Winter 2010

A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role

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A CRITICAL CONSIDERATION OF EXECUTIVE ORDERS: GLIMMERINGS OF AUTOPOIESIS IN THE EXECUTIVE ROLE

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INTRODUCTION

William G. Howell described executive power as "inversely proportional to legislative strength."[1] If Howell's statement adequately captured the full function of executive power, this would be a brief article. However, the evolution of executive power in United States governance contributes enough additional detail to render this statement a poor approximation of the material necessary for even a rudimentary discussion. The United States Constitution is a parsimonious document, meant to retain the dynamic processes of the three branches of government within their respective spheres and overarching principles, beyond which it offers the latitude necessary for the developing nation to adapt to future contingencies. The Congress and the President are the governing institutions of two of those branches, to which agility is essential as a matter of survival. The most agile tool that the President has is the executive order. There is no statutory authority for the federal executive order or any other source that describes its legal effect, as such, there is no formal definition.[2] Though there is no formal definition, it can be generally said that executive orders are "intended to direct or instruct the actions of executive agencies or government officials, or to set policies for the executive branch to follow."[3] The discussion of the executive order that follows is a starting point from which to highlight this tool of executive power, beginning with the ratification of the United States Constitution in 1788.

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† The author wishes to express deep appreciation to his wife, Elizabeth Lunsford Duncan (J.D., Howard University School of Law; B.A., Fisk University), who has served as Majority Council and General Counsel for two committees of the U.S. Congress and provided both encouragement and valuable insights and editorial suggestions. In addition, recognition rightfully extends to Mr. James Haggard, for his excellent research assistance, and to David H. Abrams, D.B.A., J.D., and Karen M. Gingold, J.D., M.L.S. for their superb editorial assistance.

1. WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 101 (2003).

2. WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW 65 (3d ed. 2009).

3. BLACK'S LAW DICTIONARY 651 (9th ed. 2009). See *infra* note 19 and THE NATIONAL ARCHIVES, http://www.archives.gov/federal-register/executive-orders/about.html (last visited Feb. 4, 2010) for other possible non-statutory definitions.

The endurance of the nation is the product of the goals of its founders, which sought to establish a lasting democratic government.[4] The doctrine of the separation of powers seeks to obstruct the federal government's monopolization of power against the constituent states.[5] It is this principle that divides power among the legislative, executive, and judicial branches of government.[6] The Constitution vests all lawmaking power in a Congress composed of an upper and lower chamber, called the Senate and House of Representatives, respectively.[7] The Constitution thus assigns to the Congress the exclusive role of drafting legislation consistent with essential and proper federal governance.[8] The Constitution further assigns to the President the role of realizing the objectives of congressional legislation by various means of enforcement.[9] Thus, the President's duty includes the conscientious interpretation of congressional legislation to bring about its intended goals through the judicious use of coercive power within the constraints of the Constitution.[10] Lastly, the judicial branch reviews the constitutionality of congressional legislation with respect to the total body of prior legislation, and this completes the intended system of checks and balances.[11] In principle, the three separate branches of government reside in separate spheres.

On the challenge of the separation of powers, future President James Madison explained that it is essential to separate legislative and executive

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4. Harold Norris, *Law: The Language of Liberty*, 68 A.B.A. J. 816, 816 (1982). The Founding Fathers sought to balance the provision of power with limiting principles in establishing the structure of democratic governance of the United States. They understood the necessity for power in proportion to its necessary purpose and sought to create a government that would avoid the abuse of power without undermining national priorities.

5. Thomas J. Cleary, *A Wolf in Sheep's Clothing: The Unilateral Executive and the Separation of Powers*, 6 PIERCE L. REV. 265, 277 (2007) (explaining that this principle aims "at preventing the consolidation of government power").

6. *Id.* at 265–66. "The Constitutional Convention of 1787 is supposed to have created a government of 'separate powers.' It did nothing of the sort. Rather, it created a government of separated institutions *sharing* powers." (quoting RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 29 (Free Press 1990) (1960) (originally published as PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP)) (emphasis in original).

7. U.S. CONST. art. I, § 1, cl. 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

8. U.S. CONST. art. I, § 8, cl. 1, 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the . . . Powers vested by this Constitution in the Government of the United States . . . .").

9. U.S. CONST. art. II, § 1, cl. 1 (vesting executive power "in a President of the United States of America").

10. U.S. CONST. art. II, § 3 (instructing that the President "take Care" to see to the faithful execution of "the Laws").

11. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

power to preserve liberty.[12] The Constitution lays both rights and limitations on each branch of government to maintain a mutual system of checks and balances, but it falls short of specifying how to enforce legislation *per se*, beyond granting the President the executive power. As the President began to issue orders to aid in executing the laws, the executive order emerged as the appropriate administrative tool.[13] The executive order is an instrument available to the President with which to carry out the functions of the executive office by directing the fulfillment of a particular program. The executive order is also used to carry out functions that the President may otherwise be unable to pursue efficiently by way of Congress.[14] The executive order is unilateral in nature, as its implementation requires no review outside the executive branch.[15] Yet it must by nature have the force of law, as opposed to the force of exhortation, for any alternative understanding would deprive the executive branch of its essential executive power.[16] Lastly, the executive order allows the President to act unilaterally to undertake specific actions within the executive role.[17]

Generally, executive orders fall into two categories, namely, "documents with written instructions . . . to executive branch officials," and "written statements that communicate a presidential decision . . . ."[18] By definition, executive orders require agents within the executive branch of the government to take or refrain from taking certain types of action.[19] Executive orders constitute presidential directives, directing and authorizing

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12. "[T]here can be no liberty, where the Legislative and Executive powers are united in the same person, or body of magistrates . . . ." THE FEDERALIST NO. 47, at 268 (James Madison) (E.H. Scott ed., 1894) (quoting CHARLES LOUIS DE SECONDAT MONTESQUIEU, THE SPIRIT OF LAWS, Book XI, chap. 6 (1750)). Elsewhere the Federalist also discusses combining all three branches.

13. Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 269–70 (2001) (explaining that the Constitution gives no express authority for the President to issue executive orders *per se*).

14. Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 452 (1999).

15. *Id.* at 452 (stating that "executive orders are a unilateral presidential tool").

16. *But see* 91 C.J.S. *United States* § 48 (2010) ("An executive order, promulgated by the President *pursuant to authority delegated to him or her by Congress*, has the effect of a statute and is a part of the law of the land, and, hence, it is a source of public policy.") (emphasis added).

17. Steven Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 659 (1987).

18. Gaziano, *supra* note 13, at 288.

19. Executive orders require the "[o]fficers of the executive branch . . . to take an action, stop a certain type of activity, alter policy, change management practices, or accept a delegation of authority under which they will henceforth be responsible for the implementation of law." PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION 16 (2002). Another use of the executive order has been the issuance of rewards for criminals, such as the last executive order issued by President Lincoln, which established a $1,000 reward for the capture and the conviction of anyone who had crossed U.S. borders and committed capital crimes against U.S. citizens or their property. Exec. Order No. 2, 13 Stat. 776 (1866).

executive agencies to particular actions.[20] Typically, they seek to invoke compliance in executing laws passed by Congress.[21]

Executive orders can be used to control the operation of executive agencies through guidance for rulemaking. President Reagan was the first President to create a modern process for rulemaking.[22] The purpose of Executive Order 12,291 was to require proposed and final rules from executive agencies to be submitted to the Office of Information and Regulatory Affairs (OIRA), a subdivision of the Office of Management and Budget, for review to ensure that they complied with the President's economic and ideological policies.[23] Since President Reagan, each President has nuanced this order.[24]

As time progressed, and various political doctrines gained or lost popularity, the requirements for what rules were to be submitted oscillated between relaxed and stringent. Setting aside what rules are to be submitted, there has been a nonpartisan trend toward a more transparent process for rules review. Under Presidents George W. Bush and William J. Clinton, the rulemaking process has been extended to allow previously unavailable draft communications between the agency proposing a rule and OIRA to be made available to the public.[25]

Regardless of how tightly the various rules developed by executive agencies are reviewed, the President always maintains some sort of control and monitoring of how these agencies perform their function.[26]

While executive orders primarily address executive departments, they often affect private individuals indirectly.[27] Different types of executive orders allow the President to undertake different actions according to their respective formats, including proclamations, presidential memoranda, directives, and signing statements.[28]

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20. KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 34 (2001).

21. COOPER, *supra* note 19, at 21, 26–27.

22. *See id.* at 31 (noting how President Reagan gave the Office of Management and Budget the power to "interdict agency rulemaking efforts and to maintain ongoing control over their operations" by enacting Executive Order 12,291) (citation omitted).

23. *Id.*

24. *Id.* at 31–32.

25. *Office of Information and Regulatory Affairs (OIRA) Q&A's*, OFFICE OF MGMT. & BUDGET (Nov. 2009), http://www.whitehouse.gov/omb/OIRA_QsandAs.

26. COOPER, *supra* note 19, at 29.

27. MAYER, *supra* note 20, at 35.

28. FREDERICK F. BLACHLY & MIRIAM E. OATMAN, FEDERAL REGULATORY ACTION AND CONTROL 76 (1940) ("Executive orders have a wide scope, ranging from the authorization of the appointment of a charwoman in a local post office (No. 6420) to prescribing rules and regulations under the Trading-with-the Enemy Act (No. 2796)." (quoting L. F. SCHMECKEBIER, GOVERNMENT PUBLICATIONS AND THEIR USE 322 (1939))).

When the President issues an executive order to implement a statute, the order serves as an ancillary act of legislation and presents a federal question when controversies arise in relation to the order.[29] The troubling aspect of executive orders is that they bypass traditional administrative law processes, which otherwise would provide for openness, discussion, and judicial review.[30] In fact, executive orders commonly bypass avenues of review. The courts generally approve such action as long as it is possible to trace the order to a grant of power arising from the Constitution or congressional mandate. Strictly speaking, no executive order issued in the absence of statutory authority, which confers power on the President for implementation on the legislative model, is construable as a law of the United States.[31]

However, the courts have overturned only two executive orders since 1789.[32] This fact illustrates the deference granted to the executive branch, and by implication the President. The first instance involved President Harry S. Truman. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court overturned the President's order to seize steel mills.[33] The President had issued this order to prevent a work stoppage during wartime. The second instance involved President Clinton. In *Chamber of Commerce v. Reich*, the D.C. Circuit Court of Appeals overturned the President's order to withhold government contracts from firms that hired strikebreakers to permanently replace striking employees.[34] This case involved the Federal Property and Administrative Services Act (FPASA) and the National Labor Relations Act (NLRA).[35] In both of these cases, as the discussions to follow will indicate, the President had proposed to act in stark dissonance from the intent of Congress, once by virtue of prior deliberations of Congress, and the other by virtue of explicit prior statutes.

The President has three sources of authority from which to draw to issue executive orders, namely, constitutional, statutory, and inherent. The inherent authority is the most controversial and contested of these, as it

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29. *See, e.g.*, Farmer v. Phila. Elec. Co., 329 F.2d 3, 7 (3d Cir. 1964); Moehl v. E. I. Du Pont de Nemours & Co., 84 F. Supp. 427, 428 (N.D. Ill. 1947).

30. COOPER, *supra* note 19, at 75.

31. Dreyfus v. Von Finck, 534 F.2d 24, 29 (2d Cir. 1976) ("Executive Orders issued without statutory authority providing for presidential implementation are generally held not to be 'laws' of the United States.") (citations omitted).

32. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1951) (invalidating as unconstitutional President Truman's executive order seizing the nation's steel mills during the Korean conflict); Chamber of Commerce v. Reich, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (holding that President Clinton's executive order conflicted with the National Labor Relations Act); *see also infra* note 249.

33. *Youngstown*, 343 U.S. at 589; *see also infra* note 249.

34. *Reich*, 74 F.3d at 1324; *see also infra* notes 438–43 and accompanying text.

35. Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 101–126 (2006); National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2006).

benefits from no exogenous counter pressures to define its boundaries. Constitutional and statutory sources of power originate outside the executive branch and thus constitute exogenous controls. In contrast, inherent power is potentially tautological, being a source of executive power that originates within executive power itself.

The authority behind executive orders also comes in two forms, namely, express and implied. This difference has no effect on the power of a given executive order to impel action, as executive orders issued based on implied authority have the same effect as those issued pursuant to express authority. However, implied authority may be easier to challenge in a judicial context.

This quasi-primer addresses executive orders in five sections. Part I is a brief history of the development of presidential orders. Part II discusses their formation scope. Part III addresses the authority for issuing executive orders. Part IV discusses limitations on their use. Finally, Part V investigates the underlying analytical and philosophical foundations that influence the creation of executive orders.

I. A DISSECTION OF THE BACKGROUND OF THE EXECUTIVE ORDER

Executive orders are a historically mature phenomenon. The President has employed them in some form since 1789, beginning with President George Washington.[36] The use of executive orders across the entire breadth of history of the United States is extensive.[37] Many presidents have issued executive orders to aid in implementing administrative processes and to solidify foreign policy.[38] Additionally, the availability of the expeditious route of the executive order has historically been critical under conditions of national emergency.[39]

There was no uniform name for presidential orders issued in the early years of the United States government, nor was there any numbering or publishing scheme. It was not until 1907 that the federal government adopted a system of enumerating and recording orders systematically.[40] In

36. Gaziano, *supra* note 13, at 273; COOPER, *supra* note 19, at 8, 15, 123 (identifying President Washington's Proclamation of Neutrality in 1793 as an early executive order); *see infra* note 162.

37. John A. Sterling, *Above the Law: Evolution of Executive Orders (Part One)*, 31 UWLA L. REV. 99, 101 (2000); *see also* Gaziano, *supra* note 13, at 275–76 (noting George Washington's use of executive orders in directing foreign policy).

38. Gaziano, *supra* note 13, at 273.

39. *Id.* at 282 ("[The] most salient historical examples of the use of executive orders are to be found in times of national crisis. Abraham Lincoln, Franklin Roosevelt, and Harry Truman all faced such periods. All issued controversial and illustrative executive orders.").

40. ARTHUR S. MILLER, PRESIDENTIAL POWER IN A NUTSHELL 86 (1977) ("[B]efore 1907 such orders were not systematically numbered . . . .").

that year, the Department of State set up a numbering scheme to organize executive orders retroactively, beginning with those issued by President Lincoln in 1862.[41] Actual publication of orders began in 1935, under the Federal Register Act.[42] The number of orders issued prior to the system of enumeration or otherwise outside of it is so uncertain—estimates range from 15,000 to 50,000—that it reveals a great historiographic lacuna in U.S. governmental history.[43]

A. Washington's Directive

President Washington's written directive of June 8, 1789 addressed the officers left over from the colonial governments under the defunct Articles of Confederation.[44] In his instructions, the President directed the officers to prepare a report to detail the current state of the union.[45] Although the term "executive order" only took on wide usage several decades later, the President's directive contained both of the essential characteristics of an executive order. First, the President issued the directive pursuant to his power as head of the executive branch. Second, the directive ordered quasi-executive officers to take action by reporting on the affairs of the new nation. The President's directive helped ascertain the immediate needs of the United States and its current position as a newly constituted republic.[46]

On its face, the constitutional origins of the executive order appear flexible, but over the years this tool has increasingly developed characteristics of a lawmaking, rather than merely interpretative, role.[47] From 1862, during the U.S. Civil War, when President Lincoln issued his Emancipation Proclamation,[48] through the Great Depression, during which

41. COOPER, *supra* note 19, at 20 (explaining that historical orders were "backnumbered" so that "Executive Order 1 was designated to be an order issued by President Lincoln in 1862 that established military courts in Louisiana") (citation omitted).

42. MILLER, *supra* note 40, at 86; Federal Register Act, ch. 417, 49 Stat. 500 (1935) (codified as amended at 44 U.S.C. §§ 1501–1511 (2006).

43. COOPER, *supra* note 19, at 20.

44. Gaziano, *supra* note 13, at 273–74 (arguing that, although the term "executive order" only began to appear in common usage many years thereafter, President Washington's order of 1789 was "unquestionably proper" in his role as head of state).

45. The purpose of the report was "'to impress [the President] with a full, precise, and distinct general idea of the affairs of the United States.'" *Id.* (citing Letter from George Washington to the Acting Secretary for Foreign Affairs (June 8, 1789), *in* 30 THE WRITINGS OF GEORGE WASHINGTON 343, 344 (John C. Fitzpatrick ed., 1939) (emphasis omitted)).

46. COOPER, *supra* note 19, at 122. The use of a direct order allowed President Washington to respond to the pressing issues at hand by going directly to the people who knew of the country's present condition without having to face the bureaucracy that might have stayed an effective response and resulted in more instability and prolonged confusion. *Id.*

47. Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 6 (2002).

48. *Id.* at 37.

President Franklin D. Roosevelt issued 3,723 executive orders, including those which created the National Labor Board (associated with the National Industrial Recovery Act) and the War Labor Board,[49] the executive order's legislative character grew rapidly.

B. Lincoln: The First Enumerated Executive Order

Throughout agencies and governments, the chief executive officer "has the inherent power to order subordinates to prepare reports for him on the performance of their duties."[50] The Constitution "expressly provides that the President may require his principal officers to prepare such reports."[51] Although many prior presidents had issued executive orders in assorted styles and formats, President Lincoln issued the first enumerated executive order (enumerated retroactively) under the modern cataloguing system.[52] President Lincoln's executive orders came during a time when the country was suffering its most significant political challenges ever.[53] The President's use of executive power in wartime took on the form of direct military command, extensive budget organization to support military needs, and the imposition of certain limitations on citizens' legal rights within the parameters of his power under the Constitution.[54] The President's most famous executive order is the Emancipation Proclamation, issued September 22, 1862, and amended January 1, 1863, which proclaimed the freedom of currently enslaved residents of selected Confederate States.[55] However, the first enumerated executive order was the President's earlier 1862 directive to establish armed-forces tribunals in the State of Louisiana with the authority to try persons that interfered with the draft.[56]

Prior to the formalization of executive orders by the Department of State, there was no specific form which an executive order took or procedure with which to enact one. Because an executive order was really

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49. *Id.* at 28.

50. Gaziano, *supra* note 13, at 274.

51. *Id.* (citing U.S. CONST. art. II, § 2, cl. 1).

52. *Id.* at 289.

53. Branum, *supra* note 47, at 24 ("The country was rapidly approaching a state of Civil War.").

54. *Id.* ("Through his broad use of the executive power, Lincoln took such actions as calling forth the militia, blockading southern ports, building warships, funding requisitions, and suspending the writ of habeas corpus.") (citations omitted).

55. *See* Anna Williams Shavers, *Katrina's Children: Revealing the Broken Promise of Education*, 31 T. MARSHALL L. REV. 499, 510 (2006). Shavers discusses the history of access to education in the U.S., specifically with regard to Americans of African descent. The author notes that, although President Lincoln signed the implementing amendment to the Emancipation Proclamation in 1863, it was only in 1865, with the end of the Civil War and ratification of the Thirteenth Amendment to the Constitution, that the document could actually take any real effect. *Id.*

56. Branum, *supra* note 47, at 8; David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2036 (2003).

fundamentally an executive utterance, which subordinates had to follow, any example of the President's writing in any form that permitted cataloguing constituted an executive order (hence the great difficulty in judging how many there were before President Lincoln's time).[57] In fact, should the President ever issue written instructions on how to create an executive order, by definition the guidance for creating executive orders would come from an executive order itself. President Ulysses S. Grant did exactly that in establishing a uniform style for the executive order in 1873,[58] a set of guidelines, which President Franklin Roosevelt greatly enhanced when he issued the first formalized procedure for drafting and routing executive orders in Executive Order 7,298.[59] President Truman later rewrote this as Executive Order 10,006,[60] which in turn President John F. Kennedy rewrote as Executive Order 11,030,[61] and to which current writers on the subject refer as the governing order on the matter.[62]

Under these guidelines, a proposed executive order must have a title and must reference the legislative or constitutional authority that governs it.[63] They require submission of the order, with seven copies, to the Office of Management and Budget (OMB).[64] If the OMB approves it, it then goes to the Attorney General.[65] Once the legal review is complete, the executive order proceeds to a review of physical form and format.[66] Once cleared, the order makes its way back to the President for his signature.[67] Presidents are free to ignore these guidelines though, because the governing executive order contains no sanctions for failure to follow it.[68]

Subsequent Presidents have amended the guidelines of Executive Order 11,030,[69] as distinct from rewriting the order completely in the

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57. COOPER, *supra* note 19, at 17 (noting that "sometimes [executive orders] took the form of hastily scribbled Presidential endorsements on legal briefs or upon the margins of maps" (quoting SPECIAL COMMITTEE ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS 93D CONG., REP. ON EXECUTIVE ORDERS IN TIMES OF WAR AND NATIONAL EMERGENCY 2 (Comm. Print 1950))).

58. *Id.*

59. Exec. Order No. 7,298, 1 Fed. Reg. 2,284 (Feb. 18, 1936); *see* James Hart, *The Exercise of Rule-Making Power and the Preparation of Proposed Legislative Measures by Administrative Departments*, *in* 5 THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 39 (1937) (discussing Executive Order 7,298).

60. Exec. Order No. 10,006, 13 Fed. Reg. 5,927 (Oct. 12, 1948).

61. Exec. Order No. 11,030, 1 C.F.R. 19 (1962).

62. COOPER, *supra* note 19, at 17.

63. Exec. Order No. 11,030, 1 C.F.R. 19.

64. *Id.*

65. *Id. See also* COOPER, *supra* note 19, at 17 (explaining that the Attorney General considers the legality of the order).

66. Exec. Order No. 11,030, 1 C.F.R. 19; *see also* COOPER, *supra* note 19, at 17 (explaining that the order goes "to the Office of the Federal Register for a review as to form").

67. Exec. Order No. 11,030, 1 C.F.R. 19; *see also* COOPER, *supra* note 19, at 17.

68. MAYER, *supra* note 20, at 60.

69. Exec. Order No. 11,354, 1 C.F.R. 19 (1967); Exec. Order No. 12,080, 1 C.F.R. 19 (1979);

manner of Presidents Truman and Kennedy, but the process by which the President may issue an executive order remains considerably more efficient than that which is necessary to pursue legislation in Congress.[70] In fact, it was in view of the relatively simple nature of the executive order that Vice President Albert A. Gore made the suggestion to President Clinton to make maximum use of executive orders to pursue his objectives, rather than either relying on statute or depending on agency heads to formulate the necessary rules within the restrictions of the Administrative Procedure Act (APA).[71] By 1999, President Clinton had written literally hundreds of executive orders in his effort to govern at a time during which he and Congress were experiencing partisan dissent.[72] Another important point is that an executive order has no publication requirement or regulatory comment period.[73] Thus, the order cannot be overruled due to a failure to provide notice or any other procedural anomaly. Neither is the President subject to the APA, which fails to specify the Office of the President as an agency by definition.[74] In *Franklin v. Massachusetts*,[75] the Supreme Court held that the APA never explicitly includes or excludes the President as an agency, a necessary provision for the Court to consider hearing any cases that might involve a challenge to an executive order under the APA.[76]

Exec. Order No. 12,608, 32 C.F.R. 1615 (1987); Exec. Order No. 13,403, 71 Fed. Reg. 28,543 (May 12, 2006).

70. COOPER, *supra* note 19, at 17 ("[The] simple process of promulgating authoritative policies is far more attractive than the arduous effort needed to move a bill through the Congress.").

71. *Id.* ("[F]ormer vice President Al Gore . . . recommended that President Clinton . . . proceed as much as possible by presidential directive rather than by statute or by administrative rulemaking." (citation omitted)); *see* Administrative Procedure Act, 5 U.S.C. § 551 (2006).

