ACADEMIA International Journal for Social Sciences
Volume 4, Issue 6, 2025 ISSN-L (Online): 3006-6638

The Limits of Presidential Power: Executive Orders, Separation of Powers, and Constitutional Accountability in the United States

Syed Abbas Ali Shah
syedabbasadvocate@gmail.com
Department of Law, University of Lahore

Corresponding Author: Syed Abbas Ali Shah syedabbasadvocate@gmail.com

Received: 12-10-2025 **Revised:** 08-11-2025 **Accepted**: 18-11-2025 **Published:** 29-11-2025

ABSTRACT

A constitutional text does little to tell us much about executive orders, which have become one of the most significant forms of American government. It poses the question of how far can presidential powers reach by executive order go without violating the separation of powers and what are the institutions for checking the president in practice? The study relies on a doctrinal analysis of selected Supreme Court decisions and a descriptive analysis of the issuance of executive orders from Franklin D. Roosevelt to Joseph R. Biden Jr., and concludes that formal constitutional constraints are real but uneven. The best time to rein in the president is when a command is clearly in conflict with legislation or encroaches on the legislative realm. By contrast, the informal constraints imposed by Congress (and political ones, to a lesser degree) are strong strains in unified government. The recent expansion of presidential immunity for official acts complicates the picture further because it makes the personal legal accountability for overreach narrower, yet it does not affect structural checks, and makes them more difficult to trigger. The article ends in saying that accountability is more a matter of the interplay between different branches than of any one branch, and that reforms are needed to recover the ability of each branch to do their job.

Keywords: *executive orders, presidential power, separation of powers, judicial review, constitutional accountability, unilateral action, presidential immunity*

INTRODUCTION

The American Constitution provides the president with a brief list of powers and a long list of expectations. The powers of the Executive are vested in one person, he has to ensure the faithful execution of the Laws, and he is named as the Commander in chief of the armed forces. It doesn't even come up with the word executive orders. Nonetheless, presidents have issued a multitude of them since the founding era, and in the twentieth century they shifted from the periphery of administration to the core of policy making (Mayer, 2001; Cooper, 2014).

The challenge this article looks at is the disconnect between text that is sparse and practice that is expansive. Executive orders have been issued to manage the federal workforce, to restructure federal agencies, to impose sanctions, to desegregate the armed services and, in one of the most unsettling events in the nation's history, to authorize the wartime internment of Japanese Americans (Mayer, 2001). The same device can be a common management tool or a means for policy which Congress has refused to enact. The problem is distinguishing between the two, and determining who can make the distinction.

The question is now more urgent than ever. Comparative politics scholars have cautioned of the dangers of democratic backsliding in the modern era, and they aren't just tanks in the street that are to blame. It is more likely to start with elected executives whose actions lead to the erosion of the institutions intended to hold them back, which Bermeo (2016) calls executive aggrandizement. American commentators have wondered if the United States is immune to this trend (Levitsky & Ziblatt, 2018). Regardless of the outcome, this debate has focused attention on mechanisms designed to contain presidential power, and on whether they are effective.

This article has three contributions. First, it explains the constitutional origins and limits of executive order authority by surveying how the Supreme Court has been overseeing them. Second, it offers a descriptive account of the evolution of executive order issuance over the course of eight decades, helping to distinguish the popular perception of a President who has gone crazy from the reality. Thirdly, it examines the scope of all accountability mechanisms, both formal and informal, and their effectiveness under different political circumstances. The central thesis is that presidential power is constrained by a series of overlapping and somewhat redundant restrictions rather than by a single bright line to be enforced by the courts.

In the following article the author examines the following. The second section is a survey of the literature and a theoretical development. Section 3 explores constitutional principles of executive order power. The research design is explained in Section 4. The empirical record of issuance is provided in Section 5. However, judicial review is examined in Section 6. Section 7 examines accountability mechanisms such as Congress. Presidential Immunity is discussed in Section 8. Implications and reform are discussed in Section 9 and the conclusion is in Section 10.

LITERATURE REVIEW AND THEORETICAL FRAMEWORK

The Imperial Presidency and Its Critics

For many scholars, the beginning of the modern debate on presidential power dates to Schlesinger's (1973) writing about the imperial presidency. In the wake of Vietnam and Watergate, Schlesinger maintained that the presidency has strayed a long way from its design, especially in foreign affairs, where the framers' intent to involve Congress had been replaced by “secrecy” and the “authority of the president.” Post-Watergate reforms such as the War Powers Resolution and oversight laws were intended to redress the balance. Rudalevige (2005), however, reveals that presidents were able to reclaim much of what Congress attempted to strip and that a “new imperial presidency” emerged and functions through administrative means rather than confrontation.

Another, very different tradition is that presidential strength is less than it may seem. Neustadt (1990) famously maintained that the president's formal power is limited and that effective power requires persuading and bargaining. From this perspective, the president is no longer just a commander, but a suppliant as well. The two traditions don't seem to be at odds with each other. Neustadt was speaking about a president who has to go through other institutions, and the critics of the imperial presidency are talking about one who's learned to work around them.

Unilateral Action as a Strategic Choice

The most recent literature that has been most impactful on the idea of executive orders as strategic tools. In the policy process, presidents have a structural advantage because they can act first and without a court or congress having to follow suit, according to Moe and Howell (1999a). Congress is subject to collective action problems and courts only intervene when cases make their way before them, which means that a presidential directive will prevail in the absence of the will and authority to mobilise against it. Howell (2003) elaborates this reasoning and provides empirical evidence that the political climate affects unilateral action, as presidents are more likely to be bold when Congress is divided or deadlocked, but not at the extremes. Moe and Howell (1999b) present a theory in a companion article in which presidential authority is not vested by explicit constitutional provisions but rather depends on the president's ability to take advantage of "ambiguity.

This picture is confirmed by empirical research on the content of executive orders. According to Mayer (2001), significant policy is made by order, such as in areas of civil rights and administrative management, and presidents generally use it more when they believe that the political price is low. What made unilateral directives the exception rather than the rule, and how they have become a norm of presidential governance over time, is explored by Dodds (2013). Belco and Rottinghaus (2017)

explain how the dual executive is composed, with it implying different forms of control over policy by the president. Thrower (2017) also notes that orders can be issued and withdrawn at will, and that their "enduring nature" is largely contingent upon the tastes and desires of their successors and Congress.

