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BEYOND THE ZONE OF TWILIGHT: HOW CONGRESS AND THE COURT CAN MINIMIZE THE DANGERS AND MAXIMIZE THE BENEFITS OF EXECUTIVE ORDERS

"Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded . . . the dangers to human liberty are frightful to contemplate." [1]

"In the event that Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act." [2]

I. INTRODUCTION

The government of the United States of America is at a precipice. The year is 2015 and the clash between the executive and legislative branches—forged in impeachment scandals of the 1990s and hardened during bitter debates over Iraq in the new century—continues to rage in the nation's capital.

The President is a lame duck in the last two years of her administration and, like all Presidents approaching retirement, she has become preoccupied with her legacy. But the President knows that the chances of getting a piece of important legislation passed though a recalcitrant Congress at this point in her administration are slim. Still, the President is determined to act, and act she does by issuing an executive order that will be her crowning achievement—an order that will move the country forward while avoiding the partisan politics and harsh resistance of Congress. Harkening back to historic executive orders such as Harry Truman's desegregation of the military and Thomas Jefferson's Louisiana Purchase, the President issues her order: "Executive boldness!" she thinks to herself.

However, on Capital Hill, many members of Congress could not disagree more. The leaders of the House and Senate feel as though their authority has been circumvented by a power-hungry President. As they react to the executive order, remembering the effects of disastrous orders such as the internment of the Japanese during World War II, members of Congress cry, "Executive tyranny!"

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1 *Ex Parte* Milligan, 71 U.S. 2, 125 (1866).

2 President Franklin Delano Roosevelt, Address to Cong. (Sept. 7, 1943), *in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 1942 v. 356, 364 (1942).

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So who is right: Congress or the President? The answer to that question has varied throughout history, which is not surprising given the variety of executive orders that Presidents have issued. For example, Presidents have waged war and established peace by executive order.[3] They have advanced both bigotry and equality with the stroke of a pen.[4] At times, Presidents have used executive orders to unilaterally draw a veil of secrecy over government actions; at other times Presidents have issued orders to investigate government corruption.[5]

On the whole, however, executive orders are useful tools of the Presidency, subject to checks by Congressional vigilance and judicial oversight. Yet too often executive orders are a little noticed caveat of governing, a footnote to history, ignored by Congress and the public.[6] This is troubling given that courts assess the legality of executive orders in terms of whether or not Congress has legislated on a particular subject, with orders frequently falling into an area the Court has termed the "zone of twilight," in which Congress has neither approved nor disapproved of an executive order.[7]

The purpose of this Note is to present measures by which Congress can move beyond the zone of twilight, effectively checking the President's power to issue executive orders through: (1) statutory changes that will make Congressional intent clear, (2) the codification of executive orders, which will lead to increased oversight, and (3) reframing the debate in terms of Presidential power not partisan politics.[8] Part II will look at the history of executive orders from

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[3] *See infra* notes 26, 43 (describing President George Washington's declaration of neutrality in 1793 and President Abraham Lincoln's suspension of the writ of Habeas Corpus during the Civil War).

[4] *See infra* notes 75, 81 (describing Order 9066, authorizing the internment of Japanese Americans during World War II and Order 10730, which authorized the National Guard to facilitate the integration of Little Rock High School in 1957).

[5] *See infra* notes 36, 74 (describing President John Tyler's executive order appointing private citizens to investigate alleged corruption in New York City's Customshouse in 1842 and Executive Order 8985, establishing the Office of Censorship during World War II).

[6] For example several studies of American politics offer scant information about executive orders. *See, e.g.*, CHRISTINE BARBOUR & GERALD C. WRIGHT, KEEPING THE REPUBLIC: POWER AND CITIZENSHIP IN AMERICAN POLITICS (2001) (text on American politics mentioning executive orders six times throughout nearly 800 pages); SYDNEY M. MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY: 1776-1998 (1999) (an exhaustive history of the presidency from 1776 to the present which does not even list executive orders in its index); NORMAN L. ROSENBURG & EMILY S. ROSENBURG, IN OUR TIMES: AMERICA SINCE WORLD WAR II (6th ed. 1999) (same).

[7] *See infra* note 88 (describing the Jackson test from *Youngstown*, the test courts use to assess the validity of executive orders).

[8] *See infra* Part IV.

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President George Washington to President George W. Bush, including the Congressional and judicial response to various orders.[9] Part III will examine whether executive orders are necessary parts of Presidential lawmaking and assess the efficacy of judicial determinations and Congressional oversight over the issuance of executive orders.[10] Part IV will propose three ways in which Congress can ensure that executive orders continue to be effective mechanisms for Presidential power without becoming vehicles for executive abuse.[11] Finally, Part V concludes with a brief summary.[12]

II. BACKGROUND

Like all executive power, the ability of Presidents to issue executive orders has developed through past practice and judicial decisions.[13] Indeed, Supreme Court jurisprudence in the area of executive orders has been called a "constitutional dialogue" between the executive and judicial branches.[14] Moreover, an examination of the long history of executive orders reveals the measures that Congress and the courts can take today to minimize the danger of absolute Presidential power, while preserving the positive attributes of executive orders.[15]

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[9] *See infra* Part II.

[10] *See infra* Part III.

[11] *See infra* Part IV.

[12] *See infra* Part V.

[13] *See* KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 40-41 (2001). Mayer discusses the imprecision of the language in Article II of the Constitution, detailing the powers of the Presidency. *Id.* at 40. Specifically, Mayer claims that not only were the framers less than clear in detailing whether Presidents have implied powers, but Article II's language is also quite brief, making a textual interpretation of Presidential powers difficult. *Id.* Accordingly, because of the meager enumeration of Presidential powers contained in the Constitution, Mayer argues that past practice of Presidents combined with judicial decisions have been the most important factors in determining today what actions are outside the purview of permissible Presidential powers. *Id.* at 41.

[14] *See* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 9-10 (2002). Specifically, Cooper states that the constitutional dialogue is a conversation about policies, the presidency, the powers of the office, and the relationship between the presidency and other participants in the governing process. *Id.* at 9. Further, Cooper states that the dialogue, from time to time, has resulted in major Constitutional debates in the Courts. *Id.* The dialogue is further deepened and complicated when the President claims a statutory grant of authority from Congress that is being challenged in the courts. *Id.* at 10. Thus, in such instances, a dispute over an executive order results in a dialogue between all three branches of government. *Id.*

[15] *See infra* Part IV (presenting three ways, including proposed legislation, in which Congress can be a powerful bulwark against Presidential abuse by executive order, including: (1) drafting legislation so that courts can clearly identify Congressional attempts

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Thus, this Part will cover over 200 years of constitutional dialogue, tracing the rise of the modern presidency and encompassing some of the great political debates and judicial decisions of the past.[16] First, this Part examines the early history of this dialogue, from its Constitutional roots to early executive orders and judicial challenges.[17] Second, this Part considers the manner in which executive orders and court challenges were affected by the Civil War and Gilded Age that followed.[18] Next, this Part focuses on how the dialogue changed with the advent of the modern presidency at the turn of the twentieth century through the duel crises of the Great Depression and World War II.[19] Finally, this Part discusses how contemporary Presidents have used executive orders and how the Supreme Court has developed the modern judicial hurdle of challenging an executive order.[20]

A. *Executive Orders from Constitutional Roots Through the Dawn of the Civil War: Congress Ignores Early Orders While the Court Firmly Establishes Statutory Supremacy*

In 1789, the framers drafted the United States Constitution and created an innovative institution: the American Presidency.[21] Though wary of creating too strong an executive figure, the framers drafted the Constitution such that the President possesses both express and implied

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to restrain the President, (2) codifying executive orders in order to increase oversight of Presidential power, and (3) framing the debate the debate over executive orders in terms of Presidential power instead of Presidential politics).

16 *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding President Franklin Delano Roosevelt's executive order interring Japanese Americans during WWII); Little v. Barreme, 2 Cranch 170 (1804) (holding that President George Washington's order allowing searches of American ships exceeded the congressional mandate); Chamber of Commerce of the United States v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) (overturning President Bill Clinton's executive order barring Federal contractors from hiring replacement workers for striking employees).

17 *See infra* Part II.A.

18 *See infra* Part II.B.

19 *See infra* Part II.C.

20 *See infra* Part II.D.

21 Article II, Section 1 of the United States Constitution establishes the Presidency, stating, "[t]he executive power shall be vested in a President of the United States of America." U.S CONST. art. II, § 1. *See also* Cass R. Sustein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 3 (1995) (stating that the establishment of the Presidency was a major Constitutional innovation, creating an Executive Branch for the new government when the Articles of Confederation had none); CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 55 (1966) (stating that on June 1, 1789 when Charles Pinckney rose at the Constitutional Convention to propose a single executive—a President of the United States—his suggestion was met with a stunned silence from delegates, a "considerable pause" as scribe James Madison put it).

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powers.[22] The authority to issue executive orders is an implied power that has been used by Presidents dating back to George Washington.[23] Executive orders have allowed Presidents to do that which even the King of England could not: bypass the legislative process by issuing orders that carry the force of law.[24]

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[22] *See, e.g., In re* Nagel, 135 U.S. 1, 81 (1890) (holding that the President has implied and express executive powers that are in no way dependant on legislation for their existence); *see also* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1175-77 (1992). Calabresi and Rhodes state that the vesting clause creating Congress in Article I—containing the language "herein granted"—differs from the Article II vesting clause creating the presidency, which has no such language. *Id.* at 1175. Further, Calabresi and Rhodes argue the difference between the two vesting clauses has incited much debate among constitutional interpreters. *Id.* at 1177. Specifically, some, known as Unitarians, read the clause as an affirmative grant of power allowing Presidents to govern all offices and officials in the executive branch, while others, known as non-unitarians, find the difference insignificant, arguing that the President should only have those powers enumerated elsewhere in Article II. *Id.* Yet, the prevailing interpretation of the vesting clauses allows Congress to act pursuant only to the legislative powers specifically enumerated in Article I, while the President may act in furtherance of *all* executive power, not simply the powers listed in the Constitution. *Id.* Indeed, since 1890 the Supreme Court has adopted the Unitarian approach, holding that the President has both express and implied powers. *But see* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1791 (1996) (arguing against the unitary interpretation of the Constitution because the difference between the two vesting clauses was not a deliberate grant of implied powers, but was instead the result of "the exhaustion and impatience of delegates trying to wrap up their business.").

[23] Executive orders have been defined in many different ways. *See, e.g.*, BLACK'S LAW DICTIONARY 610 (8th ed. 2004) (defining an executive order as "an order issued by or on behalf of the President, usually intended to direct or instruct the actions of executive agencies or government officials, or to set policies for the executive branch to follow"); Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 273 (2001) (defining executive orders as, "written, rather than oral, instructions or declarations issued by the President"); *see also* MAYER, *supra* note 13, at 4 (defining executive orders as "Presidential directives that require or authorize some action within the executive branch" and "Presidential edicts"); *infra* note 26 (offering a discussion of George Washington's 1793 Neutrality Proclamation, considered by many to be the first executive order).

[24] Many contend that the founders created a limited Presidency due to their experience with the British monarchy. *See, e.g.*, Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L.J. 987, 988 (1999) (arguing that a British King—a model of executive power for the founding generation—could "issue binding proclamations to enforce laws of the realm"); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern Day America*, 28 J. LEGIS. 1, 11 (2002) (stating that the political theories of the founding generation, specifically their fear of unchecked executive power, were primarily shaped by the oppression they felt under the British monarchy). *But see* COOPER, *supra* note 14, at 5 (stating that at the time of the American Revolution, even King George III did not have the power to issue binding proclamations having the force of law on any subject of his choosing). *See generally*, Proclamations [1610], 12 Eng. Rep. 74. In the *Proclamations* case of 1610, the King of England and his privy council sought the opinion of the King's judges,

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Though executive orders did not receive their name until well into the nineteenth century, most authorities agree that the first such order was an administrative order issued by George Washington in June of 1789.[25] However, President Washington's most divisive order did not come until 1793 in the form of a Neutrality Proclamation, declaring that the United States would not get involved in the war between France and Britain.[26] Significantly, though highly controversial, Congress never

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asking whether or not he had the authority to declare binding laws. *Id.* at 74. Specifically, the King wanted to restrict building in London and regulate the trade in starch. *Id.* Lord Coke, one of the presiding judges, argued that the King could not unilaterally declare either of the aforementioned rules law, stating, "[t]he King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm . . . also the King cannot create any offence by his prohibition or proclamation, which was not an offence before." *Id.* at 75. Further, Lord Coke stated that his argument had an ancient basis, because all indictments under British law concluded by stating: *Contra legem & consuetudinem* (against the law and custom of England) or *Contra leges & statute* (against the laws and statutes). However, no indictment ended with *Contra Regiam proclamationem* (against the royal proclamation). *Id.* Finally, Lord Coke argued that although British law was comprised of three elements: (1) the Common Law, (2) Statutory Law, and (3) Custom, Royal Proclamations fit into none of these categories and, accordingly, it is not *malum prohibitum* (wrong by reason of prohibition). *Id.* at 76. Accordingly, Lord Coke held that the King could not issue binding proclamations having the rule of law without Parliamentary approval. *Id.*

[25] *See, e.g.*, MAYER, *supra* note 13, at 51. Mayer states that the first executive order was President Washington's order instructing the acting officers of the Executive branch to prepare a report detailing their departmental affairs. *Id.* Mayer argues that this first executive order, like so many early orders, was merely a routine administrative procedure. *Id. See also* Branum, supra note 24, at 23 (stating that the first executive order consisted of Washington instructing the acting officers of the Confederation government to prepare a report regarding the state of affairs in America); Gaziano, *supra* note 23, at 273 (same). *But see* Leanna M. Anderson, *Executive Orders, "The Very Definition of Tyranny," and the Congressional Solution, the Separation of Powers Restoration Act*, 29 HASTINGS CONST. L.Q. 589 (2002) (calling Washington's Neutrality Proclamation of 1793 the first executive order).