72. The President had by this time "posted 301 formal Executive Orders." Frank J. Murray, *Clinton's Executive Orders Still are Packing a Punch: Other Presidents Issued More, but Many of His are Sweeping*, WASH. TIMES, Aug. 23, 1999, at A1. Summing up President Clinton's legacy with regard to executive orders, former Clinton advisor Paul Begala said, "Stroke of the pen, law of the land. Kind of cool." *Id.*

73. Dalton v. Specter, 511 U.S. 462, 469 (1994) (holding that the President's actions are not reviewable under the APA) (citing Franklin v. Massachusetts, 505 U.S. 788, 801 (1992) (holding that "the President's actions . . . are not reviewable . . . under the APA")). The action in *Dalton* resulted from a request for an injunction against the Secretary of Defense from carrying out a decision of the President to close the Philadelphia Naval Shipyard pursuant to the Defense Base Closure Act of 1990.

74. *Dalton*, 511 U.S. at 469 (discussing *Franklin*, 505 U.S. 788). *Franklin* involved the loss of a seat in the House of Representatives due to a 1990 census. The suit brought against the President and the Secretary of Commerce requested an injunction. The district court held the President to an agency standard and issued the injunction. The Supreme Court reversed, finding that "[b]ecause the Secretary's report to the President carries no direct consequences for the reapportionment, it serves more like a tentative recommendation than a final and binding determination." *Franklin*, 505 U.S. at 798. It thus fails to fall within the definition of a final agency action of the type encompassed by the Administrative Procedure Act (APA); *see* Administrative Procedure Act, 5 U.S.C. § 704 (2006).

75. *Franklin*, 505 U.S. at 800.

76. *Id.* at 800–01. "Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion. . . . As the

Despite their close association with the person of the executive, in addition to the fact that each new President in succession reissues most standing orders, executive orders possess a legal permanence that further enhances their quasi-legislative character.[77] Therefore, each President must be aware of the orders of his predecessors and take the opportunity to seize the power that he may derive from them.

C. The Roosevelt and Taft Eras

President Theodore Roosevelt understood the executive power as "all-inclusive," constrained only where the Constitution presents an express boundary.[78] By contrast, President William H. Taft applied a more reserved understanding, as he believed that presidential powers are only valid insofar as the Constitution expressly enumerates them.[79] President Roosevelt held a significantly broader conception of the executive order than his successor, as it was during his administration that the country sought the most sweeping social reform in its history up to that time (despite the fact that the next President Roosevelt would far surpass him on this dimension).[80] Some of President Roosevelt's most prominent orders directed the identification of public land for military reservations and wildlife refuges.[81] The opposition between the views of President Roosevelt and President Taft constitutes even now the opposing poles on the continuum of political philosophy regarding executive power.

There are many historical examples of potentially divisive executive orders. Branum cites President Washington's Neutrality Proclamation,

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APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements." *Id.*

77. COOPER, *supra* note 19, at 20 ("[E]xecutive orders remain in force until they are replaced, amended, or rescinded by the president that issued them or a successor.").

78. Branum, *supra* note 47, at 3; WILLIAM HOWARD TAFT, THE PRESIDENT AND HIS POWERS 143 (4th prtg. 1967) (originally published as OUR CHIEF MAGISTRATE AND HIS POWERS (1916)). In response to President T. Roosevelt's criticism of him as a "Buchanan" President (who exercises undue restraint), President Taft wrote:

> The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest . . . .

Id. at 139–40.

79. TAFT, *supra* note 78, at 140.

80. Branum, *supra* note 47, at 26 ("[I]f reform did not come, then he took responsibility for reform implemented by other legislation.").

81. Sterling, *supra* note 37, at 102.

President Jefferson's pursuit of the purchase of the Louisiana Territory, President Tyler's assent to annex Texas, President Lincoln's Emancipation Proclamation, President Franklin Roosevelt's internment of Japanese-American citizens, President Kennedy's creation of the Peace Corps, and President Lyndon Johnson's inclusion of affirmative action clauses in certain government contracts.[82] Nevertheless, these examples vary widely on the matter of how much the President worked demonstrably with Congress to pursue their diverse objectives.

Critics have recently scrutinized the nature of the executive order for its growing tendency to target the behavior of ordinary citizens, rather than solely that of the employees of administrative agencies.[83] Some have argued that permitting executive power to extend so far as to affect private citizens directly is inherently contrary to the intent of the Constitution, which seeks to limit governmental power, particularly that of the executive branch.[84] Lastly, critics have proposed that if future presidents proceed to construct executive orders in the same manner as current presidents, the result will be tantamount to the abdication of the duty of the legislative function by Congress.[85]

II. AN ANALYSIS OF THE FORMATION AND CHARACTERIZATION OF THE EXECUTIVE ORDER

The most basic purpose of the executive order is to execute agency direction in carrying out the objectives of legislation.[86] Thus, the President's use of the executive order should theoretically be to direct an agency to effect legislation passed by Congress. However, the debate about the source of the power to issue executive orders (a subject of later discussion herein) reveals different, sometimes controversial uses of the executive order. Particularly in the middle of the twentieth century, the executive order came to serve as a tool to further an administration's

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82. Branum, *supra* note 47, at 37 (citing CRS REPORT FOR CONGRESS, 106TH CONGRESS, EXECUTIVE ORDERS AND PROCLAMATIONS, 1933–99: CONTROVERSIES WITH CONGRESS AND THE COURTS (1999)).

83. Sterling, *supra* note 37, at 100 ("Executive Orders . . . no longer operate only on the employees of the administrative agencies of the Federal Government but on average citizens who perceive what appears to be an end-run around the Constitution.").

84. Branum, *supra* note 47, at 10 ("These policy leaders argue that the intent of the Founding Fathers was to create a government of limited powers.").

85. *Id.* (noting that some policy leaders "argue that Congress is essentially ceding to the executive branch its constitutional duty to act as the lawmaking branch of government"); *see also* United States v. Chem. Found. Inc., 272 U.S. 1, 12 (1926) (limiting the delegation of legislative power to the executive); Am. Fed'n of Gov't Emps. v. Reagan, 870 F.2d 723 (D.C. Cir. 1989).

86. MILLER, *supra* note 40, at 84 ("Under strict separation of powers theory the executive has no direct legislative power.").

idiosyncratic agenda,[87] to carry out orders of the Supreme Court instead of acts of Congress,[88] and even to impinge on the constitutional liberties of the nation's citizens in the name of national security.[89]

Presidents have also used executive orders to make law in areas in which Congress has been silent.[90] Formally, an executive order is a directive enunciated by the President that manifests itself in written form.[91] It is an order *per se*; hence, it carries inherently compelling weight only to the President's subordinates in those executive offices over which the President presides in his executive role. However, the executive order inherently carries the force of law with no requirement for congressional approval, which renders it available for abuse. Thus, a given executive order may seem merely to provide the detail necessary for implementing congressional legislation. However, its directive content may have the effect of enhancing a statute well beyond the intent of Congress, and hence well beyond the expected parameters of executive power.

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87. MAYER, *supra* note 20, at 5; *see also* Exec. Order No. 9,981, 10 Fed. Reg. 4,313 (July 12, 1948) (establishing the President's Committee on Equality of Treatment and Opportunity in the Armed Forces). This executive order effectively integrated the Armed Forces.

88. Exec. Order No. 10,730, 3 C.F.R. 89 (Supp. 1957) (activating the Arkansas National Guard into military service in Little Rock, Arkansas, at Central High School to enforce the Court's order in *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) to integrate public high schools).

89. MAYER, *supra* note 20, at 5; *see*: Exec. Order No. 9,066 C.F.R. 1,092 (1938–43) (authorizing the Secretary of War to "prescribe military areas" from which he could prevent "any person to enter, remain in, or leave"). This order called for the internment of persons of "Foreign Enemy Ancestry," mainly Japanese, Germans, and Italians, regardless of their citizenship. The order is most notorious for its effect on people of Japanese descent who were living in California, Oregon, and Washington. However, it excluded Hawaii, as the administration thought that the internment of persons of Japanese heritage in that state would cripple the Hawaiian infrastructure. This order followed swiftly in the wake of the Japanese attack on Pearl Harbor. It required the forced removal of all persons of Japanese descent in California, Oregon, and Washington inland to internment camps. Commentators after World War II cite the order's hypocrisy in light of the fight against Germany and Hitler's treatment of the European Jewish population. Although the order affected some Italians and Germans as well, their internment fell far short of the number of people of Japanese ancestry. The order provoked litigation in the Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944), Ex Parte *Endo*, 323 U.S. 283 (1944) (decided the same day as *Korematsu*), and *Hirabayashi v. United States*, 320 U.S. 81 (1943). In none of these cases did the Court find the order unconstitutional; rather, it reasoned that the government's interest in protecting the country from espionage outweighed individual liberties. *Korematsu*, 323 U.S. at 223. President Gerald R. Ford finally rescinded the order in February 1976. Proclamation No. 4,417, 3 C.F.R. 8 (1976).

90. MAYER, *supra* note 20, at 5 ("[D]espite the fact that the Constitution unambiguously vests the legislative function in Congress, 'the President's lawmaking role is substantial . . . [and] persistent . . . .'" (quoting Louis Fisher, *Laws Congress Never Made*, 5 CONSTITUTION 59 (1993))); *see infra* Part III-D.

91. MAYER, *supra* note 20, at 34 ("In the most formal sense, an executive order is a directive issued by the president, 'directing the executive branch in the fulfillment of a particular program,' targeted at executive branch personnel and intended to alter their behavior in some way . . . ." (quoting PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 130 (1996))).

Executive orders make "legally binding pronouncements" in fields of authority generally conceded to the President.[92] A prominent example of this use is in the area of security classifications.[93] President Franklin Roosevelt issued an executive order to establish the system of security classification in use today.[94] Subsequent administrations followed the President's lead, issuing their own executive orders on the subject.[95] In 1994, Congress specifically required "presidential issuance of an executive order on classification," by way of an "amendment to the National Security Act of 1947 . . . ."[96] The other areas in which Congress concedes broad power to the President "include ongoing governance of civil servants, foreign service and consular activities, operation and discipline in the military, controls on government contracting, and, until recently, the management and control of public lands."[97] Although there are also statutes that address these areas, most basic policy comes from executive orders.[98]

Executive orders commonly address matters "concerning military personnel"[99] and foreign policy.[100] "[D]uring periods of heightened national security activity," executive orders regularly authorize the transfer of responsibilities, personnel, or resources from selected parts of the government to the military or *vice versa*.[101] Many executive orders have also guided the management of public lands, such as orders creating, expanding, or decommissioning military installations, and creating reservations for sovereign Native American communities.[102]

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92. COOPER, *supra* note 19, at 21.

93. *Id.* at 25.

94. *Id.* ("Franklin Roosevelt issued the first executive order laying out the classification system and process in 1940 as World War II was unfolding in Europe, with U.S. involvement a virtual certainty.") (citation omitted).

95. *Id.* at 25–26.

96. *Id.* at 26; National Security Act, 50 U.S.C. § 435 (2006) ("Not later than 180 days after [the date of enactment of this title], the President shall, by Executive order or regulation, establish procedures to govern access to classified information which shall be binding upon all departments, agencies, and offices of the executive branch of Government.").

97. COOPER, *supra* note 19, at 27.

98. *Id.*

99. *Id.* at 33. Executive orders that affect military personnel include pay rate adjustments and "allowances for the uniformed services and amendments made to the Manual for Courts-Martial." *Id.* (citation omitted).

100. *Id.* at 34. The President crafts foreign policy through a number of tools, including executive orders, proclamations, treaties, executive agreements, and national security memoranda. Given the relative simplicity and flexibility of executive orders, they are very useful tools in foreign-policy matters that require immediate action. *Id.*

101. *Id.* at 33.

102. *Id.* at 33, 36–37. Phillip Cooper discuses *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), where the Court held that the long-continued practice of the President's using executive orders to withdraw public lands, which the Congress had previously held open to acquisition by private citizens, was akin to holding land open for a public purpose. In declaring executive orders of this character permissible, the Court noted that previous executive orders served to convert public-purpose

Executive orders serve to implement both regulations and congressional regulatory programs.[103] Regulatory orders may target specific businesses and people, or may be designed for general applicability.[104] Many executive orders have constituted "delegations of authority originally conferred on the president by statute" and concerning specific agencies or executive-branch officers.[105] Congress may confer to the President, within the statutory language, broad delegatory authority to subordinate officials, while nevertheless expecting the President to "retain[] ultimate responsibility for the manner in which [subordinates perform relevant tasks]."[106] "[I]t is common today for [the President] to cite this provision of law . . . as the authority to support an order."[107]

Many presidents, especially after World War II, used executive orders—with or without congressional approval—to create new agencies, eliminate existing organizations, and reorganize others.[108] Orders in this category include President Kennedy's creation of the Peace Corps,[109] and President Nixon's establishment of the Cabinet Committee on Environmental Quality, the Council on Environmental Policy, and reorganization of the Office of the President.[110] At the core of this reorganization was the creation of the Office of Management and Budget.[111]

President Clinton continued the practice of creating agencies, including the National Economic Council, with the issuance of his second executive order.[112] President Clinton also used an executive order "to cut one hundred thousand positions from the federal service" a decision which would have merited no congressional review, despite its impact.[113] President George W. Bush created the Office of Homeland Security as his key organizational reaction to the terrorist attacks of September 11, 2001, despite the fact that

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land into reservations for Native Americans and military forces, and for creating bird preserves. *Id.*

103. *Id.* at 27.

104. *Id.*

105. *Id.* at 28.

106. *Id.* at 29; 3 U.S.C. § 301 (1951).

107. COOPER, *supra* note 19, at 29.

108. MAYER, *supra* note 20, at 3–4. With regard to executive orders, the President need not refer to a statutory provision under which he exercises a power, rather, it is sufficient that the President actually has such power and exercises it according to some existing federal statute. Toledo, P. & W. R.R. v. Stover, 60 F. Supp. 587, 596 (S.D. Ill. 1945). Congress, however, appropriates funding for the agency. *See, e.g.*, Schism v. United States, 316 F.3d 1259, 1292 (Fed. Cir. 2002) (holding that Congress ratified agency created by executive order through appropriates statute).

109. Exec. Order No. 10,924, 3 C.F.R. 85–86 (Supp. 1961).

110. Exec. Order No. 11,472, 3 C.F.R. 792 (1966–70); COOPER, *supra* note 19, at 31.

111. Exec. Order No. 11,541, 3 C.F.R. 939 (1966–70), *reprinted as amended in* 31 U.S.C § 501 (1994).

112. Exec. Order No. 12,735, 58 Fed. Reg. 6,189 (Jan. 25, 1993).

113. COOPER, *supra* note 19, at 32. (discussing Exec. Order No. 12,839, 58 Fed. Reg. 8,515 (Feb. 10, 1993)).

Congress at the time appeared willing to enact whatever legislation he sought.[114] President Obama created several positions of Special Advisor to the President on specific issues of concern, for which there is often already a cabinet or agency position.[115]

Other executive orders have served "to alter pay grades, address regulation of the behavior of civil servants, outline disciplinary actions for conduct on and off the job, and establish days off, as in the closing of federal offices."[116] Executive orders have often served "to exempt named individuals from mandatory retirement, to create individual exceptions to policies governing pay grades and classifications, and to provide for temporary reassignment of personnel in times of war or national emergency."[117] Orders can authorize "exceptions from normal operations" or announce temporary or permanent appointments.[118] Many orders have also addressed the management of public lands, although the affected lands are frequently parts of military reservations.[119]

The fact that an executive order has the effect of a statute makes it a law of the land in the same manner as congressional legislation or a judicial decision.[120] In fact, an executive order that establishes the precise rules and regulations for governing the execution of a federal statute has the same effect as if those details had formed a part of the original act itself.[121] However, if there is no constitutional or congressional authorization, an executive order may have no legal effect.[122] Importantly, executive orders designed to carry a statute into effect are invalid if they are inconsistent

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114. Exec. Order No. 13,228, 3 C.F.R. 796 (2001), *reprinted as amended in* 50 U.S.C. § 402 (Supp. 2004); COOPER, *supra* note 19, at 32.

115. For example, the President appointed Carol Browner Special Advisor to the President on climate change and energy *and* appointed Lisa Jackson director of the Environmental Protection Agency. Robynn Andracsek, *The Obama EPA: A First Look*, 113 POWER ENGINEERING 8 (Apr. 2009), *available at* General OneFile, Document No. A199815113.

116. COOPER, *supra* note 19, at 32 (citations omitted).

117. *Id.*

118. *Id.* at 33 ("Particularly during periods of heightened national security activity, orders are regularly used to transfer responsibility, people, or resources from one part of the government to the military or the reverse.").

119. *Id.*

120. *See* 91 C.J.S. *United States* § 48, *supra* note 16 ("In the construction and interpretation of executive orders of the President, the accepted canons of statutory construction must be applied") (citation omitted); *see also* Givens v. Zerbst, 255 U.S. 11, 18 (1921) (noting that of competing constructions of an executive order, one giving it validity, the other rendering it useless, the courts will adopt the former); Toledo, P. & W. R.R. v. Stover, 60 F. Supp. 587, 591 (S.D. Ill. 1945).

121. 91 C.J.S. *United States* § 48, *supra* note 16 ("The words used, when not ambiguous, must be given their well-known and ordinary meaning, unless the intent that they be given some different meaning clearly appears." (citing Montague v. United States, 79 Cl. Ct. 624, 629 (1934)); *see also* United States v. Borja, 191 F. Supp. 563, 566–67 (D. Guam 1961) (stating that executive orders have the same effect as statutes).

122. Kaplan v. Johnson, 409 F. Supp. 190, 203 (N.D. Ill. 1976), *rev'd by* Kaplan v. Corcoran, 545 F.2d 1073 (7th Cir. 1976).

with the statute itself, for any other construction would permit the executive branch to overturn congressional legislation capriciously.[123]

The application of this rule allows the President to create an order under the presumption that it is within the power of the executive branch to do so. Indeed, a contestant carries the burden of proving that an executive action exceeds the President's authority.[124] That is, as a practical matter, the burden of persuasion with respect to an executive order's invalidity is firmly upon anyone who tries to question it.[125] The President thus has great discretion in issuing regulations.[126] An executive order, with proper congressional authorization enjoys a strong presumption of validity, and the judiciary is likely to interpret it broadly.[127] If Congress appropriates funds for a President to carry out a directive, this constitutes congressional ratification thereof.[128] Alternatively, Congress may simply refer to a presidential directive in later legislation and thereby retroactively shield it from any future challenge.[129]

A. Recording Requirements

Initially, no systematic process existed for collecting and recording executive orders.[130] In the eighteenth and nineteenth centuries, executive departments kept records of executive orders in their own files. Presidential documents then usually "found their way" into a number of different places, such as the National Archives, private collections, and the Library of Congress itself.[131] In 1895, the federal government adopted the slip form of issuing executive orders, which refers to the use of loose-leaf pages to

123. Dunning Constr. Co. v. United States, 115 F. Supp. 250, 256 (W.D. Okla. 1953). However, the *prima facie* presumption is that there is no conflict between the President's interpretation and congressional intent. Thus, as long as the language of the executive order permits an interpretation devoid of conflict, the President's order stands.

124. *See, e.g.*, Muir v. Louisville & N.R. Co., 247 F. 888, 898 (W.D. Ky. 1918).

125. 91 C.J.S. *United States* § 48, *supra* note 16 ("The same rule of presumption is applied to proclamations of the President that is applied to statutes, that is, that they have a valid existence on the day of their date and no inquiry is permitted upon the subject." (citing Lapeyre v. United States, 84 U.S. 191, 200 (1872)).

126. Fogarty v. United States, 80 F. Supp. 90, 95 (D. Minn. 1948).

127. Dames & Moore v. Regan, 453 U.S. 654, 668 (1981).

128. Branum, *supra* note 47, at 69–70.

129. *Id.* at 70.

130. MAYER, *supra* note 20, at 67; *see also* Branum, *supra* note 47, at 6.

131. MAYER, *supra* note 20, at 66–67. Until the standardization of the format and publication of executive orders in the 1920s and 1930s, it was unclear which directives by the President constituted executive orders. This uncertainty resulted in the haphazard issuance and recording of executive orders. For example, the President might write "approved" or "let it be done" at the bottom of Cabinet members' recommendations, or department heads might sign orders in place of the President, making it unclear which documents had the effect of an executive order. *Id.* at 66.

accommodate easy inclusion in collections of legal documents.[132] This rudimentarily managed system underwent a fundamental change after the turn of the twentieth century.[133]

The next development in the organization of executive orders occurred in 1905. The State Department created a central repository to which all executive agencies were to submit any orders they had in their possession. Unfortunately, this innovation often failed to produce the intended effect, as many poorly catalogued and unpublicized orders remained in existence.[134] There was some degree of confusion among executive-branch officials, who were sometimes unaware of whether a given executive order was actually in effect.[135]

The next solution was an act of Congress, namely, the Federal Register Act of 1935.[136] This legislation mandated the publication of all generally applicable executive orders and proclamations[137] and has resulted in consistent publication of all executive orders since March 1936, with the exception of classified and *ad hominem* orders.[138] Since that time, the federal government has regularly collected executive orders in an annual annex to the *Code of Federal Regulations*. However, a systematic fashion

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132. *Id.* at 67.

133. *Id.* at 67; *see also* Branum, *supra* note 47, at 8 (noting that due to the confusion caused by the numbering system and the massive volumes of unrecorded executive orders, it is impossible even to approximate the number of executive orders that presidents have issued since 1789). A congressional study estimated between 15,000 and 50,000 orders, a wide range indeed. MAYER, supra note 20, at 67.

> In 1905 the State Department created a repository for executive orders and asked executive branch agencies to submit their individual collections. In 1907 State organized this collection chronologically, and assigned numbers to each order beginning with the earliest order in its files (issued by Lincoln in October 1862, establishing military courts in Louisiana) and ordering each successive order sequentially. Orders issued since then were assigned new numbers in this series, which is now known as the 'numbered series.' To this day, executive orders are numbered according to their placement in this sequence. The numbering system was confusing as well, since officials often discovered old order series well after they had been issued. In these cases, the practice was to assign fractional numbers or letters to orders that could not otherwise be squeezed into the series in the proper sequence.

Id. (citations omitted).

134. *Id.* at 68. For example, researchers counted roughly 3,000 National Recovery Administration orders from its first year of existence, many in the thousands of press releases that the agency issued. Obviously, it was still unclear how to define an executive order, so different agencies approached the task in different ways, and few would have thought to explore press releases as a source of executive orders. *Id.*

135. *Id.* Agents in the executive branch had little greater awareness of the status of specific executive orders than did the interested public. In one case, the government prosecuted someone for violating a regulation that an executive order had actually rescinded, but no one was aware of it due to the lack of coordination and effective recordkeeping. *Id.*

136. The Federal Register Act, 44 U.S.C. §§ 1501–1511 (2006).

137. MAYER, *supra* note 20, at 70.

138. *Id.*

for codifying or cross-referencing executive orders does not yet exist, short of references to specific orders amending, retracting, or supplanting earlier orders.[139]

B. Creation of an Executive Order

Federal law does not provide extensive guidance for creating executive orders and other presidential directives.[140] Unless publication may somehow threaten national security, the President must publish any executive order in the *Federal Register* if it has legal, as opposed to merely hortatory, effect and does not reference individual persons.[141]

While several federal laws expect the President to conform to particular publication requirements, the President is generally open to adopting his own measures for issuing such orders.[142] According to the current procedure, upon completion of the initial draft, the Office of Management and Budget (OMB) first reviews the proposed executive order for its fiscal implications.[143] The OMB then collaborates with the Department of Justice Office of Legal Counsel to ensure each order's legal propriety, as any change in wording may create new fiscal implications.[144] If the OMB Director approves the draft it then goes to the Attorney General for final approval *vis-à-vis* its constitutionality and relevant statutes.[145]

Throughout the past century, the Attorney General, or another superior official in the Department of Justice, has assisted the President in fixing any problems in an executive order's specific organizational and legal consequences.[146] To be sure, there is no sanction if the President abstains from referring specifically to the statutory or constitutional provision under which he proposes to exercise authority in the form of an executive order.[147] Once the Attorney General approves an executive order, it then goes to the Director of the Office of the Federal Register, a unit of the National Archives and Records Service, which is a division of the General Services Administration.[148] However, if it is urgent, it may go directly to the

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139. *Id.* There is no chapter-organized equivalent to the United States Code for executive orders.

