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OUR VORACIOUS EXECUTIVE BRANCH

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Our Voracious Executive Branch

On the nature and causes of executive government

By Christopher DeMuth Sr.

American government has assumed a new form. The federal executive branch—the president, his political appointees, and the hundreds of agencies that report to them—has come to exercise lawmaking powers that were long the unquestioned preserve of Congress. For decades now, the executive has made law through "administrative rulemaking" under loose statutory standards such as "protect the public health." More recently, it has moved to sheer declaration, independent of or contrary to statutory law; this includes Obama administration actions on immigration policy, Obamacare implementation, greenhouse gas regulation, restroom rules for transgendered persons, and other matters.

The transformation has weakened our constitutional inheritance of checks and balances. This is more than a matter of three branches moderating each other—they also perform distinct functions, with separate sources of political legitimacy. Making law requires choosing among the differing, often conflicting interests and values abroad in society. Since the rise of republican government in the 18th century, lawmaking has been the responsibility of legislatures whose members represent a nation's diversity. Laws thus typically reflected negotiation and compromise and were practical (and, yes, often muddled) rather than ideological.

Executive lawmaking also involves compromise—the Environmental Protection Agency must navigate the positions of Exxon Mobil and the Sierra Club—but the terrain is much narrower and the destination more predictable. As a result, agencies often enact policies a legislature would not. EPA embarked on its greenhouse gas program in 2010 after a Democratic Congress declined to legislate one following extended consideration. President Obama has justified this and other incursions precisely on grounds that Congress had failed to adopt the policies he sought.

The new dispensation also alters the nature of government. It fuses lawmaking to the classic executive functions of law enforcement and program administration, and to the president's duties as head of state and national leader. The cumbersomeness of representative lawmaking and its separation from executive and presidential functions were important protections of limited government. Consolidated executive power is efficient and flexible. It makes law on the fly and metes out selective favors and punishments down to the level of the individual business firm, school, and Catholic order. The affected parties respond with increased political spending—going beyond conventional lobbying to continuously monitoring the agencies and adapting to their latest moves; they become agency "stakeholders."

These dynamics have expanded the federal domain into innumerable matters previously decided by state and local governments and by private citizens, institutions, and markets. The federal executive has become, in essence, a unitary national government of nearly unlimited jurisdiction.

The presidency has consequently become an inherently powerful office. Richard Neustadt taught JFK and his successors that they had few formal powers and had to cultivate broad public and congressional support in order to accomplish their goals. No more. As political scientists Kenneth S. Lowande and Sidney M. Milkis have shown, presidents now deploy their lawmaking prerogatives for partisan purposes—to galvanize key party constituencies, even on behalf of broadly unpopular policies, and to spare congressional allies the inconvenience of having to vote on those policies. The practice has fueled the polarization of our politics, as we have seen in the agitated reactions to President Obama's policy strokes on immigration, transgender locker rooms, and micromanagement of college dating behavior. It has also generated never-ending partisan campaigning to acquire the office's immense powers, heavily financed and excitedly reported through every daily twist and turn,

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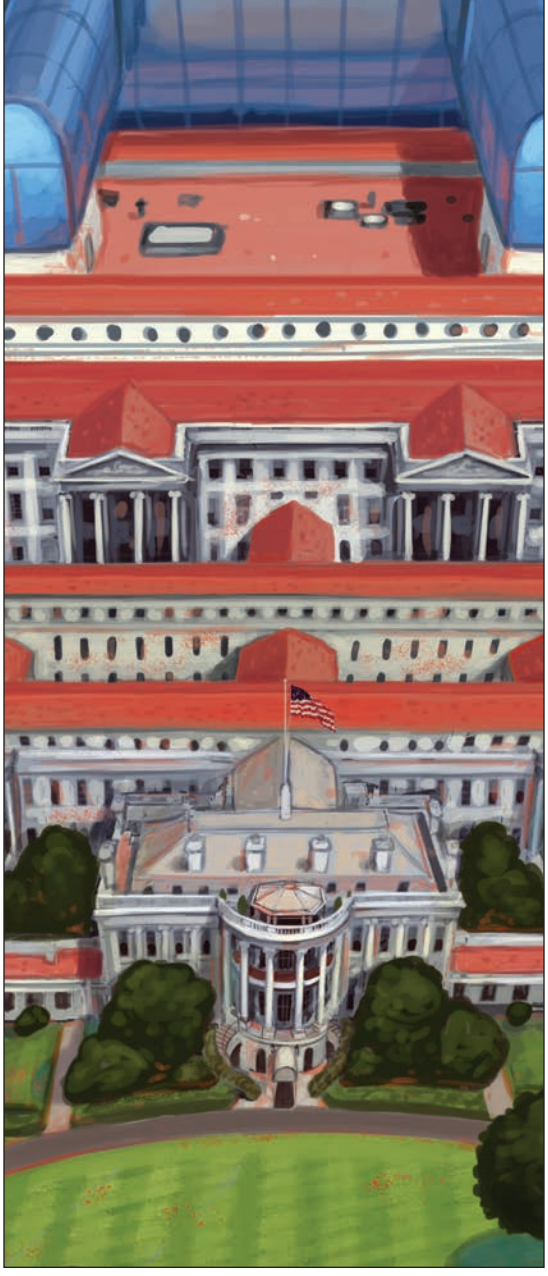
which in the current round has commandeered American politics for more than a year. Where the White House is concerned, "the permanent campaign" is no longer a metaphor.

