



**Executive Orders Under Judicial Scrutiny:  
The Role of Partisanship in Judicial Outcomes**

By: Matthew J. Zinno

Honors Thesis

Submitted to the Department of Government and Politics

College of Behavioral and Social Sciences

University of Maryland

December, 2024

## Abstract

Scholars have extensively examined the executive branch's success in the federal judiciary, principally through the Solicitor General's influence on the U.S. Supreme Court. Yet, scholars have focused little attention on the factors that affect the president's ability to successfully defend legal challenges to executive orders. This question is especially important given the president's increasing reliance on executive orders to enact policy. I argue that presidential success defending executive orders is not only influenced by the legal merits, but also by the political context, including judge partisanship and presidential approval. I construct an original dataset of all litigation in federal courts involving executive orders enacted since 1945. I present several key findings. First, I show that the president's ability to successfully defend their executive orders varies considerably. And, while few executive orders are ruled wholly unconstitutional, courts routinely limit their scope and executability. I also find a statistically significant relationship between copartisan judges (i.e., those appointed by presidents of the same party as the executive order author) and rulings in favor of the executive. Additionally, I find a statistically significant relationship between judges' ruling on executive orders and whether the case was adjudicated during versus after the issuing president's tenure. These results lend empirical evidence to the claim that judges, like other political figures, are motivated by partisan and ideological considerations. This research underscores the importance of understanding the partisan factors that affect judicial decision-making on executive orders as they become an increasingly common tool for presidential policymaking.

## Acknowledgments

This thesis represents the most significant endeavor I have undertaken in my academic career thus far, and I can say with full confidence that I could not have accomplished this without the incredible guidance, encouragement, and unyielding support of many. First and foremost, I want to thank my advisor, Dr. Patrick Wohlfarth, without whom this thesis would not have been possible. I am deeply grateful for his invaluable insights, steadfast support, and the time he devoted both over the summer and this semester, which enabled me to develop this thesis far beyond what I initially envisioned. Additionally, I would like to thank Dr. Tristan Hightower for his insightful feedback and thoughtful guidance throughout the development of this thesis. I also am immensely grateful to Dr. Sarah Croco and Dr. Kristina Miller for serving as committee members and providing invaluable advice during the final stages of this project. Finally, I want to express my heartfelt gratitude to my family and friends for their unwavering support—patiently listening to me for countless hours and helping me refine the underlying theory of this thesis through thoughtful discussions.

Table of Contents:

I. Abstract ..... 1

II. Acknowledgements ..... 2

III. List of Figures and Tables ..... 4

IV. Introduction ..... 6

V. Literature Review .....12

    A. *Unilateral Presidential Policymaking* ..... 13

    B. *Executive Order Formulation* ..... 14

    C. *Separation of Powers: Constraints on Executive Orders* ..... 17

    D. *Presidential Policymaking and Judicial Review* ..... 21

VI. Theory..... 26

    A. *Copartisan Judges* ..... 26

    B. *Presidential Approval* ..... 29

    C. *Divided Government* ..... 30

    D. *Role of Time* ..... 31

    E. *Court Level* ..... 32

VII. Results ..... 34

VIII. Conclusion ..... 71

IX. Appendix ..... 76

X. References ..... 82

## List of Figures and Tables

I.	Executive Order Legal Challenges Over Time .....	42
II.	Executive Order Legal Challenges by Issuer .....	42
III.	Executive Order Legal Challenges During the Presidency of Issuance .....	44
IV.	Executive Order Legal Challenges After the Presidency of Issuance .....	44
V.	Impact of Copartisan Alignment on Executive Success in Court .....	46
VI.	Predicted Probability of Copartisan Judicial Support for Executive Orders .....	47
VII.	Predicted Probability of Judge Support for Executive Orders During Divided v. Unified Government .....	48
VIII.	Impact of Presidential Administration on Executive Success in Court .....	51
IX.	Executive Success Rate During v. After the Issuing Presidency .....	53
X.	Impact of Cases Occuring During vs. Post Issuing Presidency on Executive Success in Court .....	55
XI.	Executive Success Rate by Number of Years Since Issuance .....	56
XII.	Predicted Probability of Judge Support for Executive Orders During v. After Issuing Presidency .....	57
XIII.	Executive Success Rate After the Issuing Presidency by Copartisan v. Non-copartisan	58
XIV.	Executive Success Rate During the Issuing Presidency by Copartisan v. Non-copartisan .....	59
XV.	Impact of Copartisan Alignment and Cases Occurring During vs. After Issuing Presidency on Executive Success in Court .....	60
XVI.	Impact of Copartisan Alignment on Executive Success in Court .....	63
XVII.	Executive Success Rate by Copartisan v. Non-copartisan .....	64

XVIII. Impact of Cases Occurring Before vs. Since 2004 on Executive Success in Court ..... 65

XIX. Predicted Probability of Judge Support for Executive Orders During v. Since 2004 ..... 67

XX. Impact of Court Level on Executive Success in Court ..... 68

XXI. Predicted Probability of Judge Support for Executive Orders by Court Level ..... 70

XXII. Impact of Cases Occurring Before vs. Since 2004 on Executive Success in District Courts  
..... 76

XXIII. Impact of Cases Occurring Before vs. Since 2004 on Executive Success in Circuit Courts  
..... 77

XXIV. Impact of Copartisan Alignment and Cases Occurring Before vs. Since 2004 Presidency  
on Executive Success in District Courts ..... 78

XXV. Impact of Copartisan Alignment and Cases Occurring Before vs. Since 2004 Presidency  
on Executive Success in Circuit Courts ..... 79

XXVI. Executive Order Legal Challenges Before vs. Since 2004 ..... 80

XXVII. Executive Order Legal Challenges Among Non-Copartisans Before vs. Since 2004 .... 80

XXVIII. Executive Order Legal Challenges Among Copartisans Before vs. Since 2004 ..... 80

XXIX. Executive Order Legal Challenges Occurring During vs. After the Issuing Presidency 81

XXX. Executive Order Legal Challenges Before 2004 Occurring During vs. After the Issuing  
Presidency ..... 81

XXXI. Executive Order Legal Challenges Since 2004 Occurring During vs. After the Issuing  
Presidency ..... 81

## Introduction

On January 27th, 2017, seven days after former President Donald Trump's inauguration, the President issued Executive Order 13,769: Protecting the Nation From Foreign Terrorist Entry Into the United States. This executive order was later referred to as the "Muslim Travel Ban" due to its travel restrictions on predominantly Muslim countries, barring citizens of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen from entering the United States (Executive Order No. 13,769, 82 Fed. Reg. 8977 (2017)). This ban prevented citizens of those countries from entering the United States for 90 days, halted refugees from those countries from gaining entry for 120 days, and indefinitely prevented citizens of Syria from entering the United States (Executive Order No. 13,769, 82 Fed. Reg. 8977 (2017)). The White House rationalized this order by asserting that the President has a constitutional duty to protect American citizens from terrorist attacks committed by foreign nationals. However, numerous members of the public and multiple states took issue with the order, resulting in immediate legal challenges.

The first challenge arose not even a day after the executive order's issuance. Hameed Khalid Darweesh and Haider Sameer Abdulkhaleq Alshawi—two Iraqi citizens who had legal documentation and were approved for entry into the United States—sued the government, requesting a temporary restraining order to halt the federal government's enforcement of the order (*Darweesh et al. v. Trump et al.*). On January 28th, 2017, Judge Ann Donnelley of the U.S. District Court for the Eastern District of New York granted their request, halting the Trump administration from deporting anyone detained under Executive Order 13,769 nationwide (*Darweesh et al. v. Trump et al.*). The following day, Judge Allison Burroughs and Magistrate Judge Judith Dein of the U.S. District Court for the District of Massachusetts also issued a temporary restraining order, prohibiting the government from detaining or deporting lawful

permanent residents in the District of Massachusetts (*Louhghalam v. Trump*). In early February, the State of Washington and Minnesota sued the government, arguing that Executive Order 13,769 harmed their citizens. Judge James Robart from the U.S. District Court for the Western District of Washington ruled in favor of the states, issuing a nationwide temporary restraining order that halted the government from enforcing any portion of the executive order (*State of Washington vs. Donald J. Trump, et al.*)

In response to the numerous court rulings opposing the executive order, the White House issued a revised order in early March: Executive Order 13,780. This revised travel ban removed Syria from the list of barred countries and exempted green card holders. Additionally, the White House included a more detailed justification which was lacking in the original order. Later that year, on September 24th, the Trump administration issued Proclamation 9645, which expanded Executive Order 13,780 to include citizens from North Korea, Chad, and certain Officials from Venezuela (Executive Order No. 13,780, 82 Fed. Reg. 13209 (2017)). The government conducted an individualized risk assessment to justify the revised executive order and proclamation (Executive Order No. 13,780, 82 Fed. Reg. 13209 (2017)). Regardless, both the revised order and proclamation received public and legal pushback, most notably in the case of *Trump v. Hawaii*, however, to no avail, as the Supreme Court ruled in a 5-4 decision that the proclamation did not unjustly discriminate on the basis of religion (*Trump v. Hawaii*).

However, this raises an important query: Did the executive's revisions to Executive Order 13,769 ultimately sway the highest court in the country's decision to uphold the executive order and rule against previous district and circuit courts restraining, or were other factors at play? While Justices' rulings are guided by constitutional provisions and statutory law, Justices' decisions may still reflect a variety of extra-constitutional, political factors, whether or not they

are conscious choices. Notably, in *Trump v. Hawaii*, the five Supreme Court Justices appointed by Republican presidents – Justices Roberts, Kennedy, Thomas, Alito, and Gorsuch – sided with the republican chief executive, Donald Trump. While, on the contrary, the four Justices appointed by Democratic presidents – Justices Ginsburg, Breyer, Sotomayor, and Kagan – ruled in opposition to the Trump administration. The Justices’ political alignment prompts further explanation into the relationship between judicial rulings on executive orders and political alignment. Throughout this thesis, I examine whether federal judges tend to favor executives with whom they share a political affiliation when assessing the constitutionality, scope, and executability of executive orders.

A vast body of literature has reviewed presidential unilateral actions' role in presidential policymaking, the checks placed upon unilateral action, and the public's perception of unilateral action. Within this rich literature, executive orders have garnered special attention from scholars as they represent direct means by which presidents can implement their policy agendas without congressional approval. Additionally, much literature has reviewed polarization within the federal judiciary, highlighting the growing partisan divide among judges, manifesting in rulings influenced by judge's policy preferences rather than traditionally constitutional rulings that strictly adhere to the Constitution and statutory laws. This is most prominently at the Supreme Court, but its effects trickle down to the district courts. Despite this, a relatively small subset of literature has examined the role of partisan judicial rulings on executive orders, leaving this intersection unexplored by scholars.

I seek to understand the numerous factors at play when federal judges assess executive orders and to explore the conditions, leading executives to experience the highest rate of success in court. Throughout this thesis, I consider the role of seven distinct factors and their effects on

the president's ability to defend executive order in court. First, I explore whether presidential-judicial political alignment leads to executives to exhibit higher rates of success due to the shared policy preferences and underlying values associated with those preferences. Second, I examine the time period in which the case occurred to determine whether it influences the ruling, as presidential power has vastly expanded over time, accompanied by an increase in judicial activism and a decrease in judicial deference to the executive. Then, I evaluate the effect of divided versus unified control of government on executive success rate in front of federal judges; during divided government, executives may be forced to unconstitutionally expand their power to enact their policy goals due to stark congressional gridlock, resulting in greater judicial opposition. Additionally, I analyze whether executive orders legally challenged during the presidency they are issued are more or less favorably received by judges compared to those cases litigated after the issuing president is no longer in office, as judges' votes may be influenced by the potential political ramifications when a sitting president's actions are subject to scrutiny. Relatedly, I also examine whether the number of years between an executive order's issuance and case affects the executive success in court, as the most egregious orders see ample challenges shortly after issuance, while more tame, non-contentious orders commonly never see the inside of a courtroom.

Understanding the factors influencing judicial rulings on executive orders' constitutionality, scope, and executability is pertinent due to presidents frequent use of them as potent tools for enacting policy unilaterally. Such an analysis that delves into these factors can reveal whether judges's rulings are influenced by solely constitutional factors, as constitutionally prescribed, or constitutional factors in addition to the underlying political factors at play in the case. Additionally, this research can underscore the ways in which partisanship compromises the

sanctity of the federal judiciary by uprooting judicial consistency – a core tenet of judicial review. Moreover, investigation into this uncharted intersection may shed light on the broader implications of judicial partisanship, allowing scholars to understand whether partisanship in the judiciary further enforces checks and balances, constraining executive power as intended by the framers or whether it allows rampant executive overreach. In this era marked by increased judicial activism, especially in politically charged issues such as executive rulemaking, affirmative action, and abortion, examining the ways in which the judiciary interacts with the executive is critical to understanding whether and at what scale are judges injecting their policy preferences into rulings. Undoubtedly, this research contributes valuable insights into the polarized judiciary's checks on executive authority, offering implications for both democratic governance and the rule of law.

In the following pages, I will first explore the extensive literature surrounding unilateral presidential policy making and the processes by which presidents craft executive orders. Then, I will conclude my review into existing literature by examining how judicial review has historically shaped presidential policymaking. Following the literature review, I will outline the theory underpinning this thesis, which focuses on explaining the various factors that are likely to shape judicial review of executive orders, such as president-judge copartisan relationship, presidential approval, and temporal proximity of the ruling to the executive order's issuance. I will then detail the research design utilized in this thesis, including the assumptions, data collection decisions, and ways in which the variables were coded and subsequently analyzed. Next, I will present the empirical results which reveal that copartisan judges statistically significantly rule in favor of the president more frequently; this effect is particularly prominent in cases occurring during the executive order's issuing presidency and those since 2004. Finally, I

will discuss the findings' implications for the broader body of literature and future avenues of investigation that can be conducted to further understand the relationship between judicial partisan polarization and unilateral presidential policymaking.

## Literature Review

Presidents frequently exercise unilateral power, such as executive orders, to enact their policy agenda and fulfill their role as chief legislator, especially during periods of divided government and congressional gridlock. Unilateral directives, especially executive orders, are crafted and tested through a stringent process involving multiple executive branch agencies and departments before issuance. The authority to issue unilateral directives is derived from delegated statutory authority and the president's Article II constitutional powers. The executive must articulate where the authority to issue each unilateral directive originates. However, the executive must be careful when doing so to minimize congressional and judicial opposition. Numerous times throughout history, presidential policy overreach or overzealous expansion of power has led the legislative and judicial branches to strike down unilateral directives. In addition to checks and balances constraints, the executive may receive public backlash for overusing unilateral directives. Due to the ever-present potential for opposition, rational chief executives exercise restraint and caution to ensure their directives' longevity and to prevent presidential power erosion. Regardless of the president's attempts to minimize opposition to unilateral directives, federal courts are commonly tasked with examining the scope, executability, and constitutionality of unilateral directives. In such scenarios, judges must decide whether to adhere strictly to legal precedent or inject their policy preferences into the ruling.

A vast body of research examines the role of Congress in checking presidential unilateral action. However, studies analyzing the role of the federal judiciary in constraining the president's unilateral power are notably understudied in the rich literature surrounding unilateral action.

*Unilateral Presidential Policymaking*

Presidents exercise unilateral power when enacting new laws that shift the status quo “without explicit consent from Congress” (Moe & Howell, 1999, p. 133). Presidents have a fairly diverse policymaking toolbox. Since the Constitution's ratification and the establishment of the presidency, officeholders have exercised over two dozen forms of unilateral power (Relyea, 2005). Some forms of unilateral directives, such as national security directives and regulatory rulemaking, are often opaque to the public. On the contrary, there are more notable forms of unilateral directives, including proclamations, memoranda, executive agreements, and, most prominently, executive orders. In addition to taking many forms, unilateral directives extend throughout the policy sphere, reaching from national security to healthcare policy (Lowande & Rogowski, 2021). Regardless of policy area, presidents must assert the authority under which they exercise unilateral authority (Cooper, 1986). Article II of the Constitution is incredibly vague with regard to executive orders. It simply vests "executive Power" in the president to ensure "the Laws be faithfully executed" (U.S. Const. Art. II.). Scholars have consistently agreed this creates legal ambiguity, enabling presidents to broadly assert unilateral authority (see, e.g., Lowande & Rogowski, 2021; Howell, 2005).

Presidents either derive their authority to act unilaterally from statutory law that delegates authority to them or from their Article II powers, specifically the "take care" clause (U.S. Const. Art. II.).<sup>1</sup> In some instances, presidents assert both authorities to avoid Congressional or Judicial

---

<sup>1</sup> Within Article II, the “take care” clause of the Constitution vests power in the president to ensure “take Care that the Laws be faithfully executed" (U.S. Const. Art. II.). This clause is central to the president’s ability to implement federal laws consistently and in good faith, as enacted by Congress. It underscores the President’s core constitutional obligation of executing the laws.

pushback, as this approach carries fewer risks than solely relying on their authority under Article II. But, this approach still presents more risks than citing congressional authority alone, as it is more challenging to strike down unilateral action solely authorized by delegated congressional authority (Bailey & Rottinghaus, 2014). Bailey and Rottinghaus (2014) find that 98% of all unilateral directives cite a congressional delegation of authority from the 75th to 110th Congress; though, only 60% of executive orders do so. Presidents tend to invoke their constitutional authority more frequently when they perceive greater autonomy, particularly during periods of stark congressional divide or gridlock (Howell, 2003; Bailey & Rottinghaus, 2014). Conversely, presidents cite Congress more frequently as the size between the majority and minority parties increases (Bailey & Rottinghaus, 2014). This suggests that the degree of congressional polarization can significantly influence presidents' decisions when issuing unilateral directives (Thrower, 2017b; Fine and Warber, 2012). Presidents must strike a balance when citing authority for unilateral actions due to the delicate nature of power between the executive, legislative, and judicial branches.

#### *Executive Order Formulation*

Since the passage of the Administrative Procedure Act in 1946, executive orders have been published in the Federal Register (5 USC §551 et seq.). Initially, presidential executive orders and other forms of rulemaking were housed under what is now the Office of Management and Budget (originally called the Bureau of the Budget before it was reorganized in 1970). A little over a decade later, the Reagan administration issued Executive Orders 12,291 and 12,498, which marked the beginning of major rulemaking reform that occurred over the following three decades (Executive Order No. 12,291, 46 Fed. Reg. 13193 (1981); Executive Order No. 12,498,

50 Fed. Reg. 1036 (1985)). This process was substantively altered due to the revocation of both executive orders, and issuance of Executive Order 12,286 (Exec. Order No. 12,286, 1981)). This order required executive agencies to issue a review containing pertinent information to the Office of Information and Regulatory Affairs within the Executive Office of the President. The executive order only required review of “significant regulatory actions” (Exec. Order No. 12,286, 1981).<sup>2</sup> Subsequently, Executive Order 13,422 expanded the scope of these reviews, requiring the creation of reviews for significant guidance documents (Exec. Order No. 13,422, 2008). It also allows agencies to execute formal rulemaking processes, and requires the reviews under Executive Order 12,866 to include further relevant material on proposed rules: the issue(s) addressed and estimate(s) of the cost and benefit of proposed regulatory directives (Copeland, 2007; Exec. Order No. 13,422, 2008). Most importantly, Executive Order 13,422 established the regulatory policy officer within each executive agency who controls upcoming rulemaking processes (Exec. Order No. 13,422, 2008). The regulatory policy officer holds a crucial role in impacting rulemaking within each agency, yet they are not subject to Senate confirmation, unlike agency directors who traditionally oversaw rulemaking (Copeland, 2007; Exec. Order No. 13,422, 2008). This raises concerns about the potential impact on the delicate balance of power between the executive and Congress (Copeland, 2007) due to the blatant expansion of presidential power. Congress, who has the constitutional responsibility to oversee executive actions, has a “vested interest” in agency rulemaking to ensure enacted laws are duly executed, as Congress passes the legislation authorizing such rules (Copeland, p. 543, 2007).

