UNILATERAL POWERS
AND THE MIDTERMS

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Elections 2018 – The Midterms
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Trump Targets Birthright Citizenship with Executive Order
Big Questions

• What are unilateral powers? How are they derived from the Constitution?
• When and why do presidents choose to use unilateral powers?

• How might the president’s use of unilateral powers change after the midterm elections?
• How does this conform with previous presidents?
What are the Constitutional Powers of the President?
Constitutional Sources of Presidential Power

1. Expressed Powers
2. Inherent Powers
3. Delegated Powers
Sources of Presidential Power

**Expressed Powers**: Granted specifically by Article II of Constitution

1. Military (Article II, Section 2)
2. Judicial (Article II, Section 2)
3. Diplomatic (Article II, Section 3)
4. Executive (Article II, Section 3)
5. Legislative (Article I, Section 7 and Article II, Section 3)
1. Military (Article II, Section 2)

“The President shall be *Commander in Chief* of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”
2. Judicial (Article II, Section 2)

“…and he shall have Power to grant Reprieves and *Pardons for Offenses* against the United States, except in Cases of Impeachment”
3. Diplomatic (Article II, Sections 2 and 3)

“He shall have Power, by and with the Advice and Consent of the Senate, to *make Treaties*, provided two thirds of the Senators present concur…”

“…he shall *receive Ambassadors* and other public Ministers…”
4. Executive (Article II, Sections 2 and 3)

“…and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States…”

“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session”

“…he shall take Care the Laws be faithfully executed…”
5. Legislative (Article I, Section 7 and Article II, Section 3)

“Every Bill…before it become a Law, **be presented to the President** of the United States; if he approve he shall sign it, but if not he shall return it…”

“If any Bill shall not be returned by the President **within ten Days**…the Same **shall be a Law**”

“He shall from time to time give to the Congress information of the **State of the Union** and recommend to their consideration such Measures as he shall judge necessary and expedient”
Sources of Presidential Power

**Delegated Powers**: Granted to the president or executive branch by congressional statute
1. Congress recognizes a problem
2. Congress recognizes it lacks time and/or expertise to deal with the problem
3. Congress sets basic policies and delegates to an agency/president to fill in the details

E.g. – New Deal agencies created in 1930s by Congress to deal with the economy
Sources of Presidential Power

**Inherent Powers**: Not explicitly expressed in the Constitution, but inferred from it and claimed by president

**Vesting Clause** (Article II, Section 1, clause 1): “The *executive Power shall be vested in a President* of the United States of America…”

**Take Care Clause** (Article II, Section 3, clause 5): “…he shall *take care that the law be faithfully executed*…”
Examples:
• War powers
• Executive Agreements
• Unilateral Actions – e.g. executive orders, signing statements

Greater reliance on the unitary executive theory
What is the Unitary Executive Theory?
The Unitary Executive Theory

- The president has the **sole responsibility** over executive branch
- Congress **does not** have the right to **limit** the president’s power
The Unitary Executive Theory

- The president has *independent authority to interpret* the Constitution and the law
- The president has the *duty to defend* against unconstitutional encroachments of executive power and individual rights
- The president is *not bound to follow unconstitutional acts* of Congress and the courts
The Unitary Executive Theory: Implications

- Concentrates power with the president
- Insulates president from constraints from other branches
- This theory has been used as a legal justification for the expansion of presidential power (inherent powers)
  - Removal of executive branch officials
  - Centralized review of agencies
  - *Unilateral actions*
What are unilateral actions?
Unilateral Actions

**Unilateral Action**: Any formal action of the president designed to influence policy that is performed outside of the traditional legislative process.

**Unilateral Directive**: A written statement or order issued by the president (designed to influence policy) that is directed towards agencies, other government officials, or those outside of government and is performed outside of the traditional legislative process.
Unilateral Actions

- Unilateral directives are a subset of unilateral actions, but these terms are often *used interchangeably* (along with “unilateral powers”)
- These unilateral powers are justified with the *unitary executive theory*
- They are considered *inherent powers*, derived from Article II of the Constitution
Unilateral actions are distinct from other presidential powers because....

1. Presidents act first.
2. Presidents act alone.
Examples of Unilateral Directives

- **Executive orders**
- Signing statements
- Proclamations
- Memorandums
- National security directives
- Executive agreements
Executive Orders (EOs)

An **executive order** is a unilateral directive issued by the president to executive branch officials and agencies, providing instruction on how to implement the law.

