The Heritage Foundation
Legal Memorandum
Executive Summary

No. 2 February 21, 2001

The Use and Abuse of Executive Orders and Other Presidential Directives

Todd F. Gaziano[1]

In recent years, there has been renewed interest in the use and abuse of executive orders and other presidential directives. Many citizens and lawmakers expressed concern over the content and scope of several of President Bill Clinton's executive orders and land proclamations. Congress responded with hearings and the consideration of several bills designed to curb the President's authority to issue such directives. In an exceedingly rare act, the courts even reacted by striking down one of President Clinton's executive orders.

Despite the increased public attention focused on executive orders and similar directives, public understanding regarding the legal foundation and proper uses of such presidential decrees is limited. Thus, the increased public attention generally has been accompanied by confusion or misunderstanding regarding the appropriateness of various presidential actions. The accompanying legal memorandum provides an overview of the President's use of executive directives, including a discussion of the historical practice, sources of presidential authority, the legal framework of analysis, and proposals to prevent abuses.

From the founding of our nation, American Presidents have developed and used various types of presidential "directives." The best-known directives are executive orders and presidential proclamations, but many other documents have a similar function and effect. Reduced to their common core, presidential directives are simply written, rather than oral, instructions or declarations issued by the President. Authority for these directives must come from either the Constitution or statutory delegations.

Produced by
The Center for Legal
and Judicial Studies

Published by
The Heritage Foundation
214 Massachusetts Ave., N.E.
Washington, D.C.
20002–4999
(202) 546-4400
http://www.heritage.org

This paper, in its entirety, can be found at: *www.heritage.org/library/legalmemo/lm2.html*

Yet the President's authority to issue directives goes beyond express language in the Constitution

1. The review of President Clinton's proclamations and executive orders and the text in this section of the Memorandum were a collaborative effort by several scholars at The Heritage Foundation, including substantial contributions by Angela Antonelli, Dan Fisk, Mark Wilson, and Christopher Summers.

or statutes that grant him such power. He possesses additional authority to issue directives where that is the reasonable implication of the power granted (implied authority) or if it is inherent in the nature of the power conferred (inherent authority). The Constitution vests the President with the duties of commander in chief, head of state, chief law enforcement officer, and head of the executive branch. When the President is lawfully exercising one of these responsibilities conferred by Article II of the Constitution, the scope of his power to issue written directives is especially broad, and Congress has little ability to regulate or circumscribe the President's use of written directives.

Nevertheless, the President's power to issue executive decrees is limited—by the scope of his powers and by other authority granted to Congress. If the President's authority is derived from a statutory grant of power, Congress remains free to negate or modify the underlying authority. Congress also has some latitude in defining the procedures the President must undertake in the exercise of that authority, although there are some constitutional limits to Congress's power to micromanage the President's enforcement or decision-making procedures.

Because the constitutional separation of powers both supports and limits a President's power to issue executive directives, it is natural that some friction exists in the exercise of that power. Over the past 60 years, presidential authority to issue certain decrees has been tested in court (although many executive directives remain difficult to challenge in court), and a legal framework of analysis for the legitimacy of this power has evolved. The interplay between Congress and the White House varies depending on the aggressiveness of the President and Congress's reaction to it.

During the previous Administration, President Clinton proudly publicized his use of executive decrees in situations where he failed to achieve a legislative objective. Moreover, he repeatedly flaunted his executive order power to curry favor with narrow or partisan special interests. A review of Clinton's executive orders shows that the number issued by him is not significantly different from the number issued by Presidents Ronald Reagan or George H. W. Bush. Yet the true measure of abuse is not the overall number of directives, but whether any of them were illegal or improper, and if so, how significant they may have been.

A review of President Clinton's directives also reveals some important departures from the practices of his two predecessors. This is particularly true of his use (and abuse) of powers under the Antiquities Act of 1906 and numerous directives issued in the areas of foreign and defense policy, environmental policy, regulatory review, labor policy, and civil rights. A disproportionate number of these executive directives were either illegal or issued in the furtherance of an improper policy or political objective. One of President George W. Bush's priorities should be to review, revise, or rescind the most troublesome of these.

Predictably, the 106th Congress considered several measures designed to rein in the past President's abuses. H.R. 2655 attempted, in part, to define presidential directives more precisely and to require that all executive decrees specify the constitutional and statutory basis for any action incorporated in such directives. Both of these provisions are worthy of further consideration. Yet provisions of other bills were problematic and might be unconstitutional in application. Internal reforms initiated by the President may have a more lasting effect and are often more workable. Because few reforms can be imposed on a President over his veto, it makes sense for Congress to work with the new President on such reforms rather than overreact to the abuses of the last President.

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THE USE AND ABUSE OF EXECUTIVE ORDERS AND OTHER PRESIDENTIAL DIRECTIVES

TODD F. GAZIANO[1]

In recent years, there has been renewed interest in the proper use and possible abuse of executive orders and other presidential directives. Many citizens and lawmakers expressed concern over the content and scope of several of President Bill Clinton's executive orders and land proclamations. Congress responded with hearings and the consideration of several bills designed to curb the President's authority to issue such directives. In an exceedingly rare act, the courts reacted by striking down one of President Clinton's executive orders, and litigation to contest the validity of other directives is ongoing.

Despite the increased public attention focused on executive orders and similar directives, public understanding regarding the legal foundation and proper uses of such presidential decrees is limited. Thus, the increased public attention generally has been accompanied by confusion and occasional misunderstandings regarding the legality and appropriateness of various presidential actions. This legal memorandum provides a general overview of the President's use of executive directives, including a discussion of the historical practice, the sources of presidential authority, the legal framework of analysis, and reform proposals related to the use and abuse of presidential directives.

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THE SEPARATION OF POWERS

"There can be no liberty where the legislative and executive powers are united in the same person."
—Charles-Louis de Secondat, Baron de Montesquieu[2]

"The accumulation of all power, legislative, executive, and judiciary in the same hands…may justly be pronounced the very definition of tyranny."
—James Madison, *Federalist 46*

1. The review of President Clinton's proclamations and executive orders and the text in this section of the Memorandum were a collaborative effort by several scholars at The Heritage Foundation, including substantial contributions by Angela Antonelli, Dan Fisk, Mark Wilson, and Christopher Summers.
2. As quoted by James Madison in *Federalist No. 47*.

> "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."
> —U.S. Constitution, Art. I, § 1

> "The executive power shall be vested in a President of the United States of America."
> —U.S. Constitution, Art. II, § 1, cl. 1

One of the great and enduring gifts from the Founders' generation was the inclusion of separation of power principles in the United States Constitution. The Framers had studied the writings of Montesquieu and other political philosophers as well as the workings of the separate branches of their own state governments. Their conscious design to enforce this separation of functions was carefully explained in *The Federalist Papers* and during the debates over ratification of the United States Constitution. The separation of powers is now enshrined in both the structure of the Constitution and various explicit provisions of Articles I, II, and III.

Yet, in the previous Administration, a baser motive seemed to prevail in the use of executive power. Former President Bill Clinton proudly publicized his use of executive decrees in situations where he failed to achieve a legislative objective. Moreover, he repeatedly flaunted his executive order power to curry favor with narrow or partisan special interests. If this were not enough, Clinton's top White House political advisers made public statements about his use of executive decrees that were designed to incite a partisan response, saying, for example, that the power was "cool" and promising that he would wield that power to the very end of his term.[3]

A President who abuses his executive order authority undermines the constitutional separation of powers and may even violate it. History will show that President Clinton abused his authority in a variety of ways and that his disrespect for the rule of law was unprecedented. Given this pattern, no one should be surprised that President Clinton sometimes abused his executive order authority as well. But it would be a mistake to try to restrict a President's lawful and proper executive order authority because of one abusive President.

Moreover, defenders of executive authority will find much in President Clinton's use of executive orders and proclamations that is instructive—even if they dispute the lawfulness or policy goals of the individual decrees. In short, some helpful lessons can be learned from recent experience about how an aggressive President can use his power for appropriate and beneficial purposes, and these lessons can help guide the current and future Presidents of the United States in making executive decisions.

In the end, the constitutional separation of powers supports both sides of the argument over a President's proper authority. It reinforces a President's right or duty to issue a decree, order, or proclamation to carry out a particular power that truly is committed to his discretion by the Constitution or by a lawful statute passed by Congress. On the other hand, the constitutional separation of powers cuts the other way if the President attempts to issue an order regarding a matter that is expressly committed to another branch of government; it might even render the presidential action void. Finally, separation of powers principles may be unclear or ambiguous when the power is shared by two branches of government.

Thus, no simple recitation of governing law or prudential guidelines is possible. However, history and practice are useful tools in understanding the President's authority, and a legal framework of analysis exists to help determine issues of validity. Beyond questions of legality, there are many separate but important issues of policy. Two broad policy questions present themselves: (1) whether a given power the President possesses ought to be

3. Paul Begala flippantly remarked, "Stroke of the pen. Law of the land. Kind of cool." See James Bennet, "True to Form, Clinton Shifts Energies Back to U.S. Focus," *The New York Times*, July 5, 1998, p. 10. Bruce Reed threatened that "This President [Clinton] will be signing executive orders right up until the morning of January 20, 2001." See Marc Lacey, "Blocked by Congress, Clinton Wields a Pen," *The New York Times*, July 5, 2000, p. 13. This promise President Clinton kept.

used to advance a particular policy objective, and (2) whether a particular draft directive effectively advances such a policy goal.

DEFINING PRESIDENTIAL DIRECTIVES

In order to place these issues of legality and policy in their proper context, it is important to start with an understanding of the nature and historical usage of such executive decrees.

From the founding of this nation, American Presidents have developed and used various types of presidential or executive "directives." The best known directives are executive orders and presidential proclamations, but many other documents have a similar function and effect. Reduced to their common core, presidential directives simply are written, rather than oral, instructions or declarations issued by the President. Because we would not expect or want the President to limit himself solely to oral instructions and declarations, it is not surprising that every President has used written directives to run the executive branch of government.