---

<sup>2</sup> Significant regulatory actions are those defined as those that contradicted actions taken by other executive agencies, altered the appropriation of funds, introduced intricate legal issues, or had an expected impact on the economy in excess of \$100 million (Copeland, 2007)

Approximately 40% of executive orders are proposed in the Office of Management and Budget and the Executive Office of the President, while the remaining 60% of executive orders originate from one of the various departments and agencies (Rudalevige, 2012). Rudalevige divides orders into four categories based on who prepares them: (1) the Office of Management and Budget (Bureau of the Budget before 1970); (2) another facet of the Executive Office of the President besides the Office of Management and Budget; (3) agencies and departments; and (4) requests made by Congress or one of its key members (Rudalvige, 2012).

It is not uncommon for proposed executive orders to overtly expand presidential power, requiring the Office of Management and Budget to “lecture” the part of the executive on the limits of presidential power; sometimes they even lecture the White House directly (Rudalvige, p. 60, 2021). All drafted executive orders initially arrive at the Office of Management and Budget's office, which, in consultation with the Resource Management Office, determines whether the proposed executive order will be an executive order or other form of unilateral action (Rudalevige, 2021). The OMB requests a view letter, including the proposed executive order's effectiveness, technical aspects, exigence, and interagency connections, which is reviewed by the OMB's Office of General Counsel (Rudalvige, 2021). Then, OMB's General Counsel responds with objections, if any, to the views letter. A proposed executive order can have formal objections, preventing the executive order from moving forward, no objection, or no formal objection which is asserted when the political circumstances are at odds with the issuance of the proposed executive order (Rudalevige, 2021). Following suit, the Justice Department reviews proposed executive orders to ensure they comply with precedent and statutory law (Rudalevige, 2021). Penultimately, memos containing OMB's review are delivered to the West Wing to determine whether the White House is on board with the proposed executive order

(Rudalevige, 2021). Finally, it is delivered to the president; however, despite passing all these initial steps, sometimes presidents still choose not to sign executive orders (Rudalevige, 2021).

*Separation of Powers: Constraints on Executive Orders*

Presidents can accomplish their policy objectives by issuing unilateral directives rather than lobbying members of Congress (Howell, 2005). However, checks and balances allow Congress to attempt to curb such unilateral directives through superseding legislation (Mayer, 2001). For instance, in 1973, President Richard Nixon deployed United States troops in Vietnam without a Congressional declaration of war; in response, Congress passed the War Powers Resolution, requiring the president to notify Congress of troop deployment within 48 hours and prohibiting military engagement that exceeds 60 days without congressional approval (War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1973)). Additionally, unilateral directives are subject to legal checks through judicial review. Federal courts have previously struck down presidential directives, such as in the 1935 case of *Panama Refining Co. v. Ryan*. In *Panama Refining*, the Supreme Court ruled that the President subsumed legislative power when issuing Executive Order 6199 – this executive order granted President Franklin Roosevelt the power to prohibit the transportation of petroleum that exceeded state limits (*Panama Refining Co. v. Ryan*). Another example is when the Supreme Court ruled executive order 10340 unconstitutional, issued by Roosevelt's successor, President Harry Truman. The Court found that Congress had not delegated President Truman the power to seize and operate privately owned steel mills nationwide (*Youngstown Sheet & Tube Co. v. Sawyer* (1952)). These examples of legislative and judicial checks on presidential unilateral directives are illustrative of a fairly

regular process of the numerous instances in which the legislative and judicial branches have checked presidents exercising unilateral power.

Moreover, sometimes unilateral directives prompt Congress and the courts to act collectively against unilateral directives, commonly in response to egregious expansions of presidential power. Between Congress and the federal judiciary, 8% of executive orders are overturned or superseded (Thrower, 2017b). It is important to note that not all executive orders even have the opportunity to get superseded by Congress or the Supreme Court; 25% of all executive orders issued between 1937 and 2013 have been revoked by presidents, and another 18% have been amended (Thrower, 2017b). Presidents strive to solidify their legacies, especially in their final year in office. Generally, executive orders issued in the final year of a presidency are less likely to be revoked, and, conversely, earlier executive orders face higher revocation rates (Thrower, 2017b). Presidents are strategic actors who strive to fulfill their policy promises while minimizing opposition from the legislative and judicial branches and future chief executives.

Neustadt (1960) pinpoints perhaps the most prominent problem modern presidents face in his foundational work, *Presidential Power*: the public expects much more of the president than is capable within their constitutionally granted powers (see also, Howell, 2005). To combat this, presidents commonly issue unilateral directives that achieve their policy objectives and expand their power beyond the text in statutory law and the Constitution; however, this approach does not come without risks. Neustadt theorized that the presidency is a relatively weak institution due to its limited formal powers to enact domestic policy, relative to the public's expectations. Neustadt (1960) further argued that presidential overreliance on unilateral action shows an inability to effectively negotiate with Congress and other key actors (Neustadt, 1960). Although

unilateral action is no longer widely seen as a sign of presidential weakness, its overuse carries risks. Mayer (2001) highlights the potential for unilateral actions to undermine presidential credibility and public standing. For instance, Reeves (2015) finds that voters report less favorable ratings of presidents who exercise unilateral power because they want a candidate that adheres to core tenets of democracy, such as separation of powers in this instance. However, the public views presidents more favorably when they claim personal responsibility for executive orders—such as through presidential declarations—because the public is less likely to believe the president overstepped the constitutional limitations placed on the office (Lowande & Gray, 2017).

The overuse of unilateral action opens presidents up to scrutiny from the other branches, which can erode presidential authority (Waber, 2006). If, in particular, the president's unilateral action is superseded by Congress or overruled by the courts, it will endanger their political standing and decrease political capital (Deering & Maltzman, 1999). Further, Light (1982) argues that simply issuing executive orders to circumvent Congress decreases a president's political capital. Presidents have attempted to avoid these consequences by issuing memoranda expanding the scope and power of the executive order (Cooper, 2001). Some may see this decision as strategic because presidential policies are often better received when using less salient and assertive forms of unilateral action instead of executive orders, but it is not (Lowande & Gray, 2017). Engaging in deception like this opens presidents to "accusations of patchwork policy making – the inappropriate use of trump cards, and a willingness to employ shell games," which has been exhibited by both Democratic and Republican presidents (Cooper, p. 140, 2001). Additionally, it is legally murky whether it is constitutional to substantively change laws with memoranda instead of an executive order because memoranda are not required to be listed in the

Federal Register, nor are they governed by a development or issuance process, like executive orders (Cooper, 2001). Thus, Presidents who avoid practicing blatant congressional circumvention and deceptive policymaking are more likely to have their executive orders endure the test of time, garnering less opposition from Congress, the courts, and future executives because the president will have higher public confidence (Thrower, 2017b). Executive orders issued by popular presidents will be more safe from amendments, opposing judicial rulings, superseding congressional legislation, and revocation (Thrower, 2017b). As presidents wield their unilateral power to navigate through the policy sphere to achieve their policy goals, it is essential that presidents consider the impacts their directives have on their standing with the electorate, Congress, and the federal judiciary.

Since the turn of the century, scholars have extensively debated what functions of Congress cause presidents to exercise unilateral power. Some empirical studies demonstrate that interbranch, partisan divide (divided government) decreases the frequency of unilateral directives issued (see, e.g., Howell, 2003; Howell, 2005; Fine & Warber, 2012; Lowande, 2014). Conversely, other scholars conclude that periods of divided government do not see a change in the frequency of unilateral directives issue (see, e.g., Deering & Maltzman, 1999; Thrower, 2017b; Mayer, 2001; Williams, 2019). Furthermore, presidents issue more executive orders the farther away their policy views differ from the median member of Congress, specifically in the Senate (Deering & Maltzman, 1999) Regardless of whether presidents exercise unilateral power more frequently during periods of divided government, executive orders issued during divided government endure longer, as presidents may aim to craft less controversial and more bipartisan executive orders to minimize legislative or judicial pushback (Thrower, 2017b). Bolton and Thrower (2016) find that divided government also leads to heightened levels of unilateral action

during the first half of the 20th century but not for the second half of the century because of Congress's increased capacity to constrain presidential directives through statutes and oversight. This persists regardless of the size of the majority in the House of Representatives and Senate (Bolton & Thrower, 2016). While these results show the evolving nature of unilateral action over time, presidents have consistently cited Congress as their source of authority to avoid it becoming null due to superseding legislation (Bailey & Rottinghaus, 2014). Presidents also attempt to avoid superseding legislation by issuing fewer executive orders when the likelihood of their veto being overridden is high (Deering & Maltzman, 1999). Presidential executive orders that assert strong authority, usually congressional, outlast executive orders asserting weak, broad claims of authority (Thrower, 2017b). This literature underscores the importance of understanding the interplay between the executive and legislative branches, as it significantly affects unilateral directives' frequency and longevity.

#### *Presidential Policymaking and Judicial Review*

While much research examines how Congress affects presidential unilateral action, comparatively little research considers judicial review's role. In cases before the Supreme Court, the president and executive branch hold a distinct advantage through the Solicitor General of the United States, often referred to as a repeat player, who influences both case outcomes and language used in opinions. The Solicitor General frequents the Court's docket, gaining experience that gives them an edge when litigating cases (McGuire, 1998; Black & Owens, 2012). Black and Owens (2012) find that the Solicitor General's advantage persists even when controlling for case complexity and case experience among litigators. Executive litigatory advantage peaked during the Reagan Administration with a success rate of 80% (Epstein, 2018).

At the same time, the Solicitor General's office increasingly started taking a politicized and partisan approach; however, justices' expectations that the Solicitor General upholds legal integrity have not waned (Wohlfarth, 2009). This requires the Solicitor General to strike a balance between advocating for the president's interests while also advising the Court in their best interests to maintain its esteemed reputation of legal integrity; otherwise, the Court will be less favorable towards the repeat player for overzealous advocacy on behalf of the executive (Wohlfarth, 2009).

Since the Reagan administration, the Solicitor General's advantage has diminished as Supreme Court Justices have increasingly exercised judicial activism – a practice where judges' rulings largely consider policy preferences, individual morals, or other broader societal considerations rather than strictly adherence to legal principles and statutory law – due to an increase in institutional confidence in relation to the executive and legislature (Epstein, 2018; Jacobi & Sag, 2019). Moreover, the emergence of the specialized Supreme Court bar, coupled with new lawyers' dedication to Supreme Court litigation, has diminished the Solicitor General's experiential advantage over other litigators (Epstein, 2018). The rise in judicial activism or judicial aggressiveness raises concerns over whether the Court has evolved into an "out-of-control, imperial judiciary" that dismantles legislative and executive accomplishments (Epstein, p. 859, 2018; Jacob & Sag, 2019). Conversely, skeptics of the notion that the Court is an imperial judiciary could argue that the Court is simply challenging the imperial presidency that consistently attempts to expand its power (Epstein, 2018).

The ongoing shift in the Supreme Court's dynamics regarding judicial activism highlights the tension between scholarly disputes over whether political or legal factors drive Supreme Court rulings. The attitudinal model of judicial ideology theorizes that Supreme Court justices

issue rulings that reflect their policy preferences rather than strictly adhering to stare decisis and similar legal doctrines (see, e.g., Rosenberg, 1994; Segal & Spaeth, 2002; Segal & Champlin, 2017). On the contrary, some legal scholars argue the legal model, theorizing that judicial decisions should be interpreted as purely legal, adhering to legal doctrines and disregarding political factors. Whittington challenges both the legal model and the attitudinal model. He argues that the legal model struggles to account for the factors affecting the Court's evolving constitutional interpretations, while, conversely, the attitudinal model fails to account for the "institutional features of the Court" (Whittington, p. 518, 2001). The strategic model accounts for both judicial ideology and institutional features, theorizing that judge's decisions are influenced by preferences and ideologies but limited by the institutional features, such as other judge's preferences on multimember courts and other political actors that influence policy implementation (Anderson & Tahk, 2007; Bailey, 2007; Gooch, 2015; Harvey & Friedman, 2006; Hasen, 2019). This ongoing debate underscores the complexity of understanding Supreme Court rulings as political and legal rulings. Nonetheless, scholars have found that political party affiliation aligns with state and federal judges' judicial ideology, meaning that Democratic judges tend to be more liberal while their Republican counterparts are often more conservative (Pinello, 1999).

Scholars have long recognized that the Supreme Court is polarized; however, over the past half-century, this ideological divide has intensified among Supreme Court justices, with fewer justices taking centrist stances and more positioning towards the poles (Clark, 2009; Gooch, 2015). Baum (2017, p. 191) observes that ideology is deeply embedded in justices "social identities, drawing them toward positions that they perceive as appropriate for conservatives or liberals to take." Consequently, the percentage of cases that result in a split vote

(with five justices voting one way and four voting the other) has increased over time (Bartels, 2015). Polarization is more apparent in appellate courts compared to district courts, as district courts defer to precedent from appellate courts (Cross 2007; Epstein et al. 2012). As previously mentioned, the rise in judicial activism dates back to the 1990s (Epstein, 2018), a period coinciding with the beginning of heightened congressional polarization and gridlock (Jacobi & Sag, 2019). The lack of interbranch competition alongside the rise in political party conflict leads to such activist rulings (Jacob & Sag, 2019). In addition, judges appointed during periods of stark political divide and stalemate more frequently rely on their policy preferences and political ideology, whether or not it is conscious (Hasen, 2019).

This trend of judicial polarization and activism is further displayed by justices' questions during oral arguments; justices use it as an opportunity to advocate for their preferred side, as opposed to neutral questioning (Hasen, 2019). Moreover, Supreme Court justices display polarization and activism through their bifurcated agenda, divided between the exigent agenda that seeks to resolve technical legal questions and the polarized, and volitional agenda that answers highly salient public issues like abortion, gun rights, and affirmative action (Bartels, 2015; Pacelle, 1991; Corley et al., 2013). When judges rule on salient, polarizing issues, there are significant differences among Republican and Democratic-appointed justices, which display the implementation of their ideological preferences. Republican-appointed judges split their votes between ruling liberally versus conservatively, while Democratic-appointed judges overwhelmingly issue liberal rulings (Keck, 2014). This ideological divide is also evident in cases that evaluate the First Amendment's Establishment Clause, which scholars refer to as the "God Gap" (Sisk & Heise, 2011; Hasen, 2019). The "God Gap" and other instances of judicial partisanship indicate that judges do not always rule cases solely on the relevant constitutional

provisions and statutory law, but also incorporate other factors, like policy preferences or religion.

Although a substantial body of literature reviews the role of checks and balances in curbing the president's unilateral powers, relatively little research addresses the role of judicial review as a key mechanism in constraining the executive branch, leaving federal courts' constraints on the executive branch underexplored. This gap in literature is surprising, considering the judiciary's significant and essential role in checking presidential power. To date, Thrower's (2017) article, *To Revoke or Not Revoke?*, offers the closest analysis of unilateral action or executive orders. Thrower analyzes factors impacting executive order longevity through survival analysis, including their anti-executive court rulings and revocation and amendments by future chief executives. However, even Thrower's analysis does not delve deeply into the institutional and legal factors impacting federal judges' decisions to rule favorably or in opposition to the executive branch. This leads me to conduct an in-depth analysis of the factors affecting judicial decisions when federal judges review the scope and executability of executive orders.

## Theory

### *Copartisan Judges*

First, I assume that presidents pursue their political agendas when issuing executive orders (Howell, 2003), in turn, reflecting their policy preferences and political ideology. Since presidents have the authority to revoke or amend executive orders, as is commonly done (Thrower, 2017b), I further assume that presidents generally agree with standing executive orders; if they disagreed with any, they would have likely revoked or amended them. Thus, the current list of legally valid executive orders at any given point in time aligns with the sitting president's policy preferences and ideology. Accordingly, when the Solicitor General's office defends executive orders, it is a demonstration of institutional support for the executive order by the president and the executive branch, regardless of whether the sitting president issued the executive order. This assumption underscores the importance of understanding that executive orders, whether issued, retained, or defended by the sitting president, are reflective of the president's political ideology at any given moment.

While judges at all levels are expected to be impartial interpreters of the Constitution and laws passed by Congress, judges' rulings are often, undoubtedly, influenced by their personal policy preferences and political ideology, in addition to the legal framework underpinning each case. This notion is widely accepted among scholars who interpret judicial rulings by utilizing the attitudinal and the strategic models (e.g., Anderson & Tahk, 2007; Bailey, 2007; Gooch, 2015; Harvey & Friedman, 2006; Hasen, 2019, Rosenberg, 1994; Segal & Spaeth, 2002; Segal & Champlin, 2017). Sunstein and colleagues capture scholars' understanding of the relationship between judicial rulings and political ideology:

"No reasonable person seriously doubts that ideology, understood as moral and political commitments of various sorts, helps to explain judicial votes. Presidents are entirely aware of this point, and their appointment decisions are undertaken with full appreciation of it" (Sunstein, et al., p. 147, 2006).

This suggests that one could predict judicial rulings, in part, by understanding a judge's ideological leanings through their rulings, just as presidents attempt to and successfully do so when appointing federal judges. It stands to reason that scholars can understand judges' policy preferences through their previous rulings, similar to how presidents base lifetime judicial appointments on prior rulings.

Assuming that judges are influenced by political ideology which is understood through prior rulings, and ideology is linked to the judge's political party – where Democrats tend to be more liberal and Republicans tend to be more conservative (Pinello, 1999) – I expect that judges' political affiliation will predict their rulings on executive orders. More specifically, I anticipate that copartisan judges – those judges who were appointed by a president from the same political party as the sitting president – will rule more favorably towards the executive branch, as their ideological and, in turn, political affiliation alignment will lead them to exhibit greater support for the president's policies. On the contrary, I expect non-copartisan judges to rule less favorably towards the executive branch, as they will be more inclined to scrutinize the president's policies and limit their power due to the lack of political affiliation alignment; this, in turn, makes the non-copartisan judges less ideologically predisposed to support the president's executive order.

