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The Rise of the Unilateral Executive

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Introduction

The public outcry against the National Security Agency's (NSA) collection of data on U.S. citizens, revealed by Edward Snowden's leak, focused almost entirely on the USA Patriot Act signed into law by President George W. Bush in 2001.[1] News media demanded greater congressional oversight, questioned the statute's implementation and interpretation, and called for judicial intervention. Yet, many are unaware that the vast majority of the NSA's controversial power should not be attributed to the Patriot Act, but rather, to an executive order signed into law by President Ronald Reagan in 1981.[2] Executive Order 12333 is not a statute, and therefore has never been put to a congressional vote or been subject to judicial review by any court.[3] Nonetheless, Executive Order 12333 has the full force and effect of law, authorizing the NSA to collect the telephone records of tens of millions of American citizens.[4]

Executive orders have gained unprecedented attention in recent years as presidents have increasingly relied on them when making unilateral decisions regarding controversial actions and policies. Due to continuous expansion of presidential powers, the need for more effective checks and balances from the other branches of government is apparent. Presidential authority has evolved to be almost entirely "unbounded" by law.[5] This has allowed presidents from across the political spectrum to enjoy boundless discretion in making important decisions — especially regarding foreign affairs — without any cooperation with Congress. While an energetic executive is important to the strength of the nation, there must be limits imposed to guarantee this energy does not detract from the powers afforded to the legislative branch. As Alexander Hamilton famously wrote in the *Federalist Papers:*

> Energy in the executive is a leading character in the definition of a good government. It is essential to the protection of the community against foreign attacks. Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic executive, it will only remain to inquire, what are the ingredients which constitute this energy?[6]

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[1] Erica Newland, Executive Orders in Court, The Yale Law Journal, 2035 (2015).
[2] John Napier Tye, *Meet Executive Order 12333: The Reagan rule that lets the NSA spy on Americans,* The Wash. Post, July 18, 2014.
[3] Ibid.
[4] *Edward Snowden: Leaks that exposed US spy programme,* BBC News Online, US & Canada, (2014).
[5] Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545, 546-47 (2004).
[6] Alexander Hamilton, *Federalist,* No. 70.

In establishing a clearer jurisprudence regarding presidential directives, the Supreme Court can restore the balance of power among the executive and legislative branches, and maintain the means for the people of the nation to decide on the ingredients constituting presidential energy.

An overview of the history of executive order issuance and its sources of authority reveals the advantages and disadvantages such direct action offers administrations. After examining the traditional framework applied to executive orders by the Supreme Court, it becomes evident that the Court's acquiescence and restraint has greatly increased presidential powers and has allowed it to encroach upon those delegated to Congress. The lack of clear jurisprudence from the Court has, either intentionally or unintentionally, favored presidential authority — particularly on foreign affairs issues. The unilateralism of recent presidential action in international affairs is vividly demonstrated by two concrete examples from the Bush and Obama Administrations. These examples show excessive executive authority in foreign relations, and further highlight the need for a more reliable Court approach to executive orders.

Executive Orders

Definition and Authority

Presidential directives are important and powerful tools that have been issued since the Washington Administration.[7] Although the slightest examination of the history of the American presidency can reveal the significant role that direct action tools have played in shaping the nation's policies, there is markedly a lack of scholarly analysis on their use and abuse by presidents.[8]

Although presidents use numerous written instruments to implement policy, defining them and differentiating between them has been difficult for academics.[9] These instruments include executive orders, presidential memoranda, and presidential proclamations. The main approach to distinguishing between these directives is typically based on their respective forms, rather than on their substance. Out of the three, executive orders have been the most contentious, as they have often been issued over controversial areas. For example, in *Korematsu v. United States* (1944) the Supreme Court upheld the constitutionality of Executive Order 9066 issued by President Franklin D. Roosevelt, which

[7] Catherine M. Dwyer, *The U.S. Presidency and national security directives: An overview,* Journal of Government Information, (2003).
[8] Phillip J. Cooper, By the Order of the President The Use and Abuse of Executive Direct Action, 2-76 (2002).
[9] Vivian S. Chu and Todd Gravey, Executive Orders: Issuance, Modification, and Revocation, Congressional Research Service, 1 (2014).

established internment camps for Japanese Americans during World War II.[10] The only technical statutory difference between the three instruments is that the Federal Register Act requires all executive orders be published in the *Federal Register.*[11] Thus, although it is unknown exactly how many have been issued, there has been an official record of all executive orders maintained by the government since 1935.

