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# PREFACE TO THE SECOND EDITION

The first edition of *By Order of the President* was in press during the early months of the George W. Bush administration. And in those first few months, the new president appeared to be following in the footsteps of the Reagan administration—not surprising, given the number of people from that era and that ideological perspective who were asked to serve in the new administration. In some respects, Bush had also learned from the Clinton administration about the range and uses of presidential power and the ways it can be exercised, including unilateral action through a variety of presidential direct action tools. It would become clear over time, and particularly in the months following the September 11, 2001, attacks on the United States, that Bush would press the limits of presidential power well beyond that of his predecessors.

Ironically, George W. Bush would make bold, even audacious, use of some of the tools of presidential direct action. In the process, he would remake some of these tools, such as presidential signing statements, and limit his use of others, such as national security directives (which he might have been expected to utilize more extensively, given the challenges facing the nation). In any case, the Bush administration would take dramatic action by means of a variety of policy tools.

Although several highly publicized controversies, particularly those associated with homeland security, Iraq, intelligence gathering, and Guantanamo Bay detentions, drew increased public attention to President Bush's use and abuse of directives, there was still a tendency to overlook the pervasiveness and significance of his actions. Except for the most obvious and blatant of them, such as the now well-known signing statement on the Detainee Treatment Act at the end of 2005, there was a general lack of awareness of the importance of some of these presidential direct actions. Even highly regarded journalists would call me and ask what the smoking gun was. What many observers, including those in the media, did not recognize is that while many presidents use direct action tools for tactical purposes to accomplish particular aims in the near term, others have far more strategic goals, playing for high stakes over the long term. The George W. Bush administration was one of the latter. The issue was not just about dealing with specific problems or taking specific actions. It was about recasting the presidency and radically altering the concept of the separation of powers and checks and balances. In the context of major change,

it is easy to miss a president's subtle use of these tools from both the tactical and strategic perspectives, yet it is in those circumstances that attention to these devices is most important.

The tumultuous Bush era ended with the arrival of Barack Obama, who took office during the worst economic downturn since the Great Depression and while the nation was involved in two major armed conflicts in Iraq and Afghanistan. Just as Bush had reached back to the Reagan administration, Obama clearly reached back to the Clinton administration to find staff who could help him issue policies not only to address the challenges facing the nation but also to make good on his signature campaign promise of change for the future. But, like others before him, Obama drew on his predecessor's use of presidential direct action for various purposes, rousing little awareness among his supporters and relatively little attention by the media. Early on, Obama focused on big policy campaigns aimed at the passage of major legislation, such as the American Recovery and Reinvestment Act and the Patient Protection and Affordable Care Act. However, this did not mean that the administration would shy away from direct presidential action. Ironically, in a number of situations, he showed a surprising willingness to use methods that were reminiscent of his predecessor—whose use of presidential power candidate Obama had so vehemently criticized. In later years, although President Obama would claim to use directives to deal with congressional gridlock, he did not employ the available presidential instruments as much or as broadly as his rhetoric suggested.

This volume adds a consideration of the George W. Bush and Barack Obama years to the first edition's analysis of the use and abuse of tools of presidential direct action. This edition also adds a new chapter on executive agreements. Although these are not treaties within the meaning of the U.S. Constitution and are not subject to Senate ratification, such agreements have become an increasingly important instrument of presidential action, and few Americans, including many scholars, are even aware of them. Indeed, according to some in Congress and elsewhere, executive agreements appear to be rapidly replacing treaties as instruments of foreign policy.

This edition moves beyond the fact that recent presidents have pushed the boundaries of presidential power and seeks to explain how and why they have done so, with careful attention to their mixing and matching of direct action tools. A central theme throughout this discussion is the effect of the 9/11 terrorist attacks on the United States. This edition also explains more fully the

factors that make these policy tools so attractive and the consequences that can flow from their use and abuse.

It is important to note that since the first edition, an array of books and articles about presidential power have been published (partly in response to the controversies surrounding the Bush years, and partly, I hope, in response to the first edition of this book). Some, such as James Pfiffner's fascinating *Power Play: The Bush Presidency and the Constitution*, focus broadly on the efforts of presidents and their supporters to expand the reach of presidential authority; others focus more narrowly on specific types of presidential action. Like the first edition, this edition depends primarily on original documentary sources and officially prepared materials or those written by participants in recent administrations, rather than on the secondary literature.

The preface to the first edition began with this statement: "Democracy is in the details." If the years since then have demonstrated anything about the modern presidency and contemporary American democracy, it is that this is a central truth. Even so, it has been challenging to ensure that the details of *how* leaders govern are accorded at least as much attention as their transient political campaigns and their short-term policy goals. If ever there was a time to acknowledge the importance of the details of democracy, that time is now.

# PREFACE TO THE FIRST EDITION

Democracy is in the details. In other words, there is indeed an interdependence between ends and means. Although that is a veritable truism, there seems to be a need to remind Americans, including professionals, of the importance of that relationship every now and again. Many presidents have found themselves embroiled in legal, political, and policy difficulties as much for the means that they chose as for the ends they sought to achieve. That has been true from the days of George Washington to the most recent occupants of the White House.

Many of the most important White House controversies have involved presidential direct action, the use of executive orders and proclamations to carry out policy. These are situations in which the president simply issues statements, many having the force of law, with no requirement for any particular processes like those required to enact legislation or even to adopt administrative rules. As new presidents come to the White House, their administrations learn from their predecessors' actions just how these tools of presidential power can be used. Indeed, in recent decades, each administration seems to find new devices and new ways of using them to achieve policy goals, including goals they know they are unlikely to accomplish if they call upon Congress for help.

