How Executive Orders Work

by Dave Roos

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President Barack Obama greets citizens of Joplin, Missouri in May 2012 to mark the first anniversary of a deadly tornado that struck the town. As the head of the executive branch of government, the president has to respond to natural disasters and a host of other crises.
Rich Sugg/Getty Images

How Executive Orders Work

On February 19, 1942, two months after the Japanese attack on Pearl Harbor, President Franklin D. Roosevelt issued Executive Order 9066. In this one-page decree, the president used his authority as the commander-in-chief to authorize the U.S. military to "exclude" 122,000 Japanese Americans -- more than half of them U.S. citizens -- from their homes and businesses and relocate them to isolated and desolate internment camps [source: Our Documents]. A month later, Congress passed Public Law 503, making it a federal offense to disobey the president's executive order.

An **executive order**, also known as a **proclamation**, is a directive handed down directly from a president or governor (the executive branch of government) without input from the legislative or judicial branches. Executive orders can only be given to federal or state agencies, not to citizens, although citizens are indirectly affected by them.

Executive orders have been used by every American president since George Washington to lead the nation through times of war, to respond to natural disasters and economic crises, to encourage or discourage regulation by federal agencies, to promote civil rights, or in the case of the Japanese internment camps, to revoke civil rights. Executive orders can also be used by governors to direct state agencies, often in response to emergencies, but also to promote the governor's own regulatory and social policies.

There is no specific mention of executive orders in the U.S. Constitution. Instead, presidents argue that the power to make executive orders is implied in the following statements in Article II of the Constitution:

- "The executive power shall be vested in a President of the United States"
- "The President shall be Commander in Chief of the Army and Navy of the United States"
- "He shall take care that the laws be faithfully executed" [source: Contrubis]

Governors use a similar interpretation of their state constitutions to justify the legality of executive orders.

Critics of executive orders argue that these unilateral decrees undermine our trusted system of checks and balances, giving undue authority to the executive branch. For that reason, executive orders are considered a form of "executive legislation" [source: Contrubis]. In recent years, both Presidents George W. Bush and Barack Obama have wielded the executive order as an increasingly powerful political weapon, pushing through programs and regulations -- often controversial in nature -- without Congressional or judicial oversight [source: Savage]. Executive orders can be overruled by the courts or nullified by legislators after the fact, but until then they carry the full weight of federal and state law [source: Contrubis].

To better understand the controversial and colorful history of executive orders in the United States, let's start at the beginning, with George Washington himself.

History of Executive Orders in the United States

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 [source: Contrubis].

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 [source: Vermeule]. 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 [source: The American Presidency Project]. 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 [source: Patterson].

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 [source: The American Presidency Project]. 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 [source: Contrubis]. 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. We'll talk about this controversial order --and the landmark Supreme Court decision that followed -- on the next page.

President Harry Truman, author of a game-changing executive order.
Hulton Archive/Getty Images

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 [source: Paulsen]. 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 [source: Contrubis]. 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 [source: Paulsen]. 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 [source: Contrubis]. 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 [source: Paulsen].

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" [source: Contrubis]

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.

Now let's fast-forward to the Bush and Obama eras to look at more recent controversies over executive orders and the limits of presidential power.

Controversy Over Executive Orders

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" [source: Wolf]. 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 [source: Risen]. 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 [source: CNN]. 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 [source: Farley]. The third created a task force designed to review detention policies and procedures [source: CNN].

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 [source: Savage]. 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 [source: Rosenthal]. 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.

For lots more information on politics and elections, explore the links on the next page.

Author's Note

Before researching this article, I might have supported the political worldview that presidents don't really matter. There are so many players in the global political landscape -- Tea Party activists, Middle East dictators, European socialists -- that how much difference could one man (or woman) make? A lot, it turns out. Not only is the U.S. president a highly visible representative of American interests abroad, but he leads the political conversation at home. Executive orders, while not mentioned in the Constitution, have become an effective means of direct executive influence. Of course we love executive orders when our candidate is sitting in the Oval Office and we hate them when it's the other guy. So ask me again in four more years.

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