Executive Branch Powers & Executive Orders
United States Federal Government Controversies

May 5, 2015

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(This focuses upon the federal government but almost all governors and many strong mayor governments have a similar set of powers and structures especially have executive offices and the power to issue executive orders)

The branch of the U.S. government that is composed of the president and all the individuals, agencies, and departments that report to the president, and that is responsible for administering and enforcing the laws that Congress passes.

The U.S. government is composed of three branches: legislative, judicial, and executive. The legislative branch consists of the U.S. Congress, which is responsible for creating laws. The judicial branch is composed of the federal courts, which are responsible for ruling on the validity of the laws that Congress passes and applying them in individual cases. The executive branch differs from both in scope and function.

The Executive Branch and the Constitution

The executive branch has undergone tremendous changes over the years, making it very different from what it was under George Washington. Today's executive branch is much larger, more complex, and more powerful than it was when the United States was founded.

When the writers of the Constitution were initially deciding what powers and responsibilities the executive branch—headed by the president—would have, they were heavily influenced by their experience with the British government under King George III. Having seen how the king and other European monarchs tended to abuse their powers, the designers of the Constitution wanted to place strict limits on the power that the president would have. Some even proposed having a plural presidency to diffuse power. At the same time, they wanted to give the president enough power to conduct foreign policy and to run the federal government efficiently without being hampered by the squabbling of legislators from individual states. In other words, the Framers wanted to design an executive office that would provide effective and coherent leadership but that could never become a tyranny.

The Framers outlined the powers and duties of the executive branch in *Article II of the Constitution*. The specific powers given to the president are few, and the language that is used to describe them is often brief and vague. Specifically, the president has the authority to be commander in chief of the armed forces; to grant pardons; to make treaties; and to appoint ambassadors, Supreme Court justices, and other government officers. More generally, the president is responsible for making sure "that the Laws be faithfully executed" (§ 3), though the Framers did not specify how the president was to accomplish this goal.

The Framers also made no specific provisions for a staff that would assist the president; the Constitution says only that the president may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices" (§ 2).

To ensure that the president could never become too powerful, the Framers made many Presidential Powers dependent upon the will of Congress. For example, the president is given the power to make treaties with foreign countries, but the Senate by a two-thirds majority must approve those treaties. Similarly, the power of Congress is limited by the need for presidential approval. Congress can create laws, but the president generally must sign those laws; if the president refuses to sign a bill, it still can become law if Congress votes to override the president's Veto by a two-thirds majority. The Framers did not divide powers among the branches so much as they required the separate branches to share power, resulting in a complex system of checks and balances that prevents any one branch from gaining power over the others.

Modern presidents have greater powers than did their predecessors, as the executive branch has grown over the years to take on more tasks and responsibilities. This has been especially true for areas of expertise and those that require 24/7 professional action. The legislature simply does not have the time or interest in overseeing and running these agency responsibilities.

For the most part, however, the power of the executive branch at any given time has depended on the leadership skills of the current president; the particular events and crises faced by the president; and the country's desire for, or resistance to, strong executive branch power at that point in history. The country’s willingness to accept serious executive power has varied through history often tied to perceptions of crisis and the need for strong but temporary leadership. Though the executive branch does have specific legal powers, the principal power of each president is simply that individual's ability to persuade others—primarily those in Congress—to follow recommendations. Whereas early presidents were selected by a small number of electors, modern presidents are selected by hundreds of electors who represent citizens nationwide; as a result, they have the advantage of a popular mandate, giving them a bully pulpit that no member of Congress can match.

Divisions of the Executive Branch

The lack of specific, detailed language in the Constitution describing the power and responsibilities of the executive branch has given presidents a great deal of flexibility to increase its size and scope over the years, in terms of both the range of its authority and the number of people, offices, and agencies employed to carry out its responsibilities. Today, the executive branch consists of well over 3 million people who work in one of three general areas: the Executive Office of the President (EOP); the cabinet and 15 executive departments; and an extensive collection of federal agencies and corporations responsible for specific areas of the government, such as the Environmental Protection Agency and the U.S. Postal Service.

Executive Office of the President The Executive Office of the President (EOP) is not a single office or department, but a collection of agencies that are all directly responsible for helping the president to interact with Congress and to manage the larger executive branch. Specific elements have changed over the years; currently, the EOP consists of nine separate divisions: the White House Office, the Office of Management and Budget (OMB), the Council of Economic Advisers, the National Security Council (NSC), the Office of Policy Development, the office of the U.S. trade representative (USTR), the Council on Environmental Quality, the Office of Science and Technology Policy, and the Office of Administration.