Executive government has many influential proponents. Traditional progressives of the Woodrow Wilson school believe the complexities of modern society demand government by expert, neutral, flexible administrators in place of amateur, parochial, slow-moving legislators. Modern Democratic party progressives take a different tack: They see executive government as a potent device for mobilizing the powerful interest-groups (public-employee unions) and recondite causes (intersectional feminism) that have come to dominate their party.

The proponents also include several eminent law professors and political scientists who, whatever their progressive sympathies, believe Congress has become irredeemably dysfunctional—leaving us to make the most of executive government, which is at least functional. Recent academic books and articles valorize "the executive unbound," disparage Congress as a "relic," and propose that the president's powers be strengthened further by constitutional amendment or outright seizure.

The opposing camp includes skeptics of comprehensive executive power such as myself. It finds its political voice in Tea Party advocates of the old-time Constitution and in members of Congress opposed to the president—today including Republican leaders Paul Ryan and Mitch McConnell and backbench institutionalists Mike Lee and Ben Sasse. But history seems to be on the side of the proponents. The Bush administration took many extralegal actions during and after the 2008 financial crisis, such as using TARP funds to bail out automobile manufacturers, which set the stage for the Obama administration's actions in more normal times. Both Donald Trump and Hillary Clinton have expressed admiration for President Obama's unilateral methods and vowed to follow his lead.



DAVE CLEGG

But how, exactly, did we arrive at this state of affairs? The conventional explanations are wrong: The executive state is not a realization of progressive political theories, nor is it a partisan enterprise or a response to a polarized, paralyzed Congress. It is instead an organic adaptation to the circumstances of modern life—affluence, widespread education, elevated sensibilities, and advanced information and communications technologies.

The Big Bang of executive government came in the early 1970s, following a quarter-century of unprecedented economic growth and a time when American government was still relatively nonpartisan and Congress was fully functional. Indeed, Congress was feverishly busy—chartering a fleet of new regulatory agencies and programs concerned with environmental protection, product and workplace safety and health, consumer protection, and personal finance. Soon after came an array of energy conservation programs. The civil rights agencies, established in the 1960s, began to expand their portfolios—policing not only racial discrimination but also discrimination based on sex, age, and other personal characteristics, and requiring "affirmative action" to promote participation of these groups in the workplace, schools, and universities.

There had, of course, been many earlier regulatory programs in the Progressive and New Deal eras. But they had been concerned mainly with regimenting production in transportation, communications, power, and banking, typically at the expense of consumers. And, although they possessed wide discretion to promote "the public interest," they exercised that discretion by adjudicating narrow issues involving one or a few firms—such as whether to renew a radio station's license, or to permit an airline to add a new route over the objections of rivals.

The new agencies were radically different. Instead of cartelizing production, they promoted consumption and

consumerism and, more broadly, personal health, welfare, dignity, and lifestyle. Rather than managing self-contained commercial disputes, the new agencies were missionary and aspirational, pursuing open-ended objectives of strong interest to growing numbers of citizens.

And, critically, they operated not through case-by-case adjudication but rather "informal rulemaking." The practice had barely existed before 1970. An agency, after public notice and comment—and free of live hearings with established standards of evidence—could issue rules covering entire economic sectors, specifying automobile design, food labels, manufacturing methods, employment practices, and much else, right down to the exact placement of railings in warehouses. The rules were typically highly detailed and prescriptive and often involved compliance costs and social benefits of scores or hundreds of millions of dollars. The new agencies were less like executive courts and more like executive legislatures. The old-line New Deal and Progressive agencies were impressed and shifted to informal rulemaking themselves.

The post-1970 agencies and their methods were more than a response to the policy preferences of the affluent society. More fundamentally, they were a response to the more democratic politics that affluence had wrought. In the Progressive and New Deal eras, few people were interested in the kinds of issues that came to the fore in the 1970s—and, even if they had been, they would have been unable to organize and mobilize effectively on behalf of such issues. In those days, the national political agenda was controlled by civic, business (management and union), and party elites, who focused on their immediate economic interests and blocked competing, disruptive enthusiasms—especially anything involving hard-to-negotiate issues of ideology or values.

