

# Policy Analysis

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## ***Executive Orders and National Emergencies How Presidents Have Come to “Run the Country” by Usurping Legislative Power***

by **William J. Olson and Alan Woll**

### **Executive Summary**

During the recent presidential scandals, concluding with the impeachment of President Clinton, many people were heard to say that the investigations should end so that the president could get back to “the business of running the country.” Under a constitution dedicated to individual liberty and limited government—which divides, separates, and limits power—how did we get to a point where so many Americans think of government as embodied in the president and then liken him to a man running a business?

The answer rests in part with the growth of presidential rule through executive orders and national emergencies. Unfortunately, the Constitution defines presidential powers very generally; and nowhere does it define, much less limit, the power of a president to rule by executive order—except by reference to that general language and the larger structure and function of the Constitution. The issue is especially acute when presidents use executive orders to legislate, for then they usurp the powers of Congress or

the states, raising fundamental concerns about the separation and division of powers.

The problem of presidential usurpation of legislative power has been with us from the beginning, but it has grown exponentially with the expansion of government in the 20th century. In enacting program after program, Congress has delegated more and more power to the executive branch. Thus, Congress has not only failed to check but has actually abetted the expansion of presidential power. And the courts have been all but absent in restraining presidential lawmaking.

Nevertheless, the courts have acted in two cases—in 1952 and 1996—laying down the principles of the matter; the nation’s governors have just forced President Clinton to rewrite a federalism executive order; and now there are two proposals in Congress that seek to limit presidential lawmaking. Those developments offer hope that constitutional limits—and the separation and division of powers, in particular—may eventually be restored.

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## **Introduction**

There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.

—Montesquieu

When America’s Founders gathered to draft a new constitution for the nation, they were especially mindful, from long study and recent experience, of the need to check governmental power if the rights and liberties of the people were to be secured—which the Declaration of Independence had made clear was the purpose of government. Thus, they instituted a plan that divided powers between the federal and the state governments, leaving most powers with the states and the people, as the Tenth Amendment would soon make explicit. And they separated the powers delegated to the federal government among three distinct branches, defined essentially by their functions—legislative, executive, and judicial.

The basic Madisonian idea was that power would check power. The states would check abuses of federal power and the federal government would check abuses of state power. Similarly, because the three branches of the federal government were defined and empowered with reference to their respective functions, each branch would check efforts by the other branches to enlarge or abuse their powers.

Not surprisingly, that system of checks and balances works to limit government only insofar as each unit in the system understands its responsibilities and carries them out. When a system of checks on power—pitting power against power—ceases to function in an adversarial way and functions instead “cooperatively”—with each unit working hand in hand with the others, pursuing “good government” solutions to human “problems”—government necessarily grows. Since there is no end to the problems government thus transformed might address, government becomes like a business, where suc-

cess is defined by growth in size and scope. Is it any wonder that at this point in the 20th century, which has been dominated by the idea of “good government,” the president of the United States is seen more as the chief executive of America, Inc., than as a person charged primarily with the limited duty of seeing “that the Laws be faithfully executed”?

Nowhere is that transformation more clear, perhaps, than in the growth of presidential lawmaking, which is an obvious usurpation of both the powers delegated to the legislative branch and those reserved to the states. To warn against that prospect, James Madison, in *Federalist* 47, quoted Montesquieu on the peril of uniting in the same person legislative and executive powers. Yet, all too often in the modern era that conflation of powers has occurred—and the loss of liberty, against which Montesquieu warned, has followed.

A few examples from the current administration will serve initially to illustrate the problem and should serve as well to show how our liberties are at risk as long as Congress, the courts, and the states fail to exercise their constitutional responsibilities to check the growth of presidential power. We will then trace the theory and history of the problem in order to show that there are constitutional restraints on presidential power available to those charged with asserting them, if only they would do so. We will next show that, almost from the beginning, but especially in our own century, those restraints have not been used. Finally, we will look at two cases in which the courts did limit presidential attempts to rule through executive order or national emergency and two efforts currently before Congress that are aimed at doing the same.

## **President William Jefferson Clinton**

In December 1998, Rep. Ileana Ros-Lehtinen (R-Fla.) rose on the floor of the House to observe that

[t]he greatest challenge of free peoples is to restrain abuses of governmental power. The power of the American presidency is awesome. When uncontrolled and abused, presidential power is a grave threat to our way of life, to our fundamental freedoms.<sup>1</sup>

Those comments were made in the context of President Clinton's impeachment on articles unrelated to his usurpation of legislative powers; however, the underlying principle applies even more when legislative usurpation is the issue. Yet Clinton has repeatedly used executive orders, proclamations, and other "presidential directives" to exercise legislative powers the Constitution vests in Congress or leaves with the states. As noted by Sen. Orrin Hatch (R-Utah), chairman of the Senate Judiciary Committee, "This President has a propensity to bypass Congress and the States and rule by executive order; in other words, by fiat."<sup>2</sup>

In addition, Clinton, far more than his predecessors, has trumpeted his use of presidential directives to legislate and, thereby, to circumvent or undercut congressional and state authority. As the *Los Angeles Times* reported last year:

Frustrated by a GOP-controlled Congress that lately has rebuffed him on almost every front, President Clinton plans a blitz of executive orders during the next few weeks, part of a White House strategy to make progress on Clinton's domestic agenda with or without congressional help.

His first unilateral strike will come today. According to a draft of Clinton's weekly radio address obtained by The Times, he plans to announce a new federal regulation requiring warning labels on containers of fruit and vegetable juices that have not been pasteurized. Congress has not fully funded Clinton's \$101-

million food safety initiative, which among other things would pay for inspectors to ensure that tainted foods from other countries do not reach American consumers.

After that initiative, Clinton will take executive actions later in the week that are intended to improve health care and cut juvenile crime, according to a senior White House official.<sup>3</sup>

In that weekly radio address, Clinton gave "a warning to Congress" reminiscent of FDR's First Inaugural Address (discussed below):

Congress has a choice to make in writing this chapter of our history. It can choose partisanship, or it can choose progress. Congress must decide. . . . I have a continuing obligation to act, to use the authority of the presidency, and the persuasive power of the podium to advance America's interests at home and abroad.<sup>4</sup>

Consistent with that rhetoric, Clinton has sought to advance "America's interests," as he has seen them, not with the concurrence of Congress but often despite Congress, as a few examples will show.

### **Permanent Striker Replacement**

On March 8, 1995, Clinton issued Executive Order 12954 in an effort to overturn a 1938 U.S. Supreme Court decision interpreting the National Labor Relations Act (NLRA). The Court had held that an employer enjoyed 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."<sup>5</sup> In 1990, 1991, 1992, and 1994, Congress had considered and rejected legislation that would have amended the NLRA to

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prohibit employers from hiring permanent striker replacements.<sup>6</sup> Following those repeated failures to enact such legislation, Clinton issued EO 12954, which prohibited federal contractors doing business with the government under the Procurement Act<sup>7</sup> from hiring permanent striker replacements.

Given that history, it was no surprise that EO 12954 was challenged in court.<sup>8</sup> In the ensuing litigation, the administration asserted that “there are no judicially enforceable limitations on presidential actions, besides claims that run afoul of the Constitution or which contravene direct statutory prohibitions,” as long as the president states that he has acted pursuant to a federal statute.<sup>9</sup> But the U.S. Court of Appeals for the District of Columbia Circuit rejected that argument—along with the administration’s claim that the president’s discretion to act under the Procurement Act trumps the statutory protections of the NLRA. The court noted that even if the administration could show that the two statutes were in conflict, under conventional judicial principles the court would not interpret the passage of the Procurement Act as implying that Congress had thereby intended partial repeal of the NLRA.<sup>10</sup>

The court concluded that the order amounted to legislation since it purported to regulate the behavior of thousands of American companies, thereby affecting millions of American workers. As the court explained, “[N]o federal official can alter the delicate balance of bargaining and economic power that the NLRA establishes.”<sup>11</sup> Thus, it struck down the executive order. The Clinton administration did not appeal the decision to the Supreme Court, but neither did it cease its aggressive use of presidential directives.

#### **Grand Staircase–Escalante Monument**

A few weeks before the 1996 presidential election, Clinton used Proclamation 6920 to establish the 1.7 million acre Grand Staircase–Escalante National Monument in Utah. A congressional review later concluded that the proclamation, issued apparently to preclude pending legislation, was “politically

motivated and probably illegal” and was made “to circumvent congressional involvement in public land decisions.”<sup>12</sup> As the House Committee on Resources found:

The White House abused its discretion in nearly every stage of the process of designating the monument. It was a staff driven effort, first to short-circuit a congressional wilderness proposal, and then to help the Clinton-Gore re-election campaign. The lands to be set aside, by the staff’s own descriptions, were not threatened. “I’m increasingly of the view that we should just drop these Utah ideas . . . these lands are not really endangered.”—Kathleen McGinty, chair, Council on Environmental Quality.<sup>13</sup>

The intent to both bypass and preempt Congress was made plain in an earlier letter from McGinty to Secretary of the Interior Bruce Babbitt:

As you know, the Congress currently is considering legislation that would remove significant portions of public lands in Utah from their current protection as wilderness study areas. . . . Therefore, on behalf of the President I/we are requesting your opinion on what, if any, actions the Administration can and should take to protect Utah lands that are currently managed to protect wilderness eligibility, but that could be made unsuitable for future wilderness designation if opened for development by Congress.<sup>14</sup>

In response to Clinton’s action, the Utah Association of Counties and the Mountain States Legal Foundation filed suit in the U.S. District Court for the District of Utah, arguing that when the president created the monument he violated the Antiquities Act of 1906. Judge Dee Benson recently denied the

Clinton administration's motion to dismiss the case, stating that "the president did something he was not empowered to do," and adding that in this matter "not one branch of government operated within its constitutional authority." Benson rejected the administration's argument that Congress had implicitly ratified the president's action; nonetheless, he noted that Congress could make the lawsuit moot: "Congress can simply pass the appropriate legislation supporting the president, and the president will no doubt sign it into law."<sup>15</sup>

### **American Heritage Rivers Initiative**

On September 11, 1997, Clinton's American Heritage Rivers Initiative was established by EO 13061. The impact of the program is not clear; however, some analysts believe that AHRI will require all land-use decisions affecting designated rivers to receive approval from the AHRI "river navigator."<sup>16</sup> According to Rep. Helen Chenoweth (R-Idaho), once a river has been designated as part of AHRI, the control exercised by the river navigator over the use of land may extend over the entire watershed of the river, from its source to its outlet, crossing state lines in the process.<sup>17</sup> Moreover, the river navigator's authority over the use of land is not limited to environmental concerns. AHRI is designed as well to address such social issues as poverty, education, and hunger.<sup>18</sup>

In addition to having created the program without congressional authority, the president seems also to have appropriated, or at least redesignated, funds for the program, in violation of Article I, section 9, clause 7 of the Constitution.<sup>19</sup> As Rep. James Hansen (R-Utah) observed:

The Administration has informed [the House Committee on Resources] that there are no fiscal year 1997 or fiscal year 1998 funds specifically authorized or appropriated for this American Heritage Rivers Initiative. However, documents provided by the Council on

Environmental Quality describe a Federal program that will be created by executive order issued later this summer that will require reprogramming of over \$2,000,000 of agency funds for this initiative.<sup>20</sup>

Even members of the president's own party expressed concern about the precedent established by AHRI. Rep. Owen Pickett (D-Va.) noted that

the unusual nature of the arrangement being proposed where the executive branch of the U.S. Government, through its agencies, was undertaking the implementation of a new Federal program that has not been authorized by Congress and for which no moneys have been appropriated by the Congress to these agencies to be expended for this purpose. This strikes me as being quite unusual and if successful, reason for alarm. Federal agencies are generally considered to be creatures of Congress but this will no longer be true if they can, by unilateral action of their own, extend their reach and usurp moneys appropriated to them for other purposes to pay for their unauthorized activities.<sup>21</sup>

A report on AHRI by the House Committee on Resources added:

Many believe that AHRI clearly violates the doctrine of separation of powers as intended by our Founding Fathers by completely bypassing the Congress. This was best stated by James Madison in Federalist Paper No. 46 that, "The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." For

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example, Executive Order 13061 was drafted with no consultation with the leadership of Congress. This illustrates yet another abuse of power by the President which is similar to that used to create the 1.7 million acre Escalante–Staircase National Monument in Utah without even consulting its Governor and Congressional delegation.<sup>22</sup>

In response to Clinton’s AHRI power grab, Reps. Chenoweth, Bob Schaffer (R-Colo.), Don Young (R-Ark.), and Richard Pombo (R-Calif.) filed suit in the U.S. District Court for the District of Columbia seeking a declaratory judgment that the AHRI was unlawful and an injunction against its implementation. The plaintiffs argued that the AHRI violated the Anti-Deficiency Act, the Federal Land Management and Policy Act, and the National Environmental Policy Act, as well as the Tenth Amendment and the Commerce, Property, and Spending Clauses of the Constitution.

The district court dismissed the suit, however, stating that the plaintiffs’ injuries were “too abstract and not sufficiently specific to support a finding of standing.” In July 1999 the U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court’s decision, citing *Raines v. Byrd*.<sup>23</sup> The plaintiffs’ injuries from the creation of AHRI were “wholly abstract and widely dispersed,” the court said, and therefore were insufficient to warrant judicial relief. Thus, neither court reached the merits of the challenge. The plaintiffs are now seeking review by the U.S. Supreme Court.

### **Federalism**

Turning now to an issue at the heart of our system of government, on May 14, 1998, Clinton issued EO 13083, attempting thereby to craft a new definition of “federalism” to guide the executive branch in its dealings with states and localities. Although the authority of presidents to issue directives governing the enforcement of constitutional

provisions is uncontested, Clinton’s federalism order was noteworthy for its contrast with the previous Reagan executive order on federalism (EO 12612). For example, all references to the Tenth Amendment, the clearest constitutional statement of federalism, were excluded. In addition, the Reagan order had provided that “[i]n the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.”<sup>24</sup> That presumption too was eliminated from the Clinton order.

In place of the doctrine of enumerated powers, which limits federal powers to those specified in the Constitution, Clinton’s executive order set forth “Federalism Policymaking Criteria.” Gone was EO 12612’s requirement that federal action be taken only on problems of national scope and only “when authority for the action may be found in a specific provision of the Constitution, [when] there is no provision in the Constitution prohibiting Federal action, and [when] the action does not encroach upon authority reserved to the States.”<sup>25</sup> Instead, federal agencies would be encouraged to find justification for their actions to solve “national” and “multistate” problems from a list of nine broad “circumstances” purporting to justify such actions.<sup>26</sup>

Gov. Mike Leavitt (R-Utah), speaking on behalf of the National Governors’ Association, raised the concerns of many about the role states would play under Clinton’s new federalism:

This new order represents a fundamental shift in presumption. Where all previous executive orders on federalism aimed to restrain federal actions over states, the current version is written to justify federal supremacy.

States are not supplicants and the federal government the overlord. States are not special interests. States

are full constitutional players—a counterbalance to the national government and a protector of the people.

In essence, this order authorizes unelected bureaucrats to determine the states’ “needs” and set the federal government on a course of action to meet them. It says the federal government can swoop in with a remedy because some career civil servant somewhere in the maze decides the federal bureaucracy can do it more cheaply. Since when?<sup>27</sup>

Facing an outcry over his federalism order,<sup>28</sup> Clinton suspended it, by EO 13095, on the very day the House voted, 417 to 2, to withhold funds for its implementation. Months later, on August 5, 1999, EO 12612, EO 13083, and EO 13095 were all revoked by a new federalism order, EO 13132. Although concerns remain,<sup>29</sup> the new order is a major improvement over the first one. In EO 13132 the nine broad “circumstances” purporting to justify federal action are gone. The Tenth Amendment is back where it belongs, as the foundation of the order. And the doctrine of enumerated powers, implicit in that amendment, is prominent as a limit on federal action. Whether the order serves to limit such action remains to be seen, of course. At the least, the states, speaking through their governors, acted in this case as they were meant to act, as a check on federal power—a check, in particular, on executive power nowhere authorized by the Constitution.

### **Clinton’s War against Yugoslavia**

As a final example of rule through executive order, just this year President Clinton waged war, through NATO, against the Federal Republic of Yugoslavia. Much like President Abraham Lincoln had done at the outset of the Civil War (discussed below), Clinton, acting alone, relied solely on his power as commander in chief. In no serious sense could his undertaking be characterized as a defensive action compelled by imminent circumstances that made congressional

authorization impracticable. The president waged war, plain and simple, without benefit of a congressional declaration of war.

Clinton took action primarily under three executive orders. On June 9, 1998, he issued EO 13088, which declared a national emergency, seized the U.S.-based assets of the government of Yugoslavia, and prohibited trade with that country as well as with the constituent republics of Serbia and Montenegro. In March 1999, without prior congressional authority, Clinton deployed and engaged the U.S. Air Force to participate in NATO’s bombing of Yugoslavia. He then deployed U.S. troops in neighboring Macedonia and Albania, merely informing Congress of his actions. On April 13, 1999, Clinton issued EO 13119, designating Yugoslavia and Albania as a war zone. On April 20, 1999, Clinton issued EO 13120, ordering reserve units to active duty. In addition, it is believed that there may have been other secret presidential directives relating to the war that were issued as presidential decision directives.<sup>30</sup>

Again, Clinton’s actions were never expressly authorized by Congress. In fact, on April 28, 1999, Congress overwhelmingly rejected a resolution to declare war against Yugoslavia and also rejected a concurrent resolution “authorizing” the continuation of the air war. Clinton continued the war, nevertheless. On May 1 he announced that NATO would enforce a ban on trade with Yugoslavia. On May 26 and June 2 he notified Congress that he had sent additional troops and aircraft to participate in the war. On June 5 he notified Congress that he had sent still more troops to the front. On June 10 NATO declared the war to be over. On June 12 Clinton informed Congress that he would deploy 7,000 U.S. troops to participate in the Kosovo Security Force (KFOR), where they remain to this day.<sup>31</sup>

Thus, at this late date in Clinton’s presidency, the tenor of his administration is clear. He continues the practice of presidents since the Progressive Era: ruling and legislating through executive order. Perhaps no one put his admiration for the raw power implicit in

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that practice more succinctly, and quotably, than did Clinton adviser Paul Begala: “Stroke of the pen. Law of the land. Kind of cool.”<sup>32</sup>

## **Background on Presidential Directives**

From George Washington’s first administration, presidents have issued executive orders, proclamations, and other documents known generally as presidential directives.<sup>33</sup> The two most prominent forms of presidential directive are executive orders and proclamations. More than 13,000 numbered executive orders have been issued since 1862<sup>34</sup> and more than 7,000 numbered proclamations since 1789. Although some directives are proper exercises of executive power, others are clearly usurpations of legislative authority.

Presidential directives deal with all manner of constitutionally authorized subjects, such as the implementation of treaties (for example, EO 12889, “To Implement the North American Free Trade Agreement,” issued December 27, 1993), government procurement (for example, EO 12989, “Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Naturalization Act Provisions,” issued February 13, 1996), the regulation of government-created information (for example, EO 12951, “Release of Imagery Acquired by Space-Based National Intelligence Reconnaissance Systems,” issued February 28, 1995), and the direction of subordinate executive officials (for example, EO 12866, “Regulatory Planning and Review,” issued September 30, 1993). There is even an executive order (EO 11030, issued by President Kennedy) that specifies how executive orders are to be prepared, routed (through both the Office of Management and Budget and the attorney general), and published.

A constitutional problem arises, however, when presidents use directives not simply to execute law but also to create it—without constitutional or statutory warrant. Such presi-

dential usurpation of legislative authority has been largely unchecked by both the legislative and judicial branches. The Founding Fathers had clearly expected that each branch of government would defend its prerogatives from encroachment by the other branches, setting power against power.<sup>35</sup> Unfortunately, members of Congress have not been faithful to their oaths of office or their obligations to check the executive, despite the Constitution’s clear direction that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States” (Article I, section 1).<sup>36</sup> Neither has the judicial branch checked such executive usurpations: only twice in the history of the nation have U.S. courts voided executive orders.

The focus of this study is presidential usurpations of legislative authority—that is, the illegal exercise of legislative authority—not acts of tyranny—that is, the illegal exercise of power never delegated to the federal government at all. In the words of John Locke, one of the principal inspirations for the American Revolution, “As Usurpation is the exercise of Power, which another hath a Right to, so *Tyranny is the exercise of Power beyond Right, which no Body can have a Right to.*”<sup>37</sup>

## **The Legal Authority for Presidential Directives**

There is no constitutional or statutory definition of “proclamation,” “executive order,” or any other form of presidential directive.<sup>38</sup> Since 1935 presidents have been required to publish executive orders and proclamations in the *Federal Register*.<sup>39</sup> Yet even that requirement can be circumvented by the nomenclature used: “the decision whether to publish an Executive decision is clearly a result of the President’s own discretion rather than any prescription of law.”<sup>40</sup> As a result, many important decisions are issued informally, using forms not easily discovered by the public, while many trivial matters are given legal form as executive orders and



proclamations.<sup>41</sup> Thus, several of President Clinton's major policy actions, for which he has been severely criticized, were accomplished not through formal directives but through orders to subordinates, or "memoranda." Those include his "don't ask, don't tell" rule for the military; his removal of previously imposed bans on abortions in military hospitals,<sup>42</sup> on fetal tissue experimentation,<sup>43</sup> on Agency for International Development funding for abortion counseling organizations,<sup>44</sup> and on the importation of the abortifacient drug RU-486,<sup>45</sup> and his efforts to reduce the number of federally licensed firearms dealers.<sup>46</sup>

Other presidential policy changes are hidden from the public, ostensibly for national security reasons, through the government's classification system. In 1974 the Senate Special Committee on National Emergencies and Delegated Emergency Powers noted that

[t]he legal record of executive decisionmaking has thus continued to be closed from the light of public or congressional scrutiny through the use of classified procedures which withhold necessary documents from Congress, by failure to establish substantive criteria for publication and by bypassing existing standards.<sup>47</sup>

Although the practice of issuing presidential directives began in 1789, only limited judicial review of such directives has ever taken place. As noted above, federal courts have clearly invalidated presidential directives on only two occasions.<sup>48</sup> For whatever reason, even when federal courts have been willing to hear challenges to presidential directives, they have been reluctant to act. More than 50 years ago, Justice Robert Jackson seemed to capture the Court's attitude in a case involving the war power: "If the people ever let command of the war power fall into irresponsible hands, the courts wield no power equal to its restraint."<sup>49</sup>

Due in part to the absence of clear constitutional or statutory definitions and the lack

of sustained judicial guidance, there remains a wide divergence of opinion about the proper scope, application, and even legal authority of presidential directives. Naturally, that controversy is minimized where directives have clear constitutional or statutory authority.

