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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 success 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.[1]

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."[2]

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.[3]

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.[4]

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."[5] 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.[6] 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[7] from hiring permanent striker replacements.

Given that history, it was no surprise that EO 12954 was challenged in court.[8] 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.[9] 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.[10]

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."[11] 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.

A congressional review later concluded that the proclamation, was "politically motivated and probably illegal" and was made "to circumvent congressional involvement in public land decisions."

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."[12] 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.[13]

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.[14]

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."[15]

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."[16] 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.[17] 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.[18]

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.[19] 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.[20]

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.[21]

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.[22]

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*.[23] 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."[24] 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."[25] 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.[26]

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

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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?[27]

Facing an outcry over his federalism order,[28] 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,[29] 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.[30]

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.[31]

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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Background on Presidential Directives

From George Washington's first administration, presidents have issued executive orders, proclamations, and other documents known generally as presidential directives.[33] 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[34] 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 presidential 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.[35] 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).[36] 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."[37]

The Legal Authority for Presidential Directives

There is no constitutional or statutory definition of "proclamation," "executive order," or any other form of presidential directive.[38] Since 1935 presidents have been required to publish executive orders and proclamations in the *Federal Register*.[39] 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."[40] 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.[41] 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,[42] on fetal tissue experimentation,[43] on Agency for International Development funding for abortion counseling organizations,[44] and on the importation of the abortifacient drug RU-486;[45] and his efforts to reduce the number of federally licensed firearms dealers.[46]

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.[47]

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.[48] 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."[49]

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."[50] 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."[51] 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."[52]

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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.,*[53] 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.[54] Consistent with that principle, the Court held that President Richard Nixon's EO 11491, implementing a federal statute, preempted state law.[55]

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.[56] 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,*[57] 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.[58]

Some executive orders cite for their authority the president's constitutional role as commander in chief. In *Dooley v. United States,*[59] 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."[60]

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.[61]

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.[62]

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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.[63]

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."[64] By proclamation dated October 3, 1789, Washington identified Thursday, November 26, 1789, as such a day of thanksgiving.[65] 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.[66]

Nevertheless, at the request of Washington, Congress later enacted those limitations on private behavior.[67] 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.[68] 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.[69] 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.[70]

Given Lincoln's view on the constitutional separation of powers, expressed more than a dozen years before his 1861 inauguration 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.[71] 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.[72] 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.[73] 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.[74]

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."[75] Lincoln's May 3, 1861, proclamation ordered the enlargement of the Army by 22,714 men and of the Navy by 18,000 men.[76] 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."[77]

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.

that he had not exercised any powers not possessed by Congress and asked Congress to ratify the actions he had taken previously by proclamation.[78] 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."[79]

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.

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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.[80] 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.[81] 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.[82]

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."[83] Except for Lincoln, constitutional scholar Forrest McDonald observed, "Nineteenth century presidents continued to be little more than chief clerks of personnel."[84] 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.[85]

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.[86] Indeed, during Roosevelt's administration, in 1907, the U.S. Department of State undertook the first effort to identify and number executive orders.[87]

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."[88] 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."[89]

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.[90] 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.[91] 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.[92] 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."[93] Using a presidential directive, Wilson was the first president to declare a national emergency.[94] 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.[95]

Wilson proclaimed a national emergency on February 5, 1917, two months before Congress declared war.[96] 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.[97]

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-

Using a presidential directive, Wilson was the first president to declare a national emergency.

Following Roosevelt's declaration, the United States remained in a state of national emergency for more than 45 years.

> sures 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.[98]

Roosevelt's first official act, at 1 A.M. on March 6, 1933, was to issue Proclamation 2038.[99] 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.[100] Following Roosevelt's declaration, the United States remained in a state of national emergency for more than 45 years.[101]

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.[102] 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[103] of the Act of October 6, 1917" (i.e., TWEA).[104] 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."[105] Thus, the act not only gave the president (and Treasury secretary) 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,[106] 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.[107] The bill was not even in print when it was passed by both houses of Congress.[108]

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[109] and to seize private businesses, even before the United States entered World War II.[110] 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.[111]

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,[112] 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."[113] 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.[114]

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.[115] 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 mineworkers.[116] As the Supreme Court observed, the resulting agreement "embodied far reaching changes favorable to the miners."[117] As authority, EO 9728 had cited, among other things, the War Labor Disputes Act.[118]

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.[119] 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."[120]

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."[121] 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."[122]

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."[123]

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.'"[124]

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

Truman's seizure of private enterprises to obtain raises and benefits for unionized workers was eventually checked by the Supreme Court.

of the President and represents an exercise of authority without law."[125] 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."[126] 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."[127]

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.[128]
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.[129]
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.[130]

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."[131] 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."[132]

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.[133] 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[134]—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.[135] 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

Our forefathers "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation."

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.[136]

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.[137] That legislation became the National Emergencies Act,[138] 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."[139] 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*.[140]

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.[141]

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

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.[144]

After TWEA was amended, Congress passed the International Emergency Economic Powers Act (IEEPA),[145] which was fashioned to limit the emergency powers available to the president during peacetime.[146] 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."[147] 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

When Congress or the states fail in those duties, the courts have no real warrant for ignoring their own duty to secure constitutional principles.

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),[148] certain residents of Bosnia-Herzegovina,[149] certain groups identified as Middle Eastern terrorists,[150] Colombian drug traffickers,[151] certain Cubans,[152] certain Burmese,[153] and certain Sudanese.[154] 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.[155]

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

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.[156] 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."[157]

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 lawmaking 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.[158]

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."[159]

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.

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_0f.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.

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: Kendell-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.text.1.

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.text.1.

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.text.1.

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.text.1.

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), 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.

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 McCardle*, 74 U.S. 506 (1869), where the Supreme Court refused to hear McCardle'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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Appendix 1

Executive Orders Issued by President Clinton

1993

12834 Ethics Commitments by Executive Branch Appointees (January 20, 1993)

12835 Establishment of the National Economic Council (January 25, 1993)

12836 Revocation of Certain Executive Orders Concerning Federal Contracting (February 1, 1993)

12837 Deficit Control and Productivity Improvement in the Administration of the Federal Government (February 10, 1993)

12838 Termination and Limitation of Federal Advisory Committees (February 10, 1993)

12839 Reduction of 100,000 Federal Positions (February 10, 1993)

12840 Nuclear Cooperation with EURATOM (March 9, 1993)

12841 Adjustments to Level IV and V of the Executive Schedule (March 9, 1993)

12842 International Development Law Institute (March 29, 1993)

12843 Procurement Requirements and Policies for Federal Agencies for Ozone-Depleting Substances (April 21, 1993)

12844 Federal use of Alternative Fueled Vehicles (April 21, 1993)

12845 Requiring Agencies to Purchase Energy Efficient Computer Equipment (April 21, 1993)

12846 Additional Measures with Respect to the Federal Republic of Yugoslavia (Serbia and

Montenegro) (April 25, 1993)

12847 Amending Executive Order No. 11423 (May 17, 1993)

12848 Federal Plan to Break the Cycle of Homelessness (May 19, 1993)

12849 Implementation of Agreement with the European Community on Government Procurement (May 25, 1993)

12850 Conditions for tRenewal of Most-Favored-Nation Status for the People's Republic of China in 1994 (May 28, 1993)

12851 Administration of Proliferation Sanctions, Middle East Arms Control, and Related Congressional Reporting Responsibilities (June 11, 1993)

