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EXECUTIVE ORDERS

HEARING

BEFORE THE

SUBCOMMITTEE ON
LEGISLATIVE AND BUDGET PROCESS

OF THE

COMMITTEE ON RULES
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

THE IMPACT OF EXECUTIVE ORDERS ON THE LEGISLATIVE PROCESS: EXECUTIVE LAWMAKING?

OCTOBER 27, 1999

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EXECUTIVE ORDERS

WEDNESDAY, OCTOBER 27, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LEGISLATIVE AND BUDGET PROCESS,
COMMITTEE ON RULES,
Washington, DC.

The subcommittee met, pursuant to call, at 10:00 a.m., in room H–313, the Capitol, Hon. Porter J. Goss (chairman of the subcommittee) presiding.

Mr. GOSS. The subcommittee will come to order. I want to advise all members and witnesses before we begin that the audio from today's hearing will be placed on the Rules Committee Web site, which is why we are using these microphones. And also advise that the full transcript and witness testimony will be available on the Web site.

Having said that, I want to welcome our witnesses to what I hope will be an important original jurisdiction hearing of the Subcommittee on Legislative and Budget Process. Our subcommittee's jurisdiction, which is most often associated with topics related to the budget process, also includes responsibility for reviewing matters of concern about the relationship between the legislative and the executive branches, a matter of some concern inside the Beltway and, hopefully, outside the Beltway, too.

In my relatively short tenure on this committee, I recall that my predecessor in this position, the distinguished former member from South Carolina, Butler Derrick, used the jurisdiction of our subcommittee to consider the important issue of the pocket veto.

In that tradition, we are here today to consider the subject of executive orders and the manner in which they impact on the legislative process. Executive orders are, at their simplest, meant to be instructions by the President to his subordinates. In their most benign form, they are management tools, means by which a chief executive can establish conformity and consistency across the many far-flung elements of his or her administration. Yet things have rarely been that simple in the realm of Federal governance.

Since the first executive order was issued in 1789 by President George Washington, there have been occasions where orders issued by the President have engendered public debate and controversy, sometimes leading to congressional or judicial reaction. We have seen this trend increase in recent decades as the scope and reach of the Federal Government have broadened, increasing the probability that policies implemented across the entire executive branch end up impacting the lives of the citizenry. Some have termed the active use of executive order "executive lawmaking".

It also appears to me that we have encountered significant creativity and ingenuity on the part of Presidents to use executive orders to advance their agendas when the legislative process has proven unwilling or unable to yield the desired results. Members may recall that as Ronald Reagan was preparing the take office as President in 1981 the Heritage Foundation published a book entitled, quote, "Mandate for Leadership," unquote, which included a list of proposals to implement more conservative policies through executive order. That list comprised 22 areas of policy, covering a broad range of issues and controversies.

On the flip side of the ideological spectrum, we can note that it was a senior advisor to President Clinton who summed up the tremendous power of the President to make policy via executive order when he said, and I quote, "Stroke of the pen, law of the land, kind of cool," unquote.

Additionally, a by-product of modern technology appears to have been greater public awareness of and interest in the unilateral actions taken by the executive. Today we have cable television, talk radio and the Internet as a means to provide unprecedented access to a wealth of information for the average citizen with an interest. I have found in recent years that more and more of the people that I represent in southwest Florida are contacting me to discuss concerns with executive orders, and indeed I would say that every time I go to a town hall or radio talk show we now have questions about executive orders. So it is something that has captured the imagination of the people we serve.

When you consider the topic of executive orders, there are almost as many subject areas possible under this heading as there are policies of the Federal Government, and that's a lot. Executive orders have touched upon a broad range of issue areas, and I know that we will get into some of those specific cases as we proceed today.

I should point out that there is a whole category of executive orders relating to implementing policies for our national security, an area of particular concern to me. Today, these are known as presidential decision directives, or PDDs, and they are mostly classified due to their sensitive content.

I wish to assure my colleagues that as chairman of the Intelligence Committee I know that congressional oversight in this area is vigorous and thorough, and in fact we spend an awful lot of time focused on those PDDs. We have chosen for a starting point in today's hearing the broader view.

We are looking at the process of executive orders: Where do they come from and under what authority are they issued? What are the procedures undertaken by the various elements of the executive branch with responsibility for executive orders? What have the trends been over recent history with respect to executive orders? To what extent does the public need to know or even care about executive orders? What is the proper role of the Congress in guarding their legislative prerogatives? And how well has Congress been doing in conducting oversight in this area? Obviously there are additional questions, but these are questions to guide our discussions today.

These are some of the questions that we have directed to our witnesses, and I am grateful for their participation.

We will start off with a panel of experts. First, we'll hear from Douglas Cox who is currently a partner at the law firm of Gibson, Dunn and Crutcher and formerly was the Principal Deputy Assistant Attorney General in the Office of Legal Counsel at the Department of Justice under President Bush.

Joining him on this panel is Neil Kinkopf, who until 1997 served as Special Assistant in the Office of Legal Counsel at the Department of Justice and currently teaches law at Georgia State University.

We also have Robert Bedell, whose career at OMB included serving as Administrator of the Office of Federal Procurement Policy, Deputy and Acting Administrator of the Office of Information and Regulatory Affairs, and Deputy and Acting Counsel of the OMB. Bob's tenure spanned 15 years and four Presidents, and today he is the President of the RPB Government Affairs Company.

Lastly on this panel we will hear from Tom Sargentich, currently Professor of Constitutional and Administrative Law at the Washington College of Law at American University. Tom formerly served as a Senior Attorney Advisor in the Office of Legal Counsel at the Department of Justice under Presidents Carter and Reagan.

We will then hear from William Olson, who has just completed a study for CATO on the issue of executive orders; and we will conclude the hearing with a presentation by Raymond Mosley, the Director of the Office of the Federal Register at the National Archives and Records Administration. I am particularly interested in this subject.

I would like to note that we have extended to the Clinton administration, through our minority, the opportunity to participate in today's hearing. Our staff has told us this offering was declined, which is certainly their right. Perhaps as this project of review proceeds, they will wish to become involved in sharing their thoughts on some of these important matters; and I hope so.

Before I turn to our witnesses, I also want to advise members that this topic is one of interest to many of our House colleagues. In fact, I understand that the House Judiciary Committee's Subcommittee on Commercial and Administrative Law has scheduled a hearing on executive orders for tomorrow. They plan to consider two legislative proposals that have been introduced on this subject, that I am aware of; and there, in fact, may be more than those two.

At this time, in the absence of our ranking member, Mr. Frost, it gives me pleasure to yield to the distinguished chairman of the Rules Committee, the Honorable David Dreier of California, without whose support and interest this subcommittee hearing would not have been possible.

[The statement of Mr. Goss follows:]

PREPARED STATEMENT OF THE HONORABLE PORTER J. GOSS, A REPRESENTATIVE IN CONGRESS FROM FLORIDA

The subcommittee will come to order. Welcome to an important original jurisdiction hearing of the subcommittee on legislative and budget process. Our Subcommittee's jurisdiction, which is most often associated with topics related to the budget process, also includes responsibility for reviewing matters of concern about the relationship between the legislative and executive branches.

In my relatively short tenure on this committee, I recall that my predecessor in this position—the distinguished former member from South Carolina, Butler Derrick—used the jurisdiction of our subcommittee to consider the important issue of the pocket veto.

In that tradition, we are here today to consider the subject of executive orders and the manner in which they impact on the legislative process.

Executive orders are at their simplest meant to be instructions by the president to his subordinates. In their most benign form, they are management tools, means by which a chief executive can establish conformity and consistency across the many far-flung elements of his administration.

Yet things have rarely been that simple in the realm of federal governance. Since the first executive order was issued in 1789 by President George Washington, there have been occasions where orders issued by the president have engendered public debate and controversy, sometimes leading to congressional or judicial reaction. We have seen this trend increase in recent decades, as the scope and reach of the federal government has broadened—increasing the probability that policies implemented across the entire executive branch end up impacting upon the lives of the citizenry. Some have termed the active use of executive order "executive lawmaking."

It also appears to me that we have encountered significant creativity and ingenuity on the part of presidents to use executive orders to advance their agendas when the legislative process has proven unwilling or unable to yield the desired results. Members may recall that, as Ronald Reagan was preparing to take office as president in 1981, the Heritage Foundation published a book entitled Mandate For Leadership, which included a list of proposals to implement more conservative policies through executive order. That list comprised 22 areas of policy, covering a broad range of issues and controversies. On the flip side of the ideological spectrum, we can note that it was a senior adviser to President Clinton who summed up the tremendous power of the president to make policy via executive order when he said "stroke of the pen, law of the land. Kind of cool."

Additionally, a by-product of modern technology appears to have been greater public awareness of and interest in the unilateral actions taken by the executive. Today we have cable television, talk radio, and the Internet as means to provide unprecedented access to a wealth of information for the average citizen with an interest. I have found in recent years that more and more of the people I represent in southwest Florida are contacting me to discuss concerns with executive orders.

When you consider the topic of executive orders there are almost as many subject areas possible under this heading as there are policies of the federal government. Executive orders have touched upon a broad range of issue areas, and I know that we will get into some of those specific cases as we proceed today. I should point out that there is a whole category of executive orders relating to implementing policies for our national security. Today these are known as Presidential Decision Directives—or P–D–D's—and they are mostly classified due to their sensitive content. I wish to ensure my colleagues that, as Chairman of the Intelligence Committee, I know that congressional oversight in this area is vigorous and thorough.

We have chosen for our starting point in today's hearing the broader view: we are looking at the process of executive orders—where do they come from and under what authority are they issued? What are the procedures undertaken by the various elements of the executive branch with responsibility for executive orders? What have the trends been over recent history with respect to executive orders? To what extent does the public need to know or even care about executive orders? What is the proper role of the congress in guarding its legislative prerogatives? And, how well has Congress been doing in conducting oversight in this area?

These are some of the questions that we have directed to our witnesses today. I am grateful for their participation.

We'll start off with a panel of experts—first we'll hear from Douglas Cox, who is currently a partner at the law firm Gibson, Dunn and Crutcher and formerly was principal deputy assistant attorney general in the Office of Legal Counsel at DoJ under President Bush. Joining him on this panel is Neil Kinkopf, who until 1997 served as special assistant in the Office of Legal Counsel at DoJ and currently teaches law at Georgia State University. We also have Robert Bedell, whose career at OMB included serving as administrator of the Office of Federal Procurement Policy, deputy and acting administrator of the Office of Information and Regulatory Affairs, and deputy and acting general counsel of the OMB. Bob's tenure spanned 15 years and four presidents and today he is the president of the RPB Government Affairs Company. Lastly on this panel we will hear from Tom Sargentich, currently professor of constitutional and administrative law at the Washington College of Law

at American University. Tom formerly served as a senior attorney advisor in the office of legal counsel at DoJ under Presidents Carter and Reagan.

We will then hear from William Olson who has just completed a study for CATO on the issue of executive orders. And we'll conclude the hearing with a presentation by Raymond Mosley, the director of the Office of the Federal Register at the National Archives and Records Administration.

I would like to note that we had extended to the Clinton Administration, through our minority, the opportunity to participate in today's hearing. Our staff was told this offer was declined, which is certainly their right. Perhaps as this project of review proceeds, they will wish to become involved in sharing their thoughts on some of these important issues.

Before I turn to our witnesses, I also want to advise members that this topic is one of interest to many of our house colleagues. In fact, I understand the House Judiciary Committee's Subcommittee on Commercial and Administrative Law has scheduled a hearing on executive orders for tomorrow. They plan to consider two legislative proposals that have been introduced on this subject.

Mr. DREIER. Thank you very much, Mr. Chairman.

I would say at the outset that I think it is more than kind of cool that you are holding this hearing, and I believe that this is an issue which is, in fact, gaining widespread public interest. Late last night, after I had left here, I went through my three weekly magazines and picked the Washington Whispers column of this week's U.S. News and World Report. After I read about George Bush and the stinginess of the campaign and several other things, I got to an item called "Project Podesta," which says, "White House Chief of Staff John Podesta, frustrated with the balky Republican Congress, thinks it is time for President Clinton to show who's boss," how Clinton plans a series of executive orders and changes to Federal rules that he can sign into law without first getting the okay from GOP naysayers. Since it is Podesta's idea, aides have dubbed it "Project Podesta."

The namesake told our Kenneth T. Walsh, quote, "There is a pretty wide sweep of things we are looking to do and we are going to be very aggressive in pursuing it. Up first, new rules to protect medical privacy and health records and providing paid leave for parents to take care of their newborns.".

Now, obviously many of these things are very well intended, but it does seem to me that, as they go further than even those things that we have authorized here, that we need to take a very close look at this issue. I will say that at the beginning of the 106th Congress, I worked closely with Speaker Hastert in trying to expand Congress' involvement in programmatic and policy oversight, which is a very important constitutional responsibility which we hold here, and it is often forgotten.

Frankly, executive orders are a significant and yet less frequently examined tool for carrying out legislative intent. That's one of the reasons that this hearing is so important. And even though I raised this issue that was in this week's news magazine, I would like to say that we are not with this hearing focusing on one particular executive order—or one particular administration, quite frankly—but we just want to better understand the very important relationship, as it was envisaged by the Founders, between the executive and the legislative branches.

The President's executive order authority is not something that we seek to undermine at all. As I said, we are not focused on the actions of just one President. We do want to make sure that executive orders continue to be written with the appropriate constitu-

tional or statutory authority, and they are not used to subvert the legislative process or implement policies that are not in the public interest.

So let me say that I appreciate the time and effort that has gone into this hearing by Chairman Goss and staff and to the witnesses who have taken time to prepare their thoughts on this very important issue, and I express my appreciation also.

Thank you, Mr. Chairman.

[The statement of Mr. Dreier follows:]

PREPARED STATEMENT OF THE HONORABLE DAVID DREIER, A REPRESENTATIVE IN CONGRESS FROM CALIFORNIA

At the urging of Speaker Hastert, House committees have been expanding their programmatic oversight activities to ensure that the Executive Branch is properly implementing the public policies enacted by Congress. Executive Orders are a significant, yet less frequently examined, tool for carrying out legislative intent.

This hearing is not intended for focus on one particular Executive Order but to shine light on the whole practice and to better understand its implications for Executive Branch and Legislative Branch relations.

The President's executive order authority is not something we have an interest in undermining. And this hearing is not focused on the actions of just one President. We, do, however, want to make sure that Executive Orders continue to be written with the appropriate constitutional or statutory authority, and that they are not used to subvert the legislative process, or to implement policies that are not in the public interest.

Mr. GOSS. Thank you, Mr. Chairman.

I again—in the absence of the ranking member at this time, I am going to directly to the panel. I do want to bring to the attention of members who are here—and I am grateful for the participation of Judge Pryce and Doc Hastings from Washington—that the staff has done really excellent background work on this, and I would recommend, if you have the opportunity to go through the materials that have been provided, at your leisure, there is quite a wealth of very provocative subject matter.

Sometimes we talk about the activist court and deal with that issue and the separation of powers in the three branches. Now we are talking about the other two players today. That doesn't mean we have to suspend from our minds the activist court. We would never want to do that. But I think it is sort of in that atmosphere that we are looking for balance, as the chairman has said.

With that, we look forward to the expert testimony ahead.

Mr. DREIER. They have some statements they want to submit for the record.

Mr. GOSS. I am sorry. We would be very happy to hear them.

Would you like to make the statements publicly?

Ms. PRYCE. I don't care to. I will just submit it.

Mr. GOSS. Without objection, Judge Pryce's statement will be accepted for the record and Doc Hastings' will be submitted for the record.

[The statement of Ms. Pryce follows:]

PREPARED STATEMENT OF THE HONORABLE DEBORAH PRYCE, A REPRESENTATIVE IN CONGRESS FROM OHIO, MEMBER OF THE SUBCOMMITTEE ON LEGISLATIVE AND BUDGET PROCESS

Mr. Chairman, thank you for holding today's hearing on the power of the president to establish policy through executive order. As the use of executive orders becomes more prevalent and the policy they establish has a more tangible impact on the lives of the people we represent, I think it is appropriate for Congress to exam-

ine the process by which these orders are developed and whether the legislature's lawmaking responsibility is being encroached.

Judging by my constituent mail, I think it is fair to say that the public awareness of the power of executive order has increased, and Congress should be able to explain to the public why the President is establishing policy without congressional approval. We have a responsibility to ensure transparency of the process by which executive orders are established and respond when the executive branch oversteps its constitutional or statutory authority.

This can be accomplished, in part, through vigilant congressional oversight in any effort to preserve a balance of power and protect our legislative prerogative. In doing so, we will protect the power of the people we represent, to whom we are accountable. I think this hearing is an important first step in that process.

So, I thank Chairman Goss, again, for holding this hearing, and I look forward to the testimony of our witnesses who have given much more thought to this subject than I or many of my colleagues. I appreciate the time you all are taking to share your knowledge with us this morning.

Mr. GOSS. Do you wish to speak?

Mr. HASTINGS. No. I will wait for the questions.

I will just say, though, Mr. Chairman, that I concur with you about the documents that were given to our offices from the staff. I think they were very enlightening for me as I was reviewing that, so I look forward to the testimony of our witnesses, and hopefully that will—I am sure it will spark some more thoughts in my mind and questions.

So thank you, Mr. Chairman.

Mr. GOSS. Thank you. We will begin with the first panel and please excuse the designation of the panel. We recognize you are all individuals. We have grouped the thought, we hope, into the three panels in order to provide ourselves the opportunity for appropriate questioning at the appropriate beaks.

I believe Mr. Cox is going to start, to be followed by Mr. Kinkopf, Mr. Bedell, Mr. Sargentich, in that order.

STATEMENTS OF DOUGLAS COX, PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, 1992–1993, AND PARTNER, GIBSON, DUNN & CRUTCHER LLP; NEIL KINKOPF, SPECIAL ASSISTANT, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, 1993–1997, AND PROFESSOR OF LAW, GEORGIA STATE UNIVERSITY; ROBERT BEDELL, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, 1986–1988, DEPUTY AND ACTING ADMINISTRATOR, OFFICE OF INFORMATION & REGULATORY AFFAIRS, 1983–1986, DEPUTY AND ACTING GENERAL COUNSEL, 1973–1983; AND PRESIDENT, RPB COMPANY; AND TOM SARGENTICH, SENIOR ATTORNEY ADVISER, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, 1978–1983, AND PROFESSOR OF CONSTITUTIONAL AND ADMINISTRATIVE LAW, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. GOSS. If that's agreeable with you, Mr. Cox, the floor is yours.

STATEMENT OF DOUGLAS COX

Mr. COX. Thank you, Chairman Goss, for inviting me to testify today on the important topic of executive orders. Rather than repeat my written testimony, with your permission, I will underscore a few key points regarding the role of executive orders in our con-

stitutional system and the tools available to Congress to respond to unlawful executive orders in defense of its own constitutional powers.

The President does not have broad authority to issue executive orders, to guide and control the work of the executive branch. As the Supreme Court recognized in the Steel Seizure case, that authority flows from the Constitution itself and also from statutes. Although executive orders are not explicitly mentioned in the Constitution, the authority to direct the executive branch is inherent in the President's role as the head of a unitary executive branch.

That authority is also found in the President's duty to take care that the laws are faithfully executed, in the appointments clause, in the commander-in-chief clause, and in other clauses of the Constitution.

In addition, Congress often grants the President statutory authority to issue executive orders, either expressly or by granting the President significant discretion in implementing the statutory scheme.

Whether the President grounds an executive order on the Constitution or on a statute, it is vitally important to the Nation that the executive power be exercised forcefully and consistently and that the chief executive's lawful policy preferences be carried out by subordinates within the executive branch. There is, thus, nothing suspect about executive orders, per se. They offer a valid mechanism for the President to direct and control the executive branch, and the vast majority of executive orders attract little attention or controversy.

Broad as the President's power is, it is, of course, subject to limitations. It is limited by the Constitution and the principle of separation of powers that is embodied in the Constitution. It is often limited by statutes that grant the President only a narrow discretion, and the President's exercise of the power may in certain circumstances be subject to judicial review.

The President's power may be abused, as all government powers may be abused. The threat of abuse may be particularly high when Congress and the executive branch are controlled by different parties. The Framers assumed that each of the political branches would seek to maximize its power and believed that the resulting struggle between the branches would help guarantee liberty.

Certainly when administration officials announce that they intend to adopt sweeping executive orders designed to circumvent Congress, Congress must be vigilant in order to protect its own powers and the constitutional plan. Congress may control executive orders based on statutory authority in a number of ways.

First, Congress can respond to a particular executive order by enacting a contrary statute. In such cases, the statute would control and the executive order would be invalid.

Second, Congress can create general mechanisms to increase congressional oversight of executive orders. For example, Congress could, by legislation, require that any statute-based executive order be submitted to Congress 30 days before it goes into effect so as to enable Congress to consider whether a legislative response is necessary.

Third, Congress can restrain the President's statutory authority by writing narrower, more precise laws. To given one example, Presidents of both parties have found in the broad purposes of the Federal Procurement Act convenient justification for a range of sweeping executive orders. Those executive orders do not necessarily change the legal rights and obligations of anyone outside the executive branch, but to the extent that offer an incentive, amounting nearly to compulsion to the very large number of companies that wish to contract with the Federal Government, such executive orders greatly extend the reach of the President's authority beyond the executive branch and into private companies across the Nation.

Congress could narrow the President's discretion under the Federal Procurement Act by amending the act to preclude such efforts to influence the internal policies to private companies seeking to qualify as Federal contractors.

And, of course, Congress can use any of its usual powers of political persuasion—oversight hearings, confirmation holds and many other forms of legislative pressure short of legislation—in order to convince the President to drop or redraft an abusive executive order.

But just as there are limits on the President's power to issue executive orders, there are limits on the ability of Congress to rein in the President's exercise of his constitutional powers. There is a core of constitutional authority given to the President that cannot be reached by legislation. Congress, in considering how to respond to the threat of abusive executive orders, must thus proceed with caution. When a President abuses his constitutional authority, Congress has an obligation to respond. Congress has ample constitutional means, including its political tools, to respond to lawless executive orders. Thus, Congress need not resort to assertions to legislative authority that would themselves raise serious constitutional problems.

Thank you, Mr. Chairman.

Mr. GOSS. Thank you very much, Mr. Cox.

[The statement of Mr. Cox follows:]

PREPARED STATEMENT OF DOUGLAS R. COX

Thank you, Chairman Goss, for inviting my submission on the important subject of the impact of executive orders on the legislative process. The specific questions I will address are the role of executive orders within our constitutional system, and the tools available for Congress to respond to executive orders.

I. EXECUTIVE ORDERS

As an initial matter, it is important to recognize that the President has broad authority to issue executive orders, to guide and control the functioning of the executive branch. As the Supreme Court recognized in the steel seizure case, *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 585 (1952), the President's executive order has two potential sources: The Constitution, and Federal statutes.

Although executive orders are not explicitly mentioned in the Constitution, the authority to direct the executive branch is inherent in the President's constitutional role as the head of a unitary executive branch. That authority is also a necessary part of the President's power to perform his constitutional duty to "take care that the laws be faithfully executed." Article II, section 3.

Some executive orders may also be rooted in other clauses of the Constitution, such as the appointments clause and the commander-in-chief clause. President Truman based Executive Order 9981, ordering the desegregation of the armed forces, on his commander-in-chief powers.

Congress itself often grants the President additional authority to issue executive orders, either expressly or by granting him significant discretion in executing the laws. When Congress grants the President substantial discretion, executive orders provide an appropriate mechanism for the President to inform his subordinates within the executive branch as to the way in which that discretion is to be exercised.

For example, 22 U.S.C. § 287c explicitly contemplates that the President will issue executive orders to give effect to United Nations Security Council resolutions. It is a very generous grant of discretion, and authorizes the President, among other things, to "investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States. . . ." 22 U.S.C. § 287c(a).

Similarly, 40 U.S.C. § 471 et seq., the Federal property and Administrative Services Act, specifically authorizes the President to issue policies and directives "as he shall deem necessary to effectuate the provisions" of the act. 40 U.S.C.

§ 486. The act's general purpose of furthering the "economic and efficient" performance of the Federal Government's procurement functions may plausibly support a wide range of presidential policies. And as an historical matter, Presidents have frequently relied on the act to justify executive orders.

The President, in issuing an executive order based on a statute, is engaging in a process similar to administrative rulemaking: Both processes require and permit executive branch officials to exercise discretion within the statutory framework created by Congress. The concept of "chevron deference" to rulemaking by Cabinet departments is a familiar one. But it is also an acknowledgment of Presidential discretion in the interpretation of very many statutes. Although rulemaking differs from executive orders in many ways—chiefly by being subject to the procedural requirements of the Administrative Procedure Act—the concept of executive branch discretion that is uncontroversial in the rulemaking setting should not be dramatically more controversial in the highly similar context of executive orders.

Whether the President is relying on his constitutional powers or on statutory authority, it is vitally important to the Nation that the executive power be exercised forcefully and consistently, and that the Chief Executive's lawful policy preferences be carries out by his subordinates within the executive branch. Executive orders are binding on officials within the executive branch.

Presidents have exercised their authority to issue executive orders throughout our history. President Washington, for example, issued directives that today would be classified as executive orders, using them to manage the business of the executive branch in such areas as prosecutorial priorities, and harmonizing the public positions of the Cabinet departments. Subsequent Presidents, including President Adams and President Jefferson, followed suit. By tradition, the distinction of issuing executive order number one is awarded to President Lincoln, although in fact the practice of numbering executive orders did not arise until this century.

The historical practice is significant in this instance because it gives content to "the executive power" granted to the President by the Constitution. As Justice Frankfurter stated in his concurrence in the steel seizure case, "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 . . . may be treated as a gloss on 'executive power' vested in the President by § 1 of art. II." 343 U.S. at 610–11 (Frankfurter, J., concurring).

Broad as the President's powers are, they are plainly not unlimited. They are limited by the Constitution's text; they are limited by the principle of separation of powers embodies in the Constitution; they are limited by the non-delegation doctrine; and they are often limited by statutory terms that grant the President only a narrow discretion.

In recent decades, Presidents have relied on the Attorney General to review and approve proposed executive orders. Executive order 11,030 issued in 1962 and which continues (as amended) to govern the form of executive orders and the procedures to be followed in issuing executive orders, provides that the Attorney General is to review proposed executive orders for "form and legality."

The Attorney General still performs that function in certain exceptional cases: Attorney General Civiletti, for example chose to approve President Carter's executive orders for dealing with the Iranian hostage crisis in an opinion over his own signature. 4a Op. Off. L. C. 302 (1981). But the Attorney General has formally delegated the responsibility to approve executive orders to the Justice Department's Office of Legal Counsel ("OLC"), in which I was privileged to serve during the administrations of President Reagan and President Bush.

The terms of that delegation, in 28 CFR § 0.25, are themselves instructive. OLC is responsible not only for reviewing proposed executive orders for "form and legality," but also for "making necessary revisions" to proposed orders before "their transmission to the President." Further, OLC offers its legal opinion in writing, so that there is a formal record that the executive order was reviewed for legality, and a formal document signed by a responsible official in OLC vouching for the lawfulness of the proposed action.

I understand that the Clinton administration continues to follow these procedures.

There is thus nothing necessarily suspect or unlawful about executive orders. They are part of our constitutional order and of the long-established functioning of the executive branch. The vast majority of executive orders attract little attention or controversy. Given that the President is politically accountable for the performance of his administration, executive orders offer a valid and necessary mechanism for the President to exercise his lawful powers.

II. CONGRESSIONAL RESPONSES TO EXECUTIVE ORDERS

The President's authority to issue executive orders is subject to abuse, as are all government powers. Under the guise of directing the executive branch, a President may further policies contrary to statute, or may shift enforcement priorities in ways that frustrate the intentions of Congress. Some executive orders may cross the line between executing the law and legislating.

The threat of abuse may be particularly high when Congress and the executive branch are controlled by different parties. Certainly when administration officials announce that they intend to adopt sweeping executive orders designed to circumvent Congress, or in reaction to a decision by Congress to reject parts of the President's program, Congress is right to be concerned that its legislative powers may be misappropriated.