Presidents have used executive orders in a plethora of ways, including, "to suspend habeas corpus, desegregate the military, implement affirmative action requirements for government contractors, institute centralized review of proposed agency regulations, stall stem cell research, create the nation's first cybersecurity initiative, and… authorize a surveillance dragnet."[12] These orders instruct the officers to take action, stop an activity, modify a policy, or change certain practices.[13] The commonly accepted official definition of executive orders originated from a study conducted for the House Committee on Government Operations in 1957:

> Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law… In the narrower sense Executive orders and proclamations are written documents denominated as such… Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly.[14]

Given the broad range of issues covered by executive orders, there is a tendency to apply the term to a whole range of presidential power tools. However, at their most basic form, executive orders are directives issued by the President to the officers of the executive branch.

An executive order, as any other presidential initiative, must derive its authority from a legal source. The President can root this legal authority in his constitutional capacity as chief executive, or in a statute. In an article for *Harvard Law Review,* now Supreme Court Justice Elena Kagan explains:

> Presidents, of course, discovered long ago that they could use executive orders and similar vehicles (for example, proclamations) to take various

[10] Ibid., 3.
[11] Available at: https://www.federalregister.gov/executive-orders
[12] See note 1 above.
[13] See note 9 above.
[14] U.S. House of Representatives, Committee on Government Operations, *Executive Orders and Proclamations: A Study of the Use of Presidential Power,* 85th Cong., 1st sess., 1957.

> unilateral actions, sometimes of considerable importance… The President in these cases, whether claiming authorization from a federal statute delegating him power or from the Constitution itself, asserted his right as head of the executive branch to determine how its internal processes and constituent units were to function.[15]

Article II, Section I, Clause I of the U.S. Constitution declares that, "the executive power shall be vested in a President of the United States."[16] While Article I contains a long list of powers delegated to Congress, Article II sets forth a comparably shorter list of presidential powers. The "Vesting Clause Thesis,"[17] contends that Article II *implicitly* grants the President a broad range of powers, and has been used to justify discretionary executive action. This broad interpretation of the Constitution has undoubtedly contributed to the development of the unilateral executive.[18]

The problem in interpreting and analyzing the validity of executive order issuance emerges from the fact that too often, the exact authority of an executive order is not clear. In many instances, the President's justification includes an aggregation of authority from various sources, making an effective analysis of the source difficult. This is due to the fact that the legal source to issue executive orders can come from a combination of statutes and Article II of the Constitution.[19] The difficulties arising from attempts to isolate the legal authority of executive orders will be discussed in greater detail (along with other challenges faced by the Court when reviewing presidential directives) in Part III.

Traditional Framework of the Court

In *Youngstown Sheet & Tube Co. v. Sawyer* (1952), the Supreme Court established the framework to analyze whether the issuance of an executive order by the President — for example, the seizure of most of the nation's steel mills — constitutes a valid presidential action.[20] The framework articulated by Justice Robert H. Jackson in his concurring opinion has been incredibly influential in guiding the Court's approach to analyzing the validity of controversial actions by the executive.[21] Justice Jackson's tripartite approach addressed the fact that the

[15] Elena Kagan, Presidential Administration, 114 Harv. Law Rev. 2245, 2291-92 (2001).
[16] U.S. Constitution, Article II, § I, Clause I.
[17] See note 6 above.
[18] Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, University of Maryland School of Law, 26 (2006).
[19] See note 10 above.
[20] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
[21] See note 10 above.

