

**The Imperial President?**  
**President Obama's use of Executive Power Compared to Other Modern**  
**Presidents**

by  
Sam Wiles

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Approved: \_\_\_\_\_  
Dr. Jason Mycoff, Ph.D.  
Professor in charge of thesis on behalf of the Advisory Committee

Approved: \_\_\_\_\_  
Dr. Wayne Batchis, Ph.D.  
Committee member from the Department of Political Science &  
International Relations

Approved: \_\_\_\_\_  
Dr. Theodore Davis, Ph.D.  
Committee member from the Board of Senior Thesis Readers

Approved: \_\_\_\_\_  
Michelle Provost-Craig, Ph.D.  
Chair of the University Committee on Student and Faculty Honors

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At the end of the Christmas classic, *It's a Wonderful Life*, Clarence Odbody leaves a note for George Bailey, which says, "No man is a failure who has friends." I believe Clarence's quote is true for most facets of life, but it is especially true for my journey during this project because of all the people I had at my side all year helping me along.

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To Mom and Dad, thank you both for always loving and supporting me in every possible way. And to Hannah, you are the best role model, sibling, and friend a guy could have. All of you encourage me to be the best son, brother, and person I can possibly be and I'm so lucky to have all three of you in my life.

## TABLE OF CONTENTS

ABSTRACT .....	v
1 Introduction .....	1
2 Development of Executive Power from Washington to Roosevelt.....	7
3 Executive Orders and Actions .....	14
4 Executive Privilege.....	42
5 Military Action .....	57
6 Conclusion .....	74
REFERENCES .....	80

## **ABSTRACT**

President Obama's use of unilateral executive power during his presidency has evoked fears that he is becoming an overreaching or imperial president. But presidents for decades have been avid users of executive power, so this thesis discusses whether President Obama's use of executive power is greater than that of any other modern president across certain categories. For the purposes of my research I broke executive power into three sections; executive orders, executive privilege, and military action. I chose these categories because of their current newsworthiness, their prominence in presidential history, and because they represent actions initiated directly by the president. I hypothesized that President Obama does not use these powers to an extent much greater than previous presidents, but also no less. I found that overall President Obama is not much different from previous presidents in his use of executive power. However, while his actions are similar to previous presidents, he has carved out areas for future presidents to further expand executive power.

## **Chapter 1**

### **Introduction**

It's not too uncommon that Presidents of the United States try to expand the powers of their office by encroaching on the duties of the other branches of government. This expansion of power generates fear among the public and Congress that the President is attempting to destroy the system of checks and balances in our Constitution and return to an era of despotism and authoritarianism.

The term "imperial president" is nothing new in American politics; it has existed in the political lexicon for decades and rose to prominence during President Nixon's term in office during the 1970s. The term has been used to describe all presidents thereafter. Recently, pundits and lawmakers alike have applied this moniker on President Barack Obama by accusing him of breaking the law or exceeding his constitutional powers. Lawmakers have taken to their legislative prerogatives to curtail, or at least try to curtail, the perceived abuses of executive power by the President. For example, in 2014 the House of Representatives dedicated a legislative week towards curbing administrative overreach, though this might have been mostly political theatre. The week consisted of introducing several bills aimed at curbing the President's overreach in the wake of his "pen and phone" plan to circumvent Congress (Parker 2014). Though many, if not all of these bills will go nowhere, it's not to say that legislation has failed in the past. Lawmakers have previously passed bills limiting the executive's power; some have worked while others failed, but President Obama is

not the first, nor will he be the last President to push the boundaries of executive power.

My motivation for writing this thesis arose from the President's 2014 State of the Union address and his declaration that "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," and that he "intends to lead by example"(Obama 2014). The actions he took during the year set off more Republicans calling him an "imperial" president and overreaching. It made me curious if President Obama really is those things, or if it's just inflammatory rhetoric.

The amount of nonsense or falsities lawmakers, pundits, and civilians expound create a culture of misinformation that could be damaging to our public discourse. With regard to false accusations, Alexander Hamilton once mused, "[N]o character, however upright, is a match for constantly reiterated attacks, however false" and that "a person often accused cannot be entirely innocent"(Chernow 2004, 457). Currently, people call the President a Monarch or a King, they call him overreaching and imperial, but do these terms really apply to President Obama? Or is he just the victim of these "reiterated attacks?"

This thesis is an in-depth analysis of President Obama's use of executive power throughout his tenure in office relative to that of other modern presidents. The goal of this thesis is to answer the question of whether the President uses his executive power to a greater degree than that of other modern presidents and to clarify how President Obama has used his power and to possibly dispel these reiterated attacks.

For the purposes of this thesis I will stray away from legislative successes by presidents because of the heavy reliance on inter-branch cooperation. That's not to say that inter-branch cooperation, or rather lack thereof, is irrelevant in the discussion, but for the most part I'll be working under the assumption that Congress and the president are already at odds with each other. While congressional acquiescence is important in discussing executive power, I feel that when both branches cooperate to achieve common goals it's less relevant to the discussion. Instead, I will focus primarily on actions initiated directly by the president that had limited or no congressional support. Of the many areas available for unilateral executive action I will focus on three in specific. These include executive orders, executive privilege, and military action. I chose these three because of their recent newsworthiness and prominence throughout presidential history. Additionally, I believe these areas give an adequate sense of a president's use of executive power.

Previous research in similar fields to the one I will explore has been done in a variety of ways. Some scholars have compared presidential actions in the context in which they occurred and their interpretations years later (Rozell and Sollenberger 2009). Other researchers have attempted to objectively compare figures, such as number of treaties ratified, in addition to comparing the numbers in context (Saldin 2004; Howell 2005). From what I have gathered so far, in order to provide the whole story I will need to do more than simply compare statistics of presidential action. I will need to research various statistics on executive power, understand those actions in the context in which they originated, and relate them to President Obama's use of the same or similar actions.



There is a great deal of research devoted to the reach of executive power, which covers many decades and administrations. However, I feel that my research will add to that list in a substantive way by addressing the current range of presidential power in comparison to where it has been in the past in a larger context. Additionally, it will clarify President Obama's use of executive power to see where he fits relative to that of other presidents.

This topic will also be valuable to the general public by providing a greater lens to view the Obama presidency. Instead of comparing President Obama's executive power in a narrow time frame, with limited context, I will provide a longer time period in order to gain a greater historical sense of his actions. A greater historical understanding of the President's use of executive power achieves the goal of informing the public to allow for better decision-making and judgments about our leaders. This extended timeframe of comparative analysis will provide a better sense of how weak or strong an executive President Obama is and whether he expanded the powers of the presidency.

The methodology for this thesis is not so much quantitative as it is qualitative. The research is based on sources such as law reviews and academic journals. Also included are reputable news sources like the *New York Times*, the *Washington Post*, etc. In addition, I gathered information from think-tanks, like the Brookings Institution and the Heritage Foundation. Official sources, such as Congressional Research Service (CRS) and administration documents are also included to get a full range of views regarding executive actions.

For the purpose of my research I will classify "modern presidents" as every president starting with Franklin Roosevelt and going forward to President Barack

Obama. I chose President Roosevelt to start with primarily because scholars agree that he was the first modern president. For example, Scott James notes that the “modern presidency is often depicted as emerging virtually full-blown from the actions of Franklin Delano Roosevelt” (James 2005, 4). This is because he transformed the presidency into a far more prominent position by extending the reach of the executive office and the federal government more so than any of his predecessors did. The role of the federal government increased dramatically during the Great Depression and World War Two, leading to a more powerful executive branch.

The first chapter is a brief primer on the development of the presidency from George Washington up to Franklin Roosevelt. The section also covers constitutional bases of power for the executive branch including observations from *The Federalist Papers*. Thereafter this thesis is broken up into three main sections including executive orders, executive privilege, and military action. I chose the topics for these sections primarily because they are the most direct actions a president can take and the actions that draw significant public reaction, especially recently. These actions are also subject to much debate on the role each branch plays the implementation of executive actions and the constitutionality of their use. For example, executive orders are in the news today because of the president’s “Pen and Phone” initiative where he plans to act wherever possible without Congress (Parker 2014). Executive privilege is a current topic because of the President’s use of it during the Fast and Furious controversy, which will be discussed further in chapter three. And lastly, Military action, especially unilateral action, is relevant with respect to the wars in Iraq and Afghanistan, along with bombings in Syria and Libya. Each of the three main sections will be broken up

into smaller sections that will cover specific issues more in depth and, for the most part, in chronological order.

Overall, after examining the various factors I'm using to evaluate President Obama's use of executive power, I hypothesize that his use of executive power is not significantly different from that of his predecessors. I believe that he will have carved out some precedent for future actions for presidents to expand executive power, but his actions themselves are not noticeably different from his predecessors.

## **Chapter 2**

### **Development of Executive Power from Washington to Roosevelt**

Before I start into the three main sections and case studies regarding the modern presidency and the analyses of President Obama's use of executive power, I feel it is important to introduce a broader historical understanding of the development of the presidency from the founding of the United States. This historical context will provide an introduction to show how the presidency has grown from an office of originally limited powers and a government dominated by the legislature to one of the most powerful offices in the world. The journey to the modern presidency started innocuously enough after the Revolution because of the public's great demand for limited government by the people.

The first form of government the former Colonies created was under the Articles of Confederation. The Articles created a government that was more centered on state power and created a limited national government. The national government faced many weaknesses that made governing between the newly created states difficult. The government was not able to regulate trade between states or with foreign countries. It couldn't tax and representation was unequal, with each state having one vote, making larger states under represented. But one of the more significant problems the framers saw was the lack of a strong executive. Under the Articles there was no Executive branch, and this led to problems enforcing laws the Congress passed. A change needed to be made (Articles of Confederation).

The failures of the Articles of Confederation eventually lead to the creation of the Constitution we have today. The Constitution was not readily accepted and it faced tremendous opposition, especially when it came to Article II, the Executive Branch. In order to argue for the ratification of the Constitution and the new Executive, James Madison, Alexander Hamilton, and John Jay wrote a series of essays titled *The Federalist Papers*. People feared the new Executive would be similar to the King of England in that he would wield a tremendous amount of power. Hamilton, writing as Publius, took the time to allay these fears in *Federalist No. 69* where he said,

“This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.”

Among other dissimilarities, Hamilton points out that the executive is eligible for reelection and liable for impeachment, while the King is not. He mentions that the King has an “absolute negative” when it comes to vetoing legislation, while the executive can be overturned. Lastly, in respect to the treaty power, Hamilton notes that the King is “the sole and absolute representative of the nation” while the President must seek “advice and consent” from the Senate in order to make treaties with foreign governments. These differences in powers between the executive and the King are spelled out in *Federalist No. 69* and subsequent essays, but the point remains that compared to the King of England, the President is a much weaker institution and will never reach a level of despotism.

While Hamilton describes the inherent weaknesses in the two positions he also notes the need for a strong executive for certain situations. In *Federalist No. 70*

Hamilton describes the necessity for a strong and “energetic” executive. Here he notes,

“Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”

He contrasts the “energetic” executive with a weak one in that “A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.” These two examples taken together show that, while the framers did want a government of limited powers, especially in the executive, they understood its importance.

The powers constitutionally provided to the president are vaguely defined, which has allowed presidents throughout the history of the United States to expand their powers through defining vague phrases in Article II and encroaching upon legislative prerogatives. Phrases under Article II such as “Commander in Chief” “Shall take care of the Laws” and even the oath of office, have been interpreted to expand presidential power, often at the expense of Congress’ (U.S. Constitution Article II).

When it comes to guarding against the growth of Executive power the framers believed they had the answer with the Separation of Powers. This concept is clearly described in James Madison’s essay, *Federalist No. 51* in which he says, “ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such

devices should be necessary to control the abuses of government” (Federalist No. 51). But the history of our country shows that at different points Congress and the Executive branch have held more power, but it’s precisely the shift in power towards the executive branch which has people worried. It becomes worrisome when too much power is combined into one office.

The transformation of the presidency from one of limited powers to one that some observers call “imperial” did not happen over one term or from one party. The powers of the presidency developed over the course of 200 years with some presidents affecting the growth of the office’s power more than others. Some presidents only marginally expanded the powers of the office while others made great strides.

Main advancements in power up until Franklin Roosevelt were accomplished by a handful of Presidents starting with George Washington. President Washington’s term in office was important for many reasons, among those being he was a symbolic leader that the new country was able to unite behind. He was a symbolic face that the new nation needed in order to begin proper governance. But his lasting impact came in the form of the precedents he set in establishing norms for the office. One of the norms he established was a maximum of two terms in office; this norm remained in effect until 1940 when Franklin Roosevelt won his third term, and his fourth in 1944. These seemingly perpetual electoral victories lead to the 25<sup>th</sup> Amendment which term limited the presidency in regard to time in office. Washington believed “that the precedents he set must make the presidency powerful enough to function effectively in the national government, but at the same time these practices could not show any tendency toward monarchy or dictatorship” (Stockwell).

