RESOLVED, Executive orders and other unilateral presidential directives undermine democracy

**PRO:** Gene Healy

**CON:** Andrew Rudalevige

“Stroke of the pen, law of the land. Kind of cool.” That is how Clinton aide Paul Begala, in 1998, memorably described the appeal of executive orders and other unilateral presidential directives, such as proclamations, national security directives, and presidential memoranda. These unilateral orders are especially cool if you are a second-term president facing a recalcitrant Congress controlled by the other party, as Bill Clinton did. And Barack Obama too.

At the outset of his second term, Obama pledged that “When Congress isn’t acting, I’ll act on my own.” And he did. In 2014, for instance, Obama issued Executive Order 13658, which raised the minimum wage of employees of government contractors by almost 40 percent, to $10.10 an hour. Republicans howled in protest. “Mr. President we are a nation of laws & we are supposed to follow our Constitution,” tweeted Kentucky senator Rand Paul. “You do not get to ‘act alone.’”

Obama’s defenders countered that the president was not behaving any differently than his predecessors. One of the earliest of George W. Bush’s nearly three hundred executive orders included an order (Executive Order 13202) prohibiting federal dollars from going to construction projects in which a contractor had signed a “project labor agreement” with a labor union. This sort of executive unilateralism is hardly a recent invention. Back in 1840, Martin Van Buren sought to secure working class political support by issuing
an executive order mandating that those laboring on federal public works could not be made to work more than ten hours a day.

Pointing out that the other side does it too or that it’s been done before is hardly a satisfactory answer, however, to the question of whether or when presidents are justified in acting alone. Those who believe that executive orders undermine American democracy appeal to Montesquieu’s famous precept that “there can be no liberty where the legislative and executive powers are united in the same person.” If presidential directives involve an exercise of legislative power, then they indeed seem to subvert the separation of powers. On the other hand, if executive orders are directed at federal officials and agencies, as they typically are, then the directives would seem to be an unobjectionable exercise of executive power.

But does the U.S. constitutional system really establish a separation of powers, or is it instead, in Richard Neustadt’s famous formulation, a system of “separated institutions sharing powers”? If the latter, then do executive orders undermine American democracy? After all, nothing in Obama’s or Bush’s or Van Buren’s directive prevented Congress from enacting a law that overrode the order. Had these directives been concealed from Congress, then there might be a strong case for constitutional subversion. But all executive orders are required by law to be published. And in the case of Obama’s minimum-wage order it was announced in the most public way possible: in a State of the Union message.

There is also the question of just how unilateral these directives really are. Notwithstanding Obama’s pledge to act on his own when Congress failed to act, he did not in fact claim to be acting alone when he issued Executive Order 13658. Yes, his order began by invoking “the authority vested in me as President by the Constitution,” but it also invoked the authority he derived from a specific statute: the Federal Property and Administrative Services Act, the same statute that George W. Bush cited in justifying his Executive Order 13202 (and that Obama cited in repealing Bush’s order). In fact, most executive orders involving contested domestic policies invoke the authority of a legislative statute. Perhaps, though, invoking statutory authority is merely a strategic effort to cloak unilateralism. That presidents can appeal to the same statute and draw diametrically opposed conclusions would indicate that statutes may do little to constrain presidents who are intent on taking actions that fit their ideological predilections.

Of course, nobody thinks that every executive order is a threat to democracy. Even the most vigilant critic would strain to see a danger in the president giving federal workers a half-day off on Christmas Eve, as Obama did by executive order in December 2015. However, Gene Healy argues that the
increasing trend toward governing by executive fiat in a broad range of contentious public policy domains, including immigration, education, and environmental regulation, poses a grave threat to the future of American democracy. Andrew Rudalevige is more skeptical. He suggests that presidential directives are often more multilateral than unilateral, and that in any event presidential directives to the bureaucracy bolster democracy by enhancing both accountability and responsiveness to the executive branch’s sole elected leader.

**PRO:** Gene Healy

Every president from George Washington onward has issued unilateral directives. It’s hard to see how any president could do the job without them. Even in 1789, the federal chief executive couldn’t execute the laws all by himself; to perform that core function, and simply to manage the executive branch in general, the president needs to issue instructions.

No sensible person would argue that all such directives “undermine democracy.” When carried out pursuant to genuine legislative or constitutional authority, unilateral presidential directives are unobjectionable—even trivial, as a perusal of the Federal Register’s “executive order disposition tables” makes clear. It would take a lurid imagination to spy the glimmerings of tyranny in, say, Executive Order 13713’s proclamation of a half-day closing for federal workers on Christmas Eve or EO 13571’s aspirational provisions for “Streamlining Service Delivery and Improving Customer Service in the Federal Government.”

And yet, other presidential directives aren’t quite so innocuous. When presidents can, as they increasingly have, call new agencies into being, shield government operations behind a veil of secrecy, and issue commands unsupported by legal authority but indistinguishable from law, we have reason to worry about the health of our democracy.