That all changed with the post-World War II growth of incomes, education, and leisure time, dramatic improvements in transportation and communications, and the emergence of national media. These developments ushered in a new era of widespread political participation and "activism" and sundered the old policy gatekeepers. Ralph Nader showed the way with his auto safety campaign in the mid-1960s, followed by the organizers of the first Earth Day in 1970.

The profusion of new policy causes pressing on Congress precipitated a rank-and-file revolt, led by northern liberal Democrats with the support of all manner of Republicans, that greatly weakened the seniority system and the prerogatives of committee chairmen. The congressional reforms of the early 1970s cleared the way for a more individualistic, entrepreneurial, responsive form of legislating aligned to the political demands of the times. But the dismantling of agenda-setting hierarchies left Congress more unwieldy than ever and incapable of managing the numerous causes now clamoring for members' attention. The solution was to hand the causes over to specialized, hierarchical agencies with broad or ambiguous rulemaking mandates that large legislative majorities could agree upon.

This was a landmark innovation in government. Business and professional groups responded with a flurry of litigation and legislative proposals seeking to harness rulemaking with traditional legal and constitutional restraints. But Congress and the courts rejected essentially all of them, and moved in a sharply different direction. Congress continued to delegate broad rulemaking powers—while enacting new requirements for agency "sunshine" and freedom-of-information and restrictions on nonpublic advisory meetings. The courts fashioned new doctrines of judicial deference to agency actions—while requiring, as a condition of that deference, that agencies demonstrate responsiveness to public comments and conscientious pursuit of their policy missions.

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The measures were highly complementary. They gave the executive extensive lawmaking discretion so long as agency procedures were transparent, participatory, and inclusive, and agency decisions were responsive and explained in elaborate detail. The upshot was a uniquely American fusion of executive management and democratic form, with its own political legitimacy and, in the decades to come, tremendous institutional momentum. It is a regime of ad hoc, nonelectoral, managed democracy.

Democratized executive lawmaking has been growing in scope and autonomy for more than 40 years now, mowing down a long succession of complaints about overregulation and unelected bureaucrats and proposals for legal and economic reform. Stupendous advances in information and communications technologies have enabled progressively narrower causes—on beyond clean air and safe products to animal welfare (count me in), bank overdraft charges, low-volume showers, supply-chain diversity, and

gluten-free foods—to achieve collective self-awareness, organize for action, and secure their own bureaus.

The same technologies have progressively increased the relative advantages of hierarchical agencies over legislative committees in monitoring and managing constituency groups and, more generally, in surveilling individual and group behavior. To executive officials, making policy by Internet postings and conference calls has come to seem natural. Congress has increasingly become a latter-day founder of freestanding special-purpose governments. In recent years, it has begun handing agencies not only lawmaking power but also authority to set and collect taxes and spend the revenues without congressional appropriations.

Our executive government is a far cry from classical progressivism. It is based not on expertise but on specialization. Expertise is mastery of an organized, independent body of knowledge that may contribute to solving practical problems. Specialization, in contrast, is mastery of the practicalities of the problems themselves. Expertise is central at a few agencies—biological sciences at the Food and Drug Administration, macroeconomics at the Federal Reserve—but only a few.

Willing to defer: Supreme Court justices reunite in 1993.

BARRY THUMMA / AP

Most agencies are instead specialized in the politics, institutions, personalities, and histories of a field of action. Many of those fields, such as affirmative action and mandatory disclosure, involve nothing that could reasonably be called expertise (the programs require employers or producers to act in certain ways with the knowledge they have). Others, such as pollution control and product safety, involve engineering and other technical information, but the agencies are mainly consumers, not suppliers, of that information. Regulated firms and other parties provide them with, for example, technical assessments of the feasibility of automobile fuel efficiency standards or statistical regressions of chemical exposure and health effects. Often the information is conflicting or ambiguous. The agencies use it selectively, in conjunction with value judgments and political calculations. Outside the FDA and the Fed and a few other agencies, the actual decision-makers are generalists—political appointees who could as well be members of Congress, and civil servants who could as well be congressional staffers.

Legislators and judges understand all of this, so when they speak of agency expertise they are usually rationalizing decisions made on other grounds. In last year's decision in *King* v. *Burwell*, the Supreme Court held that Obamacare tax subsidies could be offered on federal as well as state health insurance exchanges. Its opinion emphasized that the administration's decision to this effect had been made by the Internal Revenue Service—which "has no expertise in crafting health insurance policy" (unlike, presumably, the Department of Health and Human Services). That helped get the Court where it wanted to go—to deciding the question itself rather than deferring to the administration's decision—but it was pure fiction. Whether to extend subsidies to federal exchanges involved no expertise whatever. It was entirely a political question (with only one possible answer for the Obama administration), and the IRS and HHS were on the same political team.