[26] Issued by President Washington as a reaction to the war between France and the United Kingdom, the Proclamation of Neutrality of 1793 states that the "duty and interest of the United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent Powers." *See* COOPER, *supra* note 14, at 123. The proclamation went on to declare that U.S. citizens should avoid aiding or abetting either side of the conflict. *Id. See generally* JOSEPH J. ELLIS, HIS EXCELLENCY GEORGE WASHINGTON 222-23 (2004). According to Ellis, Washington immediately recognized the danger that the war between Great Britain and Revolutionary France brought for the newly formed government of the United States. *Id.* at 222. Accordingly, when Washington received the news that war had broken out he convened his cabinet and got their unanimous support for an executive proclamation of neutrality, which was issued a week later. *Id. See also* MAYER, *supra* note 13, at 42 (stating that Congress was out of session when the hostilities broke out and Washington issued the Proclamation rather than call the body into an emergency session).

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overturned the Neutrality Proclamation.[27] However, as history would soon illustrate, Congress was not the only check on Presidential power.[28]

In 1804, the Supreme Court first weighed in on Presidential proclamations in *Little v. Barreme*.[29] The executive order at issue in *Little*, a naval order that was issued pursuant to a Congressional grant of Presidential authority, conflicted with a statute.[30] Firmly establishing the

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[27] *See generally* COOPER, *supra* note 14, at 122-24 (discussing the controversy surrounding the Proclamation). Rather than the clear cut picture of a unanimous cabinet offered by Ellis, Cooper states that the battle over the Neutrality Proclamation "fractured the cabinet." *Id.* at 122. On one side was Washington's former aide-de camp and current Secretary of the Treasury Alexander Hamilton, who argued passionately for the British cause. *Id.* at 123. On the other side was Washington's Secretary of State, Thomas Jefferson, who took the French side. *Id.* Furthermore, there was fervent popular support for both sides. *Id.* at 122. Specifically, Cooper argues that many Americans still had deep hostilities toward the British on account of the Revolution, coupled with appreciation for the French, who had been America's ally during the Revolution. *Id.* at 123. However, on the other hand there were Americans who did not support the French because they were horrified by the violence of the French Revolution. *Id.* Finally, though the neutrality proclamation declared no basis of authority to issue the order and it was feverishly challenged in Congress, the legislative branch eventually relented and, indeed, was eventually ratified by Congress. *Id.* Thus, Cooper states that ultimately it was Washington who set the course for Neutrality and unilaterally declared it on April 22, 1793, over the protests of his cabinet, Congress, and the American people. *Id.* at 124.

[28] Though some have argued that George Washington was the first President to have an executive order challenged in court, the first judicial challenge did not come until 1804, nearly a decade after Washington's Presidency ended and seven years after his death in 1797. *See, e.g.*, COOPER, *supra* note 14, at 122-24 (stating that though the Neutrality Proclamation of 1973 was ultimately ratified by Congress, President Washington issued numerous executive orders pursuant to enforcing the proclamation, one of which would go on to be at issue in *Little v. Barreme*). *But see* Little v. Barreme, 2 Cranch 170 (1804) (stating that the President had based his authority to issue an order on a 1799 statute).

[29] *See Little*, 2 Cranch at 170. The war between Britain and France that had caused George Washington to issue the Neutrality Proclamation of 1793 was still raging on by the time John Adams became President in 1797. *See generally*, Michael Duffy, *World-Wide War and British Expansion 1793-1815*, *in* THE OXFORD HISTORY OF THE BRITISH EMPIRE: VOLUME. II: THE EIGHTEENTH CENTURY 184-207 (1998). For a discussion of President Adams' involvement in the conflict, see generally DAVID MCCULLOUGH, JOHN ADAMS (2001). *See also* MAYER, *supra* note 13, at 59. Mayer states that *Little v. Barreme* originated with an executive order put forth by John Adams, ordering the navy to seize all vessels traveling to and from France. *Id.* A U.S. Navy Captain, acting pursuant to Adams' order, seized a vessel of Danish origins the Atlantic Ocean. *Id.* The owners of the ship sued the Captain for damages. *Id.*

[30] *See Little*, 2 Cranch at 170. In *Little*, the Court noted the difference between the statute that Congress passed in 1799 authorizing the President to issue an executive order, and the actual order that was issued by John Adams that same year. *Id.* at 177-78. Specifically, Justice Marshall, writing for the Court, noted that the statute suspended intercourse between the Unites States and France. *Id.* at 177. Further, the statute authorized the President to instruct naval Captains to stop any ship engaged in traffic counter to the Act and confiscate the ship if, "it should appear that such ship or vessel is bound, or sailing to

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supremacy of statutes over executive orders, the Court held that the statute controlled and that the executive order was thus invalid.[31]

The years that followed *Little* saw numerous executive orders unchallenged by Congress, most dealing with civil service issues and the disposition of public lands.[32] Still, two important executive orders were issued prior to the Civil War.[33] First, though seldom classified as such, President Thomas Jefferson's Louisiana Purchase had all the markings of an executive order, since it was done unilaterally by Presidential order without direct statutory or Constitutional authority.[34] Significantly, neither Congress nor the public challenged the Louisiana Purchase on

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any port or place within the territory of the French republic." *Id.* However, the court further noted that President Adams' naval order was based on an overly broad construction of the statute, stating that Captains ought to, "do all that in you lies to prevent all intercourse…*between* the ports of the United States and those of France." *Id.* at 178 (emphasis added). Captain Little, responding to the President's order, had stopped the Flying Fish thinking it was an American ship traveling from a French port. *Id.* at 176.

[31] *See id.* at 177. In *Little*, Justice Marshall wrote, "[i]t is by no means clear that the President of the United States. . . might not, without any special authority for that purpose. . . have empowered the officers commanding the armed vessels" to seize the Flying Fish. *Id.* Thus, the Court held that where the language of a statute conflicts with the language of an executive order, the statute controls. *Id.* at 179. Further, the Court held that the executive order not only failed to give Captain Little the right to seize the vessel, but it also did not excuse the Captain from personal liability for damages which he was forced to pay. *Id.*

[32] *See* MAYER, *supra* note 13, at 51. Mayer asserts that, until 1900, there were only 1,259 executive orders issued. *Id.* Furthermore, Mayer explains that among these early orders were executive orders establishing Indian Reservations, townships, and setting aside land for the military. *Id.* at 75.

[33] Many early executive orders are difficult to track down because they have never been compiled in a uniform volume. *See generally* PRESIDENTIAL EXECUTIVE ORDERS vii (Clifford L. Lord ed., Archives Pub. Co. 1944) (noting that some topical compilations of early executive orders have been published, including collections on Civil Service orders, Indian Reservations, and Veterans Regulations).

[34] *See* MAYER, *supra* note 13, at 7. *See also*, CALEB PERRY PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 143 (1953) (noting that President Jefferson initially thought a Constitutional Amendment was necessary in order for the Louisiana Purchase to be considered legal, not because the Purchase was outside of his executive power to enact, but because he initially did not think the addition of land was constitutional); STEVEN E. AMBROSE, UNDAUNTED COURAGE 72 (1996) (quoting President Jefferson responding to the French acquisition of New Orleans, stating, "[t]here is on the globe one single spot, the possessor of which is our natural and habitual enemy. It is New Orleans, through which the produce of three eighths of our territory must pass to market."); E.M. HALLIDAY, UNDERSTANDING THOMAS JEFFERSON 138 (2001) (stating that when President Jefferson contemplated the thought of the French having possession of the Mississippi region, he unilaterally dispatched James Monroe to Paris with instructions to buy New Orleans and Florida from France, though the deal was later funded by Congress).

the grounds that it was issued without Congressional authority.[35] Second, President John Tyler began the tradition of establishing controversial independent Presidential commissions with executive orders when he issued an 1842 order calling for a commission to investigate corruption in the New York City Customshouse.[36]

Thus, by the beginning of the Civil War, the practice of issuing executive orders was firmly established in American politics, and, although the Court had established the supremacy of statutes over executive orders, Congress was seldom willing to override an order.[37] In the mid-1800s, as with modern executive orders, the Court had developed a framework for assessing the legality of executive orders; however, in order for the Court to effectively check Presidential power, Congress had to be proactive as well.[38]

B. Executive Orders from the Civil War Until the Turn of the Century: Congress and the Courts Grant Presidents Expansive Power to Meet the Challenges of a Growing Nation

During the Constitutional crises of the Civil War, executive orders were among the unprecedented executive powers Abraham Lincoln used to reunite the country, garnering a mixed judicial reaction.[39] For

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35 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (providing the argument of Justice Jackson in which he stated that the "Louisiana Purchase had nothing to do with the separation of powers as between the President and Congress, but only with state and federal power. The Louisiana Purchase was subject to rather academic criticism, not upon the ground that Mr. Jefferson acted without authority from Congress, but that neither had express authority to expand the boundaries of the United States by purchase or annexation").

36 *See* MAYER, *supra* note 13, at 77-78. In particular, Tyler's order was significant not for its content but for the reaction it garnered in Congress. *Id.* Specifically, Mayer discusses President John Tyler's executive order appointing private citizens to investigate alleged corruption in New York City's Customshouse. *Id.* at 77. Seeking to block the order, Congress prohibited the President from paying for the commission until Congress appropriated the funds. *Id.* at 78. Further, Tyler's Attorney General reaffirmed Congress' authority to block funding, arguing that, though the President had the right to unilaterally create the council, he could not unilaterally fund it. *Id.* at 78.

37 *See supra* part II.A. For a discussion of the expanse of Presidential power that occurred prior to the Civil War, particularly during the Presidency of Andrew Jackson, *see* MILKIS & NELSON, *supra* note 6, at 124-25 (arguing that although the Presidency of Andrew Jackson expanded opportunities for unilateral executive action, this expansion of power was dependant on the President's popularity as a leader).

38 *See infra* Part IV (presenting three ways that the modern Congress can be the first and most formidable check on Presidential power, so that courts can, in turn, apply the test the judiciary has developed in assessing the legality of executive orders).

39 For the texts of some of Lincoln's controversial executive orders, *see generally* PRESIDENTIAL MESSAGES AND STATE PAPERS 1827-2025 (Julius W. Muller ed., vol. vi 1917).

example, in the *Prize Cases*,[40] the court affirmed President Lincoln's power to establish a naval blockade by executive order.[41] In contrast, in *Ex parte Milligan*,[42] the Supreme Court declared President Lincoln's suspension of the writ of *habeas corpus* unconstitutional.[43] Still, President

For example, in February of 1862, Lincoln's Secretary of War, Edwin Stanton, issued an order in which the President granted amnesty for those who committed treason during the first year of the Civil War. *Id.* at 1887-89. The order outlined several of Lincoln's more controversial 1861 orders and offered their justification, stating:

> Congress had not anticipated, and so had not provided for, the emergency. . . . The Judicial machinery seemed as if it had been designed, not to sustain the Government, but to embarrass and betray it. . . . In this emergency the President felt it his duty to employ with energy the extraordinary powers which the Constitution confides to him in cases of insurrection. He called into the field such military and naval forces, unauthorized by the existing laws, as seemed necessary. He directed measures to prevent the use of the post-office for treasonable correspondence. He subjected passengers to and from foreign countries to new passport regulations, and he instituted a blockade, suspended the writ of *habeas corpus* in various places, and caused persons who were represented to him as being or about to engage in disloyal and treasonable practices to be arrested by special civil as well as military agencies and detained in military custody when necessary to prevent them and deter others from such practices.

Id. at 1888.

[40] The Prize Cases, 67 U.S. 635 (1863).

[41] *Id.* at 668. In the *Prize Cases*, four vessels, including cargo, were captured and confiscated by the United States as prizes of war. *Id.* at 637. The owners of the vessels brought suit, alleging that the President did not have the authority to establish the blockade. *Id.* The President claimed that the authority for the blockade was found in the Act of 1807, allowing him to use the Army and Navy during war. *Id.* at 642. Noting that the President acted before Congress had convened, the Court stated that the order rested solely upon his authority. *Id.* at 643. Further, the court noted that the mere fact that Congress later affirmed the blockade did not serve to retroactively recognize its validity. *Id.* at 647. Thus, the Court stated that the legality of the blockade necessitated an asking whether or not the President had the authority to declare it on his own. *Id.* at 648. Ultimately, the court affirmed President Lincoln's authority to declare the blockade, stating, "[i]f a war be made by invasion of a foreign nation, the President is not only authorized, but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." *Id.* at 668.

[42] *Ex Parte* Milligan, 71 U.S. 2 (1866).

[43] *Id.* at 126. In *Milligan*, Indiana resident Lamdin Milligan was arrested in October of 1864 and was tried on charges of conspiracy against the government and of offering aid to rebels. *Id.* at 6. After Milligan was found guilty and sentenced to death by hanging, he raised objection to his trial, arguing that there had been no indictment against him. *Id.* at 7. The Court noted that Congress had passed a statute allowing Lincoln the authority to suspend the writ of habeas corpus in 1863. *Id.* at 115. In powerful language the court stated, "[n]o graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with a crime, to be tried and punished according to the law." *Id.* at 118. Furthermore, with regard to the Writ of *habeas corpus*, the court reasoned that, "[w]icked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place

Lincoln's executive orders were accepted by both Congress and the public as legitimate Presidential actions, in spite of the Court's rulings, due to the unique circumstances of the Civil War.[44]

Subsequent to President Lincoln's term in office, a series of cases in the late nineteenth century served to affirm broad Presidential power in the area of executive orders.[45] First, in 1890, the Court affirmed the President's ability to take independent action in order to execute a law in *In re Neagle*.[46] Two years later, in *Jenkins v. Collard*,[47] the Court stated that executive orders have the force of law so long as they are based upon legitimate constitutional or statutory authority.[48] Finally, in an 1895 case, *In re Debs*,[49] the Court reaffirmed the broad support for independent executive action that it had upheld in *Neagle* by affirming the ability of

once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate." *Id.* at 125. Accordingly, the court held that although the writ of habeas corpus may be suspended and a person may be held without a formal indictment, a citizen cannot be tried without one. *Id.* at 126.

[44] *See, e.g.*, GLENDON A. SCHUBERT, JR., THE PRESIDENCY IN THE COURTS (1973) (noting that even in *Ex parte Milligan*, where the Court declared unconstitutional Lincoln's suspension of the writ of habeas corpus, the Court did not hand down the decision until after the Civil War had ceased, and thus had no practical ramifications for Lincoln).

[45] *See infra* notes 46-50 and accompanying text.