Today, these presidential power tools include not only executive orders and proclamations but also presidential memoranda, national security directives, and presidential signing statements. It is not just that these little-known devices exist and are not really understood by most participants in the public policy process, let alone citizens, that is important. Neither is it the fact that some of these devices need not be disclosed to Congress, much less published for the general public, that matters most. Nor is it the fact that these tools are often used together in combinations that can be confusing, to be charitable, and just plain deceptive, in a number of instances, that should be cause for attention. There is virtually no significant policy area in which presidents operate that has not been shaped to one degree or another by the use or abuse of these tools. It is for all of these reasons and more that attention really must be paid to presidential direct action and the tools used for that purpose. Yet for all of that, even professionals are only belatedly coming to pay attention to even the most obvious of these devices.

James Madison was right in pointing out that ignorance in a democracy is but a "prologue to a farce." If so, then it is past time to provide essential knowl-

edge about these instruments—all of them. They are different, and each has its unique characteristics. The task is not simply to understand what they are, but also how they can be used, what purposes presidents have sought to serve by using them, and what advantages they offer as mechanisms to accomplish those purposes. There is one other major concern that must be addressed. It is the difficulties that can arise from their use. These downsides range from the trivial to the extraordinarily serious, from inside-the-Beltway spats to deadly international clashes, and from the near-term to the long-run future of the nation.

In seeking to address all of these issues, this book is about power, how it is used and abused, even where the ends for which it is employed are laudable in themselves. Because it attempts to provide a broad and integrative understanding of these tools of presidential direct action, it can really only begin a much larger and longer conversation about the subject. At the same time, it seeks to add to several academic literatures, to provide some degree of civic education, and to inform policy makers at all levels, professional public managers, and elected officials. The use of these tools has affected all levels of government from the international to the local. They have long been a major factor, since the beginning of the nation, in policies affecting Native Americans. They have also had pervasive impacts on most areas of the business community. It may be too much to hope, but it would be the author's fondest wish that this book might even in some small way encourage conversations not only within these different groups but among them as well.

There are a number of policy makers and informed citizens who have some knowledge of at least executive orders, if not all of the tools considered in this volume. But it is surprising to find how many, including highly educated citizens and experienced professionals, know little if anything about them. For these readers, chapter 1 provides critically important foundational information that may seem familiar to many academic readers.

Within the academic community, I hope that the volume can offer a contribution to the literatures on the presidency, public law, public policy, and public administration. In the most general sense, it is about what have come to be known as policy tools, but the tools come into their true usefulness and dangerousness as we understand how they have been—and are being—applied.

As this book went into production, Kenneth R. Mayer's new work on executive orders, *With the Stroke of a Pen* (Princeton: Princeton University Press, 2001), was just emerging. I was told by another scholar of the presidency who saw it before I did that the two books were very different. When I read his new

work, I found the two are different indeed. Our approaches are very different and we consider very different material. In particular, this work focuses on a wide range of tools of presidential direct action and the interrelationships. As will become clear as readers move through this book, there are many reasons why executive orders and other tools of executive direct action need to be understood together. There are many other differences as well, but for now, suffice it to say that I hope both will together make useful additions in an area long in need of attention.

In the roughly two decades over which I have studied these mechanisms, each administration has found many uses for them. Democratically controlled Congresses have complained bitterly about the use and abuse of power by Republican presidents, only to be replaced by a Republican-dominated Congress equally frustrated by a Democratic president. In this game of power, any number can play, and both parties have been more than ready to use the tools of presidential direct action. This book, then, is also about relationships and the damage that has been done to critical Washington work ways by conservatives and liberals alike, in both political parties, who have been too ready, whether they would admit it or not, to let the ends justify the means.

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There is no way to write a book about such a big topic, encompassing material that spans the entire history of the nation, without feeling humbled, and I do. In the first edition, I expressed my gratitude to the many people who helped me with the research and writing of the book. In particular, I noted Louis Fisher, Morton Rosenberg, Ron Moe, and Harold Relyea of the Congressional Research Service (CRS). For many years, these dedicated public servants have made it their business to keep the instruments, institutions, and processes of American governance and public management in the view of those who fashion policy, as well as those who seek to understand it. Ron Moe is no longer with us, but his impact and his efforts to make public law a critical consideration in public administration and policy (when expediency led many to forget that important truth) are lasting contributions to us all.

I also recognized my academic colleagues at a number of universities, many of whom discussed the subject matter with me and offered their insights over the years. John Rohr was always one of my most important colleagues, even though we never served on the same faculty. Though we have lost him in body, his spirit and enthusiasm for the Constitution and pursuit of the public interest remain with me as I complete this second edition.

To those associates acknowledged in the first edition, I must add my colleagues at the Mark O. Hatfield School of Government at Portland State University, including Douglas Morgan, Ronald Tammen, and Claudia María Vargas. These individuals have followed the emerging debate about the use and abuse of presidential direct action during the George W. Bush years and encouraged my work in this area. Many of my students have suffered through lectures about the tools of presidential power and probably learned more than they ever wanted to know; I appreciate what they offered in return. Linda Kiltz, Carl Foreman, David Jarvis, Travis Miller, and Andrew Gzeguze assisted at various times with research for the second edition. Their efforts are gratefully acknowledged.