President's powers are not fixed. Instead, they ebb and flow, depending on their conjunction and disjunction with the powers of Congress.[22] The President's authority is at a maximum when he is acting pursuant to either an express or implied delegation from Congress. His authority is at a minimum when the measures he has taken are in conflict with the express or implied will of Congress.

In the middle of the two is what Justice Jackson identified as "[the] zone of twilight in which [the President] and Congress may have concurrent authority, or in which distribution is uncertain."[23] In this gray area, the President may act independently, but his actions could be challenged. Thus, when Congress is silent on an issue, and thereby has neither denied nor granted authority to the executive branch, the President is free to take action. The three categories established in *Youngstown* have had tremendous impact of the development of the Court's jurisprudence on presidential direct action.

This framework is visible in numerous subsequent Supreme Court decisions. For example, in *Dames & Moore v. Regan* (1981), the Court upheld executive orders issued by President Jimmy Carter, which following the resolution of the Iran Hostage Crisis, terminated all legal proceedings in U.S. courts involving claims by U.S. nationals against the government of Iran.[24] Writing for the majority was Justice William H. Rehnquist, who argued that because the President had been delegated broad authority under the International Emergency Economic Powers Act (IEEPA),[25] such action was, "supported by the strongest presumption and the widest latitude of judicial interpretation."[26] This exceptionally deferential view of executive power originated from the Court's opinion in *Youngstown*, and Justice Rehnquist's reference cemented Justice Jackson's tripartite approach.

Although formulaically granting full deference to the President when Congress is silent on an issue has enabled vast expansion of presidential powers, the Supreme Court has not been willing to address the negative consequences of this decision. The limited depth of the doctrine from *Youngstown* continues to dominate the way in which the judiciary branch interprets separation of power issues. The limit on presidential action with respect to executive orders has been distorted by the Supreme Court penchant for deference to the Executive.[27] This distortion has produced aggrandizement of presidential authority on most international affairs issues.

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[22] See note 21 above.
[23] Ibid.
[24] *Dames & Moore v. Regan* 453 US 654 (1981).
[25] See note 10 above.
[26] See note 25 above.
[27] Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, University of Maryland School of Law, 7 (2006).

Advantages and Disadvantages for the Administration

From the perspective of the President, one of the main appeals of utilizing executive orders is their ability to circumvent the procedural restraints imposed on other types of lawmaking. Given that there is virtually no procedural requirement that the Executive must satisfy prior to the issuance of an executive order, it is unsurprising that these directives have been favored and used by presidents of all eras. Other types of legislative action and agency regulations require a significantly more arduous path, while executive orders, "rid the president of the need to assemble majorities in both houses of Congress, or wait through administrative processes, such as notice-and-comment rulemaking, to initiate policy."[28]

Executive orders are also used to efficiently issue policies aimed at important problems; this strong and immediate momentum is especially appealing for a new administration.[29] In emergency situations, when immediate action is necessary, the availability and rapidity of executive orders becomes extremely important. Additionally, if there is a time-sensitive problem where the President does not have time for traditional legislation, executive orders also serve a vital purpose. In times of extreme polarization and animosity in Congress, mainly due to partisanship, executive orders grant the President the ability to overcome the government deadlock and accomplish goals. Lastly, they give presidents the ability to demonstrate direct action on issues particularly important to them, and exert greater control in shaping their legacy. Although executive orders are a legitimate and compelling way for presidents to carry out their duties, they can also pose risks to the administration.

While issuing executive orders can be an incredibly useful tool for the President, it nonetheless entails significant drawbacks. In general terms, these disadvantages include the aggravation of tensions between the branches of the federal government (as well as the various intergovernmental agencies), the weakening of the effectiveness of the President's Cabinet, and negative backlash from the public. Additionally, constant reliance on executive orders can undermine the administrative law system by discounting more balanced forms of governance.[30]

The administrative law processes that have been established over the years serve important purposes. These processes ensure that the authority of important policy actions remain clear. When the government bears its power on an individual or an organization, administrative law ensures the availability of due

[28] Kevin M. Stack, The Statutory President, 90 Iowa Law Review. 539, 552-53 (2005).
[29] See note 9 above at 69-70.
[30] See note 9 above.

process and a means for judicial review.[31] This is jeopardized by the presidential practice of bypassing regular lawmaking avenues and issuing executive orders, which often claim its authority from an inadequately identified source.