### **Presidential Directives with Clear Constitutional or Statutory Authority**

Where a presidential directive is clearly authorized by the Constitution or is authorized by a statute authorized by the Constitution and the delegation of power is in turn constitutional, the directive has the force of law. President Andrew Johnson's proclamation of December 25, 1868 ("Christmas Proclamation"), which granted a pardon to "all and every person who directly or indirectly participated in the late insurrection or rebellion," was clearly authorized by the Constitution. The Supreme Court declared the proclamation to be "a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect."<sup>50</sup> The authority for President Johnson's proclamation is found in Article II, section 2, clause 1 of the Constitution, which grants the president "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

President Washington's Whiskey Rebellion proclamation is an example of a presidential directive clearly authorized by a statute. On August 7, 1794, Washington issued a proclamation ordering persons participating in "combinations to defeat the execution of [federal] laws" to cease their resistance to the collection of the federal excise tax on whiskey. That proclamation was issued pursuant to a 1792 statute empowering a president to command insurgents, by proclamation, "to disperse and retire peaceably to their respective abodes within a limited time."<sup>51</sup> The president was also empowered by the statute to call out the militia "to suppress such combinations, and to cause the laws to be duly executed."<sup>52</sup>

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**The Supreme Court found that the executive order was invalid because the president's power to issue the order did not "stem either from an Act of Congress or from the Constitution itself."**

Federal courts have also upheld presidential directives that were unauthorized when issued but were subsequently validated by Congress via statute. In *Isbrandtsen-Moller Co., Inc. v. United States et al.*,<sup>53</sup> the Supreme Court upheld President Franklin Roosevelt's transfer of certain authority from the U.S. Shipping Board to the Secretary of Commerce, pursuant to EO 6166, where Congress had recognized the transfer of authority in subsequent acts.

Although federal preemption of state law is best known as a characteristic of congressionally enacted statutes, it characterizes executive regulations as well. Thus, citing Article VI of the Constitution, the Supremacy Clause, the Supreme Court has accorded such preemptive authority to regulations authorized by federal statute.<sup>54</sup> Consistent with that principle, the Court held that President Richard Nixon's EO 11491, implementing a federal statute, preempted state law.<sup>55</sup>

#### **Presidential Directives without Clear Constitutional or Statutory Authority**

Not all presidential directives rely on clearly identified constitutional or statutory authority. EO 10422, issued by President Harry Truman on January 3, 1953, actually cited the United Nations Charter as authority.<sup>56</sup> It was never challenged in court.

Other presidents have cited executive agreements—essentially, unratified treaties—as the basis for their directives. Article VI of the Constitution states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Executive agreements with other nations have no constitutional status as treaties and thus are not part of the supreme law of the land. Nevertheless, in *Dames & Moore v. Regan*,<sup>57</sup> Justice William Rehnquist, writing for the Court, upheld EO 12276-85 (Carter) and EO 12294 (Reagan), which implemented the

terms of an executive agreement with Iran.<sup>58</sup>

Some executive orders cite for their authority the president's constitutional role as commander in chief. In *Dooley v. United States*,<sup>59</sup> the Supreme Court determined that the president can rely on his role as commander in chief as authority for the exercise of certain powers during wartime; however, "the authority of the President as Commander in Chief to exact duties upon imports [to Puerto Rico] from the United States ceased with the ratification of the treaty of peace." Thus, the president's power to exercise that war power ceased when the state of war formally ceased.

When President Truman seized private U.S. steel mills pursuant to EO 10340, he did so, he claimed, "by virtue of the authority invested in [him] by the Constitution and laws of the United States, and as President of the United States and Commander-In-Chief of the armed forces of the United States." When the implementation of his order was challenged in the federal courts, despite the participation of U.S. troops in Korea during the litigation, the Supreme Court found that the executive order was invalid because the president's power to issue the order did not "stem either from an Act of Congress or from the Constitution itself."<sup>60</sup>

The Court's preference for constitutionally enacted laws over presidential directives not clearly based on constitutional or statutory authority is evident from its treatment of the implementation of regulations promulgated under such directives. For example, the Court has held that, even though they were issued to implement EO 11246, regulations promulgated by the Department of Labor did not have the force of law because no statute justified the regulations.<sup>61</sup>

Finally, it is well established that a congressionally enacted statute can modify or revoke a presidential directive. That has happened to at least 239 executive orders.<sup>62</sup>

# The Origins and Development of Presidential Directives

## President George Washington

The practice of issuing presidential directives dates back to the start of the nation's first administration. On June 8, 1789, President Washington's first directive ordered the acting officers of the holdover Confederation government to prepare a report "to impress [him] with a full, precise, and distinct general idea of the affairs of the United States" handled by the respective officers.<sup>63</sup>

Washington called some directives "proclamations." His first directive so named was issued in response to a request by a joint committee of the House and Senate that he "recommend to the people of the United States a day of public thanksgiving."<sup>64</sup> By proclamation dated October 3, 1789, Washington identified Thursday, November 26, 1789, as such a day of thanksgiving.<sup>65</sup> Another proclamation, discussed above, was issued pursuant to statute during the Whiskey Rebellion.

Not all of Washington's directives were issued pursuant to statute, however, or to clearly delegated constitutional authority. Consider, for example, his proclamation of April 22, 1793, declaring the neutrality of the United States in the warfare between Austria, Prussia, Sardinia, Great Britain, and the Netherlands, on one side, and France on the other. That proclamation cited neither constitutional nor statutory authority:

Whereas it appears, that . . . the duty and interest of the United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial towards the belligerent powers:

I have therefore thought fit by these presents to declare the disposition of the United States to observe

the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States, carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.

And I do hereby also make known, that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them those articles, which are deemed contraband by the modern usage of nations, will not receive the protection of the United States against such punishment or forfeiture; and further, that I have 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.

Instead of citing either the Constitution or a statute, the directive appears to cite the "law of nations" (for example, international maritime law) as its authority and to define the status of American citizens who violate the precepts of such law. Washington had sought to use the directive to control the actions of private citizens within the United States, albeit in the form of giving public notice that he had "given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted"—similar to directing prosecutors to prosecute common-law crimes. The proclamation was viewed at the time as an abuse of executive authority.<sup>66</sup>

Nevertheless, at the request of Washington, Congress later enacted those limitations on private behavior.<sup>67</sup> That action established the dangerous precedent of congressional ratification of unauthorized presidential

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directives, a precedent that would be followed many times during the ensuing years.

Until 1861, however, presidential directives were issued infrequently. A recent study by the Congressional Research Service provides a count, by president, of what it calls “executive orders,” starting with Washington.<sup>68</sup> According to that study, only 143 executive orders were issued in the 72 years between the first administration of President Washington and the administration of President James Buchanan. During their consecutive eight-year terms, Presidents Madison and Monroe each issued only one such order.<sup>69</sup> That practice changed dramatically with the inauguration of President Abraham Lincoln, who ruled by presidential directive. After Lincoln, however, prior practice returned—until the Progressive Era, and Theodore Roosevelt, when rule by executive order exploded. Table 1 is a list of the number of executive orders issued by each president since Lincoln.

**President Abraham Lincoln**

Writing in 1848 about the Constitution’s separation of powers principle, Lincoln said:

The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood.<sup>70</sup>

Given Lincoln’s view on the constitutional separation of powers, expressed more than a dozen years before his 1861 inaugu-

ration as president, one would expect him to have exercised war powers in a limited and judicious fashion. The facts paint a rather different picture.

Lincoln fought a war for nearly three months by presidential directive—acting first, seeking congressional approval later. He essentially ignored Congress’s power to declare war, reducing it to a reactive, rubber-stamp power.

Lincoln’s proclamation of April 15, 1861, issued 42 days after his inauguration, called for 75,000 militia to suppress the southern insurrection and for Congress to convene on July 4, 1861.<sup>71</sup> Between April 15 and July 4, he actively undertook the war effort without congressional participation.

On April 19 and 27, 1861, again by proclamation, Lincoln declared a blockade of ports in several southern states.<sup>72</sup> The April 19 proclamation cited as authority the laws of the United States and the law of nations. The blockade was to continue “until Congress shall have assembled and deliberated” on the secession of seven named states. The April 27 proclamation extended the blockade to four additional states. When Congress finally convened, it passed an act granting Lincoln authority to establish blockades by proclamation.<sup>73</sup> Following the passage of that act, Lincoln issued another, now authorized, proclamation, dated August 16, 1861, reiterating the declaration of a blockade of 11 southern states in the Confederacy.<sup>74</sup>

On April 20, 1861, Lincoln directed the building of 19 warships and ordered the secretary of the Treasury to advance \$2 million to three private citizens for use “in meeting such requisitions as should be directly consequent upon the military and naval measures necessary for the defense and support of the government.”<sup>75</sup> Lincoln’s May 3, 1861, proclamation ordered the enlargement of the Army by 22,714 men and of the Navy by 18,000 men.<sup>76</sup> Those actions violated Article I, section 9, clause 7 of the Constitution: “No Money shall be drawn from the Treasury, but in Consequence of Appropriation made by Law.” They also violated Article I, section 8, clauses

12 and 13, which give Congress the power to raise and support armies, and to provide and maintain a navy. Nevertheless, in August 1861, Congress again ratified Lincoln's unauthorized actions by enacting a statute that declared all his actions respecting the Army and Navy to be "hereby approved and in all

respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States."<sup>77</sup>

In his speech to Congress when it convened on July 4, 1861, Lincoln expressed his belief

**After Lincoln, however, prior practice returned—until the Progressive Era, and Theodore Roosevelt, when rule by executive order exploded.**

