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PRESIDENTIAL POWER: USE AND ENFORCEMENT OF EXECUTIVE ORDERS

Introduction

"The executive power shall be vested in a President of the United States of America."[1] With these words the framers of the Constitution created the office of the president, who is the head of the executive branch of the government — the administrative director to whom the heads of governmental departments and agencies are responsible.[2]

As Chief Executive and administrative director, the president possesses the power to issue instructions and orders to executive officers concerning the performance of their duties.[3] One of the first examples of such instructions was President Jefferson's order to Secretary of State Madison to withhold delivery of a judicial commission of appointment from Marbury.[4] Such a directive has come to be termed an executive order. Closely related to executive orders are presidential proclamations. Although there has been no legal definition of the two terms,[5] executive orders may be classified as all directives of the president which are directed to, and govern actions of, governmental officials and agencies. Because they are directed to governmental officials, executive orders generally have only an indirect effect upon the individual. Proclamations, on the other hand, are directed at the individual. Because the president's power is more limited in the area of individual activities than governmental activities, proclamations are generally hortatory in nature[6] and not legally binding. Although the difference between the two may be one of form rather than substance, this distinction is the one most often advanced.

I. *History of Executive Orders*

A. Use

Beginning with George Washington, presidents have issued documents which may be described as executive orders. The earlier executive orders were used for such purposes as the withdrawal of public lands for Indian use, for the erection of lighthouses, the establishment, transfer, and abolition of land districts and land offices, and for supplementing acts of Congress.[7] Later executive orders were employed to set aside land for water, timber, fuel, hay, signal stations, target ranges, and bird sanctuaries.[8] During World War I they were used to set up such agencies as the War Trade Board, the Committee of Public Information, the Food Adminis-

1 U.S. CONST. art. II, § 1.

2 The president can appoint officers of the United States, with the advice and consent of Congress, and can require written reports from them on their official duties. U.S. CONST. art. II, § 2. The law recognizes that a special relationship exists between the president and the department heads. The acts of department heads within the scope of their powers are in law the acts of the president. Wolsey v. Chapman, 101 U.S. 755 (1879). Department heads are also bound by statutes, and where Congress makes the act to be performed by the department head ministerial, the performance of the act is judicially enforceable. Dunlap v. United States, 173 U.S. 65 (1898). In fact, Congress may confer executive or administrative powers which are not Constitutionally reserved to the president upon other executive officers. Kendall v. United States *ex rel.* Stokes, 12 Pet. 524 (1839). A department head, therefore, may be the servant of two masters.

3 The president cannot force the department *heads* to disregard the statutes of Congress [Kendall v. United States *ex rel.* Stokes, 12 Pet. 524 (1839)], nor may he thus contravene public policy determined by Congress. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

4 Marbury v. Madison, 1 Cranch 137 (1803).

5 Even Executive Order 10006 governing the issuance of Executive orders and proclamations does not define the two terms.

6 See, *e.g.*, LAW DAY, U.S.A., 1962 27 Fed. Reg. 549 (1962) and MOTHER'S DAY, 1962 27 Fed. Reg. 4757 (1962).

7 United States v. Midwest Oil Co., 236 U.S. 459, 470 (1915).

8 HOUSE COMM. ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 35 (Comm. Print 1957).

tration, and the Grain Corporation.[9] The greatest use of the executive order was made by Franklin D. Roosevelt in the early 1930's.[10] This period was the high-water mark of the use of executive orders; since then their use has declined. However, a change in their character has accompanied this decline. The executive order, which has historically been an administrative directive, has assumed an ever increasing legislative character. In 1952 President Truman "seized" the steel mills;[11] in 1953 the heads of the contracting agencies were ordered to enforce the nondiscrimination clause in government contracts;[12] and in 1962 President Kennedy issued Executive Order 11063 entitled *Equal Opportunity in Housing*.[13]

These latter executive orders have met with varied success. The steel "seizure" was defeated; and the nondiscrimination clause has been successfully enforced by indirect and extralegal means. Executive Order 11063 is hardly a year old and has not been legally enforced; however, the ramifications of its provisions[14] are extensive.

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9 *Id.* at 36.

10 In 1933, 654 executive orders were issued. In 1934 and 1935 respectively, 467 and 383 executive orders were issued. In 1953, 1954, 1955, and 1956, there were issued 89, 72, 64, and 24 executive orders. Since President Kennedy has taken office, the number has risen.

