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## ARTICLES

### PRESIDENT OR KING? THE USE AND ABUSE OF EXECUTIVE ORDERS IN MODERN-DAY AMERICA

Tara L. Branum\*

*Stroke of the pen, law of the land. Kind of cool.  
—former Clinton advisor Paul Begala<sup>1</sup>*

*Don't be fooled . . . the pen that can wipe out a man's very existence is still  
there. Right now the pen is held by a more decent hand, that's all.  
—anonymous Hungarian tourist<sup>2</sup>*

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\* Associate, Fulbright & Jaworski L.L.P., Houston, Texas. J.D. University of Texas; Austin, Texas (2001); B.A. Rice University; Houston, Texas (1994). *Texas Review of Law & Politics*; Editor-in-Chief (Spring 2000–Spring 2001), Managing Editor (Fall 1999). The author would like to thank Mr. Doug Wilson and Mr. Steve Bryant for their thoughtful comments on early drafts of this article. The opinions and views expressed herein are those of the author only.

1. Frank J. Murray, *Clinton's Executive Orders Still Are Packing a Punch: Other Presidents Issued More, But Many of His Are Sweeping*, WASH. TIMES, Aug. 23, 1999, at A1.

2. Balint Vazsonyi, *Guiding the Pen*, WASH. TIMES, Aug. 31, 1999, at A14. The tourist was not commenting on the use of presidential directives by the President of the United States; rather, he was referring to the changed atmosphere in Eastern Europe following the end of the Cold War. *See id.* The President is not supposed to have such an “executive pen” under the United States Constitution; however, many allege that the President essentially has such a pen today, as presidents are freely issuing an increasing number of executive orders and other directives on a wider range of policy matters. *See id.*; *see also, e.g.*, Catherine Edwards, *Emergency Rule, Abuse of Power?*, INSIGHT ON THE NEWS, Aug. 23, 1999, at 18 (noting that “one stealth presidency after another” has usurped legislative power from Congress); J.R. Labbe, *Executive Orders Tend to Usurp Congress' Power*, FT. WORTH STAR-TELEGRAM, Jan. 7, 2000, at B9 (comparing presidential executive orders to Russian imperial proclamations). Some commentators are even harsher and allege that recent users of the executive pen have not been “restrained by any of the considerations that informed and guided U.S. presidents since George Washington” and are thus not “decent” holders of the executive pen. Vazsonyi, *supra*.

## I. INTRODUCTION

The increased use of executive orders and other presidential directives is a fundamental problem in modern-day America. The Constitution does not give one individual an “executive pen” enabling that individual to single-handedly write his preferred policy into law. Despite this lack of constitutional authority, presidential directives have been increasingly used—both by Republicans and Democrats<sup>3</sup>—to promulgate laws and to support public policy initiatives in a manner that circumvents the proper lawmaking body, the United States Congress.

It would be foolhardy to ignore the danger inherent in this situation, simply because one might like the individual currently holding the presidential pen.<sup>4</sup> It would be hypocritical, as well as dangerous, to seek change when a president from the opposing political party is in power, but to ignore the problem once a president from one’s own party has been elected.<sup>5</sup> While the current president

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3. *E.g.*, *Congressional Limitation of Executive Orders: Hearing on H.R. 3131, H. Con. Res. 30, and H.R. 2655 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 106th Cong. 3 (1999) [hereinafter *Hearing on H.R. 3131*] (statement of Hon. George Gekas, Chairman, Subcomm. on Commercial and Admin. Law) (“Every Administration in recent history has issued controversial Executive orders. There is no need to single out any particular Administration or order.”). Other congressional members have made similar statements. Congressman Jack Metcalf has stated:

It is important to note that our current President is not the only one at fault. I am criticizing many of the Presidents. A steady increase in controversy over Presidential directives has arisen since FDR’s administration. The use of these directives is a constitutional issue, and I am not distinguishing between Republican or Democrat Presidents. They have all been guilty as have those of us in Congress who sometimes find it politically convenient to allow the President to wield such broad power just with a stroke of the pen.

*Id.* at 14–15 (testimony of Hon. Jack Metcalf, Rep. of Congress, State of Washington) [hereinafter *Testimony of Hon. Jack Metcalf*].

4. *See, e.g.*, Editorial, “*Stroke of the Pen*,” RICH. TIMES DISPATCH, July 25, 1998, at A8 (“It [Paul Begala’s statement] is kind of disconcerting—not merely for Clinton foes, but for ardent liberals who might imagine, say, Jesse Helms wielding the presidential pen in a similar fashion. Political winds change. If Bill Clinton’s legacy includes the habitual use of executive orders—of rule by decree—that would be a legacy Clinton supporters could come to regret.”). Such a sentiment reinforces the reasons for Republicans to act now to rein in the use of presidential power. Imagine the horror of conservatives across the country if Hillary Clinton were to be elected president in 2004 or 2008, particularly given the current state of presidential power.

5. Judge Kenneth W. Starr made an analogous point concerning the failure of Congress to abide by constitutional guidelines when writing and approving the now-expired Independent Counsel Act. Danger lies in failure to abide by the checks and balances inherent in the system, regardless of the presently good—or bad—character of those in

may back acceptable policies or refrain from using his executive power in a tyrannical fashion, there is no guarantee that all future presidents will continue to do so as well.

Controversy over the nature of executive power and the limitations that should be placed upon it is not new.<sup>6</sup> Since the founding of our country, Presidents, congressmen, scholars, and individual citizens have sought to properly define the boundaries of the executive's power. Two Presidents who served in the early 1900s are often said to exemplify the two opposing views on the proper use of executive power.<sup>7</sup> President Theodore Roosevelt, a proponent of a powerful executive, once stated:

The most important factor in getting the right spirit in my Administration, next to insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers. . . . I declined to adopt this view that what was imperatively necessary for the Nation could not be done by the President, unless he could find some specific authorization to do it.<sup>8</sup>

In President Roosevelt's view, the executive power is all-inclusive, limited only when such restrictions are specifically imposed. In contrast, other presi-

office.

It does little good to rail against the particular occupants of office. This too shall pass. And there will be in our future, God willing, great public servants who answer the call to duty, and then there will be others who will fall short of that high and noble calling. The point is that the violation of structural integrity led directly to these most unfortunate events, when the Justice Department performed so poorly in carrying out its responsibilities. There were too many structural incentives to wish our office ill, and there was not present the character, the integrity, to guard against the incentives created by the anticonstitutional structure fashioned by the 1978 Congress, laboring, as it was, under the heavy burdens of Watergate.

Kenneth W. Starr, *Morality, Law and the Constitution: The Genius of the Founding Generation*, IMPRIMIS, July 2000, at 4.

6. COMM. ON GOVT. OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 14 (Comm. Print 1957) [hereinafter STUDY OF PRESIDENTIAL POWERS] ("The nature and limitations of Executive Power have been a matter of controversy from the very beginning of our Nation.").

7. See *id.* at 14–15.

8. THEODORE ROOSEVELT, NOTES FOR A POSSIBLE AUTOBIOGRAPHY, cited in WILLIAM HOWARD TAFT, THE PRESIDENT AND HIS POWERS 143 (4th prtg., Columbia Paperback ed. 1967) (emphasis added). President Roosevelt added, "I did not usurp power but I did greatly broaden the use of executive power." *Id.*, cited in TAFT, *supra*, at 143.

dents have held to the view that the executive power is not all-inclusive, but rather exists only where specifically granted. President Roosevelt's successor, William Howard Taft, was a famous proponent of this more restricted view of the executive power. He stated:

The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. *There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest . . .*<sup>9</sup>

So the question remains: What is the proper nature of executive power? This article addresses the nature of executive power specifically as it relates to the issuance of executive orders and other presidential directives.<sup>10</sup> It argues that the President exceeds his constitutional authority when he uses presidential directives to set policy and make laws, a responsibility that the Constitution expressly grants to Congress. In reaching this conclusion, this article first looks at the intent of the Founding Fathers and the history of presidential directives in Part II. Next, Part III evaluates recent trends in the use of presidential directives that stand in contradiction to the intent of the Framers. It also briefly considers the wartime uses of presidential directives by President Bush. Part IV analyzes the limited amount of case law on this subject, while Part V discusses recent aborted attempts by Congress and individuals to curb presidential lawmaking by executive order or other directive. Last, Part VI makes recommendations to President Bush for the use of executive orders during the remainder of his time

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9. *Id.* at 139–40 (emphasis added). Regarding President Roosevelt's view, President Taft stated, "My judgment is that the view of Mr. Garfield and Mr. Roosevelt, ascribing an undefined residuum of power to the President is an unsafe doctrine and that it might lead under emergencies to results of an arbitrary character, doing irremediable injustice to private right." *Id.* at 144.

10. Executive power is a wide and varied topic. The focus of this article is on presidential directives as they have been used in the domestic policy arena, particularly in recent decades. This article does not address other types of executive power, such as the war power, except as they relate tangentially to domestic topics. Neither does this article seek to explore in depth the President's power in foreign affairs unless, again, it relates tangentially to the topic of presidential directives as used in the domestic arena. A deeper analysis of these and related topics is beyond the scope of this article. For a brief discussion of President Bush's use of executive orders in relation to the war on terrorism, however, see Part III.B.2.b.

in office, particularly if the recently-started war proves to be one of extended duration.

It is imperative that the Bush administration and those that follow it use presidential directives in a manner that is in compliance with the Constitution and the principle of separation of powers. If any president fails to do so, it is incumbent upon both Congress and the American people to hold that president accountable for his actions. The inherent danger in not doing so may have best been expressed by President Rutherford B. Hayes, who stated that “[t]he real test has never come, because the Presidents have down to the present been conservative, or what might be called conscientious men, and have kept within limited range. . . . But if a Napoleon ever became President, he could make the executive almost what he wished to make it.”<sup>11</sup>

## II. THE HISTORY OF PRESIDENTIAL POWER

Originally, executive orders and other directives were used primarily as administrative tools.<sup>12</sup> They were informal in nature and were usually, although not always, fairly uncontroversial. This administrative use of presidential directives fell in line with the Framers’ vision of the new, tripartite government: It would rely upon a separation of powers among the branches to secure the people’s liberty. It was understood in the early days of our Republic that the power to legislate and to decide policy was the province of Congress. The President’s role in lawmaking was limited to his veto power and his authority to recommend legislation for consideration. Presidential directives were issued in accordance with this understanding.

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11. WILLIAM J. OLSON & ALAN WOLL, CATO INSTITUTE, EXECUTIVE ORDERS AND NATIONAL EMERGENCIES: HOW PRESIDENTS HAVE COME TO “RUN THE COUNTRY” BY USURPING LEGISLATIVE POWER 14 (1999) (quoting DAVID WATSON, THE CONSTITUTION OF THE UNITED STATES, ITS HISTORY, APPLICATION AND CONSTRUCTION 930n (1910) (quoting Interview with Rutherford B. Hayes, President of the United States)), available at <http://www.cato.org/pubs/pas/pa-358es.html>.

12. Initially, presidential directives were used in line with a more restricted view of presidential power. For instance, President Washington’s view was that the President is merely to “administer the executive government of the United States.” George Will, *Hearing With Your Third Ear*, NEWSWEEK, Nov. 13, 2000, at 100, 100 (quoting George Washington, Farewell Address (Sept. 17, 1796)). In assessing the change in Americans’ views of the role of the President since the time of Washington, Mr. Will added, “Time was, that is how presidents were understood—modestly, as administrators who executed the will of others. Nowadays, presidents permeate the federal leviathan with their wills, and they, like it, are everywhere.” *Id.*

Over the years, however, presidential power has increasingly grown to include lawmaking functions.<sup>13</sup> Initially, this change was prompted by several national crises—the Civil War, the Great Depression, and the World Wars. Unfortunately, once the crises were over, presidential power did not revert back to its former limits. An expansion of executive power that was questionable, at best, during times of true emergency, has now become a threat to our liberty. The country today faces a new crisis and, with it, the risk of a further escalation of presidential power. It is imperative that President Bush take into consideration this tendency of executive power to grow and threaten freedom. He should act thoughtfully, deliberately, and properly as he seeks to achieve a balance between being a strong wartime leader and avoiding actions that are beyond the scope of his powers. He should not assume that any constitutionally unjustifiable actions that he takes will be seen solely as “wartime” or “emergency” measures, soon to be relegated to the pages of history. Past experience has shown that this will not be the case.

In order to show how executive orders and other presidential directives have evolved to a point so far removed from the Founders’ original vision, this section looks first at the nature of the executive order itself. Next, it looks at the circumstances existing at the time of the Constitutional Convention and the Framers’ understanding of separation of powers. Finally, this section discusses modern trends in the use of presidential directives; specifically, it looks at the changing nature of presidential directives issued by presidents through the years.

#### A. *The Nature of Executive Orders*

Although there is no constitutional or statutory definition of “executive order,”<sup>14</sup> a congressional study has defined executive orders as “directives or actions by the President” that have the “force and effect of law” when “founded on the authority of the President derived from the Constitution or [a] statute.”<sup>15</sup> While an executive order constitutes perhaps the most widely discussed form in which a presidential directive may be issued, it is not the only type of presiden-

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13. *See id.*

14. STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 1 (noting that no law or executive order attempts to define either “executive order” or “proclamation”); OLSON & WOLL, *supra* note 11, at 8 (noting the lack of a statutory or constitutional definition either for executive orders or for other types of presidential directives); *see also* *Hearing on H.R. 3131*, *supra* note 3, at 55 (statement of Thomas B. Griffith, Wiley, Rein & Fielding, Washington, D.C.) [hereinafter Statement of Thomas B. Griffith] (“[T]he Constitution does not include any reference to executive orders, and therefore neither authorizes their use nor demarcates their limitations.”).

15. STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 1.

tial order. Presidents may also issue proclamations,<sup>16</sup> presidential signing statements,<sup>17</sup> presidential memoranda,<sup>18</sup> or National Security Presidential Directives,<sup>19</sup> among other types of presidential directives. In general, however, the difference is typically one of form, not substance. This article primarily discusses executive orders, as they are the most common form of presidential order

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16. The primary difference between an executive order and a proclamation is that an executive order is typically an internal order directed at government officials and agencies, while a proclamation is usually directed at those outside the government. *Hearing on H.R. 3131, supra* note 3, at 47 (statement of Phillip Cooper, Gund Prof. of Liberal Arts, Dep't of Pol. Sci., Univ. of Vermont) [hereinafter Statement of Phillip Cooper] (citing STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 1). However, the lines between the two are often blurred, and the Supreme Court has held that there is no difference between the two in terms of legal effect. *Id.* (citing *Wolsey v. Chapman*, 101 U.S. 755, 770 (1879)).

17. Presidential signing statements are usually issued when the President signs legislation, and they may either contain "congratulatory recognitions" to those working on the bill or may express the President's disagreement with certain sections of the bill. *Id.* at 49. The latter are directed to agency heads charged with implementation of the new law. *Id.* ("The agency head receiving such a directive understands not only that this it [sic] indicates the political position of the administration, but also that the Justice Department will not be prepared to support the administration should he or she seek to depart from the mandated course of action.").

18. Presidential memoranda are often issued at the same time as an executive order and may contain "significant additions to or interpretations of" the provisions in the executive order. *Id.* at 48. Although recent usage of presidential memoranda has most often been in conjunction with executive orders as outlined above, original usage was somewhat different. Until recently, the most prominent use of presidential memoranda was to make findings required by legislation, particularly in the area of foreign policy, or to give formal notice when initiating a process. *See id.*

19. "National Security Presidential Directives" appears to be the designation that the Bush II administration has given to its directives dealing with foreign policy issues. HAROLD C. RELYEA, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW 11-12 (2001) (CRS Report No. 98-611). This type of foreign policy directive has changed names many times over the years. Statement of Phillip Cooper, *supra* note 16, at 47. During the Kennedy and Johnson administrations, the order was termed a "National Security Action Memorandum." Presidents Truman and Eisenhower styled them "National Security Council Policy Papers," while President Nixon changed the name, yet again, to "National Security Decision Memorandum." The name of the order was changed again by President Carter ("Presidential Directives"), President George H.W. Bush ("National Security Directives"), and finally, by President Clinton ("Presidential Decision Directives"). *Id.* These directives are typically focused on foreign policy issues, but some also have a domestic impact. Many are classified, and Congress may not even be notified of their existence. *Id.*



and also the most easily traced; however, the analysis of executive orders herein can apply to any type of presidential directive.<sup>20</sup>

A system for numbering executive orders was not established until 1907.<sup>21</sup> At that point, all orders then on file were retroactively numbered, beginning with the "first" executive order, an order issued by President Lincoln on October 20, 1862, establishing military courts in Louisiana.<sup>22</sup> Numbering of orders after 1907 remained somewhat informal until the Federal Register Act of 1935 established formal procedures.<sup>23</sup> Today, all new executive orders must be filed with the Division of the Federal Register, which assigns numbers to the executive orders.<sup>24</sup> If an old executive order is found, it is assigned a number with a suffix "in between" other numbered executive orders in the same time period. Despite efforts to find and number all old executive orders, however, many orders issued before 1935 remain undiscovered and, thus, unnumbered.<sup>25</sup>

The official numbering of executive orders has surpassed 13,000. Due, however, to the large number of executive orders that have never been found or numbered, it is impossible to know exactly how many have been issued since the time of President Washington. In addition, the wide range of presidential action possible—including classified Presidential Decision Directives—makes it difficult to estimate how many orders have actually been issued.<sup>26</sup> At the time of a 1957 congressional study on executive orders, estimates ranged from 15,000 to 50,000.<sup>27</sup> In the nearly fifty years since that congressional study, it is

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20. See discussion *supra* note 16. The most prominent types of presidential orders, however, are executive orders and proclamations. OLSON & WOLL, *supra* note 11, at 8.

21. OLSON & WOLL, *supra* note 11, at 13.

22. STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 37.

23. *Id.*

24. *Id.* The Federal Register Act requires that executive orders and proclamations be published. However, no similar requirement exists for other presidential directives, such as presidential memoranda or National Security Presidential Directives. See Statement of Phillip Cooper, *supra* note 16, at 50.

25. *Id.* Some of these older executive orders were extremely informal. For instance, a President might simply write "approved" or "let it be done" across a recommendation of one of his advisors. In other instances, the President's secretary or a cabinet member might sign the executive order if the President were unavailable for signing but had approved the order. For instance, Executive Order 113 was signed by President McKinley's secretary. It ordered that the American flag be flown at half-mast while the remains of John A. Rawlins were removed to Arlington cemetery. *Id.* at 35.

26. See *supra* notes 16–19 and accompanying text.

27. STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 37; see also Statement of Phillip Cooper, *supra* note 16, at 46 (noting that estimated numbers for executive orders range as high as 50,000).

not unreasonable to assume that the current number would reflect an exponential increase.

The first twenty-four Presidents issued 1262 executive orders.<sup>28</sup> The last seventeen Presidents (not including the current Bush administration) issued 11,855 orders.<sup>29</sup> However, the statistics are a mere reflection of the real problem that has arisen in the area of executive orders and other presidential directives. Americans have grown concerned about the use of presidential orders not because of the number of orders issued, but because of the changed nature of the issues being determined by these orders.<sup>30</sup> As government grows and individuals increasingly seek federal solutions to state or personal problems, so the nature of presidential directives has evolved to keep up with these changing—if unconstitutional—demands. Originally, presidents used directives merely as administrative tools. In recent years, however, presidential orders have not merely impacted government employees, but they have also impacted individuals outside the government.<sup>31</sup> Even worse, orders are sometimes used in lieu of the legislative process.<sup>32</sup>

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28. Press Release, Sen. Mike Crapo, Time to Curb Abuse of Executive Orders (Nov. 1, 1999), available at <http://www.thelibertycommittee.org/s1795craporelease.htm>.

29. As of October 1999, 11,798 executive orders had been issued by the last seventeen Presidents. *Id.* President Clinton issued four executive orders in November and December of 1999; he also issued fifty-three executive orders in 2000 and 2001, raising the 11,798 total to 11,855. See Federal Register, *Executive Orders Disposition Tables: William J. Clinton—1999*, National Archives and Records Administration, at <http://www.nara.gov/fedreg/eo1999.html> (last visited Aug. 23, 2001); see also Federal Register, *Executive Orders Disposition Tables: Administration of William J. Clinton (1993–2001)*, National Archives and Records Administration, at [http://www.nara.gov/fedreg/eo\\_clint.html](http://www.nara.gov/fedreg/eo_clint.html) (last visited Aug. 23, 2001).

30. See John A. Sterling, *Above the Law: Evolution of Executive Orders (Part One)*, 31 UWLA L. REV. 99, 100 (2000) (“For many years, the average American was completely unaware of the existence of Executive Orders. They operated quietly in the background of government operation—useful tools in the hands of a capable executive for the administration of his employees. Recent attention has been focused on Executive Orders because they no longer operate only on the employees of the administrative agencies of the Federal Government but on average citizens who perceive what appears to be an end-run around the Constitution.”).