[46] *In re* Neagle, 135 U.S. 1 (1890). *Neagle* concerned the authority of a President to empower a United States Marshall to act in defense of a specific person. *Id.* Specifically, David Terry had made threats against Supreme Court Justice Steven Field. *Id.* at 46. President Benjamin Harrison responded to the threat by allowing his Attorney General to charge David Neagle, a United States Deputy Marshall, with the task of protecting Justice Field. *Id.* at 48. Subsequently, at a breakfast, a murderous assault was made by Terry toward Justice Field, at which point Neagle shot and killed him. *Id.* at 53. Terry was later charged with homicide, but was released after the circuit court granted a writ of habeas corpus. *Id.* at 41. The Supreme Court affirmed, holding that the President had the authority to grant Neagle the power to defend Justice Field. *Id.* at 40. However, the Court went on to state that while it is the duty of the President to execute the laws, he cannot create them. *Id.* at 83. Accordingly, though the Court held that the President had independent authority in executing the laws, it also affirmed that he was constrained by both the Constitution and Congressional statutes regarding what laws he may enforce. *Id.*

[47] Jenkins v. Collard, 145 U.S. 546.

[48] *Id.* at 560. *Jenkins* dealt with a Confederate property owner whose Ohio property had been confiscated during the Civil War. *Id.* at 552. Thereafter the Property owner had been pardoned by the general Presidential Pardon of 1868. *Id.* at 557. The Supreme Court was called upon to decide whether the pardon had the effect of restoring the property to its original owner. *Id.* The court ultimately held that the former confederate did retain an interest in the property, thus reaffirming the authority of the President to issue binding proclamations. *Id.* at 560. Specifically, the court stated that, "pardon and amnesty were made by a public proclamation of the President, which has the force of public law, and of which all courts and officers must take notice, whether especially called to their attention or not." *Id.*

[49] *In re* Debs, 158 U.S. 564 (1895).

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the Attorney General to take injunctive action against those who violate the laws of the United States.[50] Taken together, these decisions typified the Court's willingness to grant Presidents expansive power in order to meet the challenges of an increasingly powerful, growing nation.[51]

In sum, though the late nineteenth century is generally seen as an era of Congressional, rather than Presidential supremacy, Presidents exerted executive power by issuing executive orders that were, in turn, met with Congressional and judicial acceptance.[52]

C. *Executive Orders from 1900 to World War II: With the Advent of the Modern Executive Order the Court Struggles to Develop a Test and Congress Focuses on Politics Rather Than Policy*

As the power of the Presidency expanded during the beginning of the twentieth century, so too did Presidents' willingness to use executive orders to achieve various ends.[53] For example, Theodore Roosevelt

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[50] *Id.* at 599. *Debs* concerned striking railroad workers violating the Interstate Commerce Clause. *Id.* at 546. Specifically, the Attorney General of the U.S. acquired an injunction against union leaders, claiming that the strike violated the Interstate Commerce Clause by forcible obstructing commerce. *Id.* at 577. The Supreme Court upheld the Attorney General's authority to take such an action, stating:

> in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail [and] . . . it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions.

Id. at 599. For further discussion of executive orders and nineteenth century railroad interests, *see generally* Menotti v. Dillon, 167 U.S. 703 (1897) (holding that Congress could, with appropriate legislation, overcome an executive order that withdrew land from the private domain for the development of a railroad).

[51] *See, e.g.*, *Neagle*, 135 U.S. at 40 (affirming the President's power to oversee law enforcement); *Jenkins*, 145 U.S. at 560 (affirming the President's power to issue proclamations affecting property ownership); *Debs* 158 U.S. at 577 (affirming the President's power to enforce the Commerce Clause).

[52] *See* RICHARD J. ELLIS, SPEAKING TO THE PEOPLE, THE RHETORICAL PRESIDENCY IN HISTORICAL PERSPECTIVE 112 (1998) (describing the era from the end of Lincoln's presidency in 1865 until the beginning of President Roosevelt's presidency in 1901 as an "era of congressional government" and a time of "arrested development for the presidency").

[53] Also, by the turn of the century, the publishing and cataloging of executive orders had become much more established. *See, e.g.*, COOPER, *supra* note 14, at 17 (stating that in 1873, President Ulysses S. Grant issued an executive order in which the organized form for executive orders was outlined); *see also* PRESIDENTIAL EXECUTIVE ORDERS *supra* note 33, at vii (stating that beginning in 1895, the U.S government published a *Documentary Catalog*, which listed each executive order in slip form and made them available in depository libraries across the country).

promoted his progressive agenda using executive orders to make the civil service more inclusive and encourage conservation by setting aside public land.[54] President Taft continued the trend of setting land aside, even without the statutory authority that Congress had been unwilling to provide.[55] Significantly, in *U.S. v Midwest Oil Co.*,[56] the Court upheld Taft's decision to issue an executive order without Congressional authority, holding that Congress had "acquiesced" to Taft's authority by failing to act itself.[57] Known as the "acquiescence doctrine[,]" the Court's

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[54] *See* PRESIDENTIAL EXECUTIVE ORDERS, *supra* note 33, at 37. Among the numerous executive orders issued by President Theodore Roosevelt regarding conservation was 357, issued on October 10, 1905 which created three bird sanctuaries. *Id.* at 37. Additionally, Roosevelt issued Executive Order 984 on December 1, 1908. *Id.* at 91. The order served to admit "deaf mutes to examinations for all classified civil service posts for which they are qualified." *Id.* Significantly, this was one of the first accommodations the United States government would make toward those who are handicapped, and it was done via executive order. For a discussion of Theodore Roosevelt's efforts create national parks and national monuments, *see generally* PAUL RUSSELL CUTRIGHT, THEODORE ROOSEVELT: THE MAKING OF A CONSERVATIONIST 225-27 (1985) (listing all of the parks and monuments created during Roosevelt's tenure and stating that the President got his authority to set aside land from the Antiquities Act of 1906, which allowed the President, at his discretion, to set aside lands for national monuments).

[55] *See, e.g.*, U.S. v. Midwest Oil Co., 236 U.S. 459 (1915). In *Midwest Oil*, President Taft withdrew from the private domain three million acres of land that contained large deposits of oil. *Id.* at 466. However, both sides agreed that Taft had no statutory authority to do so. *Id. See also* respondents brief, stating:

> President Taft himself doubted his authority when he stated. . . that unfortunately Congress had not fully acted on the recommendations of the executive; that the question as to what the executive should do was full of difficulty; and that he thought it the duty of Congress by statute to validate withdrawals made by the Secretary of Interior and the President, and to authorize the Secretary temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions of emergencies as they arise.

Id.

[56] Midwest Oil, 236 U.S. at 459.

[57] *Id.* at 459. The plaintiffs in *Midwest Oil Co.*, a private oil company, claimed that the President had no authority to issue the executive order withdrawing land from the private domain and brought suit seeking to recover the land. *Id.* at 468. The Court noted past Presidential latitude in issuing executive orders regarding public lands, stating: "Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary it uniformly and repeatedly acquiesced in the practice and, as shown by these records, there had been, prior to 1910, at least 252 Executive Orders making reservations for useful, though non-statutory purposes." *Id.* at 471. The court held that several factors led to the conclusion that the President had the power to issue the order, including: (1) the long-continued practice, (2) the acquiescence of Congress, and (3) the decisions of the courts. *Id.* at 483.

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holding would come to be an important method for upholding executive orders in the face of legislative unwillingness to act.[58]

The trend of expansive Presidential power continued during World War I, when Woodrow Wilson issued a series of executive orders that increased economic regulation and facilitated the execution of the war.[59] However, in the 1920s executive orders caused an enormous national scandal when President Warren G. Harding issued an order that transferred land from the government to a cabinet official in a debacle known as the Teapot Dome Scandal.[60] Significantly, throughout the scandal, Congress focused on the politics of the day rather than the larger question of whether the President should have the power to issue executive orders at all.[61]

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[58] *Id.* at 472-73 (1915). In justifying the acquiescence doctrine in *Midwest Oil Co.*, Justice Lamar explained:

> But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

Id.

[59] *See generally*, PRESIDENTIAL EXECUTIVE ORDERS, *supra* note 33, at v. Among the Executive orders issued by President Wilson during WWI were orders creating the Food Administration, the War Trade Board, and the Committee on Public Information. *Id.* Additionally, Wilson issued orders regulating wartime radio broadcasting and detailing the duties of conscientious objectors. *Id.*

[60] The most notable executive order during the 1920s was the impetus for the infamous Teapot Dome scandal of the Harding Administration. For a detailed description of the Teapot Dome Scandal, see BURL NOGGLE, TEAPOT DOME: OIL AND POLITICS IN THE 1920S (1962). In particular, Noggle states that the land transfer from the public to a member of the Harding Administration took place because of an executive order signed by President Harding. *Id.* at 19. Additionally, Noggle notes that during the Senate Investigation of the scandal, attention focused largely on the partisan political gains that could result from the scandal. *Id.* at 64-95.

[61] *See, e.g.*, *Warm Controversy Starts*, N.Y. TIMES, January 28, 1924, at A1 (stating Congressional concern days after the scandal broke focused on the President preempting a Congressional announcement for the purpose of political gain by calling for an independent investigation of the scandal); *Republican Organ Urges Prosecution*, N.Y. TIMES, January 26, 1924, at A1 (citing Republican concern with how the scandal would affect the public's perception of the Harding Administration); *The President is Aroused*, N.Y. TIMES, January 26, 1924, at A1 (in which the President reacts to the Teapot Dome Scandal without mentioning that the scandal was caused by an executive order).

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Not surprisingly, given the Congressional response to the scandal, Teapot Dome did little to curtail the President's ability to issue executive orders and the Court continued to weigh in on the subject.[62] First, in *Myers v. U.S.*,[63] the court upheld the President's ability to remove executive branch officials by executive order without Congressional advice.[64] Second, in *J.W. Hampton Co. v. U.S.*,[65] the Court held that, when granting authority to the President, Congress must set a standard to which the President must adhere in issuing executive orders.[66] Notably,

[62] *See, e.g.,* Branum, *supra* note 24, at 9 (noting that "[t]he first twenty-four Presidents issued 1262 executive orders. The last seventeen Presidents (not including the current Bush administration) issued 11,855 orders").

[63] Myers v. United States, 272 U.S. 52 (1926).

[64] *Id.* at 176. In *Myers*, a postmaster was dismissed by an executive order. *Id.* at 106. The former postmaster sued the government, claiming that his dismissal violated an 1876 statute, stating "[p]ostmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law." *Id.* at 107. In particular the Court stated, "[t]he general doctrine of our Constitution then is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument." *Id.* at 138. Accordingly, because the Constitution was silent as to the process by which civil servants ought to be dismissed, the Court declared the statute unconstitutional and held that the President had the authority to remove the Postmaster without Senatorial consent. *Id.* at 176.

[65] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

[66] *Id.* at 409. In *Hampton*, the plaintiff challenged an executive order concerning import duties that set the amount two cents higher than that stipulated in a Congressional Statute. *Id.* at 400. However, the statute also declared that the President had the authority to modify the duty if he found it was inadequate. *Id* at 401. The Court held that the statute at issue was constitutional because Congress acted within its authority when it gave the President the power to increase the tariff. *Id.* at 407. Specifically, the Court reasoned that the Congressional grant of authority was constitutionally proper because it was not abdicating its legislative responsibilities. *Id.* Further, the Court compared Congress' delegation of authority to the executive branch to a referendum, stating:

> Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district. . . . "The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance

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only twice since *J.W. Hampton* has the Court held that Congress has failed to outline such a standard, both of which occurred during the 1930s.[67]

The increase in executive orders at the beginning of the twentieth century pales in comparison to President Franklin Delano Roosevelt's use of them during the Great Depression and World War II. As orders began affecting more and more Americans, many began calling for greater access to orders in order to facilitate greater oversight.[68] During the Great Depression, the Court initially responded to the flurry of New Deal executive orders by reiterating the fact that Congress cannot delegate its legislative authority to the President.[69] This became known

> of the law. The first cannot be done; to the latter no valid objection can be made."

Id. Additionally, the Court noted that Congress had established a specific guideline for the executive branch to follow in issuing executive orders. *Id.* at 409. Accordingly, because (1) Congress was within it authority to delegate power to the executive branch and (2) Congress laid down an intelligible principle by which the executive branch should proceed, the Congressional delegation and subsequent executive order were constitutional. *Id.* at 409.

[67] *See infra* note 69 (describing the Court's decision in *A.L.A. Schechter Poultry Corp.*, one of the two times in history that the Court has held that an executive order was invalid because Congress failed to set a standard to which the President must adhere).

[68] *See* COOPER, *supra* note 14, at 40-41. Cooper states that FDR issued 3,723 executive orders during his twelve years as President. *Id.* at 41. Additionally, Roosevelt's executive orders heralded significant policy measures, such as the bank holiday he declared two days after taking office. *Id.* at 40. Furthermore, Cooper points out that Congress granted the President the broad authority to issue executive orders of great importance when it passed a statute granting FDR war-like powers. *Id.* at 40. *See also*, PUBLIC PAPERS, *supra* note 2, at 364 (quoting Roosevelt as saying, "[i]n the event that Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act"); FRANK FREIDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 93 (1990) (noting that FDR modeled his executive style during the Great Depression on Woodrow Wilson's use of executive power during WWI). *See generally* MAYER, *supra* note 13, at 69 (noting that by the 1930s Harvard Law professor Erwin Griswold called for an official gazette that would serve as notification to the public of executive orders). Today, Executive Orders are published in the Code of Federal Regulations alongside agency rules. *See* 2 CFR § 1 (2006) (providing an annual list of all Executive Orders issued for a particular year).