12852 President's Council on Sustainable Development (June 29, 1993)

12853 Blocking Government of Haiti Property and Prohibiting Transactions with Haiti (June 30, 1993)

12854 Implementation of the Cuban Democracy Act (July 4, 1993)

12855 Amendment to Executive Order 12852 (July 19, 1993)

12856 Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements (August 3, 1993)

12857 Budget Control (August 4, 1993)

12858 Deficit Reduction Fund (August 4, 1993)

12859 Establishment of the Domestic Policy Council (August 16, 1993)

12860 Adding Members to the Committee on Foreign Investment in the United States (September 3, 1993)

12861 Elimination of one-half of Executive Branch Internal Regulations (September 11, 1993)

12862 Setting Customer Service Standards (September 11, 1993)

12863 President's Foreign Intelligence Advisory Board (September 13, 1993)

12864 United States Advisory Council on the National Information Infrastructure (September 15, 1993)

12865 **Prohibiting Certain Transactions Involving UNITA*** (September 26, 1993)

12866 Regulatory Planning and Review (September 30, 1993)

12867 Termination of Emergency Authority for Certain Export Controls (September 30, 1993)

12868 **Measures to Restrict the Participation by United States Persons in Weapons Proliferation Activities*** (September 30, 1993)

12869 Continuance of Certain Federal Advisory Committees (September 30, 1993)

12870 Trade Promotion Coordinating Committee (September 30, 1993)

12871 Labor-Management Partnerships (October 1, 1993)

12872 Blocking Property of Persons Obstructing Democratization in Haiti (October 18, 1993)

12873 Federal Acquisition, Recycling, and Waste Prevention (October 20, 1993)

12874 Establishing an Emergency Board to Investigate a Dispute between the Long Island Rail Road and Certain of Its Employees Represented by the United Transportation Union (October 20, 1993)

12875 Enhancing the Intergovernmental Partnership (October 26, 1993)

12876 Historically Black Colleges and Universities (November 1, 1993)

12877 Amendment to Executive Order 12569 (November 3, 1993)

12878 Bipartisan Commission on Entitlement Reform (November 5, 1993)

12879 Order of Succession of Officers to Act as Secretary of the Navy (November 8, 1993)

12880 National Drug Control Program (November 16, 1993)

12881 Establishment of the National Science and Technology Council (November 23, 1993)

12882 President's Committee of Advisors on Science and Technology (November 23, 1993)

12883 Delegating a Federal Pay Administration Authority (November 29, 1993)

12884 Delegation of Functions under the Freedom Support Act and Related Provisions of the Foreign Operations, Export Financing and Related Programs Appropriations Act (December 1, 1993)

12885 Amendment to Executive Order No. 12829 (December 14, 1993)

12886 Adjustments of Rates of Pay and Allowances for the Uniformed Services (December 23, 1993)

12887 Amending Executive Order No. 12878 (December 23, 1993)

12888 Amendments to the Manual for Courts-Martial, United States, 1984 (December 23, 1993)

12889 Implementation of the North American Free Trade Agreement (December 27, 1993)

12890 Amendment to Executive Order No. 12864 (December 30, 1993)

1994

12891 Advisory Committee on Human Radiation Experiments (January 15, 1994)

12892 Leadership and Coordination of Fair housing in Federal Programs: Affirmatively Furthering Fair Housing (January 17, 1994)

12893 Principles for Federal Infrastructure Investments (January 26, 1994)

12894 North Pacific Marine Science Organization (January 26, 1994)

12895 North Pacific Anadromous Fish Commission (January 26, 1994)

12896 Amending the Civil Service Rules Concerning Political Activity (February 3, 1994)

12897 Garnishment of Federal Employees' Pay (February 3, 1994)

12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (February 11, 1994)

12899 Establishing an Emergency Board to Investigate a Dispute between the Long Island Rail Road and Certain of Its Employees Represented by the United Transportation Union (February 15, 1994)

12900 Educational Excellence for Hispanic Americans (February 22, 1994)

12901 Identification of Trade Expansion Priorities (March 3, 1994)

12902 Energy Efficiency and Water Conservation at Federal Facilities (March 8, 1994)

12903 Nuclear Cooperation with EURATOM (March 9, 1994)

12904 Commission for Environmental Cooperation, Commission for Labor Cooperation, Border Environment Cooperation Commission, and North American Development Bank (March 16, 1994)

12905 Trade and Environment Policy Advisory Committee (March 25, 1994)

12906 Coordinating Geographic Data Acquisition and Access: The National Spatial Data Infrastructure (April 11, 1994)

12907 Amending Executive Order No. 12882 (April 14, 1994)

12908 Order of Succession of Officers to Act as Secretary of the Army (April 22, 1994)

12909 Order of Succession of Officers to Act as Secretary of the Air Force (April 22, 1994)

12910 Providing for the Closing of Government Departments and Agencies on April 27, 1994 (April 23, 1994)

12911 Seal for the Office of National Drug Control Policy (April 25, 1994)

12912 Amendment to Executive Order No. 12878 (April 29, 1994)

12913 Revocation of Executive Order No. 12582 (May 2, 1994)

12914 Prohibiting Certain Transactions with Respect to Haiti (May 7, 1994)

12915 Federal Implementation of the North American Agreement on Environmental Cooperation (May 13, 1994)

12916 Implementation of the Border Environment Cooperation Commission and the North American Development Bank (May 13, 1994)

12917 Prohibiting Certain Transactions with Respect to Haiti (May 21, 1994)

12918 Prohibiting Certain Transactions with Respect to Rwanda and Delegating Authority with Respect to Other United Nations Arms Embargoes (May 26, 1994)

12919 National Defense Industrial Resources Preparedness (June 3, 1994)

12920 Prohibiting Certain Transactions with Respect to Haiti (June 10, 1994)

12921 Amendment to Executive Order No. 12864 (June 13, 1994)

12922 Blocking Property of Certain Haitian Nationals (June 21, 1994)

12923 **Continuation of Export Control Regulations*** (June 30, 1994)

12924 **Continuation of Export Control Regulations*** (August 19, 1994) (EO 12923 revoked)

12925 Establishing an Emergency Board to Investigate a Dispute between the Soo Line Railroad Company and Certain of Its Employees Represented by the United Transportation Union (August 29, 1994)

12926 Implementation of the National Voter Registration Act of 1993 (September 12, 1994)

12927 Ordering the Selected Reserve of the Armed Forces to Active Duty (September 15, 1994)

12928 Promoting Procurement with Small Businesses Owned and Controlled by Socially and Economically Disadvantaged Individuals, Historically Black Colleges and Universities, and Minority Institutions (September 16, 1994)

12929 Delegation of Authority Regarding the Naval Petroleum and Oil Shale Reserves (September 29, 1994)

12930 **Measures to Restrict the Participation by United States Persons in Weapons Proliferation Activities*** (September 29, 1994) (EO 12868 revoked)

12931 Federal Procurement Reform (October 13, 1994)

12932 Termination of Emergency with Respect to Haiti (October 14, 1994)

12933 Nondisplacement of Qualified Workers under Certain Contracts (October 20, 1994)

12934 **Blocking Property and Additional Measures with Respect to the Bosnian Serb-Controlled Areas of the Republic of Bosnia and Herzegovina*** (October 25, 1994)