31. See Edwards, *supra* note 2, at 18 (noting that Americans have remained relatively unaware through the years as, one after another, each successive president has usurped more legislative power through the use of executive orders). William Olson, a constitutional lawyer and former Reagan official, stated, “In George Washington’s day, executive orders were no more than administrative directives to federal employees. . . . [Now they are] a deliberate strategy to circumvent the Congress and the legislative function.” *Id.*

32. See discussion *infra* Part III.A.

Not surprisingly, some congressional and other policy leaders have noticed this change in the use of presidential directives, and they are seeking not only to increase public awareness of this problem,<sup>33</sup> but also to find tools to hold the President accountable for the manner in which he uses his power.<sup>34</sup> These policy leaders argue that the intent of the Founding Fathers was to create a government of limited powers. By allowing presidents to continue on their current course, they argue that Congress is essentially ceding to the executive branch its constitutional duty to act as the lawmaking branch of government. Congress should instead assert its authority to restore the separation of powers intended by the Framers of our Constitution.<sup>35</sup>

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33. Cf., e.g., *Executive Orders: Hearing on The Impact of Executive Orders on the Legislative Process: Executive Lawmaking? Before the Subcomm. on Legislative and Budget Process of the House Comm. on Rules*, 106th Cong. 28–29 (1999) [hereinafter *Hearing on Executive Orders*] (statement of Thomas O. Sargentich, Prof. of Constitutional and Administrative Law, Wash. College of Law, American Univ.) [hereinafter *Statement of Thomas O. Sargentich*] (“I don’t think the public appreciates the extent to which law-making is conducted by the executive branch. Congress, of course, is the national legislature, but you have delegated unnecessarily broad powers in many, many statutes to agencies of the government and, of course, to the President.”).

34. Perhaps the best indicator of this concern is the increased number of congressional bills seeking to curb the President’s use of executive orders—as well as the high number of co-sponsors on some of these bills. See *The Separation of Powers Restoration Act*, H.R. 864, 107th Cong. (2001); *The Presidential Order Limitation Act of 2001*, H.R. 23, 107th Cong. (2001); *The Executive Orders Limitation Act of 1999*, S. 1795, 106th Cong. (1999); *The Separation of Powers Restoration Act*, H.R. 2655, 106th Cong. (1999); H.R. Con. Res. 236, 105th Cong. (1998); *The Presidential Directives and Records Accountability Act*, H.R. 5438, 101st Cong. (1990). Although several recent bills have sought to restrain the President’s use of executive orders as a general matter, most legislation in this regard is still aimed at a specific executive order that has been issued, whether it is to affirm the policy or to overrule it. E.g., *The Terrorist Elimination Act of 1998*, H.R. 4861, 105th Cong. (1998); *The Federalism Act of 1998*, H.R. 4422, 105th Cong. (1998); *The State Sovereignty Act of 1998*, H.R. 4196, 105th Cong. (1998); *The Fairness in Federal Contracting Act of 1995*, S. 989, 104th Cong. (1995).

35. See *Hearing on H.R. 3131*, *supra* note 3, at 5 (statement of Hon. Bob Barr, Rep. of Congress, State of Georgia) [hereinafter *Statement of Hon. Bob Barr*] (“By intent, history and express language, ours is a government of limited powers. This is enshrined in the Constitution itself. . . . [It] was clearly the intent of our Founding Fathers. . . . However, in recent years, certainly not beginning with this administration or the immediately preceding one or the one before that, we have drifted quite far from that fundamental principle of limited express powers, going as far back, especially in modern times, as President Teddy Roosevelt.”). William Olson similarly stated, “Congress has been asleep at the switch, at least since Teddy Roosevelt, and it is very difficult all these years later to transplant a backbone into Congress but essential that it be done.” Murray, *supra* note 1.

### B. Intent of the Framers

To ascertain the original intent of our Founding Fathers, it is first important to remember the circumstances under which the Constitution was written. To some degree, the political theories of the Framers may have been influenced by the political philosophers of their day,<sup>36</sup> but primarily, they were influenced by their observations of history<sup>37</sup> and by their personal experiences as colonists under the English King.<sup>38</sup> The sense of oppression that they had experienced, both under the English monarchy and also under many of the colonial governors, left the colonists with a fear of unchecked executive power.<sup>39</sup> As a result,

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36. Among the philosophers impacting the political theories of the colonists was Montesquieu, who is well known for his insistence that there be a division of power within government in order to protect the freedom of those so governed. See TAFT, *supra* note 8, at 1. President Taft asserted that the division of powers in the American Constitution is clearer than the division of powers in the English constitution. *Id.* But see FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 179 (1994) (asserting that the Founders did not adhere to the Montesquieuan doctrine of separating powers as strictly as commonly believed, although it was endorsed “as an abstract principle”).

37. See generally McDONALD, *supra* note 36, at 67–124 (discussing the historical and political events that would have influenced the Americans at the Constitutional Convention). McDonald notes that the Founders cited biblical history more often than Montesquieu, Bolingbroke, and Hume combined. *Id.* at 68. Similarly, lessons were gleaned from Roman, Greek, and English history. See *id.* at 72, 79, 89. The overall lesson centered around the dangers of unchecked executive powers.

38. *Id.* at 98–124. The colonists sought to create a political system that could be distinguished from the oppressive feudal system in England. See Louis Hartz, *The Concept of a Liberal Society*, in CLASSIC READINGS IN AMERICAN POLITICS 11, 11 (Pietro S. Nivola & David H. Rosenbloom eds., 2d ed. 1990). For a description of the oppression experienced by the colonists prior to the American Revolution and its impact on their mindset, see MARVIN OLASKY, *FIGHTING FOR LIBERTY AND VIRTUE* (1995).

39. The governors appointed to the colonies during the 1700s were known for their arbitrary and tyrannical decisions—as well as their willingness to be bribed. See OLASKY, *supra* note 38, at 21–43. Colonists spent much of their time fighting to limit royal power (as expressed through the governors) and seeking smaller government. *Id.* at 38–39, 43. In the early part of the century, they won small victories in this regard. The colonists considered “each successful assertion of authority . . . a precedent . . . [that] kings or courtiers . . . [violated] at their own peril.” *Id.* at 42. From the perspective of those in England, however, “London’s winks and nods were temporary peace-keeping measures, and in time, more aggressive administrations could take steps to bring the colonists to heel.” *Id.* at 38. These different perspectives caused many problems later when London sought to re-establish the royal executive power in the American colonies.

Forrest McDonald similarly notes that the sense of betrayal felt by the American colonists was even more complete in contrast to the intensity with which they had previ-

they sought to create a government that escaped tyrannical, one-man rule and instead granted its citizens the ability to govern themselves effectively. The Articles of Confederation had proven an ineffective solution, as government had remained too centralized.<sup>40</sup> As discussed further below, the Founders eventually determined that a government separating powers among tripartite branches was the best method of accomplishing their goal while allowing personal liberties to be preserved.

Most importantly, the lessons of history had taught the Founding Fathers one inescapable fact about human nature: They “believed in original sin, believed that man has a nature that is unchanging and base.”<sup>41</sup> They did not hold to the belief that all—or even some—men are ultimately willing and able to consistently act in a completely unselfish manner when entrusted with unchecked power.<sup>42</sup> Instead, they “understood that man is inherently flawed, imperfect and imperfectible, driven by selfish desires.”<sup>43</sup> They had seen too much

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ously believed in the King and his intent to serve the welfare of the colonies. McDONALD, *supra* note 36, at 124 (“The news [that the King had pronounced the colonists “rebels”] was even more shattering precisely because belief in the virtue of this Patriot King had been intense. No people could have felt more betrayed. It seemed unlikely that Americans would ever believe in executive authority again.”).

40. See Pasco Bowman, *The Separation of Powers: Myth or Reality?*, in *DERAILING THE CONSTITUTION* 114, 114–15 (Edward B. McLean ed., 1995) (noting that the Founding Fathers were not only recovering from the tyrannical rule of George III, but also from the centralized authority structure of the Articles of Confederation). Many Americans had viewed a lack of separation of powers to be a major flaw in the governmental structure created by the Articles of Confederation. *But see* GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 16–17* (1997). Stanford University President Gerhard Casper has asserted that the lack of separation of powers may not have been as important to the colonists as we now believe. He notes that John Randolph, in opening the 1787 Constitutional Convention, did not mention separation of powers when enumerating the defects in the Confederation. *Id.* at 17. The Virginia Plan submitted that day did imply the importance of a division of powers; subsequent plans pre-supposed a tripartite system. *Id.*

41. Forrest McDonald, *I Have Seen the Past and It Works*, in *DERAILING THE CONSTITUTION*, *supra* note 40, at 30, 33.

42. *Id.* (“They were utterly contemptuous of abstract political theories based upon the notion that man and society are perfectible, or that evil can be eradicated, or that man can be taught to be other than self-interested, or that man is or can become a creature governed by reason . . .”). Anti-Federalists shared the view that humans are inherently corruptible when given unchecked power. One anti-Federalist argued that “[t]hose who have governed, have been found in all ages ever active to enlarge their powers and abridge the public liberty.” “Brutus,” *Brutus II*, Liberty Library of Constitutional Classics, Constitution Society (Nov. 1, 1787), at <http://www.constitution.org/afp/brutus02.htm>.

43. McDonald, *supra* note 41, at 33; *see also* Vazsonyi, *supra* note 2 (“But the mira-

abuse of power to believe otherwise, and any government created by these patriots would reflect these beliefs about human nature.

### 1. The Importance of Separation of Powers

It is indisputable that the Founding Fathers placed great importance on governmental division of powers<sup>44</sup> and sought to incorporate this division into the Constitution as it was being prepared for ratification by the thirteen states.<sup>45</sup> James Madison was perhaps the most eloquent advocate for the separation of powers that had been incorporated into the new Constitution. In an often-quoted statement, he expressed this central principle that drove the delegates at the Constitutional Convention:

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty . . . . The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the

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cle of the American founding was precisely that they knew. Without electricity, without computers and space flights, they knew. They wrote provisions so one person could not dictate. They made certain America's future would not depend on whether 'the hand' was decent or not. They had seen how quickly rulers become corrupted. They knew the mortal danger of the evil pen.").

44. Statement of Thomas B. Griffith, *supra* note 14, at 55 ("There is no concept more fundamental to the values protected by our constitutional system of government than the separation of powers. . . . The Framers 'viewed the principle . . . as the absolutely central guarantee of a just government.'" (quoting *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting))).

#### 45. Senator Mike Crapo has stated:

In Federalist Paper 51, it is written, "If men were angels, no government would be necessary." The writer knew, when promoting ratification of the Constitution in 1788, that our government would need controls to prevent the abuse of governmental power. The Constitution does this by dividing the governmental power among three equal branches with checks and balances to prevent each of them from gaining too much power.

Press Release, Sen. Mike Crapo, *supra* note 28; *see also* Vazsonyi, *supra* note 2 (noting the intent of the Founders to write constitutional provisions preventing any one official from dictating on any single matter and theorizing that modern-day Americans do not have the same wisdom displayed by the Founding Fathers); *cf.* Editorial, *Restoring Checks and Balances*, INVESTOR'S BUS. DAILY, Nov. 2, 1999, at A26 ("It doesn't take a scholar to know that liberty is threatened when the power to make law is vested in a single person. That's the type of authority wielded by Kings and dictators. Our system—and a high degree of freedom—survives on tension between branches, not on the actions of a wannabe king.").

federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.<sup>46</sup>

Madison went on to quote Montesquieu: “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.”<sup>47</sup> After all, where this is so, “apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.”<sup>48</sup>

There is a seemingly endless supply of literature from the late 1700s affirming the importance placed on a division of powers by our Founding Fathers. It was imperative, not only to the delegates at the Convention, but also to the states ratifying the Constitution, that one branch of government be responsible for creating the laws while another carry the responsibility for executing them.<sup>49</sup> Separating these tasks was viewed as necessary to protect the “public security” and to prevent arbitrary and tyrannical rule.<sup>50</sup> Feelings ran especially high against placement of legislative power in the hands of one—or even a few—individuals.<sup>51</sup> One of the fears expressed by those opposed to the Constitution was that, despite ample provisions separating powers, these might still be insuf-

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46. THE FEDERALIST NO. 47, at 336 (James Madison) (Benjamin Fletcher Wright ed., 1996).

47. *Id.* at 337–38 (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS (1748)).

48. *Id.* at 338.

49. *Id.* at 336.

50. THE FEDERALIST NO. 77, at 489 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1996). (“But these precautions [impeachment and other measures], great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body.”); *see also* THE FEDERALIST NO. 47, at 336 (James Madison) (Benjamin Fletcher Wright ed., 1996).

51. *See, e.g.*, “Brutus,” *Brutus III*, N.Y.J., Nov. 15, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 317, 323 (Bernard Bailyn ed., 1993), *available at* <http://www.constitution.org/afp/brutus03.htm>. One anti-Federalist, known as “Brutus” alleged that a House of Representatives consisting of “only” sixty-five men was not enough to “represent the feelings, opinions, and characters of a great multitude.” *Id.* He claimed that such representation was “merely nominal.” *Id.* One can only imagine his horror at laws made by a solitary executive. *See also* “Cato,” *Cato V*, N.Y.J., Nov. 22, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra*, at 394, 402. (“[T]he representation consists of so few; too few to resist the influence of corruption, and the temptation to treachery, against which all governments ought to take precautions.”).

ficient to prevent oppression.<sup>52</sup> Without multiple safeguards, including separation of the power to legislate from the power to execute the laws, it was feared that an avenue would be left open for a future government official to “behave with all the violence of an oppressor.”<sup>53</sup>

There is a greater question than whether or not the Founders believed in a separation of powers—clearly they did. The more important issue is, of course, how did the Founders *implement* separation of powers in the newly created American Constitution.<sup>54</sup> The Founding Fathers faced a challenging task. They needed to restrain the power of the federal government, but they also needed to avoid fragmenting the government so completely that it would find itself hampered and unable to act.<sup>55</sup> They sought to separate the legislative, executive, and judicial powers to prevent tyranny and abuse of power, but they also sought to avoid isolating one branch so completely that there was no “check” on the authority exercised by that branch.<sup>56</sup>

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52. See, e.g., “Cato,” *Cato V*, N.Y.J., Nov. 22, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 51, at 394, 399 (“I [have] endeavored to prove that the language of the article relative to the establishment of the executive of this new government was vague and inexplicit, that the great powers of the President, connected with his duration in office would lead to oppression and ruin.”). Professor McDonald notes the anti-Federalists’ fears that the presidency would essentially be a kingship. Their fears probably resulted in part from a general fear of monarchy, but also from a belief that the Vesting Clause granted too much power. MCDONALD, *supra* note 36, at 192–93.

53. THE FEDERALIST NO. 47, at 338 (James Madison) (Benjamin Fletcher Wright ed., 1996) (“Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of an oppressor.”).

54. Some scholars argue that there was “no strong consensus” on what exactly a “separation of powers” meant, although there was a strong consensus that such a system was necessary to prevent tyranny. CASPER, *supra* note 40, at 21–22. Gerhard Casper asserts that the Americans’ belief in separation of powers was mingled with other, contradictory notions of governmental power: “[It] did not mean that separation of powers notions were absent before 1776. Rather, they were intertwined with older notions reflecting the allocation of powers in the mixed colonial regimes.” *Id.* at 11.

55. Louis Fisher, Senior Specialist in Separation of Powers for the Congressional Research Service, states that the Framers “did not want a political system so fragmented in structure, so divided in authority, that government could not function.” LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 10–11 (Princeton Univ. Press 1985).

56. Madison noted that governmental powers were separate, but not wholly unconnected. See THE FEDERALIST NO. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1996) (“It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other.”). The need for this state of affairs was noted



The Framers knew that a lack of accountability would result in the destruction of liberties just as surely as a failure to separate powers sufficiently would lead to tyranny. Justice Jackson articulated the balance needed in government when he stated, “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”<sup>57</sup> Justice Joseph Story, a well-known constitutional commentator, echoed this sentiment when he stated that a “rigid adherence to [separation of powers] in all cases would be subversive of the efficiency of the government, and result in the destruction of the public liberties.”<sup>58</sup> To some degree, “blending” powers protects, and even strengthens, freedom.<sup>59</sup>

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and endorsed by one of the anti-Federalists, “Brutus.” He stated:

Perhaps no restraints are more forcible, than such as arise from responsibility to some superior power. —Hence it is that the true policy of a republican government is, to frame it in such manner, that all persons who are concerned in the government, are made accountable to some superior for their conduct in office. . . . To have a government well administered in all its parts, it is requisite [that] the different departments of it should be separated and lodged as much as may be in different hands. The legislative power should be in one body, the executive in another, and the judicial in one different from either—But still each of these bodies should be accountable for their conduct.

“Brutus,” *Brutus XVI*, Liberty Library of Constitutional Classics, Constitution Society (Apr. 10, 1788), at <http://www.constitution.org/afp/brutus16.htm>. Thomas Jefferson endorsed such a governmental structure when speaking of the Virginia state assembly:

“For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. *But no barrier was provided between these several powers.*”

THE FEDERALIST NO. 48, at 345–46 (James Madison) (Benjamin Fletcher Wright ed., 1996) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1784)).

57. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

58. JOSEPH STORY, I COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 396 (5th ed. 1905), cited in FISHER, *supra* note 55, at 11.

59. See THE FEDERALIST NO. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1996) (“[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”); cf. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 127 (J.P. Mayer ed., George Lawrence trans., 1969) (“In everything important which [the President] does, he is directly or indirectly subject to the legislature; where he is entirely independent of it, he can do almost nothing. It is therefore, his weakness, not his strength, which allows him to carry on in opposition to the legislative power. In Europe there must be agreement between king and chambers, because the fight between them might be serious. In America agreement is not obligatory because there such a fight is impossible.”).

Blending them *too much*, however, leads to tyrannical government.<sup>60</sup> Such was the challenge that faced the delegates to the Constitutional Convention.

## 2. Delegation of Legislative Authority

The delegates answered the separation of powers challenge with a few simple phrases. The Constitution grants power to the legislative and executive branches by stating that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,”<sup>61</sup> and “[t]he executive Power shall be vested in a President of the United States of America.”<sup>62</sup> The language of the two grants of power differs sharply. Article I adds the caveat “[a]ll legislative powers *herein granted*,”<sup>63</sup> while the language of Article II is more similar to the grant of judicial power in Article III: “[t]he executive Power *shall be vested*.”<sup>64</sup> Not explicitly answered was the significance, if any, of the difference in phrasing.<sup>65</sup> For our purposes, the inquiry into this significance is limited to two questions. First, to what degree did the delegates intend the grant of legislative power to be separated from the executive power? Second, to what degree did

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60. THE FEDERALIST NO. 47, at 336 (James Madison) (Benjamin Fletcher Wright ed., 1996).

61. U.S. CONST. art. I, § 1.

62. *Id.* art. II, § 1, cl. 1.

63. *Id.* art. I, § 1.

64. *Id.* art. II, § 1, cl. 1. Article III states that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

65. McDONALD, *supra* note 36, at 181 (noting the different phrasing used to grant the executive versus the legislative powers and asserting that the delegates did not indicate the significance of the different wording). *But see Hearing on Executive Orders, supra* note 33, at 8–10 (statement of Neil Kinkopf, Prof. of Law, Georgia State Univ.) (asserting that the Founders intentionally left the boundaries between the legislative and executive powers undefined as they understood the nature of ambition and felt clear boundaries would be futile; instead, they intended ambition to counteract ambition).

Professor Douglas Kmiec has instead focused on the Take Care Clause in determining the bounds of presidential power. *See* Douglas W. Kmiec, *Expanding Executive Power*, in THE RULE OF LAW IN THE WAKE OF CLINTON 47, 47 (Roger Pilon ed., 2000). Professor Kmiec notes the significance of the fact that discussion of presidential power in the Constitution is “cast mostly in the language of duty.” *Id.* (“[T]he duty to execute the laws “faithfully” means that American presidents may not . . . refuse to honor and enforce statutes that were enacted with their consent or over their veto.”) (footnote omitted) (second alteration in original).

they intend the executive to participate in the lawmaking process in order to act as a check on the legislative branch?

In evaluating the intent of the Framers as they created this new presidential power, a focus could be placed on the traditional, broad notions of executive power then existing. Perhaps the Americans assumed the existence of some of these powers (including some lawmaking ability) in the executive they had just created.<sup>66</sup> However, other factors dispute the notion that the Framers assumed the existence of large, unenumerated grants of power to the executive—particularly legislative power. First, the executive power was only granted to the President once many of the “traditional royal prerogatives” had been granted to Congress.<sup>67</sup> The Founders did not want to incorporate traditional notions of a “royal” executive into the Constitution; in fact, they sought to separate themselves from these notions.<sup>68</sup> Second, the colonists had been badly burned by a monarchy with unchecked power once. It is unlikely that they would have subjected themselves to such an executive authority again.<sup>69</sup> Last, the Founders

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66. See, e.g., MCDONALD, *supra* note 36, at 181 (“The more general vesting in Article 2, combined with the specification of certain presidential functions and duties, presupposes that ‘executive power’ had an agreed-upon meaning. Given the delegates’ knowledge of the subject from history, political philosophy, and experience, it seems evident that some of them, at least, thought of executive power as contingent and discretionary: the power to act unilaterally in circumstances in which the safety or the well being of the republic is imperiled; power corresponding to that of ancient Roman dictators, or to Bracton’s *gubernaculum*, or to Fortescue’s *dominium regale*; power, in sum, that extends beyond the ordinary rules prescribed by the Constitution and the laws.”); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 20 (1993) (noting the contention of some that any power understood to be in the executive in 1789 and not reallocated to Congress remains in the executive).

67. See Monaghan, *supra* note 66, at 17 (“Not surprisingly, therefore, the most important datum—the Constitution itself—contains no hint of an independent presidential regulatory power. The great powers of the national government are vested in Congress. Some of the Crown’s important powers—to create offices, to declare war—were transferred outright to Congress; other formerly important ‘executive’ powers, such as making appointments and treaties, were shared with the Senate.”).

68. Thomas Jefferson confirmed such a view when proposing a constitution for Virginia. He stated, “By executive powers, we mean no reference to those powers exercised under our former government by the crown as of its prerogative. . . . We give them those powers only, which are necessary to execute the laws and administer the government, and which are not in their nature either legislative or judiciary.” *Id.* at 15 (emphasis added).

