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POLITICAL CONSTRAINTS ON UNILATERAL EXECUTIVE ACTION

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ABSTRACT

Pundits, politicians, and scholars alike have decried the dramatic expansion of presidential unilateral power in recent decades. Such brazen assertions, against which Congress and the courts have offered seemingly feckless resistance, have led many to decry the emergence of a new “imperial presidency.” From a political science perspective, however, perhaps the more puzzling question is the relative *paucity*, not the proliferation of unilateral actions. Why do presidents not act unilaterally to bring an even wider range of policies into closer alignment with their preferences? The dominant paradigm in political science scholarship emphasizes Congress’s institutional weakness when confronting the unilateral president. It correctly notes that presidents, in all but the rarest of circumstances, can act with impunity, secure in the knowledge that legislative efforts to undo their unilateral initiatives will fail. However, much scholarship overlooks the critical importance of political costs in constraining the unilateral president, and how other institutions—even when they cannot legally compel the president to change course—can affect presidential strategic calculations by raising these costs. We illustrate our argument with a pair of case studies: President Obama’s halting unilateral policy response to the immigration crisis, and his abrupt about-face on unilateral action against the Assad regime in Syria. In these cases, we argue that calculations about the informal political costs of unilateral action affected both the timing and content of presidential policy decisions. When contemplating unilateral action, presidents anticipate more than whether they can defeat legislative efforts to overturn their unilateral initiatives. They also consider the political costs of acting unilaterally and weigh them against the benefits of doing so. Paying greater attention to these political constraints on unilateral action affords a more accurate picture of the place of the unilateral presidency within our separation of powers system in the contemporary era.

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INTRODUCTION

On July 10, 2014, the Speaker of the House, John Boehner, disclosed his intention to file suit against President Barack Obama for allegedly wanton abuse of presidential power in acting unilaterally to delay the employer mandate provision of the Affordable Care Act, fundamentally amending the law as passed absent any legislative authorization for the change. Echoing many congressional critics of unilateral presidential action before him, Speaker Boehner lamented, “The current president believes he has the power to make his own laws—at times even boasting about it. He has said that if Congress won’t make the laws he wants, he’ll go ahead and make them himself, and in the case of the employer mandate in his health care law, that’s exactly what he did.”¹

Bold assertions of unilateral presidential authority have been prominent features of the American political landscape almost since the Founding. The assertion and exercise of unilateral presidential power has been one of the hallmarks of American politics in the post-9/11 era. Without waiting for congressional action, President Bush determined that the Geneva Convention did not apply to Taliban and Al Qaeda prisoners and created a system of military tribunals to try those suspected of terrorism outside the civilian judicial system. With a top-secret National Security Decision Directive, President Bush authorized the National Security Agency to eavesdrop on the electronic communications of American citizens without a warrant, in plain violation of the Foreign Intelligence Surveillance Act of 1978.²

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1. Lauren French, *GOP’s Obama Lawsuit to Focus on Employer Mandate*, POLITICO (July 10, 2014, 5:40 PM), <http://www.politico.com/story/2014/07/gop-obama-lawsuit-employer-mandate-108778.html> (last updated July 11, 2014, 5:29 AM).
 2. Cf. ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., Memorandum, PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION (2006) (arguing that it is “unlikely that a court would hold that Congress . . . authorized the NSA electronic surveillance activities”). But see U.S. DEP’T OF JUSTICE, LEGAL AUTHORITY SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY

Far from providing a clear break from the unilateral bent of his predecessor, President Obama has followed in his footsteps and used the unilateral toolkit at his disposal to advance both his foreign and domestic policy initiatives. While a United States Senator and presidential candidate, Obama emphasized the constitutional limits on the president's unilateral powers as commander in chief, stating that "[t]he president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."³ However, Obama would later change his tune. For example, in 2011, now President Obama, backed by the Office of Legal Counsel, argued that he possessed independent constitutional authority to intervene militarily in Libya without congressional approval because the mission was tied to a national interest, even if the crisis in Libya plainly did not involve an actual or imminent threat to the United States itself.⁴ Similarly, when contemplating military strikes against the Assad regime in Syria for its use of chemical weapons, the Obama administration articulated a legal justification for unilateral intervention because of vital national interests in enforcing international norms against the use of chemical weapons.⁵ In the domestic sphere, President Obama acted unilaterally to exempt states from the Temporary Assistance to Needy Families program's work requirement, to instruct the Justice Department not to prosecute marijuana offenders in states where its use has been decriminalized and, as we will discuss in detail shortly, to implement through administrative memorandum much of the Development, Relief, and Education for Alien Minors (DREAM) Act, which failed to pass both chambers of Congress.⁶

DESCRIBED BY THE PRESIDENT (2006) for a contrasting view offered by the Bush Administration.

3. David A. Fahrenthold, *On Debt and Libya, It's President Obama vs. Senator Obama*, WASHINGTON POST, June 24, 2011 (quoting then Senator Obama) (internal quotation marks omitted), http://www.washingtonpost.com/politics/on-debt-and-libya-its-president-obama-vs-senator-obama/2011/06/22/AGhK4AjH_story.html.
4. Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011), available at http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf (last visited Jan. 25, 2015).
5. Charlie Savage, *President Tests Limits of Power in Syrian Conflict*, N.Y. TIMES, Sept. 9, 2013, at A1, A9.
6. Memorandum from Janet Napolitano, Secretary, U.S. Dep't of Homeland Security, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (last visited Jan. 25, 2015).

Many legal scholars warn that this expansion of presidential unilateral power is a threat to the separation of powers. In 2014 testimony before the House Judiciary Committee, Jonathan Turley argued that it represents “a massive gravitational shift of authority to the Executive Branch that threatens the stability and functionality of our tripartite system.” Turley acknowledges that the shift did not begin with Obama; “[h]owever, it has accelerated at an alarming pace under this administration.”⁷

Empirically driven scholarship in political science confirms that recent presidents have exerted their unilateral powers with unparalleled frequency.⁸ Indeed, William Howell has argued that “the ability to act unilaterally speaks to what is distinctively ‘modern’ about the modern presidency.”⁹ The rise of presidential assertions of unilateral power frequently produces jeremiads lamenting the failure of Madisonian checks and balances and the search for answers as to why the other branches have failed to defend their institutional prerogatives from such naked presidential power grabs.¹⁰ From a political science perspective,

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7. *Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 32–33 (2014) (written statement of Jonathan Turley, Shapiro Professor of Pub. Int. L., Geo. Wash. U.). See also BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010), and Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010); Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871 (2006) for similar fears of extreme claims of unilateral presidential power. Further, the literature is replete with constitutional criticisms of individual executive orders. See, e.g., Michele Estrin Gilman, *If at First You Don’t Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. 1103 (2007) (on charitable choice executive orders); Stephen Yuhan, *The Imperial Presidency Strikes Back: Executive Order 13,233, the National Archives, and the Capture of Presidential History*, 79 N.Y.U. L. REV. 1570 (2004) (on access to presidential papers at the National Archives); Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981) (on mandating cost-benefit analysis in rule-making).
 8. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999); Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850 (1999); KENNETH R. MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* (2001); PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* (2002).
 9. WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 13 (2003).
 10. See, e.g., LOUIS FISHER, *CONGRESSIONAL ABDICATION ON WAR AND SPENDING* (2000); see also Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006), on

however, perhaps the more puzzling question is the relative *paucity*, not the proliferation, of unilateral actions.

The dominant scholarly paradigm is clear: presidential unilateral power is not absolute. Rather, the president's capacity to affect the course and contours of public policy unilaterally is conditional on the willingness of Congress and the courts to check unilateral measures. However, given the institutional weaknesses and reluctance of both the legislature and judiciary to overturn presidential unilateral initiatives, presidents should be able to act with impunity in all but the rarest of circumstances. As a result, this Article flips the question on its head. It does not ask why presidents are able to achieve so much unilaterally in our separation of powers system, when we might logically expect the other branches to contest presidential aggrandizement using all constitutional means at their disposal. Rather, we seek insight into why presidents do not use the instruments in their unilateral toolkit with even greater frequency to address a wide range of policy priorities.

The reason for presidential caution, we argue, is that presidents are far more concerned about the informal constraints on unilateral action—mainly the political costs of going it alone—than they are about being formally overturned by new legislation or a judicial decision. These informal constraints are all but absent from most formal models of unilateral politics.

The Article proceeds in five parts. Part I traces the evolution of political science scholarship on unilateral powers over time, from early accounts paying them scant attention to modern scholarship highlighting these tools as a foundation of presidential power in the contemporary era. It then unpacks the dominant game theoretic approach toward understanding unilateral politics; this perspective suggests that presidents have a capacity to act unilaterally that is all but unchecked by other political actors. Part II presents our counterargument that by failing to account for public opinion and informal political costs, the dominant approach seriously overestimates the president's power to achieve his policy goals unilaterally and underestimates the capacity of Congress and the courts to constrain and even deter unilateral action. Parts III and IV illustrate our argument through a pair of case studies: an examination of President Obama's halting unilateral policy response to the immigration crisis, and an assessment of President Obama's abrupt about-face on unilateral action against the Assad regime in Syria.

I. FORMAL THEORY AND PRESIDENTIAL UNILATERAL POWER

Assertions of presidential unilateral power emerged almost immediately under our constitutional system. President Washington famously

the role of partisanship in upsetting the checks and balances described in Federalist 51.

issued his Proclamation of Neutrality in 1793 and, in so doing, claimed for the executive the right to define the nation's foreign policy posture until Congress exercised its power to declare war. President Jefferson negotiated the Louisiana Purchase without any prior congressional approval. President Lincoln took many steps to put the Union on a war footing in 1861 while Congress was not in session, including an attempted resupply of Fort Sumter, the institution of a naval blockade against confederate ports, and the suspension of the writ of habeas corpus. In 1863 Lincoln issued perhaps the most sweeping unilateral directive of all time, the Emancipation Proclamation. At the turn of the twentieth century, in articulating his stewardship theory of presidential power, President Theodore Roosevelt went perhaps further still in declaring an undefined residuum of presidential power to act in the national interest. In contrast to a constrictive view of presidential power limiting the president's sphere of action to cases where he was acting pursuant to some specific authorization, Roosevelt brazenly made the case for an expansive reading of presidential power.