The Unitary Executive and Its Limits

An ongoing question is how much executive authority does Article II provide. Proponents of the unitary executive theory argue that the Vesting Clause gives the president control over the whole executive branch, including the power to remove and direct subordinate officials (Calabresi & Yoo, 2008). The argument is further advanced by Prakash (2015), who suggests that the original executive was always designed to be strong. But critics counter that the Constitution, too, grants Congress vast powers to make, fund and regulate the administrative state, and unitary theory is an interpretation of the single clause (Chafetz, 2017; Mashaw, 2012). How one answers this question will affect the way orders that affect agency behaviour are judged legitimate.

Kagan (2001) fills in the gap between the two perspectives by chronicling the gradual encroachment of the White House into the process of agency rulemaking since the end of the twentieth century. Her account is more than a little sympathetic, suggesting that the power of the president to supervise might help to increase democratic accountability by providing a source of accountability for voters. Others are not so optimistic. Posner and Vermeule (2010) contend that the Madisonian system of checks has been superseded by a plebiscitary executive with little real restraint other than politics and public opinion and the media. Ackerman (2010) also predicts a real constitutional crisis, given the convergence of factors of a charismatic president, a politicized military and weak parties.

Internal and Informal Checks

There is a developing body of literature that points out that the formal separation of powers only reflects components of the president's checks. Katyal (2006) suggests an "internal separation of powers" – the competition between executive offices. Despite the less active role of Congress and courts, the presidency's wartime actions were actually limited by lawyers, inspectors general, journalists, and advocacy groups, as Goldsmith (2012) demonstrates. Pozen (2013) draws attention to leaking as a quasi-institutional safety valve that paradoxically contributes to keeping a system going in which secrecy is the norm. The best theoretical observation about the branches that Levinson and Pildes make is the one that they make most starkly: the framers envisioned branches competing as branches, but today's politics is a party game, and a president and a majority of the same party in the Congress do not need each other.

Analytical Framework

In this article researchers bring these threads together in a framework of three propositions. First, the concept of the legal limits of executive order power is predicated on the connection between the order and Congress will. Orders that enforce statute, orders that fill gaps left by Congress in the statute, are on the strongest basis, orders that are silent are contested, and orders that contradict statue are weakest. Second, the institutions that are supposed to monitor the president do so to varying extents and their effectiveness is country-specific. Third, accountability is thus an ecosystem, and the strength of the latter is best measured by her explanation of whether or not, at least one layer can and will respond when the others cannot.

CONSTITUTIONAL FOUNDATIONS OF EXECUTIVE ORDER AUTHORITY

Textual Sources

Three kinds of textual anchors are typically used to trace the authority to issue executive orders. The power of the executive rests with the President under the "Vesting Clause" of Article II. The duty and power to supervise execution of the laws is established by the Take Care Clause. The Commander in Chief Clause contains provisions that would impact the Armed Forces. No one of these clauses defines the nature of an executive order and none says what it extends or does not extend to. The early republic's most famous defence of a vigorous executive, Hamilton's argument in the Federalist papers, emphasised energy and unity in the executive but also stressed that the office was accountable to the people and checked by the legislature and the courts (Hamilton et al., 1788/2003).

There is also a countervailing structure in the constitution. Article I gives Congress the "all legislative Powers" in the interest of carrying out all other powers granted in the Constitution.Article I gives Congress all legislative Powers to carry out other Powers they are given. The president has only a lawmaking function, and that is to recommend measures and use the veto. An executive order that is as binding as a law, placing duties on private parties without the legislative authority, is a source of the fundamental concern about separation of powers that the president is exercising a function that the constitution vests in someone else.

Delegation and the Statutory Basis of Orders

In reality, very few executive orders are based on the president's own constitutional powers. They stand on the principle of Congress entrusting discretion to the executive branch, in matters as diverse as hiring and firing federal employees to oversee imports and immigration. That's the reason why the fate of an order so often hinges on statutory interpretation. As a recent example, the Court in Trump v. Hawaii (2018) affirmed a President's proclamation banning entry by nationals of certain countries because the immigration statute afforded the President "wide discretion" in making such entry decisions and the Court did not second guess the President's national security determinations.

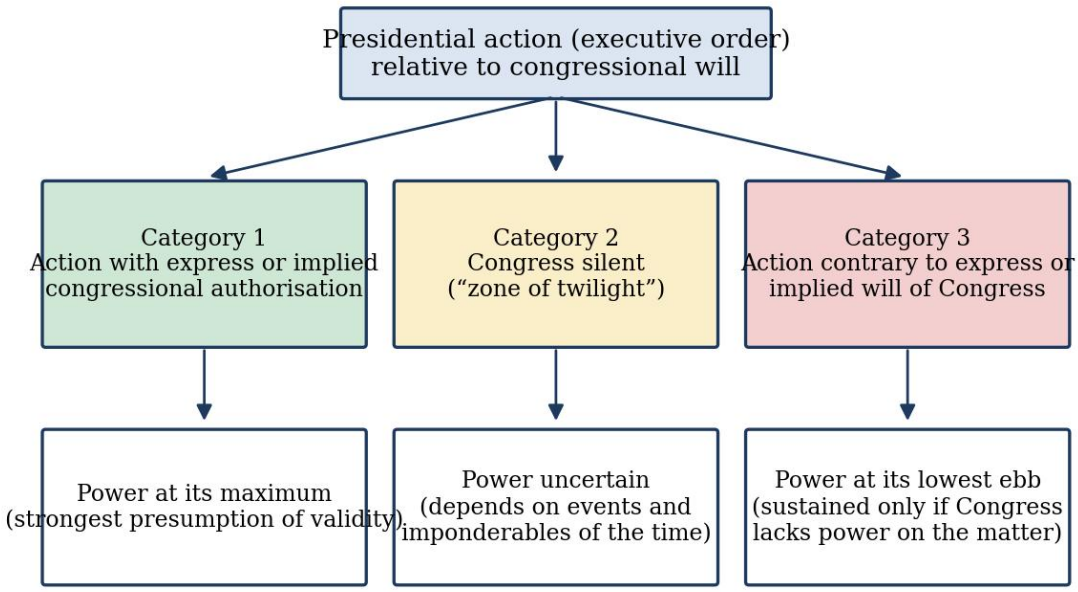
Delegation is not unlimited, however. The Court has recently brought back the major questions doctrine, which holds that any agency or the executive branch of the federal government needs clear congressional authorization to exercise power over an issue of "'vast economic and political complexity." In West Virginia v. EPA (2022), the Court concluded that EPA did not have clear authority to reorganize the national energy system via generation shifting. In Biden v. Nebraska (2023), the Court denied a request to cancel massive student loan debt under an emergency statute because it argued that such a decision would require explicit statutory authorization. The doctrine of statute ought to be regarded with one's eyes closed, if it must be regarded at all, for it is itself a place of constitutional restriction.

