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Executive Orders: Issuance and Revocation

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Summary

Executive orders and proclamations are used extensively by Presidents to achieve policy goals, set uniform standards for managing the Executive Branch, or outline a policy view intended to influence the behavior of private citizens. The Constitution does not define these presidential instruments, and does not explicitly vest the President with the authority to issue them. Nonetheless, such orders are accepted as an inherent aspect of presidential power, and, if based on appropriate authority, they have the force and effect of law. This report discusses the nature of executive orders and proclamations, with a focus on the scope of presidential authority to execute such instruments and judicial and congressional responses thereto.

Definition and Authority

The Constitution does not contain any provisions that define executive orders or proclamations. The most widely accepted description appears to be that of the House Government Operations Committee in 1957: "Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law.... In the narrower sense Executive orders and proclamations are written documents denominated as such.... Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly. Proclamations in most instances affect primarily the activities of private individuals. Since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President's proclamations are not legally binding and are at best hortatory unless based on such grants of authority. The difference between Executive orders and proclamations is more one of form than of substance....[1]

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

In addition to executive orders and proclamations, Presidents often issue "presidential memoranda." The distinction of these instruments from executive orders and proclamations is likewise more a matter of form than of substance. Specifically, all three instruments can be employed to direct and govern the actions of Government officials and agencies. Further, if issued under a valid claim of authority and published, all three may have the force and effect of law, requiring courts to take judicial notice of their existence.[2] Indeed, it would appear that the only technical difference between executive orders and proclamations in relation to presidential memoranda is that the former must be published in the Federal Register, while the latter are published only when the President determines that they have "general applicability and legal effect."[3]

Just as there is no definition of executive orders and proclamations in the Constitution, there is, likewise, no specific provision authorizing their issuance. As such, authority for the execution and implementation of executive orders stems from implied constitutional and statutory authority. In the constitutional context, presidential power to issue such orders has been derived from Article II, which states that "the executive power shall be vested in a President of the United States," that "the President shall be Commander in Chief of the Army and Navy of the United States," and that the President "shall take care that the laws be faithfully executed."[4] The President's power to issue executive orders and proclamations may also derive from express or implied statutory authority.[5] Irrespective of the implied nature of the authority to issue executive orders and proclamations, these instruments have been employed by every President since the inception of the Republic.

Despite the amorphous nature of the authority to issue executive orders, Presidents have not hesitated to wield this power over a wide range of often controversial subjects.[6] This broad usage of executive orders to effectuate policy goals has led some commentators to complain that many such orders constitute executive lawmaking that impacts the interests of private citizens and encroaches upon congressional power.[7] The controversial nature of many presidential directives thus raises questions regarding whether and how executive orders may be amended or revoked.

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[2] *Armstrong v. United States*, 80 U.S. 154 (1871); *see also, Farkas v. Texas Instrument, Inc.*, 372 F.2d 629 (5th Cir. 1967); *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3 (3rd Cir. 1964); *Jenkins v. Collard*, 145 U.S. 546, 560-61 (1893).

[3] 44 U.S.C. §1505. The Federal Register Act requires that executive orders and proclamations be published in the Federal Register. *Id.* Furthermore, executive orders must comply with preparation, presentation and publication requirements established by an executive order issued by President Kennedy. *See* Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962).

[4] U.S. Const., Art. II, §1, 2, & 3. *See* Orders and Proclamations, *supra* n. 1, at 6-12.

[5] *See Youngstown Sheet and Tube Co. v. Sawyer* 343 U.S. 579 (1952).

[6] *See* Louis Fisher, Executive Orders and Proclamations, 1933-99: Controversies with Congress and in the Courts, Congressional Research Service Report No. RL30264 (July 23, 1999).

[7] *See* William J. Olson and Alan Woll, Policy Analysis, Executive Orders and National Emergencies: How Presidents Have Come to "Run the Country" by Usurping Legislative Power, Cato Institute, Oct. 28, 1999.