140. Gaziano, *supra* note 13, at 292–94.

141. *Id.*; 44 U.S.C. § 1505(a) (requiring publishable orders be of "general applicability and legal effect").

142. Gaziano, *supra* note 13, at 292–94.

143. Exec. Order No. 11,030, 1 C.F.R. 19 (1962); Exec. Order No. 11,354, 3 C.F.R. 652 (1966–70); Exec. Order No. 12,080, 3 C.F.R. 224 (1979); Exec. Order No. 12,608, 3 C.F.R. 244 (1987).

144. Gaziano, *supra* note 13, at 292–94.

145. *See supra* note 143.

146. Gaziano, *supra* note 13, at 292.

147. Toledo, P. & W. R.R. v. Stover, 60 F. Supp. 587, 595 (S.D. Ill. 1945).

148. *See supra* note 143.

President for the sake of expedience.[149] In routine situations, the Director of the Office of the Federal Register will simply transfer the order to the President to sign.[150] Once the President signs the order, it constitutes a recordable document and thus returns to the Director of the Office of the Federal Register for publication in the *Federal Register*.[151]

C. Types of Executive Orders

There are several variations of executive orders that allow the President to undertake different actions, based on the nature of the intended effect.[152] Executive orders can occur as proclamations, presidential memoranda, directives, or presidential signing statements.[153] Additionally, executive agreements provide the President with an avenue for exercising executive power over foreign policy.[154]

1. Proclamations—To Generate Favorable Publicity

Proclamations are a special form of executive order that seeks to influence the conduct of private individuals, usually with hortatory, rather than mandatory, effect.[155] In its most basic respects, a proclamation is a meta-order; that is, except when purely ceremonial, it typically serves to proclaim the content of certain orders that the President will imminently issue.[156] Nevertheless, proclamations are most often ceremonial.[157] The most widely recognized proclamation with ceremonial behavior as its goal

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149. *Id.*

150. *Id.*

151. *Id.*

152. MAYER, *supra* note 20, at 34. There is no uniform definition for an executive order; consequently, any instruction or exhortation by the President is an executive order if the President happens to declare it so. However, despite the absence of any objective delineation between an executive order and a proclamation, there are certain areas in which one term is more applicable. Specifically, the President issues executive orders mostly within the executive branch itself, to provide direction to federal officials and agencies, while proclamations occur more often in the arena of foreign affairs and for ceremonial purposes (*e.g.*, social acts). *Id.*

153. COOPER, *supra* note 19, at 2; *see also* Branum *supra* note 47, at 7 (noting that most widely debated type of directive is the executive order *per se*).

154. HOWELL, *supra* note 1, at 19. The executive agreement provides the President an alternative to the Senate's ratification process, while executive orders, directives, and proclamations serve as counterparts to legislation. *Id.*

155. COOPER, *supra* note 19, at 117–18.

156. 91 C.J.S. *United States* § 48, *supra* note 16 (stating that a proclamation is the President's "official public announcement of an order" (citing Wood v. Beach, 156 U.S. 548, 550 (1895))); COOPER, *supra* note 19, at 117 (explaining that the presidential proclamation is "an instrument that states a condition, declares the law and requires obedience, recognizes an event, or triggers the implementation of a law"); *see also* Mayer, *supra* note 20, at 34; Ostrow, *supra* note 18, at n.2 (highlighting the ceremonial nature of proclamations).

157. MAYER, *supra* note 20, at 34.

is the Thanksgiving Proclamation, first issued by President Washington in 1789 and reissued every year since.[158] By 2002, there were over 7,000 proclamations in U.S. history.[159] Aside from the question of the proclamation's nature as a meta-order, the essential difference between executive orders and proclamations entails the fact that the former addresses "officials within the government," while the latter addresses individuals outside of the government.[160] The executive power granted to the President in the Constitution falls short of authorizing executive orders *per se* directed coercively at private individuals.[161]

Proclamations served early in U.S. history to instruct the nation's citizens and citizens of foreign nations on permissible behavior in the foreign policy arena.[162] Proclamations also seek to make formal statements to recognize certain conditions or problems.[163] An example of this kind of proclamation is the Emancipation Proclamation, which served as an affront to the Confederate Government, by announcing an end to legal slavery in selected states still under Confederate control.[164] That President Lincoln made this announcement by way of a proclamation was logical, given that in fact he had no authority over those states that the proclamation targeted; the proclamation thus served mainly to announce the President's stated

158. Branum, *supra* note 47, at 23 (explaining that President Washington issued the Thanksgiving Proclamation in 1789 after Congress asked him to recommend to the people of the United States a day of public thanksgiving); Gaziano, *supra* note 13, at 274, 275 n.25. The issued proclamation urged citizens "to recognize Thursday, November 26, 1789, as a day of thanksgiving." Gaziano, *supra* note 13, at 274.

159. COOPER, *supra* note 19, at 118. Specifically, the author reports the issuance of 7,404 proclamations by 2002. *Id.*

160. *Id.* at 119. The President has more limited authority to issue proclamations than to issue other types of directives, because they address persons outside of the government. *Id.* at 120.

161. *Id.* This assertion affords citizens standing to challenge a proclamation. To counter easy challenges, the courts usually uphold proclamations because they benefit from statutory authorization. *Id. See also* U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed").

162. COOPER, *supra* note 19, at 117–18. An example of this type of proclamation is Washington's Neutrality Proclamation of 1793, which, without prior congressional approval, announced that the United States would remain "friendly and impartial" between the French and the British and "called upon American citizens to do nothing that violated that spirit." The President justified his use of this proclamation on the premise of the law of nations. Congress later ratified the President's actions by passing, at the President's request, the Neutrality Act of 1794, which gave the President the power to prosecute any violators of the now enforceable proclamation. *Id.* at 122–24.

163. *Id.* at 125. The mechanism of the proclamation recognizes that citizens demand rapid decision-making on important national matters. They thus serve to communicate such matters and dictate solutions. *Id.*

164. *Id.* at 125–26. In reality, it failed to change the status of slaves, because the proclamation only covered selected areas "under the control of the Confederacy." This proclamation represented two key points of significance. First, it informed the citizens of the United States and "the world of important changes and admonish[ed] them to come to grips with the new reality." Second, it "trigger[ed] statutory obligations on the part of the president to take further action" in line with the proclamation's espoused principles. *Id.* at 127.

commitment on behalf of enslaved people, should the territories in which they reside return to federal (Union) control.[165]

Proclamations also serve to invoke special powers and to establish emergency actions in times of war or insurrection, economic crises, or natural disasters.[166] In 1962, President Kennedy issued a proclamation to all parties that might try to frustrate the process of racial desegregation, whether by peaceful or by violent means.[167]

Proclamations also serve the purpose of granting presidential pardons.[168] This particular power of the President is explicitly constitutional.[169] Different presidents throughout U.S. history have employed their power to pardon in different ways.[170] Early presidents used this power at the end of wars by granting amnesty as part of an effort to reunify the national spirit.[171] President Clinton issued over one hundred pardons at the end of his presidential term, including one for a woman who had received a jail sentence for refusing to testify against him during his impeachment proceedings.[172]

In general, proclamations are statements that conditions exist that should trigger particular statutory actions.[173] By comparison to speeches or press releases, proclamations convey a message of seriousness and executive formality.[174] They depict the President in the act of speaking on behalf of the nation, as opposed to his administration or the executive

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165. *Id.* at 127.

166. *Id.* Proclamations that address times of war and economic crisis tend to stir up considerably more controversy than do those that address natural disasters. *Id.*

167. *Id.* at 131. President Kennedy also issued an executive order that brought federal marshals to the University of Mississippi to end the violence there. This is an example of using multiple executive tools to address the same issue in different ways. The proclamation informed and directed the public as to desegregation efforts, while the executive order addressed the government department to direct its staff to address the same issue. *Id.*

168. *Id.* at 133. The authority of a President to grant pardons comes from Article II, section 2, of the U.S. Constitution. U.S. CONST. art. II, § 2. The Supreme Court has interpreted this power broadly, holding that the Congress has no power to limit it. *See* Schick v. Reed, 419 U.S. 256, 266 (1974); United States v. Klein, 80 U.S. 128, 141 (1871); Ex parte Garland, 71 U.S. 333, 334 (1866).

169. U.S. CONST. art. II, § 2 ("The President shall . . . have Power to grant Reprieves and Pardons for Offences [sic] against the United States, except in Cases of Impeachment.").

170. COOPER, *supra* note 19, at 133.

171. *See id.* (explaining that President Ford wanted to salve "the deep divisions in the nation at the end of the divisive Vietnam experience by providing amnesty for draft evaders"). Amnesty is a pardon extended by the government to a group or class of persons for a political offense. BLACK'S LAW DICTIONARY 83 (7th ed. 1999).

172. COOPER, *supra* note 19, at 135.

173. *Id.* Several statutes state that the proclamation is the appropriate tool for issuing such statements. However, some foreign-policy statutes that previously required proclamations now require "presidential determinations" made by memoranda. Statutes that deal with recovery from natural disasters specifically require the issuance of proclamations. *Id.*

174. *Id.* at 137.

branch of government.[175] Despite their formality, when used for hortatory purposes, proclamations are the simplest, most versatile tool for promoting the subtler aspects of the President's values.[176] In addition to the foregoing uses, proclamations also serve to "designate holidays, special days of observance, or citations of honor for individuals or groups."[177] As with executive orders, the Supreme Court held that presidential proclamations that lack statutory authority constitute pronouncements of a lesser degree of moment than legislation *per se* for purposes of establishing federal jurisdiction for specific judicial challenges.[178]

Both the Federal Register Act and Executive Order 11,030, as amended, outline the current process for promulgating an executive order.[179] The *Federal Register* publishes proclamations to provide notice to the public.[180] The structure of a proclamation "begins with a statement of conditions leading to the President's action . . . followed by a statement of the action" that the President seeks to take.[181] Because proclamations issued to influence individual behavior have limited legal strength (hence, their mainly hortatory use), the issuance of proclamations provides citizens standing to challenge orders that might seek to wield substantive influence over individual freedom of choice.[182] To counter easy access to litigation, the courts usually uphold proclamations based on referent statutes, but they generally avoid interpreting them as having mandatory and therefore legally challengeable effect.[183]

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175. *Id.*

176. *Id.* at 136 ("Hortatory proclamations generally cost nothing, require no follow-up, and, perhaps most important, rarely provide a reason for anyone to be upset."). One consequence of their non-controversial nature is that administrations issue dozens of hortatory proclamations every year. *Id.*

177. *Id.* at 135–36.

178. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 685–86 (1952); *see also* 44 U.S.C. § 1505 (2006). The Federal Register records both proclamations and executive orders, as follows:

> (a) Proclamations and Executive Orders; Documents Having General Applicability and Legal Effect; Documents Required to be Published by Congress. There shall be published in the Federal Register—
>
> (1) Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; . . .
>
> (3) documents or classes of documents that may be required so to be published by Act of Congress.

Id.

179. 44 U.S.C. § 1502; Exec. Order No. 11,030, 27 Fed. Reg. 5,847 (1962).

180. COOPER, *supra* note 19, at 118.

181. *Id.*

182. *Id.* at 120.

183. *Id.*

2. Presidential Memoranda—To Control the Executive Branch and Deal with Interagency Tensions

A presidential memorandum, earlier called a presidential letter, is a pronouncement by the President directed toward officials of the executive branch.[184] A presidential memorandum is essentially an executive order issued outside of the prescriptive process and thus lacks the legal requirements that accompany orders, which constitute ancillary statutory material.[185] There is no formal procedure for developing presidential memoranda, nor is there a requirement to publish them in the *Federal Register* or anywhere else.[186] Most memoranda find their way into the *Weekly Compilation of Presidential Documents*, in addition to the *Public Papers of the President*.[187] Memoranda are usually categorized into "presidential determinations, memoranda of disapproval, [or] hortatory declarations."[188]

Presidential determinations derive from statutes that require the President to make findings regarding the status or activity of a country concerning foreign policy.[189] The findings by the President determine what actions the government should take under the statute, such as sanctions, development assistance, or oversight activities.[190] Memoranda of disapproval are public vetoes that post-war presidents have often used to revise legislation to convey the President's preferred understanding of the statute while dispensing with those portions with which the President disagrees.[191] As such, they serve the same purpose as the much gentler signing statement used since the administration of President Reagan.

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184. Gaziano, *supra* note 13, at 294; *see also* Phillip J. Cooper, The Law*: Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games*, 31 PRESIDENTIAL STUD. Q. 126, 136–39 (2001) (discussing presidential memoranda as directed to executive branch agencies such as EPA).

185. COOPER, *supra* note 19, at 83, 85 (noting that recently the White House has begun referring to presidential memoranda and executive orders indiscriminately as presidential directives).

186. *Id.* at 85.

187. *Id.*

188. *Id.* at 86.

189. *Id.* at 86–87. For example, President Clinton issued a number of presidential determinations in his first year in office regarding trade and assistance to various countries and refugees. *Id.*

190. *Id.* at 86. In some cases, when the President is determining a course of action, the statute in question may limit the decision to act. The President must provide findings to the Congress to inform it of his actions and enable it to respond at its discretion. *Id.*

191. *Id.* at 86–90. An example of a memorandum of disapproval is President George H. W. Bush's response to the Emergency Chinese Immigration Relief bill in 1989. The President rewrote the legislation by issuing directives to accomplish selected purposes of the statute, while using the veto to dispose of the remainder. *Id.*

Hortatory declarations are similar to proclamations, but they address executive agencies instead of the public.[192] These declarations inform cabinet secretaries and agency heads to advise and remind their employees of policies and procedures.[193] The President has used this type of declaration to instruct executive departments to encourage their employees to participate in Red Cross charity drives or to remember civil rights commitments. President Clinton used this type of declaration to remind government employees of the advance payment option on the earned-income tax credit.[194]

3. National Security (Presidential) Directives—Policy Initiatives

A national security directive, otherwise known as a presidential directive, is "a formal notification to the head of a department or other government agency informing him of a presidential decision in the field of national security affairs," generally requiring that such department or agency take some follow-up action.[195] National security directives seek to implement and coordinate military policy, foreign policy, and other policy deemed to fall within the bounds of national security.[196] The name of this presidential tool has changed frequently, depending on the particular administration. President Kennedy called it a "National Security Action Memorandum."[197] President Nixon called it a "National Security Secision Memorandum."[198] President Clinton referred to it as a "Presidential Decision Directive."[199]

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192. *Id.* at 90.

193. *Id.*

194. *Id.*

195. *Id.* at 144 (quoting BROMLEY K. SMITH, ORGANIZATIONAL HISTORY OF THE NATIONAL SECURITY COUNCIL DURING THE KENNEDY AND JOHNSON ADMINISTRATIONS 23 (National Security Council 1988)). This is the definition provided by President Lyndon B. Johnson, who referred to the instrument as a National Security Action Memorandum. *Id. See also* HOWELL, *supra* note 1, at 17 (noting that the various labels applied to national security directives have included presidential directives, national security decision directives, presidential decision directives, and NSC policy papers).

196. COOPER, *supra* note 19, at 144. National security directives are employed for a variety of reasons such as: a general assessment of national security issues and development of basic policy; setting or reviewing regional or country policy; providing guidance for negotiations with foreign countries; to plan and execute arms sales and transfers, military doctrine, deployment, and warfare coordination; management and control of nuclear weapons and power; propaganda and psychological warfare; and as a vehicle for the development and implementation of economic policy. *Id.* at 144–97.

197. *Id.*

198. *Id.*

199. *Id.* at 144. Presidents Truman and Eisenhower referred to the directives as NSC policy papers. *Id.* President George H. W. Bush referred to these as national security directives, while President George W. Bush referred to them as national security presidential directives. *Id. See also* William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 720 n.377 (explaining that the term used to refer to national security directives changes depending on the administration in power).

Despite the changing name, which heightens the sense of presidential ownership of this tool, this kind of directive mainly targets foreign policy and military affairs, while often having some domestic impact as well. Economic policy refers both to issues of cost and to deciding what legitimate mechanisms to use to finance a national security policy at home or abroad.[200] Due to the fact that most national security directives possess the requisite security classification, the President has usually refused to notify Congress of their existence, provide copies of directives at the request of Congress, or send witnesses to testify at congressional hearings on a directive's subject matter.[201]

The President has issued many executive orders in response to a need for national security. While the Freedom of Information Act (FOIA) applies to executive orders, there remains a recognized need for protecting classified information, which executive orders may contain in the pursuance of safeguarding the nation. The Federal Register Act requires the publication of executive orders and proclamations, but there is no publication requirement for presidential memoranda or national security directives.[202]

The Constitution provides express authority for the President to issue certain agreements pertaining to foreign affairs and national security. Presidents have issued executive orders in relation to classified material, in addition to orders that deal specifically with the declassification of material.[203] With the goal of ensuring the most expeditious, albeit reasonable, conversion of classified directives into publicly available documentation, President Reagan's Executive Order 12,356 requires the declassification or at least downgrading of national security directives as soon as the prevailing security conditions allow.[204] While national security directives and military orders are too sensitive for publication until relevant

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200. COOPER, *supra* note 19, at 162.

201. *Id.* at 145. For example, as National Security Advisor, General Colin L. Powell refused to testify about national security directives at a congressional investigation. *Id.*

202. Branum, *supra* note 47, at 8 n.24.

203. Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982) (addressing classification scheme for all government information relating to national security). *See, e.g.*, King v. U.S. Dep't. of Justice, 830 F.2d 210, 215–16 (D.C. Cir. 1987) ("While the old executive order in some instances required declassification decisions to be made by weighing the need to protect information against the public interest in disclosure, [Executive Order 12,356] eliminates this balancing provision from the declassification calculus.") (citation omitted).

204. Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982). The official who authorized the original classification is the one to declassify or downgrade it, if that official is still serving in the same position, or, if the first official is no longer serving in that capacity, the official's successor. Alternatively, a supervisory official of either of the foregoing officials may do so, or any official delegated such authority in writing by the agency head or senior agency official designated pursuant to provisions of the executive order. *Id.*

threats have clearly passed, most published executive orders are of interest to the general public, as are national security directives, once the sensitive issues at the root of their classification expire.[205]

The National Security Council, formed by the National Security Act of 1947, is the originating agency of national security directives.[206] It consists of the President, the Vice President, and any other secretaries or officials that "priorities or circumstances dictate."[207] The process of developing national security directives begins when the Council confronts a problem, and it proceeds as follows: (1) the National Security Council selects a problem; (2) the Council analyzes the problem and submits recommendations or solutions to the President; and (3) the President chooses whether to approve and sign the National Security Directive, which action renders the recommendations a part of national security policy.[208]

4. Presidential Signing Statements—Asserting Influence in Public Policy

The Justice Department normally prepares presidential signing statements, pronouncements made by the President for the purpose of identifying legislative provisions of concern to the President.[209] Presidential signing statements supply the President's own interpretation of the construction of newly enacted legislation, while indicating constitutional boundaries that will affect its execution, and may direct agents of the executive branch on a particular manner of administering the proposed legislation.[210] Signing statements give the executive branch an opportunity to assert greater influence on the interpretation of statutes, while allowing each administration to establish clear views on how to implement specific policies.[211] The process also affords the opportunity to direct agents of the executive branch on the specific manner in which to implement newly crafted legislation in support of the President's own interpretation.[212] Signing

205. Gaziano, *supra* note 13, at 293.

206. COOPER, *supra* note 19, at 146. The National Security Act of 1947 created the National Security Resources Board and the Central Intelligence Agency (CIA).

207. *Id.*

208. *Id.* (noting that different presidents tend to operate their National Security Councils in different ways); *see also* HOWELL, *supra* note 1, at 17 (noting that, in actual practice, the President may choose to package controversial executive orders as national security directives in order to avoid congressional scrutiny, even though the presumption is that the President uses this process to safeguard the nation's security).

209. COOPER, *supra* note 19, at 201.

210. *Id.* at 201. Attorney General Edwin Meese III appears to have invented the signing statement to provide President Reagan with a more active role in judicial interpretations of the Constitution. Administrations have since established a systematic process for preparing signing statements to defend executive-branch authority to assert the President's views on political issues. *Id.* at 201–02.

211. COOPER, *supra* note 19, at 201–03.

212. *Id.* at 202; *see also* Gaziano, *supra* note 13, at 290. For example, a signing statement might

statements thus present the President's views as a legitimate and authoritative extension of the legislative history of new statutes.[213] The issuance of a signing statement can also have the purpose and effect of directing an agency to refrain from implementing a statute in the manner in which Congress has enacted it.[214] Executive officials sometimes use signing statements to influence the courts' interpretation of the legislation in order to control implementation.[215]

Signing statements have served as a type of fiscal line item veto,[216] so the President has used them to alter spending legislation.[217] They have also served as a way to respond to congressional attempts to control administrative action through spending mandates, conditions, or prohibitions.[218] An example of this use is the 1992 instance of annual congressional legislation on budgetary appropriations for energy and water development, which "prohibited the President from expending funds from the act to undertake certain types of studies concerning pricing for hydroelectric power."[219] President George H. W. Bush rejected this restraint by asserting his duty under the Constitution to recommend "necessary and expedient" measures for the protection of the Union.[220]

The use of presidential signing statements as substantive vetoes occurs when the President specifically rejects provisions of statutes while otherwise signing the legislation.[221] An example is President Reagan's

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identify a legislative provision that the President thinks is unconstitutional. In such a case, the statement might instruct executive-branch officials to refrain from enforcing the identified provision. Such a statement would thus have the same effect as a proclamation. *Id.*

213. COOPER, *supra* note 19, at 203. To ensure the regular presentation of signing statements with collections of legislative history, Attorney General Meese entered into an arrangement with West Publishing Company to record signing statements in the *United States Code Congressional and Administrative News* (U.S.C.C.A.N). *Id.*

214. *Id.* at 202; *see also* Gaziano, *supra* note 13, at 290 (noting that "[a] faithful servant in the executive branch" should give a presidential signing statement the same effect as a proclamation).

215. COOPER, *supra* note 19, at 202. Executive officials might want to influence judicial decisions that are the result of a challenged statute, or even encourage litigation. The Supreme Court has gone so far as to cite the President's signing statement as a basis for striking down legislation. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 719 n.1 (1986).

216. COOPER, *supra* note 19, at 203.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*; U.S. CONST. art. II, § 3 ("[The President] shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . . ."). The President has used other provisions of law to support what is in effect a species of item veto. In the cited example, the legislation restricted funding for certain purposes, to which the President objected on the grounds of his constitutional prerogative to recommend legislation deemed "necessary and expedient." COOPER, *supra* note 19, at 204. In effect, a presidential signing statement that excludes selected portions of a bill amounts to a veto and suggests the same congressional remedies as in the case of a veto of a bill *per se*.

221. COOPER, *supra* note 19, at 204.

national security directive to impose nondisclosure requirements in congressional legislation that prohibited enforcement of such requirements.[222] In signing the legislation, the President wrote that it is his responsibility to "ensure the secrecy of information whose disclosure would threaten our national security."[223] The President based his signing statement on a district court decision that declared as unconstitutional a provision similar to that at issue.[224] The President also vetoed an amendment to the legislation that founded the Central Intelligence Agency (CIA), which would have required the CIA's Inspector General to submit reports and recommendations to agents of the legislative branch.[225]

The President uses signing statements to fix outer boundaries to statutes.[226] When the President finds a provision to be unconstitutional, he may announce an interpretation of the legislation that will put boundaries on the new law so that it circumvents any constitutional conflict.[227] The statement directs administrative officials to implement the new policy in the way in which the President authorizes.[228] President George H. W. Bush used this authority when he signed the 1991 amendments to the Civil Rights Act, noting that application of the "disparate-impact" standard to indicate discrimination may be detrimental to business.[229] This particular signing statement "(1) established the administration's reading for the legislative history, (2) sought to influence future judicial interpretations, (3) set boundaries on the meaning of the relevant sections of the statute, . . . (4) controlled implementation," and recognized as authoritative an analysis prepared by a Republican member of the Senate.[230]

Another example is the attempt by Congress to prohibit the President from placing U.S. troops under foreign commanders.[231] President Clinton signed the bill, while writing that he interpreted it as lacking any effect to restrict his constitutional responsibility and authority as Commander in

222. *Id.*
223. *Id.* at 205.
224. *Id.* at 204.
225. *Id.* at 205 The President rejected that provision on the basis that it "would conflict with the constitutional protection accorded the integrity and confidentiality of the internal deliberations of the Executive branch." *Id.* (quoting Presidential Statement on Signing the Intelligence Authorization Act 1989, 24 WEEKLY COMP. PRES. DOC. 33 (Oct. 3, 1988)).
226. *Id.* at 206.
227. *Id.*
228. *Id.*
229. *Id.* at 207.
230. *Id.* ("These documents will be treated as authoritative interpretative guidance by all officials in the executive branch with respect to the law of disparate impact as well as the other matters covered in the document." (quoting WEEKLY COMP. PRES. DOC. 27 (March 2, 1991)).
231. *Id.* at 208.