The Youngstown Framework

The most significant judicial decision on the scope of executive order powers is Youngstown Sheet & Tube Co. v. Sawyer (1952). In the Korean War, President Truman ordered an embargo on the nation's steel mills, to halt a strike. The Court ruled that this seizure was unconstitutional, first of all because the president lacked any statutory authority or constitutional basis for such seizure, and second because Congress had thought about it and rejected it. Justice Jackson's concurring opinion, in which he classified presidential action as either of three types, is best remembered. The president's power is strongest when he acts with congressional authorization, it is at a "zone of twilight" when Congress has been silent, and it is at its weakest when the president acts in opposition to the expressed or implied will of Congress (Youngstown Sheet & Tube Co. v. Sawyer, 1952).

This framework is summarised in figure 1. It's application is impossible to overestimate. Courts have returned to Jackson's time and place again and again, such as in Dames & Moore v. Regan (1981), in which the Court justified orders to implement the settlement of the Iran hostage crisis in part because of the long practice of executive claims settlement that Congress had acquiesced in. The framework provides courts with a way to address only the specific question of Article II without having to resolve the myriad abstract arguments concerning the scope of Article II. They need only ask where the order stands with respect to what has been authorized, permitted or prohibited by Congress.

Figure 1: Justice Jackson's Tripartite Framework for Assessing Presidential Action



Note. Adapted from the concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer (1952).

Removal and the Structure of the Executive Branch

A second line of argument is that of the president's power over personnel. In Myers v. United States (1926), the Court interpreted the removal power of the President to be very broad. However, Humphrey's Executor v. United States (1935) less than ten years later found an exception for independent multimember commissions, and the president lost again. That exception has been restricted in more recent cases. In Seila Law LLC v. Consumer Financial Protection Bureau (2020), the Court ruled that Congress may not shield the single director of the Consumer Financial Protection Bureau from the President's power to remove him or her at any time. The question of accountability is key in these cases because it will shape the accountability of the administrative state to the president, and thus the extent to which the president can direct it by executive order.

Research Design and Data

The study is of a doctrinal nature as a mix of doctrinal analysis and descriptive quantitative analysis. The doctrinal portion focuses on twelve purposively chosen Supreme Court cases that all presented a fundamental issue on the limits of presidential power, ranging from removal to emergency power, executive privilege, immunity, delegation, and statutory interpretation. This is not a random sampling selection and should not be interpreted as a "statistical estimate" of presidental wins and losses. The aim is to determine the rationale for the courts, and when and why they have limited the president.

The quantitative component consists of the number of executive orders by each president, from the American Presidency Project (Peters & Woolley, n.d.) which lists executive orders published in the Federal Register and earlier records. Numbers for the earliest presidencies may change slightly depending on the source; the figures provided here should be considered approximate. The analysis also shows the average number of orders issued per year in office to make comparisons between different length presidencies. This is a limitation of the study as it does not make an attempt to code the substantive importance of each order. A raw count would count a minor administrative change the same as a major policy change, whereas they are very different in meaning. The policy weight of orders is at least as important as the number of orders, as Mayer (2001) and Howell (2003) both emphasize.

A qualitative and comparative analysis of accountability mechanisms. It considers each of the mechanisms on four aspects: the actor that brings it about, the trigger that makes it work, the usual constitution and the usual deficits of the mechanism. The intent with this is to recognize structural patterns, not to precisely order mechanisms.

The Empirical Record of Executive Order Issuance

Totals Across Presidencies

The total and the annual averages of executive orders issued by each president (Franklin D. Roosevelt to Joseph R. Biden Jr.) are reported in Table 1. The data reveal a tremendous surge during the Roosevelt period with a long downward trend.