Phillip J. Cooper, the author of the influential book *By Order of the President The Use and Abuse of Executive Direct Action* (2002), surmised succinctly, "Few knowledgeable observers… are prepared to suggest that executive orders should be banned outright… the challenge is to understand what executive orders are, how they are used, why they are employed, what potential strengths they offer, and what difficulties they might engender."[32] Executive orders touch on individual rights, the structure of the federal government, the separation of powers among the branches, and thereby affect millions of Americans.[33] Thus, the difficulties they pose are pressing and must urgently be addressed. The most appropriate form of oversight on executive order issuance is judicial review.

Executive Orders as an Insurance Policy

In order to concretely highlight the ways in which presidents overstep Congress and attempt to expand their authority beyond what has been allocated for the executive branch, specific examples must be examined. The George W. Bush and the Barack Obama presidencies present two illuminating cases. In both instances, the presidents were most likely acting in an unconstitutional way, but, by redefining legally accepted terms to suit their actions, they managed to insure themselves against any liability. In both circumstances, the Supreme Court was silent and did not review challenges to these actions.

In 2002, the Bush Administration was at the height of its "war on terror." President Bush sought ways to authorize the torture of terrorist suspects, which is against international and American law. The solution was to take unilateral action and redefine torture. In their book *Unchecked and Unbalanced* (2008), Aziz Z. Huq and Frederick A.O. Schwarz examine the President Bush's torture policy and surmise that, "Torture, according to the Bush Administration, is legal because the president says it is."[34] The definition of torture under applicable law used to be "severe physical or mental pain or suffering,"[35] but the order issued by President

[31] Ibid., at 75.
[32] Ibid.
[33] See note 1 above.
[34] Aziz Z. Huq and Frederick A.O. Schwarz, *Unchecked and Unbalanced,* The New Press, New York, 202. (2008).
[35] 18 U.S.C. sections 2340-2340A. The Standards of Conduct for Interrogation under 18 U.S.C. were amended by John Yoo, the Deputy Assistant Attorney General of the U.S. and signed by Assistant Attorney General Jay S. Bybee who was the head of the Office of Legal Counsel (OLC). They were termed the "Torture Memos" by the press.

Bush, with the support of the Office of Legal Counsel (OLC), which reviews all executive orders and proclamations proposed by the President, modified the definition so that "suffering" "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[36] By independently redefining the meaning of the word, President Bush was able to order the torture of terrorist suspects without any interference from Congress.

The Obama Administration has also employed this form of legal jujitsu. In 2011, President Obama decided to take part in the NATO mission supporting rebels in Libya. According to the War Powers Resolution of 1973, the President must ask Congress for authorization within 60 days of involving the U.S. military into "hostilities or into situations where imminent involvement into hostilities is clearly indicated by the circumstances."[37] President Obama refused to obtain authorization from Congress for the intervention in Libya. The OLC provided assistance in redefining "hostilities" in order to justify President Obama's independent and highly controversial action.

In both instances, the decisions of the administrations were met with criticism, taken by many as a clear example of unconstitutional presidential action.[38] This type of unilateral action threatens national security and stability. Authors Aziz Z. Huq and Frederick A.O. Schwarz Jr., accurately conclude:

> Making the executive supreme makes the nation no safer — either from its enemies or its own worse impulses. Indeed, the abiding genius of the Founding Generation was its rejection of the idea that unchecked unilateral powers is ever properly vested in any one branch of government. Our government was framed to 'control itself,' as James Madison wrote in the *Federalist Papers*. 'Ambition must be made to counteract ambition.' Dividing the powers between three branches, the Founders harnessed human passions in the cause of limited government.[39]

These episodes serve as a clear example of the weak legal constraints on presidential action. They also demonstrate the executive branch's ability to evade checks and balances by crafting its own definitions, even if the new definitions contradict existing valid laws.

