

## *The Contemporary Presidency* The Obama Administrative Presidency: Some Late-Term Patterns

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*President Obama's iteration of the administrative presidency, as his term ended, used both extant tools and stressed new ones. This essay centers on three themes: (1) the array of managerial directives used, as a caution against simply counting executive orders to measure Obama's administrative efforts; (2) the central role of statutory interpretation to find power in extant law to justify presidential preferences in areas such as health care, environmental protection, and immigration, with mixed results in the courtroom and thus on the ground; and (3) the aggressive—and far less challenged—use of that same tool in foreign policy and the war powers. In each area the Obama administrative presidency will bequeath useful precedent to his successors.*

In the lengthening shadow of the administrative state, Richard Nathan (1986, 82) wrote of an “administrative presidency”—necessitated by the fact that “in a complex, technologically advanced society in which the role of government is pervasive, much of what we would define as policymaking is done through the execution of laws in the management process.” Two decades years later, one-time White House policy adviser and future Supreme Court Justice Elena Kagan would observe (2001, 2385) that “by the close of Clinton’s presidency, a fundamental . . . transformation had occurred in the institutional relationship between the administrative agencies and the Executive Office of the President.” The new relationship was one that involved using a multitude of executive management tools to enhance presidential control of the bureaucracy—in Kagan’s phrase, to create “presidential administration.”

Another 15 years have passed, but the dynamics Kagan described remain key to understanding presidential behavior. She wrote that Clinton acted to expand executive management of the bureaucracy because he was “faced for most of his time in office with a hostile Congress but eager to show progress on domestic issues” (Kagan 2001, 2248), nor was he less aggressive in his use of unilateral tools in foreign policy too (Hendrickson 2002). This motivation rings equally true and perhaps even louder for the Obama administration—and probably its successors—given increasing levels of partisan polarization. Hence, Obama’s 2011 cry that “we can’t wait” for “an increasingly dysfunctional

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Congress to do its job.” Hence his fealty to utilizing his “pen and phone” during a “year of action.” As the president declared in early 2014, “I can use that pen to sign executive orders . . . and take executive actions and administrative actions that move the ball forward” (Obama 2011b; 2014a; and see Lowande and Milkis 2014).

As the Obama years come to a close, where is that ball? This essay provides a brief, relatively informal overview of the late-term patterns of the Obama administrative presidency. What follows has its inspiration in a series of blog posts written originally for The Monkey Cage blog on the *Washington Post* website.<sup>1</sup> Because such pieces are built to react to current events, reviewing them helps highlight trends in presidential behavior. In this case three related themes stand out. The first is the range of tools available to an administrative president. Obama’s tactical application of managerial strategy has centered not on executive orders per se, despite misleading commentary to the contrary both outside and inside the administration, but on the wider range of “executive actions and administrative actions” noted above.

The second is the frequent use of administrative statutory interpretation to drive these actions, whether by producing legal opinions, issuing guidance documents, or more formal rulemaking. When new laws could not be passed, old laws were given new interpretations. The Obama administration was keen to stress its fidelity to statute, in contrast to the Bush administration’s emphasis on presidential prerogative, especially as amplified in wartime (Savage 2015). But that only made the interpretation of that statute all the more important.

The actions that the Obama team’s interpretations justified were frequently contested by Congress and in the courts, with mixed outcomes. But this was less true in the third thematic case, which centers on the administration’s claims about the expansive scope of the 2001 Authorization for the Use of Military Force (AUMF) and the contrastingly narrow application of the 1973 War Powers Resolution (WPR). Here, Obama was given much more leeway, at some cost to the powers and duties of Congress.

## Defining the Administrative Presidency: Actions, Not Orders

It is common for journalists, politicians, and sometimes even scholars to call any sort of presidential directive an “executive order.” The Obama administration serves as a salutary reminder that this conflation can be problematic.

The president’s promised “year of action” was met with angry charges that he was overstepping his authority. The White House and its allies responded that far from abusing his power, Obama was doing much less than most presidents had. White House Senior Advisor Dan Pfeiffer stressed that Obama was “issuing executive orders at the lowest rate in 100 years,” a statistic Obama himself cited in a subsequent press conference (Bell 2014; Obama 2014b). In November 2014 the president added that “I have issued fewer executive actions than most of my predecessors, by a longshot. . . . [T]ake a look at

1. See <https://www.washingtonpost.com/news/monkey-cage/>

the track records of the modern presidency, I've actually been very restrained" (Obama 2014e).

Obama's use of the word "actions" instead of "orders" in November seems to have been off script. For it was true that as of mid-2016, he had issued fewer executive orders—both in absolute terms, and on an order-per-year basis, than most of his recent predecessors. Obama peaked at 39 orders, in 2009 and 2012, with a low of just 20 in 2013. With exactly seven months to go in his term (through June 20, 2016), he had issued 240 executive orders in all, for an average of 32.4 per year to that point.<sup>2</sup> That compared to 47.6 executive orders per year under Ronald Reagan and 45.5 per year under Bill Clinton.

But even those administrations represented a decline in order issuance beginning in the 1950s. Before that, Franklin Roosevelt issued nearly 300 orders per year (some 3,500 overall), and Harry Truman more than 100, many of them linked to wartime and postwar administrative policies. From Dwight Eisenhower to Jimmy Carter, the figure dropped to about 60 to 80 orders per year. And no president since has issued an annual average of more than 50. George H. W. Bush issued just over 40 per year, and George W. Bush—no shrinking violet in the administrative realm—only 36.4.

Executive orders are certainly a real measure of unilateralism, and they have been the basis of much important presidency scholarship (e.g., Howell 2003; Mayer 2001; Warber 2006). They can be a vehicle for important substantive change—as with Obama's expansion of protections for the employees of federal contractors, seeking to restrict government procurement dollars to companies who agreed to pay a higher minimum wage, ban discrimination on the basis of sexual orientation and identity, provide paid sick leave, and tighten compliance with laws mandating "integrity and business ethics."<sup>3</sup>

But executive orders are one item of many in the administrative toolbox. They follow a standard intra-administration clearance sequence, must be grounded specifically in statute or constitutional authority and are normally published in the *Federal Register*. Where these constraints are inconvenient, another sort of directive may be utilized—for example, an executive memorandum, touted by Kagan (2001) as key to Clinton's tactics. As Cooper (2014, 169) argues, "memoranda can be used to make important and often unrecognized policy changes in ways that are unlikely to be traced or subjected to oversight." While Obama issued only 20 executive orders in 2013, that same year he issued 41 presidential memoranda to the heads of departments and agencies (Korte 2014; Lowande 2014).