69. See *supra* notes 36–43 and accompanying text. In fact, when comparisons were made of the President to the English King, the President was portrayed as a much weaker figure. See, e.g., THE FEDERALIST NO. 69, at 446–47 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1996) (comparing the English King, the American President, and the New York governor); see also Eileen Burgin, *Congress and Foreign*

repeatedly asserted the need for the people to protect themselves from the exercise of unchecked legislative power by one, or even a few, individuals.<sup>70</sup>

Taking these factors into consideration, the Founders solved the separation of powers problem by giving the executive branch “partial agency,” but not “whole” control over the lawmaking power.<sup>71</sup> The executive’s role in lawmaking was to be restricted to the power to veto laws and to make policy recommendations to Congress.<sup>72</sup> There has perhaps always been a recognition that the power to execute laws may necessarily imply some discretion on the part of the President to “fill in the details” when implementing legislation; after all, statutes are sometimes unclear or may convey some discretion in execution.<sup>73</sup> However,

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*Policy, The Misperceptions, in CONGRESS RECONSIDERED 334, 335 (Lawrence C. Dodd & Bruce Oppenheimer ed., 5th ed., 1993) (recounting Hamilton’s assertions that the President would be much less powerful than the English King); DE TOCQUEVILLE, supra note 59, at 123 (comparing the King of France to the United States President).*

70. *E.g.*, THE FEDERALIST NO. 48, at 344 (James Madison) (Benjamin Fletcher Wright ed., 1996) (“In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.”).

71. THE FEDERALIST NO. 47, at 338 (James Madison) (Benjamin Fletcher Wright ed., 1996) (“[Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. . . . [But] where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.”).

72. *See* Sterling, *supra* note 30, at 108 (noting that the express language of the Constitution authorizes Congress to make the laws, while no grant of lawmaking power is given to the President except for the veto power). Support for this limitation on the executive power can be found in the limited discussions on this subject in the debates at the Constitutional Convention. One delegate suggested an amendment to Article II so that it would read, “[the Executive has] power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, *and to execute such other powers ‘not Legislative nor Judiciary in their nature,’* as may from time to time be delegated by the national Legislature.” JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 39 (Gaillard Hunt & James Brown Scott eds., Oxford Univ. Press, 1920) (emphasis added). The proposal was rejected on the grounds that the limitation, “not Legislative nor Judiciary in their nature,” was unnecessarily repetitive as the Constitution did not allow the improper allocation of powers. James Madison argued for the proposal, noting that although the addition was not necessary, it was not inconvenient to add it either. Despite his efforts, the proposal did not pass. *See id.*; *see also* Monaghan, *supra* note 66, at 16–17.

73. Hamilton saw the executive as performing largely an administrative, executive function. In contrast, Jefferson, while maintaining that the executive had no legislative or executive power, believed that the executive may be a “means to an end” when the statute is unclear. *See* Monaghan, *supra* note 66, at 39. Similarly, President Taft sug-

along with this recognition has come the understanding that the executive's role is not to extend to actual lawmaking; he may not act where his actions cannot be traced to a specific grant of power.<sup>74</sup> President Taft characterized this as the difference between presidential "discretion" and presidential "lawmaking."<sup>75</sup>

The Founding Fathers recognized that a representative body of many individuals constituted the best mode of making laws.<sup>76</sup> Any lawmaking by one individual would immediately introduce the danger of tyranny. They instead created a system that would not implement national policies until they had been "the result of open and full debate, hammered out by the legislative and executive branches."<sup>77</sup> They deliberately took the lawmaking power out of the hands of the executive and left him only with a veto power, knowing that, while such a system may sometimes create inefficiencies, it would also create protection from arbitrary rule.<sup>78</sup> They determined that the executive could not have "direct" or "complete" administration of the power of another branch, just as the legislature and judiciary would not have complete control over the executive power.<sup>79</sup>

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gested that the grant of executive power to the President includes the exercise of some quasi-legislative functions; however, his view of presidential power remained much more limited than more expansive modern notions. *See TAFT, supra* note 8, at 14.

74. *But see* Monaghan, *supra* note 66, at 2 (noting the contention of some that a more pragmatic approach should be taken to our understanding of presidential power and that the President should be granted more lawmaking authority in some circumstances).

75. *Id.* at 40; *see also, e.g.,* Bruce Bartlett, *In Search of Purloined Powers*, WASH. TIMES, July 31, 2000, at A20 (contrasting the assertion that presidents are not supposed to legislate with the reality that statutes sometimes convey some discretion to the President).

76. THE FEDERALIST NO. 48, at 344 (James Madison) (Benjamin Fletcher Wright ed., 1996) (endorsing placement of the legislative power solely in a representative, numerous assembly). *But see* Statement of Thomas O. Sargentich, *supra* note 33, at 31 (asserting that a claim that the President has no "lawmaking" power is overstated and that such an interpretation would result in an "unworkably rigid" distinction between lawmaking and executing the laws).

77. Testimony of Hon. Jack Metcalf, *supra* note 3, at 13 ("The Framers expected national policy to be the result of open and full debate, hammered out by the legislative and executive branches. They believed in careful delineation conducted in a representative assembly, subject to all the checks and balances that characterize our constitutional system.").

78. *See* Burgin, *supra* note 69, at 334 (noting that the Framers sacrificed efficiency where needed to thwart the potential for abuse of power by ambitious government officials).

79. THE FEDERALIST NO. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1996) (noting that no department should have "overruling influence over the others, in the administration of their respective powers").

Allowing the President to make laws and set national policy through the use of executive orders or other presidential directives directly contradicts the intent of the Framers.<sup>80</sup> Not only does it subvert the system of checks and balances carefully crafted by our Founding Fathers, but it also gives the President “direct” and “complete” control over the legislative power of Congress—creating a situation fraught with exactly that type of danger that the Framers sought to avoid. Justice Jackson once stated, “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and the law be made by parliamentary deliberations.”<sup>81</sup> Any use of executive authority to the contrary subverts this purpose.

### C. Uses of Executive Orders Through the Years

Historically speaking, executive orders have always been considered an indispensable tool of the executive. Over time, however, the manner in which these orders are used has changed drastically. In the first years of our republic, executive orders were used primarily to regulate government employees, to transfer property among governmental departments or to establish national holidays or days of mourning.<sup>82</sup> Today, the use has expanded so drastically that

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80. Such an argument does not undermine the theory that the Framers intended to create a strong, unitary, “energetic” executive. The Founders, in fact, argued for an executive with sufficient strength to act as a check on the legislature while they were simultaneously taking legislative power out of his hands. *E.g.*, THE FEDERALIST NO. 70, at 451 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1996) (“A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.”); *see also* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995). The Founders protected the strength of the executive, not by giving him lawmaking ability, but by giving him other characteristics. For instance, the President is unitary, not plural. While the Senate may refuse to confirm some of his appointments, the President takes the initiative in proposing these officers, ambassadors, and judges. Neither the Senate nor the House can force the President to act or otherwise share the executive power. He has a four-year term that can only be ended through the difficult process of impeachment, and he has a veto power that may only be overcome by a two-thirds vote of the legislature. DE TOCQUEVILLE, *supra* note 59, at 121–122.

81. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 658 (1952) (Jackson, J., concurring).

82. Statement of Hon. Bob Barr, *supra* note 35, at 8; OLSON & WOLL, *supra* note 11, at 8; Sterling, *supra* note 30, at 101. Such a use is consistent with checks and balances, as these functions are merely administrative in nature. *See id.* at 102.

executive orders and other directives may now even be used to create and impose legal burdens on private citizens.<sup>83</sup>

Some have hypothesized that this growth in the scope of executive power has occurred due to the increase in size of the administrative state or because the nature of the country's economy has changed.<sup>84</sup> While these factors doubtless have an impact, this article argues that the growth of executive power stems from one primary problem. Legislative representatives—and their constituents—have failed to hold presidents accountable for their ever-increasing use of executive power. In fact, they have done just the opposite. Citizens have asked presidents to skirt the legislative process to issue executive orders on their behalf.<sup>85</sup> Some in Congress have been only too happy to sit back and watch as the President facilitates the promulgation of policy that would be difficult to get through Congress.<sup>86</sup> The longer this state of affairs is allowed to continue, the

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83. Sterling, *supra* note 30, at 100.

84. *E.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 568–69 (1973) (claiming that expanded economic forces, the growth in population and business, increased interdependence among states, and a rising demand on government have contributed to the growth in presidential power); Sterling, *supra* note 30, at 100–01 (hypothesizing that a turning point was reached in America as the country moved from a period in which exploration of the continent was the primary activity to a period in which the primary goal of government was to regulate natural resources). *But see* Samuel P. Huntington, *Congressional Responses to the Twentieth Century*, in CLASSIC READINGS IN AMERICAN POLITICS, *supra* note 38, at 270 (arguing that Congress has not appropriately adjusted to the twentieth century and has not been able to play a leadership role in determining the direction of public policy initiatives); McDONALD, *supra* note 36, at 347 (noting decreasing involvement of congressmen as the volume of legislation has grown).

85. *E.g.*, Peter Cleary, *Editorial*, INVESTOR'S BUS. DAILY, Feb. 2, 2000, at A1 (reporting a request of the Institute for Women's Policy Research to President Clinton for an executive order implementing policies similar to those in the Paycheck Fairness Act pending before Congress); *see also, e.g.*, Monaghan, *supra* note 66, at 8 (noting that Americans seem to turn to the government for a solution to virtually every problem). The mentality of American citizens has changed over time. The country has moved from a time when individuals expected to take personal responsibility for their well-being to a time in which, instead, the government is expected to take responsibility. Sterling, *supra* note 30, at 100–01 (theorizing that the government has become more socialist since the time of the Civil War and that Americans place "their confidence and hope in a 'benevolent' government" who may be able to "allev[e] their economic woes"). This state of affairs seems to be worsening as America, for the first time in decades, enters a state of war.

86. *E.g.*, *Hearing on H.R. 3131*, *supra* note 3, at 39 (statement of Hon. Ron Paul, Rep. of Cong., State of Texas) [hereinafter Statement of Hon. Ron Paul] ("It is, of course, a mistake to place all blame with any single president or the presidency itself for abuse of this power. After all, presidents have had many willing accomplices in Con-

harder it will be to curb the abusive excesses of executive power by future presidents.<sup>87</sup>

### 1. Washington to Lincoln

President Washington, of course, set the initial precedent for the use of executive authority. Washington used his powers very conservatively, recognizing not only that the federal government had limited power, but also that he himself was limited by separation of powers. He did not take any action to “achieve by executive order any matter which the strictest interpretation of the Constitution could regard as within the legislative domain.”<sup>88</sup>

The first order issued by Washington was one that ordered the acting officers of the Confederation government to prepare a report for the new government regarding the state of affairs in America.<sup>89</sup> He later issued orders and proclamations in response to requests by Congress. For instance, he issued a proclamation declaring October 3, 1789, to be a day of Thanksgiving after Congress had requested that he choose a date for this purpose.<sup>90</sup> In 1794 and thereafter, Congress often authorized Washington to impose or lift embargoes, which he did.<sup>91</sup>

The most controversial order issued by Washington was his so-called “neutrality order.” The order was issued on April 22, 1793, and proclaimed the neutrality of the United States in the war between England and France.<sup>92</sup> Washington saw the order as a statement regarding the existing state of affairs, not an act that would bind Congress.<sup>93</sup> Others argued that the order did more than Washington claimed, that it cited no authority, and that it was not a valid exercise of

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gress. A great number of congressmen and senators quietly appreciate the assumed presidential authority to create and enact legislation because it allows them to see their goals accomplished without having to assume political responsibility.”)

87. Cf. Statement of Hon. Bob Barr, *supra* note 35, at 9 (“President Clinton is simply expanding a precedent for setting policy by executive order that has been established in previous Administrations.”).

88. Monaghan, *supra* note 66, at 18 (quoting JAMES T. FLEXNER, *GEORGE WASHINGTON AND THE NEW NATION* 221 (1969)).

89. See OLSON & WOLL, *supra* note 11, at 11.

90. *Id.*

91. See Monaghan, *supra* note 66, at 19. Although many thought that this might be an unconstitutional delegation of authority, none suggested that Washington should have had the authority to independently impose or lift embargoes. *Id.*

92. Statement of Thomas B. Griffith, *supra* note 14, at 55; OLSON & WOLL, *supra* note 11, at 11.

93. STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 16.



executive authority.<sup>94</sup> Washington had difficulty enforcing the order until Congress stepped in and issued the Neutrality Act of 1794.<sup>95</sup> However, dispute over this executive order was a relatively minor bump in the road as precedent for the use of presidential power was established. Presidents following Washington continued to conservatively use executive orders. President Lincoln was the first to drastically broaden the scope of executive power.<sup>96</sup>

Lincoln, admittedly, governed in unusual times. The country was rapidly approaching a state of Civil War. When the war started, Congress was not in session, and Lincoln fought the war for three months through executive order before calling an emergency session of Congress and seeking retroactive approval for the actions he had taken.<sup>97</sup> Congress allowed him to circumvent its authority, despite the fact that Lincoln could have called the special session sooner to allow legislative participation in the war. Congress was apparently reacting to a concern that refusing to ratify Lincoln's orders might place American military forces at risk.<sup>98</sup>

Through his broad use of the executive power, Lincoln took such actions as calling forth the militia,<sup>99</sup> blockading southern ports,<sup>100</sup> building warships, funding requisitions,<sup>101</sup> and suspending the writ of habeas corpus.<sup>102</sup> Lincoln saw the

94. *Id.* Hamilton saw the order as a grant of power authorized by Article II. Madison, however, argued that the American government was not a government of royal prerogatives and that the order was unconstitutional. *Id.*

95. Statement of Thomas B. Griffith, *supra* note 14, at 55.

96. OLSON & WOLL, *supra* note 11, at 12 (noting that 143 executive orders were issued from the time of Washington to Buchanan, but that the practice changed when Lincoln took office); Sterling, *supra* note 30, at 105 (discussing the change in the use of executive power at the time of Lincoln).

97. OLSON & WOLL, *supra* note 11, at 12 (noting that war was fought for nearly three months without congressional approval); *see also* Sterling, *supra* note 30, at 105.

98. OLSON & WOLL, *supra* note 11, at 14 (discussing congressional approval of Lincoln's actions after the war had already begun); Sterling, *supra* note 30, at 105 (noting the Supreme Court's deferential attitude towards Lincoln's action, given the extreme circumstances under which he was operating).

99. McDONALD, *supra* note 36, at 356 (discussing the steps taken by Lincoln following the firing on Fort Sumter); OLSON & WOLL, *supra* note 11, at 12 (delineating actions taken by Lincoln beginning in April 1861).

100. OLSON & WOLL, *supra* note 11, at 12; Sterling, *supra* note 30, at 105.

101. OLSON & WOLL, *supra* note 11, at 12.

102. STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 21. President Lincoln issued instructions to General Scott, ordering him to suppress insurrections and to suspend the writ of habeas corpus "in the extremest necessity." *Id.* (quoting Order from Abraham Lincoln to Lieutenant-General Scott (April 25, 1861), in 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3218-19 (Bureau of National Literature, Inc., New York, James D. Richardson ed., 1897)). The result was a struggle for power between the courts and the

dangers that the Founding Fathers had sought to avert by placing legislative powers in Congress, but he nevertheless used his role as Commander in Chief to justify an enlargement of the executive power. While times were certainly extreme and could be argued to justify equally extreme action, the danger that the Founders saw also came to pass—future generations of presidents later used his actions as a precedent for their own usurpation of legislative power.<sup>103</sup> A congressional study on executive orders later summed up this era by stating, “President Lincoln and other Presidents have used this military office bestowed upon them by the Constitution to enlarge the powers of the Presidency, although with good faith and with noble motives, with greater impact upon the civilian population and our constitutional system than upon the military forces.”<sup>104</sup> President Bush should remember the ramifications of Lincoln’s well-intentioned orders as he issues his own directives during this time of war. Balancing his responsibility to act and protect the country against the need to set a good precedent for future presidents will be one of the more difficult challenges facing President Bush in the upcoming years.

## 2. Roosevelt to Wilson

After the Civil War ended and Lincoln was assassinated, Presidents temporarily returned to the former, more conservative use of executive power—until President Theodore Roosevelt was elected to office.<sup>105</sup> President Roosevelt held to a significantly broader theory of the executive power than had his predecessors.

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President. When Chief Justice Taney of the U.S. Circuit in Baltimore issued a writ of habeas corpus for John Merryman, General Cadwalader, in command at Fort McHenry where Merryman was being held, returned the writ, claiming that it could not be served under order of the President. *Id.* at 21–22. The Chief Justice ordered that a writ of attachment be served on General Cadwalader, but it was returned to him, unserved, when the marshal was not allowed in the gate at Fort McHenry. *Id.* at 22. Although the Chief Justice’s opinion was later affirmed by the Supreme Court, the affirmation came too late. Lincoln ignored the Chief Justice’s demands, although he later referred to the matter in an appearance before Congress. Lincoln’s actions were legalized two years later in the Habeas Corpus Act of 1863. *Id.* at 23.

103. *Id.* at 20.

104. *Id.*; cf. William Norman Grigg, *Our Elected Dictator*, *The New American*, at [http://www.thenewamerican.com/tna/2000/02-14-2000/vo16no04\\_dictator.htm](http://www.thenewamerican.com/tna/2000/02-14-2000/vo16no04_dictator.htm) (noting that promiscuous uses of presidential power are hard to rein in due to the “collection of precedents” to which presidents can turn to justify their usurpation of legislative power).

105. OLSON & WOLL, *supra* note 11, at 12. At 1006 orders, President Roosevelt issued more executive orders than all but three Presidents: Woodrow Wilson, Calvin Coolidge, and Franklin Delano Roosevelt. See *id.* at 13 tbl.1. President Roosevelt is said to be one of the primary instigators of the more modern, expansive use of executive power.

sors. He believed that he could take any action necessary for the good of the nation and asserted that he was “‘limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers.’”<sup>106</sup>

Roosevelt governed in an era when the government was beginning to get involved in solving social problems.<sup>107</sup> He would urge reform in an area; if reform did not come, then he took responsibility for reform implemented by other legislation. Historian Forrest McDonald described this aspect of Roosevelt’s presidency: “Roosevelt’s showmanship in pretending to be the fountain of reform legislation transformed the expectations Americans had for their presidents and thus opened the door for the emergence of the legislative presidency.”<sup>108</sup> Roosevelt’s massive use of the executive order includes those for which he may best be remembered: his orders setting aside land as national monuments.<sup>109</sup>

When President Taft entered office following Roosevelt, use of executive orders decreased, but only partially. In contrast to Roosevelt’s views, Taft viewed the executive power as one that must be “fairly and reasonably traced to some specific grant of power.”<sup>110</sup> Although Taft’s views of the presidency were less broad than Roosevelt’s views, he nevertheless used executive orders more broadly than Roosevelt’s predecessors had. He unilaterally altered terms of treaties with several Indian tribes,<sup>111</sup> and he issued 698 executive orders total—almost as many as Presidents Carter and Reagan combined.<sup>112</sup>

Following Taft, Woodrow Wilson’s use of executive orders demonstrated, again, a drastic increase. Like Lincoln, Wilson at least had the excuse of a war to justify his actions. Prior to World War I, Wilson declared a national emergency two months before Congress had declared war.<sup>113</sup> He created federal agencies, including the World Trade Board, the Grain Corporation Committee on Public Information, and the Food Administration.<sup>114</sup> He restricted radio us-

106. TAFT, *supra* note 8, at 143 (quoting ROOSEVELT, *supra* note 8); *see also* OLSON & WOLL, *supra* note 11, at 15 (noting Roosevelt’s aggressive use of executive orders and his theory on executive power).

107. MCDONALD, *supra* note 36, at 358.

108. *Id.*

109. Sterling, *supra* note 30, at 102 (describing Roosevelt’s use of the executive order to set aside land).

110. TAFT, *supra* note 8, at 139.

111. *See* Sterling, *supra* note 30, at 103 (describing Taft’s use of executive orders).

112. In contrast to Taft’s 698 executive orders, Carter issued 320 and Reagan issued 381. OLSON & WOLL, *supra* note 11, at 13 tbl.1.

113. OLSON & WOLL, *supra* note 11, at 15 (describing Wilson’s presidency and his declaration of a national emergency on February 5, 1917); Sterling, *supra* note 30, at 103 (describing the widened use of executive orders by Wilson).

114. STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 36 (listing new agencies cre-

age,<sup>115</sup> and he regulated the price of coal.<sup>116</sup> In sum, he issued 1791 executive orders before he left office.<sup>117</sup>

In describing his view of the presidency, Wilson compared the office to a “prime minister,” stating that the President must be “as much concerned with the guidance of legislation as with the just and orderly execution of law . . . he is the spokesman of the Nation in everything.”<sup>118</sup> In writing on the presidency after his term of office, Wilson differentiated between constitutional “theory” and the “realities of governmental power.”<sup>119</sup> Despite his expansive views of the presidency, Wilson did show some degree of deference to Congress, and he, at least nominally, handed his newly acquired powers back to Congress following the war.<sup>120</sup> Most wartime measures taken by Wilson were repealed on March 3, 1921, shortly before President Harding was inaugurated.<sup>121</sup>

### 3. FDR and the New Deal

The next President to have a major impact on the scope of presidential power was Franklin Delano Roosevelt (“FDR”), who was elected during the midst of the Great Depression. The best expression of FDR’s approach toward executive power came in his own words during his first inaugural address. He stated that

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ated by Wilson); *see also* Sterling, *supra* note 30, at 103.

