 226 of those cases (42%).

Dependent Variable

The dependent variable is measured dichotomously. ***Uphold*** is coded as a 1 if the court upholds an executive order and a 0 if the court is constraining the limits of an executive order. To determine if the executive order is upheld or constrained the opinion of the case is read, focusing on the areas where the executive order is mentioned. Sometimes explicit language is used indicating the courts desire to defer or constrain executive power. Most cases require a more thorough reading of the case details to determine how the court citing the executive order. Understanding the facts of the case is important in determining if an order is upheld or constrained because most cases are not direct challenges to an order. Each executive order uniquely relates to the case and can only be categorized as upheld or constrained by reading the opinion. Due to the dichotomous nature of the dependent variable logit is the appropriate tool to test the probability of judicial outcomes.

Independent Variables

There are three sets of variables; political, case specific, and presidential controls.

Political

PanelLiberals is expected to have a positive coefficient and measures the percent of the panel composed of liberal. The party of the appointing president is used as a proxy for the ideology of the judge. ***EOAppointed*** is expected to have a positive

coefficient and measures the percent of the panel hearing the case that was appointed by the president that issued the executive order. **PanelParty** is expected to have a positive coefficient and measures the percent of the panel that is the same party as the president that issued the executive order. Data on judges are collected from the Federal Judicial Center.

Case Specific

ForeignPolicy is a dichotomous variable that measures if an executive order is a foreign or domestic policy issue with foreign policies taking the value of 1 and domestic the value of 0. The Agenda's Project codes executive orders by issue area that is used to determine which orders are foreign and domestic.¹ **ForeignPolicy** is expected to have a positive coefficient. **USAappellant** is dichotomous and measures if the USA was an appellant in the case. This includes agencies, individuals as the head of an agency, and the Attorney General's office, where 1 takes on the value of USA involvement and 0 is other. **USAappellee** is similar to **USAappellant** but measures if the USA was an appellee in the case where values of 1 indicate USA involvement and 0 is no involvement. Both USA variables are expected to have a positive coefficient. **DCcircuit** and **FederalCircuit** are dichotomous variables that measure if a case was decided in the DC Circuit or Federal Circuit, respectively. If a case was heard in either circuit the respected variable takes on a value of 1, otherwise 0. Both circuit variables are expected to have a negative coefficient.

¹ The executive orders in this sample include issues of administration, civil rights, commerce, environmental, foreign affairs, labor, military, national security, property, science and technology, and war powers. Foreign affairs, military, national security, and war powers are collapsed into a single foreign affairs variable. While issues like military and war powers might have a domestic component, they still speak to the president's power as Commander in Chief where he receives greater latitude. The remaining categories are collapsed into a single domestic policy variable.

Presidential Controls

Presidential controls are included in both models and measure qualities of both the issuing and sitting president. While they will likely have an effect on the courts treatment of executive orders, they are independent of presidential-judicial relations or case specific variables so they are included as controls. ***EOparty*** is dichotomous and measures the party of the president that issued the executive order with Democrats taking a value of 1 and Republicans a value of 0. ***EOsameSit*** is dichotomous and measures if the issuing and sitting president is of the same party. Values of 1 indicate they are of the same party and 0 indicates they are different. ***Popularity*** is included in the control set and measures the president's average approval rating in three months leading up to the decision. Popularity is measured by approval ratings from Gallup.

Results and Analysis

Three models are run to better understand the courts treatment of executive orders. One testing just political variables, one testing just case specific variables, and one combining both sets of variables.

Initial results indicate that politics matters (Table 1: Model 1). The strongest relationships occur when examining the party composition of the panel. While ***EOappointed*** is not significant, ***PanelEOparty*** is significant at $p < .05$ and in the expected direction. As the panel becomes more partisan--being of the same party as the president that issued the executive order under question--they are more likely to uphold the president's use of executive orders. Although ***H1*** is not confirmed and it is difficult to confidently say judges are more likely to uphold an executive order by the

president that appointed them, the partisan effects of the panel are just as important, confirming **H2**. Presidents are successful in selecting judges that will support the party even after they are out of office.

Upholding an executive order by the appointing president might not be as important as faithfully upholding executive orders issued by future partisans. The nature of executive orders makes them fickle. Carrying the weight of law makes them an important presidential tool, however, incoming presidents can easily revoke them or issue an order in their place. Constraining an order issued by an opposition president, and supporting future partisans, can uphold a president's legacy more than simply supporting exercises of power by the appointing president.