President Andrew Jackson transformed the office by taking a very active role in his use of executive power. He was the first president to explicitly use the veto power to stop a piece of legislation simply because he did not like it. His veto of the Second National Bank was not justified solely on account of Constitutional issues, as previous vetoes had been justified. The veto garnered “an immediate and vehement congressional outcry” (James 2005, 11). This was an important moment in presidential and congressional relations because Jackson diminished the stature that Congress had built up until this point and asserted the Executive was an equal branch of government (12). Jackson was also the first, and so far only, president to be censured by the Senate. This was done in response to Jackson withdrawing funds from the Bank of the United States and his refusal to show documents to Congress (Senate Censures President). While nothing more, such as an impeachment, came of the censure, it showed that Congress was displeased with the president’s actions and sought to reassert its prerogatives.

Although President Jackson asserted the Executive branch’s powers to a new level, it was President Lincoln who took major actions in asserting executive power, actions that are still used as legal precedent today. Abraham Lincoln is widely regarded as the genesis behind the idea of an “imperial President.” Scott James notes “Scholars on all sides of the debate acknowledge the unprecedented expansion of presidential power during the Civil War” (James 2005, 12). Lincoln garnered this description through his efforts to secure the unity of the country during and after the Civil War through actions that faced much legal uncertainty. His actions included suspending the writ of habeas corpus, blockading ports of the Confederacy, and raising the largest army in our country’s history up until that point. The “central



contribution” Lincoln made to the modern presidency came in his use of emergency powers. These powers came in the form of “actions to blockade Southern ports; calling up the militia, expanding the size of the army and navy, and paying mobilized troops out of the Treasury without congressional appropriation; and suspending the writ of habeas corpus” (15).

The presidents following Lincoln did not leave the same legacy he left, but President Theodore Roosevelt changed that during his term at the turn of the century. In one respect President Roosevelt can be seen as an imperial president in the literal sense. This is because he expanded the United State’s sphere of influence beyond the current borders in the age of imperialism by colonizing new territories such as the Philippines and parts of the Caribbean. Most notably Roosevelt wrote the “Roosevelt Corollary” to the Monroe Doctrine in which he declared the United States would be able to intervene in the affairs of Western Hemisphere nations, especially if it meant removing European influence. His “speak softly and carry a big stick” policy “strengthened [the United States’] position in Asia and the Pacific” as well as Central America and the Caribbean (General Article: Foreign Affairs). Roosevelt’s presidency showed for the first time that the President of the United States would use military force on a large and global scale to advance American interests. And lastly, in a failed attempt to regain the presidency, Roosevelt ran for an unprecedented third term in office as a third party candidate. Though his candidacy failed, his cousin’s, Franklin Roosevelt, would succeed in breaking the precedent set by Washington more than a century before (General Article: Foreign Affairs).

One of the last presidents to significantly alter the executive’s powers before President Franklin Roosevelt was Woodrow Wilson in the mid-1910s. One of the

main changes Wilson brought to the office was delivering his message, what we now call the State of the Union Address, directly to Congress in person. This practice had not been in place since before President Jefferson. Jefferson declined the practice because he saw it as “too similar to the British monarch’s practice of addressing each new Parliament with a list of policy mandates, rather than ‘recommendations’” (James 2015, 20). This showed that President Wilson was trying to assert the power of the executive branch over that of the legislature. Scott James notes that “Wilson’s presidency was in many ways a prototype of the modern presidency” because of the introduction of “administration bills” and the dispensing of patronage (20).

While every president, maybe with the exception of William Henry Harrison who served for only a month, affected the presidency in some significant fashion, these presidents, I believe, did so more than the others. These presidents created the foundation for the rapid development of the executive branch from 1933 to the present. The historical development of the office from limited powers to arguably the most powerful office in the world in an ongoing and fluctuating evolution. It is conceivable that the presidency can lose a great deal of power over the next few decades; however, if the next 30 years are anything like the previous it seems unlikely.

## **Chapter 3**

### **Executive Orders and Actions**

In 2014 executive orders took on a greater degree of prominence as President Obama decided take use them to advance his agenda due to congressional inaction. This has lead to a spike in the Republican refrain of calling President Obama “imperial” and “overreaching.” Although the president brought the issue to the forefront in his state of the union address, it does not make their use any more significant. Executive orders have been used by nearly every president before President Obama and many have used them at a much more prolific rate than he did. But before I delve into the rest of the section it’s important to discuss the limits upon the powers of executive orders.

Examining the use of executive orders is an important aspect in determining a president’s use of his executive power. Presidents will sometimes use executive orders to create policy by themselves when Congress is unwilling to act; such is the case with President Obama in 2014. The reach of executive orders is a very limited one for a multitude of reasons. First, the president is empowered to “Take care of all the laws” he is not empowered to create or dictate laws; that is the job of Congress (Article II, Section 2). Second, executive orders are not as powerful as they appear. They have to have a basis in some kind of statutory, treaty, or constitutional authority (Howell 2005 417). Howell then notes that “Should the president proceed without statutory or constitutional authority, the courts stand to overturn his actions, just as Congress can amend them, cut funding for their operations, or eliminate them outright.” One of the

primary ways Congress can cut funding to these orders is by “denying salaries and expenses for an office established in an executive order” (Chu and Garvey 2014, 10).

Executive orders are one of the primary methods presidents turn to in order to execute a unilateral agenda. They are a common instrument at the president’s disposal and can be used for mundane actions such as ordering a report from a department to being means for crafting unilateral policy. Presidents have used executive orders since the founding of our country; for example, President Washington issued an executive order in which he declared a “day of public thanksgiving” (Halchin 2008, 1). Legally speaking, executive orders have the force of law until they are repealed or voided by the courts or Congress. Though originally an informal power, executive orders became more standardized in the early 1900s when Congress passed the Federal Register Act in 1935. This Act “mandated the publication of executive orders in the *Federal Register*,” which in turn mandated numbers be assigned to future executive orders (2). Additionally, executive orders are still subject to congressional oversight and study.

In 1957 the House of Representatives released a report regarding executive orders, which noted, “Executive orders and proclamations are directives or actions by the President” (Chu and Garvey 2014, 1). The report also notes that executive orders are directed towards Government officials and agencies with only an “indirect” effect on private individuals, making their reach much less than that of a law enacted by Congress. The report further stressed the limited nature of executive orders in that they “are not legally binding and are at best hortatory unless based on such grants of authority” (1).

In addition to judicial and legislative checks against overreaching executive orders, there is also an executive check. The executive has a check on executive orders

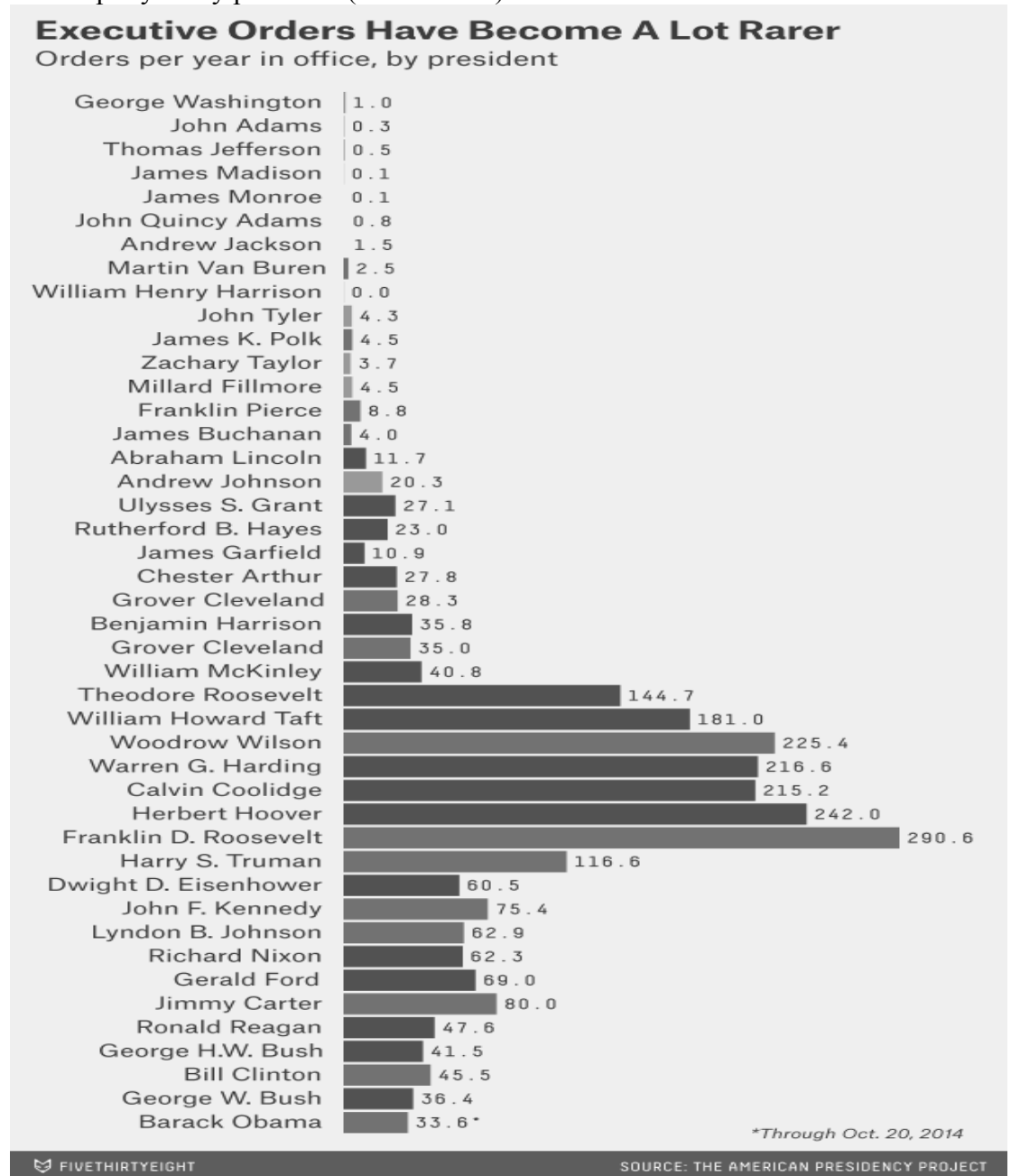
because, ironically enough, they can be removed with another executive order. In fact, it is a fairly common practice for incoming presidents to alter or revoke executive orders issued by their predecessor, especially if the predecessor was a member of the opposite party. For example, the first executive order President Obama issued revoked Executive Order 13233 which President Bush issued early in his Presidency (Executive Order 13489). Though this does not exactly mean that the new president will issue “a higher number of executive orders,” however, the end of an outgoing president’s term “is notable for an increase in the quantity of executive orders issued” (Halchin 2008, 4).

Moreover, presidential candidate (at the time of writing), Senator Rand Paul of Kentucky was quoted as saying “I think the first executive order that I would issue would be to repeal all previous executive orders” (Sullivan 2014). Though his office later clarified this statement to be a comment on President Obama’s use of executive orders the fact remains that executive orders, in theory, are easily revoked or voided. While executive orders can create the image of an imperial or overreaching president, they rarely, if ever, have that effect. When it comes to determining whether a president is exceeding his constitutional powers or encroaching on those of Congress it is important to remember these key limitations.

The number of orders issued during a presidency is an indicator of a president’s willingness to act alone. Presidents issue executive orders in varying degrees of quantities. Some Presidents have issued thousands of executive orders, as was the case with Franklin Roosevelt (he issued 290.6 per year he was in office) or none at all during William Henry Harrison’s short tenure in office (Mehta 2014). It’s also the case that over the last century Democrats have used executive orders more

often than Republicans, but that may be due in part to President Roosevelt’s term in office. However, the number of orders has also been on a decline from Roosevelt to today (Mehta 2014).

Figure 1 Orders per year by president (Mehta 2014).



But the number of orders issued is not an indicator of a president usurping Congress' power to write laws, rather, it shows the president is very active in organizing how his administration is run. The number of executive orders also varies depending on the makeup of Congress.

When it comes to assessing the degree to which a president would forgo Congress it's also important to examine whether a president would work more with a united or divided Congress. One would think that presidents use executive orders more often in cases of divided government since they are facing an opposition legislative branch hostile to their policy agenda, however, this may not be the case. Deering and Maltzman found that "Presidents appear to use executive orders against a Congress that is likely to throw legislative roadblocks in front of their policy proposals. They also find that the more likely it is that an executive order will be blocked or overturned by Congress the President will issue fewer orders (Deering and Maltzman 1999, 777). This shows that in addition to not assisting the president legislatively, an opposition Congress can implicitly stonewall a president's unilateral agenda.

So this raises the question, is President Obama's use of executive orders any greater or further reaching than those of his predecessors and is it enough to earn him the dubious distinction of an "imperial President?" I hypothesize that his use of executive orders is not entirely different than that of his predecessors in quantity or substance included in them. In this section I will examine his use of executive orders through case studies on policy categories various presidents have addressed with executive orders since President Franklin Roosevelt. Presidents address a variety of policy categories through the use of executive orders, however, for this section I focus on Civil Rights, labor, and immigration for a few reasons. First, President Obama has

used an executive order or action to affect each of these categories. Second, the topics are currently newsworthy and are still hotly debated. And third, these topics have been affected by presidential action over the course of the last 80 years, dating back to President Roosevelt.

Presidents have played a crucial role in progressing Civil Rights for African-Americans and minority communities in general. Some took marginal, non-existent, or even backwards steps in this goal while others have taken leaps and bounds towards creating a more equitable society through the use of the powers granted to them as president, specifically through executive orders. Many critical aspects of the Civil Rights movement were helped along through the use of executive orders. But they have not been met without controversial use as opponents have painting presidents as infringing on congressional powers or acting against the will of the American people.