12935 Amending Executive Order No. 11157 As It Relates to the Definition of "Field Duty" (October 28, 1994)

12936 Amendments to the Manual for Courts-Martial, United States, 1984 (November 10, 1994)

12937 Declassification of Selected Records within the National Archives of the United States (November 10, 1994)

12938 **Proliferation of Weapons of Mass Destruction*** (November 14, 1994)

12939 Expedited Naturalization of Aliens and Noncitizen Nationals Who Served in an Active-Duty Status during the Persian Gulf Conflict (November 22, 1994)

12940 Amendment to Civil Service Rule VI (November 28, 1994)

12941 Seismic Safety of Existing Federally Owned or Leased Building (December 1, 1994)

12942 Addition to Level V of the Executive Schedule-Commissioner, Administration for Native Americans (December 12, 1994)

12943 Further Amendment to Executive Order No. 11755 (December 13, 1994)

12944 Adjustments of Certain Rates of Pay and Allowances (December 28, 1994)

1995

12945 Amendment to Executive Order No. 12640 (January 20, 1995)

12946 President's Advisory Board on Arms Proliferation Policy (January 20, 1995)

12947 **Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process*** (January 24, 1995)

12948 Amendment to Executive Order No. 12898 (January 30, 1995)

12949 Foreign Intelligence Physical Searches (February 9, 1995)

12950 Establishing an Emergency Board to Investigate a Dispute between Metro North Commuter Railroad and Its Employees Represented by Certain Labor Organizations (February 22, 1995)

12951 Release of Imagery Acquired by Space-Based National Intelligence Reconnaissance Systems (February 22, 1995)

12952 Amendment to Executive Order No. 12950 (February 24, 1995)

12953 Actions required of all Executive Agencies to Facilitate Payment of Child Support

(February 27, 1995)

12954 Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts (March 8, 1995)

12955 Nuclear Cooperation with EURATOM (March 9, 1995)

12956 Israel-United States Binational Industrial Research and Development Foundation (March 13, 1995)

12957 **Prohibiting Certain Transactions with Respect to the Development of Iranian Petroleum Resources*** (March 15, 1995)

12958 Classified National Security Information (April 17, 1995)

12959 Prohibiting Certain Transactions with Respect to Iran (May 6, 1995)

12960 Amendments to the Manual for Courts-Martial, United States, 1984 (May 12, 1995)

12961 Presidential Advisory Committee on Gulf War Veterans' Illnesses (May 26, 1995)

12962 Recreational Fisheries (June 7, 1995)

12963 Presidential Advisory Council on HIV/AIDS (June 14, 1995)

12964 Commission on United States-Pacific Trade and Investment Policy (June 21, 1995)

12965 Further Amendment to Executive Order No. 12852 (June 27, 1995)

12966 Foreign Disaster Assistance (July 14, 1995)

12967 Establishing an Emergency Board to Investigate Disputes between Metro North Commuter Railroad and Its Employees Represented by Certain Labor Organizations (July 31, 1995)

12968 Access to Classified Information (August 2, 1995)

12969 Federal Acquisition and Community Right-to-Know (August 8, 1995)

12970 Further Amendment to Executive Order No. 12864 (September 14, 1995)

12971 Amendment to Executive Order No. 12425 (September 15, 1995)

12972 Amendment to Executive Order No. 12958 (September 18, 1995)

12973 Amendment to Executive Order No. 12901 (September 27, 1995)

12974 Continuance of Certain Federal Advisory Committees (September 29, 1995)

12975 Protection of Human Research Subjects and Creation of National Bioethics Advisory Commission (October 3, 1995)

12976 Compensation Practices of Government Corporations (October 5, 1995)

12977 Interagency Security Committee (October 19, 1995)

12978 **Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers*** (October 21, 1995)

12979 Agency Procurement Protests (October 25, 1995)

12980 Further Amendment to Executive Order No. 12852, As Amended (November 17, 1995)

12981 Administration of Export Controls (December 5, 1995)

12982 Ordering the Selected Reserve of the Armed Forces to Active Duty (December 8, 1995)

12983 Amendment to Executive Order 12871 (December 21, 1995)

12984 Adjustments of Certain Rates of Pay and Allowances (December 28, 1995)

1996

12985 Establishing the Armed Forces Service Medal (January 11, 1996)

12986 International Union for Conservation of Nature and Natural Resources (January 18, 1996)

12987 Amendment to Executive Order No. 12964 (January 31, 1996)

12988 Civil Justice Reform (February 5, 1996)

12989 Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Naturalization Act Provisions (February 13, 1996)

12990 Adjustments of Rates of Pay and Allowances for the Uniformed Services, Amendment to Executive Order No. 12984 (February 29, 1996)

12991 Adding the Small Business Administration to the President's Export Council (March 6, 1996)

12992 President's Council on Counter-Narcotics (March 15, 1996)

12993 Administrative allegations against Inspectors General (March 21, 1996)

12994 Continuing the President's Committee on Mental Retardation and Broadening iIs Membership and Responsibilities (March 21, 1996)

12995 Amendment to Executive Order No. 12873 (March 25, 1996)

12996 Management and General Public Use of the National Wildlife Refuge System (March 25, 1996)

12997 Korean Peninsula Energy Development Organization (April 1, 1996)

12998 Amendment to Executive Order No. 11880 (April 5, 1996)

12999 Educational Technology: Ensuring Opportunity for All Children in the Next Century (April 17, 1996)

13000 Order of Succession of Officers to Act as Secretary of Defense (April 24, 1996)

13001 Establishing an Emergency Board to Investigate a Dispute between Certain Railroads Represented by the National Railway Labor Conference and Their Employees represented

by the Transportation Communications International Union (May 8, 1996)

13002 Termination of Combat Zone Designation in Vietnam and Waters Adjacent Thereto (May 13, 1996)

13003 Establishing an Emergency Board to Investigate Disputes between Certain Railroads Represented by the National Carriers' Conference Committee of the National Railway Labor Conference and Their Employees Represented by the Brotherhood of Maintenance of Way Employees (May 15, 1996)

13004 Establishing an Emergency Board to Investigate Disputes between Certain Railroads Represented by the National Railway Labor Conference and Their Employees Represented by Certain Labor Organizations (May 17, 1996)

13005 Empowerment Contracting (May 21, 1996)

13006 Locating Federal Facilities on Historic Properties in Our Nation's Central Cities (May 21, 1996)

13007 Indian Sacred Sites (May 24, 1996)

13008 Amending Executive Order No. 12880 (June 3, 1996)

13009 Amendment to Executive Order No. 12963 Entitled Presidential Advisory Council on HIV/AIDS (June 14, 1996)

13010 Critical Infrastructure Protection (July 15, 1996)

13011 Federal Information Technology (July 16, 1996)

13012 Establishing an Emergency Board to Investigate a Dispute between the Southeastern Pennsylvania Transportation Authority and Their Employees Represented by the Brotherhood of Locomotive Engineers (July 18, 1996)

13013 Amending Executive Order No. 10163, the Armed Forces Reserve Medal (August 6, 1996)

13014 Maintaining Unofficial Relations with the People on Taiwan (August 15, 1996)

13015 White House Commission on Aviation Safety and Security (August 22, 1996)

13016 Amendment to Executive Order No. 12580 (August 28, 1996)

13017 Advisory Commission on Consumer Protection and Quality in the Health Care Industry (September 5, 1996)

13018 Amending Executive Order No. 12975 (September 16, 1996)

13019 Supporting Families: Collecting Delinquent Child Support Obligations (September 28, 1996)

13020 Amendment to Executive Order 12981 (October 12, 1996)

13021 Tribal Colleges and Universities (October 19, 1996)

13022 Administration of the Midway Islands (October 31, 1996)

13023 Amendments to Executive Order 12992, Expanding and Changing the Name of the President's Council on Counter-Narcotics (November 6, 1996)