PanelLiberals is significant at $p < .05$ but in the opposite of the expected direction. As the panel becomes more liberal, they are more like to constrain executive orders at the margins. This finding confirms Yates & Whitford's (1998) finding that liberal judges are more likely to constrain executive power.

The case specific variables do not hold up as well as the political variables (Table 1: Model 2). Both the **DCcircuit** and **FederalCircuit** are in the expected direction but neither is significant. Only **DCcircuit** approaches significance at $p < .1$. The remainder of the case specific variables are in the expected direction but are not significant and do not explain the courts propensity to uphold or constrain executive power.

Table 1: Panel Decisions to Uphold Executive Orders in the U.S. Courts of Appeals

DV: Uphold	Model 1 Political Variables	Model 2 Case Specific	Model 3 Full Model
<i>PanelLiberals</i>	-1.7441** (.7804)		-2.2502** (.8842)
<i>EOappointed</i>	.8015 (.7395)		.6051 (.7604)
<i>PanelEOparty</i>	1.738** (.8438)		2.2187** (.9335)
<i>ForeignPolicy</i>		-.2414 (.3741)	-.2528 (.3849)
<i>USAappellant</i>		.0340 (.5428)	.0264 (.5698)
<i>USAappellee</i>		.4275 (.4613)	.4835 (.4874)
<i>DCcircuit</i>		-.5469 (.3887)	-.3523 (.4080)
<i>FederalCircuit</i>		-.8084 (.9079)	-2.1588* (1.1257)
<i>EOsameSit</i>	.6294* (.3581)	.5708 (.3476)	.6202* (.3703)
<i>EOparty</i>	-.4150 (.4248)	-.2443 (.3878)	-.6483 (.4787)
<i>Popularity</i>	-.0226* (.4248)	-.0173 (.8623)	-.0247* (.0136)
Constant	2.3242** (.8973)	2.1199** (.8623)	2.6518** (.9962)