My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power, I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power.¹¹

In office, Roosevelt put this theory into practice, acting aggressively to project American power and to pursue American economic interests, be they in Santo Domingo, Panama, or across the Pacific.¹²

Courts have grappled with questions of the constitutionality of unilateral presidential actions almost since the Founding. For example, in the 1804 case *Little v. Barreme*,¹³ Chief Justice Marshall struck down an order by President John Adams issued during the quasi-war with France authorizing American naval vessels to seize ships sailing to and from French ports. Marshall argued that had Adams acted alone, the order would have been constitutional. However, because Congress had explicitly authorized the seizure only of ships sailing *to* French ports (and the *Barreme* was sailing *from* a French port), the order was unconstitutional. Additional nineteenth-century cases involved challenges to specific presidential unilateral actions, such as *Ex Parte*

11. THEODORE ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 357 (1922).

12. See generally EDMUND MORRIS, THEODORE REX (2001) (detailing Roosevelt's time as president, including his foreign policy initiatives in Panama).

13. 6 U.S. (2 Cranch) 170 (1804).

*Merriman*¹⁴ and Lincoln's unilateral suspension of the writ of habeas corpus. However, in the 1930s, the Supreme Court issued a series of rulings putting presidential unilateral powers on a firmer legal footing. Two cases, *United States v. Curtiss-Wright*¹⁵ and *United States v. Pink*,¹⁶ established the president's power to enter the United States into international agreements and that these agreements have the same legal status as treaties. A third case, *United States v. Belmont*,¹⁷ recognized the president's power to issue executive orders and held that those orders have the force of federal law, including preeminence over state law.¹⁸

Despite the growing prominence of unilateral powers, for decades they were given short shrift by political science scholarship. This is true of the more legalistic studies that dominated presidency studies during the early and mid-twentieth century.¹⁹ For example, Edward Corwin's *The President, Office and Power* never used the word "unilateral." To be sure, such powers are occasionally discussed; for example, Corwin assessed the constitutionality of executive agencies created by Franklin D. Roosevelt via executive order pursuant to his authority as commander in chief. However, these powers were far from a point of emphasis.²⁰ This characterization is perhaps even truer following the publication of Richard Neustadt's *Presidential Power* in 1960 and the behavioral revolution in presidency studies that it precipitated. Neustadt argued that the president's formal powers were wholly insufficient to the demands for energetic leadership placed upon the office in the post-World War II era. Falling back on the limited, unreliable, and often ineffective or counterproductive powers of "command" was a hallmark of weak presidents. Instead, power was largely a function of an individual president's skill and will in building and maintaining a strong professional reputation and prestige among the public and then leveraging that capital to persuade other actors, particularly legislators but also members of the executive branch, to pursue presidential policies.

The explicit de-emphasis in presidential scholarship on unilateral action began to change near the turn of the new millennium. A new wave of scholarship demonstrated that presidents can wield tremendous

14. 17 F. Cas. 144 (C.C.D. Md. 1861).

15. 299 U.S. 304 (1936).

16. 315 U.S. 203 (1942).

17. 301 U.S. 324 (1937).

18. HOWELL, *supra* note 9, at 20–21; *see also* GLENDON A. SCHUBERT JR., *THE PRESIDENCY IN THE COURTS* (1957).

19. *E.g.*, EDWARD S. CORWIN, *THE PRESIDENT, OFFICE AND POWERS, 1787–1957: HISTORY AND ANALYSIS OF PRACTICE AND OPINION* (1957); CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* (2nd ed. 1960).

20. *See* CORWIN, *supra* note 19, at 242–43.

power when acting unilaterally through an array of tools, including executive orders, executive agreements, memoranda, proclamations, and national security decision directives.²¹ This new line of research presented illustrative case studies of presidents effecting major policy changes unilaterally in policy domains as diverse as civil rights to foreign policy. Moreover, empirical assessments showed that the use of such unilateral tools has increased in recent decades.²²

How then are we to understand the forces driving when presidents employ unilateral initiatives and when they do not? William Howell's unilateral politics model remains perhaps the dominant approach in the political science literature.²³ Howell's model builds off Keith Krehbiel's pivotal politics model of lawmaking.²⁴ For decades, scholars have used a simple median voter model as a heuristic to help make sense of legislative behavior. This perspective posits that the median voter is the dominant player in a legislature.²⁵ Any policy that would make the median voter happier than the status quo (or more formally yield the median voter more utility) is enacted into law.²⁶ By contrast, proposals that the median voter does not prefer to the status quo fail when brought to a vote on the floor.²⁷

Krehbiel's insight was that this median voter framework does not accurately describe the American legislative system, which has multiple super-majoritarian requirements. Specifically, in the Senate, a minority can filibuster a bill supported by the majority and prevent it from receiving a final up or down vote. As a result, sixty votes are required to secure passage of most major legislative initiatives in the Senate. Furthermore, once passed by both chambers of Congress, a bill still must be signed by the president to become law. If a bill moves policy away from the president's preferences, he will veto it. In this case, a two-thirds majority is needed to overturn the presidential veto. Hence, the key players in the American context are what Krehbiel terms the filibuster pivot and the veto pivot—the legislators who are key in

21. See Phillip J. Cooper, *Power Tools for an Effective and Responsible Presidency*, 29 ADMIN. & SOC'Y 529 (1997); Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445 (1999); Moe & Howell, *Presidential Power*, *supra* note 8.

22. For example, while the total number of executive orders has decreased considerably since the 1940s, Howell shows that the number of significant executive orders has steadily increased over time. HOWELL, *supra* note 9, at 84–85.

23. *Id.*

24. See KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAW-MAKING* (1998).

25. *Id.*

26. *Id.*

27. *Id.*

determining whether a bill can secure sixty votes to stop a filibuster or a two-thirds vote to override a presidential veto.²⁸

Perhaps the most important result of Krehbiel's model is that many policies are "gridlocked"—that is, no bill that would change the status quo can be passed and signed by the president. The ideological space between the filibuster and the veto pivots is christened the "gridlock interval"; status quo policies within this ideological space cannot be changed by normal legislative procedures. Rather, policy change happens when an exogenous shock, such as a major electoral swing, shifts the ideological locations of the key players, making policy change again possible. This theory of lawmaking offers keen insight into our contemporary institutional malaise. Partisan polarization widens the gridlock interval by moving the pivotal players further to the ideological extremes. This, in turn, makes legislative action all but impossible for a growing number of issue areas.

Howell embraces the basic framework of the pivotal politics model but with one particularly important modification. Presidents can do more than veto legislation. Presidents can also be first-movers in the American system by acting unilaterally. Once making this adjustment, even the basic model yields a surprising result: the very same institutional setup that makes it so difficult for presidents to achieve their policy priorities legislatively gives them tremendous advantages when acting unilaterally.²⁹ Indeed, the model suggests that presidents can move any status quo policy lodged within the gridlock interval closer to their preferences, provided that the new policy remains within that interval, secure in the knowledge that Congress will not be able to undo legislatively what the president has changed unilaterally.

As a result, formal theories of unilateral politics predict that presidents should be able to act unilaterally with little risk of being overturned by Congress on a wide range of issues. Moreover, since all they need to ensure is that their veto of any initiative by Congress to restore the status quo is sustained, presidents are even more empowered in an era of intense partisan polarization.³⁰ For example, for almost any conceivable action he would desire to take unilaterally, President Obama should be able to recruit thirty-four liberal Democrats in the Senate who would support such a policy shift. As Neal Katyal describes

28. To simplify matters, Krehbiel posits a unicameral legislature in explicating his theory. *Id.*

29. Howell goes on to add additional features, such as the discretion that the judiciary will allow presidents to exercise to the model. *See* HOWELL, *supra* note 9, at 30–31. However, the basic features and conclusions that presidents enjoy wide latitude to act unilaterally remain.

30. See Christopher J. Deering & Forrest Maltzman, *The Politics of Executive Orders: Legislative Constraints on Presidential Power*, 52 POL. RES. Q. 767, 771 (1999), for a similar emphasis on the veto override and presidential anticipation thereof.

it, the veto has become a tool that can “entrench presidential decrees,” all but completely undermining legislative checks on presidential assertions of unilateral power.³¹

Of course, formal models are simplifications of reality. Are the congressional checks on the unilateral president stronger than such models propose? Howell argues no.³² In fact, Congress may be even weaker than the unilateral politics model predicts. The formal model assumes that Congress will pass and override a presidential veto on any bill amending policy changed by an executive order that is closer to the veto pivot’s preferences than the unilaterally created policy. However, in reality the task for legislators is not so simple. Congress as an institution is plagued by a collective action dilemma when it tries to rally to defend its institutional prerogatives. Moreover, even when acting to constrain the president is in enough members’ personal and political as well as collective institutional interests, it is exceedingly difficult to build and maintain large coalitions throughout a legislative process that is riddled with transaction costs.³³ As a result, the modern congressional constraint on presidential unilateral action may be even weaker than suggested by the formal model. These institutional weaknesses of Congress may render it unable to challenge successfully unilateral actions, even when a super-majority of members would prefer legislation to overturn a presidential order and restore a status quo more pleasing to most legislators.

II. THE POLITICAL COSTS OF UNILATERAL ACTION

The dominant theoretical understanding of unilateral politics suggests that presidents have the capacity to act with veritable impunity to shift unilaterally a myriad of policies closer to their preferences, secure in the knowledge that Congress will only in the rarest of cases be able to overturn their actions legislatively. Similarly, empirical evidence suggests that the courts exercise at best a weak constraint on the use of unilateral power. For example, between 1942 and 1998, the

31. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2320 (2006); see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395 (2009) (on Congress’s institutional weakness vis-à-vis the executive).