13024 Amending Executive Order 12015, Relating to Competitive Appointments of Students Who Have Completed Approved Career-Related Work Study Programs (November 7, 1996)

13025 Amendment to Executive Order 13010, the President's Commission on Critical Infrastructure Protection (November 13, 1996)

13026 Administration of Export Controls on Encryption Products (November 15, 1996)

13027 Establishing an Emergency Board to Investigate a Dispute between the Southeastern

Pennsylvania Transportation Authority and Its Employees Represented by the Brotherhood of Locomotive Engineers (November 15, 1996)

13028 Further Amendments to Executive Order No. 12757--Implementation of the Enterprise for the Americas Initiative (December 3, 1996)

13029 Implementing, for the United States, the Provisions of Annex 1 of the Decision Concerning Legal Capacity and Privileges and Immunities, Issued by the Council of Ministers of the Conference on Security and Cooperation in Europe on December 1, 1993 (December 3, 1996)

13030 Administration of Foreign Assistance and Related Functions and Arms Export Controls (December 12, 1996)

13031 Federal Alternative Fueled Vehicle Leadership (December 13, 1996)

13032 Further Amendment to Executive Order No. 12964 (December 26, 1996)

13033 Adjustments of Certain Rates of Pay and Allowances (December 27, 1996)

1997

13034 Extension of Presidential Advisory Committee on Gulf War Veterans' Illnesses (January 30, 1997)

13035 Advisory Committee on High-Performance Computing and Communications, Information Technology, and the Next Generation Internet (February 11, 1997)

13036 Establishing an Emergency Board to Investigate a Dispute between American Airlines and Its Employees Represented by the Allied Pilots Association (February 15, 1997)

13037 Commission to Study Capital Budgeting (March 3, 1997)

13038 Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (March 11, 1997)

13039 Exclusion of the Naval Special Warfare Development Group from the Federal Labor-Management Relations Program (March 11, 1997)

13040 Amendment to Executive Order 13017, Advisory Commission on Consumer Protection and Quality in the Health Care Industry (March 25, 1997)

13041 Further Amendment to Executive Order 13010, As Amended (April 3, 1997)

13042 Implementing for the United States Article VII of the Agreement Establishing the World Trade Organization Concerning Legal Capacity and Privileges and Immunities (April 9, 1997)

13043 Increasing Seat Belt Use in the United States (April 16, 1997)

13044 Amending Executive Order 12752, Implementation of the Agricultural Trade Development and Assistance Act of 1954, As Amended, and the Food for Progress Act of 1985, as Amended (April 18, 1997)

13045 Protection of Children from Environmental Health Risks and Safety Risks (April 21, 1997)

13046 Further Amendment to Executive Order 12975, Extension of the National Bioethics Advisory Commission (May 16, 1997)

13047 **Prohibiting New Investment in Burma*** (May 20, 1997)

13048 Improving Administrative Management in the Executive Branch (June 10, 1997)

13049 Organization for the Prohibition of Chemical Weapons (June 11, 1997)

13050 President's Advisory Board on Race (June 13, 1997)

13051 Internal Revenue Service Management Board (June 24, 1997)

13052 Hong Kong Economic and Trade Offices (June 30, 1997)

13053 Adding Members to and Extending the President's Council on Sustainable Development (June 30, 1997)

13054 Eligibility of Certain Overseas Employees for Noncompetitive Appointments (July 7, 1997)

13055 Coordination of United States Government International Exchanges and Training Programs (July 15, 1997)

13056 Further Amendment to Executive Order 13017, Advisory Commission on Consumer Protection and Quality in the Health Care Industry (July 21, 1997)

13057 Federal Actions in the Lake Tahoe Region (July 26, 1997)

13058 Protecting Federal Employees and the Public from Exposure to Tobacco Smoke in the Federal Workplace (August 9, 1997)

13059 Prohibiting Certain Transactions with Respect to Iran (August 19, 1997)

13060 Establishing an Emergency Board to Investigate Disputes between Amtrak and Its Employees Represented by the Brotherhood of Maintenance of Way Employees (August 21, 1997)

13061 Federal Support of Community Efforts along American Heritage Rivers (September 11, 1997)

13062 Continuance of Certain Federal Advisory Committees and Amendments to Executive Orders 13038 and 13054 (September 29, 1997)

13063 Level V of the Executive Schedule: Removal of the Executive Director, Pension Benefit Guaranty Corporation, Department of Labor (September 30, 1997)

13064 Further Amendment to Executive Order 13010, As Amended, Critical Infrastructure Protection (October 11, 1997)

13065 Further Amendment to Executive Order 13038, Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (October 22, 1997)

13066 Amendment to Executive Order 13037, Commission to Study Capital Budgeting (October 29, 1997)

13067 **Blocking Sudanese Government Property and Prohibiting Transactions with Sudan*** (November 3, 1997)

13068 Closing of Government Departments and Agencies on Friday, December 26, 1997 (November 25, 1997)

13069 Prohibiting Certain Transactions with Respect to UNITA (December 12, 1997)

13070 The Intelligence Oversight Board, Amendment to Executive Order 12863 (December 15, 1997)

13071 Adjustments of Certain Rates of Pay (December 29, 1997)

1998

13072 White House Millennium Council (February 2, 1998)

13073 Year 2000 Conversion (February 4, 1998)

13074 Amendment to Executive Order 12656 (February 9, 1998)

13075 Special Oversight Board for Department of Defense Investigations of Gulf War Chemical and Biological Incidents (February 19, 1998)

13076 Ordering the Selected Reserve to Active Duty (February 24, 1998)

13077 Further Amendment to Executive Order 13010, Critical Infrastructure Protection (March 10, 1998)

13078 Increasing Employment of Adults with Disabilities (March 13, 1998)

13079 Waiver under the Trade Act of 1974 With Respect to Vietnam (April 7, 1998)

13080 American Heritage Rivers Initiative Advisory Committee (April 7, 1998)

13081 Amendment to Executive Order No. 13038, Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (April 30, 1998)

13082 Joint Mexican-United States Defense Commission (May 8, 1998)

13083 Federalism (May 14, 1998)

13084 Consultation and Coordination with Indian Tribal Governments (May 14, 1998)

13085 Establishment of the Enrichment Oversight Committee (May 26, 1998)

13086 1998 Amendments to the Manual for Courts-Martial, United States (May 27, 1998)

13087 Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government (May 28, 1998)

13088 Blocking Property of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro, and Prohibiting New Investment in the Republic of Serbia in Response to the Situation in Kosovo (June 9, 1998)

13089 Coral Reef Protection (June 11, 1998)

13090 President's Commission on the Celebration of Women in American History (June 29, 1998)

13091 Administration of Arms Export Controls and Foreign Assistance (June 29, 1998)

13092 President's Information Technology Advisory Committee, Amendments to Executive Order 13035 (July 24, 1998)

13093 American Heritage Rivers, Amending Executive Order 13061 and 13080 (July 27, 1998)

13094 Proliferation of Weapons of Mass Destruction (July 28, 1998)

13095 Suspension of Executive Order 13083 (August 5, 1998)

13096 American Indian and Alaska Native Education (August 6, 1998)

13097 Interparliamentary Union (August 7, 1998)

13098 Blocking Property of UNITA and Prohibiting Certain Transactions with Respect to UNITA (August 18, 1998)

13099 Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process (August 20, 1998)

