

Executive Orders and Constitutional Boundaries: The Accelerating Crisis of Presidential Power

Reference Handout for West University Democratic Club

Judge Jerry Simoneaux, Harris County Probate Court No. 1

September 8, 2025

UNDERSTANDING EXECUTIVE ORDERS: FOUNDATION AND HISTORY

What Is an Executive Order?

- Presidential directives to federal agencies about implementing existing laws and policies
- Management instructions within the executive branch
- **Cannot create new law** – that power belongs exclusively to Congress
- Must operate within boundaries of existing statutes and the Constitution
- Subject to judicial review

Constitutional Authority:

- **Article II, Section 1:** "Executive Power shall be vested in a President"
- **Article II, Section 3:** "Take Care that the Laws be faithfully executed"
- No specific mention of "executive orders" in the Constitution
- Authority derived from **implied powers** – President needs tools to manage executive branch
- Tools must remain within constitutional constraints

Historical Development:

- **George Washington (1789):** First executive order establishing territorial governance procedures
- **Abraham Lincoln (1863):** Emancipation Proclamation freed enslaved people in rebelling states
- **FDR (1942):** Executive Order 9066 authorized Japanese American internment (later recognized as constitutional violation)
- **Modern average:** 35 executive orders per year
- **Key principle:** Quantity matters less than whether orders respect constitutional boundaries

Legal Limits on Executive Orders:

- **Cannot override congressional statutes** – if Congress has spoken, President must follow
- **Cannot violate constitutional rights**
- **Subject to judicial review** – courts can and do strike down unconstitutional orders

- **Must have actual legal authority** – cannot simply declare authority that doesn't exist
- **Current crisis emerges from systematic testing and ignoring of these boundaries**

KEY CRISIS STATISTICS

Litigation Explosion:

- **380+ active federal lawsuits** challenging administration actions (15% increase since July)
- **93% administration loss rate** in lower courts
- **77% Supreme Court success rate** on emergency applications
- **220+ state attorney general lawsuits** filed

Federal Workforce Impact:

- **1+ million federal employees** affected by collective bargaining elimination
- **81.8% of unionized federal workforce** stripped of protections
- **280,000+ federal employees** impacted through Schedule F/G reclassifications
- **17 inspectors general** fired without required congressional notification

Supreme Court Emergency Docket:

- **22 emergency applications** as of August 2025 (number continues growing)
- **18 emergency orders** issued related to Trump policies
- **16 decided** in the Administration's favor (77% success rate)

CONSTITUTIONAL FOUNDATIONS AT STAKE

Article II Limitations:

- Constitution requires presidents to "take care that the Laws be faithfully executed"
- Executive orders must operate within constitutional and statutory boundaries
- Cannot nullify congressional statutes or override judicial decisions

Separation of Powers Violations:

- Executive nullification of Civil Service Reform Act protections
- Circumvention of Administrative Procedure Act requirements
- Systematic override of congressional intent through reclassification

Individual Rights Under Attack:

- **Fourteenth Amendment:** Birthright citizenship order "blatantly unconstitutional" (multiple federal judges)
- **First Amendment:** Media defunding based on content, ideological compliance requirements

- **Due Process:** Mass terminations without hearings based on political loyalty

ACCELERATION TIMELINE: JULY-SEPTEMBER 2025

July 24, 2025: Military Assets for Domestic Policing

- Violates Posse Comitatus Act prohibition on military law enforcement
- DOJ directed to deploy "military and national security assets" domestically

August 29, 2025: Collective Bargaining Elimination

- NASA scientists, NOAA forecasters, patent examiners affected
- "National security work" justification legally fictional but practically effective

September 5, 2025: Unilateral Trade Authority

- Emergency tariff powers claimed under IEEPA
- Routine policy matters declared "emergencies"

September 5, 2025: Department of Defense Renamed "Department of War"

- Executive order creates "secondary title," immediate implementation
- Pentagon signage, website (defense.gov → war.gov) changed within hours
- Historical significance: War Department 1789-1949, renamed by Congress in 1947-1949
- Trump uncertain if congressional approval required: "I'm not sure they have to"
- Demonstrates pattern: implement first, determine constitutional authority later

PROJECT 2025 IMPLEMENTATION REALITY

Blueprint Adoption:

- **70% of recommendations implemented** (often exceeding original scope)
- Language matching between Project 2025 and executive orders nearly identical
- Contradicts campaign disavowals of the document

Federal Workforce Restructuring:

- Project 2025 target: 50,000 workers
- **Actual impact: 280,000+ employees**
- Education Department: 50% workforce reduction
- HHS: 20,000 positions eliminated

