

Is it Finally a Convenient Time to Rein in Executive Power?

According to the polls, the overarching driving force behind Trump's win was anger toward "elites." Donald Trump's election is a tremendous challenge for freedom. But like most challenges, it's also an opportunity. We may have never had this much bipartisan, cross-ideological, popular support for wresting power away from government.

As Jeffrey Tucker [put it](#), "Everyone underestimated the vulnerability of the status quo." The existing power structures are weak. It's time to hit them with everything we've got.

In case you need a refresher on how powerful our government has become, Donald Trump now commands:

- A nuclear arsenal capable of destroying planet Earth
- Human history's most expensive military
- An unlimited number of simultaneous secret wars
- The power to [imprison without due process](#)
- Unilateral [assassination power](#) over US citizens
- Legalized torture
- Police departments armed with combat weaponry who are unaccountable to the courts
- The largest prison population in the developed world
- A vast and unaccountable domestic surveillance apparatus

Somehow the American people allowed the President of the United States to accrue the power to unilaterally assassinate American citizens abroad and then elected Donald Trump to that role. Perhaps now is as good a time as any to re-evaluate the powers accrued to the executive branch.

What We've Lost

In his second term, when President Obama boasted: "I've got a pen and a phone," his progressive supporters cheered his get-things-done attitude. Voters of both major parties tend to like Presidents who promise to take command.

Our nation's Framers assumed the three branches of government would remain co-equal. The Framers understood this strongman-loving, authoritarian impulse. Which is why they entrusted the legislative branch with the majority of decision-making power, including the responsibility to elect the President.

Over the last 30 years, we've watched Congress cede this responsibility to the executive. Republican and Democrat Presidents have expanded the role of government even during divided governments.

"The United States – particularly over the past decade – has witnessed a legislature unable to muster the political will necessary to adequately oversee, let alone check, the executive branch's growing power," [according to](#) Glenn Sulmasy from a 2008 University of Pennsylvania law review article.

Bruce Fein, former Associate Deputy Attorney General under President Reagan and former adviser to Ron Paul's 2012 presidential campaign, [marks](#) World War II as the beginning of the end of Congressional power relative to the Executive.

"Our nation's Framers got a lot right," [wrote](#) Dana Nelson, Gertrude Conaway Vanderbilt chair of English and American studies at Vanderbilt University. "But they got something major wrong: they assumed that the three branches of our government would remain co-equal, maintaining the Constitution's delicate balance. Over time, the executive has become the dominant branch. Presidential government replaced congressional government over the course of the 20th century."

Fein lists examples of executive overreach including:

- President Truman's undeclared war against North Korea
- President Eisenhower's executive agreements to defend Spain
- President Johnson's Gulf of Tonkin Resolution regarding Vietnam

Glenn Greenwald [writes](#) that the executive has steadily expanded government powers for the last 60 years. The endless war on terror has added fuel to that fire for 15 years. "Both political parties have joined to construct a frightening and unprecedentedly invasive and destructive system of authoritarian power, accompanied by the unbridled authority vested in the executive branch to use it."

Why Congress Cannot Be Trusted

The problem is that Congress doesn't actually want to check executive power. There's nothing for them to gain and everything to lose.

The three major barriers to getting Congress to do their jobs are [rational ignorance](#), the [revolving door](#), and popular support.

Popular support is key here because it's the only tool we have. Inaction is rational when the stakes and the likelihood of change are low. That's not the world we're living in right now.

Congress has no incentive to reign in the executive if they feel that people will see it as them being "soft on terror" or "weak on defense." That's part of why Congress passed the USA Patriot Act nearly unanimously, and why Congress supported the Foreign Intelligence Surveillance Act ("FISA") and Authorization for the Use of Military Force.

Congress doesn't actually want to check executive power. There's nothing for them to gain and everything to lose. Marco Rubio [remarked](#) in late December 2015 of the USA Freedom Act,

which reformed the government's bulk collection of telecom data: "If ISIS had lobbyists in Washington, they would have spent millions to support the anti-intelligence law."

Sulmasy himself articulates the logic behind this thinking. He derisively describes legislative oversight as too slow "when fighting a shadowy enemy like al Qaeda." Threats from non-state actors require, in his mind, "dispatch and rapid response."

In theory, that makes sense. But in reality, fighting myriad shadowy non-state forces have mostly served to make unilateral executive military action abroad itself pretty shadowy. It's not just that Congress is too slow, but also that the "slow and deliberative institution of Congress" is "prone to informational leaks."

There's little evidence that delegating power to the executive has made the US any safer. Domestic terror attacks continue to happen despite mass surveillance and secret watch lists. But it's extremely clear that delegating decisions to the executive during a period of constant undeclared war has made US military action far less transparent and accountable.

For example, we know President Obama has unilaterally authorized the assassination of American citizens abroad. We do know that he lied about doing it. We do not know how many or why. President Obama has unilaterally denied the writ of habeas corpus to detainees not accused of a crime. He has unilaterally commenced war.

There will always be a reason to excuse endless runs around the Constitution, whether it's Obama's unilateral action in the DACA and DAPA immigration cases or deciding whether the Senate was in session in order to push his NLRB and CFPB nominees in against Congress' wishes.

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This article was originally published on FEE.org. Read the [original article](#).

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