

Presidential Unilateral Power: An Examination About the Issuance of Executive Orders and Whether they Make the President Too Powerful

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Abstract

In the last century, the powers of the president have steadily increased in myriad ways. This is especially evident in the president's increasing reliance on his unilateral powers when it comes to fulfilling campaign promises, asserting executive authority during gridlock, reorganizing executive branch agencies, shaping and establishing policy, and responding to an emergency situation that requires immediate action, which often "bypasses" Congress in the legislative process. The topic of presidential unilateral powers is a complex one. In this study, I will be focusing on one prominent example: the issuance of executive orders and whether they foreseeably subvert the legislative process causing an irreparable imbalance in the Madisonian Model of Government. Do these unilateral powers disrupt the separation of powers and checks and balances put in place by the Constitution in order to make sure there is political equilibrium among the branches? Should we be concerned about the implications of these powers and why? While it is true that the execution of these powers has increased the influence and reach of the president, it is equally true that they have not made the president more powerful than they ought to be with the changing times. The constitutional principles of separation of powers, checks and balances, limited government, and judicial review, are all safeguards enshrined in the Constitution that prevent any branch from overextending its authority from what the Framers originally intended.

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But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others... Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.

James Madison, *Federalist No. 51*, 1788

...[W]henver presidents contemplate a unilateral action, they anticipate how Congress and the judiciary will respond. The limits to unilateral powers are critically defined by the capacity, and willingness, of Congress and the judiciary to overturn the president. Rarely will presidents issue a unilateral directive when they know that other branches of government will subsequently reverse it.

William G. Howell, *Power without Persuasion*, 2003

At the political beginnings of this country, the structure and the powers of the newly proposed federal government were strongly debated between the two prevailing political factions—the Anti-Federalists and the Federalists. The Articles of Confederation, the first governing document of the independent United States, proved to be highly ineffective for the growing needs of the fledgling nation. This first experiment in American democracy was largely a failure due to the Articles' myriad inherent weaknesses—for example, its lack of an executive branch with a unitary president who could enforce and execute the laws of the nation proved to be a major defect of the system. At the Constitutional Convention, Anti-Federalists and Federalists sought to address these weaknesses through continuous deliberation regarding the extent of power the newly proposed centralized government should have. For months, as evidenced in

James Madison's *Notes on the Debates in the Federal Convention*, delegates meticulously deliberated every conceivable aspect for forming a new government in order to replace the existing confederation. At the culmination of the Convention, a brand-new, more nationalistic Constitution, with three independent, but co-equal branches of government, was formed. All three branches were granted distinct powers and responsibilities. During the Constitutional Convention, delegates from both sides of the aisle vigorously debated the roles, duties, and powers of the president, culminating in the creation of the Executive Branch through Article II of the U.S. Constitution. However, the ratification of the Constitution did not curtail the numerous important debates and lingering questions about the powers of the presidency in the years to come; instead, it only intensified it. In the last century, the powers of the president have steadily increased in myriad ways. This is especially evident in the president's increasing reliance on his unilateral powers when it comes to fulfilling campaign promises, asserting executive authority during gridlock, reorganizing executive branch agencies, shaping and establishing policy, and responding to an emergency situation that requires immediate action, which often "bypasses" Congress in the legislative process.

Some of the unilateral powers the president has in his toolkit include: executive orders, proclamations, presidential memorandums, executive agreements, executive privilege, signing statements, and national security directives, among others. In each of the categories, the president's power has increased measurably, but not to the point where it has become detrimental to the balance of powers between the branches. Do these unilateral powers run contrary to what the Framers intended when creating the Executive Branch? Do they disrupt the separation of powers and checks and balances put in place by the Constitution in order to make sure there is political equilibrium among the branches? Should we be concerned about the implications of these powers and why? The topic of presidential unilateral powers is a vast and complex one. For the purpose of this study, I will be focusing on one prominent example: the issuance of executive orders and whether

they foreseeably subvert the legislative process causing an irreparable imbalance in the Madisonian Model of Government. While it is true that the execution of these powers has increased the influence and reach of the president, it is equally true that they have not made the president more powerful than they ought to be with the changing times. The constitutional principles of separation of powers, checks and balances, limited government, and judicial review, are all safeguards enshrined in the Constitution that prevent any branch from overextending its authority from what the Framers originally intended.