Functions:
1. Ceremonial duties
2. Interpretation of the law
3. Policy initiatives
4. Response to economic crises
5. Response to international crises
6. Centralization of agency rulemaking
Ceremonial Duties

This can include:

- Creation of seals, flags, or medals
- Executive branch maintenance (e.g. holidays, days off or half days, salary increases)

**Example**: EO 9586 – “Medal of Freedom”

“There is hereby established a medal known to be the Medal of Freedom with accompanying ribbons…”

- Harry Truman, July 6, 1945
Creation of Policy Initiatives

EO 11249 – Equal Employment Opportunity
(Lyndon Johnson, September 24, 1965)

“All Government contracting agencies shall include in every Government contract hereafter entered into the following provisions…The Secretary of Labor shall be responsible for the administration and enforcement of…this Order”
Creation of Policy Initiatives

EO 13199 – Establishment of White House Office of Faith-Based and Community Initiatives” (George W. Bush, January 29, 2001)

“There is established a White House Office of Faith Based and Community Initiatives within the Executive Office of the President that will have the lead responsibility in the executive branch to establish policies…and expand the work of faith based and other community organizations”
Agencies Created by Trump

- **10 agencies** created by executive order (Jan – Aug. 2017)
  - 4 White House
  - 3 Cabinet
  - 3 Inter-agency

- Task Force on Crime Reduction and Public Safety
- President’s Commission on Combating Drug Addiction and the Opioid Crisis
- Interagency Task Force on Agriculture and Rural Prosperity
- Office of Accountability and Whistleblower Protection
- Office of Trade and Manufacturing Policy
- Presidential Advisory Commission on Election Integrity
- Presidential Advisory Council on Infrastructure
Response to Economic Crises

EO 11615 – Providing for the Stabilization of Prices, Rents, Wages, and Salaries (Richard Nixon, August 15, 1971)

“Prices, rents, wages, and salaries **shall be stabilized for a period of 90 days** from the date not greater than the highest of... Each person engaged in the business of selling or providing commodities or services shall maintain available for public inspection a record of the highest prices or rents...”
E.g. – Carter issued a series of executive orders during the Iran Hostage Crisis (from 1979 – 1981), placing sanctions on Iran and assisting in the final days of the crisis in releasing the hostages.

“I hereby order all blocked property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States…”
Interpretation of the Law

• EOs instruct agencies on how to interpret the law
• Interpretation of vague or ambiguous statutes
• Expansion of authority
Congress passes bill → President signs bill → Law passes with instructions → Agency implements instructions with regulations → Regulations become part of the law
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EO issued with interpretation of law and new instructions
Example: Drug Shortage Crisis in the United States

“A growing shortage of important chemotherapy drugs, anesthetics and antibiotics, which has compromised or delayed care for some US patients and have led to at least 15 deaths, represents a ‘pressing public health problem,’ a top federal health official said today.”
- ABC World News (Sept. 2011)

Shortages due to manufacturers suddenly discontinuing the production of these critical drugs without advanced notice.

Source: Food and Drug Administration. “Six Month Check Up: FDA’s Work on Shortages.”
The Drug Shortage Crisis and FDA Authority

- Food and Drug Administration (FDA) does not have enough authority under the Food, Drug, and Cosmetic Act (FDCA) to enforce prior notification

“Right now we just don’t have any authority at all to require companies to increase production or require other firms to come on the market,’ [FDA associate director] Jensen says. FDA also can’t require firms to continue making a drug, and drug makers aren’t required to report shortages or discontinuances…”

– Daily Finance (Jan. 2011)
Presidential Response to the Drug Shortage Crisis

- On October 31, 2011, Obama issued Executive Order (EO) 13588
  - More broadly interpreting FDCA reporting requirement
  - Allowing FDA enforcement authority

“…the FDA shall use all appropriate administrative tools to interpret and administer the reporting requirement in 21 U.S.C. 356c, to require drug manufacturers to provide adequate advance notice of manufacturing discontinuance that could lead to shortages of drugs that are life supporting or life sustaining, or that prevent debilitating disease.”

– Obama, EO 13588
The Travel Ban 2017

- Trump issues travel ban with unilateral orders
- Challenged in court
- Does the president have authority under the Immigration and Nationality Act (INA) of 1965 to order travel ban?
“By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions. It thus vests the President with ‘ample power’ to impose entry restrictions in addition to those enumerated in the INA.”