In contrast to modern presidents, early presidents had few people to help them, because the Constitution contained no specific provision or allowance for presidential staff. As a result, presidents became overworked and exhausted. Thomas Jefferson, for example, wrote that the presidency "brings nothing but unceasing drudgery and daily loss of friends." In many cases, presidents used their own money to hire their sons, nephews, or in-laws to work as clerks or secretaries. In 1825, President James Monroe requested that Congress appropriate funds for presidential staff, but Congress was unwilling to spend the money. It was not until 1857 that Congress approved a specific appropriation for the president to hire a private secretary. Lincoln ran the civil war with two secretaries! Throughout the rest of the nineteenth and early twentieth centuries, Congress slowly appropriated more money for presidential staff, allowing the president to hire a greater number of secretaries, clerks, and other assistants, such as stenographers and messengers.

The crisis of the Great Depression in the 1930s created a need for the presidential staff to be fundamentally reorganized and expanded. Whereas presidents of the nineteenth century had functioned with very limited powers, President Franklin D. Roosevelt took on a much stronger role, developing his collection of New Deal programs to try to grapple with the tremendous social and economic problems facing the country. These programs resulted in a much larger and more complex federal bureaucracy that was difficult to manage, leading Roosevelt to create the Committee on Administrative Management, popularly known as the Brownlow Committee. Headed by Louis Brownlow, the task of the Brownlow Committee was to study the organization of the executive branch and to suggest solutions to the problem of administrative management.

The Brownlow report, completed in 1937, made several recommendations, including the creation of the Executive Office of the President, which would bring together agencies concerned with executive branch activities, such as budgeting, efficiency, personnel, and planning. Though Congress rejected other proposals contained in the Brownlow report, it approved the creation of the EOP, by passing the Reorganization Act in April 1939 (3 U.S.C.A. § 106, 31 U.S.C.A. §§ 701,1101). As a result, key managerial agencies, such as the Bureau of the Budget and the National Resources Planning Board, were moved into the EOP; the benefit of this move was that crucial management functions could be performed by staff working directly under the president, completing the routine tasks necessary for the government to function. The Brownlow report laid the foundations for the basic administrative structure that allows presidents to manage the numerous and diverse parts of the executive branch.

The Cabinet and Executive Departments The cabinet consists of the president, the vice president, the heads of the 15 executive departments, and any other government officials the president wishes to include, such as the head of the OMB or the head of the NSC. In theory, cabinet members serve as expert advisers to the president, but in practice they more often operate as advocates for their departments and are seldom involved in actual presidential decision making.

The Constitution makes no specific reference to a president's cabinet; rather, the cabinet is an institution that has evolved over the years. The first executive departments (the Departments of State, War, and the Treasury) were created in 1789 by Washington, who frequently held conferences with their heads (Jefferson, Henry Knox, and Alexander Hamilton, respectively). By 1793, James Madison was using the term *cabinet* to refer to these conferences. The name and the institution took hold, and the cabinet became a fixed element of the executive branch.

Presidents have used their cabinets in widely different ways. During the nineteenth century, cabinet appointments were often made for political reasons, rather than because a president knew or trusted the particular individuals selected. As a result, some presidents had trouble controlling their cabinet, and others met with their cabinet only infrequently. Andrew Jackson, for example, virtually ignored his official cabinet in favor of his kitchen cabinet, a close circle of personal friends whom he trusted for information and advice. During the twentieth century, cabinets have most often served as a forum for the president to discuss issues and to collect opinions; rarely, if ever, have they served as a decision-making body. Instead, the White House staff members frequently function as primary advisers to the president.

The largest organizational units within the executive branch are the 15 executive departments: Agriculture, Commerce, Defense, Education, Energy, health and human services, Homeland Security, housing and urban development, Interior, Justice, Labor, State, Transportation, the Treasury, and Veterans Affairs. These departments, which vary greatly in size and function, are responsible for administering the great majority of the federal government's activities and programs.