The redefining of "torture" by the Bush Administration was repealed, but since the Obama Administration was able to continue the operation in Libya and defend its own definition of "hostilities," its definition is likely to become the

[36] Garrett Epps, *Obama's Bush-Like Approach to Executive Power,* The Atlantic, (2011).
[37] Ibid.
[38] Ibid.
[39] See note 35 above at 202.

accepted one.[40] In their article for *Columbia Law Review,* Curtis A. Bradley and Trevor W. Morrison suggest that, "As a result, actions supported by minimally plausible legal defenses might over time be understood to exert a gravitational pull on the best understanding of the law."[41] Institutional practice has played a central role in American foreign policy, thus the need for caution and restraint on behalf of the Executive is clear. Unfortunately, as the two examples illustrate, presidents often disregard this need.

Judicial Review

Bringing Executive Orders to the Court

Court disputes that arise over executive orders often question the authority the President claims to issue the order, and whether or not it can validly be implied from the statute in question. Since administrations have identified and interpreted several statutes to offer great flexibility to a President seeking to issue an executive order, this discussion regarding real as opposed to claimed authority has become a major issue.[42]

In accordance to the framework established in *Youngstown,* when an executive order is issued in conjunction to the will of Congress, it is upheld as valid. When it is issued against the will of Congress it is to be invalidated. And finally, in the absence of congressional opposition, in the "twilight zone,"[43] the President may take independent action and issue executive orders, the validity of which may be challenged in courts.[44] Most direct action tools that presidents employ are justified and legal, it is their widespread and unchecked use that has presented most of the difficulties.[45] As history has shown, presidents will often exceed their authority, and in these circumstances, their actions must consistently be questioned. It is specifically in these instances when the need for clear and concise jurisprudence regarding executive orders becomes necessary.

The Supreme Court case *Old Dominion Branch No. 496 v. Austin* (1974), illustrates how difficult it can be to isolate an executive order's source of authority.[46] In this case, the challenged executive order was issued to govern labor relations for federal employees. The Court upheld the order, finding its authority

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[40] See note 6 above at 1148.
[41] Ibid., at 1148.
[42] See note 9 above.
[43] *Youngstown Sheet & Tube Co. v. Sawyer.*
[44] Louis Fisher, *Separation of Powers: Interpretations Outside the Courts,* 87-88 (1990).
[45] See note 9 above.
[46] See note 1 above. (The scope of the research was limited to challenges brought in front of either the Supreme Court or the D.C. Court of Appeals).

in *both* Article II of the U.S. Constitution, as well in 5 U.S.C. §7301, which grants the President the right to prescribe regulations for the conduct of employees in the executive branch.[47]

Executive orders are often issued on sweeping claims of authority by presidents, and as addressed earlier, in many complex cases it becomes difficult for the Court to untangle the validity of the claims. For example, of the 41 executive orders issued by President Bush during the second year of his presidency, only 23 cited a specific statute.[48] Similarly, of the 34 executive orders issued by President Obama during the second year of his presidency, only 15 of them had claimed a specific law as their source of authority.[49]

A barrier to bringing congressional challenges of executive orders to the Court emerges from the fact that congressmen are often found to lack standing in these cases. Following the Supreme Court's decision in *Raines v. Byrd* (1997), which found that individual members of Congress did not have standing in challenging presidential action, many subsequent cases have been decided similarly.[50] "[The] Supreme Court has dramatically limited or perhaps more accurately, all but eliminated, legislative standing for members of Congress."[51] Examples include, *Campell v. Clinton* (2000), in which members of Congress lacked standing in their challenge to President Clinton's use of U.S. military force in former Yugoslavia, as well as in *Kucinich v. Obama* (2011), where members of Congress lacked standing to challenge President Obama's use of U.S. military force in Libya. This inability by congressmen to establish standing has sabotaged the efforts of Congress to challenge the President's encroachment on the legislative branch's authority. It has also provided ample opportunity for the Executive to abuse his power.