Chief of the nation's military forces.[232] The President also issued signing statements to the effect that, in his interpretation, Congress intended specific legislation to serve an advisory purpose, rather than to mandate constraints of action.[233]

5. Executive Agreements

An executive agreement involves the President's exercise of authority in the execution of his foreign-policy powers. Unlike an executive order, it is a specific and usually minor agreement with a foreign nation, given that the Senate must ratify actual treaties.[234] The President may issue executive agreements based on four zones of power: (1) express constitutional grant of power as Commander in Chief; (2) authorization in a prior treaty; (3) prior authorization from Congress; and (4) subsequent congressional authorization after the agreement's signing.[235] Consequently, the President may execute an executive agreement with a foreign nation with or without the consent of the Senate.[236] While executive agreements are useful when dealing with foreign nations, executive orders *per se* constitute a far more common method for the presidential use of executive power.

III. A CLOSE EXAMINATION OF THE FRAMEWORK—SOURCES OF AUTHORITY TO ISSUE EXECUTIVE ORDERS: DOMESTIC AND INTERNATIONAL CONSIDERATIONS

The President's power to issue executive orders derives from three sources. First is the constitutional grant of power *per se*.[237] Second, Congress may pass statutes that explicitly or implicitly include a grant of power authorizing Presidential action. Third, Article II of the U.S. Constitution provides inherent authority for the President to issue executive orders. The first two sources constitute either enumerated powers or logical

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232. *Id.*

233. *Id.*; INS v. Chadha, 462 U.S. 919, 959 (1983) (striking down legislative vetoes).

234. HOWELL, *supra* note 1, at 19 (arguing that executive agreements serve as additional tools for Presidents to unilaterally influence public policy).

235. Amer. Ins. Ass'n v. Garamendi, 539 U.S. 396, 397 (2003) (holding that the President can enter into executive agreements with foreign countries without Senate ratification); *see also, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 679 (1981) (clarifying that executive agreements with foreign governments are a "longstanding practice").

236. *Garamendi*, 539 U.S. at 397; HOWELL, *supra* note 1, at 19 (explaining that, rather than waiting to obtain Senate consent, the President may use executive agreements to commit the nation to arrangements that fall short of fully elaborated treaties). Examples provided include ocean fishing rights, open airspace, international trade, and immigration patterns. HOWELL, *supra* note 1, at 19.

237. U.S. CONST. art. II (expressing those powers granted to the executive branch).

inferences from enumerated powers.[238] The third source presents considerably more debate than the first two sources.

Inherent power takes as its starting point the necessity for the President to act in predictable ways to fulfill his constitutional and congressional mandates. When, as under a condition of national emergency, Congress chooses to expand the President's power temporarily, there is maximal controversy over the appropriate limits of that power.[239] Otherwise, congressional acquiescence in the form of silence on presidential action,[240] as well as judicial acquiescence in the form of abstention from review,[241] amount to ratification.

Unlike the strict rendering of the doctrine of the separation of powers, these three sources of executive power overlap and influence one another, rather than existing as discrete forces. Nor are they static, but rather their reactions to different situations vary.[242] Regardless of the specific source, the President's authority to issue executive orders invariably originates within the outer realm of the Constitution, according to the theory that an

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238. MAYER, *supra* note 20, at 36.

239. COOPER, *supra* note 19, at 18.

240. *See* United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915) (finding "[t]he case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders").

241. *In re* Neagle, 135 U.S. 1, 76 (1890); *see also infra* notes 304–12.

242. Justice Robert H. Jackson identified three categories of presidential power in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

> Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. . . .
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> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .
>
> 2. 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 may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id.

inherent prerogative power exists within the executive office.[243] The President's authority also derives from congressional grants and delegations of legislative authority through statutes.[244] The question that arises with the exercise of any executive order of particularly sweeping effect revolves around whether the President either acted within his constitutional power or acted pursuant to a constitutionally sound delegation of authority by Congress. The President may, in accordance with the Constitution, promulgate rules for executive agencies that are necessary for the faithful execution of laws passed by Congress,[245] but there must be an absence of conflict with the Constitution or other acts of Congress that remain in force, both as a matter of intent and as one of interpretation.[246] The President may act legislatively only when Congress has properly delegated the authority to do so, as long as Congress fully preserves its legislative responsibility in the process.[247]

In *Jenkins v. Collard*, the Supreme Court ruled that executive orders are indeed valid when based on a constitutional or statutory grant of power to the President, and that such executive orders are equivalent to laws.[248] In *Youngstown*, the Supreme Court held that executive orders that lack constitutional or statutory power are invalid.[249] The Court also noted that

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243. U.S. CONST. art. II, § 3; *see also* Gaziano, *supra* note 13, at 276–78. Gaziano notes that the Constitution may expressly set out the President's authority to issue executive orders, or that the authority may be inherent in the substantive power granted to the President. With regard to express authorizations of power, the Constitution expressly mentions the President's powers as Commander in Chief, Head of State, Chief Law Enforcement Officer, and Head of the Executive Branch. The President also possesses the authority to issue orders when there is reasonable implication of the power granted (implied authority), or if it is inherent in the nature of the power conferred (inherent authority). For example, the term Commander in Chief of the Army and Navy necessarily implies that the commander has the power to issue oral and written commands.

244. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); *see also* Gaziano, *supra* note 13, at 280–82. Where a statutory grant of power from Congress implies or necessitates the President's authority, the Congress is free to modify that authority and can even define the procedures that the President must take when exercising it. *Id.* at 280. However, the Constitution does place some limits on the power of Congress to manage the actual decision-making processes of the executive branch. For example, although Congress may grant to the executive branch authority to deport illegal aliens, Congress may not reserve veto power over final deportation decisions. *Id.* at 281–82 (discussing INS v. Chada, 462 U.S. 919 (1983)).

245. U.S. CONST. art. II, § 1.

246. *See* 16 AM. JUR. 2D *Constitutional Law* § 247 (2009) (explaining that the President may promulgate regulations as part of his executive function, but only so far as those regulations are not overridden by Congress).

247. Gaziano, *supra* note 13, at 281 ("Unless Congress has specified that the statutory power may be exercised only in a particular way, the President may broadly issue directives in the exercise of his statutorily delegated authority.").

248. Jenkins v. Collard, 145 U.S. 546, 560–61 (1892) (holding that a public proclamation of the President "has the force of public law" and must be recognized by courts (citing Jones v. United States, 137 U.S. 202, 212, 215 (1890))).

249. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 580 (1952). This case arose after President Truman issued an executive order following news of a steel company strike. *Id.* at 582. It directed the Secretary of Commerce to take possession of the majority of the nation's steel mills. *Id.*

longstanding judicial doctrine holds that when an executive order conflicts with a statute, the statute preempts the order.[250] Nevertheless, unless the conflict is stark, the courts will attempt to interpret an executive order under the presumption that there is no such conflict.[251]

The President specifically receives his authority to issue executive orders from Article II, Section 1, of the Constitution.[252] Because the President is the governor of the executive branch, he is by definition responsible for executing the government's laws. Nevertheless, the separation of powers among the three branches of government can limit the President's ability to fulfill that duty.[253] The executive order has proved to be a tool of executive power derivable from the Constitution but without self-logical limits. There has long been controversy over the question of the use of purely executive decrees (as opposed to legislation that mandates presidential decrees, as exists in many countries) as national law.[254] Indeed, the President's power to make laws through direct action enables some degree of bypassing normal constitutional protections.[255] Many opinions of this power exist, and they vary widely, from maximalists, who believe that there is no constitutional restriction to the power conveyable through the executive order, to minimalists, who feel that the Constitution, properly understood, limits the power of the executive order to that which it expressly grants the President.[256] Although there is no explicit constitutional definition of the executive order, the courts and Congress

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Steel companies complied with these orders but brought this case against the government, arguing that neither the Congress nor the Constitution had authorized the steel mill seizure. *Id.* at 582–83. This was the first case in which the Supreme Court overturned an executive order in its entirety.

250. *Id.* at 585–86.

251. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 674 (1981) ("[T]he President's action . . . taken pursuant to specific congressional authorization . . . is 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring))).

252. U.S. CONST. art. II, § 1, 3. (providing a value grant of "executive power," while Section 3 requires the President to "take Care that the Laws be faithfully executed").

253. *See also* Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 1184 (D. Utah 2004), *rev'd on other grounds*, 455 F.3d 1094 (10th Cir. 2006) (emphasizing the court's authority to review the constitutionality of the President's actions). The President may use executive orders to carry out his constitutional duty of attending to the faithful execution of the laws, while delegating certain duties to specified executive branch officials, but he is incapable of using them to impose legal requirements on the executive branch that are inconsistent with the express will of Congress.

254. JAMES L. HIRSEN, GOVERNMENT BY DECREE: FROM PRESIDENT TO DICTATOR THROUGH EXECUTIVE ORDERS 4–6 (1999) (describing an executive order as "law by fiat, pure and simple"). "Throughout history, corrupt monarchs and depraved dictators have used this approach of legislation by decree . . . . [E]xecutive orders vest the power of a monarch on whoever happens to hold the office of the presidency." *Id.* at 5.

255. COOPER, *supra* note 19, at 15.

256. MAYER, *supra* note 20, at 39 ("Ultimately there is no conclusive answer to the question of how far the executive power reaches.").

have interpreted the nature of this tool over time, in conjunction with the President's own pronouncements. Whatever the particular view, it is a widely accepted opinion that no executive order constitutes a proper exercise of power unless it emanates logically from the statute that it cites within its own text, or from the Constitution itself.[257]

Although action by the President in excess of his statutory authority is not necessarily a violation of the Constitution,[258] an executive order issued by the President pursuant to authority delegated by the Constitution or by Congress has the same effect as a statute.[259] In the strictest sense, executive orders have no legislative effect in the absence of constitutional or congressional authorization, but when Congress delegates rulemaking power to the President, it conveys a measure of power adequate to the accomplishment of the intended purpose.[260] In effect, it is impractical to presume that the President may be violating a statute, even if it is indeed the case in some technical sense, until there is a valid judicial challenge. Moreover, when a statute explicitly authorizes an executive order, the only practical presumption is that the President has made his decision pursuant to a full grant of discretion, and no judicial review is available.[261]

The courts have also recognized presidential orders as an acceptable means for executive agencies to issue substantive rules, a process which endows them with the force of law.[262] Opponents claim that the scope of authority employed when the President issues an executive order pursuant to inherent or implied authority is much broader than that which the Framers intended.[263]

A. Constitutional Authority

Article II of the Constitution vests the executive power in the President, using a short sentence in a passive-voice construction whose unstated agent is, by the nature of the document, the Constitution itself.[264] This "vesting clause" interacts with Article II, Section 3, which uses

257. 91 C.J.S. *United States* § 48, *supra* note 16; ("In order to be a proper exercise of a delegated power, an executive order must be rationally related to the statutory grant of authority upon which it is premised or to a grant of power arising from the Constitution itself." (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952))).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. COOPER, *supra* note 19, at 21.

263. *Id.* at 22.

264. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *see also* MILLER, *supra* note 40, at 86 (commenting that the grant of power in the Constitution to execute the laws faithfully is "vague at best").

another passive-voice construction to lay upon the President the specific duty of seeing to the faithful execution of the laws,[265] which forms the founding rationale upon which the power of the modern executive order depends. This time, the unstated agent of the passive-voice construction is neither the Constitution nor the President, but rather refers to any means or edifice by which the President ensures the faithful execution of the laws, because it must be an apparatus over which the President exercises legitimate control. It thus implies that he may build whatever means he can, or use those means that Congress chooses to build for him. Certainly, a part of that apparatus must be regulatory in nature. To parse the terms further, the executive power is literally the power to execute. In the Congress, execution is legislation. Should the President legislate, he must do so as a means of execution, rather than for its own sake. Therefore, for the President, legislation is execution, and execution refers to realizing the goals of the laws passed by the Congress.

Nevertheless, a mandate that the President faithfully execute the law is of considerable conceptual distance from the prospect that he might create laws in areas in which Congress has yet to act, for the power to legislate for its own sake is the exclusive domain of Congress.[266] However, when the President acts in an area in which he has no explicit grant of congressional authority to act, those actions may, depending on circumstances, acquire the force of law by acquiescence. That there is no way for this source of power to emanate from the Constitution *per se* has found firm ground historically.[267] Nevertheless, Article II is indeed the espoused source of every executive order.[268]

As noted, the broadest grant of authority to the President in the Constitution appears in a charge to attend to the faithful, or conscientious, realization of the goals of legislation.[269] This grant limits presidential behavior by requiring the President to carry out the will of Congress without contrary designs, while implicitly permitting some discretion to the President in the performance of his duties of implementation.[270] Nevertheless, while the Constitution is very specific about the powers that it grants the Congress, it is considerably more general about the powers that it

265. U.S. CONST. art. II, § 1, cl. 1 (stating that the President must "take Care that the Laws be faithfully executed").

266. U.S. CONST. art. I, § 8 ("[Congress has the power] to make all Laws which shall be necessary and proper . . . .").

267. MILLER, *supra* note 40, at 86.

268. All executive orders begin with the words "[b]y authority vested in me as President," a literal reference to the vesting clause.

269. U.S. CONST. art. II, § 3.

270. MAYER, *supra* note 20, at 40.

grants the President.[271] The Supreme Court recognized the existence of implied presidential powers in the case In re *Neagle*.[272] In this case, the Court expanded the scope of what the President's enumerated powers imply.[273] The Court ratified the President's authority to act independently of Congress in executing the law.[274]

The President's inherent authority is the most controversial and contested source of power, because there are no specific boundaries thereto.[275] It is unclear whether the Framers of the Constitution intended for executive orders issued pursuant to implied authority to have the same effect as those issued pursuant to express authority.[276] The extent of the President's inherent authority to act depends on the interpretation of the Constitution and congressional delegation of specific powers. Opponents of the principle of inherent presidential authority claim that the scope of authority employed when the President issues an executive order pursuant to inherent or implied authority is much broader than that which framers intended.[277] Ultimately, there is no conclusive solution to the problem of determining the outer extent of the executive power.[278]

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271. JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 35 (1926) ("There is a certain looseness in the constitutional grant of executive power which is in sharp contrast to the specification of the powers of Congress. It is the 'legislative powers *herein granted*' that are bestowed upon Congress, but it is simply the 'executive power' that is vested in the President." (emphasis in original)); *see also* MAYER, *supra* note 20, at 40–41.

272. *In re* Neagle, 135 U.S. 1, 64 (1890) (asking whether the President's duty is "limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?" (emphasis in original)). The Court answered affirmatively, specifying that the Constitution surely gives the President the implied powers necessary to perform the duties of the executive office faithfully. *Id.* at 81.

273. *See id.* at 63. (noting that although the Constitution expressly provides only that the President "shall take Care that the Laws be faithfully executed," the President is able to fulfill this duty by numerous means implied in his constitutional mandate).

274. *Id.* at 67.

275. Gaziano, *supra* note 13, at 281. Congress may not generally restrict Presidential exercise of inherent Article II or statutory authority. *Id.*

276. Branum, *supra* note 47, at 16–18 (discussing the intentions of the Framers of the Constitution when creating presidential authority, noting that the Framers wanted to avoid abuse of power by one person).

277. MAYER, *supra* note 20, at 50–51 ("Many legal scholars argue against the notion of inherent powers, concluding that it 'is incompatible with the very purpose of a limited, written Constitution.'" (quoting Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757, 770 (1979))). Presidents have themselves asserted this inherent power as that which they possess beyond that of the Constitution. *Id.* For example, President Franklin Roosevelt believed that it is the President's duty to do whatever might suit the needs of the nation unless the Constitution forbids it. *Id.* at 51. Thus, the President may infer the existence of implied powers as stemming both from the enumerated powers and from those areas on which the Constitution or congressional statutes are silent. *See id.* at 50–51.

278. *Id.* at 39; *see also* Sterling, *supra* note 37, at 109 ("No exact formula for defining the Presidential power is crystal clear from the Constitution itself and the conclusions drawn must rely on the context of the document and the extrinsic evidence.").

B. Statutory Authority

An executive order will generally cite some statutory authority to give the President the power to carry out the particular law at issue. When an order has this backing, the President is communicating that his use of the order seeks to execute the directives of Congress. Since the Constitution charges the President with effecting the laws,[279] such action is well within the President's universally recognized power. Objections to this type of order may arise if the President's prescriptions actually deviate from the mandates or intent of Congress, despite the ascription. When this is the case, Congress has recourse.[280] Congress may amend the statute referenced in the order so as to cause the order, and hence further prosecution thereof, to contradict it. The disadvantage of this remedy is that the promulgation of executive orders is swift, in contrast to the lentitude of congressional legislation.

Congress has several ways to approve an executive order other than by adopting a statute that specifically authorizes future presidential action.[281] Congress can imply approval of an executive order through its power of the purse, by funding programs to purchase goods and services established by the order.[282] In fact, the Supreme Court has even taken the fact of continued funding of particular programs, or congressional inaction when given the chance to obstruct the continuance of an executive order, as evidence of congressional ratification.[283] Alternatively, Congress can enact legislation to ratify the President's actions after their manifestation.[284] Congress also has the power to overturn executive orders after their manifestation when it disagrees with the President's actions.[285] However, the Supreme Court has

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279. U.S. CONST. art. II, § 3.

280. For more discussion on the options available to the Congress regarding executive orders, please see *infra* Part IV-E.

281. COOPER, *supra* note 19, at 23.

282. MAYER, *supra* note 20, at 45–46; *see, e.g.*, Federal Property and Administrative Services Act (FPASA), ch. 288, 63 Stat. 377 (1949) (codified as amended in scattered sections of 26 U.S.C., 31 U.S.C., 40 U.S.C., 41 U.S.C., 46 U.S.C. and 50 U.S.C. (2006)).

283. COOPER, *supra* note 19, at 23–24. This is especially true in time of war, such as approving actions taken during times of emergency and authorizing further (and often broad) presidential actions. *Id.* at 23. *See also* Alissa C. Wetzel, Note, *Beyond the Zone of Twilight: How Congress and the Court can Minimize the Dangers and Maximize the Benefits of Executive Orders*, 42 VAL. U. L. REV. 385, 417 (2007) (arguing that the failure of the Congress to rein in the President's use of abusive executive orders by inaction on its part indicates congressional irresponsibility).

284. Gaziano, *supra* note 13, at 275; *see e.g.*, *supra* note 162 and accompanying text (discussing President Washington's Neutrality Proclamation).

285. COOPER, *supra* note 19, at 23. *See also* Branum, *supra* note 47, at 26–27, 59. An example of the overturning of executive orders occurred after President T. Woodrow Wilson's robust use of executive orders at the beginning of World War I. President Wilson used executive orders during that time to create such federal agencies as the World Trade Board to restrict radio use and to regulate the price of coal. *Id.* In 1921, the Congress repealed most of the wartime measures that President Wilson

recognized the President's independent constitutional authority under Article II to act in the absence of express delegation.[286] Finally, courts can intervene to issue findings on the validity of presidential actions.[287]

Congress can also give the executive branch the authority to issue policies through express delegation.[288] The Supreme Court has only rejected an effective congressional delegation of power twice in United States history.[289] One of those instances was the case of *ALA Schechter Poultry v. United States*, in which the Supreme Court repealed the National Industrial Recovery Act of 1933, holding that the legislation gave the President so much authority to enact laws governing trade and industry throughout the country, without meaningful restrictions, as to constitute the congressional abdication of its lawmaking role.[290] In response, federal legislation now generally sets express conditions when the executive branch receives policy-related authority delegated by the legislative branch.[291] This is normally referred to as an "intelligible principle."[292] The intelligible principle normally allows the delegated power to pass judicial scrutiny.[293]

In addition to delegation of policy-related authority, Congress may delegate authority for the President to "promulgate contract rules and regulations."[294] In 1949, for example, Congress gave the President authority

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had taken, just before President Warren G. Harding assumed office. *Id.* at 27. Until 1999, the Congress or the courts had only revoked or modified 253 presidential orders. *Id.* at 59. A 1999 study performed by the Cato Institute found that the Congress was responsible for modifying and revoking 239 of those executive orders, while the courts had only struck down 14 orders, wholly or partially. *Id.*

286. Cooper, supra note 19, at 23–24.

287. *Id.* at 24; *see also* Youngstown Sheet & Tube Co v. Sawyer, 343 U.S. 579, 584 (1952) (considering the validity of the President's action by executive order to seize the nation's steel mills).

288. MAYER, *supra* note 20, at 44 ("Congress . . . has routinely delegated 'substantial discretionary authority to the executive branch' to flesh out the details of policy and implementation." (quoting LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 88 (4th ed. 1997))). *See, e.g.*, Jenkins v. Collard, 145 U.S. 546, 557 (1892) (describing both a general amnesty proclamation and special pardon delivered by the President).

289. MAYER, *supra* note 20, at 44; *see also* Pan. Ref. Co. v. Ryan, 293 U.S. 388, 405–07, 433 (1935) (holding an executive order barring oil shipments in excess of state quotas unconstitutional, despite Congress' delegation of authority to the President).

290. ALA Schechter Poultry v. United States, 295 U.S. 495, 498 (1935). Congress passed the National Industrial Recovery Act (NIRA), as part of President F. D. Roosevelt's "New Deal" legislation, authorizing the President to determine "codes of fair competition," to govern wages, working conditions and trade practices as a means to prevent "monopolies or monopolistic practices." National Industrial Recovery Act ch. 90, 48 Stat. 195, 196–97 (1933) (codified as amended at 15 U.S.C. § 703 (1934) (repealed 1935)). In *Schechter*, the "sick chicken" case, the Supreme Court found the NIRA unconstitutional. *Schechter*, 295 U.S. at 498. Except for limited passages enacted separately later (*e.g.*, the National Labor Relations Act), the NIRA never recovered.

291. MAYER, *supra* note 20, at 45. ("The Administrative Procedure Act of 1946 imposed procedural requirements on executive branch rulemaking and regulatory functions, and Congress often requires detailed reporting and oversight.").

292. WILLIAM F. FUNK et al, ADMINISTRATIVE PROCEDURE AND PRACTICE 521 (4th ed. 2010).

293. *Id.*

294. MAYER, *supra* note 20, at 46. The President already had the authority as chief executive under the Constitution to administer contract policy within standard legal boundaries. *Id.*

within the Federal Property and Administrative Services Act (FPASA) to enact regulations at his or her discretion "respecting government administration and the management and disposal of government property."[295] The FPASA gave the President authority to determine how the government would carry out its contracts and policies related to the goals of economy and efficiency.[296]

President Carter acted on FPASA and asserted that the delegation includes the power to regulate social policy. In 1978, President Carter issued an executive order requiring that government contractors comply with guidelines promulgated by the Council on Wage and Price Stability.[297] The order required all contractors that receive "more than $5 million to certify their compliance with [those] guidelines."[298] The Federal Court of Appeals upheld the executive order, finding that the FPASA enabled the President to promulgate regulations freely, at his discretion, to advance broad social policy, as long as there was a close nexus between that policy and the FPASA's goals involving economy and efficiency.[299]

C. Inherent Powers of the President

The President may write an executive order that makes a general, rather than specific, reference to an applicable statute.[300] When an executive order fails to cite a specific statute for its justification or purports to act

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295. *Id.* The legislation enabled the President to "prescribe such policies and directives" as he or she deemed necessary to carry out its provisions. *Id. See also* the Federal Property and Administrative Services Act of 1949 (FPASA), 41 U.S.C. §§ 251–266 (2006).