Early Presidential Directives

On June 8, 1789, three months after he was sworn in as President of the United States, George Washington sent an instruction to the holdover officers of the Confederation government asking each of them to prepare a report "to impress me with a full, precise, and distinct general idea of the affairs of the United States" that they each handled.[4] Although the term "executive order" was not used until 1862, President Washington's instruction was the precursor of the executive order and was unquestionably proper. Every chief executive has the inherent power to order subordinates to prepare reports for him on the performance of their duties. The United States Constitution expressly provides that the President may require his principal officers to prepare such reports.[5]

A few months later, a joint committee of Congress requested that President Washington "recommend to the people of the United States a day of public thanksgiving."[6] On October 3, 1789, President Washington responded with a proclamation urging the people to recognize Thursday, November 26, 1789, as the day of thanksgiving.[7] Heads of state had issued proclamations commemorating victorious battles and national holidays for centuries, and there was no reason for Congress or the President to conclude that the Constitution removed this ceremonial function from our head of state. Congress may go farther than the President and pass laws fixing a particular holiday and granting paid leave to federal employees, but the President is free in the absence of congressional action to recommend such celebrations as he sees fit.

Executive orders also have been used to direct foreign policy since the presidency of George Washington, when he issued a proclamation in 1793 stating that the United States would be "friendly and impartial toward the belligerent powers" of Britain and France. In this "Neutrality Proclamation," Washington justified his power to issue such a statement based on the "law of nations," but a firmer ground would have been the constitutional powers vested in the President over

4. Harold C. Relyea, *Presidential Directives: Background and Overview,* Congressional Research Service, *CRS Report for Congress* No. 98–611 GOV, July 16, 1998, p. 1, citing John C. Fitzpatrick, ed., *The Writings of George Washington*, Vol. 80 (Washington, D.C.: U.S. Government Printing Office, 1939), pp. 343–344.

5. U.S. Const., Art. II, § 2, cl. 1 ("The president…may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective office."). It could be argued that by expressly granting this power to the President with respect to principal officers, the Framers meant to deny this power with respect to inferior officers, but the rest of the clause and the drafting history suggest that this is not a plausible interpretation. Rather, it was meant to clarify that even principal officers, who are always confirmed by the Senate, were nevertheless subject to the President's control.

6. *Annals of Congress*, Vol. 1, September 25, 1789, pp. 88, 914–915.

7. Relyea, *Presidential Directives*, at 1.

foreign affairs. Washington, with the concurrence of Secretary of State Thomas Jefferson and Secretary of the Treasury Alexander Hamilton, did not convene the Congress to debate the proclamation before issuing it. James Madison, among others, criticized Washington's proclamation as an overextension of executive authority and an infringement on Congress's authority to decide issues of war and peace. Congress later gave approval to Washington's course of action by passing the Neutrality Act of 1794, at Washington's request, giving the President the power to prosecute violators of the proclamation. However, this early episode demonstrates that the President and Congress may have overlapping responsibilities, and in such situations, the scope of the President's power to act unilaterally is sometimes unclear.

Sources of Presidential Authority

Although President Washington's Thanksgiving Proclamation was hortatory, other proclamations or orders communicate presidential decisions that have a legally binding effect. Authority for these directives must come from either the Constitution or statutory delegations.

On August 7, 1794, President Washington issued a proclamation ordering those engaged in the Whiskey Rebellion to disperse and calling forth the militia to put down the rebellion. This proclamation was issued pursuant to statutory authority delegated to the President.[8] The statute provided that the President first had to warn citizens to disperse and return to their homes, but that he could call forth the militia to deal with any individuals who did not follow this command.[9] Thus, the Whiskey Rebellion Proclamation may have been the first directive issued pursuant to power conferred by Congress.

On December 25, 1868, President Andrew Johnson issued a proclamation (the "Christmas Proclamation") pardoning "all and every person who directly or indirectly participated in the late insurrection or rebellion" related to the Civil War.[10] President Johnson's Christmas Proclamation was grounded squarely on his constitutional pardon power.[11] The Supreme Court subsequently ruled that the proclamation was "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."[12]

As the Christmas Proclamation demonstrates, the President's authority to issue written directives is not limited to express language in the Constitution that grants him power to issue such directives. The President possesses additional authority to issue directives where that is the reasonable implication of the power granted (implied authority) or if it is inherent in the nature of the power conferred (inherent authority). The term "Commander in Chief of the Army and Navy" (as used in Article II of the Constitution) necessarily implies that the commander can issue oral and written commands, and it is inherent in the nature of a military commander that he do so.

If the President's authority is implied or inherent in a statutory grant of power, Congress remains free to negate or modify the underlying authority. Congress also has some latitude in defining or refining the procedures the President must take in the exercise of that authority, although there are some constitutional limits to Congress's power to micromanage executive branch decision-making procedures.[13]

When the President is exercising powers inherent in Article II of the Constitution, Congress has much less ability to regulate or circumscribe the

8. *Ibid.*, at 13.

9. See 1 Stat. 264–265.

10. William J. Olson and Alan Woll, "Executive Orders and National Emergencies," Cato Institute *Policy Analysis* No. 358, October 28, 1999, p. 9.

11. U.S. Const., Art. II, § 2, cl. 1 ("The President…shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.").

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

President's use of written directives. Some of President Clinton's claims of implied and inherent authority were outrageous.[14] The U.S. Court of Appeals for the District of Columbia Circuit struck down one of his executive orders that was based on such an overly broad claim,[15] demonstrating that a President's claim that he is exercising inherent constitutional power will not always prevail. But when the President really is exercising a legitimate constitutional power—for example, his authority as Commander in Chief—Congress and the courts have little or no say in how the President communicates his commands.

Legitimate Uses of Presidential Directives

As the foregoing discussion suggests, there are many legitimate uses of presidential directives. The following functions of the President expressly mentioned in the U.S. Constitution are among the more important under which the President may issue at least some directives in the exercise of his constitutional and statutorily delegated powers:

- Commander in Chief.[16] The President's power as Commander in Chief is limited by other constitutional powers granted to Congress, such as the power to declare war, raise and support the armed forces, make rules (i.e., laws) for the regulation of the armed forces, and provide for calling forth the militia of the several states. However, the President's power as military commander is still very broad with respect to the armed forces at his disposal, including some situations in which Congress has not acted to declare war.
- Head of State.[17] The President is solely responsible for carrying out foreign policy, which includes the sole power to recognize foreign governments, receive foreign ambassadors, and negotiate treaties. Congress may enact laws affecting foreign policy, and two-thirds of the Senate must ratify any treaty before it becomes binding law, but Congress must still leave the execution of foreign policy and diplomatic relations to the President.
- Chief Law Enforcement Officer. The President has the sole constitutional obligation to "take care that the laws be faithfully executed,"[18] and this grants him broad discretion over federal law enforcement decisions. He has not only the power, but also the responsibility to see that the Constitution and laws are interpreted correctly.[19] In addition, the President has absolute prosecutorial discretion in declining to bring criminal indictments. As in the exercise of any other constitutional power, one may argue that a particular President is "abusing his discretion," but even in such a case, he cannot be compelled to prosecute any criminal charges.
- Head of the Executive Branch. The Framers debated and rejected the creation of a plural executive. They selected a "unitary executive" and determined that he alone would be vested with "[t]he executive power" of Article II. After much debate, the Framers also determined that the President would nominate and appoint (with the Senate's consent in some cases) all officers in the executive branch. With

13. See, e.g., *United* States v. *Nixon*, 418 U.S. 683, 705–713 (1974) (recognizing constitutional protections for the executive branch deliberative process); *In re: Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (same).
14. See *infra*, "The Legal Framework of Analysis."
15. *U.S. Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1332–1337 (D.C. Cir. 1996).
16. U.S. Const., Art. II, § 2, cl. 1.
17. U.S. Const., Art. II, § 2, cl. 2, and § 3.
18. U.S. Const., Art. II, § 3.
19. *Myers* v. *United States*, 272 U.S. 52, 164 (1926); *Public Citizen* v. *Burke*, 843 F.2d 1473, 1477 (D.C. Cir. 1988) ("[T]he incumbent President, by virtue of Article II's command that he take care that the laws be faithfully executed, quite legitimately guides his subordinates' interpretation of statutes."). See, generally, Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 Cardozo L. Rev. 201 (1993).

very few exceptions, all appointed officials who work in the executive branch serve at the will and pleasure of the President, even if Congress has specified a term of years for a particular office.[20] All of this was designed to ensure the President's control over officials in the executive branch[21] and to promote "energy in the executive."[22]

When the President is *lawfully* exercising one of these functions,[23] the scope of his power to issue written directives is exceedingly broad. In short, he may issue or execute whatever written directives, orders, guidelines (such as prosecutorial guidelines or nondiscriminatory enforcement policies), communiqués, dispatches, or other instructions he deems appropriate.

The President also may issue directives in the exercise of his statutorily delegated authority, unless Congress has specified in law that the statutory power may be exercised only in a particular way. A few examples of Congress's conditional grant of statutory authority are mentioned herein, but as previously explained, there are limits to how far Congress can go in an attempt to micromanage even the President's statutorily delegated authority.[24] For example, Congress can grant the President (or his Attorney General) the authority to deport certain illegal aliens, but it cannot attempt to retain a veto over the final decision as it tried to do in the Immigration and Nationality Act.[25]

In sum, a President has broad discretion to use written directives when he is lawfully exercising one of his constitutional or statutorily delegated powers. Any broad power or discretion can be abused, but it would be wrong to confuse such potential or real abuse with the many legitimate uses.

THE LEGAL FRAMEWORK OF ANALYSIS

President Abraham Lincoln used presidential directives to run the early months of the Civil War, presenting Congress with the decision either to adopt his practices as legislation or to cut off support for the Union army. Within his first two months in office, on April 15, 1861, Lincoln issued a proclamation activating troops to defeat the Southern rebellion and for Congress to convene on July 4. He also issued proclamations to procure warships and to expand the size of the military; in both cases, the proclamations provided for payment to be advanced from the Treasury without congressional approval. These latter actions were probably unconstitutional, but Con-

20. For a detailed discussion of the President's power to fire executive branch officers at will, see *Myers* v. *United States*, 272 U.S. 52 (1926). The majority opinion in *Myers* was written by the only person (William Howard Taft) to be both a Justice of the Supreme Court and President. But see also *Morrison* v. *Olson*, 487 U.S. 654 (1988) (recognizing one of the rare exceptions to at-will dismissals for independent counsels in the now expired Ethics in Government Act). I believe that *Morrison* was wrongly decided and that this rare exception should not exist, but a detailed discussion of this area of constitutional law is beyond the scope of this memorandum.