The risk of such abuses, however, should not lead Congress to conclude that all executive orders are suspect. Nor should Congress attempt to constrain by legislation that part of the President's executive order authority that derives from the Constitution.

Rather, Congress should be vigilant to guard its legislative prerogatives and to maintain the separation of powers through its own constitutional authority. When Congress is confronted by an executive order that it believes exceeds the President's powers, it has many tools with which to respond.

First, by statute all substantive executive orders are required to be published in the Federal Register. 44 U.S.C.

§ 1505. Congress and the public thus receive notice of executive orders. Congress may respond to an executive order by exercising its legislative powers to enact contrary legislation, or to deny funding to carry out an executive order. Any subsequent contrary legislation will bind the President's discretion, assuming that the legislation does not impermissibly invade the President's constitutional powers.

Thus, for example, President Carter issued Executive Order 11,988 in May 1977. That executive order was interpreted by the Department of Housing and Urban Development as requiring the bank regulatory agencies to prohibit regulated institutions from making loans secured by real property within a flood plain unless flood insurance was available. Subsequent to the issuance of the executive order, Congress changed the law to permit such loans, and OLC not surprisingly concluded that "the statute takes precedence over" the executive order. 2 OP. OFF. L. C. 41 (1978).

Second, a President may respond to political pressure or complaint about an executive order. Executive Order 13,083, President Clinton's attempt to alter President Reagan's federalism order, elicited sufficient public outcry that President Clinton "Suspended" his own executive order by means of a subsequent executive order. E.O. 13, 095.

Third, Congress as a prophylactic matter can limit the President's ability to invoke statutory authority for executive orders by writing more specific, more precise laws. Although in certain areas it is often necessary or desirable for the President to have sufficient discretion to respond to changing circumstances, that is not true of all legislation. Congress fails to perform its essential legislative function when it allocates excessive discretion to the executive. A vague law that imposes on the executive the task of balancing costs and benefits removes the debate about that balancing from the people's representatives assembled in Congress, and relegates it to a technical world or regulation. A direction to the President, for example, to make highways "safer" without any legislative choice among the many competing policy options—requiring different and more costly automobile engineering, or changing highway design, or using Federal funds to encourage the states to change their law

enforcement policies to concentrate on speeders—would grant the President a great deal of discretion to make policy choices that Congress failed to make.

Fourth, Congress could pass a statute that required the President, whenever he invoked a grant of statutory authority to justify an executive order, to identify that statute with particularity. That would avoid the phenomenon of executive orders based generically on unspecified "laws of the United States."

Fifth, Congress could also by legislation require the President, whenever he invoked a grant of statutory authority to justify an executive order, to send the executive order to Congress and delay enforcing the order for thirty days, to give Congress an opportunity to review the order and determine if a legislative response was necessary. Congress presumably would want to build into any such requirement an exception for bona fide emergencies.

Sixth, Congress has a host of other means to influence the President. Congress can conduct oversight hearings to press the administration to explain its legal reasoning; can restrict or reduce appropriations; and can take such indirect actions as slowing the confirmation of Presidential nominees in an attempt to persuade the President to withdraw a questionable order. According to press reports, for example, the Senate delayed a confirmation vote on one of President Clinton's Cabinet nominees until the President agreed to drop a planned executive order that would have instructed Federal agencies to contract with unionized companies. E.g., the Baltimore Sun, May 1, 1997 at 2A.

Further, in addition to Congress's own powers to restrain abuses, in some cases the President's issuance of an executive order can be subject to judicial review. The steel seizure case involved a challenge to an executive order. More recently, President Clinton's Executive Order 12,954, involving striker replacements, was held to be invalid by the Court of Appeals for the District of Columbia Circuit. *Chamber of Commerce of the United States* v. *Reich,* 74 F.3D 1322 (D.C. Cir. 1996). The possibility of judicial review cannot replace congressional oversight, however private parties are often unwilling to spend the time and money to challenge the Federal Government, and in some cases it may be difficult to identify parties with standing to sue.

III. CONCLUSION

Executive orders are a part of the President's constitutional authority. Congress has often added to that authority by granting the President broad statutory discretion. The President must have such broad authority to direct and control his subordinates in the executive branch.

If an executive order exceeds the President's authority, Congress may act legislatively to correct the President, or may use any of numerous political tools. In a proper case, the judiciary is also able to strike down an executive order that is contrary to law.

When a President overreaches and uses executive orders to invade or supersede the legislative powers of Congress, Congress may be sufficiently provoked to consider an across-the-board approach to rein in those abuses. Although that reaction is understandable, Congress must be careful to understand the extent to which executive orders are a necessary adjunct of the President's constitutional duties. At all times, Congress has ample legislative and political means to respond to abusive or lawless executive orders, and thus Congress should resist the temptation to pursue more sweeping, more draconian and more questionable responses.

Mr. GOSS. Mr. Kinkopf.

STATEMENT OF NEIL KINKOPF

Mr. KINKOPF. Thank you, Mr. Chairman.

This is, in fact, a very important hearing on a very important and timely and timeless topic. Every statute accords the officer charged with enforcing that statute, unavoidably, a certain amount of discretion, and the exercise of that discretion can aptly be termed lawmaking authority.

Consider, for example, a very simple, straightforward, seemingly specific statute: a speed limit of 55 miles an hour. In a world where it is not possible to pull over everyone who exceeds 55 miles an hour, the officer enforcing that statute must decide whom to pull over and whom to let go. If the officer decides only to pull over cars

going over 60 miles an hour because that will best effectuate the legislature's purpose, the officer certainly engages in lawmaking; as a practical matter, the speed limit has been raised to 60 miles an hour. But has the officer been faithless? No. The officer is seeking expressly to advance the purpose of the statute and faithfully to enforce it.

Discretion-yielding lawmaking power can also derive from statutes because of the fact that statutes are durable. They exist over time. And over time, circumstances change. An executive unavoidably has to decide how a statute applies to changed circumstances. In doing so, the executive officer necessarily engages in something that might be termed "lawmaking."

Finally, statutes interplay, they interact. And when statutes intersect with one another, if they don't themselves tell the officer how to respond, (which often they don't because their interaction is not foreseeable at the time they are enacted), the executive officer has to decide how the two statutes will mesh, how to enforce them consistently with one another. That, itself, can often involve executive lawmaking.

Given that some executive lawmaking is inevitable, Congress has to determine who should do the executive lawmaking. The options would be the President or someone subordinate to the President. It is my contention that in most, though perhaps not all, cases it is best to leave that lawmaking authority in the President or subject to the President's discretion, supervision and control.

The reason for that is that the President is accountable and is accountable to political pressures in ways that his subordinates, who have never stood for election, at least for their current position, have not. In essence, the choice boils down to the President or a faceless bureaucrat; and I think for reasons of accountability, it is generally preferable that the President have the supervision and control, rather than a faceless bureaucrat.

Now, recognizing then that inevitably there is executive lawmaking authority whenever Congress enacts statutes, and that that authority is generally best vested in the President, it does not follow that Congress has no means of keeping the President within the proper bounds. First, Congress can legislate more frequently than it does. It can legislate when circumstances change in order to make clear how the executive should respond to changed circumstances. It can speak specifically to issues of interaction and interplay between statutes when conflicts and tensions arise and become apparent; and as Mr. Cox pointed out, Congress can act to revise or eliminate, or supersede executive orders.

Congress can also engage in oversight through a variety of functions. As Mr. Cox has mentioned, Congress can engage in oversight hearings to educate itself on how, exactly, the executive branch is enforcing the laws and this would support its updating function, its legislating more frequently.

But there are other tools of oversight. An additional tool would be reporting requirements. Rather than going through the formal and time-consuming exercise of holding hearings on every subject, Congress could require executive agencies to submit reports talking about executive orders, how they impact the functions of the agency, what sorts of alternatives are eliminated, what sorts of alter-

native enforcement mechanisms are eliminated by the executive order; and thereby Congress can keep itself informed without going to the extent of holding oversight hearings on how executive orders are functioning within the executive branch.

Finally, Congress can expressly state its disapproval of executive action through a resolution. It could be a committee resolution, a House resolution or a full Congress resolution.

Another alternative open is structural reform. In a statute such as the one that Mr. Cox cited, the Federal Procurement statute, Congress could set forth and define the basis on which the authority vested by that statute may be exercised. It could further require as to any statutorily-based order, findings be made and be made on the record and be explained.

In addition to these measures that Congress can pursue, there are checks on overreaching by the President. One Chairman Goss mentioned in his opening remarks is an activist judiciary. Judicial review is always available when an executive order reaches out and affects persons outside of the government.

In addition to judicial review, in the instances when that is not available, there are other law interpreters who can pass judgment on the President's contention that he has authority to issue an executive order. For example, Comptroller General opinions very often bear on questions underlying an executive order, especially executive orders issued pursuant to the authority of the Federal procurement statute. Other law interpreters would include the Congressional Research Service, and the House and Senate legal counsels offices.

Furthermore, public pressure and interest group vigilance can supply a very powerful check on executive orders. If the President overreaches his authority in a way that affects interest groups, and most executive orders do, those interest groups can bring pressure directly on the President and can also bring pressure on Congress to respond to the President.

Finally, there are internal checks available within the executive branch. The Office of Legal Counsel vigilantly ensures that executive orders are duly authorized. In addition, its opinions are generally published and provide precedent against which to adjudge any particular assertion of authority to issue an executive order.

Now, even if you are not terribly comfortable trusting the executive branch to police itself—the fox to police the henhouse as it were—those mechanisms of internal checking, OLC's opinions and precedents, allow the external checks to function more effectively. The public, Congress and the courts can more effectively assess what the President has done when OLC issues opinions, and those opinions, as they generally do on close questions, become public.

I want to conclude with a caution against trying to legislate too specifically, which I suspect will be a temptation, given the way this problem has been couched. Not only for the reasons that I stated do I think it is futile, I think specific legislation is very often ineffective.

Criminal statutes aimed at the Mafia, for example, have been effective precisely because they are not specific. Criminal enterprises, like many problems that confront the government, are flexible and can change form overnight. If Congress legislates specifically, it

will codify forms that can be easily evaded and so in rightly focusing upon concerns about maintaining the proper balance of power between the executive branch and Congress, I would urge that Congress not overlook the importance of its ability to enact effective legislation.

Thank you, Mr. Chairman.

Mr. GOSS. Thank you, Mr. Kinkopf.

[The statement of Mr. Kinkopf follows:]

PREPARED STATEMENT OF NEIL KINKOPF

The Constitution vests the legislative power in Congress and the executive power in the President, but it nowhere defines those powers. To be sure, the Constitution enumerates the subjects to which the legislative power extends,[1] but it does not offer a definition of what that power is, nor does it define "executive power." This was not inadvertent. The framers were practical statesmen who understood that each branch of government would be ambitious and seek to secure as much power, at the expense of the other branches, as possible. The framers also understood that any attempt to stop this by marking clear boundaries on the executive and legislative powers would be futile. Madison derisively referred to such formal demarcations as "parchment barriers." The genius of the Constitution's structure lies in the practical response it adopted. Instead of assuming that angels would govern, it structures the branches so that, as Madison put it, "ambition will be made to counteract ambition"; each branch, in short, would act as the guardian of its own constitutional role. In holding these hearings the committee is fulfilling the Constitution's vision of how the government would and should work.

The Constitution creates a federal government of limited and enumerated powers. Therefore, considerations of any federal action must begin with an inquiry into whether the action is validly authorized. When the President acts unilaterally, such as by issuing an executive order, his authority must derive from either the Constitution or a law, typically a statute.[2] If the President issues an executive order that is based entirely on authority that the Constitution's text grants exclusively to the President, that executive order, by definition, does not involve a deployment of a legislative power.[3] I will confine my comments to the two contexts that implicate directly Congress's legislative role: where the President's authority to issue an executive order is founded on statute alone, and where the order is based on a combination of constitutional and statutory authority.

The relationship between the executive and legislative powers within these contexts is not fixed and definite, but is better conceptualized as a spectrum. The extent of each is a function of several mutable factors: the specific statute at issue, the nature of Congress's underlying constitutional powers vested in the President, and the specific facts surrounding the executive order.[4] Consequently, it is difficult to offer general prescriptions for safeguarding the legislative power against executive overreaching. Nevertheless, I believe that there is support for a number of observations:

I. As long as Congress legislates, its legislation will, unavoidably, vest the executive branch with discretion as to how to enforce Congress's laws.

II. As long as the executive branch holds executive discretion, it is generally desirable that this discretion be subject to some degree of presidential supervision and control.

III. Congress is amply equipped to protect its legislative role from presidential overreaching.

IV. Beyond Congress, there are significant, additional checks against presidential usurpation of the legislative role.

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[1] *See, e.g.*, U.S. Const. Art. I, sec. 8.

[2] See *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579,585 (1952). The President may also derive authority from a duly ratified treaty.

[3] Such an order may, however, have ramifications for legislative prerogatives. It may bring about circumstances that yield strong pressure on Congress to enact appropriations. Such an executive order can also serve an agenda-setting function, diverting attention from what may otherwise have been higher congressional priorities. Each of these occurs when the President orders the use of military force, short of war.

[4] For the classic exposition of this view, see *Youngstown Sheet & Tube*, 343 U.S. at 634–55 (Jackson, J., concurring).

I.

Executive branch lawmaking, to refer back to the title of this hearing, is inevitable. Faithful execution of the laws demands it In a recent article, two important presidential scholars have argued that the ability to act unilaterally is the defining feature of modern American presidency.[5]

Statutes are not self-enforcing. Every statute unavoidably conveys some discretion. When any officer charged with the execution of a law decides how to exercise that discretion, the officer engages in something that can well be called lawmaking. Imagine a specific and straightforward law, one that declares a speed limit of 55 mph on a given highway. An officer charged with enforcing that law will have to determine whether to pull over a car for going 56 mph. An officer who does will have to leave his patrol car to write out the ticket and may then miss a car going by at 85 mph. In a world where it is impossible to catch every offender, the executive will have to determine which offenders to ticket and which to let pass. The executive may well determine that if it is most faithful to the legislature's purpose by adopting a policy that it will not pull over anyone who goes less than 60 mph. Has the executive made law? Certainly. Has the executive been irresponsible or unfaithful to the legislature? Certainly not.

Moreover, executive discretion flows from the durability of duration of statutes. Because statutes remain operative over time, they apply in the context of circumstances that will have changed in ways that are unforeseeable to even the most conscientious legislature. Applying a statute under significantly changed circumstances from those the enacting Congress faced necessarily involves executive judgment. Whatever course the executive chooses to take, including the choice to take no course of action, when confronted with changed circumstances can be termed executive lawmaking. Consider, for example, the government shutdown. The statute that required the cessation of government functions was the Anti-Deficiency Act.[6] The Congress that passed this ancient statute did not have in mind the circumstance of a complete lack of appropriations.[7] Yet Presidents have been duty bound to apply the Anti-Deficiency Act in that very unforeseen situation.[8]

The interplay of distinct statutes also occasions a great deal of execution lawmaking. Congress often passes inconsistent statutes. For example, a law may require a program to run at a specified level, but the appropriations made for the program may permit it to run at 80% of the mandated level. The executive's determination of how to proceed involves what might be deemed lawmaking. Although such examples are common, Congress does not always enact language stating how to resolve plain and direct statutory conflicts.

Often, the interplay of statutes if not so readily apparent. Again, the government shutdown provides a useful example. The Food and Forage statute[9] was enacted to ensure that military personnel who found themselves cut off from supplies could provide for themselves. It allows military personnel to secure food and necessary materiel. The Anti-Deficiency Act forbids incurring an obligation in advance of an appropriation. These statutes were enacted without apparent regard to one another, yet they come into tension during a lapse of appropriations. Resolution of that tension involves executive lawmaking.

It should not be surprising then that our history is full of examples of executive lawmaking, stretching continuously from George Washington through the present. Moreover, some of the most historically significant governmental laws have been issued by the President acting unilaterally. Some of these solitary acts deserve our praise as courageous, others merit approbation, the value of others is still debated. For example, President Washington issued the Neutrality Proclamation, declaring U.S. neutrality in the war between Britain and France and forbidding U.S. citizens from acting inconsistently with a state of neutrality.[10] Andrew Jackson effectively eliminated the Bank of the United States by ordering that the assets of the federal government be withdrawn. President Lincoln issued the Emancipation Proclamation

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[5] *See Terry Moe & William Howell*, The Presidential Power of Unilateral Action, 15 J.L. Econ. & Org. 132 (1999).

[6] See 31 U.S.C. secs. 1341–1342.

[7] See GAO Redbook.

[8] For an attempt to construe the Anti-Deficiency Act in the context of a complete failure of appropriations, see 43 Op. Att'y Gen. 29 (1981).

[9] 3 Stat. 567, 568 (March 2, 1861).

[10] For example, privateers were not permitted to sail from ports of the United States. The proclamation nearly led to war with France. The Neutrality Proclamation also spawned the famous Pacificus-Helvidius debate over the extent of the President's constitutional authority to conduct foreign affairs. For an excellent discussion, see *H. Jefferson Powell*, The Founders and the President's Authority over Foreign Affairs 40 Wm. & Mary L. Rev. 1471 (1999).

freeing the slaves in the States of the Confederacy; Theodore Roosevelt withdrew public lands and set them aside to create a system of national parks; Franklin Roosevelt ordered the internment of Japanese Americans during World War II; President Truman desegrated the military and ordered the seizure of steel mills; and President Lyndon Johnson ordered the nation's first affirmative action program on the strength of the federal procurement statute.

II.

Given that lawmaking discretion is inevitable, it is proper and desirable that the discretion be exercised subject to the President's supervision, which is to say subject to executive orders. Unlike agencies, which tend to focus on a limited subset of federal laws and of policy concerns, the President enjoys a fairly panoramic view of both the executive branch and the United States Code. The President is thus uniquely situated to bring about enforcement actions that are consistent across the executive branch and to set rational enforcement priorities. When a decision will have important consequences for more than one agency or department, the President alone can call upon the legal and policy advice of all interested agencies and weigh that input without being distracted by concern over agency jurisdiction or "turf battles." [11]

Most importantly, presidential supervision means presidential accountability. If Congress were to deprive the President supervisory control over the exercise of discretion by a federal agency, Congress and the public could not hold the President responsible for abuses of power. Moreover, the President by virtue of his high political office and of being elected, is responsive to the public in ways that no other executive branch official is. Thus, popular concern about regulation by "faceless bureaucrats." would be heightened were the President unable to control the lawmaking discretion vested in the executive branch.

III.

Recognizing that even broad executive discretion is inevitable and possibly beneficial does not undermine my basic point about about the Committee's inquiry. It is legitimate, indeed important, for Congress to remain vigilant that necessary and proper executive discretion is not carried too far. I would like briefly to canvass some of the measures that Congress might consider to protect its legislative role.

1. Legislating more specifically. That it may be impossible to eliminate all discretion does not mean it will impossible to constrict more narrowly the extent of discretion. It may be possible and even salutary to study options for reducing executive discretion,[12] but ultimately this is a dead end. The President does not possess broad because Congress is lazy or slothful. The President possesses broad discretion because it is necessary for any statutory regime to be effective. For example, federal criminal laws are phrased in broad, even capacious, terms. Making them more specific would limit the possibility of prosecutorial abuse and harassment, all the better from the standpoint of individual liberty. However, precisely phrased federal criminal laws allow dangerous and flexible criminal enterprises to change the form of their dealings in order to evade the formal categories. For example, the first federal criminal role included approximately twenty crimes, including the crime of maiming, which Congress defined very precisely to apply:

"If any person . . . shall unlawfully cut off the ear on ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the nose or a lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person in any of the manners before mentioned. . . ." [13]

This statue is remarkably specific, but for that reason fails to reach such obvious maimings as a stab wound to the ear or a blow to the nose with a club. The founders themselves were familiar with this problem. In setting forth the permissible grounds for an impeachment, they realized that a precise list of crimes would inevitably exclude misconduct that is just as harmful to the republic as bribery and treason, but that do not satisfy the formally required elements of the crimes they might

[11] An exception to this may arise when the disputing agencies include an independent agency. Here the President's institutional, or "turf," interest would yield an incentive to disfavor the independent agency.

[12] For example, when Richard Nixon asserted and exercised broad authority, based on the Constitution and on statutes, to decline to expend appropriated funds, Congress responded to protect its appropriations power by enacting the Impoundment Control Act. See Pub. L. No. 93–344, 88 Stat. 297 (1974).

[13] 1 Stat. 112, 115, 1st Cong., 2d Sess. (April 30, 1790).

have listed. Favoring effectiveness over precision, the Constitution's drafters settled on the famously vague formulation, "high crimes and misdemeanors." [14]

Federal law enforcement has been able to devastate the mafia and other criminal organizations precisely because it has at its disposal broad and vaguely worded statutes. Take away the flexibility and adaptability of federal law enforcement, and it cannot combat crime as effectively as it does.

Indeed, Congress's ability to accord lawmaking authority to the executive is generally viewed not as a derogation from its legislative power, but as one of the most important tools by which Congress can perform its legislative role. Again, history is instructive. To combat the Great Depression, Congress granted broad authority to the President to respond to economic conditions. When the Supreme Court struck down these delegations, its decisions were not viewed as promoting the power and authority of Congress. Its decisions were viewed instead as preventing Congress from enacting an effective remedy to a national crisis.

2. Legislating more frequently. Rather than trying to craft enduringly and unfailingly specific legislation, Congress should legislate more frequently. First, Congress must be vigilant in overseeing the rules that the executive branch promulgates. Congress should then repeal or amend executive branch lawmaking whenever it disapproves of the executive branch's rules. Second, Congress should be vigilant in overseeing its own statutes. Congress should seek to identify antiquated statutes, like the Anti-Deficiency Act and the Vacancies Act, before their application becomes problematic and it should keep abreast of how statutes it enacts come to interact with other statutory regimes. Where there is interplay, Congress may assert its legislative power to dictate the accommodation it prefers.

3. Oversight. Just as executive lawmaking occurs outside the framework of bicameralism and presentment, that is where Congress must look for methods to keep the executive in check. First and foremost is Congress's power to conduct oversight hearings. It would be risible to expect the President personally to participate in oversight hearings. Nevertheless, the President's executive orders on unclassified matters are publicly available. In addition, the President does not personally carry out his own executive orders. The agencies charged with doing so are themselves generally amenable to the oversight process. It is thus well within Congress's ability to inform itself as to how its statutes, and the discretion they confer, are being enforced and to discern whether there are any abuses.

Congress can supplement oversight hearings by requiring that agencies submit periodic reports describing the executive orders to which they are subject and conveying whatever other information Congress might find useful in performing its oversight function. It might, for example, call on the agency to discuss exactly how the executive order bears on or shapes the agency's enforcement of affected statutes, the order's impact on the allocation of agency resources, and alternative enforcement regimes that the order requires the agency to forgo.

Having armed itself with information, Congress may consider several types of responses. First, it may legislate to alter or supplant completely the directives of a given executive order. Second, either or both houses can pass a resolution calling upon the President to rescind or amend any executive order. A third, drastic measure is censure. If Congress believes that the President has overstepped the proper bounds of his executive role and usurped the legislative function, it may pass a resolution of censure. This is what Congress did in response to President Andrew Jackson's decision to withdraw federal assets from the Bank of the United States, with the intent and practical effect of closing the bank.[15]

At this point an institutional symmetry appears. Much as Congress is (rightly) concerned about protecting its legislative role from presidential overreaching, the executive periodically complains that mechanisms such as those set forth above thwart the constitutionally proper executive role.[16] In each case, the point is balance.

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[14] See II Joseph Story, Commentaries on the Constitution, paras. 794–802 (1833).

[15] From the perspective of protecting congressional power, this episode does not have an encouraging conclusion. Cowed by Jackson's continuing political popularity, congress three years later rescinded the censure resolution. See Register of Debates, 24th Cong., 2d Sess. 379–418, 427–506 (1837); Senate Journal, 24th Cong., 2d Sess. 123–24 (April 15, 1834). In a particularly egregious case of repeated, dangerous, and contumacious usurpation of the legislative power, impeachment and removal would be available to protect the constitutional structure of government. As 210 years of constitutional practice show, this is merely a theoretical possibility.

[16] For a representative objection, see "Common Legislative Encroachments on Executive Branch Constitutional Authority," 13 Op. O.L.C. 299 (1989) (preliminary print). Not all administrations have shared this restrictive view of the constitutional relationship between the executive and Congress. See, e.g., "The Constitutional Separation of Powers between the President

4. Structural reform. Congress might consider extending the Administrative Procedure Act to cover executive orders. This, however, would raise serious constitutional questions.[17] Rather than attempting such a general structural reform, Congress could impose tighter structural requirements as a precondition to issuing certain executive orders. Where the President's authority to issued an executive order is based exclusively on a statute, the statute might enumerate a list of findings that must be made before the power can be exercised and require that the basis for the findings be published in the Federal Register.[18]

Even though not subject to the APA, executive orders are subject to important internal and external (to the executive branch) checks. Externally, the courts will conduct an independent review of any order that affects an individual with standing to bring a lawsuit.[19] Even when review in an Article III court is not available, there are other vehicles that can serve to provide external review of the legal basis for the President's assertion of authority to issue an executive order. For many types of executive orders, the opinions of the Comptroller General stand as an independent source of legal analysis. The Congressional Research Service, and the House and Senate Legal Counsel are also capable of providing members of Congress with an independent assessment of presidential assertions of authority. Aside from legal analysis, interest groups closely watch executive orders and raise policy objections if they disagree on policy grounds with the approach of an executive order. Finally, in the ways discussed above, Congress remains actively vigilant against the President overstepping the bounds of his authority. Indeed, the current majority in Congress has been, by at least one measure, the most active guardian of its legislative role against presidential incursions. In the twenty-five years from January 1973 through the end of 1997, legislation to overturn an executive order was introduced on 37 occasions. Of these, 11 occurred in the last three years, 1995–1997.[20]

Before an executive order is submitted to the President for his signature, it is sent to the Office of Legal Counsel for approval of its form and legality.[21] The order proceeds to the President only if OLC agrees that the order is validly based on legal authority and a form memorandum stating the approval as to form and legality accompanies the order when it is presented to the President for his signature. Where the order presents a colorable issue as to the authority of the President, OLC will prepare a memorandum setting forth its analysis of the question. In the case of an order that does not involve classified material, the OLC analysis is generally made public. This allows Congress and the public to determine for themselves whether the order is validly based on legal authority, found either in the Constitution or in statues. In addition, past opinions of OLC stand as guides, or precedent, by which to judge the reasoning that supports current executive orders. These internal procedures enable the external checks—expecially the vigilance of Congress, interest groups, and the courts—to function more effectively.

Mr. GOSS. Mr. Bedell.

STATEMENT OF ROBERT BEDELL

Mr. BEDELL. Thank you, Mr. Chairman, I too will not repeat what is in my written statement. Nor will I address the subjects that are being addressed by the others on the panel here.

Mr. GOSS. I will state that, without objection, all of the testimony that's been written and prepared will be accepted into the record. I look forward to your flying as far from it as you wish.

Mr. BEDELL. Thank you. I just wanted to make a couple of points.

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and Congress" (Opinion of the Office of Legal Counsel, May 7, 1996) (superceding 13 Op. O.L.C. 299).

[17] The Supreme Court so held in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992). For this reason, it declined to interpret the term agency to include the President.

[18] Where the President's power is established in the Constitution's text, for example the appointments power or the pardon power, it would raise serious constitutional questions for Congress to regulate the Present's exercise of the power in this way. See, e.g., *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440 (1989).

[19] Eighty-six executive orders have been subject to court challenge. Of these, the President's authority to issue the order has been upheld in seventy-two (approximately 84%). Moe & Howell, at 175.

[20] Moe & Howell, at 166.

[21] *See* 28 C.F.R. 0.25(b).

First of all, OMB, the Office of Management and Budget, in the Executive Office of the President has the responsibility to process executive orders for the consideration of the President; and for about 10 years, that was among my responsibilities in the General Counsel's Office in OMB. It has been the job of OMB and its predecessors for about 50 years, as best I can tell, to specifically review and process these executive orders. The process has about four major points.