115. Sterling, *supra* note 30, at 103.

116. *Id.*

117. OLSON & WOLL, *supra* note 11, at 13 tbl.1.

118. ARTHUR S. LINK, *WOODROW WILSON: THE NEW FREEDOM* 147 (1956), *cited in* MCDONALD, *supra* note 36, at 359. Wilson further stated that Congress is “the law making part of the government” and should “be very hospitable to the suggestions of the planning and acting part of it, the presidency.” *Id.*, *cited in* MCDONALD, *supra* note 36, at 359. In his book, *CONGRESSIONAL GOVERNMENT*, Wilson described Congress as the “sovereign authority” in “central government” that is “constantly becoming stronger and more active.” *Editor’s Preface to Woodrow Wilson, Congressional Government*, in *CLASSIC READINGS IN AMERICAN POLITICS*, *supra* note 38, at 259, 259. However, his views had changed to such a degree by 1908 that he called the presidency “dominant over Congress” in his book *CONGRESSIONAL GOVERNMENT IN THE UNITED STATES*. *Id.*; *see also* Monaghan, *supra* note 66, at 1–2 (describing Wilson’s evolving theory of the presidency).

119. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT IN THE UNITED STATES* 70 (1908), *cited in* Monaghan, *supra* note 66, at 2. Wilson also stated that “[t]he President is at liberty, both in law and conscience, to be as big a man as he can.” *Id.*, *cited in* Monaghan, *supra* note 66, at 2.

120. Sterling, *supra* note 30, at 104 (noting that although Wilson handed his powers back to Congress, the programs he had created did not die).

121. OLSON & WOLL, *supra* note 11, at 15.

the normal balance of Executive and legislative authority may [not] be wholly adequate to meet the unprecedented task before us. . . . [U]nprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.

. . . [I]n the event that Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me.<sup>122</sup>

FDR was true to his word. He used his executive authority to issue 3723 executive orders, more than twice as many as Woodrow Wilson had issued during World War I.<sup>123</sup> The executive power was used to authorize a wide range of activities, including creation of the National Labor Board and the War Labor Board,<sup>124</sup> implementation of the National Industrial Recovery Act,<sup>125</sup> moving the country off the gold standard,<sup>126</sup> expanding the Trading with the Enemy Act,<sup>127</sup> establishment of a bank holiday,<sup>128</sup> relocation of Japanese-American citizens,<sup>129</sup> and other actions applicable to labor relations and private business.<sup>130</sup> Congress was a willing accomplice in this effort by the President.<sup>131</sup>

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122. First Inaugural Address of President Franklin Delano Roosevelt, in *WAR AND EMERGENCY POWERS* 58 (Paul Bailey ed., 1994), cited in *OLSON & WOLL*, *supra* note 11, at 15–16.

123. See *OLSON & WOLL*, *supra* note 11, at 13 tbl.1. The 1957 congressional study states that “[t]he peak year . . . [for executive orders was] 1933, the first year of the New Deal, when the power of the President was expanded to an unprecedented degree to cope with the depression.” *STUDY OF PRESIDENTIAL POWERS*, *supra* note 6, at 36.

124. *STUDY OF PRESIDENTIAL POWERS*, *supra* note 6, at 36.

125. *Id.*

126. Sterling, *supra* note 30, at 105.

127. *Id.*

128. *OLSON & WOLL*, *supra* note 11, at 16 (delineating FDR’s actions that were undertaken in an effort to spur economic recovery).

129. *Id.*; see also Jena Heath, *Congressmen Want to Curb Presidential Executive Orders*, *COX NEWS SERVICE*, Oct. 29, 1999 (discussing controversial executive orders, including FDR’s executive order deciding that Japanese-Americans were “national security risks” during World War II).

130. *Id.*; Sterling, *supra* note 30, at 105 (“During the first 100 days in office, [FDR] seized all gold and silver, took the country off the gold standard and established a banking system based on the debts of the people, expanded the Trading With the Enemy Act to redefine “enemy” as including all the American people, establish government control over natural resources, the social agenda and welfare, utilities, private financing, industry, labor and transportation, and bailed out the banks. Roosevelt’s acts abrogated the gold clause in all public and private contracts, thus usurping the legality of private contracts. At the same time he established control over financing and the price of homes,

FDR justified his actions based on the actions of those that had gone before him. Of Woodrow Wilson, he stated, “All one has to do is to go back and read those war acts which conferred upon the Executive far greater power over human beings and over property than anything that was done in 1933.”<sup>132</sup> Just as Lincoln’s actions during the Civil War eventually gave his successors “permission” to more freely exercise executive power, it appears that Wilson’s actions did the same for his successors. Herein lies the danger in allowing aberrations from the constitutional structure, even in emergencies. What was an emergency action in one generation will become permissible—even ordinary—in the next.

#### 4. Truman and Beyond

President Truman was the first President to operate under this post-New Deal conception of the executive power. With 905 executive orders, he issued far fewer executive orders than did FDR, but still far more than any President prior to Theodore Roosevelt.<sup>133</sup> Truman’s view of the executive power maintained the expansive, broad notion of the presidency that FDR had endorsed:

When the founding fathers outlined the Presidency in Article II of the Constitution, they left a great many details out and vague. I think they relied on the experience of the nation to fill in the outlines. The office of the chief executive has grown with the progress of the great republic. It has responded to the many demands that our complex society has made upon the Government. . . . [T]oday our government cannot function properly unless the President is master in his own house and unless the executive departments and

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and inserted into the Agricultural Adjustment Act a clause which shifted the power to coin money and regulate its value (granted by the constitution to congress) from congress to the president.” (quoting EUGENE SCHRODER, *CONSTITUTION: FACT OR FICTION* 25 (1995)) (alteration in original).

131. This era was marked not just by an unusually high number of executive orders, but also by total cooperation between Congress and the President. Nelson W. Polsby, *Some Landmarks in Modern Presidential-Congressional Relations*, in *BOTH ENDS OF THE AVENUE 2* (Anthony King ed., 1983) (“[T]he divisiveness and the normal politics of sectional interest that had dominated Congress over the previous period gave way to a depression-induced cooperation between president and Congress that had not been seen for a generation. President Roosevelt proposed various measures, and Congress enacted them very speedily indeed.”).

132. Sterling, *supra* note 30, at 105 (quoting 4 ROOSEVELT PAPERS 205–06).

133. OLSON & WOLL, *supra* note 11, at 13 tbl.1. All Presidents since Truman have issued fewer than 500 executive orders. *Id.* Of these modern-day Presidents, only Eisenhower has issued more than 400 executive orders. He issued 452. *Id.* Clinton issued 364 executive orders before leaving office.

agencies of the government, including the armed forces, are responsible only to the President.<sup>134</sup>

Truman issued the first executive order to be overturned in its entirety when he seized control of most of the country's steel mills to prevent a threatened steelworkers' strike.<sup>135</sup> Not until the administration of President Clinton was another executive order again overturned in its entirety.<sup>136</sup> These cases are discussed in greater detail below.

Presidents since the time of Truman have generally maintained an expansive view of presidential power and have used this power to implement policy, even when the orders have been somewhat controversial. For instance, Eisenhower issued 452 executive orders.<sup>137</sup> Kennedy used executive orders to establish many federal agencies and to prohibit racial discrimination in federally subsidized housing.<sup>138</sup> Johnson and Nixon used executive orders to wage the war in Vietnam.<sup>139</sup> Nixon ordered the FBI to spy on Americans not agreeing with the war, but Ford later revoked the order.<sup>140</sup> Carter used an executive order to create

134. SCHRODER, *supra* note 130, at 95–96, *cited in* Sterling, *supra* note 30, at 106.

135. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952). The dispute in the case centered around a labor dispute between the steel companies and their employees, who could not agree on wages despite recommendations by the Federal Wage Stabilization Board. *Id.* at 582–83. President Truman issued Executive Order 10,340, directing the Secretary of Commerce to take possession of the steel mills and keep them running. The President cited national defense concerns as justification for his action. *Id.* at 583.

136. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996). At least two other challenges to executive orders have been made since *Chamber of Commerce*. The first was a challenge to a Clinton order designating a national monument in Utah. The case is still pending. *See* discussion *infra* notes 183–87 and accompanying text. The second was to an executive order of Bush II's prohibiting the use of project labor agreements on federally funded construction projects. President Bush's order was overturned in its entirety by a district court in November 2001. An appeal is pending. *See* discussion *infra* notes 224–37 and accompanying text.

137. John A. Sterling, *Above the Law: Evolution of Executive Orders (Part Two)*, UWLA. L. REV. 123, 123–24 (2000) (discussing executive orders from the time of Eisenhower to the present).

138. *Id.* at 124; *see also* Heath, *supra* note 129 (discussing executive orders issued by President Kennedy in regards to federally subsidized housing). Kennedy also established the Peace Corps, the President's Commission on Equal Employment, the Commission on the Status of Women, and the President's Council on Aging, among other agencies. Sterling, *supra* note 137, at 124.

139. Sterling, *supra* note 137, at 124.

140. Heath, *supra* note 129.

the Federal Emergency Management Agency.<sup>141</sup> Reagan, Bush I, Clinton, and Bush II have each issued controversial orders on subjects ranging from labor relations disputes to abortions.<sup>142</sup> The war on terrorism has led to still more controversial orders.

Broad use of executive orders became so prevalent in the second half of the 1900s that a special Senate Committee on National Emergencies and Delegated Emergency Powers was authorized to investigate the matter in 1974.<sup>143</sup> The committee made several findings, including the fact that the United States had been governed under emergency rule since FDR called a state of emergency in 1933.<sup>144</sup> Upon completion of the study, committee co-chairman Senator Frank Church of Idaho stated, "Presidents could manage every aspect of the lives of all American citizens."<sup>145</sup> The study resulted in legislation that ended all then existing states of emergency. The legislation also gave Congress the ability to terminate any future states of emergency by joint resolution.<sup>146</sup> The cure was temporary. Thirteen states of emergency were still in effect in late 1999.<sup>147</sup> In addition, the legislation allowing termination of emergencies by Congress has never been used.<sup>148</sup>

The most significant trend in the use of executive orders over the years has been the change in the tenor of the orders.<sup>149</sup> Whereas Washington worked dili-

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141. Sterling, *supra* note 137, at 124.

142. See discussion *infra* note 173 and accompanying text.

143. Edwards, *supra* note 2, at 18.

144. *Id.* The study also identified 500 laws that go into effect when a state of emergency is called. These laws give the President many powers, including, but not limited to: the power to seize property, commodities, fuels and minerals; the power to assign military abroad; the power to declare martial law; and the power to restrict travel. Murray, *supra* note 1.

145. Edwards, *supra* note 2, at 18. He also stated, "It is distressingly clear that our constitutional government has been weakened by 41 years of emergency rule." *Id.*

146. *Id.*; Murray, *supra* note 1.

147. Murray, *supra* note 1 (noting that thirteen states of emergency are in effect, including two called by President Carter and two by President George H.W. Bush). After the 1974 National Emergencies Act sunsetted all then-existing emergencies, President Carter called the next emergency in 1979 during the Iran hostage crisis. *Id.*

148. Edwards, *supra* note 2, at 18 (stating that no emergency has ever been terminated by joint resolution under the National Emergencies Act).

149. Todd Gaziano of the Heritage Foundation has remarked:

A comparison based on numbers, however, is misleading. It is not the number, but the nature of a President's executive orders that is important. . . . [T]he overwhelming majority of directives, including executive orders, are routine and few have significant policy implications beyond the executive branch. It would be a mistake, therefore, to conclude that the number of executive orders or proclamations is a reliable indicator of whether a particular President has abused his executive order authority. . . . The true measure of abuse of authority is not the overall number of directives, but



gently to avoid issuing any order that would constitute more than an administrative order to those in the government, presidents since then have used orders to create agencies, promulgate racial policies and seize private property. This trend has created a dangerous new problem that must be addressed by Congress before it escalates out of control.

### III. THE NATURE OF THE PROBLEM

One of the most important developments in the twentieth century has been the growth of presidential power.<sup>150</sup> As the power of the federal government has grown, the power of the President has increased exponentially along with it to such a point that he is now often called “the most powerful man in the world.”<sup>151</sup>

The President’s power has grown to such an extent that he might now be called the “Chief Lawmaker,” exercising legislative power in violation of the Constitution. In recent decades, presidents have taken the initiative to set policy—even when Congress has opposed the policy or refused to address a particular area.<sup>152</sup> This is not a violation committed by one president or one political party. All have done it.<sup>153</sup>

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whether any orders were illegal or abusive, and if so, how many and of what significance.

Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. LAW & POL. 267, 296–97 (2001).

150. See, e.g., FRIEDMAN, *supra* note 84, at 567–68 (“[The twentieth century] has been an age of central, national power. . . . The main beneficiary of power at the center was not the national Congress, not the Supreme Court, but the national President.”); Bartlett, *supra* note 75 (“One of the most important developments of the modern presidency is the growth of presidential lawmaking by executive order.”). But see Ramesh Ponnuru, *Trivial Pursuits*, NAT’L REV., Nov. 20, 2000, at 16, 18 (“It is tempting to suggest that this is in fact Clinton’s real legacy: the trivialization of the presidency, of the government, of politics. The presidency may have grown more powerful by some measures: the independent-counsel law is dead, and it has become more acceptable to govern through executive order and regulatory fiat. But the presidency has never had less respect. Washington has never seemed more irrelevant. . . . Politics is now a spectator sport, which is to say a television show.”).

151. FRIEDMAN, *supra* note 84, at 568 (“The man who holds this office has become, as Presidents like to think, the most important, the most powerful man in the world. Theodore Roosevelt and Woodrow Wilson already sensed this role; Franklin Roosevelt glorified in it; Harding and Coolidge, small men with weak conceptions of their job, were only detours on the way. Weak Presidents are still possible, but a weak Presidency is not.”).

152. See discussion *infra* Part III.A.

153. E.g., *Hearing on Executive Orders*, *supra* note 33, at 4 (testimony of Hon. Porter J. Goss, Rep. of Congress, State of Florida).

The question to be addressed is not whether these policies are good or bad; there are doubtless some of each. The real question revolves around what damage is done to the country and to our democratic system when presidents can unilaterally make policy—any policy—without the consent of Congress.<sup>154</sup> What possible justification is there for the implementation of laws without regard to the normal legislative process? In short, there is no justification and no emergency so great that it requires that Congress be completely disregarded.<sup>155</sup> President Taft once cautioned against exactly this situation when he warned that allowing the President to have an “undefined residuum of power” would allow him to become a “Universal Providence” setting “all things right.”<sup>156</sup> The field of action of such an executive could not be limited. While some might use the power faithfully, others might become tyrants. The best way to protect ourselves from arbitrary and tyrannical rule is to demand that our officials remain true to the democratic legislative process outlined in the Constitution.

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154. Statement of Phillip Cooper, *supra* note 16, at 52 (“To adopt the view that the president should do whatever he or she thinks necessary to accomplish what may very well be laudable goals is to embrace quite literally the philosophy that the ends justify the means. In a constitutional republic designed to endure under the rule of law through carefully designed procedures and institutions, such an idea is repugnant.”).

155. *Hearing on H.R. 3131, supra* note 3, at 30 (statement of Hon. Jack Metcalf) (“If Congress is required to follow this rigorous process, how absurd it is to argue that a president can accomplish the same result by unilaterally issuing an executive order or proclamation.”); *see also* Labbe, *supra* note 2, at B9 (“What kind of issues are so pressing that a president feels compelled to make law via executive order—or worse yet, through classified presidential directives that even members of Congress are denied access to—rather than go through the constitutionally mandated process of congressional approval?”). Certainly, extraordinary circumstances may exist when the country is attacked, as was seen in the days following September 11, 2001. These circumstances, however, do not put the Constitution “on hold” for the duration of the crisis. Separation of powers must still exist to protect liberty; otherwise, the President could simply declare war or claim the existence of a crisis as an excuse to act at will without “interference” from Congress. Both Congress and the President have their appropriate areas of responsibility, even when the country is at war. For example, Congress, not the President, has the power to declare war. *Id.* art. I, § 8, cl. 11. Similarly, the Founders granted the President power to act as Commander in Chief of the Army and Navy. *See* U.S. CONST. art. II, § 2, cl. 1. Different considerations may exist and certainly need to be accommodated in the area of foreign policy; however, the concerns of the Founders are not negated simply because the country is at war or under attack. This area of presidential power is clearly more complicated than the President’s power in the domestic arena, particularly as the Constitution gives the President more independent authority in the foreign policy realm than in the domestic. A detailed analysis of the President’s power in the realm of foreign policy, however, is beyond the scope of this article.

156. TAFT, *supra* note 8, at 144.

### A. Presidential Lawmaking

President Taft once stated, "The truth is that great as his powers are, when a President comes to exercise them, he is much more concerned with the limitations upon them than he is affected, like little Jack Horner, by a personal joy over the big personal things he can do."<sup>157</sup> This was arguably once true. In recent years, however, as the power of the presidency has grown, presidents have seemingly fallen prey to the dangers of possessing too much power, as our Founders once warned against.<sup>158</sup> No longer are many presidents focused on the limitations to their power. Instead, they use their power as expansively as possible to impose their policy decisions single-handedly upon the nation.<sup>159</sup>

Executive orders that were once issued based on specific statutory or constitutional grants of power are now issued based on sweeping claims of authority.<sup>160</sup> For instance, one informal count of Clinton's executive orders showed that nearly one-third of his orders relied on no statutory grant of authority whatsoever.<sup>161</sup> Although the basis for presidential action is sometimes unclear, these actions nevertheless often go unchallenged.

Most modern presidents have used their powers more expansively than the Founders intended. However, only in the past few decades have such expansive powers been used in the absence of a true emergency.<sup>162</sup> President Clinton per-

157. *Id.* at 49.

158. See *supra* notes 36–43 and accompanying text.

159. See, e.g., Susan Feeney, *Optimism Fading for Political Rapport: Parties Backing off Vows of Cooperation, Experts Say*, DALLAS MORNING NEWS, Nov. 12, 1994, at 1A ("As a backstop, White House officials are exploring ways for the president to make a mark beyond the reach of Congress, such as through executive orders, law enforcement, regulations or foreign policy.").

160. Executive orders may cite authority in such a vague, sweeping fashion as: "By virtue of the authority vested in me by the Constitution and laws of the United States and as President of the United States and Commander-in-Chief of the Armed Forces of the United States." STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 39. Such a statement is generally used when there is no statutory authority, and it serves as a catch-all. *Id.*; see also Statement of Phillip Cooper, *supra* note 16, at 50 ("First, there has been an increasing tendency since the 1970s for presidents to make sweeping claims of constitutional authority as the basis for their directives. In some cases in which references are made to statutes, they are very general in nature and implicate relatively ambiguous legislative provisions. It becomes difficult to hold officials accountable when the precise basis for their actions is unclear.").

161. Kmiec, *supra* note 65, at 49.

162. FDR believed that his expansive powers would revert to the people once the war

haps used his powers more expansively than any president to date.<sup>163</sup> It is a well-documented fact that the Clinton administration perceived executive orders as a legitimate means to press its own agenda.<sup>164</sup> President Clinton himself once stated:

Congress has a choice to make in writing this chapter of our history. It can choose partisanship, or it can choose progress. Congress must decide. . . . I have a continuing obligation to act, to use the authority of the presidency and the persuasive power of the podium to advance America's interest at home and abroad.<sup>165</sup>

The Clinton administration used the executive order as a tool to circumvent an "intransigent" Congress and implement policy single-handedly.<sup>166</sup> For in-

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and economic emergencies had passed. Monaghan, *supra* note 66, at 30 ("The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. . . . When the war is won, *the powers under which I act automatically revert to the people—to whom they belong.*") (emphasis added).

163. *E.g.*, Murray, *supra* note 1 (quoting Paul Begala, who described Clinton as "an activist, muscular president"); Grigg, *supra* note 104 ("President Clinton has wielded his executive power with abandon, threatening to destroy the very delicate checks and balances of our constitutional system."); *cf.* James Hirsens, *Executive Orders and the Presidential Campaign*, Newsmax.com, at [http://www.newsmax.com/commentmax/articles/Dr.\\_James\\_Hirsens.shtml](http://www.newsmax.com/commentmax/articles/Dr._James_Hirsens.shtml) (Oct. 27, 2000) (alleging that the worst "scar" of the Clinton presidency may be the "blatant misuse" of executive orders). Clinton challenged Bush I during the 1992 presidential election, stating, "If you won't use the powers of the presidency to help people, step aside. I will." Murray, *supra* note 1.

164. *E.g.*, Statement of Hon. Ron Paul, *supra* note 86, at 39 ("Clinton plans a series of executive orders and changes to federal rules that he can sign into law without first getting the OK from GOP naysayers. White House Chief of Staff John Podesta was quoted as saying 'There's a pretty wide sweep of things we're looking to do, and we're going to be very aggressive in pursuing it.'"); James Bennet, *True to Form, Clinton Shifts Energies Back to U.S. Focus*, WASH. TIMES, July 5, 1998, at 10 ("In a favorite formula for this White House, Mr. Clinton dropped his foreign trip cold upon touching American soil and turned to domestic policy. . . . With some of his closest advisers deeply pessimistic about the chances of getting major legislation passed during the rest of the year, Mr. Clinton plans to issue a series of executive orders to demonstrate that he can still be effective."); Hirsens, *supra* note 163 (noting Clinton's repeated assertions that he will use executive orders until his last day in office to implement policies with or without the cooperation of Congress); Murray, *supra* note 1 ("President Clinton seems bent on using his powers until someone says stop." (quoting House Majority Leader Dick Armey)).

165. Remarks on Medicare and the Legislative Agenda and an Exchange With Reporters, 34 WEEKLY COMP. PRES. DOC. 1329 (July 6, 1998).

