

The Breakfast Club

Constitutional Minute for 11 January 2022

Presidential Executive Orders

Last week I discussed the doctrine of separation of powers and some of the violations of that doctrine which have taken place over the years. I pointed to one big culprit: Congress delegating its exclusive legislative powerⁱ to Executive Branch agencies, letting them “fill in the details” of sparsely and ambiguously written laws through regulations and rules that have the force of law. The other violation of the separation of powers doctrine was through simple usurpation, the outright taking of unwarranted power. I cited Teddy Roosevelt’s expansive view of the powers of the President. However, it is one thing to believe that the President has essentially unlimited power, it is quite another to put that belief into action. That is where Executive Orders come into play.

As distinguished from Article 1, where the vesting clause vests all legislative power in the Congress, and then proceeds, in Section 8, to list eighteen different ways the legislative power can be exercised, Article 2, covering the Presidency, is different. Its vesting clause simply states: “The executive Power shall be vested in a President of the United States of America.” **The** executive power? What does **The** executive power include? While we do find listed in Sections 2 and 3 of Article 2 certain powers and responsibilities of the President, the power to issue Executive Orders is not listed.

Alexander Hamilton took ten essays in *The Federalist* (#67-77) to explain the office of the President, the last five focusing exclusively on the powers of the President. In all these essays, Hamilton never suggests there are unenumerated inherent executive power to be found lurking in Article Two’s “vesting clause.”ⁱⁱ At least not in 1788.

A mere five years later, however, writing the first of the *Pacificus Letters*, Hamilton argues that George Washington’s Neutrality Proclamation sprang from just such inherent powers (“the more comprehensive grant contained in the general clause”).ⁱⁱⁱ

Does this mean Presidential Executive Orders are unconstitutional? No, common sense dictates that an executive, any executive (and as the Chief Executive of the country, the President certainly qualifies) must have the power to order his or her subordinates to carry out his legitimate responsibilities, and the Supreme Court agrees, calling this an “inherent power” of the President. In addition, the Court declared these other “inherent” powers could be legitimately exercised:

- Removal and supervisory powers over executive officers^{iv}
- Law enforcement power^v
- Power over foreign affairs^{vi}
- Control of prosecutions^{vii}

So, if Presidential Executive Orders are constitutional, what’s all the fuss about? The “fuss” occurs when the President exceeds *both* the powers given his office in the Constitution as well as the powers Congress gives the Executive Branch through legislation it passes.

Twenty-seventh President, William H. Taft took a conservative approach to the powers of the President: “*The president can exercise no power which cannot be fairly and reasonably traced to some*

specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise.” His predecessor, Teddy Roosevelt, had taken the opposite view: *“The executive power [is] limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers.”* The courts have generally sided with Taft, over the years striking down many Executive Orders which exceeded the statutory authority Congress had provided. But the Supreme Court struck down only five of FDR’s more than 3500 Executive Orders. What’s up with that?

The Supreme Court cannot take *unilateral* action to strike down anything, whether a law or an executive action. They must first be presented with a “case or controversy” challenging the constitutionality of the law or action. If Congress or the states do not challenge an Executive Order, it proceeds unmolested. All of Donald Trump’s controversial Executive Orders were quickly challenged by the states, as have been many of Joe Biden’s. And this shows us the difference between a constitutional executive order and an unconstitutional one. While the Left challenged Trump’s Executive Order restricting immigration from certain countries lacking a robust vetting process (the infamous “Muslim Ban,” which decidedly was not that), the challenge failed at the Supreme Court. Conversely, it appears at this point that Joe Biden’s vaccine mandate EOs will not survive court scrutiny.

It all comes down to the language in the law. Does it give the President or the Executive agency the latitude to do what they did, or not? As I said last week that statute language is often purposely vague or ambiguous, written that way by lobbyists to give their favored agency the “wiggle room” it needs to do what they want it to do. You can download the EOs of several recent Presidents [here](#).

How do we stop unconstitutional executive orders? Once a President is elected, we the people have little recourse; we have to rely on Congress and/or the state governments taking action on our behalf to get the court system to stop the action, even if it requires an appeal all the way to the high court. But that *must* be done. A President whose unconstitutional actions are not opposed will simply write more of them.

One final aspect of Executive Orders bears our scrutiny: Emergency Executive Orders. These orders (at least the titles and a synopsis) are matters of public record so you can do your own homework, which I suggest. In a time of declared emergency, they give the national government the power to control all, and I do mean all sectors of the American economy.

The government would control all communications media under E.O. 10995, all electrical power, gas, petroleum, fuel and minerals in the country (10997), all food resources and farms (10998), and all health, education and welfare functions (11001). E.O. 11000 gives the Secretary of Labor the authority to mobilize civilians into work brigades under government supervision. Under E.O. 11002, the Postmaster General will create a national registration of all persons. E.O. 11003 gives the Administrator of the FAA control of all airports and aircraft, including commercial aircraft. The Interstate Commerce Commissioner would control all railroads, inland waterways and public storage facilities under E.O. 11005. Under E.O. 11004 - the Housing and Finance Authority would have the power to relocate whole communities, build new housing with public funds, designate areas to be abandoned, and create new locations for populations. Under the right declaration of emergency, the national government controls literally everything. Are you OK with that?

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ⁱ “All legislative power herein granted is vested in a Congress of the United States.”

ⁱⁱ “...what would be ... feared from an elective magistrate of four years’ duration, with the confined authorities of a President of the United States? Federalist #71.

ⁱⁱⁱ <http://teachingamericanhistory.org/library/document/the-pacificus-helvidius-debate/>

^{iv} *Myers v. United States (1926)*

^v *Nixon v. Fitzgerald (1982)*

^{vi} *American Insurance Ass’n v. Garamendi (2003)*

^{vii} *Morrison v. Olsen (1988)*