Table 1: Approximate Executive Orders Issued by President, 1933–2025

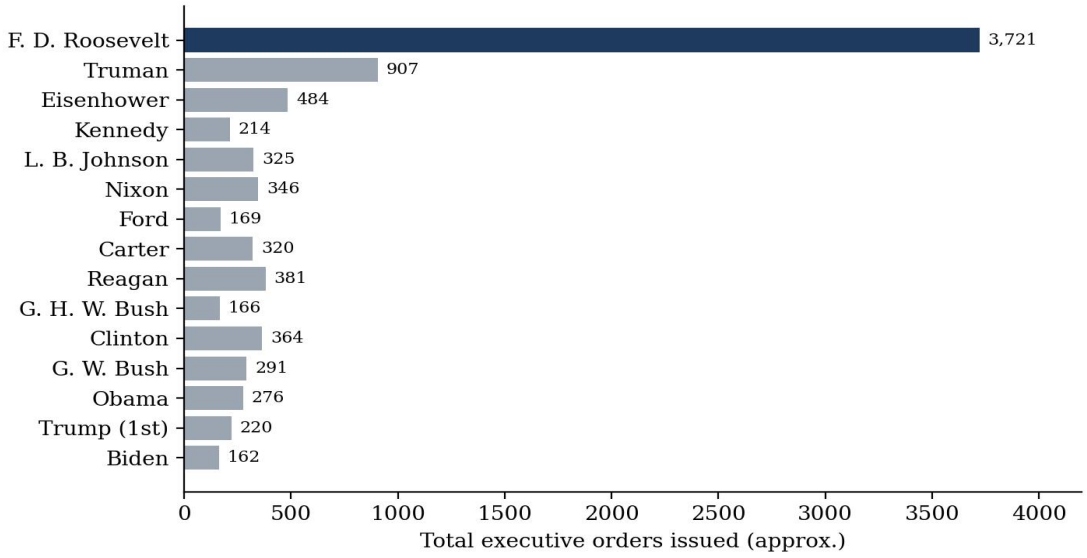
President	Years in office (approx.)	Total orders (approx.)	Average per year (approx.)
F. D. Roosevelt	12.1	3,721	307
Truman	7.8	907	116
Eisenhower	8.0	484	60
Kennedy	2.8	214	76
L. B. Johnson	5.2	325	63
Nixon	5.6	346	62
Ford	2.4	169	70
Carter	4.0	320	80
Reagan	8.0	381	48
G. H. W. Bush	4.0	166	41
Clinton	8.0	364	45
G. W. Bush	8.0	291	36
Obama	8.0	276	35
Trump (first term)	4.0	220	55
Biden	4.0	162	40

Note. Figures are rounded and based on counts compiled by Peters and Woolley (n.d.). Annual averages are calculated by dividing the total by the approximate years in office.

The sum is divided by the approximate years in office to arrive at annual averages. The totals are shown in graph 1. The number of Roosevelt dwarfs all others and it speaks for the unusual circumstances of the Depression and the Second World War when the president was forced to regulate the economy and mobilise and run a war largely by order. Some of these were also approved or incorporated into law, showcasing the Jackson approach at work. A congressional order has a

different legal and political weight if it is issued in the presence of congressional support than if it is issued in the absence of congressional support.

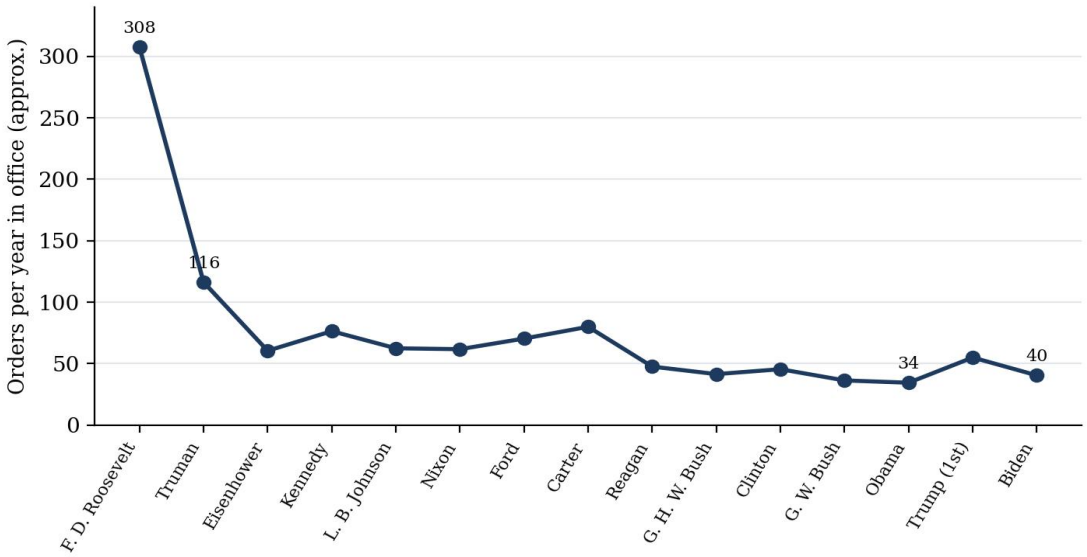
Graph 1: Total Executive Orders by President (Approximate)



Note. Data from Peters and Woolley (n.d.); figures rounded.

Turning to average annual issuance in Graph 2 addresses the effect of different times in office. The rate is then significantly reduced after Roosevelt and Truman and then the band is rather tight. In the 20th century, the number of presidential orders per year has been drastically reduced from that of the mid-century presidents. The notion that executive orders have proliferated is not backed up by the simple fact of the numbers.

Graph 2: Average Executive Orders per Year in Office (Approximate)



Note. Calculated from the totals in Table 1.

What the Numbers Do and Do Not Show

The reduction in volume is not interpreted as a reduction in power. There are a number of developments that explain why. First, many of the same routine business functions that were previously conducted in the context of an executive order are now carried out via other means such as presidential memoranda, proclamations, national security directives and agency guidance, which are less publicized and not always counted (Cooper, 2014; Dodds, 2013). Second, Congress and the courts have over the years established standards that overrode the president's orders in minor administrative matters and thus have minimized the need for orders in the first place. Third, and most important, the President has increasingly turned to the more informal mechanisms of administrative control of the regulatory process, by using which the President can influence the policy without formally issuing a command (Kagan, 2001; Rudalevige, 2005).

He also includes the count, which hides content variation. The orders relating to immigration, emergency declarations, the declaration of military force, the removal of officials and reallocation of funds have sparked the most intense constitutional debate in a small number of orders in each presidency. It is in these orders that the question raised in this article – how far can the President go – is most pressing. The number of orders should not be the focus of a measure of the limits of presidential power, but rather the system's reactions to the orders that push it to its limits.

Durability and Reversal

A fact of executive orders is that they are easily rescinded by their successors. Thrower (2017) demonstrates that the probability of an order being rescinded is higher when an incoming president's policy preferences differ from those of the order-giver, and that Congress-mandated orders are more likely to last. This has significant ramifications for accountability. Executive orders are an inherently unstable form of policymaking because they can be reversed by a stroke of the pen. Presidents who depend on them to make big contributions take the chance that their glory will not endure. In this way the instrument offers a slight, but genuine temporal check and offers an indirect means of "reversing course" to the electorate.