The U.S. Constitution does not explicitly mention the presidential power of the executive order, but rather it is implied. Article II, Section 3 notably states that the president “shall take Care that the Laws be faithfully executed.” For much of U.S. political history, this has largely meant that presidents bear the constitutional duty to responsibly carry out or enforce the laws of the U.S., particularly those passed by the Legislative Branch and deemed constitutional by the Supreme Court after a case is brought forward to them. These orders carry the same weight and effect as congressional laws. In order for an executive order to have this legal effect, it must derive its power from Article II or from a power delegated to the president from an act of Congress, which carries statutory backing (Graber 2021). Executive orders are usually classified into three categories: symbolic, routine, and significant (Fine and Warber 2012). For example, symbolic orders can be used to create medals for members of the military or to establish a seal for a new executive agency formed by the president (Fine and Warber 2012). Routine orders typically concern administrative or clerical tasks that pertain to the executive branch’s implementation of congressional laws. Both symbolic and routine orders tend to be less controversial than significant orders. As the name implies, “significant” executive orders are unilateral directives that can have a profound impact politically, economically, socially, etc. They are often employed to circumvent congressional gridlock or an obstructionist Congress during a divided government, which will be discussed at greater length later.

It is important to note that executive orders have been issued since George Washington, the “Precedent President,” and while varying in their use from administration to administration, they have increased in usage with the passage of time (Presidency Project 2023; Wilhelm 2019). The fact that executive orders have been issued since Washington demonstrates that this unilateral power is one that is based on historical and legal precedent spanning multiple administrations across time and space. Their issuance is not the problem, but “whether their implementation is consistent with statutory or constitutional requirements” (Graber 2021). The main thing that has changed about this “perfected art of going alone” approach is the fact that presidents have become increasingly reliant on them since the Great Depression (Howell 2003; Kiefer 1998). The issuance of this unilateral action became more transparent to all stakeholders in the 1930s. It was not until the Federal Register Act of 1936, that government agencies were required by law to register and publish their regulations in order to increase federal transparency across the whole spectrum. This act brought further attention to a previously overlooked topic by highlighting the inner workings of the executive branch. Moreover, in the modern era, the procedural requirements set forth for issuing these directives was codified in Executive Order 11,030 by President John F. Kennedy in 1962 (OFR 1962). This order laid out the path an executive order would need to take before it gets issued (e.g., the Director of the Office of Management and Budget (OMB) and the Office of Legal Counsel (OLC) reviewing it).

There are many mechanisms put in place to prevent the abuse of this power and the supposed obstruction of Congress via unilateral executive action. The separation of powers and checks and balances are constitutional bedrocks that prevent the abuse and executive overreach various critics have contended with when presidents employ these unilateral directives (for critics, see Branum 2002; Cooper 2002; Gaziano 2001; Olson and Woll 1998). Whenever the president issues an executive order that runs contrary to the laws of the land, the legal precedent of judicial review, established in *Marbury v. Madison* (1803),

can be invoked in order to declare these directives as being unconstitutional. Judicial review grants the Supreme Court the legal authority to strike down laws it interprets as being antithetical to the tenets of the Constitution. If a president ever overreaches the implementation of this unilateral power, it could be struck down with the ruling of the Supreme Court.

History supports this check on the president in order to ensure balance between the branches, which is most notably exemplified in the landmark Supreme Court case, *Youngstown Sheet & Tube Co. v. Sawyer* (1952). In 1952, the United Steelworkers of America planned a massive strike against the U.S. Steel Company for improving worker conditions and earning higher wages. However, President Harry S. Truman was concerned that the strikes could negatively affect the war effort in Korea because steel was an “indispensable component” for weapon production for the military (EO 10340 1952). In response to all of this, he took unilateral action to nationalize the steel industry in order to prevent any perceived disruptions in steel production. On April 9, 1952, Truman issued Executive Order 10340 to authorize this federal takeover. The steel companies challenged this order and the case eventually made its way to the Supreme Court.

In a 6-3 decision, the high court ruled that Truman lacked the constitutional authority to nationalize the steel companies and to seize private property for national security purposes. In the majority opinion, Justice Hugo Black wrote, “The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of this property as he did here. Nor is there any act of Congress that impliedly authorizes the exercise of such a power” (Justia 2023). Moreover, Justice Robert H. Jackson concurred with this opinion when he wrote, “In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker” (Justia 2023). In both of these instances, the Supreme Court ruled that Truman’s executive order lacked the legal authority because it did not have

legislative backing, but was rather reliant on a president's unilateral confiscation of property, which was not supported by the Constitution. This example illustrates that while the president's power of executive orders is powerful, it is not unlimited and it can be overturned by the high court's ruling through judicial review, subsequently ensuring a return to political equilibrium when such an occasion warrants it.