21. See *Myers*, *supra*, 272 U.S. at 135–164. The Court explained that the President must "supervise and guide" executive officers and exert largely unfettered "general administrative control [over] those executing the laws." Congress sometimes operates under the mistaken view that by vesting statutory authority in an agency head, it can insulate the implementation decisions from presidential control. Except for the erroneous exception carved out in *Morrison* (see note above), this view of agency autonomy simply cannot withstand constitutional scrutiny.

22. *Federalist No. 70* ("Energy in the executive is a leading character in the definition of good government.").

23. The legal framework for determining whether the President's directives or actions are substantively lawful is discussed *infra*.

24. For a thoughtful discussion of what Congress can and cannot do to limit the President's executive order powers, see testimony of Douglas R. Cox, Principal Deputy Assistant Attorney General, U.S. Department of Justice, 1992–1993, before the Subcommittee on the Legislative and Budget Process, Committee on Rules, U.S. House of Representatives, 106th Cong., 2nd Sess., October 27, 1999.

25. *I.N.S.* v. *Chadha*, 462 U.S. 919 (1983) (holding that Congress's attempt to retain a veto over the statutory discretion of the executive branch violated the constitutional separation of powers).

gress acquiesced in the face of wartime contingencies, and the matters were never challenged in court.

During his time in office, President Franklin Roosevelt greatly expanded the use of executive orders, partly in response to the growth of government and partly in response to the demands placed on him as Commander in Chief during World War II. Unfortunately, FDR also showed a tendency to abuse his executive order authority and claim powers that were not conferred on him in the Constitution or by statute.[26] President Harry Truman followed this pattern of governing by executive order. Some of President Truman's executive orders were to his credit, such as the integration of the armed forces,[27] and some were to his shame, such as the attempted seizure of the steel industry during the Korean conflict.[28]

The Supreme Court's opinion in the "Steel Seizure Case" striking down Truman's executive order,[29] as well as subsequent practice, helped create a workable understanding regarding when a President's executive order authority is and is not valid. A slight modification of Justice Robert Jackson's famous framework of analysis is as follows: The President's authority (to act or issue an executive order) is at its apex when his action is based on an express grant of power in the Constitution, in a statute, or both. His action is the most questionable when there is no grant of constitutional authority to him (express or inherent) and his action is contrary to a statute or provision of the Constitution. Although this framework of analysis is a helpful starting point, a deeper understanding still requires a substantive knowledge of the relevant statutory law and a President's and Congress's constitutional powers.

For example, a careful review of the substantive law shows why President Truman's desegregation of the armed forces was proper notwithstanding Congress's constitutional authority regarding the military. Congress has the power to create or abolish the military forces, and it has the power to "make Rules for the Government and Regulation" of the military,[30] including the Uniform Code of Military Justice. Congress's constitutional power permits it to establish standards for the induction of soldiers, including height, weight, and age restrictions. When Congress has acted pursuant to its constitutional authority and its act does not violate any other provision of the Constitution, its rules govern who shall serve in the military, what their pay and retirement age shall be, etc.

But when President Truman desegregated the armed forces, he was not interfering with any congressional power over induction or any military rules of conduct.[31] President Truman exercised his authority as Commander in Chief to assign individual soldiers lawfully in his command to units that he deemed appropriate. Truman also had a

26. For example, Executive Order (E.O.) No. 9066 authorized the military internment of many Japanese–Americans during World War II. The Supreme Court upheld this executive order, based in part on the discretion the Court gave to the Commander in Chief. Some scholars cite the Court's opinion as proof that the internment was constitutional. Nevertheless, I submit that the Supreme Court was wrong (whereas deportation of certain non-citizens and non-permanent alien residents may have been legal if they were accorded due process of law). In any event, the order certainly reflects an extreme and unprecedented claim of authority over the lives of ordinary Americans based on a tenuous link to the President's inherent military authority.

27. E.O. No. 9981.

28. E.O. No. 10340.

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

30. U.S. Const., Art. I, § 8, cls. 12–15.

31. The constitutional grants of authority to Congress mentioned above, however, are more relevant to the question of whether a President may permit openly homosexual soldiers to enlist in the military if that were contrary to a congressional enactment. That question is beyond the scope of this memorandum, but under current law, the legal analysis under Articles I and II and the Fourteenth Amendment of the Constitution would be quite different from that regarding desegregation of those soldiers lawfully serving in the armed forces.

constitutional duty to stop government racial discrimination.[32] Thus, even if Congress wanted to override the desegregation order, it possessed no authority to tell the President how to detail or utilize the soldiers already in his command, and the President had an obligation to end racial discrimination. This example demonstrates that an application of the legal framework requires careful attention to the underlying constitutional and statutory powers of each branch.

There may be close cases in which the validity of the executive order is uncertain, such as when a claim of inherent constitutional authority is arguable and where Congress has been silent or its will is unclear. Nevertheless, Presidents since Truman were generally more careful to stay within their constitutional and statutory grants of authority in the exercise of their executive order authority—until the Administration of President Clinton. Although the number of illegal executive orders issued by President Clinton does not constitute a large percentage of his total of 364, the pattern of illegal orders, often without any claim of statutory or constitutional authority, is still striking. The clearest example was Clinton's "striker replacement" executive order. The legal decision it spawned provides additional guidance in determining the legality of future executive orders and thus is worthy of a brief discussion.

In 1993, President Clinton urged Congress to enact a statute that would prohibit employers from hiring permanent replacements for workers who are on strike. The right to hire such permanent replacement workers was firmly established in the National Labor Relations Act (NLRA) and in decisions of the U.S. Supreme Court. Congress refused to authorize the change in law in 1993–1994. Shortly after Republicans gained control of Congress in 1995, the President issued Executive Order 12954 in an attempt to achieve through executive fiat what he could not achieve through legislation. Clinton claimed authority under the Federal Property and Administrative Services Act (the "Procurement Act")[33] to require all large government contractors, which employed roughly 22 percent of the labor force, to agree not to hire permanent replacements for lawfully striking employees.

The United States Court of Appeals for the District of Columbia Circuit unanimously overturned the executive order and the implementing regulations that had been issued by the Secretary of Labor.[34] The court first determined that it had jurisdiction over the case despite what the court described as President Clinton's "breathtakingly broad claim of non-reviewability of presidential actions." In short, the court said that it did not have to defer to the President's claim that he was acting pursuant to lawful authority under the Procurement Act. On the merits, the court ruled that since the NLRA "undoubtedly" grants an employer the right to hire permanent replacements for striking workers, it would not read the general purposes of the Procurement Act as trumping this specific right of employers. The court distinguished Executive Order 11246 (which guaranteed equal employment opportunities) and Executive Order 12092 (which restricted wage increases for government contractors) as not being in conflict with any other statute.

The striker replacement case stands for the seemingly obvious proposition that the President may not use his statutory discretion in one area to override a right or duty established in another law. As a legal matter, however, it does not stand for the proposition that the President may not use his statutory discretion in one area to advance other lawful policy goals. Whether it is wise to do so is a

32. The Supreme Court has determined that this constitutional command applies to the federal government even though the Fourteenth Amendment's equal protection clause prohibits only state discrimination. Although some still question the proper font of this constitutional obligation, it is now well-established in precedent that the federal government is equally bound by the same nondiscrimination principle.

33. 40 U.S.C. §§ 471–514.

34. The implementing regulations were "Permanent Replacement of Lawfully Striking Employees by Federal Contractors," *Federal Register*, Vol. 60 (1995), p. 27856.

Table 1 LM2

Categories of Executive Orders and Proclamations

Categories	Examples
Legal	Most government reorganization orders; most presidential study commissions
Illegal and Improper	Clinton's "striker replacemnt" order; the American Heritage River Initiative; the Clinton directive regarding *Adarand* not to end unconstitutional racial preference programs
Improper (possibly illegal)	Clinton's designation of "monuments" under the Antiquities Act (possibly illegal in scope or if done for an illegal purpose)

separate question. Some thoughtful people have argued that a President ought not to use his procurement power or similar administrative discretion to promote unrelated policy goals, but that is a political and prudential matter about which reasonable people can differ.

Lawful Orders, Bad Policy

A narrow focus on illegal executive orders, however, would not include many arguably legal orders that are still highly improper as a matter of policy. This distinction between illegal and improper executive orders is important for a variety of reasons. While almost all of President Clinton's illegal executive orders were in furtherance of an improper policy or political objective, many of the most objectionable are within the outer bounds of what is legal. President Bush should carefully review and rescind or revise both types of "bad" executive orders, but his legal duty and his policy options in doing so might be affected by this distinction. Thus, it is helpful to keep the various categories of executive orders and proclamations in mind (see Table 1).

In addition to the legal evaluation, two broad questions mentioned earlier may help guide the policy evaluation: (1) whether a given power the President possesses ought to be used to advance a particular policy objective, and (2) whether a particular draft directive effectively or appropriately advances such a policy goal. The first question raises issues of precedent and macro-policy; the second raises issues of drafting and prudence.

Types of Presidential Directives

Most presidential directives fit into one of two functional categories represented by the two types of directives issued by President Washington in 1789.[35] One broad category includes documents with written instructions from the President to executive branch officials on how they are to carry out their duties. Most executive orders fall into this category. Another category includes written statements that communicate a presidential decision or declaration to a broad group of people that might include government officials, the general public, or even foreign governments. Most presidential proclamations fall into this second category.