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ward and his successor Charles T. Myers, the University Press of Kansas has managed to remain a major publisher that continues to care in an increasingly globalized and impersonal field. For that, we should all be grateful. Susan Schott worked diligently to bring the first edition of this book to the attention of many who might have overlooked the subject, and I appreciate those efforts.

Some material included in chapter 4 appeared in "Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games," *Presidential Studies Quarterly* 31 (March 2001):126–141. Material in chapter 8 appeared in "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements," *Presidential Studies Quarterly* 35 (September 2005): 515–532, and in "The President as Judge: Signing Statements as Declaratory Judgments," *William & Mary Bill of Rights Law Journal* 16 (October 2007): 253–282.

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# ONE

## THE TOOLS OF PRESIDENTIAL DIRECT ADMINISTRATION

Suppose a call comes in from a recently elected president's transition staff. The president has asked the transition team to instruct her and her inner circle about the kinds of tools available to make things happen. This president is from outside the Beltway, as are a number of her close aides. The new team is fully aware of the importance of putting forth a legislative agenda in the now famous (even trite) first hundred days of the administration. Indeed, much of the brief time between November and January has been consumed with thoughts of what ought to be included on that agenda. Even more time has been spent trying to staff the key cabinet and subcabinet jobs. Then, of course, there is the budget. Most new administrations inherit a proposed budget developed by their predecessor, and it may take as much as a year to develop a financial plan that is fully the new president's. Finally, coming fresh from the campaign (and with a number of campaign staff members now in the White House), the new team certainly understands that the president can take a limited number of important issues to the Washington establishment in an effort to force action.

To be sure, these tasks present difficulties. In an era of divided government, sending an agenda to the legislature is just the beginning of a protracted process (possibly a battle) that may yield relatively little of substance at the end of the day. Even when the legislature is controlled by the president's party, some presidents have found it difficult to get what they want, as Barack Obama learned early in his administration. Although the White House has some leverage over the budget preparation process, it is still dependent on a complex appropriations process that ultimately requires congressional support and involves large numbers of stakeholders with their own power centers on Capitol Hill.[1]

Certainly, there have been administrations that have elected to employ a model that is often described as the "administrative presidency" in an effort to achieve their goals.[2] This approach uses reorganization, personnel management techniques, or counterstaffing measures to move agencies in the desired policy direction, whether they want to go there or not, and with or without congressional involvement.[3] Of course, most presidents who start by declaring their commitment to appoint good people and give them room to do their jobs,

often under the banner of cabinet government, end up changing their minds. They often become convinced, rightly or wrongly, that their appointees have been co-opted by the agencies they were supposed to change, or they become frustrated when change takes too long and produces too few results.[4] These presidents frequently move away from their avowed commitment to cabinet government and take a more direct approach. Others appoint White House czars even as they are filling cabinet posts. For instance, President Obama installed a White House health reform leader within days of appointing a new secretary of health and human services, before that new cabinet member had even been confirmed.[5]

What many of these new arrivals may not fully appreciate is that in addition to these more or less well-known challenges, they are inheriting a large body of executive orders and other pronouncements that remain in effect unless and until they are amended, superseded, or rescinded. If they are like most recent administrations (at least since the late 1970s), once these staff members learn about the number, range, importance, and uses of these instruments, they will want to employ them. Even those who have experience with executive orders will realize that these tools and other instruments have been evolving and can be used in new and creative, if sometimes problematic, ways.

All these factors, along with a desire to make an impact quickly, can lead an administration to employ the tools of presidential direct action, which include executive orders, presidential proclamations, presidential memoranda, signing statements, national security directives, and executive agreements. What should an outside adviser tell the White House about the nature, uses, benefits, and dangers of these instruments? Presidents since George Washington have employed a wide range of devices in an effort to move the government quickly and decisively, but the constellation of tools and the ways they have been employed have evolved over the years, and they continue to do so. They can present both opportunities and challenges for presidents.

## WHAT'S NEW, WHAT'S NOT, AND WHAT COUNTS

Curiously, until recently, the literature on the presidency has largely ignored the tools of presidential direct action, as if the way the president uses his or her power matters little.[6] For decades, the emphasis was on what the new administration wanted to achieve and how it could organize, staff, and position itself with potential political allies to accomplish that agenda. However, even a relatively quick look at history (not to mention current events) suggests that

many presidents have run into difficulties at least as much for the way they went about implementing their agendas as for the policies themselves. And a proper sensitivity to this fact requires an understanding of the tools at the president's disposal to carry out the executive's work. The ends and the means are inextricably interrelated—a truism that must apparently be relearned every so often. Even if the impact of presidential action is not obvious or immediate, it can be both real and significant.