Nor is that the president's only option: that tally does not include signing statements, statutory "findings," letters, and guidance documents and administrative orders technically issued by department heads but at the behest of the White House. A study by the Congressional Research Service lists more than 20 such managerial vehicles (Relyea 2008). And according to the Justice Department's Office of Legal Counsel (2000), "there

2. Calculated by the author from the Federal Register's on-line Executive Orders Disposition Tables index (<http://www.archives.gov/federal-register/executive-orders/disposition.html>), updated by the listing provided on the White House website (<https://www.whitehouse.gov/briefing-room/presidential-actions>).

3. Executive Orders 13658 (February 12, 2014), 13672 (July 21, 2014), 13673 (July 31, 2014), and 13706 (September 7, 2015).

is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is not styled as an executive order.”

To get a sense of the breadth of Obama’s unilateral options, consider a top-10 list of alleged presidential overreach populated with actions critiqued by both academics (e.g., Ackerman 2014; 2015; Bernstein 2015; Fisher 2012) and partisan opponents (e.g., Boehner 2014; Cruz 2014; Ryan 2016). A sampling of these will be discussed in more detail below, but a quick summary of each is enough to make the point:

1. *The use of American force* in Libya and, in aid of combating the so-called Islamic State in Iraq and Syria (ISIS), in those nations as well, without explicit congressional authorization. In Libya this was done as part of a NATO operation with humanitarian overtones; with regards to ISIS the administration has argued that the September 2001 AUMF extends to that conflict because ISIS can be seen as a successor organization to al-Qaeda.
2. *Targeted killing via drone warfare*, including that of American citizens abroad. Carried out by presidential directive, after administration legal opinions found killings of this sort part of warfare and not assassinations (Savage 2015; Shane 2015).
3. *Creative implementation of the Affordable Care Act*, for instance, over the Obama administration’s action to postpone the effective dates of certain mandates in the law. Some of the delays in question were achieved by what the Treasury called the exercise of its “longstanding administrative authority to grant transition relief when implementing new legislation,” others by rules changes announced by an administrative bulletin issued by the Centers for Medicaid and Medicare Services (Rudalevige 2016, 17–18).
4. *Waivers* to the provisions of laws such as the No Child Left Behind Act. These waivers were granted by the Secretary of Education under authority granted in turn by, well, the text of the No Child Left Behind Act (Rudalevige 2014, 47).
5. *Deferring deportations* of certain people not “lawfully present” in the United States. The two stages of this story (discussed in detail below) were carried out at presidential direction by the Secretary of Homeland Security via guidance documents implementing the Immigration and Nationality Act, as a means of setting priorities for the Department of Homeland Security (DHS) given insufficient resources to deport everyone eligible to be deported.
6. *Selective enforcement of other laws*, for instance, choosing not to use federal law to override state-level legalization of recreational marijuana. Early efforts to minimize potential conflict with Washington and Colorado drug laws, for example, flowed from the Department of Justice, which urged U.S. attorneys to “address the most significant threats in the most effective, consistent, and rational way” (Ingold 2013).
7. *Failing to enforce or defend the 1996 Defense of Marriage Act (DOMA)* in court. Once again an application of prosecutorial discretion, tied up in the long debate over the president’s role as constitutional arbiter. It was implemented by a presidential determination declaring his opinion that DOMA was unconstitutional, and conveyed to Congress by a letter from Justice.
8. *“Job-destroying environmental regulations”* (Boehner 2014) attacked as part of a “war on coal” and economic growth generally. These regulations flow from the authority delegated to the Environmental Protection Agency (EPA) by the Clean Air Act, as amended, and the Supreme Court’s interpretation of same. As discussed in more detail below, not every proposed regulation is legal, but nearly every law bequeaths a regulatory process.

9. *The release of five Guantanamo Bay detainees* in exchange for the Taliban's release of U.S. Army Sergeant Bowe Bergdahl, without giving Congress the advance notice required in statute. Obama (2013) had issued a signing statement doubting the constitutionality of the provision requiring notice, but the administration later said it did not believe the statute applied to the particular circumstances of the Bergdahl deal.
10. *Gun control measures* announced in January 2016 after a mass shooting in San Bernardino, California. These consisted of a mix of departmental actions and exhortations to enforce existing law, including guidance from the Bureau of Alcohol, Tobacco, Firearms, and Explosives aiming to increase the number of gun sellers required to have federal licenses and a presidential memorandum to the Departments of Justice and Defense and the DHS asking them to study the potential for "smart gun technology" preventing the unauthorized use of firearms (Obama 2016a).

When the gun control package was announced, former Florida governor Jeb Bush, then a candidate for president, tweeted that "I'll repeal his executive orders and protect 2<sup>nd</sup> amend[ment]." In a July 2014 op-ed then-Speaker of the House John Boehner (R-OH) observed that "every president issues executive orders." But he added: "most of them . . . do so within the law," noting waivers, environmental regulations, and the Bergdahl swap as Obama examples to the contrary. As just detailed, none of these top 10 initiatives, whatever their merits, involved a single executive order.

One lesson of the Obama administrative presidency for scholars, then, is to be careful about the terms we use in assessing what that now includes. If we use "executive order" as a catchall—by contrast Dodds (2013) suggests "unilateral presidential directives"—we may miss evidence bearing on self-interested claims regarding the use of executive authority. Research will need to determine whether Obama has expanded the scale of unilateralism as compared to his predecessors. But thanks to their wide-ranging administrative creativity, plus his own, we know he had plenty of ways to do so.

## Old Laws, New Meanings: The Centrality of Statutory Interpretation

Martha Derthick once observed that "much of the activity of American policymaking consists of attempts not to pass new laws but to invest old ones with new meanings" (2011, 56). She was writing about the Food and Drug Administration's efforts to regulate cigarettes under President Bill Clinton—but her observation sums up much of the Obama administration's late-term policy agenda.

Who gets to decide what a statute means? "Congress" is usually the first answer, of course, but statutory language is often inexact, for reasons both of choice and chance. Complicated issues spawn complicated statutes; circumstances change rapidly; and in a federalist system a one-size-fits-all mandate may be problematic. Ambiguous language that can be sold in different ways to different constituencies may also ease the passage of law in the first place, no small thing.

