



The presidency, executive orders and their impact on America

The use of executive orders, governing by decree not the rule of the people, has increased with every president. What does it mean to our eroding Constitution

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The growth of executive power threatens the system of government established by the Constitution. In principle, the elected representatives of the people in Congress pass the laws and the executive carries them out. This has not been the reality for some time.

The upcoming election will not halt that change. Both parties are responsible for the growth of executive power and the decline of the Congress.

Both parties have helped expand the power of the president. John Calhoun, in his Disquisition On Government, predicted that the powers of government would inevitably grow, that those in power would always advocate a “broad” use of power, and those out of power would always argue for a “narrow” use of power, and that no one would ever turn back governmental authority that had once been assumed.

Under both parties, the power of the president and his willingness to issue executive orders rather than dealing with Congress has grown. Under President George W. Bush, a new “Imperial Presidency” emerged. The Cato Institute’s Gene Healy notes that the administration’s broad assertion of executive power included “the power to launch wars at will, to tap phones and read e-mail without a warrant, and to seize American citizens, and hold them for the duration of the war on terror—in other words, perhaps forever.”

Neither Left nor Right sees the president as the Framers saw him: a constitutionally constrained chief executive with an important, but limited job: to defend the country when attacked, check Congress when it violates the Constitution, enforce the law—and little else. Today, for conservatives as well as liberals, it is the president’s job to protect us from harm, to ‘grow the economy,’ to spread democracy and American ideals abroad, and even to heal spiritual malaise.”

In 2014, President Obama vowed, “I’ve got a pen and I’ve got a phone—and I can use that pen to sign executive orders and take executive actions and administrative action that move the ball forward.” This stance toward executive power is a response to the inability of the Republican Congress to exercise constitutional oversight.

Obama, notes the New York Times, “has been one of the most prolific authors of major regulations in presidential history.”

In its first seven years, the Obama administration finalized 500 major regulations, never passed by Congress. These regulations were classified by the Congressional Budget Office as having particularly significant economic or social impacts. Policies included economic, foreign, intelligence and surveillance, and social policies.

Some, like those involving health care reform had especially far-reaching impact on Americans and the economy.

Obama’s executive actions have exceeded in number those his predecessor George W. Bush who executed 364 during the comparable period, according to data kept by the regulatory studies center at George Washington University.

In one celebrated case, Obama issued an order that would have allowed millions of undocumented immigrants to remain in the country and work legally. This was challenged in the courts by 26 states, which argued that the president exceeded his authority and that the issue should be left to Congress. The lower courts agreed. The Supreme Court, in the case of *United States v. Texas*, split 4-4 on the question, leaving in place the lower court ruling blocking that executive order.

Most executive orders are quietly implemented with little discussion or debate.

The decline of Congress and the growth of executive power is especially clear when it comes to the war-making power. The Constitution reserves to Congress alone the power to declare war, despite naming the president as commander-in-chief of the armed forces. The war in Iraq was not declared by Congress, nor were those in Korea, Vietnam, Panama, Haiti, Grenada or Somalia.

Congress continues to relinquish more and more authority, putting the power and responsibility for waging war on the president. In Federalist No. 69, Alexander Hamilton notes that the president’s authority “would be nominally the same with that of the King of Great Britain, but in substance much inferior to it ... While that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies, all of which, by the Constitution under consideration appertain to the legislature.”

In deciding *Perkins v. Rogers*, the Supreme Court declared, “The war making power is, by the Constitution, vested in Congress and ... the President has no power to declare war or conclude peace except as he may be empowered by Congress.”

In “Presidential War Power,” Louis Fisher, a senior specialist in separation of powers at the Library of Congress, writes,

From 1789 to 1950, Congress either declared or authorized all major wars. Members of Congress understood that the Constitution vests in Congress, not the president, the decision to take the country from a state of peace to a state of war.

The last half century has witnessed presidential wars, including President Truman going to war against North Korea and President Clinton using military force against Yugoslavia, with neither president seeking authority from Congress.

Over 200 years and after more than 100 U.S. military adventures, Congress has formally declared only five wars: The War of 1812, the Mexican-American War (1846), the Spanish American War (1898), World War I (1917) and World War II (1941).

According to the Cato Institute, “The constitutional presidency, as the Framers conceived it, was designed to stand against the popular will as often as not, with the president wielding the veto power to restrain Congress when it transgressed its constitutional bounds. In contrast the modern president considers himself a tribune of the people, promising transformative action and demanding the power to carry it out.”

The result is what political scientist Theodore J. Lowi has called “the plebiscitary presidency ... an office of tremendous personal power drawn from people ... and based on the New Democratic theory that the presidency with all powers is the necessary condition for governing a large democratic nation.”

The scope of federal regulation continues to grow. Presidents, both Democrats and Republicans, have asserted greater power in recent decades to dictate the shape of regulations while Congress has become less specific in its instructions, in effect abdicating its own authority.

When she was a Harvard law professor, Elena Kagan, now a Supreme Court justice, said, “We live in an era of presidential administration.” Professor Robert Hahn of Oxford says, “The big issue that I grapple with is that the regulatory state keeps growing. And as it keeps growing, when does it become too much?”

Whether our new president is Donald Trump or Hillary Clinton, major opposition to their campaign promises will be found in Congress. To bypass Congress, they now have the legacy of presidents like Bush and Obama, who use executive orders as an easy way to avoid the legislative process.

This is not the system our Constitution established, but it is the one we seem to have now. This is not good news for those who believe in the system of checks and balances and division of powers which the Constitution established.