11 Executive Order 10340, 17 Fed. Reg. 3139 (1952).

12 Executive Order 10479, 18 Fed. Reg. 4899 (1953).

13 Executive Order 11063, 27 Fed. Reg. 11527 (1962).

14 * * *

Section 101. I hereby direct all departments and agencies in the executive branch of the Federal Government, insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin —

(a) in the sale, leasing, rental, or other disposition of residential property and related facilities (including land to be developed for residential use), or in the use of occupancy thereof, if such property and related facilities are —

(i) owned or operated by the Federal Government, or

(ii) provided in whole or in part with the aid of loans, advances, grants, or contributions hereafter agreed to be made by the Federal Government, or

(iii) provided in whole or in part by loans hereafter insured, guaranteed, or otherwise secured by the credit of the Federal Government, or

(iv) provided by the development or redevelopment of real property purchased, leased, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under a loan or grant contract hereafter entered; and

(b) in the lending practices with respect to residential property and related facilities (including land to be developed for residential use) of lending institutions, insofar as such practices relate to loans hereafter insured or guaranteed by the Federal Government.

* * *

Part III — Enforcement

Sec. 301. * * *

Sec. 302. If any executive department or agency subject to this order concludes that any person or firm . . . or any State or local public agency has violated any rule . . . adopted pursuant to this order, or any nondiscrimination provision included in any agreement or contract pursuant to any such rule . . . it shall endeavor to end and remedy such violation by informal means . . . a department or agency may take such action as may be appropriate under its governing laws, including, but not limited to, the following:

It may —

(a) cancel or terminate in whole or in part any agreement or contract with such person, firm, or State or local public agency providing for a loan, grant, contribution, or other Federal aid, or for the payment of a commission or fee;

(b) refrain from extending any further aid under any program

B. Organization

Until the Federal Register Act of 1935,[15] the state of executive orders was one of chaos, which, to a great degree, was due to the informality with which they were treated by the presidents. On a number of occasions a president wrote "I approve," "Approved," "Let it be done," or other similar words on the bottom of a recommendation drawn up by a Cabinet member. Executive order 396 issued in 1906 was not even dated, and since the Federal Register Act had not yet been passed, it became effective as soon as the Secretary of State sealed and attested to it.[16] Until 1907, executive orders were not even numbered.[17] Perhaps the best example of the disorder which reigned is well illustrated in the 1930's by the fact that on one occasion the United States Government was forced to ask the Supreme Court to dismiss a governmental appeal because it was based upon a regulation which no longer existed.[18]

In 1935 and 1936, two events occurred which gave order to the chaos into which executive orders had fallen. In 1935 President Roosevelt approved the Federal Register Act[19] which alleviated the problems of publication and notice by specifying that various documents, including any "Presidential proclamation or Executive order and any order . . . issued . . . by a Federal agency"[20] shall be published in the Federal Register. This section of the act also defined the term "Federal agency" or "Agency" so as to include the President of the United States.[21] Then, in 1936, President Roosevelt issued Executive Order 7298[22] which prescribed the manner in which proposed executive orders and proclamations were to be prepared.[23]

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administered by it and affected this order until it is satisfied that the affected person, firm, or State or local public agency will comply with the rules . . . adopted pursuant to this order, and any nondiscrimination provisions included in any agreement or contract;

(c) refuse to approve a lending institution or any other lender as a beneficiary under any program administered by it which is affected by this order or revoke such approval if previously given.

Sec. 303. In appropriate cases executive departments and agencies shall refer to the Attorney General violations of any rules . . . adopted pursuant to this order, or violations of any nondiscrimination provisions included in any agreement or contract, for such civil or criminal action as he may deem appropriate.

* * *

15 49 Stat. 500 (1935), 44 U.S.C. § 301 (1958).

16 Lapeyre v. United States, 17 Wall. 191 (1872).

17 Numbering seems to have begun in 1907 when the Department of State began to assign numbers to all executive orders which it had on file. Back orders which were later added were given in-between numbers, while some orders were never numbered at all because they were never discovered by the Department of State. It has been estimated that the number of unnumbered executive orders is between 15,000 and 20,000. The executive order which is Executive Order 1 was issued by President Lincoln on October 20, 1862. COMMITTEE ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., *Op. cit. supra* note 8, at 37.

18 GOVERNMENT IN IGNORANCE OF THE LAW — A PLEA FOR BETTER PUBLICATION OF EXECUTIVE LEGISLATION, 48 HARV. L. REV. 198, 204 (1934).

19 49 Stat. 500 (1935), 44 U.S.C. §301 (1958).

20 49 Stat. 501 (1953), 44 U.S.C. § 305 (1935).

