Presidents and the Constitution

How Presidents Interpret the Constitution
Presidential Appointments and Senate Confirmations
Presidential Executive Orders

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This fall, Americans of voting age will exercise one of our most important civic responsibilities—electing the president of the United States. It is with this in mind that we focus the fall edition of *Insights* on the president and the Constitution. In many states around the country, voters will experience changes in the laws regulating aspects of the voting process. Our issue opens with *Perspectives* on such changes by experts exploring the scope, rationale, and impact they may have on voter participation.

The accompanying *Learning Gateways* strategy will help connect this content to your classroom. Visit the ABA's voting website—**www.voteyourvoicenow**—for state-specific voter information and lesson plans connecting your classroom to this important civic responsibility.

The feature articles in this edition of *Insights* take a look at tools the executive branch utilizes in fulfilling the considerable task of leading the nation. We begin with University of Colorado Law School Professor Emeritus Harold Bruff's article, “How Presidents Interpret the Constitution,” followed by a time line depicting “Ten Defining Moments” in presidential appointment history by Tiffany Middleton, *Insights*’ managing editor. Each of these momentous events reflects the challenges and precedents shaping today’s political landscape. The final feature article, “Presidential Executive Orders: Controversial and Common” by political scientist Graham Dodds, looks at the changing use of executive orders throughout American history. Notably, a special *Learning Gateways* lesson feature by teacher/lawyer JoEllen Ambrose centers on “Presidential Powers and Their Limits.” And our regular primary source series, *Teaching Legal Docs*, provides a detailed look at the executive order from structure to substance. To complete our focus on the president, we *Profile* Richard Norton Smith, presidential historian and former director of a number of presidential libraries.

Finally, this edition of *Law Review*, by lawyer/journalist Mark Cohen, examines two recent Supreme Court decisions with significant implications for Fourth Amendment jurisprudence. *Insights* is never complete without a visit to **www.insightsmagazine.org** for additional resources, materials, and useful links to help you bring this and other law-related topics to your classroom. There too, you will find articles, links to primary source documents, and ready-to-use handouts. And you will find links to other ABA Division for Public Education resources, including our standing column in *Social Education*, the magazine of the National Council for the Social Studies, “Lessons on the Law.” It was named a 2016 national finalist for “best editorial content in a professional magazine” by the PreK–12 Learning division of the American Association of Publishers.

As always, let us know how you use this edition! We value your input and look forward to your comments.

Best wishes for a productive and fulfilling school year,

Mabel McKinney-Browning
Mabel.MckinneyBrowning@americanbar.org
In far too many states, public policies are making voting harder—or impossible—for the unmarried women, persons of color, and young people populations, known as the Rising American Electorate (RAE), who comprise the majority of those eligible to vote.

Ever-more-stringent voter ID laws, constantly changing rules about voter registration requirements, shifting precinct boundaries, cutbacks in early voting and vote-by-mail, legalized voter intimidation, inequitable distribution of voting machines leading to long lines on Election Day—these are just some of the ways that public officials in some states are making it harder for members of the RAE to exercise their right to vote. And this is especially concerning because while they make up the majority of potential voters, the RAE has yet to constitute the majority of those who do vote. And thanks to the Supreme Court’s ruling in Shelby County v. Holder, the federal government’s ability to protect voting rights under the Voting Rights Act of 1965 (VRA) has been severely restricted.

As challenging as the environment of suppression created by increased legal impediments to voting may be, it is equally problematic that those least likely to participate are not getting the information they need about why—or how—to vote. When the Voter Participation Center’s researchers have asked RAE members who didn’t vote why they didn’t vote, the number one reason they gave was that they don’t have enough information about the candidates or about the policy debates on the issues they care about.

This is tragic. We know that the policies being made at city hall, the state-house, and the halls of Congress affect the everyday lives of the Rising American Electorate in countless ways—but the information about how those policies affect the RAE isn’t getting to them.

There’s also a lack of information about voting itself—which is all the more troubling because the ways Americans register and vote have changed dramatically (by mail, online, and early voting in person, for example), and new voter requirements have been imposed in many states.

That’s why we place such a heavy emphasis on advocacy and education programs that help inform RAE voters about the how of voting (how to register, what voters need to bring, etc.) as well as the why of voting: the issues that affect the Rising American Electorate as they work, live, and raise their families.

We’re proud to join many other organizations calling for Congress to restore the VRA (#RestoreTheVRA) and fight the effort to undermine the fundamental right of all Americans to vote. But in the meantime, it is critical to support and undertake registration and turnout campaigns that educate voters about added legal requirements for voting so that they aren’t surprised when they get to the voting booth. Information truly is power.

Gail Leftwich Kitch serves as executive vice president at the Voter Participation Center. Her career includes extensive experience as a practicing lawyer and a leader of nonprofit organizations active in civic engagement.
Laws Help Maintain Integrity of the Electoral Process

by Hans A. von Spakovsky

Measures intended to safeguard the integrity of the election process, such as photo ID and proof of citizenship to register, are common-sense reforms supported by an overwhelming majority of Americans.

All Americans who are eligible to vote should have the opportunity to do so. But it’s also important that their ballots are not diluted by fraudulent votes. The Supreme Court itself pointed out, when it upheld Indiana’s photo ID law in 2008, that “flagrant examples” of such fraud have “been documented throughout this nation’s history” and could “affect the outcome of a close election.”

That is why states such as Georgia, Alabama, South Carolina, North Carolina, Tennessee, Virginia, and others have implemented voter ID laws, and other states such as Arizona, Alabama, Georgia, and Kansas now require proof of citizenship to register. According to state Sen. Harold Metts, the African American who sponsored Rhode Island’s voter ID law, his constituents “want the integrity of the system to be above reproach.”

Academic studies and the actual results of elections show that, contrary to the hysterical claims of critics, voter ID does not depress the turnout of minority or other voters. States provide a free ID to anyone who doesn’t have one. Very few Americans lack a photo ID—you need one to get a library card, board an airplane, get married, stay in a hotel, buy a drink, cash a check, or qualify for many government welfare benefits. You even need one to get into the U.S. Department of Justice, which has waged a war on election integrity for the past eight years.

Almost all of the lawsuits filed against states challenging voter ID laws have failed because there is no evidence that they inhibit participation. In fact, such requirements may help participation by enhancing the confidence of the public in the integrity of the electoral process.

Hans A. von Spakovsky is a Senior Legal Fellow at The Heritage Foundation, a former FEC Commissioner, and the former Counsel to the Assistant Attorney General for Civil Rights at the Justice Department. Along with John Fund, he is the coauthor of “Who’s Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk” and “Obama’s Enforcer: Eric Holder’s Justice Department.”

A Balancing Act

by Wendy Underhill

Editor’s Note: Recent lawsuits in federal court successfully challenged voter identification laws in South Carolina, Texas, and Wisconsin. The National Conference of State Legislatures (www.ncsl.org) maintains up-to-date information on voter identification laws.

Policymakers of all persuasions are committed to ensuring that everyone who is eligible to vote gets a chance to do so, while preventing those who are not eligible to vote from committing fraud. Hence, over 2,000 bills are introduced in state legislatures each year that deal in one way or another with election law and, consequently, voter participation.

Policymakers may disagree, however, on what is the best balance between the sometimes-competing values of promoting voter access and preventing fraud. Here are just two examples:

• Do stricter voter ID laws, which are intended to deter voter impersonation, prevent some citizens from voting? After all, voting is a right, not a privilege. Indeed, according to the U.S. Government Accountability Office, strict voter ID laws can dampen voter participation by a couple of
percentage points. (Thirty-three states have voter ID laws in effect this year, and nine of those are “strict photo voter ID,” according to the National Conference of State Legislatures.)

- Does allowing a voter to register and vote on the same day increase voter participation, and if so, is this outweighed by the potential for a few ineligible voters to cast ballots? Same-day registration can increase turnout by a couple of percentage points, and yet, sometimes it can be hard to verify on the spot a person’s residency and eligibility to vote. (Thirteen states plus the District of Columbia allow people to register on Election Day and then cast a ballot.)

Considering all this, does it make sense to create stricter voter ID laws and/or adopt same-day registration? People of good faith can—and do—come up with different answers.

Those people can probably agree, though, that turnout goes up when voters believe their votes matter. How to make that happen? Good public education campaigns, teaching civics in high schools, increasing access to official election information, and offering voters a choice between good candidates are all more important motivators for voters than tweaks to election administration policies, such as voter ID and same-day registration. And surely these efforts are more important than party politics, too.

Wendy Underhill is the program director for elections and redistricting at the National Conference of State Legislatures, a bipartisan organization that serves the needs of our nation’s 7,383 state legislators and their staffs.