296. MAYER, *supra* note 20, at 46. The President has often expanded the interpretation of the statute "to include policies with broad social and political consequences." *Id.*

297. *Id.* at 47. This was the first executive order that expressly cited the FPASA as providing the President with the authority to "achieve broad national goals through the federal procurement system." *Id.* (quoting Exec. Order No. 12,092, 43 Fed. Reg. 51,375 (1978)).

298. *Id.* The executive order stipulated that those contractors that refused to certify their compliance with the guidelines "would be subject to termination on existing contracts and would be ineligible to receive future contracts." *Id.*

299. *Id.* at 47–48. Labor unions argued that wage and price controls on government contracts established by executive order lay outside the scope of the President's power under the FPASA. Finding to the contrary, the court reasoned that the President has exercised procurement power under the FPASA since the 1940s with no resistance from the Congress, a fact that warrants a broad interpretation of the FPASA. AFL-CIO v. Kahn, 618 F.2d 784, 784, 790 (D.C. Cir. 1979); *see also* Federal Property and Administrative Services Act of 1949 (FPASA), 41 U.S.C. §§ 251–266a (2006) ("It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system . . . .").

300. MILLER, *supra* note 40, at 93. Exec. Order No. 11,605, 41 Fed. Reg. 7,703 (1976) was President Ford's attempt to reorganize the intelligence community by creating the Committee on Foreign Intelligence and the Intelligence Oversight Board. *Id.* The President cited three sources, namely, the Constitution, the National Security Act of 1947, and his capacity as President, as follows: "By virtue of the authority vested in me by the Constitution and statutes of the United States, including the National Security Act of 1947 . . . and as President of the United States." *Id.* As the only specified statute in the decree, the National Security Act never in fact provided the requisite authority. *Id.*

solely on an inferential grant of power by the Constitution, questions arise about the limits and legitimacy of the source of its power. One theory proposes that the authority granting language in the Constitution that references the legislative branch must necessarily be similar in strength to that which references the executive branch.[301] Therefore, each passage mutually informs the other.

According to this theory, the President has implied power just as the Congress has, which includes the power to make rules that may indeed constitute a species of legislation, as long as the rules fall short of infringing on any legislative powers specifically assigned to Congress.[302] By comparison, the Constitution avoids the phrase "herein granted" when conferring the executive power to the President.[303] That is, the phrase "herein granted" creates a necessity to identify explicit passages in the Constitution to justify specific types of authority. This view emerges from two Supreme Court decisions, In re *Neagle*[304] and In re *Debs*[305] (1895). In both cases, the Supreme Court strongly supported a presumption that the President may take action of a legislative nature without an explicit congressional mandate.[306]

In *Neagle*, a federal marshal held on murder charges filed a writ of habeas corpus under section 753 of the Revised Statutes.[307] This section allowed the filing of a writ by persons based on certain exceptions, one being any case of a person's incarceration for taking any action evidently required by law.[308] The question presented in the case was whether an order issued by the Attorney General, which required David Neagle to protect Justice Stephen Field pursuant to presidential authority, constituted a law within the meaning of section 753.[309] If Neagle could prove that the

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301. *Id.* at 90 (analogizing the "President's power under the 'take care' clause . . . [and] that expressly given to the Congress in the implied powers clause of Article I, Sec. 8").

302. The President must avoid infringing on any "legislative Powers herein granted" which are reserved for Congress. U.S. CONST. art. I, § 1.

303. U.S. CONST. art. II, § 1.

304. *In re* Neagle, 135 U.S. 1 (1890).

305. *In re* Debs, 158 U.S. 564 (1895), *abrogated by* Bloom v. Illinois, 391 U.S. 194, 196 (1968) (disagreeing that the Due Process Clause and the Sixth Amendment permit summary trials in contempt cases).

306. *Neagle*, 135 U.S. at 64–65; *Debs*, 158 U.S. at 599; MAYER, *supra* note 20, at 43 ("[The Court] stated broad support for presidential action taken without statutory authorization." (quoting PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 51 (1996))).

307. David Neagle was a federal marshal assigned to protect Supreme Court Justice Stephen Field, who had received multiple threats from David Terry and his wife. On a rail trip to northern California, Neagle shot and killed Terry for attacking Field. *Neagle*, 135 U.S. at 52–53.

308. *Id.* at 40–41 ("The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody . . . for an act done or omitted in pursuance of a law of the United States . . . ." (quoting Rev. Stat. 753, as amended by 23 Stat. 437, c. 353 (1885))).

309. *Id.* at 54.

protection order was indeed a law of the United States, and that killing David Terry was therefore an action pursuant thereto, then the writ would be proper because he took the action pursuant to a law of the United States.[310] The Court held that the Attorney General's order was, in fact, a law and upheld the writ.[311] Taking a broad view of the President's powers, the Court explained that any action taken pursuant to power granted by the Constitution is by definition in pursuance of a law of the United States.[312] Thus, an order of the President, unless found unconstitutional, has the same legal status as a statute.[313] By extension, therefore, the President legitimately usurps a power that the Constitution appears to have granted Congress.[314]

Contrary to this view, some argue that a strict reading of the Constitution prohibits an inference that the "take care" clause, which applies to the President, is analogous to the "necessary and proper" clause, which applies to the Congress.[315] The focus, they say, should be on the Court's explicit holding in *Neagle* rather than on an analogy of presidential powers as implied powers.[316] Read narrowly, *Neagle* establishes that an order of the President is indeed a law of the United States,[317] but it avoids establishing any kind of equivalence between legislative and executive powers beyond that definition. To infer that the President might possess certain lawmaking powers beyond those that must arise out of the necessity of the executive function is an expansive reading and would constitute a "significant constitutional principle."[318]

In re *Debs* is the second case that supports the expansive view of presidential power.[319] Eugene Debs was incarcerated as a consequence of

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310. *Id.* at 58.

311. *Id.* at 76.

312. *Id.* at 59. ("In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible [sic] from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is 'a law' within the meaning of this phrase.").

313. MAYER, *supra* note 20, at 35.

314. MILLER, *supra* note 40, at 90 ("The President's authority in this respect should include the power to take all measures, not prohibited by the Constitution or statute, 'which shall be necessary and proper for carrying into execution' the laws of the United States or for the protection of federal rights, privileges, and immunities." (quoting B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 63 (1963))).

315. *Id.* at 90–91.

316. *Id.* at 91.

317. *Id.* at 91 ("Even on a narrow reading, however, Neagle [sic] does stand for the proposition that an executive order can in fact be a law—and that is a significant constitutional principle.").

318. *Id.*

319. *In re* Debs, 158 U.S. 564, 599 (1895). Eugene Debs, President of the American Railroad Union, encouraged the Pullman Strike of 1894 after his recent success over the Great Northern Railroad Railroad. Debs and the workers of the Pullman Palace Car Company led a strike that gained national attention, but became increasingly violent and destructive. For a more detailed discussion on Debs and

violating an injunction obtained by railroad companies to bar railroad union leaders from supporting the Pullman strike.[320] No congressional statute specifically authorized the injunction.[321] Nevertheless, the Court upheld the injunction partly based on *Neagle*, holding that a presidential executive order can serve as a legitimate extension of the power of Congress to regulate interstate commerce, due to the stark clarity of that constitutional provision.[322] In effect, the Court equated the President's injunction to the national government's elimination of the obstruction of interstate commerce so long as the President acted purely in his executive capacity.[323] Read with the Court's opinion in *Neagle*, *Debs* stands for the proposition that the President may indeed make laws, and whatever those laws may be, they have the force and power of the national government behind them.

D. Congressional Acquiescence

At times, Congress has remained silent while the President has acted in an area that is otherwise construable as the appropriate domain of the legislature. This raises a post hoc source of executive authority, namely, congressional acquiescence. Congressional acquiescence has developed into a critical foundation of executive power. The Supreme Court's upholding of a proclamation by President Taft in *United States v. Midwest Oil Co.* is the principle example.[324] In 1897, Congress declared that public lands having a primary value derived from petroleum content are available for exploitation by citizens.[325] The result of the 1897 legislation[326] was such rapid extraction of resources that some lands neared exhaustion.[327] In response to a recommendation from the Director of the Geological Survey (USGS), President Taft issued a proclamation to withdraw from use a large area of land in California beneath which prospectors had discovered oil.[328]

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the strike, see generally DAVID RAY PAPKE, THE PULLMAN CASE (1999).

320. MILLER, *supra* note 40, at 91.

321. *Id.*

322. *Debs*, 158 U.S. at 582 ("The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails.").

323. MILLER, *supra* note 40, at 91 (arguing that in *Debs* the Court effectively defined "the President in his executive capacity [as possessing] powers belonging to the United States [as a whole], that is, to the national government in its entirety").

324. United States v. Midwest Oil Co., 236 U.S. 459, 483 (1915).

325. *Id.* at 466 ("All public lands containing petroleum or other mineral oils and chiefly valuable therefor [sic], have been declared by Congress to be 'free and open to occupation, exploration and purchase by citizens of the United States . . . under regulations prescribed by law.'" (quoting Act of Feburary 11, 1897, ch. 216, 29 Stat. 526 (1897)) (omission in original)).

326. Act of Feb. 11, 1897, ch. 216, 29 Stat. 526 (making available public lands containing petroleum to citizens).

327. *Midwest Oil*, 236 U.S. at 466–67.

328. *Id.*

This proclamation contradicted the literal language of the 1897 Act by proposing to take away a property right granted by Congress. The Government brought suit after Midwest Oil Company entered the land and began extracting oil in violation of the President's proclamation.[329] The Court upheld the proclamation by citing the longstanding authority of the President to withdraw tracts of land previously granted by Congress to the public, an authority conferred by virtue of the historical lack of objection from Congress in such instances.[330] Thus, by refraining from reacting to contrary executive action in a particular domain of congressional legislation, Congress had effectively ratified that action.

In 2006, Congress repealed the *Midwest Oil* doctrine, thus creating a new limitation on executive power wherein congressional action indicates a rejection of executive preemptive authority *per se*.[331] In *Utah Association of Counties*,[332] the Utah Federal District Court recognized that by passing the Federal Land Policy and Management Act (FLPMA),[333] Congress clearly sought to repeal the *Midwest Oil* doctrine.[334] Importantly, the fact that statutory legislation has superseded the *Midwest Oil* doctrine nevertheless fails to alter the longstanding principle of congressional acquiescence as a form of ratification of executive orders.[335] Indeed, the fact that Congress moved explicitly to controvert the *Midwest Oil* doctrine reinforces the principle that its inaction in response to executive action has the effect of ratification.

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329. *Id.* at 466–69.

330. *Id.* at 469. "[The President] has during the past 80 years, without express statutory authority—but under the claim of power so to do—made a multitude of Executive Orders which operated to withdraw public land that would otherwise have been open to private acquisition." The Court noted that "the long-continued [presidential] practice, known to and acquiesced in by Congress would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands." *Id.* at 474.

331. Five years prior to President Truman's order to seize the steel mills, Congress had, in great detail, debated whether to create legislation regarding a seizure power and explicitly rejected the proposition on multiple occasions. Despite five years' transpiration, the Court considered that the congressional spirit against the principle of executive seizure persisted through the executive action, so the absence of contrary congressional reaction thereafter fell short of congressional acquiescence. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585–99 (1952).

332. Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 1199 (D. Utah 2004); *see supra* note 253 and accompanying text.

333. 43 U.S.C. § 1701 (2006).

334. Utah Ass'n of Counties, 316 F. Supp. 2d at 1199 (observing that "Congress intended to repeal . . . the *Midwest Oil* doctrine and other Acts granting withdrawal authority to the President, thereby extinguishing Presidential [sic] authority to withdraw public lands in many circumstances."); *see supra* note 253 and accompanying text.

335. It thus remains true "that presidential practice, accompanied by Congressional silence, [can become] a source of authority for the President." MILLER, *supra* note 40, at 92.

E. Judicial Deference

Judicial deference has no small role in defining the scope of presidential power. In general, the courts have adopted a presumption that the President's actions are inherently in line with the intent of Congress unless contradicted by clear statutory language under a condition of formal challenge.[336] Thus, a challenge to a presidential order is valid only if it is logically impractical to formulate an interpretation of the relevant statute that accommodates the President's extension thereof.[337]

In his concurring opinion in *Youngstown*, Justice Frankfurter discussed this deference by stating that the Court would prefer to avoid striking down any presidential proclamation or order based on constitutional principles.[338] It seems that in *Youngstown*, Congress's refusal to enact legislation permitting President Truman to seize private property persuaded many of the justices.[339] Had these multiple prior congressional acts and discussions of the seizure power failed to materialize, the Court may have decided *Youngstown* in a different way.

Nevertheless, the Court has thus far judged executive orders only on a case-by-case basis, rather than in any precedent setting manner that might influence future executive power. This approach to assessing executive power means that there are no bright line rules to determine when the President may overstep his executive authority. This leaves the power essentially to the discretion of its wielder. What is interesting to note as well is the judiciary's attitude toward the importance of precedent.[340] This longstanding practice applies to presidential precedent as well, for what one president may achieve on the matter of power, a subsequent president may achieve even more.

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336. MAYER, *supra* note 20, at 56 ("In the past few decades the judiciary has through various decisions created a presumption that favors presidential initiative.").

337. *See id.* "Unless a presidential act contravenes a clear and explicit statutory or constitutional prohibition that directly addresses the action, the courts are likely to side with the president. In a series of decisions in the 1980s that expanded the scope of executive power, the Supreme Court indicated a willingness to validate executive action in the absence of an explicit congressional prohibition (which must take legislative form) . . . ." *Id.*

338. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952).

339. MAYER, *supra* note 20, at 57 ("[The Court] gave great weight to Congress's refusal to grant Truman the explicit statutory authority to seize the mills.").

340. MAYER, *supra* note 20, at 56 ("[The judiciary] has long held that custom or long-standing presidential practice can legitimate the exercise of a specific power.").

F. Executive Precedent

Presidential precedent assumes a central role in defining the scope of executive power as well. How a prior president has used the power may determine the limitations that a subsequent president may encounter. Likewise, how Congress has reacted to that use of power may also be informative. Every presidential action that deviates from the pattern of the past creates a justification for future presidents to repeat it,[341] especially where Congress has remained silent or inactive on the matter.[342] The creation of an imperative of power by virtue of the use of power results in an inexorable increase in presidential power over time.[343] Congress and the courts have attempted to create some outer limits on the scope of this power, but the effectiveness of these limits remains a question for debate.

G. Foreign Affairs/International Relations

A somewhat different principle applies to matters which are solely on the external ambit and in which the power of the United States is exercised as a sovereign nation in the field of international relations.[344] The approach for executive orders in international affairs seems less exacting than the more particular approach in the domestic realm. The Supreme Court has pointed out that the nuances of foreign policy are more the prefecture of the executive branch and Congress than of the Supreme Court.[345] The Court has also stated that it is important to consider the unpredictability and volatility of contemporary international relations and the fact that the executive is immediately privy to information which cannot be rapidly presented to Congress. Executive orders in foreign affairs are broader than customarily wielded in domestic areas, but that "does not mean that simply because a

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341. *Id.* ("Each time a president relies on executive prerogative to take some type of action, it makes it easier for a future president to take the same (or similar) action."); *see* United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915) (finding that "[this] case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders").

342. *See supra* Part III-D and cases cited.

343. MAYER, *supra* note 20, at 58 ("Critics of the acquiescence doctrine note the potential for 'bootstrapping' of presidential power, whereby presidents can, over time, accrue power that they should not have simply because they have exercised it enough times.").

344. Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1438 (9th Cir. 1996).

345. Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 76 (1993) ("[T]he nuances of foreign policy 'are much more the province of the Executive Branch and Congress than of this Court . . . .'" (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 196 (1983))). *See also* Gaziano, *supra* note 13, at 275.

statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice" to act in this area.[346]

Foreign policy is often made using a combination of statutes, treaties, executive agreements, executive orders, national security directives, and sometimes proclamations. George Washington's Neutrality Proclamation, which led to the Neutrality Act of 1794, is an example of such a combination, and was subject to many controversies in the nation's early years. The Neutrality Proclamation was a formal announcement issued on April 22, 1793, declaring the nation neutral in the conflict between France and Great Britain. It threatened legal proceedings against any American providing assistance to warring countries, and led to the passing of the Neutrality Act of 1794.[347]

The President has the authority to regulate international economic connections in order to address any abnormal or extraordinary threat to national security, foreign policy, or economy, which has its basis "in whole or substantial part outside the United States."[348] For one thing, the President who acts by executive order in matters of foreign policy begins with a strong foundation of legal and political authority.[349] An example of this presidential authority over foreign businesses is illustrated in the USA PATRIOT Act,[350] which expands the President's powers, giving him or her the authority to block transactions involving property during the pendency of an investigation and to appropriate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he or she determines has planned, authorized, aided, or engaged in armed hostilities or attacks against the United States.[351]

Three cases, *United States v. Curtiss-Wright Export Corp.*,[352] *United States v. Belmont*,[353] and *United States v. Pink*,[354] firmly established presidential authority to issue directives involving external affairs. This judicial precedent also reinforces the President's power to issue executive orders and agreements that concern international matters.

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346. Zemel v. Rusk, 381 U.S. 1, 17 (1965).

347. *See* MAYER, *supra* note 20, at 34.

348. 50 U.S.C. §§ 1701, 1702 (2006).

349. MAYER, *supra* note 20, at 44.

350. In October 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub L. No. 107–56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.), which, among other things, expanded the authority of the President and his designees under the International Emergency Economic Powers Act (IEEPA) § 203, 50 U.S.C. § 1702.

351. 50 U.S.C. § 1702(a)(1)(B).

352. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

353. United States v. Belmont, 301 U.S. 324 (1937).

354. United States v. Pink, 315 U.S. 203 (1942).

The most contentious circumstances for executive orders are when they are made pursuant to the President's own, exclusive powers under Article II of the Constitution. These include the Recognition Clause, which is, among other interpretations, the recognition of independence or belligerency of a foreign power.[355] "[T]echnically speaking, [this] is distinctly a diplomatic matter. It is properly evidenced either by sending a public minister to the government thus recognized, or by receiving a public minister therefrom."[356] An example of this controversial authority is the President's power to receive and appoint ambassadors—thus implicitly recognizing foreign governments—and also the President's function as Commander in Chief of the armed forces. In pursuance of these powers, the President can issue executive orders which will become part of the "Law of the Land" under the Supremacy Clause.[357]

Although Congress perceives its role as a check on "executive activism," by enacting legislation to restrict executive orders, success in this area has been minimized by the judicial branch. Executive orders remain the President's "tool of choice" to direct government operations and to minimize congressional intervention.[358] Even with attempts to restrict the implementation and development of executive orders, as well as the provision of boundaries and limits on any delegated authority, Congress' success has been minimal in restricting the alleged activism by the executive. Nevertheless, one of the primary tools of choice that allows the President to exercise control and manifest his authority to carry out his executive function, is the executive order.

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355. *See* JAMES MADISON, LETTERS OF HELVIDIUS 162–64 (Gaillard Hunt, ed., G.P. Putnam's Sons 1906) (1793) (arguing that the President's constitutional duty to receive ambassadors is merely a perfunctory convenience and greater presidential powers should not be inferred from it).

356. 29 CONG. REC. 642, 699 (1897). "Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity. . . . Congress can help the Cuban insurgents by legislation in many ways, but it can not help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct. That it is correct [is] shown by the opinions of jurists and statesmen of the past." *Id.* at 670.

357. COOPER, *supra* note 19, at 23–29.

358. MAYER, *supra* note 20, at 181.

IV. CIRCUMSCRIPTION

A. Limitations (Schechter)

Just as Congress must avoid passing any law that directly violates any provision of the Constitution, the President must avoid requiring enforcement of any law in a way that contravenes the Constitution or statutes passed by Congress. However, aside from this limitation, wide discretion remains in the executive power. This discretion inevitably leads to criticism of the President's power and further attempts by Congress to create limits or guidelines on its legislative use.

Until 1935, no congressional guidelines governed the scope of executive orders. While executive orders had spawned some early litigation,[359] *Schechter*[360] and *Youngstown*[361] together effectively reined in the otherwise conceivably unlimited scope of the President's legislative power.

As previously noted, the Court decided *Schechter* in the midst of the Great Depression, in response to President Franklin Roosevelt's New Deal legislation.[362] The case focused on congressional power over interstate commerce, but it dealt indirectly with executive orders.[363] The President enjoys some freedom to create laws through executive orders and proclamations, unless Congress has already promulgated legislation bearing on the same issues.[364] However, in *Schechter*, the Court created a new

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359. For example, in *Marbury v. Madison*, no party referred to President Jefferson's order to withhold William Marbury's judicial commission as an executive order *per se*, but it nevertheless constituted a presidential directive with no statutory basis. Marbury v. Madison, 5 U.S. 137, 162 (1803).

360. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 498 (1935); *see supra* note 290.

361. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 579 (1952).

362. The Court's distaste for President Roosevelt's activist New Deal legislation effectively ended in 1937, following the President's proposal to appoint as many as six new Justices to the Supreme Court in order to shift the ideological balance in favor of his New Deal legislation. The change became manifest in the Court's favorable decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which upheld the constitutionality of minimum-wage legislation for women in the State of Washington. Justice Owen Roberts acted as the critical swing vote, abandoning the conservative Justices in favor of the New Deal legislation. Justice Robert's "switch in time [that] saved nine" occurred less than two months after President Roosevelt's announcement of his court reform bill and often receives credit for the bill's demise and the preservation of the nine-Justice Supreme Court structure. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 132–34, 154, 163–77 (1995).

363. *Schecter*, 295 U.S. at 537–39.

364. *See* Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 1184 (D. Utah 2004) ("Congress clearly had the authority to pass the Antiquities Act of 1906. It is a proper constitutional grant of authority to the President.").

precedent.[365] Specifically, it found that the Live Poultry Act exceeded the presidential power given in the Constitution.[366] The government charged the petitioners with violating the Live Poultry Code,[367] arguing that a congressional grant of power had legitimately transferred the responsibility for adopting codes of fair competition from the Congress to the President.[368]

The law in dispute was the National Industrial Recovery Act (NIRA), which would have permitted the President to approve industrial codes. If the President chose to disapprove a code, he could prescribe his own as an alternative.[369] Because the Constitution delegates to Congress the power to both regulate transactions that affect interstate commerce and that protect interstate commerce from injury,[370] the Court looked to determine whether it was Congress that had enacted the standards or whether Congress had in fact left that duty to the President.[371]

The Court decided in *Schechter* that Congress lacked the authority to delegate its legislative power to the President to make whatever laws might be necessary to regulate the rehabilitation or expansion of trade under NIRA.[372] Even so, the Court went so far as to decide that the provision of the Live Poultry Code created by the President was outside the realm of interstate commerce.[373] Consequently, the government failed in two instances: Congress lacked the power to establish provisions of this type, and it most certainly lacked the authority to delegate this power to the President.

The Court held that Congress has no right to transfer its lawmaking duty to the President,[374] nor may the President opt to engage in unrestrained legislative activity as a means of confronting national challenges without the collaborative participation of Congress.[375] To do so would be a violation of the constitutional separation of powers and the nondelegation doctrine.

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365. *Schechter*, 295 U.S. at 495.

366. *Id.* at 541–42.

367. *Id.* at 519.

368. *Id.* at 521–23.

369. *Id.*

370. *Id.* at 544.

371. *Id.* at 530 (questioning whether "Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others").

372. *Id.* at 537–39.

373. *Id.* at 550–51.