In the *Youngstown* case, Justice Robert Jackson helped establish a "tripartite scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority" (Graber 2021). These three steps include: 1. "When the President acts pursuant to an express or implied authorization of Congress." 2. "When the President acts in absence of either a congressional grant or denial of authority." and 3. "When the President takes measures incompatible with the expressed or implied will of Congress" (Justia 2023). When presidents abide by the first principle, Jackson argued that executive orders carry the greatest weight because they are acting as a mere extension of the Legislative Branch, which has given the executive impetus to act in certain emergency matters requiring immediate action. Some scholars refer to this phenomenon as a "soft prerogative" because the president combines this unilateral power "with legislation in order to develop a 'soft' prerogative that intermingles constitutional and statutory authority" (Pious 2009). A modern example of this principle in action is when President Donald J. Trump signed Executive Order 13,917, which invoked the Defense Production Act (DPA) of 1950 as a direct response to the COVID-19 Pandemic outbreak (EO 13917 2020). This executive order used the DPA, which is a federal law passed by Congress granting a president the authority needed in order to respond to crises such as supply chain shortages in food and other essential items.

When referencing his second principle in the concurring opinion of the *Youngstown* case, Justice Jackson famously wrote, "there is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which distribution is uncertain" (Justia

2023). To recap, the president's authority is at its highest when his actions fall in the first category, which are constitutionally supported and legitimized through acts of Congress. However, when there is uncertainty about invoking unilateral presidential action, or when there is silence on the matter, or when Congress simply has not taken a clear-cut position on the subject, then there exists a "zone of twilight" or a grey area between the two branches. Moreover, this second principle rests on an untested occurrence when there is little legal or historical precedent for a president to take unilateral action. In other words, there is some latitude, or a potential common middle ground, a "zone" where the president can theoretically use his unilateral powers and Congress can subsequently endorse it. Historically, this second principle can be illustrated by *United States v. Midwest Oil Company* (1910) Supreme Court case (Graber 2021). This case dealt with the president's authority to create reservations and make public withdrawals, even though no such power was explicitly granted to an executive. It also grappled with the fact that oil drilling had taken place on Native American land by large oil companies who did not ask the locals for permission to do so.

The constitutional question pertaining to *United States v. Midwest Oil Company* was: "Could the President have withdrawn from private acquisition what Congress had made free and open to occupation and purchase?" (LexisNexis 2023). The high court ruled in the affirmative that presidents do have this authority because it was based on historic and legal precedents, which did not have to rely on Congress' approval. The court stated: "The practice of the withdrawal of public lands... by the President without special authorization from Congress, after Congress has opened them to occupation, dates from an early period in the history of the government, and the power so exercised has never been repudiated by Congress..." This ruling is an archetypical example of presidential unilateral authority falling into Jackson's category of the "zone of twilight."

The *Youngstown* case illustrated the third principle because Truman's unilateral seizure of steel mills went beyond the scope of

executive authority vested by the Constitution. If this overreach was left unchecked, Jackson believed it would endanger the entire system of checks and balances. He wrote, “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its **lowest ebb** [emphasis added], for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling” (Justia 2023). Scholars have referred to this phenomenon as the “unitary president” theory or as a “hard prerogative” because the chief executive is taking unprecedented unilateral action in response to matters such as national security issues, terrorism, or military activities (Yoo 2006). In retrospect, when presidents’ unilateral actions fall in the third category, they are at their “lowest ebb” because they are not supported by constitutional precedent and thus become an overextension of executive power.

Other checks on the president’s ability to take unilateral action are term limits, new administrations’ revocations, and public pressure. In 1951, the 22nd Amendment was ratified, ensuring that president cannot serve more than two four-year terms in office. This is important because presidential actions can be subsequently revoked with incoming administrations from opposing parties. In fact, this is a very common practice. Moreover, executive orders often get amended, superseded, or completely revoked. These “checks” help illustrate the “transitory nature” of executive orders. For example, on January 17, 2017, Trump signed Executive Order 13769, commonly known as the “Travel Ban” or the “Muslim Ban” by its critics, in order to severally limit and ban refugee/immigrant entry into the U.S. from seven predominantly Muslim populated countries. Similar to the Truman directive aforementioned, this executive order used the premise of national security as a reason to warrant its implementation. This order lasted approximately 40 days after which it was superseded by Executive Order 13780, which updated the previous order by removing Iraq from the banned list of countries and it no longer

negatively impacted dual nationals and permanent legal residents as it did so in the previous unilateral directive.

