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Gene Healy: Power by executive order

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"Stroke of the pen, law of the land – kinda cool" – that's how Paul Begala described rule by executive order back in 1998, as his boss President Clinton prepared a passel of them, the better to bypass an uncooperative Congress.

After last Tuesday's "shellacking," it's a fair bet President Obama will find rule by decree kinda cool as well. A recent report from the American Prospect argues "President Obama's own executive power is a key to creating jobs at higher wages," and he should reshape federal contracting to promote unionization and the "living wage."

Such ideas likely sound increasingly appealing to the embattled president. Even when his party controlled Congress, Obama relished the chance to proclaim "make it so!" such as summarily firing GM's CEO, handing Chrysler over to the United Auto Workers, and, without any legal authority, strong-arming BP into putting \$20 billion in escrow.

Obama "revels in power," former Newsweek editor Jon Meacham concluded after interviewing him last year. The modern executive order – which long ago slipped free of its constitutional moorings – will give Obama plenty to revel in.

An odd device, the EO, given that our Constitution gives lawmaking power to Congress alone. Presidents from George Washington to Abraham Lincoln issued fewer than 200 EOs, with those rarely affecting private rights.

Teddy Roosevelt – as obnoxious and authoritarian a personality as ever occupied 1600 Pennsylvania Avenue – issued more than 1,000 EOs, including one setting aside 16 million acres of public land just before Congress restricted his authority to do so, and another pushing a trendy "Simplified Spelling" scheme, wherein "kissed" would read "kist"; "enough," "enuf," etc. (Luckily, Congress beat back TR's attempt to assert presidential dominion over the English language.)

From TR on, the presidential ukase has been a favored tool of activist presidents. With EO 9066, Franklin Delano Roosevelt authorized the mass internment of more than 110,000 innocent Japanese-Americans. Truman's 1951 EO 10290 greatly expanded government secrecy, leading to massive abuses that are still being uncovered.

Nixon's EO 11615 imposed national wage and price controls. Via a secret executive order issued in 2002, George W. Bush helped lay the groundwork for our burgeoning national surveillance state, freeing the National Security Agency from the inconvenience of securing warrants before listening into Americans' international communications.

Even where executive orders affect citizens' rights less dramatically, they place vast power in one man's hands. Harvard's William G. Howell notes that "Presidents have unilaterally created a majority of the administrative agencies listed in the United States Government Manual."

John F. Kennedy begat the Peace Corps with the stroke of a pen (EO 10924), daring Congress to defund posts he had already filled. With various EOs, Bill Clinton banned certain assault weapons and

nationalized millions of acres of Western land. His successor created the Office of Faith-Based Initiatives (EO 13199) and restricted federal funding of stem-cell research (EO 13435).

Whatever you think of these policies, it would be kinda cool if our representatives got to vote on them before they became the law of the land. But, as Professor Howell explains, "when presidential command over the legislative process reaches its low point, presidents regularly strike out on their own, set vitally important public policies, and leave it up to Congress" to try to overturn them.

That turns the Constitution upside-down: The Framers carefully erected barriers to what James Madison called "the facility and excess of lawmaking." But when the executive legislates, those barriers stand in the way of repeal.

Senate Minority Leader Mitch McConnell, R-Ky., says the next two years will be about preventing Obama's re-election.

Instead of hoping 2012 brings a decider more to their liking, constitutionalists in Congress – there must be a few – should work on cutting the presidency down to size.

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