**Table 1**  
**Executive Orders Issued**

President	EOs Issued	EO Designations
Abraham Lincoln	3	EO Nos. 1, 1A, 2
Andrew Johnson	5	EO Nos. 3–7
Ulysses Grant	15	EO Nos. 8–20
Rutherford Hayes	0	
James Garfield	0	
Chester Arthur	3	EO Nos. 21–23
Grover Cleveland (1st)	6	EO Nos. 23-1–27-1
Benjamin Harrison	4	EO Nos. 28, 28-1, 28A, 29
Grover Cleveland (2nd)	71	EO Nos. 30–96
William McKinley	51	EO Nos. 97–140
Theodore Roosevelt	1,006	EO Nos. 141–1050
William Taft	698	EO Nos. 1051–1743
Woodrow Wilson	1,791	EO Nos. 1744–3415
Warren Harding	484	EO Nos. 3416–3885
Calvin Coolidge	1253	EO Nos. 3885A–5074
Herbert Hoover	1,004	EO Nos. 5075–6070
Franklin Roosevelt	3,723	EO Nos. 6071–9537
Harry Truman	905	EO Nos. 9538–10431
Dwight Eisenhower	452	EO Nos. 10432–10913
John Kennedy	214	EO Nos. 10914–11217
Lyndon Johnson	324	EO Nos. 11218–11451
Richard Nixon	346	EO Nos. 11452–11797
Gerald Ford	169	EO Nos. 11798–11966
James Carter	320	EO Nos. 11967–12286
Ronald Reagan	381	EO Nos. 12287–12667
George Bush	166	EO Nos. 12668–12833
William Clinton	304	EO Nos. 12834–13137

Sources: This listing is of documents officially denominated "Executive Orders." Data through Dwight Eisenhower are from Senate Special Committee on National Emergencies and Delegated Emergency Powers, *Executive Orders in Times of War and National Emergency*, 93d Cong., 2d sess., 1974, Committee Print, pp. 40–46. Data from John Kennedy through William Clinton are from the National Archives and Records Administration, Office of the Federal Register. William Clinton's total is current through August 5, 1999.

No executive orders were numbered, and no systematic filing system was in existence before 1907. In 1907, the State Department began numbering executive orders on file, as well as those received after that date. After the State Department began numbering these executive orders, others have been discovered and numbered. Those orders have been given suffixes such as A, B, C, 1/2, and -1. *Executive Orders in Times of War and National Emergency*, pp. 27, 38–39.

**Congress was granted the power to declare war so that “no one man” acting alone, like a king, could throw the nation into war.**

that he had not exercised any powers not possessed by Congress and asked Congress to ratify the actions he had taken previously by proclamation.<sup>78</sup> As noted above, Congress generally complied with that request. Since the Civil War, the Supreme Court has upheld the legality of presidential actions ratified by Congress after the fact, observing “Congress may, by enactment not otherwise inappropriate, ‘ratify . . . acts which it might have authorized,’ and give the force of law to official action unauthorized when taken.”<sup>79</sup>

As noted above, a dozen years before he became president, Lincoln clearly had perceived and described the danger the Founders had sought to avert by separating powers among three branches of government. Congress was granted the power to declare war so that “no one man” acting alone, like a king, could throw the nation into war. In April 1861, President Lincoln could have called Congress into session in relatively short order; instead, he presented Congress with the difficult choice of either placing American forces and prestige at risk, by recalling soldiers in the field, or voting a blanket approval of unconstitutional actions. By initiating the conduct of the war, Lincoln was able to control the means by which it was fought, and Congress was all too willing to allow him to circumvent the constitutional limitations on presidential power. That precedent was then available to future presidents, some of whom have been quite willing to exercise equivalent war powers, whether or not a state of war exists.

Given the Supreme Court’s identification of extraconstitutional presidential powers during time of war, directives derived from the president’s role as commander in chief have become particularly common.<sup>80</sup> The first prominent presidential directive to rely on the commander-in-chief role to justify presidential lawmaking during wartime was Lincoln’s Emancipation Proclamation, issued on January 1, 1863. The proclamation cites no statute as its foundation.<sup>81</sup> Instead, Lincoln issued the proclamation “by virtue of the power in me vested as Commander-In-

Chief of the Army and Navy of the United States in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion.”

### **Lincoln’s Successors**

After Lincoln was assassinated, Congress moved aggressively to reduce the executive authority of his successor, Andrew Johnson, to the point of passing the Tenure of Office Act, restricting the president’s power to fire subordinates. That law is well-known for having precipitated President Johnson’s impeachment. What is not as well-known is that the law was not repealed until 1887.<sup>82</sup>

In 1870 the historian Henry Adams wrote that “the Executive, in its full enjoyment of theoretical independence, is practically deprived of its necessary strength by the jealousy of the Legislature.”<sup>83</sup> Except for Lincoln, constitutional scholar Forrest McDonald observed, “Nineteenth century presidents continued to be little more than chief clerks of personnel.”<sup>84</sup> That state of affairs appears to have reflected more the nature of the occupants of the office, however, than the nature of the office itself. According to President Rutherford Hayes, who issued no formally designated “executive orders”:

The executive power is large because not defined in the Constitution. The real test has never come, because the Presidents have down to the present been conservative, or what might be called conscientious men, and have kept within limited range. And there is an unwritten law of usage that has come to regulate an average administration. But if a Napoleon ever became President, he could make the executive almost what he wished to make it. The war power of President Lincoln went to lengths which could scarcely be surpassed in despotic principle.<sup>85</sup>

The quality of the men, and hence the scope of the office, changed dramatically at

the dawn of the 20th century. With Theodore Roosevelt's administration, Hayes's prophetic vision became reality.

### **President Theodore Roosevelt**

Vice President Roosevelt succeeded President William McKinley on September 14, 1901, six months after McKinley was sworn in for a second term. Thus, McKinley served as president for four years, six months, while Roosevelt served for seven years, six months. Yet Roosevelt issued 1,006 executive orders; McKinley issued only 51.<sup>86</sup> Indeed, during Roosevelt's administration, in 1907, the U.S. Department of State undertook the first effort to identify and number executive orders.<sup>87</sup>

Roosevelt's aggressive (albeit, not yet Napoleonic) use of executive orders and executive powers ushered in the Progressive Era, when the modern view took hold that government should be in the business of solving a vast array of social "problems." Although Roosevelt is well-known for characterizing the presidency as a "bully pulpit," his words and deeds made it clear that he perceived a far greater potential in that office. In asserting what is referred to as the stewardship theory of executive power, Roosevelt expressly "declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it."<sup>88</sup> To the contrary, he stated that it was "his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."<sup>89</sup>

Throughout Roosevelt's administration, only muted efforts were made to check his use of presidential directives. Congress did prevent the execution of certain executive orders regarding federal land administration.<sup>90</sup> And Roosevelt's directive providing a disability pension to all Civil War veterans age 62 or older—an entitlement with an annual price tag of between \$20 million and \$50 million—was criticized for having been taken without congressional authorization.<sup>91</sup> For the most part, however, Roosevelt

enjoyed free rein.

### **President Woodrow Wilson**

The administration of Woodrow Wilson was marked by the acquisition and exercise of "dictatorial powers," the Senate Special Committee on National Emergencies and Delegated Emergency Powers would later conclude.<sup>92</sup> Just as Lincoln had served as an example to Wilson, the committee observed, "Wilson's exercise of power in the First World War provided a model for future presidents and their advisors."<sup>93</sup> Using a presidential directive, Wilson was the first president to declare a national emergency.<sup>94</sup> Following that declaration, Wilson used presidential directives to exercise emergency authority. He was the first president to create federal agencies with presidential directives—for example, the Food Administration, the Grain Administration, the War Trade Board, and the Committee on Public Information.<sup>95</sup>

Wilson proclaimed a national emergency on February 5, 1917, two months before Congress declared war.<sup>96</sup> Unlike with later emergency proclamations, however, most of Wilson's emergency powers did not survive his administration; for under a joint resolution passed on March 3, 1921, the day before President Warren Harding was inaugurated, most wartime measures delegating powers to the president were repealed.<sup>97</sup>

### **President Franklin Roosevelt**

President Franklin Roosevelt was inaugurated on March 4, 1933. In his inaugural address, he stated:

It is to be hoped that the normal balance of Executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.

I am prepared under my constitutional duty to recommend the mea-

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sure that a stricken Nation in the midst of a stricken world may require.

But in the event that Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.<sup>98</sup>

Roosevelt's first official act, at 1 A.M. on March 6, 1933, was to issue Proclamation 2038.<sup>99</sup> The proclamation declared a state of national emergency and established a bank holiday, citing as authority the 1917 Trading with the Enemy Act (TWEA). That act, however, provided no such authority: expressly, it governed no transactions among citizens within the United States—and no transactions absent a declared state of war.<sup>100</sup> Following Roosevelt's declaration, the United States remained in a state of national emergency for more than 45 years.<sup>101</sup>

On March 9, 1933, Congress obligingly amended TWEA to remove the wartime limitation; at the same time, Congress broadly authorized the newly sworn-in president's actions *ex post facto*.<sup>102</sup> By its action, Congress "approved and confirmed . . . actions, regulations, orders and proclamations heretofore and hereafter taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury . . . pursuant to the authority conferred by subdivision (b) of section 5<sup>103</sup> of the Act of October 6, 1917" (i.e., TWEA).<sup>104</sup> The act further appropriated \$2 million, "which shall be available for expenditure, under the direction of the President and in his discretion, for any purpose in connection with the carrying out of this Act."<sup>105</sup> Thus, the act not only gave the president (and Treasury secre-

tary) *carte blanche* approval of actions previously taken pursuant to section 5(b) of TWEA but also, in language that remains in the *U.S. Code* to this day,<sup>106</sup> granted *carte blanche* congressional authorization to anything any president has done since March 9, 1933—or will do in the future—"pursuant" to section 5(b) of TWEA.

That amendment to TWEA was part of the Emergency Banking Relief Act, which passed the House after only 38 minutes of debate.<sup>107</sup> The bill was not even in print when it was passed by both houses of Congress.<sup>108</sup>

With such a beginning, it is hardly surprising that Roosevelt became the most prolific author of presidential directives—and a favored model for recent presidents. Roosevelt exercised legislative powers aggressively, freely invading private rights with presidential directives. He issued executive orders to create labor-management dispute resolution mechanisms<sup>109</sup> and to seize private businesses, even before the United States entered World War II.<sup>110</sup> On June 7, 1941, for example, Roosevelt issued EO 8773 to seize the North American Aviation Plant because of an ongoing strike, and with EO 8928 he seized another airplane parts facility that had refused to hire back striking workers.<sup>111</sup>

But the greatest and most notorious invasion of private rights occurred when Roosevelt issued EO 9066, under which more than 112,000 U.S. citizens and residents of Japanese descent were removed from their homes and forced into relocation camps. The order was based solely on his assertion of authority as commander in chief,<sup>112</sup> although the Congress subsequently "ratified and confirmed" the executive order.