Judicial Review: Where Courts Draw the Line

A Pattern of Selective Constraint

Table 2 summarises twelve decisions, which can be said to chart the contours of the judicial limits on presidential authority. The cases range over almost a hundred years and include cases on removal, emergency power, executive privilege, immunity, and statutory delegation.

Table 2: Selected Supreme Court Decisions on the Limits of Presidential Power

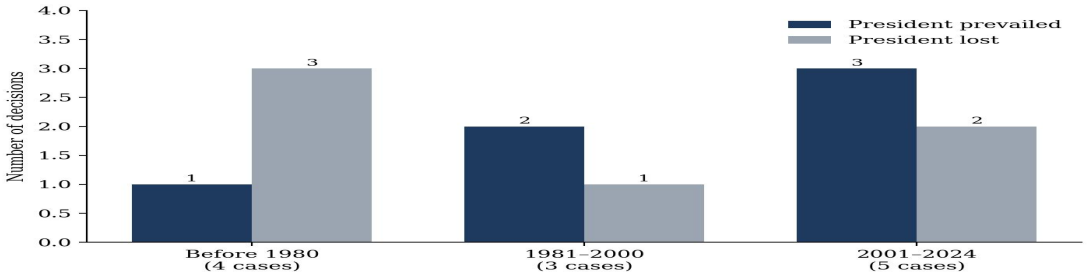
Case	Year	Core issue	Outcome for the president	Governing principle
Myers v. United States	1926	Removal of a postmaster	Won	Broad presidential removal power over executive officers
Humphrey's Executor v. United States	1935	Removal of an independent commissioner	Lost	Congress may limit removal of multimember expert bodies
Youngstown Sheet & Tube Co. v. Sawyer	1952	Seizure of steel mills by order	Lost	Presidential power is lowest when contrary to Congress
United States v. Nixon	1974	Executive privilege and subpoena	Lost	Privilege is qualified and yields to criminal process

Dames & Moore v. Regan	1981	Iran claims settlement orders	Won	Congressional acquiescence supports executive action
Nixon v. Fitzgerald	1982	Civil damages for official acts	Won	Absolute civil immunity for official acts
Clinton v. Jones	1997	Civil suit over unofficial conduct	Lost	No temporary immunity for private conduct
Trump v. Hawaii	2018	Entry restrictions by proclamation	Won	Deference under broad immigration delegation
Seila Law LLC v. CFPB	2020	Removal protection for a single director	Won	Presidential control over single-headed agencies
West Virginia v. EPA	2022	Agency power over energy sector	Lost	Major questions require clear authorisation
Biden v. Nebraska	2023	Large-scale student debt cancellation	Lost	Major questions require clear authorisation
Trump v. United States	2024	Criminal immunity for official acts	Won	Immunity for core powers, presumptive for other official acts

Note. "Outcome for the president" refers to the position of the president or the presidential administration whose action was challenged. The cases were selected purposively and are not a random sample.

These decisions are grouped together by period and displayed in Graph 3. The president won one out of four cases up until 1980. The President won two out of three in his first 12 years. The president has won three out of five since 2001. The sample is small and purposive and a trend should not be inferred. Instead, the Court's record demonstrates that it has not gone back and forth between deferential and confrontational attitudes. Its response depends on the type of question presented.

Graph 3: Outcomes for the President in Selected Supreme Court Decisions, by Period



Note. Based on the twelve decisions listed in Table 2. The sample is purposive.

When Courts Rule Against the President

All the cases in which the president failed are similar. In Youngstown (1952), the president was in conflict with Congress's clear choice. The claim of executive privilege was made in response to the demands of a criminal prosecution in United States v. Nixon (1974); in that case the Court unanimously rejected the notion that a generalised interest in confidentiality should be sufficient to preclude the need for evidence in a criminal trial. It was the most recent judicial pronouncement that a president is not above the law. The Court has rejected the idea of a civil lawsuit over alleged private misconduct because the office itself is not immune from such claims, and the costs of litigation could be controlled in the lower courts, as it did in Clinton v. Jones (1997).

The losses in West Virginia v. EPA (2022) and Biden v. Nebraska (2023) are not Youngstown separations from Congress in the Youngstown sense. They base their position on the fact that Congress has to act with clarity when it authorises such massive action. These choices are special as they cut both parties' presidents, and also they move the functional burden. A president who wants to solve a big national issue through executive order now has to find a specific language in a law, rather than a general one that is read broadly.

When Courts Defer

The President did not have the same story in the cases where his approval ratings were high. Statutes are generally broad in these areas, and courts are most hesitant to substitute their judgment for that of the political branches in the areas of foreign affairs, immigration and national security (Dames & Moore v. Regan, 1981; Trump v. Hawaii, 2018). They also refrain from exercising the authority to remove officials when the claim is against their own authority and the executive branch itself, as the Myers case (1926) and the Seila Law case (2020) demonstrate. The Court has held that the president's power to oversee the activities of his subordinates is almost an integral part of the executive branch of government in Article II.

This is an important implication of the asymmetry. Most effectively judicial review restrains the president in his private dealings with other parties and Congress's legislative authority in the domestic arena. It tightens up the reins in the places where the President's authority is most unchallenged and where there has been a challenge for judges to formulate reasonable rules. In this regard, presidents who fear losing in court have been prone to presenting the most aggressive domestic programs in the words of national security or emergency, which is an issue that should remain a subject of research (Goldsmith, 2012; Barron, 2016).

Structural Limits on Judicial Review

Conditions that affect access to courts also place limitations on judicial review. Plaintiffs must establish standing, that the concrete harm stemmed from the challenged action, and the political question doctrine prevents review of matters entrusted to another branch. Courts are also slow and an order can have irreversible effects before a conclusion. Even if there is a review, remedies against the executive have tough issues to tackle. These procedural limitations do not render judicial review futile, but they insure that judicial review operates as a 'backstop' instead of a 'checks and balances' system (Posner & Vermeule, 2010).