166. *Hearing on H.R. 3131*, *supra* note 3, at 3 (statement of Hon. George Gekas,

stance, when the Children's Environmental Protection Act stalled in the Senate, Clinton incorporated provisions from the legislation into an executive order that he issued on Earth Day in 1997.<sup>167</sup> When Congress refused to pass legislation prohibiting employers from employing permanent replacements for striking workers, Clinton issued an order implementing this policy instead.<sup>168</sup> Unfortunately, these actions have been just the tip of the iceberg.<sup>169</sup> Such usage completely ignores the principles that the Founders fought so hard to protect. Intransigent Congresses are not hindrances, but rather safeguards from arbitrary rule.<sup>170</sup>

Clinton may have misused executive orders more blatantly than his predecessors, but he is, unfortunately, not the only offender. When FDR faced resistance to his Emergency Price Control Act, he stated, "In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act."<sup>171</sup> An aide to President Kennedy similarly expressed the view that

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Chairman, Subcomm. on Commercial and Admin. Law) [hereinafter Statement of Hon. George Gekas] ("There are allegations that Executive orders have been used, are being used, and will be used to circumvent so-called 'intransigent' Congresses."); *see also* Grigg, *supra* note 104 ("It's been a mark of the Clinton administration to rule by executive fiat, circumventing a hostile Congress by signing presidential orders that affect everything from patients' rights to conservation to a war against Yugoslavia." (quoting Francine Kiefer, *Clintonian 'Tyranny' Rankles Hill*, CHRISTIAN SCI. MONITOR, Nov. 9, 1999, at 1)).

167. Jack Kenny, Editorial, *Executive Orders are "Monuments" to One-Man Rule*, N.H. SUNDAY, Jan. 16, 2000.

168. The executive order was eventually overturned. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

169. For instance, when the Patients' Bill of Rights had difficulty getting through Congress, Clinton ordered government health plan providers to provide federal employees with some of these protections. *Clinton to Focus on Domestic Agenda With New Directives*, BULLETIN'S FRONTRUNNER, July 6, 1998. Clinton ordered federal officers to keep trigger locks for their guns, ignoring the unresolved state of this policy issue in Congress. *Id.* In the face of public debate about school vouchers, Clinton instead ordered an alternative solution to educational woes: that data be published on low-performing schools and other monitoring efforts be undertaken. Charles Babington, *President to Sign Orders on Parents' Rights, Schools*, WASH. POST, May 3, 2000, at A2. Legislation protecting parents from discrimination in the workplace (based on the fact that they are parents) failed to pass Congress. Clinton immediately ordered that this protection be put into place in federal workplaces. *Id.*

170. Statement of Hon. George Gekas, *supra* note 166, at 3 ("The process for law-making established by the Constitution means that intransigence by the Congress—just like intransigence by the President—should stop the federal government from carrying out new and different policies or programs.").

171. Monaghan, *supra* note 66, at 29.

“[e]verybody believes in democracy until he gets to the White House and then you begin to believe in dictatorship, because it’s so hard to get things done. Every time you turn around, people just resist you, and even resist their own job.”<sup>172</sup>

Perhaps some presidents abuse their executive power because they legitimately believe their policy will help the country, while others do so out of frustration or because they are blinded by power. The reason for the abuse is not important. What is important is that policies are being imposed on Americans outside of the democratic process. No good can come out of such a situation, and, in fact, many orders have caused much controversy as a result.

### B. Controversial Orders

Every president since the time of FDR has issued controversial executive orders, and many presidents before him issued executive orders that were disputed.<sup>173</sup> Famous examples of controversial orders include Washington’s neutrality order, the Louisiana Purchase, the annexation of Texas, the Emancipation Proclamation, the internment of Japanese-American citizens, the desegregation of the military, the creation of the Peace Corps, and various affirmative action executive orders.<sup>174</sup> Although some uses have been more egregious than others, no administration in modern times has been exempt from the criticism that it has sometimes sought to make policy through executive order. Only three Presidents have had executive orders overturned in their entirety by the courts. Of these three, two of them are our most recent Presidents.<sup>175</sup>

#### 1. William Jefferson Clinton

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172. Thomas E. Cronin, *Everybody Believes in Democracy Until He Gets to the White House: An Examination of White House—Departmental Relations*, in CLASSIC READINGS IN AMERICAN POLITICS, *supra* note 38, at 371, 372.

173. For an in-depth discussion of controversial executive orders, see CRS REPORT FOR CONGRESS, 106TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS, 1933–99: CONTROVERSIES WITH CONGRESS AND THE COURTS (1999) (completed by Louis Fisher, Senior Specialist in Separation of Powers, Government and Finance Division) [hereinafter CRS REPORT].

174. Statement of Thomas O. Sargentich, *supra* note 33, at 29; *see also* Murray, *supra* note 1 (listing controversial executive orders).

175. The court order enjoining President Bush’s executive order is still being appealed. *See* discussion *infra* notes 224–37 and accompanying text.

President Clinton issued 364 executive orders before leaving office on January 20, 2001.<sup>176</sup> President Clinton may have issued more controversial orders than any president in recent memory. During his time in office, he became only the second President to have an executive order struck down by the courts in its entirety.<sup>177</sup> Clinton was regularly criticized for the unilateral decisions that he made through executive order, and two characteristics of his orders made them perhaps more problematic than those of many of his predecessors. First, he often used his power to make policy decisions that should have been left to the legislature. Presidents are executors of the law, not creators of the law. Second, and more troubling, was his tendency to use presidential directives to implement initiatives that had failed to pass Congress.<sup>178</sup> The Founding Fathers

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176. Federal Register, *Executive Orders Disposition Tables, January 9, 1939—March 19, 2002*, National Archives and Records Administration, at <http://www.nara.gov/fedreg/eo.html> (last visited May 3, 2002). President Clinton issued fewer executive orders than the last two-term President, Ronald Reagan (381), but Clinton's directives filled more pages in the Federal Register than Reagan's. Clinton added more than 560,000 pages to the Federal Register—27% more than Reagan and double the amount added by President Nixon. Pete DuPont, *Undoing Midnight Mischief*, WASH. TIMES, Feb. 4, 2001, at B3.

The last President to issue more executive orders than President Reagan had been President Eisenhower, who issued 452. OLSON & WOLL, *supra* note 11, at 13 tbl.1. President Nixon came close to Reagan's number with 346 orders, but he did not serve two full terms as Reagan did. *See id.* The fewest executive orders during this time period were issued by George H.W. Bush (166), Gerald Ford (169), and John F. Kennedy (214). *Id.* Each of these Presidents served one term or less. Of those Presidents not serving two terms during this time period, President Jimmy Carter issued the most executive orders with 320. *See id.*

177. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996). This executive order banning the replacement of striking workers was the subject of much political controversy before it was struck down. Several bills were introduced in Congress to nullify the order. *See, e.g.*, Fairness in Federal Contracting Act of 1995, S. 989, 104th Cong. (1995); S. 603, 104th Cong. (1995); H.R. 1176, 104th Cong. (1995); *see also* Ronald Turner, *Banning the Permanent Replacement of Strikers By Executive Order: The Conflict Between Executive Order 12954 and the NLRA*, 12 J.L. & POL. 1 (1996).

178. Editorials and articles in newspapers regularly berated Clinton for his use of executive orders while in office. For instance, they criticized the changes he made to rules regarding homosexual service in the military and his establishment of procedures that caused American soldiers to serve under foreign command during United Nations peacekeeping missions. *See* Kenny, *supra* note 167. Other orders that were criticized governed the civil service rules for workers with psychiatric disabilities, banned discrimination against homosexuals in federal jobs, prohibited federal employment of any contractor using products made by foreign child labor, revised food labeling, restricted smoking in federal buildings, and intervened in transit strikes. *See* Murray, *supra* note 1.

created a difficult and cumbersome legislative process as a safeguard for liberty. Clinton's use of presidential power circumvented this process. A few examples of Clinton's problematic orders follow.

a. Mountain States Legal Foundation v. Bush

In 1995, Congress considered legislation that would have designated 1.8 million acres of land in Utah as a wilderness; however, this legislation was opposed by state leaders and did not pass.<sup>179</sup> Clinton subsequently issued Proclamation 6920, which established the 1.7 million-acre Grand Staircase-Escalante Monument in Utah—despite the earlier congressional failure to do so.<sup>180</sup> Suit has been filed by the Utah Association of Counties and the Mountain States Legal Foundation in the U.S. District Court for the District of Utah. In denying

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Other orders criticized include: (1) Executive Order 13,112: Prevents the introduction of invasive species on public property. The definition of "invasive species" was contended to be too broad. See Edwards, *supra* note 2, at 18. (2) Executive Order 12,852: Creates the Council on Sustainable Development. The order was intended to ensure that Americans sustain the environment. See *id.* (3) Executive Order 12,833: Overturned President George H.W. Bush's executive order requiring employers to notify employees that they can reclaim union dues that have been used for political purposes. *Id.*; see also Alexis Simendinger, *What's at Stake*, NAT'L J., Sept. 30, 2000. (4) Multiple executive orders that have turned millions of acres of land into national monuments, sometimes even in the face of opposition from state and national leaders. See Kenny, *supra* note 167. (5) Executive Orders 13,088; 13,119; and 13,120, which were used to wage war against Yugoslavia in cooperation with NATO: Congress was merely informed. United States participation in the NATO effort continued despite congressional refusal to authorize the air war. OLSON & WOLL, *supra* note 11, at 7. More orders have been criticized, but they are too numerous to list in any one footnote. See, e.g., Testimony of Hon. Jack Metcalf, *supra* note 3, at 26–28 (citing CRS REPORT); Stephen Barr, *Clinton Revisits Gore's Reinvention—Which Gets a Rah, Rah, Rah From Shalala*, WASH. POST, May 23, 2000, at B2; *Curb Government by Fiat*, POST & COURIER (Charleston, S.C.), Feb. 27, 2000, at A16; Jo Becker, *Montgomery Weighs Bias Legislation; Bill Addresses Using Workers' Genetic Code*, WASH. POST, Oct. 18, 2000, at B5; Ellen Nakashima, *ADA's 10th Anniversary Marked with Initiatives, Clinton Directs Agencies to Hire More Disabled*, WASH. POST, July 27, 2000, at A21; Phyllis Schlafly, *Executive Order Epidemic*, WASH. TIMES, Apr. 14, 1999, at A19; Scott Shuger, *Breakups*, SLATE MAG., May 11, 2000.

179. Testimony of Hon. Jack Metcalf, *supra* note 3, at 26 (citing CRS REPORT).

180. *Id.*; OLSON & WOLL, *supra* note 11, at 4. Clinton claimed authority under the Antiquities Act of 1906. Testimony of Hon. Jack Metcalf, *supra* note 3, at 26 (citing CRS REPORT). In 1997 and 1999, legislation was introduced that would have regulated the procedure for declaring land part of a national monument. However, this legislation did not pass. See Testimony of Hon. Jack Metcalf, *supra* note 3, at 26 (citing CRS REPORT).



a motion to dismiss the suit, Judge Dee Benson stated that “the president did something he was not empowered to do.”<sup>181</sup> The suit is still pending.<sup>182</sup>

*b. Chamber of Commerce v. Reich*

During Clinton’s second term, his executive order prohibiting the permanent replacement of striking workers was overturned.<sup>183</sup> President Clinton’s executive order attempted to overturn a 1938 Supreme Court decision interpreting the National Labor Relations Act.<sup>184</sup> The Court had held that an employer may protect his business by hiring replacement workers and may refuse to discharge these workers later if the strikers want to return.<sup>185</sup> Congress considered (and rejected) legislation to overturn this ruling multiple times before Clinton issued his executive order.<sup>186</sup> The executive order provided that the government would not do business with federal contractors hiring permanent replacements, as allowed by the 1938 Supreme Court decision.<sup>187</sup>

*c. Order Implementing American Heritage Rivers Initiative*

In 1997, Clinton instituted a program entitled the American Heritage Rivers Initiative by executive order. This executive order preempted legislation that

181. OLSON & WOLL, *supra* note 11, at 5.

182. The case is still in its early stages. The most recent ruling was one by the Tenth Circuit allowing six environmentalist and business groups to intervene in the lawsuit. See Jacob Santini, *Appeals Court Rules on Nuclear Waste, Anti-Fornication, Grand Staircase*, SALT LAKE TRIB., July 11, 2001, at B3. The Mountain States Legal Foundation maintains a summary of the case’s status at [http://www.mountainstateslegal.com/legal\\_cases.cfm?legalcaseid=39](http://www.mountainstateslegal.com/legal_cases.cfm?legalcaseid=39). A similar case, also named *Mountain States Legal Foundation v. Bush*, was filed in the U.S. District Court for the District of Columbia. The plaintiffs in the case claimed that President Clinton had no authority to designate federal lands in Washington, Oregon, Colorado, and Arizona. The case was dismissed by the District Court and is being appealed to the U.S. Court of Appeals for the District of Columbia. Updates on the status of this case are maintained by the Mountain States Legal Foundation at [http://www.mountainstateslegal.com/legal\\_cases.cfm?legalcaseid=63](http://www.mountainstateslegal.com/legal_cases.cfm?legalcaseid=63).

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

184. *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938).

185. *Id.* at 345–46.

186. OLSON & WOLL, *supra* note 11, at 4; see also Gordon Clay, *Executive Abuse of the Procurement Power: Chamber of Commerce v. Reich*, 84 GEO. L.J. 2573, 2576 (1996) (noting that the striker replacement issue became contentious as several efforts to pass legislation before the executive order was issued had failed, despite Democratic majorities in Congress).

187. OLSON & WOLL, *supra* note 11, at 4.

had been the subject of hearings in Congress.<sup>188</sup> Under the Initiative, any land-use decisions impacting fourteen designated rivers must first be approved by “river navigators” appointed under the executive order.<sup>189</sup> Decisions by the river navigators are made based on a variety of factors, including, but not limited to, environmental impacts.<sup>190</sup> Suit was filed by several representatives in Congress, but was dismissed based on a lack of standing.<sup>191</sup>

*d. Order Regarding Federalism*

Another controversial order was one that reversed an order previously issued by Ronald Reagan. Reagan had issued Executive Order 12,612, which instituted a set of guidelines for government agencies to observe in its dealings with states.<sup>192</sup> The Reagan order made reference to the Tenth Amendment and instituted a presumption of state sovereignty to be observed by federal agencies.<sup>193</sup> Clinton’s subsequent Executive Order 13,083 reversed the effect of the Reagan order.<sup>194</sup> Instead of endorsing a presumption of state sovereignty, it outlined nine circumstances under which an agency may intervene and override state decision-making.<sup>195</sup> The executive order was received with outrage by congressmen and was eventually suspended on the same day that the House voted to withhold funds for its implementation.<sup>196</sup> A year later, a replacement order was issued by Clinton. This order was more similar to the Reagan order.<sup>197</sup> During Clinton’s years in office, there were several occasions when he issued an executive order to get around a Congress that was “failing” to act. Perhaps the most egregious facet of this particular executive order was that it

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188. Testimony of Hon. Jack Metcalf, *supra* note 3, at 27 (citing CRS REPORT).

189. OLSON & WOLL, *supra* note 11, at 5.

190. *Id.*

191. *Chenoweth v. Clinton*, 181 F. 3d 112 (D.C. Cir. 1999).

192. OLSON & WOLL, *supra* note 11, at 6.

193. *Id.*

194. See generally Jennie Holman Blake, Note & Comment, *Presidential Power Grab or Pure State Might? A Modern Debate Over Executive Interpretations on Federalism*, 2000 BYUL REV. 293 (2000) (contrasting Reagan’s executive order on federalism with the Clinton order that superseded it).

195. OLSON & WOLL, *supra* note 11, at 6; see also Robert Holland, Editorial, *When a 2nd Term Prez Sought to Repeal the 10th Amendment*, RICH. TIMES DISPATCH, Aug. 26, 1998, at A15 (discussing the “bizarre act” of President Clinton that “few know about,” which stood Ronald Reagan’s order “on its head”).

196. See OLSON & WOLL, *supra* note 11, at 6.

197. OLSON & WOLL, *supra* note 11, at 6; see generally Blake, *supra* note 194.

went a step beyond “merely” contradicting Congress—it seemed to fly in the face of the Constitution itself.<sup>198</sup>

*e. Last-Minute Orders*

Before leaving office on January 20, 2001, President Clinton issued a spate of executive orders,<sup>199</sup> implementing new workplace regulations,<sup>200</sup> creating an international criminal court,<sup>201</sup> setting aside land as national monuments,<sup>202</sup> and

198. Cf. Dick Arme, *Stop Clinton's Roughshod Over Our Constitution*, AUGUSTA CHRON., Aug. 5, 1998, at A5 (“With a stroke of the pen, President Clinton undermined the foundations of federalism. With a stroke of the pen, he repudiated a time honored fundamental principle that rules this nation. By a stroke of the pen he gave a green light to future unwarranted and unconstitutional national regulatory powers and actions. With a stroke of the pen, he may have done irreparable harm to individual rights and liberties.”). As Ronald Reagan would say, “Well, there they go again.” *Id.*

199. See BARBARA OLSON, *THE FINAL DAYS 77–95* (2001) (discussing executive orders issued in the final weeks of Clinton’s term); Jim Landers, *Sprint to the Finish*, DALLAS MORNING NEWS, Jan. 6, 2001, at A1 (describing Clinton as “anything but [a] lame [duck President]” as he “continues to pull all-nighters” and “pack[s] the Federal Register with 29,000 pages of new regulations”); Bill Nichols, Judy Keen & Richard Benedetto, *Clinton Actions Annoy Bush*, USA TODAY, Jan. 5, 2001, at A1 (“The incoming Bush administration is becoming increasingly irked with a whirlwind of end-of-term executive actions President Clinton is taking to lock in his policy goals.”). Ari Fleischer, press secretary for President Bush, described President Clinton as a “busy beaver.” Landers, *supra*; see also National Center for Policy Analysis, *Clinton Administration's Rush to Regulate*, Daily Policy Digest, Nov. 27, 2000 (describing the “rush” to implement “wide-ranging new regulations affecting business, industry and the workplace”).

President Clinton added 7371 pages to the Federal Register in the first three weeks of 2001. Robert Pear, *As President Bush Settles in, Rules About to Be Published Might Now Perish*, N.Y. TIMES, Jan. 23, 2001, at A16. Of these pages, 3500 were added during his last four days in office. Press Release, Rep. Rob Portman, Last-Minute Clinton Executive Orders Should be Reviewed (Jan. 29, 2001). It is not unusual for the number of executive orders issued by a president to increase during his last few months in office. However, George Edwards, director of the Center of Presidential Studies at Texas A&M, has noted that Clinton’s schedule has been unusually “hectic”—even for an outgoing president. Landers, *supra* (“We had a lot of defeated Presidents—Jimmy Carter, Gerald Ford, George Bush—who didn’t feel it appropriate to be writing policy at the last minute. But Clinton was not defeated.”). Clinton may not have been defeated, but his party and its platform were.

200. One executive order, issued November 13, 2000, seeks to protect keyboard users from repetitive stress injuries. Landers, *supra* note 199; see also Press Release, Rep. Rob Portman, *supra* note 199 (discussing the wide variety of issues addressed by President Clinton’s last-minute series of executive orders).

201. Landers, *supra* note 199.

overturning previous orders he had issued—to the benefit of Democratic staffers departing the White House upon President Bush’s inauguration.<sup>203</sup> Many of the policies implemented by Clinton during his last days in office run directly against policies promoted by President Bush during his campaign.<sup>204</sup> For instance, Clinton’s expansive use of presidential directives to place land off-limits to development and drilling ran directly contrary to the (then) President-elect Bush’s policy of “striking a balance between conservation and economic development.”<sup>205</sup> Other actions ran contrary to Republican ideology as well. Late in his term, Clinton signed three trade agreements with Jordan, Singapore, and Chile. These agreements were filled with environmental and labor rights protections long opposed by Republicans.<sup>206</sup> Clinton’s single-handed implementation of policy running contrary to the expressed will of the voters in the November 2000 election makes Clinton’s last-minute “blizzard” of orders seem even more egregious and tyrannical.<sup>207</sup>

## 2. George Walker Bush

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202. More than half-a-dozen national monuments were created by President Clinton during his last year in office. Douglas Jehl, *G.O.P. to Press For Unraveling Of Clinton Acts*, N.Y. TIMES, Jan. 6, 2001, at A1.

203. See, e.g., Jim Vandehei & Jeanne Cummings, *Clinton Overturns Rule Barring Former Staffers From Lobbying*, WALL ST. J., Dec. 29, 2000, available at <http://interactive.wsj.com/articles/SB978060217823917086.htm> (“President Clinton overturned his own executive order barring former government employees from lobbying agencies for five years after leaving their jobs, a potential boon for departing staffers in Mr. Clinton’s White House.”).

204. The last-minute blizzard of orders by President Clinton resulted in a tug-of-war between the two administrations. Since presidential directives are not effective until they are published in the Federal Register, the Clinton administration worked furiously to get as many pages as possible published before President Bush’s inauguration. Once inaugurated, however, President Bush put an immediate freeze on publication of these directives and his administration began its review of the orders to decide which ones to nullify. See Ken Fireman, *Bush Era Set to Begin, A Promise to Seize the Initiative*, NEWSDAY (New York, N.Y.), Jan. 20, 2001, at A7 (discussing Bush’s plan to issue executive orders intended “to nullify a host of controversial orders issued by President Bill Clinton in the waning days of his presidency”); Pear, *supra* note 199 (discussing the Federal Register’s rush to publish followed immediately by a rush to halt all publication).