One, everybody knows that OMB controls this process and runs it, and that is the way by which the formal executive orders are considered and processed and presented to the President. Again, part of this process is run by the General Counsel's Office, and we take a quick look to make sure that the head of an agency has indeed proposed it, not somebody who is thinking on the way home on the bus that "hey, I have got an idea and let's send it over to OMB." So we review it to make sure that it is indeed an agency proposal that comes over.

Secondly, we make sure that it has what appears to be the appropriate legal basis for doing what it proposes and that it is roughly consistent with what we understand to be the policy of the President and the administration on a particular matter. If we have questions on any of that, we pursue those as well.

We then coordinate these draft proposals with other people within the Executive Office of the President and with the concerned departments and agencies, those we know should have an interest in this; and we attempt to rationalize and to settle any differing views that there may be within the executive branch with regard to the substance of these orders.

And then, as has been mentioned, and I am sure Tom will mention as well, the Office of Legal Counsel in the Department of Justice plays a critical role throughout all of these proceedings. If we have questions early on in the review process of these executive orders about the legality of a particular idea or proposal, we involve the Office of Legal Counsel in an informal fashion very early on.

We don't need to waste a whole lot of time processing something and hammering out details if there isn't the basic legal authority to continue in the first place. But always at the end of the process, on the routing from the Director of the Office of Management and Budget to the White House, the Office of Legal Counsel is involved speaking on behalf of the Attorney General with regard to form and legality of any executive order—that, again, being another check to make sure that the President has the requisite authority before we present it to him and to his staff as well.

And then finally, an order, once considered by the President and signed, is sent to the Federal Register, where it is then published, codified and made available to everyone to see.

So there is a process. It has been basically the same process for 40 or 50 years. It may vary depending upon the attitudes of the people, but basically, all the folks who process this stuff are career employees of the Executive Office of the President. They guard the fact of an executive order, or that one is in process, very closely. It is not something which is a public process at all. We don't discuss that orders are under review. That, in itself, would bring

undue attention and pressure by others into a process that frankly doesn't need it.

Is there ever any interaction with the public on this? I am sure there is, but it just isn't done by OMB, or it wasn't done during my time there. It may be done by those who advise the President and it may be done at the Department or at an agency level, but it is simply not done by us, or wasn't done by us, I should say.

Another thing I wanted to mention was the fact that the executive order is a used, useful means by which the law governing how executive branch officials work is handled. It is a key component to that, but is only one. The President makes orders of a different nature every day. He decides on appointees. He decides on whether particular legislation should contain this element or that. He makes budget decisions. He makes orders on a continual basis, and people who have been delegated authority by him also do so in his name.

Those too are orders but of a different sense: executive orders are the ones with the legal effect and with general applicability and don't just simply apply to the departments and agencies. They affect other things as well, as has been mentioned, but they are just one part of this activity.

Just to give you an idea of the complexities with which some of these things occur, there is also a Reorganization Authority that Congress has enacted, and while it lapses periodically—I have often observed it lapsed during Republican administrations and was in effect during most of the Democratic administrations, it seemed. The way that it works is that the President is authorized to submit a Reorganization Plan to Congress, and then, at one point in time it was subject to a one-House vote—veto, rather—until that was determined to be an unconstitutional process; and now it requires approval by both Houses under expedited procedures.

But the point is that this is yet another means by which something other than "pure" lawmaking out of the legislative branch, as you know it, takes place.

Now, the Office of Management and Budget itself can be kind of a study of all of this stuff combined. Prior to about 1939 or so, the Bureau of the Budget existed as part of the Treasury Department, and carried out the Budget and Accounting Act, Budget and Accounting Procedures Act, and several other statutes that primarily focused on its budget responsibilities. It was then transferred over to the Executive Office of the President. I think that too was done by an executive order. Additional statutory responsibilities were assigned to it, such as the Federal Reports Act of 1946, its paperwork reduction authority and its process came when it was part of the Executive Office of the President. So the Congress continued to pass statutes giving it additional responsibilities.

In 1970, there was a presidential study by Roy Ash, called the Ash Report, which dealt with the organization of the Executive Office of the President. As a result of that, in reorganization plan number two, of 1970, President Nixon proposed that all of the authorities of the Bureau of the Budget be transferred back to him and that a new office—called the Office of Management and Budget—be created. That Reorganization Plan was approved by Con-

gress. It became the law, just as a statute, because that's what the authority provides.

As soon as that became effective, the President issued Executive Order 11541, which then delegated back to the Office of Management and Budget all of the authorities that had been transferred to him by this Reorganization Plan, the legal effect of which was that at that point in time the President could have the next day signed another executive order assigning all of those previous statutory authorities of the Office of Management and Budget around wherever he wanted.

Well, since that time, several other things have happened. Congress has passed additional statutes concerning the Office of Management and Budget, some of them dealing with the very same subject matters as had been transferred by this Reorganization Plan and then delegated down. So in a sense now Congress has reentered the picture here and solidified many of these authorities of OMB, so that it is very questionable whether the President still could reassign these things, Congress having now spoken on that issue again after the Reorganization Authority.

And then, pursuant to all of these authorities, OMB engages in some limited rulemaking, certainly not as active as many of the other agencies, that binds them in certain ways; and they also issue certain non-binding instructions that apply only to departments and agencies—at least, are supposed to—and those are called OMB Circulars. And I know that you have looked into those and confronted those in the past, but they deal with hundreds of different subjects all the way from overhead for nonprofit institutions to the procedures for preparing the budget, for contracting out under OMB's Circular A–76, which has been a very controversial issue in the past. So there are also those kinds of actions.

So the executive order then, taking several steps back, is just one of the mechanisms that a President uses to provide guidance and instructions to his appointees, but there are lots of others as well; and over time they have gotten intertwined, and it is difficult in many instances to sort out the authority of one from another.

The last point I want to make is that with regard to the many things that could be done to improve congressional oversight, if that is the purpose, I have a quick story. I remember back in the early part of the Carter Administration, again dealing with a reorganization plan, they had worked and worked and worked and they had a Reorganization Plan and they had coordinated it with the Chairman of the Government Operations Committee and they were all relatively comfortable with what it would do.

The Reorganization Plan was issued. It took effect, and shortly thereafter an executive order was issued which basically turned the reorganization plan on its head and changed a lot of the policy views—at least in the opinion of the Chairman of the House Government Operations Committee—on things that had been hammered out. Effective oversight took place. There was not another Reorganization Plan approved for quite some time.

The Authority itself was amended to make sure, if I recall—and I didn't have a chance to check this—to make sure that draft executive orders implementing Reorganization Plans had to be submitted with the Reorganization Plan or they would not have effect.

The legislative agenda of the committee—and of the administration for the next couple of years, at least as it pertained to Government Operations—was radically altered and there were some very, very uncomfortable hearings, more so than that administration wanted at that period of time.

So sometimes traditional means of congressional oversight can be very, very effective. And that is the last thing that I wanted to say.

Mr. GOSS. Thank you, Mr. Bedell.

[The statement of Mr. Bedell follows:]

PREPARED STATEMENT OF ROBERT P. BEDELL

I am Bob Bedell and the Subcommitee invited me to testify during these hearings entitled "The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?" My perspective on the Executive Order process was gained from the 15 years I spent as an employee of the Office of Management and Budget from 1973 until 1988. The OMB's General Counsel's Office is responsible for preparing Executive Orders for the President's consideration. From 1983 through most of 1986, I was the Deputy and often Acting Administrator of the Office of Information and Regulatory Affairs (OIRA) at OMB, where I carried out President Reagan's Executive Order No. 12291 establishing his regulatory policies. And from 1986 until 1988, I was the Administrator of the Office of Federal Procurement Policy at OMB.

There are orders by the Chief Executive and there are Executive Orders. Executive Orders are only one of several ways by which Presidents have communicated their policies and instructions to the heads of Executive departments and agencies.

Executive Orders are defined by statute to include documents issued by Presidents that have "general applicability and legal effect." They do not include orders that are "effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof." Since the enactment of the Federal Register Act in 1936, these Executive Orders have been required to be published in the Federal Register so that the public and Congress may be informed of the President's policies and instructions.

Orders of the President that do not have general applicability and legal effect, or that apply only to Federal agencies or employees are not required to be published in the Federal Register. These orders may be published or they may not be. Some of these orders and instructions dealing with the Federal Budget are published by the Office of Management and Budget as OMB Circulars. They deal with everything from the procedures and requirements for the preparation of the Budget that Federal law requires the President to submit annually, to instructions on how to implement the Federal Advisory Committee Act.

Like Executive Orders, these Circulars can be quite important and are frequently watched with great interest by the public, the press and Congress. Examples of these Circulars are the designation of Standard Metropolitan Statistical Areas, the setting of overhead rates for various non-profit organizations, and the requirements and procedures for Federal agencies concerning contracting out for commercial services. Frequently, Congress will hold hearings examining these activities. I have testified at several.

My point in raising the OMB Circulars is partly to explain where some of the orders and instructions may be found that do not meet the statutory requirements to be an Executive Order published in the Federal Register. It is also my purpose to point out that there are a large number of documents that have been used by Presidents—and often relied upon by Congress—to oversee and administer the responsibilities of the Executive Branch of the Federal Government, and that Executive Orders are only one of a number of these mechanisms.

There are numerous other kinds of Presidential directives (often named differently in different Administrations) including Presidential Memoranda and National Security Decisions, which are not published but by which the President provides general instructions to agency heads of his policy preferences. Furthermore, there are the daily "orders" of the President and his delegates that are essential for running any government or any enterprise for that matter. Such decisions include those instructing the officers and employees of the Executive Branch with regard to budget and funding decisions, appointments to office, the construct of proposed legislation, national security decisions. Sometimes these meet the statutory requirements of the Federal Register Act and are processed and published in the Federal Register. Many times they do not.

Often, Executive Orders, Reorganization Plans, Federal agency rules and congressional enactments become intertwined creating the governing law for a matter or an activity.

A VERY SHORT OVERVIEW OF EXECUTIVE ORDERS

Executive Orders have been used by Presidents since the founding of the United States in order to communicate the President's policy preferences to his appointees, Congress and the public, and to guide agency heads in the exercise of their discretion. (Executive Orders are also used by many, if not all, of the Governors of the States.)

From 1907 until the Federal Register Act of 1936, every Executive Order was assigned a number by the Department of State. Orders issued prior to 1907 were assigned numbers retroactively. But if the Department of State did not have a document, it did not assign it a number.

Prior to 1936 when the Federal Register Act required Executive Orders with general applicability and legal effect to be published in the Federal Register, there was no single place to go to find the full text of them. Instead, there are various collections and compilations of the messages and papers of the Presidents, from President Washington on. As you might imagine, these collections and compilations include all matters of state; some of the documents would meet our current definition of an Executive Order and others would not. Perhaps the best single source for Executive Orders is the CIS Index to Presidential Executive Orders & Proclamations, 1789–1983.

Since 1936, "Executive Order" have been published in the Federal Register, and since 1938, they have been complied annually in Title 3 of the Code of Federal Regulations. Since 1941, Executive Orders have been published in the U.S. Code Congressional and Administrative News. And, since 1965, Executive Orders can also be found in Weekly Compilation of Presidential Documents.

Because an Executive Order remains in effect until modified and Presidents have often modified Orders issued by their predecessors or even themselves, there now are publications that indicate the Orders that have been rescinded, modified or that have not been, at least those Orders issued since 1945.

Recent Presidents have issued hundreds of Executive Orders. President Kennedy issued 214 Executive Orders from 1961–1963. President Johnson issued 324 from 1963–1969. President Nixon issued 346 from 1969–1974. President Ford issued 169 from 1974–1977. President Carter issued 320 from 1977–1981. President Reagan issued 381 from 1981–1989. President Bush issued 166 from 1989–1993. And President Clinton has issued 307 Executive Orders from 1993–Present.

The Office of the Federal Register, created in the Federal Register Act of 1936, is now located in the National Archives and Records Administration and is responsible for the display and publication of Executive Orders.

THE PROCESS BY WHICH EXECUTIVE ORDERS ARE ISSUED

The process by which Executive Orders are issued is itself the subject of an Executive Order, currently Executive Order No. 11030, issued on June 19, 1962 by President Kennedy. This Order appears in the Federal Register and in the Code of Federal Regulations for the relevant period. As is the custom with modern Executive Orders, E.O. 11030 cities the Executive Orders (if any) that it supercedes, modifies or repeals, in this instance, Executive Order 10006 of October 9, 1948. One of the earliest Executive Orders on Executive Orders was Executive Order 5220 issued by President Hoover in 1929.

Under the current Executive Order on Executive Orders, formal process for issuing this form of Presidential commands has evolved. The process has four critical features:

1. Coordination of proposed Executive orders by the Office of Management and Budget

2. Circulation of proposed Executive orders by the General Counsel of OMB to interested departments and agencies and concerned parts of the White House staff. If there is a policy disagreement about the wisdom or terms of an Executive order, OMB determines or designs an inter-agency dispute resolution process to address the issues.

3. Transmission of the proposed Executive order from the Director of OMB to the President through the Office of Legal Counsel of the Department of Justice. The Office of Legal Counsel, on behalf of the Attorney General, issue an opinion on each proposed order expressing its views whether the proposal is acceptable for form and legality.

4. Circulation of the proposed Executive order within the White House staff, after its receipt from Justice, to make certain that its terms are acceptable to the President and that there are no further policy issues that need to be resolved.

Once these steps have been concluded, the Executive Order is presented to the President for his signature. The White House clerk then transmits the signed Executive Order to the Office of the Federal Register for numbering and publication.

AREAS OF INTEREST TO THE SUBCOMMITTEE

In your letter inviting me to testify, you asked several questions and described several areas of interest, including—

An examination of Executive Orders from a process perspective:

The legal guidelines and historical precedent for them;

The process by which they are developed and implemented;

The impact that they can have on the prerogatives of the Congress;

The extent to which the public is affected by them;

Given the size, scope and reach of the modern federal government, whether it is appropriate for Executive Orders to have had the significant policy implications that they have had;

What impact that the issuance of Executive Orders had on the lawmaking authority and responsibility of Congress?

What should be the role of Congress in guarding its legislative prerogatives and maintaining the proper balance between the executive and legislative branches of government?

I believe that I have described the process by which Executive Orders are promulgated already, but will be pleased to address any other questions that the Subcommittee may have.

With regard to the legal guidelines for Executive Orders, let me comment briefly on the OMB role in addressing the legal issues concerning Executive Orders. First, the draft Orders are processed by the OMB General Counsel's Office, which coordinates with the relevant interests in the Executive Office of the President and the Department and Agencies. OMB General Counsel seeks to ensure that from the beginning there is sufficient authority for the issuance of the proposed Executive Order. In cases of doubt, the proposal is circulated to the Department of Justice at the initial stage, so that OMB may obtain an early opinion as to the legality of the proposal, as submitted, and whether changes are necessary to conform to the law.

The OMB General Counsel frequently coordinates with the Department of Justice, both formally and informally, if there are significant questions about the authority involved or to determine if there are constraints upon the direction an order must adhere to. The final call on the legality of a proposed Executive order is the responsibility of the Attorney General, through the Office of Legal Counsel, within the Department of Justice, during the formal transmission from the Director of OMB to the President. The White House staff will not initiate the final approval process for a proposed Executive order unless there is an opinion from the Department of Justice approving the proposed order on legal grounds. Finally, during the White House staff circulation of a proposed Executive order, the matter is reviewed by the White House counsel, who consults frequently with OMB and the Department of Justice about any questions of the President's legal or constitutional authority to issue the proposed order.

I should also add that each Executive Order begins with a statement of the authority for its issuance. Many times this is a statute enacted by Congress, sometimes it is purely an exercise of the President's authorities under the Constitution and sometimes it is a combination of the two. If a statute authorizes or requires the President to do something, the question of whether the President has somewhat exceeded his authority is answered by looking to see whether what he does is within the scope of what Congress authorized him to do. If it is, the questions about authority (and encroachment on the prerogatives of Congress) I believe are largely resolved. If it is outside the scope of what is authorized by a statute, and not otherwise authorized by another statute or the Constitution, that action should be reversed. Federal courts have not hesitated to overturn Executive Orders that exceed the President's authority, most notably in the case of the Executive Order issued by President Truman to seize the steel mills during the Korean War.

The most difficult legal situation is where the President relying upon either a constitutional provision or a general statutory provision takes action in a field that has been highly regulated by Congress.

Sometimes—although rarely—the legal judgments of the President's lawyers are not correct. This is in part because some judgments are close calls without clear precedent. Although I have no empirical evidence to support this, I believe that in

most of these cases, the Executive Order is overturned as to its offending provisions. For most—if not all—Executive Orders, judicial oversight is generally available as is congressional oversight.

With regard to the impact that Executive Orders may have on the prerogatives of the Congress, I think that in very few instances—primarily where the Constitution or the Congress itself has assigned a responsibility or authority to the unreviewable discretion of the Presisdent—are the prerogatives of Congress unalterably affected by an Executive Order. Congress can act to undue what a President has done by Executive Order in most instances. The prerogative of Congress to legislate is accordingly not unalterably affected by most Executive Orders.

As a practical matter, if Congress chooses to over-ride a feature of an Executive order by enacting a statute, the President may require that each House approve that legislation by a ⅔ vote, often a tall order. But this is the case with any legislation as provided in the Constitution. The real question is whether the President has the requisite authority to do what he proposes in an Executive Order, and I believe that Congress retains its full panoply of prerogatives to deal with it.

The question of whether Presidents have become more assertive in issuing Executive Orders and the Congress less diligent in reviewing them and their authorities is a different question, of course, and one that is difficult for me to assess. I do know that the congressional oversight of programs that I helped to run at OMB was often quite intense. I find it hard to imagine more intense oversight by Congress than its constant review of OMB's review of agency regulations under President Reagan's Executive Order 12291. On the other hand, the newspapers tell me that Congress has not been slow to review and criticize the actions of successor Presidents, including their Executive Orders.

Whether it is any more or less intense today is hard for me to tell. But what I think is clear is that Congress—regardless of the Majority party—must carefully review presidential Executive Orders to ensure that the necessary authority is present and to ensure that they agree with the policy involved. If it doesn't, then it needs to address it as best it can, like any other decision or direction from the Chief Executive. This may be by legislation and it may be in the endless compromises that are the life-blood of the relationship between these Branches of our government.

With regard to the question of the extent to which the public is affected by them, I think the answer is that the public is affected by them, and depending upon the Order, an individual may be significantly affected by an Order. In part, this is because of the definition of an Executive Order—general applicability and legal effect. It is difficult to think of an Executive Order that would not affect the public in some way.

With regard to the question of whether it is appropriate for Executive Orders to have had the significant policy implications that they have had, I think that in the circumstance where Congress has delegated by statute the authority or the responsibility to make a decision, I am not troubled if a president then utilizes that authority or carries out his responsibilities by an Executive Order, even if the ramifications are significant. And there are several reasons for a delegation to the President by Congress, e.g., sometimes Congress delegates to the President decisions that it cannot agree on, leaving it to the Executive to parse finely the needed compromises; and in some instances it is the sole responsibility of the Executive to implement decisions. I am also not troubled by the President issuing Executive Orders using authority granted to him by the Constitution. And generally, I am not troubled by hortatory Orders, although most of these should be Proclamations.

Executive Orders may implement only the degree of power that has been delegated to the President by the Constitution or by statute. The ultimate decision about how much authority to delegate, and to which official in the Executive Branch, remains with Congress. In most instances, Congress delegates power to the head of a department or agency, rather than to the President. No matter how much he may wish he could, the President cannot overturn that delegation of power. Accordingly, the most frequent use of Executive Orders is to make a public statement from the President to his agency heads as to the lines along which he wishes them to exercise their discretion—but only to the extent, if any, that Congress has granted agency heads discretion in carrying out what Congress has delegated to them.

Except for that small number of Executive Orders that implement authority Congress has delegated directly to the President (Executive Orders implementing the Superfund statute are a good example), Executive orders have no greater legal effect or force than other, less formal means by which a President may communicate with his agency heads—i.e., a written Presidential Memorandum; a statement in a press conference; a telephone call from an assistant to the President. From a public policy perspective, Executive Orders have one salient advantage over these other, less formal and invisible means of communication; they are published in the Federal Reg-

ister, so that both the Congress and the public can understand what the President has done and can hold him accountable for his actions.

The Committee also should understand the severe limitation that Executive Orders have from the point of view of the President and his senior staff. Again, with the exception of that small number of Executive Orders that implement statutory authority granted directly to the President, Executive orders are administratively enforceable only against agency heads. Executive Orders usually do not create legal rights that can be enforced in court by a private party. Rather, the enforcement device is political. If an agency head fails to comply with an Executive Order, the lapse will have no effect whatsoever unless brought to the attention of the President and the White House staff. As with any other White House policy, if the President finds that an agency head has not followed his policy preferences, the President may ignore the matter or may use any of his tools to induce compliance, from calling the agency head on the carpet, to cutting the agency's budget or, in severe cases, dismissing the offending official. There frequently would be a political price to pay for any of these actions, including the expression of Congressional displeasure.

The result of the anomalous legal status of Executive Orders is that they often have more apparent than real effect. Many Executive Orders are quietly abandoned or modified in practice, without a formal amendment or repeal of the published text. A President may issue an apparently sweeping Executive Order directing his agency heads to do something or take something into account as they exercise their discretion, only to find that these Orders are routinely ignored by the agencies, and the White House staff is often powerless to prevent their evasion.

What impact has the issuance of Executive Orders had on the lawmaking authority and responsibility of Congress? In some instances, I believe that some Executive Orders have resulted in actions that are taken by the Federal Government that would not have been taken by Congress acting alone. (In most of these instances, however, I think there is a significant segment of the Congress that nonetheless agrees with the presidential action.) I am not troubled by this as long as the authority to do what is done is sufficient. Whether it is the right thing to do is another question, but the question of whether doing something that a President is authorized to do is inappropriate simply because it is done by an Executive Order is not a difficult issue for me as long as the authority to take the action is sufficient. When the authority for the Executive is sufficient, the effects upon Congress' authorities and responsibilities remain, in the legal sense, unaffected.

In reality, what the Executive Order process can provide to a President is a combination of the power of taking initiative, combined with the bully pulpit. In cases of inactivity or deadlock, the President may issue an Executive Order to announce his policy preferences to Congress and the public and to instruct his agency heads that they should exercise their discretion, if Congress has given them any, to follow his policy to the extent they can. The President may or may not be able to make agency heads respond to his lead. For example, in the case of President Reagan, his Administration was able to induce compliance from most agencies with Executive Order No. 12291, requiring submission of proposed rules to the White House for prepromulgation policy review. But despite their consistency with the President's overall policy goals, there was significantly less agency compliance with other Executive Orders.

As with other exercises of the Presidential power of initiative (such as statements at press conferences or calls from the Chief of Staff to an agency head), Congress may exercise effective oversight and lawmaking authority. For example, Congress may, and frequently has, attached appropriations riders to laws that prohibit affected agencies from spending any money whatsoever on implementing an Executive Order. In such cases, Congress has effectively removed all discretion from the agency, and there is nothing that its head can do to implement the Order, even if the political appointee wishes to follow the President's policy.

Accordingly, Executive Orders may be thought of as a particularly visible and transparent mechanism, among many similar mechanisms available to the President, by which he may announce a policy and attempt to rally public support behind it, in the hope that the policy will attract sufficient public support that by the time Congress exercises its power to review and modify the policy, the President's policy preference will have made sufficient headway that the status quo can never be reinstituted, and the ultimate policy outcome will be advanced somewhat along the lines the President prefers.

Again, from a purely legal standpoint, I think the issuance of Executive Orders has very little impact on the lawmaking authority and responsibility of Congress, especially when authority and responsibility mean the ability of Congress to act, not the likelihood that Congress will act in response to an Executive Order. On the other hand, I cannot recall an instance where Congress simply repealed an Execu-

tive Order outright. They may have changed how an Executive Order works, but I cannot recall that they have reversed one outright. I think that the reason Congress has not repealed many (if any) outright is because Congress is sufficiently divided on the substance of the Order to prevent it from taking action as a Congress.

If the President has the authority to take action, it may take a two-thirds vote in each House to overturn his action, or a constitutional amendment if authorized by the Constitution. But this has nothing to do with Executive Orders. The President is either authorized or he is not. Acting by Executive Order neither adds or detracts from the question of authority.

What should be the role of Congress in guarding its legislative prerogatives and maintaining the proper balance between the executive and legislative branches of government? Even as a response to a question, it is somewhat presumptuous of me to advise the Congress on what it should do in this regard. Nonetheless, here's what I recommend:

Be careful what you authorize the President to do in statutes that you pass. His exercise of that authority is likely to be sustained and political challenges will fall short;

Pass laws on the subject of an Executive Order even if there's not much you can do about it because the President is exercising clear constitutional authority. These will have an effect because Congress will have spoken on the issue and perhaps preempted the issue;

Require that the President describe what action he would recommend in Executive Order detail before you authorize him to act. For example, authorize the President to make specific recommendations after studying an issue and then provide further legislative authorization to proceed;

Scrutinize every Executive Order issued and hold hearings on them on a regular basis

Require in the statute providing the President with the requisite authority to act by Executive Order;

Review the grants of authority of prior Congresses. Many of these are quite broad. For example, Presidents have been able to hook civil rights and wage and price rules to 50 year-old procurement laws. Although major changes were made in procurement authorities in the last 5 years, these provisions were not changed; indeed, authorities of the Executive Branch were increased.

This concludes my written testimony. I will try to answer any questions that the Subcommittee may have.

Mr. GOSS. Mr. Sargentich.

STATEMENT OF TOM SARGENTICH

Mr. SARGENTICH. Thank you, Mr. Chairman and members of the committee. My name is Tom Sargentich, and I teach at American University's Washington College of Law. I codirect our program on law and government which studies issues at the intersection of law, politics and government. There is no issue more central than this one at the intersection of law and government.

I won't repeat points in my statement or ably made by my colleagues. What I would like to do instead is simply to make three points that strike me as important. I want to talk briefly about executive lawmaking. I would like to talk for a moment about the history of executive lawmaking by Presidents, to highlight it, and then I would like to talk for a moment about the oversight power of Congress.

I don't think the public appreciates the extent to which lawmaking is conducted by the executive branch. Congress, of course, is the national legislature, but you have delegated necessarily broad powers in many, many statutes to agencies of the government and, of course, to the President. And pursuant to these delegations—as well as constitutional power, I say to my classes—most lawmaking is conducted by executive agents, that is, authorities of the executive branch. By far, if you look at regulations of agencies, at other decisions by agencies, and at executive orders and procla-

mations, the vast quantity of law in the United States is made not by Congress but by the executive branch—now, making law, of course, pursuant to hopefully constitutional authority and statutory authority.

Now, when it comes to the President, executive orders are generally directed at the executive agencies, and presidential proclamations are generally directed at citizens. That's the traditional distinction, although it gets mixed up sometimes in practice. If you combine executive orders and proclamations, as well as national security directives as well as other forms of directives, you have an enormous body of law; and it has happened regularly throughout our history. It is nothing new in the modern period.

So my first point, again, is to stress how important the subject is in general—not just, of course, presidential lawmaking, but also agency lawmaking. As a person who believes in checks and balances, I think it is wonderful that a committee such as this is undertaking a study of presidential lawmaking.

My second point has to do with some of the famous examples of presidential directives that have made law. It is really quite stunning in American history how much law was made by Presidents unilaterally. George Washington, in 1793, declared in a neutrality proclamation that the United States would be neutral in a war between England and France. That had nothing to do with Congress; that was done by the President. It led to an enormous debate between Madison and Hamilton, a famous debate about the power of the President. Also the Louisiana Purchase was done by Thomas Jefferson through a presidential directive. The annexation of Texas was done by presidential directive. Lincoln issued the Emancipation Proclamation by presidential directive to free the slaves.

During World War II, of course, Roosevelt issued that infamous order interning Japanese on the West Coast, which was upheld in Korematsu. This is a dark chapter in our history, and led Congress in recent years to pass reparations legislation for the families that were so treated.

Harry Truman desegregated the military by executive order after World War II. President Kennedy created the Peace Corps by executive order. Ultimately, of course, there was a statute, but the beginning of it was through an executive order. Kennedy used emergency funds, as is often done; and then he needed money, of course, and Congress has the power of the purse, and it appropriated funds for the Peace Corps.