True Effects of New Laws Remain to Be Seen

by Nicole Austin-Hillery

Since 2011, the country has seen a spate of restrictive voting laws introduced by state legislatures across the country. These changes range from new requirements to show photo identification in order to vote in person to cut-backs to early voting and elimination of same-day registration, among others. Historically, states and the federal government have enacted changes to voting laws to, for the most part, expand access to voting rather than decrease it. However, many have criticized this onslaught of voting law changes as mere vehicles to do nothing more than make it harder for certain populations of people to register and engage in the electoral process, namely, minorities, young voters, the elderly, and the poor.

November 2016 will be the first national election since the 2013 Supreme Court decision that struck down some of the protections guaranteed by the 1965 Voting Rights Act. It will also be the first national election in which at least 17 states have new voting laws on the books. This array of challenges will, undoubtedly, make it more difficult for many Americans to engage in the electoral process. A primary issue with voting law changes is that they cause confusion in the wake of their implementation.

Voters can be unsure of the regulations governing the voting process and often they learn of changes when it’s too late for them to respond, such as on Election Day. Changes to voting laws often present obstacles for segments of our population that are hard to overcome. This is evident in voter ID laws that make it financially cumbersome or impossible due to a restrictive work schedule or family obligations for some eligible voters to obtain the proper ID.

The presumption is that these changes will make it harder for many vulnerable populations to vote. It is impossible to know for certain until after the election and there is data available to analyze, but it is a logical assumption that these numerous changes will have a huge impact on voters. While this is concerning, there are also some positive highlights to keep in mind as we go into the 2016 election. First, many states have enacted legislation that will help expand the voting franchise to many more Americans. Automatic voter registration, a reform that automatically registers voters when they conduct business at government agencies unless they opt out, has seen a surge in momentum. Second, as we saw in 2012 after the first onslaught of major voting changes in the states, voters will likely respond to the continued voting changes by empowering themselves and their communities with information to ensure that they are clear on the new voting regulations in their state. In this way, the new voting changes, which some hoped would deter voters, may very well have the opposite impact of spurring voters to greater heights of political engagement. That is the true essence of democracy.

Nicole Austin-Hillery directs the Brennan Center for Justice office in Washington, D.C., which she opened in 2008. She is the organization’s chief liaison to Congress and the current presidential administration. She is a member of the ABA Standing Committee on Election Law.
Voter Suppression

by Tiffany Middleton

This cartoon analysis sparks a discussion about voting in the United States. Students may then find opportunities to explore voting regulations in their own state and their effects on voter turnout. Download a copy of the cartoon at www.insightsmagazine.org.

Learning Targets
- Analyze a political cartoon.
- Examine voting laws at local, state, and national levels.
- Discuss voting processes, including potential reforms, in the United States.

Curriculum Standards

C3 Framework for Social Studies Standards
D2.Civ.2.9-12. Analyze the role of citizens in the U.S. political system, with attention to various theories of democracy, changes in Americans' participation over time, and alternative models from other countries, past and present.

Common Core State Standards
CCSS.ELA-LITERACY.RH.11-12.2. Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.

Grades: 7–12
Duration: 15–20 minutes

Discussion Questions
1. What is happening in the cartoon? Why do you think the cartoonist labeled it “voter suppression”?
2. Do you think that it is appropriate to make voters wait in line “for hours,” as the cartoon suggests? Why?
3. Beyond standing in line, why might the people in the cartoon be trying to stay calm? Do you think challenges like this might affect voter turnout?
4. What reforms could be introduced in the United States to help alleviate some of the challenges that voters might face?

Extended Activity
Ask students to research voting laws in their state. Students might then stage a debate or write an op-ed around an issue relevant to their state. Specifically, students should determine the status of laws in their state regarding:

- Voter identification
- Early voting, absentee voting, or voting by mail
- Automatic voter registration
- Voting rights for convicted felons

Tiffany Middleton is the managing editor of Insights on Law & Society.

Suggested Resources
The following resources offer state-by-state updates, reports, clickable maps, and additional information.

Tiffany Middleton is the managing editor of Insights on Law & Society.
How Presidents Interpret the Constitution

by Harold H. Bruff

The most important single interpreter of the United States Constitution is the president. This statement is surprising and seems wrong, but two examples drawn from American history will illustrate the truth of it. When Thomas Jefferson encountered the stupendous opportunity to buy Louisiana from Napoleon, he knew that the Constitution contained no explicit power for the new United States to acquire territory by treaty or otherwise. Jefferson decided to treat the purchase as constitutional by submitting the treaty to the Senate for ratification and by asking the House of Representatives for the necessary appropriations. The president reasoned that if Congress and the American people accepted the deal, it would become part of the Constitution. And so it has.

When Abraham Lincoln considered issuing the Emancipation Proclamation, he concluded that his power as commander in chief authorized him to free slaves in states that were rebelling against federal authority. Lincoln saw the Proclamation as a military measure that would help defeat the Confederacy, as it did. The president concluded, however, that he had no power either to free slaves in states that had not rebelled or to end slavery as an institution. He thought that such actions would take a constitutional amendment; hence he supported the eventual Thirteenth Amendment to end slavery forever.

These examples show that a very common articulation of the central principle of the separation of powers in our system of government is oversimplified and misleading. Every American student learns that Congress makes the laws, the president executes them, and the courts interpret them. As a broad generality, the principle is true, but it obscures the everyday reality of the functioning of the three branches. In fact, each of the branches interprets both the Constitution and existing statutes constantly as it operates. When Congress legislates, it asserts that its new statutes are constitutional. When presidents execute the Constitution and statutes, they claim that their actions are constitutional. As the courts perform their interpretive functions, they decide cases properly before them, but there are many issues that they do not reach. Inescapably, all three branches generate new law constantly—the important question is what the limits are to their interpretive discretion.

All Three Branches Interpret the Constitution

My recent book *Untrodden Ground* tells the story of how all forty-four American presidents have interpreted the Constitution. The title comes from George Washington’s remark that in the new office of president, he stood on untrodden ground, and everything he did would form a precedent that would guide and might bind his successors. He was right about that—as the Louisiana example reveals, many precedents in the form of presidential constitutional interpretations have become so ingrained that they have become constitutional law in every important sense, even if the courts have never blessed them. If Congress and the American people accept a presidential action, it will likely be repeated by future presidents. If not, a barrier will form.
Some ground has been contested between the two political branches for a long time. Throughout our history, presidents have claimed that their constitutional power as commander in chief enables them to use military force to respond to at least some kinds of attacks on Americans without the need for Congress to provide advance authority through its power to declare war. The boundary between these presidential and congressional powers is indistinct and has mostly been defined by historical practice, not by judicial interpretation.

Precedent has put some ground off limits for presidents. Although the Constitution says nothing about the number of justices on the Supreme Court, a political firestorm greeted Franklin Roosevelt’s ill-advised Court-packing plan, which would have added several justices for obviously partisan purposes. Objections to the plan were stated in constitutional terms—that no president may apply force to the Court to obtain...
It should not surprise anyone that the president’s constitutional powers have accreted over the years.

desired rulings. No subsequent president is likely to repeat the mistake. The barrier lies somewhere along the indistinct line between politics and constitutional law.

Presidential constitutional interpretation is fundamentally unlike that of the other two branches because it is ultimately performed by a single person, not a group. This means that it is deeply personal in a way that a collective decision never is. Untrod den Ground identifies five ingredients that go into presidential interpretation. First, a president’s personal character is crucial. Abraham Lincoln and Theodore Roosevelt, strong-willed men, pursued aggressive interpretations of their powers. James Buchanan and Warren Harding, weaklings, were diffident about their powers. Second, a president’s general political values affect his or her overall view of the Constitution, especially concerning the role and power of the federal government. Lyndon Johnson and Ronald Reagan did not share a common vision of the government or of its Constitution. Third, crises that arise affect judgments about what the Constitution should mean if the nation is to survive and thrive. Fourth, the incentives that presidents encounter once on the job, such as the need to counter opposition seeming to come from everywhere, press them to claim capacious powers. And fifth, the weight of precedents bearing on proposed options steer presidents toward ground that predecessors have occupied successfully and away from ground that has proved swampy in the past.

The President’s Constitutional Powers

Thus, the process of presidential constitutional interpretation is complex. Barack Obama once said that the final, crucial element in making a difficult decision is what is in the interpreter’s “heart,” which I take to mean both the sum of the vectors that I have just described, along with the elusive elements of judgment that in great presidents such as Lincoln become statesmanship.

Compared to the other two branches of government with their multiple membership at the top, presidential interpretation has natural advantages of speed and of potential consistency in the hands of any particular incumbent. Controlling the executive apparatus of government, presidents have the first-mover advantage—they can create a state of affairs that places Congress and the courts in an uncomfortably reactive position, for example, when troops are ordered into harm’s way without prior authorization by Congress. Often, the other branches cannot easily undo presidential actions without possible harm (or at least embarrassment) to the nation.
alarming power. In particular, the end of World War II produced a tectonic shift in presidential power as the nuclear age and the Cold War dawned together. The result was formation of the massive national security establishment that we know today, in place of the demobilization that had followed all previous wars. Now that presidents command constantly available military and intelligence forces having unmatched power, there is always an opportunity—and temptation—to put it to use for desired ends without first asking Congress to supply the necessary tools and specific legal authority.