205. Jehl, *supra* note 202.

206. Landers, *supra* note 199.

207. Jehl, *supra* note 202 (referring to Clinton’s “blizzard of last-minute orders on environmental policy”).

As of the end of 2001, President Bush had issued fifty-four executive orders.<sup>208</sup> Despite the fact that the country entered a state of war following the events of September 11, 2001, the number of Bush orders still lags behind the pace set by Clinton during his first year in office. President Clinton issued fifty-seven executive orders during his first year in office.<sup>209</sup> (Although it should be noted that more of Bush's orders may be classified for national security purposes, which would skew the numbers.) As noted above, however, the *tenor* of the executive orders generally matters more than the *number*.<sup>210</sup>

*a. Pre-War Orders*

*i. Directive Implementing Policy on Mexico City*

One of the first directives issued by President Bush reversed an early order of President Clinton and reinstated the so-called policy on Mexico City instituted by President Reagan. The directive blocks funding of international family planning groups that provide abortion-counseling services.<sup>211</sup> The directive was issued on the anniversary of *Roe v. Wade*<sup>212</sup> during the first week of President Bush's presidency.<sup>213</sup> (Presumably, the next time a Democrat is elected, the policy regarding federal funding of abortions will change yet again.) The rapid swings from one position to another—and then back again—highlights the confusion that can ensue when policy matters are left to the executive branch.<sup>214</sup>

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208. See Federal Register, *Executive Orders Disposition Tables: Administration of George W. Bush (2001–Present)*, National Archives and Records Administration, at [http://www.nara.gov/fedreg/eo\\_wbush.html](http://www.nara.gov/fedreg/eo_wbush.html) (last visited Jan. 2, 2002).

209. See Federal Register, *Executive Orders Disposition Tables: Administration of William J. Clinton (1993–2001)*, National Archives and Records Administration, at [http://www.nara.gov/fedreg/eo\\_Clint.html](http://www.nara.gov/fedreg/eo_Clint.html) (last visited Dec. 16, 2001).

210. See discussion *supra* note 149 and accompanying text.

211. See Ari Fleischer, Press Secretary to President Bush, Press Briefing at the White House, Washington D.C. (Jan. 24, 2001) (noting that President Clinton signed an executive order rescinding the policy on Mexico City on the anniversary of *Roe v. Wade* in 1993 and that President Bush's actions therefore have “a certain symmetry” to Clinton's actions); see also Laura Tolley, *President Acts to Cut Some Abortion Funds*, SAN ANTONIO EXPRESS-NEWS, Jan. 23, 2001, at 1A (discussing Bush's decision to reverse the Clinton administration's position on federal funding of overseas abortions).

212. 410 U.S. 113 (1973).

213. See Fleischer, *supra* note 211.

214. It should be noted, however, that this author is in full agreement with the policy decisions that were made by Presidents Reagan, Bush I and Bush II. It seems, however, that the legislative branch should stop avoiding this politically contentious issue and make such a policy decision itself.

Policy decisions made by the legislative branch are not only harder to implement, but are also harder to undo. The Founding Fathers intended to leave policy decisions with the legislative branch for exactly this reason—difficulty in changing the status quo protects the freedom of the people from arbitrary decision-making.<sup>215</sup>

ii. *Directive Regarding Stem-Cell Research*

Perhaps the most controversial directive issued by President Bush to date has been his decision regarding federal funding of embryonic stem-cell research.<sup>216</sup> In fairness, President Bush was forced to make a decision on this matter largely because he was seeking to negate actions of President Clinton that had effectively taken the policy decision away from the legislature and placed it in the realm of the executive.<sup>217</sup> However, it would have been better if President

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215. See discussion *supra* notes 76–79 and accompanying text.

216. See President George W. Bush, Remarks by the President on Stem Cell Research at the Bush Ranch, Crawford, Texas (Aug. 9, 2001) (announcing his decision to allow federal funding of research using only those currently existing stem-cell lines—lines “where the life and death decision has already been made”).

217. A failure to act by President Bush would not have maintained a policy created by Congress; instead, it would have allowed improper presidential policy-making by the prior administration to go forward unchecked. Research in which human embryos are “destroyed, discarded or knowingly subjected to risk of injury or death” has been banned by Congress since 1995. Joseph Curl, *Decision Likely Headed for Courts*, Hill, WASH. TIMES, Aug. 10, 2001, at A1 (quoting Samuel B. Casey, Human Life Advocates); see also Katharine Q. Seelye, *Bush Gives His Backing for Limited Research on Existing Stem Cells*, N.Y. TIMES, Aug. 10, 2001, at A1. In January 1999, the Department of Health and Human Services (DHHS) ruled—questionably—that the 1995 ban does not apply to embryonic stem-cell research. See Seelye, *supra*. In August 2000, the National Institutes of Health (NIH), aided and abetted by the Clinton administration, issued guidelines based on the DHHS decision. See Curl, *supra*; see also Seelye, *supra* (crediting Clinton for instigating the NIH decision). These NIH guidelines skirted the 1995 ban by allowing federal funds to be used for embryonic stem-cell research as long as federal money was not used to obtain the cells or destroy the embryos. See Seelye, *supra*. The guidelines stated that such stem cells “are not embryos”; therefore, the ban does not apply. Joseph Curl, *President Faces Thorny Issue of Stem Cell Research*, WASH. TIMES, July 13, 2001, at A3. This author has a hard time believing that federal financing of stem-cell research does not “knowingly subject[ ] to risk of injury or death” those embryos destroyed for their stem cells—regardless of who pays for which part of the procedure. See Curl, *Decision Likely Headed for Courts*, Hill, *supra*. After the guidelines were issued, a March 2001 deadline was set for applications for the federal funding. See Nancy McVicar, *A Question of Life & Health: Moral Concerns About Stem Cell Research Will Lead to a Review by President Bush and His New Secretary of*

Bush's action had not been the issuance of another improper directive,<sup>218</sup> but had instead been an order issued with the sole purpose of overturning President Clinton's unconstitutional actions and reinstating the congressional status quo.<sup>219</sup>

The actions of Presidents Clinton and Bush on the stem-cell research issue exhibit another dangerous tendency of improper lawmaking by the executive—once it has started, it is difficult to put a stop to it. One of the most interesting aspects of the stem-cell decision was the lack of concern on the part of the citizenry regarding exactly *why* the executive branch had authority over the matter.<sup>220</sup> Once 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

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*Health & Human Services*, SUN-SENTINEL (Ft. Lauderdale, FL), Jan. 28, 2001, at 1G. The March deadline, if nothing else, forced President Bush to take some action or to allow President Clinton's policy to go forward unchecked.

At least one group immediately saw the improper nature of the actions by the Clinton administration and took action while President Bush was pondering his own decision. Human Life Advocates filed a lawsuit in March seeking to "declare unlawful" the NIH guidelines instituted at the behest of the Clinton administration. Joseph Curl, *Judge Halts Stem-Cell Research Pending HHS Review*, WASH. TIMES, May 11, 2001, at A3. As a result of the lawsuit, Judge Royce Lamberth ordered a halt to the research while a review of the guidelines was pending by the DHHS. *Id.*

218. Although it should be noted, again, that this author largely agrees with the policy decision that was made by the President. The issue, however, is not agreement or disagreement with a particular policy decision, but rather the *manner* in which policy decisions are made. The ends do not justify the means when the means are unconstitutional.

219. The congressional status quo would be the 1995 law banning research that destroys embryos and fetuses, which should be applied even at this early stage of embryonic development—at least until Congress determines otherwise. By simply nullifying President Clinton's actions and affirming that the 1995 law applies, President Bush may also have found that he could, without committing political suicide, accomplish the result he might have preferred—a ban on *all* embryonic stem-cell research, not just a ban on stem cells from embryos yet to be killed.

220. This author conducted an extensive review of newspaper articles from January 2001 to August 2001. The review revealed little to no reporting on the basis for President Bush's authority. The President's authority to act was almost universally assumed. For instance, at a photo op with the governors in late January, President Bush expressed a belief that federal funds should not be expended on stem-cell research. Rich Brooks, *Pres. Bush Should Allow Continued Stem Cell Research*, SARASOTA HERALD-TRIB., Feb. 3, 2001, at B1. The question immediately put to him was "I assume that you'll sign an executive order to that or make that the law of the land?" *Id.* The immediate reaction that President Bush's sentiments *could* become the law of the land at the stroke of a pen was a typical one while Bush was considering the stem-cell research issue.

this issue. President Bush's decision was clearly one that will essentially legislate this contentious issue for the nation. Although the decision technically only determines whether or not federal grants will be given for stem-cell research,<sup>221</sup> it might as well impact everyone. As with any scientific research, the amount of private funding available is extremely limited.<sup>222</sup> A decision with these kinds of policy implications should clearly be made by Congress, not the President.<sup>223</sup>

iii. Building & Construction Trades Department v. Allbaugh

One last executive order issued by President Bush was recently enjoined by a district court in *Building & Construction Trades Department v. Allbaugh*.<sup>224</sup> Early in his administration, President Bush signed an executive order prohibiting federal agencies from requiring or prohibiting project labor agreements on federally funded construction jobs.<sup>225</sup> The order reinstated a 1992 order issued by Bush I,<sup>226</sup> which had been revoked in 1993 by President Clinton.<sup>227</sup> Before it

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221. *E.g.*, Seelye, *supra* note 217 (noting that Bush's decision will not prevent privately funded research from going forward).

222. *See, e.g.*, McVicar, *supra* note 217, at 1G (noting that, for researchers, millions of dollars ride on President Bush's decision since only a handful of private companies fund embryonic stem-cell research); Jeff Pillets, *Scientists Challenge Stem Cell Limits: Join Legislators in Call for Reversal*, RECORD (Bergen County, NJ), Aug. 17, 2001, at A1 (reporting that Wise Young, Director at the Rutgers W.M. Keck Center for Collaborative Neuroscience, is considering ending his stem-cell research as the limitation on funds may tie his hands).

223. In fact, many members of Congress have threatened to override the President's decision. *E.g.* Pillets, *supra* note 222; Seelye, *supra* note 217. Senator Robert Torricelli stated: "George Bush may have had the first word about stem cell research, but he will not have the last word." Pillets, *supra* note 222. To date, however, congressional efforts have not gone far and proposed legislation has not yet made it to the floor for a vote. *See, e.g.*, Stem Cell Research Act of 2001, S. 723, 107th Cong. (2001); Stem Cell Research Act of 2000, S. 2015, 106th Cong. (2000); H.R. Res. 414, 106th Cong. (2000).

224. 172 F. Supp. 2d 138 (D.D.C. 2001).

225. Exec. Order No. 13,202, 66 Fed. Reg. 11,225 (Feb. 22, 2001), *amended by* Exec. Order No. 13,208, 66 Fed. Reg. 18,717 (Apr. 11, 2001). The executive order was one of four orders issued simultaneously that dealt with labor issues. The other orders: (1) reinstated the *Communication Workers of Am. v. Beck*, 487 U.S. 735 (1988), requirement that union workers be notified of their right not to pay that portion of their union fees used for political purposes (Executive Order 13,201, 66 Fed. Reg. 11,221 (Feb. 22, 2001)); (2) dissolved the National Partnership Council created by President Clinton (Executive Order 13,203, 66 Fed. Reg. 11,227 (Feb. 22, 2001)); and (3) eliminated job protections created by President Clinton for employers of contractors at federal buildings when the contract is subsequently awarded to another company (Executive Order 13,204, 66 Fed. Reg. 11,228 (Feb. 22, 2001)).

226. *See* Exec. Order No. 12,818, 57 Fed. Reg. 48,713 (Oct. 28, 1992); *see also* Paul



was enjoined, an incidental effect of the executive order was that it had effectively resolved a dispute between the Governors of Maryland and Virginia, who had disagreed on whether union-only work crews should be used for construction of the new Woodrow Wilson Bridge between the two states.<sup>228</sup> In November 2001, however, Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia overturned the executive order, making it the third executive order to be invalidated by a court.<sup>229</sup> The order was invalidated partly on constitutional grounds and partly on National Labor Relations Act (“NLRA”) preemption grounds.<sup>230</sup>

President Bush’s order is clearly no more, nor less, improper than the order issued by Bush I, as both are essentially the same.<sup>231</sup> Even if the Bush II order is ultimately upheld by the appellate court, the two orders exhibit the danger inherent in attempting to use executive orders to make policy: Future presidents will expand on whatever precedent is set for them and broaden presidential power still more. The proponents of President Clinton’s striker replacement order justified it, in part, by claiming that it was valid if the Bush I project labor agreement order was valid.<sup>232</sup> Both the Bush I order and the Clinton order were

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Bradley, *Wilson Bridge Pact Imperiled*, RICH. TIMES, Feb. 1, 2001, at B1 (discussing the proposed executive order and the history of executive orders on this subject); Greg Garland & David L. Greene, *Labor Deal for Bridge Threatened*, BALT. SUN, Jan. 31, 2001, at 1B; Steven Greenhouse, *Bush is Moving to Reduce Labor’s Political Coffers*, N.Y. TIMES, Feb. 16, 2001, at A14 (reporting on the four labor executive orders being considered).

227. Exec. Order No. 12,836, 58 Fed. Reg. 7045 (Feb. 1, 1993). President Clinton also issued a memorandum in 1997, which directed federal agencies to use project labor agreements when the agency determines that it will “advance the Government’s procurement interest in cost, efficiency and quality and in promoting labor-management stability.” President’s Memorandum, *The Use of Project Labor Agreements for Federal Construction Projects*, 1997 WL 309842, at 1 (June 5, 1997).

228. See *The Bridge Impasse*, WASH. TIMES, Feb. 1, 2001, at A16 (noting that Bush’s executive order is a contentious one between Maryland and Virginia, which are splitting the costs of the project); see also Garland & Greene, *supra* note 226, at 1B (noting that Bush’s executive order will effectively block a project labor agreement negotiated by Maryland Governor Parris N. Glendening and will instead open the job to competition from nonunion contractors); Michael D. Shear, *Wilson Bridge Labor Talks to Resume*, WASH. POST, Aug. 14, 2001, at B1.

229. See *Allbaugh*, 172 F. Supp. 2d at 172.

230. *Id.*

231. See Exec. Order No. 13,202, 66 Fed. Reg. 11,225 (Feb. 22, 2001); Exec. Order No. 12,818, 57 Fed. Reg. 48,713 (Oct. 28, 1992).

232. *E.g.*, *Chamber of Commerce*, 74 F.3d at 1333 (noting the argument of the government that President Clinton’s order is valid under the Procurement Act, just as President Bush’s order was assumed valid when issued); 141 CONG. REC. S3785 (1995)

issued pursuant to the same statutory provision, the Federal Property and Administrative Services Act (the "Procurement Act"), and can only be applied to federal construction projects.<sup>233</sup> Both orders implement policies in the face of a Supreme Court holding to the contrary.<sup>234</sup> Both were issued to court voters by implementing a labor policy yet to be successfully pushed through Congress<sup>235</sup>—although the Clinton order flew in the face of failed legislative attempts to prohibit the hiring of permanent striker replacements, while neither Bush order followed failed legislative attempts aimed specifically at prohibiting project labor agreements. (Legislation has since been introduced to overcome the Bush II order.<sup>236</sup>) Both orders seem to implement a "presidential policy . . . in a manner prescribed by the President" rather than a "congressional policy . . .

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(statement of Sen. Kennedy) ("Several Senators . . . suggest that President Clinton's Executive order prohibiting Federal contractors from permanently replacing lawfully striking workers is completely unprecedented. They stated . . . that there has never before been an Executive order that has prohibited Federal contractors from undertaking an otherwise legal act . . . [T]hese Senators are simply and plainly wrong. . . . In late October 1992 President Bush issued Executive Order No. 12818 prohibiting Federal contractors from entering into pre-hire agreements.")

233. See Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (Mar. 10, 1995); Exec. Order No. 12,818, 57 Fed. Reg. 48,713 (Oct. 28, 1992) (claiming authority under the Federal Property and Administrative Services Act). The Bush II order relies on the same statutory provision. Exec. Order No. 13,202, 66 Fed. Reg. 11,225 (Feb. 22, 2001).

234. See *Bldg. & Constr. Trades Council v. Associated Builders & Contractors* (Boston Harbor), 507 U.S. 218 (1993) (holding that project labor agreements are a legal option under § 8(f) of the NLRA); *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938) (holding that an employer may protect his business by hiring permanent replacement workers under the NLRA).

235. See, e.g., *Bush Bans Nonunion Labor Bias: Move Seen as Effort to Shore up Support of Builders' Group*, DALLAS MORNING NEWS, Oct. 24, 1992, at 5A (noting that Bush's order won him the support of Associated Builders and Contractors, a group that has challenged the legality of union-only agreements); Frank Swoboda, *Bush Shifts on Non-Union Contract Bids; Executive Order Goes Against Court Stance*, WASH. POST, Oct. 25, 1992, at A16 (reporting that Associated Builders and Contractors pulled its support for Bush's reelection after the administration sided with labor unions in a Supreme Court case early in 1992, but endorsed Bush in October 1992 after he issued an executive order prohibiting project labor agreements).

236. No legislation was introduced regarding project labor agreements until the 107th Congress, with the small exception of an attempted rider on another bill during the 106th Congress. See *Government Neutrality in Contracting Act*, H.R. 2055, 107th Cong. (2001) (prohibiting discrimination against a party that did not become a signatory to a project labor agreement); *Government Neutrality in Contracting Act*, S. 962, 107th Cong. (2001); H.R. 1360, 107th Cong. (2001) (ensuring that project labor agreements are permitted in certain circumstances); S. Amdt. 2905, 106th Cong. (2000) (requiring project agreements on federal construction projects).

in a manner prescribed by Congress."<sup>237</sup> Despite the fact that the Bush II order does not seem to contravene the expressed will of Congress as directly as the Clinton order did, both orders are regulatory in nature and neither are a valid use of presidential power.

### *b. Wartime Orders*

Since the terrorist attacks of September 11, 2001, President Bush has used his power extensively in the name of national security.<sup>238</sup> These actions have been met by a mixture of criticism, praise, and relief from the American people and their representatives in Congress. Ironically, those actions that have been most criticized often pose a lesser threat to the liberty of Americans than other actions or proposed actions that have received less criticism. The erroneous focus of this criticism seems to stem from confusion regarding the broader powers of the President against the nation's enemies during war as compared to his more narrow powers in enacting legislation.<sup>239</sup>

Much of the discussion in this article has revolved around the President's use of power in the domestic, legislative arena. In this legislative arena, the

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237. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952). It seems that the executive order expresses a presidential policy rather than a congressional policy, based at least in part on the fact that it apparently contradicts Congress's intent to the contrary. See, e.g., *Boston Harbor*, 507 U.S. 218 (holding that project labor agreements are a legal option under § 8(f) of the NLRA).

238. E.g., Exec. Order No. 13,236, 66 Fed. Reg. 59,671 (Nov. 29, 2001) (waiving dual compensation provisions of the Central Intelligence Agency Retirement Act of 1964); Exec. Order No. 13,235, 66 Fed. Reg. 58,343 (Nov. 20, 2001) (invoking emergency construction authority of 10 U.S.C. 2808); Exec. Order No. 13,234, 66 Fed. Reg. 57,355 (Nov. 15, 2001) (establishing a presidential task force on citizen preparedness in the war on terrorism); Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 10, 2001) (establishing the Office of Homeland Security and the Homeland Security Council); Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001) (blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism); Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 18, 2001) (ordering the Ready Reserves to active duty).

239. Cf. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (testimony of William P. Barr, Former Attorney General of the United States) [hereinafter Testimony of William P. Barr] ("Much of the criticism of the President's Executive Order authorizing the use of military tribunals stems from a fundamental confusion between the realm of domestic law enforcement and the realm of military defense of the Nation. This is not a confusion that has been shared by past Presidents, past Attorneys General, or the United States Supreme Court.").

President's powers are limited to his veto power,<sup>240</sup> his power as chief law enforcement officer,<sup>241</sup> and his ability to recommend legislation for consideration.<sup>242</sup> In contrast, he has broader authority through which he may act in the foreign arena. For instance, he is Commander in Chief of the Army and Navy, and he is bound to use that power to protect the nation.<sup>243</sup> The President's power is, by necessity, extensive when he is acting to protect the nation from a foreign enemy. The focus of this article has been on the importance of not allowing the President to intrude upon congressional power; however, it is equally important that Congress not be allowed to intrude upon presidential power. Separation of powers is the best guarantor of liberty.

*i. Order Authorizing the Use of Military Tribunals*

Perhaps one of the most criticized executive orders has been the presidential directive authorizing the use of military tribunals.<sup>244</sup> Much of this concern has come from those who wish to protect the civil liberties of all—even terrorists.<sup>245</sup> Other criticisms have stemmed from the belief that Congress should formally declare war before the President takes such an action.<sup>246</sup> Certainly, the President's powers would be clearer if Congress were to formally declare war.<sup>247</sup> However, when the nation is attacked, the President's Commander-in-Chief

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240. U.S. CONST. art. I, § 7.

241. *Id.* art. II, § 3.

242. *Id.*

243. *Id.* art. II, § 2, cl. 1.

244. The directive was issued as a military order, rather than an executive order. It can be viewed at <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html>.

245. Cf. EDWIN MEESE III & TODD GAZIANO, HERITAGE FOUNDATION, EXECUTIVE SUMMARY: BRINGING AL QAEDA TO JUSTICE: THE CONSTITUTIONALITY OF TRYING AL-QAEDA TERRORISTS IN THE MILITARY JUSTICE SYSTEM (2001), available at <http://www.heritage.org/library/legalmemo/lm3es.html> ("Such is our love of liberty that [the Al-Qaeda defendants] invocation of the U.S. Constitution would be taken seriously.").

246. Cf. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm on the Judiciary*, 107th Cong. (2001) (testimony of Kate Martin) (claiming that "unilateral issuance of this order . . . is the most blatant example" of how President Bush has violated the separation of powers since September 11 and distinguishing the use of military tribunals during World War II when Congress had formally declared war against Germany and Japan).

