Executive Orders and Proclamations

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Summary

What are executive orders and proclamations, and where does the President derive the authority to issue them? These questions have been the subject of political and academic debate since the inception of our nation. Their lack of definitive resolution stems from the ambiguity of the scope of executive authority vested in the President by the Constitution. Upon developing the Constitution, the Framers included Article II which, for our purposes, states that "the executive power shall be vested in a President of the United States," "the President shall be Commander in Chief of the Army and Navy of the United States," and "he shall take care that the laws be faithfully executed." Although the power to issue executive orders has often been based upon Article II, the Framers did not specifically give the President such authority. Moreover, the question has yet to be answered by either Congress or the Supreme Court. In any event, it is clear that if based on appropriate authority, executive orders have the force and effect of law.

This report examines the origin and usage of these presidential instruments. It also analyzes the scope of the President's authority to use such instruments and possible responses by Congress and the Judiciary.

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Executive Orders and Proclamations

Introduction

Typically, an inquiry concerning executive orders and proclamations may only be related to one particular issue. However, it is useful to fully understand the dynamics behind executive orders and proclamations. Otherwise, the reader may be disappointed when it becomes apparent that there is no hard and fast rule concerning these presidential instruments. The fact is, executive orders and proclamations encompass so many aspects of government and society that each of them must be considered on a case-by-case basis. Consequently, this report seeks to give a better understanding of executive orders and proclamations, but may not provide ready answers to questions concerning specific presidential actions. This report examines the origin and usage of these presidential instruments. It also analyzes the scope of the President's authority to use such instruments and possible responses by Congress and the Judiciary.

The first task is to define executive orders and proclamations. Unfortunately, there is no exact meaning since neither the Framers of the Constitution nor Congress defined executive orders or proclamations. However, many commentators have expressed their understanding of such instruments. The most commonly cited description is that prepared by the House Government Operations Committee:

> Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law. . . . In the narrower sense Executive orders and proclamations are written documents denominated as such. . . . Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly. Proclamations in most instances affect primarily the activities of private individuals. Since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President's proclamations are not legally binding and are at best hortatory unless based on such grants of authority. The difference between Executive orders and proclamations is more one of form than of substance. . . .[1]

As executive orders and proclamations are not defined in the Constitution, there is also no specific provision in the Constitution authorizing the President to issue executive orders and proclamations. However, the fact remains that Presidents have been issuing them since the inception of the Republic. Often Presidents have relied

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[1] Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., Executive Orders and Proclamations: A Study of a Use of Presidential Powers (Comm. Print 1957).

upon Article II of the Constitution as the sole basis for issuing executive orders and proclamations. For present purposes, Article II states that "the executive power shall be vested in a President of the United States," "the President shall be Commander in Chief of the Army and Navy of the United States," and "he shall take care that the laws be faithfully executed."[2] The President's ability to issue executive orders and proclamations is also derived from express or implied statutory authority from Congress.[3]

The ambiguity behind executive orders and proclamations poses a great concern for Congress and the public. At issue is the possibility that these presidential instruments may directly or indirectly affect the substantive rights, duties or obligations of persons outside the government. As a consequence, since executive orders and proclamations are a species of *executive legislation,* they have important constitutional implications, particularly with respect to the separation of powers. Furthermore, these instruments, if issued under a valid claim of authority and published,[4] have the force and effect of law[5] and courts are required to take judicial notice of their existence.[6] Thus, it is important to examine the legal basis for each executive order and proclamation issued and the manner in which the President has used these instruments.

The primary focus of this report is to determine the limits of the President's authority to issue executive orders and proclamations and to determine the role of the legislature and judiciary in shaping the President's use of these powerful instruments. This report will also compare presidential memoranda, a frequently used executive instrument, to executive orders.

Evolution of Executive Orders and Presidential Proclamations

The first use of proclamations can be traced back to George Washington. In 1793, the Washington Administration was wrestling with the idea of issuing a proclamation declaring the United States' neutral in the war between England and

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[2] U.S. Const., Art. II, Secs. 1, 2, & 3.

[3] *Youngstown Sheet and Tube v. Sawyer,* 343 U.S. 579 (1952), *discussed, infra,* at pp. 5-8. In such instances where Congress statutorily grants the President the authority to act, his authority is at its peak.

[4] The Federal Register Act requires that executive orders and proclamations be published in the Federal Register. 44 U.S.C. § 1505. Moreover, the President is required to comply with the regulations, established by executive order, governing the preparation, presentation, filing, and publication of executive orders and proclamations. Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962).

[5] *Armstrong v. United States,* 80 U.S. 154 (1871); *see also Farkas v. Texas Instrument Inc.,* 372 F.2d 629 (5th Cir. 1967); *Farmer v. Philadelphia Electric Co.,* 329 F.2d 3 (3d Cir. 1964).

[6] *Jenkins v. Collard,* 145 U.S. 546, 560-561 (1893).

France. Given the option of calling Congress back into session or issuing a proclamation on his own accord, President Washington chose the latter. On April 22, 1793 Washington issued a proclamation which enjoined the citizens of the United States to ". . . avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition . . ." of ". . . a conduct friendly and impartial toward the belligerent powers . . . ." Moreover, he had "given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the powers at war, or any of them."[7] However, he found that enforcing his proclamation was difficult and, thus, decided to look to Congress for assistance. Congress responded by passing the Neutrality Act of 1794 which gave the Administration the power to prosecute those who violated Washington's proclamation.[8]

The next major use of proclamations came during the Presidency of Abraham Lincoln. At the outset of the Civil War, President Lincoln issued a proclamation authorizing Gen. Scott to watch the activities of the Maryland State Legislature and to act to suppress any insurrection. In his proclamation, Lincoln even authorized the suspension of the writ of habeas corpus. Pursuant to this proclamation, John Merryman was arrested on May 25, 1861, and held at Ft. McHenry by Gen. Cadwalader. Subsequently, Chief Justice Taney ordered that a writ of habeas corpus be issued. Gen. Cadwalader, however, citing his authority pursuant to Lincoln's proclamation, refused to comply. Chief Justice Taney, in his opinion, stated that the power to suspend the writ of habeas corpus was exclusively a legislative one, and that the President cannot suspend the privilege nor authorize a military officer to do it. Taney based his argument on legal and constitutional history and the fact that the power to suspend the writ is contained in Article I (the legislative article) of the Constitution.[9] Although Taney was unable to enforce his decision, Lincoln addressed Congress, on July 4, 1861, to explain the actions he had taken and to get congressional approval for them. Almost two years later, Congress passed the Habeas Corpus Act of 1863 which authorized the President to suspend the writ of habeas corpus when, in his judgment, the public safety may require it.[10] Thus, Congress did assert its jurisdiction over the matter of habeas corpus suspension, and, in the long run, Lincoln's actions were sanctioned by Congress.

With the exception of Lincoln's assumption of power during the Civil War, Congress usually maintained tight control over the executive branch through detailed statutes, strict budgetary controls, and reviews of even the most mundane administrative matters. During the nineteenth century, executive orders most often

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[7] Charles M. Thomas, *American Neutrality in 1793,* A Study in Cabinet Government, p.42-43 (1931).