Affirmative action and many civil rights initiatives by Presidents back to Franklin Roosevelt were done by executive order. A system of centralized executive review of rulemaking going back to the Nixon administration, the Carter administration, the Reagan administration, and the Clinton administration, all done by executive order. And this is just the tip of the iceberg. Enormous historical events can be traced back to presidential, unilateral power—what amounts to presidential lawmaking or unilateral presidential action.

Now, the third point. I agree with my colleagues as to the categories of things Congress can do, and it seem to me one of the most important things is oversight. And I just wanted to address some of the problems that clearly confront Congress when it en-

gages in oversight power. This is widely recognized in the literature.

What are the incentives on individual Members of Congress? Clearly, the political science literature says, to get reelected. How do you get reelected? By appealing to constituents. Now, if constituents aren't excited by something, then what is the incentive for an individual Member of Congress to get excited about something? Political scientists have started with this premise and have argued that, therefore, Members of Congress often do not have very strong incentives to protect the power of Congress as an institution because that's rather more abstract and rather more general. And yet Justice Jackson said famously in *Youngstown*, only Congress can prevent power from slipping through its fingers.

A second problem that confronts Congress, aside from its incentives, is the organizational difficulty of passing laws that you are very familiar with, more familiar than any of us. You have got the subcommittee to deal with, you have got the committee to deal with it. You have to get it through committees in both the House and the Senate in identical form.

There are many other roadblocks, of course, that can occur—not just the filibusters, but the Rules Committees and the leadership, and others. It is difficult, clearly, organizationally to corral hundreds of Members of Congress. You have tremendous transaction costs and collective action problems getting legislation through.

It is much easier for a President to sign a document, with one person acting flexibly, taking the initiative. The incentives for the President clearly are to push the use of the ambiguous Article II power and to do so in a way that protects the power and prerogatives of the executive.

Congress, on the other hand, has difficulty according to the literature, given that their incentives are not so much to protect the institution of Congress as to get reelected. There is a need, in my view, to address that issue. And secondly, the operational problems of acting collectively are considerable.

What does this mean? It means simply that a hearing like this, I think, is an excellent thing. I am a believer in checks and balances, and I do believe that it is important for there to be dialogue between the branches. But I don't think we should be surprised that Presidents through our history have used the unilateral lawmaking power aggressively, given the ambiguity of Article II power, given the flexibility of executive action, and given the broad delegations that have gone to the executive.

Thank you.

[The statement of Mr. Sargentich follows:]

PREPARED STATEMENT OF THOMAS O. SARGENTICH

Chair and Members of the Subcommittee: My name is Thomas Sargentich, and I am a professor of law at American University Washington College of Law. I co-direct our Program Law and Government, which focuses on the study of administrative law and regulatory policy as well as constitutional law and rights. I also am the director of our LL.M. Program on Law and Government. From 1978 until 1983, I worked in the Office of Legal Counsel of the U.S. Department of Justice. In OLC, I participated in the consideration of numerous issues involving constitutional and statutory powers of the President and executive agencies. Among other things, I participated in the review of a number of proposed executive orders and other presidential actions.

I am pleased to be here today to discuss presidential power under Article II and, in particular, the power to issue executive directives that constitute, in any colloquial sense, "lawmaking."[1] There can be no doubt that presidential "lawmaking" by executive order is a central phenomenon in modern governance. Let me highlight my conclusions at the beginning.

I. Summary of Conclusions

First, the President is the federal official in whom the U.S. Constitution vests the executive power. The term, executive power, refers to the execution of the law, which includes the Constitution as well as the body of statutory law granting authority to the executive branch.

Second, there is an ongoing debate about the extent of executive power under the Constitution. Some have argued that the President has a vast reservoir of inherent executive power, whereas others believe that the President can do only what Congress specifically authorizes by statute.

In my view, the proper construction lies between these two extremes. On the one hand, the Supreme Court has questioned the theory of uncharted "inherent" executive power. The President does have to conform to constitutional and statutory limits. On the other hand, the President has broad power to oversee and supervise the execution of the law by executive officials.[2] Also, the President is one of the constitutionally named repositories of governmental power, the others being Congress and the Supreme Court. It does not make sense to say that the President has only the authority provided specifically by statute, for that would reduce the President's role to being the implementor of express grants that Congress chooses to provide from time to time. Just as Congress has authority given to it by Article I, the President has power pursuant to Article II.

Third, some argue that the President has no "lawmaking" power. Such a claim is seriously overstated. It rests on an unworkably rigid, definitionalist distinction between "lawmaking" and "execution" of the law. To be sure, Congress is the national legislature, and must be respected as such. However, the courts have long accepted broad delegations of authority to the executive branch. Such delegations inevitably call for the interpretation and application of statutory provisions. Such interpretation and application, in any ordinary usage, is a form of lawmaking. In practice the President, through executive orders or other directives, does engage in what colloquially can be called "lawmaking"—although in constitutional terms, the President is executing some prior statute or constitutional provision.[3]

Fourth, it is worth underscoring that the President does not have unlimited power to issue executive orders that make law. In every instance, a reasonable connection with a constitutional or statutory grant of authority needs to be made. Consequently, each order should be viewed on its own terms.[4]

Fifth, Congress should protect its own power in this context. As Justice Jackson once stated, "only Congress itself can prevent power from slipping through its fingers."[5] In particular, Congress has an important responsibility to help maintain a balance between the executive and legislative branches of government. The central prerogative of Congress, when it considers that an executive order or other presidential directive goes too far in policy or legal terms, is to exercise its oversight authority.[6] The key practical question is whether or not to engage in oversight of a

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[1] For general discussion of presidential lawmaking through executive orders, see William Neighbors, Presidential Legislation by Executive Order, 37 U.Col L. Rev. 105 (1964); Joel Fleishman & Arthur Aufses, Law and Orders: The Problem of Presidential Legislation, 40 Law & Contemp. Probs. 1 (1976).

[2] The President's power to supervise and guide the execution of the law is generally grounded on *Myers* v. *United States*, 272 U.S. 52 (1926). *See also Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935) (upholding independent agencies whose members are not removable at will by the President).

[3] I return to this point in discussing *Youngstown* at page 6 below.

[4] Compare *American Federation of Government Employees* v. *Reagan*, 870 F. 2d 723 (D.C. Cir. 1989) (holding that relevant statute did not require President to incorporate written findings into an executive order implementing his statutory authority to exempt certain agencies from coverage by the statute) with *Reyes* v. *U.S Dept. of Immigration and Naturalization,* 910 F. 2d 611 (9th Cir. 1990) (invalidating executive order imposing restriction on geographical areas within which Philippines national who had served in the U.S. military could serve and be eligible for naturalization for the statute authorized no such limitation).

[5] *See Youngtown Sheet & Tube Co.* v. *Sawyer.* 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

[6] Executive orders are publicly available once issued. *See* U.S.C. § 1505 (requiring orders and proclamations to be published in the Federal Register); Exec. Order No. 11,030, 27 Fed. Reg. 5847 (1962) (dealing with preparation filing and publication of executive orders).

particular presidential action. Case-by-case engagement between the legislative and executive branches is certainly consistent with our system of separation of powers and checks and balances.

Having stated my general conclusion, let me hasten to add I am aware that there have been controversies about President Clinton's use of executive orders. I would simply comment that such controversies are not unusual. Debates about executive orders have occurred with respect to every President in modern times.[7] We should remember that vigorous give-and-take between the executive and legislative branches is precisely what is contemplated by our system of separation of powers. It is natural and appropriate that there will be bargaining and negotiation between the two political branches in the development of national policy. To be sure, a certain degree of self-restraint on both sides is necessary in order for the process of checks and balances to work effectively.

I will now discuss two leading Supreme Court decisions dealing with the President's power to issue executive orders: *Youngstown* and *Dames & Moore*. I will continue to develop the theme that case-by-case investigation of presidential action is the appropriate way to review executive orders.

II. MAIN CASES DEALING WITH EXECUTIVE ORDERS

The leading case on presidential power to issue executive orders remains *Youngstown Sheet & Tube Company* v. *Sawyer,* 343 US 579 (1952). By a vote of 6 to 3, the Court struck down President Truman's executive order seizing private steel mills. The President had acted in anticipation of a strike by steel workers that he believed would cripple the country's efforts in the Korean conflict. The President had issued an executive order instructing the Secretary of Commerce to take possession of and to operate most of the nation's mills. The President gave notice to Congress of this action, but Congress did nothing specific in response. The President's lawyers argued that although there was no statutory authority for this action, the President had inherent constitutional power as Chief Executive as well as authority as Commander-in-Chief to take this step, relying upon an historical practice of executive seizures of property.

Justice Black wrote the main opinion, which concluded that the issuance of an executive order in this context amounted to unauthorized lawmaking by the President. One of Justice Black's notable statements was that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[8] Certainly, the President must respect the role of Congress as the national legislature. However, in any ordinary sense, executive branch rule making is lawmaking when it establishes new, binding norms, even though as a constitutional matter, rule making is seen as executive action. As one commentator has stated, "all statutory delegations of power to the executive confer at least some discretion to define the law with greater particularity—and thus to 'make law'—through its execution."[9] Accordingly, a highly abstract, definitionalist argument that only Congress can make law does not stand up to scrutiny as a way to distinguish between legislative and executive power.[10]

Of critical importance in *Youngstown* was the fact that the executive order altered the legal status of private property in the United States. Justice Black noted that this is the sort of thing that Congress can do by statute, as long as it complies with any applicable limits such as the Takings Clause.[11] But in general, the President needs some kind of authority in order to take the action. Justice Black rejected the ideas that the President has "inherent" power in this situation, or that the Com-

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[7] *See generally* Louis Fisher, Executive Orders and Proclamations, 1933–99: Controversies with Congress and in the Courts, CRS Report for Congress, Order Code RL 30264 (July 23, 1999).

[8] See 343 U.S. at 587.

[9] See Harold H. Bruff, Judicial Review and the President's Statutory Powers, 68 Va.L.Rev. 1, 6 (1982).

[10] See Thomas O. Sargentich, The Contemporary Debate about Legislative-Executive Separation of Powers, 72 Cornell L. Rev. 430, 431–432 (1987) ("[A]gency rulemaking obviously shares the core characteristics—prospectivity, generality, policy-making force—ascribed to legislated norms. As the Supreme Court acknowledged in a classic delegation decision, *United States* v. *Grimaud,* it has become "difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations." In *Amalgamated Meat Cutters* v. *Connally,* a leading statement of modern delegation doctrine, the late Judge Leventhal noted that 'no analytical difference, no difference in kind' exists between the legislative function 'of prescribing rules for the future' and what agencies do by rulemaking pursuant to statute.") (footnotes omitted).

[11] See 343 U.S. at 588.

mander-in-Chief Clause provides authority in a context which is not at all near a theater of war.[12]

Of note in *Youngstown* are the concurring opinions that go beyond a formalistic definition of legislative versus executive power. Justice Frankfurter suggested that longstanding executive practice, when there is silent acquiescence by Congress, might provide some basis for executive action.[13] However, in this case, Frankfurter did not find such a practice. Also, he stressed that Congress specifically rejected a seizure provision during debate on the Labor Management Relations Act of 1947.[14] Moreover, there were statutes on the books that provided for the President to take specific steps to accomplish a seizure.[15] The President chose not to follow these statutes, but instead sought to rely on general claims of power under Article II.

Justice Robert Jackson wrote the most famous opinion in *Youngstown.* In his separate concurrence, he noted that there is a "poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." [16] He referred to the well-known fact that the framers said little about executive power. He also noted that subsequent authorities provided "more or less apt quotations . . . on each side of any question." [17]

Justice Jackson established a useful, widely-followed framework for analyzing issues of presidential power.[18] He distinguished among three different situations. The first is where the President acts with all his own Article II power as well as an express or implied authorization by Congress. Here, the President is at his height of power. The second is where the President acts under Article II, but without any authorization or any contradiction by Congress. Congress is silent on the matter at issue. Here, Justice Jackson pointed out, one is in a kind of "zone of twilight" [19] in which the imponderables of the moment are likely to count as significant factors in an analysis of presidential power. This second category reflects the ambiguity of what it can mean to be chief executive. In the third situation sketched by Justice Jackson, the President claims to take action based on Article II, but the action seems to contradict either an express or implied limitation or direction established by Congress. Here, there is direct tension between the competing claims of Article II and of Article I. Justice Jackson doesn't say that in every case in situation three, the President will necessarily lose, presumably because there may be circumstances in which the President has some express constitutional authority that Congress cannot cut off. However, it seems plain from his opinion that the presumption in situation three is strongly against the legality of presidential behavior.[20]

In *Youngstown* itself, Justice Jackson concluded that the President's executive order was promulgated in a context properly characterized as situation three. First, Congress had not authorized the seizures, as the government admitted. Second, it would be difficult to claim that Congress had been silent or had left the field open. In fact, there were statutes dealing specifically with seizures of military production facilities, which the President decided not to invoke.[21] Furthermore, in the legislative debate about the Labor-Management Relations Act of 1947, Congress rejected a provision that would have included plant seizure as a tool for ending labor-management disputes, thereby indicating an intent not to give the President seizure power in labor controversies. Accordingly, Justice Jackson placed the steel seizure

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[12] *See id.* at 587.

[13] *See id.* at 610–611 (Frankfurter, J., concurring).

[14] *See id.* at 599 (Frankfurter, J., concurring) ("A proposal that the President be given powers to seize plants to avert a shutdown where the 'health and safety' of the nation was endangered was thoroughly canvassed by Congress and rejected.").

[15] *See id.* at 597–98 (Frankfurter, J., concurring) ("Congress has frequently—at least 16 times since 1916—specifically provided for executive seizure of production, transportation, communications, or storage facilities. In every case it has qualified this grant of power with limitations and safeguards.").

[16] *See id.* at 634 (Jackson, J., concurring).

[17] *See id.* at 634–635 (Jackson, J., concurring).

[18] *See id.* at 635–638 (Jackson, J., concurring).

[19] *See id.* at 637 (Jackson, J., concurring).

[20] *See id.* at 638 ("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.").

[21] Justice Burton, in his own concurring opinion, usefully summarized these statutes. *See id* at 663–664 (Burton, J., concurring). The two seizure statutes were the Defense Production Act of 1950 (which "grants the President no power to seize real property except through ordinary condemnation proceedings, which were not used here, and creates no sanctions for the settlement of labor disputes", *id.* at 663) and the Selective Service Act of 1948 (which authorizes the President to seize plants that fail to fill the orders for goods, within a certain period of time, when the goods are required by the armed forces or for national defense, *see id.* at 664).

case in his third category, in which "severe tests" are applied in reviewing the constitutionality of a presidential decision.

It is important to see that Justice Jackson assumed that, in many instances, the President and Congress will have concurrent authority over some subject matter. Congress could act and bind the executive branch, but often a field is left open for executive behavior. At the same time, there is presumably some limit on Congress' ability to restrict the President, for the President needs to retain core executive authority in order to be an adequately functioning Article II entity.

Most centrally, *Youngstown* establishes that executive orders should be grounded in constitutional or statutory provisions. Executing the law means implementing legal norms found in either source. The Court showed justifiable suspicion of a free-floating theory of inherent executive power that cannot be traced to some discernable constitutional or statutory source.[22]

Another leading Supreme Court decision dealing with presidential power to issue executive orders is *Dames & Moore* v. *Regan*, 463 US 654 (1981). In this 9 to 0 decision, the Court found authority for actions taken by President Jimmy Carter in January 1981 to settle the controversy resulting from the 1979 capture of hostages in the American Embassy in Tehran. In particular, the President issued a series of Executive orders that terminated legal proceedings against Iran in United States courts involving U.S. nationals. The orders also nullified attachments against Iranian property entered by United States courts to secure judgements against Iran. Furthermore, the orders transferred claims from United States courts to a newly-created arbitration tribunal. The result of these presidential decisions was to limit the ability of U.S. companies to receive judgements and payments with respect to their disputes with Iran.

The Supreme Court, in an opinion by then-Justice Rehnquist, explicitly invoked the analytical framework set up by Justice Jackson in *Youngstown*, distinguishing cases in which the President acted with authority, with silence by Congress, or in contradiction to congressional intent.[23] Among other things, the Court concluded that the International Emergency Economic Powers Act (IEEPA) authorized the President to nullify attachments and to transfer Iranian assets.[24] The Court also held that the President was authorized to suspend claims filed in United States courts. In reaching its conclusion about claims suspension, the Court took account of what it called "congressional acceptance of a broad scope for executive action in circumstances such as those present in this case."[25] The Court stressed "a history of congressional acquiescence in conduct of the sort engaged in by the President."[26] The Court also relied on prior decisions recognizing presidential power to enter into executive agreements that are not submitted to the Senate for ratification as treaties.[27] Overall, *Dames & Moore* reflects a tendency by courts to
give broad deference to the executive branch in matters relating to foreign affairs and foreign policy.[28]

Youngstown and *Dames & Moore* confirm that different legal results can flow from divergent circumstances. Observers of *Youngstown* have noted that a critical development in the litigation was the government attorney's claim, in response to questioning by the lower court, that the President's power in emergencies was essentially unlimited by the Constitution.[29] Although this argument was softened later, the government's initial claim led to considerable public alarm at the potential scope of presidential power as envisioned by the executive branch.[30] Moreover, the case

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[22] For Justice Jackson's discussion of the inherent powers argument, *see id.* at 647–655 (Jackson, J., concurring).

[23] *See* 453 U.S. at 668–669. The Court added that "it is doubtless the case that executive action in any particular instance falls.. . . at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." *Id.* at 669.

[24] *See id.* at 674

[25] *Id.* at 677.

[26] *Id.* at 678–679.

[27] *See id.* at 682.

[28] The Court's opinion quoted the leading case on judicial deference to presidential action in foreign relations, *United States* v. *Curtiss-Wright Export Co.*, 299 U.S. 304 (1936). See 453 U.S. at 661.

[29] See Maeva Marcus, Truman and the Steel Seizure case: the limits of presidential power 121 (1994, Duke University Press) ("The Court: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive. Is that what you say?

Mr. Baldridge: That is the way we read Article II of the Constitution.").

[30] *See id.* at 125 ("Newspapers across the country carried headlines to the effect that the Justice Department asserted that the President's power was unlimited. The friendly New York Post

dealt with the control of domestic private property, a subject as to which rights are clearly implicated. Since *Marbury* v. *Madison,*[31] courts have seen themselves as the institution best attuned to protect rights against governmental power.

On the other hand, the settlement of the Iranian hostage crisis was made possible by the series of executive orders challenged in *Dames & Moore*. As a legal matter, the claim of presidential authority was not an easy one. However, under the circumstances and considering the extent to which courts defer to Presidents in the area of foreign relations, it may not seem surprising that the Court upheld the presidential action. These two cases, viewed together, support the proposition that the courts will look individually at the circumstances involved in determining whether there is authority for an executive order.[32]

III. WHAT CONGRESS SHOULD DO

I will return to the question what Congress should do when it is concerned about a presidential order or other action. The core legal principle is clear enough: the inquiry is whether an executive order is grounded on constitutional or statutory authority. Frequently, the answer will not be obvious, given the ambiguity that can surround executive power and statutory interpretation.[33] Yet Congress has one clear avenue to follow as a practical matter when it is concerned about the use of presidential power for legal or policy reasons. It can, and in my view should, use its oversight authority.

In aid of its legislative function, Congress is a critical overseer of the execution of the law. In addition, its oversight power has its own value as a way of engaging in a dialogue with the executive branch in general and the President in particular. A system of separation of powers and checks and balances requires ongoing deliberation between the two branches in order for the government to work effectively.

Perhaps the main message to draw as a member of Congress from general consideration of the law relating to executive orders is that when a question arises, the relevant Committee or Subcommittee should consider having an exchange of views with appropriate executive officials. That is a process our framers had in mind when they spoke of checks and balances as a way to maximize accountability, prevent factional capture of government, and advance the public interest.

Mr. GOSS. I want to thank you all. I appreciate the extra observations departing from your prepared statements, because I think that's the value-added part, the reason we do this.

I have already learned some things. You stimulated some thought. And the summation I make out of this, in some ways, is something that had occurred to me more than once.

We are talking about power-sharing. No matter how you look at it, we have a pie up here that's cut three ways and that's the beauty of our system and the vision of our Founding Fathers. And the power-sharing issue obviously is related to politics, but we are trying to talk about it here in terms of governance. It occurs to me, particularly with regard to Mr. Sargentich's point that the composition of the power structure at any moment in history probably has a lot to do with the variability that we have seen, that was so well outlined by Mr. Bedell and others—in the history of this.

I can foresee if we had a parliamentary form of government, a two-party system and the party in power was doing the bidding of the leader, in that agenda we would have a different view of executive orders; the definition of opposition would come into play.

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declared, "President Truman can usually deal with his enemies, but who will protect him from his Justice Department . . . The reaction in Congress was equally severe.").

[31] 5 U.S. (1 Cranch) 137 (1803).

[32] For another example of a case invalidating an executive order, see Chamber of Commerce of the *United States* v. *Reich,* 74 F.3d 1322 (D.C. Cir. 1996) (holding that National Labor Relations Act provision preempted executive order barring the government from contracting with employers who hired permanent replacements during a lawful strike).

[33] For a case exemplifying the ambiguities that can surround statutory interpretation in this context, see *AFL–CIO* v. *Kahn,* 618 F.2d 784 (D.C. Cir.), (en banc), *cert. denied,* 443 U.S. 915 (1979) (upholding President Carter's executive order directing the establishment of voluntary wage and price standards).

It seems that the American public today, the voters, I think those that do vote, sort of enjoy stalemate. I have heard members of the media say that as recently as this morning, that stalemate is something that has hit home. They like the idea of the balance between the parties, and one group controls one thing, the other group controls the other, and then neither can do any serious mischief and everybody can go about their business and prosper, knowing that nothing meaningful really is going to happen to them.

I think there is probably some truth to that. It may be a little cynical, but I think there may be some truth in that.

We clearly have had recited for us for the record that there is a duty here for the elected people to use their positions responsibly, and that requires duty. There is activity in this because we have seen the President doing proclamations, executive orders and PDDs and so forth; and Congress is doing oversight. So we see that there is activity. We see that there are limits that have been clearly outlined by Mr. Cox, Mr. Kinkopf, on both sides, of what we can do. We appear to have the necessary oversight tools and there appears to be a pretty good process down at OMB.

The purpose of this in part today was to review that and sort of take the pulse and say, okay, understanding all of that, so where are we now? How is this working?

What is your view of the pulse in America today on this? Obviously that's a loaded question because I an getting a lot of questions on talk shows when I go on the radio or on TV, and some people are outraged at what goes on.

Mr. Bedell talked about not a lot of public input on the preparation of these executive orders, so that there tends to be a pleasant surprise aspect to them or an "I have been ambushed" surprise to them, which is not so pleasant, which causes the American public to pick up the phone and call their Federal legislator when he or she is on a talk show. We find that happening.

So that means we are here today not just by coincidence, historical accident that suddenly the calendar said that it is time to review this. It is the fact that there is interest out there among the people. Part of the issue is the sunshine question—I come from the Sunshine State—the transparency piece. We are trying to create some awareness on the subject today.

I think one of the demands that the public is making on legislators today and on all governments is transparency. That is not because I come from Florida, where we actually do have a government of sunshine. It is not just a motto in our State, but it does work pretty well. And I say that, holding the national security portfolio on PDDs, and recognizing that those—I think I would make a sincere exception from, with regard to the sunshine and transparency. There is a need.

I would like your views on whether or not you think there is satisfaction in America today on the broad subject of the tension between Congress and the White House on the use of executive orders. And I would like your view on whether or not you think more transparency is a part of your conclusion, or less transparency, if that's part of it, because that is certainly the kind of comment that I am hearing from the people across the land.

I would like to hear from all of you.

Mr. Cox, we will start with you.

Mr. COX. Thank you, Mr. Chairman. Without purporting to speak to the political mood of the country, I do think that it is the case that the current administration's aggressive announcements about executive orders have raised public concern about precisely what is going on here and the extent to which the President can unilaterally change the law of the Nation.

I think that in responding to that increased level of concern it is often important for people like yourself and the other Members of Congress to look behind the executive orders. Many of the executive orders which the President has announced with great fanfare and which I understand from the press to have elicited substantial public concern, upon examination either are unexceptional as falling clearly within the President's power, of if they, at the margins, are in fact too aggressive, they may not really have much significance beyond the President's ability to make the announcement that this is his policy.

Some of the executive orders of recent years, for example, seem to be little more than press releases, because when you look at them closely, they say at the end, of course, we are only doing this to the extent that the law allows, which seems to acknowledge that the administration is aware that there may well be contrary legal authority and that the executive order may not have much force and effect. So I think that by helping to educate the public from the point of view of Congress, you can respond to any President's aggressive pretensions to use the executive order power.

Mr. KINKOPF. I agree with what Mr. Cox has said. I think that there is often a great deal of fanfare, loud trumpets blaring, accompanying the release of an executive order, but upon examination, not really very much there. The result of the loud trumpets is loud response, both from supporters of the President and detractors. But attention to the details of executive orders tends to indicate that in fact not very much is being done.

Mr. BEDELL. I think that's correct. Indeed, for some of the orders that I have looked at of late, there is less—it amends an existing order—left at the end of the process than there was at the beginning, in large measure because interest groups didn't like what was there, put in place perhaps by a prior administration.

Indeed, it seems to me that one of the things that happens at the beginning of a new administration is that they immediately go over the executive orders that were issued in the immediate past and say, "I never liked that one very much either," but there are political reasons for it to be there, so let's just mangle it and leave something in place that has the name so that nobody can get really mad at us for having rescinded it. But at the same time we have taken all of the teeth out of it.

The ability to get transparency into the process is a difficult one. I think it behooves an administration to do a lot of that, to not take people by surprise, certainly not take Congress by surprise by it, but that is really an election on their part to do it and if they choose not to do it, they are obviously making a judgment that the pain of doing so is not worth the benefits gained from that type of coordination.

As far as Congress trying to impose an Administrative Procedures Act kind of rulemaking transparency on the President, that might be difficult with regard to his constitutional authorities, but with regard to his statutory authorities, I don't know that it would raise those kinds of concerns.

Mr. SARGENTICH. Mr. Chairman, your question about divided government is an excellent one. Of course, for a long time, Congress was dominated by Democrats and we had a Republican President. Now we have the opposite situation. Divided government does lead to stalemate, partisan bickering, and attacks from one side to the other that they are being too partisan.

I think that that critique aside, the issue of presidential lawmaking is of great interest generally to the public. I happen—I was amazed to be—on Washington Journal this morning, on a segment on executive orders, and the call-in questions were very exercised. People knew about some executive orders I didn't know about and were very concerned. I think people have a right to be concerned about lawmaking by both the Congress and the President.

So I think, in answer to the question, certainly this is an important issue.

How does one assess the recent history? The chart that C–SPAN put up this morning showed that President Reagan had the greatest number of executive orders since World War II, followed by Johnson, Nixon and then Clinton at this point in his presidency. In other words, in terms of quantity, this is a post-World War II phenomenon that every President has made use of. The greatest number historically, I believe, were issued by Franklin Roosevelt, something like——

Mr. GOSS. Three thousand five hundred.

Mr. SARGENTICH. Yes, an amazing number. Way in excess of other more modern Presidents, but of course, that was in an economic emergency. So we are dealing with the modern presidency since the New Deal and the tendency to coalesce power in the executive branch.

Transparency is a difficult issue because of the need to preserve the constitutional power of the President. But publicity is another matter, and it seems to me that the public should have access, easy access, to executive orders. The Federal Register statute, which you will hear about later, is an important development in guaranteeing information flow and protecting the public's right to know.

But ultimately what we are talking about is dialogue between the branches of government. Especially in the situation of divided government, where one party captures one branch and another party dominates the other political branch of government, it is all the more important to have ongoing dialogue and discussion.