32. HOWELL, *supra* note 9, at 101.

33. See Terry M. Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*, in THE PRESIDENCY AND THE POLITICAL SYSTEM 437 (Michael Nelson ed., 1998) (on collective action dilemmas); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1 (1994) (on transaction costs).

federal courts heard only eighty-three cases challenging the legality of executive orders. Moreover, in 83 percent of those cases, the president's order was upheld.³⁴ Thus, presidents act unilaterally, secure in the knowledge that the probability of a legal challenge ever being heard in federal court is quite low; and if the judiciary does hear a case, the probability of the order being upheld is quite high.³⁵

Consistent with scholarship demonstrating the severe limitations hindering the capacity of Congress and the courts to check assertions of unilateral presidential power, contemporary presidents have indeed used their unilateral toolkit to materially affect the course and content of public policy across a range of issues. Indeed, the use of unilateral power has given rise to jeremiads from both pundits and scholars alike that we are witnessing the return of the "imperial presidency."³⁶ However, what is perhaps more surprising is the number of times and issue areas in which presidents have refrained from acting unilaterally to move policy closer to their preferences when they find themselves blocked legislatively. From our perspective, what is puzzling is not the frequency with which presidents act unilaterally but the relative paucity with which they do so.³⁷ Identifying and measuring trends in the number of "significant" executive orders over time is a difficult enterprise.³⁸ Like laws, most executive orders, as well as many other unilateral directives, have relatively little tangible influence on politics and policy. While presidents have undeniably achieved major policy victories through unilateral action, the number of major unilateral actions in a given year is usually relatively modest. Given their

34. HOWELL, *supra* note 9, at 153–55.

35. To be sure, there are notable exceptions to this general rule, such as the *Hamdan v. Rumsfeld* decision. See Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006).

36. See, e.g., CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007); ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE (2005). See ARTHUR M. SCHLESINGER JR., THE IMPERIAL PRESIDENCY (1973), for the original articulation of the emergence of an imperial presidency during the Johnson and Nixon administrations.

37. This is analogous to a paradigm shift in electoral studies, which instead of decrying the influence of the billions of dollars spent on American election campaigns asks instead, given the high stakes, "why is there so little money in U.S. politics?" See Gordon Tullock, *The Purchase of Politicians*, 10 W. ECON. J. 354–55 (1972); Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSPS. 105 (2003).

38. See Kenneth R. Mayer & Kevin Price, *Unilateral Presidential Powers: Significant Executive Orders, 1949–99*, 32 PRESIDENTIAL STUD. Q. 367, 79 (2002).

institutional advantages, why do presidents not act unilaterally more aggressively?

A small but growing number of studies has pushed back against the dominant theoretical paradigm emphasizing the president's great latitude to act unilaterally. The most prominent critique concerns difficulties in bureaucratic implementation. Presidents may well have the power to issue orders; however, that does not necessarily ensure that other actors in the executive branch will automatically comply and implement orders in strict accordance with presidential preferences. Emphasizing the principal-agent problems that hinder presidential efforts to control the bureaucracy, Matthew Dickinson argues that rather than replacing bargaining, unilateral action represents "a change in where, and with whom bargaining takes place." Moreover, Dickinson contends that "the transaction costs of unilateral action—haggling over the details of presidential directives, estimating bureaucrats' preferences, attracting interest-group and public support, and ensuring bureaucratic compliance—often rival the costs of acting through Congress."³⁹

Here, we take a different tack and emphasize the informal political costs of unilateral action. Specifically, we argue that presidents consider more than just whether Congress or the courts will act affirmatively to overturn a unilateral presidential order. Rather, presidents consider the longer-term political costs that unilateral action may entail. These political costs can take many forms, two of which are particularly important. First, when presidents act unilaterally, they may burn bridges with members of Congress opposed to the action on political, ideological, or even constitutional grounds. To be sure, in almost all circumstances, presidents will be able to carry the day and beat back any legislative effort to undo what they have done unilaterally. However, the ill will so generated on Capitol Hill may prove politically costly the next time the president's policy wishes require action that only Congress can take. For example, despite being a rather blunt instrument, Congress retains the power of the purse and therefore, ultimately, the power to support or de-fund most policies that presidents begin unilaterally.⁴⁰ This echoes Neustadt's moral from the

39. Matthew J. Dickinson, *The Politics of Persuasion: A Bargaining Model of Presidential Power*, in *PRESIDENTIAL LEADERSHIP: THE VORTEX OF POWER* 277, 296 (Bert A. Rockman & Richard W. Waterman eds., 2008). See Joshua Kennedy, "Do This! Do That!" *And Nothing Will Happen: Executive Orders and Bureaucratic Responsiveness*, 43 *AM. POL. RES.* 59 (2015), for empirical evidence of agency nonresponsiveness to unilateral orders. See also Andrew Rudalevige, *Executive Orders and Presidential Unilateralism*, 42 *PRESIDENTIAL STUD. Q.* 138 (2012).

40. See Kate Stith, *Congress' Power of the Purse*, 97 *YALE L.J.* 1343 (1988); Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 *MICH. L. REV.* 447

“three cases of command”—Truman’s firing of General Douglas MacArthur and seizure of the steel mills during the Korean War, and Eisenhower federalizing the Arkansas National Guard to integrate Central High School. In each case, the president succeeded in achieving his immediate policy objective. Yet, in each case, Neustadt argues the victory was a pyrrhic one, coming at a high political cost. Truman’s actions, in particular, only intensified ongoing battles with Congress on both the foreign and domestic fronts and likely hindered Truman’s efforts to extract concessions from Congress on other key elements of his legislative agenda.⁴¹

A second constraining force is public opinion. In addition to anticipating the reaction of Congress, presidents also anticipate the reaction of the American people to a bold assertion of presidential unilateral power.⁴² Unilateral action may provide a potent mechanism for the president to carry the day and move policy closer to his ideal preferences on a specific issue. However, if it erodes his overall support among the general public, it could come at a significant long-term cost in terms of future policy priorities that overwhelm any short-term policy gain. Decades of scholarship have shown that presidential approval is a vitally important resource for presidents as they pursue their policy agendas in Congress.⁴³ Stripped of public support and the political pressure it generates, presidents with low approval ratings face long odds in advancing their programmatic agendas in Washington.

(2011), on the limitations of congressional appropriations power as an instrument of separation of powers politics.

41. “Truman’s dismissal of MacArthur involved other costs as well, charged against other policy objectives. These ‘indirect costs’ are hard to isolate because causation is no single-track affair, but certainly they were not inconsiderable. Among others, it is possible that Truman’s inability to make his case with Congress, Court and public in the steel crisis of 1952 resulted from exhaustion of his credit, so to speak, in the MacArthur battle a year earlier.” RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 27–28 (1990).
42. See, e.g., William Howell & Douglas Kriner, *Power without Persuasion: Identifying Executive Influence*, in *PRESIDENTIAL LEADERSHIP*, *supra* note 39, at 129–33, on the role of public opinion in prompting President George W. Bush to abandon his plan to unilaterally ease regulator limits on the allowable level of arsenic in water.
43. See, e.g., Douglas Rivers & Nancy L. Rose, *Passing the President’s Program: Public Opinion and Presidential Influence in Congress*, 29 AM. J. POL. SCI. 183 (1985); Brandice Canes-Wrone & Scott de Marchi, *Presidential Approval and Legislative Success*, 64 J. POL. 491 (2002); Bryan W. Marshall & Brandon C. Prins, *Strategic Position Taking and Presidential Influence in Congress*, 32 LEGIS. STUD. Q. 257 (2007); MATTHEW N. BECKMANN, *PUSHING THE AGENDA: PRESIDENTIAL LEADERSHIP IN U.S. LAWMAKING, 1953–2004* (2010).

How does the public respond to bold assertions of unilateral power? Relevant polling data are rather scarce; however, the extant evidence, despite its limitations, suggests that the public holds deep reservations about broad assertions of unilateral presidential power.⁴⁴ For example, in January 2014 an ABC News/Washington Post poll revealed an evenly divided public on the idea of unilateral action in the abstract. The question began, “Presidents have the power in some cases to bypass Congress and take action by executive order to accomplish their administration’s goals.” Respondents were then asked whether they supported or opposed this approach. Just more than 40 percent strongly or somewhat supported presidents pursuing their policy goals via executive order; 46 percent opposed a unilateral leadership approach, with 25 percent strongly opposing it.⁴⁵ Polling data on more concrete issues often reveal even greater public concern with a unilateral approach. For example, a July 2014 poll referencing President Obama’s unilateral changes to the ACA, which prompted the House lawsuit with which this Article began, asked Americans, “Do you think President (Barack) Obama exceeded his authority under the Constitution when he changed the health care law on his own by executive order?” A substantial majority, 58 percent, said yes, the president had exceeded his constitutional authority. Only 37 percent replied that no, he had not done so.⁴⁶

Finally, polls that explicitly measure public support for policy action through presidential unilateral initiatives versus through the legislative process show a strong preference for the latter. For example, a December 2001 poll reveals a widespread public preference for joint presidential-congressional action—even in the immediate aftermath of 9/11 when President George W. Bush enjoyed the highest approval ratings ever recorded. After a series of questions measuring popular support for a number of potential changes to criminal procedures after

44. See Andrew Reeves & Jon Rogowski, *Mass Attitudes Toward Executive Power* (working paper) (presented at the 2014 Annual Meeting of the Am. Pol. Sci. Ass’n, Washington, D.C.), for one of the only political science analyses of public attitudes toward unilateral power.

45. Survey, *Presidents have the power in some cases to bypass Congress and take action by executive order to accomplish their administration’s goals. Is this approach something you . . . ?*, ABC NEWS/WASHINGTON POST (Jan. 27, 2014), available at http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2014/01/26/National-Politics/Polling/question_13006.xml?uuid=Rv4tgIZHEeOv-BkfjReDJQ. [USABCWP.012614.R12].

46. Survey, *Do you think President (Barack) Obama exceeded his authority under the Constitution when he changed the health care law on his own by executive order?*, FOX NEWS (July 23, 2014), available at <http://www.foxnews.com/politics/interactive/2014/07/23/fox-news-poll-voters-say-putin-has-upper-hand-in-ukraine-obama-exceeded/>. [USCBSNYT.121101.R46].

9/11, a CBS/New York Times poll asked, “Do you think changes to the way in which government agencies seek, investigate and prosecute suspected criminals should be decided by the President alone through an executive order, or through legislation enacted by the Congress and approved by the President?” A full 82 percent said that such changes should be made by both branches through the legislative process. Only 12 percent supported the president acting alone through executive order.⁴⁷ Thus, presidents have good reason to worry that acting unilaterally on a high-profile issue or too frequently may trigger a public backlash that will undermine their efforts to achieve other policy priorities. Presidents face strong incentives to be strategic in their use of unilateral powers.