Implications of Executive Orders
**Myth #1**: Presidents (especially the most recent ones) have increasingly issued more EOs over time.
Number of Executive Orders, 1820 – 2017
Average Number of Executive Orders by President, 1905 - 2017

- Taft: 310
- Wilson: 250
- Harding: 235
- Coolidge: 199
- Hoover: 224
- F. Roosevelt: 246
- Truman: 337
- Eisenhower: 117
- Kennedy: 61
- L. Johnson: 74
- Nixon: 64
- Ford: 63
- Carter: 70
- Reagan: 80
- HW Bush: 48
- Clinton: 42
- W Bush: 46
- Obama: 36
- Trump: 35

Numbers correspond to the average number of executive orders signed during each president's term.
Average Number of EOs by Presidents in the First Year

- Reagan: 50
- H.W. Bush: 31
- Clinton: 57
- W. Bush: 54
- Obama: 39
- Trump: 55
Myth 2: Presidents issue more EOs under divided government than under unified government
An Unconstrained President?
“While much of the items on President Obama’s wish list appear dead or stalled in Congress, Obama could still cement his legacy on one of his key issues by use of executive orders and bypassing the legislative branch.”
- US Finance Post

“But should the GOP stand in the way, the president indicated he’s willing to use executive orders to accomplish his aims.”
- The Washington Times
“...the Obama administration’s pattern reflects how presidents usually behave, especially during divided government, and appears aggressive ...”

- The New York Times
Yet, the main finding in the political science research is that there are significantly fewer executive orders under divided government in post-WWII periods (e.g. Fine and Warber 2012; Howell 2003, 2005; Young 2013).
Average Number of EOs under Unified v. Divided Government, 1945 - 2017
Why Do Presidents Exercise Restraint?

• Ways Congress can punish the president:
  • Defunding programs
  • Block president’s legislative agenda
  • Confirmation process
  • Oversight
  • Limiting
Why Do Presidents Exercise Restraint?

- Executive actions based on discretion
  - i.e. leeway given to president and agencies by Congress to implement the law
- Courts can overturn or uphold executive actions based on discretion
  - Youngstown v. Sawyer (1952)
How Might the Midterm Elections Influence Trump’s Use of Unilateral Powers?
Average Number of EOs by Year in the President’s Administration, 1945 – 2017

*Midterm 1; **President Reelection; ***Midterm 2
Why Differences During the Term?

• Early in term:
  • Active agenda
  • Policy reversals

• Middle in term:
  • Loss of seats in Congress
  • Declining approval

• Late in term:
  • Lame duck
  • Legacy
Early in Presidential Term
Immigration Reform

- **Travel ban** (EO 13769, 1/27/2017)
  - Struck down by federal courts
- **Revised travel ban** (EO 13780, 3/6/2017)
  - Revokes previous order, revises content
  - Struck down by federal courts
- **Federal funding cuts to sanctuary cities** (EO 13768, 1/25/2017)
  - Blocked by federal court
- **Orders agencies to look into building the wall** (EO 13767, 1/25/2017)
  - Still needs congressional funding
Government and Regulatory Reform

- **2-for-1 regulation repeal**: $0 spending cap (EO 13771; 1/30/2017)
- **Ethics pledge** for gov’t employees (EO 13770; 1/28/2017)
- **Designates regulatory reform officers** to find rules needing repeal (EO 13777; 2/24/2017)
- **Review financial regulations** (EO 13772, 2/3/2017)
- **Review tax regulations** (EO 13789; 4/21/2017)
- **Review and revise offshore energy regulations** (EO 13796; 4/29/2017)
Other Policy Areas

- **Find ways to repeal ACA** (EO 13765; 1/20/2017)
- **Fast track infrastructure projects** (EO 13766; 1/24/2017)
- **Review policy related to law enforcement protection** (EO 13774; EO 2/9/2017)
- **Review trade policy and agreements** (EO 13786, 13787, 13796)
- Agency compliance to “Buy American, Hire American” policy (EO 13788; 4/18/2017)
- **Review recent national monument designations** (EO 13792; 4/26/2017)
- **Review education policy** (EO 13791; 4/26/2017)
Ways to Change Executive Orders

- **Revoke** – nullifies legal status of order; reverts policy back to status quo

- **Amend** – alters content of order, which remains part of the law; small to large shifts in status quo

- **Supersede** – suspends the legal status of an order; small or large shifts in the status quo
Average # of EOs Revoked, Amended, and Superseded by Presidents in their First Year

- Reagan
- H.W. Bush
- Clinton
- W. Bush
- Obama
- Trump

Graph showing the average number of executive orders revoked, amended, and superseded by each president in their first year.
Examples of Policy Revisions

• Repealed *flood readiness* requirements for infrastructure projects (EO 13807; 8/15/2017)

• Repealed *labor law requirements* for gov’t contracts (EO 13782; 3/27/2017)

• Revokes *climate change* executive actions (EO 13783; 3/28/2017)
Middle of Presidential Term
The president's party usually loses seats

