

Executive Legislation and the Expansion of Presidential Power

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The increased use of executive legislation in the absence of challenges from Congress or the Supreme Court has expanded the power of the president beyond constitutional bounds and poses a serious threat to our democracy. The author concludes that fears of the president becoming some type of dictator are overblown, but the tendency by modern presidents to use executive legislation to expand the scope of their power is especially dangerous considering that neither the Supreme Court nor Congress is very likely to challenge an executive order, rendering the most important check on presidential legislation virtually nonexistent.

Introduction

The frequent use of executive legislation in recent years has attracted criticism from those worried about the expanding power of the president. The most significant type of executive legislation is the executive order. Although not explicitly listed in the Constitution, executive orders are generally interpreted as an implied executive power deriving from Article II, Section 3, which says that the president “shall take Care that the Laws be faithfully executed.”¹ No hearings or consultation with anyone outside the executive branch are required prior to the president signing an executive order, nor does the president have to notify Congress or the Supreme Court about executive legislation in advance.

² Many executive orders are used merely for symbolic purposes, such as establishing a federal holiday, or for organizing and managing the large federal bureaucracy, perhaps by changing the wording of an official document or modifying employee benefits.³ Executive orders become problematic, however, when presidents abuse them, relying on them to create or affect policy without going through Congress or by using them to violate constitutional principles.

Executive orders were responsible for the Louisiana Purchase, the annexation of Texas, the creation of

the Peace Corps, and the desegregation of the military.⁴ But presidents have frequently abused their legislative powers, especially during wartime. Abraham Lincoln used the emergency of the civil war to justify activating federal troops, expanding the size of the military, purchasing warships, suspending the writ of *habeas corpus*, and advancing federal funds, all without Congressional approval.⁵ During World War II, Franklin D. Roosevelt’s internment of the Japanese was accomplished using an executive order. Woodrow Wilson implemented censorship of telegraph and telephone lines via executive order, even though the United States was not yet involved in World War I. More recently, President Bush’s executive legislation established the use of secret military tribunals to try suspected terrorists following September 11. What is especially alarming, however, is the recent tendency of presidents to use executive legislation in the absence of a national emergency.

Fears of the president becoming some type of dictator are overblown, but the tendency by modern presidents to use executive legislation to expand the scope of their power is especially dangerous considering that neither the Supreme Court nor Congress is very likely to challenge an executive order, rendering the most important check on presidential legislation virtually nonexistent. Using executive orders to work around Congress, undercut federal agencies, or escape accountability violates the principle of checks and balances our Founding Fathers felt was crucial to our democracy and unlawfully increases the power of the president.⁶ Allowing the president to continue abusing executive orders and other presidential directives sets a dangerous

1 Phillip J. Cooper, “Power tools for an effective and responsible presidency.” *Administration & Society* 29.5 (1997): 529. http://go.galegroup.com.proxy.library.vanderbilt.edu/ps/i.do?id=GALE%7CA20057261&v=2.1&u=tel_a_vanderbilt&it=r&p=AONE&sw=w.

2 Matthew Crenson and Benjamin Ginsberg, *Presidential Power: Unchecked and Unbalanced*. (New York: W.W. Norton & Company, Inc., 2007).

3 Adam L. Warber, *Executive orders and the modern presidency: Legislating from the oval office*. (Boulder: Lynne Rienner Publishers, Inc., 2006).

4 Crenson and Ginsberg, *Presidential Power: Unchecked and Unbalanced*.

5 Ibid.

6 Cooper, “Power tools for an effective and responsible presidency,” 529.

precedent, one that could result in a future president using executive legislation to act outside his given authority, potentially by suspending civil liberties or ignoring the will of Congress. This increased and unchecked use of executive legislation has expanded the power of the president beyond constitutional bounds and poses a serious threat to our democracy. After discussing the types of executive legislation and their use by recent presidents, I will analyze the effectiveness of the checks on presidential power and explore the potential threats posed by the expansion of the presidency.