Not much turns on even this distinction, however, because different types of directives can have the same effect. Some statutes delegating authority to the President provide that he must exercise that authority by issuing a particular type of directive—such as an executive order or a proclamation. But there is no statute or other authority that defines different presidential directives or distinguishes one type from another. Apart from tradition, historical usage, and a few words common to each device (such as the title), there are no rules

35. As explained below, this categorization may provide a better understanding of the uses and functions of presidential directives, but it does not follow from any particular legal distinction.

regarding the substance of each directive. In short, a President can comply with a statute that requires him to make a particular statutory determination by proclamation simply by placing the word "Proclamation" at the top of the document and using a phrase like "it is hereby proclaimed" somewhere in the text before the determination.

The distinction between executive orders and proclamations was even less clear in other eras. President Abraham Lincoln directed much of the early Civil War by proclamation, including calling forth the militia. Calling forth the militia is now typically accomplished by executive order.[36] In 1862, President Lincoln issued the first formally designated "executive order." But later that year, he ordered federal officials not to return captured former slaves to the states in rebellion in his "Emancipation Proclamation."[37] In sum, there is not much that distinguishes Lincoln's executive orders from his wartime proclamations—apart from the title. Likewise, President Andrew Johnson could have issued an executive order (instead of a proclamation) on Christmas Day 1868 that all public officials recognize and give effect to his decision to pardon all persons recently in rebellion. Modern practice has delineated the borders of these devices somewhat more, but there is little to constrain a President from departing from the modern practice.

The presidential "signing statement" demonstrates that hybrid directives are even harder to categorize. Presidents often issue such written statements when they sign a bill into law. Presidential signing statements are themselves a type of directive, but they can incorporate language similar to that in an executive order or a presidential proclamation. For example, some signing statements identify a provision of the bill that the President believes is unconstitutional and instructs executive branch officials not to enforce the provision.[38] Assuming the President has this power—and the author believes he does[39]—the wording of his signing statement should not matter. A signing statement ordering all executive branch officials not to enforce a particular provision in the statute because it is unconstitutional would have the same effect as a signing statement in the form of a proclamation to all concerned that the President believes a particular provision to be null and void. A faithful servant in the executive branch ought to give both statements the same effect. An official outside the executive branch ought to give both statements the same deference, regardless of what level of deference that is.

36. See, e.g., E.O. No. 13120 (1999) (ordering reserve units into active duty in NATO's campaign in Yugoslavia). See also E.O. No. 13088 (1998) (prohibiting trade with Yugoslavia, Serbia, and Montenegro) and E.O. No. 13119 (1999) (designating Yugoslavia and Albania as war zones).

37. The Emancipation Proclamation ordered the "Executive Government of the United States, including the military and naval authorities thereof, [to] recognize and maintain the freedom of" those set free by the Proclamation. See the Emancipation Proclamation, September 22, 1862 (original Proclamation), and January 1, 1863 (final Proclamation).

38. Presidents since John Tyler have claimed this power and increasingly have exercised it during the past 50 years. See Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 Cardozo L. Rev. 337, 347–359 (1993).

39. Although there is controversy surrounding this practice, it should be defended in appropriate circumstances. The President has an obligation not to enforce a particular provision of a law that is unconstitutional, although the President can sometimes interpret the statute to avoid the constitutional infirmity. See Kmiec, *OLC's Opinion Writing Function*, at 347–359. See generally *Who Speaks for the Constitution? The Debate Over Interpretive Authority*, Federalist Society *Occasional Paper* No. 3 (1992) (on file with The Heritage Foundation and available from The Federalist Society). The President has a duty to try to defend the constitutionality of congressional acts if that is reasonably possible, but his ultimate oath is to defend the Constitution. When no reasonable defense of a provision is possible, the President is obliged to disregard the unconstitutional provision without waiting for a court to confirm his view. When only one provision or section of a statute is in question and it is "severable" from the rest, the President's position is analogous to that of a court which must treat an unconstitutional provision as null and void but may sign and enforce (or uphold, in the case of a court) the remainder of the statute. See Kmiec, *OLC's Opinion Writing Function*, at 347–352.

Many Forms of Directives. One scholar has identified 24 different types of presidential directives,[40] although even his list is incomplete. A partial list includes administrative orders; certificates; designations of officials; executive orders; general licenses; interpretations; letters on tariffs and international trade; military orders; various types of national security instruments (such as national security action memoranda, national security decision directives, national security directives, national security reviews, national security study memoranda, presidential review directives, and presidential decision directives); presidential announcements; presidential findings; presidential reorganization plans; presidential signing statements; and proclamations.

Despite the specialized settings in which some of these directives are used, it is a bit misleading to overclassify presidential directives as comprising separate and distinct "types" just because they have different headings at the top of the first page. The distinctions between some of these directives are merely convenient or the result of an arbitrary bureaucratic evolution. As the list of directives also demonstrates, a new President and a creative bureaucracy could come up with 24 new "types" if they wished to do so.

There are, however, some practical constraints that limit, or at least influence, a President's decision on which form of directive to use. As mentioned earlier, tradition and historical practice will often lead to a particular choice. For example, a President will probably want to use a published executive order to repeal or modify a previously published executive order. Political considerations may also weigh in favor of a more or less public directive. But unless a statute requires a President to use one form of directive in the exercise of his statutory (as opposed to constitutional) authority, the President can revoke or modify a previous directive or issue a new one orally or in any written form he chooses. To a military officer in the field of battle, telephone calls, cables, or handwritten notes from the President are, and should be, equally compelling orders.[41]

Despite the variety of directives used, there are sound reasons why scholars focus most of their attention on executive orders and presidential proclamations. Executive orders and presidential proclamations are the forms most frequently used by Presidents to convey important decisions that affect the general public. Because better records have been kept of executive orders and proclamations, it is also possible to compare the relative use of them by different Presidents. In addition, most other presidential directives can be analogized to a typical executive order or presidential proclamation, so the discussion of them can be applied elsewhere.

Procedures for Issuing Proclamations and Executive Orders. The federal law governing presidential decrees is sparse. Since 1935, a federal statute provides that presidential proclamations and executive orders "of general applicability and legal effect" must be published in the *Federal Register* unless the President determines otherwise for national security or other specified reasons.[42] In addition, some federal statutes that delegate statutory authority to the President require him to exercise that authority through the issuance of a particular type of directive, generally a published proclamation or an executive order. Other than these few rules, a President is free to adopt proce-

40. See generally Relyea, *Presidential Directives*.

41. We can imagine a hypothetical military command to disregard any subsequent order unless it is delivered in a particular way or accompanied with a secret code. But in such cases, the President himself has attempted to limit his future options to ensure the authenticity of future orders. That does not undermine the normal validity of any particular type of order. As an aside, it is also far from clear in the hypothetical above whether a subsequent order that appears to be authentic but violates the protocol should always be disregarded. For examples of how Hollywood has portrayed this dilemma (which is a lot more fun than a legal discussion), compare *Fail Safe* (in which the refusal to follow the President's nonconforming oral command to abort a bombing run leads to the nuclear annihilation of Moscow and New York City) with *Crimson Tide* (in which Denzel Washington's arguably mutinous act to disregard the firing protocol saves the world from nuclear holocaust).

42. That statute is now codified at 44 U.S.C. § 1505.

dures regarding the issuance and publication of directives as he sees fit.

For over 100 years, the President has asked the Attorney General or another senior official in the Department of Justice to review draft executive orders and proclamations with regard to their form and legality. Since 1962, the proper form and routing of executive orders and proclamations has been governed by Executive Order 11030, which makes the Director of the Office of Management and Budget responsible for shepherding such directives through the process.

The Attorney General's review responsibility is currently delegated to the head of the Office of Legal Counsel (OLC) in the Department of Justice. OLC staff attorneys work with lawyers in the Office of Management and Budget, the Office of White House Counsel, and the originating agency (if there is one) to ensure that the draft order or proclamation is legal and in the proper form. Once the order or proclamation is revised to his satisfaction, the Assistant Attorney General for OLC transmits it with a formal letter that dates back to the 19th century. The letter begins with the salutation "My dear Mr. President." It summarizes the proclamation or order in a few paragraphs and then assures the President that the document for his signature has been approved with regard to form and legality.

Some directives, including many military and national security orders, remain secret unless and until they are declassified. Others may not be secret, but they are not published either. Many presidential designations of officials, such as a White House special assistant to the President, are so routine that they do not merit publication. Of increasing use and importance are "presidential memoranda to the heads of executive departments and agencies." These memoranda also are rarely published, but some of them are more important than many executive orders that are published.

It is worth keeping in mind that a President may use one of the less public types of directives in almost any circumstance in which he could issue a published executive order or presidential proclamation. In some instances, President Clinton may have selected a memorandum format for political reasons precisely because he did not want to draw heightened attention to his act. President Clinton's initial instruction to allow open homosexuals in the military[43] and his order to allow abortions to be performed on military bases overseas[44] were issued by memorandum. Thus, it is unwise to arbitrarily exclude nontraditional directives, such as memoranda, when examining a President's rule by executive decree. That said, a review of published directives will include most of the important directives that affect the public.