The "Sole Organ" Doctrine

Another reason why the Court has failed to articulate a clear jurisprudence on executive orders stems from its rudimentary approach to interpreting presidential direct action. This approach has been most common in cases where the issues involve foreign affairs. After the Court's ruling in *United States v. Curtiss-Wright Corp.* (1936), the President has been widely regarded as the "sole organ" of the nation in the realm of international relations. Justice Southerland wrote that the President must be accorded "a degree of discretion and freedom from statutory restrictions which would not be admissible were domestic affairs

[47] *Letter Carriers v. Austin,* 418 U.S. 264 (1974).
[48] See note 1 above.
[49] Ibid.
[50] See note 6 above.
[51] See note 9 above at 70.

alone involved."[52] The decision in the case has been used to justify both broad delegations of legislative authority to the Executive and the exercise of inherent presidential power.[53] Therefore, even when the validity of an executive order is challenged, and the parties are found to have standing, the tendency of the Court has been to interpret the initial acquiescence of Congress as favorable to the President.

Only in the absence of a clear legislative record opposing the challenged presidential action will the Court abandon this simplistic approach.[54] The case *Goldwater v. Carter* (1979), is a clear example that when an Executive is challenged by Congress on foreign affairs issues, the courts either conclude that the lack of initial confrontation by Congress means the President may carry on with his action, or they find that the issue is a political question and is therefore nonjusticiable."[55] When foreign policy-based executive orders are challenged, the understanding of the President as the "sole organ"[56] in international affairs plays a large role in the Court's decision-making.

Scholars have often criticized this interpretation of the "sole organ" doctrine, but the Supreme Court has been generous in allowing for presidential strides for greater authority in international affairs. Louis Fisher, a Senior Specialist in separation of powers at the Congressional Research Service at the Library of Congress has written extensively on the decision in *Curtiss-Wright.* He argues that the "sole organ" doctrine articulated by Justice Southerland has been altogether misinterpreted from the speech delivered by then-Representative John Marshall. Fisher states that Marshall's objective in calling the President the sole organ was to defend President John Adams' authority to carry out an extradition treaty; the President was not the sole organ in formulating the treaty, simply in implementing it.[57] Thus, the Court's practice of attributing exceptional authority to the Executive in foreign affairs is misguided. Fisher states that, "Only after the policy had been formulated through the collective efforts of the executive and the legislative branches, either by treaty or by statute, did the President emerge as the

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[52] *United States v. Curtiss-Wright Corp.* (1936).

[53] Louis Fisher, *Constitutional Conflicts between Congress and the President,* University Press of Kansas (1991).

[54] See note 9 above at 70.

[55] *Goldwater v. Carter* (1979) 444 U.S. 996. The District of Columbia Court of Appeals held that, "It cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so." The Supreme Court, on appeal, found that, "the issue presented by this case is a nonjustiable political question which can never be considered by this Court."

[56] Louis Fisher, *Study No. 1 The "Sole Organ'" Doctrine,* The Law Library of Congress, 8 (2006).

[57] Ibid., at 7. Stresses the distinction between formulation and implementation of foreign policy.

'sole organ' in implementing it."[58] If Fisher's arguments are true, they undermine the current Court's entire jurisprudence regarding the distribution of power on foreign affairs between the two branches.

Regardless of the criticism, the common interpretation of *Curtiss-Wright* continues to dominate the Court's decisions today. Unsurprisingly, this broad delegation of legislative authority is most evident in the Court's treatment of executive orders concerning foreign policy issues. A recent example of this emerged in the *Zivotofsky v. Kerry* (2015) case, in which the Supreme Court upheld the President's authority over Congress in international relations once again. Citing *Curtiss-Wright* four times, the Court ruled that a congressional legislation requiring the State Department to record Israel in the passport of a U.S. citizen born in Jerusalem intrudes on the President's authority to recognize foreign nations.[59]

