

If scholars of the presidency are truly concerned with developing a pedagogy and presidential evaluation scheme rooted in critical education for citizenship, then their students must be asked to consider why so little questioning generally occurs regarding the role of the president in committing American troops to war. The Persian Gulf war was a case in point.* It begged for serious discussion, reflection, debate, and questioning about the Bush administration's foreign policy decisionmaking. Some argued that those who dissented from the president's foreign policy strategy were un-American and unpatriotic and were trying to undermine the troops who were already in the Middle East. In fact, if citizens fail to question a president's decisionmaking, then they are giving the president virtually unchecked power to do what he wants with their lives. The failure to question a president abdicates all of the principles of a meaningful and effective democracy and embraces the dictates of an authoritarian and totalitarian regime. This is, of course, the logical consequence of the plebiscitary presidency.

Alexis de Tocqueville spoke of a blind and unreflective patriotism that characterized the American citizenry during the nineteenth century. He would surely see evidence of such patriotism in America today. There is little doubt that such patriotism can be connected to the relationship of the citizenry to the state and the office of the presidency. No modern president can expect to succeed without the support of the public. Yet this support must be grounded in a firm rejection of the unrealistic notion of presidential power. Citizens who respond to the presidency in a highly personalized and reverential manner are likely to be disappointed by presidential performance and are also likely to embrace political passivity and acquiescence in the face of presidential power. In the words of Benjamin Barber, "democratic politics thus becomes a matter of what leaders do, something that citizens watch rather than something they do." As this book has pointed out, Ronald Reagan and George Bush heightened these expectations even further by using techniques that emphasize the plebiscitary, personal character of the modern presidency. Ross Perot's 1992 presidential campaign was firmly rooted in plebiscitary principles.

*The Persian Gulf War occurred within a two-month period in early 1991. Backed by House and Senate resolutions of support—not an actual declaration of war—President George H.W. Bush sent U.S. troops to the Persian Gulf as part of a multinational coalition to force Iraqi President Saddam Hussein's military out of Kuwait. The United States experienced quick and dramatic success, with CNN's coverage bringing the war directly to Americans daily. Years later, questions remained about the long-term effectiveness of the military strikes in weakening the Iraqi threat. In 2003, President George W. Bush ordered an invasion of Iraq, claiming that Saddam Hussein possessed weapons of mass destruction, an allegation later found to be false.—EDS.

His proposals for nation-wide town meetings and an electronic democracy scheme reflected support for government by plebiscite. To Perot, running as an outsider, anti-establishment candidate, such a plan was desperately needed to challenge the gridlock growing out of the Madisonian policy process and two party system. His proposals also enabled him to emphasize his own leadership abilities and claim that he had the necessary leadership and entrepreneurial abilities to break governmental paralysis. In doing so, Perot reinforced the direct line between the presidency and the American people. Any course on the presidency should examine Perot's government-by-plebiscite proposals and the broader implications of his apparent willingness to bypass the congressional policy process and the two party system. The amount of attention and popularity that Perot's campaign garnered in a short period of time suggests once again that the plebiscitary presidency is an important explanatory construct. It also encourages political scientists to study, with renewed vigor, the relationship between the presidency and the citizenry.

For many students, the presidency is the personification of democratic politics and, as a result, monopolizes "the public space." This view impedes the development of the meaningful and effective participation needed by citizens as they attempt to control decisions that affect the quality and direction of their lives. Presidential scholars have been developing a more realistic understanding of the changing sources of presidential power and how individual presidents have used these powers through the years. We would also do well to consider Murray Edelman's claim that "leadership is an expression of the inadequate power of followers in their everyday lives." This is particularly important as we begin to evaluate the Bush presidency. It is also the first step toward challenging the plebiscitary presidency and achieving a more realistic and successful presidency, one that is grounded in principles of democratic accountability and the development of citizenship.

35

KENNETH MAYER

From *With the Stroke of a Pen*

Students of American government need to understand all the basics of a system of government based on separation of powers: three branches, checks and balances, bicameralism, the veto, war powers, Senate advice and consent, to mention a few key examples. But there are important powers that are

less visible and less checked; they do not readily fall into the standard textbook treatment of American government. Kenneth Mayer points out that presidents can have great influence beyond that specifically authorized in the Constitution or gained from a personal ability to persuade. "With the stroke of a pen," a president, without congressional involvement, can issue an executive order that can significantly shape policy. Mayer introduces us to the little-known power of the executive order by citing the often vague contours of the power. He then delineates the policy areas in which executive orders occur, presenting data on the use of the executive order over time. Though perhaps lacking in drama and excitement, executive orders can have great impact.