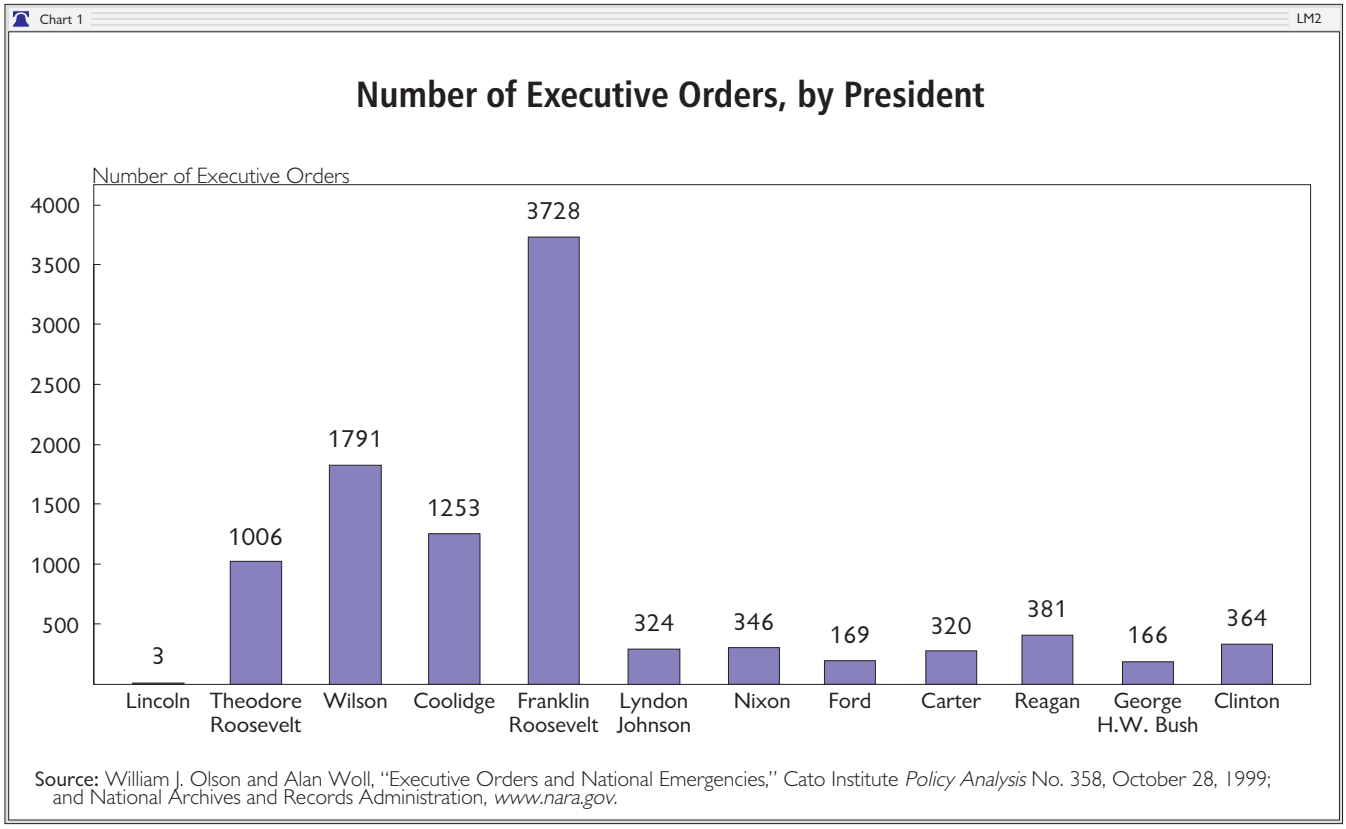
Presidential Proclamations and Executive Orders by the Numbers

More than 7,300 presidential proclamations have been issued since 1789. Although they were not numbered sequentially until early in the 20th century, the earlier proclamations have been numbered retroactively, and newer ones are assigned a number upon issuance. As is discussed elsewhere, the overwhelming number of modern proclamations are ceremonial or hortatory, such as the commemoration of Thanksgiving or recognition of some particular interest. The two exceptions in modern practice do not make up a significant number of the total: declarations of emergency and land regulations under the Antiquities Act of 1906. Both are discussed further in this memorandum.

President Abraham Lincoln is credited with issuing the first directive called an "executive

43. On January 29, 1993, President Clinton ordered certain immediate changes in the military policy toward homosexual service members and directed the Secretary of Defense to prepare a draft executive order on the subject. See White House Press Documents on file with The Heritage Foundation. After a firestorm of protest, the Administration compromised on its position and had the Secretary of Defense issue a July 19, 1993, memorandum to the Service Secretaries and the Chairman of the Joint Chiefs of Staff instituting the "don't ask, don't tell" policy.

44. See Robin Toner, "Settling In: Easing Abortion Policy; Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush," *The New York Times*, January 23, 1993, p. 1.



Source: William J. Olson and Alan Woll, "Executive Orders and National Emergencies," Cato Institute *Policy Analysis* No. 358, October 28, 1999; and National Archives and Records Administration, *www.nara.gov.*

order" in 1862. Approximately 13,200 executive orders have been issued since then.[45] Chart 1 shows that the number of executive orders issued by recent Presidents has not matched that of Presidents in the early and mid-20th century. This is true even if the figures are adjusted to reflect the length of service in office. President Franklin Roosevelt, who served for over three terms, still issued more executive orders per year than did any other President.

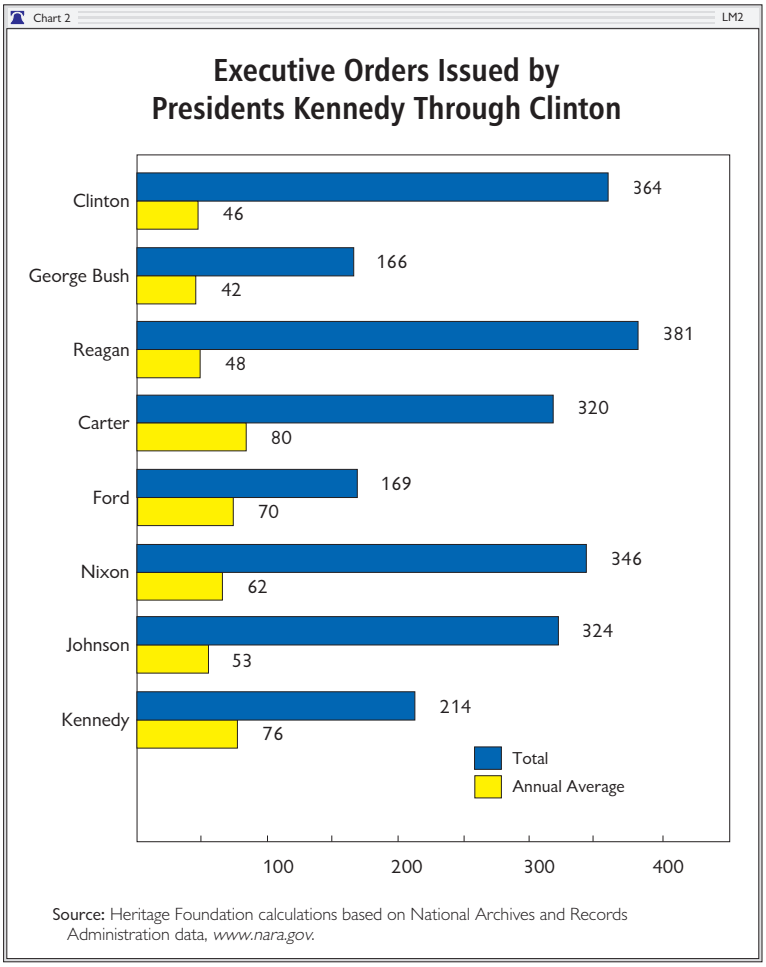
However, there is reason to be cautious in comparing the executive order output of Presidents from different eras, even in the same century. President Franklin Roosevelt was Commander in Chief during most of World War II. A wartime period will likely reflect many mobilization orders that are not applicable in other periods. In addition, the President's National Security Council was not created until 1947, and many of the specialized directives that it now drafts were not developed until recent Administrations.[46] Thus, many of the executive orders issued by FDR might take some other form in a modern Administration. Many of these same considerations apply to other Presidents in the early and mid-20th century.

45. Proclamations and executive orders were not numerically designated before 1907. In that year, a numbering convention was adopted. Existing proclamations and executive orders on file were numbered retroactively. In a few cases, executive orders discovered later were designated in the appropriate sequence with an extra letter or number, such as 1A or 28–1. Subsequent proclamations and executive orders have been numbered sequentially upon issuance.

46. Since the formation of the National Security Council (NSC), American Presidents frequently have issued directives through the NSC to direct their foreign policy agenda. Although these directives are not counted as executive orders, their effect can be the same. Different Administrations have given such directives different names: NSC policy papers (Truman and Eisenhower), National Security Action Memoranda (Kennedy and Johnson), National Security Decision Memoranda (Nixon), Presidential Directives (Carter), National Security Decision Directives (Reagan), National Security Directives (George H. W. Bush), and Presidential Decision Directives (Clinton). No matter what their name, these presidential directives are usually classified, and Congress is rarely notified of their existence, although there is some precedent for providing copies or briefings when specifically requested.

Although presidential executive order practices continue to evolve with each Administration, it is reasonable to make at least rough comparisons of the Presidents since 1960. Chart 2 shows that on an annualized basis, President Carter outpaced other recent Presidents in the sheer number of executive orders issued. On an annualized basis, President Clinton did not issue a significantly different number of executive orders than did Presidents Reagan or Bush.

But as the next section shows, the overwhelming majority of directives, including executive orders, are routine and few have significant policy implications beyond the executive branch. Thus, it would be a mistake to conclude that the number of executive orders or proclamations is a reliable indicator of whether a particular President has abused his executive order authority. In fact, a more careful review of executive orders suggests no correlation between the overall number of executive orders issued and the legitimacy of individual orders. The true measure of abuse of authority is not the overall number of directives, but whether any orders were illegal or abusive, and if so, how many and of what significance.



Source: Heritage Foundation calculations based on National Archives and Records Administration data, *www.nara.gov.*

A SURVEY OF CLINTON PROCLAMATIONS AND EXECUTIVE ORDERS

The vast majority of modern presidential directives are routine or have little direct effect on the lives of citizens outside government. This holds true even for executive orders and presidential proclamations, which tend on average to have a greater impact on the public than do other directives. A review of President Clinton's proclamations and executive orders (881 and 364, respectively)[47] reveals some similarities and some important differences between Clinton's practices and those of his two predecessors.

Proclamations

President Clinton used his proclamation authority in many of the same ways as had previous Presidents. Many of his proclamations are hortatory and thus noncontroversial. For example, President Clinton issued an annual Thanksgiving Proclamation and proclaimed that certain days, weeks, and months would commemorate or recognize some cause (e.g., American Heart Month).

President Clinton's most significant departure from President Reagan and President George H. W. Bush was his use (and abuse) of his powers under the Antiquities Act of 1906 to designate millions of acres of federal land as protected national monuments. The most controversial was Proclamation 6920, which established the 1.7 million-acre Grand Staircase–Escalante National Monument in

47. Heritage calculations derived from National Archives and Records Administration data, *at http://www.nara.gov* (February 7, 2001).

Utah, but other designations are equally outrageous. (See Table 2.) Since the law was passed, Presidents have established over 100 monuments, covering 70 million acres.