Recent Use of Executive Legislation

The increased attention and criticism given to executive orders has helped motivate recent presidents to rely on other forms of executive legislation. The president's legislative abilities include the use of signing statements, "proclamations, memoranda, [and] executive agreements [...] to unilaterally establish law".⁷ Franklin D. Roosevelt still holds the record for most executive orders used, but recent presidents have been much more creative and manipulative in employing these alternative forms of executive legislation to work around Congress and accomplish their policy goals.⁸ Presidents must base their authority to issue an executive order on an existing law or part of the Constitution, and executive orders – unless they deal with classified material – must be submitted to the Federal Register for publication.⁹ These other options allow the president to accomplish his agenda without needing to necessarily cite existing statutes or make his actions public, giving him a variety of options to implement in order to more easily affect policy and avoid accountability.

Signing statements in particular have attracted criticism in recent years. These are statements affixed to legislation when the president signs it into law. They are controversial because recent presidents have used them to justify not enforcing certain parts of a bill, stating that the provisions to be ignored are unconstitutional.¹⁰ The president's use of signing statements to enforce his opin-

7 Warber, *Executive orders and the modern presidency: Legislating from the oval office*, 1

8 Crenson and Ginsberg, *Presidential Power: Unchecked and Unbalanced*.

9 Phillip J. Cooper, "The Law: Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games." *Presidential Studies Quarterly* 31.1 (2001): 126-41. <http://proquest.umi.com.proxy.library.vanderbilt.edu/pqdlink?Ver=1&FMT=7&DID=69310218&RQT=309&cfc=1>.

10 Michael A. Genovese, *Presidential Prerogative: Imperial Power in an Age of Terrorism*. (Stanford: Stanford University Press, 2011).

ions on the constitutionality of a bill's provisions violates the presidency's constitutional powers; the Constitution gives the president three options when it comes to legislation: signing a bill into law, issuing a veto, or doing nothing, thus allowing a bill to become law without being signed. Signing statements are a way for a president to oppose legislation without giving Congress the opportunity to overturn a veto, removing a key check on presidential power.¹¹ They also allow the president to escape congressional restrictions on executive authority, usually mentioned as the main reason for objections.¹² The sudden increase in the use of signing statements is particularly alarming. Only 75 signing statements had been used when Reagan became president; however, Reagan, George H.W. Bush, Clinton, and George W. Bush together issued over 400 signing statements. Some signing statements may be merely rhetorical or ceremonial, but the recent reliance on constitutional signing statements – those dealing with the executive branch's opinion on the constitutionality of a bill - represents an abuse of presidential power.

Recent presidents have also made clever use of executive legislation similar to executive orders. Proclamations, while lacking any legal distinction from executive orders, are generally directed at agencies or officials outside the government.¹³ They have the strength of law behind them and usually permit the president to define a law or fact; the most famous example is Lincoln's Emancipation Proclamation.¹⁴ Increased use of memoranda – documents containing announcements or statements from the president to executive officials that are legally equivalent to executive orders - is particularly alarming because memoranda do not have to be recorded in the Federal Register, meaning that the president can potentially use them to hide executive actions from the public.¹⁵ Executive agreements are a specific type of executive order that acts as an unofficial treaty between the president and a foreign head of state, lasting only as long as both leaders are in office. While executive agreements are useful for dealing with minor issues that arise without adding strain to Congress's busy schedule, they have essentially replaced treaties as the vehicle of securing international

11 Crenson and Ginsberg, *Presidential Power: Unchecked and Unbalanced*.

12 Ibid.

13 Cooper, "Power tools for an effective and responsible presidency," 529.

14 Brandon Rottinghaus, "The Presidency and Congress." In *New Directions in the American Presidency*, ed. Lori Cox Han, 83-102. (New York: Routledge, 2011).

15 Cooper, "The Law: Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games."

agreements, limiting the extent to which the Senate can check the power of the president.¹⁶ The clever usage of these alternative forms of executive legislation further expands the power of the president and further complicates keeping the president in check.

