The Powers of the President

Executive Orders, Laws, and the Constitution

Scott Bowman, Ph.D.
Associate Vice President for Research, Scholarship, and Creative Activities
Professor of Political Science

Martin J. Adamian, J.D., Ph.D.
Associate Director, Honors College
Associate Professor of Political Science
Theories of Executive Power

- **Literalist theory** – A grant of power must be either in the Constitution or in an act of Congress passed in pursuance thereof. Based on the belief that the best government is that which governs least.

- **Stewardship theory** – The Constitution as a document of possibilities and ambiguities and in a philosophy of government – the belief that gov’t has an affirmative duty to make the lives of its citizens better.

- **Prerogative power theory** – citing John Locke in his *Second Treatise of Civil Government*, this is “nothing but the Power of doing public good without a rule,” that is, acting in the absence of a statute. Under this theory, the president is entitled to act unilaterally and, if necessary, contrary to statutory or constitutional provisions for the good of the country.
Presidential Powers

- **Appointment Powers**: the President appoints people of his choosing to lead the various programs under the executive office.

- **Executive Orders**: the president can issue orders to his departments that have the force of law.
  - Executive orders must be related to Powers the president already has.
  - Example: during World War II, FDR ordered the relocation of millions of Japanese Americans to prison camps in the interests of national security.

- **Signing Statements**: issued at the time of laws signing, give instructions for executive branch interpretation and enforcement. In some cases, they have been used to reflect the President’s intent to ignore the law.
Which President Used Executive Orders The Most?

Number Of Executive Orders Issued By Each President, Per Day In Office

- George Washington
- John Adams
- Thomas Jefferson
- James Madison
- James Monroe
- John Quincy Adams
- Andrew Jackson
- Martin Van Buren
- William Henry Harrison
- John Tyler
- James Polk
- Zachary Taylor
- Millard Fillmore
- Franklin Pierce
- James Buchanan
- Abraham Lincoln
- Andrew Johnson
- Ulysses S. Grant
- Rutherford B. Hayes
- James Garfield
- Chester A. Arthur
- Grover Cleveland
- Benjamin Harrison
- William McKinley
- Theodore Roosevelt
- William Howard Taft
- Woodrow Wilson
- Warren G. Harding
- Calvin Coolidge
- Herbert Hoover
- Franklin D. Roosevelt
- Harry Truman
- Dwight Eisenhower
- John F. Kennedy
- Lyndon Johnson
- Richard Nixon
- Gerald Ford
- Jimmy Carter
- Ronald Reagan
- George H.W. Bush
- Bill Clinton
- George W. Bush
- Barack Obama

Republic Average
Democratic Average

With 3,522 executive orders issued and 4,422 days in office, FDR issued orders at a rate approaching one per day.

At his current rate of 0.09 executive orders per day in office, Obama is issuing orders at the slowest rate since Grover Cleveland.

Note: Data Through January 20, 2014. (Five years of the Obama Administration)
Diplomatic and Military Powers

- The President is the commander-in-chief of the Armed Forces
  - But only Congress can declare war
  - The War Powers Resolution, 1973 clarifies the relationship between the president and Congress on the ability to send troops into potential hostilities:
    - Within 48 hours of deploying troops, the president must issue a report to Congress explaining why the troops are necessary
    - The commitment of troops must within 60 days unless Congress gives its approval to keep the troops deployed
    - Congress may recall the troops at anytime if they pass a concurrent resolution (in other words, the troops maybe committed as long as Congress gives its support). President Bush threatened to ignore Congress if they failed to support his deployment of troops in Iraq
**Korematsu v United States (1944)**

- **Facts:** During World War II there was fear that the west coast was going to be invaded. There had been numerous unauthorized radio transmissions and every ship that had departed from there had been attacked by enemy submarines. Presidential Executive Order 9066 and congressional statutes gave the military authority to exclude citizens of Japanese ancestry from areas deemed critical to national defense and potentially vulnerable to espionage (curfews and relocation camps). Korematsu remained in San Leandro, California and violated Civilian Exclusion Order No. 34 of the U.S. Army.
- **Procedures:** Curfews had been upheld in *Hirabayashi v US*, and others. Korematsu was convicted for refusing to evacuate, which was affirmed on appeal.
- **Legal Question:** Did the President and Congress go beyond their war powers by implementing exclusion and restricting the rights of Americans of Japanese descent?
  - **Holding:** No.
  - **Legal Reasoning:** The Court sided with the government and held that the need to protect against espionage outweighed Korematsu's rights. Justice Black argued that compulsory exclusion, though constitutionally suspect, is justified during circumstances of "emergency and peril."
**Youngstown Sheet & Tube v Sawyer (1952)**

- **Facts:** During the Korean War, an impasse developed between labor and management in the steel industry after existing collective bargaining agreements expired 12/31/51. When the union finally called a strike, President Truman issued an executive order taking possession of the steel mills and keeping them operating. There was no statutory authorization. Keep in mind that Korea was a “police action,” not a declared war.

- **Procedures:** Youngstown Sheet & Tube and other steel companies filed a complaint seeking to enjoin the Secretary of Commerce from executing the seizure, because, absent just compensation, it was a taking of private property in violation of the Fifth Amendment.

- **Legal Question:** Whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills?

- **Holding:** No, affirmed.

- **Legal Reasoning:** President does not have power from the Constitution or Congress to issues this order.
Facts: In 1933, the United States established formal diplomatic relations with the Soviet Union. This case involved a Russian metal works company which had deposited money in an American bank prior to the Russian Revolution of 1917. The Soviet Union nationalized the company and attempted to reclaim its assets with the help of the United States. The bank refused to cooperate, citing protection of a New York law.

Procedures: The District Court and the COA ruled against the US on the grounds that the property could not rightly be regarded as falling within the Soviet jurisdiction and the US petitioned for cert.

Legal Question: Did the diplomatic agreements between the two countries compel the bank to release the assets?

Holding: Yes, reversed.

Legal Reasoning: Even though the diplomatic agreements had not been implemented as formal treaties with Senate approval, they did empower the United States to seek assets on the Soviet Union's behalf. Justice Sutherland argued for a unanimous Court that different kinds of treaties existed which did not require Senate approval, but nonetheless overrode state statutes. "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies," he reasoned.
United States v Curtiss-Wright Export Corp. (1936)

- **Facts:** Curtiss-Wright was charged with conspiring to sell fifteen machine guns to Bolivia, which was engaged in an armed conflict in the Chaco. This violated a Joint Resolution of Congress and a proclamation issued by President Roosevelt.
- **Procedures:** US District Court sustained a demurrer to the indictment, and the US gov’t appealed.
- **Legal Question:** Did Congress in its Joint Resolution unconstitutionally delegate legislative power to the President?
- **Holding:** No, reversed and remanded.
- **Legal Reasoning:** The Court agreed that the President was allowed much room to operate in executing the Joint Resolution; it found no constitutional violation. Making important distinctions between internal and foreign affairs, Justice Sutherland argued because "the President alone has the power to speak or listen as a representative of the nation," Congress may provide the President with a special degree of discretion in external matters which would not be afforded domestically.