

The Constitution, Executive Power, and War | Evaluating the constitutionality of presidential actions in the name of national defense

By Emma Humphries

The executive shall never exercise the legislative and judicial powers, or either of them, to the end that it may be a government of laws and not of men.

John Adams

I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare; I acted for the common well being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition.

Theodore Roosevelt

I'm the commander -- see, I don't need to explain -- I do not need to explain why I say things. That's the interesting thing about being the president. Maybe somebody needs to explain to me why they say something, but I don't feel like I owe anybody an explanation.

George W. Bush

- **Recommended Grade Level/Ability Level**
 - Advanced high school American history or American government
- **Recommended Lesson Length**
 - Two full 50-minute class periods
- **Central Engagement Question**
 - To what extent can the President expand his powers during wartime and still remain within the bounds of the Constitution?
- **Overview**
 - This lesson explores the complex intersections of the Constitution, executive power, and presidential actions. These actions occurred during wartime, involving military measures, and/or using government military and/or intelligence agencies. Students are tasked with evaluating these actions alongside Constitutional provisions.
- **Materials**
 - For each student
 - A copy of the Beeman article (see below)
 - For each 3-student group:
 - a set of markers
 - a set of “Presidential Action Slips” (cut and placed in an envelope)
 - poster board or butcher paper
 - markers
- **Objectives**
 - The student will identify Constitutional provisions dealing with wartime powers of the Executive and Legislative branches.
 - The student will analyze the intent of the framers in regards to the above-mentioned powers.
 - The student will evaluate executive actions on the basis of constitutionality and construct a spectrum to illustrate their findings.
- **Standards**
 - United States History Content Standard | [Era 3, Standard 3A](#) | Analyze the fundamental ideas behind the distribution of powers and the system of checks and balances established by the Constitution.
 - Historical Thinking Standards | [3. Historical Analysis and Interpretation](#) | Examine the influence of ideas
- **Instructional Activities**
 - **Pre-Learning | Founders’ Intent**
 - Review and discuss Article I and II of the Constitution, specifically in regards to wartime powers.

- Read *The Founding Fathers and Executive Power*, by Richard Beeman (this could also be a homework assignment for the night before)¹.
 - Discuss the article with specific attention to the ambiguities surrounding executive power and to Hamilton's ideas being of the exception.
- **Bell-Ringer | Unlimited power?**
 - Have the following student on the front board for students to consider: Should executive power be limited in wartime or in the face of national security threats?
- **Main Activity | Day 1-2 | The Past**
 - Place students into groups of three.
 - Distribute an envelope to each group. Envelopes will contain small cutouts briefly describing executive actions ranging from FDR to Clinton. All actions will either take place during wartime, involve military measures, or somehow have used government military or intelligence agencies.
 - Each group will have to place the actions on a spectrum ranging from "legitimate executive use of power" to "abuse of executive power." Depending on breadth of their U.S. history, students may or may not know which presidents carried out which actions.
 - Allow groups to share their spectrums with the rest of the class. This will naturally lead to discussion of what constitutes an appropriate use of presidential power, specifically in regards to the Constitution.
 - During discussion, students will most likely connect some of the actions to its respective presidents. Reveal the remaining presidents and the actions that they took.
 - Lastly, have the class rank the presidents from most to least imperial using pictures of the presidents on the front board.
- **Main Activity | Day 2 | The Present**
 - Place students in groups of three different from the previous day's lesson.
 - Assign each group a different extension of executive power made during one of the two previous administrations (NSA domestic wiretapping, labeling enemy combatants, signing statements, extraordinary rendition, drone strikes, etc.)
 - Groups must read a small collection of newspaper articles about the action, discuss the action, and then take a stand as to the constitutionality of the action.
 - Then explain to students that they must now take the opposite stand. They must briefly explain their action to the class and then argue for or against it (opposite to what they believe). The class will have the opportunity to make pro/con statements during this time.
- **Assessment**
 - The lesson has two distinct parts – one historical, one current. Ask students to think of what they have done over the past two days in each of those contexts and to write a 500-word response to the following questions.
 - Do presidents have the constitutional rights to assume more power during wartime?

¹ Beeman, R. R. (2006). *The Founding Fathers and Executive Power*. *Chronicle of Higher Education*, 52(28).

- To what extent should Congress allow the president to usurp some of its powers?
- Which president of the 20th and 21st Centuries do you think has taken the most liberty with his executive actions during wartime or in the name of national security?

- **Long-Term Extension Option**

- Individual student research: Ask students to write a 1,000-word research paper discussing the various ways that Congress has tried to limit or reclaim executive/war-making powers from the executive branch.

OR

- Progressive or Conservative spot ad: Instruct students to create a 45-second to one-minute spot ad either praising a president for his strong leadership in protecting the country from foreign threats or blasting the president for trampling on civil liberties in the name of national security.

- **Author Contact**

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PRESIDENTIAL ACTION SLIPS

Issued an executive order calling for the internment of over 120,000 Japanese Americans.

Japanese American Internment was the forced removal of approximately 120,000 Japanese and Japanese Americans (62 percent of whom were United States citizens) from the West Coast of the United States. While approximately 10,000 were able to relocate to other parts of the country, the remainder – roughly 110,000 men, women and children – were sent to hastily constructed camps called "War Relocation Centers" in remote portions of the nation's interior. This president authorized the internment with Executive Order 9066, which allowed local military commanders to designate "military areas" as "exclusion zones", from which "any or all persons may be excluded." This power was used to declare that all people of Japanese ancestry were excluded from the entire Pacific coast, including all of California and most of Oregon and Washington, except for those in internment camps.