Mr. GOSS. Well, I want to thank you. This is actually a fascinating subject as you get into it. I have heard some testimony here that executive orders are actually a little less meaningful than some of us thought, maybe, and one wonders why one goes through the process of doing something which leads to other questions about whether this is good governance. Or is this just politics? Those are the questions that get asked, maybe too often these days, or not enough, depending on your view.

The other thing that—I share your experience on the talk shows, Mr. Sargentich; the question about the public's right to know is undisputed. The question about them getting to know accurate facts is a subject that we are all struggling with these days, especially with the Internet. I find that there are indeed executive orders I have never heard of, and sometimes neither has the White House, that we get calls about. That's all part of public service, as we know. But it does seem the advent of the Internet has added to that phenomenon.

Doc Hastings.

MR. HASTINGS. Thank you, Mr. Chairman. I found the answers to the chairman's question about the significance of the executive orders to be very interesting, because I at home hear a great deal from my constituents on particular executive orders. In fact, I daresay there is not a town hall meeting that I have that somebody brings up an executive order, which means that they are probably in tune with what's going on.

But the notion that maybe these executive orders don't really have a whole lot of substance to them nevertheless lends itself to at least a perception that there is more and more power devolving to the presidency, and the President is therefore doing more legislating that, in fact, he may not be doing. Maybe it is a press release that is going out, but there is a perception out there at least that there is more power flowing to the President because of the executive orders.

So the first question that I would have, is that a good trend or is that a bad trend or is it a real trend?

Any one of you who wants to respond to that.

Mr. COX. Let me start, Congressman, by clarifying, I think, what we were saying in the last round of answers.

I don't think anyone is suggesting that there are not some executive orders that are very significant indeed and that do extend the reach of the Presidents' powers; but I think what we were saying was that there are some executive orders announced with a great deal of publicity by the administration that when you actually look at the details of the order have very little legal significance and they, therefore, have little more meaning than the President coming out any day into the Rose Garden and announcing his policy preferences on a given topic. But certainly I would not want and I don't think anyone on the panel would want the subcommittee to come away today thinking that there is not a real issue here and a real problem with abusive use of executive orders.

Responding directly to your question, I agree that I think that any administration that makes a show of using executive orders, as the chairman said, perhaps to pursue political ends rather than the ends of good governance, does add to an impression that the President has more power than he either does in reality or than the Founders contemplated. And I would agree, picking up on Professor Sargentich's point earlier, that that is not a good thing, that we do have a constitutional system of checks and balances in which Congress has the primary and central role to play in lawmaking; and anything that tends to confuse the electorate about that leads to a decrease in accountability, which is further bad for our political life.

Mr. KINKOPF. Observing that most—many, perhaps most—executive orders have little practical consequence doesn't, I think, undermine the importance of what you are hearing; that is, if there is a public perception that the President is engaging in lawmaking, there is a public perception that the President's executive order is important. That perception makes it important, and it makes it important because it then serves an agenda-setting function.

You, in Congress, have to respond to whatever the executive order is about. If it is about, say, deadbeat dads, you have to respond to deadbeat dads that day instead of what you were planning to talk about that day. So it a way the President has of having input into the agenda of Congress.

I am not sure that that is an illegitimate exercise of the executive order power, but it is one that Congress is rightfully concerned about and can respond to through the various mechanisms we have already set forth.

But I agree with your point, which is the fact that the public is asking you about these at town hall meetings and is raising them on call-in shows makes executive orders very important politically, even if they may not be very important legally.

Mr. BEDELL. I think if the public has a preception that the President is doing more lawmaking than he has previously or other presidents had previously I don't think that is good, if that addresses your question. I think that the public takes greater solace in Congress doing that than the President doing that.

And another point I wanted to make with regard to the executive orders and their effect, is the enforcement of executive orders, which is something I skipped over earlier. And, just briefly, executive orders are largely enforced only by the President. They don't create, generally, private rights in third parties to go to court saying someone violated the President's executive order and force him to do what the President told him to do. Usually, these are political documents. And if the President directs the heads of departments and agencies to do something and they don't do it, he can fire them, he can replace them, he can yell at them, he can jump up and down or he can ignore them.

And often what happens with these executive orders is he writes something and tells all of these people to do all of these wonderful things that staff has worked on and ground out for months and months and months, and then it is issued and the Register publishes it and trees are cut down to print it and nothing happens because nobody pays any attention to it.

I, frankly, wish we could clean out—if somebody had the authority to go out and clean out all of the executive orders that really don't do much other than create concerns and raise questions about what really is the policy here for the executive branch and how does it relate to what Congress is doing? Enforceability is a key, and it all comes back to the President. If he cares about it, then it will be enforced and folks will pay attention to it from the top down. And the more that the President backs up what he writes, the more consistently an executive branch can function because it doesn't have to take everything back up to the top to ask the question, "are you really serious?" They know, and if they know, then everybody can understand the line and follow it. But too often, they

aren't enforced. Maybe there are just too many executive orders for the President to do that at every turn.

Mr. SARGENTICH. Well, I agree with my colleagues. I think there are a number of orders that have mostly political or symbolic significance, not legal significance. But we live in a world in which symbols play a major role, and symbolic politics is a large part of politics.

Having said that, I just want to reiterate a concern about oversight. It seems to me that there is a good deal of executive initiative taken to make law, that this is a function of the ambiguity of article II and of the position of the President in the government, which is that of an initiator, a person who can act quickly, much more quickly than Congress, simply because you have one person, not 535, and also because of the inherent tendency for executive branch advisors, of which I was one at one time, to protect the power of the President and to work to initiate in a legal way policies that the President wishes.

Congress is a diffuse organization with a lot of collective action problems; and to get a handle on this it would be important to, I think, try to overcome some of those problems to have serious oversight. But it is, I think, a point of wisdom to recognize the difference between legally significant orders and just symbolic orders.

Mr. HASTINGS. It seems to me that this whole debate, it has probably been ongoing for 210 years, is the notion of the division of powers, and that you should respect the division of powers that our Founding Fathers envisioned. Setting up a government that ultimately protects the people from government, that seems to be the basic principle.

Now, inherent in that, it seems to me, is the notion that Paul Harvey frequently says on his radio program, that self-government is a work without self-discipline. That is something that we all have to take individually and act accordingly. But it appears, maybe with—well, I will just simply say, with this President, particularly in some of the environmental areas that the chairman of the committee mentioned within this reading last night, that this President is maybe stepping across that to try to enact something that the Congress collectively would not enact. he is not the first president to have thought that way I am sure, but, nevertheless, that seems to be a trend that we may be emerging to.

Now, if I am right and that is indeed the start of a trend, is there anything that we ought to do or we ought to pursue other than just government oversight? I am sure this has been wrestled with for 200 years. Is there anything we should be looking at maybe specifically to address what may or may not be happening in the future?

Mr. SARGENTICH. Sir, you know, I think that there are three or four clear things. One is oversight of particular cases. Another one is to look at statutes which are cited commonly as authority for some of the more controversial orders.

The Procurement Act has been mentioned by two of my colleagues, and it certainly has been cited very broadly in discrimination contexts and in wage-price and all sorts of contexts and used broadly by presidents to do things. And so Congress, if it is concerned about some of these uses, can look at these omnibus stat-

utes and decide collectively whether it really wants them to be used as authority in this manner.

Of course, the appropriations power is sort of the linchpin power of Congress. Congress has the power of the purse and presidents can't go ahead and do things that spending of money, at least for very long, without getting new appropriations.

Report and wait provisions have also been mentioned. That is to say, in certain categories have the President report what is going on to Congress and wait 30 days, 60 or whatever for some feedback. Those are the traditional powers of Congress, oversight, narrow authority, appropriations, report and wait.

But they are tremendous powers. I mean, ultimately, they are the fundamental powers of governing. Used selectively and carefully they can have tremendous, as Bob Bedell pointed out, impact as a practical matter.

Mr. BEDELL. Just one thing to amplify what Tom said, is that Congress can preempt a field. It doesn't have to specifically do the same thing that the President would do but in a slightly different way in order to state its views on the matter and to make its case. It can preempt a field by showing sufficient action so that the constitutional authority of the President, if that is what he is relying on, as Justice Jackson indicated, would be at its lowest point and raise questions whether the President has the authority to move.

So you don't have to try to figure out what the President is doing and then seek to counter that in advance of his doing it in some kind of game process. You can do it more broadly and more sweepingly, I believe, than that.

Mr. KINKOPF. Just one caveat on the last point, and that is I think broad and sweeping action is problematic in this area because of constitutional limitations. For example, when it was contended that the Administrative Procedures Act applies to the President, the Supreme Court said we will not interpret it to do so because if we did it would raise significant constitutional problems.

So we don't have actual decisional law telling us whether Congress could or could not, although we do have a decision indicating that it is, at the very least, extremely problematic enough so that Congress adopted what was not exactly a natural reading of the statute in order to avoid the problem.

In another related case, where it was contended that the Federal Advisory Committees Act applies to the ABA committee, which advised on judicial appointees, the Supreme Court again read the FACA not to apply because it would raise significant constitutional questions. In that case, three justices were unwilling to rewrite the statute, in the way, ti had to be rewritten to achieve that result, and actually addressed the constitutional question it said it would violate the Constitution. That was an opinion written by Justice Kennedy, saying it would violate the Constitution to apply FACA when the President is deciding who to nominate under his constitutional power.

The reason that broad responses, categorical responses to the executive order authority generally are problematic is that power is not a discrete thing. It is based sometimes exclusively in statute, sometimes exclusively in the Constitution. Most of the time it is a combination of the Constitution and statutes that give rise to the

authority. But how much of that power is coming from the Constitution and how much from the statute will vary with every executive order, and the constitutional power of Congress to respond to the President then varies with respect to every executive order. And an across-the-board approach to dealing with the President's authority to issue executive orders then runs into that problem, that this is a very fact-specific inquiry constitutionally.

So it is for that reason, I think, that the Supreme Court has been extremely reluctant to apply these blunderbuss acts to the President when the President is acting unilaterally. So I think you are right to be concerned, but the responses probably do need to be tailored to specific sorts of situations.

Mr. COX. Just briefly, while I certainly agree with everything that Professor Kinkopt said, that you have to be careful about the broad brush response because of the President's core of constitutional powers, some of the ideas we have been talking about this morning about broad mechanisms that would apply to all statutory-based executive orders, report and wait, requiring the statutory authority to be identified with particularity, would be things that would be within the power of Congress, would be things, I think, that over time would act to rein in the President. If he could no longer, for example, get away with simply saying, by the authority vested in me by the laws of the United States, without specification, and I think also would inform Congress, in the way we have talked about, about the Federal Procurement Act as sort of the classic example of the broad-based statute that gives the President enormous power that is often used very much at the margins of his power.

If Congress saw over time that one or two statutes were being invoked by presidents over and over again as the basis for questionable executive orders, Congress then would be in a better position to focus on its own inquiry into amending the statutes.

Mr. KINKOPF. If I might, just one footnote to Mr. Cox's observation. The problem with applying broad mechanisms even facially to statutes is that often when the President is deploying a power, a statute will be involved, even though what is really going on is an exercise of constitutional power.

For example, when the President appoints a judge or an officer, the President is exercising a statutory power. Congress created that office. Congress vested the appointment power in the President alone with respect to an inferior office. With respect to a non-inferior office, it is vested in the President by the Constitution, but it is still by Congress that, by statute, that created the office.

In that situation, is the President exercising a statutory power? In some sense, yes, but for the statute there would be no power here. But that is precisely the situation where the Supreme Court—three justices said that Congress may not apply a broad mechanism and five other justices strongly indicated that the President could not and instead read the broad mechanism not to apply.

Mr. GOSS. I am going to have to say that we are all subject to the exigencies of the clock.

I am going to thank you very much for your contributions. I would like to reserve the right to continue our dialogue in writing

as questions occur to all of us. I want to thank this panel very much. I assure you of the committee's interest.

The subcommittee suffers today. We have a rule on the floor at this moment, and several of our members are there doing that business, and that is why it is so clumsy and hard to get things done here. Because we have got this huge process that we have to deal with all the time, and it is hard to keep focused. And the President does not have quite that much baggage to carry I think when he does an executive order.

We have learned a lesson. You have added a lot, and I appreciate very much your time here and tell you that we are hoping to further this. I don't know whether we will go into legislation or not. Perhaps that is a possibility. But I think that you have added very much to our sense of a pulse on this, and I appreciate that.

I will dismiss this panel, and I will call the second panel. Thank you, gentlemen.

Mr. GOSS. The committee will call the second panel, Mr. William Olson, co-author, CATO research paper entitled "Executive Orders and National Emergencies." We are very pleased to have Mr. Olson with us here today.

You are a panel unto yourself. Your prepared remarks will be accepted into the record without objection, and any enlightenment you wish to share with us would be most welcome.

STATEMENT OF WILLIAM OLSON, CO-AUTHOR, CATO STUDY ENTITLED "EXECUTIVE ORDERS AND NATIONAL EMERGENCIES", ATTORNEY-AT-LAW, WILLIAM OLSON P.C., MCLEAN, VA

Mr. OLSON. Thank you, Mr. Chairman and members of the subcommittee. I do want to thank you for the opportunity to testify before you regarding the impact of executive orders on the legislative process, and what I perceive to be the very real problem of presidential lawmaking by fiat, and I will stray from my prepared remarks to make some comments.

I do want to begin with some comments on the prior panel. I was chaffing for a microphone while much of the discussion was going on.

I knew Bob Bedell during the Reagan administration when I served there and have the highest regard for him and his comments. I have to say that I did disagree substantially with really only one witness, who was Professor Kinkopf, I believe, who appeared to indicate that there was no problem with respect to executive lawmaking when, in fact, I think, the instincts of the committee members, as expressed during your comments, are that there are problems here that are serious, constitutional, and have to be dealt with.

And I want to encourage you and I hope my comments today will make the case that there is a serious problem, that the Constitution is being flaunted and the Congress is not doing an adequate job of defending its institutional prerogatives and that simply more of the same, more oversight, more hearings, more oversight is important only when the opinion of Congress is respected by the executive. If the executive does not respect the position of Congress, it is an empty threat.

And certainly Mr. Dreier's quotation from U.S. News and what they characterize as President Clinton's showing the Congress who is boss is something that should raise the hair on the back of the neck of every self-respecting Member of Congress, and yet I am afraid that this is accepted much too often as simply the way the business is conducted.

I do want to bring one other article to your attention that I came across in a Salt Lake City paper, and it had to do with a hearing that was held just last week and Secretary Babbitt's opportunity to testify with respect to the Grand Staircase Escalante National Monument, which has been alluded to before by Mr. Hastings. And he said in his testimony, "I am not prepared to sit back and let this Congress do what it has done for the past 7 years in these areas, which is virtually nothing." And he was referred to as "unusually feisty" and went on to say, "if Congress does not act and produce an acceptable bill protecting these lands, I will consider asking the President to use his power." Of course, his power, as they view it, was an obscure 1906 Antiquities Act which had never been used for the purposes that he had used it, and he looked at the Congress and said, the clock is running.

At some point, oversight with an administration that is not particularly caring of the opinions of Members of Congress is less than effective, and I want to make some suggestions today.

First of all, I have been researching and working in this area for a long while. Based on some earlier writings we had done, Roger Pilon of the CATO Institute had asked us to do a study for them, and we did undertake that, and very providentially that study is available today for the very first time, having gone to the printer at the end of last week. Our title has a more exciting title perhaps than the committee chose for its hearings. The title of our paper is, "Executive Orders and National Emergencies, How Presidents Have Come to Run the Country by Usurping Legislative Power."

[Paper by William J. Olson and Alon Woll, submitted for the record:]

Policy Analysis

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Routing

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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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—government necessarily grows.

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.

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.

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

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

"Many believe that AHRI clearly violates the doctrine of separation of powers as intended by our Founding Fathers by completely bypassing the Congress."

> 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.

"Where all previous executive orders on federalism aimed to restrain federal actions over states, the current version is written to justify federal supremacy."

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

> 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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that practice more succinctly, and quotably, than did Clinton adviser Paul Begala: "Stroke of the pen. Law of the land. Kind of cool."[32]

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]

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."

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]

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.

That action established the dangerous precedent of congressional ratification of unauthorized presidential directives.

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.

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

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]

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

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-

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]

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

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

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.

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

national emergency demonstrates clearly that the Watergate-era statutes have failed to restore the separation of powers and the constitutional structure of government. Under IEEPA, for example, Clinton has declared national emergencies that have enabled him to prevent U.S. residents from providing humanitarian aid to various groups he disfavors. He has declared a national emergency (annually renewed) with regard to UNITA (anti-communist participants in the Angolan civil war who had received support during the Reagan administration),[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 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.

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:

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 I 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 **Hindenburg? 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 ½ 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 7_ 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**

I would very much hope that—I understand copies of that study have been made available to the subcommittee members, and I would very much appreciate your attention to the thoughts in there because I think there is a lot of useful background.

I also want to commend the subcommittee because the testimony that has been filed today by the other panelists has done a great deal to develop the literature on executive orders, which is remarkably scarce. There are remarkably few players in this arena, and I do notice that three of the four panelists who began the day were from the Office of Legal Counsel and the other from OMB, all of which were responsible for protecting the powers of the President, as Mr. Bedell said, and I am afraid they have done their job all too well and not been sensitive at all to the constitutional limitations on the President's actions.

And let me say that and go back to January 30, 1788, Federalist 47, when James Madison quoted Montesquieu, and this is how we begin our study. He said, "there can be no liberty where the legislative and executive powers are united in the same person or body of magistrates"; but that saying, he said, did not apply to the Constitution as they were writing it because the magistrate in whom the whole executive power resides cannot of himself make a law; though he can put a negative on every law.

And this is exactly the concept, that the President has the legislative power to propose and the legislative power to veto. In between he has no power whatsoever. And I am frankly shocked and disappointed to hear a panel of lawyers and constitutional professors testify with blase with respect to presidential lawmaking as if this was the way it was meant to be.

This is very definitely not the way it was meant to be. We have strayed very far from the original plan, and it is my hope that this hearing is very much a beginning of getting Congress back on track, reining in a President who has exceeded his constitutional bounds.

There is another interesting citation we make. As early as 1792, according to Thomas Jefferson, he said, "I said to President Washington that if the equilibrium of the three bodies, legislative, executive and judiciary, could be preserved, if the legislature could be kept independent, I should never fear the result of such a government, but I could not but be uneasy when I saw the executive had swallowed up the legislative branch."

The people do not fear the Congress. The people do responsibly fear the presidency and lawmaking by the presidency.

I would say that the discussion earlier about transparency, Mr. Chairman, is a very interesting point; and I want to respond to that briefly. The process of transparency comes into the legislative process when the Congress has hearings, when the Congress debates legislation, when the Congress has to defend their position as they go back to town halls and meet with constituents. That is the process of transparency.

I do not seek—I would not recommend trying to introduce the concept of transparency into the executive order process, but rather I would try to stop the President from using executive orders to legislate. It is that simple.

Now, Congress and the courts have taken action from time to time to challenge presidential exercise of authority that they believed was unconstitutional, and some of the prior panelists did discuss this. They did talk about the Louisiana Purchase and the Emancipation Proclamation. There are many other instances where the Congress and courts have taken action, but the Constitution anticipated that the Congress and the courts would jealously guard their prerogatives.

They believed that they would set power against power and in that way they would make sure that no one branch of government exceeded their constitutional role. There was supposed to be fierce resistance. But yet, through the first panel anyway, you have been counseled to not worry about it, take it easy, and applied a great deal of legal balm on what is a politically explosive issue.

I, too, have had a great a number of radio talk shows and such, and perhaps I plead guilty to trying to cause those people to come to your town meetings to ask you these questions as I do the radio talk shows. Because I do find that through the Internet we have had an explosion of information about executive orders, about executive orders that are not cosmetic, not "less than meets the eye", not all the descriptions we have heard before but very real, profound changes in the policy direction of the United States in areas exactly as Mr. Hastings says where the Congress of the United States would have refused to take that action, but the President knowing that the Congress had refused to take the action said, I do not care; I will do it anyway. And then he puts the Congress in this terrible situation of having to, again, change their agenda, to respond and, secondly, to be able to develop a piece of legislation which then has to be presented to the President and can be vetoed by the President.

And so we see a situation where if 65 percent of both the House and the Senate believe that the President of the United States was acting unconstitutionally and if they were willing to not vote to override a veto the President would escape scot-free.

Now, we begin to think, can we not go to the courts? But through the entire research that we had the opportunity to do, we found two instances and two instances alone of situations where the courts have voided executive orders in their entirety.

The first was discussed today, with President Truman, the *Youngstown Sheet and Tube* case, and there is a very famous concurrence by Justice Jackson with his multiple levels of analysis. It is, frankly, not the kind of analysis that I would have hoped for because it does grant the president greater latitude than I think appropriate, but it was a very good case.

And then the case of U.S. Chamber of Commerce versus Reich, which involved, of course, President Clinton's executive order having to do with the powers under the Procurement Act and his refusal to buy goods and services from companies which hired permanent striker replacements, and he was rebuffed by the Court.

But despite the fact that he was rebuffed by the Court early in his administration, he did not shrink from continuing to exercise executive orders in controversial areas and in areas where the Congress had refused, simply refused, to pass legislation. He decided he would do it anyway.

I do say that this is not a partisan issue. I had the pleasure of serving in three positions in the Reagan administration and shortly after the third position I was hired by a group to sue President Reagan because he had announced that he was directing Secretary Weinberger to implement SALT II, despite the fact that he could not get it through the consent process in the United States Senate. And we brought the action in the U.S. District Court for the District of Columbia.

As I remember, opposing counsel was Royce Lamberth, now Judge Lamberth, who has been famous lately, and he won because he raised the standing issue. And he said, this is a private group, and despite the fact that the President's order may be unconstitutional, may flaunt the Senate's role in advice and consent in treaties, we have no way that this particular organization, which was The Conservative Caucus, a (C)(4) lobbying organization, they were not aggrieved in some special way; therefore, they had no standing.

This is a problem that people have had over and over and over again. It is not true, as was said before, that parties who are affected by executive orders can always go into court and always be heard. It simply is not the history of executive orders. And if you read the cases where people have attempted to defend their rights, where executive orders were imposing duties and responsibilities on them, those people frequently have been unable to get a hearing in court on the merits because of the standing issue.

The courts cannot be counted on; and, therefore, the Congress must be the party that defends the U.S. Constitution.

And I would say the last time that this was done seriously was when the Senate set up the Special Senate Committee on the Determination of the National Emergency, cochaired by Frank Church and Charles "Mack" Mathias more than 25 years ago. This was not only on executive orders but also on states of emergency and emergency powers, all related issues.

A couple of years later, the committee came back with a slightly different name, but it developed a series of legislative changes, including the War Powers Resolution, IEEPA, the International emergency Economic Powers Act, which is a favorite source of authority for presidents. They recite that statue in the preamble clause of virtually every executive order that can possibly think of a way to cite it.

They also made an amendment to the Trading With the Enemy Act of 1917, TWEA, but all of those efforts to restrict presidential lawmaking were ineffective. We had the impossibility of even restraining President Clinton conducting a war against the Federal Republic of Yugoslavia. We had 31 Members of Congress try to go to court to find a way to have a declaration of that by the Court, and the Court refused on the grounds of, again, standing.

So we come to what is it that can be done? And I do understand this is not a legislative hearing, that is going to happen tomorrow, and the Judiciary Committee will consider this. But I do want to make just a couple of comments about the two proposals that are pending now.

One is by Congressman Metcalf, House Concurrent Resolution 30, and that, of course, would be a concurrent resolution rather than a law. It would not be presented to the President of the

United States for signature and, therefore, would never have the force of law. It would be a resolution that expressed the sense of the House in terms of its outrage about what has been happening with executive orders, but it would have no legal effect whatsoever. It has the advantage of not being able to be vetoed, and so it could be passed, but it would be advisory only, without force and effect.

The other proposal is H.R. 2655 introduced by Congressman Ron Paul and by Congressman Metcalf, and it is an approach that holds great promise to solve this recurrent problem. It actually follows up on a 1983 bill that Mr. Paul had introduced that I found in some research last night, and so he has been at this issue for a long while. It does several things that have never been done before, and it tries to do some things that have been tried before but where presidents have gotten around the rules.

It tries to establish the first statutory definition of a presidential directive. It greatly expands access to the courts to challenge the legality of presidential orders and eliminates some of the standing cases which have made it so hard for Members of Congress to get rulings by courts as to whether the President has acted unconstitutionally. It defines the constitutional powers that the President can exercise by presidential order, and it says whenever he acts by statute he has to be very precise about specifying the statute and, failing that, the executive order would be null and void.

It would terminate all the existing states of emergency. There are right now either 13 or 14 concurrent and overlapping states of emergency existing the United States of America. Most people don't realize that since 1933 there has only been a period of 14 months when the United States has not been in a presidentially declared state of national emergency.

Presidents don't do this because it feels good. They do it because, as the Mathias and Church research showed, at that time there were over 430 separate standby statutes. The power to which the President brought to himself the moment he declared a state of national emergency and this vast standby reservoir of powers, many of these have been repealed now, but there are still hundreds out there, are powers that the President can exercise when he declares a state of national emergency.

And we see language in the reports in the mid-seventies by the Congress which called these powers "dictatorial". We see language of Clinton Rossiter in his studies, certainly a main-line political scientist, calling them dictatorial, and I would say that those are justified descriptions.

So, lastly, I would just say that this is not a problem with President Clinton, although President Clinton has exhibited a certain degree of latitude as he has used executive orders that has never been seen before in this country.

It is something that I would hope would cause Members of Congress to resist. I would hope that when Members of Congress would read an executive order the first instinct would be not be, do I like the policy being achieved but, rather, where does the President get the authority to do this?

Because, basically, these are legislative actions, and we have to go back to the opinion by Justice Frankfurter in the *Youngstown Sheet and Tube* case where he said that the President had the

power to execute the laws but not to make them and that the blending of these powers in one person was considered by the Framers, but rejected because that would certainly create tyrannies in blending executive and legislative powers.

They rejected that approach. The President doesn't realize it. Many presidents don't realize it. It is an extremely serious problem, but it is solvable. The Constitution looks to you in the House and the Senate, and charges you with the duty to protect the Constitution from assault, and the American people do look to you to do just that.

Thank you.

Mr. GOSS. Thank you very much, Mr. Olson.

[The statement of Mr. Olson follows:]

PREPARED STATEMENT OF WILLIAM J. OLSON

Mr. Chairman and members of the Subcommittee, I want to thank you for this opportunity to testify before you regarding the impact of Executive Orders on the legislative process and the very real problem of presidential lawmaking by fiat.

From the standpoint of my participation, the timing of your hearing is providential, in that many months ago I was asked to undertake a study of this very subject by Roger Pilon, director of the Cato Institute's Center for Constitutional Studies. The paper which I co-authored with Alan Woll, an associate in our law firm, was finalized just last week. It is now back from the printer and today receiving its first public release. The Cato paper has a title somewhat more flamboyant than that of this hearing—"Executive Orders and National Emergencies: How Presidents Have Come to 'Run the Country' by Usurping Legislative Power." I greatly appreciate the opportunity to testify about the matters discussed at length there, and I understand that copies of this paper have been made available to the Subcommittee, and otherwise are available on Cato's website at www.cato.org.

On January 30, 1778, in Federalist 47, James Madison observed that Montesquieu's warning—"There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates"—did not apply to our constitution because "[t]he magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law. . . ." Despite Madison's predictions, our government quickly strayed from its principles and our chief magistrate has, in fact, again and again, legislated by fiat. In fact, in our research on presidential directives (such as executive orders and proclamations), I learned that from its beginning, American political history has been marked by efforts of many presidents to define the extent of their power and authority in ways violative of the U.S. Constitution.

As early as 1792, according to Thomas Jefferson: "I said to [President Washington] that if the equilibrium of the three great bodies, Legislative, Executive and Judiciary, could be preserved, if the Legislature could be kept independent, I should never fear the result of such a government; but that I could not but be uneasy when I saw that the Executive had swallowed up the Legislative branch."