... AMONG POLITICAL SCIENTISTS the conventional wisdom is that the president is weak, hobbled by the separation of powers and the short reach of his formal legal authority. Presidential power, far from being a matter of prerogative or legal rule, "is the power to persuade," wrote Richard Neustadt in the single most influential statement about the office in the past fifty years. Yet throughout U.S. history presidents have relied on their executive authority to make unilateral policy without interference from either Congress or the courts. In this book, I investigate how presidents have used a tool of executive power—the executive order—to wield their inherent legal authority. Executive orders are, loosely speaking, presidential directives that require or authorize some action within the executive branch (though they often extend far beyond the government). They are presidential edicts, legal instruments that create or modify laws, procedures, and policy by fiat.

Working from their position as chief executive and commander in chief, presidents have used executive orders to make momentous policy choices, creating and abolishing executive branch agencies, reorganizing administrative and regulatory processes, determining how legislation is implemented, and taking whatever action is permitted within the boundaries of their constitutional or statutory authority. Even within the confines of their executive powers, presidents have been able to "legislate" in the sense of making policy that goes well beyond simple administrative activity. Yale Law School professor E. Donald Elliot has argued that many of the thousands of executive orders "plainly 'make law' in every sense," and Louis Fisher finds that despite the fact that the Constitution unambiguously vests the legislative function in Congress, "the President's lawmaking role is substantial, persistent, and in many cases disturbing."...

A president can declare a national emergency by executive order, a

step that authorizes an immense range of unilateral warrants, including—theoretically—the power to restrict travel, impose martial law, and seize property, transportation networks, and communications facilities. And even orders that lack such sweeping effect can still be extraordinarily important to particular interest groups or constituencies, who seek substantive or symbolic redress for their concerns. Congress, in an attempt to protect its own prerogatives, regularly probes the appropriate limits of the executive's independent power through investigations of particular executive orders.

Technically, although the term was not in use at the time, the Louisiana Purchase was carried out by an executive order.

Presidents and their staffs consider executive orders an indispensable policy and political tool. In the wake of the 1994 congressional elections that gave the Republicans control of both chambers for the first time in four decades, Clinton White House officials predicted a renewed emphasis on "regulations, executive orders, and other presidential tools to work around Capitol Hill, much as Ronald Reagan and George Bush did when the House and the Senate were in Democratic hands." In 1998, as Clinton headed for impeachment, his advisors noted that he would resort to executive orders and other unilateral actions to show that he remained capable of governing. In a statement that both summarized the White House position and served to provoke congressional Republicans, advisor Paul Begala outlined the strategy to *New York Times* reporter James Bennett: "Stroke of the Pen... Law of the Land. Kind of cool."...

The phrase "stroke of a pen" is now virtually synonymous with executive prerogative, and it is often used specifically to refer to the president's ability to make policy via executive order. *Safire's Political Dictionary* defines the phrase as "by executive order; action that can be taken by a Chief Executive without legislative action." Safire traces the political origins of the phrase to a nineteenth-century poem by Edmund Clarence Stedman, but it was in use long before this, at least as a literary metaphor signifying discretionary power or fiat. The phrase became most widely known during the 1960 presidential election campaign, when Democrats made an issue of Eisenhower's refusal to issue an executive order banning discrimination in housing and federal employment. Kennedy promised to do so, committing himself to ending discrimination by executive order. During the second Kennedy-Nixon debate on October 7, 1960, Kennedy continued his criticism. "What will be the leadership of the President in these areas," he asked, "to provide equality of opportunity for employment? Equality of opportunity in the field of housing, which could be done in all federal-

supported housing by a stroke of the President's pen." After several delays Kennedy issued the fair housing order in November 1962. . . .

Observers who are even less sympathetic cast executive orders in an altogether sinister light, seeing in them evidence of a broad conspiracy to create a presidential dictatorship. The common theme of these complaints is that the executive order is an example of unaccountable power and a way of evading both public opinion and constitutional constraints. In the more extreme manifestations, executive orders are portrayed as an instrument of secret government and totalitarianism. The president says "Do this! Do that!" and not only is it done, but the government, the economy, and individual freedom are crushed under the yoke of executive decree. . . .

In making this argument about the importance of executive power, I recognize that our "separated system" puts both formal and informal limits on what presidents can do. Presidents come to office in widely varying electoral and political contexts that shape their ability to transform their formal powers into action. Checks and balances were built into institutional structures of the federal government from the beginning, and presidents reeling from a prolonged recession, facing united majority party opposition in Congress, or mired in an unpopular war will find little solace in the powers specified or implied in Article II of the Constitution.