374. *Id.* at 529. "Congress is authorized '[t]o make all laws which shall be necessary and proper for carrying into execution' its general powers. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Id.* (quoting U.S. CONST. art. I, § 8).

375. *Id.* at 537–38 ("Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.").

The Court rejected the government's argument that, in times of national emergency, the President should be able to wield more unilateral power consistent with the gravity of the crisis.[376] The Court responded that the executive power may vary within its relationship with Congress under various circumstances, but never innately as a consequence of the relative gravity of national emergencies.[377] This precedent has far-reaching implications for the preservation of the separation of powers intended by the Framers of the Constitution.

Although *Schechter* failed to limit the scope of the President's legislative power, it did establish the principle that Congress lacks the authority to give the President any power to enact laws in its stead.[378] *Schechter* says nothing about the President unilaterally enacting laws by executive order where Congress has yet to act. Thus, *Schechter* continues to accommodate the *Neagle* principle, by which the President may, in fact, make law.

B. Revocability (Youngstown)

Youngstown is by far the most significant judicial decision regarding the limits of executive power.[379] Executive Order 10,340, signed in 1952 by President Truman,[380] effectively gave control of nearly 80% of the nation's steel mills to the federal government.[381] The order sought to prevent a possible strike by the nation's steelworkers over wage increases.[382] The case stemmed from an ongoing dispute between certain steel manufacturers

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376. *Id.* at 528. The government argued that "the adoption of [Presidentially prescribed] codes must be viewed in the light of the grave national crisis with which Congress was confronted." *Id.*

377. *Id.* at 528–29. "Extraordinary conditions do not create or enlarge constitutional power. . . . Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary." *Id.*

378. U.S. CONST. art. I, § 1 (vesting all legislative powers in the Congress). In *Schechter*, the Supreme Court interpreted this clause to mean that Congress has no permission to delegate its legislative power to any other branch. *Schechter*, 295 U.S. at 529. Nevertheless, subsequent Supreme Court cases redefined the strict nondelegation doctrine enunciated in *Schechter*, and thus Congress does indeed delegate some authority as an implied power.

379. MAYER, *supra* note 20, at 11.

380. Exec. Order No. 10,340, 3 C.F.R. 65 (1952).

381. At the time of the seizure, the United States was in the midst of the Korean War, in response to which President Truman sent troops without the authority of Congress. The President feared that any labor strike, regardless of length, would severely disrupt the nation's efforts. When negotiations between the unions and the industry failed, he seized the production facilities, keeping them operating under their current management scheme. Although he could have sought an injunction under the Taft–Hartley Act of 1947, he decided against this action because he felt that it was the industry, rather than the workers, who were the cause of the strife, and perhaps because he had vetoed the Taft–Hartley Act five years prior. JOHN J. PATRICK, RICHARD M. PIOUS, & DONALD A. RITCHIE, THE OXFORD GUIDE TO THE UNITED STATES GOVERNMENT 723 (2001).

382. Exec. Order No. 10,340, 3 C.F.R. 65.

and their workers. Because the Federal Mediation and Conciliation Service had failed to resolve the issue between the parties, the employees decided to plan a strike several months in the future.[383] Failing to come to a mutually acceptable resolution, the government opted to submit the issue before the Wage Stabilization Board on December 22, 1951.[384]

It was in reaction to a potential future strike that President Truman issued Executive Order 10,340. The order sought to subject to federal control all steel mills in the United States, on the premise that the dispute might spread into a general strike among steelworkers across the country.[385] The President claimed that the executive order was valid because of the state of national emergency.[386] The order sought to ensure a constant and uninterrupted supply of steel for the war effort.[387] The list of companies involved ranged from the east coast to the west coast of the United States.[388]

The Court disagreed that a state of emergency authorized the President to make such an order. It found that there was no authorizing source, either in congressional statutes or in the Constitution, from which the President could draw such power.[389] The Court found the order invalid for attempting to enable the President to make law in the place of Congress, as opposed to clarifying or furthering a law promulgated thereby.[390]

The Court started by stating that the President's powers derive from the Constitution or congressional statutes.[391] Failing to find a statute that might

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383. *Id.*

384. *Id.* Note that the President previously established the Wage Stabilization Board with Executive Order 10,233. Exec. Order No. 10,233, 16 Fed. Reg. 3,503 (Apr. 24, 1951).

385. Branum, *supra* note 47, at 60–61 (asserting that the President feared that the dispute "threatened to result in a steelworkers' strike").

386. *Id.* Specifically, he claimed that the "potential stoppage of steel production in the midst of war" created this national emergency. *Id.* In the text of the order, he claimed that the strike would "jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression," and that the strike would increase the danger to the "soldiers, sailors, and airmen engaged in combat." Exec. Order No. 10,340, 3 C.F.R. 65.

387. Exec. Order No. 10,340, 3 C.F.R. 65–66. To ensure this supply, the order explained, "it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies . . . ." *Id.*

388. *Id.* The list of companies was quite inclusive, ranging from Washington, D.C., to Los Angeles, California. The list included: American Bridge Company, Pittsburgh, Pennsylvania; Rockefeller Building, Cleveland, Ohio; Columbia Steel Company, San Francisco, California; Consolidated Western Steel Corporation, Los Angeles, California, Geneva Steel Company, Salt Lake City, Utah; Oil Well Supply Company, Dallas, Texas; Virginia Bridge Company, Roanoke, Virginia; Atlantic Steel Company, Atlanta, Georgia; and Newport Steel Corporation, Newport, Kentucky. Exec. Order No. 10,340, 3 C.F.R. 66–68.

389. Branum, *supra* note 47, at 60–61, 63; Youngstown Sheet & Tube Co. V. Sawyer, 343 U.S. 579, 587 (1952).

390. *Youngstown*, 343 U.S. at 588.

391. *Id.* at 585. ("There is no statute that expressly authorizes the President to take possession of property as he did here."). What made the President's case most difficult was that his order failed to cite

justify the order, the Court analyzed the order from the perspective of the President's authority as the nation's Commander in Chief.[392] The government tried to justify the order under the President's wartime powers.[393] The Court rejected this argument. The Court said that, despite the evolving theory of executive power in wartime, it had no basis for justifying the extension of executive power to seizing private property.[394] By implication, it was insufficient for the President to act unilaterally to achieve the intended goal.[395]

In an opinion written by Justice Hugo Black, the Court essentially held that there are no sources of executive power outside the Constitution or the powers explicitly granted by Congress.[396] The Court effectively placed a limit on the President's power to make laws and rejected the principle that the President possesses an inherent legislative power.[397]

It is important, as a matter of logic, to note that Congress remained silent while President Truman issued the order, but had previously (in the late 1940s) rejected the idea of granting a seizure power in its debates.[398] The Court decided *Youngstown* in a 6–3 opinion, in which five Justices each wrote his own concurring opinion. Perhaps the most notable parts of

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any act of Congress "from which such a power [could] fairly be implied," nor did Secretary Sawyer even attempt to do so in his arguments to the Court. *Id.*

392. *Id.* at 587.

393. *Id.* The government did this "by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war." *Id.*

394. *Id.* The Court said that, even though the theater of war was an "expanding concept," it "cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces" has the power to seize "private property in order to keep labor disputes from stopping production." *Id.*

395. *Id.* The Court ended the discussion by concluding, "[t]his is a job for the Nation's lawmakers . . . ." *Id.*

396. *Id.*

397. *Id.* at 587–88.

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States . . . . [The Congress may] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'

Id.

398. MAYER, *supra* note 20, at 57 (noting that in both the majority and concurring opinions, the Court "gave great weight to Congress's refusal to grant [the President] the explicit statutory authority to seize the mills"). See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593–600 (1952) (Frankfurter, J., concurring), for the concurring opinion of Justice Frankfurter and his discussion of the prior action of Congress deliberately to withhold from the President the seizure power.

Youngstown come in the concurring opinions of Justices Felix Frankfurter and Robert H. Jackson.

Justice Frankfurter began his opinion with a note that the Court follows the basic rule that it will prefer to find grounds outside the Constitution upon which to overrule presidential action.[399] Justice Frankfurter refused to delineate the limits of the executive power or even attempt to define that power comprehensively. To do so would be impractical, as the respective spheres of constitutional power in the legislative and executive branches must overlap, even if there is a relatively clear delineation at the source and in the nature of the power of each branch.[400]

Justice Jackson's concurring opinion in *Youngstown* receives noted attention in the area of presidential powers. The opinion identifies three tiers of presidential power: (1) when the President acts in conjunction with Congress; (2) when he acts in an area in which Congress has been silent; and (3) when he acts contrary to congressional will.[401] Where the President acts in consonance with Congress, he does so with maximum authority, because the power behind his actions includes that of the Congress.[402] Thus, if the President's order is unconstitutional, then the federal government is also without power to act.[403] When the President acts under a condition of congressional silence, he does so under a lesser variety of power, as he benefits from no reinforcing power from Congress.[404]

Restating Justice Frankfurter's perspective on the infeasibility of dividing the executive and legislative power into non-intersecting spheres, Justice Jackson stated that there may be significant areas of overlap between the executive and legislative spheres, where the President and Congress actually share in their authority to act on a given matter.[405] When this occurs, congressional acquiescence may indeed create a power for the President to act.[406] Justice Jackson noted that the President's power in this circumstance depends on the prevailing conditions in the country, particularly when the President must act to forestall any imminent threat.[407] Finally, where the President acts in contravention of Congress, he wields

399. *Youngstown*, 343 U.S. at 595 ("[C]lashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available."). There is a desire for the "Court to avoid putting fetters upon the future by needless pronouncements today." *Id.* at 596.

400. *Id.* at 597–98 (stating that delineating limits would amount to a desire to "establish and divide fields of black and white" (quoting Springer v. Phil. I., 277 U.S. 189, 209 (Holmes, J., dissenting))).

401. *Id.* at 635–37.

402. *Id.* at 636 (discussing United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936)).

403. *Id.* at 636–37.

404. *Id.* at 637.

405. *Id.*

406. *Id.*

407. *Id.* (stating that the President's power depends "on the imperatives of events and contemporary imponderables rather than on abstract theories of law").

minimal power, as he now depends on his own powers derived from the Constitution, as against the powers of Congress.[408] In this condition, the President effectively makes the claim that Congress has failed to obey the Constitution, an inherently serious charge that is difficult to substantiate.

In *Youngstown*, Justice Frankfurter reasoned that the President's power to act, even without explicit congressional limits, could encounter a limitation in view of a previous congressional action or expression of congressional will in the affected area of law.[409] Congress had indeed supported seizure of private property under specific circumstances on numerous prior occasions.[410] However, Congress included clear boundaries each time that it provided for such a seizure, which the President lacked the authority to exceed.[411] By doing so, Congress refrained from enacting statutory precedent that the President could leverage to apply the seizure power to new contexts. According to Justice Frankfurter, the inclusion of strict limits in specific statutes that authorize seizure emphasized the special sensitivity of the seizure power.[412]

As recently as 1947, Congress had debated the necessity for governmental seizure in times of national emergency.[413] Importantly, Congress decided against issuing a blanket authority for such seizure, preferring instead *ad hoc* legislation, or legislation created on a case-by-case basis.[414] *Youngstown* provides clear guidance regarding the executive order and unequivocally lays out the circumstances in which presidential executive authority is warranted. Specifically, the Court held that an executive order falls short of constituting general law.[415]

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408. *Id.* ("[H]is power is at its lowest ebb . . . .").

409. *Id.* at 597–98.

410. *Id.* (stating that Congress had "frequently—at least 16 times since 1916—specifically provided for executive seizure of production, transportation, communications, or storage facilities").

411. *Id.* at 598 (finding that Congress had "qualified [the] grant of power [each time] with limitations and safeguards").

412. *Id.*

> Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority. The power to seize has uniformly been given only for a limited period or for a defined emergency, or has been repealed after a short period. Its exercise has been restricted to particular circumstances such as 'time of war or when war is imminent,' the needs of 'public safety' or of 'national security or defense,' or 'urgent and impending need.'

Id.

413. *Id.* at 599.

414. *Id.* (finding in 1946, a specific proposal to give the President seizure powers "was thoroughly canvassed by Congress and rejected"); MAYER, *supra* note 20, at 57 (concluding that this "steel seizure did not constitute a 'systematic, unbroken executive practice,' [of congressional acquiescence] since Congress had spoken clearly on the seizure question over the years, and presidents had only rarely resorted to such action without clear statutory authority").

415. Branum, *supra* note 47, at 63 ("The end result of *Youngstown* is that, at least nominally, a

Justice Frankfurter also addressed the argument that national crises require swift action, which Congress is often incapable of taking feasibly.[416] He argued that the types of conditions under which it has tended to be justifiable to grant the President specific seizure powers have benefited from sufficient time for planning and hence for congressional deliberation, as opposed to arising suddenly, without warning, and necessitating a more urgent resolution.[417]

While this discussion may appear straightforward on its face, the analysis causes some problems when there is an attempt to apply it. As with many directives from Congress and the courts, there is often ambiguity in the language. It is often obscure when an express grant is present and when it is absent, either in congressional legislation or the Constitution. The end result of *Youngstown* is that an executive order must stem from a constitutional or statutory source to be valid.[418] To establish this, there must be an absence of stark conflict between the order and either statutory content or congressional intent. Otherwise, Congress must accept or acquiesce the directive to make it effective.[419]

Congress alone has the duty to make laws.[420] In *Youngstown*, the President's executive order executed no congressional directive, because there is none to execute.[421] In fact, the President seemed to think, and acted as though, he had been making law.[422] Executive Order 10,340 reads more like a statute than an order to carry out a statute.[423] The order, like a statute, points out the reasons for which the President thought it was necessary to issue the order, just as the Congress does when passing laws.[424]

In *Youngstown*, the Court determined that the executive order issued by President Truman was entirely legislation.[425] Furthermore, the Court found

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presidential directive will be valid only if it stems from a statute or from the Constitution itself.").

416. *Youngstown*, 343 U.S. at 601–02. "Congress presumably acted on experience with similar industrial conflicts in the past. It evidently assumed that industrial shutdowns in basic industries are not instances of spontaneous generation, and that danger warnings are sufficiently plain before the event to give ample opportunity to start the legislative process into action." *Id.* Accordingly, "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Id.* at 610 (quoting Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting)).

417. *Id.* at 601–02.

418. Branum, *supra* note 47, at 63–64; *see generally*, STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS, & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 34 (4th ed. 2007) (presenting Youngstown, 343 U.S. at 585).

419. Branum, *supra* note 47, at 63–64.

420. *Youngstown*, 343 U.S. at 589.

421. *Id.* at 588.

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.* (stating that there is no question that the Congress could "adopt such public policies as those proclaimed by the order").

the prevailing national emergency to constitute something less than a compelling justification for granting an exception to ordinary presidential powers.[426] Instead, it emphasized in strong language that the executive branch of government under the Constitution is incapable of subjecting the legislative function to its own power.[427] The separation of powers exists regardless of the exigency of war.[428] The Court concluded that the executive order was invalid because it exceeded the constitutional power granted to the President under Article II, including his power to act as Commander in Chief of the nation's military forces.[429] The President had also attempted to act outside the authority granted by Congress.

In summary, *Youngstown* sets the parameters for presidential executive orders. The President holds the highest authority to exercise executive powers when acting pursuant to Congressional will. In contrast, the President holds minimal power when acting contrary to Congressional will. Where Congress has not specified its views towards presidential action, the authority behind such acts is open to debate.

C. Final Agency Action (Dalton)

In *Dalton v. Specter*, the Secretary of Defense had submitted recommendations to the Defense Base Closure and Realignment Commission, which in turn prepared reports based on those recommendations and then submitted the reports to the President.[430] The President then determined, based on the reports, which bases to close.[431] The statute at issue specifically granted this power to the President.[432] The *Dalton* Court found the President's actions that merely exceed his statutory grant of power are insufficient as evidence that he has violated the Constitution.[433] The Court ultimately found that it lacked grounds on which to review the President's decision, because the actions of the Secretary and the Commission fell short of final agency actions under the Administrative Procedure Act (APA) definition, given that the reports carried no direct

426. *Id.* at 613 (Frankfurter, J., concurring).

427. *Id.* "The Constitution does not subject [the] law-making power of Congress to presidential or military supervision or control." *Id.* at 588.

428. *Id.* at 587.

429. *Id.* at 589.

430. Dalton v. Specter, 511 U.S. 462, 464–66 (1994).

431. *Id.* at 464–66.

432. Base Realignment and Closure Act, 10 U.S.C. § 2687(c) (1990). The Philadelphia Naval Shipyard employees alleged that the decision to close the shipyard benefited from improper criteria. *Dalton*, 511 U.S. at 464–66. They brought suit under the Administrative Procedure Act to enjoin the plan to close the facility. *Id.* The President had made the decision pursuant to the Defense Base Closure and Realignment Act of 1990. *Id.*

433. *Dalton*, 511 U.S. at 472.

consequences.[434] The Court also declared that the Office of the President fails to qualify as an agency, so the APA is irrelevant to its actions.[435] By holding that the President's actions fall outside APA rules, the Court effectively made it easier for the President to promulgate agency rules.

D. Preemption Doctrine (Reich)

Despite the strong language used by the Court in *Youngstown* in declaring an executive order unconstitutional if it effectively usurps or subjugates the legislative function, the federal courts have only revoked one other executive order in history.[436] This occurred when President Clinton issued an executive order to prevent federal contractors from hiring permanent replacements for temporarily vacated positions due to lawful striking activity.[437] Although such an action may have suffered error in the planning stages, even a judge that exercises significant deference to the President would find it difficult to argue that this executive order benefited from the firm reasoning of a statutory or constitutional provision.

In *Reich*,[438] employer organizations challenged Executive Order 12,954[439] issued by President Clinton, which barred the government from entering into contracts with employers that hire permanent replacements for striking workers.[440] First, the court had to decide whether the President's action, which claimed justification under the Federal Property and Administrative Services Act (FPASA), was reviewable.[441] The court

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434. *Id.* at 469.

435. Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) When the President makes a decision pursuant to a statute, judicial review of that decision is unavailable. *Id.* at 796; *see also* FUNK ET AL., *supra* note 292, at 11.

436. Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).

437. *The Impact of Executive Orders on the Legislative Process: Executive Lawmaking? Before the Subcomm. on Legislative and Budget Process of the Comm. on Rules*, 106th Cong. (1999) (statement of William J. Olson, William J. Olson, P.C., Attorneys at Law) (noting that *Youngstown* and *Reich* are the only cases in which the courts have ever voided executive orders in their entirety).

438. *Reich*, 74 F.3d at 1322.

439. Exec. Order No. 12,954, 3 C.F.R. 329 (1996).

440. *Reich*, 74 F.3d at 1324 (noting that Executive Order 12,954 specified that the federal government "shall not contract with employers that permanently replace lawfully striking employees"). The order explained "that the 'balance' between allowing businesses to operate during a strike and preserving worker rights is disrupted when an employer hires permanent replacements during a strike." *Id.* Exec. Order No. 12,954, 3 C.F.R. 329. Executive Order 12,954 found that hiring permanent replacements creates longer strikes and other consequences that "adversely affect federal contractors' ability to supply high quality and reliable goods and services." *Reich,* 74 F.3d at 1324. The order's stated purpose was therefore "to ensure economical and efficient administration and completion of Federal Government contracts." Exec. Order No. 12,954, 3 C.F.R. 329. Contracts "in excess of the Simplified Acquisition Threshold" fall under the Order. *Id.* at 331. The Simplified Acquisition Threshold is $100,000. 41 U.S.C. § 403(11) (2006). This means that all contracts greater than $100,000 must comply with the order.

441. 40 U.S.C. §§ 101, 121 (2006) (explaining that under the FPASA, the President has the authority to effectuate the purpose of the FPASA, which is to "provide the [] Government an economical

asserted that it is indeed within the purview of the judiciary to set limits on the extent to which Congress may delegate the legislative function in specific instances to the executive branch.[442] It also reiterated the principle that all actions taken by government officials require identifiable legal backing.[443] The court ultimately held that the executive order explicitly violated the National Labor Relations Act (NLRA) and hence the will of Congress.

The executive order's goal of preventing the replacement of striking workers also contradicted the explicit holding of a Supreme Court case decided sixty years prior. In *NLRB v. Mackay Radio & Tel. Co.*,[444] the Court had clarified a previously unaddressed provision of concern in NLRA actions, namely the question of whether lawfully striking workers benefit from any job protection during a strike. In so doing, it placed greater weight on the employer's need to stay in business than on the employees' need to remain employed.[445]

Secretary Reich first tried to justify the executive order by stating that the action was within the President's power under the Procurement Act. However, the Procurement Act clearly fails to address labor issues.[446] The President made a valiant attempt to make the order look like rulemaking rather than lawmaking. The Procurement Act vests the President with power to establish those policies which the government may use for the promotion of efficiency.[447] President Clinton inserted ample text into the order to build an argument to implicate the Procurement Act.[448] The

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and efficient system for" procurement and supply).

442. *Reich*, 74 F.3d at 1327 ("[T]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function . . . ." (quoting Stark v. Wickard, 321 U.S. 288, 310 (1944))). The Court also stated that, "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Reich*, 74 F.3d at 1328 (quoting Dart v. United States, 848 F.2d 217, 224 (D.C. Cir. 1988)).

443. *Reich*, 74 F.3d at 1327 ("[A]cts of all [a government department's] officers must be justified by some law . . . ." (quoting Amer. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108, 110 (1902) (alterations in original))).

444. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

445. *Id.* at 345–46. "'Nothing in [the NLRA] shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them." *Id.* (quoting National Labor Relations Act of 1935 § 13).

446. *Reich*, 74 F.3d at 1330, 1332–33 (stating that Congress passed the Procurement Act to establish an "efficient, businesslike system of property management" (quoting S.REP. No. 81-475, at 1 (1949))).

447. 41 U.S.C. §§ 404–406, 486 (2006). The President's duties under the legislation were to ensure the "efficient and economical" supply of necessary resources to the federal government. *Id.* § 486(a); *see also* § 471.

448. Exec. Order No. 12,954, 3 C.F.R. 329 (including such phrases such as "[e]fficient economic performance and productivity are directly related to" and "cooperative working relationships between

President made the argument that tension in the workplace is harmful to employee loyalty because it decreases employee productivity. The result of this decrease in productivity is an increased acquisition cost to the government.[449] These arguments failed to persuade the court.[450]

Reich also reiterated that no fewer than eight Supreme Court decisions had affirmed the principle that employers retain rights to continue with business operations.[451] The court disagreed with the government's argument that the FPASA granted it power to trump the constraints of the NLRA and instead looked at a long list of Supreme Court precedent that defined the theory of NLRA preemption. Specifically, the Supreme Court has recognized two distinct varieties of NLRA preemption, namely, *Garmon* preemption[452] and *Machinists* preemption.[453] Preemption rules seek to avoid conflicts between state and federal regulations.[454]

Garmon preemption bars state and local regulation of labor activities that the NLRA already either arguably or explicitly regulates.[455] *Machinists* preemption, on the other hand, bars state and local regulation of labor activities that Congress has deemed the proper domain of the free market, even though neither the NLRA nor any other statute regulates them.[456] Next, the court explained that the fact that the government is a party to a contract with a unionized company falls short of overriding NLRA preemption.[457] The broad scope of this particular executive order runs directly contrary to the NLRA and both preemption doctrines alike.

The court also looked at how the order comported with legislation already passed by Congress and signed by former presidents.[458] A key judicial interpretation of the NLRA grants private employers the power to

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employers and employees").

449. *Id.* (specifying that the steps taken would ensure "a stable collective bargaining relationship").

450. *Reich*, 74 F.3d at 1339.

451. *Id.* at 1332. The government argued that the Procurement Act gave "broad discretion . . . [to] the President to set procurement policy for the entire government." *Id.*

452. *Id.* at 1334 (referring to San Diego Bldg. Trades Counsel v. Garmon, 359 U.S. 236, 244 (1959)).

453. *Id.* (referring to Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 144 (1976)).

454. *Id.* (discussing Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)).