**THE PRESIDENTIAL ORDERS THAT LED TO MASS SPYING**

Consider: Starting in the summer of 2013, courtesy of a former National Security Agency (NSA) contractor named Edward Snowden, Americans learned, in unsettling detail, about the vast surveillance machine the federal government had secretly constructed after 9/11. The dangers of dragnet data collection are, by now, fairly well understood: the digital trails we leave are a
window into our private lives. They can be used to ferret out the sort of information that authoritarian governments have historically used to blackmail and control dissenters: who’s leaking to reporters, how political opponents are organizing, who’s sleeping with whom. In the NSA’s quest to “collect it all,” the agency had built what Sen. Ron Wyden, D-Ore., has described as a massive “human relations database,” ripe for abuse—or, as Snowden himself termed it, a “turnkey tyranny.”

What’s less well appreciated, perhaps, is the fact that the burgeoning surveillance state Snowden exposed rests on a foundation built from unilateral presidential directives and executive orders.

Among the most important of those directives was a “presidential authorization” issued by President George W. Bush on October 4, 2001, that secretly—and illegally—allowed the NSA to evade the Foreign Intelligence Surveillance Act (FISA) Congress passed in 1978 to rein in domestic spying. The public has never been allowed to see a copy of Bush’s order, but according to a secret draft report by the NSA’s inspector general—also leaked by Snowden—it “allowed NSA to intercept the content of any communication, including those to, from, or exclusively within the United States” without a FISA warrant. That purported “authorization” spawned a program codenamed “Stellarwind,” which involved, among other activities, targeted acquisition of the content of Americans’ international phone calls and wholesale collection of their phone and e-mail records.

“I welcome this debate and I think it’s healthy for our democracy,” President Obama declared in June 2013, shortly after the Snowden leaks revealed the existence of the bulk collection programs: “it’s a sign of maturity,” because just a few years ago, “we might not have been having this debate.” Which was true enough: if you’ve been deliberately kept in the dark about your government’s surveillance policies, it’s hard to get a proper debate going. But now, armed with better information, surely fixing the problem was just a matter of petitioning our elected representatives to address our grievances.

In early 2014 John Napier Tye, then a State Department official with a top-secret security clearance, prepared a speech making that very point: if citizens objected to mass data mining, “they have the opportunity to change the policy through our democratic process.” But when Tye sent the draft over to the White House Counsel’s office for approval, the president’s lawyers told him to take out that line: it just wasn’t true. Even after Snowden’s disclosures, Tye later explained in an op-ed for the Washington Post, “some intelligence practices remain so secret, even from members of Congress, there is no opportunity for our democracy to change them.”
Thanks to another presidential directive, Tye hinted, some of those practices go beyond “metadata” and involve bulk collection of the content of citizens’ personal communications. Tye pointed to Executive Order 12333, a Reagan administration directive that loosened restrictions on U.S. intelligence activities. “If the contents of a U.S. person’s communications are ‘incidentally’ collected . . . in the course of a lawful overseas foreign intelligence investigation,” Tye explained, “then Section 2.3(c) of the executive order explicitly authorizes their retention.” Vast amounts of Americans’ private communications—e-mail content, text messages, Skype chats, and Facebook messages—can now be funneled through that loophole and onto the NSA’s servers; from there, that information can be legally shared with the Drug Enforcement Administration, the Federal Bureau of Investigation, and other law enforcement agencies, without judicial or congressional oversight.6 Choosing his words carefully to avoid potential liability for revealing classified information, Tye writes that “Americans deserve an honest answer to the simple question: What kind of data is the NSA collecting on millions, or hundreds of millions, of Americans?”

“DEMOCRACY,” THICK AND THIN

Did the presidential directives that led us to this pass “undermine democracy”? Unless one embraces the narrowest possible conception of the term—“yeah, but still: those guys were elected”—it’s hard to how they didn’t.

At its most basic, etymological roots, “democracy” means rule (kratos) of the people (demos), as distinguished from “autocracy”: ruling by oneself. A bare-bones definition of a democratic system might be: one in which, at regular intervals, leaders are chosen by elections. But in common parlance, “democracy” means more than that: it speaks to what those leaders are allowed to do once elected, and what we the people are allowed to know about what they’re doing.7

“For almost a century in the West,” Fareed Zakaria writes, “democracy has meant liberal democracy—a political system marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties.”8 Accordingly, scholars who rank regimes on their democratic health tend to use robust criteria. The widely used Polity IV database puts democracy and autocracy at opposite ends of its scale, and weighs “constraints on the chief executive” most heavily among its criteria.9 The annual Freedom House ranking grades regimes broadly on civil liberties and political rights, including whether “citizens have the legal right and practical ability to obtain information about government operations and the means to petition...
government agencies for it.[…]” And the Economist Intelligence Unit’s Democracy Index tracks, among other indicators, whether the regime is “open and transparent, with sufficient public access to information?”; “is the legislature the supreme political body, with a clear supremacy over other branches of government?”; and “is there an effective system of checks and balances on the exercise of government authority?”