Another problem that one finds in much of the literature on presidential success or failure has to do with perspective. In Washington, and in the literature about it, there is a sense that one must be either a White House proponent or a Capitol Hill advocate. And as anyone who has spent much time in Washington knows, it can often be a long distance between the two ends of the avenue. These biases are understandable and sometimes even necessary. There has for many years been a tendency of the Congress not to defend its institutional character and authority against White House challenges to its processes and powers.[7] By the second term of George W. Bush, this situation was verging on an utter breakdown of the separation of powers and the checks and balances designed to protect that constitutional design.[8] At the same time, presidents have become increasingly frustrated by the way members of Congress, their committees, or their institutional rules work to delay or even bury important policies. President Clinton expressed this frustration when he announced a new policy on privacy protections:

> I am taking this action today because Congress has failed to act and because a few years ago Congress explicitly gave me the authority to step in if they were unable to deal with this issue. I believe Congress should act. Members of Congress gave themselves 3 years to pass meaningful privacy protections, and then gave us the authority to act if they didn't. Two months ago their deadline expired. After 3 full years there wasn't a bill passed in either Chamber.[9]

Barack Obama, locked in a battle with Congress and facing a looming deadline to adopt a debt limit extension, complained: "This is no way to run the greatest country on Earth. It's a dangerous game that we've never played before, and we can't afford to play it now. . . . We can't allow the American people to become collateral damage to Washington's political warfare."[10]

On the Hill itself, frustrations about partisanship, intraparty conflicts, and pressures related to campaign finances seem to prevent even the most dedicated members from focusing on the nation's most pressing problems. These frustrations have intensified as it has become increasingly necessary to obtain

at least sixty votes in the Senate to take virtually any serious action. Recently, a number of members of Congress have decided not to seek reelection in part because of these dynamics.

For longtime Washington insiders, much of this seems like old news. Congresses and presidents have been battling for years, and partisan wrangling is not a recent invention; nor is the presence of strongly held ideologies on one end of the spectrum or the other. Yet the climate has been changing for some time now, and that change is sorely felt. It has, in fact, intensified dramatically since the first edition of this book was published. Indeed, the memorials and eulogies for Senator Edward Kennedy in August 2009 provided a very public setting in which senators and others mourned the passing of civility. Old hands from both parties have made it clear that something has changed. Call it the erosion of Washington rules. These rules are not codified anywhere. Political scientists address them, if at all, as informal relationships among institutions. To professionals, these rules are the understood norms that make it possible for staffers and elected officials to work together, despite having strong institutional, partisan, or even ideological differences. These understandings have long been the warp and the woof on which policy is woven and programs function. These rules make it possible for losers to continue to work with victors and for institutions to wage pitched battles yet retain the ability to cooperate with one another and with the public administrators at all levels who are called on to implement the policies created by the political process.

## FOCUSING ON THE CRITICAL CORE

The task, then, is to examine the use and abuse of presidential instruments of direct action to better understand their nature, strengths, and dangers. The objective is not only to see these devices in terms of their legality or the ends they attain but also to understand how their use affects the critical institutions, processes, and actors involved in the policy process (including what were once called the Washington rules).

The purpose here is analytic, but there are several relatively obvious normative implications as well. The thesis that emerges is this: although there is substantial justification for the rise and use of most of the tools of presidential direct action, they have been utilized in increasingly problematic ways that present constitutional, institutional, procedural, and policy difficulties. These negative effects operate in both the formal and informal spheres and have contributed to the erosion of the Washington rules that make effective

working relationships possible. What also becomes clear is that to understand the operation and significance of these tools, it is essential to look beyond the use of any one tool and recognize that multiple instruments may be employed in any given situation. Another key lesson is that in addition to understanding the substance of public policies or the processes by which they are created, we must pay close attention to the public policy tools used to shape these policies and put them into operation, given that each tool has its own set of characteristics, strengths, potential challenges, and effects.

## THE ESSENTIAL PREMISES OF PRESIDENTIAL DIRECT ACTION

With all that in mind, consider the challenge of advising a new administration. Clearly, each of the instruments is complex and requires individual attention. However, before that can be done, it is essential to establish some foundations against which to assess each of the presidential tools. There are at least four critical dimensions: the prerogative debate, the constitutional dialogue, interorganizational and intergovernmental complexity, and international and emergency pressures. For many scholars, this may be but a reminder of important premises. For the uninitiated, they are necessary foundations for further understanding of the use and abuse of the tools.

### The Problematic Prerogative Argument

It is well understood that different presidents have very different understandings of their own role and authority.[11] And it is certainly the case that the political power of the presidency is not the same as the president's legal authority.[12] Even so, executive orders and proclamations, among other devices, are formal instruments of government action, and as such, their validity rests on the constitutional or statutory authority advanced to support them.[13] In the background of many debates over the president's power to issue such orders is the argument over the concept of executive prerogative. This concept becomes particularly important when the traditional power sharing among institutions breaks down or when there is a legal challenge by someone outside of government.

The prerogative theory is the idea that the chief executive is not limited to delegations of authority by the Constitution or statutes.[14] The argument is not merely about what the president can do politically; it is based on the claim that there is formal authority for broad action and, apparently, a legal warrant

for it. This idea derives from the British royal prerogative, under which the monarch can issue a variety of orders and proclamations citing the authority of the Crown as the basis for those actions. However, the prerogative is both misunderstood and misapplied by U.S. presidents and their supporters when they cite it as a formal constitutional authority to issue executive orders and other directives. Because presidential decrees originate from the idea of the British royal prerogative, and because presidents still assume such power, it is important to consider it briefly. Although a full-blown discussion of the prerogative is beyond the scope of this book, at least four points are critical. First, assumptions about the prerogative powers of the British monarch are often incorrectly stated. Second, after independence, the newly formed states reacted against assertions of prerogative powers by creating weak executives. Third, at the time the Constitution was drafted and the campaign for its ratification was waged, great pains were taken to deny that the new presidency would have the same broad powers of the British king. Finally, caution is required when considering John Locke's treatment of the prerogative in the American context.