*Copartisan Favorability Hypothesis (H1):* Copartisan judges rule more favorably on cases than non-copartisan judges on cases examining executive orders.

Due to the rise in political polarization over the past few decades, I additionally anticipate that the copartisan effect will be amplified in recent years. The rise in polarization, alongside a sustained period of congressional gridlock, dating back to the 1990s (Jacobi & Sag, 2019), and the rise in judicial activism (Epstein, 2018) leads me to expect that more judicial rulings since around the turn of the 21st century will be influenced by partisan ideology and preferences. Polarization has infiltrated the federal judiciary since then through presidents who are increasingly committed to nominating judges that reflect their ideological preferences. This trend has led judges, on average, to be more politically motivated than before. I theorize that due to the heightened level of polarization in the federal judiciary, judges will more frequently rule in favor of copartisans to advance their policy preferences, especially those stuck in Congressional gridlock who cannot forward their policy agenda. More specifically, I expect this trend to have emerged around the beginning of President George W. Bush's second term, following the expansion in presidential power in response to the September 11th terrorist attacks. With the expansion of presidential power at the turn of the century, judges have exhibited less judicial deference and heightened levels of polarization in their rulings, suggesting that there is a higher level of judicial deference to the executive among copartisans (and less deference among non-copartisans). This suggests that judges are even more inclined to rule favorably toward presidents who ideologically align with them and scrutinize those who do not, as they understand the heightened political stakes, in turn also reflecting the broader societal divides present in Congress and the general public.

*Escalating Judicial Ideological Gap Hypothesis (H2):* Over the past two decades, the influence of partisan alignment on federal judicial rulings has amplified, leading to the

intensification of federal judge's partisan divide when deciding cases that examine executive orders.

*Presidential Approval*

Although the Constitution prescribes an independent judiciary, insulated from outside influences, such as public approval, scholars have consistently argued that public opinion influences the Supreme Court's ruling to some degree (see, e.g., Flemming, 1997; Klarman, 2004; Casillas et al., 2011). Casillas and colleagues (p. 86, 2011) find that the "public[']s mood directly constrains the justices' behavior and the Court's policy outcomes, even after controlling for the social forces that influence the public and the Supreme Court." Additionally, these authors find that for salient cases, justices rule on ideological lines; however, for non-salient cases, justices' rulings largely coincide with public opinion (Casillas et al., 2011). This highlights how Supreme Court justices allow their ideology to influence rulings on salient issues, while for non-salient cases, which represent the vast majority of cases, justices' rulings align with public mood. Courts who rule against popular presidents will garner negative attention, casting doubt on the federal judiciary as an institution and, in turn, judges will be more inclined to rule favorably. This effect will be most prevalent among Supreme Court justices who are more frequently subject to public scrutiny, and do not want to be seen as an illegitimate court. On the contrary, district court judges will be significantly less influenced by presidential approval ratings, as their cases are not commonly known by the general public, garnering little scrutiny. Similarly to Supreme Court cases, most executive orders do not attract significant public attention. Thus, I anticipate that when ruling on executive orders, all federal judges – whether it be district court, circuit court, or Supreme Court justices – are influenced by presidential

approval at the time of the executive order's issuance.<sup>3</sup> In turn, judges may unconsciously, or consciously, factor in presidential approval when ruling.

*Presidential Approval Hypothesis (H3):* Federal judges will more frequently rule favorably on executive orders issued by presidents who had high public approval ratings at the time of issuance.

*Divided Government:*

Scholars have long debated whether presidents issue more substantive and controversial executive orders during periods of divided government or unified government. Some scholars contend that presidents issue partisan executive orders at a higher frequency during periods of divided government. These scholars theorize that the partisan divide compels the president to strengthen their role as chief policymaker by relying on executive orders to enact their policy goals, when congressional consensus is not apparent or opposed to the president's initiative. However, this is complicated by Mayhew's (1991) finding that scholars enact legislation at similar rates, regardless of whether the government is unified or divided. In addition, Thrower (2017b) finds that executive orders issued during divided government are less likely to be revoked, amended, or overruled by the legislative or judicial branches, as policies crafted during divided government are intentionally more bipartisan and less controversial to prevent conflict (Thorson, 1998; Weatherford, 1993). However, I argue that when it comes to judicial review, executive orders issued during divided government will be less favorably ruled on by judges because presidents will attempt to implement their policy goals that would be more difficult to

---

<sup>3</sup> One could argue that it would be more accurate to record presidential approval at the time of the executive order's issuance, rather than at the time of the case; however, this prevents the public's response to the current president from being reflected in presidential approval (Mayer, 2001; Reeves, 2015).

get passed through Congress by enacting executive orders.<sup>4</sup> The legal basis to issue the executive order may be less grounded in codified statutory law or the Constitution, in turn, making them more vulnerable to judicial scrutiny. Regardless of whether there are more executive orders issued during divided government, I anticipate that judges will exhibit lower support for the executive branch if the president issued the executive order during a period of divided government.

*Divided Government Hypothesis (H4):* Federal judges are more likely to oppose executive orders issued during periods of divided government.

#### *Role of Time*

Executive orders that egregiously expand executive power or infringe on an individual's rights or liberties are immediately ripe for public scrutiny, many times leading to swift judicial review. Highly controversial executive orders are most likely to be challenged shortly after their issuance, and thus executive orders that last longer before being challenged are more likely to endure the test of time. Moreover, changes in the presidency, especially when coupled with a partisan change in the White House, frequently lead to the revocation of countless executive orders. Thus, the likelihood of federal judges voting in favor of the executive branch will increase when the executive order is challenged after its issuer no longer holds the presidency. I theorize that by the time of a shift in the White House, many vulnerable executive orders will have already faced legal challenges or revocation, leaving the remaining orders more likely to

---

<sup>4</sup> While one could contest that some instances occur where the president issues an executive order to ensure expediency when they have the majority's support in Congress, this most likely makes up a very small portion of executive orders issued.

survive judicial review. Additionally, judges may subconsciously consider the political implications for the sitting chief executive when deliberating on an executive order issued by the sitting president, leading copartisans to be more preferable to the executive for cases adjudicated during the issuing presidency and the converse for those adjudicated after the issuing presidency. I expect non-copartisan judges will exhibit the contrary, ruling less favorably in cases occurring during the executive order's issuing president's tenure and more favorably in cases afterwards.

*Post-Presidency Hypothesis (H5):* Federal judges will rule more favorably towards the executive on cases where the issuing president is no longer in office.

Furthermore, I expect that federal judges examining executive orders will rule favorably more frequently towards the executive branch the more time has passed since the executive order's issuance. Executive orders lasting far after their issuing presidency exhibit the highest safety from judicial review, as numerous earlier opportunities for legal challenges to the executive order would have risen and passed.

*Longevity Impact Hypothesis (H6):* Federal judges' likelihood of ruling favorably towards the executive increases as more time passes since the executive order's issuance.

#### *Court Level*

Scholars broadly agree that in cases adjudicated by appellate courts, especially the Supreme Court, judges are more likely to rule against the executive branch, while district court judges more often defer to the executive. This is because district court judges more strictly adhere to stare decisis and other legal principles, while appellate judges are less constrained by such principles which allows them to become judicial activists (Cross, 2007; Epstein, 2013). In turn, circuit court judges many times reverse district court decisions and rule against the

president and their unilateral directives – a trend that is even most prevalent among Supreme Court justices. Additionally, since district courts with original jurisdiction most frequently rule in favor of the executive, appellate courts commonly take cases on appeal where the district court's ruling favored the executive. Consequently, circuit court judges are less constrained and more willing to scrutinize and rule against the executive's unilateral directives. Additionally, the Supreme court frequently examines cases involving novel, and many times complex, legal questions, leading the Court to naturally afford the executive branch less deference when they choose to review legal questions surrounding executive orders. I hypothesize that district court judges examining executive orders will rule more favorably towards the executive compared to appellate judges. Furthermore, I expect that deference toward the executive will be lowest among Supreme Court justices.

*Decreasing Appellate Deference Hypothesis (H7):* When examining the scope and executability of an executive order, district court judges are most likely to rule in favor of the executive branch, circuit court judges will rule in favor of the executive less often, and Supreme Court Justices will rule favorably towards the executive branch least frequently.

## Data and Methods

To assess the factors that shape judicial review of presidential executive orders, I created an original, comprehensive dataset of all executive orders published in the Federal Register from 1945 to 2022 that were later challenged in federal court. I utilized Westlaw's legal database to identify all federal court cases that reviewed an executive order issued since 1945. I first entered the Federal Register citation for each executive order. I then included any case that Westlaw designated with one of the following reference treatment statuses: "Examined," "Held invalid," "Limited," "Temporarily restrained," "Enjoined," and "Distinguished." Among all of these treatment statuses, the court examined the executive order in substantive and legal terms, rather than merely discussing, mentioning, or citing the executive order without any analysis.

Cases with the "Examined" treatment status are cases where the court exercised judicial review over the executive order's provisions, scope, and legality. When a case is assigned a Westlaw treatment status of "Held invalid," it means the court found the executive order unconstitutional in part or in its entirety. Similarly, cases assigned the treatment status of "Limited" are those where the court narrowed the scope or executability of the executive order. Cases where the treatment status is "Temporarily restrained" are those where the court issued a temporary restraining order to prevent the enforcement of an executive order. In cases assigned the "Enjoined" treatment status, the court issued an injunction prohibiting the executive order's enforcement or implementation. Lastly, cases that Westlaw assigned a treatment status of "Distinguished" were examined by the court, similar to all prior mentioned treatment statuses, and then determined not to apply to the case.<sup>5</sup> This analysis did not include cases that had a

---

<sup>5</sup> Although an argument could be made to drop these cases, I would contest that cases with a treatment status of "Distinguished" should be included due to the discretionary decisions judges make when

treatment status of "Discussed," "Cited," or "Mentioned," as those cases did not delve into the scope, executability, or constitutionality of the executive order.

Court cases that examined executive orders issued prior to President Harry Truman's Administration are not included in this analysis due to the unavailability of comprehensive data for President Franklin Delano Roosevelt's administration on Westlaw (The Federal Register started tracking executive orders in 1937, midway through President Franklin Delano Roosevelt's administration). Additionally, cases before military courts and federal courts in United States territories are not included. In particular, cases in front of military courts qualitatively differed from the other cases; these cases were military court martials which did not substantively review the executive order. One case, *Laguana v. Ansell*, was heard before the District Court of Guam. I excluded this case from the analysis as Guam is an unincorporated territory of the United States, meaning that not all provisions of the Constitution apply to Guam. Lastly, cases where the federal government was not a party are not included within this dataset; this excluded cases adjudicated at the state level. Following these parameters, the dataset consists of 578 total cases in the federal courts that ruled on the validity of an executive order. It is important to note that there were not 578 unique executive orders challenged, as some executive orders received a multitude of challenges. In the dataset, 200 unique executive orders have undergone legal challenges since 1945.

The unit of analysis is the judge's vote on federal court cases that review executive orders. The dependent variable is a binary indicator that reflects whether a judge's vote supported the executive branch or opposed it. Judicial votes that favored the executive branch

---

determining whether a law, in this case executive order, is applicable. It is important to include these cases, as a different judge may have determined that the executive order was relevant.

were assigned a 1, while those that opposed the executive branch were assigned a 0. The vast majority of rulings' summary judgments were either unanimous or significantly in favor of one side, making it a simple decision of whether the case favored the executive or not. However, in a very small number of cases<sup>6</sup>, the summary judgments were evenly split, meaning the judge ruled favorably towards the executive in part as well as against the executive in equal measure. In these instances, I evaluated the case with all context, especially the central issue at hand, to determine whether the rulings were more substantively in favor or opposed to the executive branch.

I conducted a judge-level analysis rather than a case level analysis because cases before the Circuit Courts and the Supreme Court have multiple judges, making a judge-level analysis necessary to determine the value of the copartisan indicator. This approach allows for a more in-depth analysis of judicial behavior, as individual judges may cast a dissenting vote contrary to the majority in any case where there were multiple judges. A case level analysis would not capture the deviation in cases with non-unanimous rulings, whereas a judge-level analysis provides a more accurate depiction of judicial behavior in multi-judge cases. The judge level analysis produced 1,024 observations with 449 district court judge rulings, 477 circuit court judge rulings, and 88 Supreme Court judge rulings.

The primary explanatory variable is a binary copartisan indicator (coded as "copartisan"), reflecting whether the president that appointed the judge shared the same partisan affiliation as the sitting president. I assigned the political party of the judge to match the political party of their appointing president to be a proxy measure for a judge's presumed policy preferences. While one cannot definitively know the political affiliation of judges, as stated previously, presidents aim to

---

<sup>6</sup> Less than 5% of the 578 cases had split summary judgments.

insert judges into the judiciary who reflect their political ideology through the judge's previous rulings (Sunstein, 2006). Subsequently, it is fair to assume that an overwhelming majority of judges share political ideology with their appointing president, with few exceptions. This approach ensures consistency in the coding of judicial affiliations across all cases in the dataset. Lastly, I identify whether the judge is a copartisan with the sitting president at the time of a cases' decision, meaning that the judge and president's political affiliation match. To obtain a judge's party, I identified the appointing president for each judge(s) who made a ruling in one of 578 cases using the Federal Judicial Center's Biographical Directory of Article III Federal Judges.<sup>7</sup> I assigned a 1 to judges that were copartisan with the president; conversely, I assigned a 0 if the judge was not a copartisan with the president (non-copartisan).

Another key independent variable is public approval of the sitting president at the time of the court case. I measured this using the average approval rating in the six months before the case's ruling. I explored several alternative measures of presidential approval, including using the most proximate approval poll prior to the case's ruling, the average approval ratings for the year prior to the case's ruling, and the average approval for the entire administration of the issuing president. However, I opted for the six-month approval average. Measuring presidential approval by the most proximate poll significantly fluctuated and tended to be a less reliable measure of public sentiment towards the ruling and executive order, as it only displays a brief snapshot of presidential approval. Although the average of approval across the entire administration may be appealing for cases decided long after the executive order's issuance, it does not reflect the nuances of public approval across an administration. In addition, measuring public approval by the average of polls for the year prior to the case's ruling does not lack nuance because it is very similar to average approval across the entire administration. However, it also does not drastically

---

<sup>7</sup> <https://www.fjc.gov/history/judges>

differ from the average approval ratings in the six months before the case.<sup>8</sup> For these reasons, I chose to measure it by taking the average presidential approval ratings in the six months before the executive order's case's ruling.

Measuring presidential public approval in the six months before the case's ruling allows for any impact the executive order had on public opinion to manifest within public opinion polls. Furthermore, this six-month period allows for scrutiny from other political actors, including Congress, interest groups, and the media, to reach the public eye. Additionally, measuring public approval over six months prevents short fluctuations on public opinion from significantly impacting approval. To create the presidential approval variable, I used data from the University of California, Santa Barbara's The American Presidency Project which contains data collected by Gallup.<sup>9</sup> Although presidential approval could have been measured at the time of the executive order's issuance, many cases were not challenged or ruled on until years, in some cases decades, after the executive order's issuance; the median number of years between issuance and ruling is eight years.<sup>10</sup> When attempting to demonstrate the circumstances under which a judge ruled on an executive order, it would be an inaccurate depiction to assess presidential approval at the time of the executive order's issuance due to the notable differences in time.

Another binary independent variable tested within the model is divided government. Divided government occurs when the House of Representatives, Senate, or both are controlled

---

<sup>8</sup> The regression analysis results for presidential approval taken in the year before the case ruling did not differ significantly, compared to those taken only in the 6 months prior.

<sup>9</sup> <https://www.presidency.ucsb.edu/>

<sup>10</sup> The case distribution of years between executive order issuance and time of the ruling has a positive skew with a mean of approximately 13.5 years.

by a different political party than the president. For a party to control a chamber of Congress, the party must have a simple majority. If a president issued an executive order during a period of divided government, then the variable was assigned a 1; I assigned a 0 to executive orders issued during periods of unified government.

Next, I created an independent variable to indicate whether the case was adjudicated during the presidency that issued the executive order. This binary variable is coded as a 1 if the case occurred during the presidency the executive order was issued and assigned a 0 to cases where the executive order was issued in a previous presidency. Additionally, I created an independent variable that measures the number of years between the executive order's issuance and the case's ruling. To calculate this, I subtracted the year the case was decided from the year the executive order was issued. Another independent variable represents the court level. I assigned cases adjudicated in a district court to *district*, circuit court cases to *circuit*, and Supreme Court cases to *scotus*.

Next, in Table 8, I include fixed effects for presidential administration to account for differences in outcomes across presidents. Each case is assigned to the administration when the court issued their ruling, from President Truman's administration to President Biden's administration. For instance, I would assign a case ruling issued in 2010 to *Obama*, regardless of whether President Obama issued the executive order. Since presidents have the authority to revoke executive orders and frequently utilize it (Thrower, 2017b), cases were not assigned to the issuing administration, as it would not reflect the solicitor general's success rate in court on behalf of the executive.