[69] During the 1930s, two cases found an improper Congressional delegation of authority, both of which involved the National Industrial Recovery Act ("NIRA"). *See* Panama Refining Co. v Ryan, 293 U.S. 388 (1935). *Panama* involved the legality of a 1933 executive order that prohibited interstate and foreign commerce of oil that had been illegally withdrawn from the ground. *Id.* at 406. The Court held that the portion of NIRA that gave the President the authority to issue the order was an invalid grant of Legislative authority. Specifically, the court stated:

> It would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing

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as the "non-delegation doctrine."[70] The Court also emphasized that it was necessary for a President to identify a specific statutory or constitutional basis for executive orders.[71] Lastly, the Court reacted to the poor record of public notification of executive orders that had increasingly important ramifications for Americans.[72]

> its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government

Id. at 430. Furthermore, the Court found that Congress had declared no policy, had established no standard, and had laid down no rule regarding how the President was to regulate petroleum. *Id.* at 415. *See also,* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). *Schechter* involved an alleged violation of the live Poultry code, a code promulgated under NIRA. *Id.* at 521. NIRA gave the President the authority to approve of codes of fair competition submitted by trade groups, requiring him to: (1) find that the trade or industrial group which propose a code, "impose no inequitable restrictions on admission to membership therein and are truly representative" and (2) find that the code is not "designed 'to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them." *Id.* at 846. The court found the grant of authority to be an unconstitutional delegation of Legislative power, even during the economic crises of the Great Depression, stating, "[e]xtraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power." *Id.* at 528. For a discussion of President Roosevelt's reaction to the *Schechter* decision, see FREIDEL, *supra* note 68, at 163 (discussing a May 31, 1935 press conference held by FDR in which he analyzed the *Schechter* decision, worrying not about the court's holding concerning an unconstitutional delegation of power, but instead expressing concern about the Court's narrow interpretation of federal regulatory power); *see also* MILKIS & NELSON, *supra* note 6, at 272 (noting that New Dealers referred to May 27, 1935, the day the *Schechter* decision was handed down, as "Black Monday").

[70] *See Panama Refining Co.*, 293 U.S. at 433 ("We cannot regard the President as immune from the application of . . . constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation"); Brief for Petitioner, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) ("[P]rivate citizens directly affected are entitled to have Congress . . . declare definite standards which are capable of guiding administrative action and properly restricting it, and to have provision made for quasi-judicial administrative procedure properly conforming to due process of law. Otherwise dictatorship is surely here . . .").

[71] *See Panama Refining Co.*, 293 U.S. at 432. In *Panama*, in addition to finding that the order was an invalid delegation of legislative power, the Court found that President Roosevelt's executive order was invalid because it did not contain any statement of constitutional or statutory authority. *Id.* at 432. Specifically, the court stated that without a statement of authority the President would have had "uncontrolled legislative power." *Id.*

[72] As executive orders shifted from the civil service orders of the nineteenth century to the more significant orders of the New Deal era, poor public notice and draftsmanship of

Additionally, during the Roosevelt administration, the Second World War brought about two significant developments concerning executive orders.[73] First, FDR firmly established Presidential supremacy in the area of intelligence when he issued Executive Order 8955, establishing the Office of Censorship which controlled communications from the United States to foreign countries.[74] Second, the Supreme Court

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executive orders became an issue of great concern. *See* United States v. Smith, 293 U.S. 633 (1934) (attempting to prosecute an individual for violating the National Recovery Administration, but dismissed prior to oral arguments at the request of the Solicitor General of the United States due to the fact that an executive order had inadvertently dropped the language that empowered the government to prosecute individuals such as the defendant); *see also* MAYER, *supra* note 13, at 68-69. Mayer noted that the *Smith* case serves as "a metaphor for the legal chaos that stemmed from the lack of coordination and effective record keeping of administrative actions and executive orders . . ." *Id.* at 68. Specifically, Mayer explains that *Smith* arose out of the National Recovery Administration ("NRA") which, according to statute, set codes of fair competition for private industries. *Id.* One month after the NRA set quotas for the oil industry in August of 1933, President Roosevelt issued an executive order amending the oil provision in order to disallow the transfer of illegally produced oil across state lines. *Id.* Meanwhile, the Department of Justice brought suit against an individual for violating the NRA code. *Id.* at 69. The case went up to the Supreme Court, at which time a government attorney realized that Roosevelt's executive order had dropped the enforcement language from the code. *Id.* Thus, the government was trying to prosecute Smith for violating a law that did not exist. *Id.*

[73] It should be noted that prior to WWII, the court had already granted the President wide latitude in issuing executive orders in the area of national security. *See, e.g.,* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). In *Curtiss-Wright*, President Roosevelt issued an executive order pursuant to a statute in which he declared illegal the sale of arms to Bolivia, which was then in a state of war. *Id.* at 312. Appellees were charged with conspiracy to sell arms to Bolivia and appealed, arguing that the executive order was an invalid delegation of legislative power. *Id.* at 314. However, in a strong assertion of Presidential power, the Court held that the President had the authority to issue the order. *Id.* at 333. In particular, the Court emphasized the President's constitutionally granted power in international affairs, stating:

> [T]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations- a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the United States Constitution. . . . [C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.

Id. at 320. *See also* MAYER, *supra* note 13, at 50 (referring to the *Curtiss-Wright* decision as laying out, "a sweeping theory of inherent Presidential prerogative in foreign affairs").

[74] *See* Exec. Order No. 8985, 6 Fed. Reg. 6625 (Dec. 23, 1941) (establishing the Office of Censorship). *See also* Exec. Order No. 8381, 5 Fed. Reg. 1147 (Mar. 26, 1940) (empowering

lent validity to one of the most reprehensible executive orders ever issued when it affirmed the President's ability to have Japanese-Americans placed in internment camps during World War II.[75] Significantly, Congress also affirmed the internment plan; had they overturned the order by statute, the internment of Japanese-Americans never would have taken place.[76]

Thus, from the beginning of the twentieth century until WWII, the Court's treatment of executive orders mirrored shifts in national mood, with the public favoring an active Presidency during World War I as the Court enunciated the broad acquiescence doctrine, and a more limited

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civilians in defense agencies to classify certain vital military and naval installations and equipment); Exec. Order No. 9182, 7 Fed. Reg. 4468 (June 16, 1942) (consolidating certain war information functions into the Office of War Information, which brought all government information functions under one organization). *See also* MAYER, *supra* note 13, at 144. Mayer describes FDR's executive orders concerning classification and national security as a major increase toward Presidential hegemony. *Id.* First in 1940, Roosevelt issued Executive Order 8381, allowing civilians in defense agencies the authority to classify documents. *Id.* Next, only weeks after the Japanese attack on Pearl Harbor, Roosevelt issued an executive order establishing the Office of Censorship, which controlled communications from the United States to foreign countries. *Id.* Finally, in 1942 Roosevelt issued an executive order consolidating all government information offices into the Office of War Information. *Id.* Mayer argues that each of these orders served to increase Presidential authority in the area of intelligence and government classification. *Id.*

[75] *See* Korematsu v. United States, 323 U.S. 214 (1944). In *Korematsu*, the Court affirmed Executive Order 9066, issued by FDR on February 19, 1942 for the purpose of interring Japanese Americans during WWII. *Id.* at 217. In declaring that the executive order was constitutional, the Court stated, "[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger." *Id.* at 219. *See also* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942) (authorizing the internment by stating that, "successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities"); 56 Stat. 173 (1942) (codifying the executive order and outlining the penalty for violating restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones). *See also* COOPER, *supra* note 14, at 78. Cooper states that as a result of the order, 117,000 Japanese-Americans were placed in camps. *Id.* Additionally, Cooper points out that Roosevelt cited no authority for the order other than his role as commander-in-chief. *Id.* Furthermore, though the President issued the executive order, and the Court affirmed it, Congress also lent its approval to the internment when it passed a statute affirming the order later in 1942. *Id.* Thus, all three branches of government approved of one of the most shameful government actions of the twentieth century. *Id.*

[76] *See infra* Part III.A (arguing that the practice of issuing executive orders is not per se flawed simply because an order has the potential for abuse, because: (1) like the Japanese internment, the order would have been passed and brought into existence even in the absence of unilateral executive power; or (2) the order can and should be superceded by Congress).

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government during the 1920s when the Court enforced the restrictive non-delegation doctrine.[77] Therefore, by the 1940s the Court recognized both broad Presidential power in issuing executive orders, as well as the competing need for Congressional oversight.[78]

D. Executive Orders from 1945 to Present: The Court Develops the Jackson Test, as Congress Unsuccessfully Attempts Oversight, and Presidents Continue to Issue Significant Executive Orders

As World War II came to a close, many of the civil rights issues that had been simmering just under the surface during the war came to a boil.[79] During this period, it was primarily through executive orders that Presidents were able to make early civil rights strides.[80] For example, in

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[77] *See* MILKIS & NELSON, *supra* note 6, at 196-259 (detailing the expansive vision of Presidential power espoused by Theodore Roosevelt and Woodrow Wilson followed by "The Triumph of Conservative Republicanism" during the 1920s, including limited government and a less active presidency).

[78] *But see* MILKIS & NELSON, *supra* note 6, at 273 (arguing that with the Court's enunciation of the non-delegation doctrine, Roosevelt lost the battle but won the war because, "[m]ost of the judicial barriers to national and Presidential power . . . have fallen"); *see also* COOPER, *supra* note 14, at 23 (stating that since the Court has been unwilling to impose the non-delegation doctrine as a check on Presidential power since the New Deal, it is doubtful that the doctrine could be used today to challenge an executive order).

[79] *See* ROSENBURG & ROSENBURG, *supra* note 6, at 35-37. The Rosenburgs describe civil rights during the Truman era. *Id.* Specifically, Rosenburg and Rosenburg argue World War II changed what Americans thought about civil rights, stating, "[r]evulsion against Nazi racism had helped to produce a backlash against discrimination at home; wartime economic gains had encouraged civil-rights groups to mount new attacks on discrimination; and scattered outbreaks of racial violence immediately after the war had intensified efforts to calm racial tensions." *Id.* at 35. Further, the Rosenburgs detail President Truman's ambitions civil rights agenda, including: a ban on poll taxes, an anti-lynching law, and employment legislation. *Id.*

[80] *See* MAYER, *supra* note 13, at 182-217. Mayer traces the history of executive orders and civil rights. *Id.* First, Mayer notes that although Presidents did little to further civil rights in the beginning of the twentieth century, the Presidency was still looked upon as the key authority for change. *Id.* at 186. The reason for this was because "[b]y the 1930s . . . legislative hostility to significant civil rights legislation was firmly entrenched, largely a function of southern opposition to federal intervention of any kind." *Id.* Mayer further notes that while the New Deal initially offered few civil rights progressions, there were a few, such as a 1935 Executive order prohibiting race discrimination in the Works Progress Administration. *Id.* at 187. Six years later in 1941, President Roosevelt established the Fair Employment Practices Committee ("FEPC") through executive order, which sought to end race discrimination in employment. *Id.* Though FEPC had questionable success, it did set off a great battle between the executive and legislative branch over the extent of executive autonomy in creating agencies through executive authority. *Id.* at 189. Mayer explains that FEPC was created out of executive order but funded outside the normal appropriations process with emergency funds assigned to the President to use at his discretion. *Id.* In response to FEPC, Senator Richard Russel of Georgia sponsored an amendment to restrict the President's ability to spend money on agencies created by executive agency. *Id.*

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1948, President Truman issued an executive order desegregating the United States Military.[81] A decade later, in 1957, President Eisenhower issued an executive order calling in the National Guard to facilitate the peaceful integration of Little Rock Central High School.[82] Such executive boldness, however, was rendered less necessary in the 1960s because the political makeup of Congress ensured that many civil rights measures could be implemented by statute, rather than by executive order.[83] Yet, had it not been for executive orders, the struggle for civil rights would

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Though the Russell Amendment succeeded in killing FEPC (it was abolished in 1946), Presidents have since skirted around the amendment by creating interdepartmental agencies via executive orders and funding them with Executive agency funds, which were not within the purview of the Russell Amendment. *Id*. at 190.

[81] *See* Exec. Order No. 9981, 13 Fed. Reg. 4314 (July 29, 1948) ("It is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in out country's defense"); *see also* Memorandum from David K. Miles, Administrative Assistant to President Harry S. Truman, to James V. Forrestal, Secretary of Defense (May 12, 1948), http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/documents/index.php?pagenumber=1&documentdate=1948-05-12&documentid=87&studycollectionid=Desegregation (laying out the methods that the Department of Defense should use in implementing Truman's executive order, in which Miles stressed the timeliness and imperative of the order, stating, "I think we are all fully aware of the difficulties and the fact that the world is not going to be changed overnight, but I also think that the time has come when we must make a start"); DAVID MCCULLOUGH, TRUMAN 915 (1992) (arguing, in part because of Executive Order 9981, that Truman had, "done more for any President since Lincoln to awaken American conscious to issues of civil rights); *see also* ROSENBURG & ROSENBURG, *supra* note 6, at 35-37 (noting the broad Congressional resistance to civil rights legislation during the Truman era).

[82] See Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 25, 1957). Specifically, the order stated:

> I hereby authorize and direct the Secretary of Defense to order into the active military service of the United States as he may deem appropriate to carry out the purposes of this Order, any or all of the units of the National Guard of the United States and of the Air National Guard of the United States within the State of Arkansas to serve in the active military service of the United States for an indefinite period and until relieved by appropriate orders.

Id. See also, ROSENBURG & ROSENBURG, *supra* note 6, at 84-86 (describing the President's role in the desegregation of Little Rock High School, arguing that President Eisenhower could no longer afford to ignore civil rights in the face of open defiance); Notes by President Eisenhower on decision to send troops to Little Rock, Sept. 1957, http://www.eisenhower.archives.gov/dl/LittleRock/DDEtroopstoArkansas.pdf (in which President Eisenhower doodled to himself, "[t]roops—not to enforce integration but to prevent opposition by violence to orders of a court").

[83] *See, e.g.,* The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. *See also*, MILKIS & NELSON, *supra* note 6, at 309-10 (describing the Civil Rights Act—including the fact that Congress passed the bill very quickly—and describing the supermajorities won by the Democrats in both Houses of Congress in 1964 that allowed Johnson easy passage of his Great Society legislation, much of which had to do with civil rights).

have been slowed and segregation would have been even more pervasive in the middle of the twentieth century.[84]

Additionally, although the years following World War II saw the maintenance of strong Presidential leadership through executive orders, they also brought the most stinging rebuke of Presidential power the Court has ever delivered in the form of *Youngstown Sheet & Tube Co. v Sawyer*.[85] In *Youngstown*, President Truman issued an executive order authorizing the Secretary of Commerce to take over the nation's steel mills.[86] In a landmark decision, the Supreme Court declared that

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[84] *See also* PRESIDENTIAL EXECUTIVE ORDERS, *supra* note 33, at 91 (describing Executive Order 984, issued on December 1, 1908 admitting "deaf mutes to examinations for all classified civil service posts for which they are qualified" and predating the Americans with Disabilities Act by almost eighty years).