247. DAVID B. RIVKIN, JR., ET AL., HERITAGE FOUNDATION, BRINGING AL QAEDA TO JUSTICE: THE CONSTITUTIONALITY OF TRYING AL-QAEDA TERRORISTS IN THE MILITARY JUSTICE SYSTEM (2001), available at <http://www.heritage.org/library/legalmemo/lm3.html> (analyzing the difference between a formally declared war and a "limited" war).

power does not await a formal declaration of war by Congress before it may be used.<sup>248</sup> The Supreme Court recognized this truth when it stated, "If 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."<sup>249</sup>

The Supreme Court has not addressed whether the President's Commander-in-Chief power alone will support the use of military tribunals.<sup>250</sup> Nevertheless, the traditional use of military tribunals as a tool of war,<sup>251</sup> combined with the use of military commissions by early generations of Americans,<sup>252</sup> indicate that the Founding Fathers would have considered it one of the President's options as Commander in Chief, at least against non-citizens. Former Attorney General William P. Barr has stated:

It is anomalous to maintain that the President has constitutional authority to order deadly bombing strikes or commando raids against such an enemy, while at the same time maintaining that, if the enemy surrenders or is captured, the President is suddenly constrained to follow all the constitutional protections applicable to domestic law enforcement.<sup>253</sup>

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248. Of course, it is important to ensure that the President cannot declare his own emergencies and broaden his own powers spontaneously; however, once an emergency is determined to exist, as when the nation is under attack, it is equally important that we not strip the President of his power to protect the country.

249. *The Prize Cases*, 67 U.S. 635, 668 (1862).

250. The primary case on point, *Ex parte Quirin*, 317 U.S. 1 (1942), declined to evaluate this question. *Id.* at 29 ("It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.").

251. *See id.* at 28-29 ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."); *see also infra* note 254.

252. For instance, in 1780, George Washington established a "Board of Commissioned Officers" to try Major John Andre, an English spy who was charged with receiving information from Benedict Arnold. Testimony of William P. Barr, *supra* note 239. Similarly, Andrew Jackson used military tribunals while a general and extensive use of tribunals was made during the Civil War. *Id.*

253. Testimony of William P. Barr, *supra* note 239. In his testimony before Congress, Attorney General Barr also cited several early Attorney General opinions, including that of former Attorney General Speed: "The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set squadrons in the field and fight battles. His authority in each case is from the law and usage of war." *Id.* (quoting 11 Op. Atty. Gen. 297, 305 (1865)).

Even if the President's Commander-in-Chief power, standing alone, is not sufficient to support the use of military tribunals, Congress has upheld the ability of the President to do so in the Uniform Code of Military Justice ("UCMJ").<sup>254</sup> The Supreme Court has confirmed that "[t]he trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war . . . , but is [also] an exercise of the authority sanctioned by Congress . . . so long as a state of war exists . . . ."<sup>255</sup> Similarly, the Court stated:

Congress has explicitly provided . . . that military tribunals shall have jurisdiction to try offenders or offenses against the law of war. . . . [T]he President, . . . by his Proclamation in time of war has invoked that law. . . . [H]e has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief . . . .<sup>256</sup>

The only question that remains unanswered by the Supreme Court is whether the "state of war" in existence at the time of the President's order must be one that is formally declared.<sup>257</sup> Some have claimed that the joint resolution

254. See 10 U.S.C. § 818 (1994) (providing that courts martial may try those subject to trial by military commission under the "law of war"); *Id.* § 821 (1994) (providing that courts martial are not to deprive military commissions of their jurisdiction); *Id.* § 836 (delegating authority to the President to prescribe trial procedures, including modes of proof, for military commissions).

255. *In re Yamashita*, 327 U.S. 1, 11–12 (1946).

256. *Quirin*, 317 U.S. at 28. Some claim that *Ex Parte Milligan*, 71 U.S. 2 (Wall.) (1866), creates a conflicting precedent prohibiting the use of military commissions when other courts are open. However, the better interpretation of the two is that *Quirin* stands for the proposition that "unlawful belligerents" may be tried by military tribunals while "traitorous civilians" must be tried in Article III courts. For a discussion of the two cases, see GEORGE TERWILLIGER ET AL., THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES, THE WAR ON TERRORISM: LAW ENFORCEMENT OR NATIONAL SECURITY? (2001), available at <http://www.fed-soc.org/Publications/Terrorism/military-tribunals.htm>; see also RIVKIN ET AL., *supra* note 247 (differentiating between the general rule of *Milligan* that civilians are not normally subject to military justice and the *Quirin* exception by which unlawful combatants during a time of war may be subject to military tribunals).

257. *Quirin* did not discuss what state of war is necessary. At the time of the decision, the country was in a formally declared state of war, and it was unnecessary. For a discussion of the validity of military tribunals in a "limited" or "partial" war, see generally RIVKIN ET AL., *supra* note 247 (noting the difficulty in determining what the Supreme Court would do in the current situation, as *Quirin* was decided during a formally

issued by Congress on September 18 is sufficient to uphold the President's authority.<sup>258</sup> Others claim that military tribunals are a valid exercise of power, even in a "limited" war.<sup>259</sup> In addition, there is an argument that it was unnecessary for Congress to formally declare war, as the country was involuntarily plunged into a state of war upon being attacked.<sup>260</sup> Either way, President Bush's claim that he is authorized to exercise this military power in protection of the nation is a reasonable claim.<sup>261</sup> Given the expansive powers accorded to the President as Commander in Chief and the fact that the crisis was not one declared by the President himself to broaden his own powers, this exercise of executive authority is not nearly as troublesome as some other uses of executive power have been.

## ii. Federalization of Aviation Security

Despite the furor over the President's decision to authorize the use of military tribunals, little has been said about the executive order improving aviation security that was nearly issued by the President. In the weeks following September 11, the airlines, many American citizens, and the Bush administration called upon Congress to pass a bill improving aviation security in airports.<sup>262</sup> The legislation stalled for weeks, as congressmen and senators wrangled over whether or not the security workforce in airports should be federalized.<sup>263</sup> Dur-

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declared war and the Court has become more protective of civil liberties in recent years).

258. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (declaring that it is "both necessary and appropriate that the United States exercise its rights to self-defense"); see also *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (presenting various views on whether the joint resolution authorizes the use of military tribunals).

259. RIVKIN ET AL., *supra* note 247 (noting that there is a valid argument that a limited war included the right to subject unlawful combatants to military courts).

260. *E.g.*, *The Prize Cases*, 67 U.S. 635, 668 (1862).

261. Policy arguments regarding whether tribunals should or should not be used are a different matter. There are valid reasons on either side. Some argue that civil rights must be accorded to all and that a military tribunal cannot afford all the protections necessary for a fair trial. Others note that national security concerns are of paramount importance and that military tribunals are necessary to protect American intelligence agents. Either way, the policy decision has already been made by Congress.

262. *E.g.*, Carrie Johnson, *Flight Attendants Increasingly Demanding Greater Safeguards*, WASH. POST, Oct. 5, 2001, at A21; President George W. Bush, Radio Address of the President to the Nation (Oct. 27, 2001), available at <http://www.whitehouse.gov/news/releases/2001/10/20011027.html>.

263. *E.g.*, Juliet Eilperin & Ellen Nakashima, *Security Bill Stalls in Congress*, WASH. POST., Oct. 13, 2001, at A6 (discussing tension between the House and Senate in nego-

ing this time, House Republicans repeatedly used the threat of an executive order in their (failed) attempts to force Democrats in Congress to abandon the idea of a federalized security force.<sup>264</sup> In the end, despite these threats, a bill was enacted that will federalize all airport passenger screeners after a one-year transition period.<sup>265</sup> The bill also implements higher security standards on a variety of issues.<sup>266</sup>

If an executive order had been issued in this instance, as urged by the House Republicans, it would have been exactly the kind of executive order that the President should not be issuing.<sup>267</sup> A war legitimately gives the President expanded powers in certain areas. His hands should not be tied when it comes to using his constitutional powers to fight the nation's enemies. In this instance, however, the war would have been a mere excuse for an illegitimate presidential action.<sup>268</sup> The President cannot use his executive powers solely for the purpose

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tations on aviation security provisions); Dana Milbank, *Bush Expected to Back Federalized Screening at Airports*, WASH. POST, Oct. 29, 2001, at A5 (reporting on ongoing discussions between the House and Senate and the failure to pass a compromise bill).

264. E.g., Major Garrett, *Bush Willing to Bypass Congress on airport security, House GOP ally says*, CNN.com (Oct. 29, 2001), at <http://www.cnn.com/2001/US/10/29/rec.airport.security> (noting the statement of House Majority Whip Roy Blunt that “[t]he President is prepared to do the Republican House bill by executive order”); see also Eilperin & Nakashima, *supra* note 263, at A6 (reporting that House Republicans are urging Bush to act by executive order).

265. See Aviation and Transportation Security Act of 2001, Pub. L. No. 71, 115 Stat. 597 (2001).

266. *Id.*

267. Yet again, this author is in agreement with the policy decision that Bush would have made had he issued an executive order. Early signs of the impending failure of the federalized workforce can already be seen. See, e.g., David Firestone, *Rules Will Allow Airport Screeners to Remain in Jobs*, N.Y. TIMES, Dec. 30, 2001, at A1 (“After stoking high expectations that the federal takeover of airport security would lead to a new breed of airport security screener, one who was better educated and more qualified to assume a position of increased responsibility, the Department of Transportation has decided not to impose rules that would displace thousands of current screeners.”). Rather than federalizing the nation's workforce, Congress should have sought a private workforce such as those that have shown such success in Europe and Israel in recent years. Despite this author's disagreement with Senate Bill 1447, a congressional vote was the proper manner in which to enact this law. Any other route would have caused the implementation of a presidential policy rather than a congressional one. President Bush would have used an executive order to do an “end-run” around Congress. The short-term policy would have been beneficial, in this author's opinion, but the long-term effect on the growth of presidential power would not.

268. The President may have been able to take limited action to enforce congressional measures already in place or to make discretionary decisions already entrusted to him. If this was his intention, it was not so portrayed in the media. For instance, in the



of circumventing an intransigent Congress, even in times of war. Lawmaking is reserved to the Congress. Rather than focusing criticism on the President's legitimate uses of his Commander-in-Chief power, Americans should instead be attentive to issues such as those surrounding aviation security. It is in areas such as these that past presidents have illegitimately expanded presidential power during wars and crises.<sup>269</sup> One of the easiest mistakes that President Bush could make would be to inadvertently fall into the same trap, although it would undoubtedly be with the best of intentions.

Presidential authority during times of war is more expansive than it is at other times. Criticism of some of the military actions that President Bush has taken have not been justified. Presidential power has grown during times of war, but it has not grown due to the actions of the commander of the armed forces. It has grown when the President has extended his military powers into the lawmaking realm. The threat to our liberty does not come from military orders issued by the Commander in Chief of the Army and Navy. The threat to our liberty comes when the President uses the excuse of national security to inappropriately violate separation of powers in the legislative arena. Many who have criticized President Bush's use of military tribunals have encouraged him to issue executive orders in other, inappropriate areas, such as aviation security. Identifying the difference between the two is admittedly a challenging task; however, it is imperative that President Bush seek to achieve that balance in the upcoming months and years.

### C. Changes in Public Perception

Another factor contributing to the growth in presidential lawmaking is the change in public attitude toward such action on the part of the President. Not only does the public fail to condemn the President, but many people also demand that he use executive orders to right perceived wrongs.<sup>270</sup> As Professor

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wake of the Pan Am 103 bombing and the loss of TWA Flight 800, Congress passed the Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, 110 Stat. 3213. The Act mandated that new regulations be implemented to improve performance. Those regulations never were implemented. Editorial, *Pie in the Sky Security?*, WASH. TIMES, Oct. 13, 2001, at A12 (detailing the failure of the Federal Aviation Administration ("FAA") to enforce regulations). Similarly, the President could have taken action to ensure that the FAA, an executive agency, enforces regulations already on the books. The failure of the FAA to enforce regulations is well known. See, e.g., Fred Bayles, *FAA Ignores Violations, Report Says*, USA TODAY, Mar. 31, 1998, at 1A; Alexandra Marks, *Security Now Top Airport Priority*, CHRISTIAN SCI. MONITOR, Sept. 13, 2001, at 4.

269. See discussion *supra* notes 82-149 and accompanying text.

270. Monaghan, *supra* note 66, at 8; see also, e.g., Dan Horodysky, Letter to the Edi-

Monaghan of Columbia University has stated, "That twentieth-century Presidents and their advisors should hold expansive, and perhaps ill-formed views of 'inherent' presidential power is not surprising. Most Americans expect modern presidents to provide solutions for every significant political, military, social, and economic problem."<sup>271</sup> Since the inception of the war against terrorism, the American people have seemingly been leaning on President Bush still more.

The perception of Americans that the President is not only willing, but also able to solve their problems is reinforced by the media and by the political process. During this past presidential campaign, candidates promised solutions to virtually every conceivable social ill. One exchange between Bill Bradley and Vice President Gore during a Democratic debate provides a good illustration both of the problem and also how Americans have come to expect their presidents to make policy decisions without Congress:

Mr. BRADLEY: . . . . If I were president of the United States, I would put an executive order in immediately that would end racial profiling in the federal government. I would work to get local police departments to keep data to be able to demonstrate that there was racial profiling. And then I'd sic the Justice Department after them to make sure they were going to abide by the law in which no racial profiling [would be allowed].

Vice Pres. GORE: I said at the beginning of my campaign for president that on the first day of the Gore presidency I would issue an executive order to ban racial profiling, and the first civil rights bill introduced from the White House of the year 2001 would be a bill outlawing racial profiling.

Mr. BRADLEY: You know, Al, I know that you would issue an order to end racial profiling if you were president of the United States. But we have a president now. You serve with him. I want you to walk down that hallway, walk into his office and say, "Sign this executive order today!"<sup>272</sup>

The public perception problem is not limited to promises by political candidates. Congressmen and private citizens besiege the President with demands

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tor, *Justice for Mariners*, S.F. CHRON., Mar. 29, 1998, at A6 ("Mr. President, you can right this injustice with a stroke of the pen. How can we reach you?").

271. Monaghan, *supra* note 66, at 8.

272. *ABC News: Nightline* (ABC television broadcast, Jan. 17, 2000). Upon being asked if he would sign an executive order banning racial profiling by police, President Bush promised only to "look" into it. Marilyn Rauber, *Dubya Treads Gingerly on Race Profiling*, N.Y. POST, Feb. 10, 2001, at 12.

that action be taken on various issues.<sup>273</sup> To make matters worse, once a president has signed an executive order, he often makes it impossible for a subsequent administration to undo his action without enduring the political fallout of such a reversal. For instance, President Clinton issued a slew of executive orders on environmental issues in the weeks before he left office.<sup>274</sup> Many were controversial and the need for the policies he instituted was debatable.<sup>275</sup> Nevertheless, President Bush found himself unable to reverse the orders without invoking the ire of environmentalists across the country.<sup>276</sup> A policy became law by the action of one man without the healthy debate and discussion in Congress intended by the Framers. Subsequent presidents undo this policy and send the matter to Congress for such debate only at their own peril. This is not the way it is supposed to be.

Restoration of our system of separation of powers will require that the public be educated on what does—and does not—constitute a constitutional use of executive orders and other presidential directives. Americans and our elected

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273. *E.g.*, Cleary, *supra* note 85 (“Well, it would take just one stroke of that pen to mandate that the federal government couldn’t do business with any firm that didn’t comply with the guidelines. . . . There is nothing stopping Clinton from signing that executive order today.”). Citizens are not alone in sending requests to the President. Congressmen, the very people who should be holding the President accountable *not* to abuse presidential authority, have gotten on the bandwagon as well. Rep. Frank Wolf, Republican from Virginia, encouraged President Clinton to sign an executive order requiring all federal agencies to offer transit subsidies to employees. Mike Causey, *Unions Hope to Make Hay During the Heat of an Election Year*, WASH. POST, Feb. 10, 2000, at B7. He later encouraged Clinton to issue an executive order expanding telework opportunities for federal employees; he said that he would ask Congress to pass comparable legislation only if the administration “balks.” Stephen Barr, *Pushing to Ease the Switch From Long Drive to Hard Drive*, WASH. POST, Aug. 21, 2000, at B2.

274. *E.g.*, Lee Anderson, *Mr. Clinton’s ‘Arsenic Water’ Booby Trap*, CHATTANOOGA TIMES, Apr. 24, 2001, at B7 (“President Bill Clinton, fortunately, is gone from the White House. But, unfortunately, he cannot be forgotten. As he departed, he left a number of political booby traps lying around. . . . Just hours before he was to leave office . . . [he was] rushing through ‘executive orders’ on a variety of controversial issues.”); *The Edge With Paula Zahn* (Fox television broadcast, Apr. 27, 2001) (recording statement of ex-presidential candidate Gary Bauer that the Clinton administration “set a bunch of time bombs before it left” in regard to environmental issues “for one reason, and that was to provide fodder for the Democrats in Congress when President Bush repealed some of these things”).

275. *E.g.*, Anderson, *supra* note 274, at B7 (noting that the arsenic standard for water—an allowable fifty parts per billion—had remained unchanged since 1942 and throughout the eight years of Clinton’s administration before it suddenly became a matter of extreme importance that the standard be lowered in January 2001).

276. *E.g.*, *id.* (reporting that the “predictable liberal ‘environmentalists’ went hysterical, screaming, in effect, that Mr. Bush was trying to poison the American people!”).

officials must quit looking to the President for quick solutions to hard problems that should instead be debated in Congress. Difficulty in getting policies out of Congress is a good difficulty to have<sup>277</sup> and an important safeguard that our Founding Fathers incorporated into the Constitution. Americans must begin to view it as such.

#### IV. CONSTITUTIONAL USES OF EXECUTIVE ORDERS

From the inception of our republic through 1999, only 253 presidential directives had been modified or revoked, either by Congress or by the courts. A Cato Institute study completed late in 1999 found that Congress had modified or revoked 239 executive orders,<sup>278</sup> while the courts had struck down only fourteen orders, either in whole or in part.<sup>279</sup> The orders struck down by the courts resulted from eighty-six challenges,<sup>280</sup> and only two orders had been wholly overturned.<sup>281</sup> Since that time, one additional executive order has been overturned in its entirety by a lower court.<sup>282</sup> An expedited appeal of the order has been granted.<sup>283</sup> Legislative and judicial challenges to several other executive orders are ongoing.

In contrast to the number of presidential directives issued, few challenges have been made. Even when challenges are brought, the most notable contribu-

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277. In fact, one sometimes wishes that it were a little *more* difficult to get rules and regulations passed by Congress.

278. OLSON & WOLL, *supra* note 11, at app. 3, at 4 (listing executive orders that have been modified or revoked by statute); *see also* *Hearing on H.R. 3131*, *supra* note 3, at 58 (testimony of Elliot Minberg, Vice President, Legal Director, and General Counsel, People for the American Way Foundation) [hereinafter Testimony of Elliot Minberg] (citing figures in reliance on Cato Institute study); *Restoring Checks and Balances*, *supra* note 45 (reporting on Cato Institute study).

279. Testimony of Elliot Minberg, *supra* note 278, at 58 (citing figures in reliance on Cato Institute study).

280. *Id.*

281. *See* *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Hearing on Executive Orders*, *supra* note 33, at 129 (statement of William Olson, co-author, Cato Study); *see also* Edwards, *supra* note 2, at 18 (reporting on the two executive orders to be contested in the courts and contrasting them with other orders that were eventually upheld).

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

283. *Legal News: Department of Justice Granted Expedited Briefing and Argument in the Appeal of Injunction in PLA Executive Order Case*, Associated Builders and Contractors (Jan. 24, 2002), at <http://www.abc.org/page.cfm?keyPageID=3718#eo>; *see also* Press Release, Associated Builders and Contractors, ABC Supports Justice Department Appeal of Court Ruling on Bush Executive Order (Nov. 30, 2001), available at <http://164.109.58.49/documents/AppealCourtRuling11-30.PDF>.

tion of the courts has been its reluctance to get involved. Typically, courts uphold the presidential directive,<sup>284</sup> find that the plaintiff lacks standing,<sup>285</sup> or hold that the dispute revolves around a political question that should not be judicially resolved.<sup>286</sup> On those occasions when a court has modified or revoked a presidential directive, the holding has often been fact-specific or the explanation for the court's action has been brief.<sup>287</sup> The result has been a remarkable dearth of precedent and accountability in this area.<sup>288</sup> The lack of precedents combined with the lack of challenges to presidential authority have resulted in a system in which presidents have seemingly been "bound by only their conscience."<sup>289</sup>

#### A. *Youngstown Sheet & Tube Co. v. Sawyer*

The Supreme Court first overturned an executive order in its entirety in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>290</sup> The case centered around an executive order issued by President Truman during World War II. When a labor dispute threatened to result in a steelworkers' strike, President Truman issued an executive order directing the Secretary of Commerce to take possession of and operate the steel mills involved in the dispute.<sup>291</sup> President Truman claimed authority based on the national emergency created by a potential stoppage of

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284. *E.g.*, *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974); *Korematsu v. United States*, 323 U.S. 214 (1944); *Sea-Land Serv., Inc. v. ICC*, 738 F.2d 1311 (D.C. Cir. 1984); *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980); *Kaplan v. Corcoran*, 545 F.2d 1073 (7th Cir. 1976); *Conservation Law Found. v. Clark*, 590 F. Supp. 1467 (D. Mass. 1984).

285. *E.g.*, *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999).

286. *See infra* Part V.A.

287. *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) ("Perhaps it is because it is so difficult to reconcile the foregoing definition of Art. III judicial power with the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive, without either challenge or interference by the Judiciary, that the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases. The tensions present in any exercise of executive power under the tripartite system of Federal Government established by the Constitution have been reflected in opinions by Members of this Court more than once.").