Moreover, other institutions, particularly Congress, may play an important role—even when presidents know that efforts to overturn an executive action will fail—by engaging in the political debate and mobilizing public pressure against the president should he act unilaterally contra congressional preferences. Decades of political science scholarship have demonstrated that the public lacks systematic knowledge of politics and therefore relies heavily on heuristics when forming their political judgments.⁴⁸ Political elites thus become key cue-givers who help inform and shape public opinion.⁴⁹ Finally, citizens acquire most of their knowledge about politics from the mass media. Scholars have long noted that the media depend on official Washington sources for information. However, a robust literature in political communications goes further and argues that the media tend “to ‘index’ the range of voices and viewpoints in both news and editorials according to the range of views expressed in mainstream government debate about a

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47. Survey, *Do you think changes to the way in which government agencies seek, investigate and prosecute suspected criminals should be decided by the President alone through an executive order, or through legislation enacted by the Congress and approved by the President?*, CBS NEWS/N.Y. TIMES (Dec. 2001), available at <http://presdata.tamu.edu/ArchiveData/cbs01.html> (download DEC01A.DDL using DDLTOX to open the dataset in SAS, SPSS, or Stata). [USCBSNYT.121101.R46].
48. GABRIEL A. ALMOND, *THE AMERICAN PEOPLE AND FOREIGN POLICY* (1950); MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996); WALTER LIPPMANN, *PUBLIC OPINION* (1922).
49. RICHARD A. BRODY, *ASSESSING THE PRESIDENT* (1991); ADAM J. BERINSKY, *IN TIME OF WAR: UNDERSTANDING AMERICAN PUBLIC OPINION FROM WORLD WAR II TO IRAQ* (2009); JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* (1992); Douglas Kriner & Francis Shen, *Responding to War on Capitol Hill: Battlefield Casualties, Congressional Response, and Public Support for the War in Iraq*, 58 AM. J. POL. SCI. 157 (2014).

given topic.”⁵⁰ When other political actors, particularly members of Congress, object and criticize presidential actions in the public sphere, they are all but assured of receiving considerable media coverage, and they are well-positioned to influence public opinion against the executive branch.⁵¹

In essence, we argue that while the statutory and legal constraints on presidential unilateral power are weak, the political constraints are quite robust.⁵² Unilateral actions that could provoke public ire and erode the president’s political capital, thereby undermining later efforts to pursue other aspects of the president’s programmatic agenda, may fail a simple cost-benefit calculation. The informal political costs of acting—even when Congress and the courts are almost certainly unwilling or unable to strike down the action—may outweigh the policy benefits of acting unilaterally. These political costs, which are not accounted for in most extant models of unilateral politics, are tangible and substantial; indeed, they may explain why presidents fail to act unilaterally as aggressively and on as many issues across the gamut of policy as formal models suggest they should.

III. CASE STUDY: OBAMA AND IMMIGRATION

As an initial illustration of his argument that presidential power is primarily achieved through informal persuasion, Richard Neustadt paradoxically began with what he labeled “three cases of command.”⁵³ These rare instances of presidential success through command were, Neustadt argued, the exceptions that prove the rule; more importantly, each “victory” came at considerable political cost. As a result, Neustadt argued, these cases show that presidents are better able to exert lasting influence in Washington through bargaining and other informal means. Here we embrace a similar strategy. We first illustrate our argument about the importance of informal political constraints on unilateral

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50. W. Lance Bennett, *Toward a Theory of Press-State Relations in the United States*, 40 J. COMM. 103, 106 (1990). See also ROBERT M. ENTMAN, *PROJECTIONS OF POWER: FRAMING NEWS, PUBLIC OPINION, AND U.S. FOREIGN POLICY* (2004); JONATHAN MERMIN, *DEBATING WAR AND PEACE: MEDIA COVERAGE OF U.S. INTERVENTION IN THE POST-VIETNAM ERA* (1999).
51. See DAVID R. MAYHEW, *AMERICA’S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH 1–28* (2000), on the influence members of Congress can exert by engaging in policy debates in the public sphere.
52. Our argument is similar to that of Posner and Vermeule. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010); see also JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012) (arguing that informal constraints have largely replaced formal legislative and judicial checks on the commander in chief since 9/11).
53. NEUSTADT, *supra* note 41.

executive action by examining the area where Obama has had the most dramatic impact by acting unilaterally: immigration. Even in this case, routinely cited as the most brazen example of President Obama wielding unbridled unilateral executive authority, we argue that a close read of the evidence suggests that President Obama did more than simply move policy as close to his ideal preference as possible while still ensuring that his allies in Congress could sustain a presidential veto. Rather, President Obama, like all presidents, engaged in a much more complex cost-benefit calculation. Indeed, we argue that informal political constraints significantly influenced both the timing and the content of President Obama's two most important executive actions in this sphere.

As the midterm elections of 2014 approached, Obama rallied voters in Bridgeport, Connecticut, to support Governor Dan Malloy. A not-unfamiliar experience for him at this point in his trip along the East Coast, protesters interrupted with shouts demanding changes to the nation's immigration policy. Despite a recent string of primarily Republican opposition to legislative actions on the issue, Obama seemed unable to quell the protesters with claims that "Republicans are blocking immigration reform."⁵⁴ Instead, the protesters called for unilateral action from the president. Maria Praeli, a member of the immigration protest group United We Dream said that "[o]ur community expects President Obama to be broad in using his executive authority to provide deportation relief to millions of people from our community, including parents of dreamers, and we're here to hold him accountable to his promise."⁵⁵ Moreover, the timing of the protests suggests that citizens were unwilling to wait until after the election and instead were calling for the president to deliver on his long-promised executive action to liberalize immigration policy immediately.

The case of immigration provides a lens through which to view the precarious position of presidents in pursuing unilateral action on domestic policy. It is a nearly ideal example in so far as it has been a constant consideration since the birth of the country, is both simple and salient enough for the public to grasp and demand policy change, and, finally, pits the president in direct conflict with Congress via the expressed powers in the Constitution. Here we will concentrate on the first six years of the Obama presidency's experience with immigration reform, though it is helpful to begin with a brief mention of the history and origins of executive action in immigration policy in the U.S.

The 4th clause of Article I, section 8 of the Constitution gives Congress the power "to establish a uniform Rule of Naturalization."

54. Dave Boyer, *Immigration Hecklers Interrupt Obama at Connecticut Campaign Rally*, WASH. TIMES, Nov. 2, 2014, <http://www.washingtontimes.com/news/2014/nov/2/immigration-hecklers-interrupt-obama-connecticut-c/?page=all>.

55. *Id.*

Presidents, however, have played a key role in changing and modifying immigration laws and, even more so, their applications through unilateral action. While the president is constitutionally mandated to faithfully execute the laws enacted by Congress, presidents have some discretion in how they instruct agents of the executive branch to go about enforcing the laws and absolute discretion in the case of criminal laws against private individuals.⁵⁶ A key feature of separation of powers is that the president is granted autonomy to protect individual liberties,⁵⁷ which is legalistically expressed under “prosecutorial discretion,” such that the executive branch may choose whether to “seek charges against violators of a federal law or to pardon violators of a federal law.”⁵⁸ These executive powers have been employed to protect various immigrant communities throughout history, and the Court has repeatedly affirmed such agency discretion.⁵⁹ In *Arizona v. United States*,⁶⁰ for example, the Court explained that the executive branch was dominant on immigration law because of its power over enforcement: “A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”⁶¹

President Eisenhower, for example, took advantage of executive powers in the face of broad immigration laws seemingly out of step with the times. Following World War II and Korea, Eisenhower recognized that a number of American citizens, many members of the armed forces who had served overseas, had adopted foreign-born children but, due to quotas under the McCarran-Walter Act and Refugee Relief Act, could not bring their children back with them. In a public statement announcing this exception, Eisenhower also addressed the novelty of this power:

I requested the Secretary of State and the Attorney General to determine whether it is possible to alleviate this problem within

56. U.S. CONST. art. II, § 3. See CHARLES GORDON, STEPHEN YALE-LOEHR, & RONALD Y. WADA, 1-3 IMMIGRATION LAW AND PROCEDURE § 3.14 (2014), available at <http://www.lexis.com>, for a description of this in terms of immigration policy.

57. *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2001).

58. U.S. CONST. art. II, § 1, cl. 1 (Executive Power Clause); U.S. CONST. art. II, § 1, cl. 8 (Oath of Office Clause); U.S. CONST. art. II, § 2, cl. 1 (Pardon Clause); U.S. CONST. art. II, § 3 (Take Care Clause). See also U.S. CONST. art. I, § 9, cl. 3 (Bill of Attainder Clause).

59. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). See also *Confiscation Cases*, 74 U.S. 454, 457 (1868).

60. 132 S. Ct. 2492 (2012).