21 *Ibid.*

22 1 Fed. Reg. 2284 (1936).

23 Executive Order 7298 was superseded by Executive Order 10006 and then Executive Order 11030 27 Fed. Reg. 5847 (1962), which provides:

* * *

Section 1. *Form.* Proposed Executive orders and proclamations shall be prepared in accordance with the following requirements:

(a) The order or proclamation shall be given a suitable title.

(b) The order of proclamation shall contain a citation of authority under which it is issued.

(c) Punctuation, capitalization, spelling. . . .

* * *

Sec. 2. *Routing and approval of drafts.* (a) A proposed Executive

II. *Scope of Executive Orders*
A. Extent of Presidential Power

From the nation's very beginning the nature and limitations of presidential power have been controversial. Article II, Section I of the Constitution states that "The executive power shall be vested in a President of the United States of America." Whether or not the term "executive power" is a mere summary description of powers which are granted in more specific terms in the following provisions of the article or is a specific grant of power has been a subject of dispute ever since the article was written.

One of the first controversies over the interpretation of the "executive power" clause arose in 1793. England had declared war against France, and anti-British feeling ran high, as did pro-French sympathy. A bitter struggle arose in Washington's Cabinet whether the president should issue a proclamation ". . . for the purpose of preventing interference of the citizens of the United States in the war between France and Great Britain. . . ."[24] On April 22, 1793, Washington issued a proclamation enjoining United States citizens from ". . . all acts and proceedings whatsoever, which . . . tend to contravene such disposition . . ." of ". . . a conduct friendly and impartial toward the belligerent powers . . ."[25] under pain of prosecution. The issuance of this proclamation precipitated the dispute between *Pacificus* (Hamilton) and *Helvidius* (Madison). Hamilton supported the Constitutionality of the proclamation saying:

> . . . first, that the opening clause of Article II is a grant of power; secondly, that the succeeding more specific grants of the article, except when "coupled with express restrictions or limitations," "specify the principle articles" implied in the general grant and hence serve to interpret it; thirdly — by inference — that the direction of foreign policy is inherently an *"executive"* function.[26]

Madison felt that the proclamation was unconstitutional and took the contrary position, saying that if the president possessed the power to issue such a proclamation it took from Congress the right to choose between war and peace, a right which was opposed to the Constitutional right to declare war.[27] The dispute was ended the following year when Congress passed America's first neutrality act. Since then, the subject of neutrality has been conceded to lie within the jurisdiction of Congress.[28] Although Hamilton technically lost the dispute, his conception of the "executive power" clause has played an important part in later Constitutional law.

In 1926 in *Meyers v. United States,*[29] the Supreme Court was faced with the question of whether or not the president has exclusive power to remove officers of the United States whom he has appointed by and with the consent of the

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order or proclamation shall first be submitted, with seven copies thereof, to the Director of the Bureau of the Budget, together with a letter, signed by the head or other properly authorized officer of the originating Federal agency, explaining the nature, purpose, background, and effect of the proposed Executive order or proclamation and its relationship, if any, to pertinent laws and other Executive orders or proclamations.

(b) If the Director of the Bureau of the Budget approves the proposed Executive order of proclamation, he shall transmit it to the Attorney General for his consideration as to both form and legality.

* * *

Sec. 5. *Proclamations of treaties excluded.* Consonant with the provisions of Section 12 of the Federal Register Act (49 Stat. 503; 44 U.S.C. 312), nothing in this order shall be construed to apply to treaties, conventions, protocols, or other international agreements, or proclamations thereof by the President.

* * *

24 Thomas, American Neutrality in 1793, 26 (1931).
25 *Id.* at 42.
26 Corwin, The President, Office and Powers, 179 (4th ed. 1957).
27 *Id.* at 181.
28 *Ibid.*
29 272 U.S. 52 (1926).

Senate. In 1876 Congress had provided that "Postmasters of the first, second, and third classes . . . may be removed by the President with the advice and consent of the Senate. . . ."[30] The president precipitated the controversy when he ordered the Postmaster General to remove a first-class postmaster. In holding that the president's removal power is unrestricted, the Court adopted Hamilton's theory of the "executive power" clause, saying that:

> The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no express limit was placed on the power of removal by the Executive was convincing indication that none was intended.[31]