President Clinton's proclamations have been highly controversial particularly with respect to the monuments' size, the process used to establish them, and restrictions on the use of the land. The Antiquities Act requires that monuments be "the smallest area compatible with the proper care and management of the objects to be protected."[48] With only a few exceptions, including the 10,950,000-acre Wrangell–St. Elias National Monument created by President Carter in 1978, most monuments are relatively small (less than 5,000 acres). All of President Clinton's proclamations, however, cover very large areas of land.

President Clinton also proclaimed the Grand Staircase–Escalante Monument with insufficient public participation and arguably without adequate due process. Although the Antiquities Act may appear to grant this authority at first blush, inconsistencies between the Act and other laws that establish various notice and hearings processes raise important questions about the appropriate processes for designating monuments.[49] Legitimate questions also exist about the applicability of the environmental review and due process requirements of the National Environmental Policy Act (NEPA).[50]

While presidential proclamations creating national monuments do not usually result in the outright taking of private lands (they only change the form of control over lands already owned by the federal government), they can restrict activities on the land, such as mining, grazing, or timber harvesting, that is deemed to conflict with the intended purpose of the monument. The monuments created by President Clinton were intended to restrict significantly the use of natural resources. They prevent almost all future uses of the land and may work as a partial taking of mining, grazing, and timber leases owned by private individuals. This is one of the main reasons President Clinton was urged to grant monument status to certain parts of the Arctic National Wildlife Refuge just before he left office.

Several organizations have mounted legal challenges against President Clinton's proclamations. For example, the Utah Association of Counties, Utah Schools and Institutional Trust Lands Administration, and Mountain States Legal Foundation filed challenges against the designation of the Grand Staircase–Escalante National Monument.[51] They have raised questions about violations of the Antiquities Act; the relative authority of the Congress, President, and Secretary of the Interior to withdraw lands from public use; the application of mining and mineral leasing laws; procedural and substantive issues under NEPA and the Federal Land Policy and Management Act (FLPMA); the lawful size of the monuments; and the nature of the resources being protected.

Of particular importance is whether President Bush or any future President has the authority to reverse a proclamation establishing a national monument. Though he may be able to modify or narrow the boundaries of an existing national monument, the authority to rescind a proclamation is less clear. Past Presidents have modified national monuments, but none has reversed the designation of an existing monument. A recent Congressional Research Service report, "Authority of a President to Modify or Eliminate a National Monument," discusses this issue.[52] Although the

48. 16 U.S.C. § 431.

49. See, e.g., the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 et seq. (FLPMA).

50. 42 U.S.C. § 4321 et seq. (NEPA).

51. For a more detailed discussion of these cases, see Carol Hardy Vincent and Pamela Baldwin, "National Monuments and the Antiquities Act," Congressional Research Service, *CRS Report for Congress* No. RL30528, April 17, 2000, at *http://www.cnie.org/nle/pub-15.html*.

52. See Pamela Baldwin, "Authority of a President to Modify or Eliminate a National Monument," Congressional Research Service, *CRS Report for Congress* No. RS20647, August 3, 2000.

Table 2 LM2

Monuments Designated by President Clinton by Proclamation

Proclamation	Date	Monument	Acres
6920	September 18, 1996	Grand Staircase-Escalante	1,700,000
7263	January 11, 2000	Agua Fria	71,100
7264	January 11, 2000	California Coastal	840 miles*
7265	January 11, 2000	Grand Canyon-Parashant	1,014,000
7266	January 11, 2000	Enlargement of the Pinnacles	7,900
7295	April 15, 2000	Giant Sequoia	327,769
7317	June 9, 2000	Canyons of the Ancients	164,000
7318	June 9, 2000	Cascade Siskiyou	52,000
7319	June 9, 2000	Hanford Reach	195,000
7320	June 9, 2000	Ironwood Forest	128,917
7373	November 9, 2000	Enlargement of Craters of the Moon	661,287
7374	November 9, 2000	Vermilion Cliffs	293,000
7392	January 17, 2001	Boundary Enlargement and Modifications of the Buck Island Reef	18,135**
7393	January 17, 2001	Carrizo Plain	204,107
7394	January 17, 2001	Kasha-Katuwe Tent Rocks	4,148
7395	January 17, 2001	Minidoka Internment	72.75
7396	January 17, 2001	Pompeys Pillar	51
7397	January 17, 2001	Sonoran Desert	486,149
7398	January 17, 2001	Upper Missouri River Breaks	377,346
7399	January 17, 2001	Virgin Islands Coral Reef	12,708**
7402	January 20, 2001	Governors Island	20
		Total Acres	**5,686,767*** **

Note: *Excludes California Coastal because total acreage cannot be readily calculated. **Figure is denoted in marine acres. ***Total exludes California Coastal acreage and marine acres.
Source: National Archives and Records Administration, *www.nara.gov*.

matter is not entirely free from doubt, I believe a President can at least rescind any prior designation under the Antiquities Act that was improper.

In addition, various legislative proposals for addressing the issues raised by President Clinton's proclamations were introduced in the last Congress.[53] They focused principally on modifying the Antiquities Act and sought to ensure greater public consultation, environmental review, congressional approval, and other procedural protections.

With regard to his power under the Antiquities Act, President Bush should:

1. **Review** existing presidential authority to reverse designations of federal lands as national monuments;
2. **Examine** existing designations to determine whether modifications in the boundaries or the allowed uses are appropriate;
3. **Seek** (if necessary) congressional action to clarify presidential, congressional, and other executive branch authority to reverse or modify previously designated monuments; and
4. **Seek** congressional action to increase the public consultation, environmental review, and other procedures applicable to the creation of new monuments.

ADMINISTRATIVE ORDERS

Over half of President Clinton's executive orders (approximately 181) were routine administrative orders that can be broken down into the following groups or purposes:

- Organize/Reorganize the Executive Branch
  1. Establish Orders of Succession within Executive Agencies.

53. 106th Congress, specifically H.R. 1487 and S. 729.

2. Designate Officials in the White House and Executive Agencies.
3. Delegate Authority within the Executive Branch.
4. Create or Terminate Advisory Boards, Commissions, and Councils.

- Federal Personnel Decisions
  1. Establish Cost of Living Increases for the Civil Service.
  2. Recognize Government Holidays and Government Closures.

President Clinton issued dozens of executive orders to establish or terminate a particular federal advisory board, commission, or council (collectively referred to here as "commissions"). All recent Presidents have created similar commissions. Many of these commissions expire with the passage of time or by the completion of a final report, and President Bush is free to use or eliminate the rest. Indeed, each new President should review the list of such commissions to see how many still exist and what purpose they serve. Yet the creation, elimination, or consolidation of such commissions is unlikely to have a major policy impact on a new Administration.

Succession orders specify the hierarchy of authority within an agency and should be revised when Congress has modified or created new offices at the same level within the agency, such as the Assistant Secretary level. The typical order of succession lists the hierarchy by office rather than by office holder. In the Department of Justice, for example, the order of succession after the Attorney General is the Deputy Attorney General, the Associate Attorney General, the Solicitor General, then the Assistant Attorney General for the Office of Legal Counsel, and so forth. During Watergate, it was necessary for Solicitor General Robert Bork to become Acting Attorney General when the top two appointees stepped down during the so-called Saturday Night Massacre. The order of succession is invoked far more often for temporary assignments of responsibility when senior officials are on vacation or otherwise are unavailable due to vacancy in office, travel, illness, etc. President Bush is free to modify these succession orders but need not do so unless Congress modifies the principal offices within a particular agency. Once again, this is not a priority area.

Many designations of officials, such as those in the White House, and some delegations of authority will expire with the normal change in personnel at the beginning of a new Administration. The remaining designations of officials and delegations of authority will eventually come to the attention of officials in the Office of Presidential Personnel or the new Cabinet Secretaries. President Bush should review previous designations and delegations, but this should be done in an orderly fashion. In addition to those with responsibility for such matters within the White House, the President and his assistants should call upon the Justice Department's Office of Legal Counsel for legal advice on keeping agencies running smoothly during the first few months of the new Administration.[54]

Many of President Clinton's personnel executive orders were also routine. These include executive orders that establish pay scales, annual salary increases, and conditions for civil service or appointed positions.

SUBSTANTIVE ORDERS

Most of the remaining executive orders issued by President Clinton can be divided into five substantive categories: foreign and defense policy, environmental policy and natural resources, regulatory review, labor policy, and civil rights issues. These executive orders show the greatest break from past Administrations and include most of the controversial orders. Two other categories, government procurement and "emergency" orders, fre-

54. Although the appointment of the Assistant Attorney General for OLC should be one of the Administration's top priorities, the senior career attorneys who have been through a number of transitions prior to the Clinton Administration can be counted on to provide professional advice on a number of arcane legal doctrines relating to temporary delegations and acting appointments.

quently overlap with and frequently include these five substantive categories.[55]

President Clinton repealed a number of important executive orders issued by Presidents Reagan and Bush, who both had issued a variety of crosscutting executive orders calling on executive branch agencies to take important constitutional or institutional principles into account when they take regulatory action. The constitutional and institutional principles elevated by Presidents Reagan and George H. W. Bush were varied but fundamental. They included paying special attention to the cost and benefit tradeoffs of government regulation (Executive Order 12291, 1981); the constitutional structure of federalism with an instruction not to carelessly preempt state authority and law (Executive Order 12612, 1987); avoiding interference with the traditional family (Executive Order 12606, 1987); the constitutional guarantee against uncompensated takings of private property (Executive Order 12630, 1988); and the clarity of drafting regulations and whether any unclear rules would lead to costly and unnecessary law suits (Executive Order 12778, 1991).

President Clinton repealed all of these crosscutting executive orders. In some cases, he replaced them with weaker executive orders that purported to address the same goals. For example, his regulatory review executive order (Executive Order 12866, 1993) weakened the cost-benefit analysis that agencies are required to prepare for review by the Office of Management and Budget. President Clinton signed his initial federalism executive order (Executive Order 13083, 1998) in Birmingham, England, but it created such an outcry that he eventually suspended it and replaced it (Executive Order 13132, 1999).