Three constitutional sources have supported presidential powers that are claimed today. First, control of the nation’s foreign policy gravitated to the presidency from the earliest days of the Republic and was essentially in place by the time of Jefferson, even though the Constitution’s grants of foreign policy power to the president are fragmentary. Article II of the Constitution, which creates the executive branch, vests the “executive power” in the president, which implies at least some substantive grant of power. Then it authorizes the president to receive foreign ambassadors and to submit treaties to the Senate for ratification. On this thin base, presidents since Washington have built their primacy in determining foreign policy, largely as a result of the need for the nation to speak with one voice to other nations and the president’s supervision of the diplomatic corps.

An example of the breadth of the foreign policy power is the executive agreement that President Obama negotiated with Iran and a group of European nations to limit Iran’s nuclear capacity. Presidents since George Washington have made agreements with other nations without submitting them to the Senate for ratification as treaties. Sometimes these concern minor matters, but many presidents have used executive agreements for major foreign policy decisions. Congress has sometimes modified or even repudiated particular agreements by statute, but has generally acquiesced in the existence of the overall practice. Famous examples of these agreements include Franklin Roosevelt’s recognition of the Soviet Union and President Richard Nixon’s recognition of Communist China.

Second, the president’s power as commander in chief both implies the existence of foreign policy powers short of war (such as saber-rattling) and authorizes at least some military measures to protect the nation without a formal declaration of war by Congress. Over the centuries, the president’s capacity to initiate military actions that are claimed to be less than a full war in the legal sense has built a long record of clashes with other nations or less-formal groups. Some of these actions have led to extended national commitments, most notably in Vietnam. During the Cold War, presidential control of nuclear weapons and the need for possibly instantaneous response to a missile threat vastly concentrated executive power. At the height of the
Discussion Questions

1. Do you agree that the “three branches of government” model of American government is “oversimplified and misleading”? What can we learn from this model? What are its limitations? What might be a better way to discuss it?
2. Is the U.S. president “the most important single interpreter” of the Constitution? Should he or she be?
3. Why do you think the author argues that adapting our eighteenth-century Constitution to the twenty-first century “is a task for all of us”? Do you agree?

Executive Orders

Presidents exercise their control over the bureaucracy by issuing executive orders, which are commands to officers telling them how to do their statutory duties. Nowadays it is generally understood that the president can issue executive orders that are either supported by express or implied statutory authority, or are at least in a “twilight zone” where no statute clearly allows or forbids a particular action. By contrast, presidential actions that are forbidden by statute are ordinarily illegal, because they can be upheld only by establishing that constitutional executive power overrides a particular congressional limitation (and courts are properly reluctant to come to that conclusion).

Presidents can ordinarily craft their executive orders in ways that steer between statutory reefs, so the faithful execution duty confers broad practical power to form and execute policy. Theodore Roosevelt’s early modern presidency featured a vigorous use of executive orders to promote values of conservation that were neither clearly authorized nor forbidden by existing statutes. He created many national monuments and other reserves of federal lands and successfully resisted congressional attempts to override his actions. Subsequent presidents have taken his example to heart. In the most prominent current controversy, Barack Obama ordered immigration officials to prioritize deportations of undocumented aliens by focusing on criminals and other dangerous persons and by deferring deportation of families including members who are United States citizens. Enforcement resources allow deportation of only a small fraction of the millions of undocumented people in the United States. The president was obligated to decide which aliens to pursue and which ones to leave alone for the time being. Heated controversy and litigation have resulted from the massive scale of this executive order program. It is, however, different only in size and not in kind from actions many modern presidents have taken.

Adapting Our Eighteenth-Century Constitution to the Twenty-First Century

In the twenty-first century, the American people confront a basic dilemma about presidential constitutional power that the generation that framed the Constitution could not have imagined. Today’s most important challenge is the existence of a massive and secretive national security bureaucracy that wields immense power and is subject to only tenuous constitutional controls. It is very difficult for either Congress or the people to monitor this bureaucracy effectively. Of equal concern, it is very difficult for the single individual who occupies the presidency to monitor these subordinate officers. In our time of a seemingly never-ending “war on terror,” novel constitutional issues proliferate, for example, the legality of “cyberwar” directed against computers in foreign nations or of drone strikes against suspected terrorists far from our shores.

The challenge for the American people and their presidents today is to adapt our eighteenth-century Constitution to twenty-first-century conditions. That is a task for all of us. To begin, we must realize during this presidential election year that the forty-fifth president will take office with an opportunity to shape the Constitution through his or her interpretations in ways that may last for the ages.
Learning Gateways

Presidential Powers and Their Limits
by JoEllen Ambrose

This lesson offers several instructional strategies enabling students to examine more closely presidential powers and their limits. This lesson builds on familiarity with the executive branch, language in Article II of the Constitution, and roles of president, Cabinet departments and bureaucracy. The three instructional strategies ask students to read, write, and speak on the topic.

Learning Targets
- Identify evidence from the reading to support claims for presidential powers.
- Analyze presidential powers, responsibilities and limits by writing a memo advising President #45 on how to meet the challenges of acting as a foreign policy leader, commander in chief, and chief executive.
- Examine the scope and limits of presidential powers by participating in a class presidential power snap debate.

Curriculum Standards
C3 Framework for Social Studies Standards
D2.Civ.4.9-12. Explain how the U.S. Constitution establishes a system of government that has powers, responsibilities, and limits that have changed over time and that are still contested.

Common Core State Standards
CCSS.ELA-LITERACY.W.11-12.1. Write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence.

GRADES: 9–12
DURATION: One class period for close read and memo-writing strategies; one class period for presidential powers snap debate

Materials
All materials are available at www.insightsmagazine.org.
- Articles I, II, III in U.S. Constitution
- "How Presidents Interpret the Constitution" by Harold Bruff (pp. 8–12 in this issue of Insights)
- Student chart on presidential powers handout, plus completed chart answer key
- Description of Roles & Time Line handout

Procedure

Introduction
Ask students to identify and discuss recent actions taken by presidents:
- Are such actions necessary when acting as chief executive?
- Do any actions go too far?
- Who decides which actions are appropriate?
- What limits presidential actions?
- How do newly elected presidents learn their new job?

Strategy ONE: Reading for Evidence
Number students 1-2-3 and assign each group to one of the three powers presidents claim today as discussed in the article, “How Presidents Interpret the Constitution.” Students should read article carefully and complete the chart on their assigned power by adding evidence and examples of the power. A completed chart answer key is available at www.insightsmagazine.org.

<table>
<thead>
<tr>
<th>Claim of Presidential Power</th>
<th>Constitutional Claim of Power</th>
<th>Constitutional Checks on Power</th>
<th>Past Presidential Actions as Precedent</th>
<th>Limits by the People/Politics</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. President controls nation’s foreign policy</td>
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<tr>
<td>2. President controls military</td>
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<tr>
<td>3. President’s duty to faithfully execute the Office of President and laws</td>
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Regroup students to include all three powers and ask students to discuss the power they were assigned and complete the entire chart. All students should have support for each of the three presidential powers.
Strategy TWO: Writing a Memo

Tell students: You are now advisers in the Office of Legal Counsel in the U.S. Department of Justice. Your goal is to give the president advice on the office of the presidency. Your task is to write a memo advising the forty-fifth president on how presidential powers may be used by the new president during his or her administration. Each group is assigned one of the new president’s priorities as the subject of the memo:
- War on terrorism: military intervention, government surveillance
- Environment: climate change, energy
- Immigration: reform, enforcement

Student memos should advise the president, or answer the following questions:
- Which constitutional powers could the president claim when acting in this area?
- What possible presidential actions can be taken? (Brainstorm.)
- Are there presidential actions in history that would support this claim of power?
- Which constitutional limits might apply?
- Are there other potential limits outside of the Constitution (e.g., public opinion, budget, time)?
- What is your group’s recommendations for presidential action?

Ask students to share their memos with the rest of the class.

Ask students:
- What factors do you think the president considers when making decisions on the matters we discussed?
- How might a president’s personal character, views, or values influence their choices?
- How might crises and events influence a president?
- Which incentives would encourage presidential action? How could Congress/Supreme Court/public opinion limit actions?

Memo Format Example

To: President #45
From: Office of the White House Counsel
Subj: Presidential powers claimed in

(war on terrorism, environment, immigration)

Strategy THREE: Presidential Power Snap Debate*

Have students read “How Presidents Interpret the Constitution,” by Harold Bruff, prior to class. Ask them to read the article with the purpose of agreeing or disagreeing with Professor Bruff’s thesis that the president is the single most important interpreter of the United States Constitution.

On the day of the debate, introduce the debate question: Is the president the single most important interpreter of the United States Constitution?