61. *Id.* at 2499.

the framework of existing law. The Secretary of State and the Attorney General have just reported to me that this can be done. Provision for bringing these orphans to our country, pending action by Congress to amend the law, will be put into effect immediately.⁶²

Eisenhower would later also grant parole to 31,915 Hungarians after a failed uprising against the Soviets and to Cubans seeking asylum during and after the Cuban Revolution, a policy that would be expanded by Presidents Kennedy, Johnson, and Nixon. Indeed, every president since Eisenhower has used unilateral action to grant temporary immigration relief to one population or another.⁶³

Most notably, given its similarity to Obama's recent actions, President George H.W. Bush had his Immigration and Naturalization Service (INS) Commissioner Gene McNary issue a "Family Fairness" policy in 1990. The policy addressed a practical loophole in the Immigration Reform and Control Act (IRCA). Signed into law by President Reagan in 1986, the law, while making it illegal to hire immigrants without legal status and requiring employers to attest to their employees' status, legalized groups of immigrants doing seasonal agricultural work and those who arrived before 1982 if they could pay various fines and demonstrate minimal knowledge of U.S. history and government. However, this left spouses and children of aliens legalized through the IRCA in jeopardy. Bush's "Family Fairness" policy, which affected approximately 1.5 million immigrants, discarded the "compelling or humanitarian factors" requirement, granted relief from deportation, and authorized affected persons to apply for employment

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62. Dwight D. Eisenhower, Statement by the President Concerning the Entry Into the United States of Adopted Foreign-Born Orphans (Oct. 26, 1956) (transcript available at The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=10677>).
63. See Executive Grants of Temporary Immigration Relief, 1956–Present, IMMIGRATION POLICY CENTER (Oct. 2, 2014) <http://immigrationpolicy.org/just-facts/executive-grants-temporary-immigration-relief-1956-present>; Marshall Fitz, *What the President Can Do on Immigration If Congress Fails to Act*, CTR. FOR AM. PROGRESS (July 1, 2014), <http://www.americanprogress.org/issues/immigration/report/2014/07/01/93042/what-the-president-can-do-on-immigration-if-congress-fails-to-act/>; Andorra Bruno, Todd Garvey, Kate Manuel & Ruthe Ellen Wasem, CONG. RESEARCH SERV., Memorandum, ANALYSIS OF JUNE 15, 2012 DHS MEMORANDUM, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012), available at <http://edsources.org/wp-content/uploads/Deferred-Action-Congressional-Research-Service-Report.pdf>; Arthur C. Helton, FOREIGN LANGUAGE INFO. SERV., *Immigration Parole Power: Toward Flexible Responses to Migration Emergencies*, 71 INTERPRETER RELEASES 1637 (Dec. 12, 1994); John W. Guendelsberger, *Family Fairness: A Status Report*, in 15 IN DEFENSE OF THE ALIEN 45 (CTR. FOR MIGRATION STUDS. 1992).

permits for family members.⁶⁴ These past precedents suggest that the actions of the Obama administration, while made up of its own dynamics, have been anything but unusual.

In 2008, Barack Obama campaigned on the need for significant reform to the nation's broken immigration system. With the Latino vote an ever-expanding consideration in campaigns and with some of the biggest supporters of immigration reform hailing from his home state of Illinois (e.g., Congressman Luis Gutierrez and Senator Richard Durbin), Obama promised to overhaul immigration policy by supporting a comprehensive immigration reform bill in his first year, specifically one that would secure the border, dissuade employers from hiring unlawful immigrants, and offer a pathway to citizenship for undocumented immigrants in good standing.⁶⁵ The main legislative vehicle became the "Development, Relief, and Education for Alien Minors Act" (S. 1291), or DREAM Act, which had seen a number of incarnations in various bills since originally proposed in Representative Gutierrez's "Immigrant Children's Educational Advancement and Dropout Prevention Act of 2001" (H.R. 1582).⁶⁶

64. Bruno et al., *supra* note 63.

65. Lukas Pleva, *No Big Push in First Year*, POLITIFACT.COM (Aug. 13, 2010), <http://www.politifact.com/truth-o-meter/promises/obameter/promise/525/introduce-comprehensive-immigration-bill-first-yea/>.

66. See DREAM Act, S. 1545, 108th Cong. (2003); DREAM Act of 2005, S. 2075, 109th Cong. (2005); DREAM Act of 2007, S. 774, 110th Cong. (2007); DREAM Act of 2007, S. 2205, 110th Cong. (2007); Student Adjustment Act of 2003, H.R. 1684, 108th Cong. (2003); American Dream Act, H.R. 5131, 109th Cong. (2006); American Dream Act, H.R. 1275, 110th Cong. (2007). The focus of the bill was to provide a path for immigrant students with unlawful status who had resided in the U.S. for five years to avoid deportation and apply for permanent residency, provided they met various age, educational, and character criteria. The original Act had thirty-four cosponsors, which grew to sixty-two when it was reintroduced a month later with a lower age cutoff as the "Student Adjustment Act of 2001." H.R. 1918. Having never made it to law on its own, supporters attempted to push its major components into other bills, including the "Comprehensive Immigration Reform Acts" of 2006 and 2007 (S. 2611 and S. 1348) as well as amendments to bills not exclusively dedicated to comprehensive immigration reform, like the "Department of Defense Authorization Act for Fiscal Year 2008" (S. 1548), the latter by virtue of the Senate Majority Whip, Dick Durbin. In a further attempt to include it, Durbin removed controversial language related to in-state tuition, capped the qualification age at thirty and provided citizenship benefits to members of the military, all to no avail. Even months later with Republican cosponsors Hagel and Luther, Durbin would be unable to push the DREAM Act over procedural hurdles in the face of primarily Republican opposition and claims of amnesty. Elisha Barron, *Recent Development: The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 633 (2011).

In 2009 and early 2010, Obama frequently promoted immigration reform in speeches, including his State of the Union address, and had Secretary of Homeland Security Janet Napolitano begin drafting a framework for immigration reform. Meanwhile, while the DREAM Act stalled, the 111th Congress continued to pursue immigration reform through a new vehicle, S. 3827, a considerably stricter version of the earlier act with heightened qualifications for resident status. Lending momentum to the cause, Senators Charles Schumer and Lindsay Graham publicly announced a bipartisan immigration reform proposal, which Obama called “a very important first step.”⁶⁷ Along with the repeal of “Don’t Ask, Don’t Tell”, the immigration act was included in the National Defense Authorization Act of 2011 but did not overcome a Senate filibuster in the lead up to the 2010 midterm elections. In the lame duck session, Obama, the Congressional Hispanic Caucus (CHC), and top Democrats agreed to attempt a final push for reform via a new introduction of the DREAM Act in the House.⁶⁸ Despite passing the House, the bill failed to attract unanimous support from all fifty-nine Democrats, and the measure failed in the Senate.⁶⁹ In May 2011, Senate Majority Leader Reid reintroduced the Act less than twenty-four hours after Obama’s call for Congress to take action on the issue, but it died in committee.

Blocked legislatively, President Obama acted unilaterally. On June 15, 2012, the administration announced the Deferred Action for Childhood Arrivals program, or DACA. Implemented by Janet Napolitano, Secretary of the Department of Homeland Security, it directs the various immigration enforcement agencies to exercise prosecutorial discretion toward some immigrant populations that reside in the country illegally. While not a legislative action, and thus not able to change citizenship status, it grants eligible youth a work permit and two-year reprieve from deportation.⁷⁰

Plainly DACA shows that presidents can gain tremendous influence over policy by acting unilaterally. However, it also raises important questions, including why Obama waited so long to use his executive power and why he did not pursue an even bolder action moving

67. Pleva, *supra* note 65.

68. Amanda Terkel, *Obama and Top Congressional Democrats Call for DREAM Act’s Passage Before Year’s End*, HUFFINGTON POST (May 25, 2011, 6:15 PM), http://www.huffingtonpost.com/2010/11/16/obama-congressional-democrats-dream-act-lame-duck-passage_n_784476.html.

69. Karoun Demirjian, *Harry Reid Reintroduces the DREAM Act*, LAS VEGAS SUN: THE POLICY RACKET (May 11, 2011), <http://www.lasvegassun.com/news/2011/may/11/harry-reid-reintroduces-dream-act/>.

70. U.S. CITIZENSHIP & IMMIGRATION SERV., *Consideration of Deferred Action for Childhood Arrivals (DACA)*, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Dec. 4, 2014).

immigration even closer to his personal preferences? Obama has regularly offered two justifications for the scope and extent of his use of unilateral power. First, perhaps due to his background as a law professor, he sees limits to the extent of prosecutorial discretion rooted in precedent. Fully stopping all deportations would be unprecedented and “would be ‘difficult to defend legally.’”⁷¹ Indeed, DACA emphasizes family considerations of young undocumented immigrants as the justification for preventing only some deportations. Legal concerns are a fairly formal constraint on unilateral action. However, just how strong a constraint they really are is up for debate. For example, in 2011 President Obama publicly stated that he did not have the power to implement a major change in immigration policy, such as that outlined in the DREAM Act, unilaterally. Obama stated that the law was clear “that for [him] to simply, through executive order, ignore those congressional mandates would not conform with [his] appropriate role as president.”⁷² Second, Obama has argued that policy is better created through Congress. For example, in an immigration speech in San Francisco in November 2013, again responding to a protester, he stated:

If in fact I could pass all these laws without Congress, I would do so. But we’re also a nation of laws, that’s part of our tradition. The easy way out is to yell and pretend that I can do something by violating our laws, but what I’m proposing is the harder path which is to use our democratic process, to achieve the same goals. . . .⁷³

Moreover, any unilateral action on immigration would likely be overturned by a Republican president, and thus passing immigration reform as an act of Congress establishes a more permanent solution even in terms of actions he can institute unilaterally.

Despite expressed concerns about the scope of his legal authority for independent action and a stated preference for the more sweeping and lasting change that can be effected through legislation, President Obama ultimately decided to act. What tipped the balance of his strategic calculations? The timing of the DACA announcement plainly speaks to the importance of electoral incentives. Although the

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71. Esther Yu-Hsi Lee, *President Won’t Halt Deportations of Some Parents, Pressures House Republicans to Act on Reform*, THINKPROGRESS (Sept. 18, 2013, 1:49 PM) <http://thinkprogress.org/immigration/2013/09/18/2638811/obama-telemundo-deportation-parents/>.
 72. Michael D. Shear, *Immigration Has President Altering Stand*, N.Y. TIMES, Nov. 18, 2014, at A1, A15.
 73. Esther Yu-Hsi Lee, *Why Obama Told a Protestor He Doesn’t Have the Power to Stop All Deportations*, THINKPROGRESS (Nov. 25, 2013), <http://thinkprogress.org/immigration/2013/11/25/2992151/obama-tells-activist-stop-deportation/>.

legislative history above suggests that it was far from his preferred method, the presidential election of 2012 undoubtedly influenced his decision to act unilaterally in the summer. With hopes of maintaining the support of Latino voters, who largely support the DREAM Act (87 percent of Latinos and 62 percent of non-Latinos⁷⁴), Obama announced DACA less than five months before the 2012 presidential election. Polls taken immediately after the announcement suggest that it was a wise political calculation in so far as 49 percent of Latino voters were more enthusiastic about Obama as a result.⁷⁵ In addition, supporters of the DREAM Act, like Representative Gutierrez, who had become an outspoken critic of the administration's inability to reform immigration policy, called it a "tremendous first step," while Senator Durbin called it a "historic humanitarian moment."⁷⁶ The presumptive Republican nominee, Mitt Romney, on the other hand, argued during the campaign that the undocumented should commit to "self-deportation"⁷⁷ and stated that if he were to win the election and Congress pass the DREAM Act, he would veto it.⁷⁸ Polls unsurprisingly found that 59 percent of Latino voters were less enthusiastic about the self-deportation comment.⁷⁹