Again, not all unilateral presidential directives threaten the rule of law, the public’s right to know, our system of checks and balances, or other essential features of democracy, properly understood. But many clearly do. As presidents’ responsibilities expanded throughout the twentieth century, their powers to make law by executive fiat expanded accordingly, in ways that undermine the representative system of government our Constitution’s architects designed.

THE ORIGINAL DESIGN

Governments derive their just powers from the consent of the governed, the Declaration of Independence insists, a sentiment echoed by James Madison in Federalist No. 49: “the people are the only legitimate fountain of power.” The Framers of our Constitution didn’t believe in direct democracy, viewing it as unworkable in an extended republic and dangerous to minority rights. What their efforts produced was the basis for a representative democracy.

In such a system, the power to make law is properly lodged in the members of the legislative department: “the nature of their public trust implies a personal influence among the people,” Madison wrote, and, compared to the chief executive or the judiciary, members of the legislative branch “are more immediately the confidential guardians of the rights and liberties of the people.” Accordingly, in Article I, Section 1, the first sentence following its Preamble, the Constitution declares that “all legislative Powers herein granted shall be vested in a Congress of the United States.”

The first sentence of Article II vests “The executive Power” in the president. At its core, that power consists of the authority to carry into execution the laws that Congress makes—a point underscored in Article II, Section 3, which imposes a number of duties on the president, among them that the chief executive “shall take Care that the Laws be faithfully executed.”

Justice Hugo Black summed that framework up nicely in a 1952 Supreme Court opinion: “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.”
**LAWMAKER IN CHIEF**

That case, of course, was *Youngstown Sheet & Tube Co. v. Sawyer*, which arose out of a labor dispute in the U.S. steel industry during the Korean War. Facing down a nationwide steelworkers’ strike, President Harry S. Truman issued Executive Order 10340, “Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies.” That directive rested on the theory that in times of (self-proclaimed) emergency, the president’s powers were essentially unlimited. When asked by a reporter whether the president could also lawfully “seize the newspapers and/or the radio stations,” Truman would say only that “under similar circumstances, the President of the United States has to act for whatever is for the best of the country.”

The Supreme Court, however, disagreed with the proposition that the Constitution granted unlimited power to the chief executive, holding the seizure invalid by a 6–3 vote. Yet *Youngstown* turned out to be the vanishingly rare case in which the courts rebuked a president for overreaching with a unilateral directive, even as the president’s unilateral powers continued to expand.

Where most of the executive orders during the 1920s related to administrative matters such as civil service rules, with no more than 10 percent “policy-specific,” by the 1960s, executive orders making national policy “reached 50% and never declined.” Though Black’s majority opinion rejected the notion of president-as-lawmaker, in the years after *Youngstown*, more and more presidential directives took on the character of legal commands.

Our constitutional structure of separated powers rests on the Madisonian belief that “when the legislative and executive powers are united in the same person or body . . . there can be no liberty.” The most infamous unilateral directive in our history—Executive Order 9066, through which President Franklin D. Roosevelt authorized the mass internment of over 110,000 innocent Japanese Americans—seemed to justify those fears.

A less notorious directive, but one that did lasting damage, was Truman’s 1951 Executive Order 10290, which greatly expanded federal officials’ ability to classify information they deemed “necessary . . . to protect the security of the United States.” “One could say that the ‘national security president’ was born on paper at 10:57 a.m., September 26, 1951,” Robert M. Pallitto and William G. Weaver write in *Presidential Secrecy and the Law*, “when E.O. 10290 was submitted for publication in the *Federal Register*.” Where before classification authority had rarely extended to nonmilitary departments, Truman’s order gave secrecy powers to all civilian federal agencies and did not limit its exercise to wartime. State secrecy was largely a presidential creation, Pallitto and
Weaver explain: by the late twentieth century, “less than two percent of all classification [was] made pursuant to statute; the rest is classified in accordance with executive orders and administrative guidelines.”

In *Federalist* No. 69, Alexander Hamilton undertook an extended comparison of the president’s powers with those of the British monarch, the better “to place in a strong light the unfairness of the representations which have been made” against the proposed Constitution. There is obviously “a great inferiority in the power of the President,” he insisted, when one considers that the British king “not only appoints to all offices, but can create offices.” By the mid-twentieth century, the difference was no longer so stark, given the modern president’s power to summon whole agencies into being with the proverbial “stroke of a pen.”

Many of the most important agencies listed in the *United States Government Manual* were “immaculately” conceived by presidents, without the mess and bother the democratic process entails. Among the agencies established by presidential decree are the NSA (via a top-secret directive issued by President Truman in 1952), the Federal Emergency Management Agency (EO 12148), and the Drug Enforcement Administration (EO 11727). “Since the end of World War II,” William G. Howell and David E. Lewis note, “presidents have unilaterally created over half of all administrative agencies in the United States,” using executive orders and other unilateral directives to spawn new governmental bodies “that would never have been created through legislative action, [and] design[ing] these agencies in ways that maximize their control over them.”