455. *Id.* at 1334 ("[NLRA] forbids state and local regulation of activities . . . ." (quoting Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 224–25 (1993))).

456. These are areas that Congress has left "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140. *Machinists* addressed "the 'hiring of permanent replacements' as an economic weapon available to an employer." *Reich*, 74 F.3d at 1334 (quoting *Mechanists*, 427 U.S. at 153).

457. *Reich*, 74 F.3d at 1334 ("When the government acts as a purchaser of goods and services NLRA pre-emption is still relevant.").

458. *Id.* at 1332.

replace striking workers without requiring them to reserve a place for those workers upon settlement of the labor dispute.[459]

The government contended that there is no conflict between the NLRA and the more recent Procurement Act, but that it is necessary to read both acts together.[460] Thus, the actions of the President fell within the broadest reaches of the Procurement Act, so there could be no conflict between the statutes.[461] The court rejected this argument as contrary to the traditional and long-established canons of statutory interpretation.[462]

The court went out of its way to discuss legislation that relates to the employment of strikebreakers and receipt of government contracts.[463] The President's executive order appeared to be attempting to supplant the ordinary legislative process by stretching the meaning of tangential legislation so as to overturn a significant judicial precedent. This was particularly true in the wake of the failed Workplace Fairness Act, which tried to make the use of strikebreakers an unfair labor practice[464] but fell short of passage in the Senate. The court ultimately determined that the order violated the NLRA and therefore constituted a use of presidential power in contravention of established law.[465]

The President has broad power to use executive orders.[466] However, despite this broad power, the President is unable to prevent the courts from reviewing his decisions.[467] While actual review is minimal in practice, the courts' power of review is necessary to ensure that the actions of the President comply with the Constitution and statutes.[468] The President would have unlimited legislative and administrative power if, in order to render an executive order unreviewable, he only had to make the general claim that either Congress or the Constitution has vested him with the power to issue it.[469] A favorable rendering of *Reich* would have controverted these principles and opened the way for the President alone to overturn a statute.

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459. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938). Senator Robert F. Wagner, author of the National Labor Relations Act, had attempted to incorporate wording to prohibit employers from hiring strikebreakers. The National Urban League was among the opponents of this wording, on the grounds that strikebreakers were often African American, given that most labor unions refused to admit minorities at the time. *See generally*, Thomas C. Kohler & Julius G. Getman, *The Story of NLRB v. Mackay Radio & Telegraph Co.: The High Cost of Solidarity* 23 (Boston Coll. Law Sch. Faculty Paper No. 160, 2006), *available at* http://lawdigitalcommons.bc.edu/lsfp/160.

460. *Reich*, 74 F.3d at 1332.

461. *Id.*

462. *Id.*

463. *Id.* at 1325.

464. César Chávez Workplace Fairness Act, H.R. Res. 5, 103rd Cong. (1993).

465. *Reich*, 74 F.3d at 1339.

466. *Id.* at 1330, 1331.

467. *Id.* at 1331.

468. *Id.* at 1332.

469. *Id.* at 1332, 1338.

E. Congressional Reaction to an Executive Order

The President has occasionally gone far beyond the intent or comfort level of Congress in issuing an executive order.[470] However, Congress has its own remedies and may react in several ways. First, it may introduce a new version of, or an amendment to, that prior legislation upon which the order espouses justification to give better detail as to the expectations of Congress over the presidential action.[471] Should the President subsequently veto the amended statute, Congress may override the veto by a vote of two-thirds of its membership in each chamber.[472] Congress may alternatively rewrite the law to which the order subscribes so that the order comes into direct conflict with the amended statute.[473] Congress may refuse to fund the agency charged with carrying out the order, thus forcing the President to communicate with legislators.[474] Finally, Congress may challenge the order in court by means of affected parties with standing, on grounds that it exceeds presidential authority or deviates from congressional intent.[475]

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470. MAYER, *supra* note 20, at 58 ("Federal courts have long considered executive orders to be the equivalent of statutes when they are issued pursuant to the president's legitimate constitutional or congressionally delegated powers."). *See* Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228, 234 (8th Cir. 1975) ("Presidential proclamations and orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress.").

471. *The Impact of Executive Orders on the Legislative Process: Executive Lawmaking? Before the Subcomm. on Legislative and Budget Process of the H. Comm. on Rules*, 106th Cong. (1999) (statement of William J. Olson, William J. Olson, P. C., Attorneys at Law). Unhappy with President Clinton's proclamation designating 1.7 million acres of land as wilderness in Utah for a national monument, Congress introduced legislation limiting "future presidential actions with regard to national monuments." *Summary of Hearing on the Impact of Executive Orders on the Legislative Process: Executive Lawmaking?* THE U.S. HOUSE OF REPRESENTATIVES COMM. ON RULES (Oct. 27, 1999), [hereinafter *Executive Lawmaking?*] *available at* http://www.rules.house.gov/archives/rules_hear08.htm.

472. U.S. CONST. art. I, § 7.

473. U.S. CONST. art. I, §§ 7–9; *see also* U.S. CONST. art. VI, ¶ 2 (Supremacy Clause); subject to judicial review pursuant to U.S. CONST. art. III § 2 & amend. XI.

474. Exec. Order No. 13,083, 13 C.F.R. 146 (1998). President Clinton sought to establish new principles of federalism, which President Reagan had originally enforced, but many organizations opposed the order. "In addition, the Congress moved to cut off funding for implementation of the new order. The Administration ultimately withdrew E.O. 13083 . . . . " *Executive Lawmaking?*, *supra* note 471.

475. MAYER, *supra* note 20, at 59 ("Judicial review of executive orders extends back to *Little v. Barreme*." (citing *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804))). *Barreme* resulted from a U.S. naval vessel's seizure of a Danish vessel that had departed from a French port. The seizure resulted from an order by President John Adams—in response to a statute that authorized seizure of vessels sailing *to* French ports—that the navy seize all vessels traveling to or *from* France. Chief Justice John Marshall found that the capture was not authorized by statute, and ordered the captain to pay damages. *Barreme*, 6 U.S. (2 Cranch) at 179.

V. ANALYTICAL AND PHILOSOPHICAL PRAGMATICS

A. Critical Scrutiny of the Praxis of the Executive Order Mechanism

An analysis of congressional action and judicial decisions suggests that the President's power to issue executive orders equally derives from implied authority and authority expressly granted by the Constitution or Congress. The three branches of government must stand in equilibrium from the perspective of constitutional grants of power. The courts and Congress, for their part, likewise enjoy implied powers that emanate from express provisions in the Constitution.

Given that the Constitution falls short of constraining the executive branch to wield explicitly less power than the legislative or judicial branches, it should benefit from the same assumption up to and including the point at which it wields approximately equal power to that of Congress, so long as it falls short of exceeding it. Unless this is true, it will throw the other branches out of equilibrium. It will both fail to serve the purpose of equilibrium (having lost the presumption of countervailing power to serve that purpose), and open the way for a logic that permits one branch of government to wield greater power than another *per se* (which nullifies the assumption of equilibrium itself). By giving the President the authority to see to the conscientious realization of the goals of statutory law,[476] the Constitution has partially defined the nature of the executive branch. Adding the assumption of equilibrium among the branches provides the additional elaboration that the definition requires for its own coherence.

The Supreme Court has held that an executive order, if based on legitimate constitutional or statutory power, is a law.[477] This was a wholly necessary conclusion, as a contrary ruling would have prevented the executive branch from promulgating any rules whatsoever if they might encounter the threat of a judicial challenge by an injured party. In addition, the presidential power to issue executive orders pursuant to implied authority is equal in weight to those issued by express power from the Constitution and Congress.

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476. U.S. CONST. art. II, § 3.

477. MAYER, *supra* note 20, at 35 ("It is more useful to think of executive orders as a form of 'presidential legislation' or 'executive lawmaking,' in the sense that they provide the president with the ability to make general policy with broad applicability akin to public law.") (citations omitted). As an administrative tool of the President's executive power, the reach of executive orders extends as far as executive power itself.

The Supreme Court has implied powers from express provisions in both the Constitution and in congressional legislation. Given that the Constitution clearly seeks to avoid conferring a more constrained variety of power on the President than on Congress (*i.e.*, the absence of a clause specifying the President's powers as "herein granted"), the President must likewise be able to exercise implied powers from express provisions in the Constitution.[478] Proponents of implied presidential powers feel that the President has a right to employ this power to carry out the intent of Congress faithfully when executing laws.[479]

Even in express constitutional and congressional grants of authority, the President has latitude to issue policies that are merely implicit from the intent of the legislators or Framers.[480] In *Utah Ass'n of Counties v. Bush*, President Clinton had broad discretion under the Antiquities Act of 1906[481] to preserve almost two million acres of federally owned land in southeastern Utah as a national monument, namely, Grand Staircase-Escalante.[482] The district court upheld the President's use of the executive order in this case.[483] Consequently, the President had authority to act absent express congressional authority. The court looked to the intent of the legislators to determine if the President's actions fit that intent.

If the President is acting to execute laws, his actions must be valid if they fall short of contradicting the provisions of the Constitution or the intent of Congress. President Franklin Roosevelt's view was valid, that the President should be able to act at his discretion to execute those laws that are consistent with constitutional or congressional grants of power, rather than restricting himself to pursuing actions only as Congress specifies affirmatively.[484] Thus, where Congress is silent on a matter, the President

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478. MAYER, *supra* note 20, at 42–43. Since the Supreme Court first recognized the existence of implied presidential powers in 1890, it has expanded the scope of both implied and enumerated powers as contained in the Constitution. *Id.*

479. *Id.* at 43; *see also* Branum, *supra* note 47, at 3.

480. MAYER, *supra* note 20, at 45.

481. 16 U.S.C. § 431 (2006).

482. Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 1176, 1184 (D. Utah 2004), *rev'd on other grounds*, 455 F.3d 1094 (10th Cir. 2006) (holding that the President may use executive orders to effect his constitutional duty to ensure the faithful execution of the laws and to delegate certain of his duties to other executive branch officials, but has no authority to impose legal requirements by way of executive order onto executive agents in any manner that is inconsistent with the express will of Congress).

483. *Id.* at 1183. The district court held that the "use of executive orders may be employed by the President in carrying out his constitutional obligation to see that the laws are faithfully executed." *Id.* at 1184. The court also held that the judiciary has no authority to determine whether the President has abused his discretion when he enjoys such a broad grant of power. *Id. See also* Proclamation No. 6,920, 61 Fed. Reg. 50, 223 (Sept. 18, 1996); *but see* Gaziano, *supra* note 13, at 281 (criticizing President Clinton's use of the Antiquities Act despite the court's ruling).

484. Branum, *supra* note 47, at 3–4 (noting that President Roosevelt insisted "upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers.") (citation omitted).

may nevertheless act along the same line of logic as that initiated by Congress, as congressional silence indicates the absence of express or implicit prohibition.[485]

Executive orders respond to urgent national needs, as in wartime, postwar reconstruction, and impending natural or technological disaster. If the President must wait for express congressional authorization in such cases, it could render the country vulnerable to considerable harm.[486] In some cases, presidents have found the issuance of executive orders between Congressional sessions convenient as well as necessary.[487] Nevertheless, Congress may act via legislation when it feels that the President overstepped authority via executive order.

Executive orders represent an important part of executive power in their role of creating agencies and implementing policies. There are numerous examples of the issuance of executive orders in times of need or emergency. For example, in 1996, President Clinton saw a need to take action in anticipation of the Year 2000 (Y2K) challenge.[488] The twentieth-century-date orientation of computer coding created a reasonable fear of widespread computer malfunctions that could interrupt critical infrastructures, such as the supply of electricity, natural gas, or water.[489] The President therefore issued an executive order to create the President's Commission on Critical Infrastructure Protection.[490] The following year, the

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485. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 Yale L.J. 1255, 1310-11 (1988); *see also* Dames & Moore v. Regan, 453 U.S. 654, 681–83 (1981) (equating congressional silence with tacit approval).

486. COOPER, *supra* note 19, at 60 (explaining that executive orders can provide a more rapid response to challenges that arise unexpectedly, by comparison to congressional or judicial action); *see also* William G. Howell, *Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUD. Q. 417, 421 (2005) (observing several instances where executive orders have rapidly and substantially altered public policy).

487. Perhaps the most aggressive use of executive order and timing by a President came on April 27, 1861. Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 83 (1993) (discussing President Lincoln's refusal to be bound by *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487)). President Lincoln suspended the privilege of the writ of habeas corpus by Executive Order. *Id.* at 89–90. At the time, President Lincoln was dealing with increasing secessionist activity in areas that surrounded Washington, D.C. and Congress was out of session. *Id.* The unpublished executive order authorized Commanding General Winfield Scott to suspend the writ; shortly thereafter, "[a]rmy officers began arresting a large number of suspected secessionists and imprisoning them . . . ." *Id.* at 90. One of those arrested, petitioned the Supreme Court. *Id.* Chief Justice Roger Taney declared that "the President had no right to suspend the writ, as such power was implicitly vested in Congress by virtue of its location in Article I of the Constitution, which sets forth Congress's powers." *Id.* at 91; *Merryman*, 17 F. Cas. at 148–49.

488. COOPER, *supra* note 19, at 43.

489. *Id.*

490. *Id.* at 43 (noting that Exec. Order No. 13,010 created the President's Commission on Critical Infrastructure Protection, which sought to confront the Y2K challenge, even though its original mandate was to address other problems (citations omitted)); Exec. Order No. 13,010, 61 Fed. Reg. 37,347 (July 17, 1996).

President issued a related executive order, this time creating the President's Council on the Year 2000 Conversion, to address precautionary measures in view of possible but unknown ramifications involving Y2K.[491]

The President likewise has some latitude to act by executive order in foreign-policy actions and to address private disputes that affect the entire nation, such as labor disputes.[492] Again, the power of Congress to correct mistaken forays by the President reduces the risk of abuse. While Congress could alternatively attempt to promote analogous actions to those of the President in questions of foreign policy and labor, and in fact do so in a more consequential way, it would be rare to expect congressional legislation to react as specifically and quickly as the executive branch.

Executive orders can serve the purpose of allowing the President to generate favorable publicity, such as when President Clinton signed an executive order on ethics,[493] and when President George W. Bush signed the first of a series of executive orders to launch his Faith-Based and Community Initiatives.[494] While these orders pay off political debts and thus may seem trivial, they nevertheless create both infrastructural and regulatory precedents for future administrations. Hence, they create an avenue for key constituencies of each administration to influence the executive structure as a whole without necessarily permitting that influence to extend to arenas of reserved for Congress. That is, while the President can act more swiftly and precisely to satisfy political commitments, the impact of his action will fall considerably short of analogous congressional action. This in turn serves to satisfy selected constituencies without giving them undue power *via* the presidency.

Executive orders have even served to create presidential commissions to investigate and research problems, and have been instrumental in solving remedial issues.[495] Commission reports that result from such orders can in

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491. COOPER, *supra* note 19, at 44 (noting that President Clinton took this action by citing nothing more specific than "the authority vested in me as President by the Constitution and the laws of the United States of America" (quoting Exec. Order No. 13,073, 61 Fed. Reg. 37,347 (July 17, 1996))).

492. *Id.* at 44–45. With regard to foreign policy actions, the Supreme Court has usually deferred to executive orders, especially where the President could assert that there was a foreign policy emergency. Part of the motivation for this deference is that executive orders send a powerful message in short order. *Id.*

493. *Id.* at 48 (noting that signing the executive order on ethics was President Clinton's first presidential action, performed even before leaving Capitol Hill after his inauguration) (citation omitted).

494. *Id.* at 48, 51. Here, President George W. Bush was responding to the conservative wing of the Republican Party. *Id.* During the election, he had tried to maintain a moderate stance while preserving conservative support. *Id.* Consistent with this goal, he both launched the Faith-Based Initiatives and issued orders to reverse President Clinton's pro-labor policies in favor of measures that were more responsive to the concerns of both moral and fiscal conservatives. *Id.*

495. *Id.* at 52–53. For example, following the assassination of President Kennedy, many in the Justice Department wanted President Johnson to establish a national commission to supplement the criminal investigation in the wake of numerous conspiracy theories. *Id.* Although initially opposed to the

turn put pressure on Congress to enact legislation to respond to those problems. President Franklin Roosevelt pursued this process when he issued a report of the Committee on Economic Security studying financial insecurity due to "unemployment, old age, disability, and health."[496] This report led to the Social Security Act.[497]

The President could in no way implement congressional legislation without designing the necessary regulatory structure within which to do so. Furthermore, the emergence of the necessary edifices for exercising that regulatory structure in turn produces a necessity to refine the regulation to ensure the satisfaction of emergent structural needs. Therefore, it was inevitable that the courts would determine that the President does possess some authority to direct action within the executive branch and render judgment on the same, in an enduring and therefore quasi-legislative and quasi-judicial way. The same is true of the President's express duties under the Constitution, outside the parameters of congressional action.

Thus, the express powers of the Constitution require the elaboration of the necessary executive structure, which in turn creates new needs to which the President must attend in hopes of the enactment of the appropriate congressional legislation. Express power thus necessitates implied power at least by way of the emergence of the infrastructure to support it. Therefore, it is logical that the express grants of constitutional and congressional authority give the President latitude to issue policies that logic, circumstance, and the intent of the Framers or legislators suggest.[498]

Thus, in many cases, the courts have recognized the President's authority to act absent an express congressional grant of power. In the key rulings, the courts have been able to look to the intent of the legislators to determine whether the President's actions were analogous thereto. The objective of the courts is to determine the extent to which the President's actions fall in line with those of Congress, imperfectly, but generally, with an affirmative assumption in the instance of doubt.

On the matter of constitutional or congressional silence, the President's authority to act must therefore be analogous to that of the Congress and the courts, short of that point at which the President's actions begin to usurp that authority. Executive orders that derive from implied authority should carry the same weight as those issued pursuant to express authority. This assertion is justified by the fact that it is impossible to distinguish between

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idea, the President eventually created the Warren Commission by executive order to pursue such an investigation. *Id.*

496. *Id.* at 53 (quoting Cal. Dep't of Human Res. Dev. v. Java, 402 U.S. 121, 130–31 (1971)).

497. COOPER, *supra* note 19, at 53; Social Security Act, 42 U.S.C. ch. 7 (2006).

498. MAYER, *supra* note 20, at 45.

the two types of authority without an active judicial review of every order, which itself is contrary to the processes of the judiciary. Short of that level of scrutiny, distinguishing between implied and express authority for an executive order would require a more objective criterion than can ever be available for judicial review, as implied authority grows out of the structural implications of express authority. Thus, as the physical and regulatory structure of the executive branch changes over time, so must a critical aspect of the nature of implied authority.

The power of Congress to enact legislation to proscribe presidential authority either before or after the promulgation of an executive order undermines the view that this creates a lack of reasonable boundaries for the executive. Nevertheless, executive orders issued merely to further national success lack constitutional authority, as the generic pursuit of success falls short of constituting a natural demand of the physical or regulatory structure that grows out of the President's pursuit of express constitutional authority. Nor do they benefit from statutory authority unless Congress has specifically enacted a relevant statute or alternatively ratifies the President's actions by issuing one. This is precisely because the courts (in the case of a challenge) expect the President to cite the statutory basis of any executive order that seeks to extend executive power.

In the courts' deference to the power of the executive branch to issue executive orders lies a bias toward action. Without that deference, it is possible to conceive of a government that is incapable of acting in response to some particular contingency due to a failure on the part of Congress to enact the necessary statute. The courts have opted to permit action rather than countenance the possibility of injury to public interests due to inaction. This theory emerges in part from the notion that the power of the executive branch is immutable, irrespective of congressional action, as a consequence of the President's declaration of a national emergency. While this theory is necessary to prevent an imbalance among the branches that could in turn lead to authoritarian rule, it would render the nation vulnerable to catastrophe if the courts failed to defer on the matter of action concomitantly.

The theory of the separation of powers has no tolerance for the President's assumption of extraordinary authority in defiance of Congress to confront national emergencies. Yet the necessity for efficiency of action creates a judicial bias for action and deference to presidential autonomy. Nevertheless, presidential authority can never exceed legislative authority or assume the legislative role *per se* in the stead of Congress. The result is a potentially active executive with sufficient checks on potential abuses of power.

A bias toward action permits *post hoc* congressional review, which discourages the executive branch from reaching too far without keeping it from acting quickly. Executive orders are a quicker remedy than congressional legislation to national challenges that arise unexpectedly in the usual course of human events.[499] However, it would be erroneous to infer that they are simply a faster substitute for congressional legislation.

B. Current Issues and Politics

Both purely political situations and strategic imperatives have typically been the driving force behind the utilization of the executive order authority, as has the need for policy implementation.[500] President Reagan moved to overhaul the creation and management of executive orders with a substantial amendment to Executive Order 11,030.[501] This project sought to streamline the regulatory process in the executive branch, while enhancing the President's control of agency accountability.[502] Presidents Clinton and George W. Bush had further impact on the creation, execution, and regulation of executive orders.[503]

1. President William J. Clinton

Since the administration of President Truman, presidents have been more cautious in issuing executive orders and have tended to stay more safely in the realm of judicial and legislative precedent.[504] However, with the Clinton Administration came a pattern of issuing many executive orders, arguably most without any claim of statutory or constitutional authority.[505] For President Clinton, extraordinary reliance on executive orders sought to counter congressional opposition when the Republican Party assumed dominance in the Congress.[506] For example, after trying to

499. COOPER, *supra* note 19, at 43, 69.

500. Mayer, *supra* note 14, at 449–50.

501. Exec. Order No. 11,030, 3 C.F.R. 219 (1962).

502. Exec. Order No. 12,291, 3 C.F.R. 127, 127 (1981) (proposing "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations").

503. *See infra* Part V-B-1, 2.

504. Gaziano, *supra* note 13, at 285.

505. *Id.*

506. Murray, *supra* note 72, at A1 (quoting White House Communications Counsel Paul Begala as stating "Stroke of a pen, law of the land. Kind of cool."). This attitude created much concern among "citizens and lawmakers over the content and scope of several of President Clinton's executive orders and land proclamations." Gaziano, *supra* note 13, at 269. *See also* Branum, *supra* note 47, at 38 ("Clinton was regularly criticized for the unilateral decisions that he made through executive order . . . .").

pass the Children's Environmental Protection Act, which stalled in Congress, the President simply inserted provisions from the act directly into an executive order issued in commemoration of Earth Day in 1997.[507]

2. President George W. Bush

President George W. Bush faced significant difficulty in overcoming the public criticism of executive orders that his predecessor had created, and a war on terror exacerbated his difficulties. Consequently, many of the President's directives have been controversial.[508] The President used his power to create executive orders extensively in the name of the physical, and later economic, security of the nation.[509] The President issued Executive Order 13,233,[510] which would allow any President, current or former, to block access by the public to any federal records created during his presidency.[511] Some viewed this executive order as intensifying an ongoing dispute among the three branches of government over questions of public access to key federal documents.[512] Executive Order 13,292 advanced a broad-based prescription for handling national security information, including how to classify, protect, and under specific circumstances declassify it, especially with consideration of the threat of transnational terrorism.[513]

President Bush also issued a military order[514] to deny habeas corpus review to suspected terrorists who would be subject to trial in military courts.[515] The last President to use executive orders extensively in wartime

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507. Branum, *supra* note 47, at 36.

508. *Id.* at 31.

509. *Id.* at 50 (explaining that this evoked "a mixture of criticism, praise, and relief from the American people and their representatives in Congress"). *See also* JAMES K. JACKSON, CONG. RESEARCH SERV., RS 22863, FOREIGN INVESTMENT, CFIUS, AND HOMELAND SECURITY: AN OVERVIEW (Feb. 4, 2010), available at www.fas.org/sgp/crs/homesec/RS22863.pdf.

510. Exec. Order No. 13,233, 3 C.F.R. 815 (2002).

511. Marcy Lynn Karin, *Out of Sight, but Not Out of Mind: How Executive Order 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records*, 55 STAN. L. REV. 529, 530–31 (2002).