President Harry Truman made greater strides in advancing Civil Rights for African Americans than many of his predecessors did. Acting unilaterally, he built upon President Roosevelt's Executive Order 8802, which established fair employment practices for Federal defense contractors, with executive orders of his own, thus circumventing a Congress full of Southern Democrats hostile to the civil rights movement.

The first executive action President Truman took was in 1946 when he issued Executive Order 9808, which established a committee on Civil Rights (Executive Order 9808). The committee was "authorized on behalf of the President to inquire into and to determine whether and in what respect current law-enforcement measures and the authority and means possessed by Federal, State, and local governments may be strengthened and improved to safeguard the civil rights of the people" (Executive



Order 9808). The committee eventually generated a report titled “To Secure these Rights: The Report of the President’s Committee on Civil Rights” (To Secure These Rights...). The report contained numerous recommendations that could be accomplished through Congress or the executive in order to improve Civil Rights. One of the recommendations the committee made was to create a joint Standing Committee on Civil Rights in Congress, the enactment of an anti-lynching act, and the elimination of segregation in general. While some of these were successful the president also took action of his own accord. Acting unilaterally, President Truman signed Executive Orders 9980 and 9981 in accordance with some of the Committee’s recommendations.

President Truman issued Executive Order 9980 in 1948, which created regulations governing fair employment practices for the Federal government (Executive Order 9980). The order declared, “personnel actions taken by Federal appointing officers shall be based solely on merit and fitness; and such officers are authorized and directed to take appropriate steps to insure that in all such actions there shall be no discrimination because of race, color, religion, or national origin” (Executive Order 9980). Additionally, the order mandated that departments “receive complaints or appeals concerning personnel actions taken in the department on grounds of alleged discriminating because of race, color, religion, or national origin.”

Finally there is Executive Order 9981, which ordered the desegregation of the armed forces (Executive Order 9981). This Executive Order is a critical moment in the Civil Rights movement in that it is the first time the armed forces of the United States were racially integrated. The order declares, “there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin” and that the policy “be put into effect as rapidly as possible”

(Executive Order 9981). Unsurprisingly, Southern Democrats did not willingly accept the President's attempts to desegregate the armed forces. One example is Senator Richard Russell of Georgia. In May 1948, before Truman signed the executive order, Senator Russell failed in his attempt to attach an amendment to a Selective Service bill that would have allowed draftees and new soldiers to choose whether or not they would want to serve in a segregated unit (Yon and Lansford 112).

Presidential executive orders, like I mentioned before, are subject to revocation or amending by subsequent orders. Additionally, they are subject to Congressional removal, however, even though attempts were made, that did not occur with Truman's order. So in the effort to achieve Civil Rights victories for African Americans, presidential executive orders continued to play an important role. For Truman and Roosevelt, it can hardly be seen as expanding the office's power when they weren't even able to push the needle on an issue like Civil Rights without experiencing significant pushback and rancor from their opponents. The lasting impact of their limited orders is that they created precedent for future presidents to act using executive orders in advancing Civil Rights without congressional support. The next major action came in 1957 when President Eisenhower used an executive order to desegregate a southern school.

President Eisenhower's Executive Order 10730 came three years after the Supreme Court's historic ruling in *Brown v. Board of Education* where the court held that segregation in public schools is a violation of the Equal Protection Clause of the 14<sup>th</sup> Amendment. The Court's holding was not warmly received in many parts of the United States, particularly in the South. For example, in Arkansas governor Orval Faubus ordered the Arkansas National Guard to block African-American children

from attending Little Rock Public Schools (Desegregation of Central High). President Dwight Eisenhower responded to the Governor's action in a forceful, and slightly ironic fashion.

President Eisenhower's response came in the form of Executive Order 10730 in September of 1957. The order federalized the National Guard of Arkansas for "an indefinite period and until relieved by appropriate orders" (Executive Order 10730). This order effectively turned the Arkansas National Guard against Governor Faubus in order to effectuate a court order. The executive order's main objective was to direct the Secretary of Defense to "take all appropriate steps to enforce any orders of the United States District Court for the Eastern District of Arkansas for the removal of obstruction of justice in the State of Arkansas with respect to matters relating to enrollment and attendance at public schools in the Little Rock School District, Little Rock, Arkansas" (Executive Order 10730). Additionally, the executive order placed a thousand paratroopers from the 101<sup>st</sup> Airborne Division in Little Rock in order to prevent people from rioting or hurting the students (Desegregation of Central High).

President Eisenhower's order and subsequent use of the military to enforce the desegregation, though successful, faced significant public backlash. The order itself was controversial because it was the first time since Reconstruction that federal troops had gone down to the South to enforce the law. This action by President Eisenhower was viewed as an example of federal overreach and infringed on states' rights (Pach). Full desegregation of public schools would still not come until after the passage of the Civil Rights Act of 1964 and even after passage, problems still persisted. All the executive orders up until the 1960s affecting Civil Rights, though important in their own regard, can be best seen as the foundation for the most wide-reaching executive

action, and one of the most controversial, in the creation of Affirmative Action programs by President Johnson.

The term Affirmative Action has been in the American political vocabulary since 1961 when President John F. Kennedy used Executive Order 10925 to ensure that government contractors “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin” (Executive Order 10925). The program, expanded under President Lyndon Johnson with Executive Order 11246, built upon the Civil Rights Act of 1964. Affirmative Action is a subject that has been and remains subject to strong debate in the United States with everyone from presidents to college administrators to employers using it to justify increasing opportunities for African Americans and minorities.

President Lyndon Johnson took unilateral action to better effectuate parts of the Civil Rights Act of 1964 through executive order. In September of that year President Johnson issued Executive Order 11246, which is famous for mandating Affirmative Action practices in hiring by the Federal government and its contractors. The order expands on the passage of the Civil Rights Act in a significant way. Under the original Civil Rights Act “organizations must produce documents *only if* there is a preliminary finding of wrong doing. According to the executive order, organizations must produce documentation of their employment practice whenever the government asks to see the documents, even if there is no presumption of wrongdoing” (Crosby and VanDeVeer 2000, 220). The limitation behind the order is that it only affects the Federal government or its contractors, and not the private labor market. Additionally,

at the time, the only penalty for noncompliance was the loss of business from not being able to contract with the Federal government.

President Johnson amended Executive Order 11246 in 1967 with Executive Order 11375. The new order expanded upon Executive Order 11246 by including a ban on discrimination based on sex in hiring and employment practices (Executive Order 11375). It has been noted that Executive Order 11246 “remains among the most effective and far-reaching federal programs for expanding opportunity” (Affirmative Action). So while on the whole executive orders are limited, there are examples of orders having legacies that last for decades beyond their original enactment.

Almost 20 years after the creation of Affirmative Action in Federal hiring practices there came a presidential effort to revoke or replace it with a new executive order. President Reagan’s administration was “committed to a society in which all men and women have equal opportunities to succeed, and so we oppose the use of quotas” and urged for a “colorblind society” (Reagan Quotes King Speech...). On these grounds President Reagan sought to amend or revoke Executive Order 11246 through one of his own, however, he faced significant resistance in his efforts. His administration wanted to replace the order with one that made “clear that the federal government does not require, authorize, or permit the use of goals, or any other form of race- or gender-conscious preferential treatment by federal contractors” (Mayer 2001, 207). This attempt fell flat on a few grounds as noted by then-Attorney General Edwin Meese. Meese noted that the order would first “provoke Congress to pass law requiring the executive order.” Second, the order would weaken political support in Congress. Third, it would hurt the public’s perception of the President. And lastly, it

would hurt the Republican Party (207). The effort to amend President Johnson's executive orders was ultimately dropped due to all the forces acting against it.

President Reagan's attempt to change policy through executive order shows further limitations on the practice, and executive power for that matter. Not only are there legal and judicial factors working against the enactment or issuance of certain orders, there are also significant political factors creating obstacles. The fact that President Reagan's own party showed an aversion to his proposed order was an additional check on his power. If there is no public motivation or will in Congress to accept the president's order, it can be stopped. President Obama's actions over 25 years later show him acting with the political and cultural winds at his back, opposite of the situation faced by Reagan.

President Obama is the first President, while in office, to publically support the LGBT community when he did so in 2012 prior to his reelection (**Lee**). In addition to his vocal support for the community, he has used the power of his administration to do so as well. He has done this in a variety of ways such as not defending the Defense of Marriage Act in *United States v. Windsor* (2012) and the White House's "It gets better" campaign to help "give hope and support to young people who are being bullied or harassed because of their actual or perceived sexual orientation or gender identity" (*United States v. Windsor and Strengthening Protection...*). In 2014 he took another step towards supporting this community when he signed Executive Order 13672.

The President's order prohibits "discrimination based on sexual orientation and gender identity" in the Federal Government, thereby building upon presidential actions on Affirmative Action in that it amends Executive Orders 11246 and 11478 in that it

changes the terminology “sex or national origin” to “sex, sexual orientation, gender identity, or national origin” (Executive Order 13672). The order also instructed the Secretary of Labor to create regulations for implementing the order for the Federal government and its contractors. The regulations were implemented towards the end of 2014.

The executive order came in response to the Employment Non-Discrimination Act’s (ENDA) failure in Congress. Though the ENDA passed through the Democratic Senate, it was never brought up in the House. Some Republicans billed the ENDA as “redundant” and “frivolous” which ultimately resulted in its failure (Sink 2014). With both houses of Congress split on the issue the president decided to take action. The action, while not applauded by President Obama’s opponents, was not met with much resistance. This lack of resistance could be due to the amount of precedent behind the executive order. Additionally, the lack of explicit denial or approval of the ENDA allowed President Obama to take action by himself, continuing a legacy of presidential action in advancing Civil Rights.

A contrast to President Obama’s executive order comes at the state level, where governors are using their powers as state executive to roll back protections for LGBT. Recently, Kansas Governor Sam Brownback used an executive order of his own to repeal protections for gays and lesbians employed by the state (Lacey-Bordeaux and Stapleton 2014). The Supreme Court has even struck down State Constitutional Amendments that prevented the state legislature from offering official protections for people who suffer discrimination due to their sexual orientation (Romer v. Evans).

Civil Rights have been and continue to be a policy area that is subject to presidential executive orders and actions. Leadership by the executive helps to advance the Civil Rights agenda. Though these actions only affect a small amount of people, the message they send goes much further and lasts much longer. So while these actions can be repealed, as attempted by President Reagan, or enhanced, as evidenced by Presidents Johnson and Obama, their impact symbolically goes much further in promoting a Civil Rights agenda. These executive orders affecting Civil Rights, while controversial at times, have not been contested on constitutional grounds or called illegal. Rather, opponents simply dislike the action being taken and attempted to curtail the executive's actions. The long line of executive orders by presidents shows that President Obama is not overreaching since he acted very similarly to those who came before him.

Multiple presidents have used executive orders in the modern era to affect labor in the private and public sectors. Some presidents have used executive orders to change or advance change in labor policy. For example, presidents have used executive orders in order to promote wage increases, take over certain industries, and advance civil rights in the workplace. Some executive orders affecting labor have been very significant exercises of executive power such as the case with Harry Truman's executive order in the early 1950s. His executive order would result in a change in Constitutional law and a tough judicial ruling against the executive's power.

One of the most controversial uses of an executive order came with President Harry Truman's Executive Order 10340. The executive order came in response to a failed attempt to resolve a labor dispute among the steel mills and the workers during the Korean War. President Truman needed the mills to remain open in order to support



the war effort in Korea. In order to get the mills open again President Truman took executive action.

It's been noted that the executive order "was drafted almost entirely as a military imperative" to support soldiers currently fighting in Korea (Devins and Fisher 2014, 65). In fact, executive order 10430 explicitly reads, "American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea..." (Executive order 10340). President Truman attempted to justify his seizure of the plants as being pursuant to a national emergency he declared two years prior to Executive Order 10340. In the first paragraph of Executive Order 10340 President Truman declares the emergency "requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made throughout the United Nations and otherwise to bring about a lasting peace" (Executive Order 10340).

Executive Order 10340 explicitly ordered the Secretary of Commerce to "take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation." The executive order was unprecedented and was later rebuked by the Supreme Court.

The case *Youngstown Sheet & Tube Co. v. Sawyer (1952)*, where the Supreme Court ruled 6-3 against President Truman, remains one of the most important cases in United States Constitutional law. In *Youngstown* the Supreme Court ruled against

President Truman's Executive Order on multiple grounds. First, the court found that the "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself" (*Youngstown v. Sawyer*). Here, there was no statute explicitly granting that power. Next, the Court noted that there was no act of Congress from which the power implicitly exists, in that Congress never granted the president the power to seize civilian industries. Additionally, the Court found that the President acted in opposition to the will of Congress when he seized the steel mills. In reference to the Taft-Hartley Act the Court found when the act was "under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency." President Truman's explicit opposition to Congress in this situation doomed his order from the start, not even powers granted to him as Commander in Chief were able to uphold the seizure of private property for a war effort.