Divide class in half, one half answers “yes” to the debate question and the other half answers “no.” Assign a team leader for each side. Work with the team leader to assign debate roles as follows: opening, persuasive argument, rebuttal argument, questioner or answerer, closing argument. Note: More than one student may fill each role. See handout Description of Roles and Time Line.

Allow 15–20 minutes for in class preparation.

Ask students to turn desks so both sides are facing each other. Have students sit in the order in which they will speak. See Description of Roles and Time Line handout.

Introduce the debate topic to the class, and call on the “yes” opener to begin. Follow the time line. Do not allow interruptions. Questions and clarifications are part of debate. Teacher could add a competitive element with volunteer students judging performance. Debrief the debate:
- What were the most compelling arguments on both sides? weakest arguments?
- What underlying constitutional values (e.g., rule of law, separation of powers, checks and balances) do you think are part of this debate?
- How do you resolve the debate question?

*Adapted from a “We the People” snap debate format presented by students from California in Washington, D.C., in 2005.

Extension Activity

Alexander Hamilton, in Federalist Paper No. 70, argues for strong executive power. He argued that “all men of sense will agree on the necessity of an energetic executive.” How would you describe an “energetic executive” and do you agree with Hamilton that one is needed? Why or why not?

What would you tell Hamilton about the presidency today?
The Office of Legal Counsel

The Office of Legal Counsel (OLC) within the U.S. Department of Justice, known as “the president’s law firm,” provides legal advice to the president and all of the agencies in the executive branch of government. It was established by Congress in 1934. An assistant attorney general oversees the office, which writes legal opinions for the attorney general and provides legal opinions and advice to the president and the agencies of the executive branch. If two agencies are in disagreement over an issue, the OLC might issue an opinion resolving the disagreement, for example. The OLC is responsible for providing legal advice to the executive branch for all constitutional questions, and for reviewing pending legislation for constitutionality. In addition, the OLC reviews all of the executive orders and proclamations issued by the president for form and legality, as well as all proposed orders of the attorney general.

Newsweek called the OLC “the most important government office you’ve never heard of.” Generally, the legal opinions issued by the OLC are respected, and rarely will a president override an OLC decision. Noteworthy former heads of the OLC include Supreme Court Justices William Rehnquist and Antonin Scalia.

Answer key to close reading activity [Online]

<table>
<thead>
<tr>
<th>Claim of Presidential Power</th>
<th>Constitutional Claim of Power</th>
<th>Constitutional Checks on Power</th>
<th>Past Presidential Actions as Precedent</th>
<th>Limits by the People/Politics</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. President controls nation’s foreign policy</td>
<td>Article II “executive power” -- receive foreign ambassadors -- submit treaties to the Senate</td>
<td>-- Congress passes laws, e.g., trade sanctions -- Congress appropriates money -- Senate ratifies treaties with 2/3 vote -- Courts — judicial review</td>
<td>-- FDR recognized Soviet Union -- Nixon recognized Communist China -- Obama uses executive agreement with Iran and European nations to limit Iran’s nuclear capacity</td>
<td>Elections Public opinion Protests Media Democratic principle — economic freedom</td>
</tr>
<tr>
<td>2. President controls military</td>
<td>Article II “executive power” -- commander in chief</td>
<td>-- Congress declares war -- Congress appropriates money -- Congress passes laws, e.g., War Powers Act -- Courts — judicial review</td>
<td>-- Kennedy, Johnson, Nixon military action in Vietnam -- Kennedy, Cuban Missile Crisis -- direct and secret negotiations with Kruschev</td>
<td>Elections Public opinion Protests Media Democratic principle — control of the abuse of power</td>
</tr>
<tr>
<td>3. President’s duty to faithfully execute the Office of President and laws</td>
<td>Article II “executive power” -- oath of office -- appointment power</td>
<td>-- Congress passes laws -- Congress appropriates money -- President nominates with advice and consent of the Senate -- Courts — judicial review</td>
<td>-- T. Roosevelt -- Executive orders promoting conservation and national monuments, reserves of federal lands -- Obama issues executive order prioritizing INS resources to deportation of criminals</td>
<td>Election mandate Public opinion Protests Media Democratic principle — rule of law</td>
</tr>
</tbody>
</table>

Description of Roles and Time Line

Description of Roles and Time Line for Snap Debate

The snap debate modeled here requires at least two teams, with at least thirteen students per team.

Opening Argument

(1 minute per side) 2 students per team
Team introduces the basic argument(s).

Persuasive Argument

(2 minutes per side) 3 students per team
Team delivers the most compelling evidence to support their side’s position.

Rebuttal

(2 minutes per side) 3 students per team
Team argues against the persuasive arguments of the other side.

Question and Answer Session

(6 minutes total) 3 students or more per team
Team asks a question of the other side. One student from that team should answer. Continue alternating sides, until each side has asked and answered at least three questions.

Closing Argument

(1 minute per side) 2 students per team
Teams repeat their best arguments.

JoEllen Ambrose is an educator, lawyer, and former high school teacher, in Champlin Park, Minnesota. She is the 2013 winner of the Isidore Starr Award for Excellence in Law-Related Education and is a member of the Advisory Commission of the ABA Standing Committee on Public Education.
Presidential Appointments and Senate Confirmations: Ten Defining Moments in U.S. History

by Tiffany Middleton

The U.S. Constitution empowers the U.S. president to appoint certain government officials with “the Advice and Consent of the Senate.” They include ambassadors, Cabinet officials, “Article III” judges, and other personnel in federal agencies. Currently, there are an estimated 4,200 jobs in the federal government that require presidential appointments. Of those, an estimated 1,500 jobs require Senate approval. Here are ten moments from our country’s history that have helped to better define this presidential power, constitutional norms, and our own modern political landscape.

1803

Marbury v. Madison

During the final days of John Adams’s presidency, he appointed a number of people to serve as justices of the peace for the District of Columbia. The Senate confirmed the appointments, and the commissions were prepared. President Adams’s secretary of state, John Marshall, did not deliver all of the commissions before the incoming president, Thomas Jefferson, took office. Once in office, President Jefferson ordered his secretary of state, James Madison, not to deliver the rest of the commissions. The men whose commissions were not delivered, including William Marbury, sued Madison and argued that, by refusing to deliver the commissions, thereby finalizing the appointments, the secretary of state was neglecting his constitutional duty. The Supreme Court ruled unanimously in favor of Marbury. The decision is more significant for providing a basis for judicial review, as certain provisions of the Judiciary Act of 1789, which was implicated in Marbury’s case, were declared unconstitutional.

1867

Tenure of Office Act

When Andrew Johnson, a Democrat, assumed the presidency following the assassination of Abraham Lincoln, he inherited a Republican presidential Cabinet and a post–Civil War Reconstruction political landscape. In March 1867, the Republican-controlled Congress passed the Tenure of Office Act over President Johnson’s veto. The act prevented Johnson from removing from office any official who had been appointed by the president and confirmed by the Senate, unless the Senate approved the removal. In August 1867, with the Senate recessed, Johnson removed Edwin Stanton as secretary of war. The Senate reconvened in January 1868 but did not approve Johnson’s removal of Stanton. In spite of the Senate’s decision, Johnson tried to appoint a new secretary of war. This action prompted the Senate to initiate impeachment proceedings against Johnson. After a three-month trial, he avoided removal from office by one vote, and Stanton ultimately resigned the same year. The Tenure of Office Act was repealed by Congress in 1887, and a similar law in 1926 was declared unconstitutional by the Supreme Court.
**1916**

**Senate opens judicial confirmation hearing to the public**

After President Woodrow Wilson nominated Louis Brandeis to the U.S. Supreme Court, an unprecedented one hundred twenty-five days passed before the Senate confirmed his nomination. During that time, the Senate Judiciary Committee, for the first time, held a public hearing, allowing witnesses to offer testimony in support of, or against, Brandeis’s appointment. Some scholars questioned whether this public participation violated the “Advice and Consent of the Senate” stipulation in the Constitution. Known as “the People’s Lawyer,” and the first Jewish judge appointed to the Court, Brandeis was a Progressive leader who used the law to effect social change. Opponents of his appointment argued that he was a radical thinker who lacked appropriate judicial temperament. Ultimately, Brandeis was confirmed, and the public hearings became more common with Senate judicial confirmations.

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**1937**

**Roosevelt announces “Court-packing” plan**

When President Franklin Roosevelt announced a plan to increase the number of justices on the Supreme Court to as many as fifteen, critics accused him of trying to “pack” the Court. He argued that it would make the Court more efficient. He proposed offering retirement options to justices over 70 years old. If a justice refused to retire, another justice would be appointed to the Court to assist with cases. The Senate did not approve Roosevelt’s plan. Roosevelt’s plan highlighted a constitutional norm, not law, within American government: the Constitution leaves the determination of the number of justices on the Supreme Court to Congress. With legislation, Congress could change the number of justices. The Judiciary Act of 1869 set the number at nine, and it hasn’t changed since.