During wartime, used an executive order to try to take over the steel industry to prevent a strike.

The government had imposed controls of raw materials, production, shipping, credit, wages, and prices. When the wage-price controls created a collective-bargaining impasse in the steel industry, threatening a nationwide strike, this president ordered the Secretary of Commerce to seize and operate most of the country's steel mills for the ostensible purpose of maintaining production of critical munitions.

Concealed the CIA operations he was mounting against governments around the world.

One such example took place in Guatemala. In Guatemala, President Jacobo Arbenz suddenly legalized the organization of the Communist party and the importing of arms from then Soviet-satellite state of Czechoslovakia. This convinced major policy makers in the White House and CIA to try for Arbenz's forced removal, although his term was to end naturally in two years. This led to a CIA-orchestrated coup, known as Operation PBSUCCESS, which saw Arbenz toppled and forced into exile by Colonel Carlos Castillo Armas.

Secretly authorized a CIA-conceived plot to overthrow Cuban leader Fidel Castro.

Over a thousand Cuban exiles, trained by the U.S. Central Intelligence Agency, tried to land in Cuba to overthrow the communist government of Fidel Castro. It was feared that a communist country so close to the mainland United States posed a severe threat to American security as it could be used by the Soviet Union as a launch pad for attacks.

Used a twisted public presentation of the Gulf of Tonkin incident to justify the escalation of the Vietnam War.

The Gulf of Tonkin incident involved two alleged attacks on American ships in the waters off the coast of Vietnam. This president may have exaggerated the extent of the attacks to gain support for widening the war. In response to the incident, the Senate voted 88 to 2 and the House voted 416 to 0 to allow the president significant latitude in the use of American forces in Vietnam. No formal declaration of war was ever made concerning Vietnam, but the Gulf of Tonkin Resolution became the executive branch's "blank check" to expand the conflict.

Sent U.S. troops to Yugoslavia to stop the mass killing of ethnic Albanians by Serbians.

This president justified his decision to use force with two arguments: that NATO bombing was needed to prevent a Serbian military offensive in Kosovo with attendant "ethnic cleansing," and that vigorous action was essential to prevent the Kosovo conflict from spilling over into neighboring states, thereby destabilizing the southern Balkans. Administration leaders also hoped that NATO pressure would undermine the government's political power and embolden the democratic opposition in Serbia.

Openly used executive branch law enforcement agencies (FBI, CIA, IRS) to attack his political opponents, and to actively cover up his supporters' criminal activities. Claimed that the activities were done in the name of national security and argued for executive privilege to keep information about the activities secret. To uncover the sources of leaked news about such matters as the bombing of Cambodia, this president authorized, without court approval, the wiretapping of the phones of government officials and newspapermen. But some of the men whose phones were wiretapped had no involvement with security matters, and taps on two men continued after they had joined the staff of a U.S. Senator who was seeking the Democratic presidential nomination. Also, this president created the Special Investigations Unit—known as the "plumbers"—to plug news leaks. After they broke into the office of a suspected "leaker" this president and his top aides agreed to say that the break-in had been carried out for national-security reasons.

Organized a secret military expedition to rescue U.S. hostages in Iran. The Iran hostage crisis was a diplomatic crisis. A group of militant university students, who were supported by the new Islamic regime, held 63 diplomats and three additional U.S. citizens hostage inside the American diplomatic mission in Tehran, Iran. The captors released several captives, but 52 hostages remained until the conclusion of the crisis. This president approved a secret rescue mission, Operation Eagle Claw. As the first part of the operation, a number of C-130 transport airplanes met up with eight RH-53 helicopters at an airstrip in the Great Salt Desert of Eastern Iran, near Tabas. Two helicopters broke down in a sandstorm and a third one was damaged on landing. The mission was aborted, but as the aircraft took off again one helicopter clipped a C-130 and crashed, killing eight U.S. servicemen and injuring several more. The prestige of the Iranian leadership skyrocketed as they credited divine intervention on behalf of Islam for the mission's failure.

Bombed Libya without asking Congress. The bombing raid was the conclusion of a period of escalating reciprocal actions by the United States and Libya. After years of occasional skirmishes with Libya over Libyan territorial claims to the Gulf of Sidra and years of vulnerability to Libyan-supported terrorism, the United States decided to push the issue, contemplating a military attack in order to send a message about support for international terrorism. The United States, asserting the 12 nautical mile limit to territorial waters recognized by the international community, sent a carrier task force to the region. Libya responded with aggressive counter-maneuvers that led to the destruction of Libyan radar systems and missile attack boats. Less than two weeks later, a bomb exploded in a West Berlin disco, La Belle, killing two American servicemen and a Turkish woman and wounding 200 others. This president justified the bombing of Libya by claiming he had irrefutable evidence that Libya was responsible for the West Berlin nightclub bombing.

After the Iraqi invasion of Kuwait, ordered a large force to deter further aggression. This president claimed that he had authority as president to launch the war without congressional approval. He did go to the UN for backing for the war. The House reacted by passing a resolution stating that the president must seek approval from Congress before launching a war in the Gulf unless American lives were in imminent danger. The law ended up in federal court. The court ruled that it couldn't decide such a political question. This president later asked Congress for legislation signifying its support for his policy, though he continued to maintain that he did not need it.