13100 President's Council on Food Safety (August 25, 1998)

13101 Greening the Government through Waste Prevention, Recycling, and Federal Acquisition (September 14, 1998)

13102 Further Amendment to Executive Order 13038, Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (September 25, 1998)

13103 Computer Software Piracy (September 30, 1998)

13104 Amendment to Executive Order 13021, Tribal Colleges and Universities (October 19,

1998)

13105 Open Enrollment Season for Participants in the Foreign Service Retirement and Disability System and the Central Intelligence Agency Retirement and Disability System (November 2, 1998)

13106 Adjustments of Certain Rates of Pay and Delegation of a Federal Pay Administration Authority (December 7, 1998)

13107 Implementation of Human Rights Treaties (December 10, 1998)

13108 Further Amendment to Executive Order 13037, Commission to Study Capital Budgeting (December 11, 1998)

13109 Half-Day Closing of Executive Departments and Agencies of the Federal Government on Thursday, December 24, 1998 (December 17, 1998)

1999

13110 Nazi War Criminal Records Interagency Working Group (January 11, 1999)

13111 Using Technology to Improve Training Opportunities for Federal Government Employees (January 12, 1999)

13112 Invasive Species (February 3, 1999)

13113 President's Information Technology Advisory Committee, Further Amendments to Executive Order 13035, As Amended (February 10, 1999)

13114 Further Amendment to Executive Order 12852, As Amended, Extending the President's Council on Sustainable Development (February 28, 1999)

13115 Interagency Task Force on the Roles and Missions of the United States Coast Guard (March 25, 1999)

13116 Identification of Trade Expansion Priorities and Discriminatory Procurement Practices (March 31, 1999)

13117 Further Amendment to Executive Order 12981, As Amended (March 31, 1999)

13118 Implementation of the Foreign Affairs Reform and Restructuring Act of 1998 (March 31, 1999)

13119 Designation of Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Airspace above, and Adjacent Waters as a Combat Zone (April 13, 1999)

13120 Ordering the Selected Reserve and Certain Individual Ready Reserve Members of the Armed Forces to Active Duty (April 27, 1999)

13121 Blocking Property of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro, and Prohibiting Trade Transactions Involving the Federal Republic of Yugoslavia (Serbia and Montenegro) in Response to the Situation in Kosovo (April 30, 1999)

13122 Interagency Task Force on the Economic Development of the Southwest Border (May 25, 1999)

13123 Greening the Government through Efficient Energy Management (June 3, 1999)

13124 Amending the Civil Service Rules Relating to Federal Employees with Psychiatric Disabilities (June 4, 1999)

13125 Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs (June 7, 1999)

13126 Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor (June 12, 1999)

13127 Amendment to Executive Order 13073, Year 2000 Conversion (June 14, 1999)

13128 Implementation of the Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act (June 25, 1999)

13129 **Blocking Property and Prohibiting Transactions with the Taliban*** (July 4, 1999)

13130 National Infrastructure Assurance Council (July 14, 1999)

13131 Further Amendments to Executive Order 12757, Implementation of the Enterprise for the Americas Initiative (July 22, 1999)

13132 Federalism (August 5, 1999)

13133 Working Group on Unlawful Conduct on the Internet (August 5, 1999)

13134 Developing and Promoting Biobased Products and Bioenergy (August 12, 1999)

13135 Amendment to Executive Order 12216, President's Committee on the International Labor Organization (August 27, 1999)

13136 Amendment to Executive Order 13090, President's Commission on the Celebration of Women in American History (September 3, 1999)

13137 Amendment to Executive Order 12975, As Amended, National Bioethics Advisory Commission (September 15, 1999)

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* Executive orders declaring states of national emergency are in boldface.

All of President Clinton=s EOs are available online from the National Archives and Records

Administration, http://www.access.gpo.gov/ su_docs/aces/aces140.html. EOs since January 1, 1995, are available through the Federal Register *or* The Weekly Compilation of Presidential Documents; *EOs before 1995 are available only through* The Weekly Compilation of Presidential Documents.

Appendix 2

Excerpts from *Youngstown* and *Reich*

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

Justice Black's decision joined by Justices Burton, Clark, Douglas, Frankfurter and Jackson

Chief Justice Vinson's dissent joined by Justices Reed and Minton

Justice Black, decision of the court:

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States. [Ibid. at 582.]

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. [The authors have added boldface to certain passages for emphasis.] There is no statute that expressly authorizes the President to take possession of

property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. **There are two statutes which do authorize the President to take both personal and real property under certain conditions.** However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes. The Government refers to the seizure provisions of one of these statutes (' 201 [b] of the Defense Production Act) as "much too cumbersome, involved, and time-consuming for the crisis which was at hand."

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, **Congress had refused to adopt that method** of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. [Ibid. at 585–86.]

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that **express** constitutional language grants this power to the President. The contention is that presidential power should be **implied** from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President . . .";

that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States." [Ibid. at 587.]

Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. **In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker**. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. **The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States**. . . ." After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of

conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its 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."

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand. [Ibid. at 587–89.]

Justice Frankfurter, concurrence:

The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for

effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.

To that end they rested the structure of our central government on the system of checks and balances. **For them the doctrine of separation of powers was not mere theory; it was a felt necessity.** Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. **The accretion of dangerous power does not come in a day.** It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority. [Ibid. at 593–94.]

When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.

Apart from his vast share of responsibility for the conduct of our foreign relations, the embracing function of the President is that "he shall take Care that the Laws be faithfully executed . . . ." Art. II, ' 3. The nature of that authority has for me been comprehensively indicated by Mr. Justice Holmes. **"The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress**

sees fit to leave within his power." *Myers v. United States,* 272 U.S. 52, 177. The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government. [Ibid. at 609–10.]

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by ' 1 of Art. II. [Ibid. at 610–11.]

Thus the list of executive assertions of the power of seizure in circumstances comparable to the present reduces to three in the six-month period from June to December of 1941. We need not split hairs in comparing those actions to the one before us, though much might be said by way of differentiation. Without passing on their validity, as we are not called upon to do, it suffices to say that these three isolated instances do not add up, either in number, scope, duration or contemporaneous legal justification, to the kind of executive construction of the Constitution revealed in the Midwest Oil case. Nor do they come to us sanctioned by long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers.

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a 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. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford. I know no more impressive words on this subject than those of Mr. Justice 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 the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 240, 293.

It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well-being, in the assured conviction that he acted to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world. [Ibid.

at 613–14.]

Justice Douglas, concurrence:

There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act. [Ibid. at 629.]

We therefore cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution. That in turn requires an analysis of the conditions giving rise to the seizure and of the seizure itself. [Ibid. at 630.]

The method by which industrial peace is achieved is of vital importance not only to the parties but to society as well. A determination that sanctions should be applied, that the hand of the law should be placed upon the parties, and that the force of the courts should be directed against them, is an exercise of legislative power. In some nations that power is entrusted to the executive branch as a matter of course or in case of emergencies. We chose another course. We chose to place the legislative power of the Federal Government in the Congress. The language of the Constitution is not ambiguous or qualified. It places not some legislative power in the Congress; Article I, Section 1 says "All legislative Powers herein granted shall be vested in a

Congress of the United States, which shall consist of a Senate and House of Representatives." [Ibid.]