In sum, Obama resisted the temptation to simply implement most of the DREAM Act unilaterally throughout much of his first term. This decision appears a function of legal concerns, a preference for legislative

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74. Matt Barreto, *New LD Poll Finds Latinos Favor Obama over Romney, Oppose Rubio DREAM*, LATINO DECISIONS (June 8, 2012), <http://www.latinodecisions.com/blog/2012/06/08/new-ld-poll-finds-latinos-favor-Obama-over-romney-oppose-rubio-dream/>.
75. Matt Barreto, *New Poll: Latino Voters in Battle Ground States Enthusiastic About Obama DREAM Announcement, Oppose Romney "Self-deport" Alternative*, LATINO DECISIONS (June 17, 2012), <http://www.latinodecisions.com/blog/2012/06/17/new-poll-latino-voters-enthusiastic-about-obama-dream-announcement-oppose-romney-policy-of-self-deport/>.
76. Elise Foley, *Obama Administration to Stop Deporting Younger Undocumented Immigrants and Grant Work Permits*, HUFFINGTON POST (June 15, 2012, 5:28 PM), http://www.huffingtonpost.com/2012/06/15/obama-immigration-order-deportation-dream-act_n_1599658.html.
77. "Self Deportation": *Exploring Mitt Romney's Odd New Phrase (VIDEO)*, HUFFINGTON POST (Mar. 25, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/01/24/self-deportation-romney_n_1228296.html.
78. Elise Foley, *Mitt Romney Says Immigration "Dream Act" Would Get Veto From Him*, HUFFINGTON POST (Jan. 2, 2012, 9:03 AM), http://www.huffingtonpost.com/2011/12/31/mitt-romney-immigration-dream-act-veto_n_1178060.html.
79. New Five State Latino Battle Ground Pool Highlights Democrats' Lead, Growing Voter, AMERICA'S VOICE (June 2012), <http://americasvoice.org/polls/new-five-state-latino-battleground-poll-highlights-democrats-lead-growing-voter-enthusiasm-2/>.

action, and, perhaps most importantly, broader fears about the political costs such an action—a clear affront to a Congress that had refused to enact the DREAM Act legislatively—could entail, costs that might hinder the administration’s prospects of securing other major items on its legislative and programmatic agendas. Indeed, many Republicans greeted the announcement of DACA with charges of unprecedented executive overreach.⁸⁰ Ultimately, however, President Obama decided to act unilaterally, not simply because he correctly deduced that Congress would be unable to overturn his action legislatively, but also because the electoral benefits of acting now outweighed the anticipated political costs of doing so.

However, the 2012 DACA order did not end the administration’s unilateral moves in immigration policy. Almost immediately following President Obama’s reelection victory, immigration advocates renewed their call for more far-reaching reform. With the prospects for legislation bleak in a Republican-controlled Congress, these advocates demanded additional unilateral presidential action. President Obama himself publicly expressed doubts about the legality of such a move. For example, in a 2013 interview on *Telemundo*, Obama declared that while he was proud of his earlier action to protect “Dreamers,” pursuing more sweeping change unilaterally would rest on far weaker legal foundations: “If we start broadening that, then essentially, I’ll be ignoring the law in a way that I think would be very difficult to defend legally . . . so that’s not an option.”⁸¹

Despite these public statements questioning his legal authority to liberalize immigration enforcement further, by early 2014 the Obama administration signaled that further unilateral action on immigration was imminent. And yet, in the summer of 2014, the administration executed an about-face and delayed any final decision on new action in immigration policy. Electoral incentives are again key to understanding the administration’s strategic calculus. Executive action on immigration so close to the election was seen as potentially damaging to red state Democrats, on whom the party’s prospects for retaining control of the Senate depended.⁸² The salience of such concerns

80. Foley, *supra* note 76.

81. Shear, *supra* note 72. Many legal experts, however, do not share Obama’s concerns about the legality of such an action. *See, e.g.*, Peter Shane, *How Obama’s Immigration “Executive Action” Respects the Rule of Law*, WASHINGTON MONTHLY: TEN MILES SQUARE BLOG (Dec. 1, 2014, 9:00 AM), http://www.washingtonmonthly.com/ten-miles-square/2014/12/how_obamas_immigration_executi053118.php.

82. David Nakamura & Ed O’Keefe, *Obama Delays Executive Immigration Action Until After Midterm Elections in November*, WASH. POST (Sept. 6, 2014), http://www.washingtonpost.com/politics/obama-delays-executive-immigration-action-until-after-midterm-elections-in-november/2014/09/06/e3ecf346-35cf-11e4-9e92-0899b306bbea_story.html.

increased further still when migrant children were found illegally crossing the border from Mexico into the U.S. in such a large number that Obama called it a “humanitarian crisis.” According to the U.S. Department of Homeland Security, about 52,000 unaccompanied children were apprehended between October 2013 and September 2014, with the largest numbers coming from Mexico, Guatemala, Honduras, and El Salvador.⁸³ Obama therefore postponed action until after the midterms.⁸⁴ Ultimately, however, the delay failed to pay political dividends. Former President Clinton’s post-election comments are illustrative of the pickle Obama found himself in. Speaking of the Democratic Party, he said that “we had a little bit of a loss of the Hispanic vote perhaps because the president [did not provide another executive order on immigration].”⁸⁵ “It was a tough call for him because had he [signed another executive memorandum on immigration], a lot of others would have lost by even more.”⁸⁶

Weeks after suffering his second consecutive midterm loss, President Obama unilaterally ordered a new deferred action program to shield up to another five million illegal aliens from the threat of deportation.⁸⁷ In so doing, Obama rejected his own publicly expressed fears about legal constraints on his unilateral authority in the immigration sphere. Indeed, the greatest constraints on the president’s actions appear to have been political. In summer 2014, unilateral action on immigration endangered his party’s hold on the Senate, and Obama deferred a final decision accordingly—not because Congress would overturn his action, but because acting unilaterally promised to be politically costly. By December, other political risks remained. Indeed, after the midterms Washington was abuzz with speculation as to how congressional Republicans would retaliate against Obama should he act unilaterally on immigration, with many warning of another budget shutdown. A veteran of a previous shutdown, former House Speaker

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83. *Why Are So Many Children Trying to Cross the U.S. Border?*, BBC (Sept. 29, 2014), <http://www.bbc.com/news/world-us-canada-28203923>.
 84. Thomas Sparrow, *Can Obama Pass U.S. Immigration Reform?*, BBC (Nov. 5, 2014), <http://www.bbc.com/news/world-us-canada-29890300>.
 85. Interview by Mike Allen with Bill Clinton, Former U.S. President (Nov. 15, 2014), <http://www.politico.com/story/2014/11/clinton-no-obama-immigration-action-may-have-hurt-in-midterms-112924.html#ixzz3JGUhwjD>.
 86. Maggie Haberman, *Clinton: No Obama Immigration Action May Have Hurt in Midterms*, POLITICO (Nov. 16, 2014), <http://www.politico.com/story/2014/11/clinton-no-obama-immigration-action-may-have-hurt-in-midterms-112924.html#ixzz3JGUhwjD>.
 87. Michael D. Shear & Robert Pear, *Obama’s Plan Could Shield Four Million*, N.Y. TIMES, Nov. 20, 2014, at A1; Barack Obama, Address to the Nation on Immigration Reform (Nov. 20, 2014) (transcript available at THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=107923&st=&st1> =).

Newt Gingrich, warned Obama against acting unilaterally, calling the resulting war it would initiate with Congress one that the president could not win.⁸⁸

However, the Republican landslide in the midterm, paradoxically, may have reduced the political costs of acting unilaterally. With Congress hopelessly gridlocked, President Obama may rationally have calculated that the prospects for movement on other legislative priorities were so bleak that they were unlikely to be damaged further by acting unilaterally on immigration and moving policy away from congressional preferences and toward his own. The contemporary environment—legislative gridlock on Capitol Hill and a term-limited president insulated from electoral concerns—may indeed create the most favorable conditions for robust unilateral action. Yet even in this case where President Obama did achieve significant influence over policy by acting unilaterally, it is important to reiterate that President Obama did not simply move policy as far left as he could while still ensuring that congressional Democrats could sustain a veto of any effort to overturn his action. Rather, Obama's unilateral actions in immigration were products of strategic calculations in which political constraints affected both the timing and scope of the resulting executive actions.

IV. CASE STUDY: OBAMA AND THE SYRIAN CIVIL WAR

At first blush, military policy may seem a surprising policy venue in which to look for evidence of informal political constraints on unilateral presidential action. After all, a mountain of scholarship has documented the increase in presidential war power over time, with a particular emphasis on President Truman's decision not to seek congressional authorization for the Korean War.⁸⁹ Virtually every president since has cited Truman's action as a precedent establishing that presidents possess the requisite constitutional authority under Article II to order American military forces abroad to pursue a variety of foreign policy goals independent of any congressional authorization. This new state of affairs is tacitly acknowledged in the War Powers Resolution of 1973, which sought to create a mechanism by which Congress could terminate presidential military ventures aside from the unwieldy and politically all but impossible proposition of cutting off

88. Newt Gingrich, *Gingrich: Obama, You Won't Win a War with Congress*, CNN (Nov. 13, 2014), <http://edition.cnn.com/2014/11/12/opinion/gingrich-obama-congress-confrontation/>.