Congress and the courts have taken action from time to time to examine and, at times, challenge presidential exercises of authority perceived to be unconstitutional: from President Washington's declaration of neutrality to the Louisiana Purchase, Jefferson's embargo, Jackson's removal of federal funds from the Second Bank of the United States, Polk's sending of Gen. Zachary Taylor's troops into contested territory before the declaration of war with Mexico, Lincoln's conduct of the Civil War without calling Congress into session, Lincoln's amnesty and reconstruction plans, the Tenure of Office Act and Andrew Johnson's impeachment . . . and the list goes on and on.

But the Constitution anticipated that the Congress and the Court would jealously guard their prerogatives, and, setting power against power, unconstitutional excursions by the executive would be met with fierce resistance. Sadly, neither the Congress nor the Court have acted boldly in defense of the Constitution, particularly in the recent past.

My first personal experience with an unconstitutional exercise by the executive of a legislative power arose in the mid-1980's, shortly after I completed serving three part-time positions in the Reagan Administration, when I filed suit against the Reagan Administration for usurping the Senate's power to ratify treaties before they became effective. The case was *The Conservative Caucus* v. *Reagan,* litigated

in the U.S. District Court for the District of Columbia. Our client had sought to prevent Secretary of Defense Casper Weinberger from ordering the Pentagon to unilaterally implement the SALT II treaty—which the Senate had thus far refused to ratify. President Reagan had announced his determination to implement the treaty, notwithstanding the Senate's constitutional role. Unfortunately, we were unable to obtain a review on the merits, as the suit was dismissed, as so many similar suits have been, on the theory that our client lacked standing to bring suit.

The simple truth is that the courts cannot be counted upon to check Presidential power—our research has been able to identify only two cases in the history of the country in which the courts have struck down completely an executive order. The first of these was in 1952, when the U.S. Supreme Court negated the seizure of the steel mills ordered by President Truman, observing that:

> 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." [*Youngstown Sheet & Tube* v. *Sawyer*.]

Notwithstanding this U.S. Supreme Court decision, presidents of both parties continued to implement controversial initiatives using presidential directives—often in the face of Congressional opposition. The other time the court struck down completely an executive order was President Clinton's executive order relating to the hiring of permanent striker replacements by federal contractors, and the decision of the U.S. Court of Appeals for the D.C. Circuit was not appealed to the U.S. Supreme Court. *Chamber of Commerce of the U.S.* v. *Reich.*

Congress has done little more than the courts in restricting presidential lawmaking. Nevertheless, Congress did make one bold step to check executive powers in the related arenas of executive orders, states of emergency and emergency powers. The Congressional concern led to the creation of a Special Senate Committee on the Termination of the National Emergency, co-chaired by Sens. Frank Church (D–ID) and Charles Mathias, Jr. (R–MD), more than 25 years ago. The diligent efforts of this committee resulted in the successful codification of efforts to restore the Constitutional separation of powers, through a check on the presidential exercise of "emergency powers," by means of the National Emergencies Act. Other contemporaneous statutory efforts to check presidents' unconstitutional exercise of power include the War Powers Resolution, the International Emergency Economic Powers Act, and the amendment of the Trading with the Enemy Act of 1917.

Unfortunately, these 1970s efforts to impose restraints on unconstitutional exercises of power by presidents have been ineffective—witness the inability of Representatives and Senators to obtain judicial review of President Clinton's war upon the Federal Republic of Yugoslavia pursuant to the terms of the War Powers Resolution. Likewise, notwithstanding the National Emergencies Act and the International Emergency Economic Powers Act, the number of presidentially-declared national emergencies has exploded. Since then, although individual members of Congress have spoken out, the Congress has failed to act.

I commend the efforts of this Subcommittee to take a new look at the issue of executive lawmaking, urge you to expand the scope of your investigation to focus on emergency powers, and in both cases to begin your investigation where Senators Church and Mathias left off, and to act boldly to curtail Presidential lawmaking.

Two proposals are currently before the House which would address this concern. First there is Rep. Metcalf's H. Con. Res. 30, which would express:

> 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.

The proposal has been useful in focusing attention on the problem, but the solution it proposes would be cosmetic only. First, as a concurrent resolution, even upon

passage, it will not enjoy the force of law. If a resolution passed into law by both Houses of Congress over a presidential veto, such as the War Powers Resolution, cannot be enforced in the courts, then passage of a resolution with no legal effect is essentially a symbolic gesture. Second, it is unclear what constitutes an infringement of the powers and duties of Congress, or a specific appropriation for the purpose of the executive order. And third, even if it were an effective limitation on executive orders, it could be evaded easily by entitling the directive as a proclamation (or some other directive). Rather than truly solve the problem, I fear passage of this proposal would be counterproductive in that it would give Members of Congress and the public the false impression that the problem had been solved.

By contrast, H.R. 2655, Rep. Paul's and Rep. Metcalf's approach holds great hope to solve this recurrent problem. This bill, which, as a proposed statute, would become legally binding, would:

- Establish the first statutory definition of "presidential directive" (it uses the term "presidential order");
- Expand access to the courts to challenge the legality of presidential orders;
- Define the constitutional powers which the president may exercise by presidential order; would require any statutory authority for the presidential order to be expressed for the order to be valid;
- Terminate the powers and authorities possessed by the president, executive agencies, or federal officers and employees, that are derived from the currently existing states of national emergency;
- Vest the authority to declare future national emergencies in Congress alone; and
- Repeal the ineffective War Powers Resolution.

Lastly, I would say that concerns about presidential lawmaking must not be written off as attacks on the policies underlying the executive orders. This is not partisan politics masquerading as separation of powers issues. It is true that it finds fault with President Clinton, but it also finds fault with Presidents Reagan, Bush, and others. As a review of the above-mentioned CRS report will demonstrate, presidential directives were used to legislate to accomplish political objectives which could be viewed as "liberal" and political objectives which could be viewed as "conservative." No constitutional power should be misused, irrespective of the benefit perceived for a political objective. If constitutional processes are violated, in the end, we all lose.

In his concurring opinion in *Youngstown Sheet and Tube*, Justice Frankfurter observed:

> 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. [Emphasis added.]

The problem before you is extremely serious, but solvable. The U.S. Constitution charges you with the duty to protect it from assault, and the American people look to you to do just that. Thank you.

Mr. GOSS. I am reminded that one of the first acts at the beginning of every Congress is we all put our hand up and say "I do swear to protect the Constitution of the United States of America", and I think we all are sincere in our commitment to do that. What we have to understand a little bit better is what "protect the Constitution" means, and that is one of the reasons for this hearing.

You brought up some good points and I think added balance. I note that it took four on the other panel to present that side, and it only took one on your panel. It never could be said that we aren't interested in balance here.

I think there is a point I would make, and it is a little bit off the subject, but it certainly is flavoring what is happening here. You draw the question of the responsibility of the institution of

Congress as well as the institution of the judiciary and the institution of the executive branch to do their functions as envisaged by the Founding Fathers and spelled out in the Constitution.

I would suggest that what has happened is that partisan politics have come into play to a point where the loyalty to the Constitution has been replaced by the loyalty to the party, and what that causes to happen is that whoever is in the White House, members of that person's party will circle the wagons, protect the President and are more interested in the partisan question than in the governance question. And I suspect that is something that is being fed by the media a little bit and also the desire to get reelected.

All of these things are facts of life. I am not saying this is good or bad, I am just simply saying that those are points that are perhaps illustrative of why there has not been, in the eyes of some, apparently, including yourself, enough attention to rein in the presidential, quote, lawmaking.

The other piece of information that struck me as a Member of Congress since I have been here is a word that I had not heard much before I came to Washington and that was the word micromanage. I don't know who first threw that word out, but it is regularly considered a sin to micromanagement. I don't know where micromanagement starts and oversight stops, and if you could care to offer an observation on any of that, that is certainly a fact of life that we have here today, and I think it fits in very well with your concern that there is a bright line about presidential lawmaking.

I am not sure exactly where it is. I think we surely don't want to hamstring the President of the United States as chief executive officer in executing properly the laws that are passed by Congress, but we don't want him going out and going beyond that point, and it is that bright line we are trying to find.

In the atmosphere of the sin of micromanagement and the problems of partisanship, if you have any further observation I would welcome it.

Mr. OLSON. Well, I too, might have been guilty of this exact thing. I noticed in your opening comments you talked about "Mandate for Leadership", and I was a contributor to one of the chapters of that, probably calling on President Reagan to take certain actions in the area of export controls and the matters that I was concerned about at that time. I wouldn't say my entire career has been consistent on these points, but I do like to think that my views now are the right ones.

I would say that if there was one thing—one message that I could get to each Member of Congress, it would be this: That before you vote on any piece of legislation, you simply have to make sure the bill passes a threshold question as to whether it is constitutional, irrespective of whether it is desirable.

Mr. GOSS. Right.

Mr. OLSON. The same thing is true with respect to executive orders. The first inquiry cannot be, is this desirable? Do we want to have hate crimes being able to be punished by the Uniform Code of Military Justice so that if people are killed for reason A they are punished more severely than if they are killed for reason B? It is not whether you like that or not. It is whether that is a function

of the executive branch of government or whether that is a legitimate function only of the Congress.

I guess, beyond that, the reason that you are warned against micromanagement, of course, is that there is an army of bureaucrats in this city who do not answer to anyone, sometimes not to the President. The Federal Government has simply vastly exceeded its power and we have 18 enumerated powers for the Congress and we have a Congress that disregards the enumeration.

So when the government tries to do too much, it does what it does not particularly well. But, on the other hand, it is no wonder people would want to be paid more if they are going to take on the role of State legislature and the local city council. But I would urge restraint not only with respect to your own powers but also with respect to the powers of the President.

I hope that wasn't too uppity.

Mr. GOSS. No. I heard you.

Ms. Pryce, questions?

Ms. PRYCE. Well, thank you, Mr. Chairman.

Unfortunately, I wasn't able to be here for most of the hearing. I think it is a fascinating subject and certainly one which I hear a lot about from my constituents. And I don't know if that is due largely to the efforts of people like you or what, but I think it has an incredible amount of momentum behind it, and I think I just want to congratulate the chairman on bringing it forth here in the Rules Committee.

I don't really have any questions. I just want to thank you for your testimony and your activism in this regard, and from where you sit activism is a good thing, maybe not so much from other perspectives.

Thank you very much, Mr. Chairman.

Mr. GOSS. Thank you, Mr. Olson. I want to thank you very much. I think you have said very succinctly the pieces that we needed to fill out the balance piece on this, and I consider that extremely helpful to the committee's work.

I would also like to reserve the right to have further dialogue in writing with you, if you would be agreeable to that.

Mr. OLSON. I would be honored.

Mr. GOSS. It would be our pleasure. Thank you very much, sir. We wish you well.

At this point I would dismiss the second panel and invite the third panel, Mr. Ray Mosley, Director, Office of the Federal Register, National Archives and Records Administration. Come to the witness table.

I understand, with Mr. Mosley, Mr. Michael White will be joining you to be available for questions, illumination, further clarification, micromanaging or whatever might come up.

Mr. Mosley, welcome. Your prepared remarks will be accepted without objection into the record, and we welcome you. We appreciate your patience for waiting. You have now had the benefit of hearing all of this. You know what is left of value for this committee to hear. Please proceed.

STATEMENT OF RAY MOSLEY, DIRECTOR, OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; ACCOMPANIED BY MICHAEL WHITE, GENERAL COUNSEL

Mr. MOSLEY. Thank you, Mr. Chairman, for the opportunity to testify today.

As you indicate, with me is Michael White, who is the General Counsel of the Office of the Federal Register; and Mr. White can help me provide some institutional perspective. He has served with the Federal Register since the 1980s. I have been there since—approximately 3 years now, since 1996.

I will offer a summary of my written statement provided earlier to the committee and then be happy to answer your questions.

The Office of the Federal Register was established in 1935 for the purpose of creating a centrally located system for filing and publishing presidential documents, as well as agency regulations and administrative notices. The Federal Register Act governs the operations of the Federal Register publication system.

The statute specifically requires that executive orders and presidential proclamations must be published in the Federal Register, except for those that do not have general applicability and legal effect or those that only affect Federal agencies, officers, agents or employees. In practice, however, most executive orders are published in the Federal Register, regardless of subject matter.

The on-line edition of the Federal Daily Register is available at 6:00 a.m. Eastern time, making new executive orders accessible to the American public on a very timely basis. We compile each year's executive orders in Title III of the Code of Federal Regulations as required under the Federal Register Act. 1997 through 1999 editions of the CFR are available on-line on the Government Printing Office access service.

Some of the Presidential memoranda and determinations that are not published in the Federal Register and CFR are released by the White House Press Secretary and carried in the Federal Register's weekly compilation of presidential documents and the public papers of presidents of the United States. These Federal Register publications are available in printed editions and on-line formats that we have recently developed for the GPO access service.

To help the public sort through these various sources of information, we use our National Archives and Records Administration Web site to direct customers to the text of executive orders and other presidential documents, and I have provided the Web site address to the committee, Mr. Chairman.

We also provide other information services, such as our historical codification of proclamations and executive orders and an on-line index of executive orders which tracks dates of issuance, amendments, revocations and dates of publication in the Federal Register.

During the first 9 months of calendar year 1999, our customers have retrieved a total of almost 560,000 documents from these pages.

The Federal Register publication system also depends on its partnership with the Government Depository Library Program to ensure that all citizens have equal access to government information. More than 1,350 depository libraries throughout the United States

and its territories provide free public access to Federal Register publications in print and on-line via the GPO access service.

The Superintendent of Documents at GPO reports that Federal Register publications are among the most frequently used databases on the GPO access service, accounting for almost 79 percent of total usage. In fiscal year 1998, the public retrieved more than 102 million individual documents from our publications. At the end of the third quarter of this fiscal year, 1999, that figure had already been surpassed by 9 million and was headed for projected year end total of 145 million retrievals of information.

About one-third of those retrievals are from the daily on-line Federal Register and two-thirds are from the 200 volume Code of Federal Regulations. During the same period, our customers have retrieved 138,000 individual documents from the weekly compilation of presidential documents and 367,000 from the United States Government manual. Overall, public use of on-line Federal Register publications has increased by more than 1,000 percent since free on-line service began in late 1995.

I believe these figures demonstrate that Federal Register publications and information services are helping to build a digital democracy by providing the American people with direct access to essential government information and the opportunity to express their views on the various programs and policies of Federal agencies.

This concludes my summary. I thank the Chairman for this opportunity to address the subcommittee and would be pleased to take your questions.

[The statement of Mr. Mosley follows:]

PREPARED STATEMENT OF RAYMOND A. MOSLEY

Mr Chairman and members of the Subcommittee: My name is Raymond A. Mosley. I am the Director of the Office of the Federal Register, which is a component of the National Archives and Records Administration (NARA). I have been the Director of the Federal Register since November, 1996. Prior to that time, I worked for NARA in a number of different capacities as a senior manager.

Thank you for inviting me to testify today on the manner in which the Office of the Federal Register processes Executive orders and makes them available in our publications. In my testimony today, I will describe the role of the Federal Register under the applicable law and procedures. My statement will also include a summary of our recent efforts to broaden public access to Executive orders and other Presidential documents.

BACKGROUND

The Office of the Federal Register (OFR) was established in 1935 for the purpose of creating a centrally located system for filing and publishing Presidential documents, as well as agency regulations and administrative notices. The Federal Register Act (44 U.S.C. Chapter 15) governs the operations of the Federal Register publication system. The statute specifically requires that Executive orders and Presidential Proclamations must be published in the Federal Register, except for those that do not have general applicability and legal effect, or those that only affect Federal agencies, officers, agents or employees (44 U.S.C. 1505(a)). In practice, most Executive orders are published in the Federal Register regardless of subject matter.

The Federal Register Act does not define Executive orders or Proclamations. Under well-established tradition, Executive orders relate; to domestic matters, and Proclamations relate either to foreign and trade matters or to ceremonial functions. The President may also issue certain directives characterized as "Determinations" or "Memoranda." The Federal Register Act does not require publication of these other types of Presidential documents, but the President may direct that they be submitted for publication in the Federal Register.

The President does not submit any classified orders to the Office of the Federal Register. Classified documents, such as Presidential Decision Directives, are maintained at the White House and eventually transferred to the National Archives' Presidential Library system.

PROCEDURE FOR PROCESSING AND PUBLISHING EXECUTIVE ORDERS

The Office of the Federal Register does not currently have any responsibility for reviewing the substance or form of Executive orders prior to issuance. E.O. 11030 of June 15, 1962, as amended (see http://www.nara.gov/fedreg/eos/e11030.html), specifies a standardized format for Executive orders and the procedures for proposal and review within the Executive branch. Those requirements are also codified in Federal Register regulations in 1 CFR part 19. Under these provisions, the Director of the Office of Management and Budget and the Attorney General review and approve the format and substance of Executive orders prior to signature. The Attorney General also has the option of routing draft Executive orders through the OFR to check for typographical and clerical errors, but has not followed that practice for more than 20 years.

Once the President signs an Executive order, the Office of the Executive Clerk in the White House submits the document to the OFR by messenger. When a messenger delivers an Executive order, our Presidential and Legislative Documents Unit verifies that the Executive order meets the following basic requirements. Our Staff confirms that we have received a signed and dated original, along with two certified copies. We check the order of pages and numbered sections and the continuity of the text to ensure that the document is intact. It is also customary for the Executive Clerk to include a computer disk and a letter certifying the file on the disk as a true copy of the original. Once we have completed our initial review, we sign a receipt and give it to the messenger to return to the White House.

We begin processing the document for public filing and publication in the Federal Register by assigning it the next available number in the Executive order series. A staff member hand writes the series number on the original and certified copies. On the rare occasions when we receive more than one Executive order, we assign the series numbers by signature date, then by relative importance, and then be alphabetical order if the documents are of equal importance. After initial processing, we secure the originals of Executive orders and other Presidential documents in a safe for eventual transfer to the National Archives.

To prepare an Executive order for publication, our editorial staff enters information into our document tracking system, marks up an editorial copy for Federal Register style, converts the word processor file into publishing software, and adds typesetting codes. We print out the typeset file to check the appearance of the document and a review for typographical errors. Very rarely, our editors will find an error or omission in the text of the Executive order. In those instances, we contact the Executive Clerk for authorization to make a correction. When we complete our editorial review, we transmit the finished electronic file to the Government Printing Office (GPO). GPO's production staff complete the processing necessary for the Executive order to appear in the printed and on-line editions of the Federal Register.

Executive orders are published in the Federal Register on an expedited schedule. If the OFR receives an Executive order before noon, we publish it in the next issue of the daily Federal Register. If it arrives after noon, we will publish it within two days. If an Executive order addresses an emergency situation, we will instruct our editors and the Printing Office to include it in the next day's issue regardless of the time we received it during the working day.

Our responsibility for processing Executive orders also includes making a copy available for public inspection. Under the Federal Register Act, documents published in the Federal Register must be placed on file for public inspection during official hours, at least one business day before the date of publication. Executive orders scheduled for the next day's Federal Register are filed as soon as possible. Those scheduled for publication within two days are filed at 8:45 a.m. on the day after submission. Our staff time-stamps the file copy to record the time of day, and files the document in our public inspection area, which is open to any member of the public. To alert our customers to newly filed documents, including Executive orders, we update our "List of Documents on Public Inspection," which is posted on our NARA Web site.

ACCESS TO PRESIDENTIAL DOCUMENTS AND FEDERAL REGISTER INFORMATION

The Federal Register publication system is the product of a unique partnership between our parent agency, NARA, and the GPO. The support of these two institutions helps guarantee the public's right to know about the actions of their Govern-

ment. In recent years, the OFR/GPO partnership has developed on-line editions of every major Federal Register publication and posted them on the GPO Access service to make it easier for citizens to gain access to essential legal information.

The on-line edition of the daily Federal Register is available at 6 a.m. (ET), making new Executive orders accessible to the American people on a very timely basis. We also compile each year's Executive orders in title 3 of the Code of Federal Regulations (CFR), as required under the Federal Register Act. The 1997 through 1999 editions of the CFR are available on-line on the GPO Access service. Some of the Presidential Memoranda and Determinations that are not published in the Federal Register and CFR, are released by the White House Press Secretary and carried in the OFR's Weekly Compilation of Presidential Documents and the Public Papers of the Presidents of the United States. These Federal Register publications are available in printed editions and on-line formats that we have recently developed for the GPO Access service.

To help the public sort through these various sources of information, we use our NARA Web site to direct customers to the text of Executive orders and other Presidential documents (see http://www.nara.gov/fedreg/presdoc.html). We also provide other information services, such as our historical Codification of Proclamations and Executive Orders and an on-line index of Executive orders, which tracks dates of issuance, amendments, revocations and dates of publication in the Federal Register. During the first nine months of calendar year 1999, our customers retrieved a total of 557,657 documents from these pages.

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The Superintendent of Documents at GPO reports that Federal Register publications are among the most frequently used databases on the GPO Access service, accounting for 79 per cent of total usage. In fiscal year 1998, the public retrieved more than 102 million individual documents from our publications. At the end of the third quarter of fiscal year 1999, that figure had already been surpassed by 9 million and was headed for a projected year-end total of 145 million retrievals of information. About one-third of those retrievals are from the daily on-line Federal Register and two-thirds from the 200-volume Code of Federal Regulations. During the same time period, our customers retrieved 138,000 individual documents from the Weekly Compilation of Presidential Documents, and 367,000 for The United States Government Manual. Overall, public use of on-line Federal Register publications has increased by more than 1000 per cent since free on-line service began in late 1995.

I believe these figures demonstrate that Federal Register publications and information services are helping to build a "digital democracy" by providing the American people with direct access to essential Government information and the opportunity to express their views on the various programs and policies of Federal agencies.

This concludes my testimony. I thank the Chairman for this opportunity to address the Subcommittee, and I would be pleased to take any questions that you may have.

Mr. GOSS. I want to thank you, and I was aware of some of that information, but I think it bears underscoring.

That really is startling, that there is this much public interest and technology is providing this kind of access. For those of us who are not as skilled as some of our younger members of our generation in all of this digital access you speak of, there has still got to be a way for us to retrieve these. So I hope you have a telephone or a public information office or answer your mail as well in addition to the electronics.

Mr. MOSLEY. Yes, we do.

Mr. GOSS. I guess I am asking the question this way: It is hard for people to know when we say, gee, check the library, they might have it, it is hard to know which library does or doesn't. There needs to be a way that I think Members of Congress have staffers who are informed in their offices when these calls come in from the

public to say, if you call this number, you contact this office or we can do it for you, however is best, you can get this information.

Part of the other problem is that some of the stuff that comes into congressional offices are hoaxes. They are just plain somebody made it up or there is a conspiracy going around the talk show circuit or something like that, which I presume is not in your database—I hope it is not in your database—and you probably are as puzzled as we are by some of those calls as well.

What I guess my question would be, since public access is so very important to this, are you satisfied that a member of the public who wants to get an executive order and review it for himself knows how to get it and can get it and that there are enough distribution points out there for—information points to advise the public on how to do this?

Mr. MOSLEY. Yes. I think there are, Mr. Chairman.

We get telephone calls and letters from the public, which—for these documents, for which we respond to, and we can direct them to the nearest depository library, which has a set of our publications. In certain instances, we will make copies of documents that are in our holdings, in our office here on North Capitol Street, and provide those to the public. Regrettably, we are limited in providing copies of lengthy documents because of the resources, the limitation on resources available to us. But if we are not able to provide an entire document we do make certain that we can direct the inquiry to an appropriate library or an appropriate source where they could get the entire document.

Mr. GOSS. One of the questions we often get about executive orders is that, once they are written, they are in cement forever. The question is, can you briefly outline for us what does it take for an executive order to be revoked? How does that happen? How does the public know whether an executive order still is or still is not in effect, that part of the process?

Mr. MOSLEY. Generally, one of the things that we will look for in processing a new executive order is whether or not it is revoking previous executive orders, and that is—or provisions of previous executive orders, and that that is so stated.

In addition, on our Web site we provide an index of all executive orders that we have been able to make an accounting for and indicate whether or not they are still in effect or if they have been revoked or replaced by a provision of a more recent executive order. We have accounted for over 13,000 executive orders and can provide that information on virtually all of those.

Mr. GOSS. If I had, say, a favorite subject and I wanted all executive orders on that subject, you could provide me that information?

Mr. MOSLEY. That is a good question. I guess we could test—it would test the query capabilities of our system and, of course, given whether or not the information is standardized from one executive order to the next would go a long way toward determining if it was a reliable answer, but, yes, we could get you along the way for sure.

Mr. GOSS. Part of the question is, it would be hard to know for sure what is in conflict and what isn't in a general area if you didn't have the full matrix, I would think.

Secondly, it seems to me, just in the area of good housekeeping, that at a point where a law is no longer useful—or an executive order, excuse me, is no longer useful, that there ought to be some way to compile all of those together and throw them out. Is that something that can happen?

Mr. MOSLEY. Right. Yes. That is what we are doing with the index that we have placed on-line and we have available in our office relating to all the executive orders that we have been able to account for, some 13,000 plus another 500 or so that are unnumbered.

Mr. GOSS. Thank you.

Judge Price.

Ms. PRYCE. Why would they no be numbered?

Mr. MOSLEY. The tradition prior to this century was that executive orders were not numbered. There was not consistency in terms of numbering prior to this century. About 1907, the State Department undertook an effort to begin numbering all executive orders. That remained sporadic until President Hoover issued an executive order in the 1920s that began the standardization of the process. So, basically, since about 1907 they are all numbered. Prior to 1907, some are numbered, some are not. It is inconsistent.

Ms. PRYCE. The standardization is just a numbering system?

Mr. MOSLEY. The standardization is a numbering system which has been essentially consistent since the 1960s, since about 1962. We are under Executive Order 11030, I believe, that provides the numbering and the processing manner for executive orders.

Ms. PRYCE. Following up on the Chairman's question, I mean, is it indexed at all by subject matter or is it a word search kind of thing that you do, a computerized search? How would you do a research of any particular area of law or executive order to determine? Is there a legal way of going about this?

Mr. MOSLEY. The on-line site provides a title to the executive order, and so one could inquire based on that information, but the reliability of that inquiry may not be very high because an executive order issued today on a subject matter could be similar to an executive order issued previously but used different terminology.

Our staff will go through the actual documents and will make these assessments in terms of updating this index information so we have—we are not relying simply on the title or an abbreviation of this information. We are relying on the actual documents and the substance of the documents in order to create the index.

Ms. PRYCE. Is there any analysis or anything that is a part of the index or is it just straight subject matter index?

Mr. MOSLEY. Well, we don't, as a rule, provide analysis of the executive orders, but in terms of advancing the ability to index them we would look carefully at it for some common terms and common features in an executive order.

Ms. PRYCE. Thank you very much.

Mr. GOSS. I was just trying to determine the antecedents of the National Archives and Records Administration. That is a quasi legislative branch, quasi executive branch or entirely one or the other? What are the antecedents?

Mr. MOSLEY. We are an independent agency of the executive branch. We became independent in 1985. Prior to that, we were

part of the General Services Administration from 1949. Prior to 1949, we were an independent agency of the executive branch known from—created in 1934, known from 1934 until 1949 as the National Archives Establishment.

Mr. GOSS. So your budget comes through the OMB process?

Mr. MOSLEY. That is right.

Mr. GOSS. You start there and your oversight presumably is one of the House committees?

Mr. MOSLEY. That is right. Government Reform, I believe, is our oversight.

Mr. GOSS. I assumed that.

I want to tell you, this has been helpful. I don't know whether you have a legislative affairs office that has outreach, but if you do my suggestion would be that you could advise Members on how to instruct constituents to get the material of executive orders. It would be definitely a positive service effort I think most Members would appreciate.

We do foresee that there will continue to be executive orders and that they will be controversial from time to time. That causes a huge onrush of interest in congressional offices, and I guess my answer would be we would like to turn to the easiest, quickest source of information to help our constituents. It would appear that you are it, and I presume you are geared up to handle what I will call I guess an unusual situation or an emergency situation.

Mr. MOSLEY. Sure.

Mr. GOSS. Is that true or not?

Mr. MOSLEY. We would be pleased to work with you and other Members of Congress.

Mr. GOSS. It wouldn't be just us. Once something hits the fan it usually hits it across the board.

Mr. MOSLEY. I might add that we have just in recent days created a means by which the public might more readily obtain access to presidential documents. We created on our Web site a listing of the sources for presidential documents that are available on-line.