[85] Youngstown Sheet & Tube Co. v Sawyer, 343 U.S. 579 (1952). *See also* MAYER, *supra* note 13, at 74-76. Mayer argues that although the number of executive orders decreased in 1953 from an average of 186 per year to an average of 60 per year, they became much less trivial and more substantive in nature. *Id.* at 76. The reasons for this shift are threefold. *Id.* First, routine civil service orders decreased markedly during WWII when FDR began to issue blanket orders to deal with individual exemptions. *Id.* at 74. Second, public land executive orders decreased during WWII because FDR delegated the authority to manage public lands to the Secretary of the Interior. *Id.* at 75. Finally, and most notably, in 1952 Congress passed the Presidential Sub-delegation Act allowing President Truman to formally delegate authority to executive agency actors to issue routine orders. *Id.* at 76. Accordingly, because Presidents no longer had to deal with the minutiae of civil service orders and public land orders, the number of executive orders went down after WWII, while the subject matter of orders became increasingly more substantive. *Id.* *See also*, Glendon A. Schubert, Jr., *The Presidential Subdelegation Act of 1950*, 13 THE JOURNAL OF POLITICS 647 (Nov., 1951) (providing a summary of the act as well as an analysis of its implications).

[86] *See* MCCULLOUGH, *supra* note 81, at 896-97. McCullough discusses Truman's rationale in seizing the steel mills, referring to the seizure as "one of the boldest, most controversial decisions of his presidency." *Id.* at 896. Following a labor impasse that threatened to shut down production, Truman made the decision to seize the mills believing that it was within his Presidential power to do so. *Id.* Specifically, McCullough states that years before he was appointed to the Supreme Court, Justice Clark had advised Truman that a President had "inherent" power to act in order to prevent economic disaster. *Id.* at 897. Further, according to later comments by the Secretary of Commerce, days before the seizure Truman had received confidential information from Justice Vinson that the President could on legal grounds seize the mills. *Id.* Accordingly, McCullough argues, Truman felt that the action was constitutional, telling his cautions Secretary of Commerce, "[t]he President has the power to keep the country from going to hell." *Id.* *See also*, MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977). Marcus notes that Truman's decision was most influenced by the Korean War being fought by American troops at the time of the seizure. *Id.* at 74. For instance, members of Truman's cabinet argued that (1) all three branches of service relied upon steel in order to effectively fight, (2) atomic weapons would not be able to effectively be deployed without steel, (3) ammunition supplies were low already, and (4) the stoppage of steel would hurt the Unites States' ability to protect its allies in Europe against Soviet aggression. *Id.* Marcus goes on to assert

President Truman lacked the authority to seize the steel industry by executive order.[87]

The *Youngstown* decision is significant not just for its rejection of expansive Presidential power, but also for the analysis developed in a concurring opinion by Justice Jackson, known as the "Jackson test[,]" in which he argued that a President's power is dependent on whether or not Congress has spoken to a particular issue.[88] Though merely a

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that had the defense argument been Truman's sole basis for the seizure, perhaps the steel industry would not have reacted so bitterly; however, his speech announcing the seizure served as a scathing rebuke of the greed of big steel. *Id.*

[87] *See Youngstown*, 343 U.S. at 579. In holding that Truman's order was unconstitutional, the Court in *Youngstown* stated that, "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. The court found that Truman had neither Constitutional nor statutory power to issue the order. *Id.* at 585. Further, the Court emphasized the supremacy of Congress' legislative authority, in good times and in times of national emergency. *Id.* at 589. Accordingly, in a 6-3 decision, the Court held that Truman's executive order was unconstitutional. *Id. See also* MARCUS, *supra* note 86 (offering an extensive discussion of the briefs, oral argument, and decision in *Youngstown*). Significantly, although Congress did not overturn the executive order authorizing the steel seizure, they did celebrate its overturn by the Supreme Court. *See, e.g.,* C.P. Trussell, *Congress Hails End of Steel Seizure*, N.Y. TIMES, June 3, 1952, at A1 (noting that following the steel seizure, the Senate Judiciary Committee had measures on its docket to impeach or censure President Truman, while bills seeking to amend the Constitution to ban such seizures were on the Senate Calendar on the day the decision was announced).

[88] *See Youngstown*, 343 U.S. at 634. In his Youngstown concurrence, Jackson argues that the legal consequences of Presidential action are determined by their particular circumstances with regard to Congress. *Id.* at 635. Specifically, Jackson argued that:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said . . . to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

*Id.*at 635-37.

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

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concurring opinion, Justice Jackson's *Youngstown* analysis has become the decisive judicial test for determining the legality of executive orders.[89] Furthermore, though it was written in support of an opinion that overturned an executive order, in the fifty-five years since it was developed, the Jackson Test has been used to uphold numerous orders.[90]

In the years immediately following *Youngstown*, the threat of the Cold War ensured that Presidents would continue to issue bold executive orders involving national security.[91] First, in the area of

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Id. at 637.

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

Id. at 637-38. Further, Jackson equated each of his classifications to cases that the court had heard in the past. For example, Jackson stated that in *Curtiss Wright*, President Roosevelt had maximum authority to issue his executive order because it was based on a valid Congressional grant of authority. *Id.* at 636. Second, Jackson stated that in *Ex parte Milligan*, President Lincoln was operating within a zone of twilight because there was neither a congressional grant nor denial or authority for him to suspend the writ of habeas corpus. *Id.* at 637. Finally, Jackson argued that in *Myers v U.S.*, the President acted counter to a Congressional statute, thus his power was at its lowest ebb because he relied only upon his own Constitutional power in issuing the executive order. *Id.* at 638. Finally, Jackson held that because Congress had passed three statutes rejecting giving the authority to seize industries, *Youngstown* fell into the third category, under which the President's authority was at its lowest ebb. *Id.* at 640. Because Jackson found that the President lacked the express Constitutional authority on his own to issue the executive order, and he further stated that "the President does not enjoy unmentioned powers[,]" he concurred in the judgment in finding Truman's executive order unconstitutional. *Id.*

[89] *See* Dames and Moore v Regan, 453 U.S. 654, 661 (1981) (applying the Jackson Test, which, "both parties agree brings together as much combination of analysis and common sense as there is in this area"); Russell Dean Covey, Note, *Adventures in the Zone of Twilight: Separation of Powers and National Economic Security in the Mexican Bailout*, 105 YALE L.J. 1311, 1323 (1996) ("In his concurring opinion, Justice Jackson articulated a theory of Presidential power that retains force today"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: POLICIES AND PRINCIPLES 332-34 (2002) (describing the Jackson Test and stating, "[a]nalysis of Presidential power often starts with Justice Jackson's three part test. . . It should be noted that the dissenting Justices in Youngstown appeared to agree with this third approach [Justice Jackson's test] to inherent power, but disagreed as to whether Congress had acted").

[90] *See, e.g., Dames and Moore*, 453 U.S. at 661 (applying the Jackson Test in upholding an executive order issued by President Reagan); AFL-CIO v. Kahn, 618 F.2d 784, 787 (D.C. Cir. 1979) (same for an executive order issued by President Carter).

[91] *See* STEVE NEAL, HARRY AND IKE: THE PARTNERSHIP THAT REMADE THE POSTWAR WORLD 166-76 (2001) (describing the politically charged atmosphere of the McCarthy era

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intelligence, Congress and the Court gave Presidents wide latitude in intelligence classification and gathering during the 1940s and 1950s.[92] However, during the Communist scares of the 1950s, the Court limited the President's ability to order the administration of loyalty oaths and deny security clearance.[93]

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during which both Truman then Eisenhower struggled to fight communism without resorting to McCarthy's tactics).

[92] *See, e.g.,* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948). In *Waterman*, the Civil Aeronautics Board, with express approval of the President, issued an executive order denying Waterman Steamship a certificate necessary to procure an air route and granted one to Chicago and Southern Air Lines, a rival applicant. *Id.* at 104. The Court held that the final order qualified as "Presidential discretion" concerning "political matters beyond the competence of the courts to adjudicate." *Id.* at 114. In particular, the Court declined to rule on the validity of a Presidential action involving intelligence, stating:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. at 111.

[93] *See* Cole v. Young, 351 U.S. 536 (1956). In *Cole*, the petitioner, a member of the classified civil service as a food and drug inspector, was fired because of suspicions that he was a communist. *Id.* at 540. Previously, Congress had passed a statute allowing the President to terminate the employment of civil servants in a number of agencies if he though it was in the best interests of national security. *Id.* at 541. Later, President Eisenhower issued an executive order extending the power to all agencies. *Id.* However, the Supreme Court declared that this extension was unconstitutional because the Executive order had gone beyond Congress' intention. *Id.* at 558. Instead, the court held that, "an employee can be dismissed 'in the interest of the national security' under the Act only if he occupies a 'sensitive' position." *Id.* at 551; *see also* Greene v. McElroy, 360 U.S. 474, 508 (1959) (holding that the Department of Defense cannot hold a hearing on the denial of a security clearance without traditional due process standards without specific legislative or executive authorization to waive due process requirements); Exec. Order No. 10865, 25 Fed. Reg. 1583 (February 24, 1960) (establishing a defense security clearance program that would comply with the Court's Due Process requirements); *see also* MAYER, *supra* note 13, at 150 (noting how President Eisenhower issued an executive order complying with the Court's criteria rather than pressing Congress to act, because his advisors felt that "[t]he

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Next, in the 1970s, following the Court's unwillingness to curb Presidential autonomy in the intelligence arena in the 1950s, Congress made two major attempts to restrain Presidential power to issue executive orders concerning classification.[94] First, in 1971, when President Nixon attempted to reinstate the Subversive Activities Control Board with the issuance of an executive order, Congress responded by expressly overturning the order.[95] Next, in 1974, Congress acted to ensure that courts could review executive orders concerning classification when it revised the Freedom of Information Act.[96]

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appearance of executive impotence would also tend to limit future Presidential discretion in this area . . .").

[94] For a general discussion of the President's power to issue executive orders dealing with foreign affairs and intelligence, *see* MAYER, *supra* note 13, at 138-81. In particular, Mayer notes that both intelligence organization and information classification lean heavily upon the President's inherent executive power. *Id.* at 139. Further, Mayer points out that although the secrecy of information and intelligence undercuts the ability of both Congress and the public to hold Presidents accountable, he has nonetheless been granted wide autonomy because of pressing national security concerns. *Id.* at 138.

[95] *See* Exec. Order No. 11605, 36 Fed. Reg. 12831 (July 8, 1971) (amending a previous executive order and revising the mission of the Subversive Activities Control Board ("SACB") to identify organizations to which federal employees could not belong). *See also* MAYER, *supra* note 13, at 139-41. Mayer describes President Nixon's attempt to revitalize the SACB and the corresponding Congressional reaction. *Id.* at 141. Specifically, Nixon wanted the Board to be charged with the task of reviewing organizations to see which ones federal employees could belong to and which ones were subversive. *Id.* at 140. Mayer then states that after Nixon issued executive order 11605, Congress reacted swiftly, cutting off appropriations and prohibiting the SACB from spending any money pursuant to the order. *Id.* Notably, this incident marks one of the few instances in which Congress has expressly overturned an executive order. *Id.*

[96] *See* EPA v. Mink, 410 U.S. 73 (1972). In *Mink*, Congresswoman Patsy Mink made a request under the Freedom of Information Act ("FOIA") to the President for documents concerning underground nuclear testing. *Id.* at 74. The Environmental Protection Agency denied the request citing national security concerns. *Id.* The court noted that FOIA exempts certain specified categories of information, those required by executive order to be kept secret in the interest of the national defense or foreign policy. *Id.* Accordingly, the Court held that the disclosure of the documents was not required, noting that *in camera* inspection of documents was not made mandatory by the statute and stating, "Congress chose to follow the Executive's determination in these matters and that choice must be honored." *Id.* at 81. *But see* MAYER, *supra* note 13, at 156-57. Mayer notes that following the Mink decision Congress amended FOIA to allow the type of *in camera* judicial review that the Court had found lacking in the Mink decision. *Id.* at 156. Notably, the legislation was passed over President Ford's veto. *Id.* *See also* Freedom of Information Act, 5 U.S.C. § 552 (2006).

> (b) This section does not apply to matters that are—
> (1)
> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

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However, in practice, judicial review over executive orders has had little effect on Presidential actions in the intelligence arena because the Court did not interpret Congress' intent as seeking to restrain Presidential power.[97]

From there, two decisions issued during the 1970s and 1980s further refined the acquiescence doctrine that was first established in *Midwest Oil* in 1915.[98] First, in *AFL-CIO v. Kahn*,[99] the D.C. Court of Appeals cited the acquiescence doctrine in holding that President Carter could issue executive orders advancing broad social policies even if the policies were not the reason for the statutory grant of power.[100] Then, in *Dames & Moore v. Regan*,[101] the Court held that the failure of Congress to reject Presidential actions having to do with the Iranian hostage crises constituted acquiescence.[102] Thus, by the 1980s, courts had not only

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> (B) are in fact properly classified pursuant to such Executive order

Id.

97 *See* MAYER, *supra* note 13, at 156-57 (noting that subsequent courts have afforded the denial of FOIA requests the utmost deference). In fact, since the FOIA Amendment, only once has an agency been required to turn over classified material. *But see* Rosenfeld v. Dept. of Justice, 57 F.3d 803 (9th Cir. 1995) (holding that a FOIA request from the Department of Justice to obtain information about FBI investigations of 1960s protests at the University of California, Berkeley, were, in part, unreasonably denied).

98 *See supra* note 57 (providing a discussion of the origins of the acquiescence doctrine in *U.S. v. Midwest Oil Co.*).

99 AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979).

100 *Id.* at 784. In *Kahn*, the Court upheld President Carter's ability to issue an executive order denying government contracts to bidders who did not meet certain wage and price controls. *Id.* at 785. In particular, the Court noted that as long as there is a close nexus between the criteria laid out in a statute and the program implementing the statute via executive order, the order is unconstitutional. *Id.* at 792. In the case of Carter's executive order, the statute—the Federal Property and Administrative Services Act—called for "economy" and "efficiency." *Id.* Further, the Court found significant the fact that Congress had acquiesced to the practice for a number of years. Specifically, the Court stated:

> The President's view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is "entitled to great respect." As the Supreme Court observed this Term, the "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."