Environmental Deregulation:

- **37% of U.S. coal fleet** granted Mercury and Air Toxics Standards exemptions
- Presidential exemptions used instead of standard regulatory processes

SUPREME COURT ENABLEMENT PATTERN

Trump v. CASA Inc. (2025):

- **6-3 majority** eliminated nationwide injunctions
- Justice Barrett: district courts "likely exceed equitable authority"
- **Justice Jackson dissent:** "existential threat to the rule of law"

Federal Workforce Decisions:

- **8-1 decision** (only Jackson dissenting) allowed mass terminations
- Reinforced presidential authority without congressional approval
- Significant victory for Unitary Executive Theory

Emergency Docket Abuse:

- Traditional emergency relief: rare, exceptional circumstances
- **Current pattern:** routine administrative tool to bypass constitutional review
- Creates constitutional paradox: same orders "blatantly unconstitutional" in lower courts receive Supreme Court approval

FEDERAL JUDICIARY IN CRISIS

Unprecedented Judicial Criticism:

- **NBC News survey:** 10 of 12 federal judges (including Trump appointees) believe Supreme Court failing to explain emergency rulings
- Lower courts operating "in a bit of a vacuum"
- **400+ threats** investigated by U.S. Marshals Service in 2025

Direct Quotes from Federal Judges:

- Judge with death threats: "If major efforts are not made to address the situation, somebody is going to die"
- Reagan-appointed judge: "It is inexcusable. They don't have our backs"
- Another judge: "If the entire foundation falls out from under your house, it does no good to have a really well-insulated attic. It sure would be nice if someone had our backs"

Judge Burroughs vs. Justice Gorsuch:

- Judge Allison Burroughs directly challenged Justice Gorsuch's claim that lower courts were "defying" the Supreme Court
- Called criticism "unhelpful and unnecessary" when courts must grapple with Supreme Court guidance that "appears to set that precedent aside without much explanation or consensus"

- Represents unprecedented breakdown in judicial comity

STATE RESISTANCE EFFORTS

California Leading Opposition:

- 37 lawsuits filed
- \$168 billion in federal funding protected from administration threats

Multi-State Coordination:

- 23 states filed briefs supporting federal unions
- 19 states challenged election integrity order
- Unprecedented subnational resistance to federal executive actions

Legal Costs and Activity:

- ACLU First Term (2017-2021): 434 legal actions
- ACLU Second Term: 107 actions in first 100 days (accelerated pace)
- States functioning as democracy's backup system

CONSTITUTIONAL PRINCIPLES UNDER THREAT

Youngstown Framework (1952):

- Presidential power fluctuates based on congressional cooperation/opposition
- Maximum authority: acting with Congress
- Uncertain authority: congressional silence ("twilight zone")
- Minimal authority: acting against congressional will

Unitary Executive Theory:

- Moderate version: Presidential oversight of executive decisions
- Strong version: Presidential substitution of judgment for any official
- Removal-focused version: Unlimited firing power
- Historical claims challenged: "Founding generation never understood unitary executive to be part of Constitution" (Christine Kexel Chabot)

JUDICIAL INDEPENDENCE: LAST CONSTITUTIONAL CHECK

Cross-Ideological Judicial Consensus:

- Republican and Democratic appointees finding systematic constitutional problems
- Focus on textual constitutional constraints over executive claims
- Strict enforcement of Administrative Procedure Act requirements

Innovation Under Constraints:

- Class action certifications replacing nationwide injunctions
- Coordinated preliminary injunctions across jurisdictions
- Rights protection through heightened scrutiny of First Amendment/due process violations

Citizens' Constitutional Duty:

- Support judicial independence under political attack
- Understand judicial review as constitutional obligation, not partisan obstruction
- Recognize courts' institutional limitations require civic engagement

THE STAKES: CONSTITUTIONAL MOMENT

This represents a **constitutional moment** requiring active resolution---not passive observation. Previous generations faced similar tests during the Civil War, Great Depression, and World War II.

The Choice:

- Balanced powers vs. executive dominance
- Constitutional limits vs. unlimited authority
- Democratic governance vs. imperial presidency

What's Required:

- **Courts:** Constitutional compliance enforcement despite political pressure
- **Congress:** Oversight regardless of partisan advantage
- **Citizens:** Informed engagement and electoral accountability

The Constitution requires each generation's active defense. Our response determines what institutional arrangements we leave to future generations.

This analysis reflects judicial examination of constitutional law principles and does not advocate for any political position. The views expressed are those of the author in his capacity as a legal scholar and do not represent official positions of any court.