Net loss or gain by party in control of the White House

<table>
<thead>
<tr>
<th>Year</th>
<th>President</th>
<th>House seats</th>
<th>Senate seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>1958</td>
<td>Eisenhower</td>
<td>-48</td>
<td>-13</td>
</tr>
<tr>
<td>1962</td>
<td>Kennedy</td>
<td>-4</td>
<td>+3</td>
</tr>
<tr>
<td>1966</td>
<td>Johnson</td>
<td>-47</td>
<td>-4</td>
</tr>
<tr>
<td>1970</td>
<td>Nixon</td>
<td>-12</td>
<td>-2</td>
</tr>
<tr>
<td>1974</td>
<td>Ford</td>
<td>-48</td>
<td>-5</td>
</tr>
<tr>
<td>1978</td>
<td>Carter</td>
<td>-15</td>
<td>-3</td>
</tr>
<tr>
<td>1982</td>
<td>Reagan</td>
<td>-26</td>
<td>-1</td>
</tr>
<tr>
<td>1986</td>
<td>Reagan</td>
<td>-5</td>
<td>-8*</td>
</tr>
<tr>
<td>1990</td>
<td>HW Bush</td>
<td>-8</td>
<td>-1</td>
</tr>
<tr>
<td>1994</td>
<td>Clinton</td>
<td>-52*</td>
<td>-8*</td>
</tr>
<tr>
<td>1998</td>
<td>Clinton</td>
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<td>0</td>
</tr>
<tr>
<td>2002</td>
<td>W Bush</td>
<td>+8</td>
<td>+2</td>
</tr>
<tr>
<td>2006</td>
<td>W Bush</td>
<td>-30*</td>
<td>-6*</td>
</tr>
<tr>
<td>2010</td>
<td>Obama</td>
<td>-63*</td>
<td>-6</td>
</tr>
<tr>
<td>2014</td>
<td>Obama</td>
<td>-13</td>
<td>-9*</td>
</tr>
</tbody>
</table>

* chamber switched party control

Source: The American Presidency Project
Battle for the Senate, 2018

Source: realclearpolitics.com

* Sen. Bernie Sanders (I-VT) and Sen. Angus King (I-ME) currently caucus with the Democrats. Current Senate: 49* Democrats | 51 Republicans
Presidential Approval

Source: The Wall Street Journal
End of Term
In the Midnight Hour

- Lame duck president
- Legacy concerns
- Pardons
- Finalized regulations
- Unilateral actions
Summary: Predictions after Midterms

- President will lose seats
- Shift to divided gov’t
- Decline in public approval
- Less push for new policy agenda
- Decrease in EOs
- Increase in other unilateral actions?
Presidential Memoranda

- Written pronouncements directed at executive branch or White House officials
- Unilateral directive, with similar functions as executive order
  - Gives specific instructions
  - Initiate policy processes
  - Establish WH offices and taskforces
- Often used in conjunction with EOs
## Memoranda v. Executive Orders

<table>
<thead>
<tr>
<th>Executive Orders</th>
<th>Memoranda</th>
</tr>
</thead>
<tbody>
<tr>
<td>Viewed as legally valid by the courts</td>
<td>Does not have the same legal status as EOs</td>
</tr>
<tr>
<td>Must be published in the Federal Register, mandated by the law</td>
<td>President decides whether to publish them in FR</td>
</tr>
<tr>
<td>Generally used for larger policy purposes</td>
<td>Generally used for more perfunctory purposes</td>
</tr>
<tr>
<td>More well known</td>
<td>Less well known</td>
</tr>
</tbody>
</table>
Number of Memoranda, 1945 – 2017
Memos and EOs, 1945 - 2017
Average Number of Memoranda, 1945 - 2017

- Divided Gov't: 36
- Unified Gov't: 32
Government and Regulatory Reform

• Explore ways to *streamline regulations* (1/24/2017)
• Federal *hiring freeze* (1/23/2017)
• Review *fiduciary rule* (2/3/2017)
Foreign Relations/Defense

- **Withdrawal from TPP** (1/23/2017)
- Reinstates **Mexico City policy** (1/23/2017)
- Conduct **readiness review** of US military (1/27/2017)
- Develop plan to **defeat ISIS** (1/28/2017)
- Travel and business **restrictions on Cuba** (6/16/2017)
Other Important Memoranda

• Review and approve construction of *Dakota and TransCanada Pipelines* (1/24/2017)
• Implementation of *travel ban* (3/6/2017)
• Review and *rollback* *Dodd-Frank* (4/21/2017)
Proclamation

A proclamation is a directive issued by the president that declares the law, states a condition, recognizes an event, or calls for obedience or response.

While executive orders are directed at government officials and agencies, proclamations are directed at those outside of government.

Proclamations are also seen as legally valid policy tools by the courts.
Citizenship EO: Why now?

- Congressional support?
- Mobilize conservative base?
- Unintended consequences:
  - Mobilize liberal base
  - GOP opposition
  - Attention to constitutional problems