This order was highly controversial across the political spectrum and it was immediately challenged in the courts and it eventually made its way up to the Supreme Court, illustrating the separation of powers and checks and balances at play. In *Trump v. Hawaii* (2018), the high court ruled in a 5-4 landmark decision that the president had exerted his prerogatives constitutionally, thereby upholding his executive authority in the review process. The high court argued that “The Proclamation is squarely within the scope of Presidential authority... [and b]y its plain language, §1182(f) [the Immigration and Nationality Act (INA)] grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings... that is well within executive authority” (Justia 2023). This is a prime example of Jackson’s first tripartite principle because the president was acting on an “implied authorization of Congress,” which was based on historical and legal precedent.

However, this court victory was short-lived. When President Joseph R. Biden assumed office on January 20, 2021, he immediately revoked the aforementioned order by signing a presidential proclamation, called *Ending Discriminatory Bans on Entry to The United States*. This proclamation formally ended the travel ban from the countries referenced in Executive Order 13780. Ironically, Biden also used the argument of national security in his revocation because he argued that 13780 had “undermined our national security... [and it has] jeopardized our global network of alliances and partnerships” (Proclamation 2021). This is a prime example of an incoming administration from an opposing party—revoking executive orders from the previous administration—because it illustrates the impermanence of controversial directives.

Another potential check against the president’s executive order is public pressure. While public pressure has no legal binding on the issuance of these directives, public opinion, media coverage, and public

pressure can potentially mitigate the president's willingness to take unilateral action when it goes against popular opinion (Cooper 2002; Warber 2006). When Trump signed his executive order banning entry from several Muslim populated countries, popular opinion and polling was not in favor of it. At the time, over 59% of the population disapproved of the order (Pew Research Center 2017). When Biden entered office, it was politically expedient for him to revoke it because it not only ran contrary to his administration's immigration policies but its revocation was supported by most Americans percentagewise, making it an easy executive decision to make from the outset. There are endless examples that show that while executive orders can be controversial and often viewed as subverting the legislative process, they are not permanent, but easily revocable when a new administration that is ideologically diametric assumes the presidency. This is another check on the president's power. The impermanence of executive orders is well documented and this further illustrates that while being powerful, they are malleable. For example, from 1937 to 2013, 6,158 executive orders were issued: 18% were amended, 8% were superseded, and 25% were revoked (Thrower 2017).

Historically, executive orders have been issued more under unified governments and less under divided ones (Howell 2003). Simply put, presidents are reluctant to rely on unilateral action during a divided government because of the potential pushback and negative atmosphere it could create from the opposition party that is in the majority. However, during unified governments, presidents are more predisposed to issuing executive orders because they have the support of both chambers of Congress, which helps further legitimize the president's unilateral actions when it comes to achieving his legislative agenda. It is also more common for presidents to issue executive orders at the beginning of their terms than later because they are expected to deliver on campaign promises and implementing new policies in an expedient matter. Presidents have momentum on their side because of first-mover advantage (Canes-Wrone, Howell, and Lewis 2008; Mayer 2009). When they take unilateral action, they place

pressure on Congress and the courts to respond and oftentimes they do not, giving the president a political edge in this regard. In *Pacificus No. 1*, Hamilton alluded to this first-mover advantage when he wrote, “The Legislature is free to perform its own duties according to its own sense of them—though the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions” (Founders Online 2023). This power of acting alone, especially when it pertains to conducting foreign policy, is further attested to in *Federalist No. 74* when Hamilton wrote, that “the exercise of [effective] power [is needed] by a single hand” (Avalon Project 2023). Historical precedent tends to support this line of thinking when the president needs to exert unilateral actions.

Constitutionally, the president does not have the power of the purse nor does he have the power to legislate—that power is expressly given to Congress, so the president strategically treads carefully, weighing the costs and benefits as well as the depth of each executive order when considering taking unilateral action. Presidents are also less likely to issue executive orders during election years to avoid public backlash, increased negative media attention, and giving further political ammunition to their political opponents (Fine and Warber 2012). In this way, presidents are constantly checking the thermometer in order to gauge the political temperature.