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**1961**

**Kennedy appoints brother attorney general**

As President Kennedy announced his Cabinet selections, his selection of his brother, Robert Kennedy, as attorney general, was both unprecedented and controversial. The *New York Times* described the 35-year-old Robert as “unqualified.” Robert Kennedy was confirmed by the Senate with a voice vote, because there was skepticism among other senators that he’d garner the requisite number with a roll call vote. Historically, Robert Kennedy is regarded as being an influential attorney general, but the appointment of family did not settle well with critics. In 1967, the comptroller of the United States issued a policy decision prohibiting public officials, including the president, from appointing certain family members to other certain public offices. The prohibition remains part of the U.S. Code.

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**1979**

**Carter asks for the resignations of Cabinet officials**

Following a televised national address to the American people where he discussed the energy crisis, recession, and a general “crisis of confidence” that he felt was posing a threat to American democracy, President Jimmy Carter asked for resignations from all of his Cabinet officers in order to “start fresh.” No U.S. president had ever replaced so many Cabinet members at one time. Ultimately, Carter accepted the resignations of five Cabinet members.
1987

Robert Bork nomination provokes a public response

Within 45 minutes of President Ronald Reagan announcing the nomination of Robert Bork to the U.S. Supreme Court, Senator Ted Kennedy (D-MA) made a speech describing “Robert Bork's America” that was televised nationally, condemning the nominee. In the weeks that followed, television ads with voiceovers by Gregory Peck attacked Bork as an “extremist,” and the NAACP pledged to fight the confirmation “all the way.” Bork's credentials qualified him for the job, but his political ideologies, which favored “disproportionate powers for the Executive Branch,” raised concerns not only with the U.S. Senate, but also with a wide range of Americans. The public response to the nomination was unprecedented, and historians view the nomination as a watershed moment in the contemporary politicization of Supreme Court nominations. Ultimately, Bork removed himself from the entire process, unhappy with his treatment, and “to bork” became part of the English lexicon, meaning “to keep someone from public office.”

1989

Senate rejects John Tower

John Tower became the first nominee of a new president's initial Cabinet to be rejected by the U.S. Senate following a presidential nomination. He was nominated by President George H.W. Bush to become secretary of defense, but an investigation raised questions about his financial dealings, drinking, and reported womanizing. Tower was rejected on character grounds.

1991

Clarence Thomas confirmation hearings nationally televised

Clarence Thomas's nomination to the Supreme Court by President George H.W. Bush was highly contentious and public. Thomas had an impressive resume but had been a federal judge for only 19 months. During his Senate confirmation hearing, a former employee of his, Anita Hill, came forward with allegations of sexual harassment. Three days of testimony from Hill and Thomas were broadcast on national television, and Americans were transfixed. Ultimately, Thomas was confirmed by the Senate with a 52-48 vote, but the dramatic hearings marked an increasingly political confirmation process and growing interest from the American public.

2014

Supreme Court defines Senate “recess”

The Supreme Court decision in National Labor Relations Board v. Canning defined a Senate “recess” as more than simply “time between sessions of Congress,” but, specifically, at a length of ten days or more. The decision dealt with appointments that President Obama made to the National Labor Relations Board during the Senate’s traditional recess period in 2012. The Constitution grants the president power to make such “recess appointments” that do not require immediate Senate confirmation. In order to possibly prevent President Obama from exercising this power, however, members of the Senate met informally every three days during the formal recess period in 2012, which the Court ruled as insufficient recess time for purposes of recess appointments.

Tiffany Middleton is the managing editor of Insights on Law & Society.
Recent or Recurring Controversy?

Of the many things for which Barack Obama’s presidency will be remembered, his use of executive orders might well figure prominently. Obama was not the first president to use such directives—every other president has done so—but his unilateral directives occasioned a great deal of controversy and thus brought greater public attention to what was previously a little-known aspect of presidential power.

During his 2008 campaign, Obama was critical of George W. Bush’s unilateralism, but his attitude appeared to change after his election. In October 2011, after nine months of trying to work with the new Republican majority in the House of Representatives, the Obama White House launched a “We Can’t Wait” initiative, in which the president said he would use executive orders to do unilaterally what the Congress would not agree to do collaboratively. Similarly, in January 2014 Obama declared, “I’ve got a pen and I’ve got a phone, and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward.” And in his 2014 State of the Union speech, Obama said, “America does not stand still—and neither will I. So wherever and whenever I can take steps without legislation to expand opportunity for more American families, that’s what I’m going to do.” The speech contained multiple references to unilateral presidential directives that the president would issue as part of a “Year of Action,” in which he would utilize such directives to advance his policy preferences in the face of congressional gridlock.

Republicans soon responded to Obama’s threats of unilateral action with a barrage of criticism, complaining that Obama’s unilateralism was unprecedented, as he was allegedly exceeding his constitutional limits and usurping the legislative role of Congress. In historical perspective, however, there was little new about Obama’s executive orders, which were neither quantitatively nor qualitatively more audacious than those of his predecessors. And the complaints of Obama’s critics were much the same as those that liberals
made against George W. Bush and that conservatives made against Bill Clinton. Indeed, controversies about unilateral presidential directives are as old as the presidency itself.

There is no official definition of executive orders, but they are essentially written directives by which the president can control the actions of the executive branch. Executive orders are legally identical to presidential proclamations, and they are very similar to presidential memoranda, as well as over two dozen other types of unilateral presidential directives, most of which are themselves poorly defined. They have the force of law and are binding but can be overturned by Congress, courts, or future presidents. For presidents, these directives can be an attractive means to many ends, as presidents are expected to do many things, but the Constitution provides the president with very few specific powers. Unilateral directives enable a president to enact legally binding policies, to effectively make law without Congress, so they are central to presidential power. They can be used to circumvent, prompt, or preempt Congress, and they afford the president a distinct advantage in policymaking battles with Congress, as it is far easier for a president to pen a directive than for congressional majorities to mobilize.

**Constitutional Ambiguity**

Executive orders are not explicitly provided for in the Constitution, but they have come to be accepted as a valid and appropriate presidential tool. Like the practice of judicial review, executive orders have developed from a starting point of constitutional contestation, to an enduring consensus of constitutional consonance. Like many aspects of the presidency, their legitimacy rests as much on history and tradition as on law and the Constitution.

Since the Constitution does not specifically mention unilateral presidential directives, their status is bound up with the broader questions of the nature and scope of executive power. The Constitution's treatment of the chief executive is ambiguous. For example, Article II's "vesting" and "take care" clauses seem to support wide presidential powers, perhaps including the power to issue various unilateral directives. But other parts of the Constitution suggest a highly limited executive, and unilateral presidential directives appear to be in tension with the overall architecture of separation of powers and perhaps also checks and balances.

Within this context of constitutional ambiguity, early presidents undertook various unilateral actions, some of which eventually figured in cases that came before the judicial branch. The judiciary first endorsed the constitutional legitimacy of unilateral presidential directives, subject to certain constraints, in two cases in the early nineteenth century: *Little v. Barreme* (1804) and *The Orono* (1812).
TR issued executive orders to advance a host of progressive reforms, and he used the mere threat of an executive order to resolve the crippling 1902 coal strike. Also, acting pursuant to authority that Congress gave the president in the 1906 Antiquities Act, TR issued proclamations to create many new national monuments, effectively reserving and protecting enormous areas of public land. TR’s conscious choice to use unilateral presidential directives served to establish a new understanding of the executive as a leading force in activist government, an understanding that was contested but finally triumphed under later presidents.

Indeed, the regular use of unilateral presidential directives for significant purposes was not just an aberration under TR but rather became further institutionalized and entrenched over the next half-dozen presidencies, including not only TR’s progressive brethren Woodrow Wilson and Franklin Roosevelt (FDR), but also the four other more reserved presidents who
down the particular order because it contradicted a policy that Congress had previously set, thus establishing that executive orders must not negate established law. In the second case, the judiciary again affirmed the propriety of executive orders in general but struck down the particular order for violating a specific constitutional clause. Thus, courts had established the legitimacy of executive orders, subject to constitutional and congressional restrictions, by the time the nation was only 23 years old, fully 140 years before the Court famously reiterated those limits in striking down Harry Truman’s executive order seizing the steel industry in *Youngstown Sheet & Tube Co. v. Sawyer* (1952). Those two limits—the Constitution and Congress—continue to constrain executive orders to the present day.

**Early Executive Orders**

Despite the early judicial acceptance of unilateral presidential directives, presidents did not initially make extensive use of this new policymaking tool. Beyond a handful of well-known early directives such as George Washington’s Neutrality Proclamation and Abraham Lincoln’s Emancipation Proclamation, presidents before the twentieth century generally avoided prominent unilateral directives. However, there were a surprising number of early directives that were perhaps little noticed at the time—often concerning governmental administration and personnel—that nevertheless served to solidify politically the legitimacy of executive orders, setting the stage for much wider usage.