Even under British law, the Crown did not have absolute authority—not at the time of American colonization, much less in the days after independence—to produce decrees having the force of law on any subject.[15] For example, in 1611 the *Proclamations Case* held that "the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament."[16] Indeed, American colonists were prepared to argue precisely that limitation when they opposed the British Orders in Council and other directives imposed on the colonies.[17]

After independence was declared, the new states continued to react against abuses by the Crown and the royal governors. One result was the creation of weak chief executives in the state governments, making them quite dependent on the legislatures.[18] Two states specifically denied their chief executives the prerogative in their new constitutions.[19] "In the Virginia constitution of 1776 it was stipulated, as if out of abundant caution, that 'the executive powers of government' were to be exercised 'according to the laws' of the commonwealth, and that no power or prerogative was ever to be claimed 'by virtue of any law, statute, or custom of England.'"[20] Interestingly, although state constitutions have changed over the years, many still constrain the governor.[21]

It is certainly true that by the 1787 convention, there was frustration with weak executives and the abuses of state legislatures. In fact, in Federalist 48, Madison reminded his readers that those who crafted the state constitutions "seem never for a moment to have turned their eyes from the danger, to liberty,

from an overgrown and all-grasping prerogative" of the king, thus forgetting the dangers that might emanate from strong legislatures and excessively weak executives.[22] By then, there was clearly a desire to ensure a more energetic and efficacious executive. Even so, the framers frequently reiterated that the presidency would not be based on the British monarchical model and that a number of the powers generally regarded as central to the royal prerogative would be denied to the president, or at least divided between the executive and the legislature.

James Wilson began the debate on the Virginia design for the presidency on June 1, 1787. At the outset, he dismissed fears surrounding the proposal for a single executive by rejecting "the Prerogative of the British Monarch as a proper guide in defining the Executive Powers."[23] Indeed, the debates make it obvious that the framers did not want the presidency to be modeled on the British monarch; they knew that merely replacing one king with another of the homegrown variety could jeopardize the new constitution.

Certainly, the push for a strong and effective executive had no more committed advocate than Alexander Hamilton, who argued, "A feeble executive implies a feeble execution of government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[24] But Hamilton, like Wilson and Madison, knew the advocates of the new constitution would have to address the fears of an excessively powerful chief executive, and indeed, those concerns were raised during the ratification debate.[25] It was for this reason that Hamilton wrote Federalist 69, in which he explained in detail the differences between the powers of the president and the royal prerogative.[26]

In their design for the presidency, the framers went beyond a general rejection of the British prerogative and carved up the powers at the heart of it. The power of the king to create offices and appoint officials to fill them was split; Congress retained the authority to create important offices, and an additional check was added—the advice and consent process, or what we refer to today as Senate confirmation of presidential nominees. The president was denied an absolute veto over legislation, and Congress retained the authority to override a veto. The military power was also split: the power to declare war and to raise and support the military was given to Congress, and the authority of the commander in chief was given to the president. Authority over foreign affairs was subject to consent by an extraordinary majority in the Senate. Revenue measures were required to be initiated in the most numerous branch of Congress. These were areas in which the Crown had exercised prerogative authority, to

the anger of the colonists and the consternation of many British citizens as well.[27] When an element of the prerogative was given to the president, such as the pardon power, it was specifically enumerated, and even in this case, there was a qualification with respect to impeachments.[28]

John Locke, in his *Second Treatise on Civil Government*, supported the idea of the prerogative, and given his influence during the founding period, there is a tendency to perceive this as strong justification for the prerogative in the American context. Locke wrote:

> The good of the society requires that several things should be left to the discretion of him that has the executive power. . . .
>
> This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called "prerogative"; for since in some governments the lawmaking power is not always in being, and is usually too numerous and so too slow for the dispatch requisite to execution, and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm if they are executed with an inflexible rigor on all occasions and upon all persons that may come in their way, therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe.[29]

Yet it was understood at the time of the framing that Locke was writing in the context of British experience. He was not basing his opinion on a positive constitution in the American tradition. Therefore, great care must be exercised in applying Locke directly and broadly in the latter setting. Madison made this point quite specifically with respect to the prerogative:

> Writers such as Locke, and Montesquieu, who have discussed more the principles of liberty and the structure of government, lie under the same disadvantage of having written before these subjects were illuminated by the events and discussions which distinguish a very recent period. Both of them, too, are evidently warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry. . . . The chapter on prerogative shows how much the reason of the philosopher was clouded by the Royalism of the Englishman.[30]

Presidents and commentators would later debate the narrower aspect of Locke's prerogative argument with respect to true emergencies, but the framers took pains during both the debate on the presidency and the ratification debate to distance themselves from the concept and certainly from its broad use as described by Locke's expansive language.