[8] Ch. 50, 1 Stat. 381 (See 18 USC § 960).

[9] *See* Taney's Decisions in the Circuit Court of the United States for the District of Maryland, 1836-61, p. 252; see Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., Executive Orders and Proclamations: A Study of a Use of Presidential Powers (Comm. Print 1957).

[10] Ch. 81, 12 Stat. 755.

supplemented acts of Congress to carry out minor details.[11] The use and scope of executive orders and proclamations expanded, however, with the Presidency of Theodore Roosevelt.

President Roosevelt's theory on the presidency, the "stewardship" theory, was based on his view that the President was vested with residual powers which were neither enumerated in the Constitution nor assigned broadly to a specific branch; instead, they simply resided in concepts like national security or the public good. Thus, Roosevelt stated: "My view was that every officer, and above all every executive officer in high position, was a steward of the people. . . . My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."[12] This expansion of executive power, however, did not firmly take hold until the Presidency of Woodrow Wilson.

With the onset of World War I, President Wilson was able to expand the discretion of the presidency through the use of emergency powers. During his tenure, Wilson issued over 1800 executive orders. This period appears to mark the beginning of legislative and judicial tolerance towards expanded executive power during times of national emergency. Nothing underscores this more than the use of executive orders by President Franklin D. Roosevelt (FDR). Taking office during the depression, FDR was given great latitude by Congress to implement his New Deal program. In his first year, FDR issued 654 executive orders,[13] including his Inaugural Day proclamation closing all banks for four days to restructure the financial system and to establish the administrative mechanism necessary to implement his New Deal programs. World War II provided further impetus for him to continue the expansion of executive power. Without statutory authority, but as he put it, pursuant to the powers vested in him "by the Constitution and laws of the United States, as President of the United States of America and Commander in Chief of the Army and Navy of the United States," FDR issued an executive order on June 9, 1941, seizing North America Aviation's plant in California.[14] Two years later, Congress acquiesced in this and other seizures by passing the War Labor Disputes Act which provided statutory authority for presidential seizure of plants, mines, and other facilities.[15] However, as the war drew toward an end, Congress began to regain control of legislative activity which in large part had been relegated to the executive in a time of national emergency. In 1944, Congress invoked its power of the purse to prevent the President from using appropriated funds to finance agencies created by executive

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[11] Probably for this reason there were few executive orders issued until President Theodore Roosevelt took office. *See* Table 1.

[12] Theodore Roosevelt, *An Autobiography* (New York: Scribners's, 1931), 388.

[13] Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., Executive Orders and Proclamations: A Study of a Use of Presidential Powers, 36 (Comm. Print 1957).

[14] Exec. Order No. 8773, 6 Fed. Reg. 2777 (1941). FDR later that year used the same authority to seize shipbuilding companies, a cable company, a shell plant, and almost 4,000 coal companies. *See* Louis Fisher, *Constitutional Conflicts between Congress and the President,* 106 (3rd ed. rev. 1992)

[15] June 25, 1943, c. 144, 57 Stat. 163.

order unless Congress specifically appropriates for the agency or authorizes the expenditure of funds by it.[16] At the beginning of this country's next conflict, the Korean War, President Truman was not as successful as Presidents Wilson and FDR were in expanding his authority to issue executive orders and proclamations.

Truman and the "Steel Seizure Case"

The President's use of executive orders and proclamations experienced a turning point at the onset of the Korean Conflict. On December 18, 1951, collective bargaining between steel companies and their employees broke down and led to an announcement that the employees would strike on December 31, 1951. In an attempt to reach an agreement between the parties, the Federal Mediation and Conciliation Service intervened. Its efforts were unsuccessful. President Truman then referred the dispute to the Federal Wage Stabilization Board to investigate and make recommendations for fair and equitable terms of settlement. Unfortunately, this method also proved fruitless. The President did not, perhaps for political reasons, invoke the emergency provisions of the Taft-Hartley Act which could have enjoined the strike for 60 days.[17] Upon the announcement of a nation-wide strike, President Truman issued an executive order authorizing the Secretary of Commerce to take possession of and operate most of the nation's steel mills.[18] Similar to FDR's executive orders seizing property in the name of national security, this order was not based on any statutory authority, but was based generally upon all powers vested in the President by the Constitution and laws of the U.S. and as President of the U.S. and Commander in Chief of the Armed Forces. The order contained a finding that the President's action was necessary to avoid a national catastrophe, since a work stoppage would immediately imperil the national defense at a time when American troops were fighting in Korea. Truman immediately informed Congress of his action and stated his intention to abide by the legislative will. However, Congress took no action. Therefore, the judicial branch was called upon to determine the scope of the President's executive authority.

The steel companies sued the Secretary of Commerce in a Federal district court, praying for a declaratory judgment and injunctive relief.[19] The district court issued a preliminary injunction, which the court of appeals stayed.[20] The Supreme Court granted certiorari. In *Youngstown Sheet & Tube Co. v. Sawyer*,[21] the Court found that the President had acted without statutory or Constitutional authority. Moreover, the

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[16] 31 U.S.C. § 1347.

[17] 29 U.S.C. §§ 176, 179(b).

[18] Executive Order 10340, 17 Fed.Reg. 3139 (1952).

[19] 103 F.Supp. 569 (1952).

[20] 197 F.2d 582 (D.C.C. 1952).

[21] 343 U.S. 579 (1952).

Court declined to entertain the contention that presidential power should be implied from the aggregate of his powers under the Constitution.[22]

In its decision, the Court explained that the President's power to issue executive orders must stem from either an act of Congress or from the Constitution itself. The Court could not find any statute which either expressly or impliedly authorized the President to take possession of property as he did in this situation. In fact, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment, but had been rejected by Congress as a method of settling such disputes.[23] Instead, Congress enacted the Taft-Hartley Act which permitted the executive to settle disputes through mediation, conciliation, investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling-off periods of 60 days. Congress' explicit refusal to include the seizure technique as one of the many mechanisms provided to the executive made it clear that the President did not have statutory authority to issue the executive order in question. Moreover, the Court failed to find any constitutional basis for the President to issue such an order. In particular, the Court declined to find the "aggregate" of the President's powers was sufficient to authorize seizure of the nation's steel mills.

The Court went on to state that although other Presidents may have taken possession of private businesses in order to settle labor disputes, Congress has not lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution. Thus, the only role the President had in this situation was to make sure that the laws be faithfully executed, not to make them.

Six members of the Court joined in affirming the lower court, holding that (1) the constitutional issue was ripe for decision; and (2) that the seizure order was not within the constitutional powers of the President. However, four justices (Frankfurter, Douglas, Jackson, and Burton) concurred in the result but wrote separate opinions, which, as stated by Frankfurter, J., show differences in attitude toward the basic constitutional principles involved. The lack of constitutional authority supporting the President's action was emphasized, not only in the Court's opinion, but in Douglas' concurring opinion as well.