89. See generally SCHLESINGER, *supra* note 36; GORDON SILVERSTEIN, *IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY* (1997); STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

funds for the troops in the field. For decades, the decision to use force has been made by the president alone.⁹⁰

Yet, while Congress has largely ceded the authority to and responsibility for initiating military action to the executive, it has repeatedly exploited opportunities to chastise the administration and attack its conduct of military operations that fail to unfold according to plan. While members of Congress may rationally prefer to be silent in the lead-up to a use of force, once military action begins, members of Congress have used an array of tools at their disposal to inflict political damage on the commander in chief and, indirectly, to influence the course of foreign policy. Since the conclusion of World War II, members of Congress have introduced dozens of legislative instruments that would in some way hamstring the president's flexibility in the military arena, from efforts to cut off funding for military operations to those that would establish timetables for the withdrawal of American forces. Between 1945 and 2004, congressional committees held hundreds of days of hearings alleging presidential misconduct of military actions ranging from the Korean War to the Black Hawk down incident and the Battle of Mogadishu in Somalia to peacekeeping missions in the Balkans and the war in Iraq. More informally, members of Congress have taken their criticisms to the airwaves and generated considerable media coverage sharply criticizing administration policies.⁹¹ Although this opposition has largely failed to legally compel the president to abandon his preferred policy course, a wealth of empirical evidence suggests that congressional challenges—and the anticipation of them and the political costs they generate—has materially affected presidential decisions over the initiation, scale, and duration of major military actions since World War II.⁹² To illustrate the constraints on presidential unilateral power as commander in chief, we conclude by

90. Moreover, once American troops are in theater, on only the rarest of occasions has Congress succeeded in legislatively compelling the president to alter his preferred military policy course. For a discussion of the most important exceptions, including legislation cutting off funds for Nixon's expansion of the Vietnam War into Cambodia, the Tunney and Clark amendments barring U.S. assistance to paramilitary forces in Angola, the Boland Amendment barring Contra aid, and legislation limiting American military action in Rwanda, see DOUGLAS L. KRINER, *AFTER THE RUBICON: CONGRESS, PRESIDENTS, AND THE POLITICS OF WAGING WAR* 39–41 (2010).

91. *Id.* at 152–66.

92. See WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007); David H. Clark, *Agreeing to Disagree: Domestic Institutional Congruence and U.S. Dispute Behavior*, 53 *POL. RES. Q.* 375 (2000); KRINER, *supra* note 90; Kevin H. Wang, *Presidential Responses to Foreign Policy Crises: Rational Choice and Domestic Politics*, 40 *J. CONFLICT RESOL.* 68 (1996).

briefly examining how domestic political considerations influenced President Obama's military policy decision-making when choosing how to respond to the use of chemical weapons by the Assad regime in Syria.

After spending the first two years focusing on drawing down America's military commitment in the Middle East (while ramping it up in Central Asia), events and the eruption of political unrest across much of the region presented the Obama administration with a host of new policy challenges and calls for military action. On December 17, 2010, a Tunisian street vendor set himself on fire to protest abuses by the police forces of Tunisian dictator Zine el-Abidine Ben Ali. The shocking act triggered a wave of protests that culminated in the collapse of the Ben Ali regime in January 2011. The dramatic fall of the Tunisian dictator kindled pro-democracy movements across much of the Arab world, including serious threats to autocratic rule in Egypt, Libya, and Syria.⁹³ That same month, anti-Mubarak demonstrators flooded Cairo's Tahrir Square. After eighteen days of clashes, the military turned on Mubarak, and Egypt's defiant pharaoh stepped down.⁹⁴

By February, the Arab spring had spread to Libya as demonstrators protested against the more than forty-year reign of Moammar Gadhafi. A rebel army from Benghazi headed west across the desert and by March threatened the capital of Tripoli itself. However, Gadhafi rallied his troops and turned the tide on the rebels, driving them back to their eastern stronghold. On March 17, Gadhafi issued a chilling warning to the rebels in Benghazi: "The moment of truth has come . . . There will be no mercy. Our troops will be coming to Benghazi tonight."⁹⁵ In a desperate effort to prevent the slaughter of innocents, the United Nations Security Council passed Resolution 1973, which called for a cessation of hostilities, authorized the establishment of a no-fly zone, and empowered member states to take "all necessary measures" to protect civilians. To enforce the resolution, a coalition of countries including the United States began a lengthy air campaign that included scores of attacks on Libyan military targets.

That same month, demonstrations began in Syria against the oppressive regime of Bashar Al Assad. When the regime brutally cracked down on the demonstrators, more widespread conflict erupted, which eventually spiraled out of control into a full-fledged civil war. As

93. For an overview, see Lisa Anderson, *Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt, and Libya*, 90 FOREIGN AFF. 2 (2011).

94. David D. Kirkpatrick, *Mubarak Out: Egypt Exults as Youth Revolt Ends 3 Decades of Iron Grip*, N.Y. TIMES, Feb. 12, 2011, at A1.

95. Ian Black, *Gaddafi Threatens Retaliation in Mediterranean as UN Passes Resolution*, THE GUARDIAN, Mar. 17, 2011, <http://www.theguardian.com/world/2011/mar/17/gaddafi-retaliation-mediterranean-libya-no-fly-zone>.

the fighting intensified in the summer of 2012, the body count also soared. By August 2012, the United Nations estimated that more than 20,000 people had died, 1,600 in the month's final week alone; more than a quarter million had fled into neighboring countries.⁹⁶ The growing brutality and threat to the Assad regime raised fears that Assad might use chemical weapons if its position on the ground further deteriorated. In July, the Syrian government confirmed international suspicions that it possessed stockpiles of chemical weapons when it threatened to use chemical weapons against any foreign forces that might intervene on behalf of the rebels.⁹⁷ That same day, President Obama issued a veiled warning to Assad not to use chemical weapons:

Given the regime's stockpiles of chemical weapons, we will continue to make it clear to Assad and those around him that the world is watching and that they will be held accountable by the international community and the United States should they make the tragic mistake of using those weapons.⁹⁸

A month later, during an August 20, 2012, news conference, Obama went further and declared that the use of chemical weapons constituted a "red line" for the United States:

But the point that you made about chemical and biological weapons is critical. That's an issue that doesn't just concern Syria, it concerns our close allies in the region, including Israel. It concerns us. We cannot have a situation where chemical or biological weapons are falling into the hands of the wrong people. We have been very clear to the Asad [sic] regime, but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus. That would change my equation.⁹⁹

96. United Nations, *August Produces Worst Toll in Syria Conflict, Says UN*, REUTERS (Sept. 17, 2012), <http://www.reuters.com/article/2012/09/17/syria-crisis-un-idUSL1E8KH8ZN20120917>.

97. Neil MacFarquhar & Eric Schmitt, *Syria Threatens Chemical Attack on Foreign Force*, N.Y. TIMES, July 23, 2012, <http://www.nytimes.com/2012/07/24/world/middleeast/chemical-weapons-wont-be-used-in-rebellion-syria-says.html>.

98. Barack Obama, Remarks at the Veterans of Foreign Wars National Convention in Reno, Nevada (July 23, 2012) (transcript available at THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=101548>).

99. Barack Obama, The President's News Conference (Aug. 20, 2012) (transcript available at THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=101939>).

In early 2013, the United States government began to receive initial reports that chemical weapons may have been used in an attack against the rebel stronghold of Homs that killed seven on December 23, 2012. Throughout the spring, the intelligence community gathered additional evidence of a series of small-scale potential chemical weapons attacks.¹⁰⁰ On April 25, 2013, the White House sent a formal letter to Senators John McCain (R-AZ) and Carl Levin (D-MI) in response to their concerns about the use of chemical weapons in Syria. The White House letter, which was widely reprinted in the American press, acknowledged that “[o]ur intelligence community does assess with varying degrees of confidence that the Syrian regime has used chemical weapons on a small scale in Syria, specifically the chemical agent sarin.” However, wary of repeating the Bush administration’s mistakes in prewar intelligence regarding Iraq and its weapons of mass destruction, the Obama administration emphasized the need for more concrete proof: “Our standard of evidence must build on these intelligence assessments as we seek to establish credible and corroborated facts.”¹⁰¹

The death toll continued to mount as fighting intensified and Assad’s forces gained ground in the summer of 2013. A June 2013 report by the United Nations Human Rights Office estimated that almost 93,000 people had died in the Syrian war between March 2011 and April 2013.¹⁰² Despite the human carnage, the Obama administration resisted calls for military intervention in Syria. This reluctance on the part of the administration to intervene appeared to change in August when unimpeachable evidence of a large-scale chemical weapons attack emerged. Images of the August 21 attacks, including video clips showing victims struggling to breathe after inhaling poisoned gas, quickly pervaded the media.¹⁰³ Three days later, President Obama met with the National Security Council to consider options for an American military response. By all accounts, the President appeared to have decided to

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100. For a chronology, see *Timeline of Syrian Chemical Weapons Activity, 2012–2014*, ARMS CONTROL ASS’N (Aug. 19, 2014), <http://www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity>.
 101. *White House Letter on Syria Chemical Weapons to Senators*, ASSOCIATED PRESS, Apr. 25, 2013, http://www.huffingtonpost.com/2013/04/25/white-house-letter-syria-senators_n_3156099.html.
 102. Office of the High Commissioner for Human Rights, *Updated UN Study Indicates at Least 93,000 People Killed in Syria Conflict* (June 13, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13447&LangID=E#3>.
 103. For news coverage, including video footage of the attacks, see Loveday Morris & Karen DeYoung, *Syrian Activists Accuse Government of Deadly Chemical Attack Near Damascus*, WASH. POST (Aug. 22, 2013), http://www.washingtonpost.com/world/syrian-activists-accuse-government-of-deadly-chemical-attack-near-damascus/2013/08/21/ae157e6-0a50-11e3-89fe-abb4a5067014_story.html.

order unilaterally a limited series of military strikes against the Assad regime for its use of chemical weapons.¹⁰⁴ Setting the stage for a military strike, on August 30, the White House released an official assessment concluding that the Assad regime had indeed used chemical weapons in the August 21 attack that killed 1,429 people, including at least 426 children.¹⁰⁵

As a result, when President Obama strode into the Rose Garden on August 31, 2013, his words took many by surprise. The president began predictably enough by informing the American people that he had decided the United States should take military action to punish the Assad regime for its use of chemical weapons. However, what Obama said next caught even many administration officials off guard:

But having made my decision as Commander-in-Chief based on what I am convinced is our national security interests, I'm also mindful that I'm the President of the world's oldest constitutional democracy. I've long believed that our power is rooted not just in our military might, but in our example as a government of the people, by the people, and for the people. And that's why I've made a second decision: I will seek authorization for the use of force from the American people's representatives in Congress.¹⁰⁶

The reversal stunned most political and legal observers.¹⁰⁷ Only two days prior, Secretary of State John Kerry had denounced Assad as “a ‘thug and a murderer,’” leaving little doubt in the minds of most that

104. See Adam Entous & Carol L. Lee, *At the Last Minute, Obama Alone Made Call to Seek Congressional Approval*, WALL ST. J., Sept. 1, 2013, <http://online.wsj.com/articles/SB10001424127887324009304579047542466837078>.