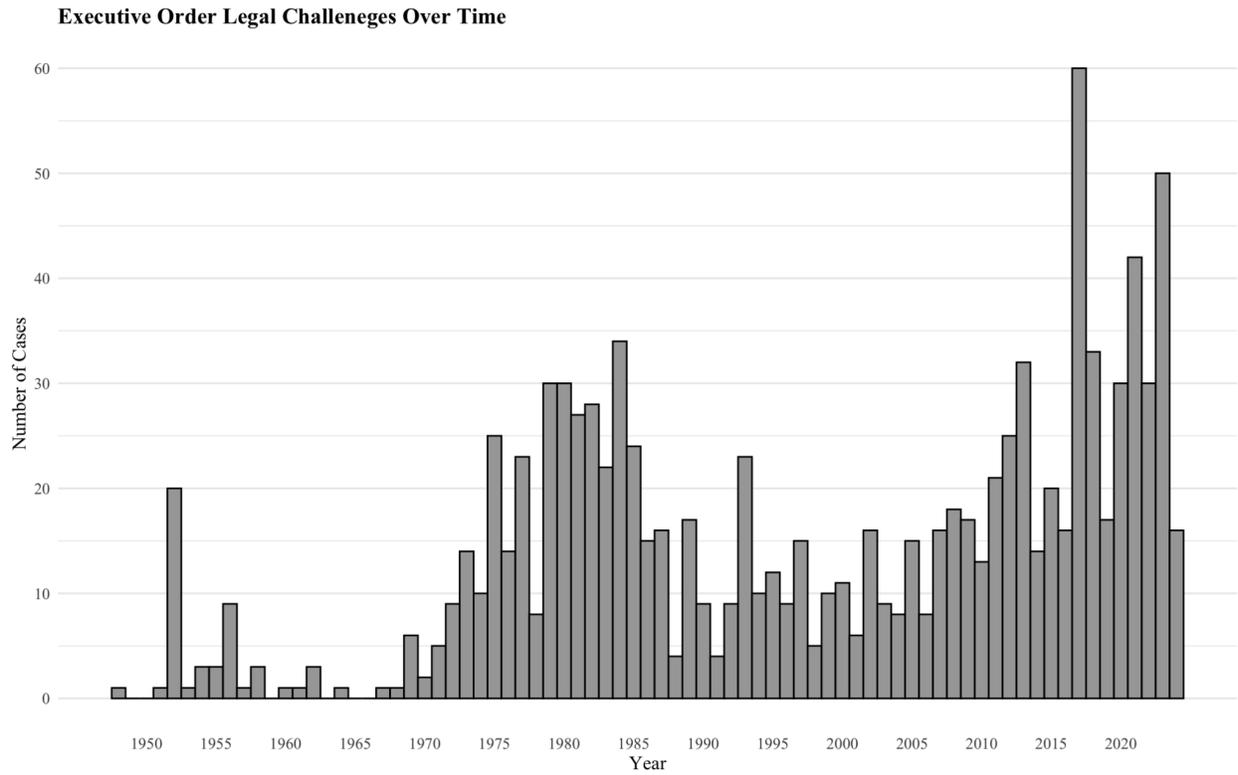
Lastly, when testing the theorized effects in the Escalating Judicial Ideological Gap Hypothesis (H2), I split the data into two periods: 1945 to 2003 and 2004 to 2024. This allowed a

more in-depth analysis of the data to determine whether the effect of copartisan and presidential approval on judicial rulings varied across these two time periods. While some may hesitate to divide the data in the midst of an administration, this decision was made for the following reasons. After the September 11th attacks, President George W. Bush vastly expanded the executive branch's power, particularly in national security and foreign policy. Dividing the data in 2004 allows time for the public and congressional hysteria after the September 11th attacks to fizzle out and allows time for actors to rationally challenge the overzealous executive expansion of power, leading to policies like enhanced interrogation techniques. Splitting the data at the start of the Bush administration would skew the data to be more favorable towards the executive because of post-9/11 judicial deference; splitting the data in 2004 precludes this from affecting the data. Additionally, 2004 marks the beginning of a continual trend in presidential approval ratings, where presidential approval never significantly outpaces presidential disapproval. This period also reflects a shift due to the influence of the 2004 election on public perceptions and policy.

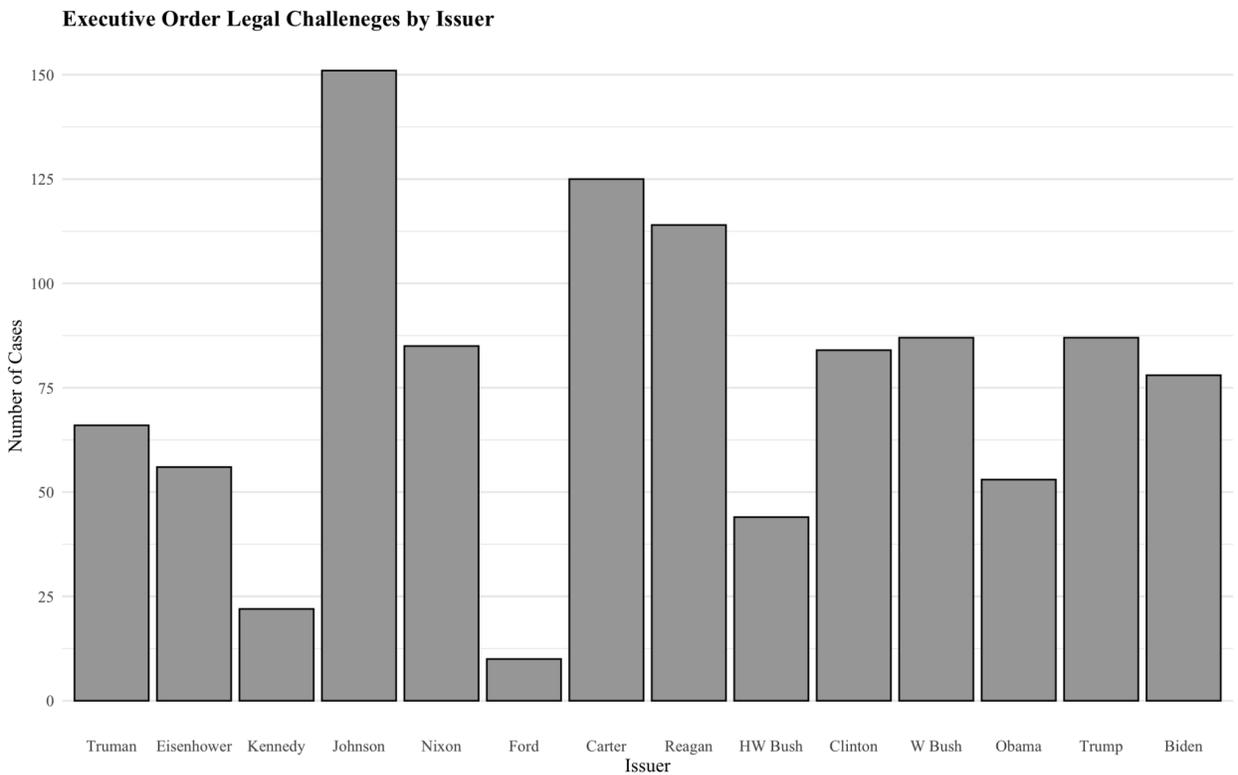
## Results

Since 1945, approximately 13 federal judges have adjudicated cases examining executive orders each year, including approximately 5.61 district court judges annually, 5.96 circuit court judges, and 1.1 Supreme Court justices. Of the 1,014 judge votes in the dataset, 489 came from copartisan judges, making up approximately 48.2% of judge votes; the remaining 525 (51.2%) were issued by non-copartisan judges. Furthermore, the data show a positive skew in the number of years between the case and the judge's ruling with a median of 8 years and a mean of approximately 13.5 years. Notably due to the high mean, 672 of the judge votes came from cases occurring after the issuing presidency, making up approximately two-thirds of all judge votes. Despite the uneven distribution of cases between those occurring during and after the issuing presidency, the large sample size should mitigate against any leverage on the results. The distribution between executive orders issued during divided government compared to unified government also is somewhat uneven; 601 of the judges who adjudicated cases ruled on executive orders issued during unified government, representing approximately three-fifths of judge votes. Conversely the remaining two-fifths of judges' votes, 413 to be specific, examined orders issued during divided government. Of the 1,014 judges who examined executive orders in the federal judiciary since 1945, 646 of them ruled favorably towards the executive, while 348 judges' votes opposed the executive, resulting in an average, judge-level executive success rate of 63.7% across all cases examining executive orders.

**Figure 1:**

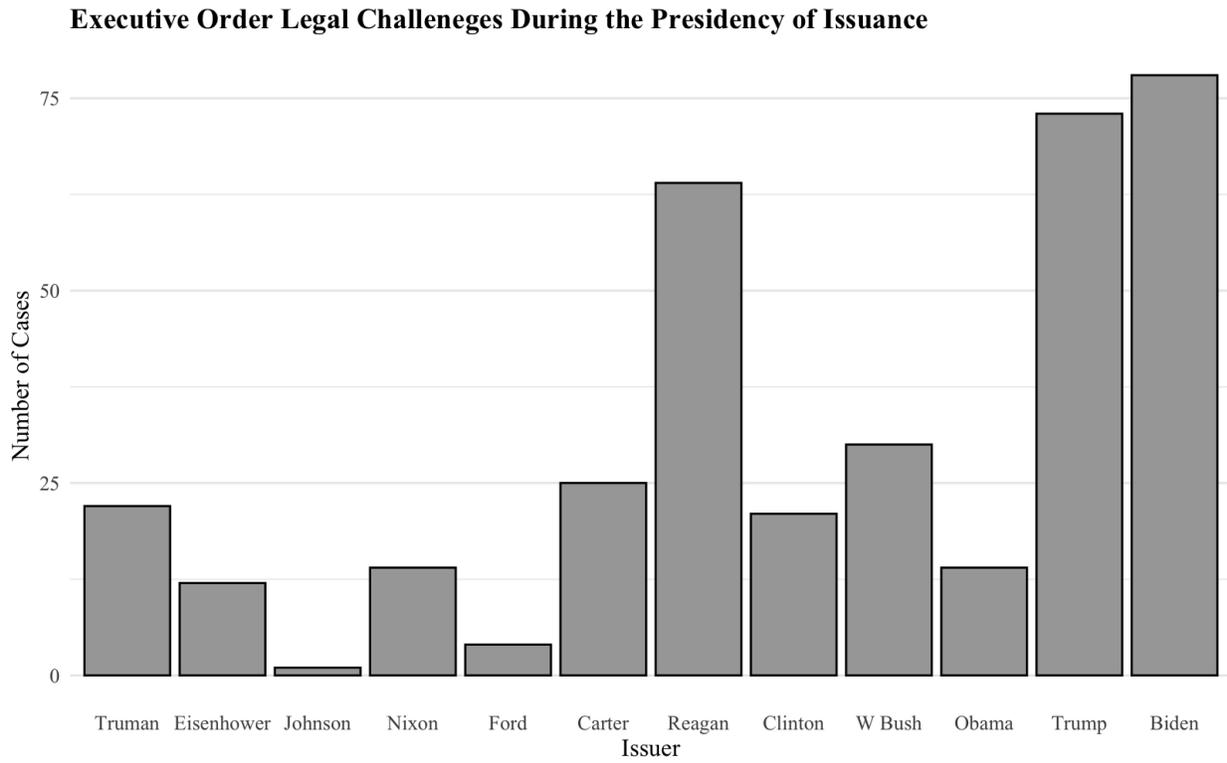


**Figure 2:**

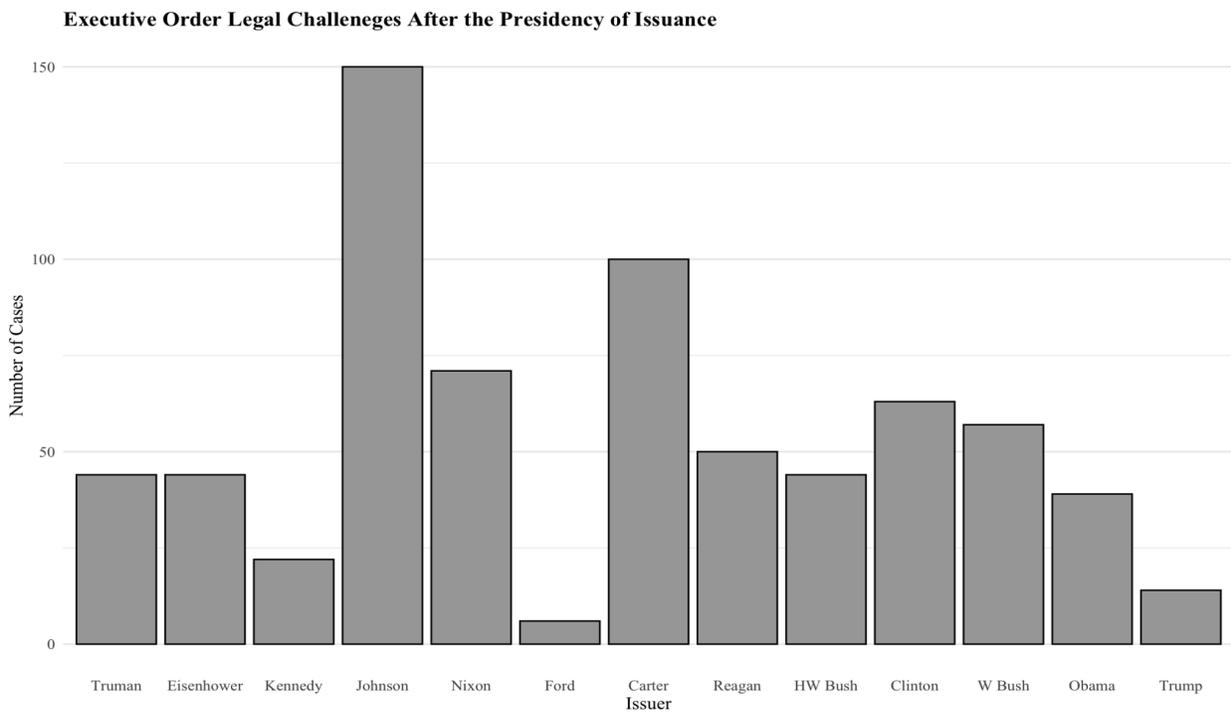


Over time, the number of legal challenges to executive orders has increased, as illustrated by Figure 1. From 1945 to 1970, only one year saw more than 10 judicial votes, with two years seeing no challenges. This trend has not persisted; in the past two decades, only three years had fewer than 20 judicial votes, with a record number of 60 judicial votes in 2017. While one could argue that this trend is due to the increasing total number of executive orders in the Federal Register, the number of rulings occurring during the issuing presidency has increased over time, as displayed by Figure 3. Specifically, in the past two presidencies, both the Trump and Biden administration saw a significant influx in the number of executive orders issued and challenged during their presidency. Each administration experiences upwards of 70 judicial rulings (73 cases during Trump's administration and 78 cases during Biden's administration), which is notably higher than the historical median which is approximately 21 rulings. Additionally, the total number of executive order challenges under both Presidents Trump and Biden has already surpassed the mean value of approximately 74 rulings per administration. This is shocking considering that the median time between an executive order's issuance and a judge's ruling is eight years. Figure 2 illustrates that these recent presidencies have already undergone an average level of judicial review despite their recency. This uptick underscores the ongoing trend of heightened levels of judicial activism and politically influenced judges' seeking to block partisan executive orders that started during the Reagan administration (Epstein, 2018; Jacobi & Sag, 2019). Contrarily, Figure 4 displays the number of cases reviewing executive orders has decreased slightly each presidency since President Jimmy Carter's presidency.

**Figure 3:**



**Figure 4:**



To test my hypotheses, I estimate logistic regression models to better understand how the binary copartisan indicator and other independent variables predict judicial outcomes. Additionally, I display predicted probabilities to illustrate the magnitude of the effects on judges' votes. Throughout my analysis, I estimate seven total logistic regression models. The first logistic regression model analyzes the effects of the data amongst all values within the dataset. The following six logistic regression models estimate the effect of the variables when the data are split in the following ways: before versus after the issuing presidency, before versus after 2004, cases heard by copartisan versus non-copartisan judges, and by court level. I also incorporate five additional figures to illustrate trends over time. These figures examine the following trends' impacts on executive orders in court: the effect of a case arising during versus after the issuing presidency, the effect of the copartisan indicator on cases occurring during versus after the issuing presidency, the effect of the copartisan indicator on the number of years between the issuance of executive orders and subsequent rulings, and the overall effect of the copartisan indicator across all cases.

**Table 5:**


---

**Impact of Copartisan Alignment on  
Executive Success in Court**  
DV: Pro Executive Rulings

---

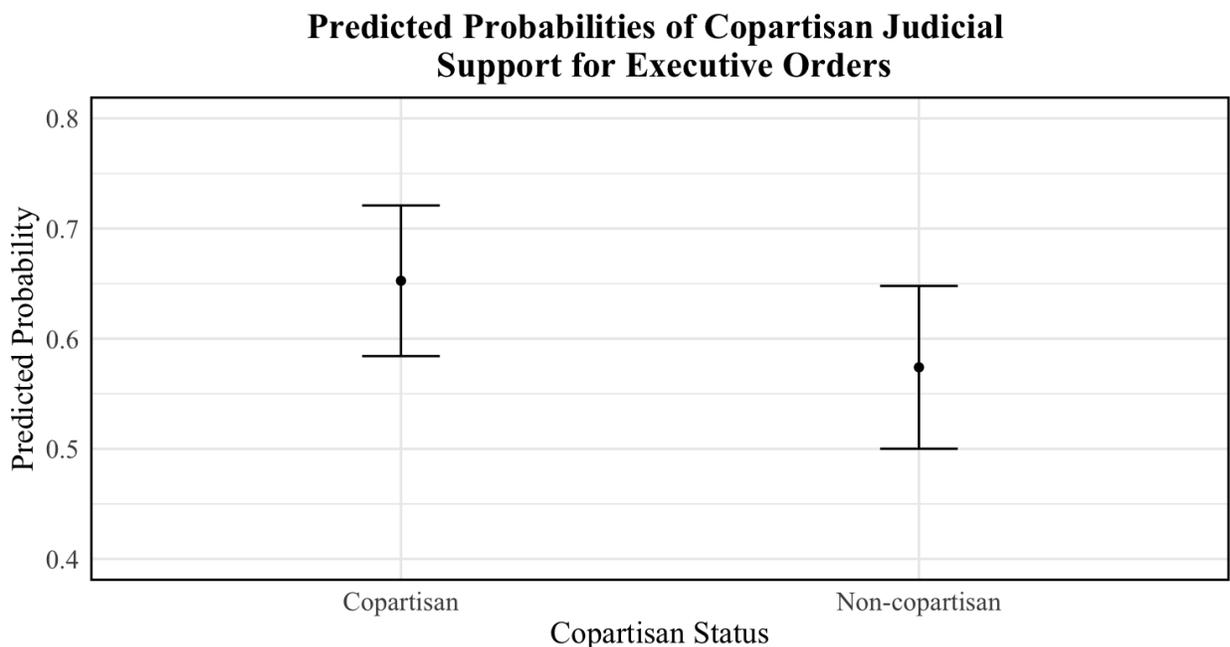
Copartisan	0.332** (0.135)
Years	0.011* (0.006)
Pres. Approval	0.493 (0.659)
Case During Pres.	-0.157 (0.178)
Divided Government	0.076 (0.138)
District Courts	0.345** (0.141)
Supreme Court	-0.634*** (0.239)
Constant	-0.033 (0.382)
<hr/>	
Observations	1,014
Log Likelihood	-646.284
Akaike Inf. Crit.	1,308.567

---

*Notes:* Table entries are logistic regression coefficients with standard errors in parentheses. \* $p < 0.1$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.01$ . The dependent variable measures whether each judge ruled in favor of the executive branch in all cases examining executive orders since 1945. Higher values indicate heightened levels of executive success.