But not lost in the ruling is Justice Jackson's famous concurrence where he brought forward guidelines for the limits of presidential power with a three-part spectrum. First, Justice Jackson writes, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at a maximum." Justice Jackson found that when "the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress have concurrent authority, or in which its distribution is uncertain." This "zone of twilight" is a murky area, which could invite presidential action in the presence of "congressional inertia, indifference, or quiescence..." Lastly, the President's power is at its weakest when the president acts

in a manner “incompatible with the expressed or implied will of Congress...”  
(*Youngstown v. Sawyer*).

President Truman fell into, what Justice Jackson calls, the “lowest ebb” since President Truman acted against the explicit demands of Congress. Justice Robert Jackson’s concurrence has had a long ranging impact on Constitutional law with one of its most notable uses coming in *Dames & Moore v. Regan* where “Jackson’s analytical framework...upheld executive orders and agency regulations that nullified all non-Iranian interests in Iranian assets and suspended all settlement claims” (Chu and Garvey 2014, 6). Harry Truman’s attempt to seize the steel mills through executive order was overturned through one of the many methods of revoking them, through court order. The case also shows a ruling against a president during wartime, which is uncommon and will be further discussed in the military action section. President Truman’s action also appears to be one of the farthest reaches of power for a president, with many of his successors opting for less controversial uses.

President Franklin Roosevelt had an enormous impact on labor in the United States through many of his New Deal programs such as the Civilian Conservation Corps, the Tennessee Valley Authority, and, most notably, Social Security. He was able to adjust and in some cases augment the impact of these programs through executive orders. One of his lasting impacts on labor came through Executive Order 8802 in 1941. Executive Order 8802 stated, “that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin...” (Executive Order 8802). Section two of the order obligates “the contractor not to discriminate against any worker because of race, creed, color, or national origin.” The order also set up the Committee on Fair Employment

Practices (FEPC), which had the mandate to “receive and investigate complaints of discrimination in violation of the provisions of this order and shall take appropriate steps to redress grievances which it finds to be valid” (Executive Order 8802). The order was made in order to appease Civil Rights leaders at the time and to augment the size of the workforce in the defense industry because of war developing abroad (President Orders an Even Break...). Roosevelt noted while signing the order that denying people the opportunity to work because of their race is “to the detriment of workers’ morale and of national unity” and “it is the duty of employers and of labor organizations to provide for the full and equitable participation of all workers in the defense industries without discrimination” (President Orders an Even Break...). President Roosevelt’s order functioned in a limited nature in that it was targeted towards African-Americans. Neither Executive Order 8802 nor the committee it empaneled had absolute support in Congress, as evidenced by actions made by Members of Congress.

In 1944 Congress introduced a bill that would limit the president’s unilateral power when it came to creating agencies (Contrubis 1999, 4). Even members of the president’s party were becoming weary of the expansion of executive power, as evidenced by Senator Richard Russell. Senator Russell introduced an amendment to the bill that would prohibit appropriations to an agency created by Executive Order if that agency was in existence for more than one year if Congress had not appropriated funds specifically for that agency (5). The Russell Amendment is still a part of United States law today in 31 U.S.C. 1347 “Appropriations or Authorizations Required for Agencies in Existence For More Than One Year” (31 U.S.C. 1347).

Congress cut off funding for the Committee on Fair Employment Practices in 1945 and the committee disbanded in 1946. Though the life of this committee was short lived the influence it had on future presidents and civil rights programs continues to exist (Contrubis 1999, 5). The executive order laid the groundwork for Affirmative Action programs initiated by President Lyndon Johnson and various other Civil Rights advances all the way to the present with President Obama.

As for whether President Roosevelt exceeded his executive power in this instance, it seems unlikely that he did. Congress disagreed with the action and approved an amendment limiting future presidents in the creation of agencies. One of the legacies of this order was that it limited executive power in the years following but it did help to advance Civil Rights.

President Obama has, much like his predecessors, used executive orders to affect labor in the United States. His use of executive orders comes in response to a Congress that has repeatedly rebuffed his polices to increase the minimum wage, to advocate for fairer wages, and fight income inequality.

President Obama's goal of raising the Federal minimum wage to \$10.10 an hour has been largely stalled by the Republican controlled House of Representatives and Republicans in the Senate. In April of 2014, two months after the president's order, a vote to advance the minimum wage raise in the Senate failed in a procedural hurdle by a vote of 54-42 with four senators absent. The bill needed 60 votes to clear the filibuster hurdle, though, even if it passed the Senate it would have likely died in the House (Lowery 2014). So in order to advance his agenda and make the issue more prominent the president started pursuing executive action. As a part of his "Year of Action" the president signed Executive Order 13658 which raised the minimum wage

for federally contracted employees to \$10.10 an hour (Brown and Epstein). By increasing the minimum wage of some Federally contracted employees the order hopes to increase employee morale, productivity, and quality of work. Additionally, the order mentions that it seeks to lower “turnover and its accompanying costs” (Executive Order 13658).

Later in 2014 Secretary of Labor Tom Perez issued regulations relating to the Executive Order. A “fact sheet” on the Department of Labor’s website clarifies the order and its implications. The executive order is subject to numerous exemptions and contingencies on when and where it applies. Additionally, the order will only affect 200,000 Federal employees. This number is much smaller when compared to the projected 16.5 million people whose wages would be increased under a new Federal minimum wage set at \$10.10 an hour according to the Congressional Budget Office (United States, Congressional Budget Office 1). The CBO report describes those 16.5 million people as the “number of workers with hourly wages less than the proposed minimum whose earnings would increase in an average week.” This also includes workers who make just above the proposed new wage who would also be likely to see wage increases (2).

The differences between the president’s executive order and a law passed by Congress are markedly significant. For example, the amount of people who benefit from the executive order is striking. A law raising the minimum wage to \$10.10 an hour would encompass vastly more people and affect much larger swaths of the economy as a whole compared to the relatively limited nature of an executive order. Additionally, Executive Order 13658 does not affect current Federal contracts; it only affects new and renewed contracts after January 1, 2015. Lastly, like all executive

orders, this one can be repealed, overturned, or defunded by Congress, although in this situation it seems unlikely to occur over the president's last two years in office. But when it comes to whether the president's actions are an overreach into the powers of Congress it is still uncertain. President Obama breaks new ground in requiring Federal contractors to pay their employees more but the conflict may "ultimately be decided in federal court" (Farley and Robertson 2014).

For decades immigration has been a realm of policy that has been affected, in sometimes dramatic fashion, by presidential action. Some of these actions were taken pursuant to congressional approval or acquiescence, while others have been taken in explicit or implicit opposition to the will of Congress. The issue is important in discussing whether a president is overreaching because many of these actions have expanded upon laws passed by Congress, while others have expanded upon previous presidential actions. When it comes to the president's power to alter the immigration system, the question isn't if he is able to alter it, it's to what degree he can. Currently, the issue of presidential action in immigration is under debate on Capitol Hill and across the country because of Congress' failure to pass an immigration overhaul bill and which ultimately lead President Obama to issue his much delayed unilateral executive actions after the 2014 midterms (Bolton 2014).

Proponents of President Obama's executive actions to alter the current immigration system turn to a long history of presidents amending the system through executive orders or other executive actions. One of the first presidents to affect immigration through executive action in the modern era was President Eisenhower in 1956 when he paroled 923 foreign-orphans "into the custody of military families seeking to adopt them" while legislation that would approve this action was still

pending in Congress. Between 1956 and 1958 Eisenhower granted parole to almost 32,000 Hungarians after they escaped from the Soviets (Executive Grants of... 2014, 3). This is the first major example of a president acting to protect immigrants in the absence of explicit congressional approval, thus creating precedent for almost every president in the following decades.

The immigration system in the United States was drastically reformed in 1986 with the Immigration Reform and Control Act and with that reform came executive actions from Presidents Reagan and George H.W. Bush. For example, in 1987 “Reagan’s Immigration and Naturalization Service (INS) commissioner announced a blanket deferral of deportation (logistically similar to today’s DACA program) for children under 18 who were living in a two-parent household with both parents legalizing, or with a single parent who was legalizing” (Executive Grants of... 2014, 1). He also deferred deportation for about 200,000 Nicaraguans while legislation waited in Congress. President Bush issued a similar action building upon those of his immediate predecessor.

Every president since Eisenhower ordered similar actions, however, not every action was identical in scale or done with the approval of Congress. President Reagan’s actions affected a larger number of undocumented persons compared to other presidents. During his presidency, Ronald Reagan’s actions for undocumented immigrants covered hundreds of thousands of people. President George H.W. Bush followed up on President Reagan’s actions in a grander scale. President Bush’s biggest action came in 1990 when he acted pursuant to the Immigration Reform and Control Act (IRCA) of 1986 in order to offer “deferred deportation of unauthorized spouses *and* children of individuals legalized under” the act (Executive Grants of... 2014, 6).



This action in 1990 ultimately covered 1.5 million people. It's worth noting that legislation "had passed the Senate, but not the House, providing similar relief" because a similar scenario happened to President Obama prior to his action (6).

The actions made by Presidents Bush and Reagan provided the most groundwork for President Obama's actions, but the real question in assessing whether President Obama's actions are more overreaching or illegal is whether they are done in a very similar manner to the actions made in the late 1980s and early 1990s or whether they are a new type of action all together.

Though these actions provided the framework for President Obama, his actions have the potential to affect thousands, if not millions of more people than the actions of Reagan and Bush combined, thus making them more expansive in terms of sheer numbers. President Obama's actions, in theory, could affect up to five million undocumented immigrants out of the total population of about 11.4 million (Parlapiano 2014).

President Obama's actions in 2014 are a follow up to an action his administration took in 2012 with the Deferred Action for Childhood Arrivals (DACA) program. The DACA "allows young people who were brought into the country as children to apply for deportation deferrals and work permits" (Parlapiano 2014). There were originally 1.2 million immigrants who were eligible for the program, though half of those actually applied (Lind 2014). The action in 2014 extends eligibility of the program and increases the deferral period from two to three years

One of the main pillars of the administration's defense comes from the Family Fairness plan issued under Presidents Reagan and Bush Sr. The actions are similar in that they "involve the granting of temporary relief from removal and work

authorization to certain unlawfully present aliens based, in part, on humanitarian factors” (Manuel 2014, 22). However, there are notable differences. First, there was no central process established under the Bush and Reagan programs. Second, under the Family Fairness plan, some undocumented immigrants were subject to deportation proceedings. Lastly, and most importantly, the Family Fairness plan was sandwiched between “legislation legalizing certain unlawfully present aliens” (22-23).

In 2013 the Senate passed legislation overhauling the immigration system with a degree of bipartisan support, however, the measure died in the House of Representatives. This caused the president to start working on executive actions he could take to tackle the problem without Congress. Eventually, after months of delay, mainly in an effort to appease vulnerable Democrats from the electoral flack of his action, the president took action that granted temporary legal status to millions of undocumented persons.

The president presented his plan in a nightly address to the nation and said that he was signing this action because of the inaction in Congress to act upon fixing the immigration system. He reiterated that he would revoke the order if Congress passed a law; he said, “I want to work with both parties to pass a more permanent legislative solution. And the day I sign that bill into law the actions I take will no longer be necessary” (Obama 2014). However, it seems unlikely that a bill will pass through Congress in the last two years of his presidency. President Obama’s plan in general is to grant temporary relief from deportation to up to five and a half million unauthorized immigrants in the United States. As mentioned before the actions President Obama expand upon DACA in 2012. They also extended eligibility for deportation protection to parents of U.S. citizens or green-card holders under Deferred Action for Parents

(DAP) (Lind 2014). While those affected under the actions are still not legal citizens or have no legal status in the United States, they are protected from deportation for the time being. The decision to take action enraged Republicans, who called President Obama's actions illegal or overreaching. This set off multiple attempts to revoke or nullify President Obama's order through legislative and judicial channels.

The first legislative attempt at overturning President Obama's actions came during the lame-duck session of the 113<sup>th</sup> Congress when Republicans tried to work in language to a government-funding bill that would have revoked the executive actions. This attempt failed and instead a compromise on the issue was reached. Funding to the Department of Homeland Security (DHS) would be cut off early as "retaliation for President Obama's unilateral action to defer the deportation of as many as five million undocumented immigrants." The funding for DHS's was cut because it "has primary responsibility for carrying out the president's immigration directive" (Parker and Weisman 2014). The issue finally arrived in late February of 2015 and Congress ultimately decided to fully fund the department until that September (Sullivan 2015).

A recent development in the opposition to the President Obama's actions came from a Federal District Court in Texas where a judge ruled against the administration over the executive actions. In February 2015 Judge Andrew Hanen ruled in favor of Texas and 25 other states challenging the president's actions on the grounds that the actions would impose major burdens on state budgets and that the administration "had not followed required procedures for changing federal rules" (Shear and Preston 2015).

This ruling caused the administration to delay parts of the program, but it is still committed to implementing them if appeals are successful (Shear and Preston

2015). The battle over the actions still has to work its way through the judicial system but there is precedent that helps the administration. In recent cases, the Supreme Court has “acknowledged the Executive Branch’s discretionary powers on immigration matters” (Skrentny and Lopez 2013, 67). But this is a matter that will have to work itself out over the next few months or years due to the length of the appeals process. As of writing this, the appeal is still ongoing.