Congress and Other Accountability Mechanisms

Congress: Formal Powers and Political Reality

Congress has an impressive arsenal of formal weapons. It has the authority of appropriating funds, confirming nominations, conducting oversight, investigating and issuing subpoenas, impeaching and removing, and passing bills to overturn an order, all subject to the president's veto. These and other informal means provide Congress with significantly more power to control the executive than many realize (Chafetz 2017). There are also a variety of provisions in the statutory architecture aimed at curbing both emergency and war powers, such as the National Emergencies Act and War Powers Resolution, which Congress passed in the wake of Watergate and Vietnam (Barron, 2016).

The record of use is not as rosy. A two-thirds vote in both houses is needed to override a veto, which is hard to achieve on a controversial topic. The legislative reaction to unilateral action is therefore structurally weak and the strategic logic following Moe and Howell (1999a) is logical. Presidents have learned that Congress does not typically repeal an order, so the risk of making a unilateral move is not great. This is a good example, in the form of the War Powers Resolution. Presidents from both

parties considered its reporting and withdrawal provisions constitutionally suspect or met with "minimal compliance", and Congress rarely enforced them (Barron, 2016).

The more fundamental issue, Levinson and Pildes (2006) find, is a partisan one. The framers believed that members of Congress would be zealous for the prerogatives of their branch of government. In a polarised system, however, party is sometimes the strong allegiance of the members. A majority of the president's party in Congress has little reason to uncover or oppose the president's overreach, while an opposition majority has all the reason in the world to expose and oppose it. Thus, Congress enjoys high levels of checking when government is divided and low levels when it is unified, and often checks as much for partisan gain as for constitutional principle. Institutional and political context also influences incentives for oversight of executive action, as noted in Lowande (2018).

Internal Executive Checks

Some of the most important restrictions lie within the executive branch. Katyal (2006) contends that a properly structured administrative state has multiple sources of expertise and authority, including career lawyers, inspectors general, independent statistical agencies and legal advisers, all of whom help to increase the cost of illegality. Centralised regulation review is shown to increase presidential influence by Kagan (2001) but also through process requirements, forces analysis and justification. As Goldsmith (2012) explains, the practice of hiring lawyers within government, and the fear that government officials could be personally liable in court in the future, influenced the decisions taken on surveillance and detention during the post-September 11 era, without the formal branches.

These internal checks are real but fragile. They depend on the willingness of officials to dissent, on norms of professional independence, and on the president’s tolerance of resistance. A president who is determined to remove obstacles can fire inspectors general, replace legal advisers, or reorganise offices. The strength of the internal check is therefore a function of political culture rather than law, which makes it difficult to rely upon in a crisis (Levitsky & Ziblatt, 2018).

Federalism, the Press, and Public Opinion

Federalism supplies an additional layer. State governments and attorneys general have become frequent litigants against federal executive action, often on the basis of harms to state interests, and their suits have produced a number of significant rulings. This litigation tends to track partisan alignment, since state officials of the party opposed to the president are the most likely to sue. Federalism therefore operates as a pluralist check, one that mobilises when the political conditions are right.

The press and public opinion work differently. Pozen (2013) shows that leaks are a pervasive feature of executive governance that, although often illegal, help inform Congress and the public about executive conduct that official channels conceal. Public opinion constrains presidents mostly through electoral risk, which matters especially for those facing re-election and for those whose party colleagues will face voters. Neustadt’s (1990) classic insight applies here as well, because a president’s reputation and popularity are resources that can be spent or squandered, and unilateral action can deplete them.

A Comparative Assessment

Table 3 compares the principal mechanisms along the dimensions identified in the research design.

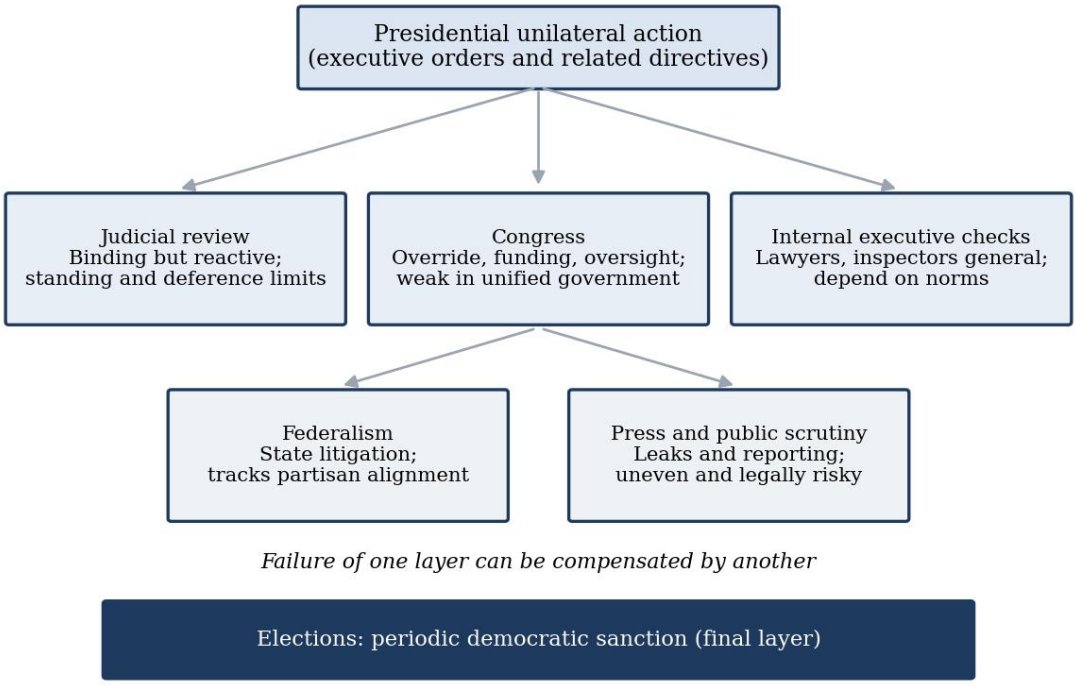
Table 3: Accountability Mechanisms Compared

Mechanism	Primary actor	Typical trigger	Main strength	Main weakness
Judicial review	Federal courts	Lawsuit by an injured party	Binding, reasoned, independent	Slow; limited by standing and deference in security matters
Legislative override	Congress	Majority and veto-proof coalition	Democratic legitimacy	Veto threshold; partisan alignment
Appropriations and oversight	Congress	Hearings, subpoenas, budget riders	Continuous leverage	Weak under unified government
Impeachment	House and Senate	Allegation of high crimes	Reaches the president personally	Extremely high supermajority threshold for removal
Internal checks	Lawyers, inspectors general, career staff	Professional dissent	Early, informed, low cost	Depends on norms; easily bypassed
Federalism	States and attorneys general	State-level litigation	Pluralist, well-resourced	Tracks partisan alignment
Press and leaks	Journalists and officials	Disclosure	Exposes concealed conduct	Legally risky; uneven
Elections	Voters	Periodic ballots	Ultimate democratic sanction	Infrequent; blunt

Note. Assessments synthesise the literature cited in Section 2 and the case analysis in Section 6.