The nature of the use of unilateral presidential directives changed dramatically with Theodore Roosevelt (TR), who found in them the perfect means to implement his “stewardship” view of the presidency at the vanguard of an activist federal government. TR issued almost as many executive orders as all of his predecessors combined, and he tended to do so for greater purposes than previous presidents, often provoking sharp conflicts with Congress.

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Number of Executive Orders from U.S. Presidents over Time

<table>
<thead>
<tr>
<th>President</th>
<th>Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>George Washington (1789–1797)</td>
<td>8</td>
</tr>
<tr>
<td>Abraham Lincoln (1861–1865)</td>
<td>48</td>
</tr>
<tr>
<td>Ulysses S. Grant (1869–1877)</td>
<td>217</td>
</tr>
<tr>
<td>Theodore Roosevelt (1901–1909)</td>
<td>1,081</td>
</tr>
<tr>
<td>Woodrow Wilson (1913–1921)</td>
<td>1,803</td>
</tr>
<tr>
<td>Franklin D. Roosevelt (1933–1945)</td>
<td>3,522</td>
</tr>
<tr>
<td>Dwight D. Eisenhower (1953–1961)</td>
<td>484</td>
</tr>
<tr>
<td>Bill Clinton (1993–2001)</td>
<td>364</td>
</tr>
<tr>
<td>Barack Obama (as of 6/22/16)</td>
<td>244</td>
</tr>
</tbody>
</table>

Source: The American Presidency Project, University of California, Santa Barbara
orders have continued to figure prominently in unilateral presidential actions. Presidents have used executive orders to create governmental entities, such as the Peace Corps and the White House Office of Community and Faith-Based and Community Initiatives, to advance affirmative action, to extend benefits and protections to same sex couples, and to institute policies concerning abortion, organized labor, and environmental protection.

Recent Unilateral Actions
The number of executive orders declined after FDR, as subsequent presidents increasingly turned to other unilateral devices such as executive memoranda to enact their policy preferences. (Memoranda are not required to be published, as executive orders and proclamations are.) But from the post-war era to the present day, executive orders have continued to figure prominently in unilateral presidential actions.

At times, Congress has not just objected to a particular directive, it has pushed back against the president’s use of executive orders in general.
of his pledge; he issued the order shortly after the 1962 midterm elections. In 1970, Congress authorized the president to issue orders freezing prices and wages, mainly in an effort to embarrass Richard Nixon, who was opposed to such controls; yet in 1971 Nixon issued an executive order to impose a 90-day freeze, and Congress complained bitterly. In 1976, Gerald Ford responded to reports of CIA abuses by issuing an executive order banning assassination, but subsequent presidents have effectively avoided that prohibition, sometimes issuing their own directives exempting from the ban certain individuals who would be targeted. Ronald Reagan’s 1985 executive order for sanctions against South Africa was a cynical attempt to avoid or forestall the harsher sanctions that Congress favored, and eventually passed, over his veto.

Among the last three presidents, Bill Clinton’s 1995 executive order banning the permanent replacement of striking workers was noteworthy because it became one of the few unilateral directives that the judiciary has struck down, in the case of Chamber of Commerce of U.S. v. Reich (1995). George W. Bush’s various unilateral directives for the “war on terror” were often highly controversial, particularly his secret 2002 executive order for the National Security Agency to engage in domestic spying and his Executive Order 13440 of 2007, which promulgated an interpretation of the Geneva Conventions that would permit coercive interrogation techniques that some claimed amounted to torture. Obama often used executive orders to reverse policies that his predecessor had enacted via executive orders for the “war on terror” and other policy areas. But those actions have not always been successful: Congress has effectively blocked Obama’s order to close the military’s detention center at Guantanamo, Cuba, by blocking the funds that would be necessary for its closure.

At times, Congress has not just objected to a particular directive, it has pushed back against the president’s use of executive orders in general. For example, in the aftermath of Nixon’s allegedly imperial presidency, a Senate special committee flagged executive orders as a priority for greater regulation in 1974, but it did not follow through on that plan. Similarly, Congress tried but failed to pass various restrictions on the president’s right to issue unilateral directives towards the end of Clinton’s presidency. And after Obama’s declaration about a possibly more robust use of executive orders, members of Congress sought to pass legislation to curtail the practice, but again these efforts did not come to fruition.

Unilateralism and Democracy

Despite periodic resistance from Congress and even the occasional court case striking down a directive, there is every indication that presidents will continue to use executive orders and other unilateral directives for a variety of important and controversial purposes. This state of affairs is not without its benefits. Indeed, presidents often have to act, and unilateral directives are a prime means of presidential action. And persistent congressional dysfunction may make executive orders appear to be an understandable shortcut or even an unavoidable substitute for regular legislation.

But few people realize the extensive role that unilateral directives play in many controversial issues and in everyday contemporary governance. Whatever our feelings about a particular order or a particular president, extensive reliance on unilateral presidential directives calls into question the separation of powers, and it is difficult to reconcile with robust conceptions of democracy. Whether Americans really need pervasive governance by unilateral presidential directives is a central question for American politics.

Controversies about executive orders and similar directives will likely figure prominently in future presidential politics. Obama may well issue some significant late-term executive orders, either to enhance his legacy or to hedge against the possible actions of an unsympathetic successor. And Hillary Clinton and Donald Trump may well incorporate into their campaigns a promise to issue certain executive orders if elected. For advocates of a powerful presidency, this is as it should be; but for people sensitive to issues of constitutional balance and democratic legitimacy, it is reason for concern.

Discussion Questions

1. Do you think executive orders can be appropriate alternatives to traditional legislation? Have they been overused or abused?

2. Do you think that unilateral presidential directives, including the executive order, challenge the constitutional balance of power among the three branches of government?

3. Why do you think it might be important to publish executive orders publicly? Should all executive memoranda also be published?

Suggested Resources


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What Is an Executive Order?

ne of the most common “presidential” documents in our modern government is an executive order. Every American president has issued at least one, totaling more than 13,731 since George Washington took office in 1789. Media reports of “changes made by executive order,” or “executive orders to come” rarely explain what the document is or other technical details, such as why or how. They seem to be “instant law” and, at times, steeped in controversy. Here, “Teaching Legal Docs” tries to unpack these sometimes controversial legal documents produced by the executive branch of the U.S. government.

What It Is, What It Isn’t

An executive order is a signed, written, and published directive from the president of the United States that manages operations of the federal government. They are numbered consecutively, so executive orders may be referenced by their assigned number or their topic. Other presidential documents are sometimes similar to executive orders in their format, formality, and issue, but have different purposes. Proclamations, which are also signed and numbered consecutively, communicate information on holidays, commemorations, federal observances, and trade. Administrative orders—e.g., memos, notices, letters, messages—are not numbered but are still signed and are used to manage administrative matters of the federal government. All three types of presidential documents—executive orders, proclamations, and certain administrative orders—are published in the Federal Register, the daily journal of the federal government that is published to inform the public about federal regulations and actions. They are also cataloged by the National Archives as official documents produced by the federal government. Both executive orders and proclamations have the force of law, much like regulations issued by federal agencies, so they are codified under Title 3 of the Code of Federal Regulations, which is the formal collection of all of the rules and regulations issued by the executive branch and other federal agencies.

Executive orders are not legislation; they require no approval from Congress, and Congress cannot simply overturn them. Congress may pass legislation that might make it difficult, or even impossible, to carry out the order, such as removing funding. Only a sitting U.S. president may overturn an existing executive order by issuing another executive order to that effect.

The Document

The format, substance, and documentation of executive orders have varied across the history of the U.S. presidency. Today, executive orders follow a format and strict documentation system. Typically, the White House issues the order first, then it is published in the Federal Register, the official journal of the federal government. As a more permanent documentation, orders are also recorded under Title 3 of the U.S. Code of Federal Regulations, which is simply a codification of the permanent rules issued by the executive branch of the U.S. government.

Executive orders are numbered. Each order is assigned a number that is unique to the order and consecutive in relation to past executive orders. The Department of State began numbering executive orders in 1907, and even worked backward to assign numbers to all of the orders on file since 1862. In 1936, the Federal Register Act put into place the system that is still in use today. Occasionally, an executive order that predates the numbering system is located, which might result in assigning it a number already in use with a distinguishing letter (e.g., 7709, 7709-A). As a result, there are actually more total executive orders in existence than the most recent number.

There are formatting differences between executive orders released by the White House press office, those printed in the Federal Register, those printed under Title 3, and those found in digital archives as HTML text. Regardless of source, however, all formats will include basic components that are central to the executive order document. Those components are outlined below, and numbered in the nearby example:

1. **Heading.** Executive orders are generally labeled as such, include a number, and a date of issue. Historically, however, these features might appear at the end of an order, rather than the beginning, and the number might be handwritten at the bottom of the last page.

2. **Title.** Each executive order has a title that typically indicates what the order concerns.