Ten years later, in *United States v. Curtiss-Wright Export Corp.*,[32] the Court adopted Hamilton's "inherently executive" view of the president's role in the field of foreign relations. The question was whether or not Congress could delegate to the president the power to impose an impartial arms embargo on Bolivia and Paraguay during the Chaco War whenever he felt such an embargo would contribute to the maintaining or securing of peace between the two countries. The Court answered the question "yes" and proceeded further and said that the president is the sole representative of the government in the conduct of foreign affairs; this proposition has today become an accepted fact.[33]

With the pre-emption of the field of foreign relations came the power to enter into international agreements, yet:

> [N]owhere in the Constitution can there be found an explicit provision granting to the President the power to conclude international agreements without the sanction of Congress or the Senate. . . . The President's authority to enter an agreement which becomes an international obligation of the United States is so indispensable to his power to initiate foreign policy that it may reasonably be derived by implication from the language of the Constitution. Article I, section 10, which states that "No State shall enter into any Treaty, Alliance, or Confederation" and that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power," indicates that the Constitution itself recognizes the existence of international agreements other than treaties. Since power to make these agreements was accorded to the states with congressional consent, it would be difficult to conclude, and has never been concluded, that this power was denied to the Federal Government. And, in order to prevent his substantive powers under Article II from being in large measure ineffectual, the President must share in this federal power. Moved by practical considerations, and fortified by inferences from constitutional language, the courts have recognized that the President does possess this power. . . . And the Congress has . . . accepted his exercise of such power.[34]

Executive agreements are generally considered as being akin to treaties, but in addition, they may be likened to executive orders. Although the addresses differ, like executive orders, such agreements spring from the presidential power and possess as much validity and obligation as if they had proceeded from the legislative branch of the government.[35] In *United States v. Pink*,[36] and *United States v. Belmont*,[37] the Court gave effect to the terms of an executive agreement made without Congressional authorization even though the implementation of this agreement required the contravention of the laws of the state of New York.

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30 19 Stat. 80, 81 (1876).

31 Myers v. United States, 272 U.S. 52, 118 (1926). Nine years later the Supreme Court confined the removal power of the president to "all purely executive officers." Humphrey's Ex'r v. United States, 295 U.S. 602, 627-628 (1935).

32 299 U.S. 304 (1936).

33 CORWIN, THE PRESIDENT, OFFICES AND POWERS, 177 (4th ed. 1957).

34 Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L. J. 345, 351 (1954). This work contains a comprehensive treatment of executive agreements.

35 United States v. Pink, 315 U.S. 203 (1942).

36 315 U.S. 203 (1942).

37 301 U.S. 324 (1937).

A second augmentation of presidential power is exemplified in *In re Neagle*.[38] Theodore Roosevelt explained this power as the "Stewardship Theory." The facts of the case were these: The United States attorney general ordered Neagle, a United States marshal, to act as Justice Field's bodyguard because threats had been made against the justice's life. In the course of his duty, Neagle shot and killed a man; Neagle was arrested for the homicide and sought release on a writ of habeas corpus, which could be granted if he was acting in pursuance of a law of the United States. The Court held that the attorney general's order should be treated as a law because it was presumably made with the president's consent, and the Court recognized that the president's duty is not limited " . . . to the enforcement of the acts of Congress or of treaties of the United States according to their express terms," but includes " . . . the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."[39]

In re Debs,[40] decided five years later, supported the *Neagle* decision. In pursuance to an order from the White House, the United States attorney general sought and received an injunction against the Pullman strike in Chicago, for the violation of which Debs was jailed for contempt. The question before the Court was whether or not a federal court had power to issue such an injunction. The Court said:

> [W]hile it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.[41]

In both the *Neagle* case and the *Debs* case, the Court attributes powers to the president in his executive capacity because such powers belong to the United States; i.e., to the national government as a whole.[42]

The validity of certain executive action was questioned when the Constitutionality of Executive Order 10340 was attacked.[43] This order directed the Secretary of Commerce to "seize" the steel mills. In 1953 the Supreme Court held the order to be unconstitutional.[44] Professor Corwin, a noted writer on this subject, feels that the case is of value to Constitutional law and practice because it affirms:

> That the president does possess "residual" or "resultant" powers over and above, or in consequence of, his specifically granted powers to take temporary alleviative action in the presence of serious emergency is a proposition to which all but Justices Black and Douglas would probably have assented in the absence of the complicating issue that was created by the President's refusal to follow the procedures laid down in the Taft-Hartley Act.[45]

Thus,

> To Summarize: The President's power as Chief Executive is multidimensional, and has expanded along almost every dimension. His role as interpreter of the law has become, with the watering down in recent times of the Lockian maxim against the delegation of legislative power, a power of quasi-legislation and, in times of emergency, power of legislation unqualified by "the softening word quasi." His power as Commander-in-

38 135 U.S. 1 (1890).
39 *Id.* at 64.
40 158 U.S. 564 (1895).
41 *Id.* at 586.
42 CORWIN, THE PRESIDENT, OFFICES AND POWERS, 152 (4th ed. 1957).
43 17 Fed. Reg. 3139 (1952).
44 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1953).
45 Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 65 (1953).