Roosevelt was not content simply to legislate, however. During the war he demanded that Congress repeal a statutory provision, threatening that "in the event that Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act."<sup>113</sup> Thus, not only did Roosevelt claim the power to act contrary to statute, he also asserted the dictatorial right to unilaterally supersede a law.



Roosevelt's administration constituted one continuous state of national emergency. Using presidential directives he asserted legislative authority that no president had ever before asserted, particularly in peacetime. He was also extremely creative in the development of different forms of presidential directive. Of the 24 different types identified by the Congressional Research Service, at least eight were initiated by Roosevelt—and three of those he alone used.<sup>114</sup>

### **President Harry Truman**

President Harry Truman followed Roosevelt's example, using presidential directives to seize manufacturing plants, textile mills, slaughterhouses, coal mines, refineries, railroads, and other transportation companies facing threatened or actual strikes.<sup>115</sup> Thus, with EO 9728 (May 21, 1946), Truman seized most of the nation's bituminous coal mines so that the secretary of the interior could negotiate a contract with miners.<sup>116</sup> As the Supreme Court observed, the resulting agreement "embodied far reaching changes favorable to the miners."<sup>117</sup> As authority, EO 9728 had cited, among other things, the War Labor Disputes Act.<sup>118</sup>

Truman's seizure of private enterprises to obtain raises and benefits for unionized workers was eventually checked by the Supreme Court. In *Youngstown Sheet & Tube v. Sawyer*, the Court found that EO 10340 (April 8, 1952), under which Truman seized steel mills in order to provide a 26 cent per hour raise to unionized steelworkers, was unconstitutional.<sup>119</sup> As noted earlier, the Court determined that, for the executive order to be valid, the president's power to issue it "must stem either from an Act of Congress or from the Constitution itself."<sup>120</sup>

In *Youngstown*, Justice Hugo Black, writing for the Court, found that no statute had expressly authorized the president's action. He then said that no statute had been identified "from which such a power can be fairly implied."<sup>121</sup> Two statutes did give the president authority to seize private property, the Court continued, but counsel for the United

States had admitted that the president had not acted in accordance with the terms of those acts. Congress had considered giving the president the power he exercised under EO 10340, the Court concluded, but then "refused to adopt that method of settling labor disputes."<sup>122</sup>

Finding no statutory authority, the Court next considered whether Truman had constitutional authority for his action. Counsel for the United States had identified three constitutional provisions purporting to provide such authority: "The executive Power shall be vested in a President" (Article II, section 1); "The President shall be Commander in Chief" (Article II, section 2); and "He shall take Care that the Laws be faithfully executed" (Article II, section 3). In response, the Court found that the executive power did not authorize the executive order because it directed the execution of a presidential policy in a manner prescribed by the president, not the execution of a congressional policy in a manner prescribed by Congress. Likewise, the commander in chief's power was found not to include "the ultimate power to take possession of private property in order to keep labor disputes from stopping production." Finally, the president's power "to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."<sup>123</sup>

The Court concluded that Truman lacked authority to issue the order. Therefore, it invalidated the order, observing that "Congress has . . . exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or any Department or Officer thereof.'"<sup>124</sup>

Without comparable deference to the text of the Constitution, several concurring opinions expanded on the principle that a president has limited authority to act under the Constitution. Justice Robert Jackson's concurring opinion observed that "[t]he executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will

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of the President and represents an exercise of authority without law.”<sup>125</sup> Jackson rejected the appeal to the president’s “inherent powers” arising out of the state of national emergency, noting that our forefathers “knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.”<sup>126</sup> He concluded that “[w]ith all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the executive be under the law, and that the law be made by parliamentary deliberations.”<sup>127</sup>

In the course of his opinion, Jackson set forth a three-part test for authoritative presidential directives:

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.<sup>128</sup>
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.<sup>129</sup>
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.<sup>130</sup>

Justice Felix Frankfurter’s concurring opinion observed that it is one thing “to say that Congress would have explicitly written what is inferred, where Congress has not

addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.”<sup>131</sup> Frankfurter added that the American system of government, “with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments.”<sup>132</sup>

Unfortunately, with the exception of the *Reich* case in 1996, as discussed at the outset, the *Youngstown* case constitutes the high-water mark for judicial review of executive usurpation of legislative authority.<sup>133</sup> For the next major test did not come until 1981, in *Dames & Moore v. Regan*, and in that case the Court’s deference to the executive branch returned. In *Regan* the Court upheld President Ronald Reagan’s EO 12294<sup>134</sup>—which suspended private claims filed against Iran in the federal courts—on the theory that Congress had delegated its authority to the president by mere “acquiescence.” Notice that such “authority” is even weaker than the retroactive approval granted to other presidential directives.<sup>135</sup> According to Justice William Rehnquist, writing for the Court, while no specific statutory language authorized the presidential directives at issue, the Supreme Court “cannot ignore the general tenor of Congress’ legislation in this area.” Evidently, that tenor was in harmony with the nearly unbounded executive discretion exercised by Presidents Carter and Reagan to control the judicial consideration of claims against Iran.

Given President Clinton’s aggressive use of presidential directives, as discussed earlier, and the weight the Court appears to give to congressional “tenor,” it is imperative that Congress carry out its constitutional duty to check the executive’s usurpation of congressional authority and to restore the separation of powers. Likewise, it is imperative that states

do the same to check the executive's usurpation of state authority and to restore the division of powers, as the governors did recently when they resisted Clinton's federalism order. Yet even when Congress or the states fail in those duties, the courts have no real warrant for ignoring their own duty to secure constitutional principles through the cases or controversies that are brought before them.

## Congressional Solutions

### Watergate-Era Congressional Efforts to Check Executive Abuses

Congress has not been entirely silent, of course, especially during the administration of President Richard Nixon—and particularly regarding Nixon's use of emergency powers to prosecute the Vietnam War. In fact, in 1972 Congress created a special Senate committee, the Special Committee on the Termination of the National Emergency, to study the problem of presidential usurpation through declarations of national emergency.<sup>136</sup>

Perhaps believing that presidential directives were too firmly established to be challenged directly, the committee focused on the states of national emergency that undergirded many of the most aggressive executive usurpations of lawmaking power. Rechartered in 1974 as the Special Committee on National Emergencies and Delegated Emergency Powers, the committee, by a unanimous vote, recommended legislation to regulate presidential declarations of national emergency as well as congressional oversight of such emergencies.<sup>137</sup> That legislation became the National Emergencies Act,<sup>138</sup> signed by President Gerald Ford on September 14, 1976.

Effective September 14, 1978, the National Emergencies Act terminated “[a]ll powers and authorities possessed by the President, any other officer or employee of the Federal Government, or any executive agency . . . as a result of the existence of any declaration of national emergency in effect on September 14, 1976.”<sup>139</sup> In addition, the

act required that before the president could exercise an extraordinary power on the basis of a national emergency, he had to declare such an emergency to Congress and publish that declaration in the *Federal Register*.<sup>140</sup>

The act also provided for the termination of national emergencies thereafter, either by joint resolution of Congress, or by presidential proclamation, or

on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the *Federal Register* and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary.<sup>141</sup>

Finally, the act requires the president to indicate the powers and authorities being activated pursuant to the declaration of national emergency<sup>142</sup> and requires certain reports to Congress.<sup>143</sup>

After the National Emergencies Act became law, Congress turned its attention to TWEA. Recall that TWEA was a product of World War I. President Roosevelt later used TWEA to close the banks and seize private holdings of gold. Congress amended TWEA in 1977 to expressly state that it applies only after Congress has declared war.<sup>144</sup>

After TWEA was amended, Congress passed the International Emergency Economic Powers Act (IEEPA),<sup>145</sup> which was fashioned to limit the emergency powers available to the president during peacetime.<sup>146</sup> The avowed purposes of the act are to “bring us back another measure toward Government as the Founders intended” and “to conform the conduct of future emergencies to the constitutional doctrine of checks and balances.”<sup>147</sup> Notwithstanding those noble ends, since the passage of IEEPA, there has been an explosive growth in the number of declared national emergencies.

President Clinton's use of executive orders to generate multiple concurrent states of

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**Congress needs to take more effective action to check presidential usurpations of legislative power and restore the constitutional structure of government.**

national emergency demonstrates clearly that the Watergate-era statutes have failed to restore the separation of powers and the constitutional structure of government. Under IEEPA, for example, Clinton has declared national emergencies that have enabled him to prevent U.S. residents from providing humanitarian aid to various groups he disfavors. He has declared a national emergency (annually renewed) with regard to UNITA (anti-communist participants in the Angolan civil war who had received support during the Reagan administration),<sup>148</sup> certain residents of Bosnia-Herzegovina,<sup>149</sup> certain groups identified as Middle Eastern terrorists,<sup>150</sup> Colombian drug traffickers,<sup>151</sup> certain Cubans,<sup>152</sup> certain Burmese,<sup>153</sup> and certain Sudanese.<sup>154</sup> Obviously, there is no objective standard defining what constitutes a national emergency—but surely the United States faces no significant national security risk from UNITA, Burma, or Sudan. Previously, President Bush had followed the same path in order to ban aid to certain Iraqis, Haitians, and Yugoslavians.<sup>155</sup>

Congress needs to take more effective action to check presidential usurpations of legislative power and restore the constitutional structure of government. Congress has such power: it may modify or revoke all presidential directives except those undertaken pursuant to constitutional powers, such as the power to pardon, that are vested in the president.

**Legislative Proposals**

Given that the congressional efforts of a quarter of a century ago to limit presidential exercises of war and emergency powers have all failed, Congress should now take a more direct approach: it should circumscribe presidential power by dramatically reducing the authority it has statutorily delegated to the executive branch.<sup>156</sup> There are currently two proposals before Congress that aim at accomplishing that: House Concurrent Resolution (HCR) 30, cosponsored by Rep. Jack Metcalf (R-Wash.) and 75 other representatives; and the newly introduced HR

2655, cosponsored by Reps. Ron Paul (R-Tex.) and Metcalf.

*HCR 30.* In the 106th Congress, Representative Metcalf has reintroduced a proposal similar to one he introduced in the 105th Congress. HCR 30 purports to limit the force and effect of executive orders that infringe on congressional powers enumerated in Article I, section 8; or Article I, section 9, clause 7 (“No funds shall be expended except as appropriated by law”) of the Constitution. HCR 30 states in its entirety:

To express the sense of the Congress that any Executive order that infringes on the powers and duties of the Congress under article I, section 8 of the Constitution, or that would require the expenditure of Federal funds not specifically appropriated for the purpose of the Executive order, is advisory only and has no force or effect unless enacted as law.