Acting alone, a president can reshape the governmental landscape, presenting the people’s elected representatives with a *fait accompli* and daring them to destroy what the chief executive has made. A good example of that dynamic can be found in President John F. Kennedy’s creation of the Peace Corps in 1961, despite the failure of multiple bills aimed at establishing the agency. Via Executive Order 10924, JFK simply bypassed congressional opposition to what Republicans had called “a juvenile experiment,” set up the program with contingency funds from the foreign-aid budget, and appointed his brother-in-law, Sargent Shriver, to head it. When the time came for Congress to actually vote on the program, the Peace Corps already had hundreds of employees and volunteers worldwide, and legislators balked at defunding an agency that could never command a majority in the first instance. “Presidents create more agencies when Congress is relatively weak,” Howell and Lewis explain. “By strategically employing these unilateral powers, presidents have managed to create a broad array of administrative agencies that perform functions that congressional majorities oppose.”
Modern presidents regularly use “the power of the pen” to take what legislative majorities won’t willingly grant. Though the literature on “strategic timing” of presidential directives varies, one recent study finds that “presidents issue many more policy executive orders” when their ideological preferences differ significantly from those of congressional majorities, “suggesting that presidents are attempting to circumvent an ideologically hostile Congress.” One person makes national policy and then, should legislators object, it is up to them to change the law.

That process turns the Constitution on its head. Under Article I, a law must meet with the approval of the representatives of three different constituencies: the House, the Senate, and the president. But when the executive branch makes the law unilaterally, those constitutional hurdles then obstruct legislative efforts to repeal it. “Congressional repeals of executive orders are relatively rare in modern times,” the Congressional Research Service reports, “primarily because such legislation could run counter to the President’s interests and therefore may require a congressional override of a presidential veto.” One review of significant executive orders from 1936 to 2001 finds that fewer than 4 percent have been successfully modified or terminated via legislation; another that only twice since 1970 has Congress managed to “explicitly invalidat[e] an executive order of any substance.” Nor are the courts a reliable bulwark against executive overreach. Between 1943 and 1997—a period that saw some four thousand EOs—presidents lost only fourteen times in federal court challenges to those orders.

Of course, checks and balances are utterly unavailing when presidential law-making is done in the dark, as so much of it is today, via secret rulemaking, classified legal opinions, and national security directives. Such instruments often affect Americans’ rights directly, setting out the procedures under which American citizens can be spied upon or even targeted for assassination abroad. Yet, as Howell explains, “unlike other tools presidents have for unilateral action, such as proclamations or executive orders, national security directives are not subject to the Freedom of Information Act. They are not published in the National Register, and indeed their very existence often remains unknown,” even to Congress. Ours is supposed to be a system based on “the consent of the governed,” but knowledge has to precede consent. On fundamental questions of national policy, we’re increasingly becoming a “democracy in the dark.”

UNILATERAL DIRECTIVES IN THE BUSH/OBAMA ERA

As Aaron Wildavsky observed in his seminal 1966 article, “The Two Presidencies”: “Presidents have had much greater success in controlling the nation’s defense
and foreign policies than in dominating its domestic policies.” What applied during the Cold War has largely held true during the War on Terror as well: both President Bush and President Obama found themselves freer to act unilaterally in the national security arena than in a purely domestic context.

But it’s not as though the powers the president claims in the name of national security apply only outside U.S. borders, never disturbing our domestic tranquility. In the post-9/11 era, presidential unilateralism in the name of national security impacts the rule of law and civil liberties on the home front as well.

On October 8, 2001, for example, President Bush issued Executive Order 13228, creating the Office of Homeland Security and setting the stage for the establishment of what would become the cabinet-level Department of Homeland Security. A little over a month later, Bush issued a sweeping “military order” allowing for the arrest of noncitizens—even legal residents of the United States—and their trial before military commissions in cases where the president has “reason to believe” the suspect has connections to international terrorism.

Nor are foreign policy crises the only occasions that enhance the chief executive’s ability to govern without Congress, as the financial crisis of 2008 made clear. In December of that year, American automakers General Motors and Chrysler tottered on the brink of bankruptcy, while Congress debated legislation to provide some $15 billion to keep two of the “Big Three” alive. A week after the auto bailout bill failed to pass a key procedural vote in the Senate, President Bush announced that, despite the bill’s failure, he had decided to lend the car companies $17.4 billion out of funds Congress had already approved for an entirely different purpose: taking toxic mortgage-backed securities off failing banks’ asset sheets. White House spokesman Tony Fratto explained: “Congress lost its opportunity to be a partner because they couldn’t get their job done.”

President Obama vigorously exercised the new economic powers his predecessor had left him. After Youngstown, the president might not have been able to seize a steel mill, but he could summarily fire the CEO of a major American company, as became clear in March 2009, when President Obama’s “car czar” summoned GM’s CEO Rick Wagoner to his office to get pink slipped.