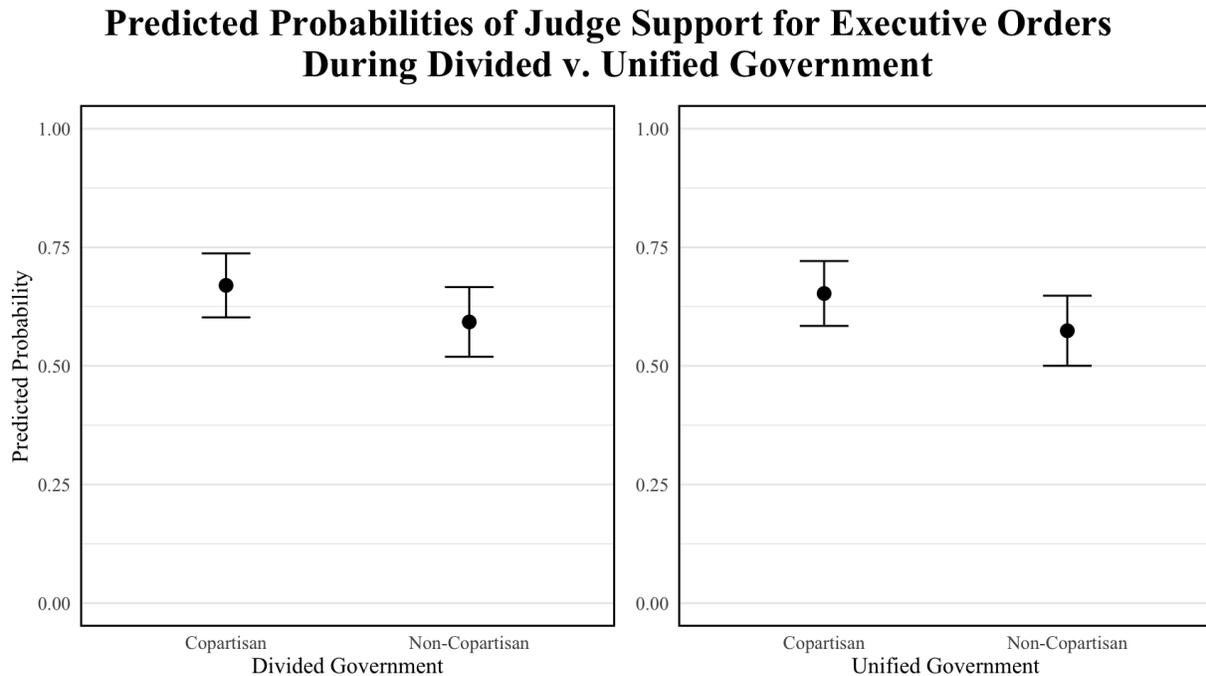
Table 5 reports the effect of the independent variables on whether a judge’s ruling will favor or oppose the executive, among all executive order legal challenges since 1945. According to Table 5 and as theorized, copartisans judges rule in favor of the executive more frequently than non-copartisan judges ( $p < .05$ ), making this result consistent with *H1*. Additionally, Figure 6 reports the predicted probability of a judge supporting an executive order among copartisan vs. non-copartisan judges. The data show that, on average, copartisan judges rule in favor of the executive with a probability of 0.653, while non-copartisans exhibit a probability of 0.574. This 0.0786 difference between copartisans and non-copartisans further demonstrates the impact of political affiliation on judicial outcomes. On the contrary, presidential approval does not have a statistically significant, independent effect on whether federal judges rule favorably towards the executive. This contradicts *H2*, as Table 5 does not show that higher presidential approval ratings lead to more favorable rulings.

Figure 6:



**Figure 6**

*Notes:* Estimates reflect the predicted likelihood of executive success in court among copartisan and non-copartisan judges when evaluating an executive order. The vertical whiskers represent 95% confidence intervals. These predicted probabilities are computed using logistic regression results from Table 5. The differences across the predicted values are statistically significant.

**Figure 7:**

*Notes:* Estimates reflect the predicted likelihood of executive success in court among copartisan and non-copartisan judges when evaluating an executive order issued during divided and unified government. The vertical whiskers represent 95% confidence intervals. These predicted probabilities are computed using logistic regression results from Table 5. The differences across the copartisan and non-copartisan judge's predicted values are statistically significant. The differences across divided and unified government are not statistically significant.

In addition, from the results in Table 5, whether a president issued an executive order during a period of divided government does not have a statistically significant impact on executive success in federal court. These results are consistent with the predicted probabilities shown in Figure 7. During divided government, the predicted probability of executive success

among copartisan judges is 0.67, while during unified government, the predicted probability slightly decrease to 0.653. Among non-copartisan judges, during divided government, the predicted probability of executive success in court is 0.593, and during a period of unified government, the predicted probability slightly decreases to to 0.574. Both Table 5 and Figure 5 lend evidence opposing the hypothesized relationship, illustrating that the presence of divided vs. unified government does not significantly or substantively influence whether judges rule favorably or unfavorably towards the executive branch.

As shown by Table 5, the probability of a district court judge ruling favorably on an executive order increases the predicted probability by .081, compared to circuit courts (the baseline category), which is statistically significant at  $p < .05$ . Moreover, the predicted probability that Supreme Court justices will vote in favor of the executive branch decreases by .157, compared to circuit court judges, which is statistically significant at  $p < .01$ . These results both support *H7* and are consistent with the literature surrounding the appellate nature of the circuit courts and Supreme Court. Appellate courts, especially the Supreme Court, more frequently vote contrary to the executive branch compared to district court due to the selection of cases adjudicated on the appellate level. Parties are more likely to appeal lower court decisions when they believe they have a strong chance to win. Additionally, cases adjudicated in front of the Supreme Court often delve into complex legal issues that frequently lack clear precedent. If such precedent exists, then the Court is unlikely to grant review. Supreme Court justices prioritize cases with the potential to overturn the lower court's ruling, ensuring that their limited docket space is reserved for that warrant reconsideration rather than merely affirming prior decisions.

Additionally, as the number of years between an executive order's issuance and legal challenge increases, the likelihood of a judge ruling in favor of the executive increases, a statistically significant result at  $p < .1$ . This result is consistent with *H6* because, as theorized, executive orders that are legally questionable are more likely to face judicial scrutiny soon after issuance. While the number of years between an executive order's issuance and legal challenge exhibits statistically significant results, whether the executive order was challenged during or after the issuing presidency does not produce statistically significant results, even at  $p < .1$ ; this result does not support the theory, as laid out in *H5*.

Next, Table 8 incorporates an indicator variable for each presidential administration to estimate differences in executive success across presidents. This allows me to determine what presidents exhibited the highest level of success in front of the judiciary, compared to President William Clinton's administration (the baseline category). When accounting for differences across presidential administrations, the magnitude of the copartisan effect dampens compared to Table 5; the size of the coefficient decreases and the effect is only significant at  $p < .1$ . Conversely, it heightens the significance of the effect on the difference in years between the executive order's issuance and case ruling and increases the predicted probability by .003. However, consistent with Table 5, presidential approval, divided government, and executive orders challenged during the issuing administration variables do not exhibit statistically significant effects. With statistical significance at  $p < .05$ , judges were more likely to support executive orders issued during the George H.W. Bush administration, compared to the Clinton administration. Furthermore, executive orders issued by Presidents Barack Obama and George W. Bush more frequently survived judicial review compared to those issued by President Clinton ( $p < .1$ ). Conversely, executive orders issued during President John F. Kennedy's administration were less likely to

produce favorable outcomes ( $p < .1$ ). Similarly, President Trump’s executive orders survived judicial review less frequently than those from the Clinton administration ( $p < .05$ ). While one may argue President Trump’s decreased success is due to the recency of his presidency, executive orders issued by President Joe Biden, whose term is currently unfinished, are no more or less frequently overruled compared to Clinton.

**Table 8:**

<b>Impact of Presidential Administration on Executive Success in Court</b>	
DV: Pro Executive Rulings	
Truman	-0.176 (0.399)
Eisenhower	0.046 (0.422)
Kennedy	-1.066* (0.553)
Johnson	-0.093 (0.377)
Nixon	0.124 (0.329)
Ford	1.308 (0.827)
Carter	-0.357 (0.374)
Reagan	0.343 (0.317)
HW Bush	1.043** (0.446)
W Bush	0.678* (0.349)

Obama	0.735*
	(0.403)
Trump	-0.926**
	(0.393)
Biden	0.034
	(0.415)
Copartisan	0.253*
	(0.139)
Years	0.014**
	(0.006)
Pres. Approval	0.336
	(0.711)
Case During Pres.	-0.412
	(0.267)
Divided Government	-0.072
	(0.217)
Constant	0.274
	(0.527)

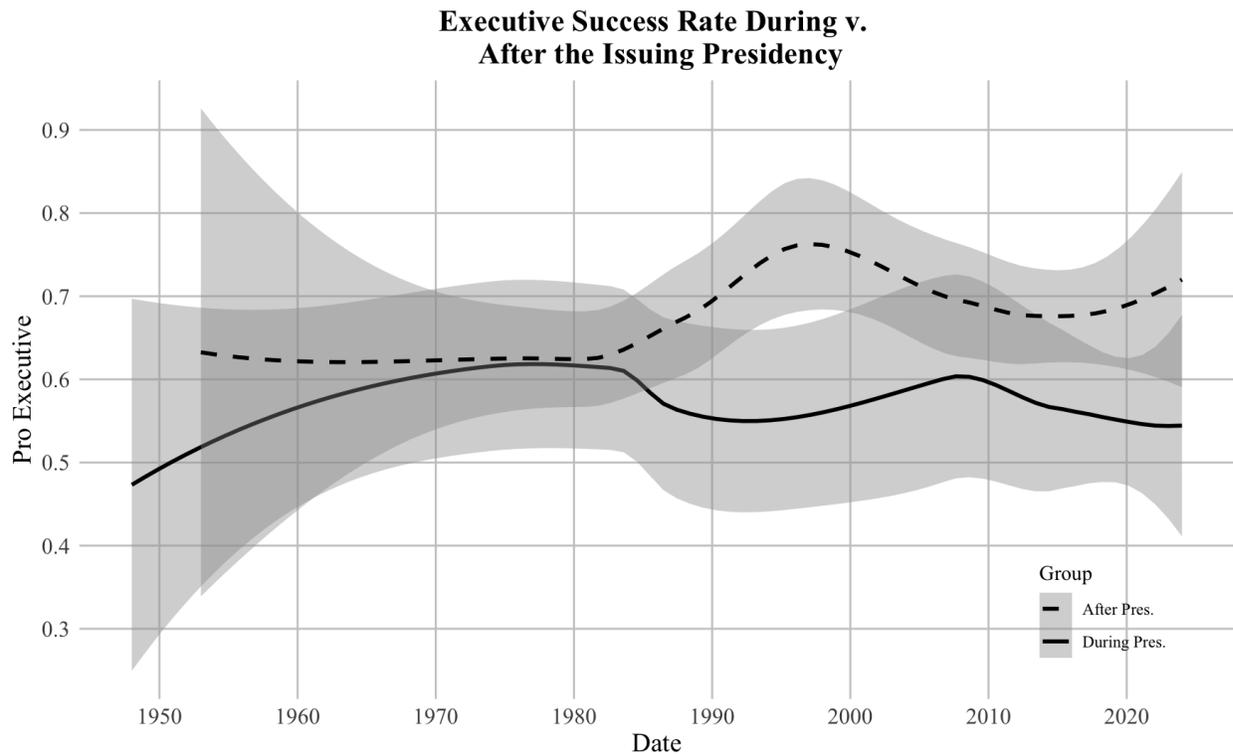
---

Observations	1,014
Log Likelihood	-635.315
Akaike Inf. Crit.	1,308.629

---

*Notes:* Table entries are logistic regression coefficients with standard errors in parentheses. \*  $p < 0.1$ ; >; \*\*  $p < 0.05$ ; >; \*\*\*  $p < 0.01$ . The dependent variable measures whether each judge ruled in favor of the executive branch in all cases examining executive orders since 1945. Higher values indicate heightened levels of executive success. Model accounts for presidential administration in which the case ruling was issued.

Figure 9:



Although Table 5 did not show statistically significant results for the effect of cases occurring during versus after the issuing presidency, Figure 9 reveals a stark divide, starting in the 1980s where cases occurring after the issuing president’s term are more frequently decided in favor of the executive branch compared to those adjudicated during the issuing president’s term. This trend persists today. Furthermore, the copartisan effect significantly varies between cases adjudicated during versus after the issuing administration, as evidenced by Table 10. I divide the dataset into cases before and after the issuing presidency to examine the difference in copartisan executive success in court between the two time periods. The predicted probability of a copartisan judge ruling favorably towards the executive branch on an executive order during the administrations increases by .076 with statistical significance at  $p < .001$ . While, conversely, the

copartisan effect has a negative, yet statistically insignificant, relationship when the case occurs after the issuing presidency. These findings indicate that copartisan judges overwhelmingly rule in favor of presidents if the executive order was issued during that term; however, after the issuing term, there is no statistically significant difference between copartisans and non-copartisans. This stark change among cases adjudicated during versus after an executive order's issuing presidency most likely stems from the political ramifications associated with a sitting president's order facing judicial backlash, such as heightened public scrutiny and diminished political capital. Copartisan judges will not want to see the president be scrutinized following a court decision when their ideologically preferences align with policy put forth by the executive order. This is particularly evident in cases involving executive orders promoting major policy initiatives or fulfilling campaign promises.

Additionally, Table 10 shows that the number of years between an executive order's issuance and case ruling only significantly affects whether the case is ruled in favor of the executive when the case occurs during the issuing presidency. For every year difference in cases adjudicated during the issuing presidency, the predicted probability of a favorable vote for the executive increases by .090 with statistical significance at  $p < .001$ . On the contrary, the predicted probability increases by .003 for every year between the issuance and ruling for cases occurring after the issuing presidency; this effect does not have statistical significance. Additionally, Figure 11 illustrates executive success among copartisans and non-copartisans, factoring in the number of years between the order's issuance and the case ruling. This figure highlights the disparity in executive success between copartisans and non-copartisans as the time between issuance and ruling lengthens. Figure 11 shows that executive success in court only heavily fluctuates within the five years following an executive order's issuance, afterwards it

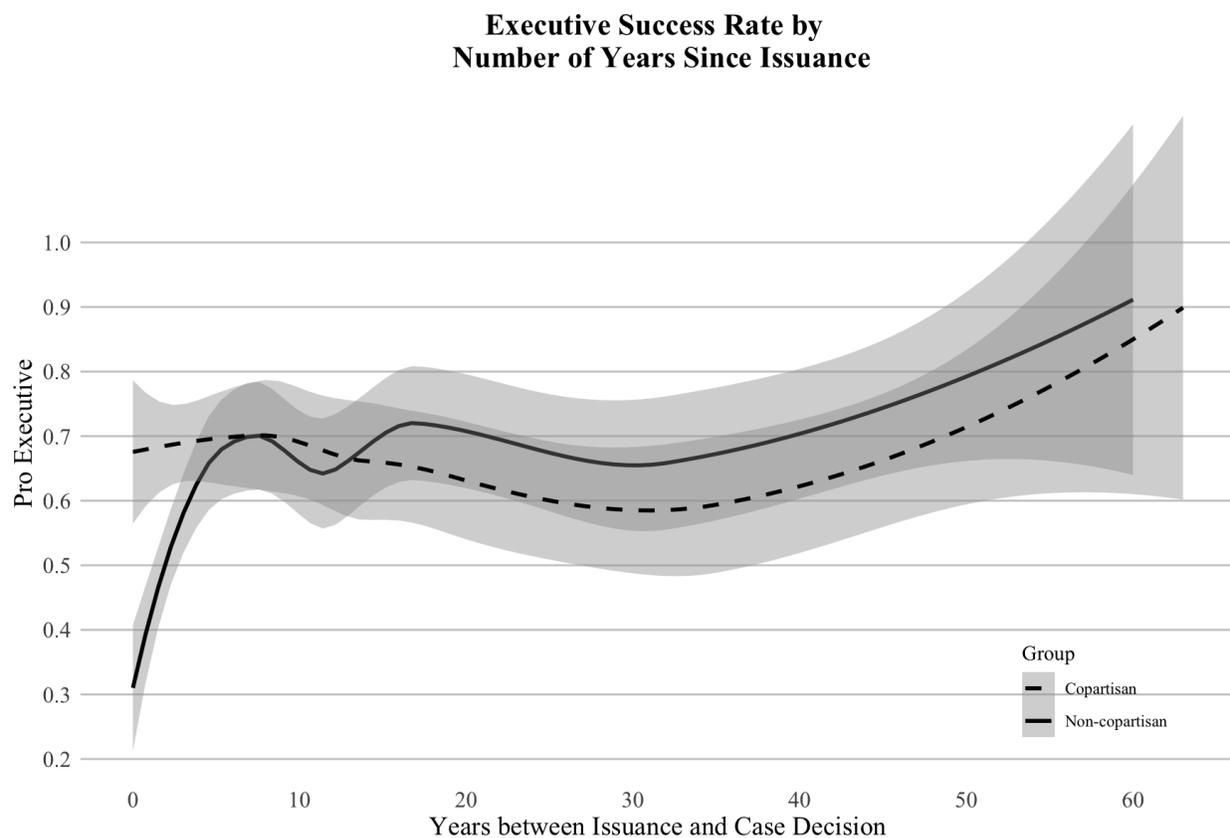
stagnates around 65% to 70%. Although this fluctuation only occurs among non-copartisans, it most likely explains the deviations in the copartisan indicator’s effect in cases happening during versus after the issuing presidency because cases adjudicated during the issuing presidency are subject to higher levels of scrutiny from non-copartisan judges; however, this effect heavily fades after a few years.

**Table 10:**

<b>Impact of Cases Occuring During vs. Post Issuing                      Presidency on Executive Success in Court</b> DV: Pro Executive Rulings		
	During Presidency	After Presidency
Copartisan	1.150*** (0.241)	-0.179 (0.166)
Pres. Approval	0.091 (1.177)	0.776 (0.844)
Years	0.308*** (0.078)	0.009 (0.006)
Divided Gov.	-0.406 (0.272)	0.222 (0.170)
Constant	-0.663 (0.542)	0.152 (0.480)
Observations	342	672
Log Likelihood	-212.878	-422.184
Akaike Inf. Crit.	435.757	854.368

**Table 10**

*Notes:* Table entries are logistic regression coefficients with standard errors in parentheses.  
 \* $p < 0.1$ ; >, \*\* $p < 0.05$ ; >, \*\*\* $p < 0.01$ . The dependent variable measures whether each judge ruled in favor of the executive branch in all cases examining executive orders since 1945. Higher values indicate heightened levels of executive success. Table divides the data between cases occurring during versus after the executive order's issuing presidency.