All this tends to give the executive branch more discretion, especially as the federal government has grown in size and policy scope. As Alexander Hamilton observed in his

first *Pacificus* letter in 1793, “he who is to execute the laws must first judge for himself of their meaning.” Not surprisingly, presidents tend to find that meaning in line with their own preferences. And because in Newtonian fashion, statutes once in place tend to remain in place, presidents obtain aggregating authority to act over time. The power to conserve land via its designation as a “national monument” came from a 1906 law; Obama’s push to increase the minimum wage and overtime pay in 2014 though federal procurement policy rested on authority granted to presidents back in 1938.

Obama’s efforts in priority policy arenas such as health care, the environment, and immigration—based on one new law and two old ones—owed a lot to his administration’s interpretations of past imprecision.

In each case, Congress played only a small role in the present day, because of its polarized inability to act—either to pass new law or to push back against presidential unilateralism. In each case, then, the key venue for challenging Obama was the courtroom. This period was a strong endorsement of Melnick’s (1994, 7) observation that “it would be difficult to find a domestic policy area in which statutory interpretation by the federal courts has not played a significant role in shaping the activities of government.”

In the 2015 case dealing with the Affordable Care Act (ACA), *King v. Burwell*, the Supreme Court did this even more directly than might have been expected.

Unlike the ACA’s first judicial audition in *NFIB v. Sebelius* (2010), where a split Court upheld the law’s individual mandate as within Congress’s power to tax, *King v. Burwell* dealt not with interpreting the Constitution but about how to read a statute. The ACA, thanks in part to its tortured legislative process at best suffered (as the majority opinion gently put it) from “inartful drafting.”

The key issue in *King v. Burwell* was whether the tax credits available under the law could be given to people purchasing their insurance from a health care “exchange” established by the federal government or only, as one section of the law seemed to state, to those purchasing coverage from an exchange run by one of the states. That section, some said, was an elaborate typographical error (Pear 2015). But it became a crucial issue when two dozen or so states refused to set up their own exchanges, forcing the federal government to step in.

The administration came into the fray with some advantages, or so it must have thought. Following the 1984 *Chevron* case, the Supreme Court has preached judicial deference to an executive branch department or agency’s interpretation of a vague law, assuming that interpretation is on reasonable grounds. The *Chevron* majority claimed that “the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies.”<sup>4</sup>

The case laid out three steps for courts to follow, namely:

1. To ask, is the meaning of the law clear, or ambiguous?
2. If ambiguous, did the agency come up with a “permissible” or “reasonable” interpretation of what it might mean?

4. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

3. If yes, to let the agency interpretation stand, even if it is not the interpretation the judges themselves think is ideal. That is, “When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”

Following this logic, the Fourth Circuit Court of Appeals ruled in favor of the government. That is, the court decided that the language was ambiguous, that the agency (here, the Internal Revenue Service [IRS]) had come up with a reasonable interpretation and that, therefore, the tax credits for users of federal exchanges could remain. But following the same process, the D.C. Circuit Court of Appeals came up with the opposite result. It decided instead that the law was unambiguous—as Justice Antonin Scalia later put it, “so obvious there would hardly be a need for the Supreme Court to hear a case about it”—and that the tax credits were therefore invalid.

Yet when the case reached the Supreme Court, the majority ditched the *Chevron* framework and decided to do the interpreting itself. *Chevron*, they argued, is based on Congress delegating discretionary authority to a knowledgeable agency to make choices about how the law works. But the tax credit program was too central to the working of the law for such delegation to be assumed; “had Congress wished to assign that question to an agency, it surely would have done so expressly,” Chief Justice John Roberts wrote for the majority. And the IRS could not in any case be expected to be expert in health insurance and its workings, the usual reason for deference. “This is not a case for the IRS,” Roberts argued. “It is instead our task to determine the correct reading of Section 36B.”

Having done so, the Court found the notion of an exchange “established by the State” was indeed ambiguous when taken in the context of the law as a whole. Otherwise, the health care marketplace governed by the law, and really the point of the law, would collapse in a “death spiral”—something Congress could not have meant to do. Thus, while a close call, the key section “can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.” The law had a certain architecture overall, and the section in question could be read to support that architecture rather than to knock it down.

Justice Scalia’s instantly famous dissent in *King* accused his colleagues of stupidity, judicial malpractice, and even “jiggery-pokery.” But he was happier with the outcome of *Michigan v. Environmental Protection Agency* a few days later. *Michigan* overturned the EPA’s efforts to regulate power plants, one of a series of administration attempts to tighten regulation of greenhouse gas emissions. Democrats had pushed “cap and trade” emissions legislation in the 111th Congress, but failed to win Senate approval; its chances shifted from slim to none in the aftermath of growing Republican majorities in both chambers. Obama moved ahead instead with a Clean Power Plan based on an EPA-empowering reading of the Clean Air Act, springing from an expansive reading of the Clean Air Act enabled by the Supreme Court’s 2007 decision in *Massachusetts v. EPA*.

In the *Michigan* case, *Chevron* was directly utilized. Scalia noted that “*Chevron* directs courts to accept an agency’s reasonable resolution of an ambiguity in a statute that the agency administers.” Justice Elena Kagan agreed: “judges may interfere only if the

agency's way of ordering its regulatory process is unreasonable—i.e., something Congress would never have allowed.” However, this was the only point of overlap in their opinions, because they disagreed entirely on what constituted a “reasonable” interpretation of the Clean Air Act. The majority said that EPA was indeed allowed under the law to regulate certain power plants if that regulation is “appropriate and necessary.” However, when the EPA decided to regulate, it did not take the potential costs of such regulation into consideration. And while “there are undoubtedly settings in which the phrase ‘appropriate and necessary’ does not encompass cost,” Scalia wrote, “. . .this is not one of them.” He accused the agency of “interpretive gerrymanders” that “keep parts of statutory context it likes while throwing away parts it does not.”

Kagan and the dissenters argued instead that it was perfectly “appropriate” to begin the regulatory process, knowing that future development of the rule would and did involve the cost–benefit analysis the Court demanded in *Michigan*. They complained of judicial “micromanagement” that “ignores everything but one thing EPA did.”