Modern Presidents and Executive Legislation

Most of the current trends in the use of unilateral executive actions can be traced back to the presidency of Ronald Reagan. Previous presidents had used such power, but none of them used the ability to act unilaterally to make major changes to policy; Reagan's administration patented and perfected using executive power to accomplish his agenda.¹⁷ It was his attorney general – with the help of future Supreme Court Justice Samuel Alito, then working for the Justice Department – who transformed the signing statement into a potent part of executive legislation and facilitated their being published in law textbooks.¹⁸ The president used a signing statement to construe the 1986 Safe Drinking Water Amendments' requirement of mandatory enforcement to mean discretionary enforcement, completely changing the spirit of the law.¹⁹ He often used executive orders to defy Congress, notably using an executive order to bring weak sanctions against South Africa just before legislation calling for strong ones would have passed.²⁰ Reagan would issue 1,118 proclamations, the most of any president in history.²¹ This repurposing of executive tools like signing statements and proclamations would set a dangerous precedent for modern presidents.

President Clinton's administration built on the unilateral actions employed by Reagan to further enhance the power of the president. After the Democrats lost their majority in Congress in the 1994 midterm elections, Clinton essentially ruled by executive order, his preferred option in the face of the difficulties of divided government. Clin-

ton used an executive order to lend \$43 billion to Mexico after Congress refused to approve the loan.²² President Reagan may have been the first to use signing statements and proclamations to accomplish major policy changes, but President Clinton made extensive use of presidential memoranda. He used a memorandum to the secretary of health and human services to reverse the "gag rule" on abortion counseling by instructing the department to make new rules designed to change its implementation.²³ In one of the key executive actions of his presidency, President Clinton used both an executive order and a memorandum to enforce environmental justice in minority communities. The executive order merely stated that agencies were to consider environmental implications in their decisions and created an interagency committee to streamline communication between the executive and various agencies.²⁴ The memorandum contained the real policy change, mandating that "each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not [...] discriminate on the basis of race, color, or national origin."²⁵ Relying on the use of the memorandum is a trend that has continued in subsequent administrations. Interestingly, federal courts did overturn one of Clinton's executive orders; in the 1995 case *Chamber of Commerce v. Reich*, the court struck down executive legislation that prevented government contractors from replacing striking workers.²⁶ Along with the Reagan administration's precedents towards signing statements and proclamations, President Clinton's use of memoranda illustrated the ways a president could use previously insignificant internal tools to bring about sweeping policy change, techniques that would play a crucial role in the presidency of George W. Bush.

The most controversial of President Bush's executive legislation are those directives concerning the War on Terror. While he did not suspend *habeas corpus* or send Arab and Muslim Americans to internment camps, President Bush did use executive orders to freeze foreign assets and set up the system of trying suspected terrorists before secret military tribunals, both without consulting or relying on Congress at all.²⁷ His administration justified

16 Crenson and Ginsberg, *Presidential Power: Unchecked and Unbalanced*.

17 John F. Freie, *The Making of the Postmodern Presidency: From Ronald Reagan to Barack Obama*. (Boulder: Paradigm Publishers, 2011).

18 Crenson and Ginsberg, *Presidential Power: Unchecked and Unbalanced*.

19 Cooper, "Power tools for an effective and responsible presidency," 529.

20 Kenneth R. Mayer, "Executive Orders and Presidential Power." *The Journal of Politics* 61.2 (1999): 445-66. [http://users.polisci.wisc.edu/kmayer/Professional/Executive Orders and Presidential Power.pdf](http://users.polisci.wisc.edu/kmayer/Professional/Executive%20Orders%20and%20Presidential%20Power.pdf).

21 Gerhard Peters, *The American Presidency Project*. Ed. John T. Woolley and Gerhard Peters. Santa Barbara, CA: University of California, 2011. <http://presidency.ucsb.edu/index.php>.

22 Crenson and Ginsberg, *Presidential Power: Unchecked and Unbalanced*.

23 Cooper, "Power tools for an effective and responsible presidency," 529.

24 Cooper, "The Law: Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games."

25 Ibid.

26 Mayer, "Executive Orders and Presidential Power."

27 Crenson and Ginsberg, *Presidential Power: Unchecked and Unbalanced*.

these executive actions by insisting that the country was in a state of national emergency, but with the War on Terror's fundamental nature as a never-ending conflict, this reasoning would give the president emergency power indefinitely.²⁸ This justification certainly makes executive action "an attractive alternative to the constitutional presidency [but] does not make the unitary executive constitutional."²⁹