The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. The President might seize and the Congress by subsequent action might ratify the seizure. But until and unless Congress acted, no condemnation would be lawful. The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effected. That seems to me to be the necessary result of the condemnation provision in the Fifth Amendment. It squares with the theory of checks and balances expounded by MR. JUSTICE BLACK in the opinion of the Court in which I join.

If we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency. Article II which vests the "executive Power" in the President defines that power with particularity. Article II, Section 2 makes the Chief Executive the Commander in Chief of the Army and Navy. But our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs. Article II, Section 3 provides that the President shall "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate. Article II, Section 3 also provides that the President "shall take Care that the Laws be faithfully executed." But, as MR.

JUSTICE BLACK and MR. JUSTICE FRANKFURTER point out, the power to execute the laws starts and ends with the laws Congress has enacted.

The great office of President is not a weak and powerless one. The President represents the people and is their spokesman in domestic and foreign affairs. The office is respected more than any other in the land. It gives a position of leadership that is unique. The power to formulate policies and mold opinion inheres in the Presidency and conditions our national life. The impact of the man and the philosophy he represents may at times be thwarted by the Congress. Stalemates may occur when emergencies mount and the Nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill. That is a risk inherent in our system of separation of powers. The tragedy of such stalemates might be avoided by allowing the President the use of some legislative authority. **The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement.** Some future generation may, however, deem it so urgent that the President have legislative authority that the Constitution will be amended. We could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws but to make some. Such a step would most assuredly alter the pattern of the Constitution.

We pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many. Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade-unionists, to regiment labor as oppressively as industry thinks it has

been regimented by this seizure. [Ibid. at 631–34.]

Justice Jackson, concurrence:

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction. But as we approach the question of presidential power, we half overcome mental hazards by recognizing them. The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic. [Ibid. at 634.]

Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. **When the President acts pursuant to an express or implied authorization of**

Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. **When the President acts in absence of either a congressional grant or denial of authority**, he can only rely upon his own independent powers, but there is a **zone of twilight** in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. **When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb**, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. [Ibid. at 635–38.]

In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.

This leaves the current seizure to be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress. Thus, this Court's first review of such seizures occurs under circumstances which leave presidential power most vulnerable to attack and in the least favorable of possible constitutional postures.

I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand. However, because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.

The Solicitor General seeks the power of seizure in three clauses of the Executive Article, the first reading, "The executive Power shall be vested in a President of the United States of America." Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon

it: **"In our view, this clause constitutes a grant of all the executive powers of which the Government is capable."** If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones.

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated. [Ibid. at 639–41.]

There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions.

That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. Time out of mind, and even now in many parts of the world, a military

commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Thus, even in war time, his seizure of needed military housing must be authorized by Congress. It also was expressly left to Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions. . . ." Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy. Congress, fulfilling that function, has authorized the President to use the army to enforce certain civil rights. On the other hand, Congress has forbidden him to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress. [Ibid. at 643–45.]

The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. **They 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. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work,

and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers.

Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg **Hindenb*u*rg? Please check original .***to*** suspend all such rights, and they were never restored. [Ibid. at 649–51.]

In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency. In 1939, upon congressional request, the Attorney General listed ninety-nine such separate statutory grants by Congress of emergency or wartime executive powers. They were invoked from time to time as need appeared. Under this procedure we retain Government by law—special, temporary law, perhaps, but law nonetheless. The public may

know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties. [Ibid. at 652-53.]

I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

The essence of our free Government is "leave to live by no man's leave, underneath the law"—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With 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. [Ibid. at 654–55.]

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

Silberman, Sentelle, and Randolph, Circuit Judges

The government, for its part, claims that a cause of action under the APA is not available, even were appellants to rely on it, because a challenge to the regulation should be regarded as nothing more than a challenge to the legality of the President's Executive Order and therefore not reviewable. It would seem that the government's position is somewhat in tension with its previous claim that the Secretary's regulations were necessary to "flesh out" the Executive Order. And we doubt the validity of its unsupported interpretation of the APA; that the Secretary's regulations are based on the President's Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question. See *Public Citizen v. United States Trade Representative,* 303 U.S. App. D.C. 297, 5 F.3d 549, 552 (D.C. Cir. 1993) ("Franklin['s denial of judicial review of presidential action] is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties."), cert. denied, *126 L. Ed. 2d 652, 114 S. Ct. 685 (1994)* (emphasis added). Still, recognizing the anomalous situation in which we find ourselves—not able to base judicial review on what appears to us to be an available statutory cause of action—we go on to the issue of whether appellants are entitled to

bring a non-statutory cause of action questioning the legality of the Executive Order. [Ibid. at 1326–27.]

The message of this line of cases is clear enough: courts will "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, 90 L. Ed. 2d 623, 106 S. Ct. 2133 (1986). [Ibid. at 1328.]

Since "the [Secretary of Labor's] powers are [allegedly] limited by [the NLRA], his actions beyond those limitations [viz., enforcing the Executive Order] are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do . . ." *Larson*, 337 U.S. at 689. So, there is no sovereign immunity to waive—it never attached in the first place.

Although the government's brief advanced a breathtakingly broad claim of non-reviewability of presidential actions, the government does not seriously press its argument that we may not exercise jurisdiction over appellants' claim because they lack a cause of action or cannot point to a waiver of sovereign immunity. **At oral argument counsel relied instead on the more limited notion, also advanced in the brief, that the Procurement Act delegated wide discretion** to the President and we were **not authorized to review** his exercise of that discretion so long as he did not violate a direct prohibition of another statute (or the Constitution). [Ibid. at 1329, parentheses in original.]

In sum, we think it untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President claims that he is acting pursuant to the Procurement Act in the pursuit of governmental savings. Yet this is what the government would have us do. **Its position would permit the President to bypass scores of statutory limitations on governmental authority, and we therefore reject it.** [Ibid. at 1332.]

It does not seem to us possible to deny that the President's Executive Order seeks to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers. The President has, of course, acted to set procurement policy rather than labor policy. But the former is quite explicitly based—and would have to be based—on his views of the latter. For the premise of the Executive Order is the proposition that the permanent replacement of strikers unduly prolongs and widens strikes and disrupts the proper "balance" between employers and employees. Whether that proposition is correct, or whether the prospect of permanent replacements deters strikes, and therefore an employer's right to permanently replace strikers is simply one element in the relative bargaining power of management and organized labor, is beside the point. Whatever one's views on the issue, it surely goes to the heart of United States labor relations policy. [Ibid. at 1337.]

No state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be.

If the government were correct, it follows, as the government apparently conceded, that another President could not only revoke the Executive Order, but could issue a new order that actually required government contractors to permanently replace strikers, premised on a finding that this would minimize unions' bargaining power and thereby reduce procurement costs. Perhaps even more confusing, under the government's theory, the states would be permitted to adopt procurement laws or regulations that in effect choose sides on this issue, which would result in a further balkanization of federal labor policy. Yet the whole basis of the Supreme Court's NLRA pre-emption doctrine has from the outset been the Court's perception that Congress wished the "'uniform application' of its substantive rules and to avoid the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.' " *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 30 L. Ed. 2d 328, 92 S. Ct. 373 (1971) (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490, 98 L. Ed. 228, 74 S. Ct. 161 (1953).