No crisis was necessary for President Obama to dramatically reshape American immigration law by executive fiat. He’d initially resisted the temptation, telling a panel of Latino journalists in 2011 that “This notion that somehow I can just change the laws unilaterally is just not true. . . . We live in a democracy.” By 2012 he’d decided he could change the laws unilaterally after
all, using a “Homeland Security Directive” to grant legal status to up to 1.7 million undocumented residents, a move that basically implemented the core of an immigration reform bill that had been stalled in Congress. As Obama prepared to further extend the program in 2014, he told his congressional critics that if they think he’s “taking too many executive actions, the best solution to that is passing bills. Pass a bill; solve a problem.” But there’s little incentive to build legislative coalitions if presidents can effectively change the law on their own.

In his second term, boasting that “I’ve got a pen and I’ve got a phone,” President Obama increasingly governed by unilateral directive in areas ranging from education policy, immigration, and environmental regulation at home to military action abroad. Even if you like the results, Obama won’t be the last president to wield the expansive new powers he’s forged.

**A “LOADED WEAPON”**

In discussions with his advisers, President Obama has been heard to worry about “leaving a loaded weapon lying around” for future presidents, as *Newsweek* reported just before the 2012 election in an article titled “Obama’s Executive Power Grab.”

Obama’s possible successors seem eager to pick up that weapon. Democratic nominee Hillary Clinton said she’d go “as far as I can, even beyond President Obama,” acting unilaterally on immigration and using presidential directives to stop corporations from headquartering abroad to avoid taxes.

“I won’t refuse them,” Republican nominee Donald Trump said of executive orders. “I mean, [Obama] has led the way, to be honest with you.” Not to worry, though: Trump made it clear that he’d wield the “power of the pen” to do the “right things.”

George Washington University law professor Jonathan Turley notes that those who’ve applauded Obama’s efforts to govern by decree have ignored the “obvious danger that they could be planting a deeply unfortunate precedent . . . while the policies may not carry over to the next president, the powers will.” Why couldn’t a president with a different set of priorities “use his executive discretion to extend, perhaps indefinitely, the deadline for corporate income tax payments,” or use Obama’s broad theory of administrative waivers to amend national curriculum standards and create space for “creation science” in America’s schools? And in the national security arena, where the president’s unilateral powers are at their height, what’s to stop future commanders in chief from going “even beyond” our two post-9/11 presidents, in ways that further infringe on Americans’ privacy rights? “The problem with allowing a president
to become a government unto himself,” Turley concludes, “is that you cannot guarantee who the next president might be.”

If you introduce a gun in the first act, it needs to be fired in the second, the old dramatic principle goes. Unfortunately, we seem determined to play out that script.

**CON: Andrew Rudalevige**

“The President has been blatantly ignoring the will of the people throughout his Presidency and it’s time to rein in his Administration,” trumpeted Rep. Randy Weber in a March 2016 press release. Weber’s feelings on the matter had been clear for some time. As Barack Obama was about to deliver his 2014 State of the Union address, the Texas Republican tweeted that he was waiting for the “‘Kommandant-In-Chief’ . . . the Socialistic dictator.”

What prompted such hostility? The release was in support of a House measure to file an amicus brief in a lawsuit opposing President Obama’s initiatives in immigration policy. The tweet previewed Obama’s promise that “a year of action” was in store, regardless of whether any of that action took place on Capitol Hill. As the president had already said, “I’m going to be working with Congress where I can, . . . but I’m also going to act on my own if Congress is deadlocked. I’ve got a pen to take executive actions where Congress won’t. . . .”


This essay argues instead that unilateral presidential directives do not undermine democracy but may in fact reinforce it. Administrative actions vary widely in their scope and import, but even at their most powerful they aim to shape the behavior of unelected and often uncoordinated bureaucratic actors consonant with the preferences of the only official chosen by the American people to represent the entire nation. To be sure, presidents can overstep their branch’s constitutional bounds. But “democracy” should not be glibly defined in a knee-jerk way as “congressional enactment”: the framers of the Constitution did not glorify the legislative branch, and nor should we. Indeed, in some cases executive action may be democracy’s last line of defense.
WHAT DO EXECUTIVE ACTIONS DO?

The very first sentence of Article II of the U.S. Constitution vests “the executive power . . . in a President of the United States.” That power is not defined, and many (starting with Alexander Hamilton) have suggested the vesting clause gives the president residual authorities beyond those granted in the rest of the document. Even without making that claim, serving as “chief executive” clearly must include the power to manage the executive branch (given the hierarchy set up between presidents and their department heads in Article II, Section 2) through the control of personnel and policy implementation.

Executive actions flow directly from this authority. They proceed from statutory or constitutional authority—not personal whim—and apply to the president’s initiatives as manager of a large and complex enterprise. That also means, as a congressional committee put it, that “executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly.” An indirect impact can certainly be important; by changing how cost-benefit analysis is applied to regulatory review, or how antidiscrimination laws are enforced by government contractors, for instance, presidents can influence the private-sector economy. However, many orders deal with organizational issues or civil service rules—President Jimmy Carter issued five orders extending the retirement date of a single member of the Civil Aviation Board. In 2009 President Obama prohibited texting while driving in federal vehicles. In 2016 he allowed the Peace Corps to come up with a new logo. So it’s clear that simply counting up executive orders, even broadly defined, is a poor proxy for “dictatorship.”