Whereas some Executive orders have infringed on the prerogatives of the Congress and resulted in the expenditure of Federal funds not appropriated for the specific purposes of those Executive orders: Now, therefore, be it

*Resolved by the House of Representatives (the Senate concurring),* That it is the sense of the Congress that any Executive order issued by the President before, on, or after the date of the approval of this resolution that infringes on the powers and duties of the Congress under article I, section 8 of the Constitution, or that would require the expenditure of Federal funds not specifically appropriated for the purpose of the Executive order, is advisory only and has no force or effect unless enacted as law.

Any effort to curtail the usurpation of legislative powers by the president should be

welcomed, and HCR 30 has helped focus attention on the problem. But even if passed, the resolution would not remedy the problem—and could even divert attention from a real solution.

Since HCR 30 has been introduced as a concurrent resolution, its passage would not have the force of law. Concurrent resolutions are not presented to the president for signature; they represent the sense of Congress only. They “are to be used for such purposes as to correct the enrollment of bills and joint resolutions, to create joint committees, to print documents, hearings, and reports, and so forth.”<sup>157</sup>

Another concern with HCR 30 is that the purported limitation on expenditures is not self-enforcing. The president can easily assert that the “purpose” of any given executive order is harmonious with prior appropriations.

Finally, HCR 30 could be easily evaded. There are many types of presidential directives; HCR 30 applies to only one: executive orders. Or, in the alternative, if HCR 30 is intended to affect all presidential directives, the resolution fails to adequately define the object of its regulation. An effective remedy must address the great creativity presidents have demonstrated in imposing their policies on the country without benefit of constitutional or statutory authority.

*HR 2655.* Given those limitations, a more conventional legislative measure has just been introduced under the sponsorship of Representatives Paul and Metcalf, HR 2655, the Separation of Powers Restoration Act. Following the approach taken by Congress in 1976 in the National Emergencies Act, HR 2655 would eliminate the powers of the president and his subordinates that are derived from currently existing declarations by terminating all such declarations. Further, under HR 2655 the authority to declare national emergencies would be vested exclusively in Congress, making it impossible for one person, by the mere stroke of a pen, to plunge the nation into a state of emergency.

HR 2655 also requires that all presidential directives identify the specific constitutional

or statutory provision that empowers the president to take the action embodied in the directive, failing which the directive is deemed invalid. In addition, the application and legal effect of any directive that does cite such authority are limited to the executive branch unless the cited authority does in fact authorize the embodied action. And, HR 2655 would establish, for the first time, a statutory definition of a presidential directive.

Finally, recognizing that federal courts have severely limited standing to challenge presidential directives, the bill would grant standing (1) to members of Congress if the directive infringes on congressional power, exceeds a congressional grant of power, or fails to state any authority; (2) to state and local officials if the directive infringes on their legitimate powers; and (3) to “any person aggrieved in a liberty or property interest adversely affected directly by the challenged Presidential order.”

Solving the problem of presidential law-making by statute will doubtless require overriding a presidential veto; but if that can be done, the result will be more sure and lasting than any attempt by concurrent resolution. Such a statute would provide a powerful weapon for members of Congress and others to wield to defend their authority and their rights under the Constitution, even if the courts must ultimately give force to the restraints the statute spells out. If our system of constitutional checks on power is to be preserved, Congress cannot, for the sake of expediency or efficiency, continue to ignore, much less assist, presidential efforts to circumvent those checks. Powers were separated not to make government more efficient but to restrain the natural bent of men, even presidents, to act as tyrants.

## Conclusion

St. George Tucker, a prominent early American jurist, understood well the point at issue in both the division and the separation of powers:

**Powers were separated not to make government more efficient but to restrain the natural bent of men, even presidents, to act as tyrants.**

**Congress, the states, and the courts must perform their duties under our system of divided and separated powers.**

Power thus divided, subdivided, and distributed into so many separate channels, can scarcely ever produce the same violent and destructive effects, as where it rushes down in one single torrent, overwhelming and sweeping away whatever it encounters in its passage.<sup>158</sup>

In our own century, the point was well stated by Justice Louis Brandeis:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.<sup>159</sup>

Over the 20th century, presidential power has too often rushed down in a single torrent. If we are to be saved from the autocracy that follows, Congress, the states, and the courts must perform their duties under our system of divided and separated powers. Of late we have seen the beginnings of that. We need to see more.

## Notes

1. 144 *Congressional Record*, December 18, 1998, H11817.

2. House Committee on Resources, *Establishment of the Grand Staircase–Escalante National Monument by President Clinton on September 18, 1996: Hearing before the House Committee on Resources*, 105th Cong., 1st sess., April 29, 1997, p. 12.

3. Elizabeth Shogren, “Clinton to Bypass Congress in Blitz of Executive Orders,” *Los Angeles Times*, July 4, 1998, p. A1.

4. William Jefferson Clinton, “Clinton Says He Will Use ‘Authority of the Presidency’ to Press Agenda,” White House bulletin, July 6, 1998. Notwithstanding Clinton’s aggressive rhetoric, and the scope of many of his efforts, his use of

executive orders, measured simply by the numbers, has not been out of line with that of several of his predecessors. See Table 1.

5. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938), quoted in *U.S. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996).

6. Michael H. LeRoy, “Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements,” *Boston College Law Review* 37 (1996): 279–80.

7. *Federal Property and Administrative Services Act*, 40 U.S.C. § 471 et seq.

8. *Reich*.

9. *Ibid.* at 1332.

10. *Ibid.* at 1333.

11. *Ibid.* at 1337.

12. House Committee on Resources, *Behind Closed Doors: The Abuse of Trust and Discretion in the Establishment of the Grand Staircase–Escalante National Monument*, Committee on Resources Report, 105th Cong., 1st sess., November 7, 1997, <http://www.house.gov/resources/105cong/parks/staircase.htm>. See also 142 *Congressional Record*, September 18, 1996, S10827–31, September 20, 1996, S11084–87, and September 30, 1996, S11832–33.

13. House Committee on Resources, *Behind Closed Doors*. In March 1997 the committee requested that the administration supply documentation about the identification and designation of this national monument. The request was ignored, as was an October 1997 subpoena. As a contempt resolution was being drafted, the documents were finally supplied.

14. Kathleen McGinty, Draft letter to Secretary of the Interior Bruce Babbitt, March 19, 1996. *Ibid.*

15. Jim Rayburn and Jerry Spengler, “Counties’ Suit over Staircase Advances,” *Deseret News*, August 18, 1999, *Deseret News Archives*, [http://www.desnews.com/cgi-bin/libstory\\_reg?dn99&9908180134](http://www.desnews.com/cgi-bin/libstory_reg?dn99&9908180134).

16. See, for example, David Almasi, “American Heritage Rivers: A Trojan Horse,” *Washington Times*, July 25, 1997.

17. House Committee on Resources, *Oversight Hearing on the Clinton Administration’s American Heritage Rivers Initiative* [“AHRI Hearings”]: *Hearing before the House Committee on Resources*, 105th Cong., 1st sess.,

July 15, 1997, p. 21, [http://\\_commdocs.house.gov/committees/resources/hii42836.000/hii42836\\_of.htm](http://_commdocs.house.gov/committees/resources/hii42836.000/hii42836_of.htm).

18. *Ibid.*, pp. 100–101, response of Kathleen McGinty.

19. “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”

20. AHRI Hearings, p. 3.

21. *Ibid.*, p. 64

22. House Committee on Resources, *Terminate Further Development and Implementation of the American Heritage Rivers Initiative*, 105th Cong., 2d sess., October 6, 1998, H. Rept. 105–781, pp. 2–3.

23. *Raines v. Byrd*, 521 U.S. 811 (1997).

24. EO 12612, sec. 2(i).

25. *Ibid.*, sec. 3(b)(2).

26. EO 13083, sec. 3(d).

(1) When the matter to be addressed by Federal action occurs interstate as opposed to being contained in one State’s boundaries; (2) When the source of the matter to be addressed occurs in a State different from the State (or States) where a significant amount of the harm occurs; (3) When there is a need for uniform national standards; (4) When decentralization increases the costs of government thus imposing additional burdens on the taxpayer; (5) When States have not adequately protected individual rights and liberties; (6) When States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other States; (7) When placing regulatory authority at the State or local level would undermine regulatory goals because high costs or demands for specialized expertise will effectively place the regulatory matter beyond the resources of State authorities; (8) When the matter relates to federally-owned or managed property or natural resources, trust obligations, or international obligations; and (9) When the matter to be regulated significantly or uniquely affects Indian tribal governments.

27. Mike Leavitt, Statement at Hearing before the House Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, 105th Cong., 2d sess., July 28, 1998.

28. See, for example, Fred Thompson, “Big-Government Power Grab,” *Washington Post*, August 7, 1998, p. A25.

29. See, for example, Sen. Fred Thompson, “Thompson Reacts to Administration’s New Federalism Order: Calls on White House to Support Federalism Legislation.” Press release, August 5, 1999. Among other things, Senator Thompson notes that the new order requires agencies issuing new regulations to conduct “Federalism Summary Impact Statements” only when the regulations are “not required by statute.” “But most of the important rules that concern state and local government—and everyone else—are required by statute,” Thompson points out, which means that that requirement in the order will come to almost nothing.

30. To deal with issues of national security and foreign policy, presidents issue classified executive orders. Clinton’s are known as presidential decision directives (PDDs). The public learns about such orders, for the most part, only from veiled references during White House press briefings, the release of sanitized summaries, and, occasionally, the disclosure by the National Security Council of incomprehensible redacted versions in response to Freedom of Information Act requests. Members of Congress have complained that they too are denied access to classified PDDs. One PDD (no. 8, June 10, 1993), relating to the declassification of POW/MIA records, was never classified, apparently, and has been publicly released. Portions of a PDD on counterterrorism (PDD, no. 39, June 21, 1995) were voluntarily disclosed in response to a Freedom of Information Act request. Another classified PDD (no. 17, December 11, 1993) was, to the consternation of the Clinton administration, published in a recent book (Bill Gertz, *Betrayal*, Regnery, 1999). The best available source of information on PDDs is the Web site of the Federation of American Scientists, <http://www.fas.org>.

31. See, generally, Cliff Kincaid, “How Clinton Waged War through Executive Order,” <http://www.usasurvival.org>.

32. James Bennet, “True to Form, Clinton Shifts Energies Back to U.S. Focus,” *New York Times*, July 5, 1998, sec. 1, p. 10. A complete list, to date, of Clinton’s 304 executive orders can be found in Appendix 1 of the electronic version of this study, which is posted at the Cato Institute Web site, [www.cato.org](http://www.cato.org).