Judicially Enforced Limitations

The proper framework for analyzing executive orders in the judicial context may be found in *Youngstown Sheet & Tube Co. v. Sawyer*.[8] There, the Supreme Court dealt with President Truman's executive order directing the seizure of steel mills, which was issued in an effort to avert the effects of a workers' strike during the Korean War. Invalidating this action, the majority held that under the Constitution, "the President's power to see that laws are faithfully executed refutes the idea that he is to be a lawmaker."[9] Specifically, Justice Black maintained that Presidential authority to issue such an executive order "must stem either from an act of Congress or from the Constitution itself."[10] Applying this reasoning, Justice Black's opinion for the Court determined that as no statute or Constitutional provision authorized such presidential action, the seizure order was in essence a legislative act. The Court further noted that Congress had rejected seizure as a means to settle labor disputes during consideration of the Taft-Hartley Act. Given this characterization, the Court deemed the executive order to be an unconstitutional violation of the separation of powers doctrine, explaining "the founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[11]

While Justice Black's majority opinion in *Youngstown* seems to refute the notion that the President possesses implied constitutional powers, it is important to note that there were five concurrences in the case, four of which maintained that implied presidential authority adheres in certain contexts.[12] Of these concurrences, Justice Jackson's has proven to be the most influential, even surpassing the impact of Justice Black's majority opinion. Specifically, Jackson established a tri-partite scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority.[13]

Jackson's first category focuses on whether the President has acted according to an express or implied grant of congressional authority. If so, according to Jackson, presidential "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate," and such action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation."[14] Secondly, Justice Jackson maintained that, in situations where Congress has neither granted or denied authority to the President, the President acts in reliance only "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."[15] In the third and final category, Justice Jackson stated that in instances where presidential action is "incompatible with the express

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[8] 343 U.S. 579 (1952).

[9] *Id.* at 587.

[10] *Id.* at 585.

[11] *Id.* at 586-589.

[12] *Id.* at 659 (Burton, J., concurring); *Id.* at 661 (Clark, J., concurring in result only); *Id.* at 610 (Frankfurter, J., concurring); *Id.* at 635 (Jackson, J., concurring).

[13] *Id.* at 635-638.

[14] *Id.* at 635, 637.

[15] *Id.* at 637.

or implied will of Congress," the power of the President is at its minimum, and any such action may be supported pursuant only the President's "own constitutional powers minus any constitutional powers of Congress over the matter."[16] In such a circumstance, presidential action must rest upon an exclusive power, and the Courts can uphold the measure "only by disabling the Congress from acting upon the subject."[17]

Applying this scheme to the case at hand, Justice Jackson determined that analysis under the first category was inappropriate, due to the fact that President Truman's seizure of the steel mills had not been authorized by Congress, either implicitly or explicitly. Justice Jackson also determined that the second category was "clearly eliminated," in that Congress had addressed the issue of seizure, through statutory policies conflicting with the President's actions.[18] Employing the third category, Justice Jackson noted that President Truman's actions could only be sustained by determining that the seizure was "within his domain and beyond control by Congress."[19] Justice Jackson established that such matters were not outside the scope of congressional power, reinforcing his declaration that permitting the President to exercise such "conclusive and preclusive" power would endanger "the equilibrium established by our constitutional system."[20]

These standards remain applicable in the modern era. In 1996, the United States Court of Appeals for the District of Columbia invalidated an executive order issued by President Clinton on the grounds that it conflicted with the National Labor Relations Act (NLRA).[21] The order at issue prohibited federal agencies from contracting with employers that permanently replaced striking employees. Upon determining that the order conflicted with a provision of the NLRA guaranteeing the right to hire permanent replacements during strikes, the court of appeals held that the statute preempted the executive order, stripping it of any effect.[22]

Congressional Revocation

Further, as long as it is not constitutionally based, Congress may repeal a presidential order, or terminate the underlying authority upon which the action is predicated. The most recent example of the express nullification of an executive order by Congress appears to have involved Executive Order 12806.[23] There, Congress revoked an order by President George H.W. Bush to the Secretary of the Department of Health and Human service to establish a human fetal tissue bank for research purposes. To effectuate this repeal, Congress simply directed that the "the provisions of Executive Order 12806 shall not have

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[16] *Id.* at 637.

[17] *Id.* at 637-638.

[18] *Id.* at 638-639.

[19] *Id.* at 640.

[20] *Id.* at 638, 640-645.

[21] *Chamber of Commerce v. Reich*, 74 F.3d 1322 (1996).

[22] *Id.* at 1339.