> Chief to employ the armed forces to put down "combinations too powerful to be dealt with by ordinary judicial processes" is, in the absence of definitely restrictive legislation, almost plenary, as is also his power to employ *preventive* (as against *punitive*) martial law. Furthermore, the line that today separates the "peace of the United States" from the domestic peace of the states severally has been since the First World War a tenuous one. The third source of the President's power as Chief Executive is the theory that attributes to him the responsibility of "stewardship" to act for the public good so far at least as the laws do not inhibit.[46]

The following are illustrative of the sweep of the power exercisable through the executive order. He can declare martial law,[47] enforce the laws of the United States,[48] and remove executive officers.[49] In addition to the president's constitutionally inherent powers, his powers may be augmented by Congress;[50] and whenever an executive order or proclamation is founded upon constitutional or delegated authority, it has the force of public law,[51] the violation of which may be made punishable by Congress.[52] Moreover, an executive order or proclamation which exceeds presidential authority may be ratified by Congress, with the same result as if the order or proclamation were issued after the statute was enacted.[53]

B. Limits Upon Executive Power

Whatever the extent of presidential power may be, it is nevertheless limited by Congress. The legislative function of the government has been entrusted to Congress, with the result that neither the president nor an agency head,[54] who acts at the president's direction, may contravene a statutory provision.[55] The courts will strike down such an order even when it emanates from a Constitutionally enumerated power like that of Commander-in-Chief.[56] In issuing an executive order, the president must conform to the standards laid down in a Congressional delegation of authority, and must also state the existence of the particular circumstances and conditions which authorize such order.[57]

Presidential power is also limited by Congressional declarations of public policy. The determination of public policy is within the province of the legislative branch of the government, and the executive branch may only apply the policy so fixed and determined, and may not itself determine matters of public policy or change the policy laid down by the legislature.[58] Mr. Justice Jackson, concurring in *Youngstown Sheet & Tube Co. v. Sawyer* stated that:

> When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can

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46 CORWIN, THE PRESIDENT, OFFICES AND POWERS, 168-9 (4th ed. 1957).

47 Prize Cases, 2 Black 635 (1863). This power was limited in *ex parte Milligan*, 4 Wall. 2 (1866).

48 *In re* Neagle, 135 U.S. 1 (1890); *In re* Debs, 158 U.S. 564 (1895). Taken together, these two cases imply that there is a "peace of the United States" which the president may take active measures to protect.

49 Myers v. United States, 272 U.S. 52 (1926). This case was severely limited by Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

50 See, *e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

51 Jenkins v. Collard, 145 U.S. 546 (1892); Moehl v. E. I. Du Pont De Nemours & Co., 84 F.Supp. 427 (N.D. Ill. 1947).

52 Hirabayshi v. United States, 320 U.S. 81 (1943); United States v. Grimaud, 220 U.S. 506 (1910).

53 Hirabayshi v. United States, 320 U.S. 81 (1943).

54 An act of a department head, within the field of his jurisdiction, is considered in law to be an act of the president, even though there has been no specific written delegation from the president, and even though only presidential action is authorized. Wolsey v. Chapman, 101 U.S. 755 (1879).

55 Kendall v. United States, 12 Pet. 524 (1838); United States v. Guy Capps, Inc., 204 F.2d 655 (4th Cir. 1953).

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

57 Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

58 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Broos v. Barton, 142 F.2d 690 (C.C.P.A. 1944).

> rely 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 Congress from acting upon the subject.[59]

Justice Frankfurter entertained similar thoughts, but complicated the issue by considering the duration of the seizure:

> We must . . . put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given.[60]

Whatever contribution *Youngstown Sheet & Tube Co.* has made to constitutional law,[61] it does reaffirm the principle that the president is subservient to Congressionally declared public policy.

III. *Enforcement*

As previously stated,[62] executive orders are directives to governmental officials and agencies. Enforcement of these orders falls into two major categories: administrative and judicial enforcement. Administrative enforcement comprehends the action taken if a governmental official refuses to execute an order or to apply indirect compulsion to an individual to effectuate a policy established through an executive order. Judicial enforcement may be obtained both by the government if affirmative action is necessary, and by an individual who feels that he has been injured.