The emphasis of the concurring opinions of Frankfurter, Jackson, and Burton is on the fact that whatever the President's inherent power to seize private property to meet an emergency may be, he was precluded from exercising such power in the present case by specific legislation designed to meet the emergency confronting him.

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[22] *Id*. The "aggregate of powers" theory of presidential power states that the President has and may exercise a reservoir of implied powers created by the accumulation of the total of express powers vested in him by the Constitution and the statutes. Thus, executive orders will often start with a recital of the so-called powers vested in the President as President, as Commander in Chief, etc.

[23] In its discussion of the Taft-Hartley Act in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. 93 Cong. Rec. 3637-3645 (1947).

Justice Clark, who concurred in the result, held that in the absence of action by Congress to deal with the type of crisis confronting the President, his independent power to act turns upon the gravity of the situation confronting the nation. However, when Congress has laid down specific procedures to deal with such a crisis, the President must follow these procedures. In this case, Clark found that the President did not avail himself of his authority under the Selective Service Act of 1948 to seize plants which fail to produce goods required by the armed forces.

Chief Justice Vinson, with the concurrence of Justices Reed and Minton dissented. They would have upheld the seizure as an appropriate method, not prohibited by the Labor Management Relations Act or any other act of Congress, of faithfully executing and preserving the defense program enacted by Congress, until the latter could take appropriate action.

Of all the opinions in *Youngstown,* Justice Jackson's has become the most enduring and influential. Justice Jackson's concurrence in *Youngstown*, which sets forth a framework for analysis of exercises of presidential power through executive orders, has become the standard by which courts test such executive actions.[24] In his concurrence, Justice Jackson stated:

> Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat oversimplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
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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. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be 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.
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> 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.
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> 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

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[24] *See Dames & Moore v. Regan,* 453 U.S. 654 (1981); *Haig v. Agee,* 453 U.S. 280 (1981); *AFL-CIO v. Kahn,* 618 F.2d 784 (1979).

> upon his own constitutional powers minus any constitutional powers of Congress over the entire 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.[25]

Executive Authority after *Youngstown*

Justice Jackson's "oversimplified"[26] standards have been and continue to be adhered to. However, some modifications have been made as more complex situations have arisen. Thus, the Supreme Court had the opportunity to review such a case when President Carter claimed implied legislative support for his actions in response to the seizure of American personnel as hostages at the American Embassy in Tehran, Iran. There the President, pursuant to the International Emergency Economic Powers Act (IEEPA), declared a national emergency on November 14, 1979, and blocked the removal or transfer of all property and interests in property of the Government of Iran which were subject to the jurisdiction of the United States.[27] On January 19, 1981, the President, pursuant to an agreement with Iran, issued an executive order revoking all licenses permitting the exercise of "any right, power, or privilege" with regard to Iranian funds, securities, or deposits; "nullified" all non-Iranian interests in such assets acquired subsequent to the blocking order of Nov. 14, 1979; and required those banks holding Iranian assets to transfer them "to the Federal Reserve of New York, to be held or transferred as directed by the Secretary of the Treasury."[28] On February 24, 1981, President Reagan issued an executive order in which he "ratified" Executive Order 12279.[29] Moreover, he "suspended" all "claims which may be presented to the . . . Tribunal" and provided that such claims "shall have no legal effect in any action now pending in any court of the United States."[30]

In *Dames & Moore v. Regan,* the Supreme Court was asked to review various executive orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that could be presented to an International Claims Tribunal.[31] The Court upheld the President's action in nullifying the attachments and ordering the transfer of the assets since it was taken pursuant to specific congressional

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[25] *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. at 635-638.

[26] As described by Jackson himself in his concurrence in *Youngstown*. 343 U.S. at 635.

[27] Exec. Order No. 12170, 3 CFR 457 (1980).

[28] Exec. Order No. 12279, 46 Fed. Reg. 7919.

[29] Exec. Order No. 12294, 46 Fed. Reg. 14111.

[30] *Id*.

[31] 453 U.S. 657 (1981).

authorization[32] and, thus, was "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."[33] However, the Court could not find that either IEEPA or the Hostage Act[34] authorized the President to suspend claims. The Court, therefore, looked at the legislative intent of these statutes in order to determine whether the President acted alone or with the acquiescence of Congress.[35] In finding that Congress had acquiesced in the President's actions, the Court stated:

> Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. *Haig v. Agee,* 453 U.S. 280, 291. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility." *Youngstown* 343 U.S. at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.[36]

It would also appear highly significant that the executive order issued in *Dames & Moore* involved issues of foreign policy and national security. Traditionally, executive orders and proclamations that involve these two areas have been given great leeway by the courts. One example of a controversial executive order, involving national security during WWII, which was upheld, was Executive Order 9066 which authorized the dislocation of Americans of Japanese ancestry from the West Coast and their confinement in camps in the southwestern desert for the duration of the war. In *Korematsu v. U.S.,* the Supreme Court speaks at length about the facts of the case and the national emergency which we faced.[37] The following statement sums up the Court's reasoning behind sanctioning Executive Order 9066:

> Compulsory exclusion of large groups of citizens from their homes, *except under circumstances of direst emergency and peril,* is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our

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[32] *See* § 203 of the IEEPA, 91 Stat. 1626, 50 U.S.C. § 1702(a)(1) and § 5(b) of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. § 5(b).

[33] *Dames & Moore,* 453 U.S. at 674, *quoting, Youngstown,* 343 U.S. at 637 (Jackson, J., concurring)

[34] Rev.Stat. § 2001, 22 U.S.C. § 1732.

[35] *See also Haig v. Agee,* 453 U.S. 280 (1981); *AFL-CIO v. Kahn,* 618 F.2d 784 (1979).

[36] *Dames & Moore,* 453 U.S. at 678. *See also U.S. v. Midwest Oil Company,* 236 U.S. 459 (1915) (Long congressional silence with respect to unauthorized executive order construed as consent).

[37] 323 U.S. 214 (1944). *See also Hirabayashi v. U.S.,* 320 U.S. 81 (1942) (a conviction for violation of a curfew order, based upon Executive Order 9066, was sustained by the Court).

> shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[38]

The Court's reasoning in *Korematsu* appears to be consistent with a passage from President Lincoln's message to the extraordinary session of Congress convened on July 4, 1861, in which he asks, "[a]re all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated: Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?" Since it appears that the Court may view executive orders more leniently when foreign policy and national security are involved, it is appropriate that we review decisions by the courts involving executive orders that effect the social, economic, and political framework of this country.

FDR was the first President to use executive orders in order to establish an antidiscrimination policy.[39] Executive Order 8802 prohibited discrimination in the employment of workers in "defense industries or government because of race, creed, color, or national origin."[40] Presidents Truman, Eisenhower and Kennedy followed FDR's lead in prohibiting discrimination,[41] but it was President Johnson's executive order which eventually created a stir. In 1965, President Johnson issued Executive Order 11,246 which prohibits employment discrimination because of race, color, religion, sex, or national origin by nonexempt federal government contractors and requires inclusion of an affirmative action clause in all covered federal contracts for procurement of goods and services.[42] Moreover, the order empowered the Secretary of Labor to issue rules and regulations necessary and appropriate to fulfill its purpose. Based on this provision, the Philadelphia Plan was promulgated under the Nixon Administration.