[23] 3 C.F.R., 1992 Comp., p. 302 (March 19, 1992).

any legal effect."[24] While this seems to be the most recent such action by Congress, there have been numerous similarly revoked executive orders.[25]

Presidential Revocation

Illustrating the fact that executive orders are used to further an administration's policy goals, there are frequent examples of situations in which a sitting President has revoked or amended orders issued by his predecessor. This practice is particularly apparent where Presidents have used these instruments to assert control over and influence the agency rulemaking process. President Ford, for instance, issued Executive Order 11821, requiring agencies to issue inflation impact statements for proposed regulations.[26] President Carter altered this practice with Executive Order 12044, requiring agencies to consider the potential economic impact of certain rules and identify potential alternatives.[27]

Shortly after taking office President Reagan revoked President Carter's order, implementing a scheme asserting much more extensive control over the rulemaking process. Executive Order 12291 directed agencies to implement rules only if "the potential benefits to society for the regulation outweigh the potential costs to society," requiring agencies to prepare a cost-benefit analysis for any proposed rule that could have a significant economic impact.[28] This order was criticized by some as a violation of the separation of powers doctrine, on the grounds that it imbued the President with the power to essentially control rulemaking authority that had been committed to a particular agency by Congress.[29] Despite these concerns, there were no court rulings assessing the validity of President Reagan's order. In turn, President Clinton issued Executive Order 12866, modifying the system established during the Reagan Administration.[30] While retaining many of the basic features of President Reagan's order, E.O. 12866 eased cost-benefit analysis requirements, and recognized the primary duty of agencies to fulfill the duties committed to them by Congress.

It remains to be seen whether President George W. Bush will issue an executive order implementing yet another standard for executive review of agency rulemaking. Nonetheless, President Bush, like his predecessors, has already evinced a willingness to

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[24] P.L. 103-43, 107 Stat. 133, §121. Given the highly speculative basis of any asserted constitutional authority for the President to issue such an order, there appears to be little doubt as to the legitimacy of this congressional revocation. *See Youngstown*, 343 U.S. at 635-638.

[25] *See* House Comm. on Rules, SubComm. on Legislative and Budget Process, 106th Cong., 1st Sess., Hearing on the Impact of Executive Orders on Lawmaking: Executive Lawmaking?, p. 124-127 (Oct. 27, 1999).

[26] 3 C.F.R. 926 (1971-75).

[27] 3. C.F.R. 152 (1978).

[28] 3 C.F.R. 127, 128 (1981).

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

[30] 58 Fed. Reg. 51735 (1993).

use executive instruments to achieve policy goals. Specifically, on February 17, 2001, President Bush revoked a series of executive orders issued by President Clinton regarding union dues and labor contracts, significantly altering several requirements pertaining to government contracts.

First, President Bush issued Executive Order 13201, directing that all government contracts must include a provision requiring contractors to notify their employees that they cannot be required to join a union, and that they can object to the use of required union dues for any purpose other than to support collective bargaining, contract administrations, or grievance adjustment.[31] Executive Order 13203 revoked an order issued by President Clinton establishing the National Partnership Council and requiring federal agencies to form labor-management partnerships.[32] Executive Order 13204 revoked another order issued by President Clinton that required, with respect to contracts for public buildings, successive contractors to offer a right of first refusal of employment to employees of the prior contractor.[33]

Perhaps most significantly, President Bush also issued Executive Order 13202, ordering that any executive agency that awards a construction contract must ensure that no awarding government authority either prohibit or require project labor agreements with a labor organization.[34] This directive has been criticized as an example of the use of executive orders to achieve policy goals without explicit constitutional or statutory authority. Specifically, critics assert that this order conflicts with the Supreme Court's decision in *Building Trades Council v. Associated Builders* (*Boston Harbor)*.[35] There, the Supreme Court held that the National Labor Relations Act (NLRA) does not preempt a state authority, when acting as the owner of a construction project, from enforcing an otherwise legal prehire construction labor agreement between private parties. Specifically, the Court explained that if a private purchaser can enter into such an agreement, a public entity, acting as a purchaser, must be able to do the same. Any other result, according to the Court, would run contrary to the legislative goals that led Congress to allow such agreements under the NLRA.[36] Given that Executive Order 13202 appears to prohibit a government authority from requiring a project labor agreement, even when that authority is acting as the owner of a construction project, it has been argued that a reviewing court could determine that the order lacks statutory authority, rendering it invalid.

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[31] 66 Fed. Reg. 11221 (2001).

[32] 66 Fed. Reg. 11227 (2001); *See also*, Exec. Order No. 12871, 58 Fed. Reg. 52201 (1993).

[33] 66 Fed. Reg. 11228 (2001); *See also*, Exec. Order 12933, 59 Fed. Reg. 53559 (1994).

[34] 66 Fed. Reg. 11225 (2001).

[35] 113 S.Ct. 1190 (1993).

[36] *Id.* at 1199.