A. Administrative Enforcement

Against governmental officials — Direct enforcement of executive orders in this area is not difficult because of the hierarchical division of authority which exists in the executive department and the prestige of the presidential office. In the event that an executive order were disobeyed, either discharge or mandamus would suffice to insure the order's performance.

Against individuals — Because executive orders are generally self-enforcing, once the government official acts the order is carried out. To illustrate: President Jefferson's order was enforced as soon as Madison withheld the judicial commission of appointment from Marbury;[63] and President Truman's order was enforced as soon as the American Flag was flown over the steel mills.[64] In each of these cases, no affirmative action was required of the government.

Certain executive orders, however, are not self-enforcing, with the result that the government must affirmatively enforce them. One such class are those orders which deal with discrimination.[65] Although the government has not yet attempted to judicially enforce one of these orders, but has solely relied on persuasion,[66] there are a number of possible weapons available.

a. *No more contracts* — One of the most effective means of enforcing the nondiscrimination clause in government contracts is the refusal to let additional contracts to those persons or companies which discriminate. Similarly, President Kennedy's executive order *Equal Opportunity in Housing*[67] contains a specific

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59 343 U.S. 579, 637-638 (1952).

60 *Id.* at 597.

61 For an analysis of the *Youngstown Sheet & Tube Co.* case, see CORWIN, *op. cit. supra* note 45.

62 See note 7 *supra.*

63 Marbury v. Madison, 1 Cranch 137 (1803).

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

65 Executive Order 11063, 27 Fed. Reg. 11527 (Equal Opportunity in Housing); and Executive Order 10925, 26 Fed. Reg. 1977 (Nondiscrimination Clause in Government Contracts).

66 Pasley, *The Nondiscrimination Clause in Government Contracts,* 43 VA. L. R. 837 (1957).

67 27 Fed. Reg. 11527 (1962).

provision to this effect, and the Supreme Court would probably approve it. In *Perkins v. Lukens Steel Co.* the Court said that:

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.[68]

Although this statement is not unqualifiedly correct because it overlooks the fact that the government and its agencies are subject to Constitutional limitations when they act in a proprietary capacity,[69] the Court does recognize the vast contractual power of the government. Such a power, if used, could deal a crippling blow to all the discriminatory practices envisioned in both the contract and housing orders. The only possible exception is the situation in which a single person or company manufactures the needed article, in which case the government would be shorn of its usual bargaining power and the supplier could refuse the government's terms without injury.

b. *Breach and termination of contract* — Not only do government contracts contain nondiscrimination clauses, but they also contain "Default" clauses[70] which permit the government to terminate the contract upon the breach of any of the contract's provisions.[71] In effect, therefore, failure to perform any of the provisions of the contract is a material breach.[72] Although it is patently clear that in entering into the contract the government's primary concern was the delivery of the requested goods, that the nondiscrimination clause was only an incidental part of the contract, and that the bargaining position of the parties to the contract was vastly unequal, there seems little doubt that the judiciary would rely on freedom of contract[73] and support the government's position. Obviously, termination is a most potent weapon, but so far "it has been held in reserve. It may have a certain *in terrorem* effect, but this is necessarily minimized by the obvious reluctance of the Government to invoke it."[74]

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68 310 U.S. 113, 127 (1940).

69 DAVIS, ADMINISTRATIVE LAW TEXT 128 (1959).

70 32 C.F.R. § 7.103-11 (1961).

71 Coons & Whelan, DEFAULT TERMINATION OF DEFENSE DEPARTMENT FIXED PRICE SUPPLY CONTRACTS, 32 NOTRE DAME LAW. 189, 218 (1957).

72 It is readily apparent that in the absence of the default clause a breach of the nondiscrimination provision in the contract would not constitute a material breach. Hence the government would be able to collect only nominal damages.

73 When speaking of government contracts it is interesting to note the words of Judge Francis in *Henningsen v. Bloomfield Motors,* 161 A.2d 69, 86 (1960):

> The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. "The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party. . . . Such standardized contracts have been described as those in which one predominant party will dictate its law to an undetermined multiple rather than to an individual. They are said to resemble a law rather than a meeting of the minds."

74 Pasley, *op. cit. supra* note 66, at 852. At page 842 while discussing enforcement of the clause, the author states that:

> Under the old system, the nondiscrimination clause was simply a part of the "boiler plate" included in all government contracts, which many contractors never read or, paid no attention to even if they did read it. If this should happen today, it is not for lack of Government effort to make contractors realize that there is a nondiscrimination clause in their contract.

