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How the Courts Transformed Executive Authority in Foreign Affairs

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President Donald Trump, with the backing of the United States Supreme Court, has sole authority to determine the direction of the country's foreign affairs. Presidents from Abraham Lincoln to Donald Trump have all asserted their authority to take one-sided action, and contemporary presidents since Ronald Reagan have all ordered American forces into combat by calling on their unbridled power to act in the interest of national security. President Bill Clinton repeatedly ordered the bombing of other nations without input or approval from Congress. During the War on Terror, George W. Bush claimed his actions were unreviewable. President Barack Obama similarly relegated Congress to the sidelines when he signed the Iranian Nuclear deal, waged war with Yemen, and executed orders of drone warfare.

Even when Congress attempts to force presidents to cooperate with the legislative branch – for example, in the War Powers Act of 1973 and the Intelligence Oversight Act 1980 – the White House works hard to break the legal shackles that inhibit presidential power to wage war. In fact, by the end of the Clinton administration, it was not clear what war powers, if any, remained with Congress. This trend continues with President Donald Trump, who takes shelter in the shadows cast by past presidential claims of executive prerogatives. Trump insists that the Constitution confers on him, and him alone, unbounded power to manage the nation's foreign affairs.

The Legal Backdrop to the Expansion of Executive Power

Whether Congress has been outmaneuvered, bullied, or simply chosen to ignore presidential assertions, the outsized role of the president has become entrenched. Why has this happened? What changed to let contemporary presidents regard foreign policy as their exclusive domain? How have executives marshalled so much power that they can say they are beyond reproach?

In principle, the U.S. Constitution sets up three distinct branches – the legislative, the executive, and the judicial – and recognizes the breadth and bounds of each branch's power, allowing each the authority to check the actions of the other two branches. In practice, however, the limits of each branch's powers have turned out to be vague and ambiguous, and the methods of exercising and checking authority have proven, at times, insufficient, especially in foreign policy. My research highlights the importance of the Supreme Court in redefining the scope of presidential powers vis-à-vis Congress. In recent times, the Court has transformed power relations, reshaped politics, and redirected history.

Prior to 1936, the Supreme Court decided foreign affairs cases in favor of a strong legislature – treated as a deliberative body that could collectively make decisions. Judicial support for Congress often undermined presidents' claims to solo decision-making authority. Then, in 1936, the Court decided a case that placed

executive action in foreign affairs front and center. In *United States* v. *Curtiss-Wright Export Co*., the Court reasons the executive has "plenary," or full, powers. These powers were deemed not to be contingent on congressional delegation. This assertion was a sharp departure from the Court's earlier rulings and the decision has changed the course of the country's constitutional and political development. The doctrine established in *Curtiss-Wright* makes it possible for presidents to claim constitutional support for their authority to act alone in dictating foreign policy for the country.

Diminishing Legislative Power

The Court's decision weakened republican ideals of shared power and shifted away from the jurisprudence of the Court prior to 1936. Since then, the decision has helped executives assert pragmatic reasons to take speedy, one-sided decisions to defend the nation. As the United States continues to face foreign challenges, the Court has largely backed the idea that the executive should do the lion's share of decision-making over the ever-expanding scope of the nation's foreign policy.

In detail, the Court has given the executive one-sided power over foreign travel, recognition of other states, detainment of enemy combatants, and many decisions related to waging war. This reframing situates the Court as the final authority in institutionally entrenching the rise of presidential power in foreign affairs. Over recent decades, the Supreme Court has continued this trend, setting it out as the rule of law for future executives.

Ways Forward

One-sided presidential sway in matters of war and foreign relations should be deeply concerning. Many constitutional scholars argue that the president does not have the constitutional authority to determine the scope and breadth of the nation's foreign affairs. Skeptics argue that the Constitution's framers emphasized the dangers of concentrating foreign affairs in the hands of the Executive. Just freed from monarchy, many U.S. framers feared any situation in which the nation could be subject to policies set by the impulses of one man.

To deter the abuse of power, the framers created a system that fostered discussion and debate about foreign policy, a system meant to prevent exploitation. Early judicial decisions favored a strong legislature and regarded the president's involvement secondary to Congress. Prior to the game-changing 1936 *Curtiss-Wright decision*, the Supreme Court adhered to the original constitutional blueprint.

The Constitution's framers were right to be afraid of outsized executive power. They were right that concentrating power in the hands of a single individual could be devastating to the country's foreign policy and the nation's institutions. By now, their fears have been realized. The powers now claimed by and for the U.S. presidency resemble those of the English Monarchy the framers aimed to escape.

Citizens and legislators need to reevaluate the division of power between the legislature and the president. That balance should not be left in the hands of the nine unelected judges that sit on the Supreme Court. If, in the end, the people decide to leave the lion's share of power over foreign affairs with the executive, then the Constitution should be amended. Anything short of such an explicit revision of the founders' blueprint for a republic, not a monarchy, means that there has been an unconstitutional redelegation of power in the United States.

Read more at Kimberley L. Fletcher, *The Collision of Political and Legal Time: Foreign Affairs and the Supreme Court's Transformation of Executive Authority* (Temple University Press, 2018).