3. **Introduction.** The introduction usually begins with phrasing to the effect of “by the authority vested in me as President by the Constitution
and the laws of the United States of America," and follows with an introduction to what is being ordered. The introduction typically acts to legitimate the order, and may even resemble the beginning of traditional legislation with a "whereas" or a "therefore." The introduction may be longer or shorter, depending on the complexity of the order, whether it quotes other existing orders or laws, or offers the president's legal rationale for issuing the order. From the introduction, we can note that the order is written in the first person, from the president to other officials or personnel in the executive branch or federal agencies.

4. Body of the order. The orders in the executive order are grouped into sections and subsections, each numbered or lettered according to a general outline. The body of the executive order will be longer or shorter, depending on the order contents. Sections spell out the orders, action steps to realize the orders, and other directives, such as study or evaluation, and subsections add additional details, including any relevant definitions. The last section in the order is typically administrative in nature, authorizing publication of the order in the Federal Register; or offering a relevant disclaimer.

5. Signature. Executive orders are signed by the issuing president. Following the signature is a "White House" notation and date that the order was issued. If there was a date in the heading, the dates in the heading and signature typically match. Executive orders that are pulled from the Federal Register will also include a time and date stamp of when the order was published, and a billing code.

Presidential executive orders, both historical and contemporary, may generally be found online. Often, orders may be located by the issuing president, date, number, or subject. Historical or online archives might offer the text of an order, or a PDF of the Federal Register entry about the order, or a PDF of the order from the White House. All three presentation formats contain the elements identified earlier and may serve as valuable primary source texts. A few excellent online repositories of executive orders include:

**White House**
https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders
Executive orders from the current presidential administration are available as PDFs from the White House press office.

**National Archives and Records Administration**
Archive of all things related to the U.S. government, the National Archives maintains a digital index of executive orders that is searchable by date, number, or topic. Orders may be viewed as PDFs or text, in the Federal Register, or within Title 3 of the U.S. Code.

**American Presidency Project**
An archive maintained by the University of California–Santa Barbara includes texts of almost all executive orders, searchable by year of issue back to the early nineteenth century.
When Edward Strieff walked out of a house in Salt Lake City in December 2006, he had no idea he had just put himself on the radar screen of police and on a decade-long pathway to the United States Supreme Court.

Narcotics detective Douglas Fackrall had begun observing the house a week earlier after police received an anonymous phone tip of drug activity there. Fackrall noticed what he believed was an unusual amount of visitors and activity. After seeing Strieff leaving the house, Fackrall made the fateful decision to stop Strieff and ask him to display identification. Strieff complied, showing the detective a state identification card. Fackrall relayed the information to a police dispatcher, who informed him that there was an outstanding warrant for Strieff’s arrest for a traffic violation. Fackrall immediately arrested Strieff, searched him, and discovered a bag of methamphetamine and drug paraphernalia. Strieff was subsequently charged with drug possession.

In response to a defense motion to suppress, prosecutors acknowledged that Fackrall had lacked reasonable suspicion for the stop. However, they went on to argue that the fact that the valid arrest warrant for Strieff’s arrest for a traffic violation, Fackrall immediately arrested Strieff, searched him, and discovered a bag of methamphetamine and drug paraphernalia. Strieff was subsequently charged with drug possession.

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In a second major Fourth Amendment decision also issued at the end of last session, Birchfield v. North Dakota, the Supreme Court clarified if and when suspected drunk drivers may be compelled to participate in blood and breath tests under threat of criminal prosecution.

These watershed Fourth Amendment rulings were issued by an eight-member Court after the death last February of Justice Antonin Scalia, who, in a number of key cases, had been a strong advocate of Fourth Amendment rights. The cases provided an excellent window into the Fourth Amendment thinking of the Court as well as an entryway into a discussion of how constitutional principles connect to searches of our bodies.

Police Stops and the Fourth

The Fourth Amendment protects “[t]he right of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures.”

In the 1914 case of Weeks v. United States, the Supreme Court first applied what became known as the “exclusionary rule,” concluding that evidence obtained in violation of Fourth Amendment rights was inadmissible in federal court proceedings. In the 1961 case of Mapp v. Ohio, the Supreme Court extended the exclusionary rule to state court proceedings.

Under what has become known as the “fruit of the poisonous tree doctrine,” the exclusionary rule applies not only to evidence found as a direct result of an illegal search, but also to other evidence that would not have been found but for the illegal search. So, for example, if an illegal search leads to the discovery of a piece of paper with an address that otherwise would not have been found, not only would the paper itself be excluded from evidence, but so would any evidence subsequently discovered during a search of a residence located at that address.

An “Attenuated Connection”

In Utah v. Strieff, nobody argued that Fackrall’s stop of Strieff without a reasonable suspicion of wrongdoing was anything other than unconstitutional. Without that stop, Fackrall would not have checked Strieff’s identification and discovered the outstanding warrant. The defense argued the drug evidence was inextricably linked to the unconstitutional search, and therefore unconstitutional.

The state countered that Fackrall had a right to arrest Strieff at any time pursuant to the outstanding traffic warrant, and that right was completely independent of the “poisonous” stop. The state maintained that the evidence against Strieff, the product of an indisputably valid arrest, was clearly

When It Comes to Body Searches, the Fourth Isn’t Always with You

by Mark A. Cohen
admissible as the fruit of a “search incident to arrest,” a long-recognized exception to the warrant requirement of the Fourth Amendment.

In a 5-3 ruling authored by Justice Clarence Thomas, the Supreme Court agreed with the state and concluded the Fourth Amendment did not bar admission of evidence against Strieff.

“In some cases, … the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression,” wrote Justice Thomas. “... We hold that evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.”

Key to this ruling was the Supreme Court's finding that the valid arrest warrant against Strieff constituted an “intervening event” sufficient to break the causal link between the invalid police stop and the post-arrest search made after a valid arrest warrant was executed.

To arrive at this conclusion, the Court looked at three factors articulated in a 1975 Supreme Court decision, Brown v. Illinois:

• the temporal proximity between the unconstitutional conduct and the discovery of evidence;
• the presence of intervening circumstances; and
• the purpose and flagrancy of the police conduct.

In the present case, only the first factor, near time proximity of the unconstitutional stop and the subsequent search, favored suppression, Thomas stated. The presence of a valid arrest warrant clearly constituted an intervening circumstance, the justice said.

Turning to the third factor, police conduct, Thomas observed: “[T]here is no indication that this unlawful stop was part of any systematic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house.”

Joining Justice Thomas in the majority opinion were the Court's three other conservatives: Chief Justice John Roberts and Justices Anthony Kennedy and Samuel Alito. Breaking ranks with his liberal colleagues, Justice Stephen Breyer also joined the majority.

In a strongly written dissent joined in part by Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor was less sanguine about the benevolence of the motives of law enforcement in making police stops. “Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you have done nothing wrong,” she wrote.

Noting that state and federal databases have more than 7.8 million outstanding warrants, many for minor offenses, Sotomayor pointed out that the decision has the potential to impact a vast number of people.

Justice Sotomayor went on to decry the indignity of police stops made when law enforcement officers are looking for other criminal behaviors. “[I]t is no secret that persons of color are disproportionate victims of this type of scrutiny,” she said.

In a separate dissent also joined by Justice Ginsburg, Justice Elena Kagan said that the majority's opinion threatens to undercut the exclusionary rule's intended purpose of dissuading law enforcement from engaging in unconstitutional conduct.

“Consider an officer who, like Fackrall, wishes to stop someone for investigative reasons but does not have what a court would view as reasonable suspicion,” Kagan wrote. “If the officer believes that any evidence he discovers will be inadmissible, he is likely to think...
the unlawful stop not worth making—precisely the deterrence the exclusionary rule is meant to achieve. But when he is told of today’s decision? Now the officer knows that the stop may well yield admissible evidence: So long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution.”

Not a Breathless Result
While Utah v. Strieff involved a traditional situation that most everyone will recognize implicates the Fourth Amendment—a stop and search by a police officer—people are less inclined to think about search-and-seizure law when they are pulled over on suspicion of drunk driving and asked to submit to a blood or breath test.

Perhaps it’s because random police searches were likely more on the minds of the Framers of the Bill of Rights than were driving-under-the-influence charges. It’s not that the Framers did not drink; they liked to imbibe as much as the next person (and perhaps more). However, it was not until the appearance of the automobile in the twentieth century that driving drunk came to be viewed as a public safety crisis, and not until the introduction of blood-alcohol testing that search-and-seizure law was implicated.

To enforce their drunk-driving laws and to be able to use blood or breath tests to measure blood alcohol content, every state passed “implied-consent” laws, which provide that drivers impliedly consent to the administration of these tests as a condition of using the state’s roadways. Suspected drunk drivers who refuse to participate in the tests are subject to penalties. Until relatively recently, those penalties were mostly civil in nature, such as the suspension or revocation of the motorist’s driver’s license. However, as states have continued to crack down on drunk driving, several have passed laws making refusal to be tested a crime.