Relatedly, Obama’s critics were fond of calling his use of administrative directives “unprecedented” or “unparalleled.” But every president has utilized these tools. Indeed, as political scientist Graham Dodds has documented, “early unilateral presidential directives were more numerous and more important than conventional wisdom holds.” From George Washington’s 1793 neutrality proclamation onward, Americans recognized the need for, and legitimacy of, administrative instruments that would allow presidents to direct the function of executive branch subordinates. Indeed, in cases as early as 1795, the federal courts took presidential directives for granted. Even when the Supreme Court disallowed the substance of an order a decade later, it affirmed the power of the president to issue that order, even “without any special authority for that purpose.”

The vast increase in the size and scope of the federal government has made executive management all the more crucial, and thus presidential action in this vein all the more necessary. As early as the 1920s, scholars were documenting
what they called “administrative legislation” and “the ordinance-making powers of the president.” In the 1940s, the eminent scholar Edward Corwin observed that “executive interpretations of statutes flower—in proclamations, orders, ordinances, rules, regulations, ‘directives’. . . .” In March 1961 John F. Kennedy himself noted that when it came to his civil rights priorities he had identified a “good deal of things we can do now in administering laws previously passed by the Congress, . . . and also by using the powers which the Constitution gives the President through Executive orders. . . . When I feel there is a necessity for congressional action, with a chance of getting that congressional action, then I will recommend it to the Congress.” And in the 1980s, former White House staffer Richard Nathan concluded that “in a complex, technologically advanced society in which the role of government is pervasive, much of what we would define as policymaking is done through the execution of laws in the management process.”

The rhetoric greeting Obama’s actions is not new either. Kennedy received so much correspondence charging him with seizing “absolute power” through a series of executive orders setting up emergency planning processes that the White House developed a form letter to keep up. Reagan received similar fan mail—in 1981, a Mississippi voter wrote that one order made him “think the CFR [Council on Foreign Relations] owns R. R., smile and all. . . . Wouldn’t it be healthy if all E.O.’s were revoked?”

But the administrations’ responses reinforce the purpose of executive action noted above. The Kennedy White House (using language drafted by the Justice Department) wrote that “it appears . . . that [people] are under the impression that the President can enhance his powers simply by issuing an Executive Order. That, of course, is a misconception. . . . [Such] documents having the effect of law, are issued only pursuant to, or in conformity with, powers vested in the President by the statutes or the Constitution of the United States, or both” and do not directly apply to private citizens. The Reagan administration noted likewise: “Executive Orders are a part of the management prerogative exercised by the President. They provide him with a facility for dealing with a range of governmental concerns.” (Whether President Reagan’s smile was leased from the CFR was, alas, not addressed.)

BUREAUCRACY AND DEMOCRACY

Let’s turn, then, to the field where executive orders play out—the bureaucracy. It’s worth noting that the rise of the administrative state—driven by programmatic expansion under the New Deal, World War II, the Cold War, the Great
Society, and the 1970s explosion of regulation—reflects the aggregation of congressional choices about governmental functions over time.

In so doing, legislators directly delegated a wide range of administrative power to the president and also created a wide range of imprecise statutory provisions. Maneuvering a bill through Congress nearly always requires some degree of ambiguity, so each side can claim its demands were met. In the No Child Left Behind Act, for instance, how was the broad notion of educational “accountability” to be defined in practice? In the Affordable Care Act, what insurance plans would comply with the law? These details were not in the statutes themselves. It is difficult to anticipate every possible outcome in legislative language. Thus executive departments and agencies are routinely delegated power to promulgate regulations specifying how a given law will work in practice. Statutes also frequently grant waiver authority, allowing the suspension of parts of the law under certain conditions.

Who should exercise this power? Should it be the millions of unelected civil servants—the “fourth branch” of government—who make up the permanent bureaucracy? It seems far more democratic for presidents, elected nationally, to influence executive preferences. As an academic, Woodrow Wilson posited a difference between “politics” and “administration,” handing over implementation to the bureaus, but he changed his mind when he became president.52 The Supreme Court has held that “the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it.”53 Presidential executive action thus helps ensure that executive branch behavior is in tune with the popular will.

Presidential appointments are surely one way of trying to shape how executive branch employees behave.54 But very few of the 2.5 million civilians working for the federal government are chosen by the president. In the Department of Agriculture, just 60 or so of a staff of over 95,000—less than one-tenth of 1 percent—are politically appointed. It is hard to imagine that provides much in the way of direct supervision.

Furthermore, the executive branch is hopelessly fragmented—in 2015 one senator claimed it contained 430 departments, agencies, and subagencies.55 And the same governmental function—for environmental protection or trade policy, for instance—may be spread across the overlapping jurisdictions of multiple agencies. At least fifteen bureaus have a say in food safety. “Chickens are regulated one way, but when the egg emerges, it’s another agency’s problem,” Politico reported in 2016. “Crack the egg and you’re off in a new direction.”56
Presidents have long understood their responsibility for ensuring coordination and accountability. Only the president can referee this jockeying over turf (and potential chaos) and, again, rein in the bureaucratic autonomy it helps shield. Many executive orders and memoranda are devoted to creating interagency committees—deadly dull on their face, but with the important role of merging multiple departmental jurisdictions into a decision-making process that produces a unified policy, and that in turn can be assessed by the electorate.