Somewhere in between came another case that was generally a win for the administration and EPA (again, dealing with the regulation of greenhouse gas emissions) but contained a cautionary guide to administrative statutory interpretation. In May 2010, Obama sent a memorandum to four agency heads, directing (technically, “requesting”) them to tighten greenhouse gas and fuel efficiency standards such that “coordinated steps . . . produce a new generation of clean vehicles.” One result came in March 2014, when the EPA announced new rules that would reduce sulfur in gasoline and drive changes in both automotive and oil refinery technology. The rule-writing project also resulted in 2012 and 2014 draft rules aiming to extend Clean Air Act authority to existing power plants, especially those fueled by coal, and to limit greenhouse gases produced by new development (Davenport and Harris 2015). Because even agency attorneys suggested “the legal interpretation is challenging” (Davenport 2014), it was not surprising that a collation of lawsuits over these issues wound up before the Supreme Court in 2014 as *Utility Air Regulatory Group (UARG) v. EPA*.

The Court wound up largely upholding the EPA's substantive position, noting that “Congress's profligate use of [the phrase] ‘air pollutant’ is not conducive to clarity.” However, the justices went on to clarify some administrative boundaries. In its regulations, the EPA had sought to change the threshold for regulating carbon emissions produced by new development. The Clean Air Act states this should occur when a facility generates more than 250 tons of a given pollutant—but that is a tiny amount when it comes to greenhouse gases. To avoid an “absurd result,” the EPA's regulation raised the limit for carbon pollutants to 75,000 tons per year.

This meant less rather than more agency oversight of industry, but as a result (as one opposing legal brief argued) of “amending [and] disregarding specific, unambiguous statutory text.” The Court agreed. Indeed, in oral argument, one justice mused: “the solution that EPA came up with actually seems to give it complete discretion to do whatever it wants, whenever it wants.” That this came from the author of “Presidential Administration” did not bode well for the president's position. As Justice Scalia later put the point in the decision, “An agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”

The question of executive discretion arose again in what was perhaps the most controversial second-term claim of executive authority, Obama's announcement of administrative action on immigration in November 2014. In June 2012, the president had set out a program of Deferred Action for Childhood Arrivals (DACA), which aimed to protect about 1.2 million people in the country illegally from deportation. This group consisted of young people who had been brought to the United States before they were 16 and who were high school students or graduates or had served in the armed forces and had no criminal record. This was criticized as a unilateral implementation of the so-called DREAM Act, which had failed to pass Congress; but its beneficiaries were a sympathetic group and one that for legal purposes was clearly defined (Chen 2016).

After Obama's reelection, most observers thought action on immigration would move to the legislative arena; after all, the Republican National Committee's self-study after the 2012 election argued that "we must embrace and champion comprehensive immigration reform" in order to broaden the party's appeal to minority voters (Barbour et al. 2013, 9). But this did not occur. In response, on November 20, 2014, Obama took to the national airwaves to announce he was acting to greatly expand his earlier initiatives. He proposed to make it easier for an additional 4 million (of perhaps 11 million) people living in the United States illegally to stay and to work. Saying that he wanted to deport "felons, not families," the president announced that he would extend and expand the DACA program, while creating another, larger variant called Deferred Action for Parents of Americans (DAPA). As with DACA, the upshot was that in certain circumstances, the deportation as many as 4 million parents of U.S. citizens would be deferred. In the meantime they would be able to work legally in the United States.

No executive orders were involved; and while Obama issued two presidential memoranda on the subject, telling the departments to figure out a better visa system and creating a White House Task Force on New Americans, these were largely tangential to the task. The burden of the change fell on the enforcement of the Immigration and Nationality Act (INA) by the DHS, and the Department of Justice advisory opinion on the action was addressed to the DHS rather than to the president. (Still, given Obama's ownership of the issue on national television, it is safe to say the DHS had not gone rogue.) The Secretary of Homeland Security issued guidance to law enforcement officials, reshaping their "removal priorities."

The immediate question, of course, was whether all this was legal. Did the INA allow so much prosecutorial discretion? Obama's directives did not change the law per se; rather, they set forth who was to be prosecuted (in this case deported) first, or rather last. The Justice Department's analysis focused on the INA's emphasis on keeping families together, allowing the president to argue that in so doing he was, in fact, faithfully executing the law. The numbers were big, but then so was the chasm between the law and the resources available to enforce it. And discretion in immigration cases had a strong jurisprudential pedigree—as recently as 2012, in *Arizona v. U.S.*, and as distantly as 1950's *Ex Rel. Knauff*. The administration took solace also in Justice William Rehnquist's claim in the 1985 case *Heckler v. Chaney*: "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."

Even so that prosecutorial discretion is something Congress can limit in law. But the polarized 114<sup>th</sup> Congress was not able to agree on a response to Obama's move. Instead, opponents of the president's agenda again turned to the judiciary. This time the attack was from below, as Texas Attorney General Ken Paxton brought suit on behalf of some two dozen states and state officials. They argued that the "brazen lawlessness" of the president's administrative actions actually changed the substance of the law, not making individual exceptions within prosecutorial discretion, but rather affirmatively bestowing new rights on large groups of people. A proxy battle resulted when sixteen states wound up filing briefs supporting the administration's initiatives. (The state of Maine managed to be on both sides—its governor opposed the program while its attorney general supported it.)

In February 2015, a district court judge in Texas imposed an injunction blocking the DAPA program, upheld in May by a three-judge panel of the Fifth Circuit Court of Appeals. Neither decision directly addressed the merits of the question—though the circuit court held that "the United States has not made a strong showing that it is likely to succeed on the merits"—but rather procedural concerns. Did the states have standing to sue over this policy (had they been harmed by it)? Was it okay to issue guidance documents, rather than issue new regulations under the Administrative Procedure Act (APA)?

The lower courts decided between them that the answers were "yes" and "no," and the program was suspended. In January 2016 the Supreme Court agreed to hear the administration's appeal of the case and asked the parties to answer those questions—but also whether the policy was legal and even whether it might violate the constitutional mandate that the president "faithfully" execute the law.