The Philadelphia Plan required contractors to set specific goals for hiring members of minority groups as a condition for working on federally assisted projects. The courts upheld the legality of this plan and the executive order upon which it was based. In *Contractors Association v. Secretary of Labor,* the court found a relationship sufficiently established in respect of federally assisted construction projects because of the strong federal interest in ensuring that the cost and progress of these projects were not adversely affected by an artificial restriction of the labor

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[38] *Id.* at 219-220 (emphasis added).

[39] Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

[40] *Id.*

[41] *See* Exec. Order No. 10308, 16 Fed. Reg. 12303 (1951); Exec. Order No. 10479, 18 Fed. Reg. 4899 (1953); Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

[42] 3 CFR, 1964-1965 Comp., p. 339. The status of this executive order and affirmative action programs in general is now in question. In *Adarand Constructors, Inc. v. Pena,* 63 USLW 4523 (1995), the Supreme Court altered the standard to be applied to affirmative action programs to that of strict scrutiny. Since the Court remanded the case, the interpretation of this standard with regards to affirmative action will be decided in the near future.

pool caused by discriminatory employment practices.[43] Thus, the court made a connection between the executive order and the Federal Property and Administrative Services Act of 1949 (FPSA or Procurement Act)[44] that was sufficient to uphold Executive Order 11246.[45]

Similarly, the court in *AFL-CIO v. Kahn,*[46] established a "nexus" test in upholding President Carter's executive order directing the Wage and Price Stability Council to establish voluntary wage and price standards for noninflationary behavior for the entire economy and making compliance with those guidelines a factor in determining whether a company could receive a government contract.[47] The court found that there was a sufficiently close nexus between Executive Order 12092 and the efficiency and economy criteria of the Procurement Act. The court specifically emphasized the importance of the wage and price standards and likely savings to the Government.

On March 10, 1995, President Clinton issued Executive Order 12954 prohibiting the use of striker replacements by employers who are performing under federal contracts.[48] Subsequently, the U.S. Chamber of Commerce and other employee associations brought actions for declaratory and preliminary injunctive relief against the Secretary of Labor's enforcement of the executive order.[49] They alleged that the executive order was contrary to the National Labor Relations Act, the Procurement Act and the Constitution. The United States District Court for the District of Columbia did not reach the substantive issues, instead dismissing the action for lack of ripeness.[50] On expedited appeal the Court of Appeals for the District of Columbia reversed the District Court's determination and remanded the case for further consideration.[51] On remand, the District Court again ruled in favor of the executive order.[52] The District Court held that the challenge was not judicially reviewable since the Procurement Act vests broad discretionary authority in the President. In the alternative, the District Court also rejected the appellants' statutory claim on the merits, reasoning that under the executive order the government was acting in a

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[43] 442 F.2d 159 (3d Cir. 1971).

[44] 40 U.S.C. § 486(a).

[45] *But see Chrysler Corp. v. Brown,* 441 U.S. 281 (1978) (the Court casts doubt upon the "nexus" between Executive Order 11246 and the Procurement Act since "nowhere in the Act is there a specific reference to employment discrimination." *Id.* at fn. 34. However, the Court did not determine the precise source of authority for the executive order since it held that the regulation being challenged there was not authorized by any of the arguable statutory grants of authority.

[46] 618 F.2d 784 (D.C.C. 1979) (en banc).

[47] 43 Fed. Reg. 51375 (1978).

[48] 60 Fed. Reg. 13023 (March 10, 1995).

[49] *U.S. Chamber of Commerce v. Reich,* 886 F.Supp. 66 (D.D.C. 1995).

[50] *Id.*

[51] *U.S. Chamber of Commerce v. Reich,* 57 F.3d 1099 (D.C.Cir. 1995).

[52] *U.S. Chamber of Commerce v. Reich,* 897 F.Supp. 570 (D.D.C. 1995).

proprietary capacity and, therefore, the NLRA pre-emption was inapplicable. Once again, the decision was appealed to the Court of Appeals for the District of Columbia. The Court of Appeals found that the executive order was regulatory in nature and was preempted by the NLRA which guarantees the right to hire permanent replacements.[53] Thus, the Court of Appeals, reversing the ruling of the District Court, found the executive order to be unlawful.

There have also been other courts unable to find an appropriate nexus to support a presidential action through an executive order. In *Liberty Mutual v. Friedman,*[54] while applying the nexus test used in *Contractors Association* and *Kahn,* the court was unable to find a sufficient relationship between the Procurement Act and Executive Order 11246. In this case, the issue involved a regulation promulgated pursuant to Executive Order 11246 in which the government determined that providers of workers' compensation insurance to government contractors are government subcontractors and thus subject to affirmative action requirements governing equal employment opportunity. The court found that "the connection between the cost of workers' compensation policies, for which employers purchase a single policy to cover employees working on both federal and nonfederal contracts without distinction between the two, and any increase in the cost of federal contracts that could be attributed to discrimination by these insurers is simply too attenuated to allow a reviewing court to find the requisite connection between procurement costs and social objectives."[55] However, the court does distinguish this case from *Contractors Association* since in that case there was sufficient evidence to show that the executive was acting to protect the Federal Government's financial interest in the state projects thereby establishing a sufficiently close nexus sought by both *Contractors Association* and *Kahn*.[56]

Executive orders and proclamations have also been used to further the policy agenda of a President through control of the agency decision making process. Two very controversial orders which exemplify this use were President Reagan's Executive Orders 12291 and 12498.[57] On February 17, 1981, the President issued Executive Order 12291 which was designed "to reduce the burden 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."[58] In essence, this order increased control over executive branch rulemaking.

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[53] *U.S. Chamber of Commerce v. Reich,* 74 F.3d 1322 (D.C.Cir. 1996).

[54] 639 F.2d 164 (4th Cir. 1981).

[55] *Id.* at 171.

[56] *Id.* at 170-171; *Cf. Fullilove v. Klutznick,* 448 U.S. 448 (1980) (Powell, J., concurring: importance of legislative findings of discrimination to sustain Act of Congress mandating affirmative action in federal grants for local public works project).

[57] 3 CFR 127 (1981); 3 CFR 323 (1985).

[58] 3 CFR 1981 Comp., 127, 5 U.S.C. § 601 note, amended by Exec. Order No. 12498, 3 CFR 1985 Comp., 323, repealed by Exec. Order No. 12866, 58 Fed. Reg. 51735 (1993).