The overarching themes of President Clinton's executive orders were:

1. **A relative shift** in foreign policy and national security from concerns about national interests to international arrangements;
2. **The promotion** of federal government control over environmental policy, with a corresponding disrespect for the rights of private property owners;
3. **The expansion** of federal regulatory power over various aspects of private life;
4. **The promotion** of organized unions' political agenda at the expense of government and consumer efficiency; and
5. **The promotion** of preferential treatment and quotas for certain racial and ethnic groups at the expense of equal treatment under law.

Foreign and Defense Policy. More than half of Clinton's substantive orders were in the area of foreign affairs or national defense policy. Presidential directives in the foreign and national security arena should focus on aligning American policy with the President's priorities to ensure the effective defense of the United States and its allies. To this end, one of the Bush Administration's first priorities should be to issue new directives that provide for the protection of American territory from the increasing threat of ballistic missile attack. An equally important priority is mandating a comprehensive review of the Clinton Administration's Presidential Decision Directives, with specific attention focused on areas that affect the strategic posture and peacekeeping commitments.

Environmental Policy. During his tenure, President Clinton issued approximately 40 executive orders related to the environment and natural resources, and made extensive use of executive orders to achieve his environmental policy and political objectives. Prior Presidents used executive orders, proclamations, or other administrative means to further environmental goals (the most notable recent example being President Nixon's creation of the Environmental Protection Agency), but few reached the level achieved during the Clinton Administration.

Although most of President Clinton's orders were drafted to appear as if they focus primarily on

55. For example, President Clinton attempted to use the government's procurement power to advance certain labor, environmental, and civil rights objectives, and invoked various emergency powers to achieve military and foreign policy goals as well as some domestic policy ends.

operations of the federal government, their clear intent was to affect the private marketplace, public behavior, and government policy at the state, local, and international levels. They ranged from actions that address comparatively straightforward matters of agency management to establishing environmental civil rights, linking environmental and trade policy, and using proclamations to establish national monuments or other protected areas.

Each executive order should be carefully reviewed to determine whether the current Administration should (1) allow it to continue; (2) revoke it or replace it with a new directive; (3) revise, supplement, or otherwise amend it; or (4) redirect agency implementation through a presidential memorandum or other action. Initially, the Bush Administration should reorient federal agency implementation of the existing orders. Certain orders, for example, have established interagency committees, comprised of Cabinet-level officers, that could be used to begin redirecting agency activity.

Regulatory Review. In 1993, President Clinton revoked several major executive orders, including Executive Order 12291, which had governed important oversight aspects of federal regulatory and policymaking processes since 1981. He replaced them with two orders that maintain many of the same underlying principles but contain important procedural and substantive flaws. Clinton's Executive Order 12866 on "Regulatory Planning and Review" currently governs the process for developing federal regulations. The Bush Administration may wish to replace the Clinton order with a stronger management tool that builds on Executive Order 12291 and incorporates other procedures to strengthen the President's ability to exercise authority over the rulemaking process. In the meantime, the requirements of E.O. 12866 (or any similar order) should be scrupulously enforced as part of an effort to see that the President can exercise his constitutional authority effectively.

Clinton's second Executive Order 13132 on "Federalism" (which replaced his failed Executive Order 13083) attempts to clarify the relative roles of the states and the federal government in a variety of regulatory and policy actions. Although President Reagan's federalism Executive Order 12612 (which President Clinton repealed) is still superior to either of Clinton's statements on federalism, action by Congress, the states, and the Supreme Court in the intervening years suggests there may be grounds to revisit the issue anew. With proper input from state and local officials, President Bush is in a good position to begin the process of ensuring that the national government does not unconstitutionally encroach on powers reserved to the states or interfere with individual rights of citizens.

Labor Policy. The Clinton Administration used labor-related executive orders and directives primarily to advance the political objectives and interests of its supporters in organized labor.[56] It also used these orders to create task forces to study a variety of workplace issues, to improve employment opportunities for disabled Americans, and to expand the number of groups covered by employment nondiscrimination executive orders.

The highest priority labor-related executive orders for the Bush Administration to review include (1) the financial reports that unions are required to furnish under the Labor–Management Reporting and Disclosure Act of 1959 (LMRDA) so that workers can more easily exercise their decision rights under *Communications Workers* v. *Beck*;[57] (2) the Birth and Adoption Unemployment Compensation regulation, which undermines the original intent of the Unemployment Insurance program;[58] and (3) all executive branch policies requiring federal contractors to enter into agreements with unions on construction projects.

56. One of the first executive orders (E.O. No. 12836) issued by President Clinton dealt with union-only federal contracts and union dues.

57. 29 U.S.C. Chapter 11. The *Beck* decision recognized that union employees may not constitutionally be required to pay the portion of their dues that is used for political activity.

58. *Federal Register*, Vol. 64, No. 232 (December 3, 1999), p. 67971.

Civil Rights. Approximately 18 executive orders contain a significant civil rights component. Of these, several are plainly unconstitutional because they attempt to impose preferential governmental treatment on the basis of race and ethnicity with no remedial justification. These unconstitutional orders should be revoked as soon as practicable and replaced with orders that ensure equal treatment and equal opportunity for all Americans. Another order should be issued to implement the Supreme Court's landmark decision in *Adarand Constructors, Inc*. v. *Peña* (1995), which held that all federal preference programs are presumptively unconstitutional. Despite the Clinton Administration's efforts to resist these and other court rulings, the Bush Administration should undertake a careful review of all federal preference programs, whether created by statute or regulation, and take action consistent with the *Adarand* ruling.

THE EFFECT OF PRESIDENTIAL DIRECTIVES ON PRIVATE CITIZENS

As the preceding section explains, many administrative directives either have no direct effect or have a trivial effect on the rights exercised by the general public. For example, a particular reporting structure or order of succession within the executive branch has no direct effect on the rights of private citizens even if it sometimes results in a different decision's being made.[59] Other directives may affect the general public but may be difficult or impossible to challenge, depending on a variety of factors.[60]

Political Questions and Matters Squarely Committed to Presidential Discretion

Presidential decisions that present "political questions," as that term has been defined in the law, or actions that are squarely committed to the President's discretion do not present justiciable issues for a court to resolve. There are some unresolved questions regarding a President's commitment of troops in an undeclared war, but they often present political questions that only Congress and the President can resolve. Whether the overall military action is authorized or not, however, a President's tactical military commands are committed to his sole discretion. Such tactical military commands simply are not subject to challenge, regardless of their effect on numerous people's lives.

A presidential pardon is another example of a decision squarely within the President's discretion.[61] President Thomas Jefferson believed that the Sedition Act of 1798 was unconstitutional, although the courts had upheld over 10 convictions under it. President Jefferson could not overturn the convictions, but he did drop the remaining prosecutions when he assumed office and pardoned the two individuals still in prison. Jefferson's pardons were not subject to challenge. Likewise, President Clinton's pardons of 16 Puerto Rican terrorists (FALN pardons) on August 11, 1999, and his many questionable pardons on January 20, 2001, are not subject to challenge in court—regardless of Clinton's alleged political or other improper motives in granting the pardons. The fact that the Sedition Act truly was unconstitutional[62] and Clinton's pardons were arguably corrupt still does not make one more or less subject to challenge. The congressional probe into

59. The executive branch "deliberative process" is also constitutionally protected for reasons founded in the President's executive authority and the separation of powers. See *United States* v. *Nixon*, 418 U.S. 683, 705–713 (1974) (recognizing constitutional protections for the executive branch deliberative process); *In re: Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997).

60. For a good discussion of this topic, see Bryan A. Liang, "'A Zone of Twilight': Executive Orders in the Modern Policy State," National Legal Center for the Public Interest, Washington, D.C., March 1999.

61. U.S. Const., Art. II, § 2, cl. 1; *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) ("[t]o the executive alone is entrusted the power of pardon").

62. President Jefferson issued his pardons in separate "clemency warrants" for David Brown and Thomas Callender. Brown had been convicted and sentenced by Justice Samuel Chase for publishing "false, scandalous, malicious, and seditious writings" against the United States. Callender was a famous pamphleteer convicted of "malicious writings."

President Clinton's FALN pardons was questionable unless Congress was willing to consider impeachment proceedings for an improper motive.[63] Even then, nothing can change the effect of a duly issued pardon.[64]

Delegations of presidential authority, in themselves, rarely alter public rights. Regardless of their effect on the public, most delegations of authority are squarely within the President's discretion and are thus immune from challenge. The Constitution provides for both principal and inferior officers to assist the President, and the President's authority to delegate portions of his executive power within the executive branch has been broadly construed. For example, Executive Orders 2877 (1918) and 12146 (1979) delegate to the Attorney General the responsibility to resolve legal disputes within the executive branch. Because the President possesses the power to interpret the law within the executive branch,[65] he may entrust some of that power to the Attorney General and order other federal officers and employees to abide by the Attorney General's opinion.[66]

Directives with Indirect Effects on the Public

Some directives may not be subject to judicial review if the effect on private citizens is indirect or if the directive is implemented through agency regulations or other agency action. Both President Reagan's and President Clinton's regulatory review executive orders (Executive Orders 12291 and 12866, respectively) are examples of orders with indirect effects on private citizens. The orders required regulatory agencies to prepare certain analyses of proposed rules and to take various factors into account in their regulatory decisions, and they allowed the Office of Management and Budget to oversee the rulemaking process. However, neither order altered the statutory obligations of the regulatory agencies to issue particular substantive rules. A citizen adversely affected by a regulation (or lack thereof) has the same judicial recourse regardless of the type of executive branch review the rule underwent. Thus, the citizen may challenge the resulting substantive rule but may not challenge the type of executive branch review it received.

The lack of judicial review to challenge a regulatory review executive order does not mean that such orders have no impact on the regulations issued. Presidents Reagan and Clinton would not have altered the type of review if they did not think it mattered. But it would be highly speculative to predict *ex ante* (assuming it can be discerned at all) what effect OMB review will have on

63. The House report on the FALN pardons does raise some troubling issues regarding the President's use of his pardon power. The report also contains letters from the Attorney General and the White House asserting their immunity from congressional oversight. See H. Rep. No. 488, 106th Cong., 1st Sess. (1999). See also *Public Citizen* v. *U.S. Department of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) ("Congress cannot interfere in any way with the President's power to pardon.").