512. *Id.* ("[T]he [Executive] Order implicates and incites an interbranch controversy by both superseding and fundamentally altering previous congressional legislation and Supreme Court precedent.").

513. Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003). The President argued that "throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security remains a priority." *Id.*

514. Whether referred to as military orders or executive orders, "the choice of terminology is arbitrary." Norman J. Futor, *The Publication of Presidential Orders: A State of Chaos and Confusion*, 49 A.B.A. J. 69, 70 (Jan. 1963).

515. Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831 (Nov. 13, 2001).

was President Franklin Roosevelt. During World War II, President Roosevelt enacted proclamation 2,561.[516] President Bush's order to deny habeas corpus review arguably bears some resemblance to this proclamation.[517] Consequently, in *Rasul v. Bush* [518] and *Al Odah v. United States*,[519] British and Australian authorities detained certain citizens of their respective countries in connection with the ongoing war against terrorist entities and incarcerated them at the Guantánamo Bay Detention Camp, a military base on Cuban soil controlled by the United States.[520] The petitioners asserted that their detention had occurred without charges or proof of unlawful activity, and that they had no opportunity to establish their innocence.[521] The government claimed that it had legal justification to detain the petitioners indefinitely in the manner described as a result of the President's executive order, and that no court had jurisdiction to review the basis for their detention.[522]

This issue, which has moved energetically between the Supreme Court and the circuit courts, provides an important illustration of a presidential power in which the reviewing court is under pressure to uphold an action as constitutional, even if it might exceed the President's legitimate power. When the courts examine constitutional issues in the context of military tribunals, they do so from a safeguarding stance, rather than with a prohibitive focus. Instead of allowing political and social pressure to induce

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516. Proclamation 2561, Denying Certain Enemies Access to the Courts (1942), 56 Stat. 1964 (1942). This proclamation reads, in part, as follows:

> [A]ll persons who are subjects, citizens or residents of any nation at war with the United States who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war.

Id.

517. Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001). This order reads, in part, as follows:

> [If] there is a reason to believe that such an individual . . . (i) is or was a member of the organization known as al Qaeda; [or] (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, [sic] that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy . . . .

Id.

518. Rasul v. Bush, 542 U.S. 466 (2004).

519. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

520. Brief for Petitioner at 2–3, Rasul v. Bush, 542 U.S. 446 (2004) (No. 03-334).

521. *Id.*

522. In 2004, the Supreme Court granted *certiorari* to determine the issue of "[w]hether the United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." Rasul v. Bush, 540 U.S. 1003 (2003).

them to make a forced choice between allowing and disallowing certain presidential actions, the courts focus on providing procedural safeguards for these types of decisions to ensure their constitutionality.[523]

3. President Barack H. Obama

President Barack Obama's early pattern in promulgating executive orders is consistent with those of his predecessors, including the use of executive orders to address significant political issues. The President's executive orders issued on his first day in office included revocation of Executive Order 13,233[524] and a pledge of ethics.[525] The first order creates an affirmative burden on former presidents to claim executive privilege when the Archivist of the United States proposes to disclose previously classified presidential records.[526] The second creates conditions of employment within the executive branch, including restrictions on former lobbyists who receive executive agency appointments.[527]

In addition, the President issued three presidential memoranda, related to FOIA,[528] an executive pay freeze in the executive branch,[529] and government transparency.[530] On his second day in office, the President issued three more executive orders, the first to revoke Executive Order 13,440,[531] addressing the issue of lawful interrogation and foreswearing torture,[532] the second to close the detention facility at the Guantánamo Bay Naval Base,[533] and the third to review options relating to the future detention of terrorist combatants.[534] In addition, the President issued a presidential memorandum to review the detention of the sole terrorist combatant held on U.S. soil.[535] This series of orders clearly demonstrates

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523. Lisa M. Ivey, *Ready, Aim, Fire? The President's Executive Order Authorizing Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism is a Powerful Weapon, But Should it be Upheld?*, 33 CUMB. L. REV. 107, 112, 128–29 (2002).

524. Exec. Order No. 13,489, 74 Fed. Reg. 4,669, 4,669 (Jan. 26, 2009) (revoking Exec. Order No. 13,233 of November 1, 2001, and effectively restoring Exec. Order No. 12,667 of January 18, 1989).

525. Exec. Order No. 13,490, 74 Fed. Reg. 4,673 (Jan. 21, 2009).

526. Exec. Order No. 13,489, 74 Fed. Reg. at 4,671.

527. Exec. Order No. 13,490, 74 Fed. Reg. at 4,673.

528. 74 Fed. Reg. 4,683.

529. 74 Fed. Reg. 4,679.

530. 74 Fed. Reg. 4,685.

531. Exec. Order No. 13,440, 3 C.F.R. 229, 229 (2007).

532. Exec. Order No. 13,491, 74 Fed. Reg. 4,893–4,894 (Jan. 27, 2009).

533. Exec. Order No. 13,492, 74 Fed. Reg. 4,897–4,898 (Jan. 27, 2009).

534. Exec. Order No. 13,493, 74 Fed. Reg. 4,901, 4,901 (Jan. 27, 2009).

535. Review of the Detention of Ali Saleh Kahlah, 2009 DAILY COMP. RES. DOC. 1 (Jan. 22, 2009). Alî Sâlih Kahlah al-Marrî [علي صالح كحلة المري], is a Qatarî citizen incarcerated at the Naval Consolidation Brig, a military facility in Charleston, North Carolina. Pursuant to the President's presidential memorandum, Defense authorities released al-Marrî on March 10, 2009, and federal

the President's visible political commitments. A few days later, on January 26, the President issued two more presidential memoranda referencing the Energy Independence and Security Act of 2007[536] and a request by the State of California for a waiver of federal Clean Air Act requirements.[537] Despite the still relatively early date, these memoranda, and indeed the fact that they fall short of qualifying as executive orders *per se*, evidence interests of the President that fall outside the immediate realm of partisan political commitments.

Subsequent orders have: addressed FPASA,[538] revoked Executive Orders 13,258 and 13,422,[539] amended President George W. Bush's orders on Community and Faith-Based Initiatives,[540] amended Executive Order 12,835,[541] amended Executive Order 12,859,[542] set up an economic-recovery advisory board,[543] established a White House Office of Urban Affairs,[544] authorized an extension of federal projects to rebuild the Gulf Coast region through September 30, 2009,[545] revoked Executive Order 13,435,[546] established a White House Council on Women and Girls,[547]

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authorities subsequently arrested him anew to place him in the custody of the United States Marshal Service and transport him to the Federal Correctional Institution in Pekin, Illinois. *See generally*, John Schwartz, *After Years in Navy Brig, A Day in Open Court,* N.Y. TIMES, Mar. 24, 2009, at A16.

536. Memorandum on the Energy Independence and Security Act of 2007 (Jan. 26, 2009), *available at* http://www.gpoaccess.gov/presdocs/2009/DCPD200900024.pdf.

537. Memorandum on EPA Waiver, (Jan. 26, 2009), *available at* http://www.whitehouse.gov/the-press-office/Presidential-Memorandum-EPA-Waiver.

538. Exec. Order No. 13,494, 74 Fed. Reg. 6,101, 6,101 (Feb. 4, 2009) (restricting federal funding of contractors' labor-management relations expenses); Exec. Order No. 13,495, 74 Fed. Reg. 6,103, 6,103 (Feb. 4, 2009) (restricting federal contractors from replacing employees upon reissuance of a contract; revoking Exec. Order No. 13,204 of Feb. 17, 2001, and effectively restoring Exec. Order No. 12,933 of Oct. 20, 1994); Exec. Order No. 13,496, 74 Fed. Reg. 6,107, 6,107 (Feb. 4, 2009) (pertaining to contractors' notifying employees of their rights under federal labor laws; revoking Exec. Order No. 13,201 of Feb. 17, 2001, and effectively restoring Exec. Order No. 12,836 of Feb. 1, 1993); Exec. Order No. 13,502, 74 Fed. Reg. 6,985, 6,986 (Feb. 9, 2009) (revoking Exec. Order No. 13,202 of Feb. 17, 2001, and Exec. Order No. 13,208 of Apr. 6, 2001, and authorizing federal agencies to restrict contracts to contractors that adopt collective-bargaining agreements to cover the contracting period).

539. Exec. Order No. 13,497, 74 Fed. Reg. 6,113 (Jan. 30, 2009) (revoking Exec. Order No. 13,258 of Feb. 26, 2002, and Exec. Order No. 13,422 of Jan. 18, 2007, and effectively restoring Exec. Order No. 12,866 of Sept. 30, 1993).

540. Exec. Order No. 13,498, 74 Fed. Reg. 6,533 (Feb. 9, 2009) (amending Exec. Order. No. 13,199 of July 29, 2001, and recasting the program as Faith-based and Neighborhood Partnerships).

541. Exec. Order No. 13,499, 74 Fed. Reg. 6,979 (Feb. 11, 2009) (amending Exec. Order No. 12,835 of Jan. 25, 1993, concerning the establishment of the National Economic Council).

542. Exec. Order No. 13,500, 74 Fed. Reg. 6,981 (Feb. 5, 2009) (amending Exec. Order No. 12,859 of Aug. 16, 1993, concerning the establishment of the Domestic Policy Council).

543. Exec. Order No. 13,501, 74 Fed. Reg. 6,983 (Feb. 6, 2009).

544. Exec. Order No. 13,503, 74 Fed. Reg. 8,139 (Feb. 19, 2009).

545. Exec. Order No. 13,504, 74 Fed. Reg. 8,431 (Feb. 24, 2009) (amending Exec. Order No. 13,390 of Nov. 1, 2005, by changing the deadline of Feb. 28, 2009, to Sept. 30, 2009, for federal projects that are still in the process of rebuilding the Gulf Coast region due to prior hurricane damage).

546. Exec. Order No. 13,505, 74 Fed. Reg. 10,667, 10,668 (Mar. 11, 2009) (revoking Exec. Order No. 13,435 of June 20, 2007, which was the original order to authorize stem cell research, but which limited such research to current lines and adult cells; the 2009 order seeks to review standing

established a White House Office of Health Reform,[548] issued a policy under the Clean Water Act to see to the restoration of the Chesapeake Bay region,[549] and established a White House Council on Automotive Communities and Workers.[550] Thus, the President's primary domains of concern in his early decisions encompass labor relations, civil service appointments, and national security policy as it relates to wartime detainees, and urgent issues appertaining to the current recession.

The President's concern for labor relations is paramount, although all orders apply strictly to federal contractors, as has been the standard pattern in executive orders since the issuance of Executive Order 11,246 by President Lyndon Johnson.[551] Of these, President Obama's most controversial order appears to be Executive Order 13,502,[552] which permits the executive branch to reject applications for federal contracts from non-unionized prospective contractors. This gives unions inordinate leverage over employers and thus stands to upset the balance between labor and management that has defined the history of the labor management relations position of the United States since the Norris–LaGuardia Act of 1932.[553] That the President issued Executive Order 13,502 on February 6, 2009, appreciably after the most visible period of January 21 and 22, seems to indicate that labor issues are less a concern involving political commitments and more one involving the President's preferred agenda.

Aside from specific content, the pattern of President Obama's issuance of executive orders reflects the natural expectation for a successor President from an opposing party. Several of the President's executive orders specifically revoke executive orders of President George W. Bush, particularly in those cases in which the latter's executive orders had revoked those of President Clinton. A review of President Obama's early orders suggests that a President is most likely to attend to key points of difference between the political parties in selecting which of his predecessor's orders to overturn. Nevertheless, the extent to which the President created new White House offices in early orders seems to reflect personal interests unrelated to any key differences between the political parties.

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policy and look for ways to lift current limitations with respect to research lines).

547. Exec. Order No. 13,506, 74 Fed. Reg. 11,271 (Mar. 11, 2009).
548. Exec. Order No. 13,507, 74 Fed. Reg. 17,071 (Apr. 8, 2009).
549. Exec. Order No. 13,508, 74 Fed. Reg. 23,099 (May 15, 2009).
550. Exec. Order No. 13,509, 74 Fed. Reg. 30,903 (June 23, 2009).
551. Exec. Order No. 11,246, 3 C.F.R. 339 (1965).
552. Exec. Order No. 13,502, 74 Fed. Reg. 6,985 (2009).
553. 29 U.S.C. § 101 (1932).

As of the writing of this paper (a kind of post script to this section), President Obama signed Executive Order 13,535 on March 24, 2010, forbidding the use of federal funds for abortions.[554] The ratification of this order was a political commitment to help the recent enactment of the Patient Protection and Affordable Care Act (H.R. 3590),[555] commonly known as "The Healthcare Act."

This executive order was intended to ensure an adequate enforcement mechanism to prevent federal funds from being used for abortion services (except in cases of rape, incest, or when the life of the woman would be endangered).[556] This was consistent with a longstanding federal statutory restriction on federal funds for abortions, which is commonly known as the Hyde Amendment.[557] The purpose of this order is to establish a comprehensive, government-wide set of policies and procedures to achieve the goal of the "The Healthcare Act"[558] and to make certain that all relevant actors—federal officials, state officials, insurance regulators, and health care providers—are aware of their responsibilities.[559]

The Patient Protection and Affordable Care Act is the major health care reform bill, passed by the House on March 21, 2010, by a party-line vote of 219–212. The Act purportedly expanded health care coverage to 31 million uninsured Americans through a combination of cost controls, subsidies and mandates. "It is estimated to cost $848 billion over a 10 year period, but would be fully offset by new taxes and revenues and would actually reduce the deficit by $131 billion over the same period."[560] This is an example of a President pursuing his promised agenda by supplementing legislation with an executive order.

554. Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

555. The Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2010). The voting on this Bill appeared to be strictly along political lines because no Republican representative voted for it. However, to encourage some wavering Democrats to vote for the Healthcare Act, President Obama signed Executive Order 13,535 to facilitate the process. Exec. Order No. 13,535, Fed. Reg. 15,599 (Mar. 24, 2010).

556. Exec. Order No. 13,535, 75 Fed. Reg. 15,599.

557. ACLU, *Public Funding for Abortions*, REPRODUCTIVE FREEDOM (July 21, 2004), http://www.aclu.org/reproductive-freedom/public-funding-abortion..

558. *See H.R. 3590 – Patient Protection and Affordable Care Act*, OPEN CONGRESS, http://www.opencongress.org/bill/111-h3590/show (last visited Sept. 13, 2010) (summarizing the objectives of H.R. 3590).

559. Exec. Order No. 13,535, 75 Fed. Reg. at 15,599.

560. OPEN CONGRESS, *supra* note 558.

CONCLUSION

The trajectory of the evolution of the executive power in the United States, as seen through the prism of the growing edifice of executive orders have become increasingly formal and permanent. The evolution of executive power in the United States has shifted executive orders from mere legislative interpretation to ancillary legislation. Executive orders continue to influence subsequent presidents. The elaboration of executive order promulgation, as an autopoietic process was necessary to the very existence of presidential power. That is, the mechanisms for formalizing executive orders have always existed in the executive power in a government whose legitimacy lives in written pronouncements treated as delicate, sacred, and worth protecting at all cost. Part of this formalization is a consequence of the reverence for precedent. Thus, prior presidents influence future presidents, less because future presidents wish to mimic their predecessors, but more because future presidents act within an edifice their predecessors have already erected. Thus, the growth and elaboration of an ever more robust structure of executive orders resembles an autopoietic process.[561]

Presidents have used the executive power in ways that they arguably should have avoided. They have also used it to bring about change for which the nation was arguably ready (*e.g.*, the racial integration of the armed forces). In the sway between mild execution of statute and potential abuse, there has emerged a robust structure that continues to refine itself. That the power of the executive branch is dynamic, rather than static, is perhaps beneficial. At times, especially during national crises, the nation wants to present a strong, united front, which a 535-member Congress, known for slow processes encumbered by partisan dissent, is often unable to project.

The shifting weight of executive and legislative power defines its scope on balance. The executive power reaches an equilibrium, albeit an evolving one, when citizens feel safe and the economy is strong. During such periods, decisive action beyond the capacity of the legislature's pattern of

561. *See* Anthony Beck, *Is Law an Autopoietic System?* 14 OXFORD J. LEGAL STUD. 401 (1994). The structure has grown in accordance with the necessity for the executive branch to meet the demands of the executive function. However, the author suggests that the greater the proliferation of standing orders, the more frequent would become the incidence of modification, as well as revocation, by subsequent presidents. To compensate, the regulatory body of the executive branch as a whole has required successively higher orders of regulatory structure to support it. Over time, an ever greater proportion of executive-branch activities must serve the purpose of maintaining the structure *per se*, as opposed to executing legislation.

compromise is unnecessary. The nation would prefer to act slowly or even refrain from acting altogether. In contrast, when the nation perceives immediate threats, it may seek to avoid wading through the slow and cumbersome process of congressional action. It desires something quick, affirmative, and decisive instead. When the President acts under such conditions, he may have more than the force of law behind him. He may very well have the force of the nation (the people) behind him as well. It is conceivable that the attitude of the nation as a whole is construable as both a source and a limitation on presidential power.

Whatever the limits on executive orders may be, in the present day the President may act where Congress has placed no explicit restraints. Successful challenges to presidential authority are rare. The last precedent-setting assertion of the limitation on presidential power came nearly sixty years ago in *Youngstown*.[562] It may be impossible to define executive power, but the best summation of the governing principle behind it may be Justice Frankfurter's pronouncement in *Youngstown*. He states that it is best "to avoid putting fetters upon the future by needless pronouncements today."[563]

Historically, the use of executive orders by presidents has ranged from administrative items to pressing matters of national security. Over time, and punctuated significantly by President Franklin Roosevelt's unprecedented approach to their use, more trivial matters have tended to move to the jurisdiction of subordinate agencies, while the President has devoted more time proportionally to matters of greater national impact.

Nevertheless, the use of the executive order continues to cause some concern among constitutional scholars and the public as a whole. Many people fear that the executive order allows the President undue autonomy and power that should remain the domains of other branches of government, thus ensuring the separation of powers. Proponents of the executive order argue that the power of the President remains limited, usable in specific, strict circumstances, and that this power in no way usurps the source of power balanced by the separation of powers doctrine.

The fact that the courts have overturned only two executive orders in over 200 years reflects a strong judicial bias in favor of granting the President ample latitude in carrying out the executive function. It may also reflect the level of restraint typically exercised by the President regarding the matters about which he makes the decision to issue executive orders. The executive order is thus an immensely powerful administrative tool at

562. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
563. *Id.* at 596 (Frankfurter, J., concurring).

the disposal of the President. Questions about the legitimacy of a given order must focus on its possible role in attempting either to overturn congressional legislation or to supplant the legislature's duty to craft legislation by way of its deliberative processes.

The logic in *Youngstown* revolves around a combination of congressional intent, the magnitude of executive branch interference in the sacrosanct concerns of private property, and the question of whether presidential power should vary without the necessity of a congressional grant of power according to the seriousness of national emergencies. *Youngstown* is thus substantially more complex than *Reich*.[564]

On the matter of congressional intent, *Youngstown* established that both the express proscription of Congress and evidence of its will are relevant to considerations of executive order validity. Nevertheless, the mere fact that Congress discussed and dismissed a question addressed later by an executive order is unlikely by itself to suffice as a justification for overturning the order, because such congressional deliberation can vary in the sharpness of the intent thereby implied. The vaguer the implied Congressional intent is, the more important the other two key considerations become in judging the order's validity.

The question of private property closely touches constitutional protections.[565] It thus places more pressure on the President to cite unequivocal justification for an order, rather than merely create a persuasive argument based on generalities. More generally, the closer an executive order appears to be to violating a constitutional protection, the more strictly will the courts examine it. However, they will try to find a non-constitutional rationale for overturning it, should that outcome be necessary. Lastly, the most independent precedent of *Youngstown* may be the declaration that a state of national emergency fails to enhance the President's power. Rather, the President's power remains buttressed by what the Congress or Constitution confers, regardless of the circumstance.

Reich adds a subtle consideration in conjunction with *Youngstown*. This author posits that the fundamental issue is whether the President can controvert a prior judicial precedent, rather than whether he can enact a law instead of Congress.[566] *Reich* thus emphasizes the role of the judiciary in

564. Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).

565. U.S. CONST. amend. V. The author posits that the word "law" in the phrase "due process of law" emphasizes the duty of the legislature, rather than the executive branch, to enact the requisite legislation that may result in a confiscation of property. Meanwhile, the phrase "due process" emphasizes the presumption of equitability in that enactment. Any executive action that might result in confiscation of property is therefore subject to the utmost caution.

566. Nevertheless, the author asserts that the duty of the Congress to make laws and resist transferring that responsibility to the President remains the key to any case wherein the President might

interpreting statutory law. *Reich* stresses that only Congress, and not the President, may overturn precedent through the normal legislative process. Overturning judicial precedent is an inherently legislative function, rather than an ancillary extension thereof. Congress is incapable of delegating this function to the President. *Reich* thus adds a critical nuance to drawing the distinction between legislation under the constitutional definition and legislation by executive order.

Overall, the most important principle to draw from *Youngstown* and *Reich* is that the President has no authority to act in any way that supplants the will of Congress, unless his actions draw from a power specifically delegated to him by the Constitution. To that end, an executive order is legislative in effect only to the point that it falls short of conflicting with a statute or being contrary to the will of Congress. It is legislative in the same sense as judicial interpretation. An executive order, like judicial interpretation, may address areas of the law for which new challenges highlight points of vagueness, and is subject to congressional correction. As in the case of judicial precedent, valid executive orders are incapable of contradicting congressional legislation unless that legislation contradicts the Constitution itself. Thus, the lawmaking function of either the judiciary or the executive must necessarily address only previously unaddressed areas or nuances of statutory law.

Executive orders constitute a codification of executive intent. In history, these originally came in various forms of self-expression. In any executive structure, the functionaries seek to abide by the chief executive's verbal and written orders, transmitted directly or by way of the subordinate agencies that the executive and his predecessors have developed over time. Two forces place natural pressure on the executive structure to formalize orders progressively—first by methodically reducing them to writing, then by compiling them systematically, and ultimately by formalizing the procedure for promulgating them. The first is the growing size and complexity of the executive structure. This increases demands on the personal abilities of functionaries to retain the details of a growing number of orders. The second is the extent to which that growth necessitates orders of ever-increasing longevity, consistent with the growing permanence of the structure's proliferating institutions. The more formalized and enduring the impact of the executive order becomes, the more legislative in nature it becomes.

Even the most specific and ephemeral order by an executive is a rule that demands some semblance of obedience. Insofar as society charges the

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appear to supplant the Congress as the lawmaking body.

executive to carry out social policy enacted by another body, the executive must be able to expect some semblance of social cooperation to enable it to carry out its duties. As the formalization and codification of executive orders grow, so will the quasi-legislative nature of those orders as felt by society at large.

At some point the question arises as to whether the executive is now pursuing a legislative, rather than executive, function. It is precisely at this point that it becomes important for society to identify the dividing line between the two. Starting with the premise that the executive and legislative entities must be approximately equal in power (i.e., the theory of the equilibrium among the branches), that line naturally looks for a distinction in roles, rather than for a body in which to place the predominant power. Consistently, society ascribes legislation to the legislative body and execution to the executive, holding that the division of power on behalf of the society is adequate as long as neither agency goes so far as to usurp the other's basic role. Determining this requires an ongoing assessment of whether the executive branch continues to act in consistency with the legislative branch, rather than vice versa.

A bias toward action explains why the executive branch has the power to act in the complete absence of legislative action. In this case, the relevant question becomes broader, but by no means different, as the society continues to expect the executive body to act in a manner that is consistent with the broader intent of the legislative body. Thus, there is logically no question of whether the executive branch of the U.S. Government may undertake whatever action it chooses to pursue ostensibly on behalf of the nation's people. It possesses finite freedom to pursue action in the absence of congressional action. It is generally free to pursue broader action of the style that Congress has generally promoted in the past via the executive order autopoietic tool process.

Ab esse ad posse valet, a posse ad esse non valet consequential.

—Anonymous

Translation: "From a thing's reality one can be certain of its possibility, from its possibility one cannot be certain of its reality."