Those policy decisions, and the directives sent to the bureaucracy to implement them, will of course reflect the president’s preferences. Some point to the constitutional command to “take care that the law be faithfully executed” to suggest that any presidential interpretation of the law is by definition problematic. But note that presidential decisions of this sort, though usually termed unilateral, are rarely that. Presidents almost always take into account the effect their directives will have on the public and on other political actors, including Congress and the courts, and adjust their actions according to the anticipated reactions they predict. Furthermore, presidential directives are normally arrived at by a process of bargaining across the multitude of actors contained within the executive branch, prior to their issuance. Thus many interests have the chance to make their voices heard in the process of “unilateralism.”

It’s certainly true that presidents are at times tempted to substitute their preferences for the plain meaning of the text. But more often there is no plain meaning of the text. As noted above, for good reasons and bad Congress often passes vague laws that contradict other statutes already on the books. And rarely do legislators provide sufficient resources to fully enforce the penalties they demand. For example, federal statute requires all persons in the United States without citizenship or legal residence to be deported—which would mean deporting something like 11 million people. By contrast, Congress has typically provided enough money to deport 400,000 people a year. Thus it would take more than twenty-seven years to deport everyone, even if none of those deported ever returned and if no new people ever crossed the border. In such circumstances, presidents must use their prosecutorial discretion and set priorities for how the law will be enforced.

Congress can specifically prohibit a given action or set of priorities in law. But when legislators fail to do so it is hard to say that inaction, even gridlock, is always the outcome most in tune with public opinion. And when they do grant discretion it is more, not less, democratic for presidents to utilize that discretion to reflect the preferences of the electoral majority that brought them into office. Certainly, it is more representative than allowing bureaucrats to
ride herd according to their own desires. And indeed, should we be so eager to argue that congressional preferences are themselves “democratic”?

THE “WHOLE GROUND”: IS CONGRESS DEMOCRATIC?

In the 2012 congressional elections, Republican candidates for the House received 47.6 percent of the national vote, losing to Democratic candidates by some 1.4 million votes in aggregate. Their reward for this defeat? A strong majority comprising 54 percent of the House.

One standard response to presidential directives is that they overturn the will of the people—which usually means the will of Congress. (Leaders of the House, for their part, rarely go a full day without referring to their chamber as “the People’s House.”) Yet in that 2012 election, President Barack Obama received a clear majority of the national popular vote; despite the existence of the Electoral College, the candidate winning the popular vote has failed to become president only three times. In 1834 Andrew Jackson bluntly told Congress that legislators had no right to judge him, since “the President is the direct representative of the American people.” Or as George H. W. Bush less truculently observed, “Consider the president’s role. Thomas Jefferson once noted that a President commands a view of the whole ground, while Congress necessarily adopts the views of its constituents. The President and Vice President are the only officials elected to serve the entire Nation.”

This is a simple matter of institutional design. Legislators are a product of parochial geography, their election and reelection determined by voters in a specific corner of a single state. As a result, it has been said that Congress understands the national interest only when it is spoken in a local dialect. If each district were a representative slice of the United States, that might not matter, but this is not the case; furthermore, House districts are skillfully gerrymandered to prevent just that sort of ideological diversity, making sure that members of Congress largely preach to—and are preached to by—a very loyal and homogenous choir. Even when a majority in the House or Senate could claim in aggregate to represent the country as a whole, the legislature’s internal rules or polarized bickering frequently prevent it from acting. The filibuster in the Senate is designed to protect minorities from anything short of supermajority consensus. Likewise, the House Rules Committee served for many years as a mechanism allowing an entrenched vanguard of white Southern Democrats to fend off desegregation—in short, to save their region from majority rule. The 113th and 114th Congresses have been the least productive in modern history, and the public has taken notice. In 2015 Gallup found that about
a third of Americans had confidence in the institution of the presidency. For Congress, the figure was 8 percent.\textsuperscript{65}

As Ruth Morgan concluded in her book on executive orders, “legislating is preeminently a representative function. The President, as well as Congress, represents the nation. Each is popularly elected and must return periodically to the voters. . . . Each has its own constituency, the President a national one and the Congress a state and local one. Each affords interest groups access to the policy-making process, and frequently groups that have no access to one process will enjoy privileged access to the other.”\textsuperscript{66} In this sense executive action provides an outlet for national majorities thwarted by local factions that favor the status quo.