Id. at 790. Accordingly, because President Carter's executive order had a sufficiently close nexus with the authorizing statute, and because Congress had acquiesced to similar orders in the past, the order was Constitutional. *Id.* at 793.

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

102 *Id.* at 685. In *Dames & Moore*, a company sued the government of Iran and a number of Iranian banks. *Id.* at 664. Meanwhile, a series of executive orders issued between 1979 and 1981 by Presidents Carter and Reagan served to end the Iranian hostage crises by nullifying all attachments on Iranian held assets in the U.S. and suspending all claims thereto. *Id.* at 666. Writing for the Court, Justice Rehnquist held that the President had the

rejected the non-delegation doctrine in favor of the acquiescence doctrine, they had also interpreted the acquiescence doctrine extremely broadly, thereby granting the President great power to issue executive orders.[103]

Following the Court's broad application of the acquiescence doctrine, Congress began to weigh in on the issuance of executive orders.[104] Since the 1980s, numerous bills have been introduced in Congress limiting or altering the President's ability to issue executive orders.[105] The most significant of such bills are the Separation of Powers Restoration Act[106] and the Presidential Order Limitations Act.[107] Yet,

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right to issue the executive orders and that they served to nullify Dames and Moore's claim. *Id.* at 689. Specifically, the Court cited to *Youngstown* in holding that, "from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294." *Id.* at 686. Accordingly, the Court concluded, "[t]he President has exercised the power, acquiesced in by Congress, to settle claims and, as such, has simply effected a change in the substantive law governing the lawsuit." *Id.* at 685. *See also* COOPER, *supra* note 14, at 10 (noting that Rehnquist had been a law clerk for Justice Jackson, the author of the *Youngstown* concurrence, and went on to write the *Dames and Moore* opinion which served to expand the *Youngstown* test by finding that the failure of Congress "to reject the actions of the two Presidents, coupled with what were considered to be similar examples of international settlement agreements, constituted acquiescence in the President's actions").

[103] *See Kahn*, 618 F.2d at 790 (holding that the President's interpretation of his own authority is "entitled to great respect" in the absence of Congressional action to the contrary); *Dames & Moore*, 453 U.S. at 685 (holding that "[t]he President has exercised . . . power, acquiesced in by Congress").

[104] *See infra* notes 106-07.

[105] *See, e.g.*, H.R. 27, 107th Cong. (2001) (granting members of Congress and aggrieved members of the public standing to challenge Executive Orders deploying U.S. troops into hostilities or using Department of Defense monies to do so); H.R. 3838, 101st Cong. §6 (1989) (granting the President the power to issue Executive Orders altering the scope of orders issued by the Defense Nuclear Facilities Safety Board).

[106] *See* H.R. 2655, 106th Cong. (1999); HR 864, 107th Cong. (2001). Though introduced in two separate Congresses with over forty sponsors, the Separation of Powers Restoration Act languished in committee. *Id*. The text of the statute reads in pertinent part:

> SEC. 4. REQUIREMENT OF STATEMENT OF AUTHORITY FOR PRESIDENTIAL ORDERS.
>
> (a) STATEMENT OF AUTHORITY-The President shall include with each Presidential order a statement of the specific statutory or constitutional provision which in fact grants the President the authority claimed for such action.
>
> (b) INVALIDITY OF NONCONFORMING ORDERS-A Presidential order which does not include the statement required by subsection (a) is invalid, to the extent such Presidential order is issued under authority granted by a congressional enactment.
>
> SEC. 5. EFFECT OF PRESIDENTIAL ORDERS.

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(a) LIMITED EFFECT OF PRESIDENTIAL ORDERS-A Presidential order neither constitutes nor has the force of law and is limited in its application and effect to the executive branch.
(b) EXCEPTIONS-Subsection (a) does not apply to—
(1) a reprieve or pardon for an offense against the United States, except in cases of impeachment;
(2) an order given to military personnel pursuant to duties specifically related to actions taken as Commander in Chief of the Armed Forces;
(3) a Presidential order citing the specific congressional enactment relied upon for the authority exercised in such order and—
(A) issued pursuant to such authority;
(B) commensurate with the limit imposed by the plain language of such authority;
(C) not issued pursuant to a ratified or unratified treaty or bilateral or multilateral agreement . . .

SEC. 6. STANDING TO CHALLENGE PRESIDENTIAL ORDERS WHICH IMPACT SEPARATION OF POWERS INTEGRITY.
The following persons may bring an action in an appropriate United States court to challenge the validity of any Presidential order which exceeds the power granted to the President by the relevant authorizing statute or the Constitution:
(1) CONGRESS AND ITS MEMBERS-The House of Representatives, the Senate, any Senator, and any Representative to the House of Representatives, if the challenged Presidential order—
(A) infringes on any power of Congress;
(B) exceeds any power granted by a congressional enactment; or
(C) violates section 4 because it does not state the statutory authority which in fact grants the President the power claimed for the action taken in such Presidential order.
(2) STATE AND LOCAL GOVERNMENTS-The highest governmental official of any State, commonwealth, district, territory, or possession of the United States, or any political subdivision thereof, or the designee of such person, if the challenged Presidential order infringes on the powers afforded to the States under the Constitution.
(3) AGGRIEVED PERSONS-Any person aggrieved in a liberty or property interest adversely affected directly by the challenged Presidential order.

[107] *See* H.R. 3131, 106th Cong. (1999); H.R. 23, 107th Cong. (2001). The Presidential Order Limitations Act has been introduced in the United States House of Representatives twice, most recently in 2001. *Id.* Yet, the Act has not had wide support and has never made it out of committee. *Id.* The text of the act reads as follows:
(a) TRANSMISSION OF PRESIDENTIAL ORDERS TO CONGRESS-The President shall transmit a copy of each Presidential order to-
(1) the Speaker of the House of Representatives;
(2) the President pro tempore of the Senate; and

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neither of these bills passed and Congress has yet to pass a statute limiting a President's ability to issue an executive order, indicating a lack of political will to restrict the President's power.[108]

In contrast to the Congressional inaction in the wake of the Court's broad interpretation of the acquiescence doctrine, lower courts have invalidated two executive orders involving labor policy for going beyond granted legislative authority.[109] First, in *Chamber of Commerce v. Reich*,[110] the D.C. Court of Appeals held that President Clinton lacked the statutory authority to issue an executive order which conflicted with an already existing statute.[111] Similarly, in 2001, in *Building and Construction*

(3) the chairperson and ranking member of each standing and select committee of the House of Representatives and the Senate.

(b) TIME BEFORE TAKING EFFECT- Except as provided in subsection (c), to the extent a Presidential order is issued under authority granted by any enactment of the Congress, such order shall not take effect earlier than 30 days after its transmission pursuant to subsection (a), during which time the Congress may review and take any action it deems appropriate with regard to such order (or portion thereof).

(c) EXCEPTION FOR EMERGENCIES- The time limitation in subsection (b) shall not apply in the case of a Presidential order describing an emergency which requires the order to take effect at an earlier time to

(1) protect the national security;

(2) prevent physical injury to any individual;

(3) provide disaster relief; or

(4) safeguard an American foreign policy interest.

[108] *See supra* note 106 (noting that the Separation of Powers Restoration Act was not passed despite significant support and a committee hearing held on the bill); *supra* note 107 (noting that the Presidential Order Limitations Act died in committee with little Congressional support).

[109] *See* Branum, *supra* note 24, at 11 (providing a summary of *Reich* and *Allbaugh* and contrasting the two cases).

[110] Chamber of Commerce of the United States v. Reich, 316 U.S. App. D.C. 61 (D.C. Cir. 1996).

[111] *Id.* at 1324. In *Reich*, the court declared unconstitutional an executive order issued by President Clinton. *Id.* Specifically, the order stated: "It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, contracting agencies shall not contract with employers that permanently replace lawfully striking employees." *Id.* The plaintiff challenged the order, claiming it contradicted the National Labor Relations Act ("NLRA"). *Id.* at 1325. Further, the plaintiffs claimed that the President was required to issue findings of fact in the order, otherwise the executive order would be an unconstitutional delegation of legislative power under *Panama Refining Co. Id.* The Court agreed, holding that the order conflicted with the NLRA, and accordingly the executive order was declared invalid. *Id.* at 1338. *See also* MAYER, *supra* note 13, at 49 (discussing the Court's rationale in Reich and arguing that the decision was not a significant departure from the Court's typical

Trades Department v. Allbaugh,[112] a district court enjoined an executive order issued by President Bush partly on pre-emption grounds and partly on Constitutional grounds.[113] However, in a telling reversal, the D.C. Court of Appeals held that the President, in fact, had the authority to issue the executive order.[114]

The *Allbaugh* case is merely the latest addition to a Constitutional dialogue that has been going on since the age of Washington.[115] As two hundred years of this dialogue prove, determining whether or not executive orders are legal is a question that goes to the very heart of our system of government.[116] Accordingly, the next section will analyze whether executive orders vest too much power in the President, the extent of congressional oversight of executive orders, and the efficacy of the Court's jurisprudence in the area of executive orders.[117]

III. ANALYSIS

As the previous Part demonstrates, American history is replete with executive orders, ranging from the mundane to the controversial.[118] Correspondingly, judicial decisions over the past two centuries have served to expand, or at times limit, Presidential power to issue such

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deference because the Court simply invalidated an order that directly conflicted with a statute, rather than lessening the acquiescence doctrine).

[112] Bldg. & Constr. Trades Dep't v. Allbaugh, 172 F. Supp. 2d 138 (D.D.C. 2001).

[113] *Id.* at 138 (holding that President Bush's executive order that disallowed federal agencies requiring or prohibiting project labor agreements was unconstitutional, because the President had no statutory authority to issue the order).

[114] Bldg. & Constr. Trades Dep't v. Allbaugh, 295 F.3d 28, 36 (D.C. Cir. 2002). In *Allbaugh*, the D.C. circuit reversed, holding that the order did not conflict with the NLRA and that the President had the authority to issue the order. *Id.* at 36. Specifically, the court noted: "The President's power necessarily encompasses 'general administrative control of those executing the laws,' throughout the Executive Branch of government, of which he is the head." *Id.* at 32 (Citation Omitted).

[115] *See supra* note 14 (referring to jurisprudence in the area of executive orders as a "constitutional dialogue").

[116] *See* MAYER, *supra* note 13, at 218 (quoting Justice Storey stating "problems among the most important and probably the most difficult to be satisfactorily resolved, of all which are involved in the theory of free governments").

[117] *See infra* Part III.

[118] *See also* MAYER, *supra* note 13, at 75 (describing the mundane business of early executive orders, which mostly served to establish Indian Reservations and townships, and set aside land for the military); COOPER, *supra* note 14, at 8 (listing significant executive orders, including: the order interring Japanese-Americans during WWII, the order desegregating the military in 1948, and the order blocking striker replacements during the 1990s).

orders.[119] This Part will seek to answer some pressing questions concerning executive orders stemming from all three branches of the federal government.[120] First, this Part will analyze whether executive orders are necessary parts of Presidential lawmaking.[121] Second, this Part will analyze the efficacy of judicial determinations in the area of executive orders.[122] Finally, this Part will assess Congressional oversight over the issuance of executive orders.[123]

A. *Executive Orders and the Executive Branch: Instruments of Presidential Tyranny or Executive Boldness?*

President Clinton's advisor, Paul Begala, once famously summed up the administration's opinion about executive orders: "Stroke of the pen . . . Law of the land. Kind of cool."[124] Yet, for all of their convenience and prevalence, it remains unclear whether executive orders are necessary and exactly how our national landscape would be different without them. Many argue that the ease with which a President can issue an order causes them to be per se abusive.[125] Yet, in order to

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[119] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (establishing the non-delegation doctrine, stating that Congress cannot delegate its legislative power to the President); U.S. v. Midwest Oil Co., 236 U.S. 459 (1915) (outlining the acquiescence doctrine, whereby Congress can acquiesce to a President's executive order by failing to legislate against it); Little v. Barreme, 2 Cranch 170 (1804) (establishing the supremacy of statutes over executive orders).

[120] *See infra* Parts III.A-C.

[121] *See infra* Part III.A.

[122] *See infra* part III.B.

[123] *See infra* part III.C.

[124] James Bennet, *True to Form, Clinton Shifts Energies Back to U.S. Focus*, N.Y. TIMES, July 5, 1998 at A10.

[125] *See, e.g.*, Anderson, *supra* note 25, at 589. Anderson argues that executive orders are legislative in nature and upset the balance of powers by vesting legislative power in the executive branch. *Id.* at 611. Accordingly, Anderson concludes that executive orders run the risk of becoming what the Federalist papers termed "[t]he [v]ery [d]efinition of [t]yranny." *Id.* at 589. *See also* Branum, *supra* note 24, at 1. Branum argues that simply because a person agrees with a particular President, that is no reason to allow all Presidents the power to unilaterally write a policy into law. *Id.* at 2. Branum blames not only the public, but also Congress and various Presidents for allowing the spike in executive orders. *Id.* at 22. Specifically, she argues that the public has simply become used to Presidential abuse of the power to issue executive orders, vehemently stating, "[o]nce President Clinton illegitimately snatched the authority to decide this issue from the legislature, few even bothered to wonder whether President Bush actually had the responsibility (or authority) to take over the decision-making on this issue." *Id.* at 46. *See also* Gaziano, *supra* note 23, at 287. Gaziano argues that legal rules surrounding executive orders have resulted in many improper orders becoming law. *Id*. Specifically, Gaziano argues that, through his use of executive orders, "President Clinton abused his authority . . ." *Id.* at 272. Yet, despite the fact that Anderson, Branum, and Gaziano all argue against executive orders, stating that they are per se abusive and tyrannical, they fail to look beyond partisan politics of the day

genuinely assess the efficacy of executive orders, it is necessary to look at both the best and worst of Presidential orders.