It appears to this writer that the government has not remedied the "boiler plate" status

c. *The liquidated damage clause* — A provision for liquidated damages might be employed to enforce the nondiscrimination clause. However, since violation of the clause would not subject the government to serious, if any, harm, a court would probably construe the provision as a penalty clause[75] and therefore void.

d. *More direct compulsion* — Subsections (b) and (c) of Section 302 of Executive Order 11063, Equal Opportunity in Housing, authorize governmental agencies to take more stringent coercive action. Such action consists in the prohibition of lending federal funds to uncooperating individuals and the power to refuse recognition to lending institutions that would be a beneficiary under any federally administered housing program.

B. Judicial Enforcement

By the government — The normal governmental action involves defending a suit brought by an aggrieved party.[76]

However, there are affirmative steps which the government could take to enforce the nonself-enforcing executive orders such as the injunction.

c. *Injunction and Liquidated damage clause* — The future holds little promise for the injunction as a means of enforcing the nondiscrimination clause, for an injunction is generally granted only when the remedy at law is inadequate.[77] In the case of the nondiscrimination clause, there is good reason for believing not only that the government's remedy at law is adequate, but that the government has suffered no injury. But even assuming that there were no adequate remedy at law and that the government did suffer harm,

> There are . . . more substantial reasons why a court might be reluctant to grant specific relief: (1) the difficulty of enforcing any such decree and (2) the traditional hesitancy of courts of equity to grant specific performance of employment contracts.[78]

Although Section 303 of Executive Order 11063, Equal Opportunity in Housing, authorizes the institution of criminal action against any violator of a nondiscrimination provision, it is not apparent what law or laws are envisioned to have been violated. Until such legislation is enacted, Section 303 is meaningless.

By the individual — In 1946 Congress passed the Administrative Procedure Act[79] which provides that:

> Except so far as (1) statutes preclude review or (2) agency action is by law committed to agency discretion —
>
> (a) *Right of Review.* Any person suffering legal wrong because of any agency action . . . shall be entitled to judicial review thereof.
>
> (b) *Form and Venue of Action.* The form of proceeding for judicial review shall be any special statutory proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. . . .[80]

Since agency is defined to include the president,[81] a number of remedies are re-

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of the clause because the weapons with which it has armed itself are too potent to use. Instead, the government should have supplied more moderate means of enforcement — ones that could be used uniformly and in every instance.

75 Restatement, Contracts, § 339 (1932) states that:

> (1) An agreement, made in advance of breach, fixing the damages therefore, is not enforceable . . . unless
>
> (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and
>
> * * *

76 Some cases in which the government was forced to take the initiative: United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); United States v. Carpenter, 113 F. Supp. 327 (E.D.N.Y. 1949).

77 4 POMEROY, EQUITY JURISPRUDENCE § 1338 (5th ed. 1941).

78 Pasley, *op. cit. supra* note 66, at 853.

79 60 Stat. 237-244 (1946), 5 U.S.C. §§ 1001-1011 (1959).

80 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1959).

81 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1959).

served for an injured party, the most important of which are the injunction and declaratory judgment.

> The injunction is of course an equitable remedy, and the theory as expounded in the opinions is that the requirements of equity jurisdiction — threat of irreparable injury and inadequate remedy at law — must be satisfied. But *the injunction as a means of reviewing administrative action has moved away from its historical foundations in equity and has become a general-utility remedy for use whenever no other form of review proceeding is clearly indicated.*[82]

Other forms of proceedings which may be utilized by an aggrieved party to test administrative action (executive orders) are: habeas corpus — to test the legality of plaintiff's detention;[83] resisting enforcement — defending an action brought to enforce an executive order;[84] and mandatory relief.[85]

In a recent case[86] a somewhat novel argument was advanced in an attempt to enforce the nondiscrimination clause in a government contract. Plaintiff, a negro citizen of Pennsylvania, was allegedly denied employment by the Philadelphia Electric Company because of his race. In his suit plaintiff claimed a right as a third party beneficiary to recover damages for the breach of the contract between the electric company and the government. Defendant motioned for dismissal (a) for lack of jurisdiction, or (b) for failure to state a claim upon which relief could be granted. Judge Luongo felt that the complaint could be interpreted as asserting (1) a common law action for breach of contract, or (2) a cause of action created by the executive order, but that under either interpretation the defendant's motion should be granted.