In Birchfield v. North Dakota, the Supreme Court considered whether requiring a suspected drunk driver to take a breath or blood test or face a criminal prosecution for not taking the test was a violation of the suspect’s Fourth Amendment rights. Said another way, does compelling suspects under threat of criminal law to submit to these tests render the tests nonconsensual, and thereby require that police obtain a warrant before administering the test?

The challenge was brought by three defendants in two states who were charged or threatened to be charged with criminal violations for refusing to submit to a breath test, unlike a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond the BAC reading,” the justice pointed out.

In a strongly worded dissent from the breath-test portion of the decision, Justice Sotomayor, joined by Justice Ginsburg, wrote: “Here, the Court lacks
even the pretense of attempting to situate breath searches within the narrow and weighty enforcement needs that have historically justified the limited uses of warrantless searches. I fear that if the Court continues down this road, the Fourth Amendment’s warrant requirement will become nothing more than a suggestion.”

End Result: A Mixed Bag
The post–Justice Scalia Supreme Court produced a mixed bag for defendants in its first two major Fourth Amendment cases. On the one hand, the Court reaffirmed its long-standing principle that physically intrusive searches, such as blood tests, are generally going to require a warrant. On the other hand, the Fourth Amendment’s protections will continue to be ethereal for breath tests.

The biggest setback to defendants’ rights advocates was Utah v. Strieff, a case that has the potential of driving a sizeable hole in the exclusionary rule. The case provides a perverse incentive to law enforcement to engage in pretextual stops. If it turns out there is an outstanding warrant against the subject, police can conduct a search without having to concern themselves with probable cause.

Whether Strieff leads to these types of abuses will likely be largely dependent on the courts’ willingness to enforce the third prong of the Brown test, which requires the examination of the purpose and flagrancy of police conduct in conducting the searches. Police officials who engage in pattern of pretextual searches ought not to benefit from that misconduct by using the evidence in court.

Mark Cohen, a lawyer and journalist, is an associate director in the American Bar Association Division for Public Education.

Other Key Fourth Amendment Rulings

The following are some key U.S. Supreme Court Fourth Amendment rulings on police stops and body searches. Please visit our website at www.insightsmagazine.org for a classroom-ready lesson on the Fourth Amendment and the body.

Terry v. Ohio (1968)
The Court held that police can conduct a warrantless stop and frisk if they have a reasonable suspicion that the person has committed, is committing, or is about to commit a crime and has a reasonable belief that the person “may be armed and presently dangerous.”

Segura v. United States (1984)
Items in an apartment not noticed during an illegal entry that were first discovered the following day after agents made a legal entry with a valid search warrant are not subject to suppression. The Court reasoned that the illegality of the first entry had no bearing on the admissibility of the challenged evidence “because there was an independent source for the warrant under which that evidence was seized.”

The Court upheld Federal Railroad Administration (FRA) regulations requiring mandatory, warrantless, blood and urine tests of employees involved in certain train accidents. In a 7–2 decision, the Court held that the government’s interest in assuring safety on the nation’s railroads constituted a “special need” which justified a departure from standard warrant and probable-cause requirements in searches.

Florence v. County of Burlington (2012)
In a 5–4 ruling, the Court upheld a local law-enforcement policy that required officials to strip-search people arrested for any offense, however minor, before admitting them to jails even if the officials have no reason to suspect the presence of contraband.

Missouri v. McNeely (2013)
In a 5–4 ruling, the Court held that the drawing of blood does constitute a “search” under the Fourth Amendment, and thus, generally requires a warrant. Additionally, in drunk-driving investigations, the fact that alcohol in the bloodstream dissipates relatively quickly, making it difficult to determine from a test result whether a person driving was drunk unless the test is conducted immediately, does not constitute an exigency in every case.

Maryland v. King (2013)
In a 5–4 ruling, the Court found police do not violate the Fourth Amendment by taking DNA samples from all people arrested in connection with serious crimes and depositing them in a national DNA database. “Taking and analyzing a cheek swab of the arrestee DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment,” Justice Anthony Kennedy wrote for the Court’s five-justice majority.

Riley v. California (2014)
The Court unanimously held that the warrantless search of the digital contents of an individual’s cell phone during an arrest is unconstitutional.
Richard Norton Smith

Richard Norton Smith is a nationally recognized authority on the American presidency. He has been the director of numerous presidential libraries and centers. Between 1987 and 2001, Mr. Smith directed the Herbert Hoover Presidential Library and Museum; the Dwight D. Eisenhower Center; Ronald Reagan Presidential Library, along with the Ronald Reagan Presidential Foundation and the Ronald Reagan Presidential Library, along with the Gerald Ford Museum and Library. In 2001, Mr. Smith became director of the Robert J. Dole Institute of Politics at the University of Kansas. In 2003, he was appointed the first executive director of the Abraham Lincoln Presidential Library and Museum. Mr. Smith is the author of several books, most recently, On His Own Terms: The Life of Nelson Rockefeller. He also leads historical tours and appears on media programs.

Q: How did your background, including serving as a political speechwriter, help prepare you to direct presidential libraries?
My apprenticeship included writing speeches, work on Capitol Hill and as a White House intern, and crafting presidential biographies. Combining practical experience with historical storytelling made me appreciate the diversity of library visitors, the schoolkids in the museum as well as archival scholars.

Q: What was the favorite presidential library you directed? Why?
That’s like asking a parent to identify his favorite child. In fact, each of the libraries was a learning experience. Each offered unique challenges. Perhaps the Ford was special, because Gerald and Betty Ford were special, as was the relationship we enjoyed during their later years. How lucky I was!

Q: What can students learn by studying U.S. presidents?
They can learn the history of their country, and the art of leadership; the importance of character, and the ability to adapt to change, even while adhering to timeless values. Harry Truman said the primary function of modern presidents is persuasion. Great persuaders forge a new consensus in their wake. The greatest wind up on Mt. Rushmore. The 1961, a poll of historians ranked him in twenty-second place, below Chester Arthur. Five years later, Ike’s presidential papers became available for scholarly review. Old assumptions crumbled overnight, and his reputation soared, as historians uncovered Eisenhower’s “hidden hand” style of leadership artfully concealed behind the famous smile and nonpolitical persona. Likewise, Lyndon Johnson’s White House tapes and Ronald Reagan’s personal letters have significantly enhanced our view of their presidencies. Several presidents, beginning with Jimmy Carter, have established at their libraries post-presidential centers to carry on the work they started in the White House, establishing their legacies in ways unimaginable to earlier chief executives.

Q: How do presidential libraries help shape the legacies of particular presidents?
Most history is revisionist. Case in point:

Q: You recently published a biography of Nelson Rockefeller. Why is he an interesting and important American political figure? What kind of a president do you think he might have been?
Rockefeller defies labels. Like Theodore and Franklin Roosevelt, he was a conservative innovator, coupling a fervent belief in democratic capitalism with a frank acknowledgement of its imperfections. Like them, he favored reform as an alternative to revolution. Following in their footsteps, his approach seems especially timely, as Americans grapple with income inequality and political polarization.

Q: In your study of political leaders, what have you learned that has especially surprised you?
Statesmanship places the national interest ahead of ideological certitude or even consistency. Think of Thomas Jefferson, that strictest of constructionists, who acknowledged that in buying Louisiana from France, he stretched the Constitution so far that it almost cracked. Or Richard Nixon, lifelong anti-Communist, opening China to the world. Or George W. Bush supporting TARP [Troubled Asset Relief Program], a hugely controversial “bailout” at odds with his free market preferences, at a time of maximum economic peril. By the way, history tends to look more favorably than the Gallup Poll on such U-turns.
WHAT’S ONLINE?

Download Classroom Resources—
There are classroom-ready discussion questions, handouts, and PowerPoint presentations to accompany the teaching ideas in this issue, all at one location. Go get them!

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Find links to articles and additional teaching resources about U.S. presidents’ interpretations of the U.S. Constitution.

How Presidents Interpret the Constitution
Watch a special program produced by the National Constitution Center featuring Harold Bruff.

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Link to new resources from the ABA Division for Public Education:

Gun Violence and Public Health
This latest Teaching Resource Bulletin offers information on and classroom discussions for talking about gun violence as a public health matter.
http://ambar.org/gunviolence

ABA Teacher Portal
Have you been looking for one place to find lesson plans for teaching about law? Maybe you’ve been reading Insights for years and want all of the teaching ideas in one place. It’s here!
http://ambar.org/teachlaw

Mark Your Calendar
November 8, 2016 • Election Day
Do you want to volunteer at your local polling station? Looking for lesson plans to teach about voting? Find it all in one place.
www.voteyourvoicenow.org
The 14th Amendment

It’s the Constitution’s longest amendment, the second of the “Reconstruction Amendments,” and, according to legal historian John Witt, “the end of one story and the beginning of another.” Insights will look at how, since its ratification in 1868, the 14th Amendment has been the legal cornerstone for understandings of citizenship, due process, and equal protection, as well as the democratization of certain rights.