Having said that, many presidents have felt the need to issue executive orders, proclamations, and other presidential directives, leading to some of the most important debates over executive action and some of the most important policy moves in our history.[31] These include George Washington's Neutrality Proclamation; Abraham Lincoln's many direct actions during the Civil War (including the Emancipation Proclamation); the more than 1,700 executive orders issued by Woodrow Wilson before, during, and after World War I; the executive orders used to engineer the Teapot Dome debacle; the raft of orders issued by Franklin Delano Roosevelt to implement the National Industrial Recovery Act, as well as his use of Executive Order 9066 to exclude and later incarcerate Asian Americans during World War II; Harry Truman's order desegregating the military; Truman's and later Dwight Eisenhower's orders launching the ill-fated loyalty and security program; Eisenhower's national security directive launching the overthrow of the government in Iran and, shortly thereafter, of the Arbenz regime in Guatemala; John F. Kennedy's order attacking housing discrimination; Lyndon Johnson's order mandating affirmative action in government contracting; Richard Nixon's imposition of a wage and price freeze by the issuance of orders and proclamations; Jimmy Carter's oil import fee order; Ronald Reagan's regulatory review and security classification orders; George Herbert Walker Bush's national security directives supporting the Iran-Contra conflict; William Jefferson Clinton's order attempting to block the replacement of strikers; and George W. Bush's order calling for the military arrest, detention, and trial of noncitizens in the wake of the 9/11 attacks and his dramatic use of presidential signing statements to reject constraints on his claims to power. All these tools of presidential direct action have been at the heart of the good, the bad, and the ugly of the presidency. Broad assumptions about the existence or scope of a prerogative power in the presidency will not resolve such difficulties either politically or constitutionally. When George W. Bush tried to invoke the prerogative power in virtually all aspects of international affairs and national security policy, as well as in a domestic version referred to as the unitary theory of the executive (often with Vice Present Richard Cheney as his spokesperson), criticism came not only from Democrats but also from many Republicans.[32]

## The Importance of the Constitutional Dialogue

Despite the difficulties involved in getting into court to challenge the use of presidential direct action instruments, many cases have addressed the limits of

executive action or have come about because of executive directives. As Louis Fisher has argued, it is important to understand that the issue goes beyond a set of presidential actions and legal reactions; it involves an ongoing "constitutional dialogue."[33] It is a continuing conversation not only about particular policies but also about the presidency, its powers, and its relationships to other key participants in the governing process.

Although, as James David Barber has argued,[34] each occupant of the White House has a great opportunity to place his or her distinctive stamp on the office, the presidency is an institution. And as Michael Sandel reminds us, "Political institutions are not simply instruments that implement ideas independently conceived; they are themselves embodiments of ideas."[35] Institutions are not merely mechanisms to accomplish particular purposes; they are repositories and maintainers of values. And the temporary occupant of the presidency can, by his or her actions, affect the institution for good or ill. "Beyond the character and times of individual presidents, and the vagaries and coherence of their appeal and advisory systems, there is the ongoing office. Each incumbent fleshes out the presidency in a different way."[36] The constitutional dialogue that takes place over time, involving the chief executive and the other branches of government, affects not only the resolution of particular policy disputes but also the nature and powers of the presidency itself.

When the president relies on the executive powers contained in Article 2 of the Constitution for his or her authority to issue an order or proclamation, major constitutional debates can occur, and their results can have long-lasting effects. President Truman's seizure of the steel mills during a labor dispute provides an important case in point. By the time Truman issued Executive Order 10349 on April 8, 1952, the debate was well under way.[37] The president had fought a losing battle with Congress over labor legislation. During the debate over what became the Taft-Hartley Act, Congress had considered granting the president seizure authority under certain conditions during labor disputes, but it ultimately rejected the proposal. Even so, the president was convinced that the nation's commitments to European reconstruction and to troops on the battlefields of Korea, along with a number of historical precedents for seizures, would sustain his claim to constitutional authority. For several members of the Supreme Court, the fact that Congress had already considered and rejected the president's request for support was critical. The Court's majority, speaking through Justice Hugo Black, overturned Truman's seizure of the steel mills, but Justice Robert Jackson's concurring opinion would have an important impact.[38] Jackson analyzed the president's action not principally by examining

his Article 2 powers but by utilizing a wider framework that asked the following: (1) Was the circumstance one in which the president was in agreement with Congress? (2) Was the president acting in the absence of any legislative statement on the type of action taken by the chief executive? (3) Was the president acting in a way that had been rejected by Congress?

William Rehnquist, a young clerk who had worked for Jackson, learned much from the justice and would later turn Jackson's approach into the controlling standard in a case involving executive agreements and executive orders issued first by President Carter and then by President Reagan concerning resolution of the Iran hostage crisis. Applying and even expanding on Jackson's framework, Justice Rehnquist found that Congress's failure to reject the actions of the two presidents, coupled with similar examples of international settlement agreements, constituted acquiescence in the president's actions.[39]

Of course, the interbranch dialogue described by Fisher is often more active and continuous when statutory authority is involved. And since presidents usually claim either direct statutory authority or mixed statutory and constitutional authority for their actions, a rich, complex, and ongoing dialogue involving all three branches is common, at least when the president's actions are controversial either inside or outside of government. One of the most obvious examples of such a dialogue was the response to the George W. Bush administration's order establishing detention and trial by military commission at the Guantanamo Bay, Cuba, facility. The administration claimed that Congress's Authorization for Use of Military Force following the 9/11 attacks, along with the commander in chief's authority under Article 2, supported Bush's actions.[40] The White House also argued that because Guantanamo was outside the United States, and because those at the facility had been detained outside the country, the federal courts had no jurisdiction over detainees' claims that they had been arrested and incarcerated illegally. The Supreme Court rejected that argument and held that "the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."[41] In another case involving an American citizen, a plurality of the Court found that even if the Authorization for Use of Military Force were read to provide some authority for the detention of illegal combatants, "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[42] Following that decision, the administration established Combatant Status Review Tribunals to determine the status of detainees and to meet the Court's requirement for