Nevertheless, in most circumstances presidents retain a broad capacity to take significant action on their own, action that is meaningful both in substantive policy terms and in the sense of protecting and furthering the president's political and strategic interests. Some of this authority, particularly in regulatory affairs, has been delegated to the president by Congress, but presidents have also simply assumed many policy-making powers, especially in national security and foreign policy matters. Although the courts do step in to block presidential action on constitutional grounds (with *Youngstown* the most notable case), the general pattern has been more one of judicial deference to executive action than of assertiveness. . . .

What, precisely, is an executive order? In the most formal sense, an executive order is a directive issued by the president, "directing the executive branch in the fulfillment of a particular program," targeted at executive branch personnel and intended to alter their behavior in some way, and published in the *Federal Register*. Executive orders are instruments by which the president carries out the functions of the office, and every president has issued them (although there was no system for tracking them until the twentieth century). A 1974 Senate study of executive orders noted that "from the time of the birth of the Nation, the day-to-day

conduct of Government business has, of necessity, required the issuance of Presidential orders and policy decisions to carry out the provisions of the Constitution that specify that the President 'shall take care that the laws be faithfully executed.' " The lack of any agreed-upon definition means that, in essence, an executive order is whatever the president chooses to call by that name. . . .

It is more useful to think of executive orders as a form of "presidential legislation" or "executive lawmaking," in the sense that they provide the president with the ability to make general policy with broad applicability akin to public law. For over a century the Supreme Court has held that executive orders, when based upon legitimate constitutional or statutory grants of power to the president, are equivalent to laws. In *Youngstown*, the Court concluded with some force that executive orders lacking a constitutional or statutory foundation are not valid, and longstanding judicial doctrine holds that when an executive order conflicts with a statute enacted pursuant to Congress's constitutional authority, the statute takes precedence.

Since executive orders are a tool of the president's executive power, their reach extends as far as executive power itself. The question of when a president can legally rely on an executive order, therefore, is the same as the question of when the president can bring into effect the executive power generally. It is not a coincidence that many of the most important Supreme Court rulings on presidential power have involved executive orders, including *Youngstown*, *Korematsu v. United States*, *Schechter Corp. v. United States*, *Cole v. Young*, and *Ex Parte Merryman*. . . .

The analysis here relies on a random sample of 1,028 executive orders issued between March 1936 and December 1999, drawn from the entire set of all executive orders issued. This sample, which covers 17.6 percent of the approximately 5,800 orders issued since March 1936, can be used to generate inferences about the total population of orders. . . .

The first task is to classify the executive orders in the sample based on subject matter. I created the following exhaustive and mutually exclusive categories. When an order addressed multiple issues or crossed policy boundaries, I assigned it to the category that best described the order's primary focus:

Civil service: Orders dealing with civil service appointments, retirement exemptions, administration of federal personnel, salary, holidays, and so on. I also included personnel loyalty orders and any orders dealing specifically with Foreign Service management or personnel.

Public lands: Orders that withdrew land for public use, restored public

lands, revoked previous land orders, or that established or altered the boundaries of public lands, migratory waterfowl refuges, or airspace reservations.

War and emergency powers: Orders that created or abolished wartime agencies, addressed the exercise of special wartime administrative functions, took possession or control of private economic entities, or established emergency preparedness procedures for federal agencies.

Foreign affairs: Orders dealing with export controls, foreign economic policy, foreign trade, foreign aid, foreign affairs and diplomatic relations generally, establishment of international or treaty-based organizations, management of territories (Philippines, Puerto Rico, the Canal Zone), and immigration.

Defense and military policy: Orders dealing with military personnel, classified information, organization of the intelligence community, administration and reservation of military lands and reservations, and defense policy generally.

Executive branch administration: Orders creating boards, commissions, or interagency councils; orders that delegated presidential power or transferred powers from one agency to another, established civilian awards, administered tax policy (including inspection of tax returns), affected the organization of the Executive Office of the President, administered customs, law enforcement, and commemorative orders; contracting.

Labor policy: Orders creating emergency boards and boards of inquiry to investigate labor disputes, and orders managing federal government labor policy.

Domestic policy: Orders that dealt with domestic policy generally, including energy, the environment, civil rights, the economy, and education.

Tables 1 and 2 show the overall distribution of executive orders in the sample by subject area and across time. Overall, from 1936 to 1999, more than 60 percent of the orders dealt with general executive branch administration, the civil service, or public lands. Most of the remaining orders concerned the president's foreign affairs and war powers, with only a small percentage dealing with domestic and labor policy.