The government insists that the President's intervention into the area of labor relations is quite narrow. In contrast to the Wisconsin debarment scheme in Gould, the Executive Order does not provide for automatic contract termination or debarment of contractors. The government emphasizes the discretion that the Secretary and contracting agencies have in deciding whether to impose the Executive Order's penalties on contractors who hire permanent replacements. The Secretary may terminate a contract if a contractor has permanently replaced strikers and only if the agency head does not object. The Secretary is also given discretion as to whether to debar a contractor and cannot debar a contractor if an agency head concludes that there is a compelling

reason not to do so. The Executive Order's flexibility is said to ensure that intervention into labor relations only occurs to the extent necessary to guarantee efficient and economical procurement.

We do not think the scope of the President's intervention into and adjustment of labor relations policy is determinative, but despite the government's protestations, the impact of the Executive Order is quite far-reaching. It applies to all contracts over $100,000, and federal government purchases totaled $437 billion in 1994, constituting approximately 6.5% of the gross domestic product. STATISTICAL ABSTRACT OF THE UNITED STATES 451 (1995). Federal contractors and subcontractors employ 26 million workers, 22% of the labor force. GAO REPORT. The Executive Order's sanctions for hiring permanent replacements, contract debarment and termination, applies to the organizational unit of the federal contractor who has hired permanent replacements. The organizational unit includes "any other affiliate of the person that could provide the goods or services required to be provided under the contract." *60 Fed. Reg. at 27,861* (emphasis added). If a local unit of Exxon had a contract to deliver $100,001 worth of gas to a federal agency, the organizational unit would include all the other affiliates of Exxon that could have provided the gas; no doubt a significant portion of the Exxon corporation. The broad definition of "organizational unit" will have the effect of forcing corporations wishing to do business with the federal government not to hire permanent replacements even if the strikers are not the employees who provide the goods or services to the government. Indeed, corporations who even hope to obtain a government contract will think twice before hiring permanent replacements during a strike. It will be recalled that in *Kahn,* 618 F.2d at 792–93, the government itself asserted that controls imposed on government contractors—given the size of that portion of the economy—would alter the behavior of non-government contractors.

Not only do the Executive Order and the Secretary's regulations have a substantial impact on American corporations, it appears that the Secretary's regulations promise a direct conflict with the NLRA, thus running afoul not only of Machinists but the earlier Garmon pre-emption doctrine. Under the regulations, the Secretary assumes responsibility for determining when a "labor dispute" ends, thereby permitting an employer who is debarred because he used permanent replacements to be declared eligible. But the regulations contemplate that the Secretary will not declare the "labor dispute" over without the striking union's approval (which enables either strikers to return to work thus ousting the replacements or a collective bargaining agreement to be reached, both of which are factors listed in the regulations for supporting the conclusion that a "labor dispute" has ended. See 60 *Fed. Reg*. at 27,862). Under the NLRA, however, an employer's duty to bargain with a striking union after the strikers have been replaced ends if a year has passed since certification and he has a good faith doubt as to the union's majority status, or the union does not in fact have majority status. See *Curtin Matheson*, 494 U.S. at 778. If after a union lost majority status an employer were to continue to recognize the union as the exclusive representative—the recognition of which the Secretary's regulations would seem to induce—the employer would be committing an unfair labor practice. See *International Ladies' Garment Workers' v. NLRB*, 366 U.S. 731, 6 L. Ed. 2d 762, 81 S. Ct. 1603 (1961).

We, therefore, conclude that the Executive Order is regulatory in nature and is pre-empted by the NLRA which guarantees the right to hire permanent replacements. The district court is hereby reversed. [Ibid. at 1337–39.]

Appendix 3

Executive Orders That Have Been Modified or Revoked by Statute, with the Statute Identified (Partial List)

President Grover Cleveland
EO 27-A by 61 Stat. 477 '6

President Theodore Roosevelt
EO 589 by 66 Stat. 279
EO 597 2 by 47 Stat. 1123 '1240

President William Taft
EO 1141 by 47 Stat. 810
EO 1712 by 66 Stat. 279

President Woodrow Wilson
EO 2834 by 41 Stat. 1359

President Warren Harding
EO 3550 by 96 Stat. 907
EO 3578 by 96 Stat. 907

President Calvin Coolidge
EO 4049 by 66 Stat. 163

President Herbert Hoover
EO 5869 by 66 Stat. 163

President Franklin Roosevelt
EO 6098 by 50 Stat. 798
EO 6568 by 50 Stat. 798
EO 6715 by 96 Stat. 1073
EO 6868 by 87 Stat. 779
EO 6981 by 52 Stat. 437
EO 7057 by 67 Stat. 584
EO 7180 by 67 Stat. 584
EO 7493 by 67 Stat. 584
EO 7554 by 67 Stat. 584
EO 7689 by 67 Stat. 584
EO 7784A by 87 Stat. 779
EO 8033 by 87 Stat. 779
EO 8185 by 60 Stat. 1038
EO 8294 by 67 Stat. 584
EO 8557 by 80 Stat. 650
EO 8734 by 56 Stat. 23
EO 8766 by 66 Stat. 280
EO 8802 by 59 Stat. 473
EO 8823 by 59 Stat. 473
EO 8888 by 67 Stat. 584
EO 8902 by 79 Stat. 113
EO 8972 by 62 Stat. 865, 868
EO 9001 by 80 Stat. 651
EO 9023 by 80 Stat. 651
EO 9054 by 60 Stat. 501
EO 9055 by 80 Stat. 651
EO 9058 by 80 Stat. 651
EO 9070 by 80 Stat. 651
EO 9082 by 80 Stat. 651
EO 9111 by 59 Stat. 473
EO 9116 by 80 Stat. 651
EO 9142 by 80 Stat. 651
EO 9177 by 80 Stat. 651
EO 9195 by 70A Stat. 666
EO 9210 by 63 Stat. 839
EO 9219 by 80 Stat. 651
EO 9221 by 80 Stat. 651
EO 9233 by 80 Stat. 651
EO 9241 by 80 Stat. 651
EO 9244 by 60 Stat. 501
EO 9250 by 57 Stat. 63 '4(b)
EO 9253 by 80 Stat. 651
EO 9264 by 80 Stat. 651
EO 9269 by 80 Stat. 651
EO 9278 by 67 Stat. 584
EO 9279 by 80 Stat. 651
EO 9296 by 80 Stat. 651

EO 9299 by 80 Stat. 651
EO 9330 by 80 Stat. 651
EO 9344 by 87 Stat. 779
EO 9410 by 80 Stat. 651
EO 9425 by 58 Stat. 785
EO 9427 by 58 Stat. 785
EO 9458 by 70A Stat. 666
EO 9460 by 63 Stat. 839
EO 9472 by 61 Stat. 450
EO 9487 by 68A Stat. 933
EO 9491 by 68A Stat. 933
EO 9495 by 80 Stat. 651
EO 9519 by 80 Stat. 651
EO 9524 by 70A Stat. 666