1. *Standing.* To show that it had the right to sue, Texas argued that it would incur costs in issuing drivers licenses to the newly nondeported (at \$130.89 per license, to be exact). This argument went back to a different part of *Massachusetts v. EPA*, which in allowing Massachusetts to sue said the states are "not normal litigants"—they have a lower burden of proof to get into court than an individual might. Relying on that precedent was, however, a bit ironic. In other contexts the plaintiffs had little love for *Massachusetts v. EPA*, because the states there were demanding more national regulation, not less.

The administration responded in a flurry of counterarguments. For one, it claimed, the DHS guidelines did not give any particular alien any particular rights, but only advice to immigration officials about how to use their existing discretion. Thus, there was nothing to sue about in the first place. Even if there was, states do not *have* to subsidize licenses and the like. They can change their law. (To this the states argued that even being pressured to change state law constituted an injury they could sue over.)

In any case, said the administration, immigration is a power reserved exclusively to the federal government by the Constitution. To allow states into court over incidental costs in such a case, this argument goes, would undermine the supremacy clause.

2. *Procedural requirements.* The second question centered on whether the DHS guidance was legally issued. The APA aimed to increase transparency and public input for regulations (Kerwin and Furlong 2010). Among other things, the APA requires a "notice and comment" process: the government must publish notice that proposed rulemaking is underway, then allow for public comment, and then respond to those comments as it writes a final rule.

The DHS, of course, did none of this—because in the administration’s view, none of its output constituted a regulation. As guidance, instead, DHS’s memo was to be applied to discretionary decisions made case by case within *existing* regulations.

But the states argued that was simply semantics—that in practice, the guidance documents changed the program itself, not just the cases within the program.

3. *The merits.* If the directives were properly issued, the question comes back (finally!) to the substantive merits of the case. Did the INA allow these new rules? The district court did not directly answer this, but Judge Andrew Hanen clearly thought the DHS had gone too far. So did the Fifth Circuit, which said the plan “would affirmatively confer ‘lawful presence’ and associated benefits” on a group not identified in current law.

On the other hand, the administration argued that it had no choice but to set priorities: Congress’s annual appropriation for dealing with “removable aliens” amounted to 3.5 percent of the amount needed to actually remove them. Given that fact, the president’s lawyers held, many presidents have acted in similar ways and courts have traditionally given presidents wide deference in such cases.

4. “*Whether the guidance violates the Take Care Clause of the Constitution, Article II, section 3.*” This question was added by the Supreme Court itself, and was something of a wild card. Concluding that Obama is guilty of violating the Constitution instead of simply overestimating his statutory authority would make for more dramatic headlines but the same practical outcome. Because the Constitution requires that the president “take care that the laws be faithfully executed,” if the DHS guidance does not “faithfully” follow the INA, the administration had already lost the case. Was the Court hoping to make a bold statement about when statutory misinterpretation bleeds into constitutional malfeasance? Or even to revisit the *Chevron* doctrine of judicial deference to administrative agencies in how they execute the law?

In any case that last question got little attention at the oral argument stage, which occurred in April 2016, two months after the sudden death of Justice Scalia left the Court with just eight members.

By contrast, the question of standing was central to the discussion, perhaps because a technical ruling on those grounds would be a conveniently nonsubstantive way for the divided court to temporarily dispose of the case.<sup>5</sup> Liberal justices had been eager to grant states standing in the 2007 climate change case noted above—but were rather less so here. Chief Justice Roberts, by contrast, dissented then that “relaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence,” but in the *Texas* arguments was pleased to treat the majority opinion as gospel. “We have an easily identifiable sovereign interest on who’s within our borders,” added Texas Solicitor General Scott Keller.

Much of the argument, as in the lower courts, centered on the costs Texas would incur by issuing drivers’ licenses to DAPA-protected individuals. “Isn’t losing money the classic case for standing?” Roberts asked. The liberal justices, by contrast, reasserted that Texas could change its law to avoid subsidizing its licenses. Justice Sonia Sotomayor asked Keller, “Can we give you standing just on the basis of you saying, ‘I’m going to do this when it

5. Presumably, someone else harmed by the program would bring suit later, but by then there would be a new president and, maybe, a full bench.

makes no sense?” She also argued that Texas could choose to avoid new costs by not hiring new licensing personnel, because customer service is so terrible at most motor vehicles departments that no one would notice if the DAPA population just got in the existing lines.

On the substantive side, things were equally divided. Justice Anthony Kennedy worried about “upside down” arguments that emphasized congressional acquiescence to past executive decisions. “What we’re doing,” he noted, “is defining the limits of discretion. And it seems to me that that is a legislative, not an executive act.” The administration argued the legislature had already acted—and given the DHS the discretion it needed.

Interestingly, despite the broad claim by Texas’s Keller that “DAPA is an unprecedented unlawful assertion of executive power,” the focus was *not* on whether the administration had the right to defer the deportation of such a large number of people. Rather, it was on what that deferral granted—such as the right to work. “They could do forbearance from removal,” Keller said. “But what they can’t do is grant authorization to be in the country” and therefore garner positive benefits. The House’s counsel added, “you’re not considered lawfully present just because the Executive is not actively pursuing removal proceedings against you.” Solicitor General Donald Verrilli argued that this interpretation would “completely and totally upend the administration of the immigration laws,” because “huge numbers” of people in the United States have the ability to work but no pathway to citizenship. Under questioning, Verrilli held that no one’s legal status was being changed—indeed, that “lawfully present does not mean you’re legally present.” Justice Samuel A. Alito Jr. wondered what this suggested for common sense or the English language. (Granted, as a Supreme Court justice, he is familiar with many abuses of common sense, and of the English language, for that matter.)

Observers wondered if the Court might split the difference here. If Texas and its allies were conceding that the president can choose not to deport someone, even 4 million someones, the resolution could be limited to restricting the grant of “lawful presence” and what that implies. That would leave the president dissatisfied, but the headline questions of presidential power unresolved.

But, in the end, the eight-person Court could not reach a decision. The holding, issued on June 23, 2016, was just one sentence long: “The judgment is affirmed by an equally divided Court.”

This meant the injunction issued by the district court, and upheld by the Fifth Circuit, remained in place. It meant the merits of the case remained undecided and would have to work their way through the system again, starting in Texas (where, granted, the district judge had made little secret of his disdain for the administration’s interpretation of the law). And it also meant that the future of the policy depended more keenly than most on the outcome of the presidential election in November, because Obama’s successor—and, presumably, Scalia’s—would be in place if the case made its way back to Washington.