Since there was no diversity of citizenship between the parties, plaintiff claimed jurisdiction solely on the basis that the suit arose under the Constitution and laws of the United States.[87]

> Viewing the complaint as stating a cause of action under common law contract principles and applying the test of *Gully*,[88] the Executive Order does not create a right which is an essential element of plaintiff's cause of action.
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> * * *
>
> As stated earlier, however, it is *possible* to construe the complaint, not as one based on common law contract principles, but as claiming a cause of action created by an Executive Order. Under this latter view, applying the principles enunciated in *Montana-Dakota Co. v. Pub. Serv. Co.*,[89] . . . [and see *Bell* v. *Hood*, 327 U.S. 678 (1946)] plaintiff manages to get over the jurisdictional hurdle, for simply by asserting that he has a cause of action under a "law" of the United States, he has created jurisdiction in this court to determine whether such a claim is well founded, but by doing so he has created a problem for himself as to whether he can set forth a cause of action.[90]

Since no express private right of action was granted and since he felt a private action was not to be implied, Judge Luongo granted defendant's motion to dismiss.

Although the case never reached the merits, plaintiff's claim for damages

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82 DAVIS, *op. cit. supra* 69, at 423.
83 *In re* Neagle, 135 U.S. 1 (1890).
84 United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).
85 DAVIS, *op. cit. supra* note 69, at 428-9.
86 Farmer v. Philadelphia Electric Co., 215 F. Supp. 729 (E.D. Pa. 1963).
87 28 U.S.C. § 1331 (1958).
88 Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936), wherein it was said that in order to bring a case within the statute,

> (A) right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.

89 341 U.S. 246 (1951).
90 Farmer v. Philadelphia Electric Co., 215 F. Supp. 729, 731-2 (E.D. Pa. 1963).

as a third party beneficiary is not entirely without substance[91] or support. In *United States v. Carpenter*[92] the government asserted a right against the defendant which arose out of an executive agreement. The United States, pursuant to its farm program, had been supporting the price of table stock potatoes when it discovered that such potatoes were being imported from Canada and thus injuring the program. In order to curtail the imports, the United States and Canada entered into an executive agreement whereby Canada agreed to force all Canadian growers to acquire permits to export potatoes to the United States and to make assurances that any potatoes exported to the United States would be used only as seedlings and not as table stock. Defendant, after promising the seller that he would use them only as seedling, imported potatoes from Canada and proceeded to use them as table stock, whereupon the United States brought suit for damages and an injunction.

Although the defendant was really challenging the validity of the executive agreement, the Court avoided this issue by deciding that the contract between the defendant and the Canadian grower was made for the benefit of the United States, and that the United States was a third party beneficiary to the contract. The *Carpenter* rationale could readily be applied to the set of facts in the *Philadelphia Electric Co.* case. Whereas the court in *Carpenter* was forced to stretch the beneficiary doctrine in order to avoid the executive agreement issue, it could apply the doctrine in cases of discrimination with much greater ease.

It appears that only one obstacle can prevent plaintiff's recovery. In order for a cause of action to be created in a third party beneficiary there must have existed such an intent in the minds of the parties to the contract.[93] In the case of the nondiscrimination clause, it appears that this intent was lacking.[94]

Conclusion

The history of executive orders is, to a great extent, a narrative of the evolution of presidential power. From a rather humble beginning, the president has become the head of a giant executive complex. As head of the executive department he rarely and only indirectly affects the rights of the individual. But in addition to his power as chief executive, he possesses a certain amount of legislative or quasi-legislative power which has devolved upon him, such as the power to seize property (in spite of *Youngstown Sheet & Tube Co.*[95]), to conclude executive agreements, and to regulate government contracts. Of particular importance is his control over government contracts, by which he may extensively and directly affect the individual, as a glance at the contract and housing orders will indicate.

Thus far the power of enforcement of these executive orders has been confined to the government. Although it is extremely doubtful whether the president could expressly grant a cause of action to an individual in order to enforce the orders, there appears to be no reason why a private individual could not be given third party rights which would arise not from any actual or supposed presidential power, but from common law contract principles. If such rights are ever given, or if the *Philadelphia Electric Co.* case holds that they have already been given, a new dimension will be added to the enforcement of executive orders.

Robert B. Cash

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91 WILLISTON, CONTRACTS § 357 (3rd ed. 1959):

> A person is a donee beneficiary when "it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary."

92 113 F. Supp. 327 (E.D.N.Y. 1949).

93 RESTATEMENT, CONTRACTS §§ 133, 135, 145 (1932).

94 Pasley, *op. cit. supra* note 66, at 855.

95 Corwin, *op. cit. supra* note 45.