Unfortunately, it is important to note that hyperpartisanship and polarization have increased substantially since the 1970s, resulting in an unprecedented level of animosity between political parties and their followers (Pew Research Center 2014; Pew Research Center 2022). This rise in hyperpolarization has impacted both politicians and their constituents because it has led Democrats to become more liberal and Republicans to become more conservative ideologically, leading to further division in the political arena that has resulted in having fewer moderates from both sides of the aisle (Pew Research Center 2022). Furthermore, this “partisan antipathy” is greater for those who are more actively engaged in politics (Pew Research Center 2014). As a

result, both chambers of Congress have become increasingly diametrically opposed to each other. In the context of presidential unilateralism, specifically when issuing executive orders, this is significant because hyperpartisanship has made presidents more reliant on their unilateral powers because they are “expected to deliver quick legislative policy victories to match their electoral promises” during the so-called “honeymoon period” (Bimes, Dominguez, and Grushkevich 2022; Christenson and Kriner 2020). Regardless of party affiliation, presidents now face more resistance, gridlock, and even obstruction whenever they want to pursue their agendas during divided governments. The dependence on unilateral presidential actions is a direct byproduct of this asymmetric polarization, which in many ways has created a new political norm for presidents. As a result, presidents are most effective legislatively during unified governments and least effective during divided governments. In summary, there is a positive correlation between polarization and the use of unilateral powers and this trend has only increased in propensity since the Obama Administration.

This study has discussed the various checks and balances enacted to curtail the perceived abusive nature of issuing executive orders, but what could be said about their duration throughout different political contexts? The context in which unilateral actions are amended, superseded, or completely revoked, is entirely circumstantial; however, the longevity of executive orders is well-noted by Thrower (2017). Under the ideological compromise hypothesis proposed by Thrower, executive orders issued during divided governments are at lower risk of being revoked, supporting the idea that while unilateral in nature, these actions have undergone certain interbranch compromise and moderate bipartisanship (Thrower 2017). This helps explain their duration into subsequent administrations that are ideologically opposite. Moreover, according to the EO Authority Hypothesis, Thrower finds that executive orders focused on foreign policy tend to have a longer duration than those that do not. This is likely due to the president’s access to a vast amount of national security

intelligence he is exposed to compared with members of Congress who do not have this same level of access and could be more concerned about domestic matters that directly impact their constituents more (Canes-Wrone, Brady, and Cogan 2002). The longevity of executive orders is contingent on a number of factors, but there remains one constant in all of this: the subsequent interplay of separation of powers and checks and balances with each other after a directive is issued, ultimately determines their durability and longevity.

It is without question that the powers of the president have steadily increased with the passage of time. However, the same can be said with the other two branches. At the beginning of the twentieth century, the United States emerged as a major power on the international stage. Following the aftermath of World War II, a new world order was created and the U.S. helped fill the political vacuum by becoming a superpower. America's importance and role in international affairs naturally increased with it becoming a global hegemon. It was during this time that the powers of the president in relation to Congress and vice versa, increased substantially in order to execute America's new role as the "policeman of the free world." There is a theory that supports this notion (Mayer 2009). The ratchet effect argues that government's power increases meteorically in response to crises, subsequently establishing new precedents for governments to stretch their authority and power. The twentieth century is littered with examples where the U.S. Government expanded its powers greatly in response to domestic and foreign issues, each creating a precedential watershed moment in the acquisition of governmental power. This includes responding to an economic depression, engaging in hot and cold wars, containing communism, sending troops in harm's way, overthrowing regimes, establishing military bases around the world, enforcing international treaties and agreements with nations, and responding to terrorism following the 9/11 attack, to name a few. Despite the incremental growth in the president's power over the course of the last century, this has not created an imbalance in the system of checks and balances. Instead, it

has enforced it because the authority and influence of the two other branches have grown commensurately with that of the executive branch, which is constantly evolving in order to respond to America's role as a global superpower.

Although the power of the presidents has increased incrementally since the founding, I do not believe it has made the executive too powerful. Instead, I believe it has grown proportionately with the growing responsibilities the office entails of an executive and not at the expense of the other two branches of government. In *Federalist 70*, Hamilton argued that "A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government." A president needs to have sufficient authority to enforce the law, to perform his constitutional duties "energetically," and have the ability to take unilateral action when it is needed. Whatever power the president has from issuing executive orders and other unilateral directives, there are numerous mechanisms put in place to ensure that unilateral actions do not disrupt the system of checks and balances but rather enforce it whenever the need for it arises. In conclusion, executive orders are an essential tool, which are supported by both historical and legal precedents. The president employs executive orders in his chief legislator role during the inter-branch bargaining process, to make the other branches comply with the executive branch when no other viable option for implementing "necessary" policies can be materialized using traditional venues (Mayer 2009). This unilateral power does not necessarily subvert the legislative process but rather it encourages inter-branch negotiating, compromising, and facilitating necessary changes whenever gridlock exists. Finally, rather than mitigating, the issuance of executive orders helps ensure that the principles of separation of powers and checks and balances are enacted and upheld whenever they are needed.

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