Perhaps the most notorious executive order ever issued, Executive Order 9066, authorized the internment of Japanese-Americans during World War II.[126] Yet, the government's subsequent support for the order, including Congressional passage of a statute affirming the order and the Supreme Court's firm support of the internment, is illustrative. For even without the executive order, the internment still would have taken place: Congress simply would have passed a statute facilitating the internment and the Court would have affirmed the statute just as it affirmed the executive order.[127] If Congress had been against the internment, they could have easily overturned the order by statute.[128]

The middle ground, wherein an executive order is passed and Congress neither overturns the order nor affirms it by statute, constitutes the only situation in which executive abuse has occurred because of an executive order; however, at this point the burden must shift to Congress to reign in the President.[129] Congress's failure to overturn an abusive executive order indicates Congressional irresponsibility, confounding the idea of checks and balances and evidencing corruption at the highest levels. Thus, the practice of issuing executive orders is not per se flawed simply because an order has the potential for abuse, because: (1) like the Japanese internment, the order would have been passed and brought

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toward what the historical ramifications would be if executive orders did not have the position they currently possess in American politics.

[126] *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942) (arguing that "successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities").

[127] *See supra* note 75 and accompanying text; *see also*, 56 Stat. 173 (1942) (Congressional statute outlining the penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones); Korematsu v. United States, 323 U.S. 214, 219 (1944) (upholding the order and arguing, "[c]ompulsory exclusion of large groups of citizens from their homes . . . is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger").

[128] *See* Little v. Barreme, 2 Cranch 170 (1804) (establishing the supremacy of statutes over executive orders); *see also supra* note 95 (describing the process of Congress overriding President Nixon's executive order by passing a statute).

[129] *See infra* note 158 (comparing Congressional acquiescence to an executive order to statutory lawmaking in which the President allows a bill to become law but refuses to sign it).

into existence even in the absence of unilateral executive power; or (2) the order can and should be superceded by Congress.[130]

On the other hand, one of the most progressive and acclaimed executive orders, Executive Order 9981, desegregated the United States military in 1948.[131] Unlike the order interning the Japanese-Americans, Truman's executive order was not affirmed by Congress.[132] Thus, Order 9981, like so many civil rights orders before and after, is significant because "but for" the executive order, there is little chance that the United States military would have been desegregated by 1953.[133] Thus, Executive Order 9981 highlights a larger issue having to do with executive orders: by issuing a controversial executive order, the President takes the political heat and historical glory for issuing an order that Congress, for ideological and political reasons, is unwilling or unable to pass as a statute.[134]

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[130] This analysis is similar to the "but for" test that is at the heart of factual causation in tort law. For a description of the "but for" test, see VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 364-65 (3rd ed. 2005). Johnson and Gunn explain the "but for" test, which asks, but for the defendant's conduct, would the harm have occurred? *Id.* at 364. If the answer is yes, than the defendant is a cause in fact of the harm. *Id.* If not, the defendant is not a factual cause of defendant's harm. *Id.* Further Johnson and Gunn state that the "but for" test is normally required for a defendant to be liable in tort law. *Id.* at 365.

[131] *See* Exec. Order No. 9981, 13 Fed. Reg. 4131 (July 29, 1948) (stating that, "it is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all who serve in our country's defense").

[132] *See, e.g.*, ROSENBURG & ROSENBURG, *supra* note 6, at 36 (noting that Civil Rights bills stalled in the late 1940s, because the "conservative coalition in Congress bottled up legislation"); *see also* MAYER, *supra* note 13, at 186 ("By the 1930s . . . legislative hostility to significant civil rights legislation was firmly entrenched, largely a function of southern opposition to federal intervention of any kind.").

[133] S*ee* JOHNSON & GUNN, *supra* note 130, at 364-65 (3d ed. 2005) (describing the "but for" test as it applies to tort law).

[134] *See* Martin Luther King, Jr., *The President Has the Power: Equality Now*, THE NATION, 91-95 (Feb. 4, 1961). In this 1961 article, Dr. King states, "[i]t is no exaggeration to say that the President could give segregation its death blow through a stroke of the pen." *Id*. at 93. In attempting to persuade the incoming Kennedy Administration to act in the area of civil rights, Dr. King cited the inadequate measures the government had taken to advance civil rights prior to the 1960s. *Id*. at 92. As a remedy, Dr. King first suggested that the President pressure Congress for action, stating, "[t]he influence the President can exert upon Congress when, with crusading zeal, he summons support from the nation has been demonstrated more than once in the past." *Id*. But beyond influencing the legislature, Dr. King argued for the bold use of executive orders in advancing civil rights, including orders to: (1) end discrimination in housing, (2) prohibit government contractors from discriminating, (3) end employment discrimination in executive agencies, and (4) end segregation in public hospitals. *Id*. Dr. King's strong emphasis on executive orders

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Thus, executive orders may appear tyrannical based on the broad power they afford Presidents; however, in effect, they are useful tools of the Presidency, able to be checked by Congressional oversight.[135] Without executive orders, bad policy would still find its way into the law books because all three branches of government are fallible.[136] But with executive orders, Presidents are sometimes able to make bold, far-sighted policy, even when Congress is unwilling to act.[137]

B. Executive Orders and the Legislative Branch: Assessing Congress' Check on Presidential Power

As Justice Brandeis stated, "[t]he separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others."[138] Indeed, in the area of executive orders, the President's ability to issue an order is

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indicates that he found this to be the most likely area for government action. In other words, it was through executive orders and not Congressional legislation that Dr. King thought civil rights would progress. *See also,* MCCULLOUGH, *supra* note 81, at 915. McCullough offers an example of the extent to which Truman's order effected his legacy. Specifically, McCullough emphasized the positive effect Executive Order 9981 has had on Truman's legacy by arguing that Truman had "done more for any President since Lincoln to awaken American conscious to issues of civil rights." *Id.*

135 *See infra* Part III.B (describing Congressional oversight of executive orders).

136 *See, e.g.*, THE FEDERALIST No. 37 (James Madison). In Federalist No. 37, James Madison discusses the inherent fallibility of government and, in particular, the new government submitted by the members of the Constitutional Convention. *Id.*

> Persons . . . will proceed to an examination of the plan submitted by the Convention, not only without a disposition to find or to magnify faults; but will see the propriety of reflecting that a faultless plan was not to be expected. Nor will they barely make allowances for the errors which may be chargeable on the fallibility to which the Convention, as a body of men, were liable; but will keep in mind, that they themselves also are but men, and ought not to assume an infallibility in rejudging the fallible opinions of others.

Id.

137 *See* COOPER, *supra* note 14, at 70. Cooper notes that executive orders are one way for a President to take significant actions without attracting much attention. *Id.* Cooper calls this "hiding in plain sight," and states:

> Few people regard executive orders as important, which has made them a vehicle that can be used to take significant actions that are . . . unlikely in most instances, to attract much attention, unless they are particularly sweeping in character.

Id. Cooper's assessment is correct. Moreover, if, as Cooper postulates, an order is sweeping in character or particularly abusive, someone will pay attention and Congress can then, if necessary, exercise the appropriate oversight in restraining Presidential action.

138 Myers v. United States, 272 U.S. 52, 291 (1926).

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largely dependent upon the action or inaction of Congress.[139] Yet, traditionally Congress has been reluctant to exercise either option, and its reluctance is entirely political.

For instance, since the Court's 1804 holding in *Little v. Baremme*, it has been well established that a statute supersedes an executive order.[140] Yet, Congress has only overridden an executive order a few times over the past one hundred years.[141] One reason for this may simply be a matter of Congress' inability to gather the necessary votes to override a President's veto of the superseding statute.[142] For example, members of a President's political party may be unwilling to overturn a measure promulgated by their party's leader.[143] Still, Congressional practice over the past century indicates that if a President were to issue a particularly egregious executive order, Congress would overturn the order by statute.[144]

Additionally, Congress has the power to broadly limit the President's ability to issue executive orders, yet no such statute has come

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[139] *See supra* note 88 (presenting the Jackson test, in which a President's executive order is given disparate amounts of deference depending on whether Congress has expressly authorized an order, has remained silent as to an issue, or has passed legislation counter to an order).

[140] *See supra* notes 29-31 (describing *Little v. Baremme*, in which the court explicitly held that statutes can override executive orders).

[141] *See, e.g.,* MAYER, *supra* note 13, at 139-41 (describing Nixon's effort to revive the Subversive Activities Control Board and Congress's response of passing a statute in order to override the order).

[142] *See* BARBOUR & WRIGHT, *supra* note 6, at 280 ("Because the President can usually count on the support of *at least* one-third of *one* of the houses, the veto is a powerful negative tool; it is hard for Congress to accomplish legislative goals that are opposed by the President.").

[143] For a discussion of the President's influence in Congressional legislating, see BURDETTE A. LOOMIS, THE CONTEMPORARY CONGRESS 155 (2000). Loomis argues that the President exercises unparalleled influence over the behavior of Senators and Representatives, stating:

> As a rule no member of Congress is as important a legislator as is the chief executive. . . . Whether in setting the congressional agenda, twisting a lawmaker's arm to support a favored measure, or threatening to veto an unsatisfactory bill, the President can affect the legislative process more forcefully, and in more ways, than the most influential senator or representative.

Id.

[144] *See, e.g.,* MAYER, *supra* note 13, at 27-28. Mayer explains that Congress has successfully blocked two executive orders since 1970. *Id.* at 27. First, in 1972, Congress blocked President Nixon's efforts to reestablish the Subversive Activities Control Board. *Id.* at 28. Second, in 1998, Congress blocked President Clinton from spending money on funds to carry out an executive order on federalism. *Id.* However, Mayer goes on to state that Congress has, since 1973, mounted twenty-six efforts to block executive orders. *Id.*

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close to passing. Both the Separation of Power Restoration Act and Presidential Orders Limitation Act, which were introduced into Congress over the past few years, would have sharply increased Congressional oversight in the area of executive orders, yet this oversight may be precisely the reasons why those measures failed.[145] More succinctly, though Congress may want to check Presidential power, it may not want the added responsibility, and correspondingly, the potential political liability that would come with increased oversight.[146]

Another reason why Congress has been unwilling to curb the power to issue executive orders is that when Congress or the public see an executive order as abusive, members of Congress are often preoccupied with placing political blame, and thus, Congress does not address the larger issue of whether a President ought to have the power to issue such orders in the first place.[147] For example, at the height of the Teapot Dome scandal of the 1920s, neither the new President nor Congress nor the media framed the scandal in terms of its origins in an executive order.[148] Instead, all talk focused on where the political blame should fall.[149] Conversely, in *Youngstown*, the fact that the steel seizure was

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145 *See supra* note 106 (describing the Separation of Power Restoration Act, which would have allowed Senator and Members of Congress standing to challenge any executive order they allege to be illegal). *See also supra* note 107 (describing the Presidential Orders Limitation Act, which would have created a thirty day lapse after an order is written but before it has taken effect, during which time the Act would have granted Congress the power to review and take any action it deems appropriate).

146 *See* BARBOUR & WRIGHT, *supra* note 6, at 748. Barbour and Wright describe Congress' unwillingness to enforce the War Powers Resolution of 1973. *Id.* In particular, Barbour and Wright state that while the President routinely circumvents Congress in making foreign policy, Congress does not view this circumvention as a bad thing: "The calculation for Congress is fairly straightforward: let the President pursue risky military strategies. If he succeeds, take credit for staying out of his way; if he fails, blame him not consulting and for being, 'imperial.' Either way, Congress wins." *Id.* This analysis may go far in explaining why Congress is so willing to allow the President latitude in issuing executive orders—Congress can allow the President to make policies for which Congress cannot be held politically liable.

147 *See supra* note 61 and accompanying text.

148 For a description of the Teapot Dome scandal, see *supra* note 60 and accompanying text. *See also*, *The President, supra* note 61, at A1 (offering an example of how the President's reaction to the Teapot Dome scandal ignored the fact that Teapot Dome began with an executive order issued by his predecessor); *Republican Organ, supra* note 61, at A1 (same with regard to Congressional Republicans' reaction to the scandal); *Warm Controversy, supra* note 61, at A1 (same with regard to Congressional Democrats' reaction to the scandal).

149 For an example of the type of partisan rancor that prevents Congress from looking at the overriding issue of the validity of executive orders, see *Warm Controversy, supra* note 61, at A1. This article, published the day after it was revealed that an oil official had transferred one hundred thousand dollars to the Secretary of the Interior based on an

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caused by an executive order was at the forefront of the debate over Presidential abuse.[150] Therefore, when Presidential action is seen as abusive because of an executive order, Congress is more likely to respond by curbing Presidential power.[151] However, when Presidential action is seen as abusive without specific focus on the involvement of an executive order, Congress most likely will not act and the power to issue executive orders will go unchecked.[152]

C. *Executive Orders and the Judicial Branch: Is the Jackson Test up to the Task?*

During the New Deal, President Franklin Delano Roosevelt compared the three branches of government to three horses working together to plow a field, with the failure of one resulting in the failure of all three.[153] In the field of executive orders, the Court has been a fairly cooperative horse, affirming independent executive action, issuing the acquiescence doctrine, and granting the President broad deference in the

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executive order issued by the late President Harding offers Congressional reaction to the Teapot Dome Scandal. *Id.* Specifically, Democratic leaders in Congress were concerned that President Coolidge had purposefully preempted a statement by a Democratic Senator calling for an independent investigation of the scandal by calling for one of his own. *Id.* Further, Democratic leaders in Congress asserted that their Republican counterparts purposefully stalled their announcement to allow the President to gain from making the announcement of the investigation, first stating that, "(Republican) Leaders were greatly worried yesterday after it was seen that [Democratic] action . . . would place the Republicans in the attitude of being forced to "clean house." *Id.* It follows that if the President and members of Congress from both political parties of Congress were worried only about the political fallout from the Teapot Dome Scandal, there was little concern as to whether or not executive orders such as the type that led to the scandal ought to be issued in the first place.

[150] *See* MCCULLOUGH, *supra* note 81, at 896 (calling the order "one of the boldest, most controversial decisions of his presidency").

[151] *See* Trussell, *supra* note 87, at A1 (noting that following the steel seizure, "[a] House Judiciary subcommittee . . . has on its docket a dozen or so measures to impeach Mr. Truman, to censure him or to give him powers or deprive him of them").

[152] *See supra* note 61 and accompanying text.

[153] *See Another Crises*, TIME, (Mar. 15, 1932).

> As yet there is no definite assurance that the three-horse team of the American system of government will pull together. If three well-matched horses are put to the task of plowing up a field where the going is heavy, and the team of three pull as one, the field will be plowed. If one horse lies down in the traces or plunges off in another direction, the field will not be plowed.

Id.

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area of national security orders.[154] But does the Court's cooperation lend itself too readily to affirming tyrannical executive orders?