The comparison yields a clear lesson. No mechanism is sufficient on its own. Courts are independent but reactive, Congress is powerful but partisan, internal checks are early but fragile, and elections are decisive but infrequent. What sustains accountability is the redundancy among them. Figure 2 depicts this layered structure and shows how the failure of one layer can be compensated by another, provided that at least one layer retains both capacity and willingness to act.

Figure 2: The Layered Accountability Ecosystem for Presidential Unilateral Action



Note. Conceptual model developed by the author from the literature reviewed in Section 2.

Presidential Immunity and the Question of Personal Accountability

The Doctrinal Background

The issue of personal responsibility for the president has always been ambiguous. In Nixon v. Fitzgerald (1982), the Court ruled that a president enjoys absolute immunity from civil liability for damages for his official actions within the outer boundary of presidential responsibility in order to prevent that exposure from tainting his judgment about whether to engage in political, social, and economic activities. The Court said in Clinton v. Jones (1997) that this line of thought was inapplicable to unofficial conduct. In United States v. Nixon (1974), the Court ruled that the President has to obey a criminal subpoena, as he is ordered to produce evidence. The two decisions implied that a president was liable to law for his private life, and could be brought before a criminal courts for violations of the law, but was protected against criminal investigation for basic official actions.

Trump v. United States

This protection was extended to the criminal context in the 2024 case of Trump vs. the United States. A majority said the President should be immune from criminal prosecution for his core constitutional powers, but not for other official actions—presumptive immunity—and not for actions as an unofficial actor. Further, the Court stated that it would not allow evidence of immunised conduct to be used to prosecute for unofficial conduct (Trump v. United States, 2024). The decision left many issues unanswered, such as what the courts determine to be mixed purpose conduct and how the presumption of immunity may be rebutted.

The decision has been justified and criticised in terms of the general theoretical dichotomy. Proponents of a robust executive argue that, in order to do his job effectively, the president needs to

be able to act decisively without worrying that a future president or political adversary will label a "legitimate" decision as a crime. This fear is consistent with the unitary executive tradition (Calabresi & Yoo, 2008; Prakash, 2015). Critics say the ruling protects exactly what the Constitution's framers wanted to hold accountable and undermines one of the few remaining personal checks on abuse (Ackerman, 2010; Levitsky & Ziblatt, 2018).

Implications for the Accountability Ecosystem

The analytical point of the decision is related to the redistribution of burdens within the above-described ecosystem. It eliminates an avenue of criminal liability, and thus a potential deterrent under the normal criminal law. It won't affect the structural review that courts will be allowed to conduct on the legality of orders in the first place — if a directive is found to be illegal, courts can still prevent its enforcement. It does however, add to the dependence on the political layers such as Congress, internal checks, federalism, and elections. In a major change in the partisan world discussed in section 7, this is. In terms of resilience, it will be more reliant on the ongoing readiness of institutions beyond the judiciary to take on their restraining functions.

DISCUSSION AND REFORM IMPLICATIONS

What the Evidence Suggests

There are three key findings. First, the volume of executive orders is not a good measure of presidential power. While the absolute numbers are still very high, as in the Roosevelt period, presidents have discovered other tools and have strengthened the machinery of administration (Kagan, 2001; Rudalevige, 2005). Second, more limits can be placed on most of these restrictions in the domestic realm, and especially when the president is taking action against Congress, or resorting to the broad language of statutes to assert expansive powers. Third, accountability is multi-layered, and the parts that are weakest are where partisan alignment makes congressional oversight impossible while doctrine limits individual legal liability.

These results support the pessimistic and the optimistic accounts. The pessimists are right that political constraints are weak and that the structural advantages enjoyed by modern presidents are often overwhelming (Moe & Howell, 1999a; Posner & Vermeule, 2010). The optimists are right that the system has in fact generated these real limits numerous times before, as the steel seizure, the Nixon tapes, and the recent big questions decisions have all shown. The right word is not collapse, but noncollapsing, nor is self-correction the right word, but non-self-correcting. Requires political circumstances, which are not assumed.

Policy and Institutional Reforms

The analysis leads to a number of reforms. These are provided as debating options, with pros and cons.

Congress could do more to tighten up the law on emergency powers. The National Emergencies Act has proven to be largely ineffective at holding the president back as they are in the power of Congress and can be vetoed by the President. Proposals for reform would need to be reauthorized by Congress after a certain time, with the default being restraint rather than continuation (Goldsmith, 2012; Barron, 2016). Second, Congress could, in drafting delegations, be more specific and have shorter sunsets, thus minimizing the uncertainty presidents exploit and providing courts with the standards. Third, Congress might use its own institutional resources—its oversight staff and independent analytical resources—to build its own capacity, since a legislature without information cannot check an executive that controls it (Chafetz, 2017).

Fourth, formalisation of internal checks could be undertaken. Making norms less necessary to impose internal constraint would be promoted by statutory protections for inspectors general, by requiring

that significant legal opinions be published, and by providing more clear rules for the review of executive orders (Katyal, 2006; Kagan, 2001). Fifth, there should be procedural changes to further expedite and increase the effectiveness of judicial review of executive action, such as the establishment of clearer standards for institutional plaintiffs and for expeditious review of orders with significant consequences. Lastly, the issue of individual responsibility could be a subject for legislation. Congress might codify under statute the nature of conduct that is subject to ordinary law and also the procedures by which it's to be adjudicated, within the scope of the Court's decision.