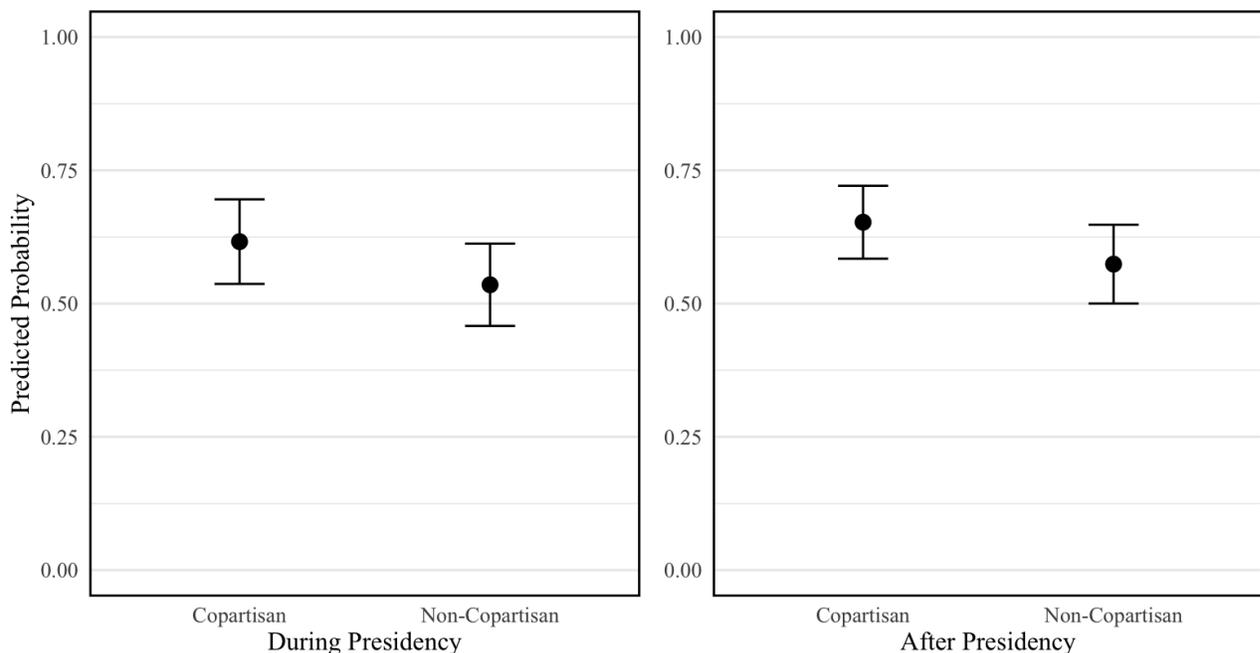
**Figure 11:**

Similar to Figure 5, Figure 12 supports *H5* with results suggesting that judges ruling on cases adjudicated after the executive order's issuing presidency more frequently vote in favor of the executive. The predicted probability of a favorable ruling for the executive among copartisan judges is 0.616 for cases ruled during the issuing presidency, while this likelihood increases to 0.653 for cases adjudicated after the presidency. Similar findings are present among non-partisan

judges, with a 0.535 probability that the executive receives favorable cases adjudicated during the issuing presidency and a 0.574 likelihood for those adjudicated afterward. The above findings also show support for *HI*, as cases ruled on by copartisan judges exhibited higher success rates, regardless of whether the case was adjudicated during or after the issuing presidency. These results underscore the substantive significance of case timing, suggesting that not only do copartisan judges rule more favorably, but also that whether the case occurred during or after the issuing presidency is a critical predictor of judicial success. Moreover, the split in executive success rate between copartisans and non-copartisans is consistent over time for cases adjudicated during the issuing presidency where copartisans have consistently ruled in favor of the executive more frequently, as displayed in Figure 13 which illustrates executive success in cases occurring after the issuing presidency. Although the trend is not as evident in Figure 14 which illustrates executive success in cases occurring during the issuing presidency, over the past two decades, copartisans have ruled more favorably towards the executive compared to non-copartisans.

Figure 12:

**Predicted Probabilities of Judge Support for Executive Orders  
During v. After Issuing Presidency**



**Figure 12:**

*Notes:* Estimates reflect the predicted likelihood of executive success in court among copartisan and non-copartisan judges when evaluating an executive order adjudicated during versus after the issuing presidency. The vertical whiskers represent 95% confidence intervals. These predicted probabilities are computed using logistic regression results from Table 10. The differences across the copartisan and non-copartisan judge's predicted values are statistically significant. The differences across divided and unified government are also statistically significant.

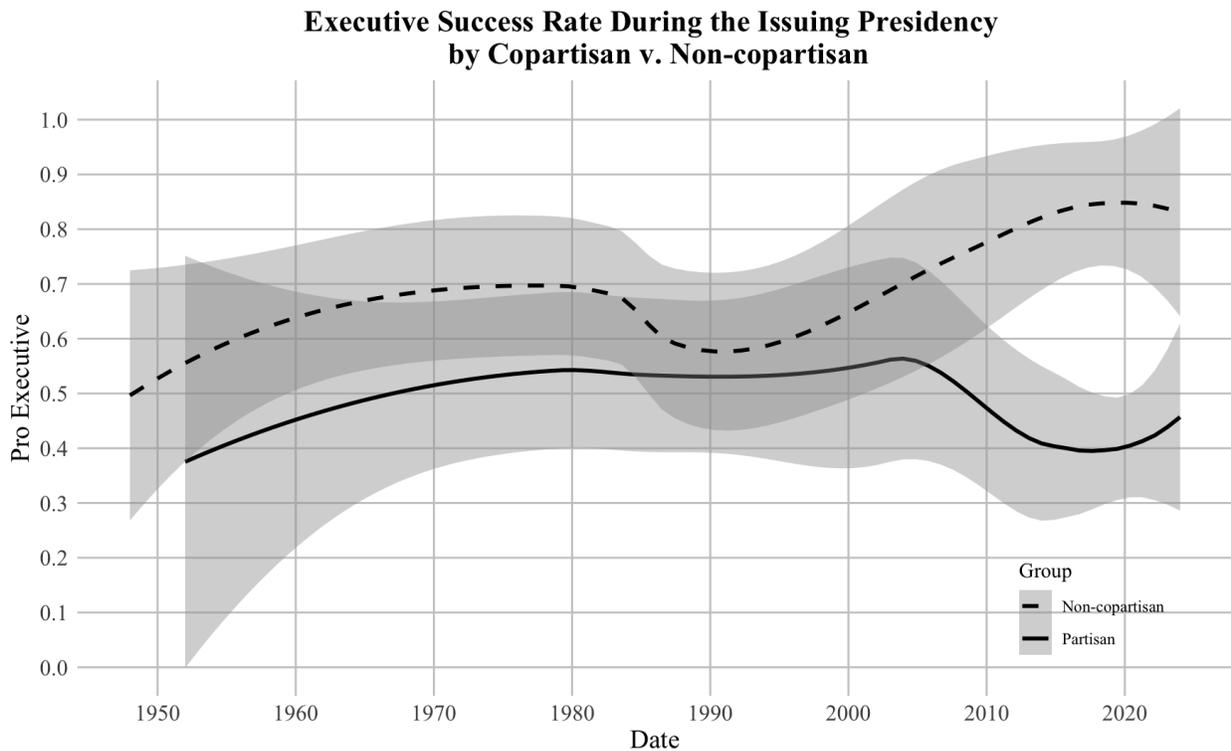
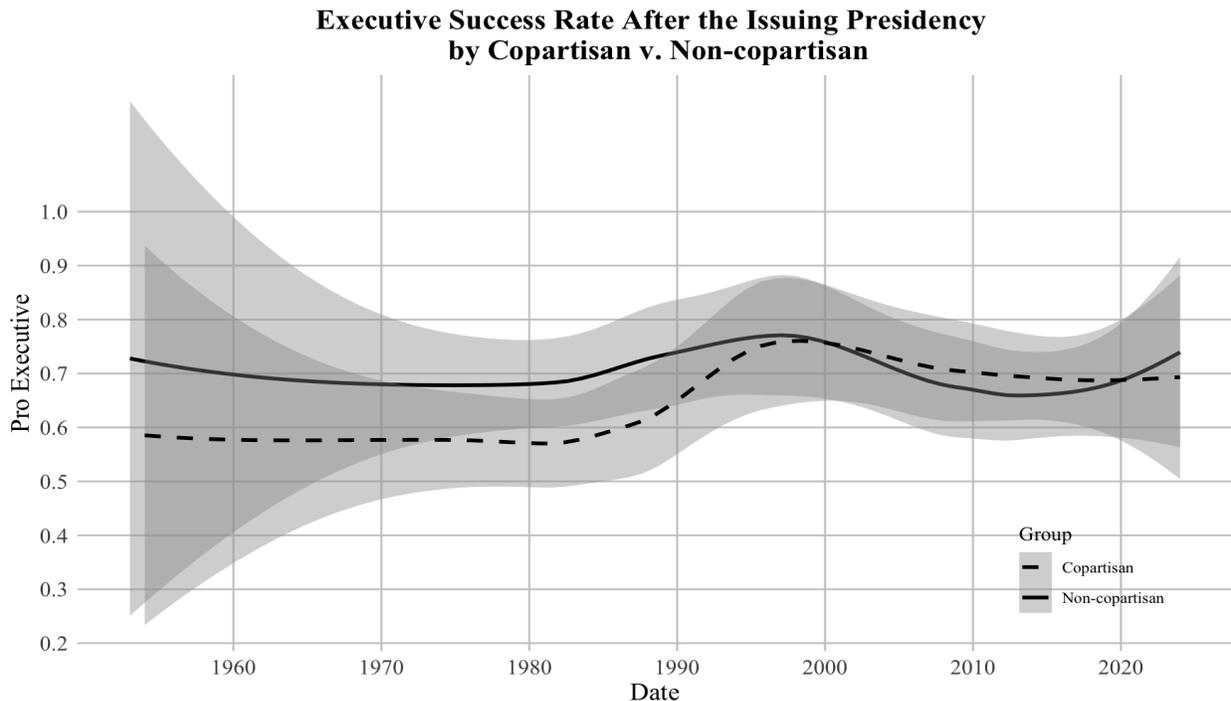
**Figure 13:**

Figure 14:



The results provided in Table 5 do not support the hypothesis (*H4*) that executive orders issued during divided government are struck down less frequently. However, conditional results emerge, supporting this hypothesis in Table 15, which categorizes the regression analysis into four categories: rulings by a copartisan judge during the issuing presidency, a non-copartisan during the issuing presidency, a copartisan after the issuing presidency, and a non-copartisan after the issuing presidency. Among copartisans, judges were less favorable to the executive orders when executive orders were issued during divided government and the issuing presidency. Specifically, during divided government, the predicted probability that a case will result in a favorable outcome for the executive decreases by .188 when the judge is copartisan with the president and the case occurs during the issuing presidency – a result significant at  $p < .05$ . Conversely, the results among non-copartisan judges indicating are not statistically significant, even at  $p < .1$ .

Table 15:

<b>Impact of Copartisan Alignment and Cases Occurring During vs. After Issuing Presidency on Executive Success in Court</b>				
DV: Pro Executive Rulings				
	During Presidency		After Presidency	
	Copartisan	Non-Copartisan	Copartisan	Non-Copartisan
Pres. Approval	0.649 (1.929)	2.257 (1.970)	0.069 (1.192)	1.943 (1.260)
Years	0.263* (0.144)	0.415*** (0.105)	0.007 (0.008)	0.013 (0.009)
Divided Gov.	-1.165** (0.492)	-0.135 (0.344)	0.396* (0.240)	0.003 (0.248)
District Court	-0.322 (0.468)	0.722** (0.322)	0.473* (0.244)	0.343 (0.253)
Supreme Court	-1.613*** (0.509)	-0.973 (0.725)	-0.434 (0.438)	-0.978* (0.508)
Constant	1.106 (0.832)	-2.184** (0.921)	0.117 (0.681)	-0.487 (0.706)
Observations	146	196	342	330
Log Likelihood	-77.262	-123.403	-216.314	-197.591
Akaike Inf. Crit.	166.524	258.805	444.628	407.182

*Notes:* Table entries are logistic regression coefficients with standard errors in parentheses. \* $p < 0.1$ ; >; \*\* $p < 0.05$ ; >; \*\*\* $p < 0.01$ . The dependent variable measures whether each judge ruled in favor of the executive branch in all cases examining executive orders since 1945. Higher values indicate heightened levels of executive success. Table divides the data between cases occurring during versus after the executive order's issuing presidency and further divided by cases adjudicated by copartisan and non-copartisans.

The contrast between whether executive orders were issued during divided or unified government raises questions as to why copartisan judges would rule less favorably on executive orders compared to non-copartisan judges, under these circumstances. As noted earlier, Thrower (2017b) argues that orders issued during divided government endure longer because they are crafted with more bipartisan language to decrease legislative and judicial conflict. Building on Thrower's theory, I propose the following explanation: For executive orders adjudicated during their issuing presidency, copartisan judges ruling on cases rule in favor of the executive less frequently on executive orders issued during divided government compared to unified government because, the executive deliberately designs executive orders to be less controversial and more broadly appealing during divided government. Consequently, judges examining these executive orders are less inclined to rule strictly on party lines, as the executive order's language is less reflective of such party lines.

On the contrary, the predicted probability of a favorable ruling for the executive increases by .095 during divided government when a copartisan judge rules on an executive order after the order's issuing presidency. This difference between orders issued during divided government and adjudicated during or after the issuing presidency reflects how orders receive less scrutiny over time, and excluding the previous scenario, copartisan federal judges consistently rule more favorably than non-copartisan judges.

In Table 15, the results indicate that the number of years between the executive order's issuance and the cases' rulings produce a statistically significant effect on whether judges vote in favor of the executive, regardless of whether the judge is copartisan or non-copartisan with the president. This further supports the notion that as more time passes between an executive order's issuance and ruling, the likelihood of executive success increases (*H6*). For copartisans, this

result is statistically significant at  $p < .1$ , while for non-copartisans, it is significant at  $p < .001$ . Consistent with the results in Figure 11, Table 15's results suggest that the impact of time elapsed between issuance and case outcome on executive success diminishes, as more years pass. Figure 11 and Table 15 both illustrate that after the first few initial years or following the end of a presidential administration, the divide between copartisans and non-copartisans decreases.

In Table 16, I split the dataset into cases adjudicated by copartisan and non-copartisan judges to examine the effects of case timing (whether it occurred during the presidency), the presence of divided government, and the court level (District, Circuit, or Supreme Court). Although previous logistic regression models throughout my analysis have not produced statistically significant results for presidential approval's effect on favorable executive outcomes, Table 16 displays presidential approval's positive effect among non-copartisans judges, supporting *H3*. For every 1% increase in presidential approval, the predicted probability of non-copartisan judges ruling in favor of the executive increases by .001 – a result statistically significant at  $p < .1$ .

Table 16:

<b>Impact of Copartisan Alignment on Executive Success in Court</b>		
DV: Pro Executive Rulings		
	Copartisans	Non-copartisans
Pres. Approval	-0.628 (0.939)	1.837* (0.985)
Years	0.006 (0.008)	0.016* (0.009)
Case During Pres	0.549** (0.274)	-0.630** (0.247)
Divided Gov.	0.084 (0.204)	0.082 (0.193)
District Courts	0.281 (0.212)	0.449** (0.194)
Supreme Court	-0.856*** (0.318)	-0.769** (0.391)
Constant	-0.628 (0.939)	0.728 (0.530)
Observations	526	488
Log Likelihood	-329.970	-301.116
Akaike Inf. Crit.	673.940	616.233

*Notes:* Table entries are logistic regression coefficients with standard errors in parentheses. \* $p < 0.1$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.01$ . The dependent variable measures whether each judge ruled in favor of the executive branch in all cases examining executive orders since 1945. Higher values indicate heightened levels of executive success. Table divides the data between cases occurring during divided by cases adjudicated by copartisan and non-copartisans.

Figure 17:

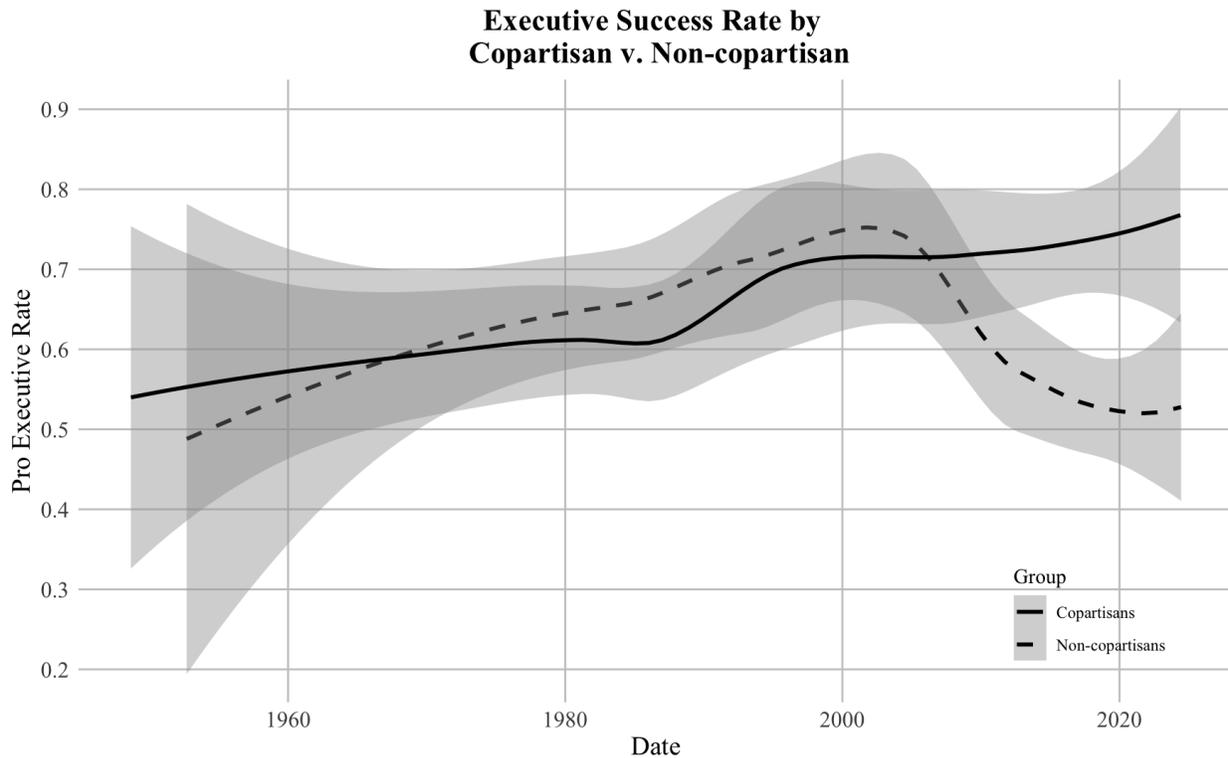


Figure 17 displays the executive branch's success rate in cases examining executive orders 1945 onward, with a dotted line representing success when the executive faces a copartisan judge, and a solid line representing success when facing a non-copartisan judge. The two lines do not deviate much from one another from 1945 to shortly after the turn of the century. However, beginning around 2004, a notable divergence emerged where non-copartisan judges have ruled significantly less frequently towards the executive, compared to copartisan judges. As seen in the graph, executive success in front of non-copartisan judges over the past twenty years has drastically decreased, while for copartisans it has slightly increased, consistent with patterns observed previous decades.