President Obama’s immigration actions have been some of the most controversial in his presidency and still face significant legal and political challenges. The fact that there is significant opposition in Congress and that his actions have already been dealt a setback in federal court shows that President Obama’s actions are not absolute. If the District Court’s ruling is upheld it will show that President Obama’s actions on immigration went to far and will serve as a victory for Congress, as well as the states, over the executive.

Based on these examples, President Obama’s use of executive orders and other similar executive actions can be described as being very similar to his predecessors and not as far reaching as his opponents say he is. But that is not to say that these limited actions will pave the way for future actions that are more expansive.

When it comes to affecting Civil Rights through executive orders his order relating to workplace protections for the LGBT community follow very closely to actions taken by President Johnson. In fact, he amended President Johnson’s very own executive order on Affirmative Action in order to offer protections to gays and lesbians in the workplace. The order also follows closely with President Roosevelt’s, which mandated fairer employment practices in the time leading up to World War Two. While President Obama’s order can be overturned in the future, it may not

actually occur. If the order becomes so ingrained in federal hiring practices it could be difficult to overturn, especially with the rise in public support for LGBT rights.

President Obama's impact on labor through his executive order on minimum wage has had a marginal effect to date, especially when it's compared against the impact a minimum wage law could have. The executive order only affects a very small segment of the working population and could still be revoked or challenged in court, while a minimum wage law would not be challenged and would affect a larger number of people. So in this regard the President's order is not overreaching, in fact he could revoke it himself if Congress passes a minimum wage law. However, that is unlikely. But the president's order raises the issue to national prominence and could be used to create stronger public sentiment towards passing a law increasing the wage, leaving the full effect of this executive order and its reach to still be determined.

Actions taken by the president on immigration push the boundaries of his office more so than many other executive actions he has taken. Though he did act on the precedent set by many former presidents in terms of enforcing immigration laws and he did act on statutory authority, he did extend this action to a far greater number of people than that of any president before him. Furthermore, he acted in an area where he did not have a great deal of support from Congress. Even though he had the support of Democrats he faced stiff opposition from Republicans who have rebuked his actions. The most important aspects in determining whether his actions are illegal are still in flux at the time of writing and could determine the fate of these actions. While the president suffered an initial defeat by Judge Hanen, he still has the possibility to come out on top. But if the actions are ultimately struck down it will serve as a clear indication that he overstepped the bounds of his power.

Overall, President Obama's executive orders faced limited or no contest from those in Congress. For the most part they are limited in nature and scope, and many were used to advance his policies if only to a small degree. But his actions on immigration were more far-reaching and less semantic in nature. If the actions are successfully upheld then over five million people will be affected and possibly be able to remain in the country. If they are not, it will be a sign that President Obama overstepped his bounds of executive power.

## Chapter 4

### Executive Privilege

Executive privilege is a key aspect of the “imperial president” in that it allows the president and executive branch officials to safeguard information from Congress or the public. By safeguarding information the administration creates an aura of secrecy and, according to one observer, secrecy “represents power—power to act according to one’s own preferences, and power to avoid accountability” (Berman 2009, 1). This observer, Emily Berman, of NYU’s Brennan Center, goes on to say, “secrecy thwarts the efforts of the people and their elected representatives to obtain information, it undermines Congress’s core functions, its ability to enact legislation and exercise oversight” (1). This is the core issue; Congress has a strong need for information and when the executive withholds pertinent information a conflict arises between the two branches. Though it is a common tactic presidents use, invoking executive privilege creates the perception of illegality or wrongdoing.

A general definition for executive privilege is:

“The privilege that allows the president and other high officials of the executive branch to keep certain communications private if disclosing those communications would disrupt the functions or decision-making processes of the executive branch.”

The negative perception of the privilege came about as a result of President Nixon’s use of it during the Watergate investigations. As a result, when a president uses executive privilege, fairly or not, memories of Watergate and political scandal are brought up. For all the negative publicity surrounding executive privilege it is

important to note that it is a legitimate power available for presidents to ensure that he receives candid advice from his advisors and other officials.

Just like executive orders, executive privilege is not explicitly defined in the constitution; but instead, it is an action that has been given life through legal precedent over the last 230 years. In fact, “presidential claims of a right to preserve the confidentiality of information and documents in the face of legislative demands have” been apart of inter-branch relations since 1792 (Garvey and Dolan 2012, 1). The Nixon administration, and the accompanying Watergate Scandal, brought executive privilege to the forefront of public debate in the worst of ways. By using executive privilege as a result of investigations into his actions, President Nixon set in motion a line of Appellate and Supreme Court decisions that came to define the scope of executive privilege.

The first major case to address executive privilege at the Supreme Court was *United States v. Nixon* where the court ruled “neither the doctrine of separation of powers, nor the general need for confidentiality of high-level communication, without more, can sustain an absolute, unqualified, presidential privilege” (United States v. Nixon). The ruling placed a variety of conditions on when a president can invoke the privilege and that the privilege is not absolute. Two areas subject to executive privilege include presidential communications and deliberative process (Rozell and Sollenberger 211). Presidential communications require the most showing for a claim of privilege to be overcome because it protects “communications of those who are personally advising, or preparing to advise, the president” (211). Deliberative process protects pre-decisional documents by executive branch officials, but this part of executive privilege is more easily overcome in an investigation (211). It is the same



area that President Obama invoked in regards to the Fast and Furious controversy. What these two types of privilege have in common is that both can be overcome with a showing of corruption or “other wrongdoing in the executive branch” (212).

Additionally, a court can overturn an invocation of executive privilege if it does not meet certain qualifications that have been listed in previous judicial decisions. This is first evidenced with the Court’s unanimous ruling in *Nixon*, as well as other cases, including against President Clinton when his attempts to withhold information during the Monica Lewinski scandal were “withdrawn or rejected (Nakumara 2012).

Every president since John F. Kennedy has invoked executive privilege at least once during his tenure in office. It is not a common occurrence to formally invoke the privilege since each president has done so less than 10 times, with the exception of President Clinton who invoked executive privilege 14 times (Nakamura). But the number of times the privilege is invoked isn’t the main issue, it’s “whether there is a legal justification” (Nakumara 2012). In fact, the number of times a president uses executive privilege is relatively immaterial in its analysis, instead, as Rozell mentions, “each use of executive privilege should be weighed on its own merits (Rozell 818).

Invoking executive privilege does not tell the whole story in regards to presidential attempts to stonewall Congress’ fact-finding and oversight missions. Even the threat of a president invoking executive privilege can deter congressional investigations. Emily Berman notes, “The number of explicit ‘executive privilege’ disputes is dwarfed by the number of information disputes between Congress and the Executive that, though they do not always involve an explicit presidential assertion of executive privilege, still force Congress to decide whether—and how aggressively—to

pursue information with an awareness that, if Congress pushes too hard, the President may assert executive privilege” (Berman 2). The threat of executive privilege might deter future congressional inquiries, limiting Congress’ oversight powers.

Additionally, if Congress and the president reach an agreement on which information will be released it could mean that the executive can still retain information and deprive the public of possibly necessary information.

The reason that I am including executive privilege as a part of the analysis of President Obama’s use of executive power is because withholding information from Congress directly infringes on Congress’ right to provide oversight and accountability. Emily Berman goes on to say “When secrecy thwarts the efforts of the people and their elected representatives to obtain information, it undermines Congress’s core functions, its ability to enact legislation and exercise oversight” (Berman 2). When a power given to Congress is deprived or limited it loses power relative to the executive. So when a president invokes executive privilege he directly affects the balance of power between the two branches.

For this section I will go into detail on how presidents have used executive privilege in order to protect themselves and their administrations from congressional oversight, starting with President Nixon and finishing with President Obama. I will outline President Nixon’s controversial use of the power during the Watergate Scandal, President Clinton’s surrounding Monica Lewinski and his impeachment, George W. Bush with regards to the firings of U.S. Attorneys, and Barack Obama’s use in respect to the “Fast and Furious” gun walking controversy. When compared to the other three presidents I believe that President Obama’s use of executive privilege will be less than those before him, however, his use will have a legal basis created by

previous presidents and their use of executive privilege. Whether his actions make him overreaching will be discussed in the conclusion.

The Watergate scandal is seen as one of the darkest political chapters in the history of the United States. It resulted in the first, and so far only, resignation for a president along with a precipitous drop in the public's trust in government that has still not been fully restored. President Nixon, in his attempt to hold on to power attempted to stonewall Congress' and a special prosecutor's inquiries into his involvement in criminal activities before the 1972 election through the use of executive privilege. His invocation of the privilege set up a major confrontation between all three branches of government. This ultimately altered the balance of power, giving the legislative branch an increased roll in federal government compared to that of the executive over the decade after Nixon left office.

The infamous scandal stemmed from a break in of the Democratic National Committee headquarters at the Watergate Hotel. The burglars were arrested and tried in Federal Court. All the while there remained a sense of White House involvement in the break in, however, President Nixon denied any involvement. The burglars and their accomplices eventually either plead guilty or were found guilty by a jury, yet, there still remained a degree of uncertainty regarding the facts of the case. The uncertainty lead to the founding of the Select Committee on Presidential Campaign Activates in early 1973 (Select Committee on Presidential...). The Committee had "the power to investigate the break-in and any subsequent cover-up of criminal activity, as well as 'all other illegal, improper, or unethical conduct occurring during the presidential campaign of 1972, including political espionage and campaign finance practices'" (Select Committee on Presidential...). President Nixon adamantly refused

to comply with the Committee's inquiries, but after enough probing he allowed some of his aides to testify before the Committee.

In response to growing pressures from Congress, President Nixon "refused to comply with subpoenas from both the congressional committee and a special prosecutor for tapes of his Oval Office conversations about" the break-in (Berman 8). Not surprisingly the contentious nature of the congressional investigation and the recalcitrant President Nixon created many legal battles, some of which reached the Supreme Court and established lasting legal precedent on executive privilege. The first case in what are called the Watergate Cases was *Nixon v. Sirica*. In *Sirica* the Court of Appeals for the District of Columbia held that a claim of executive privilege is not absolute and that while there is a "presumption" that presidential conversations are privileged, it can be overcome with "an appropriate showing of public need by the branch seeking access" (Dolan and Garvey 2).

Perhaps the most important decision to be handed down as a result of the Watergate fallout was *United States v. Nixon*. In this case the Supreme Court issued a unanimous and fatal ruling for the Nixon presidency. Here the Court ruled, "neither the doctrine of separation of powers, nor the general need for confidentiality of high-level communication, without more, can sustain an absolute, unqualified, presidential privilege." The tapes subpoenaed following the indictments of aides to President Nixon were not in the area of "military or diplomatic affairs." A few weeks later President Nixon resigned from office before the House could vote on his impeachment (*United States v. Nixon*).

The ruling in *Nixon* struck several blows to the Executive branch that lasted well beyond Presidents Nixon and Ford's term in office. First, the Court's opinion

“affirmed its own relevance, overturning Nixon’s claim of absolute separation of powers” (Rudalevige 105). Next, the ruling tempered future presidents’ use of executive privilege, partly because invoking executive privilege tends to bring up memories or comparisons to Watergate, leading to suspicion and bad press. Lastly, the decision created guidelines for future invocations of the privilege. These guidelines take a few forms and have been interpreted very differently by different administrations.

As a final insult of sorts to President Nixon, Congress passed the Presidential Recordings and Materials Preservation Act, which “applies only to the Nixon Presidential Materials, stipulates that those materials relevant to the understanding of Abuse of Governmental Power and Watergate are to be processed and released to the public prior to the release of all other materials” (Presidential Recordings...). This prevented President Nixon from holding on to his documents and papers in response to inquiries by Congress or the Special Prosecutor. A few years later the Supreme Court “upheld the Act in 1977’s *Nixon v. General Services Administration* (Rudalevige 108).

Congress took action in accordance with the Watergate Committee’s findings in the years following President Nixon’s resignation. First it amended the Federal Election Campaign Act to impose limitations on expenses and contributions, require more disclosure in reporting, and establish public financing for elections. Additionally, Congress passed the Freedom of Information Act over a Presidential veto. Lastly, the Government in Sunshine Act was passed which requires “federal agencies to hold their meetings in public” (Select Committee...). These new laws were indicative of an era of Congressional reemergence and a decline of executive strength. Additionally, a lasting legacy of the Watergate Committee’s success was an expansion of

congressional investigatory power (Select Committee...). New laws after Nixon's resignation exemplified congressional reemergence over the executive, but President Ford best exemplified the newly enfeebled executive. In the wake of the scandal, and shortly after he took office and pardoned President Nixon, Ford testified before a House committee regarding his decision to sign the pardon. As Andrew Rudalevige notes in "The New Imperial President" this testimony was a "resonant tribute to the state of executive power in the resurgence regime" (Rudalevige 116).

President Richard Nixon tested the boundaries of executive power as president by attempting to withhold certain documents and transcripts from Congress. His quest to maintain power through executive privilege possibly hastened the timetable of events that lead to his resignation. Since President Nixon's time in office, many presidents have attempted to push the bounds of their power by stymying congressional investigations, some with more success than others. Over the next few years the executive branch started to regain the power it lost in following Nixon and Ford's terms. The legal framework created in the wake of Watergate allowed presidents to more precisely use the privilege or more easily justify it. When President Bill Clinton started to face questions regarding his relationship with a White House intern and possible criminal charges he turned to executive privilege to help protect himself from impeachment.