p < .1*, p < .05**, p < .001***

Model 1

N=226, Pseudo R2=.075

Model 2

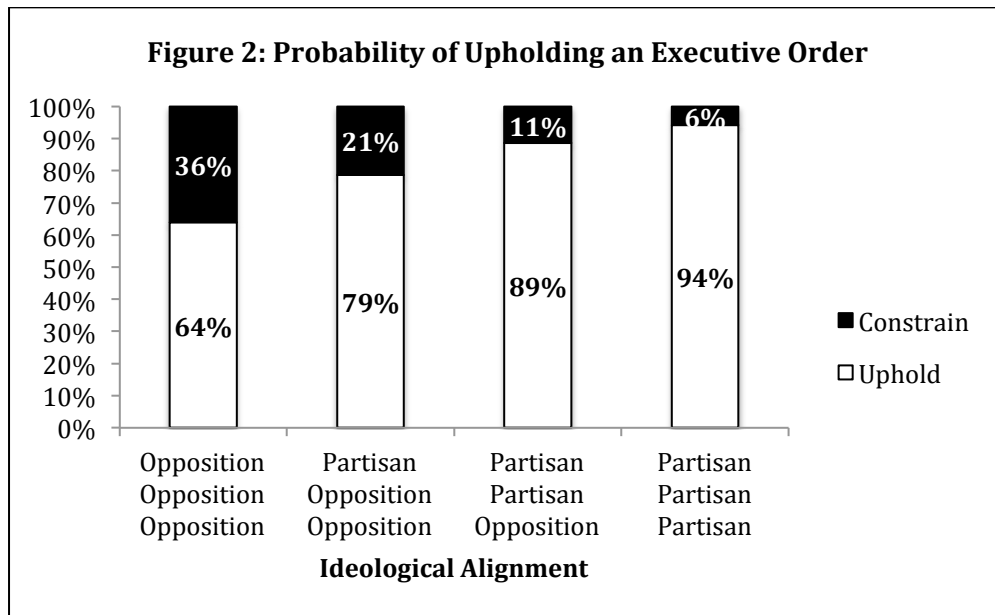
N=226, Pseudo R2=.043

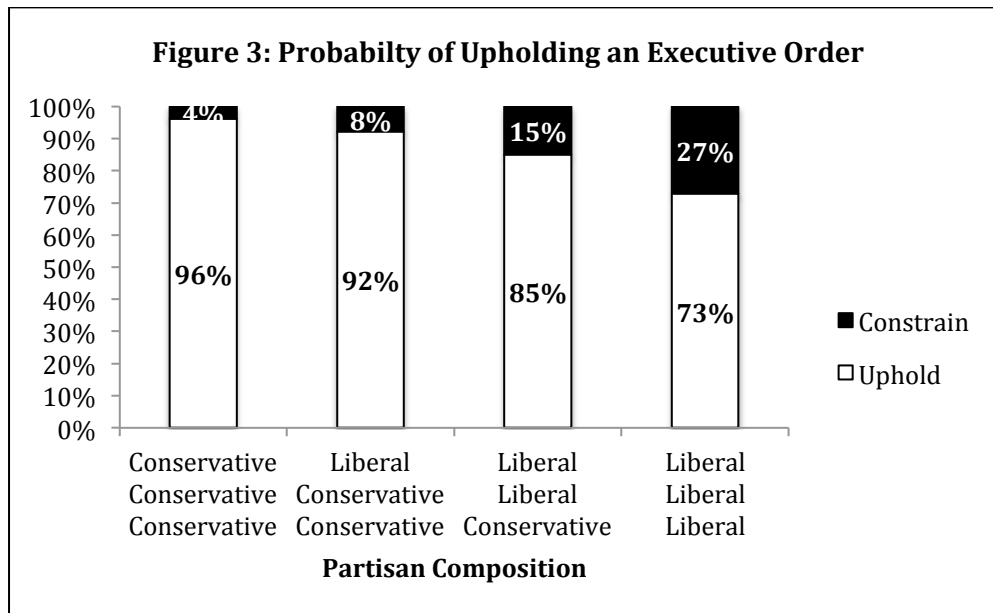
Model 3

N=226, Pseudo R2=.09

When both the political and case specific variables are run together, the political variables remain significant and in the expected direction (Table 1: Model 3). **PanelEOparty** is significant at $p < .05$ and in the expected direction. When the panel contains no partisans there is only a 64% chance the panel will uphold an executive order. However, as the panel becomes fully aligned with the president's party, the probability of upholding an executive order increases to 94%, a 30 percentage point increase (Figure 2).

PanelLiberals also remains significant at $p < .05$, but again in the opposite direction anticipated. As the composition of the panel moves from fully conservative to fully liberal, the probability of upholding an executive order drops from 96% to 73%, a 23 percentage point decrease. Put another way, a fully liberal panel is likely to constrain an executive order 27% of the time (Figure 3). Finally, **EOappointed** remains non-significant indicating a judge appointed by an issuing president is no more likely to uphold or constrain executive power than an order issued by a later president.





Conclusion

Despite the growth of this unilateral policy tool available to presidents, there is relatively little scholarly attention to checks on this power. Although Congress and the media have the ability to constrain presidential power, the president's use of executive orders is rarely checked this way. I argue the courts are the most viable and authoritative check on executive order use. Previous research suggests the courts rarely confront the president head on, ruling an executive order completely null and void. When this does occur, it occurs at the Supreme Court level (Howell 2003). This does not make the lower courts inconsequential, they play a critical role in constraining executive power. This study shows the U.S. Courts of Appeals effectively defines the limits of executive power at the margins. Instead of directly overturning an executive order, the court will limit the reach of this tool by defining the parameters of an executive order.

I examine two sets of variables; political and case specific. My results indicate that life appointment to the federal panel does not insulate the court from politics. The court is more likely to uphold an executive order as the panel becomes more ideologically aligned with the president that issued the order and constrain the opposition. However, there is a general constraining effect when the panel becomes more liberal. Although this paper examines decisions from a collegial panel, the political influences could be driving individual judges seeking appointment to a higher court to act strategically by upholding partisans and constraining opposition presidents.

Conversely, case specific variables tend not to matter. Only when case variables are included in the full model does the Federal Circuit become a predictor of the court's propensity to constrain executive power. Intuitively this makes sense because its topical jurisdiction covers appeals from administrative agencies.

This research is important for several reasons. First, it shows the court does play a crucial role in constraining executive power. It does not do so directly, but it does limit executive power at the margins. Secondly, this research shows the importance of the U.S. Courts of Appeals. This court acts as the final arbiter and check on executive power in many cases. Contrary to previous findings, the court does serve as a significant check at the intermediate level. Finally, despite life tenure, the court is not insulated from politics. The panel's affiliation with the president and the party affects their decision to uphold or constrain the use of executive orders.

Future Research

This paper highlights several avenues for future research. First, completing this dataset to make sure the relationships hold across the full set of cases. Second, writing this paper called to attention the lack of the courts treatment of executive orders. This expanded case set should be applied to the District and Supreme Court levels as well. Future research should also examine the role of individual judges because judicial appointments are the best way for a president to secure their legacy. The role judicial appointees play in upholding the president's program will provide important information on the president's success in maintaining key programs after leveling office.

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