The issuance of Executive Order 12291 was followed by an opinion, from the Office of Legal Counsel in the Department of Justice supporting its validity. [59] The opinion stated that the President's authority to issue the order was based solely on his constitutional power to "take care that the laws be faithfully executed."[60] While concluding that any inquiry into congressional intent in enacting specific rulemaking statutes "will usually support the legality of Presidential supervision of rulemaking by Executive Branch agencies," the opinion stated that Presidential supervision of agency rulemaking "is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress had allocated to a particular subordinate official."[61]

Executive Order 12291 drew much criticism from Members of Congress, public interest groups, and commentators. These criticisms were primarily based on constitutional, statutory, and management principles. One such criticism was that the Office of Management and Budget (OMB) violated separation of powers principles when it sought to "control" agency rulemaking authority that had been assigned to the agency by Congress in the enabling statute establishing the regulatory program.[62] Although the order exempted independent regulatory agencies, the President's authority to extend the executive order's requirements to them was also the subject of much debate.[63] Another concern raised by the order was that nonpublic communications between OMB and the rulemaking agency during review of an agency rule would deny members of the public an opportunity to rebut OMB's arguments made to the agency, and thus undermine the integrity of the rulemaking record.[64] Due to congressional pressure, OMB responded by reaffirming certain previously established procedures and by establishing additional procedures for reviews by OMB's Office of Information and Regulatory Affairs (OIRA).[65]

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[59] Op. Office of Legal Counsel, Dept. of Justice, Proposed Executive Order entitled "Federal Regulation" (Feb. 18, 1981), reprinted in 1988-1989 Regulatory Program of the United States Government at 532-36.

[60] Id. at 532.

[61] *Id*. at 533-34.

[62] *See, e.g.,* Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291,* 80 Mich. L. Rev. 193 (1981). Erik D. Olsen, *The Quiet Shift of Power: OMB Supervision of EPA Rulemaking Under Executive Order 12291,* 4 Va. J. Nat. Res. L. 1 (1984).

[63] *See* McGarity, *Presidential Control of Regulatory Agency Decisionmaking,* 36 Am. U. L. Rev. 443 (1987); Strauss and Sunstein, *The Role of the President and OMB in Informal Rulemaking,* 38 Admin. L. Rev. 181, 202-05 (1986).

[64] *See, e.g.,* McGarity, supra n. 56 at 457-60; Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291,* 4 Va.J.Nat.Res. 1, 75-77 (1984).

[65] Memorandum, *Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12,291 and 12,498,* June 13, 1986, from Wendy A. Gramm to Heads of Departments and Agencies Subject to Executive Orders 12,291 and 12,498, *reprinted in* 1990-1991 Regulatory Program of the United States Government 605-07.

Although no court has specifically addressed the constitutionality of the review provisions of Executive Order 12291, *Sierra Club v. Costle*[66] is often cited as being supportive of the policy underlying presidential review. In *Sierra Club,* the primary issue involved the propriety of nonpublic executive communications in an EPA rulemaking, not the constitutionality of presidential review. However, the court of appeals' following statement lends support to such review:

> The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administrative policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared — it rests exclusively with the President. The idea of a "plural executive," or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead the Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source. To ensure the President's control and supervision over the Executive Branch, the Constitution — and its judicial gloss — vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy. In the particular case of EPA, Presidential authority is clear since it has never been considered an "independent agency," but always part of the Executive Branch.
>
> The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.[67]

On September 30, 1993, President Clinton issued Executive Order 12866 which repealed Executive Orders 12291 and 12498.[68] This order maintains the basic process established by President Reagan, including the essential procedural provision requiring that major regulations be submitted to OMB for general review and oversight. It also includes the requirement that agencies submit an annual regulatory plan, compiled in conjunction with OMB. However, Executive Order 12866 does make a number of important substantive and procedural modifications. In particular, it addresses certain

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[66] 657 F.2d 298 (D.C.C. 1981).

[67] *Costle* at 405-06 (footnotes omitted). A panel of the D.C. Circuit chose to avoid the sensitive constitutional issue in *Public Health Citizens Research Group v. Tyson,* 796 F.2d 1479 (D.C.C. 1986).

[68] 58 Fed. Reg. 51735 (1993), *reprinted in* 5 U.S.C. § 601 note.

conflicts between agencies and OMB, and the appearance of improper influence over the review process.[69]

Neither Executive Order 12866 nor, its predecessors, 12291 and 12498, have been directly challenged in the courts. Thus, it is difficult to say how much deference the courts would give to executive orders involving political issues. However, the courts may treat political issues in a manner similar to executive orders involving social or economic aspects of society.

Therefore, it appears that the current standard of review for an executive order or proclamation includes Justice Jackson's tripartite test espoused in *Youngstown* with a determination of whether the executive order is closely related to the statute upon which it relies. The courts may also look at congressional intent when necessary. However, the courts may also base their determination upon the topic of the presidential instrument. As has been demonstrated, the courts are more likely to give deference to the President when the issue involves foreign affairs or national security than when they involve economic, political or social matters.

Congressional Oversight of Executive Orders and Proclamations

The previous discussion described the judiciary's role in determining whether the President has validly issued an executive order or proclamation pursuant to his authority. The next question is, what is Congress' role in executive orders or proclamations? The role that Congress may play varies with the authority upon which the President bases his executive order or proclamation. As discussed in Justice Jackson's concurrence in *Youngstown*, the President's authority to issue executive orders and proclamations can be broken down into three categories. Briefly stated, these three categories include executive orders and proclamations that: (1) are issued pursuant to an express or implied authorization of Congress; (2) are based upon undefined powers that lay in a "zone of twilight" where the President acts solely on the basis of his independent power and Congress has not spoken; and (3) are incompatible with the expressed or implied will of Congress, and thus rely solely upon his constitutional authority. The standard propounded in *Youngstown* is primarily applicable to the judiciary when reviewing the validity of a presidential action. This standard does not necessarily reflect Congress' strong ability to affect presidential action.

Unless it is constitutionally based, Congress may directly affect a presidential action by either amending, nullifying, repealing, revoking, or terminating the authority on which it is founded. The most recent example of Congress nullifying an executive order appears to have involved Executive Order 12806.[70] Executive Order 12806, issued by President Bush, directed the Secretary of the Department of Health and Human Services to establish a human fetal tissue bank for research projects. The

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[69] *See* Exec. Order No. 12866 § 6(b), *supra* n. 61.

[70] 3 CFR, 1992 Comp., p. 302 (March 19, 1992).

President based this order on his authority under "the Constitution and the laws of the United States of America."[71] Congress, however, explicitly nullified this order by stating that "the provisions of Executive Order 12806 shall not have any legal effect."[72] Since the President's authority in this situation was on tenuous grounds, there was little, if anything, that could prevent Congress from affecting his order.[73]

Congress may also retroactively repeal the statutory authority in which the President based his executive order or proclamation. This would render any executive order or proclamation, issued after the date established by Congress, invalid.

Another means by which Congress may affect executive orders and proclamations based on statutory authority, or where there is concurrent authority, is to amend such language to include a sunset provision. With a sunset provision, Congress may extend the effective period of the necessary provision or let it lapse. If Congress lets the provision lapse, the President will no longer have the authority, with regards to this statute, to act.[74] An example of using a sunset provision involved the National Council on Indian Opportunity (NCIO). The NCIO was established by Executive Order 11399[75] and later amended by Executive Order 11688.[76] In 1969, Congress appropriated funds to continue the NCIO for five years at which time it would terminate unless reauthorized by Congress.[77] The NCIO is no longer in existence.