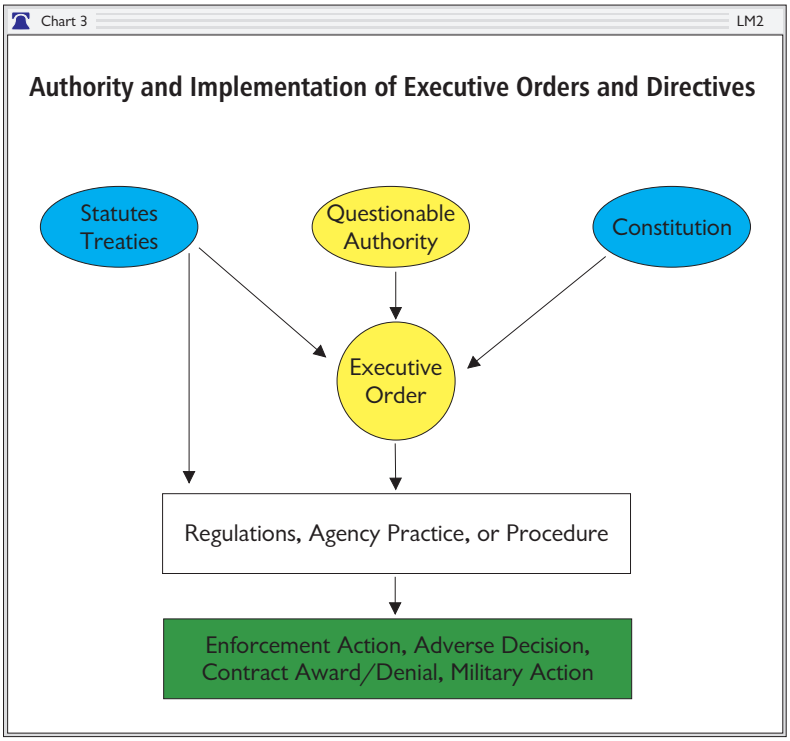
64. That said, if a President or his advisers accepted a bribe in exchange for granting a pardon, that would be a separate crime. The person offering a bribe would be equally subject to prosecution, unless the subsequent pardon discharged that liability as well. Nevertheless, it is still unclear what role Congress should take in investigating the Marc Rich or similar pardons by the former President. Impeachment is no longer an option, and Congress cannot dictate pardon review procedures to a future President. Finally, bribery allegations are usually best left to professional prosecutors and grand jury investigations.

65. Article II of the Constitution vests in the President "[t]he executive power," which includes the responsibility to "take care that the laws be faithfully executed." See Art. II, § 1, cl. 1, and Art. II, § 3. Moreover, the doctrine of "coordinate branch construction" holds that the President not only may interpret the law in situations where the courts have not issued an opinion binding on the government, but also is required to render independent judgment in many such cases. His duty is derived from the clauses cited above and aspects of the constitutional separation of powers. This conclusion is also reinforced by the debate at the Constitutional Convention, at which a council of revision was rejected. See generally *Symposium on Executive Branch Interpretation of Law*, 15 Cardozo L. Rev. 21–523 (1993).

66. See also 28 U.S.C. §§ 511–513, 521. The Attorney General subsequently delegated her statutory and executive order authority to issue binding legal opinions to the Department of Justice, Office of Legal Counsel. 28 U.S.C. § 510; 28 CFR § 0.25.

a particular rule in the future. More important, the type of executive branch review, in itself, does not alter the rights of the private citizens who are regulated to challenge the regulation directly in court.

Some executive orders explicitly instruct an agency head to issue particular regulations. In such situations, the regulations clearly result from the executive order. But it is usually easier for someone adversely affected by the regulation or other agency action to challenge the agency action itself rather than the presidential order. In litigation or other administrative challenges to the regulation, the fact that the President ordered that the regulation be issued is irrelevant unless the President possesses some constitutional or statutory power that augments the agency's authority. Whether the authority is cited or not, the underlying constitutional or statutory authority either exists to support the regulation or does not. (See Chart 3.) The fact that the agency was instructed by the President to issue the regulation can only help, but it may add nothing to the legal analysis of the regulation.



Standing Requirements

Other directives may have a direct and predictable affect on the rights of parties outside the government, but the proper party must challenge the directive before a court may act. If the President attempts to place conditions on who may bid for or receive government contracts, that action may have a predictable effect on prospective government contractors. A current or prospective government contractor who is adversely affected by the new conditions may seek to have them invalidated, but only such contractors and other injured parties within a foreseeable "zone of interest" may do so. The average citizen who is seeking to ensure good government does not have a "particularized injury" to redress, and his challenge will likely be thrown out of court. Thus, even an unlawful executive order that directly affects the public will survive a challenge if no one with proper standing to sue brings the case.

President Clinton's American Heritage Rivers Initiative (AHRI), established by Executive Order 13061, is an example of a presidential directive that appears to be illegal but has not yet been judicially invalidated because of a "technical" standing problem. The scope of the initiative is somewhat unclear, and a thorough discussion of it is not possible here, but the program grants power to "river navigators" to supervise and control development along designated rivers for a variety of purposes, including environmental, social, educational, and economic concerns. A river navigator's control purports to extend over the entire watershed of the river.[67]

In 1998, Representatives Helen Chenoweth (R–ID), Bob Schaffer (R–CO), Don Young (R–AK), and Richard Pombo (R–CA) sought an injunction in federal district court against implementation of the AHRI. These Members of Congress alleged that

67. H. Rep. 105–781, 105th Cong., 1st Sess. (1997), p. 21.

the AHRI violated various laws, including several appropriations laws and other acts under the oversight of committees or subcommittees they chaired. They attempted to invoke a "congressional standing" doctrine, alleging an injury to their right to vote as Members of Congress. Both the district court and the U.S. Court of Appeals for the District of Columbia dismissed the suit without reaching the merits. The judges rejected the argument that plaintiffs suffered an injury unique to Members of Congress and concluded instead that any injuries from AHRI were "wholly abstract and widely dispersed."[68]

REFORM PROPOSALS

During the 106th Congress, several measures were introduced to address Congress's concern over President Clinton's broad assertion of power to govern by decree. At least two measures were the subject of hearings held by the House Judiciary and Rules Committees. House Concurrent Resolution 30 (HCR 30), introduced by Representative Jack Metcalf (R–WA) with 75 other cosponsors, would have expressed the sense of Congress that any executive order that "infringes on the powers and duties of 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 and effect unless enacted by law." HCR 30 itself would have been "advisory only." But statutory language modeled after the resolution would have serious constitutional and other problems because of its ambiguous reach and its potential to interfere with or "infringe" the President's shared or exclusive powers.

The Separation of Powers Restoration Act (H.R. 2655), introduced by Representative Ron Paul (R–TX) in 1999, has several provisions that are worthy of further consideration and others that are problematic. H.R. 2655 would have terminated all existing national emergencies declared by Presidents under various statutes. The number of ongoing, declared emergencies is surprising.[69] There clearly is a need for Congress or the President to review and terminate those that do not still present exigent circumstances.

H.R. 2655 also would have taken away the President's power to declare any future national emergency. A convincing case can be made that the emergency powers Congress has granted the President in various statutes (most notably, the International Emergency Economic Powers Act, or IEEPA) are too broad. Yet narrowing the President's range of discretion by further defining an appropriate emergency or limiting the President's range of action for various emergencies might be wiser than simply eliminating all such power. Moreover, the President may have some inherent authority as Commander in Chief to take certain actions during a war or military crisis.

H.R. 2655 also would have attempted to define a presidential directive. It addition, it would have required that all presidential directives specify the constitutional and statutory basis for any action incorporated in the directive or be void as to parties outside the executive branch. With few exceptions, most recent Presidents before Clinton did cite the font of their authority in their executive directives. President Clinton cited some authority in a majority of his directives, but others were vague or had no citation of authority at all. A faithful executive should not have a problem citing the authority for his actions, and this requirement would help citizens, lawyers, and the courts evaluate new directives. Although there may be some constitutional problems with the application of this requirement in some cases, it is worth further consideration and possible refinement.

Finally, H.R. 2655 would have attempted to expand the number of parties with standing to challenge an arguably unlawful directive, including Members of Congress, state and local officials, and any aggrieved person. Because part of the standing doctrine is constitutional, a statute could

68. *Chenoweth, et al.* v. *Clinton*, 181 F.3d 112 (D. C. Cir. 1999); see also *Raines* v. *Byrd*, 521 U.S. 811 (1997) (rejecting a similar congressional standing theory in the first challenge to the Line Item Veto Act of 1996).

69. See Olson and Woll, "Executive Orders and National Emergencies," at 19–20.

not automatically confer standing on someone without a "particularized" injury in fact. Nevertheless, the provision would potentially expand the range and number of persons who could bring suit to challenge a questionable directive by removing any statutory impediments to suit.

The President is free to take up such internal reforms as he deems appropriate, including any that are designed to address past congressional concerns. Such institutional reforms tend to have a more lasting effect than many statutory reforms, perhaps in part because executive branch officials are directly answerable to the President and perhaps also because they are instituted with more flexibility or sensitivity to the needs of future Presidents. Whatever the reason, it makes sense for a new President to follow tradition but also to consider, in time, proposals to improve the process by which executive directives are issued.

CONCLUSION

A proper understanding of a President's power to issue executive orders, proclamations, and other directives will enable President Bush to use this power confidently in the exercise of his constitutional responsibilities and to implement important Administration policies. An aggressive use of this power is necessary for a modern President to project strength as leader of the free world and to manage the largest bureaucracy in the world.

The Bush Administration will have to weigh its legal options, political concerns, and policy objectives to find the right solution for each opportunity or problem. A substantive review of President Clinton's executive directives, however, suggests that President Bush has many opportunities to make a significant impact with a carefully orchestrated program of executive orders and presidential proclamations. Such a program may be even more important in light of the narrow margins in the 107th Congress.

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