The distinction between expertise and specialization is crucial for two reasons. First, expertise is supposed to be neutral and professional. It is envisioned as a superior substitute for the messy clash of private interests in guiding public policy. But American regulatory agencies, as we have noted, are obliged to be messy—porous to outside influence, participatory, democratic. That guarantees they cannot be aloof and detached in the manner (so it is said) of French and German administrators.

Second, specialization is the opposite of detachment. It is a mechanism of engagement, efficiency, and growth. Adam Smith emphasized the central role of the division of labor in promoting economic growth on the first page of *The Wealth of Nations*; the subsequent centuries of unprecedented growth are a history of ever-increasing specialization in knowledge and practice. The more recent growth of executive government is a testament to the power of specialization in political practice. The executive has eclipsed Congress precisely because of its superior capacity for growth. Specialized agencies can be multiplied essentially without limit, and each one is an efficient lawmaker because of its freedom from the legislature's need to achieve representative consensus.

Finally, the specialization of executive government is in political organization, and this is often at odds with the specialization that propels social prosperity. A common complaint about "one size fits all" regulation—uniform standards for almost anything that comes to the regulator's attention—is that it suppresses variety and innovation in production and ignores differences in personal preferences and local circumstances. These are the "complexities" of the modern economy that expertise is supposed to

accommodate! But for the politically specialized agency, suppressing diversity is frequently the whole point—to accommodate the ideological positions, membership needs, or corporate interests of members of their "stakeholder communities."

The evolutionary, adaptive nature of executive government may suggest that the prospects are dim for controlling its future course. Yet in private life, affluence and technology—in the form of the automobile, television, birth-control pill, Internet, and mobile smartphone—have brought many serious problems along with their cornucopian benefits. Over time, we have learned to control the problems. True progressivism consists of realizing the benefits while limiting the harms of the growing powers that wealth and technology place in our hands. That should be our goal in the public sphere as well.

A possible opening lies in the excesses of the Obama administration, which have broken the mold of post-1970 regulation. Making national policy by decree violates the requirements of public notice, participation, and responsiveness that have legitimized executive lawmaking. The Obamacare and Dodd-Frank programs are making mock of their consumerist pretensions. Billed as providing "Affordable Care and Patient Protection" and "Wall Street Reform and Consumer Protection," in practice both programs consist of active collaboration with large producers. They are throwbacks to New Deal industrial regimes and are degrading health insurance and banking services in ways that are increasingly conspicuous. The president's imposition of New Deal utility controls on the Internet is even more jarringly anachronistic and is alienating sophisticated technologists.

The administration may be taking America to a further, darker stage of executive lawmaking—more authoritarian and syndicalist. But it may instead be provoking reactions that, once underway, could go beyond correcting individual abuses. The courts—and not only conservative judges and justices—are clearly rethinking many of their doctrines of deference to executive discretion, and their decisions could rouse Congress to broader responses:

■ The administration's practice of skirting notice-and-comment rulemaking, in its actions on immigration, transgender restrooms, and other matters, is being vigorously litigated. The cases are prompting Congress to consider banning now-common agency lawmaking by such devices as "guidance documents" and the notorious "Dear Colleague" letters from the Education Department's Office for Civil Rights.

■ The Supreme Court recently issued its second unanimous decision in recent years rejecting the administration's denial of hearings to citizens caught in its impossibly expansive definition of "waters of the United States." This could embolden Congress to revisit the Clean Water Act and, even better, to guarantee citizens hearings before tribunals that are independent of prosecuting agencies.

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■ Another recent Supreme Court decision held that the EPA must take account of the costs as well as benefits of its pollution controls under a general "appropriate and necessary" statutory standard, and recent Court of Appeals decisions have applied similar reasoning to certain SEC rules. The decisions point the way to a general statutory requirement that agency benefit-cost assessments be subject to judicial review.

■ Strong legal and constitutional challenges are underway to key features of Obamacare, Dodd-Frank, and the EPA's Clean Power Plan and have produced some promising preliminary decisions. Further successes would strengthen Congress's hand in these momentous instances of executive unilateralism, and might even prompt a movement away from congressional over-delegation.

Measures such as these would be in the time-honored political tradition, going back to the Declaration of Independence and Magna Carta, of taking concrete abuses as the occasion for instigating broader reform. In seizing the opportunities as they arise, we should keep in mind that the ultimate goal is to correct the pathologies of concentrated executive power and to make our system of specialized, pertinacious lawmaking more representative, moderate, and respectful of the problem-solving strengths of private society. And that will take something more: a great reawakening in Congress itself that leads to more vigorous legislating and a more auspicious balance of the powers of making and administering our laws. ♦