Bush's Executive Order No. 12233 made obtaining the release of records from past presidents more difficult and was designed to limit presidential accountability, a dangerous policy because it helps prevent other branches from keeping a check on the presidency.³⁰ This obfuscation and hiding of presidential actions was a theme of President Bush's executive legislation, in which the president often asserted his actions were not subject to review by either of the other branches, a statement which has no legal basis in the Constitution.³¹ President Bush was extremely active in dealing with executive legislation; he modified the largest number of past executive orders, passed the largest number of symbolic executive orders on average of any president since 1936, and changed the most executive orders dealing with key policy concerns per year of any president since Carter.³² This frequent and deliberate use of executive legislation did result in two Supreme Court decisions challenging his actions. In *Hamdi v. Rumsfeld* in 2004, the court upheld the constitutional right of American citizens classified as "'enemy combatants' [...] to be heard before a neutral decision-maker."³³ And in 2006, the court in *Hamdan v. Rumsfeld* ruled that the president did not have the authority to set up military commissions that conflicted with congressionally-established provisions.³⁴ These rare cases of the judiciary opposing the president's agenda illustrate that the president's power has certainly increased but has not grown to be completely beyond enforcement by the Supreme Court.

President Obama continues the trend of presidents relying heavily on alternative forms of executive legislation to accomplish a broad range of policy objec-

28 Scott M. Matheson Jr., *Presidential Constitutionalism in Perilous Times*. (Cambridge, MA: Harvard University Press, 2009).

29 Genovese, *Presidential Prerogative: Imperial Power in an Age of Terrorism*, 129.

30 Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy*. (Chicago: The University of Chicago Press, 2009).

31 Genovese, *Presidential Prerogative: Imperial Power in an Age of Terrorism*.

32 Warber, *Executive orders and the modern presidency: Legislating from the oval office*.

33 Scott M. Matheson Jr., *Presidential Constitutionalism in Perilous Times*, 88.

34 Ibid.

tives. As a candidate he was a vocal critic of the Bush administration's use of unilateral actions and pledged to use a different approach as president, but while he may not consider the executive branch quite as untouchable as his predecessor, he has been more than willing to rely on executive power to achieve his legislative goals.³⁵ In his first 100 days, he reversed the Bush administration's ban on stem-cell research, banned torture and other coercive techniques, put strict restrictions on lobbying in the White House, and established guidelines for greater transparency in government, all accomplished without Congressional involvement but with the largest number of executive orders, memoranda, and proclamations used by any president during their first days in office.³⁶ His Executive Order No. 13535 – which prevents federal funding of abortions – was integral to securing the passage of health care reform, reform that he let Congress take the lead on.³⁷ On the other hand, he has continued the Bush administration's policy of hiding information about extraordinary rendition and has yet to close down Guantanamo Bay.³⁸ He said during the campaign that he would not use signing statements unless they were absolutely necessary to correct unconstitutional actions by Congress, but he has issued 18 signing statements so far, 8 of which mention provisions of legislation that the executive has problems with.³⁹ Among his most recent executive orders are those dealing with sanctions against Syria and Iran and an executive order outlining periodic review for those held at Guantanamo Bay.⁴⁰ President Obama has also threatened to use executive orders to pass provisions of the jobs bill that never made it through Congress. Although his administration has taken great steps to be more transparent and rely less on executive legislation, President Obama has in no way forfeited his power to act unilaterally to accomplish his agenda and seems likely to continue using executive orders and signing statements at will.

The past few presidents have made extensive use of executive legislation, specifically constitutional signing statements passed by Congress and proclamations. Table 1 shows the number of each type of executive legislation issued by recent presidents. While the number of execu-

35 Genovese, *Presidential Prerogative: Imperial Power in an Age of Terrorism*.

36 Ibid.

37 David Shafie, "The Presidency and Domestic Policy." In *New Directions in the American Presidency*, ed. Lori Cox Han, 166-179. (New York: Routledge, 2011).

38 Genovese, *Presidential Prerogative: Imperial Power in an Age of Terrorism*.

39 Peters, *The American Presidency Project*.

40 National Archives. *The Federal Register*. 2011. <http://www.archives.gov/federal-register/>.

tive orders has stayed approximately the same, the number of presidential proclamations has increased sharply since the Carter administration, with President Reagan issuing 1118 of them while in office. The number of memoranda used by the last three presidents has been significantly higher than that of their predecessors, showing the relatively new trend of relying on presidential memoranda to effect policy change. The number of signing statements dealing with the constitutionality of legislation passed by Congress peaked under George W. Bush but is already high for President Obama. This data shows that, although presidents have not been issuing more executive orders on average, they have been relying more frequently on the alternative forms of executive legislation to accomplish their policy agenda, making it harder for Congress, the media, and the American public to understand and follow exactly what the president is doing.