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[71] *Id*. Although Justice Jackson's concurrence in *Youngstown* creates a standard primarily for the judiciary, it is indicative of the President's ability to stand behind an executive order. In a case, such as this one, where the President relies solely on his constitutional powers, his power is at its lowest ebb. There may be instances where the President's authority under the Constitution is truly strong and exclusive which would require a constitutional amendment in order to alter such authority. However, in this situation, the President relied upon very broad language in describing his authority to issue Executive Order 12806.

[72] P.L. 103-43, 107 Stat 133, § 121.

[73] *See Youngstown, supra* n. 19 (clause 3).

[74] Although not involving executive orders or proclamations, a good example of using a sunset provision to oversee the President's authority to act is with reorganization authority. On various occasions, Congress has given the President the authority to reorganize agencies through the use of reorganization plans. 5 U.S.C. § 903. The President was compelled to abide by certain requirements which included presenting the plan to Congress which would then vote, within a specified amount of time, to approve the plan as a whole. Sometimes a failure to vote indicated acceptance of the President's plan. However, this reorganization authority was effective until a specified date unless reauthorized. 9 U.S.C. § 905(b). The last day this authority was in effect was December 31, 1984. Since then no President has had the authority to present reorganization plans to Congress.

[75] 33 Fed. Reg. 4245, as amended by Exec. Order No. 11551, 35 Fed. Reg. 12885; Exec. Order No. 11688, 37 Fed. Reg. 25815.

[76] 37 Fed. Reg. 25815 (Dec. 1, 1972).

[77] P.L. 91-125, 83 Stat. 220, 25 U.S.C. nt. prec. 1.

Congress may also play a role in the President's ability to issue an executive order or proclamation when the President relies on authority which exists in a "zone of twilight." In this "zone of twilight," the President and Congress may have concurrent authority or there may be uncertainty as to the distribution of such authority. In either situation, "congressional inertia, indifference or quiescence"[78] may leave the door open for the President to act. Congress may either close the door or prop it open further.

If Congress wishes to close the door on the President in the "zone of twilight," it may legislate in contradiction to the executive order or proclamation. Such was the case at the end of World War II (a period where Congress had acquiesced in expanded presidential authority due to a time of national emergency). By 1944, Congress grew uncomfortable with the expanse of executive power and decided to use its power of the purse to prevent FDR from using executive orders to create agencies and carry out agency activities that had no legislative authority.[79] Subsequently, Congress passed the "Russell Amendment" which prohibits the use of any appropriation or fund to pay the expenses of "any agency or instrumentality including those established by Executive Order" if Congress has not appropriated money specifically for it or authorized the expenditure of funds by it.[80]

Another instance where Congress has used its appropriation power involved the Subversive Activities Control Board (SACB) which required the public registration of "communist action" and "communist front" organizations.[81] After the registration requirement was held to violate the Fifth Amendment,[82] Congress revitalized the SACB by authorizing it to determine, through hearings, whether individuals and organizations were communist.[83] This too was found to violate the Constitution (First Amendment).[84] President Nixon later got involved by issuing an executive order which expanded the board's authority and field of inquiry.[85] Senator Sam Ervin took exception to this use of executive power and introduced a resolution to prohibit the use of appropriated funds to implement the executive order.[86] His contention in this issue was based on the sentiment that the President had no power "to alter by Executive order the content or effect of legislation enacted by Congress." This resolution was passed by the Senate, but was tabled by the House. The next year the House passed a bill which supported the executive order while the Senate entertained an amendment to delete the SACB's entire budget of $450,000. In conference, the

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[78] *Youngstown,* 343 U.S. at 637 (Jackson, J., concurring).

[79] Louis Fisher, *Laws Congress Never Made,* 5 Constitution 59, 63 (Fall 1993).

[80] 31 U.S.C. § 1347; 58 Stat. 387, ch. 286, sec. 213 (1944).

[81] 64 Stat. 987 (1950).

[82] *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965).

[83] 81 Stat. 765 (1968).

[84] *Boorda v. SACB,* 421 F.2d 11 42 (D.C.Cir. 1969), *cert. denied,* 397 U.S. 1042 (1970).

[85] Exec. Order No. 11605, 36 Fed. Reg. 12831 (1971).

[86] S.Res. 163, 92d Cong., 1st Sess. (1971).

House and Senate compromised by appropriating $350,000 to the SACB, but they specifically prohibited the SACB from using any of the funds to carry out the executive order.[87] Following this experience, the Administration did not request appropriations for the SACB in the 1974 budget.

Other than attempting to derail an executive order or proclamation which exists in the "zone of twilight," Congress may want to prop up such action by enacting legislation in support of the President's use of power. One strong reason for Congress to do this is so that it establishes its jurisdiction over that particular area of authority. Otherwise, continued acquiescence towards presidential action in a particular manner may be given great weight by the judiciary in determining who actually possesses such authority.[88]

The proclamations issued by Presidents Washington[89] and Lincoln,[90] and the executive orders issued by FDR[91] are prime examples of situations in which the President has acted in a manner which is highly dubious, yet is later sanctioned by congressional action. *The Prize Cases*[92] support the proposition that Congress may ratify actions of the President, thereby curing any defects which may have existed. In *The Prize Cases,* the Supreme Court heard a challenge to President Lincoln's right to proclaim a blockade which resulted in the capture of prizes by the public ships of the United States. At issue was whether a state of war existed which would have authorized the President to take such action.[93] The Supreme Court stated that ". . . if it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "*ex majore cautela*" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, etc., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States."[94]

Congress may also act, where there is concurrent jurisdiction, in a manner similar to the President, yet tailored to its own purposes. Such was the case involving

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[87] 86 Stat. 1134, sec. 706 (1972).

[88] *See Midwest Oil v. U.S.,* 236 U.S. 459 (1915).

[89] *Supra*. 2.

[90] *Supra* p. 3.

[91] *Supra* p. 4

[92] 2 Black 635 (1862).

[93] By Acts of Congress of February 28, 1795, and March 3, 1807, the President was authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, ". . . and to suppress insurrection against the government of a State or of the United States." *See* Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., Executive Orders and Proclamations: A Study of a Use of Presidential Powers (Comm. Print 1957).

[94] 2 Black 670-671 (1862).

Executive Order 11599. In 1972, President Nixon established a Special Action Office for Drug Abuse Prevention, by executive order. Although it appeared that Congress was in concurrence with the establishment of this office, it also seemed as though the Director was given more authority than Congress may have wished. Subsequently, Congress established, through legislation, a Special Office for Drug Abuse Prevention in which the Director was given less authority.[95] Thus, Congress utilized its legislative powers to repeal portions of an executive order, while permitting the President's office to remain intact.

Other Means of Affecting Executive Orders and Proclamations

There are also methods of amending or repealing an executive order or proclamation that do not involve Congress. The President may amend or repeal an executive order that he issued or that any other President issued. This is done by issuing a similar document and declaring such change. A recent example involved President Clinton's Executive Order 12,866, which altered the regulatory planning and review process which had been in place since 1981.[96] In his order, President Clinton explicitly revoked "Executive Orders 12,291 and 12,498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule."[97]

Moreover, the President may amend or repeal an executive order or proclamation, with the advice and consent of the Senate, through treaty. Executive Order 11618 established the foundation of the legislative and executive branches of government on the Ryukyu Islands.[98] Shortly thereafter, the United States, by treaty, returned the administration of the Ryukyu Islands back to Japan.[99] Thus, Executive Orders 11618 and 10713 were repealed by treaty.