Mr. GOSS. Okay.

Mr. MOSLEY. So we could direct constituents very readily to that, and I think they would get essentially what you are suggesting they would want to have access to.

Mr. GOSS. Thank you.

Judge Pryce, do you have anything further?

Ms. PRYCE. No.

Mr. GOSS. I want to thank you gentlemen very much.

I particularly want to thank you for coming as well, Mr. White, and standing by. Obviously, we didn't have enough serious questions for Mr. Mosley to have him participate.

Mr. WHITE. Thank you, Mr. Chairman.

Mr. GOSS. But I am sure we have forgotten something, and we will be hearing about it. And as we proceed down this, as I said at the beginning of this, you heard me say, I think, that we are trying to deal on the subject of awareness and attention here and create some interest in a subject that has already gotten plenty of interest to see what, if anything, Congress should be doing about this, and there will be legislation coming forward.

All that, as good as it may be in good time, doesn't mean that we aren't going to have questions from American citizens wanting to know what is going on, and I do think we have the responsibility to respond and give them satisfactory answers, and we will try the system and see how it works.

Thank you all very much. We will dismiss the third panel.

[Questions and Answers submitted by witnesses:]

SUBMITTED QUESTIONS AND ANSWERS BY DOUGLAS COX

Question. 1. In your testimony, you mention the broad delegation of authority granted to the President by the Congress in the area of national security. Do you see any difference in the latitude that should be afforded a President for executive orders relating to national security as compared with other types of policymaking?

Answer. The President's constitutional powers in the national security area are very great. See, e.g., Article II, Section 2 of the Constitution, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936); The Federalist No. 64 (John Jay) (Jacob E. Cooke, ed., 1961). Thus, executive orders relating to national security should be considered by Congress in light of the President's unique constitutional role in national security matters, and in foreign affairs more generally. It is perhaps less a question of Congress affording the President greater latitude in these settings, than the recognition of the breadth of the President's constitutional powers.

Question. 2. In your testimony, you discuss the "line between executing and legislating." Could you tell us your view of where that line is drawn?

Answer. This is one of the most profound and complex questions in the structural analysis of the Constitution, and I have no definitive, universally applicable guidance to offer.

Most observers would agree that certain functions fall clearly on the legislative side of the line—such as appropriating funds—while other functions, such as receiving ambassadors, are clearly executive. In between the extremes there is a gray area where it is difficult to place the line with precision. As Justice Brandeis famously observed in his dissent in *Myers* v. *United States,* 272 U.S. 52,291 (1926), "The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial." Thus, for example, the President does participate in the legislative process in several ways, most obviously through vetoing or signing a bill into law. See also Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569, 570–71 (1953) ("It is fruitless, therefore, to try to draw any sharp and logical line between legislative and executive functions."), quoted in *Bowsher* v. *Synar,* 478 U.S. 714, 749 n.13 (1986) (Stevens, J., concurring); *Morrison* v. *Olson,* 487 U.S. 654, 725 (1988) (Scalia, J., dissenting) ("It has often been observed, correctly in my view, that the line between 'purely executive' functions and 'quasi-legislative' or 'quasi-judicial' functions is not a clear one or even a rational one."). I note also that former Senate Legal Counsel Thomas B. Griffith recently testified before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law that "[t]here is an uncertain boundary between legislative and executive power in the area of executive orders." Griffith Testimony, October 28, 1999, at 2.

The difficulty in drawing the line between executing and legislating does not mean that there is no such line: rather, it means that the line cannot always be defined clearly or in the abstract. The lack of an absolute and readily ascertainable line between the legislative and executive functions should not be viewed as a flaw in the constitutional design. Rather, the Founders anticipated that both the executive branch and the legislative branch may seek to invade the powers of the other branch, and the resulting struggle between the branches could be used, through the separation of powers, to guarantee liberty. See e.g., The Federalist No. 51 at 349 (James Madison) (Jacob E. Cooke ed., 1961) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . Ambition must be made to counteract ambition."); see also *INS* v. *Chadha*, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.").

Question. 3. You discuss the option for Congress to require the President, when invoking statutory authority to issue an executive order, to submit his proposal to Congress for review. Do you think it is likely that any President would agree to this type of change in current practice? How would you structure such a change in the process?

Answer. Presidents are likely to resist any attempts to limit their powers. As noted above, that resistance was anticipated by the Framers and built into the constitutional plan. Nonetheless, a President could be led to agree to such a change, either in the interests of good governance, or as part of some larger political compromise with Congress.

There are many ways to structure such a change. In particular, Congress has had ample experience with "report and wait" provisions and could draw upon whichever version has worked best.

Question. 4. In a recent article for the Journal of Law, Economics and Organization, Terry Moe and William Howell argue that: "[E]ssentially . . . the constitutional and statutory powers of presidents are fundamentally ambiguous, and that this sets the stage for a relentless (and usually moderate and incremental) brand of presidential imperialism that Congress and the courts cannot be counted on to stop—in part because their incentives don't prompt them to want to, and in part because they both suffer from distinctive institutional weaknesses . . . [Congress] has also had a very difficult time responding when presidents have gone off on their own, and it has not done an effective job of protecting its own institutional interests." (Page 33)

Do you share the view that "Congress has not done an effective job of protecting" its interests? Do you have any thoughts on what Congress could/should be doing better in this regard?

Answer. In the context of executive orders specifically, Congress has not done an effective job of protecting its interests. There are many reasons for that, including the increased scope of the duties assigned by Congress to the executive branch, which inevitably reduces congressional oversight over any particular program. Congress has many mechanisms to protect its institutional interests, some of which were mentioned in my prepared testimony. Those mechanisms include increased oversight; enacting narrower, more specific legislation; structural reforms such as "report and wait" provisions for executive orders based on statutes; and the usual tools of political persuasion.

Question. 5. Scholars Moe and Howell argue in their article for the Journal of Law, Economics and Organization that it is wrong to say that the Congress makes the law and the President executes them—as if to imply that the President is an agent of the Congress. Instead, they argue that the President is "an independent authority under the Constitution, and thus has an independent legal basis for taking actions that may not be simple reflections of congressional will." (Page 4). Could you discuss your view of the "gray area" that exists between the realms of law-making and law-executing?

Answer. A summary of my views on the gray area between legislating and executing is set forth above in my response to question 3. More specifically, I agree that the President is an independent authority under the Constitution, and thus has powers and duties that are independent of Congress and, indeed, may be exercised in the fact of congressional opposition. Perhaps the most common and most obvious example of that power to override the will of Congress is the use of the veto power to reject a bill passed by both Houses. At the same time, the Constitution clearly requires that Congress enact the laws—and thus set the general policies that govern the Nation. both Congress and the President have great constitutional power, and it is important that both Congress and the President exercise their powers vigorously and properly.

Question. 6. Some scholars argue that the fact of presidents acting unilaterally to "make law" has been reality throughout the history of our country, but that the power of presidents in this regard has grown in recent history and has become more significant. What factors do you believe account for this trend? Do you see this trend as a positive or negative development from the perspective of the institutional prerogatives of the Congress, or just a neutral fact of modern life?

Answer. Although I am not a political scientist, I believe the trend has accelerated as the federal government has grown bigger and become more intrusive. As Congress has multiplied the number of federal programs to be executed, opportunities to "make law" through policy preferences in the execution of the laws have also multiplied. Congress may have further accelerated the trend, by writing overly-broad laws and relying on the President or the courts to fill in the details. This trend is a negative development for the institutional prerogatives of Congress.

Question. 7. This entire debate and the tension between the President and the Congress with regard to executive orders seems to boil down to several basic questions. One of those is the threshold issue: who should be making policy for the nation? What is your view?

Answer. Congress should be making policy for the Nation within its broad constitutional sphere, including the power of the purse. There are other areas—primarily involving the conduct of military and foreign affairs—in which the President is given greater (though not unlimited) authority to make policy. That grant of power is not inadvertent: the Framers plainly intended that the President be chiefly responsible for such matters, and that intent is reflected in the constitutional text. But the grant of legislative power to Congress is equally intentional and equally clear.

Question. 8. What role should the public play in this tension between the President and the Congress? Is the system set up well enough to ensure that the people have enough information about executive orders and their impact to make their preferences known? What is the obligation, in your view, of the two branches with respect to transparency of executive orders and their impact?

Answer. The public, in a sense, is the ultimate arbiter in the tension between the President and Congress, because that tension is often resolved on a case-by-case basis through political means. At the same time, as the federal government becomes bigger and plays a larger role in the lives of private individuals, there is often insufficient information for individuals to make informed judgments about various policy choices or presidential actions. That is not a failure of the system per se, because clearly both Congress and the President have available mechanisms to provide that information to the public. It is, perhaps, more a failure that arises from the sheer volume of government activity: private individuals, with private concerns, simply cannot be expected to focus on the intricacies of every federal program. Reducing the role of the federal government would help to correct that failure.

The President has an obligation to be candid about executive orders and their impact. The failure to be candid imperils good government and leads to increased cynicism by the public. Congress has its role to play, in policing executive orders and explaining them to the public, and in defending its own legislative powers; but the President, as the author of executive orders, is primarily responsible for their presentation to the public.

Question. 9. What is your view of the practice of Congress passing legislation after the fact to sanction an executive order that has already been implemented? Do you believe this enhances or erodes the legislative prerogatives of the Congress?

Answer. As a general matter, I believe this practice preserves the role of Congress in the constitutional system. First, once Congress passes the legislation, the President will be bound by the terms of the legislation. Even if the statutory terms do not themselves significantly alter the executive order, the fact that the executive order is now embodied in legislation will limit the President's power to alter the executive order to repeal the executive order thereafter. Second, Congress will only pass such legislation when it agrees with the President's executive order, and thus subsequent legislation is an appropriate way for Congress to place its policy and enforcement preferences in the law. Third, history has shown that in some instances executive orders have been ineffective until backed by the judgment of Congress, thus underscoring the role of Congress in the proper governance of the Nation. I do not think, however, that Congress can assume that if it adopts a practice of passing such approving legislation that its failure to do so in a particular case will be taken by the courts or by the public as undermining the legitimacy of an otherwise lawful executive order.

SUBMITTED QUESTIONS AND ANSWERS BY NEIL KINKOPF

Question 1. In a recent article for the Journal of Law, Economics and Organization, Terry Moe and William Howell argue that: "Essentially . . . the constitutional and statutory powers of presidents are fundamentally ambiguous, and that this sets the stage for a relentless (and usually moderate and incremental) brand of presidential imperialism that Congress and the courts cannot be counted on to stop—in part because their incentives don't prompt them to want to, and in part because they both suffer from distinctive institutional weaknesses . . . [Congress] has also had a very difficult time responding when presidents have gone off on their own, and it has not done an effective job of protecting its own institutional interests."

Do you share the view that "Congress has not done an effective job of protecting" its interests? Do you have any thoughts on what Congress could/should be doing better in this regard?

Answer: Professors Moe and Howell advance a powerful and largely accurate model, particularly in its capacity to account for the balance of power between Congress and the President from the Nixon Administration through the end of the Bush Administration. Nevertheless, I believe that the model requires some refinements and, lacking them, that it may misperceive presently prevailing conditions.

1. The article overstates the tendency of congressional incentives to lead Congress away from asserting and protecting its institutional interests. Here, the article relies on the assumption, prevalent throughout the political science literature, that a member of Congress, or at least the vast majority, is motivated by securing his or her own reelection. Thus the typical member of Congress is driven by how his or her constituents regard a given executive order on the merits, not by abstract questions regarding the balance of power between the branches of the federal government. "That fact than [an] executive order may be seen as usurping Congress's lawmaking powers, or that it has the effect of expanding presidential power, will for most legislators be quite beside the point." (144).

Given the extraordinary high retention rates that members of Congress have enjoyed over long periods of time, the typical member of Congress would have to be superhumanly risk-averse to be so exclusively focused on his or her reelection. While reelection concerns are important, Members of Congress are also motivated by considerations that would tend to support an allegiance to the institutional interests of Congress. Prominently, members of Congress are motivated by considerations of their place or rank within Congress. Members will seek to secure positions on powerful committees, chairmanships of significant committees or subcommittees, and offices within the leadership of their party's caucus. The value of these "plumbs" increases along with power of the institution and so tie, to some extent, the interests of members to the interests of the institution.

2. The article fails to appreciate corresponding incentives that can drive a wedge between the interests of a given President and the institutional interests of the Presidency. A particularly significant incentive is the President's concerns for his legacy. The Moe and Howell model assumes (p. 136) that a President's concerns for his legacy will tighten identity of interests between President and presidency, because a President will seek to be regarded as having been a strong and effective leader. This consideration may lead a President to seek to maximize the institutional powers of the presidency. It is not, however, inevitable. And, under some circumstances, may predictably lead a President to cede power to Congress.

Two important factors will predict whether a President will cede or augment the institutional powers of the Presidency. The first factor is whether the President sees his legacy in terms of accomplishing an affirmative domestic agenda, or instead sees his legacy in terms of either a negative domestic agenda or of foreign relations. By an affirmative domestic agenda, I mean an agenda that seeks to accord the federal government an active role in identifying domestic problems and goals and in resolving those problems and achieving those goals. By a negative domestic agenda, I mean an agenda that seeks to minimize the role and presence of government in domestic affairs. In terms of party, the Democratic Party has generally favored an affirmative domestic agenda, relative to their Republican counterparts, while the Republican Party has embraced a negative domestic agenda, relative to their Democratic counterparts.

Because the President's power of unilateral action is rather modest on the domestic side, a President who sees his legacy in terms of an affirmative domestic agenda must secure the cooperation of Congress in order to be successful. A President who sees his legacy in terms of limiting the affirmative role of government in domestic affairs or in terms of foreign policy is not similarly constrained. On the domestic side, a President's veto power will normally be sufficient to realize his agenda. Even as to existing authorities, a President need not secure enactment of a repeal. Instead, he could veto the appropriations necessary to continue the function. As to foreign affairs, the range of unilateral presidential authority is relatively expansive, in large measure because the Constitution's text grants the President broad categories of authority but does not vest Congress with the sorts of power it does on the domestic side. Thus, a President who views his legacy primarily in terms of either foreign affairs or of a negative domestic agenda does not rely on the cooperation of Congress in the way that a President with an affirmative domestic agenda does.

The second factor is whether the President's party is in the majority in Congress. The President is acknowledged to be the leader of his party. One component of a President's legacy is whether the President was an effective leader of his party. When the President's party holds the majority in Congress, this consideration will lead a President to be relatively more accommodating. When the opposition party holds a majority in Congress, the President is apt to be relatively more assertive of institutional powers.

3. These two factors generate a matrix of four possible states of affairs. Each will predict a different balance of power between the branches.

(A) The President has an affirmative domestic agenda and his party is also the majority party in Congress.

(B) The President does not have an affirmative domestic agenda and his part is also the majority party in Congress.

(C) The President has an affirmative domestic agenda and faces an opposition Congress.

(D) The President does not have an affirmative domestic agenda and faces an opposition Congress.

The thesis that the President enjoys advantages over Congress in the accumulation of power is generally accurate. The extent of those advantages, however, has been exaggerated by the circumstances that have typically prevailed in the last 30 years. From 1969 until 1995, the circumstances of American government have most often fallen into category (D). Here, Congress's leverage over the President is at its low point. Neither his legacy nor his interest in supporting his party will lead him to cede power to Congress. Each, in fact, will lead the President to be aggressive in expanding his institutional prerogatives and to act unilaterally. This thesis applied most forcefully during the Reagan and Bush Administration, each of which vigorously asserted the institutional powers of the presidency.

The thesis is not nearly so powerful under current circumstances. 1995 marked a historic paradigm shift. Not since the administration of President Truman had a Democratic President faced a Republican Congress. Even then, Truman's focus and legacy can be understood as having emphasized foreign affairs and national security (the Korean War, the Marshall Plan, and Soviet containment). The currently prevailing circumstance—of a President whose legacy rests mainly on an affirmative domestic agenda facing an opposition Congress—has no obvious modern analogy.

Viewing the circumstances in the abstract, there is reason to believe that Congress's leverage over the President will be at its maximum. First, the President needs congressional cooperation to achieve any significant component of an affirmative domestic agenda. This element alone will include a President to yield significantly on institutional prerogatives. For example, even when President Clinton did not face an opposition Congress, he made significant concessions. In order to secure the support of certain members of Congress for his health care reform measure, President Clinton signed legislation making the Social Security Administration an independent agency. Thus, he relinquished authority over this significant executive agency leaving it subject exclusively to congressional control through oversight and appropriations.

Second, an opposition Congress does not have political incentive to assist the President. Moreover, insofar as the Congress's domestic agenda is not affirmative, it can stalemate the President by declining to fund government operations at levels in excess of the preceding year. Indeed, there is precedent for Congress funding the federal government for an entire fiscal year through a continuing resolution. In light of these factors, it is not surprising that President Clinton has allowed substantial control over his constitutional appointment power to flow to the opposition in the Senate. Notwithstanding these factors in its favor, Congress can overplay its hand. The government shutdown was an example of Congress overestimating the extent of its advantages, which is not to deny the existence of a relative advantage.

Question 2. Scholars Moe and Howell argue in their article for the Journal of Law, Economics and Organization that it is wrong to say that the Congress makes the law and the President executes them—as if to imply that the President is an agent of Congress. Instead, they argue that the President is "an independent authority under the Constitution, and thus has an independent legal basis for taking actions that may not be simple reflections of congressional will." Can you discuss your view of the "gray area" that exists between the realms of lawmaking and law-executing?

Answer. At the general level at which you pose the question, I do not think I can improve upon Justice Jackson's famous albeit enigmatic pronouncement in *Youngstown Sheet & Tube* v. *Sawyer*, 343 U.S. 579 (1952).

The actual arto fo governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. . . .

1. When the President acts pursuant to an express or implied authorization from Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

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 express or implied will of Congress, his power is at its lowest ebb, for the he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . .

Id. at 635–37. As this statement implies, more specific pronouncements depend upon the facts of a given application of federal law.

The Moe and Howell article, in the passage the question cites, also contends that the Congress is required to rely upon the President to act as its executive officer and has no ability, outside of impeachment, to remove him. In fact, Congress has other options. It can vest many functions in independent agencies. Congress can also assign executive or administrative authority to the states, private parties, or international organizations. In fact, it frequently does so. Examples include, welfare reform, the qui tam provisions of the False Claims Act, and the World Trade Organization.

The determination of whether to employ one of these alternatives to the President should be made on a case-by-case basis. Some authorities and functions are best insulated from the President's supervision, such as control over federal monetary policy, while others are best left subject to accountability through the President, such as the functions of the Federal Bureau of Investigation and the Department of Justice generally.

Question 3. Some scholars argue that the fact of presidents acting unilaterally to "make law" has been reality throughout the history of our country, but that the power of presidents in this regard has grown in recent history and has become more significant. What factors do you believe account for this trend? Do you see the trend as a positive or negative development from the perspective of the institutional prerogatives of the Congress, or just a neutral fact a modern life?

Answer. Phrasing the inquiry this way begs the question, significant for what purpose? In many respects the President's lawmaking power seems less significant than it once did, at least outside the context of foreign affairs. No modern President has issued an executive order of the moment of Abraham Lincoln's Emancipation Proclamation, or of Theodore Roosevelt's establishment of the system of national parks, or of Andrew Jackson's effectively repealing the Bank of the United States by withdrawing all federal deposits.

Certainly the number of occasions of presidential lawmaking has increased, even multiplied. But this increase directly corresponds to the increase in congressional lawmaking. As I explained in my statement, an increase in presidential discretion is inevitable and even desirable whenever Congress enacts legislation. Viewed relative to the power of Congress, the increase in the President's lawmaking power may not be significant at all. Indeed, this is the perspective that is relevant for separation of powers purposes. The Constitution looks to a balance of power between the branches. The increase in the President's lawmaking power derives from Congress's decision to expand its legislative reach. Insofar as this is the case, the power of each institution relative to the other remains roughly in balance. From the standpoint of the Constitution, then, this is a positive development.

Foreign affairs may present a different picture. As the world becomes more integrated, the President's power to respond may increase without Congress exercising a corresponding power. Such a development would be harmful from the standpoint of the interbranch balance of power. But such a development is not inevitable. Congress possesses the power to regulate foreign commerce and should use this power to set the policies that govern how the President responds to changes in the global economy. The President should be given discretion to respond to crises and developments in this sphere, but that does not preclude Congress from setting forth in statute the mechanisms that the President may use and the conditions under which he may use them. In this way, Congress can establish the policies that govern the nation's participation in the global economy, which role the Constitution plainly assigns to Congress.

Question 5. What role should the public play in this tension between the President and the Congress? Is the system set up well enough to ensure that the people have enough information about executive orders and their impact to make their preferences known? What is the obligation, in your view, of the two branches with respect to transparency of executive orders and their impact?

Answer. It is unrealistic to expect the public to play an important role in policing the balance of power between Congress and the President. If the public supports the substance of a given executive order or, to turn the tables, an oversight hearing, it is difficult to imagine the public objecting on the abstract grounds of separation of powers. In this respect, separation of powers is similar to federalism. Support for the abstract principle tends to evaporate when it impedes realization of desired concrete policy objectives.

The Constitution looks to each branch to act as the guardian of its own constitutional domain. In doing so, however, each branch may usefully appeal to the public. If a regulatory regime is not sufficiently popular to secure its enactment as ordinary legislation, there will be a ready reservoir of opposition for Congress to draw upon should the President attempt to promulgate the regime through an executive order. In this connection, interest groups that oppose the order can be especially effective. For example, the opposition of the national Governors' Association was a significant factor in the President's decision to rescind his initial executive order on federalism.

Transparency is an important value in government generally. It allows the public to exercise its democratic powers and responsibilities effectively. Yet, transparency may not always be possible. For instance, it is often crucial that executive orders, and the deliberations leading to their promulgation, dealing with national security remain secret.

Question 6. What is your view of the practice of Congress passing legislation after the fact to sanction an executive order that has already been implemented? Do you believe this enhances or erodes the legislative prerogatives of Congress?

Answer. In general, passing legislation that formally repeals an executive order, or that achieves the same effect by denying appropriations to enforce the order, will enhance the institutional prerogatives of Congress. Insofar as Congress increasingly asserts its institutional prerogatives, the President can be expect to assert his institutional prerogatives correspondingly. Whether Congress best maximizes its power and influence over federal policy through the inevitably confrontational course of asserting its prerogatives or through cooperation and accommodation with the President will depend upon an intricate and context-bound political calculation.

Question 7. In your testimony you make the point that you believe Congress is "amply equipped" to protect its turf. Would you also conclude that Congress makes proper use of the tools it has available to guard its prerogatives?

Answer. There is a remarkable symmetry between the executive and legislative branches. This is anticipated and encouraged in the Constitution's design. The Constitution expects that each branch will attempt to encroach upon the other. The Constitution arms each branch to protect itself against the encroachments of the others and looks to each branch's instinct for self-preservation as the primary guardian of the separation of powers.

On the whole, both Congress and the President make proper use of their respective powers of self-protection. Your question focuses on Congress, so that is where I will focus my answer. At least with respect to matters of domestic policy, Congress seems to protect its turf effectively from unilateral executive branch encroachment. It is true that the historic record reveals some dramatic examples of unilateral executive action: Jackson withdrawing the assets of the Bank of the United States, Lincoln's Emancipation Proclamation, Theodore Roosevelt establishing the system of national parks, and Lyndon Johnson adopting the first affirmative action program. These examples are dramatic, in part, for how aberrational they are. One scans the Code of Federal Regulations in vain to find a similar example from a recent administration.

The Clinton Administration has yielded at most two possible significant executive orders relating to domestic policy: the executive order banning federal contractors from permanently replacing lawfully striking employees, and its initial order on federalism. A careful reading of President Clinton's executive order on federalism does not disclose how it would have worked any meaningful change from its predecessors, much less an objectionable change. The striker replacement order could have had appreciable and possibly significant results, but this was not its inevitable course. In any event, neither order was ever put into actual operation.

Each branch makes occasional misuse of its constitutional powers and in doing so encroaches upon the other. This has been a bipartisan exercise. Under both parties, congressional committees have, on occasion, exercised their oversight and investigative powers to coerce executive without even a fig leaf of a legitimate congressional purpose. Presidents of both parties have also made extreme claims to unilateral war powers. The exercise of such powers is especially pernicious because Congress is put in the position of either acquiescing in the President's decision or denying support for U.S. troops engaged in military combat and undermining the position of the United States in the international community. The most proper course

for Congress is to act before the President deploys troops or, failing that, to respond after the fact with appropriate legislation.

Question 8. You state that it is your view that Congress should "repeal or amend executive branch lawmaking whenever it disapproves of the executive branch's rules." This statement suggests that the result you advocate is one that is easy to achieve. It takes a ⅔ majority of the Congress to accomplish such action, making it likely that in reality it will not occur that often. Please comment on that point.

Answer. If Congress were to respond to an executive order in the most straightforward manner—by drafting a bill to repeal the order and passing the repeal—the President would surely veto the repeal. Consequently, such a straightforward repeal would become effective only if Congress were to override the veto. By constitutional design, congressional override is extraordinarily difficult to accomplish. Thus, limiting our consideration to straightforward repeal, the question implies a valid rejoinder to my testimony—Congress cannot effectively respond to an executive order by enacting a straightforward repeal.

Congress, however, has a number of effective arrows in its quiver. Rather than a straightforward repeal, it can attach a rider to appropriations legislation stating that no funds may be spent to enforce the executive order. No executive order can be enforced without the expenditure of at least some funds. If an executive branch functionary spends even a minute considering the order, some funds—in the form of the functionary's salary prorated for one minute—will have been expended. If done in contravention of an appropriations rider, this would violate the Antideficiency Act and, if done willfully, would be a crime. The President might veto an entire appropriations bill in order to preserve an executive order. The order would have to be popular enough to allow him to avoid blame for shutting down the agencies of the government covered by the appropriations bill. If the rider were attached to, say, the Defense Appropriations Act, it would be very difficult to justify a veto on the basis of preserving the typical executive order.

Congress can also achieve the repeal of an executive order through the time-honored method of legislative compromise. The President may be forced to bend to Congress's will and repeal an executive order as a condition for the enactment of some other piece of legislation that the President supports. This is precisely what occurred in the recent controversy over funding for international family planning organizations that promote abortion rights. President Ronald Reagan has issued an executive order prohibiting grants from being made to such organizations. President Clinton rescinded the Reagan order. Congress required President Clinton to agree to, in essence, rescind his rescission of the Reagan order as a condition for receiving the United Nations funding he had fervently sought. The effectiveness of this approach will depend on the specific political setting that prevails at the time of the proposed compromise. Where a President views his legacy mainly in terms of achieving an affirmative domestic agenda, as has President Clinton, Congress will be in a strong position to force the President to rescind or amend executive orders that Congress finds problematic.

Question 9. You make the very valid suggestion that Congress should be more vigilant in exercising oversight on existing statutes and ensuring that it understands the manner in which legislation interacts. Given the balkanized jurisdiction that exists among the committees of Congress, do you believe that Congress is currently well-equipped to meet that challenge?

Answer. Balkanized committee jurisdiction can represent an obstacle to effective oversight. There are committees with jurisdiction broad enough to detect collisions between legislative regimes. The Government Reform and Oversight Committee, for example, could perform such a function. The most significant obstacle to its doing so stems from priorities; the committee has chosen to focus on investigations rather than on oversight.

Moreover, Congress need not take the initiative in detecting problems that arise from overlapping statutes. As most legislation involves some enforcement by a federal agency, this sort of information should already be available to the various agencies of the federal government. A congressional committee or subcommittee could require all federal agencies to report problems arising from statutory interactions. Inasmuch as such interactions lead to executive branch lawmaking, this subcommittee could properly assert jurisdiction to require such reports.

SUBMITTED QUESTIONS AND ANSWERS BY ROBERT BEDELL

Question. "In your testimony you state that many executive orders often have more apparent than actual effect. Could you expand on this point and perhaps provide us with some real-life examples of what you mean?"