When it comes to putting a bad name to executive privilege and the accompanying abuse of executive power, President Bill Clinton is one of the worst offenders since President Nixon. During the latter part of his second term President Clinton invoked executive privilege on multiple occasions relating to the criminal investigation on his involvement with Monica Lewinsky, then a White House intern.

In response to probing by Independent Counsel Kenneth Starr, the White House shielded documents regarding staff discussions revolving around Monica Lewinsky (Rozell 816).

President Clinton also took another step in trying to expand the privilege when he tried to use it to shield discussions involving the First Lady. Mark Rozell notes that this attempt was “quite likely a real stretch of the doctrine” and “unprecedented” (819). It was unsurprising that the attempts did not stand up in court. Judge Norma Holloway Johnson ruled against President Clinton and “determined that the balancing test weighted in favor of” Kenneth Starr’s need for information in a criminal investigation (819).

By rebuking President Clinton’s executive privilege claims the court reaffirmed that, while the privilege is important in receiving candid and quality advice, it also shows that no one is above the law (820). It doesn’t matter how great or popular a president is, he cannot deny a legitimate request for information if the correct need is presented.

President Clinton ultimately survived the impeachment and finished his term in 2001, turning over the reins of power to Texas Governor George W. Bush. But, through his incorrect use of the privilege, President Clinton perpetuated negative “images of Watergate” and the “use [of] that doctrine to obstruct justice (816). This maintained the image of an overreaching executive and further showed evidence of the executive’s resurgence since the 1970s. President Bush’s term is described by many as an attempt to create a “unitary executive,” one that “has virtually all of [the executive] power, unchecked by Congress or the courts, especially in critical realms of authority” (MacKenzie 2008, 1 qtd. in Rozell and Sollenberger 213). Executive

privilege under the unitary executive theory would expand the privilege's reach "into all areas of the executive branch" thus protecting information from disclosure.

President George W. Bush formally invoked the privilege six times during his presidency, notably in 2007. In 2007 the Bush administration faced public and congressional scrutiny for the dismissal of several United States Attorneys, with many observers believing their dismissals to be politically motivated.

In 2007, in response to the dismissal of several U.S. Attorneys, the Democratic lead House Judiciary Committee started an investigation. Over the course of "six hearings and numerous interviews" the House Committee issued subpoenas, which required testimony and documents, most notably from White House Chief of Staff Joshua Bolten and former White House Counsel Harriet Miers (Garvey and Dolan 2014, 22). Both Bolten and Miers failed to comply with the Committee's demands on the grounds of executive privilege. The House Judiciary Committee eventually filed suit in United States District Court in Washington D.C. The D.C. District Court found Bolten and Miers to not be immune from testifying, "but could claim privilege in response to individual questions" (Mastrogiacomo 2010, 164). Additionally, the court ruled the pair must surrender "non-privileged documents requested in the subpoena and a list of all documents withheld under a claim of executive privilege" (164). In this instance the court also rejected the administration's claim that presidential aids have absolute immunity (Rozell and Sollenberger, 2009 218).

In a letter to the House and Senate Judiciary Committees, White House Counsel Fred Fielding "notified the committees that the President was asserting executive privilege and had instructed the subpoena recipients not to produce any documents" (Garvey and Dolan 22). The letter grounded its claim for executive



privilege in that the documents were internal White House communications, communications involving White House officials with outside personnel, and communications with Justice Department officials (22).

The invocation of executive privilege surrounding an already politically contentious issue set off a series of events that involved all three branches of government. One of the end results of the controversy was the resignation of Attorney General Alberto Gonzalez and the further defamation of an otherwise legitimate use of executive power.

The suit the filed by the House of Representatives eventually ended in 2009 when the D.C. Circuit Court dismissed the suit following an agreement with new President Barack Obama. This is after Miers agreed to provide testimony in a closed hearing and the Committee was able access much of the information it had been seeking (Garvey and Dolan 28-29). The CRS report goes on to describe the suit as “a vindication of congressional oversight prerogatives, or at least a clear limitation on the scope of executive privilege in the face of a congressional investigation, the ultimate impact of the case is unclear.” But since the case was never fully decided by the supreme court there was a “sidestep” of the executive privilege question, meaning Bush’s claim in this instance was not completely resolved (Rozell and Sollenberger 220). The lasting impact could prove to be that the ruling “repudiated the executive’s claim of absolute immunity for presidential advisors.” This would be a further justification of the *Nixon* ruling against absolute immunity, however, on the other hand, the ruling leaves room for advisors to assert the privilege for specific questions asked by Congress (Garvey and Dolan 2012, 29).

In 2012 President Obama invoked executive privilege for the first and only time thus far in his presidency. This action came in response to congressional probing into the controversy surrounding the “Fast and Furious” program in 2010.

The “Fast and Furious” program, which was run by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), can be described as a group of gun trafficking cases handled by the ATF which involved “more than 2,000 weapons, including hundreds of AK-47 type semi-automatic rifled and .50 caliber rifles” (Attkisson 2013). The idea behind this program was to allow gun sellers to sell guns to otherwise suspicious customers in the hope that this would build a bigger case for law enforcement officers. However, the program went awry and some guns went missing. A “vast majority” of the guns were not tracked which eventually resulted in the murder of a Border Patrol agent. The agent, Brian Terry, was killed in December of 2010 and two rifles were found at the scene that were involved in the Fast and Furious program.

A month later in January 2011 ATF whistleblowers contacted Senator Chuck Grassley and an investigation into the program began (Attkisson 2013). The first response from an administration official came from Assistant Attorney General Ronald Weich. Weich wrote that the department was not aware of allowing the sale of weapons to suspicious customers. However, the Justice Department retracted the letter on the grounds that it contained inaccuracies, triggering a greater scrutiny from Congress, especially from the Republican lead House Oversight Committee.

On June 20, 2012 President Obama formally asserted executive privilege for Justice Department documents relating to the ATF’s operation. This assertion came just before the House voted to hold Attorney General Eric Holder in contempt

(Horwitz and O’Keefe 2012). In response to not disclosing Justice Department documents requested by Congress, the House of Representatives voted to hold Attorney General Eric Holder in contempt (Weisman and Savage 2012). Additionally, the contempt citations did not go much further because it was the Justice Department decision to pursue charges, and an Attorney General pursuing charges against himself was a near impossibility. This is similar to the tactic that President Bush took in 2008 when contempt citations were made against Bush administration officials (Weisman and Savage 2012). President Obama used the precedent President Bush created only a few years earlier. Overall, this episode in Legislative-Executive branch relations is remarkably similar to the U.S. Attorney Dismissal controversy, with the exception being the party roles are reversed.

When the President invoked executive privilege he did it under the judicial doctrine of deliberative process. Deliberative process is the much more expansive view of the privilege in that the communications involved can involve “White House staff or [staff] within other agencies on legal or policy decisions that don’t necessarily involve the president or his immediate advisors” (Currier). This means that, in the case of the Fast and Furious controversy, the “communications could be just between Justice Department officials and not...anybody at the White House itself” (Currier). The documents were not internal White House documents that weren’t directly related to decision making.

The executive privilege claim set off a firestorm of rancorous opposition from the president’s opponents, much like what happened with President Bush five years prior. Republicans on the House Oversight Committee kept pushing the narrative that the administration was covering up something illegal. In fact, in the 114<sup>th</sup> Congress the

new Chairman of the House Oversight Committee, Jason Chaffetz, made his first priority, according to his Twitter account, to subpoena Attorney General Eric Holder in connection with the Fast and Furious controversy. Chaffetz guaranteed that the investigations would continue, at least in the near future (Marcos 2015). Republican ire over Attorney General Holder still remained fierce all the way up to his resignation from office following the confirmation of Loretta Lynch to the post.

The difference between President Obama's use of executive privilege compared to other presidents' is that his were not used during an active criminal investigation. Presidents Nixon and Clinton tried to stonewall investigations into criminal wrongdoing while President Obama just tried to slow or stop a congressional investigation prior to there being any criminal investigations, much like in the Bush example. Even in the case with President George W. Bush there was no criminal activity, the rancor that followed his and Obama's could be seen as being primarily politically driven.

Does President Obama's sole use of executive privilege make him an imperial or overreaching president? No, it doesn't. He acted in a similar fashion to those who came before him and also to a lesser degree. The congressional actions taken against Presidents Nixon and Clinton were done over the course of criminal investigations, while the inquiries made into President Obama's actions were similar to President Bush's in that they were more politically motivated. The latter actions are not likely to threaten the Obama presidency or his legacy, such as what happened with Nixon and Clinton. However, this is not to say that his actions will not enable future presidents to expand the scope of the privilege. There is also the issue with the greater transparency problems in his administration. These less explicit tactics to maintain privacy can

prove to be even more secretive than assertions of executive privilege. Presidents have and will continue to use other methods to prevent internal documents or communications from reaching the public.

Beyond executive privilege the Obama administration has taken other steps to decrease transparency and stymie congressional inquiries, but this is not out of step with previous administrations. This lack of transparency can be evidenced by a “backlog of unanswered” Freedom of Information Act (FOIA) requests (Bridis 2015). In March, the White House announced “new rules exempting an administrative office from subjection to the Freedom of Information Act.” This new rule is a longstanding policy and has been upheld multiple times in court (Wilson 2015).

## **Chapter 5**

### **Military Action**

Any discussion revolving around the topic of an overreaching president would not be complete without mentioning use of the armed forces. This is especially true when it comes to unilateral use of these forces by the executive. The issue of using military force has long been a source of conflict between the Legislative and Executive branches of the Federal Government. Each branch has, throughout its history, tried to gain supremacy in the debate over military control with the Legislative Branch relying on specific provisions guaranteed to it by the Constitution such as the power to declare war, raise and support armies, and to raise a navy among other powers in Article II, Section 8. The Executive asserts his dominance in regards to military authority on the broader statutory language in Article II. Primarily, presidents will justify their use unilateral military power under the title given to him as Commander in Chief of the armed forces.

Military force is historically associated with creating empires, ruling people, and conquering others. In other occasions, military action can be seen as a force for good, one that liberates and secures freedoms, such was the case with the Allies in World War Two. Those in command of the military can exercise that force in either of those two fashions. This is why the use of military force is critical in the understanding of the imperial president. Those with absolute power of the military can make their citizens weary of that power and sometimes even worried. Left unchecked, military action can fall into the former of the two categories.

In the United States there is a Constitutional check on the military power of the president that comes in the form of Congress. Congress and the president jointly control the military and military action. Under the Constitution Congress is empowered to “provide for the common Defense and general Welfare of the United States,” “To declare War,” “To raise and support Armies,” “To provide and maintain a Navy,” and “To provide for calling fourth the Militia to execute the Laws of the Union.... and repel Invasions” (Article I, Section 8). The Executive branch’s military powers are not as specific as the Legislative’s are. Article II, Section 2 stipulates “The President shall be Commander in Chief of the Army and Navy of the United States” and that, with him, rests “the executive Power” (Article II, Section 2). The broad parameters that exist in Article II have allowed an expansion of executive power over the military and this usurpation of power has come at the expense of Congress’s power over the military.

Over the last 200 years presidents have carved out new niches in their use of unilateral military power. A few presidents have altered the balance more so than others leading up to the modern presidency, but some of the most drastic developments in the executive’s military powers came during Abraham Lincoln’s term in office. In response to the secession of Southern States, President Lincoln ordered a blockade of ports all across the South. Lincoln took this action while Congress was not in session and the Supreme Court upheld it in the Prize Cases (Elsa, Garcia, Nicola 2013, 8). The ruling in that case is still cited “to support claims of greater presidential autonomy by reason of his role as Commander in Chief” (8).

Military action by the United States became even more contentious around the time of World War Two because of the increased global presence of the United States

following the end of World War I. William Rogers, Secretary of State to President Nixon, wrote in 1971 that the United States has maintained a large, standing military since the end of World War II and this lead to "reliance upon the United States by other nations" (Rogers 1971 1207). He goes on to argue in favor of what Alexander Hamilton would call an "energetic executive" because in the "heightened pace, complexity, and hazards of contemporary events" there must be "rapid and clear decisions" that only the president can provide (1208). These developments are as applicable now as they were in the 1970s, if not more so.

For the most part, President Franklin Roosevelt's military actions came pursuant to Congress's will. This is because, in the wake of the attacks on Pearl Harbor, Congress, at the President's urging, declared war on Japan and Germany. Later declarations were made against Italy, Bulgaria, Hungary, and Romania. The declaration against Romania was the last time Congress officially declared war against another sovereign nation. Congress's role in military action took a different turn after World War Two, as this was the last time Congress declared war against another nation (Official Declarations of War by Congress). Not to say that Congress doesn't still play a major role in military use, as it is still very significant, but its Constitutional prerogatives have not been followed so strictly since then, especially with the power to declare war or use military force.

President Harry Truman took unprecedented steps in taking military action without congressional support. In June of 1950 President Truman ordered troops to Korea in the absence of congressional authority, in fact, he didn't even request the authority arguing instead that his "legal footing" existed in the form of a United Nations Security Council Resolution (Fisher 1995). By sending troops to Korea,



President Truman started what “would become the first great undeclared war” which would last three years and result in over thirty-seven American deaths (Rudalevige 2005,50). In addition to his boldness regarding the conflict in Korea, Truman also sent combat divisions to Europe by claiming the title of Commander in Chief empowered him to do so, even while lacking congressional support and the presence of active hostilities (50). This shows that the legacy of the *Prize Cases* lived on for close to one hundred years.