These patterns change when orders are broken down by time period. Table 2 shows the distribution of orders across categories for each decade, from the 1930s to the 1990s (the 1930s includes four years, from 1936 to 1939). Several patterns are immediately apparent, especially the sharp drop in the percentage of orders devoted to public land and civil service issues. Over three-fourths of orders in the 1930s dealt with these issues, with nearly half devoted to public lands alone. In the 1990s there were

Table 1 • EXECUTIVE ORDER SUBJECT CATEGORIES, 1936–1999

Type of Order	Percentage of Orders in Sample
Executive branch administration	25.5
Civil service	19.6
Public lands	15.6
Defense and military policy	11.9
Foreign affairs	11.3
War and emergency powers	7.1
Labor policy	5.4
Domestic policy	3.8

Note: Percentages are drawn from a random sample of 1,028 orders. Margin of error is ± 2.6 .

no public land orders, and only one order in eight dealt with the civil service. As I noted above, presidents no longer issue these orders, having delegated these responsibilities to subordinates. The number of orders devoted to war and emergency powers has gone down considerably since the 1940s and 1950s, with the higher figures obviously attributable to the extraordinary impact of World War II and the Korean War.

The percentage of executive orders that deal with foreign affairs, executive branch administration, and domestic policy has grown significantly since the 1930s. Part of this is undoubtedly due to the rise of the presidency as an institution, since as presidents have taken on more and more administrative responsibility they have come to rely on the executive order as an instrument of policy making. . . .

The second area of relative growth in executive orders is in foreign and military affairs. In these areas the absolute number of orders has remained roughly consistent, but they have become a larger percentage of all orders over time. . . .

The tangled history of the executive power points to the conclusion that executive orders matter. Presidents, particularly in the twentieth century (although there are crucial examples from earlier history), have pushed the boundaries of presidential power by taking advantage of gaps in constitutional and statutory language that allow them to fill power vacuums and gain control of emerging capabilities. Because of the inherent ambiguities of the constitutional vestments of executive authority, presidents have expanded their powers outward as a function of precedent, public

Table 2 • EXECUTIVE ORDER SUBJECT CATEGORIES BY DECADE, 1936–1999 (Sample of 1,028 Orders)

	1936–1939	1940s	1950s	1960s	1970s	1980s	1990s
Civil service	30.5%	21.8%	13.8%	11.9%	22.0%	13.1%	12.0%
Public lands	46.1	18.4	10.5	5.0	2.5	1.0	0.0
War and emergency powers	0.0	19.3	3.3	4.0	1.7	1.0	0.0
Foreign affairs	9.6	7.6	9.9	11.9	10.2	20.2	22.7
Defense and military policy	2.4	12.7	27.6	10.9	6.8	6.1	11.9
Executive branch administration	10.8	13.6	28.3	36.6	44.9	41.4	36.6
Labor policy	0.0	4.4	5.9	13.9	3.4	10.1	5.3
Domestic policy	0.6	2.2	0.7	5.9	8.5	7.1	9.3
Number of orders in sample	167	316	152	101	118	99	75
Number of administrations	1	2	2	4	3	3	2
Significant orders	1	50	14	14	26	23	21
Percentage	0.6%	15.8%	9.2%	13.9%	22.0%	23.2%	28.0%

expectations, and deference from the legislative and judicial branches. Executive orders have played a central role in this expansion.

In order to see the importance of constitutional form to the presidency, studies of presidential power must include a broader understanding of the president's formal powers. The notion that studying the president's constitutional authority will not produce useful or interesting findings is shortsighted, and it obscures important elements of the institution. A president's willingness to exercise formal legal authority is conditioned on broader strategic considerations, to be sure, but that does not diminish the powers available. Even within the constitutional constraints of the separation of powers, presidents can use executive orders to alter and adapt government structure, processes, and policies. A president's ability to effect major policy change on his own is in many instances less dependent on personality or powers of persuasion than on the office's formal authority and the inherent characteristics of governing institutions. To understand the nature of the president's legal power, executive orders are a good place to start.

36

BRADLEY PATTERSON

From *The White House Staff: [Chief of Staff]*

Drawing on many examples, Bradley Patterson paints a detailed picture of one of the least public but most important positions in Washington, D.C. The president's chief of staff is in charge of every aspect of the White House office, from the mundane to the weighty. Patterson is a long-time observer of the inside political scene in the nation's capital, and he brings to his prescription for the chief of staff a vast knowledge both of the individuals who have held the job and of the executive branch. The chief of staff must be all things to the president, Patterson feels, but he must be careful in the process not to become isolated and alienated from the numerous people whose requests he has to reject on behalf of his boss.

IT SEEMED AS IF two traditions were in the making: Republican presidents, following the Eisenhower model, emplaced chiefs of staff in their White Houses; Democratic presidents, aghast at the Nixon experience, shunned the idea. The second "tradition" came to a halt with