LIMITATIONS AND FUTURE RESEARCH

There are some limitations of this study. Case sample is small and purposive. Orders are not the same as substantive importance, as the empirical data do not measure substantive importance. The method of analysis for accountability mechanisms does not involve systematic coding of outcomes but rather qualitative synthesis. Furthermore, constitutional law in this area is a developing doctrine and some of the post-decisions conclusions are preliminary. Future research might expand the data set to include more significant orders; code subject matter, legal justification, and judicial (and congressional) outcomes; and test the predictive power of party affiliation for judicial and congressional reactions, while comparing the American system with other presidential democracies in which executive decree powers are constitutionally limited.

CONCLUSION

In the United States, there are indeed some hard constraints on the executive branch of government but they are not imposed by any single institution. These arise out of a multi-layered system of checks: The courts hold an enforcement role over the distinction between delegated authority and undelegated authority, Congress has effective but electorally sensitive enforcement powers, the executive branch has internal disputes, and the states, the press, and the electorate provide additional limits. Executive orders are an intersection of these layers, and have been the source of some of the most significant constitutional conflicts in U.S. history.

The evidence given here indicates that the real risk is not from a single constraint failing, but from multiple constraints failing. Unified government can shut down Congress, deference can be curtailed by the courts when it comes to security, and internal checks can be eliminated by a determined president. Recent doctrine on immunity adds to the stakes by making one personal deterrent less potent, while leaving the others more potent. The challenge for policy-makers, judges and citizens is to maintain the redundancy of the system that provides resilience. An order that relies on the restraining power of one is easily destroyed. This one, instead, that provides more than one actor with the power and incentive to resist is much more enduring, and it is this “durability” and not the text of Article II per se that ultimately sets the limits on presidential power.

REFERENCES

Ackerman, B. (2010). *The decline and fall of the American republic*. Harvard University Press.

Barron, D. J. (2016). *Waging war: The clash between presidents and Congress, 1776 to ISIS*. Simon & Schuster.

Belco, M., & Rottinghaus, B. (2017). *The dual executive: Unilateral orders in a separated and shared power system*. Stanford University Press.

Bermeo, N. (2016). On democratic backsliding. *Journal of Democracy, 27*(1), 5–19.

Biden v. Nebraska, 600 U.S. 477 (2023).

Calabresi, S. G., & Yoo, C. S. (2008). *The unitary executive: Presidential power from Washington to Bush*. Yale University Press.

Chafetz, J. (2017). *Congress's constitution: Legislative authority and the separation of powers*. Yale University Press.

Clinton v. Jones, 520 U.S. 681 (1997).

Cooper, P. J. (2014). *By order of the president: The use and abuse of executive direct action* (2nd ed.). University Press of Kansas.

Dames & Moore v. Regan, 453 U.S. 654 (1981).

Dodds, G. G. (2013). *Take up your pen: Unilateral presidential directives in American politics*. University of Pennsylvania Press.

Goldsmith, J. (2012). *Power and constraint: The accountable presidency after 9/11*. W. W. Norton.

Hamilton, A., Madison, J., & Jay, J. (2003). *The Federalist papers* (C. Rossiter, Ed.). Signet Classics. (Original work published 1788)

Howell, W. G. (2003). *Power without persuasion: The politics of direct presidential action*. Princeton University Press.

Humphrey's Executor v. United States, 295 U.S. 602 (1935).

Kagan, E. (2001). Presidential administration. *Harvard Law Review, 114*(8), 2245–2385.

Katyal, N. K. (2006). Internal separation of powers: Checking today's most dangerous branch from within. *Yale Law Journal, 115*(9), 2314–2349.

Levinson, D. J., & Pildes, R. H. (2006). Separation of parties, not powers. *Harvard Law Review, 119*(8), 2311–2386.

Levitsky, S., & Ziblatt, D. (2018). *How democracies die*. Crown.

Lowande, K. (2018). Who polices the administrative state? *American Political Science Review, 112*(4), 874–890.

Mashaw, J. L. (2012). *Creating the administrative constitution: The lost one hundred years of American administrative law*. Yale University Press.

Mayer, K. R. (2001). *With the stroke of a pen: Executive orders and presidential power*. Princeton University Press.

Moe, T. M., & Howell, W. G. (1999a). The presidential power of unilateral action. *Journal of Law, Economics, and Organization, 15*(1), 132–179.

Moe, T. M., & Howell, W. G. (1999b). Unilateral action and presidential power: A theory. *Presidential Studies Quarterly, 29*(4), 850–873.

Myers v. United States, 272 U.S. 52 (1926).

Neustadt, R. E. (1990). *Presidential power and the modern presidents: The politics of leadership from Roosevelt to Reagan*. Free Press.

Nixon v. Fitzgerald, 457 U.S. 731 (1982).

Peters, G., & Woolley, J. T. (n.d.). *Executive orders*. The American Presidency Project. https://www.presidency.ucsb.edu/statistics/data/executive-orders

Posner, E. A., & Vermeule, A. (2010). *The executive unbound: After the Madisonian republic*. Oxford University Press.

Pozen, D. E. (2013). The leaky Leviathan: Why the government condemns and condones unlawful disclosures of information. *Harvard Law Review, 127*(2), 512–635.

Prakash, S. B. (2015). *Imperial from the beginning: The Constitution of the original executive*. Yale University Press.

Rudalevige, A. (2005). *The new imperial presidency: Renewing presidential power after Watergate*. University of Michigan Press.

Schlesinger, A. M., Jr. (1973). *The imperial presidency*. Houghton Mifflin.

Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197 (2020).

Thrower, S. (2017). To revoke or not revoke? The political determinants of executive order longevity. *American Journal of Political Science, 61*(3), 642–656.

Trump v. Hawaii, 585 U.S. 667 (2018).

Trump v. United States, 603 U.S. 593 (2024).

United States v. Nixon, 418 U.S. 683 (1974).

West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022).

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).