Executive orders and proclamations may also be terminated by the terms of the presidential action. In other words, an executive order may be temporary. Executive Order 12664 was a temporary order which established an Emergency Board to investigate a dispute between the Port Authority Trans-Hudson Co. and certain of its employees represented by the Brotherhood of Locomotive Engineers.[100] The Emergency Board remained in existence until it submitted its final report about 60 days after the order was issued. Thus, Executive Order 12664 was self terminated.

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[95] 21 U.S.C. § 1113 (repealed 1988).

[96] Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993).

[97] *Id*. at Sec. 11.

[98] Exec. Order No. 11618, 3 CFR, 1971-1975 Comp., p. 610, amending Exec. Order No. 10713, 22 Fed. Reg. 4007.

[99] TIAS 7314, 23 UST 446 (May 15, 1972).

[100] 3 CFR, 1989 Comp., p. 206 (Jan. 6, 1989).

Executive Orders vs. Presidential Memoranda

Another executive tool which has raised many questions is the presidential memoranda. Although they possess a different title than executive orders, it appears as though these instruments are very much alike. Both are undefined, written instruments by which the President directs, and governs actions by, Government officials and agencies. They differ in that executive orders must be published in the Federal Register whereas presidential memoranda are similarly published only if the President determines that they have "general applicability and legal effect."[101] If issued under a valid claim of authority and published,[102] executive orders and presidential memoranda have the force and effect of law[103] and courts are required to take judicial notice of their existence.[104] In at least one instance, a federal district court seemed to use the two terms interchangeably. In *Lower Brule Sioux Tribe v. Deer,* the court, in describing how a particular presidential memorandum did not create an enforceable duty to permit a private right of action, referred to executive orders needing specific foundation in order to be judicially enforceable in private civil suits.[105] This usage implies that the two terms are similar, if not identical. One may say that the difference between executive orders and presidential memoranda may be, similar to executive orders and proclamations, one more of form than of substance.

This proposition may best be demonstrated in the uses of presidential memoranda. One example is the use of a type of presidential memorandum called a "presidential determination."[106] Typically, a presidential determination is made in order to satisfy a statutory requirement that a certain event or action has occurred or a condition has been met. The determination often acts as the President's way of notifying Congress of such satisfaction. For example, President Clinton's most recent determination, based on section 614(a)(1) of the Foreign Assistance Act of 1961,[107] was that "it is important to the security interests of the United States to furnish . . . funds [from the] Nonproliferation, Anti-terrorism, Demining and Related Programs

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[101] 44 U.S.C. § 1505(a).

[102] The Federal Register Act requires that executive orders and proclamations be published in the Federal Register. 44 U.S.C. § 1505. Moreover, the President is required to comply with the regulations, established by executive order, governing the preparation, presentation, filing, and publication of executive orders and proclamations. Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962).

[103] *Armstrong v. United States,* 80 U.S. 154 (1871); *see also Farkas v. Texas Instrument Inc.,* 372 F.2d 629 (5th Cir. 1967); *Farmer v. Philadelphia Electric Co.,* 329 F.2d 3 (3d Cir. 1964).

[104] *Jenkins v. Collard,* 145 U.S. 546, 560-561 (1893).

[105] 911 F.Supp. 395, 401 (D.S.D. 1995).

[106] As of April 24, 1997, President Clinton has issued 21 presidential determinations in 1997.

[107] 22 U.S.C. § 2364(a)(1).

. . . to the Korean Peninsula Energy Development Organization."[108] This determination permitted the President, pursuant to section 614(a)(1) of the Foreign Assistance Act of 1961, to contribute $25 million to this organization. Although Presidents have chosen to issue presidential memoranda to make such determinations, there is no constitutional or statutory provision that would have prohibited them from issuing an executive order instead. Thus, there would be no substantive difference between an executive order and a presidential memorandum in this situation.

Presidential memoranda have also been used by the President to delegate his authority in certain instances. In a recent delegation of authority, President Clinton, citing the Constitution and 3 U.S.C. § 301, delegated to the Secretary of State the authority to set rates on compensation for U.S. representatives to the United Nations.[109] However, the use of presidential memoranda for this purpose is not exclusive. Previous presidents have relied on the same authority to make delegations of authority pursuant to executive orders. One example of this occurred in 1979, when President Carter issued an executive order in order to delegate certain functions to the Director of the Office of Management and Budget.[110] Once again, there appears to be no substantive difference between the use of these presidential mechanisms.

One of the more controversial uses of presidential memoranda, and for that matter, executive orders,[111] has been to effectuate action by the agencies. Although the term "executive order" usually comes to mind when a President directs an agency to act, there are many instances when a presidential memorandum was used for this purpose. One example of this involved a very controversial presidential memorandum, issued by President Clinton, directing the Secretary of Health and Human Services to remove the moratorium on Federal funding of research involving the transplantation of fetal tissue from induced abortions.[112] Although this action was reported by many as an executive order, it was actually done by presidential

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[108] Presidential Determination No. 97-21, 62 Fed.Reg. 23939 (May 2, 1997). *See* Presidential Determination No. 97-20, 62 Fed.Reg. 15353 (March 31, 1997) (certifying that North Korea is complying with the Nonproliferation, Anti-Terrorism, Demining and Related Programs in title II of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997).

[109] Memorandum of April 1, 1997, 62 Fed.Reg. 18261 (April 5, 1997).

[110] *See* Executive Order No. 12152, 44 Fed.Reg. 48143 (Aug. 14, 1979).

[111] *See* President Reagan's Executive Orders 12291 (3 CFR 127 (1981)) and 12498 (3 CFR 323 (1985)) (These executive orders were very controversial because they were perceived as furthering the policy agenda of a President through control of the agency decision making process).

[112] Memorandum of January 22, 1993, 58 Fed.Reg. 7457 (February 5, 1993).

memorandum.[113] The confusion, however, is understandable since there is no reason why the President could not have issued an executive order in this case.

The interchangeability of presidential memoranda and executive orders can be seen more clearly in the following examples. In April 1995, President Clinton issued a presidential memorandum directing specific agency heads to implement new policies, outlined by the President, "to give compliance officials more flexibility in dealing with small business and to cut back on paperwork."[114] Several months later, the President issued an executive order requiring agencies that conduct, support, or regulate research involving human subjects to review, and report on, the protections of the rights and welfare of human research subjects that are afforded by existing policies and procedures.[115] Although these two actions are not directly related, they both involve policy initiatives initiated by the President. Once again, either presidential mechanism would have been sufficient to direct the agencies to act.