Answer. Because most executive orders are dependent upon the President for enforcement, if the President or his senior staff does not follow-up to make sure that they are complied with, and there is no adverse consequence for failing to abide by its terms, compliance with the executive order becomes a matter of discretion with the President's appointees to whom it is directed. If they do not elect to follow the directions in the order, the order will not have the effect in practice that it may appear to from its language.

Failures to enforce executive orders may occur for many reasons some of which are fully understandable. But my point was that in practice an executive order may have a much different impact than most had hoped for, or feared. Sometimes, the issuance of an executive order is not the beginning of a new direction but simply begins the process by which interest groups seek to avoid its consequences.

Furthermore, knowing that there are usually no judicial remedies available for the failure to carry out executive orders and that compliance usually depends on an Administration's subsequent enforcement, I'm sure that at least some features of some executive orders have been included knowing that they will not be enforceable. Agencies often take these factors into account in determining whether, or how strongly, to object to proposed orders during the OMB pre-issuance clearance process.

As far as examples of some executive orders that have had a more apparent than real effect, in many instances that list will be influenced by what one thinks of the apparent purpose of the executive order. For example, if I support a strong oversight of agency rulemaking by the President then I would include in the examples executive orders that deal with such oversight but that dilute the strength of that oversight. If I do not favor a strong oversight review, I am not likely to include it on the list of orders that are more apparent than real.

Nonetheless, I think that there are some executive orders that have not lived up to their promise. To avoid the appearance of criticizing others, I will briefly describe—experiences that I was involved with or responsible for. The first example is Executive Order No. 12498 signed by President Reagan on January 4, 1985. The purposes of the Order included the following: "to create on an annual basis the Administration's Regulatory Program, establish Administration regulatory priorities, increase the accountability of agency heads for the regulatory actions of their agencies, provide for Presidential oversight of the regulatory process, reduce the burdens of existing and future regulations, minimize duplication and conflict of regulations, and enhance public and Congressional understanding of the Administration's regulatory objectives." In retrospect, while these all were hoped for objectives, their breadth quickly attracted opposition from many whose interests were affected by agency rulemaking.

The essence of the Regulatory Program process established by the Order required agency heads to identify on an annual basis its regulatory priorities for the upcoming year and a list of its most significant regulatory actions and send these to the Director of OMB. The Director would then coordinated these proposals within the Executive Branch to ensure that they were consistent with one another and with Administration policy. The results would then be published each year with a listing of significant actions to be taken during the year.

One of the principal purposes of this process was to avoid the problem of agency rulemaking that was not consistent with Administration policy from being discovered too late in the process to do anything about it, something that too often occurred. With various exceptions, the consequences of failing to abide by this process was that rules that were significant but that had not been identified by the agency and reviewed by the Administration would be delayed until the next round unless to do so was not allowed under law.

The implementation of this process was time-consuming, often contentious with many from Congress and the interest groups concerned about what it would do to the regulatory world they were more comfortable with. A Regulatory Program was issued as required by the Order, but the energy and resolve from the Administration to continue the process waned and the process of developing subsequent Programs became increasingly non-controversial and of lesser value. Eventually, the Clinton Administration essentially rescinded it.

In my view, the results fell far short of the objectives of the Order. While there may have been many reasons for this including overly ambitious goals, I think that the primary reason was that the process required by the Order took too much time and energy away from the limited time that senior Administration officials had to deal with the many issues that they faced. Annual "trench warfare" with the agencies could not pass a cost-benefit test. Without that energy, the process turned into one that could produce a product only without contest.

A second example is Executive Order No. 12615 signed by President Reagan in 1988. The Order sought to increase the amount of "contracting out" studies by agencies of jobs that could be done by the private sector. During the previous years of the Reagan Administration, over 70,000 jobs had been studied to see if they could be done by the private sector at less cost. As a result of these studies, over $700 million was saved without a loss in services. The Administration was eager to increase the savings that could be achieved by conducting studies of whether to contract out the functions or not. The Order required agencies to identify the jobs that could be carried out by the private sector and to conduct studies on them. The likely savings would then be shared with the agencies in the process of formulating the agency's budget.

The opposition from the Federal workforce and interest groups and Congress proved to be more costly than the benefits of the proven savings, and the process became basically inconsequential.

Today, the Federal agencies are still wrestling with the first step in this process, one that Congress wrought in the Federal Activities Inventory Reform (FAIR) Act. BNA describes the situation, in part, as follows: "Business groups strongly support the FAIR requirement for agencies to annually produce lists of activities that are potential candidates for contracting out to the private sector, they contend that the government should not deprive the private sector of the opportunity to do commercial-type work. Government employee unions, on the other hand, have taken a dim view of the law, since federal employees stand to lose their jobs if an activity is contracted out. Among federal agencies, only the Defense Department has made any real effort to identify and contract out commercial activities. DOD says it needs to do more contracting out in order to save billions of dollars, but efforts to contract out base support services have resulted in heated litigation." (Daily Report for Executives, 9/30/99, page A–35.)

These are only two examples. There are certainly more, but which ones are included in a list will depend somewhat on what one thinks of the purposes of the Orders in the first place.

1. I believe that the Constitution vests each of the three Branches of the Federal Government with powers that are shared among them, and powers that are not shared (or at least not shared equally) among them. The proposition that "Congress has not done an effective job of protecting" its interests is too sweeping a statement for me to be able to agree with it. I am certain that in some specific areas I would agree that the present or a past Congress could have done a more effective job of protecting its interests than it has or did, but not in all areas, indeed not in many, would I agree that it could have done a more effective job in protecting its interests. This is particularly so since Congress was not designed to be as single-minded as was the Chief Executive and hence action by it is more difficult.

More emphasis on oversight even at the expense of passing additional legislation could enable a better understanding of, and control over, Executive actions, especially those pertaining to Executive Orders.

2. I agree that there is substantial "gray area", i.e., uncertainty, among the constitutional authorities of the Branches and that it is too simplistic to say that Congress merely "makes the law" and is not involved in its "execution" and that the President "executes the law" and is not involved with the "making" of it. Both the President and Congress must be vigilant about its own authorities and those it shares in these "gray areas", and must be willing to engage in the joint resolution of positions there.

Furthermore, there are "gray areas" between the Branches that are created by the laws enacted by Congress in addition to those "gray areas" created by the Constitution. Virtually every enactment of Congress requires interpretation by Presidents over time and by the officials of the Executive Branch that Presidents supervise. While some of this interpretation is unavoidable and hopefully non-controversial, too often the Executive is left to resolve what Congress could not or would not in obtaining the consensus necessary to enact legislation. The dynamics of legislative "gray areas" are similar to the constitutional ones, requiring vigilance by the Branches on one hand and an ability to resolve differences on the order.

3. I do not agree that "the power of presidents to 'make law' has grown in recent history and has become more significant." While the realm of legislative "gray area" has increased, and the authority to Congress to delegate authority to the Executive Branch is a relatively new phenomenon, the breadth of congressional activity has also circumscribed presidential authority. I believe that presidential "power" has remained fairly constant over time, and that Congress has been more aggressive since the 1970s in exerting its constitutional authorities and in obliging the President and agency heads to take congressional priorities into account in the implementation of laws.

4. "Who should be making policy for this nation?" Within the Federal Government, in my view, both the Congress and the President should be making policy for this nation, and I believe that is what the Constitution provides. Each has powers, authorities and limitations, many of them shared with the other, and together policies are established. With regard to the role of Executive Orders, they are but one way, albeit an important way, for the President to make or advance policy. But only when the President's authority is unilaterally assigned to him is Congress precluded from re-directing that policy.

5. The public does play a role with regard to Executive Orders. Members of the public often urge that Executive Orders be issued, or comment on those they know are being developed or comment on them once issued. The public does not hesitate to bring its concerns with Executive Orders to the attention of Congress and seek its intervention. They also make judgments about Presidents based in part on Executive Order activities.

The requirements with regard to the "transparency" of Executive Orders generally pertain to the period following the issuance of the Order. There are usually no requirements for a public notice and comment period as there is for rulemaking by Federal Departments and Agencies covered by the Administrative Procedures Act, as amended. But there are requirements pertaining to the publication and codification of presidential orders that meet the definition of Executive Orders in the Federal Records Act.

Because of the wide differences in scope and authority for Executive Orders, I do not believe that the benefits of a public notice and comment requirement for all Executive Orders would be worth the costs, measured in terms of the loss of efficiency, time and decisiveness of presidential action. As you know, the Administrative Procedures Act allows for judicial review of agency compliance with its public notice and comment requirements, both with regard to procedural matters and to ensure that there is a rational basis for the actions taken. A similar requirement for the issuance of Executive Orders would likely embroil Presidents in lengthy and stultifying litigation and raise significant constitutional concerns as well. In adopting the APA in 1946, Congress did not extend its procedural obligations to the president due in part to such constitutional concerns.

Furthermore, Executive Orders are but one of many avenues by which Presidents make policy decisions and issue directions to agency heads. The Executive Order process already is the most public and transparent of these decision-making processes. If Congress were to impose formal procedural requirements on this channel, the Executive Branch could respond by shifting decision making to a channel, e.g., phone calls from the Chief of Staff to agency heads, that are far less visible to the public and Congress. Thus, more formal procedures for Executive Orders may in practice prove to be counter-productive.

The obligations of the two branches with respect to transparency of Executive Orders should be determined in my view essentially as it is today: by determining whether it would be better to do so than not to. If disclosing the drafts of orders before they are issued would be more undesirable than the effects of Congress' anger at not being informed, then disclosure will likely not take place, otherwise, there is likely to be some congressional involvement. Again, given the wide scope and differing authorities for Executive Orders, I think this is about the best formula to apply to the transparency issue.

6. I do not believe that if Congress passes legislation after the issuance of an Executive Order to sanction it, that doing so would be likely to either enhance or erode the legislative prerogatives of the Congress. I think that Congress' legislative prerogatives are likely to remain what they have always been regardless of what the President would do in an Executive Order. However, I do believe that on important Executive Orders that it would be very desirable for Congress to review them and to enact them if it agrees with them or to modify or rescind them if that is what it believes should be done. This is what has happened in the past in an ad hoc or non-systematic basis. It would be desirable because Executive Orders usually can be changed at any time or rescinded without notice. They also may not be adequately or uniformly carried out by those to whom requirements are directed. Presidents usually cannot rescind legislation so it is likely to be more permanent. Furthermore, because it would be enacted by Congress it is more likely to be taken seriously. Legislation also usually includes some form of enforcement action.

SUBMITTED QUESTIONS AND ANSWERS BY TOM SARGENTICH

Question 1. Could you briefly elaborate on the manner in which modern communications technology—specifically the Internet—has extended the public's access to Executive orders?

Answer. The Office of the Federal Register (OFR), in partnership with the Government Printing Office (GPO), has extended public access to Executive orders in several different ways. Since 1994, we have published the full text of all Executive orders in the daily on-line Federal Register on the GPO Access service (http://www.access.gpo.gov/nara). Depending on the time of day that we receive them from the White House, Executive orders appear in the on-line Federal Register at 6 a.m. (ET) on the next business day, or at 6 a.m. on the following business day. In the past, people who had subscriptions to the printed edition of the Federal Register could expect to wait a week or more for the daily issue to arrive by second class mail.

Before the on-line era began, most people depended on clipping services, traveled to a library, or waited for a copy to filter down to them through a distribution chain to gain access to Executive orders. Most general circulation newspapers have not carried the full text of Executive orders, not even those with significant impact. A handful of Washington news services and trade associations generally come to the Federal Register to obtain copies of the documents from our public inspection desk to include in their reports. But by and large, the general public did not have ready access to Executive orders prior to the advent of our on-line services on GPO Access. Now, large and small businesses, State and local governments, and any interested person can have free, on-demand access to Executive orders through a desktop computer.

Expanding access to information also involves making Internet services easy to use, especially for non-experts. In response to comments from customers and our own design criteria, we developed a separate "field" for Presidential documents which makes it much easier for users to find Executive orders. In addition, beginning in January 1998 we added hypertext tables of contents to the daily on-line Federal Register, which allows users to simply browse the contents for "Presidential Documents," click on the link and retrieve a listed Executive order. The OFR also worked with GPO to improve the means of navigating the 200 volume on-line Code of Federal Regulations (CFR), which includes a compilation of Executive orders for each year. We now offer CFR tables of contents with hypertext links, which identify Executive orders by their number designation and descriptive title. Users can browse the table of contents of title 3 for the 1997 through 1999 compilations, click on a link and retrieve any Executive order published during the prior year.

OFR and GPO have recently developed an on-line edition of the Weekly Compilation of Presidential Documents, an official serial record of Presidential statements, memoranda, messages to Congress and federal agencies, and other documents released by the White House. This publication also contains the text of Executive orders originally published in the Federal Register. Some of the documents published in the Weekly Compilation are related to the implementation of Executive orders. Historically, there have been relatively few subscribers to the paper edition of the Weekly Compilation, but a growing number of customers are discovering the on-line edition.

Comparisons between usage of paper and on-line publications are imprecise, but I believe that we are reaching far more citizens via the Internet than we ever have in the past through our paper and microfiche editions. We do not have a specific breakdown on the number of Executive orders retrieved from the on-line Federal Register and CFR, but overall, the public has been using on-line Federal Register publications in large and increasing numbers. When free online service began, we had about 17,000 annual paid subscriptions to the Federal Register, and annual sales of about 1.3 million CFR volumes. During fiscal year 1999, the public retrieved 48 million individual documents from the on-line Federal Register and 88 million from the on-line CFR. Our customers retrieved 138,000 documents from the on-line Weekly Compilation of Presidential Documents during fiscal year 1999 as compared with 402 paid subscriptions to the paper edition.

In the Internet environment, the reliability of information providers can be problematic. Executive orders may be posted on-line by any number of organizations, but the material may not be current and accurate. It is particularly important that Executive orders be available from a reliable source to remove any doubt as to their content and effectiveness. The OFR adheres to the highest standards of accuracy and integrity for our on-line publications to fulfill our mandate as the official source for Presidential documents and administrative rules and notices. When we developed our Internet services with GPO, we specified that the on-line editions must be

just as true to the original documents as the printed editions. OFR and GPO generate the on-line Federal Register, CFR and the Weekly Compilation from the same databases used to create the printed editions to ensure that we meet those standards. In our regulations, we assure the public that the on-line edition of the Federal Register has the same official legal status as the printed edition. This month, the Administrative Committee of the Federal Register passed a resolution to grant official status to the on-line editions of the CFR and Weekly Compilation of Presidential Documents. To guarantee future access to Executive orders and other Federal Register documents, GPO is committed to maintaining the on-line Federal Register, CFR, and Weekly Compilation of Presidential Documents on GPO Access as part of the permanent collection known as the "Core Documents of U.S. Democracy" series.

The task of sorting through the large volume of material available on web sites can also limit access to information. We use our National Archives and Records Administration (NARA) web site (http://www.nara.gov/fedreg/index.html) as a gateway to guide customers to the text of Executive orders available in various publications and to related ancillary information services. The ancillary services on the NARA web site include a historical Codification of Proclamations and Executive Orders (1945–1989) and our on-line index of Executive orders. The Codification directs users to the text of Executive orders by subject matter, series number and Presidential administration. The on-line index of Executive orders is possibly the only authoritative source of information on the current amendment status Executive orders. It has information on dates of issuance, amendments, revocations and dates of publication in the Federal Register. The staff in our Presidential documents unit converted the index from a card catalog that we used to respond to reference requests received by letter and telephone. Now the index is available on-demand to any member of the public, in a hypertext format for easy navigation among the various entries. During the first nine months of calendar year 1999, our customers retrieved a total of 557,657 individual items from these ancillary services.

Question 2. The NARA web site offers the public a wealth of primary source information about Presidential documents, specifically Executive orders. Is there also an objective source of analytical information available to the public concerning the impact that such orders have on the public?

Answer. I do not know of an objective source of analytical information relating to the impact that Executive orders have on the public. Analytical reporting would go beyond the scope of the OFR's statutory mission. In the past, we have been provided with reports prepared by the Congressional Research Service, which contained some analytical content. But I don't know whether CRS has done recent work on this subject, or whether the information would be made available to the public.

You asked me several [other] questions, to which I would [also] like to respond.

1. First, you asked me to elaborate on what I meant by the word "restraint" when I noted that some degree of restraint by both branches of government is needed. What I meant was that in order for a separation of powers system to work, especially in a time of divided government, both the President and Congress have to show the restraint of not taking their position to the most extreme lengths. Otherwise, there is a danger of governmental stalemate. The need for restraint runs to both ends of Pennsylvania Avenue.

2. Second, you asked me for my thoughts on proposed legislation pertaining to the issue of Executive orders. In general, I think it is better to deal with executive orders one-by-one, rather than to lay down in legislation general norms to prevent executive orders from being issued. Without discussing in detail the proposed legislation, I am concerned that it would not be effective, in part because the President does have constitutional power to act in many cases and, as we see in history, Presidents may well do so. It's also not clear to me that preventing a President from taking action is always a good thing, at least when we don't know what the action is. Also, legislation such as this can turn around and bite the hand that feeds it, especially if a Republican President were elected in the upcoming presidential contest.

3. Third, you asked about a passage from a recent article by Terry Moe and William Howell in which, among other things, they assert that "Congress has not done an effective job of protecting its interest in the context of unilateral presidential action." This may be an overstatement. As I said in my oral remarks, there are forces at work that make it difficult for Congress to take definitive action. It is easier for one person, namely, the President, to act than it is for both houses of Congress to take action. With the exception of the War Powers issue, it's not clear to me that Congress has dropped the ball. I would say that the passage of the Item Veto Statute in 1996 was a huge institutional mistake on the part of Congress, although I understand the political factors that went into the decision. In any event, that stat-

ute has been struck down as unconstitutional, as I believe it should have been, so it no longer stands as a monument to the expansion of executive power.

4. Fourth, you discussed the "gray" area that exists between the realm of lawmaking and law execution. There is no doubt that a gray area exists. As stated in my prepared statement, the President has vast lawmaking power in any colloquial sense. It simply is not true that all law is made by Congress. The main check that we have is the requirement that executive lawmaking be authorized by the Constitution or a statute. Also, Congress can take steps to reverse or limit the effects of executive lawmaking, as discussed in my prepared statement and oral remarks. I don't think it is reasonable to try to identify, as a definitional matter, a sphere of lawmaking that excludes the President and the executive branch agencies. Execution of the law involves the interpretation and application of statutes, and interpretation and application in any ordinary sense constitutes the development of law by executive officials.

5. Fifth, if there is a trend toward greater presidential lawmaking, it is a function of broad institutional change during the twentieth century. Many factors have contributed to the growth of executive power. The development of a multitude of executive agencies has been an important factor. These agencies were created because Congress determined that there was a need to have a separate bureaucracy address major social problems. For instance, the NLRB was created to address serious and ongoing problems in the relations between labor and management. As long as major social problems exist and something is sought to be done about them that involves governmental action, the proliferation of programs seems a likely consequence.

In addition, the growth of presidential power is a function of the increasing importance of the United States in world affairs since World War I. It would be hard to say that the position of the United States has declined since the end of the Cold War. As the only major superpower, the United States plays a unique role on the world's stage, and the President, as the nation's spokesperson in foreign affairs, necessarily achieves heightened power.

I don't think that any of this should be taken to mean that Congress is unimportant. After all, Congress is the national legislature; it has the power of the purse; and it has the major role in structuring and overseeing the power of executive agencies. I am concerned that Congress may have let the War Power given to it in the Constitution slip through its fingers, but in domestic life it is not fair to speak generally about a tremendous decline in the institutional position of Congress.

What has changed is the relative decline of a disciplined party system and seniority system that used to discipline members of Congress in reaching collective decisions. Many commentators who have studied the institution attribute an important role to internal changes as a cause of greater difficulties in developing coalitions of members to support a common result.

6. Sixth, I think that the basic policy for the nation should be set by Congress. That is why Congress is designated in Article I of the U.S. Constitution as having the legislative power therein granted. However, as noted above and in my written statement, this does not mean that policy pursuant to statute or constitutional grants of power is not also initiated by the executive.

7. Seventh, you ask whether the public has enough information about executive orders to make a judgment about their impact on them. I don't believe the public ever has enough information about government. Partly, this is a function of the fact that our media covers the government in very selective ways. Most of what the government does, as a matter of fact, the public may know little or nothing about. Studies about particular issues often show a dramatic lack of information on the part of the public. Accordingly, I strongly support efforts to promote public education in this and other areas. Both branches of government have an obligation to publicize presidential directives. This includes an obligation on the part of the executive branch to publicize executive orders.

8. Eighth, Congress does from time to time pass legislation after the fact to ratify some action that the President has taken by means of executive order. This practice goes back many years. It was, for example, a prominent development during the Civil War, when Congress came back into session at the beginning of the War and ratified unilateral actions taken by President Lincoln.

If you ask whether Congress should ratify presidential action taken unilaterally, I suppose the answer has to be, it depends. There are times when Presidents have acted unilaterally in response to emergency situations, and may have created a good deal of legal doubt about what was done. In those circumstances, it can be extremely useful for Congress to ratify what the President does by subsequent authorization. At the very least, this shows that when Congress looked at the matter, it agreed with the President.

The hope for subsequent authorization is not an excuse for a President to act in a reckless way. After all, Congress may not subsequently authorize some action. Presidents need, when they act unilaterally, to be sure that they have the requisite statutory and constitutional power before they act. Subsequent authorization does not cure a lack of initial authority.

A related point involves a situation, such as in *Youngstown,* when a President takes action by executive order and then says that he would obey any contrary direction by the Congress if it should make one. As you know, Congress did not subsequently disapprove of the seizure of the steel mills. That failure to disapprove did not in any way authorize the seizure. A failure by Congress to act can reflect a number of conditions, such as a lack of ability to achieve a majority vote, a preoccupation with other matters, a lack of leadership, or perhaps in some cases a lack of interest. The point is that Presidents cannot claim that the failure of Congress to disapprove a unilateral action after the fact provides authority to act at the time a decision is made.

SUBMITTED QUESTIONS AND ANSWERS BY WILLIAM J. OLSON

Question 1. At what point, in your view, did the trend begin to turn toward more aggressive use of the executive order by Presidents? What triggered this new direction?

Response. We recently completed a study on behalf of the Cato Institute entitled "Executive Orders and National Emergencies: How Presidents Have Come to 'Run the Country' by Usurping Legislative Power." This study is available at our internet site, www.wjopc.com. In this study, we trace the use of executive orders beginning with President Washington. In Table 1 of the study, we set out the number of executive orders issued by each president since Abraham Lincoln. It can be readily concluded that the explosion of executive orders is a 20th Century phenomenon.

No president from Lincoln to William McKinley issued more than 71 identified executive orders, and all 10 presidents during this span issued a combined total of only 158 executive orders. This all ended abruptly when Theodore Roosevelt ascended to the presidency upon the assassination of McKinley on September 14, 1901. During the seven and one-half years of Theodore Roosevelt's presidency, with neither a world war nor an economic catastrophe to supposedly force his hand, he issued 1006 executive orders—making him the third most prolific of all presidents, behind only Franklin Roosevelt at 3,723, and Woodrow Wilson at 1,791.

Theodore Roosevelt's autobiography revealed his revolutionary view of presidential powers, which has come to be known as the "stewardship theory" of executive power. His approach was unchecked by any regard for the form of government established by the U.S. Constitution.

Theodore Roosevelt ignored the fact that in our federal scheme the national government was intended to be a government of limited, enumerated powers, and he ignored the fact that the president's role was limited to execution of the laws that were written by Congress. In his autobiography, 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." 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." These are not the words of a man who believes this is a nation of laws and not of men.

A president who observes his vow to preserve, protect, and defend the U.S. Constitution must find express authority for his actions—not just a personal preference combined with the absence of an express prohibition. During the rest of the 20th Century, the Theodore Roosevelt view of presidential authority has rarely been articulated in such stark terms, except perhaps by Franklin Roosevelt, but has often been the unspoken basis underlying the issuance of many executive orders.

As recently as 1995, when President Clinton unsuccessfully tried to defend the legality of his Executive Order 12954 prohibiting the hiring of permanent striker replacements by federal contractors, the U.S. Justice Department argued 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. Fortunately, the U.S. Court of Appeals for the D.C. Circuit, in only the second judicial invalidation of an executive order ever, rejected the position of the Clinton Administration.

Question 2. What role would you assign to the public in the process of maintaining a proper balance between the branches when it comes to executive orders? In your

view, is the current process transparent enough—and is the public engaged enough—to allow for that role to be realized?

Response. The role of the public is to elect to the presidency only persons of character, who are capable of exercising self-control, and who view it as their supreme duty and responsibility to defend the U.S. Constitution and exercise only those limited powers provided to them under the U.S. Constitution. Further, the role of the public is to elect to Congress only persons of character, who themselves live under the limitations on their power set out in the U.S. Constitution, and who, therefore, without hesitation or impediment of hypocrisy, will make it their highest priority to meet power with power and stop in his tracks any president who exceeds his enumerated powers.

Having elected such persons to office, the public must hold those persons accountable to that trust that they have placed in them, demonstrating the willingness to throw out of office persons who prove unworthy of that trust. When presidents violate the Constitution, the public should support efforts by the House to impeach and the Senate to convict and remove from office, such unworthy presidents. Lastly, we have a Biblical duty to support our leaders in prayer (I Timothy 2:1–2).

I view the issue of making the executive order process more transparent as a red herring—a diversion from that which is important. For those executive orders which the president can constitutionally issue—those which provide proper direction to his subordinates within the executive branch of government—he should not have new additional, principally cosmetic, burdens imposed on him of notice, comment, or the like. With respect to those executive orders where the president has no authority, he must be stopped directly, certainly and rapidly by a Congress full of righteous indignation against a president who has violated his role.

When my father read the testimony that I provided to the House Rules Committee, he was concerned that I was too guarded and did not provide a sufficiently clear and forthright message as to the severity of the problem, and the need for action by Congress. To remedy that well-founded criticism, I would say that based on the study we have undertake, the United States is rapidly headed toward tyranny, defined as our founding fathers defined that term—the union of the power to write the laws in the same person as the power to execute the laws. As Montesquieu stated: "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." Congress has not been on the sidelines, but rather has been a willing participant in this nation's march toward tyranny.

It is my earnest hope that a sufficient number of members of Congress take it upon themselves, as their highest priority, to return the government to its constitutional limitations. If Congress does not respond to this threat to liberty, it is my hope that as the people of the United States learn how badly the Constitution has been violated on both ends of Pennsylvania Avenue, they will vent their fury at the ballot box against all elected officials who have failed their sacred trust.

SUBMITTED QUESTIONS AND ANSWERS BY RAYMOND A. MOSLEY

Question 1. Could you briefly elaborate on the manner in which modern communications technology—specifically the Internet—has extended the public's access to Executive orders.

Answer. The Office of the Federal Register (OFR), in partnership with the Government Printing Office (GPO), has extended public access to Executive orders in several different ways. Since 1994, we have published the full text of all Executive orders in the daily on-line Federal Register on the GPO Access service (http://www.access.gpo.gov/nara). Depending on the time of day that we receive them from the white House, Executive orders appear in the on-line Federal Register at 6 a.m. (ET) on the next business day, or at 6 a.m. on the following business day. In the past, people who had subscriptions to the printed edition of the Federal Register could expect to wait a week or more for the daily issue to arrive by second class mail.

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person can have free, on-demand access to Executive orders through a desktop computer.

Expanding access to information also involves making Internet services easy to use, especially for non-experts. In response to comments from customers and our own design criteria, we developed a separate "field" for Presidential documents which makes it much easier for users to find Executive orders. In addition, beginning in January 1998 we added hypertext tables of contents to the daily on-line Federal Register, which allows users to simply browse the contents for "Presidential Documents," click on the link and retrieve a listed Executive order. The OFR also worked with GPO to improve the means of navigating the 200 volume on-line Code of Federal Regulations (CFR), which includes a compilation of Executive orders for each year. We now offer CFR tables of contents with hypertext links, which identify Executive orders by their number designation and descriptive title. Users can browse the table of contents of title 3 for the 1997 through 1999 compilations, click on a link and retrieve any Executive order published during the prior year.

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Unless there is further business before the subcommittee, the committee will be adjourned.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned.]

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