Judicial Abstention

The lack of judicial review and the failure by the Supreme Court to articulate a clear doctrine regarding executive orders has also made it difficult to appropriately apply the limits set forth by the Constitution to the President. A comprehensive overview of the court cases challenging presidential direct action either in front of the District of Columbia Court of Appeals or the Supreme Court of the United States, revealed that checks and balances available to "temper executive action" are "inconsistently" invoked by the courts.[60] This allows for the aggrandizement of the President and subsequently endangers the balance of powers that guarantees the stability of the nation. Louis Fisher warns:

> Under the best of conditions, the Supreme Court offers limited help in resolving the basic disputes of separation of powers. There are simply too many conflicts over issues that are not easily addressed in the court. Moreover, during the last two decades the Court has slipped back and forth in its search for principles, sometimes embracing a functional and pragmatic approach and switching later to doctrinaire, formalistic mode. With this confusion, the executive and legislative branches operate under unusual pressure to fend for themselves.[61]

Judicial abstention in this area is defended by the argument that the respective political branches are equipped to protect their interests and keep other branches

[58] Ibid, at 8.
[59] See *Zivotofsky v. Secretary of State* 576 US __ (2015).
[60] See note 1 above.
[61] See note 45 above at 57-58.

from encroaching on their rights. Nonetheless, the emergence of presidential unilateralism demonstrates the need for more oversight. The courts are often viewed as incapable of resolving national security and foreign affairs issues. However, as the examples from the Bush and Obama Administrations have demonstrated, the abstention by the Supreme Court has contributed to the inflation of the executive branch's authority.

Attempting to interrogate and interpret executive orders in the Supreme Court opinions is a gargantuan undertaking. A recent study from Yale Law School surveying the Court's doctrine on executive orders, echoed the commonly held claim by congressmen and constituents that, "The resulting judicial elevation of executive order does not seem to take the form of a studied esteem for the President's greater flexibility, expertise, or role in our constitutional system. Rather, it seems to be born of disaster."[62] Even though the Court has the power to review the contested presidential powers and determine whether or not a certain type of historical practice is valid, there continues to be a lack of reliable judicial review in this area.

Conclusion

While there has been some judicial review of direct presidential action, the Supreme Court has generally abstained from addressing issues regarding executive orders and their impact on the allocation of authority among in the federal government.[63] This has led to the emergence of ambiguous jurisprudence on presidential directives. This form of judicial avoidance is primarily evident in questions surrounding the limits of presidential authority in foreign affairs. Additionally, even when the Court has agreed to review a challenge to an executive order, it has been inconsistent with respect to determining when a statute can preclude or invalidate it.[64]

The Yale Law School study noted above concluded that, "This jurisprudence of executive orders may not derive from any coherent doctrine of presidential exceptionalism but instead from an under-theorized understanding of the role of executive orders and how they should function as part of our separation of powers."[65] This conclusion highlights that a clearer jurisprudence by the Supreme Court is needed to address executive orders, and the ways in which they have allowed the presidents to operate as monarchs. Unconstitutional actions, such as bypassing Congress and infringing upon its legislative authority, are going to continue in future administrations unless the Court clarifies its doctrine on

[62] See note 1.
[63] See note 6 above.
[64] See note 1 at 1063.
[65] See note 1 at 2083.

executive orders. By eliminating its current simplistic practice, the Court will also be better equipped to determine the circumstances under which standing should be granted to Members of Congress when they present challenges to presidential directives.

A closer examination of the asymmetries that have emerged as the result of the issuance of presidential directives is necessary. The Supreme Court must take note of the need for more complex and sophisticated approaches to interpreting the validity of executive orders. The motives of the Court in practicing avoidance are not clear, but the resulting inflation of presidential authority and the weakening of Congress are undeniable.

Finally, two important questions regarding the vagueness of the jurisprudence on executive orders must be asked: Is the ambiguity meant to be a tool awarding the modern presidency with the flexibility needed to navigate today's rapidly shifting world? Or is it a failure by the Supreme Court to realize the dangerous impact that unchecked presidential unilateralism has on the prosperity of the Republic?

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18 U.S.C. sections 2340-2340A.