105. Press Release, The White House, Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013 (Aug. 30, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21>.

106. Barack Obama, Remarks on the Situation in Syria (Aug. 31, 2013) (transcript available at THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=104044&st=Syria&st1=>).

107. For example, in a *Lawfare* blog post, Jack Goldsmith wrote, “I have been hard on the President—on this blog last week, and today in the NYT—for what just about everyone (except Philip Bobbitt) thought was going to be his strike in Syria without congressional authorization. I was thus surprised, but very happily surprised, when the President announced this afternoon that he would seek congressional authorization for the strike.” Jack Goldsmith, *Congratulations President Obama*, LAWFARE (Aug. 31, 2013), <http://www.lawfareblog.com/2013/08/congratulations-president-obama/>.

an American military response was in the offing.¹⁰⁸ However, in the twenty-four hours preceding the Rose Garden address, Obama had changed his mind.¹⁰⁹

President Obama did not reverse course because he believed a unilateral strike would be unconstitutional. In 2011, the Office of Legal Counsel provided the administration with a sweeping opinion that the president possessed independent constitutional authority to intervene militarily in Libya without congressional approval because the mission was tied to the national interest, even if the crisis in Libya plainly did not involve an actual or imminent threat to the United States itself.¹¹⁰ Administration lawyers reached similar conclusions in the case of Syria; because the United States possessed “important national interests” in enforcing international norms against the use of chemical weapons and in bringing stability to Syria, the president had the constitutional authority to act independently of Congress.¹¹¹ Indeed, in the Rose Garden address itself, Obama, like post-1945 presidents seeking congressional authorization before him, emphasized that he possessed the requisite constitutional authority to act unilaterally absent any congressional approval. His reasons for going to Congress were political, not constitutional: “[W]hile I believe I have the authority to carry out this military action without specific congressional authorization, I know that the country will be stronger if we take this course, and our actions will be even more effective.”¹¹²

Most journalistic accounts have argued that Obama’s eleventh-hour reversal was the product of concerns, both at home and abroad, about the legitimacy of a unilateral military strike. Unlike military action in Libya, which was authorized by a United Nations Security Council Resolution, or the Clinton-era peacekeeping mission in Kosovo, which operated under the aegis of a united NATO, military action in Syria rested on a murkier international legal footing. Moreover, the United States would act almost alone. France continued to stand with the United States, but even the United Kingdom had decided not to join an American-led military action following Prime Minister David Cameron’s shocking defeat in Parliament.

This emphasis on legitimacy is likely correct; however, it is also imprecise. It is important to remember that Obama faced almost no risk that a unilateral strike in Syria would be seriously challenged in

108. Mark Memmott, *Kerry Says Assad, A “Thug and a Murderer,” Was Behind Attack*, NPR (Aug. 30, 2013), <http://www.npr.org/blogs/the-two-way/2013/08/30/217211589/coming-up-kerry-statement-about-the-crisis-in-syria>.

109. Entous & Lee, *supra* note 104.

110. Authority to Use Military Force in Libya, 35 Op. O.L.C. 2 (2011).

111. Savage, *supra* note 5, at A9.

112. Remarks on the Situation in Syria, *supra* note 106.

Congress or in the international community. Any legislation seeking to limit his discretion as commander in chief would almost certainly die in the Senate. Even if legislation passed both chambers, it would certainly be blocked by a presidential veto. Similarly, while the UN Security Council might object to a unilateral American strike, any effort to block American military action would be defeated by a U.S. veto.

Presidency scholarship often argues that presidents place great emphasis on their legacies and the judgment of history.¹¹³ Perceptions of a strike's legitimacy could conceivably affect Obama's legacy; however, it is equally, if not more, likely that any vacillation in the face of Assad's brazen use of chemical weapons against his own people would harm Obama's legacy more than arcane debates over legalistic minutiae had Obama acted alone, like virtually all of his predecessors, without congressional sanction. Indeed, from a policy standpoint, even if limited military action in Syria was unlikely to topple Assad, failing to enforce the president's own red line could seriously damage American credibility with adversaries across the globe. Policy concerns would appear unable to explain the president's decision. Rather, Obama's reversal is best explained as an effort to avoid the political costs of another unilateral military strike in the Arab world.¹¹⁴

In the days leading up to Obama's decision, a growing chorus in Congress was calling for the president first to seek legislative authorization before any use of force in Syria. As of August 29, 140 members, including twenty-one Democrats, had signed a letter stating that unilateral presidential military action in Syria would violate the separation of powers.¹¹⁵ The overwhelming majority of the American public agreed. An NBC News poll conducted between August 28 and 29, 2013, asked, "Do you think that President Obama should or should not be required to receive approval from Congress before taking military action in Syria?" A startling 79 percent said that the president should be required to seek prior approval from Congress.¹¹⁶

113. See, e.g., Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1 (1994).

114. For a fuller explication of this argument and empirical evidence of the tangible political benefits that congressional authorizations give presidents, see Douglas L. Kriner, *Obama's Authorization Paradox: Syria and Congress's Continued Relevance in Military Affairs*, 44 PRESIDENTIAL STUDIES Q. 309 (2014).

115. Rebecca Shabad, *140 House Members Say Obama Needs Approval from Congress on Syria*, THE HILL (Aug. 29, 2013), <http://thehill.com/blogs/blog-briefing-room/news/319127-55-house-members-say-obama-needs-approval-from-congress-in-syria-strikes>.

116. Survey, *Hart Research Associates/Public Opinion Strategies Study #13338*, NBC NEWS (Aug. 28–29, 2013), available at http://msnbcmedia.msn.com/i//MSNBC/Sections/A_Politics/_Today_Stories_Teases/13336_NBC_Syria_Poll.pdf (accessed by searching for the URL in the Internet Archive Index). [USNBC.083013.R12]. It is also important to

The president plainly articulated the political rationale behind his decision to forego unilateral action in a press conference on September 4. If the White House acts alone, “Congress will sit on the sidelines, snipe. If it works, the sniping will be a little less; if it doesn’t, a little more.”¹¹⁷ Legislation constraining his freedom of action was not what the president feared. Rather, public criticism of his policies, particularly if they should prove to be more costly or less immediately successful than expected, is what the president hoped to avoid. Thus, Obama’s abrupt about-face had little to do with constitutional concerns or even fears of successful legislative challenges from an increasingly restive Congress that might compel him to amend his policy toward Syria.¹¹⁸ Rather, President Obama hoped that by compelling members of Congress to vote to authorize military action against Syria, he could tie members to the mission politically and thereby minimize the political costs downstream.¹¹⁹ Anticipations of future political costs and the likely reactions of Congress and the public produced a dramatic policy shift, even though President Obama knew well that if he had acted unilaterally, other governmental actors would have been all but powerless to stop him formally.

CONCLUSION

Recent presidents have boldly acted unilaterally to effect major changes in public policy on issues ranging from the prosecution of the

note that this strong public preference for legislative authorization is not unique to the Syrian case. For example in 2002, despite President Bush’s 68% approval rating, three-quarters of Americans said that President Bush should first secure congressional authorization for any use of force against Iraq. See Survey, *Post-ABC Poll: Military Action Against Iraq Favored*, WASH. POST (Aug. 13, 2002), available at <http://www.washingtonpost.com/wp-srv/politics/polls/vault/stories/data081202.htm>. For Bush’s 68% approval rating, see *Presidential Approval Ratings—George W. Bush*, GALLUP POLL (Aug. 2002), available at <http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx>.

117. Barack Obama, The President’s News Conference with Prime Minister John Fredrik Reinfeldt of Sweden in Stockholm, Sweden (Sept. 4, 2013) (transcript available at THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=104040>).
118. See also William G. Howell, *All Syria Policy Is Local: The Political Expediency of Obama’s Congressional Push on Syria*, FOREIGN POLICY (Sept. 3, 2013), http://www.foreignpolicy.com/articles/2013/09/03/all_syria_policy_is_local_obama_congress.
119. *Id.* At the time of his decision, President Obama also seemed confident that he could secure the necessary votes in Congress. Chuck Todd, *The White House Walk-and-Talk That Changed Obama’s Mind on Syria*, NBCNEWS (Aug. 31, 2013), http://firstread.today.com/_news/2013/08/31/20273128-the-white-house-walk-and-talk-that-changed-obamas-mind-on-syria.

war on terror to overhauling the nation's immigration system. These seemingly brazen assertions of unilateral presidential power are frequently decried as evidence of presidential aggrandizement that threatens to upset the delicate balance of power between the branches carefully erected by the Framers.

It is little wonder that contemporary presidents have increasingly turned to unilateral measures to pursue their policy objectives. As the dominant paradigm in the literature clearly articulates, presidents enjoy significant institutional advantages vis-à-vis the legislature when acting unilaterally. By acting first, presidents seize the initiative and force other political actors to overcome their own institutional barriers to overturn policy changes effected by the executive with the stroke of a pen. Given the collective action dilemma that hinders congressional efforts at institutional self-defense, a legislative process riddled with transaction costs, and the looming threat of a presidential veto, Congress has always faced long odds when endeavoring to undo a presidential unilateral action through legislation. In a highly polarized polity, in all but the rarest of circumstances Congress would appear all but incapable of doing so.

However, to focus exclusively on the legislative remedy is to overlook the more informal pathways through which other political actors can retain some measure of constraint on the unilateral executive by affecting the political costs the president stands to bear from acting unilaterally. Presidents do more than simply calculate how far they can move policy toward their ideal point while insuring that their veto can be sustained. Rather, presidents also consider the political costs of acting unilaterally and weigh them against the benefits of doing so. Paying greater attention to these political constraints on unilateral action affords a more accurate picture of the place of the unilateral presidency within our separation of powers system in the contemporary era. Moreover, an emphasis on political costs helps explain why presidents routinely forego unilateral action across a range of policy areas, even when Congress and the courts would be highly unlikely to overturn their action. The political costs of “victory”—not the possibility of a formal legislative or judicial reversal—are perhaps the most significant constraints on the unilateral president.