33. Executive orders and proclamations are the best known of the 24 types of presidential directive: administrative orders, certificates, designations of officials, executive orders, general licens-

es, interpretations, letters on tariffs and international trade, military orders, national security action memoranda, national security council papers, national security decision directives, national security decision memoranda, national security directives, national security reviews, national security study memoranda, presidential announcements, presidential decision directives, presidential directives, presidential findings, presidential reorganization plans, presidential review directives, presidential review memoranda, proclamations, and regulations. See Harold C. Relyea, *Presidential Directives: Background and Review* (Washington: Congressional Research Service, 1998), table of contents. Several of those forms of directive have not been used extensively. *Ibid.*, pp. CRS-4, CRS-6, CRS-7.

This study follows Congressional Research Service practice and refers to such instruments as “presidential directives.”

34. President Abraham Lincoln issued the first presidential directive to be formally designated an “executive order.” That October 20, 1862, order established federal courts in parts of Louisiana held by federal troops. Senate Special Committee on National Emergencies and Delegated Emergency Powers, *Executive Orders in Times of War and National Emergency*, 93rd Cong., 2d sess., 1974, Committee Print, p. 2.

35. See, for example, *Federalist* 48 (Madison), student ed. (Dubuque, Iowa: Kendall-Hunt Publishing, 1990), p. 256.

36. See M. J. C. Vile, *Constitutionalism and the Separation of Powers*, 2d ed. (Indianapolis, Ind.: Liberty Fund, 1998) for perhaps the most comprehensive treatment of this fundamental constitutional doctrine.

37. John Locke, “An Essay concerning the True Original Extent and End of Civil Government” (1690), chap. 18, sec. 199, in John Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1997), p. 398. Emphasis in the original.

38. John Contrubis, *Report for Congress: Executive Orders and Proclamations*, Congressional Research Service, 1995, p. CRS-1. However, a bill pending in Congress, HR 2655, would establish a statutory definition. See discussion on HR 2655 later in this paper.

39. 49 Stat. 501.

40. Senate Special Committee on National Emergencies, *Executive Orders in Times of War*, p. 5.

41. *Ibid.*, p. 3.

42. William Jefferson Clinton, “Privately Funded

Abortions at Military Hospitals,” Memorandum for the Secretary of Defense, in *Weekly Compilation of Presidential Documents*, January 22, 1993, <http://www.pub.whitehouse.gov/uri-.../oma.eop.gov.us/1993/1/26/1.text1>.

43. William Jefferson Clinton, “We Must Free Science and Medicine from the Grasp of Politics,” Remarks by the President during Signing of Presidential Memoranda, in *Weekly Compilation of Presidential Documents*, January 22, 1993, <http://www.pub.whitehouse.gov/uri-.../oma.eop.gov.us/1993/1/25/1.text1>.

44. William Jefferson Clinton, “AID Family Planning Grants/Mexico City Policy,” Memorandum for the Acting Administrator of the Agency for International Development, in *Weekly Compilation of Presidential Documents*, January 22, 1993, <http://www.pub.whitehouse.gov/uri-.../oma.eop.gov.us/1993/1/25/3.text1>.

45. William Jefferson Clinton, “Importation of RU-486,” Memorandum for the Secretary of Health and Human Services, in *Weekly Compilation of Presidential Documents*, January 22, 1993, <http://www.pub.whitehouse.gov/uri-.../oma.eop.gov.us/1993/1/26/2.text1>.

46. William Jefferson Clinton, “Gun Dealer Licensing,” Memorandum for the Secretary of the Treasury, in *Weekly Compilation of Presidential Documents*, August 11, 1993, <http://www.pub.whitehouse.gov/uri-.../oma.eop.gov.us/1993/8/11/4.text1>.

47. Senate Special Committee on National Emergencies, *Executive Orders in Times of War*, p. 6.

48. Most Supreme Court cases involving presidential directives address the substantive effect of the directive; rarely do the cases reach the legality or constitutionality of the issuance of the directive itself. *Ibid.*, p. 36.

49. *Korematsu v. United States*, 343 U.S. 214, 248 (1944) (Jackson, J. dissenting).

50. *Armstrong v. United States*, 80 U.S. 154, 156 (1871).

51. “An act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions.” 1 Stat. 264–65. The president could call out the militia of a state to suppress insurrections by “combinations too powerful to be suppressed by the ordinary course of judicial proceedings.” *Ibid.*

52. The president’s power “to call forth and employ such members of the militia of any other State or States . . . as may be necessary” was available only “if the Legislature of the United States



shall not be in session.” Ibid. A successor statute, which does not limit the president’s power to calling out the militia only when Congress is not in session, is found at 10 U.S.C. § 332.

53. 300 U.S. 139.

54. “[A]gency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 295–96 (1979).

55. *Letter Carriers v. Austin*, 418 U.S. 264, 273 (1974). Inexplicably, a federal appeals court subsequently stated that EO 11491 “cannot attain the status as a ‘law of the United States.’” *Local 1498, American Federation of Government Employees v. American Federation of Government Employees, AFL/CIO*, 522 F.2d 486, 491 (3d Cir. 1975).

56. Senate Special Committee on National Emergencies, *Executive Orders in Times of War*, p. 31.

57. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

58. President Reagan also implemented the terms of a treaty the Senate had rejected. In *The Conservative Caucus v. Reagan*, C.A. No. 84-183, U.S. District Court for the District of Columbia, the plaintiff sought to prevent Secretary of Defense Casper Weinberger from unilaterally implementing, pursuant to a secret executive agreement, the unratified SALT II treaty. Reagan had been frustrated by opposition to the treaty, led by Sen. Jesse Helms (R-N.C.). Determined to implement the SALT II agreement, Reagan administratively thwarted the Senate’s constitutional role. The suit was dismissed in the U.S. District Court on the basis of a finding that the plaintiff lacked standing to bring suit.

59. 182 U.S. 222.

60. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). Implementation aside, executive orders are also subject to direct constitutional challenge. In *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984), the Court of Appeals determined that EO 10422 (issued by President Truman), as applied to the plaintiff Ozonoff, violated the First Amendment. Ozonoff sought a position with the World Health Organization; under EO 10422, loyalty investigations were conducted of Americans seeking to work at the United Nations or with other public international organizations, including the World Health Organization, that enter into special loyalty screening agreements with the United States.

61. *Chrysler Corp. v. Brown*, 441 U.S. 281, 307–8 (1979). Applying *Chrysler*, the U.S. Court of

Appeals for the Fourth Circuit ruled that the federal government lacked statutory authority to apply EO 11246 to the Liberty Mutual Insurance Company, which underwrites workers’ compensation insurance for many companies that contract with the government. *Liberty Mutual Insurance Company v. Friedman*, 639 F.2d 164 (4th Cir. 1981).

62. Appendix 3 of the electronic version of this study, posted at the Cato Institute Web site ([www.cato.org](http://www.cato.org)), is a list of executive orders later modified or revoked by legislation.

63. Relyea, *Presidential Directives*, CRS-1. Emphasis omitted.

64. 1 *Annals of Cong.* 90, 92, 949–50 (Joseph Gales, ed., 1789).

65. Ibid.

66. See the discussion in *Myers v. United States*, 272 U.S. 52, 137–39 (1926).

67. 1 Stat. 381–84.

68. Contrubis, *Report for Congress*, CRS-24 through CRS-25.

69. Ibid., p. CRS-24.

70. Abraham Lincoln, Letter to William H. Herndon, February 15, 1848. Quoted in *Respectfully Quoted*, ed. Suzy Platt (Washington: Library of Congress, 1989), p. 281. Emphasis in the original.

71. Lincoln’s proclamation of April 15, 1861, may have had an unasserted statutory basis. Although the proclamation did not cite any statutory authority, it called for 75,000 militia to suppress “combinations” against the laws of the United States and to execute those laws. Thus, the proclamation may have relied on “An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the Act now in force for these purposes.” 1 Stat. 424–25 (February 28, 1795).

President Lincoln commanded “the persons composing the aforesaid combinations to disperse,” possibly pursuant to section 3 of that statute, which said that “whenever it may be necessary, in the judgment of the President, to use the military force hereby directed to be called forth, the President shall forthwith, by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time.” Ibid.

72. See *The Prize Cases*, 67 U.S. 635, 684 (1863) (Nelson, J., dissenting).

73. Act of Congress of July 13, 1861, *ibid.* at 695.
74. *Ibid.* at 695.
75. Abraham Lincoln, "To the Senate and House of Representatives, May 26, 1862," reprinted in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler et al. (New Brunswick, N.J.: Rutgers University Press, 1953), 5:241, quoted in Jill E. Hasday, "Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War," *Kansas Journal of Law and Public Policy* 5 (1996): 130.
76. Senate Special Committee on National Emergencies and Delegated Emergency Powers, *A Brief History of Emergency Powers in the United States*, 93rd Cong., 2d sess., 1974, Committee Print, p. 12.
77. "An Act to increase the Pay of the Privates in the Regular Army and in the Volunteers in the Service of the United States, and for other Purposes" (August 6, 1861), quoted in Hasday, p. 130.
78. Senate Special Committee on National Emergencies, *Brief History of Emergency Powers*, pp. 12–13.
79. *Swayne & Hoyt v. United States*, 300 U.S. 297 (1937). Citations omitted, ellipsis in original.
80. The Supreme Court has identified an extra-constitutional presidential "war power" over conquered territory, and that directive exists until the ratification of a treaty of peace. See, for example, *Dooley v. United States*, 182 U.S. 222 (1901).
81. A July 22, 1862, draft of the Emancipation Proclamation cited a statutory authority. It began: "In pursuance of the sixth section of the Act of Congress entitled 'An Act to suppress insurrection and to punish treason and rebellion, to seize and confiscate property of rebels, and for other purposes' approved July 17, 1862, and which Act, and the Joint Resolution explanatory thereof, are herewith published, I, Abraham Lincoln, President of the United States, do hereby proclaim to, and warn all persons. . . ." <http://lcweb.loc.gov/exhibits/treasures>.
82. James Bryce, *The American Commonwealth* (London: Macmillan and Co., 1891), 1:60.
83. Henry Adams, "The Session," *North American Review* 111 (1870): 60, quoted in Forrest McDonald, *The American Presidency*, (Lawrence: University Press of Kansas, 1994), p. 315.
84. *Ibid.*, p. 320.
85. David Watson, *The Constitution of the United States, Its History, Application and Construction* (Chicago: Callaghan & Co., 1910), p. 930n, quoting from his interview with Hayes.
86. McKinley's predecessor, President Grover Cleveland, issued 71 executive orders (second term), while President Benjamin Harrison issued only 6. *Ibid.*
87. Senate Special Committee on National Emergencies, *Executive Orders in Times of War*, pp. 26–27.
88. Theodore Roosevelt, *An Autobiography* (New York: Scribner, 1926), quoted in Senate Special Committee on National Emergencies, *Brief History of Emergency Powers*, p. 2.
89. *Ibid.*
90. Frederick Drinker and Jay Mowbray, *Theodore Roosevelt, His Life and Work* (Washington: National Publishing Co., 1919), p. 201.
91. *Ibid.*, p. 181. In Roosevelt's defense, it was stated that President Cleveland had previously taken the same action by presidential directive with regard to Mexican War veterans.
92. Senate Special Committee on National Emergencies, *Brief History of Emergency Powers*, p. 41.
93. Senate Special Committee on National Emergencies and Delegated Emergency Powers, *Emergency Powers Statutes*, SR 93-549, 93d Cong., 1st sess. (Washington: Government Printing Office, 1974), p. 2.
94. Senate Committee on Government Operations and Special Committee on National Emergencies and Delegated Emergency Powers, *The National Emergencies Act*, 94th Cong., 2d sess., 1976, Committee Print, p. 1. Once a state of national emergency had been declared, statutory provisions that delegated extraordinary authority to the president became activated.
95. Senate Special Committee on National Emergencies, *Executive Orders in Times of War*, p. 25.
96. Senate Committee on Government Operations, *National Emergencies Act*, p. 1.
97. The Knox Resolution, 41 Stat. 1359, reprinted in House Committee on International Relations, *Trading with the Enemy: Legislative and Executive Documents concerning Regulation of International Transactions in Time of Declared National Emergency*, 94th Cong., 2d sess., 1976, Committee Print, pp. 235–36. Only the Trading with the Enemy Act, The Food Control and District of Columbia Rents Act, several Liberty Bond and Liberty Loan acts, and a joint resolution directing the War Finance Corporation to relieve an agricultural depression

survived the end of the Wilson administration.