Table 1. Executive Legislation Issued by Recent Presidents

	Executive Orders	Signing Statements	Percent Constitutional	Proclamations	Memoranda
Ford	169	137	-	178	72
Carter	320	228	-	335	176
Reagan	381	250	34	1118	151
Bush	166	228	47	589	149
Clinton	364	381	18	878	563
Bush	291	152	78	940	444
Obama	104	18	44	127	167

Source: American Presidency Project

Challenges to Executive Legislation

Theoretically, the president’s use of executive orders and other forms of presidential directives is well-restrained by the system of checks and balances between the three branches of government. Congress can overturn or nullify the effects of any executive order by passing new legislation or refusing to approve any necessary funds.⁴¹ In the event the president vetoes this new piece of legislation, Congress can override its veto with a 2/3 vote in both houses. Congress could pass and then over-

41 Evan Todd Bloom, “The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications.” *Columbia Law Review* 85.1 (1985): 155-89. <http://www.jstor.org/stable/1122407?origin=JSTOR-pdf>.

ride the inevitable veto on a bill specifically designed to curb executive power, perhaps by banning constitutional signing statements. If the president were to ever seriously overstep his constitutional bounds, Congress could always draw up articles of impeachment. If Congress is unwilling or unable to challenge executive legislation, the Supreme Court can overturn it through judicial review. All executive orders must be reported to the Federal Register to be published unless they contain confidential information, preventing presidents from using executive orders in secret.⁴² This requirement also allows for the media to play watchdog and monitor the president’s actions. Finally, any executive order can be nullified by a future president’s executive order, meaning there is no guarantee that any single executive order is permanent.⁴³ These constraints on the presidency are designed to prevent abuse of executive power and preserve the individual authority of the other two branches of government.

In actuality, however, Congress is generally unwilling or unable to respond to the president’s use of executive legislation. Congress can override a presidential veto but does not do it very often; of 2,564 presidential vetoes in our nation’s history, only 110 have ever been overridden.⁴⁴ The 2/3 vote of both houses needed to override a veto basically means that unless the president’s executive order is grossly unconstitutional – and thus capable of earning bipartisan opposition - one party needs to have a supermajority of both houses. Even passing legislation to nullify an executive order can be difficult to accomplish, especially with Congress as polarized and bitterly divided along party lines as it is today. Congress could pass legislation designed to limit the power of the president, but such a bill would be difficult to pass and any veto on it – which would be guaranteed – would be hard to override. In addition, if such legislation was passed over a veto, there is no guarantee that the bill would successfully limit the president’s actions; the War Powers Act does little to restrain the president’s ability to wage war.⁴⁵ Impeachment is always an option, but the gravity of such a charge would prevent many from supporting it unless the president was very unpopular and truly abused his power.⁴⁶ Congress’s best weapon against executive legislation

42 Cooper, “The Law: Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games.”

43 Warber, *Executive orders and the modern presidency: Legislating from the oval office*.

44 Peters, *The American Presidency Project*.

45 Warber, *Executive orders and the modern presidency: Legislating from the oval office*.

46 Freie, *The Making of the Postmodern Presidency: From Ronald Reagan to Barack Obama*.

is its appropriations power, but this only gives it power over orders that require funding. Members of Congress may even support a president's use of executive legislation to establish policy when gridlock occurs on the floor. Congressmen can include policy changes made through executive legislation as part of their party's recent accomplishments for the next election cycle, giving them more incentive to support executive legislation.⁴⁷ These factors combined mean that Congress has only modified or challenged 3.8% of all executive orders, of which there have been over 13,000 total, leaving them an ineffective check on the president's legislative power.⁴⁸ Essentially the only times Congress can and will challenge an executive order are when the president has extremely low support, when in a divided government the party in power of Congress has a supermajority of both houses, or when a president seriously and obviously abuses his power in such a way as to earn opposition from both parties.