due process. Members of Congress from both political parties were at odds with the administration's claims about its authority, its assertion that the Geneva Convention did not apply to detainees, and its interrogation techniques. In late 2005 Congress passed the Detainee Treatment Act, which addressed these concerns but also included some limitations on future judicial review of detainee cases; however, it allowed cases that were already pending before the courts to move through the process and test the existing detention policies.[43] In a now famous presidential signing statement, Bush signed the legislation but announced that the administration would interpret for itself the detainee protection requirements. He also declared that all judicial challenges to detention were barred by the legislation, and he sent Justice Department lawyers into federal courts to terminate pending cases. When the Supreme Court actually addressed the process for determining who could be held as an illegal combatant, it rejected the administration's claim that all current cases were barred and found that the existing procedures violated the Geneva Convention as well as the Uniform Code of Military Justice.[44] Congress responded by passing the Military Commissions Act, which suspended the writ of habeas corpus for detainees, meaning that they would be unable to contest the legality of their confinement in federal court.[45] The Supreme Court ruled again, this time finding that the detainees were entitled to seek habeas corpus relief in federal courts, that the procedures under the Military Commissions Act were "not an adequate and effective substitute for habeas corpus," and that "§7 of the Military Commissions Act of 2006 operates as an unconstitutional suspension of the writ."[46]

Of course, the debate over Guantanamo and the status of detainees was a significant feature of the 2008 presidential campaign, with candidate Barack Obama promising to close the facility if elected. Once in office, President Obama issued Executive Order 13492, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Close of Detention Facilities,"[47] and Executive Order 13493, "Review of Detention Policy Options."[48] However, the administration failed to fulfill its promise to close Guantanamo by the promised deadline. The administration moved to acquire a state correctional facility, with plans to relocate some of the detainees there; however, it gave no clear indication whether or when they would be released if they had not been charged or convicted of a criminal offense. Congress quickly reacted to block the movement of detainees to the continental United States. The debates shifted once again to the judiciary, as detainees sought federal court intervention, and the matter is still unresolved. With a number of cases still in various stages of litigation, Congress moved in late 2011 to block the

president's efforts to exercise unlimited discretion with regard to detentions and prosecutions through provisions contained in the National Defense Authorization Act of 2012.[49] The president threatened a veto, and language in the bill was altered before its passage. Even so, on signing the bill into law, the president issued a statement threatening to ignore any effort to interpret the law's language in such a way as to limit executive discretion with regard to the arrest and detention of those considered terrorist threats or illegal combatants.[50] This debate resurfaced in 2014 when President Obama, without congressional involvement, exercised his claimed discretion over detentions and releases to trade five Taliban detainees at Guantanamo for army sergeant Bowe Bergdahl, who had been held captive by the Taliban. It is not clear what the next round of the constitutional dialogue among the president, Congress, and the courts will entail. What is clear is that the constitutional dialogue is ongoing and active.

## The Many Players in the Contemporary Game: Interorganizational and Intergovernmental Complexity

To understand the full significance of these presidential policy tools, it is important to remember that the conversation includes many participants in addition to Congress and the Supreme Court. It includes all the stakeholders in the policy communities that are affected directly, and sometimes even indirectly, by presidential directives. Just as various interest groups propose legislation in an effort to get their causes onto the public agenda and to obtain acceptable policy resolutions, there are interest groups that press the White House for direct action.

Even beyond the numerous voices in the Washington dialogue, it is important to consider the discussion that occurs outside the Beltway. Indeed, it is essential to acknowledge the intergovernmental dimensions of presidential direct action. In some instances, state and local governments, and the contractors that work with them to deliver public services, are positively affected by presidential direct action. For example, when President Carter sought to increase the opportunity for governmental agencies to participate in rule making, it became more feasible for state and local voices to be heard in the policy process.[51] Conversely, voices from beyond the Beltway have been growing stronger and more critical as states and localities have been forced to accept greater responsibility for the implementation of national policies, while resources to support these obligations have declined.[52] State and local officials have reacted with increasing anger when they perceive that executive orders

or other presidential instruments constitute federal government intrusion into their affairs.[53]

Intergovernmental issues commonly arise in the areas of health, education, and welfare, which the federal government has traditionally addressed through grants with a host of regulations attached. Presidents have recognized that participants in such programs can often be reached by executive orders associated with grantees or contractors.[54] However, what is not widely understood is the growing importance, since the late 1970s, of an intergovernmental model of regulation.[55] Under this approach, states are permitted to develop their own standards for regulated activities (provided they are at least as rigorous as the federal standards and are approved by the national agency involved), and they are authorized to enforce the standards as well. If a state is unable or unwilling to set its own standards, it may still be approved to implement the federal standards. Only if a state does neither will the federal government step in and operate a program directly. Thus, state and local governments are intimately involved in federal programs, including those governed or at least shaped by presidential direct action. For this reason, among others, they are important participants in the constitutional dialogue.

## International and Emergency Pressures

One additional consideration in a discussion of presidential direct action relates to the traditional deference granted to presidents in international matters and in emergency situations. Although the framers of the Constitution clearly did not intend for the president to possess the powers of the king with respect to treaties and the ability to commit the nation to war, presidents have historically been granted considerable freedom of action in the foreign policy arena, even in situations in which Congress or the courts might have asserted their own powers. The latitude afforded President George W. Bush after the 9/11 attacks on the World Trade Center and the Pentagon is a clear example. Legislators of both parties have often responded to a perceived need to rally around the president when troops have been sent into the field, even in the absence of a declaration of war. Indeed, it has been common over the course of American history for Congress to pass a war powers resolution after the outbreak of hostilities to ratify presidential orders and proclamations, however sweeping they might be.