The Vietnam War represented a dramatic change in the way the United States went to war. Previous wars started with either a declaration or immediate military involvement, however, Vietnam turned into a full-scale conflict from a seemingly benign beginning. The conflict “made the seemingly inexorable transition from” advisors to deploying ground troops in an “incremental escalation” of hostilities (A Chronology of U.S...). Although it started off as a small and localized conflict, it grew into an all out proxy war with the communist Soviet Union and became one of the United States’ longest and deadliest wars.

The conflict grew in large part because of presidential action at the outset and not so much congressional willingness. President Kennedy was the first to send military advisors to the small, Southeast Asian country of South Vietnam to help train the soldiers to fight the communist North after the end of the French occupation. Those sent over included 3,000 military advisors and support personnel, along with helicopters and other weaponry (A Chronology of U.S...). These advisors eventually participated in military operations along side the South Vietnamese, marking the beginning of U.S. hostilities.

The situation in Vietnam changed drastically on August 4, 1964 when the captain of the USS Maddox reports his ship was fired upon, though he later retracted the claim. However, this report caused President Johnson to launch a retaliatory attack on naval bases and oil field against the North Vietnamese. Three days later Congress passed the Gulf of Tonkin Resolution, which turned the conflict into an all out war (A Chronology of U.S...). President Johnson's proposal had no time limits nor did it have a set duration for the conflict. In an address to Congress on August, 5, 1964 President Johnson requested that Congress pass "a resolution expressing the unity and determination of the United States in supporting freedom and in protecting peace in southeast Asia" (Gulf of Tonkin Incident). Two days later on August seventh Congress passed the Gulf of Tonkin Resolution, which declared "the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the force of the United States and to prevent further aggression." Section three of the Resolution declared that the president had the power to terminate the resolution whenever he deemed peace had been obtained or through a concurrent resolution in Congress.

This broad request for authority wasn't unlike President Johnson's predecessors or his successors' requests in regards to presidents and war powers. Just as Harry Truman sent troops to Korea without asking Congress to declare war or both President Bush's broad authorizations in Iraq in the early 1990s and 2000s respectively (Baker 2015). The highly unspecific language in the resolution allowed for the massive proliferation of the conflict that cost billions of dollars and left over 57,000 Americans and thousands of more people dead.

President Nixon, while originally promising to end the war with a settlement instead ramped up attacks on the Vietcong and North Vietnamese by bombing bases in Cambodia and North Vietnam (A Chronology of U.S....). In 1971 Congress passed a repeal of the Gulf of Tonkin Resolution, which was attached to an arms sale bill, which President Nixon signed. However, before signing the repeal it was noted that President Nixon felt that his authority as Commander in Chief was the only authority he needed to continue hostilities in the region, further perpetuating the executive's claim of power under the Article II clause (Gulf of Tonkin Repealed...). The repeal of the Gulf of Tonkin, while somewhat symbolic because the war lasted an additional four years, showed the beginning of a congressional resurgence that would define the 1970s.

In the aftermath of multiple unilateral military actions taken by the Executive branch Congress decided to reassert itself in the war making process with the War Powers Resolution (WPR) of 1973. Congress passed the WPR after a veto by President Nixon, who claimed the Resolution placed restrictions "upon the authority of the President" and that it was "both unconstitutional and dangerous to the best interest of our nation" (President Nixon qtd. In Rudalevige 2005, 85).

The Resolution is still a part of Federal law today and it is designed to control the president's ability to initiate and continue hostilities in that it requires the president to notify Congress within 48 hours of committing hostilities and that those forces involved must be withdrawn after 60 days. Section 3 of the WPR requires the president "in every possible instance...consult with Congress before introducing United States Armed Forces into hostilities" (War Powers Resolution).

The passage of the WPR started an era of congressional resurgence in the early 1970s where Congress passed a great deal of legislation that limited the powers of the presidency in many aspects, not just war. For example, Congress passed the Budget and Impoundment Control Act, which created the Congressional Budget office and gave Congress more leverage in creating Federal budgets. Congress also passed new ethics and election laws to help reduce corruption in the wake of Watergate. These reforms though seem to have only temporarily slowed the growth of executive power. The president's ability to use the military has expanded, especially in an era where soldiers don't need to be directly involved in combat. Later developments essentially weaken the WPR.

The WPR may have actually produced the opposite effect of its intended effect in terms of limiting the president's ability to wage unilateral war. First of all, every president since the WPR's enactment has "taken the position that the War Powers Resolution is an unconstitutional infringement upon the power of the executive branch" (War Powers). Second, all litigation against the President for not abiding by the act has failed because "Court[s] usually 'rubber stamp' executive foreign policy decisions" (Stone and Seidman 2009, 397). One reason courts usually defer to the executive branch is because "constitutional requirements are best enforced through the give and take of the political process" (397). Additionally, courts will rely on the political question doctrine, ripeness or mootness of a case, and standing in order to dismiss a case or side with the executive branch (Garcia 17). Third, Presidents often fail to comply with the WPR and its notification requirement. Presidents will make "suspect rationales to avoid compliance" such as delaying notification until after the fact or the fact that the hostilities are limited or isolated (Druck 2012, 215).

The years after the passage of the WPR still contained a great deal of unilateral military action by the executive. Presidents of both parties, over the decades, have pushed the bounds of their military powers ever so slightly, almost daring Congress to stop them. The first major action to come after the WPR was when President Ford informed Congress of an action to retake the shipping vessel *Mayaguez*. He submitted a notification to Congress after he ordered troops to take the ship, triggering the 60-day deadline, however, the operation ended well before the deadline (War Powers).

Members of Congress chastised President Carter in the aftermath of the failed attempt to rescue hostages in Iran with many claiming he violated the WPR. Members claimed that the administration did not inform them before the operation took place, thus violating the WPR, however, members still appeared to back Carter despite their reservations (Congress Reacts...).

Presidents Reagan and Bush also took unilateral military action of varying degrees, but each action did not reach the level of conflict that occurred in Korea or Vietnam. President Reagan's administration used the military without explicit congressional approval in a few instances. He took action in Grenada under the auspices of heading off another hostage scenario only two years removed from the Iranian hostage crisis. Additionally, he ordered action against Libya for its support of terrorists involved in a bombing in West Berlin. In relation to the rise in presidential militarism in the WPR era, "the attack was evidence of the Reagan administration's increasing willingness to use military force in pursuit of certain discrete, limited goals (A Chronology of U.S...). The WPR seemed to have prevented all out wars, but at that expense it has increased the possibilities for minor attacks and less invasive operations.

President Bush started one of the largest military campaigns since Vietnam when he sent troops to the Persian Gulf region to take action against President Saddam Hussein of Iraq after he captured Kuwaiti oil fields. President Bush reported his actions to Congress in accordance with the War Powers Resolution but Members of Congress were not happy with the prospect of an unauthorized war. President Bush gained the support of the United Nations to help Kuwait and Congressional support soon followed. (Elsea and Weed 12-13). The President's actions continued a pattern of president's taking action without congressional authority, only to seek it after the action occurred. This has proven to be a successful tactic for presidents, as will be evidenced in the future.

While every military action is significant there remains a degree of action that Congress is willing to permit without much fuss. The danger in Congress allowing these relatively minor actions, or courts not pushing back on the executive, allows for gradual, incremental buildups in the president's ability to launch unilateral attacks. This buildup of power lead to further air strikes and troop deployments during the Clinton, Bush, and Obama administrations, with each having laid the groundwork for further military action. Presidents taking these gradual steps in gaining unilateral military power can be closely analogized to the saying "If you give a man an inch, he'll take a mile."

The eight years President Bill Clinton was in office were marked with unilateral military action. These actions took place in Iraq, Bosnia, Haiti, and Somalia. However, when discussing the expansion of the executive's military authority it is particularly important to note Clinton's actions in Kosovo in March of 1999. That March President Clinton ordered U.S. military operations in Kosovo in a coalition

with other NATO allies in order to prevent “the Yugoslav government’s campaign of violence and repression against the ethnic Albanian population in Kosovo (Grimmett 5). The President did notify Congress within 48 hours, as is required with the WPR and the Senate also passed a non-binding resolution condoning the President’s actions a few days prior. Congress also passed other bills and resolutions in regard to the actions in Kosovo, but most notably it passed emergency supplemental funding for the ongoing actions in Kosovo. However, the 60-day threshold required under the WPR passed for removing troops and the actions were still ongoing. Representative Tom Campbell filed suit in Federal Court along with other Members of Congress, yet the court ultimately sided with the president, as it has done in the past, ruling that Campbell and the other members lacked standing, among other considerations (5-6).

The strikes President Clinton ordered against Kosovo, Sudan and Afghanistan were examples of Clinton asserting his “presidential prerogative” even while “the House debated his fate” during his impeachment (Rudalevige 2009, 190). The military action was not so unremarkable, however, it was unique because President Clinton asserted the full powers of his office during and immediately after the impeachment proceedings against him. Bill Clinton’s use of air strikes to protect civilians in Kosovo and his use of limited air strikes set a precedent that President Obama would act upon to justify his operations in Libya in 2011. While President Clinton’s actions were significant, they came to be dwarfed in scale by his successor, George W. Bush.

After the September 11, 2001 terrorist attacks the role of the U.S. Military and subsequent use of presidential military action underwent massive changes. The world changed drastically on that day and along with that change came assertion of military power and presidential requests for authorization.

While it would seem likely that President Bush took these actions unilaterally or in response to congressional apathy, it's actually just the opposite. In the aftermath of the attacks and for the immediately following years, Congress authorized the president to take broad military action in the Middle East to find and destroy the perpetrators of the attacks. The wars in Afghanistan and Iraq "were clearly and formally approved in advance by Congress in, respectively, its September 2001 and October 2002 authorizations for use of military force" (Goldsmith and Waxman 2015). It can also be noted "in the context of initiating war, Bush acted in a manner respectful of separation of powers" (Goldsmith and Waxman 2015). The authorizations for use of military force were almost rubber stamped by Congress and this is where a fear of an imperial president comes from. Andrew Rudalevige describes an imperial president as requiring "for its activation an invisible Congress" and between 2001 and 2006 this was very much the case with President Bush (Rudalevige 2009, 188).

The weeks and months following the attacks Congress passed funding bills for military action and domestic security. Congress also passed a resolution granting "broad discretion in [the President's] direction of military response to the terrorist attacks (Pfiffner 2009, 50).

In addition to the direct military action in Iraq and Afghanistan, President Bush also took actions in detaining prisoners indefinitely and without trial. He took action to detain terror suspects indefinitely, suspended parts of the Geneva Convention, ordered the National Security Agency to monitor communications, and issued many signing statements (Pfiffner 2009, 52). The courts struck some of these actions down. The Supreme Court ruled that the president "does not have the right to suspend habeas



corpus and that the laws stripped the courts of jurisdiction were unconstitutional (53). This rebuke of President Bush's claim of power is indicative of limits on presidential power even in a time of war.

One of the legacies of President Bush's military action, especially in the Middle East, are the many areas of conflict and volatile situations he left to his successor. With many Americans and lawmakers weary of further war there was not a great deal of support behind full-scale military conflict, however, this lack of support left the door open for limited unilateral engagements to locate and destroy elusive terrorists. President Obama's use of force took a page out of the Clinton presidency's through his use of air strikes and President Reagan's through his use of limited action. Besides attempting to wind down the wars in Iraq and Afghanistan President Obama is also ramping up unilateral military power in the form of air and drone strikes.

President Obama, though originally reluctant to continue using military force, became a convert to the powers of the office. The president's first major use of unilateral military action came in 2011 when he ordered air strikes against the Libyan government to protect Libyan citizens from their government and to establish a no-fly zone over the country (Garcia 13-14). The strikes took place on March 19<sup>th</sup> in accordance with United Nations Security Council Resolution 1973, however, the President did not submit a report to Congress until two days later on March 21<sup>st</sup> (13-14). The reason President Obama delayed a report to Congress was because the administration believed "that such large-scale, non consensual 'airstrikes and associated support missions' did not amount to 'War' that required congressional consent" (Goldsmith and Waxman 2015). Additionally, this rationale followed what

some believe to be the rationale used to justify the airstrikes in Kosovo by President Clinton.

President Obama again leaned towards taking unilateral action in 2013 against the Syrian government after the regime of Bashar al-Assad used chemical weapons against its own people during the ongoing civil war. Obama said in an address that Syria cross a “red-line” by using these weapons and that action would be taken. In the address, President Obama noted that he would be willing to commence airstrikes against the Assad regime, however, he asked for congressional support. In asking for Congress’ support he acknowledged that he did not need Congressional approval for “limited military interventions, and the executive branch has not sought it in the past” (Londoño 2013). This odd “I won’t, but I can” statement by the president garnered mixed reaction from Congress, with some hawkish members saying the president can act alone militarily, while others applauded him for involving Congress in the process. Ultimately, the president avoided ordering airstrikes because of a Russian brokered deal that involved removing chemical weapons from the country. The deal did not preclude any military involvement in the future (Lewis 2013).