President Harry Truman
EO 9550 by 63 Stat. 839
EO 9556 by 80 Stat. 651
EO 9557 by 63 Stat. 839
EO 9570 by 60 Stat. 341
EO 9571 by 62 Stat. 342
EO 9581 by 80 Stat. 651
EO 9592 by 80 Stat. 651
EO 9599 by 60 Stat. 664
EO 9602 by 60 Stat. 341
EO 9605 by 80 Stat. 651
EO 9609 by 59 Stat. 658
EO 9610 by 59 Stat. 658
EO 9612 by 79 Stat. 113
EO 9616 by 47 Stat. 761 and 48 Stat. 4601
EO 9618 by 67 Stat. 584
EO 9621 by 80 Stat. 651
EO 9639 by 57 Stat. 163
EO 9643 by 80 Stat. 651
EO 9651 by 60 Stat. 664
EO 9658 by 80 Stat. 651
EO 9661 by 60 Stat. 341
EO 9664 by 59 Stat. 473
EO 9665 by 80 Stat. 651
EO 9666 by 90 Stat. 2519
EO 9673 by 80 Stat. 651
EO 9676 by 68A Stat. 933
EO 9346 by 59 Stat. 473
EO 9347 by 58 Stat. 792
EO 9350 by 60 Stat. 501
EO 9685 by 57 Stat. 163
EO 9686 by 80 Stat. 651
EO 9689 by 80 Stat. 651
EO 9690 by 60 Stat. 341
EO 9692 by 61 Stat. 450
EO 9707 by 80 Stat. 651
EO 9722 by 80 Stat. 651
EO 9726 by 55 Stat. 31
EO 9727 by 60 Stat. 341
EO 9728 by 57 Stat. 163
EO 9736 by 60 Stat. 341
EO 9744A by 80 Stat. 651
EO 9750 by 63 Stat. 973
EO 9758 by 57 Stat. 163
EO 9760 by 68 Stat. 804
EO 9766 by 80 Stat. 651
EO 9768 by 80 Stat. 651
EO 9772 by 64 Stat. 147
EO 9797 by 80 Stat. 651
EO 9802 by 68A Stat. 933
EO 9804 by 96 Stat. 2556
EO 9817 by 68 Stat. 1114
EO 9820 by 61 Stat. 193
EO 9821 by 80 Stat. 651
EO 9828 by 61 Stat. 193
EO 9829 by 61 Stat. 193
EO 9836 by 63 Stat. 404 and 80 Stat. 651
EO 9839 by 80 Stat. 651
EO 9842 by 80 Stat. 651
EO 9843 by 60 Stat. 539
EO 9846 by 70A Stat. 666
EO 9850 by 63 Stat. 839
EO 9853 by 76 Stat. 473
EO 9871 by 63 Stat. 839
EO 9901 by 67 Stat. 584
EO 9903 by 80 Stat. 651
EO 9909 by 64 Stat. 320
EO 9916 by 87 Stat. 779
EO 9930 by 82 Stat. 1277

EO 9946 by 80 Stat. 653
EO 9976 by 63 Stat. 859
EO 9998 by 94 Stat. 2159
EO 10009 by 66 Stat. 279
EO 10102 by 76A Stat. 701, 702
EO 10128 by 87 Stat. 779
EO 10131 by 80 Stat. 654
EO 10141 by 70A Stat. 660
EO 10149 by 64 Stat. 147
EO 10155 by 70A Stat. 660
EO 10159 by 68 Stat. 832
EO 10197 by 72 Stat. 806
EO 10199 by 65 Stat. 729
EO 10209 by 80 Stat. 650
EO 10210 by 80 Stat. 651
EO 10216 by 80 Stat. 651
EO 10227 by 80 Stat. 651
EO 10231 by 80 Stat. 651
EO 10240 by 94 Stat. 2887
EO 10243 by 80 Stat. 651
EO 10251 by 76 Stat. 360
EO 10260 by 70 Stat. 786
EO 10262 by 90 Stat. 1255 (National Emergencies Act)
EO 10272 by 65 Stat. 729
EO 10282 by 76 Stat. 360
EO 10294 by 70 Stat. 786
EO 10298 by 80 Stat. 651
EO 10299 by 70 Stat. 786
EO 10351 by 94 Stat. 3459
EO 10369 by 70 Stat. 786
EO 10382 by 80 Stat. 654
EO 10396 by 67 Stat. 131
EO 10398 by 90 Stat. 1255 (National Emergencies Act)
EO 10416 by 76 Stat. 360
EO 10426 by 67 Stat. 462
EO 10428 by 70A Stat. 680

President Dwight Eisenhower
EO 10443 by 76 Stat. 360
EO 10468 by 67 Stat. 584
EO 10012 by 63 Stat. 973
EO 10053 by 76 Stat. 451
EO 10059 by 63 Stat. 839
EO 10079 by 88 Stat. 1210
EO 10487 by 67 Stat. 400
EO 10492 by 72 Stat. 432
EO 10498 by 70A Stat. 680
EO 10510 by 93 Stat. 668
EO 10516 by 75 Stat. 318
EO 10522 by 94 Stat. 2078
EO 10567 by 70 Stat. 786
EO 10617 by 94 Stat. 2880
EO 10629 by 77 Stat. 134
EO 10632 by 90 Stat. 1255 (National Emergencies Act)
EO 10667 by 77 Stat. 134
EO 10677 by 77 Stat. 134
EO 10725 by 94 Stat. 2897
EO 10764 by 76 Stat. 360
EO 10780 by 94 Stat. 2897
EO 10781 by 94 Stat. 2897
EO 10807 by 90 Stat. 472
EO 10824 by 96 Stat. 976
EO 10857 by 73 Stat. 141
EO 10861 by 94 Stat. 2897
EO 10907 by 92 Stat. 1043

President John Kennedy
EO 10945 pursuant to 63 Stat. 7
EO 11071 by 89 Stat. 59
EO 11096 by 92 Stat. 1119
EO 11175 by 90 Stat. 1814
EO 11198 by 90 Stat. 1814
EO 11211 by 90 Stat. 1814

President Lyndon Johnson
EO 11254 by 79 Stat. 1018
EO 11270 by 90 Stat. 1255 (National Emergencies Act)
EO 11285 by 90 Stat. 1814
EO 11313 by 84 Stat. 719
EO 11357 by 84 Stat. 1739

EO 11368 by 90 Stat. 1814
EO 11381 by 90 Stat. 472
EO 11399 pursuant to 83 Stat. 220
EO 11401 by 87 Stat. 779

President Richard Nixon
EO 11464 by 90 Stat. 1814
EO 11751 by 87 Stat. 707
EO 11754 by 90 Stat. 1814
EO 11766 by 90 Stat. 1814
EO 11509 by 86 Stat. 770
EO 11523 by 86 Stat. 770
EO 11551 pursuant to 83 Stat. 220
EO 11571 by 87 Stat. 779
EO 11599 by 86 Stat. 65
EO 11614 by 86 Stat. 770
EO 11688 pursuant to 83 Stat. 220

President James Carter
EO 12155 by 101 Stat. 1247

President George Bush
EO 12806 by 107 Stat. 133

Total Number, for Each President, of Executive Orders Modified or Revoked by Statute

President Grover Cleveland	1	President Harry Truman	104
President Theodore Roosevelt	2	President Dwight Eisenhower	23
President William Taft	2	President John Kennedy	6
President Woodrow Wilson	1	President Lyndon Johnson	9
President Warren Harding	2	President Richard Nixon	11
President Calvin Coolidge	1	President James Carter	1
President Herbert Hoover	1	President George Bush	1
President Franklin Roosevelt	64	**Total**	**239**