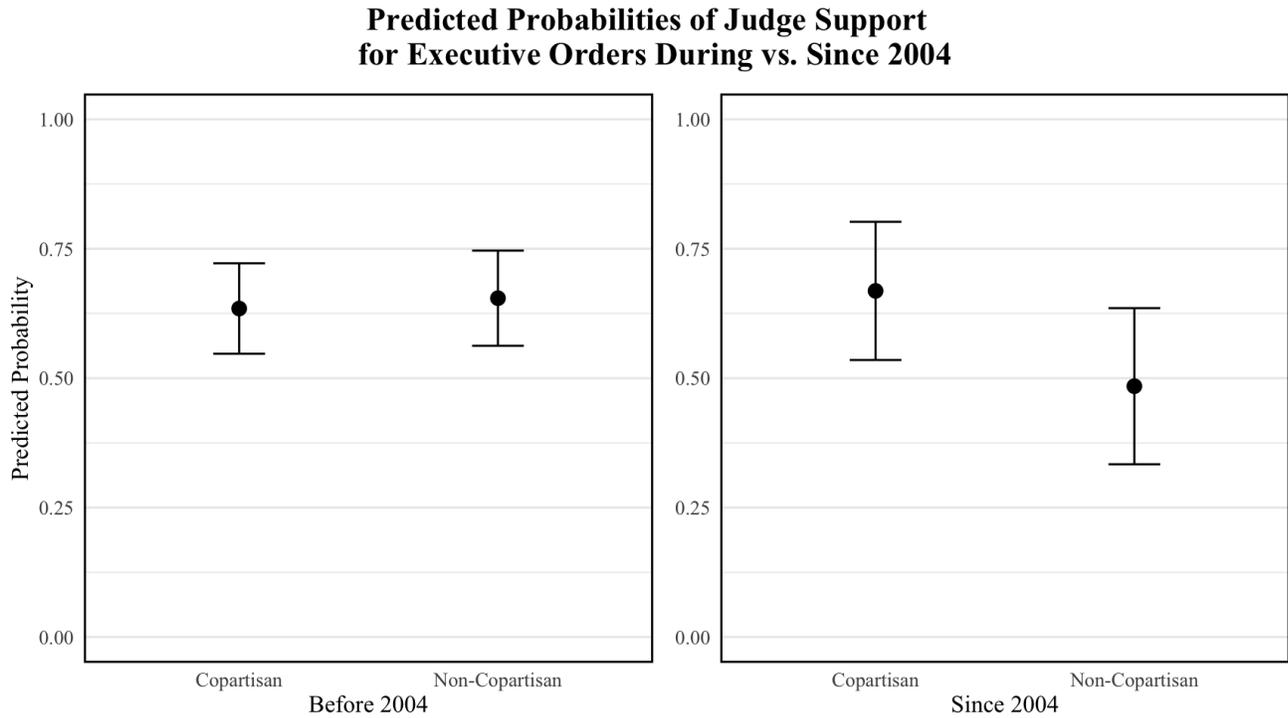
Table 18:

<b>Impact of Cases Occurring Before vs. Since 2004 on Executive Success in Court</b>		
DV: Pro Executive Rulings		
	Before 2004	Since 2004
Copartisan	-0.087 (0.188)	0.764*** (0.205)
Years	0.016 (0.012)	0.010 (0.008)
Pres. Approval	-0.967 (0.829)	2.728 (1.660)
Case During Pres.	-0.198 (0.245)	0.061 (0.329)
Divided Gov.	0.257 (0.213)	-0.045 (0.241)
District Courts	0.162 (0.213)	0.637*** (0.201)
Supreme Court	-0.842*** (0.269)	0.680 (0.881)
Constant	0.995** (0.483)	-1.509* (0.843)
Observations	481	533
Log Likelihood	-298.149	-337.021
Akaike Inf. Crit.	612.298	690.043

*Notes:* Table entries are logistic regression coefficients with standard errors in parentheses. \* $p < 0.1$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.01$ . The dependent variable measures whether each judge ruled in favor of the executive branch in all cases examining executive orders since 1945. Higher values indicate heightened levels of executive success. Table divides the data between cases adjudicated prior to and 2004.

In Table 18, I employ a logistic regression to assess the copartisan effect when the data is divided into two time periods: before 2004 and since 2004. Prior to 2004, the copartisan effect is not statistically significant in predicting whether federal judges rulings are favorable towards the executive branch; furthermore, the coefficient is negative, indicating that before 2004 copartisan judges ruled less frequently in favor of the executive. This slight favorability among non-copartisans is supported by the results of the predicted probabilities in Figure 19. For cases adjudicated prior to 2004, the predicted probability that the judge will rule in favor of the executive is 0.536 among non-copartisans, while it is 0.52 among copartisans. However, in cases adjudicated since 2004, the predicted probability of a copartisan judge ruling in favor of the executive branch increases by .184 compared to non-copartisans; this result is statistically significant at  $p < .001$ . Figure 19 highlights this shift, that the predicted probability of a favorable ruling from copartisan judges since 2004 rises to 0.631, while the predicted probability that non-copartisans will rule in favor of the executive since 2004 is 0.443. This result is a predicted probability difference of 0.188 between copartisans and non-copartisans since 2004, underscoring the significant influence that party alignment, or lack thereof, has on the likelihood that the executive branch will receive a favorable outcome in federal court in the post-2004 period.

Figure 19:



*Notes:* Estimates reflect the predicted likelihood of executive success in court among copartisan and non-copartisan judges when evaluating an executive order adjudicated before versus since 2004. The vertical whiskers represent 95% confidence intervals. These predicted probabilities are computed using logistic regression results from Table 18. The differences across the copartisan and non-copartisan judge’s predicted values are statistically significant in cases occurring since 2004, but not for cases occurring before. The differences across cases adjudicated before and since 2004 are also statistically significant.

**Table 20:**

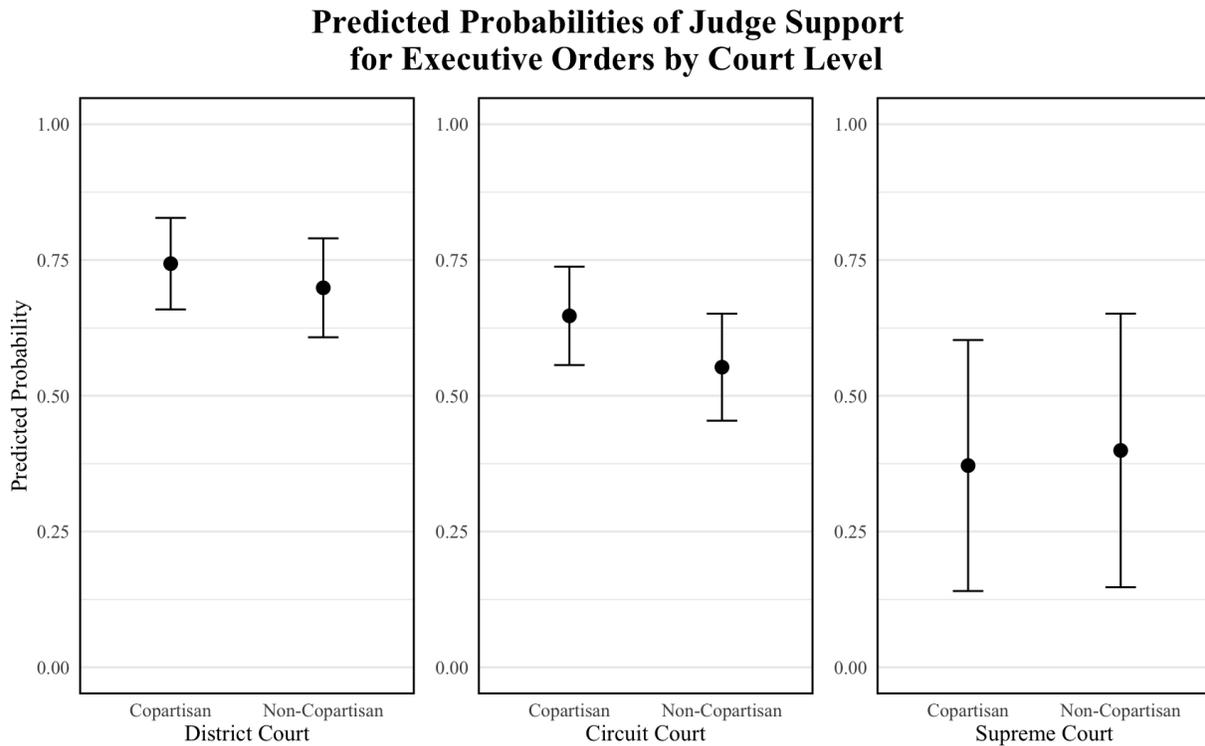
<b>Impact of Court Level on Executive Success in Court</b>			
DV: Pro Executive Rulings			
	District Court	Circuit Court	Supreme Court
Copartisan	0.222 (0.211)	0.395** (0.192)	-0.117 (0.524)
Pres. Approval	0.633 (1.091)	1.954* (1.013)	-4.760** (1.927)
Years	0.010 (0.009)	0.012 (0.009)	-0.006 (0.019)
Case During Pres.	-0.332 (0.278)	0.057 (0.260)	-0.378 (0.605)
Divided Gov.	-0.122 (0.213)	0.098 (0.202)	1.156** (0.498)
Constant	0.443 (0.609)	-0.864 (0.567)	2.017* (1.226)
Observations	449	477	88
Log Likelihood	-272.062	-311.410	-55.168
Akaike Inf. Crit.	556.124	634.820	122.336

*Notes:* Table entries are logistic regression coefficients with standard errors in parentheses. \* $p < 0.1$ ; >; \*\* $p < 0.05$ ; >; \*\*\* $p < 0.01$ . The dependent variable measures whether each judge ruled in favor of the executive branch in all cases examining executive orders since 1945. Higher values indicate heightened levels of executive success. Table divides the data by court level – District Court, Circuit Court, and Supreme Court.

In Figure 19, I split the dataset by court level – district court, circuit court, and Supreme Court – to understand the copartisan indicator’s effect on producing favorable rulings for the

executive at each level. The copartisan alignment between district court judges and the president does not produce statistically significant results, indicating that such copartisan alignment does not significantly sway judge's votes. However, among circuit court judges, the predicted probability of a case resulting in a favorable outcome for the executive increases by .095 for judges that are copartisan with the president – a result statistically significant at  $p < .05$ . For Supreme Court justices, there is not a positive relationship between copartisan justices and favorable executive rulings; however, this is most likely due to the small, non-random sample of Supreme Court cases. Excluding the effect of copartisan alignment among Supreme Court Justices, the results displayed in Table 20 support the theorized relationship in the last hypothesis (*H7*) – district court judges are less affected by copartisan alignment due to the adherence to *stare decisis* and lower tendency to engage in judicial activism compared to circuit court judges.

Furthermore this is supported by the predicted probabilities displayed in Figure 21. For cases adjudicated in district courts, the predicted probability of executive success is 0.711 among copartisans and 0.663 among non-copartisans. The predicted probabilities decrease among both copartisans and non-copartisans among circuit court judges; for copartisans, the predicted probability of executive success is 0.601, while, the predicted probability is 0.503 for non-copartisans. Lastly, the predicted probability executive success rate among copartisans is 0.37, and it slightly increases to 0.399 for non-copartisans. These results are consistent with the court level hypothesis (*H7*), suggesting that the executive exhibits lower levels of success in appellate courts, most especially in the Supreme Court.

**Figure 21:**

*Notes:* Estimates reflect the predicted likelihood of executive success in court among copartisan and non-copartisan judges when evaluating an executive order ruled on before versus since 2004. The vertical whiskers represent 95% confidence intervals. These predicted probabilities are computed using logistic regression results from Table 20. The differences across the copartisan and non-copartisan judge's predicted values are statistically significant in cases adjudicated on the district and circuit level, but not for cases adjudicated in front of the Supreme Court. The differences across court level are also statistically significant.

### Conclusion

Since the turn of the century, scholars and the public have increasingly questioned the idea that the federal judiciary is shielded from political, non-constitutional influences (Keck, 2014; Sisk & Heise, 2011; Hasen, 2019; Jacob & Sag, 2019). This research underscores the judiciary's politicized nature, revealing that federal judges are more likely to rule favorably on cases involving executive orders when they share party affiliation with the sitting president. Moreover, the copartisan effect significantly impacts the outcome of judicial decisions, specifically in instances where the executive order subject to judicial review is challenged during the issuing presidency and in cases occurring shortly after the executive order's issuance. In addition, this effect most significantly impacts judicial rulings in cases occurring since 2004, a time marked with a stark increase in presidential power alongside a continual decline of judicial deference to the executive. The role that political party affiliation has on judicial rulings that review executive orders raises serious concerns about the impartiality of the judiciary, ultimately, threatening the integrity of the judiciary and our democratic balance of power (Clark et al., 2015). This perceived bias undermines the courts' perceived role as neutral arbiters. Although the judiciary has historically enjoyed the highest public approval of the branches of government, growing perceptions of a lack of judicial impartiality over the past few decades has eroded the public's confidence, resulting in striking declines in public approval (Gibson et al., 2003; Ura & Wohlfarth, 2010; Ura & Merrill, 2017). Federal judges' deference to copartisans when examining executive orders poses a dangerous threat to the institution, inviting accusations of partisan bias and undermining confidence in judges' commitment to impartial and apolitical legal interpretation of executive orders.

Scholars have extensively debated whether more controversial, substantive executive

orders are issued during periods of divided versus government; however, this distinction does not produce significantly distinct results, indicating that, regardless of how the data were spliced, executive orders issued during unified government do not receive more favorable treatment from federal judges (see, e.g., Deering & Maltzman, 1999; Thrower, 2017b; Mayer, 2001; Williams, 2019). As Thrower (2017b) suggests, the lack of distinction is most likely a byproduct of presidents employing language less conducive to judicial and congressional review during divided government in an attempt to prevent opposition to their policy. This finding underscores the nuanced relationship between political strategy and judicial review, highlighting how the judiciary's role as an independent check on the executive branch can be subtly influenced by the president's approach to order design.

A potential limitation of my results is that in my analysis, I do not consider the text of the executive order; the results produced may change if I accounted for whether the executive order was substantive versus ceremonial, the sector of the policy sphere it affected, and the authority cited, allowing the president to cite the order. For instance, scholars find that when ruling on election issues, like redistricting and campaign finance law, judges show the most "tribal type of partisanship," which would not be reflected in my analysis, as I do not control for the type of policy (Hasen, 2019; Hasen, 2017; Kopko, 2008; McKenzie, 2012). Additionally, accounting for the authority cited may give further insights into the role of divided government. By considering the nature and policy type of the executive order, alongside the political context surrounding the case, future research could offer a more nuanced understanding of the federal judges' rulings on executive orders and proclivity to defer to the executive.

Future research can further examine the relationships present between president-judge copartisan alignment and favorable rulings in the federal judiciary. Such analyses could analyze

the substantive factors of executive orders, such as the policy realm of the executive order to determine whether an executive order's policy type garners more legal opposition. Furthermore, researchers could evaluate if the authority asserted in the executive order – whether it be statutory, constitutional, or a combination of both – plays a role in executive success in court. Both analyses would allow researchers to better grasp the textual factors impacting presidential success in the courtroom. Such analysis would align closer with the ideology behind scholars who evaluate judicial decisions with the strategic model, as it would further incorporate the legal factors, in addition to the political factors evaluated in this thesis.

Additionally, to adhere more closely to the strategic model, future scholars could assess judge's proclivity to adhere to *stare decisis* and other legal provisions when examining the scope and executability of executive orders. Similarly to the textual factors, examining adherence to legal provisions would allow for a more in-depth, nuanced analysis of judicial rulings. Due to the high number of cases elevated to an appellate court, future research could investigate whether a relationship exists between appellate judges ruling in favor of the lower court more frequently, perhaps because judges may be less inclined to rule a certain way if a lower court has previously ruled in a different way. Also, research could determine if executive success rate is significantly affected by whether the executive is the plaintiff or respondent, and in appellate cases, whether the executive is the appellant or appellee.

A political factor that deserves further investigation is media coverage of the executive order, and subsequently, the case. This would allow for a more nuanced understanding of public opinion's role in affecting judicial decisions that examine executive orders, which is currently solely measured by public opinion polls around the time of the case. Lastly, future researchers could evaluate the factors impacting executive success in court for other, less direct forms of

unilateral action, such as presidential proclamations or memoranda. Moreover, analyses could determine whether less salient forms of presidential unilateral action, like rulemaking, produce less legal challenges, and in turn, receive less judicial opposition.

While further research should be conducted to account for the textual factors in the executive orders and the legal principles at play, federal judges' deference to the executive branch based on party affiliation raises concerns about separation of powers due to the judiciary's appearance of impartiality. U.S. law requires federal judges to disqualify themselves when their "impartiality might reasonably be questioned," a standard in place to uphold the public's trust in the judiciary as a neutral arbiter of the law (28 U.S.C. § 455). However, when judges' decisions appear to be influenced by political alignment rather than legal merit, it challenges the judiciary's role as an unbiased check on the presidency, potentially eroding public confidence in the courts.

Such repeated instances of partisan-aligned deference may weaken the judiciary's ability to fulfill its constitutionally prescribed duty to be an independent check on presidential power, ultimately threatening our system of democratic governance. By solely relying on appointing copartisan judges to the bench, a future president could expand their power and centralize federal authority in the executive branch through the court system, setting a harmful precedent. Consequently, presidents would be enabled to enact their policy agendas with minimal checks or balances. This prompts compelling questions of whether federal judges' lifetime appointments are still appropriate, and in turn whether the imposition of term limits is necessary. Judicial reform may be critical in discouraging judges from engaging in blatant partisan rubber stamping and ensuring greater impartiality in judicial decision-making, as constitutionally prescribed. However, given the high turnover of presidencies, there is hope that future appointments will

result in a more politically diverse judiciary, which could strengthen the system of checks and balances envisioned by the framers of the Constitution. Regardless, safeguarding the federal judiciary from partisan decision-making is essential to preserving the balance of power within our government and upholding the integrity of our democracy.

Appendix

**Table 22**

<b>Impact of Cases Occurring Before vs. Since 2004 on Executive Success in District Courts</b>		
DV: Pro Executive Rulings		
	Before 2004	Since 2004
Copartisan	-0.128 (0.356)	0.477* (0.268)
Years	0.029 (0.024)	0.009 (0.011)
Pres. Approval	0.373 (1.651)	0.161 (2.024)
Case During Pres.	-0.656 (0.486)	-0.127 (0.385)
Divided Gov.	0.051 (0.423)	-0.064 (0.285)
Constant	0.543 (0.914)	0.466 (1.022)
Observations	162	287
Log Likelihood	-95.254	-174.447
Akaike Inf. Crit.	202.508	360.895

*Notes:* Table entries are logistic regression coefficients with standard errors in parentheses. \*  $p < 0.1$ ;  $>$ ; \*\*  $p < 0.05$ ;  $>$ ; \*\*\*  $p < 0.01$ . The dependent variable measures whether each judge ruled in favor of the executive branch in all cases examining executive orders since 1945. Higher values indicate heightened levels of executive success in federal district courts. Table divides the data between cases adjudicated prior to and 2004.