98. First Inaugural Address of President Franklin Delano Roosevelt, reproduced in *War and Emergency Powers*, ed. Paul Bailey (Campo, Colo.: American Agriculture Movement, 1994), p. 58.

99. Note: “The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power,” *Harvard Law Review* 96 (1983): 1114, note 61.

100. Sections 5 and 6 of the Trading with the Enemy Act (1917) were reprinted in Senate Special Committee on the Termination of the National Emergency, Hearings, 93rd Cong., 1st sess., April 11–12, 1973, pp. 101–2.

101. The National Emergencies Act, enacted September 14, 1976, terminated executive powers authorized under existing states of national emergency as of September 14, 1978. The next state of national emergency was declared 14 months later by President Jimmy Carter, on November 14, 1979, during the Iranian hostage situation. Since then, the United States has been constantly under a declared state of emergency. At present, 13 presidentially declared states of emergency exist concurrently.

102. The Emergency Banking Relief Act (EBRA) (March 9, 1933), *inter alia*, amended TWEA. The Emergency Banking Relief Act is reprinted in Senate Special Committee on the Termination of the National Emergency, Hearings, pp. 231–38.

103. Section 5(b) of the 1917 TWEA reads as follows:

That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, export or earmarking of gold or silver coin or bullion or currency, transfers of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfer of evidences of indebtedness or of the ownership of property between the United States and any foreign country, whether enemy, ally of enemy, or otherwise, or between residents of one or more foreign countries, by any person within the United States; and he may require any such person engaged in any such transaction to furnish, under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either

before or after such transaction is completed.

The Act of September 24, 1918, inserted provisions relating to hoarding or melting of gold or silver coin or bullion or currency and to regulation of transactions in bonds or certificates of indebtedness.

104. The Emergency Banking Relief Act is reprinted in Senate Special Committee on the Termination of the National Emergency, Hearings, p. 231. In Senate debate, Sen. Arthur Robinson (R-Ind.) suggested that the words “or hereafter” be stricken. Sens. George Norris (R-Neb.) and David Reed (R-Pa.) argued that the language should remain in the bill, on the theory that it was “mere surplusage.” House Committee on International Relations, *Trading with the Enemy*, pp. 243–44.

105. Senate Special Committee on the Termination of the National Emergency, Hearings, p. 238.

106. 12 U.S.C. § 95b. Since 1977 this power has been limited to “the time of war.” PL 95-223.

107. Senate Special Committee on National Emergencies, *Brief History of Emergency Powers*, p. 57. The Senate debated the bill for eight hours. Senate Special Committee on the Termination of the National Emergency, *Review and Manner of Investigating Mandate Pursuant to S. Res. 9, 93rd Congress*, 93rd Cong., 1st sess., 1973, Committee Print, p. 11.

108. *Ibid.* Rep. Bertrand Snell (R-N.Y.) observed that “it is entirely out of the ordinary to pass legislation in this House that, as far as I know, is not even in print at the time it is offered.” House Committee on International Relations, *Trading with the Enemy*, p. 248.

109. The National Defense Mediation Board was established by EO 8716 (March 19, 1941) to mediate labor disputes that, in the view of the secretary of labor, could threaten the national defense.

110. LeRoy, pp. 236–43.

111. *Ibid.*, pp. 240–41.

112. *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81, 91 (1943). See also *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944).

113. 88 *Congressional Record*, 1942, 7044, quoted in Henry P. Monaghan, “The Protective Power of the Presidency,” *Columbia Law Review* 93 (1993): 29. Roosevelt objected to a provision of the Emergency Price Control Act.

114. Relyea, *Presidential Directives*. In 1935, undoubtedly in response to Roosevelt’s rule by

presidential directive, Congress enacted a requirement that future proclamations and executive orders of general applicability be published in the *Federal Register*. 44 U.S.C. § 1505.

115. LeRoy, p. 244.

116. *United States v. United Mine Workers of America*, 330 U.S. 258 (1947).

117. *Ibid.* at 263.

118. *Ibid.* at note 1. According to the Court, the act permitted the seizure of facilities necessary under the war effort until hostilities formally ceased; Truman declared the end of hostilities by proclamation on December 31, 1946.

119. *Youngstown Sheet & Tube*. See also the discussion in LeRoy, pp. 245–46.

120. *Youngstown Sheet & Tube* at 585.

121. *Ibid.*

122. *Ibid.* at 586.

123. *Ibid.* at 587–88.

124. *Ibid.* at 588–89.

125. *Ibid.* at 655.

126. *Ibid.* at 650.

127. *Ibid.* at 655.

128. *Ibid.* at 636.

129. *Ibid.* at 637.

130. *Ibid.*

131. *Ibid.* at 609.

132. *Ibid.* at 613.

133. Extensive excerpts from the *Youngstown* and *Reich* opinions can be found in Appendix 2 of the electronic version of this study, posted at the Cato Institute Web site, [www.cato.org](http://www.cato.org).

134. Section 8 of the order purported to “ratify” EOs 12276 through 12285 of January 19, 1981, issued by President Jimmy Carter.

135. *Regan* at 688. EO 12294 is either a usurpation of legislative power or an example of tyranny, depending on one’s interpretation as to whether Article III, section 2, clause 2 grants Congress authority to suspend or limit access to the federal courts on a particular subject matter. See *Ex parte McCordle*, 74 U.S. 506 (1869), where the Supreme Court refused to hear McCordle’s case after

acknowledging jurisdiction, because Congress had subsequently withdrawn the Court’s jurisdiction over the case.

136. Senate Committee on Government Operations, *National Emergencies Act*, pp. 3–9. The Special Committee, chaired by Sens. Frank Church (D-Idaho) and Charles Mathias Jr. (R-Md.), determined that proclamations of national emergency gave force to 470 provisions of federal law. *Ibid.*, p. 5. The committee issued SR 93-549, which listed “all provisions of Federal law, except the most trivial, conferring extraordinary powers in time of national emergency.”

137. *Ibid.*, p. 6.

138. 50 U.S.C. §§ 1601–51.

139. *Ibid.*, § 1601.

140. *Ibid.*, § 1621.

141. *Ibid.*, § 1622. A joint resolution of Congress is the functional equivalent of a bill; both must be presented to the president for his signature. If vetoed, the joint resolution cannot become effective unless both the House and the Senate override the veto. Joint resolutions have statutory authority. (Riddick’s Senate Procedure, rev. ed. [Washington: Government Printing Office, 1992], p. 225.) The National Emergencies Act also made the following provision: “Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.”

142. 50 U.S.C. § 1631.

143. *Ibid.*, § 1641. Such reports, in the form of letters to Congress, are reproduced in, among other places, *The Weekly Compilation of Presidential Documents*. See, for example, letters to congressional leaders dated January 21, 1998 (Middle Eastern terrorists); February 25, 1998 (Cuba); March 4, 1998 (Iran I); May 18, 1998 (Burma); July 28, 1998 (Iraq); August 13, 1998 (Export Control Regulations); October 19, 1998 (Colombia Drug Traffickers); September 23, 1998 (UNITA); October 27, 1998 (Sudan); November 9, 1998 (Iran II); November 12, 1998 (Weapons of Mass Destruction); May 28, 1998 (Yugoslavia); and December 30, 1998 (Libya). There appear to be two concurrent states of emergency attributed to Iran, as discussed in the March 4, 1998, notice: “Because the emergency declared by Executive Order 12957 constitutes an emergency separate from that declared on November 14, 1979, by

Executive Order 12170, this renewal is distinct from the emergency renewal of October 1997.”

144. *The International Emergency Economic Powers Act*, p. 1105. However, Congress also permitted the president to extend, annually, his authority to exercise certain emergency powers derived from section 5(b) of TWEA, by way of the Foreign Assets Control Regulations (31 C.F.R. § 500, et seq.), the Transaction Control Regulations (31 C.F.R. § 505), and the Cuban Assets Control Regulations (31 C.F.R. § 515). Not surprisingly, such authority has been faithfully extended annually for more than 20 years. See, for example, Presidential Determination no. 98-35, 63 *Federal Register*, 50455 (September 11, 1998); Presidential Determination no. 97-32, 62 *Federal Register*, 48729 (September 12, 1997); and Presidential Determination no. 96-43, 61 *Federal Register*, 46529 (August 27, 1996); the first extension was obtained by President Carter, 43 *Federal Register*, 40449 (September 8, 1978).

145. 50 U.S.C. §§ 1701–6.

146. *The International Emergency Economic Powers Act*, pp. 1105–6.

147. *Ibid.*, p. 1106, note 20.

148. EO 12865 (September 26, 1993).

149. EO 12934 (October 25, 1994).

150. EO 12947 (January 23, 1995).

151. EO 12978 (October 21, 1995).

152. Proclamation 6867 (March 1, 1996).

153. EO 13047 (May 22, 1997).

154. EO 13067 (November 3, 1997).

155. EO 12722 (August 2, 1990); EO 12775 (October 4, 1991); and EO 12808 (May 30, 1992).

156. As the Senate Special Committee on National Emergencies and Delegated Emergency Powers observed, “[T]he institutional checks designed to protect the guarantees of the Constitution and Bill of Rights are significantly weakened by the growing tendency to give the President grants of extraordinary power without provision for effective congressional oversight, or without any limitation upon the duration for which such awesome powers may be used.” Senate Special Committee on National Emergencies, *Executive Orders in Times of War*, pp. 8–9.

157. Riddick’s Senate Procedure, p. 1202.

158. *Ibid.*, p. 48.

159. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

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