Agencies and Corporations The executive branch includes a large number of agencies for which the president is responsible. Some of these agencies function independently; others are connected to an executive department but still may function as largely autonomous units. These agencies manage specific areas of government operations and have little in common except that they lie outside of the traditional management structure of the executive departments. In general, they come in three types: regulatory agencies, independent executive agencies, and government corporations. Regulatory agencies and commissions control certain economic activities and consumer affairs. They include the Securities and Exchange Commission and the Occupational Safety and Health Administration. Congress creates regulatory agencies and commissions when members believe that certain economic or commercial activities need to be regulated. They accomplish the task of regulation in various ways, depending on their mandate from Congress. Typical methods of regulation include requiring licensing for specific professions and requiring products to be labeled accurately. Some regulatory agencies operate independently, bipartisan commissions govern some, and some report to an executive department.

Independent executive agencies are not part of any executive department; rather, they report directly to the president. These agencies include the National Aeronautics and Space Administration (NASA) and the General Services Administration. Frequently, Congress makes such agencies independent so that they can operate without the burden of bureaucratic regulations or the influence of particular executive departments. For example, NASA was made an independent agency so that it could be created more quickly, function more freely, and avoid the demands and influence of the department of defense.

Government corporations are a unique type of agency in that they function like businesses, providing necessary public services that would be too expensive or unprofitable for private companies to provide. They include the U.S. Postal Service; Amtrak; and the Tennessee Valley Authority, which was created to develop electric power in the Tennessee Valley region. Corporations have more independence than do agencies of any other type. They can buy and sell real estate, and they can sue and be sued. They are not dependent on annual appropriations from Congress, and they retain their own earnings. Congress does provide long-term funding for government corporations, however, so it retains a certain amount of control over their operations.

Further readings

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Cross-references

Administrative Agency; Congress of the United States; Constitution of the United States; Federal Budget; Separation of Powers.

History of Executive Orders in the United States

One of the most critical powers modern executives have is the ability to issue executive orders to initiate quick action and sometimes to get around paralysis with the legislature. These orders in various forms for all elected executives and constitute a critical and controversial aspect of modern governance.

The very first presidential executive order was a proclamation signed by George Washington on April 22, 1793, giving instruction to federal officers to prosecute any citizens interfering with the war between England and France. In this case, Washington made the decree by executive order because Congress was out of session and had not time to get together and authorize actions. Jefferson deployed executive orders, despite the fact he despised them, to help gain the Louisiana Purchase.

Similarly, Abraham Lincoln used an executive order to manage a constitutional crisis when Congress was out of session. The year was 1861, on the eve of the Civil War. Armed militias, under the banner of state control, were attacking federal troops passing through Virginia and Maryland. John Merryman was the leader of one of the most active militias, so Lincoln had him captured and locked up in Fort McHenry outside Baltimore. Merryman's lawyers appealed for his legal right to appear in court to determine if he was being lawfully held, a concept known as **habeas corpus**. Through an executive order, Lincoln called for a suspension of Merryman's right to habeas corpus, something that only Congress could do in times of rebellion or invasion. Lincoln explained his actions to Congress, which later passed the Habeas Corpus Act of 1863, officially giving the president the power that Lincoln had assumed.
While Washington and Lincoln issued only eight and 48 executive orders respectively, other presidents issued thousands. Teddy Roosevelt was the first to break the 1,000 mark, thanks to his "stewardship" theory of executive power in

which the president should do everything that isn't explicitly forbidden by the Constitution to actively direct the affairs of the nation. Many land preservation and national parks started as executive orders to set aside land from development.

World War I and World War II brought dramatic increases in the use of executive orders, as did the years spanning the Great Depression. Franklin D. Roosevelt issued 3,522 executive orders during his prolonged presidency. His very first was on Inauguration Day, when he ordered the closure of all banks for four days to begin restructuring the financial system under the New Deal.

The period that saw the greatest increase in the use of executive orders were the years spanning World War I to World War II, including the Great Depression. Given the military and economic crises of the era, Congress extended unprecedented power to the president to act in the best interest of a nation at war. For example, President Roosevelt used his executive authority to seize factories, mines and other privately owned industrial facilities for wartime production. As World War II drew to a close, Congress began to rein in the sovereign powers of the presidency.

The most significant episode in the post-World War II history of executive orders came during the presidency of Harry Truman.

Supreme Court: The Youngstown Decision

In 1952, President Truman was leading the nation through yet another war, this time in the Korean Peninsula. During war, the price of critical raw materials like steel is usually fixed. Because the price of steel was unnaturally low, steelworkers weren't receiving their normal wages and raises. The result was a major labor dispute in the steel industry that threatened to cut off the steel supply in a time of war.