## Room to Roam: Foreign Policy and the War Powers

On the other hand, the Court seemed happier to give ground on executive power in the realm of foreign policy.

Back in 2002, Congress passed a law allowing Americans born in Jerusalem to state on their passports that they were born in “Israel.” President George W. Bush objected in a signing statement that this provision bound the executive branch to a diplomatic position it did not hold—officially, U.S. policy is neutral on the provenance of Jerusalem—and should be under no obligation to assert. President Obama affirmed this position. Thus Menachem Zivotofsky (or his parents, given that he was born in 2002) sued to uphold the plain text of the statute. *Zivotofsky v. Rice* became *Zivotofsky v. Clinton* became *Zivotofsky v. Kerry* as the case dragged on. But the basic question remained, as Justice Anthony Kennedy put it, “whether the President has the exclusive power to grant formal recognition to a foreign sovereign” and whether Congress can force him to use that power in a certain way. In June 2015, the Supreme Court ruled “yes” and “no,” respectively: a win for presidential power.

Diplomatic recognition is closely tied to the express presidential power of “receiv[ing] ambassadors and other public ministers” and presidents feel that Congress has no business involving itself in this task. Indeed, those presidents argue, they are the “sole organ” of American foreign policy—a phrase they adore, stemming from the 1936 *Curtiss-Wright* case.

Yet this doctrine is drawn from an out-of-context snippet of a John Marshall speech—before he was on the Court himself—arguing mostly the opposite (Fisher 2007). Justice Scalia pointed out that “[o]ur cases say repeatedly that the president is the sole instrument of the United States for the *conduct* of foreign policy, but it doesn’t necessarily mean that the president determines everything in foreign policy” (emphasis added).<sup>6</sup> That is, in some areas Congress can and should call the tune that the presidential organ must play.

The Court held, though, that this was not one of those cases. The administration, via Solicitor General Verrilli, argued that the law “forces the Executive Branch to engage in diplomatic communications that contradict our official recognition position,” which Congress couldn’t do. And while the counsel for Zivotofsky argued that recognition itself could be congressionally dictated (“the law passed by Congress would trump the President”), Verrilli held that recognition “is an exclusive power with the President. Recognition is not lawmaking. It is an executive function.”

The Court endorsed this position, placing the recognition power somewhere near the pardon power as an unchecked and perhaps uncheckable presidential power. Justice Kennedy held that for the framers of the Constitution, receiving an ambassador was “tantamount to recognizing the sovereignty of the sending state” and because “the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. . . . [t]he formal act of recognition is an executive power that Congress may not qualify.” Requiring the president to recognize Jerusalem as part of Israel was such a qualification.

6. This was in *Zivotofsky v. Clinton*, 566 U.S. \_\_\_ (2011), an earlier iteration of the case hinging on whether this was a “political question” that the courts could not answer. The D.C. Circuit Court said it was, but the Supreme Court ruled 8-1 that it was not. So the case returned to the D.C. Circuit for decision on the merits, whence it returned to the Supreme Court as *Zivotofsky v. Kerry* in 2015.

On the other hand, the Court emphasized that, despite the “sole organ” language of *Curtiss-Wright*, that case “did not hold that the President is free from Congress’ lawmaking power in the field of international relations.” Indeed, “the Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.” There are even ways Congress could undermine in practice a president’s recognition of a given nation, through the budget power.

So, the bad news for Congress: this *was* a constitutional issue and one within the presidential toolbox. The good news: the congressional toolbox is plenty big too.

Still, at least during the Obama administration, it did not seem to encompass the war powers.

While a variety of issues could be raised here—Obama’s critics on the left frequently argued that he showed more continuity than change with George W. Bush’s policies regarding surveillance, detention, and the like—the key issue for present purposes returns to the aggressive use of statutory interpretation. In this case, the statutes of most interest are the WPR and the AUMF.

The U.S. intervention in Libya in 2011 has been analyzed in detail (e.g., Edelson 2013; Fisher 2012) and as a first-term initiative will not receive sustained attention here. However, it serves as a reminder that statutory interpretation is a product available through a market of sorts within an administration: a market for legal advice. The WPR’s vague language has proved problematic in enforcing it (Fisher and Adler 1998). Still, it envisions explicit congressional authorization for any U.S. involvement in “hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,” and prohibits unauthorized involvement after a 60-day clock has expired. As the Libya operation approached that mark, the Obama administration needed to decide its course of action.

Its national security lawyers—a large and acronym-laden population (Koh 2010)—had diverging views on the legality of using the American military in Libya after those 60 days. Most (including the Office of Legal Counsel and the Pentagon) seemed to think that, at the very least, the “operational tempo” would have to be dialed back. In this scenario the United States would provide logistical support for NATO attacks but not carry them out. However, White House Counsel Robert Bauer, along with the State Department Legal Adviser Harold Koh, developed what Charlie Savage (2015, 645) termed “a very aggressive interpretation” of the WPR. They argued that the Libya operation did not constitute “hostilities” under the terms of the WPR. That phrase should be reserved, Obama (2011a) himself later said at a press conference, for wars on the scale of Vietnam. Legislative (nor legal) critics were not impressed with the logic, but Congress as a whole was too divided on the merits of the policy to take firm action regarding its legality.

The use of American force in Syria and Iraq against the so-called Islamic State (ISIS) met with another creative exegesis of statute but even less little political opposition—thanks in part to ISIS’s brutal tactics and efforts to spread the war well beyond the Levant though mass murders in Paris, Brussels, Beirut, and elsewhere. Neither the president nor congressional leaders seemed interested in reviving the war powers debate, though the extensive use of airstrikes and more limited use of ground forces again certainly seemed to constitute hostilities under the WPR. Obama, in an August 2014 letter to Congress, said

he was notifying legislators about his decisions, “consistent with” the WPR but not “pursuant to” it.

What legal authority governed the operation? Obama, unlike some of his predecessors, did not argue the WPR was unconstitutional—hence the administration’s legal gymnastics regarding Libya. But the law was an awkward fit for the ISIS case.

In the WPR, presidents are given authority to use force when there is (1) a declaration of war; (2) a specific statutory authorization; or (3) “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.” Options (1) and (2) are self-explanatory; but they did not apply to ISIS.