The Supreme Court constitutes the other major check on presidential power. Executive legislation – specifically executive orders and signing statements – is considered law, so the Supreme Court has the jurisdiction to deem an executive order unconstitutional using judicial review.⁴⁹ If a case challenging a president's legislation comes before the court, the judges can choose to hear the case and overturn the legislation if they think it represents a severe violation of the Constitution.⁵⁰ Unfortunately, the Supreme Court is generally unwilling to intervene in the president's use of executive legislation, even when the directives used are “of – at best dubious constitutional authority [or] issued without specific statutory authority.”⁵¹ In addition, the wide and vague grounds the president can use in his defense can make challenging the president problematic.⁵² Of the executive orders passed in our nation's history, only 14 have actually been challenged by federal courts and only 2 were completely overturned, showing how very rare it is for the Supreme Court to challenge executive legislation.⁵³

Public knowledge of executive orders and other forms of executive legislation is extremely low, in part because presidential directives are not usually part of the

basic discussion of the government. Citizens generally are “disconnected from politics, dislike political conflict, distrust political leaders, [and] possess low levels of information about specific policies,”⁵⁴ so there is no reason to believe the average American understands the complex use and nature of executive legislation. Since so many executive orders, signing statements, and memoranda are used for routine, symbolic, or house-keeping purposes, their use does not always make for an interesting story, meaning that the press does not always pay attention to or cover the use of executive legislation and the public hardly ever hears about it. Phillip J. Cooper insists that “the idea that the president could [...] govern in no small part by decree is a concept of which most Americans are blissfully unaware. If they were alert [...], many would most likely be aghast that the president could, in effect, write law.”⁵⁵ This ignorance of the masses ensures that the president does not really have to worry about the people's opinion when he uses executive legislation, removing one potential limit on his unilateral power.

The Threat of Executive Orders

Presidential power is not inherently a threat, for the presence of a strong executive is essential to a functioning democracy. Freie points out that “Congress itself is prone to inaction” and that, without a president, the “government will be unable to act decisively to address significant national issues.”⁵⁶ With the expansion of the bureaucracy in the past few decades, the president and his administration need to be able to organize the executive branch and act coherently in response to policy changes, a valid use for executive legislation.

Presidential power becomes a problem, however, when it expands at the expense of the other branches of government. Extensive abuse of executive legislation poses the biggest risk to Congress, whose legislative powers can be effectively circumvented by the president. Using executive orders to create or change existing policy without going through Congress ignores the constitutional principle of having the laws made by democratically-elected representatives of the people. The president is not directly elected, nor is he subject to the rules of debate and compromise that bind individual legislators. The Founding Fathers intended Congress to make the laws, not the

47 Warber, *Executive orders and the modern presidency: Legislating from the oval office*.

48 Ibid.

49 Ibid.

50 Ibid.

51 Mayer, “Executive Orders and Presidential Power,” 448.

52 Cooper, “Power tools for an effective and responsible presidency,” 529.

53 Crenson and Ginsberg, *Presidential Power: Unchecked and Unbalanced*.

54 Freie, *The Making of the Postmodern Presidency: From Ronald Reagan to Barack Obama*, 132.

55 Phillip J. Cooper *By Order of the President: The Use and Abuse of Executive Direct Action*. (Lawrence, University Press of Kansas, 2002), 15.

56 Freie, *The Making of the Postmodern Presidency: From Ronald Reagan to Barack Obama*, 8-9.

president.

Executive orders also reduce the incentive for compromise in the legislature. If the president can enact controversial policy on his own, there is no reason for him to rely on Congress, especially when legislation takes months to pass. Congress also tends to get gridlocked; instead of working out a compromise, the president could choose to pass an executive order that is effectively the same as the legislation in question, eliminating any need for the members of Congress to work things out on their own.⁵⁷ Members of the minority party may find it easier just to wait until they have a president in office to try and enact controversial policies rather than deal with a probable loss in both chambers.⁵⁸ Compromise is the intended goal of Congress; instead of eliminating any need for it, the president should function as legislative liaison, appealing to the public or inviting Congressmen to the White House to discuss legislation.⁵⁹ Executive legislation thus not only reduces the need for Congress but also prevents it from functioning properly. According to Crenson and Ginsberg, modern presidents have continued “the onward march of executive power [...] in the face of a Congress that seems to retain only the power to complain and harass.”⁶⁰ With the decline of political party strength in the past half-century and the dramatic polarization in the legislature, Congress is not powerful enough to stop executive expansion.