Table 23:

<b>Impact of Cases Occurring Before vs. Since 2004 on Executive Success in Circuit Courts</b>		
DV: Pro Executive Rulings		
	Before 2004	Since 2004
Copartisan	-0.198 (0.252)	1.237*** (0.333)
Years	0.025* (0.015)	0.016 (0.015)
Pres. Approval	-0.434 (1.187)	7.716** (3.059)
Case During Pres.	0.138 (0.331)	0.715 (0.734)
Divided Gov.	0.276 (0.281)	0.169 (0.530)
Constant	0.582 (0.684)	-4.288*** (1.630)
Observations	292	185
Log Likelihood	-184.251	-114.473
Akaike Inf. Crit.	380.502	240.945

*Notes:* Table entries are logistic regression coefficients with standard errors in parentheses. \* $p < 0.1$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.01$ . The dependent variable measures whether each judge ruled in favor of the executive branch in all cases examining executive orders since 1945. Higher values indicate heightened levels of executive success in federal circuit courts. Table divides the data between cases adjudicated prior to and 2004.

**Table 24:**

<b>Impact of Copartisan Alignment and Cases Occurring Before vs. Since 2004 Presidency on Executive Success in District Courts</b>				
DV: Pro Executive Rulings				
	Among Partisans		Among Co-Partisans	
	Before 2004	Since 2004	Before 2004	Since 2004
Pres. Approval	-1.207 (2.391)	-1.721 (2.801)	1.203 (2.367)	1.517 (3.041)
Years	0.073* (0.043)	0.032* (0.017)	-0.012 (0.032)	-0.006 (0.015)
Case During Pres.	-0.545 (0.699)	-0.281 (0.506)	-0.933 (0.720)	0.562 (0.680)
Divided Gov.	-0.126 (0.590)	-0.255 (0.373)	0.452 (0.647)	0.170 (0.468)
Constant	1.080 (1.402)	1.173 (1.416)	0.298 (1.189)	0.342 (1.506)
Observations	87	158	75	129
Log Likelihood	-46.995	-98.018	-45.620	-71.136
Akaike Inf. Crit.	103.990	206.035	101.241	152.272

*Notes:* Table entries are logistic regression coefficients with standard errors in parentheses. \*  $p < 0.1$ ; >; \*\*  $p < 0.05$ ; >; \*\*\*  $p < 0.01$ . The dependent variable measures whether each judge ruled in favor of the executive branch in all cases examining executive orders since 1945. Higher values indicate heightened levels of executive success in federal district courts. Table divides the data between cases occurring during versus since 2004 and further divided by cases adjudicated by copartisan and non-copartisans.

Table 25

<b>Impact of Copartisan Alignment and Cases Occurring Before vs. Since 2004 Presidency on Executive Success in Court</b>				
DV: Pro Executive Rulings				
	Among Partisans		Among Co-Partisans	
	Before 2004	Since 2004	Before 2004	Since 2004
Pres. Approval	0.981 (1.755)	6.235 (4.431)	-1.166 (1.652)	9.366** (4.349)
Years	0.013 (0.019)	0.007 (0.020)	0.039 (0.025)	0.018 (0.020)
Case During Pres.	-0.928* (0.494)	-0.671 (1.086)	1.011** (0.487)	2.475** (1.073)
Divided Gov.	0.606 (0.437)	-0.147 (0.791)	0.199 (0.397)	-0.056 (0.688)
Constant	0.144 (0.961)	-2.739 (2.409)	0.430 (0.933)	-4.194* (2.199)
Observations	143	104	149	81
Log Likelihood	-84.602	-65.519	-94.498	-42.457
Akaike Inf. Crit.	179.204	141.038	198.997	94.915

*Notes:* Table entries are logistic regression coefficients with standard errors in parentheses. \*  $p < 0.1$ ; >; \*\*  $p < 0.05$ ; >; \*\*\*  $p < 0.01$ . The dependent variable measures whether each judge ruled in favor of the executive branch in all cases examining executive orders since 1945. Higher values indicate heightened levels of executive success in federal district courts. Table divides the data between cases occurring during versus since 2004 and further divided by cases adjudicated by copartisan and non-copartisans.

**Table 26:**

<b>Executive Order Legal Challenges Before vs. Since 2004</b>			
	Before 2004	Since 2004	Total
Anti Executive	.400 (192)	.365 (176)	.362 (368)
Pro Executive	.640 (342)	.634 (306)	.638 (648)
Total	.526 (534)	.474 (482)	1 (1,016)

**Table 27:**

<b>Executive Order Legal Challenges Among Non-Copartisans Before vs. Since 2004</b>			
	Before 2004	Since 2004	Total
Anti Executive	.341 (89)	.449 (119)	.395 (208)
Pro Executive	.659 (172)	.551 (146)	.605 (318)
Total	.496 (261)	.504 (265)	1 (526)

**Table 28:**

<b>Executive Order Legal Challenges Among Copartisans Before vs. Since 2004</b>			
	Before 2004	Since 2004	Total
Anti Executive	.377 (103)	.262 (57)	.327 (160)
Pro Executive	.623 (170)	.737 (160)	.673 (330)
Total	.557 (273)	.443 (217)	1 (490)

**Table 29:**

<b>Executive Order Legal Challenges Occurring During vs. After the Issuing Presidency</b>			
	During Presidency	After Presidency	Total
Anti Executive	.433 (148)	.326 (220)	.362 (368)
Pro Executive	.567 (194)	.674 (454)	.638 (648)
Total	.337 (342)	.663 (674)	1 (1,016)

**Table 30:**

<b>Executive Order Legal Challenges Before 2004 Occurring During vs. After the Issuing Presidency</b>			
	During Presidency	After Presidency	Total
Anti Executive	.436 (168)	.328 (124)	.360 (192)
Pro Executive	.564 (88)	.672 (254)	.640 (342)
Total	.292 (156)	.708 (378)	1 (534)

**Table 31:**

<b>Executive Order Legal Challenges Since 2004 Occurring During vs. After the Issuing Presidency</b>			
	During Presidency	After Presidency	Total
Anti Executive	.430 (80)	.324 (96)	.365 (176)
Pro Executive	.570 (106)	.676 (200)	.635 (306)
Total	.386 (186)	.614 (296)	1 (482)

## References

17-480 - Darweesh et al v. Trump et al

28 U.S.C. § 455

5 USC §551 et seq.

Anderson Iv, R., & Tahk, A. M. (2007). Institutions and Equilibrium in the United States Supreme Court. *American Political Science Review*, 101(4), 811-825.

Bartels, B. L. (2015). The sources and consequences of polarization in the US Supreme Court.

*American gridlock: The sources, character, and impact of political polarization*, 171, 177.

Bailey, M. A. (2007). Comparable preference estimates across time and institutions for the court, congress, and presidency. *American Journal of Political Science*, 51(3), 433-448.

Bailey, M. A., & Maltzman, F. (2008). Does legal doctrine matter? Unpacking law and policy preferences on the US Supreme Court. *American Political Science Review*, 102(3), 369-384.

Bailey, J. D., & Rottinghaus, B. (2014). Reexamining the use of unilateral orders: Source of authority and the power to act alone. *American Politics Research*, 42(3), 472-502.

Black, R. C., Owens, R. J., Wedeking, J., & Wohlfarth, P. C. (2020). *The Conscientious Justice: How Supreme Court Justices' Personalities Influence the Law, the High Court, and the Constitution*. Cambridge University Press.

Black, R. C., & Owens, R. J. (2012). *The solicitor general and the United States Supreme Court: Executive branch influence and judicial decisions*. Cambridge University Press.

Casillas, C. J., Enns, P. K., & Wohlfarth, P. C. (2011). How public opinion constrains the US Supreme Court. *American Journal of Political Science*, 55(1), 74-88.

Chiou, F. Y., & Rothenberg, L. S. (2014). The elusive search for presidential power. *American Journal of Political Science*, 58(3), 653-668.

- Clark, T. S. (2009). Measuring ideological polarization on the United States Supreme Court. *Political Research Quarterly*, 62(1), 146-157.
- Clark, T. S., Lax, J. R., & Rice, D. (2015). Measuring the political salience of Supreme Court cases. *Journal of Law and Courts*, 3(1), 37-65.
- Cohen, J. E. (2012). *The President's Legislative Policy Agenda, 1789–2002*. Cambridge University Press.
- Cooper PJ. 1986. By order of the president: administration by executive order and proclamation. *Adm. Soc.* 18:233–62
- Cooper, P. J. (2014). *By Order of the President: The Use and Abuse of Executive Direct Action*. Revised and Expanded. University Press of Kansas.
- Cooper, P. J. (2001). The Law: Presidential memoranda and executive orders: Of patchwork quilts, trump cards, and shell games. *Presidential Studies Quarterly*, 31(1), 126-141.
- Copeland, C. W. (2007). The law: Executive Order 13422: An expansion of presidential influence in the rulemaking process. *Presidential Studies Quarterly*, 37(3), 531-544.
- Corley, P. C., Steigerwalt, A., & Ward, A. (2013). *The Puzzle of Unanimity: Consensus on the United States Supreme Court*. Stanford University Press.
- Cross, F. B. (2007). *Decision making in the US Courts of Appeals*. Stanford University Press.
- Deering, C. J., & Maltzman, F. (1999). The politics of executive orders: Legislative constraints on presidential power. *Political Research Quarterly*, 52(4), 767-783.
- Epstein, L., Landes, W. M., & Posner, R. A. (2012). *The behavior of federal judges: a theoretical and empirical study of rational choice*. Harvard University Press.
- Enns, P. K., & Wohlfarth, P. C. (2013). The swing justice. *The Journal of Politics*, 75(4), 1089-1107.

Epstein, L., & Posner, E. A. (2018). The decline of Supreme Court deference to the president.

University of Pennsylvania Law Review, 829-860.

Executive Order No. 10,006, 13 Fed. Reg. 5917 (1948).

Executive Order No. 12,286, 3 C.F.R. 132 (1981)

Executive Order No. 12,291, 46 Fed. Reg. 13193 (1981)

Executive Order No. 12,498, 50 Fed. Reg. 1036 (1985)

Executive Order No. 13,769, 82 Fed. Reg. 8977 (2017)

Executive Order No. 13,780, 82 Fed. Reg. 13209 (2017)

Executive Order No. 13,422, 3 C.F.R. § 191 (2008)

Executive Orders and the Modern Presidency: The Use of Presidential Directives in the 21st Century." *Presidential Studies Quarterly*, vol. 36, no. 3, 2006, pp. 471-485.

Federal Register Act, Pub. L. No. 74-220, 49 Stat. 500 (1935). Codified as amended at 44 U.S.C. §§ 1501–1511.

Fine, J. A., & Warber, A. L. (2012). Circumventing adversity: Executive orders and divided government. *Presidential Studies Quarterly*, 42(2), 256-274.

Flemming, R. B., & Wood, B. D. (1997). The public and the Supreme Court: Individual justice responsiveness to American policy moods. *American Journal of Political Science*, 468-498.

Gibson, J. L., Caldeira, G. A., & Spence, L. K. (2003). Measuring Attitudes toward the United States Supreme Court. *American Journal of Political Science*, 47(2), 354–367.

<https://doi.org/10.2307/3186144>

- Gooch, D. M. (2015). Ideological polarization on the Supreme Court: Trends in the Court's institutional environment and across regimes, 1937-2008. *American Politics Research*, 43(6), 999-1040.
- Hamilton, A. (1788). Federalist No. 78: The judiciary department. In J. E. Cooke (Ed.), *The Federalist* (pp. 521-530). Wesleyan University Press.
- Hanmer, M. J., & Ozan Kalkan, K. (2013). Behind the curve: Clarifying the best approach to calculating predicted probabilities and marginal effects from limited dependent variable models. *American Journal of Political Science*, 57(1), 263-277.
- Hasen, R. L. (2019). Polarization and the Judiciary. *Annual Review of Political Science*, 22(1), 261-276.
- Hasen, R. L. (2017). Race or party, race as party, or party all the time: three uneasy approaches to conjoined polarization in redistricting and voting cases. *Wm. & Mary L. Rev.*, 59, 1837.
- Harvey, A., & Friedman, B. (2006). Pulling punches: congressional constraints on the Supreme Court's constitutional rulings, 1987–2000. *Legislative Studies Quarterly*, 31(4), 533-562.
- Howell, W. G. (2003). *Power without persuasion: The politics of direct presidential action*. Princeton University Press.
- Howell, William G. "Unilateral powers: A brief overview." *Presidential Stud. Q.* 35 (2005): 417.
- Jacobi, T., & Sag, M. (2018). The new oral argument: justices as advocates. *Notre Dame L. Rev.*, 94, 1161.
- Klarman, M. J. (2004). *From Jim Crow to civil rights: The Supreme Court and the struggle for racial equality*. Oxford University Press.

- Krause, G. A., & Cohen, J. E. (2000). Opportunity, constraints, and the development of the institutional presidency: The issuance of executive orders, 1939–96. *Journal of Politics*, 62(1), 88-114.
- Krause, G. A., & Cohen, D. B. (1997). Presidential use of executive orders, 1953-1994. *American Politics Quarterly*, 25(4), 458-481.
- Keck, T. M. (2020). *Judicial politics in polarized times*. University of Chicago Press.
- Kopko, K. C. (2008). Partisanship suppressed: judicial decision-making in Ralph Nader's 2004 ballot access litigation. *Election Law Journal*, 7(4), 301-324.
- Light, P. C. (1981). The president's agenda: notes on the timing of domestic choice. *Presidential Studies Quarterly*, 11(1), 67-82.
- Lowande, K. S. (2014). The contemporary presidency after the orders: Presidential memoranda and unilateral action. *Presidential Studies Quarterly*, 44(4), 724-741.
- Lowande, K., & Rogowski, J. C. (2021). Presidential unilateral power. *Annual Review of Political Science*, 24(1), 21-43.
- Lowande, K., & Gray, T. (2017). Public perception of the presidential toolkit. *Presidential Studies Quarterly*, 47(3), 432-447.
- Louhghalam v. Trump*, 230 F.Supp.3d 26 (2017)
- Mayer, K. R. (1999). Executive orders and presidential power. *The Journal of Politics*, 61(2), 445-466.
- Mayer, K. R., & Price, K. (2002). Unilateral presidential powers: Significant executive orders, 1949-99. *Presidential Studies Quarterly*, 32(2), 367-386.
- Mayer, K. R. (2002). *With the stroke of a pen: Executive orders and presidential power*. Princeton University Press.

- Mayhew, D. R. (1991). *Divided we govern* (pp. 8-33). New Haven: Yale University.
- McGuire, K. T. (1998). Explaining executive success in the US Supreme Court. *Political Research Quarterly*, 51(2), 505-526.
- McKenzie, M. J. (2012). The influence of partisanship, ideology, and the law on redistricting decisions in the federal courts. *Political Research Quarterly*, 65(4), 799-813.
- Moe, T. M., & Howell, W. G. (1999). Unilateral action and presidential power: A theory. *Presidential Studies Quarterly*, 29(4), 850-873.
- Newland, E. (2014). Executive orders in court. *Yale LJ*, 124, 2026.
- Neustadt, R. E. (1960). *Presidential power* (p. 33). New York: New American Library.
- Pacelle, R. L. (2003). *Between law and politics: The solicitor general and the structuring of race, gender, and reproductive rights litigation* (No. 14). Texas A&M University Press.
- Pacelle, R. (2019). *The transformation of the Supreme Court's agenda: From the New Deal to the Reagan administration*. Routledge.
- Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)
- Pinello, D. R. (1999). Linking party to judicial ideology in American courts: A meta-analysis. *The Justice System Journal*, 219-254
- Raven-Hansen, P. (1983). Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291. *Duke Law Journal*, 1983(2), 285–353.  
<https://doi.org/10.2307/1372328>
- Reeves, A., & Rogowski, J. C. (2015). Public opinion toward presidential power. *Presidential Studies Quarterly*, 45(4), 742-759.
- Reeves, A., & Rogowski, J. C. (2018). The public cost of unilateral action. *American Journal of Political Science*, 62(2), 424-440.

- Relyea H. 2005. Presidential directives: background and overview. CRS Rep. Congr., Congr. Res. Serv., Washington, DC
- Rosenberg, G. (1994). The Supreme Court and the Attitudinal Model. *Law and Courts*, 4, 6.
- Rudalevige, A. (2021). Executive Orders: Structure and Process. In *By Executive Order: Bureaucratic Management and the Limits of Presidential Power* (pp. 49–75). Princeton University Press. <https://doi.org/10.2307/j.ctv17nmzjz.7>
- Segal, J. A., & Champlin, A. J. (2017). The Attitudinal Model. In *Routledge Handbook of Judicial Behavior* (pp. 17-33). Routledge.
- Segal, J. A., & Spaeth, H. J. (2002). *The Supreme Court and the attitudinal model revisited*. Cambridge University Press.
- Sisk, G. C., & Heise, M. (2011). Ideology All the Way Down-An Empirical Study of Establishment Clause Decisions in the Federal Courts. *Mich. L. Rev.*, 110, 1201.
- Skowronek, S. (2008). *Presidential leadership in political time: Reprise and reappraisal*. University Press of Kansas.
- State of Washington and State of Minnesota v. Trump, 847 F.3d 1151 (2017)
- Sunstein CR, Schkade D, Ellman LM, Sawicki A. 2006. Are Judges Political? An Empirical Analysis of the Federal Judiciary. Washington, DC: Brookings Inst.
- Thorson, G. R. (1998). Divided government and the passage of partisan legislation, 1947-1990. *Political Research Quarterly*, 51(3), 751-764.
- Thrower, S. (2017). The president, the court, and policy implementation. *Presidential Studies Quarterly*, 47(1), 122-145.
- Thrower, S. (2017). To revoke or not revoke? The political determinants of executive order longevity. *American Journal of Political Science*, 61(3), 642-656.

Trump v. Hawaii, 585 US \_ (2018)

Ura, J. D., & Wohlfarth, P. C. (2010). "An appeal to the people": Public opinion and congressional support for the Supreme Court. *The Journal of Politics*, 72(4), 939-956.

Ura, J. D., & Merrill, A. H. (2017). The Supreme Court and public opinion. *The Oxford handbook of US judicial behavior*, 435-7.

Urrutia, A. R. (2022). Executive Orders on a Political Timeline: Examination of Executive Orders in the Supreme Court and Stephen Skowronek's Theory of Presidential Leadership (Master's thesis, Utah State University).

U.S. Const. Art. II.

War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1973).

Warber, Adam L. 2006. *Executive Orders and the Modern Presidency*. Boulder, CO: Lynne Rienner.

Weatherford, M. S. (1993). Responsiveness and deliberation in divided government: Presidential leadership in tax policy making. *British Journal of Political Science*, 24(1), 1-31.

Williams RT. 2019. Unilateral politics in the traditional era: significant executive orders and proclamations, 1861–1944. *Presidential Stud. Q.* 50:146–62

Whittington, K. E. (2001). Taking what they give us: Explaining the Court's federalism offensive. *Duke LJ*, 51, 477.

Wohlfarth, P. C. (2009). The tenth justice? Consequences of politicization in the solicitor general's office. *The journal of politics*, 71(1), 224-237.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

Young, Laura. 2013. "Unilateral Presidential Policy Making and the Impact of China." *Presidential Studies Quarterly* 43(2): 328–52.