How about (3)? Presidential uses of force without those authorizations have tended to fall into one or both of two categories: cases of self-defense (even if imaginatively defined) and/or cases with wide multilateral support. The first contains examples such as the (failed) rescue attempt of the American hostages in Iran in 1980 or the 1998 missile strikes after the African embassy bombings and also instances where presidents were more generous in their interpretation of “attack upon the United States.” (For instance, the 1989 invasion of Panama was explained by President Bush as a response to “reckless threats and attacks upon Americans in Panama [that] created an imminent danger to the 35,000 American citizens” there.)

The second category requires a cause of action endorsed by the international community, normally with a humanitarian component. In the 1983 Grenada operation, Reagan combined arguments for the safety of American students there with the fact that the United States had been invited to respond, that it was doing so in concert with other nations in the region, and that “this collective action has been forced on us by events that have no precedent in the eastern Caribbean and no place in any civilized society.” In Somalia (1992), Kosovo (1999), and in Libya, one could cite both humanitarian concerns and treaty obligations (e.g., to the United Nations or NATO). While the WPR specifically rules out inferring authority to use force from treaties, they do muddy the waters.

Obama’s early arguments regarding ISIS feinted toward both categories but did not, in the end, try very hard to establish the facts of a “national emergency.” The president said the mission focused on the Mosul Dam, whose breach “could threaten the lives of large numbers of civilians, endanger U.S. personnel and facilities, including the U.S. Embassy in Baghdad, and prevent the Iraqi government from providing critical services to the Iraqi populace.” But his general argument at the time was a grab-bag: that “these actions. . . are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. These actions are being undertaken in coordination with the Iraqi government.”

A month later, in September 2014, Obama clarified that he did not need congressional authorization to expand air attacks on the Islamic State in Iraq or even to extend them to Syria. “I’m confident that I have the authorization that I need to protect the American people,” he told NBC’s *Meet the Press* on Sunday (Obama 2014c). The *Washington Post* reported that “the White House’s belief that it has authority to act is based on the reports Obama has filed with Congress under the War Powers Act (sic) and the earlier congressional authorization for the war in Iraq” (Eilperin and Nakamura 2014).

But neither rationale was very convincing. As noted above, the Obama administration had not actually filed any reports directly under the WPR, only letters intended to keep Congress “fully informed.” In each letter Obama claimed to be acting “pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.” Likewise the authorization to use force in Iraq passed in 2002 (P.L. 107-243) stated that the president could “defend the national security of the United States against the continuing threat posed by Iraq” and enforce all relevant United Nations Security Council resolutions regarding Iraq. Thus it was for the use of force *against* (the state of) Iraq, rather than *in* Iraq. The Security Council resolutions referred to dealt with weapons of mass destruction, with “repression of its civilian population,” and with “threatening its neighbors.” ISIS was doing some of those things, but Iraq itself was not; indeed, the threat to the United States from Iraq’s government seemed to be from the latter’s incompetence. Potential attacks within Syria’s borders seemed even more removed from the authorization’s intent.

Thus the Obama administration soon argued that its authority to conduct the ISIS war lay in neither the WPR nor the Iraq resolution but came from behind Door #3: the 2001 AUMF (P.L. 107-40). As White House press secretary Josh Earnest (2015) later framed it, “The answer simply is that Congress, in 2001, did give the executive branch authorization to take this action, and there’s no debating that.”

The AUMF, passed three days after the 9/11 attacks, says that

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

This is of course very broad language: it allows the president to determine not only what counts as “necessary and appropriate force” but also whom to use it on—including anyone who might have “aided” the 9/11 attackers—with the goal of preventing *any* future terrorist attacks. Even so, it is linked explicitly to the 9/11 attacks, and thus to al-Qaeda. Al-Qaeda, in turn, is not ISIL.

Or is it? The administration argued that the connection was good enough for government work. Press Secretary Earnest briefed:

So it is the view of the . . . Obama administration that the 2001 AUMF continues to apply to ISIL because of their decade-long relationship with Al Qaida, their continuing ties to Al Qaida; because of their—they have continued to employ the kind of heinous tactics that they previously employed when their name was Al Qaida in Iraq. And finally, because they continue to have the same kind of . . . aspiration that they articulated under their previous name. (Dennis 2014)

Stephen Preston, the Pentagon’s general counsel, put it this way in April 2015: “the name may have changed, but the group . . . has been an enemy of the United States within the scope of the 2001 AUMF continuously since at least 2004.”

This legal interpretation did not receive stellar external reviews; Jack Goldsmith (2014), who headed the Office of Legal Counsel for part of the Bush 43 administration, called it “presidential unilateralism masquerading as implausible statutory interpretation.” That ISIL used consistently “heinous tactics” was true, but did not, unfortunately, make them unique. The clearest critique of the chosen rationale was that ISIS was not in itself associated with the 9/11 attacks, because it did not exist in 2001; it had broken rather firmly with al-Qaeda, which had repudiated its even-more-evil twin. Thus it was not an “associated force” even under the administration’s earlier definition of that term. As Benjamin Wittes (2014) put it, “‘associated’ does not mean ‘not associated’ or ‘repudiated by’ or ‘broken with’ or even ‘used to be associated with.’” Robert Chesney (2014) asked, “If a *past* nexus is now all that is required. . . [w]ill we later hear of the AUMF applying to associated forces of this successor force?” That is, do splinter groups from ISIS count? Groups that splinter from the splinter groups?

There is, in short, a “six degrees of separation” problem with the rationale. Using the logic of the game that ties Kevin Bacon to every other actor in the world, one could probably discover al-Qaeda connections to most current and future actors with evil intent against the United States. Indeed, the administration argued that the March 2016 airstrikes that killed about 150 al-Shabab militants in Somalia were also authorized by the same law, as was a campaign against ISIS in Surt, Libya, beginning in August of that year (Savage 2016a; Cooper 2016). A June 2016 “supplemental consolidated report” to Congress listed operations in Afghanistan, Iraq, Syria, Yemen, Somalia, Djibouti, and Libya as part of the AUMF umbrella (Obama 2016b).

Fun as a parlor game, this is rather more serious as a matter of checks and balances. Consider Abraham Lincoln’s discussion of the Mexican War in an 1848 letter to his former law partner: “Allow the president to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you allow him to do so, whenever he may choose to say he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect, after you have given him so much as you propose.”