Just because presidents can bypass Congress so efficiently, however, does not mean they always rely on executive legislation. A president who used only executive orders and did not work with Congress at all would certainly earn sharp criticism from both parties and the media. A president’s bill that has been passed by Congress is a much bigger accomplishment and is more permanent than a policy enacted by executive order, meaning presidents will always have some incentive to work with Congress to achieve their goals. Crenson and Ginsberg argue that one of the reasons for this reliance on executive legislation is that presidents have lost traditional avenues of accomplishing their policy goals.⁶¹ Before C-SPAN continuously broadcasted Congress, the president had the advantage in using the media to appeal to the people, and with the recent decrease in party strength, the president

can no longer rely on fellow party members and party loyalty as he once did. No president can rule entirely by executive legislation and expect the other two branches to stand docile while he makes major policy change; presidents still have to take Congress into account when passing executive legislation.⁶² For example, President Clinton could have easily passed an executive order repealing the military’s ban on gays serving openly, but he never issued any such directive, largely because he did not want to risk Congress passing legislation making the ban permanent.⁶³ Congress is not in danger of losing its functionality entirely, but the extent to which modern presidents can unilaterally effect change was certainly unintended and unforeseen by the Founding Fathers.

Perhaps the most worrying aspect of executive legislation is how difficult it is to challenge. With most average Americans unaware of executive orders – not to mention the several alternate forms of executive legislations and the nuances distinguishing them – and the two other branches of government frequently unable or unwilling to overturn the president’s actions, there is no effective way to limit the president’s power. Unless he makes an extremely serious and controversial violation of the Constitution, something that both parties and the average American would find obviously wrong, the president will continue to possess the ability to use executive legislation to bypass Congress in the domestic arena and determine foreign policy. In summary, “direct presidential policymaking – once reserved for times of war or national emergency – has now become a routine affair.”⁶⁴ Executive legislation that only slightly oversteps the president’s constitutional bounds or that is strategically designed to prevent the enforcement of certain provisions of a bill is unlikely to disappear any time soon. The president has a variety of executive tools at his disposal, but Congress and the Supreme Court have few ways to prevent the continued increase of presidential power and the frequency of unilateral action.

Conclusion

Presidents in recent years have had more opportunities to expand their power and authority, largely through the use of executive legislation. Allowing the president to act decisively and without consulting Congress, executive orders and the other forms of executive legislation provide the president with a variety of options to enact in order to accomplish his policy agenda, especially in the

57 Crenson and Ginsberg, *Presidential Power: unchecked and Unbalanced*.

58 Ibid.

59 Freie, *The Making of the Postmodern Presidency: From Ronald Reagan to Barack Obama*.

60 Crenson and Ginsberg, *Presidential Power: Unchecked and Unbalanced*, 94.

61 Ibid.

62 Mayer, “Executive Orders and Presidential Power.”

63 Ibid.

64 Crenson and Ginsberg, *Presidential Power: Unchecked and Unbalanced*, 195.

event of gridlock or divided government. This expansion of presidential power comes at a time when the decline of party strength and increase in polarization have made Congress less able and less willing to respond to executive legislation. With the Supreme Court generally unwilling to overturn executive orders and the public largely ignorant of their existence – not to mention the existence of proclamations, signing statements, memoranda, or executive agreements – there is no viable way to challenge the president’s increased ability to act unilaterally. Although it does not enable the president to rule as a dictator, executive legislation is dangerous in that it remains unchecked and has been used to violate the constitutional principles of separation of powers and checks and balances, principles the Founding Fathers intended to keep any one of the three branches of government from becoming more powerful than the others and thus threatening the stability of the nation. The president’s ability to act unilaterally to accomplish his goals, both domestically and in terms of foreign policy, has sharply increased since the presidency of Ronald Reagan and will continue to rise, providing the potential for continued and more serious abuses of executive authority in the future.

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