The Supreme Court has usually avoided head-on confrontations with the chief executive in crisis conditions, as evidenced by initial challenges to the World War II–era Japanese exclusion orders issued by General DeWitt pursuant to Executive Order 9066.[56] The Court has frequently repeated the famous

(or infamous, depending on one's point of view) dictum that the president is the sole organ of foreign policy and that great deference is owed to his or her actions in that arena.[57] Indeed, when the Court reviewed Abraham Lincoln's actions at the outbreak of the Civil War, it found that he was not only authorized to take such actions but also constitutionally obligated to do so.[58] And in the contemporary world, the other participants in the constitutional dialogue have been willing, within limits, to recognize that natural disasters and even economic emergencies warrant considerable deference to the president. Still, after the high point of a crisis has passed, the president had better be prepared for two kinds of reactions. First, Congress and the courts may quickly shed their deferential approaches. Second, the fallout from emergencies is often intense and may have long-lasting consequences for the institutional presidency.

With respect to the first reaction, although the Supreme Court has rarely confronted the chief executive during a crisis, once the immediate emergency has passed, it has shown a willingness to rule against the president.[59] The series of Supreme Court rulings against the Guantanamo operation provide contemporary examples. The mere fact that a president claims the existence of an economic emergency does not mean that the judiciary or Congress will agree, as President Carter learned when he tried to impose a fuel import charge, citing the economic impact of the energy crisis.[60] Another example was the Reagan administration's attempt to block rule making on a claim that it was required to address soaring inflation first and then respond to the recession.

Advocates of a strong presidency may answer that such late responses count for little; by the time they are issued, the crisis has already been resolved successfully. However, this is the kind of situation in which the actions of one president may be troublesome for future administrations. For instance, there is little question that the perceived abuses of emergency powers based on military or other foreign policy necessities during the Johnson and Nixon years led to a string of legislative responses in the 1970s. The National Emergencies Act, the War Powers Resolution, and the Congressional Budget and Impoundment Control Act are among the more obvious examples, though by no means the only ones.

## A FEW WORDS ABOUT NUMBERS AND HOW LITTLE THEY TELL US

During the Clinton years, there was a good deal of discussion in the news media, much of it poorly informed, about executive orders. Some of these misconceptions have persisted in the years since then. The media tend to use the

term executive order to describe a wide range of presidential tools that apply to diverse people in significantly different ways. At the core of this commentary has been the assertion that presidents are using executive orders more than ever before. The logical response would be to count the number of orders, but unfortunately, this is an unhelpful exercise because the issue is more about content than quantity. In fact, there has been no significant increase in the number of orders issued by recent administrations; in some cases, the quantity of orders has actually decreased compared with earlier periods, particularly in the Wilson through Truman administrations. Further, the administrations of George Herbert Walker Bush, William Jefferson Clinton, George W. Bush, and Barack Obama significantly increased the use of presidential memoranda, sometimes using them interchangeably with executive orders or even side by side with executive orders on the same topic. This has become so common that some presidents (e.g., Clinton) have made public statements about the issuance of a new executive order that in fact turned out to be a memorandum. The same confusion exists with respect to national security directives, but in that case, it is impossible to determine the extent of the problem because significant portions of such material remain classified. The fact that the Federation of American Scientists and some presidential libraries have provided numbers and approximate titles tells us something, but it is certainly not the full picture. Presidential signing statements have also been common in most modern administrations, but there is no question that their substance and import have changed since the Reagan years, for reasons explained in chapter 8. The George W. Bush administration made dramatic use of this presidential device and dramatically increased the number of signing statements. However, the nature and scope of the claims to presidential power contained in these statements mattered more than their number.[61] Similarly, there have been thousands of executive agreements, many of which were extremely limited and specific, while others were very broad and functioned more like treaties in terms of their scope and importance.[62] For all these reasons, running the numbers tells us relatively little, and this study does not focus on quantities.

It should be noted, however, that it was possible to locate thousands of executive orders, proclamations, memoranda, national security directives, signing statements, and executive agreements for use in this analysis. Each chapter addresses the methods of accessing the material in question, and some were obviously much easier to locate and use than others. The process of locating and accessing materials has improved substantially since the first edition of this book was published, largely because of the interest generated by George

W. Bush's dramatic use of presidential direct action tools. While the emphasis in this study is on the postwar presidencies, materials dating all the way back to George Washington provided useful insights. Surprisingly, it was possible to obtain a large body of national security directives dating back to the Truman years, as well as some declassified portions of directives from the Clinton administration and after. Of course, in the years since 9/11 and the George W. Bush White House, national security concerns have limited the access to many documents, and they may not be available for some time. Even so, the dramatic expansion of Internet-based resources, including some available through the presidential libraries, has made the process of acquiring materials much easier.

## CONCLUSION

The chapters that follow examine each of the power tools available to the president and address a number of questions: What is this tool? How is it used? Why are such devices used? What are their potential strengths? What difficulties might they engender? How has their use changed over time? After this individual tool-by-tool consideration, the concluding chapter considers some of the general lessons to be learned from these analyses. These lessons are important for presidents, their administrations, legislators, scholars, and citizens.