Paradoxically, *Youngstown*, the most dramatic instance of the Court declining to cooperate with the executive branch, also presented the seminal test that the Court has used to uphold subsequent executive orders.[155] Justice Jackson's test, outlined in *Youngstown*, which grants the President less deference depending upon Congressional action or inaction, properly assures that executive orders will not become instruments of abuse.[156] By allowing Congressional behavior to determine whether an executive order is valid, the Courts have allowed the two political branches of government to draw the territorial line themselves.[157] Congress is able to allow the President to issue an executive order without endorsing it or overturning it.[158] This process

[154] *See, e.g.*, *In re* Neagle, 135 U.S. 1 (1890) (affirming independent Presidential action to enforce the law); U.S. v. Midwest Oil Co., 236 U.S. 459, 471 (1915) (outlining the acquiescence doctrine, stating, "Congress did not repudiate the power claimed or the withdrawal orders made"). *But see*, Rosenfeld v. Dep't of Justice, 57 F.3d 803 (1995) (serving as one of the few times in which the Court has stated that an executive agency violated the Freedom of Information Act).

[155] *See supra* note 88 and accompanying text (describing the *Youngstown* decision, containing Justice Jackson's test for the validity of independent executive action).

[156] *See supra* note 88 and accompanying test (describing the *Youngstown* analysis whereby, (1) a President's authority is at its maximum when he is acting pursuant to an express statutory grant of authority, (2) a President's power is in a "zone of twilight" when he acts pursuant to neither a congressional grant of authority nor a denial of authority, and (3) a President's power is at its lowest ebb when he takes measures incompatible with the expressed or implied will of Congress).

[157] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981). *Dames & Moore* held that the failure of Congress to reject the actions of the President, coupled with similar examples of international settlement agreements that had been affirmed by Congress, were sufficient to constitute acquiescence. *Id*. This put the President's actions in the first category of the Jackson test, in which a President's power is at its strongest. *Id*. Not surprisingly, once categorized thusly, the action was upheld. *Id*. *Dames & Moore* illustrates that the Court has left the line drawing to Congress and the President by assessing specific Congressional actions that indicated their support or disapproval of the action rather than relying upon an a Court test to figure out whether or not the subject of the executive order was within the purview of Congress.

[158] *See* BARBOUR & WRIGHT, *supra* note 6, at 280. This silent, but significant acquiescence to an executive order is not without its precedent. In fact, the reciprocal is present in the case of statutory lawmaking. *Id*. For example, when the President wants to allow something to become law without drawing too much attention to it, he may simply do nothing. *Id.* As long as Congress remains in session, the bill will automatically become law within ten days, even without a Presidential signature. *Id*. As Barbour and Wright put it, "[t]his seldom used option signals Presidential dislike for a bill, but not enough dislike for him to veto it." *Id*. Similarly, Congress may either dislike an executive order, and thus would not pass it into law, or they might like it just fine, but simply do not want to extend

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results in a delicate political balance between Congress and the President, and allows the Court to stay out of subjective determinations of whether or not a President has issued a tyrannical executive order.[159]

Though *Youngstown* properly ensures that executive orders do not become mechanisms of executive tyranny, there is one area in which the Court has inexplicably declined to apply the *Youngstown* analysis—intelligence and government classification.[160] Even following clear Congressional attempts to curb the President's power to classify information under the Freedom of Information Act and allow Courts to review intelligence information *in camera*, the Court has declined to apply the proper prong of the Jackson Test.[161] Instead, the Court has treated intelligence and classification orders as if they are backed by Constitutional or statutory authority, when they are in fact within the purview of both the executive and legislative branches of government.[162] Thus, the Court offered deference to the President for policy reasons.[163] Yet, avoidance of these types of subjective judicial determinations was the reason behind the Jackson test. Accordingly, under the Jackson test, Congress, and not the Court, should be making the determination of how much deference to give to the President in issuing intelligence orders.[164]

As this Part has shown, though executive orders may seem to leave open the possibility of Presidential abuse, in practice, the system, though not perfect, creates appropriate blocks to executive tyranny.[165] First, executive orders allow the President to issue bold prerogatives on

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the political capital, or do not possess the political capital, to pass an order into law. Therefore, Congress can simply do nothing and acquiesce to the order's validity.

[159] *See infra* Part III.A, Part III.B.

[160] *See, e.g.*, Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.").

[161] *See supra* notes 96-97 and accompanying text (providing examples of Congress' attempt to reign in Presidential autonomy in classification and intelligence orders).

[162] *See, e.g.*, *Waterman*, 333 U.S. at 111 ("Such decisions are wholly confided by our Constitution to the political departments of the government, *Executive and Legislative*. They are delicate, complex, and involve large elements of prophecy.") (emphasis added). *But see* MAYER, *supra* note 13, at 156-57 (noting that even after congressional attempts to allow for greater judicial review of classified information, courts have afforded the denial of FOIA requests the utmost deference).

[163] *See, e.g.*, *Waterman*, 333 U.S. at 111 ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world").

[164] *See supra* note 88 (describing the Jackson test).

[165] *See supra* Part III.

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politically sensitive issues.[166] Second, Congress is able to appropriately check any potential for Presidential abuse, though it does not often do so.[167] Finally, the Court's test for the validity of executive orders is proper, though it is improperly applied to intelligence and classification.[168] In short, the Constitutional dialogue on executive orders has been a productive one, producing a test that, if applied correctly, can guard against executive tyranny and abuse. However, Congressional oversight has not been sufficiently effective and the Court's application of the Jackson test is flawed in the area of intelligence and classification.[169] Now, it is up to Congress to take a bolder stance on such issues in order for the Court to apply the test correctly.[170]

IV. Proposed Legislation and Congressional Action

As the previous Part illustrates, each of the three branches of the Federal Government plays an important role in ensuring that executive orders do not become tools of tyranny.[171] Even when the President issues an order that has the potential for abuse, one of the other two branches of the federal government has the power to nullify the order, either through the passage of a Congressional statute or by the issuance of a judicial decision.[172] Generally this system of checks and balances ensures that the executive order remains a benign measure for Presidents to efficiently administer the executive branch.

However, in order for executive orders to remain effective vehicles for Presidential power, the other two branches of the federal government—Congress in particular—must be proactive in restraining executive power when it becomes abusive. This Part presents three ways in which Congress can be the first and most powerful bulwark against Presidential tyranny via executive order. First, Congress must be unequivocal in its support or disdain for particular types of executive orders.[173] Second, Congress must ensure that the public is informed about the topic of various executive orders as well as the fact that they have the force and effect of law.[174] Finally, Congress must ensure that

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166 *See supra* Part III.A.
167 *See supra* Part III.B.
168 *See supra* Part III.C.
169 *See supra* Part III.C.
170 *See infra* Part IV.
171 *See supra* Part III.
172 See supra note 27 (describing *Little v. Baremme*, a Supreme Court case that overturned an executive order and established statutory supremacy over executive orders).
173 *See infra* Part IV.A.
174 *See infra* Part IV.B.

when an abusive executive order is issued, Senators and Representatives frame the Congressional and public debates in terms of the order itself and not the President who issued it.[175]

A. Clarifying Intentions: Congress Must Explicitly State Its Desire to Restrain the President's Ability to Issue Executive Orders

In instances where a President issues an executive order that is harmful or tyrannical, and Congress acts to alleviate the risk of corruption, it then falls to the court system to apply the Jackson Test from *Youngstown* in order to determine whether or not the President has the independent power to issue the executive order.[176] Only when the Court finds that the President has independent power to issue the order under the third prong of the Jackson Test is the order proper. Further, because the President's power is at its lowest ebb under the third prong of the Jackson Test, the likelihood of the Court upholding such an order is minimal.[177]

However, in order for the Jackson Test to work, Congress must first be clear about its intentions toward a particular type of executive order. For example, one category in which Congress has unsuccessfully sought to remove unilateral power from the executive branch has been in the area of Presidential classification via executive order.[178] Following the Watergate scandal, Congress amended the Freedom of Information Act ("FOIA") in order to limit the President's ability to classify certain documents.[179] However, the Court has subsequently interpreted the President's power expansively and has only once ordered classified documents released due to legislative history, suggesting that the President's determination ought to be given significant weight.[180] The lesson from the FOIA example is that if Congress wishes to decrease the President's autonomy in issuing executive orders, this must be made

[175] *See infra* Part IV.C.

[176] *See supra* note 88 and accompanying text (describing Justice Jackson's concurrence in *Youngstown*, which stands as the proper judicial test for the validity of an executive order).

[177] *See supra* note 88 and accompanying text (describing the third prong of Justice Jackson's concurrence in *Youngstown*, wherein "the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter").

[178] *See supra* notes 96-97 and accompanying text (providing examples of Congress' attempt to reign in Presidential autonomy in classification and intelligence orders).

[179] *See supra* notes 96-97 and accompanying text (describing Congress' response to EPA v. Mink, in the form of the revised Freedom of Information Act, and the court's subsequent failure to grant access to plaintiffs seeking information classified by executive order).

[180] *See supra* note 97 and accompanying text.

plain from the language of the statute. The following text is an excerpt of FOIA with proposed language making Congress' intentions clear in italics:

> (b) This section does not apply to matters that are—
>
> > (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order[] ***as determined by a in camera judicial review with significant, but not absolute, deference given to executive determinations***[181]

Though the policy debate behind any change to FOIA is beyond the scope of this Note, the FOIA example illustrates the care with which Congress must undertake to restrain the President's power in issuing executive orders. If Congress wishes to decrease the President's autonomy in issuing any type of executive order, its intent must be made plain from the language of the statute so that courts can later apply the correct prong of the Jackson Test and ensure that executive orders do not become abusive.

B. Informing the Public: Congress Should Codify Executive Orders that Have the Force and Effect of Law

Because executive orders carry the force and effect of law, it is essential that more care be taken with their codification and organization.[182] Improper notice of executive orders has long been a concern, dating back to the days before orders were even recorded and extending through the Great Depression when orders began having very real implications for individual Americans.[183] Yet even today, when executive orders are published in the Federal Register and then published in the Code of Federal Regulations, they are not codified according to topic and included in the United States Code.[184]

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[181] Freedom of Information Act, 5 U.S.C. § 552 (2006).

[182] *See supra* note 24.

[183] *See supra* note 72 and accompanying text (describing *U.S. v. Smith*, in which the government tried to prosecute an individual under an executive order that had been rescinded).

[184] While many old executive orders are codified into a separate document, known as the CODIFICATION OF PRESIDENTIAL PROCLAMATIONS AND EXECUTIVE ORDERS, they are

Just as the government has a non-discretionary duty to publish statutes, so too should it have a non-discretionary duty to publish and codify executive orders having the force and effect of law, so that Congress and the public are on notice of important, as well as abusive, executive orders. Such notice can only increase oversight of executive orders, ensuring that they do not become mechanisms for abuse. Accordingly, Congress should mandate the codification of executive orders so that measures that have the force and effect of law are elevated to the same importance as statutory laws. For example, the following text is the language of §106(a) of the first title of the United States Code, establishing the method for publication of Statutes, with proposed changes in italics:

> § 106a. Promulgation of laws
>
> Whenever a bill, order, resolution, or vote of the Senate and House of Representatives, having been approved by the President, or not having been returned by him with his objections, becomes a law or takes effect, ***or whenever the President issues an executive order having the force and effect of law***, it shall forthwith be received by the Archivist of the United States from the President. . . and he shall carefully preserve the originals.[185]

Though the mere publication of an executive order may seem trivial, it would serve to elevate those executive orders that carry the same weight as statutes to the same level as statutes.[186] Such a change would result in more awareness among both members of Congress and the public as to what effect executive orders have on a particular area of the law. This would, in turn, lead to greater oversight and lessen the chances that Presidents will be able to issue abusive executive orders without consequence.

C. Framing the Debate: Congress Must Critique Executive Orders in Terms of the Power Itself, not the President Exercising the Power

Executive orders are often debated in highly politicized atmospheres, with loyalty following party lines and attacks centering

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nonetheless not included in the UNITED STATES CODE alongside statutes. *See* CODIFICATION OF PRESIDENTIAL PROCLAMATIONS AND EXECUTIVE ORDERS (1989).

185 1 U.S.C. § 106 (2006).

186 *See supra* note 68 (noting that Harvard Professor Erwin Griswold called for an official gazette that would serve as notification to the public of executive orders in the 1930s).

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less on the merits of an order and more on a specific President.[187] Rather than debating whether Presidents ought to have the power to issue binding orders at all, members of Congress simply attack the individual President who issued the order.[188] For this reason, abusive orders are more associated with the President who issued the order than with the institution of executive orders.[189]

In the future, if Congress wishes to restrain the President's ability to issue executive orders, it should frame the debate in terms of the power itself, not the President exercising the power. By questioning the practice of issuing executive orders Congress would, in turn, focus the media and the public debate upon the great power that executive orders grant Presidents, resulting in increased oversight. Such increased oversight into executive orders would still allow the President the power to issue important and expedient orders, while making it less likely that an order will be used for Presidential abuse and tyranny.

V. CONCLUSION

For two centuries, executive orders have allowed Presidents to exercise enormous power. At times, that power has been used to implement important measures to advance the country. At other times, executive orders have bred scandal and national shame. Upon closer examination of 200 years of Constitutional dialogue among the three branches of government concerning how much unilateral power a President ought to have, however, it becomes clear that although executive orders may appear tyrannical based on the broad power they afford Presidents, in practice executive orders are useful tools of the Presidency, able to be checked by Congressional oversight and controlled by the Court. If correctly wielded, such Congressional and judicial oversight can guarantee that executive orders will not allow Presidents to become the despots so feared by the founding generation. Instead, by moving out of the zone of twilight and exercising proper oversight, Congress and the Court can ensure that the President is able to

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[187] *See supra* note 87 and accompanying text (discussing Congress' reaction to the Steel Seizure Case).

[188] *See supra* note 61 accompanying text (discussing Congress' reaction to the Teapot Dome scandal).

[189] Sometimes, a Congressional reaction can be both political and based on policy. *See, e.g.,* Trussel, *supra* note 87, at A1 (noting that following the steel seizure, the Senate Judiciary Committee had measures on its docket to impeach or censure President Truman, a decidedly political response that would achieve a policy oriented goal).

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administer the executive branch effectively, pass measures quickly, and occasionally rise above political divisions and do the right thing.

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