In an attempt to avoid an all-out strike, Truman brought in the Federal Mediation and Conciliation Service to strike a bargain between the steelworkers unions and management. When that failed, he called in the Federal Wage Stabilization Board, but the steelworkers rejected its recommendations. On the eve of a nationwide steelworkers strike, Truman decided to invoke his presidential authority and issue an executive order for the federal government to seize control of the nation's steel mills. The mill owners immediately sued to block the seizure and the case of *Youngstown Sheet & Tube v. Sawyer* made it all the way to the Supreme Court.

In a 6-3 ruling, the Supreme Court rejected Truman's executive order as unconstitutional. For the first time, the judiciary imposed a limit on executive authority, stating that the power to issue executive orders must come from an act of Congress or the Constitution itself. In Truman's case, he had the authority to delay a strike for 60 days under the Taft-Hartley Act, a provision known as a "cooling off period." But instead, he chose to seize the mills using an executive order -- an act not unlike President Roosevelt's seizures of factories and mines during World War II. Unlike Roosevelt, however, Truman was an unpopular president fighting an unpopular war, so he wasn't given as much free rein.

The Youngstown decision was critical because it established a standard for the exercise of executive power. In his concurring opinion, Justice Robert H. Jackson described three different situations and three corresponding levels of presidential authority:

- The president acts with the **most authority** when he has the "express or implied" consent of Congress
- The president has **uncertain authority** in situations where Congress has not imposed its authority -- either by inaction or indifference -- and the president takes advantage of this "zone of twilight" to make an executive decision
- The president acts with the **least authority** when he issues an executive order that is "incompatible" with the expressed or implied will of Congress. Such an act, wrote Justice Jackson, threatens the "equilibrium established by our Constitutional system."

The Supreme Court rejected Truman's seizure of the steel mills because it was incompatible with the expressed will of Congress in the form of the Taft-Hartley Act.

Controversy Over Executive Orders

Modern American politics is often characterized by split power between executive and legislative (with each branch controlled by a different party) has lead to intense use and controversy over them as presidents seek to escape the problems of "gridlock." Executive orders offer a powerful and immediate way for a president to advance his policy priorities. A White House aide to President Bill Clinton described the lure of executive orders this way: "Stroke of the pen, law of the land." President Ronald Reagan used the direct power of executive orders to peel back layers of government regulation that he and his administration believed were hampering economic growth. President George W. Bush signed executive orders that approved more aggressive surveillance after 9/11 and limited public access to presidential documents. And President Obama has increasingly relied on executive orders to forward his agenda in the face of an intransigent Congress.

President George W. Bush issued several controversial executive orders surrounding the gathering of intelligence in the war on terror. Arguably the most controversial was a secret executive order he signed in 2002, authorizing the National Security Agency (NSA) to eavesdrop without a warrant on phone calls made by U.S. citizens and others living in the United States. The NSA had previously been limited exclusively to intelligence gathering operations outside of the country. Critics of Bush's executive order accuse the NSA of conducting unconstitutional searches under the president's authorization. The Bush administration defended the secret program as necessary to root out homegrown terrorist plots. The 9/11 attackers, after all, had lived in the U.S. while making the final preparation for their hijacking plot.

On his very first day in office, President Obama signed three executive orders to draw a clear distinction between the policies of his administration and his predecessor's. One of the orders essentially banned the use of "enhanced" interrogation techniques like waterboarding and instructed the CIA and the armed forces to strictly follow the interrogation procedures outlined in the Army field manual.

The most controversial executive order called for the closure of the Guantanamo Bay detention facility within a year. Naysayers who called the order unrealistic were eventually proven correct: The president issued another executive order two years later allowing for the continued detention of suspected terrorists at Guantanamo, with or without a formal charge. The third created a task force designed to review detention policies and procedures.

In the spring of 2012, President Obama launched an aggressive campaign of executive orders to combat what he viewed as an intractable Congress. Since Congress refused to vote on legislation that would forward the Obama administration's policies on the economy, job creation, education, energy and foreign policy, the president and his advisers decided to do as much as could be done without Congress' help at all. The campaign, called "We Can't Wait," has included tougher regulation of greenhouse gas emissions, a revamped deportation policy, and better education and employment options for returning troops. The president has received sharp criticism for flexing his executive muscle, but even his critics acknowledge that Obama is far from the first president to wield executive orders as a political weapon.

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