Few would classify a presidential request for the ability to order airstrikes as an “imperial” act. Fewer would suspect the president’s actions in 2014 to be “imperial” either, especially with many hawkish members of Congress, especially among the president’s opponents, arguing that the president take a stronger stance against the new and surging threat of ISIS.

In August of 2015 President Obama decided to order airstrikes in Iraq and Syria against the terrorist group the Islamic State of Iraq and Syria (ISIS), or what the administration refers to as ISIL. The administration started the bombing campaign

without explicit approval from Congress; however, the president did eventually send a request for authority a few months later (Baker and Parker 2015). The president ultimately sent a letter to Congress in accordance with the WPR, but he noted it wasn't "possible to know the duration of these deployments and operations" (White House Letter). Congress did provide emergency funding for military operations and funding to train Syrian rebels in December 2014, however, the greater scope of the authorization was left up for debate (US Congress Approves... 2014). Some in Congress still felt that they were being shut out of the process and wanted more involvement. In fact, Senator Rand Paul wanted to reassert a strict reading of the Constitution by introducing a declaration of war against ISIS, this measure is not likely to move forward (Peralta 2014).

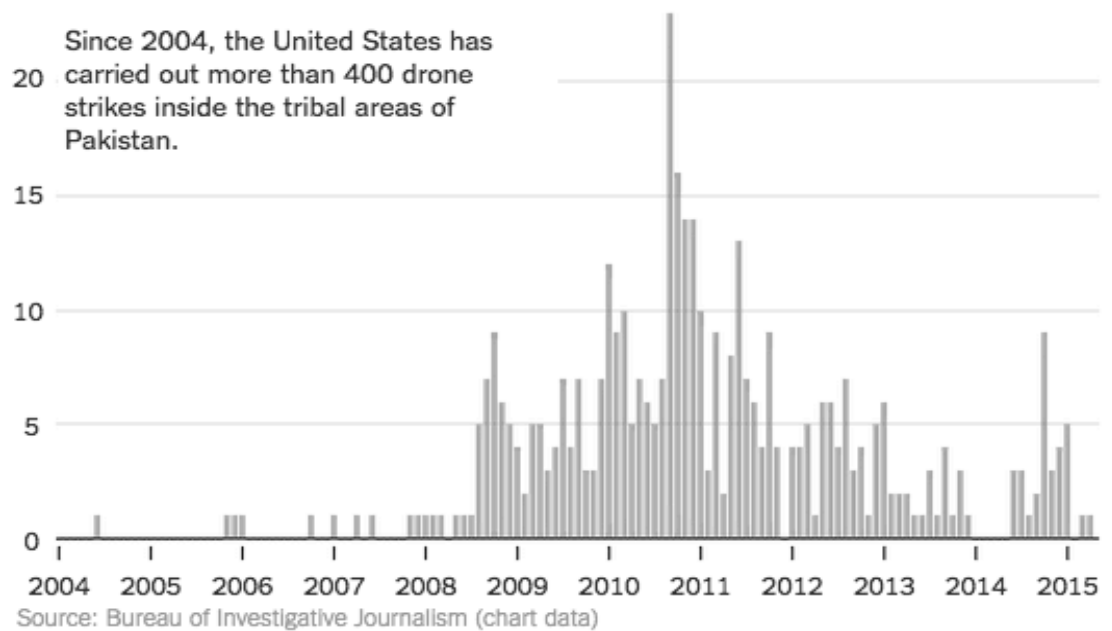
In February 2015, the Obama Administration formally requested an Authorization for Use of Military Force (AUMF) in order to continue the fight against ISIS. The measure asks Congress to "formally authorize what [the President] has been doing all along" in terms of airstrikes against ISIS. The proposal would authorize military force against ISIS as well as "associate persons or forces" while ruling out "enduring offensive ground combat operations" (Baker and Parker 2015). As of now, the president rests his authority to continue strikes on the terrorist group in absence of Congressional authority on the grounds of the 2001 AUMF. The difference between President Bush's AUMF in 2001 and Obama's requested one is that the updated AUMF would repeal a 2002 authorization for force, but it would maintain the resolution authorizing the war in Afghanistan and War on terror (Baker and Parker 2015). But, most notably, the new AUMF would have a sunset provision in that it would limit operations to three years unless Congress approved more time. The sunset

provision is unusual in that only “once since 1819 has Congress authorized force with a time limit” and that was in 1983 when Congress authorized an 18-month limit for peacekeeping operations in Lebanon (Baker and Parker 2015).

The verdict on President Obama’s use of executive power is a muddled one. In some areas he acts in a way similar to those who came before him, but his use of air and drone strikes shows a president with an expansive view of military power. The number of drone strikes has exploded in number during his presidency due to their becoming a more viable weapon during Obama’s presidency and the lack of a desire to use ground forces.

Figure 2 The number of drone strikes has increased dramatically since 2009. This chart accounts just for Pakistan, not other countries where drones have been used (Baker and Davis 2015).

### U.S. Drone Strikes in Pakistan



Overall, President Obama's unilateral military attacks pave the way into somewhat uncharted territory. His action against Libya, which stemmed from a United Nations Resolution had a similar justification to what President Truman used to send troops to Korea, albeit the attacks in Libya were much more limited in duration and scope. The self-policing of sorts in regards to asking for congressional approval for attacks in Iraq and Syria represent an attempt to depart from a decade of endless war caused by broad statutes and authorizations. However, the president's willingness to rely on those same statutes, even when their application may not be appropriate, shows that he is willing to circumvent Congress when using military force if Congress is unwilling to aid him in his efforts. Lastly, his AUMF request in 2015 leaves in place much of the same broad language from the post-September 11<sup>th</sup> AUMF that he is relying on to order these airstrikes. The precedent President Obama is setting by acting on that language would enable future presidents to more easily act unilaterally by broadening already broad language.

It is not just the unilateral action President Obama has taken that could set a dangerous precedent, it's the fact that he orders actions without troops even being in the vicinity of combat through the use of drone or air strikes. Without troops in the field there is less potential for "social backlash" that would result from the deaths of American troops, which would reduce accountability for the executive (Druck 2012, 223). In addition to the check Congress provides, the public also places a check on the executive. Druck goes on to say that as technology-driven warfare increases "fewer checks on presidential military action" will exist and there will be "more instances of unilateral presidential initiatives" (231). The effects of the new type of drone warfare

are yet to be determined as no president, besides President Obama has had a chance to use drones to a significant degree.

President Obama tried to be a transformative president when it came to the use of military powers in that he would extricate American forces from two ongoing wars and create more global peace. He inherited two, full-scale, foreign wars, both of which are winding down, but he has replaced this “heavy footprint” kind of war with a “light-footprint war characterized by small forces acting with stealth and a heavy reliance on air power, especially drones” (Goldsmith and Waxman 2015).

Former Representative Lee H. Hamilton possibly sums up the president’s powers when it comes to making war and using unilateral military action, “My view is that the president can go to war—if he wants to—and Congress cannot stop him—even if it wanted to, which it rarely, if ever, has been the case” (Hamilton 2009, 285). Thus is the case with President Obama.

## **Chapter 6**

### **Conclusion**

When it comes to evaluating President Obama's use of his executive power it is essential that he be compared to other modern presidents. There needs to be an adequate comparison because executive power is not just created overnight, instead, it is built up over decades and across multiple administrations. This build up of executive power is important in determining whether President Obama acted in an unparalleled or overreaching manner with his use of executive power, as many of his opponents claim. While in isolation, acts of unilateral executive power appear to be extraordinary, they actually aren't. For example, President Obama's use of unilateral military strikes without congressional approval have a strong basis in actions taken by Presidents Truman, Johnson, Nixon, Regan, and Clinton to name a few. They weren't ordered by pure executive fiat; rather, they were based in decades of precedent.

Without context we can never truly gain a full understanding of President Obama's use of executive power. While it may seem like he's a "tyrant, a "monarch," a "dictator," in the present he's not when compared to the likes of Richard Nixon, Harry Truman, Bill Clinton, or any other modern president. Every modern president has tried to push the envelope of executive power at some point in his presidency, but relatively minor changes don't make a president imperial nor does it make him overreaching. Without understanding the full historical context we are left misinformed, which is as bad, if not worse, than not being informed at all.

Executive orders, executive privilege, and unilateral military action cover only a few areas of executive power, but they are a good representation of a president's use of those powers. Executive orders show the lengths a president will go to in order to craft his own policy in the absence of Congress. Executive privilege shows how willing an administration is to work with Congress or remain secretive. And unilateral military action exemplifies executive power at its strongest because of the president's willingness to use force with or without Congress.

A properly informed citizenry acts as the biggest check on abuses of power, especially by the executive. Thomas Jefferson once said, "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power." We need to ensure that citizens are informed, especially when it comes to executive power. And through my examination of President Obama's executive power, it appears that his use of them is not strikingly different from presidents over the last 80 years and surely not imperial.

In terms of executive orders President Obama's use has been nominal thus far. For one, he has only ordered 205 to date, which puts him on pace to use about the same, or less than many recent presidents. But it's not the amount of orders that matters; it's the content and scope. In regards to labor and Civil Rights the president has taken action, but it's very limited, politically motivated, and the future ramifications are yet unknown. However, while those actions were relatively minimal his actions on immigration were not. The actions remain very contentious and their



legality is still up in the air. A ruling against President Obama, which is entirely possible, would be a blow towards the executive's power in immigration policy.

From a strictly numerical standpoint President Obama's sole use of executive privilege represents a departure from previous presidents. This departure shows that the president may be more willing to work with Congress in its effort to practice oversight. However, executive privilege does not tell the whole story of presidential secrecy, as there are many different ways for a president to withhold information.

For originally being averse to war, President Obama has taken a liking to unilateral military power. President Obama has brought the U.S. military into ongoing hostilities all over the world from Libya, Syria, Somalia, and Yemen. The unique and expansive view of executive power in regard to these examples is that the president conducted operations without seeking explicit authorization from Congress.

The most interesting part of Obama's executive power in terms of military is that he sometimes will claim to have authority to commence attacks without congressional approval, while at others he will ask for congressional support. This is exemplified when he presented his plan to attack Syria in 2013 after the use of chemical weapons. And more recently, in late 2014 the president launched strikes against ISIS in Iraq and Syria before Congress had a chance to authorize those attacks.

While he has helped wind down the broadly authorized wars of President George W. Bush, President Obama has paved the way for a new type of warfare in the form of drones. Even though drones were used during the Bush administration, the Obama administration has taken a liking towards them as the amount of strikes has exploded under his term. By using drone strikes, President Obama is able to initiate hostilities and accomplish counterterrorism goals without having to seek congressional

approval or acceptance of his actions. While President Obama may take care to not abuse the use of these strikes, he has left open a precedent for future presidents to possibly abuse this strategy, thus expanding executive power by creating a precedent for remote and technological warfare.

Unilateral executive action is a topic that contains areas of study that students and scholars alike have devoted and continue to devote years of study to. This thesis covers actions in three very broad, but publically notable, uses of executive power. From these three areas there can be further study and analysis about the future of executive power.

One interesting area of future study for executive power can be the executive's power when it comes to creating treaties or agreements with foreign nations. While the president represents the nation on the international scene as the "sole organ of the nation in its external relations, and its sole representative with foreign nations." He is also limited by the legislature back home. This clash of powers between the two branches is evident today in the form of the Trans-Pacific Partnership (TPP) trade agreement, which is working its way through the Senate. There is also the much more controversial nuclear deal with Iran. While President Obama and his negotiating team are at work with the Iranians many Members of Congress, particularly Senators, have insisted on being involved in the process. While the president initially rejected the idea of Congress' involvement, he later changed course due to the strong majority in the Senate. Ceding what he originally claimed to be his presidential prerogative on this nuclear deal, President Obama opens the door for future congressional involvement in international affairs (Baker 2015).

Drone strikes and remote warfare present a unique opportunity for future presidents in the realm of unilateral military action. Drones enable presidents to launch effective, yet deadly, military actions without sending American Armed Forces into danger. The strikes are also very limited in terms of duration and would likely not run afoul with the 60-day requirement under the WPR. A conflict could arise in the future if presidents continue to wage war through drones alone, as this further removes Congress from the war making process and consolidates war powers to the executive alone. Additionally, drone strikes have the potential to evolve into larger conflicts, which could put American soldiers in danger. This was one of the worries during the military action in Libya in 2011 that maintaining a no-fly zone through drones and other aircraft could eventually morph into an all out ground war.

And in terms of secrecy in the executive branch there can be further study into different methods presidents use to maintain it. For example, most recently the Obama administration has made obtaining information that should otherwise be publically available more difficult. This is in part because the administration censored or denied more Freedom of Information (FOIA) request more than ever since Obama took office and various Federal agencies have not updated FOIA request regulations (Hicks). Presidents have an arsenal of methods for preventing information from leaving the confines of the administration and President Obama has taken advantage of these.

The executive branch has not only augmented its size throughout the last 200 years, it has also augmented its powers at the expense of Congress. But there is no need to fear a president, especially President Obama, reaching a dangerous aggregation of power. Our Constitution has ample checks on the executive branch, which have been used in the past and are used today. History has shown that the

executive can be rebuffed in his quest for more power and political norms in the United States would not permit a president to overreach to a dangerous level. While President Obama has taken some overreaching actions, particularly in terms of immigration and unilateral military action, the claims that he is an imperial president, when compared to other modern presidents, fall flat.

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