**EXECUTIVE ACTION AND DEMOCRACY**

I have argued here that executive action is anticipated in the Constitution—and that such action is necessary to make government work, now more than ever given the growth of governmental dysfunction. Most executive orders direct administrative behavior and have little impact on the public, except in coordinating governmental policy to allow that public to hold the president responsible for that policy. Presidential direction of the bureaucracy thus aids both accountability and responsiveness. As Alexander Hamilton noted long ago, “it may be laid down as a general rule that [the people’s] confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration.” And “a government ill executed, whatever it may be in theory, must be, in practice, a bad government.”\textsuperscript{67} It would lack energy; it “must always savor of weakness, sometimes border upon anarchy.” And it was anarchy, not government, that posed the greatest threat to democracy at the time of the founding. The “energy” of government was therefore something worth protecting.\textsuperscript{68} So it remains today.

None of this is to deny that the president’s actions must flow from constitutional or statutory authority. Presidents must obey the letter of the law—which means that Congress must step to the plate and legislate clearly. “Faithful execution” can be gauged, and often is, by the court system. But it would be better for all concerned—including the public—if the legislative and executive branches were to work together to forge policy, rather than to reflexively choose rancor and gridlock. As it stands, presidents arguably gain politically by acting aggressively—and even illegally.\textsuperscript{69}

This might be especially true in the arena of foreign policy and national security. War powers receive little attention in this chapter, but represent an arena where Congress has too often backed away from its constitutional duties.
Legislative lawsuits are a poor substitute for the hard work of deliberation and oversight.

Still, foreign policy is not the worst place to consider the role of executive action in its broadest context. As Abraham Lincoln famously observed, “my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law.” He argued it was not “possible to lose the nation, and yet preserve the constitution.” Executive action might be necessary to save the very system of American democracy. A nation cannot meet crises, or even the day-to-day needs of governing, with 535 chief executives or commanders in chief.

So does executive action undermine democracy? No—and even less in the context of the American system of separated powers. If it is not, by some definitions, “democratic,” it is certainly “republican.” And a democratic republic is what the Constitution’s framers bequeathed us.

NOTES

PRO

1. Since 1789, presidents have “inscribe[i]d] upon a sheet of paper words establishing new policy, decreeing the commencement or cessation of some action, or ordaining that notice be given to some declaration. Dated and signed by the Chief Executive, the result was a presidential directive.” Harold C. Relyea, “Presidential Directives: Background and Overview,” Congressional Research Service Report for Congress, November 26, 2008, 2, https://www.fas.org/sgp/crs/misc/98-611.pdf

2. See ibid. for a partial taxonomy of the instruments presidents have used.


Executive Orders and Other Unilateral Presidential Directives Undermine Democracy


18. William G. Howell and David E. Lewis, “Agencies by Presidential Design,” *Journal of Politics* 64, no. 4 (November 2002): 1096, 1099. “Presidents also were less likely [than Congress] to create agencies governed by independent boards or commissions . . . agencies created through executive action almost always reported directly to the president.”


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CON

35. The full tweet read: “On floor of house waitin on ‘Kommandant-In-Chef’ [sic] … the Socialistic dictator who’s been feeding US a line or is it ‘A-Lying?’” The original message may be found at https://twitter.com/TXRandy14/status/428334051595132928
39. These were issued on behalf of G. Joseph Minetti. See Executive Orders 12006, 12011, 12016, 12037, and 12056.
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41. The term executive order actually refers to a specific type of directive issued by the president and published in the Federal Register. But the term is often used in the press and even by political actors to refer to a wide range of presidential orders and decision-making documents that include presidential proclamations, formal findings, guidance documents, designations, letters, memoranda, and a wide range of national security orders. A 2008 Congressional Research Service report listed twenty-seven types of such directives. See Harold Relyea, “Presidential Directives: Background and Overview,” Congressional Research Service Report, 98-611 (updated November 26, 2008).

42. See Rep. Jim Gerlach, D-Pa., in Rudalevige, “Old Laws, New Meanings,” 3; Ted Cruz, “The Imperial Presidency of Barack Obama,” Wall Street Journal (January 28, 2014). The next year Senator Cruz piled on: “This administration has been the most lawless administration we have ever seen,” RealClear Politics, http://www.realclearpolitics.com/video/2015/09/01/ted_cruz_barack_obama_has_become_the_president_nixon_wished_he_could_be.html


44. Ibid., 57, 84–85; see also Glendon Schubert Jr., The Presidency in the Courts (Minneapolis: University of Minnesota Press, 1957).


51. Ibid.


60. For how these might be derived, see Anthony Downs, Inside Bureaucracy (Prospect Heights, IL: Waveland Press, 1967); and James Q. Wilson, Bureaucracy (New York: Basic Books, 1989).

61. In 1824, 1888, and 2000. This excludes 1876, but that electoral process was so corrupted that it is hard to know who properly won the popular vote. Even including 1824 is somewhat generous, since at that time not every state linked the popular vote to its votes in the Electoral College.


64. Thanks to Morris Fiorina for this formulation.


66. Morgan, President and Civil Rights, 84.
67. See *Federalist* Nos. 27, 70, and 22, respectively. No. 70 famously lays out the need for “energy in the executive,” while No. 22 warns against procedures that would destroy that energy and lead to “contemptible compromises of the public good.”

68. Note that this notion is echoed by James Madison. In *Federalist* No. 37, Madison argued that “energy in government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good government.”