One function where Presidents have almost exclusively relied on executive orders has been for the establishment of advisory committees and other similar bodies.[116] Another has been to establish emergency boards to investigate certain labor disputes. Most recently, President Clinton issued an executive order creating such a board to help avert a strike between American Airlines and its pilots.[117] Neither of these actions require that an executive order be issued. The President could have issued a presidential memorandum in both these instances. The only time a President is required to use an executive order rather than another instrument is when Congress so requires in statute. One example of such a requirement is where the apprehension, detention, or conditional release of individuals is necessary to "prevent the introduction, transmission, or spread of communicable diseases as may . . . be specified in *Executive orders* of the President . . . ."[118] Otherwise, executive orders and presidential memoranda may be, and appear to be, used interchangeably.

Presidential memoranda and executive orders appear to be very closely related, if not identical. However, the lack of a definition for either of these mechanisms has made it difficult to make a clear distinction between them. Although a clear distinction cannot be made, they are both forms of executive legislation that must

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[113] *See,* Amy Goldstein, Richard Morin, *Clinton Cancels Abortion Restrictions of Reagan-Bush Era,* Washington Post, January 23, 1993, at A1; *See also, The Legal and Ethical Implications of Gag Clauses in Physician Contracts,* 22 Am.J.L. & Med. 433 (January 1996) (refers to President Clinton's presidential memorandum suspending the "gag rule" as an executive order).

[114] Memorandum of April 21, 1995, 60 Fed.Reg. 20621 (April 26, 1995).

[115] Executive Order No. 12975, 60 Fed.Reg. 52063 (Oct. 5, 1995).

[116] *See,* Executive Order No. 13038, 62 Fed.Reg. 12065 (March 13, 1997) (Establishing an advisory committee for public interest obligations of digital television broadcasters).

[117] Executive Order No. 13036, 62 Fed.Reg. 7653 (Feb. 19, 1997); *See,* Executive Order No. 13004, 61 Fed.Reg. 25771 (May 22, 1996) (Establishing an emergency board to investigate disputes between certain railroads and their employees).

[118] 42 U.S.C. § 264(b) (emphasis added).

possess similar authority. If issued under a valid claim of authority and published,[119] executive orders and presidential memoranda have the force and effect of law[120] and courts are required to take judicial notice of their existence.[121] Thus, it is important to examine the legal basis for each executive order and presidential memoranda issued and the manner in which the President has used these instruments.

Conclusion

In summary, the President's authority to issue executive orders and proclamations is neither explicitly stated in the Constitution nor in statute. However, it is generally accepted that the President derives his authority to act from Article II of the Constitution. The President's authority is primarily based upon the following language of Article II: "the executive power shall be vested in a President of the United States," "the President shall be Commander in Chief of the Army and Navy of the United States," and "he shall take care that the laws be faithfully executed."[122]

Because the Framers of the Constitution left the question of executive authority open to interpretation, there has been much confusion and controversy since the first proclamation was issued by President George Washington.[123] Although this confusion and debate persists, some clarifying guideposts have been developed. *Youngstown* has enlightened the situation by providing a tripartite standard which simply states three degrees of presidential authority in issuing executive orders and proclamations. Briefly stated, these three categories include executive orders and proclamations issued pursuant to: (1) an express or implied authorization of Congress (presidential authority is at its maximum); (2) are incompatible with the expressed or implied will of Congress, and thus rely solely upon his constitutional authority (presidential power is at its lowest ebb); and (3) undefined powers that lay in a "zone of twilight" (presidential power is uncertain). The judiciary has also expanded its examination of executive orders and proclamations to include a review of legislative history when necessary.

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[119] The Federal Register Act requires that executive orders and proclamations be published in the Federal Register. 44 U.S.C. § 1505. Moreover, the President is required to comply with the regulations, established by executive order, governing the preparation, presentation, filing, and publication of executive orders and proclamations. Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962).

[120] *Armstrong v. United States,* 80 U.S. 154 (1871); *see also Farkas v. Texas Instrument Inc.,* 372 F.2d 629 (5th Cir. 1967); *Farmer v. Philadelphia Electric Co.,* 329 F.2d 3 (3d Cir. 1964).

[121] *Jenkins v. Collard,* 145 U.S. 546, 560-561 (1893).

[122] U.S. Const., Art. II, Secs. 1, 2, & 3.

[123] For an example of the confusion that existed see the correspondence between Alexander Hamilton and James Madison concerning President Washington's desire to issue a proclamation declaring this country's neutrality in the French and British War in 1793. See Charles M. Thomas, *American Neutrality in 1793, A Study in a Cabinet Government,* (New York, Columbia University Press 1931).

Other than relying upon the judiciary to determine the validity of executive orders and proclamations, Congress may also play a role. Congress may effectively oversee presidential action by amending or repealing legislation, retroactively, which authorizes the President to issue executive orders or proclamations. Congress may propose a constitutional amendment which would remove a particular power from the President. Finally, where Congress is silent, and the President has acted, Congress may legislate to either support or derail such action unless that action is firmly based on exclusive constitutional authority.

Table 1 Executive Orders, by President, 1789-1995

President	Years in Office	Number of Orders	Average per Year
Washington	8.00	8	1.00
J. Adams	4.00	1	.25
Jefferson	8.00	4	.50
Madison	8.00	1	.13
Monroe	8.00	1	.13
J.Q. Adams	4.00	3	.75
Jackson	8.00	12	1.50
Van Buren	4.00	10	2.50
W.H. Harrison[124]	0.08	0	-
Tyler	4.00	17	4.25
Polk	4.00	18	4.50
Taylor	1.25	5	4.00
Fillmore	2.75	12	4.36
Pierce	4.00	35	8.75
Buchanan	4.00	16	4.00
Lincoln	4.00	48	12.00
A. Johnson	4.00	79	19.75
Grant	8.00	217	27.13
Hayes	4.00	92	23.00
Garfield[125]	0.50	6	-
Arthur	3.25	96	29.50
Cleveland (1st Term)	4.00	113	28.25
Harrison	4.00	143	35.75
Cleveland (2nd Term)	4.00	140	35.00
McKinley	4.75	185	38.95

[124] Died after only 1 month in office.

[125] Assassinated after 6 months in office.

T. Roosevelt	7.25	1081	149.10
Taft	4.00	724	181.00
Wilson	8.00	1803	225.38
Harding	2.60	522	200.77
Coolidge	5.40	1203	222.77
Hoover	4.00	968	242.00
F.D. Roosevelt	12.33	3522	285.64
Truman	7.67	897	116.96
Eisenhower	8.00	478	59.75
Kennedy	3.00	228	76.00
L.B. Johnson	5.00	316	63.20
Nixon	5.60	355	63.39
Ford	2.40	152	63.33
Carter	4.00	311	77.75
Reagan	8.00	409	51.13
Bush	4.00	149	37.25
Clinton[126]	6.00	281	46.83

Sources: Calculated by the author from Gary King and Lyn Ragsdale, *The Elusive Executive: Discovering Statistical Patterns in the Presidency* (Washington, D.C.: CQ Press, 1988), 160-167; Information for the Bush and Clinton years has been calculated by John Contrubis using information *available in* LEXIS, Codes Library, FEDREG File.

[126] Currently in his 2nd term of office. The number of executive orders he has issued is through March 5, 1999.