The Supreme Court vs. the President: How the Court Decides the Constitutionality of Challenged Presidential Actions

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The Supreme Court vs. the President

How the Court decides the constitutionality of challenged presidential actions
The theory of balance of powers
Precedent

noun
1. Law. a legal decision...serving as an authoritative rule or pattern in future similar or analogous cases.

Source: dictionary.com
A tale of two articles

- Article III: the judiciary
- Article II: the president

President’s powers come from two sources:
  - First: Constitution itself (Article II)
    - The administrator of the laws
    - Foreign affairs
    - Commander-in-chief of military
  - Second: an act of Congress

“an errand boy for Congress”?  
- Or the “unitary executive”?

- He can recommend legislation to Congress
- Its job is to settle disputes arising under the Constitution
What methods have presidents used to expand their authority?

• Five main tools
  • Executive orders and Memorandums
    • Usually directing government officials
    • No statutory regulation except publication
  • Proclamations: for the public
  • National security directives: secret
  • Signing statements: becoming more important (problematic?)
Examples: executive orders/proclamations

- Louisiana Purchase, 1803
- Emancipation Proclamation, 1863
- Japanese-American internment, 1942
- Desegregating the U.S. armed forces, 1948
- Sending troops to Little Rock, 1957
- Affirmative action, JFK, LBJ, Nixon, Clinton & Obama
Unilateral actions on the rise

• Divided governance & partisanship
  • Makes unilateral action more likely
    • Example: Obama’s frustration with DREAM Act
    • DACA and later DAPA
    • Result? legal challenge
    • A new pattern?

• How to stop unilateral action if unconstitutional?

"When a president releases an executive order, one of the instant responses is to try to tie it up legally....this can be an incredibly effective tool to stop presidents from doing things that you don't want them to do."

Julian Zelizer
Checking the president

• How often does a challenge to the president’s authority to act reach Supreme Court?
  • Rarely (in the past)
  • Standing

Requires showing the court that you have been injured in some fashion.
How successful the challenges?

What types of challenges have there been?

- Use of executive orders
- Removal of appointees
- Conduct of foreign affairs
- President’s actions during wartime
  - Suspension of habeas corpus
  - Blockade
  - Use of military tribunals/detention
  - Seizure of private property: the case that set the standard.
Associate Justice Robert Jackson
1941-1954
Truman and The Court

Classic confrontation

President

Commander-in-chief

Selective Service Act

Steel companies

Theater of war

Congress had not authorized

Taft-Hartley Act 1947

TRUMAN EXPECTED TO TAKE SOME MILLS FOR COMBAT STEEL

Truman Insists Courts, Congress Cannot End His Inherent Power

Steel Mills Must Roll, Says Truman

President Ready to Use Taft-Hartley or Other Laws to Avert Jan. 1 Strike

U.S. Seizes Steel Industry; Strike Canceled; Truman’s Action Touches Off Court Battle
Youngstown Sheet and Tube v. Sawyer (1952)

• Truman’s executive order unconstitutional

• Justice Jackson’s three-part test categorized presidential action:
  
  #1. when “the President acts pursuant to an express or implied authorization of Congress”
  
  • At the height of his powers: constitutional
#2. “in absence of either a congressional grant or denial of authority”
- “zone of twilight” where president may act if
  - New situation
  - Congress has failed to act
- A gray area

Either because it doesn’t want to or because of inertia
3. when “the President takes measures incompatible with the expressed or implied will of Congress”
   - Against the will of Congress
     - President must assert both “exclusive” and “conclusive” power
     - **President at his weakest**
Examples

• #3: at the lowest
  • Truman and steel seizure

• #2: “zone of twilight”
  • 2014 recess appointment case
    • thru 2015, 83% upheld president

• #1: the height of presidential authority
  • Japanese-American Internment order
Can Congress Sue the President?

• **1979: Supreme Court said no**
  • *Goldwater v. Carter*
    • No standing/co-equal branch

• **Shift recently**
  • 2013 case opened the door (*U.S. v. Windsor*)
    • If one house agrees to bring suit
    • If no one else can bring suit
    • And presidential action nullifies act of Congress
• Two cases now pending

• 2014 House suit over Obamacare payments to insurers
  • Congress’s “power of the purse”

• 2017: Democrats’ suit over emoluments
  • Untested to this point
Cases since *Youngstown*

- The Guantanamo cases
  - Habeas corpus cannot be denied to
    - American citizens
    - Non-Americans
  - Military tribunals not legal
  - 2006 Military Commissions Act struck down
    - Habeas corpus must apply if accused of violating American law (wherever)
- Taken together, major curtailment of executive war power expansion AND slap at Congress

- Hamdi v. Rumsfeld, 2004
- Rasul v. Bush, 2004
- Hamdan v. Rumsfeld, 2006
Jackson’s test modified in 2008

• Medellin v. Texas
  • “zone of twilight” now only if long-standing Congressional “acquiescence”
  • Effectively ends Jackson’s gray area?
Most recent Supreme Court decision

• Obama and the DAPA
  • United States v. Texas (2016)
  • 4-4 Supreme Court upheld injunction against
    • No reason given
Current case at Supreme Court

- **Trump vs. International Refugee Project**
  - The travel ban
  - Proclamation of new travel ban
  - Arguments delayed—moot?

Takes effect October 18
Other cases in lower courts

- Emoluments clause
- Transgender military ban
- Sanctuary cities’ federal funding
- DACA and now DACA termination
- *House v. Price* (Obamacare)
And a new issue....

- Presidential speech
• [one] may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power...

• [Indeed, a] century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected resources on each side...

Source: concurring opinion, Youngstown Sheet & Tube v. Sawyer, 1952
To learn more

- **Number of executive orders** by president
- **Executive orders** by year
- President Trump’s **executive orders**
- Supreme Court: [scotusblog.com](http://scotusblog.com)
- [Lwittern@albany.edu](mailto:Lwittern@albany.edu)