Yet as the Obama term wound down, Congress showed little inclination to get involved. The ISIS attacks in Paris in November 2015 and in Brussels in March 2016—and the alleged allegiance of American murderers in California and Florida to the group—prompted both bellicose rhetoric and the use of special forces as “advisers” on the ground in Syria and Iraq. They did not prompt Congress, however, to deliberate matters of war and peace.

In February 2015 President Obama did send Congress a new draft AUMF to cover the ISIS war. Obama’s version would have repealed the 2002 Iraq authorization AUMF but kept the 2001 version in place. It provided for a three-year window in which the president was authorized “to use the Armed Forces of the United States as the President determines to be necessary and appropriate against ISIL or associated persons or forces,” though it did not allow for the use of American troops in “enduring offensive ground combat operations” and expired after three years.

Congressional doves thought this too strong, while hawks thought it too restrictive, and the draft itself received no serious legislative consideration. Neither did other

versions, some of which were more restrictive and others less so. Rep. Jim McGovern did manage to force a roll call on the blunt question of withdrawing forces from Syria and Iraq altogether; this was rejected, with 288 members voting against withdrawal. Senate Foreign Relations chair Bob Corker, among others, agreed that “I believe the administration has the authorities to do what they’re doing against ISIS.” Senate minority leader Harry Reid had a more faith-based approach: “I don’t believe in AUMFs” (Everett 2015). His colleagues seemed to share his existential doubts.

Into this vacuum, the American commitment kept ramping up. The administration promised to avoid “boots on the ground”—but despite their inadequate footwear, special ops advisers numbered several hundred by the spring of 2016 and were very much on the front lines. In early May, a Navy SEAL was killed in fighting near Erbil, Iraq. “It is a combat death, of course,” at least the third of the operation, noted Defense Secretary Ash Carter (Calamur 2016).

Which brought the story back to a familiar place: the courtroom. In May 2016, Army Captain Nathan Smith filed a lawsuit asking a U.S. District Court to declare that “President Obama’s war against ISIS is illegal because Congress has not authorized it” (Savage 2016b). He argued that the WPR’s requirements have not been met and that as far back as the 1804 case *Little v. Barreme* the judiciary has required that presidential orders be “strictly warranted by law.” The administration immediately moved that the case be dismissed. But if the courts hold that Smith has standing, the result could be the first direct judicial analysis of the scope of the WPR.

## The Obama Administrative Presidency

Barack Obama’s presidency began with large Democratic majorities in Congress and an ambitious legislative agenda. It ended with Republicans in charge of both chambers and renewed stress on the many tools of the administrative presidency. Indeed, Obama’s last year in office saw a flurry of new rulemaking, with an eye on thwarting the use of the regulatory veto provisions in the Congressional Review Act (Noah 2016).

These developments were of course not unrelated. Administrative tactics took pride of place partly as a substantive end run around legislative gridlock. In the *King v. Burwell* oral arguments, the solicitor general was asked why legislators couldn’t simply fix the problem, if it stemmed from a simple drafting error. He replied, to knowing laughter, “*this* Congress?” Obama was oft accused of poisoning the well of bipartisanship in his second-term Congresses—but his evident take was that everything in that well was already dead. As Obama (2014d) put it in his immigration address, almost as a taunt, “to those members of Congress who question my authority. . . , or question the wisdom of me acting. . . , I have one answer: Pass a bill.”

But Congress’s ability to do that was limited, as Obama well knew, and in any case would take place in an altered political and substantive environment. Alexander Hamilton wrote (as Pacificus) that “the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions. . . .” That “antecedent state” is not impossible to undo but comes with its own new

constraints. In these cases, if Congress doesn't act, the president wins. If it does, she might still win. This is one reason William Howell (2013) argues that presidents are almost always better off politically when they take decisive action, even if that action is not obviously legal.

Still, there was another common answer to Obama's challenge: Go to court. The jurisprudence of the Obama administrative agenda—in immigration, the environment, and health care—suggested the many actors, from industry groups to state-level politicians, with a chance to have a say in the success of that agenda's implementation. One upshot was to reinforce James Q. Wilson's classic observation (1989, 299) that American politics is a bar fight. (Or perhaps, when applied to the courts, a fight at the bar?) As soon as a policy is issued, the winning side declares victory and seeks to move on. But its opponents do not have to await a scheduled rematch. They simply move to a new venue in hopes of undermining it. And there are many such venues—with no real bounds on participation, tactics or weaponry. Indeed, new combatants with new energies are pulled in as the fight spills into the surrounding streets (or states). By the end of his term, however much he liked the eponymous musical, Obama probably did not agree with Alexander Hamilton's assessment of the courts as "the least dangerous branch."

A different constraint on unilateralism was self-imposed. The Obama White House stressed that it differed from its predecessors, notably George W. Bush, in forswearing claims to inherent presidential powers and basing its claims on statutory authority. Doing so was made easier by various extensions of that authority in controversial areas—for example, through the Military Commissions Acts, the FISA Amendments Act, and the reauthorizations of the Patriot Act. But it did seem to represent a good faith shift in philosophy as well. While Obama promised in an early executive order to close the Guantanamo Bay detention facility, for instance, he abided by a series of congressional budget riders preventing that outcome.

Still, scholars will have plenty to consider in the Obama's iteration of the administrative presidency, which learned from its predecessors and will grant its own precedents to presidents to come. As noted above, we will have to broaden our gaze to include not just executive orders but the wide range of managerial tools available to presidents. We will have to consider how the courts fill the vacuum of congressional inaction—or, in the case of the war powers, don't. And we will have to analyze how presidents deploy their lawyers to conduct statutory interpretation, because finding authority in extant law can be a matter of reading it anew. Obama's legal team has shown great talent in crafting opinions to justify the president's preferences.

That is hardly unique to Obama. But it does raise a key question: whether there is any practical difference between claiming the right to act as a matter of prerogative power and claiming the blessing of statutory authority, if statute can be read to support doing pretty much anything the president wants to do. In the prisoner swap for Sgt. Bergdhal, for instance, the White House decided that the requirement to notify Congress in advance—part of the 2014 National Defense Authorization Act—could not have been what Congress meant to write. "We believe it is fair to conclude that Congress did not intend that the Administration would be barred from taking the action it did in these circumstances," explained a spokesperson for the National Security Council

(2014). If this is not a prerogative claim it is at least its doppelganger. If that too becomes precedent the future of the administrative presidency may be worryingly unbounded.

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