288. *Cf. Michael H. LeRoy, Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 232 (1996) (discussing the lack of precedent under which to evaluate the constitutionality of Executive Order 12,954).

289. *Restoring Checks and Balances*, *supra* note 45.

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

291. *Id.* at 583.

steel production in the midst of the war.<sup>292</sup> After issuing Executive Order 10,340, President Truman notified Congress. Congress took no action.<sup>293</sup>

The Court overturned the order, holding that presidential authority “must stem either from an act of Congress or from the Constitution itself.”<sup>294</sup> President Truman had not claimed statutory authority. Indeed, Congress had rejected seizure techniques as a means of resolving labor disputes in the past.<sup>295</sup> The Court found that President Truman’s claim of constitutional authority could not be upheld under any of the constitutional provisions granting authority to the President—the “Vesting Clause,” the “Take Care Clause,” or the “Commander in Chief Clause.” Of the latter, the Court stated that the Commander in Chief Clause cannot be used to grant the President “ultimate power” to “take possession of private property in order to keep labor disputes from stopping production.”<sup>296</sup> The power belonged to Congress, not to the President.

Ultimately, the Court affirmed that the President is the “executor” of the laws, not the “lawmaker.”<sup>297</sup> The executive order issued by Truman was invalid as it did not direct congressional policy “in a manner prescribed by Congress,” but instead promulgated presidential policy “in a manner prescribed by the President.”<sup>298</sup> The Court held:

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding . . . .<sup>299</sup>

The concurring opinions further reinforced the importance of a separation of powers and the role of Congress as the lawmaker. Justice Frankfurter noted the reliance of the Founders on a system of checks and balances to protect the country from “[t]he accretion of dangerous power” in the hands of one who is left “unchecked.”<sup>300</sup> Justice Douglas added, “We pay a price for our system of

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292. *Id.*

293. *Id.*

294. *Id.* at 585.

295. *Id.* at 586 (noting that the Taft-Hartley Act of 1947 had rejected an amendment granting the President the authority to resolve labor disputes through seizures).

296. *Id.* at 587. Three justices dissented in the case. Justice Vinson, writing for the dissent, argued that the President has an inherent power to act in times of crisis even without express statutory authorization. *Id.* at 667 (Vinson, J., dissenting).

297. *Id.* at 587.

298. *Id.* at 588.

299. *Id.* at 589.

300. *Id.* at 594 (Frankfurter, J., concurring). Justice Frankfurter went on to quote Jus-

checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many."<sup>301</sup> While President Truman might have seemed a "kindly President" who wished to effect a wage increase, a future president might later "regiment labor as oppressively as industry thinks it has been regimented by this seizure."<sup>302</sup>

Despite the numerous opinions issued in *Youngstown* upholding the importance of a system of checks and balances, Justice Jackson's concurrence may have been the most important, as it is perhaps the most thorough judicial evaluation of the use of presidential directives, and it is often relied upon.<sup>303</sup> Justice Jackson outlined three areas of presidential authority:

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. . . .

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 acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.

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.<sup>304</sup>

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tice Holmes:

"The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government.

*Id.* at 610 (quoting *Myers v. United States*, 272 U.S. 52, 177 (1926)).

301. *Id.* at 633 (Douglas, J., concurring).

302. *Id.* at 633-34.

303. *E.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (noting that Justice Jackson's concurrence "brings together as much combination of analysis and common sense as there is in this area"); Statement of Thomas B. Griffith, *supra* note 14, at 56 (discussing Justice Jackson's concurrence as a "helpful framework for analyzing executive orders").

304. *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring).

No other executive order was overturned, in its entirety, from the time of *Youngstown* until the administrations of Presidents Clinton and George W. Bush.<sup>305</sup> In *Chamber of Commerce v. Reich*,<sup>306</sup> an appellate court overturned an order of President Clinton's prohibiting the federal government from contracting with employers who hire permanent replacements for striking workers.<sup>307</sup> Not only did the executive order contradict both a Supreme Court ruling and legislation on the subject, but the court also found no validity to Clinton's claims that the Federal Property and Administrative Services Act authorized his action.<sup>308</sup> In *Building & Construction Trades Department v. Allbaugh*, a district court overturned an executive order of President Bush's based on similar reasoning.<sup>309</sup> Although these latter cases each overturned an executive order, those opinions have not provided much in the way of additional guidance, as the analyses of the judges were aimed specifically at labor issues.<sup>310</sup> Today, *Youngstown* is still the primary case dealing with presidential directives.

### B. Applying *Youngstown*

The end result of *Youngstown* is that, at least nominally, a presidential directive will be valid only if it stems from a statute or from the Constitution itself.<sup>311</sup> If the order does not stem from one of these two sources, then Congress

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305. As discussed above, at least one other challenge to an executive order has been made and is pending. See discussion *supra* notes 183–87, 224–37 and accompanying text.

306. 74 F.3d 1322 (D.C. Cir. 1996).

307. *Id.* at 1324.

308. The appellants claimed that the executive order was in conflict with the National Labor Relations Act and the Supreme Court's holding in *NLRB v. Mackay Radio & Tel. Co.* See *Chamber of Commerce*, 74 F.3d at 1332; *Mackay Radio*, 304 U.S. 333 (1938). *Mackay Radio* held that "an employer retained the right 'to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.'" *Chamber of Commerce*, 74 F.3d at 1332 (quoting *Mackay Radio*, 304 U.S. at 345–46).

309. 172 F. Supp. 2d 138 (D.D.C. 2001).

310. *Chamber of Commerce*, 74 F.3d at 1332–39 (evaluating whether the executive order conflicted with the NLRA and whether the order was regulatory in nature). The court eventually determined that the executive order was "pre-empted by the NLRA." *Id.* at 1339; see also *Allbaugh*, 172 F. Supp. 2d at 162–72.

311. *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)); see also *Allbaugh*, 172 F. Supp. 2d at 158 (quoting *Youngstown*, 343 U.S. at 585); Statement of Thomas B. Griffith, *supra* note 14, at 55 ("Any individual executive order does, of course, require the



must either ratify the directive or “acquiesce” in the decision before the order will have the force of law.<sup>312</sup> Unless the President has independent constitutional authority, presidential directives are always invalid when they are issued in contradiction to the expressed intent of Congress and Congress does not ratify the policy or acquiesce in the decision promulgated by the order.<sup>313</sup> These standards are probably appropriate, but unfortunately, problems have arisen as a result of Congress’s broad delegation of authority,<sup>314</sup> the courts’ often cursory examinations of presidents’ authority<sup>315</sup> and their broad definition of “acquiesce,”<sup>316</sup> as well as the difficulty of enforcing these standards against presidents.<sup>317</sup> This section addresses the standards that have been applied to presi-

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exercise of legitimate presidential authority, either constitutional or statutory.”); Statement of Hon. Ron Paul, *supra* note 86, at 39 (“Because the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President’s proclamations are not legally binding and are at best hortatory unless based on such grants of authority.” (quoting STUDY OF PRESIDENTIAL POWERS, *supra* note 6)).

312. See STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 24 (discussing congressional ratification of the blockades ordered by Lincoln).

313. See *Youngstown*, 343 U.S. at 588; FISHER, *supra* note 55, at 109 (noting that executive orders may not supercede a statute or override an act of Congress).

314. E.g., *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 273 n.5 (1974) (citing statute granting authority: “[the] President may prescribe regulations for the conduct of employees in the executive branch”) (citation omitted); *Mow Sun Wong v. Campbell*, 626 F.2d 739, 742 n.6 (9th Cir. 1980) (evaluating a statute granting the President the authority to issue regulations “as will best promote the efficiency of that service” (citation omitted); cf. Statement of Thomas B. Griffith, *supra* note 14, at 55 (“The scope of power granted to a president pursuant to a statutory delegation is, of course, dependent upon the wording of the statute. Therefore, it is within Congress’s power to cabin the scope of statutory authority upon which a president can rightfully act. Indeed, it is Congress’s responsibility to do so.”).

315. The Supreme Court has even gone so far as to relegate a finding of executive authority to a footnote. See *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 273 n.5 (1974) (“The Executive Order is plainly a reasonable exercise of the President’s responsibility for the efficient operation of the Executive Branch. Moreover, the Executive Order finds express statutory authorization . . .”) (citations omitted).

316. E.g., *Dames & Moore*, 453 U.S. at 677 (“Concluding that neither the IEPPA nor the Hostage Act constitutes specific authorization of the President’s action . . . is not to say that these statutory provisions are entirely irrelevant to the question of the validity of the President’s action. We think both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case.”).

317. See MCDONALD, *supra* note 36, at 296 (noting that although executive orders are supposedly only valid if justified by the Constitution or a statute, most go unchallenged in reality). McDonald notes that from 1941 to 1951, no executive order was

dential directives. Part V discusses the problems that have arisen in attempting to enforce these standards.

### 1. Express Statutory or Constitutional Authority

To have the force of law, a presidential directive must have clear statutory or constitutional authority.<sup>318</sup> Where the claim to authority is based on a statute, the inquiry into the legitimacy of the action tends to be fact-specific and may involve a discussion of whether a delegation of authority was appropriate.<sup>319</sup> This type of claim is the most common manner in which presidents tend to justify their actions.<sup>320</sup> However, where the claim to authority is based on the President's constitutional authority, academics differ on the appropriate basis for presidential action. Some assert that a president may only issue presidential directives in accordance with his enumerated powers in Article II of the Constitution.<sup>321</sup> Others claim that action may be taken based on so-called "inherent

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declared invalid despite the fact that FDR seized aviation plants and shipbuilding companies. *Id.* In addition, every president from Roosevelt to Nixon issued executive orders prohibiting racial discrimination when such an action was not authorized and may have, in fact, violated existing statutes. *Id.* Lastly, Kennedy used executive orders to create and fund the Peace Corps—among other actions—yet no challenge was made. *Id.*

318. OLSON & WOLL, *supra* note 11, at 9 (giving examples of orders with clear constitutional or statutory authority that have been given the force of law). *But see* STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 28 (noting that "temporary Presidential actions" of "doubtful legality" have been taken in times of crisis, despite the general rule that executive orders must have clear constitutional or statutory authority).

319. Proper delegations of authority are governed by the "nondelegation doctrine." A discussion of the nondelegation doctrine is beyond the scope of this article. However, in its simplest form, the principle upheld by the nondelegation doctrine is that, while Congress may delegate discretion in the execution of laws to other branches of the government, it may not delegate its lawmaking responsibilities. *See, e.g.,* *Loving v. United States*, 517 U.S. 748, 758–59 (1996) ("Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties. . . . The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress and may not be conveyed to another branch or entity. . . . "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."") (citations omitted) (third alteration in original).

320. *See* Monaghan, *supra* note 66, at 14 (noting that the exercise of presidential power is usually defended as merely an execution of congressional commands).

321. *See, e.g.,* Blake, *supra* note 194.

powers,” “implied powers,” or an “aggregate of powers.”<sup>322</sup> Despite such assertions that presidential authority may be implied, courts have failed to uphold such a theory and instead require express, not implied, constitutional authority.<sup>323</sup>

*a. Statutory Grant of Authority*

It is virtually undisputed that courts will uphold presidential directives that are based on clear—and appropriate—grants of statutory authority.<sup>324</sup> For instance, President Washington’s Whiskey Rebellion proclamation ordering Americans to cease resistance to the collection of federal excise taxes was upheld, as it had been issued pursuant to a 1792 statute empowering the President to suppress insurgents.<sup>325</sup> Presidential authority supported by statute has been upheld even in some arguably questionable circumstances. For instance, FDR issued an executive order during World War II that required exclusion of all persons of Japanese ancestry from a military area in the west.<sup>326</sup> The order was issued pursuant to an act of Congress stating that ““whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President . . . shall . . . be guilty

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322. STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 28. For instance, Hamilton claimed that President Washington’s neutrality order should be justified as valid under the inherent powers of the presidency. Madison vigorously opposed such an idea. *Id.* Additionally, President Theodore Roosevelt adhered to a “stewardship theory” of the presidency whereby presidents may—and should—intervene for the good of the country, with or without congressional approval. Professor McDonald claims that the presidents have intervened in twenty-five “major industrial disputes without specific legal authorization, or even to the derogation of the law in some instances.” MCDONALD, *supra* note 36, at 295; *see also* Blake, *supra* note 194 (discussing alternative bases for presidential action, such as claims that a president has a duty to the people to act for the public good); Monaghan, *supra* note 66, at 14 (discussing presidential attempts to justify action not based on a statute by claiming inherent powers, implied powers or an aggregate of powers).

323. *See* STUDY OF PRESIDENTIAL POWERS, *supra* note 6, at 28 (noting that the idea of “inherent” executive powers has persisted throughout history, despite the failure of courts to give legitimacy to the idea).

324. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *Conservation Law Found. v. Clark*, 590 F. Supp. 1467, 1477 (D. Mass. 1984) (stating that executive orders are valid if issued “pursuant to either a statutory mandate or delegation of authority from Congress” (quoting *Indep. Meat Packers Ass’n v. Butz*, 526 F.2d 228, 234 (8th Cir. 1975))).

325. OLSON & WOLL, *supra* note 11, at 9 (discussing the Whiskey Rebellion proclamation).

326. *Korematsu v. United States*, 323 U.S. 214, 216–17 (1944).

of a misdemeanor.”<sup>327</sup> Despite the fact that Americans were being excluded from their homes based on their ancestry, the Supreme Court found itself “unable to conclude” that the exclusion “was beyond the war power of Congress and the Executive.”<sup>328</sup>

Cases do not usually revolve around whether or not presidential authority will be respected when the President has exercised discretion at the direction of Congress; it is typically understood that authority will be acknowledged in such circumstances.<sup>329</sup> The question before courts typically focuses on “whether or to what extent Congress did grant . . . such authority’ to the executive branch of the government.”<sup>330</sup> Such authority may be found whether “[c]ongressional authorization for executive orders . . . [was] ‘express or implied.’”<sup>331</sup> If the President did not cite a statute as the basis for his order, the courts (or the government’s lawyers) will often seek a statute on his behalf, thus validating his exercise of power.<sup>332</sup>

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327. *Id.* at 216 (citation omitted).

328. *Id.* at 217. Curfews issued under the same executive order were also upheld, despite the fact that they were aimed only at those of Japanese ancestry. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

329. *E.g.*, *Loving v. United States*, 517 U.S. 748 (1996) (affirming authority of the President to prescribe aggravating factors permitting imposition of the death penalty upon a member of the military, as delegated by Congress); *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311 (D.C. Cir. 1984) (holding that an executive order of the President clarifying the rate-setting authority of the ICC and approving certain contract rates fell within the authority delegated to him under the Alaska Railroad Act); *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980) (upholding statutory authority of the President to issue an executive order prohibiting lawfully residing aliens from serving in the federal competitive service); *Conservation Law Found. v. Clark*, 590 F. Supp. 1467, 1470 (D. Mass. 1984) (holding that executive orders issued under congressional statute had the force of law and enforcing the orders against defendants).

330. *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 168 (4th Cir. 1981) (quoting *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 665 (1976)).

331. *Conservation Law Found.*, 590 F. Supp. at 1477 (quoting *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 465 (5th Cir. 1977)). The court further stated that executive orders have the force of law if they have “‘some basis in an act of Congress.’” *Id.* (quoting *Romero-Barcelo v. Brown*, 643 F.2d 835, 844 (1st Cir. 1981)) (emphasis added).

332. For instance, where the President cites “the authority vested in [him] by the Constitution and statutes, and as President of the United States and Commander in Chief,” the courts have found statutory provisions to support the order. *Kaplan v. Corcoran*, 545 F.2d 1073, 1074 (7th Cir. 1976) (citing Executive Order 10,096, issued by President Truman on January 23, 1950) (alteration in original). The court found that the question of “whether the President had implied powers from the Constitution” did not need to be answered as three statutory provisions “appear” to authorize the President’s executive order and none “appear[s]” to “require a contrary holding.” *Id.* at 1077; *see*

Despite the tendency of the courts to justify the exercise of presidential power where possible, there are occasions when an exercise of authority is deemed invalid. Typically, orders are found invalid where a statutory delegation is determined to be an invalid exercise of legislative authority,<sup>333</sup> where there is no statutory grant of authority to the President,<sup>334</sup> or where a court has not been able to feasibly imply such a grant of authority.<sup>335</sup>

### *b. Constitutional Grant of Authority*

Since courts are reluctant to accept claims of “inherent” presidential power as a valid basis for unilateral action by the executive, the President must base any constitutional claim on an express grant of power. Often, presidents seek to base their authority for action on the Take Care Clause, the Vesting Clause, or the Commander-in-Chief power.<sup>336</sup>

Where there is an express grant of authority, the courts will uphold the right of a president to act on his own. For instance, when President Andrew Johnson issued a Christmas proclamation pardoning those participating in the rebellion, the Supreme Court acknowledged and upheld his express authority under Article II to issue pardons.<sup>337</sup> In contrast, if no express authority is granted and no other claim to power is made, the courts are more dubious about the validity of a presidential directive. However, the cases in which no claim to statutory authority is made are rare. Typically, numerous claims to power are

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*also, e.g., Old Dominion Branch*, 418 U.S. at 273 n.5 (finding presidential authority in a footnote).

333. *See supra* note 319 and accompanying text; *see also, e.g., Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (“Congress has declared no policy, has established no standard, has laid down no rule. . . . If § 9(c) were held valid, 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. . . . Instead of performing its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President.”).

334. *Bldg. & Constr. Trades Dep’t v. Allbaugh*, 172 F. Supp. 2d 138, 160–62 (D.D.C. 2001) (finding that Section 3 of Executive Order 13,202 is not supported by any one of several federal statutes).

335. *Liberty Mut. Ins. Co.*, 639 F.2d at 166 (concluding that, while the regulation upon which an executive order relies grants authority for regulation of government sub-contractors, the scope of this grant did not extend to workers’ compensation insurance contracts).

336. *See Monaghan, supra* note 66, at 14 (discussing the use of the Vesting Clause and the Take Care Clause as a basis for presidential action).

337. *Armstrong v. United States*, 80 U.S. 154 (1871); *see also OLSON & WOLL, supra* note 11, at 9 (discussing Johnson’s Christmas proclamation).

made, including the rarely accepted claim that the President has “inherent” constitutional power.<sup>338</sup>

## 2. Congressional Acquiescence

Presidential directives issued without clear constitutional or statutory authority may be upheld where Congress has later ratified the action. Subsequent enactment by Congress gives the President’s order the force of law if the characteristics of bicameralism and presentment are factors in the congressional action. Congress is held to have ratified the order if it either appropriates funds for enactment of the President’s action, mentions the President’s action in later legislation, or explicitly ratifies the action by an act of Congress.<sup>339</sup> Naturally, Congress has the power not only to ratify the action, but also to overturn it.<sup>340</sup>

First, Congress may ratify a presidential order by appropriating funds for use in carrying out the President’s directive. For instance, the President’s authority to transfer the administration and enforcement of the Age Discrimination in Employment Act (“ADEA”) from the Secretary of Labor to the Equal Employment Opportunity Commission (“EEOC”) was upheld in *Muller Optical Co. v. EEOC*.<sup>341</sup> The district court, basing its reasoning on the Supreme Court’s decision in *Isbrandtsen-Moller Co. v. United States*,<sup>342</sup> held that the transfer was ratified by Congress when it appropriated funds to the EEOC for enforcement of the ADEA.<sup>343</sup> Similar justifications for presidential actions have been given in other cases, such as *EEOC v. Delaware Department of Health & Social Services*, which held that appropriation of funds constituted ratification of a presi-

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338. *E.g.*, *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 620–21 (D.D.C. 1980) (“The gasoline conservation fee at issue in the instant litigation does not fall within the inherent powers of the President, is not sanctioned by the statutes cited by Defendants, and is contrary to manifest Congressional intent. The Court has no choice but to grant Plaintiffs the relief they seek.”).

339. *E.g.*, *Muller Optical Co. v. EEOC*, 574 F. Supp. 946, 953 (W.D. Tenn. 1983), *aff’d*, 743 F.2d 380 (6th Cir. 1984) (“Such Congressional ratification may occur when both Houses of Congress either pass legislation appropriating funds to implement the executive order or make reference to the executive order in subsequently passed legislation.”); *see also, e.g.*, *Swayne & Hoyt Ltd. v. United States*, 300 U.S. 297 (1937); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139 (1937).

340. The Cato Institute study found that 239 executive orders had been modified or revoked by statute through late 1999. OLSON & WOLL, *supra* note 11, at 10.

341. *Muller Optical*, 574 F. Supp. at 954–55.

342. 300 U.S. 139.

343. *Muller Optical*, 574 F. Supp. at 954. The court stressed that the appropriation bills were approved by both houses of Congress and signed by the President. *Id.*

dential order transferring enforcement of the Equal Pay Act of 1963 to the EEOC.<sup>344</sup>

Second, Congress is said to have ratified the action if it approvingly refers to a presidential directive in later legislation. In *Isbrandtsen-Moller*, one of the disputes concerned the validity of an executive order abolishing the Shipping Board and transferring its functions to the Department of Commerce.<sup>345</sup> The Supreme Court upheld the order, noting that the Merchant Marine Act of 1936, enacted after the executive order, referred to the functions of the Shipping Board as “now vested in the Department of Commerce pursuant to § 12 of the President’s Executive Order No. 6166.”<sup>346</sup> Ratification of an order was again upheld in *Swayne & Hoyt, Ltd. v. United States* on the same reasoning.<sup>347</sup> In that instance, plaintiffs had sought to set aside rate schedules of the Secretary of Commerce, alleging that authority to set the rates had not properly been transferred.<sup>348</sup>

Congressional acquiescence may also be implied where Congress has passed legislation of the same “general tenor,” but could not anticipate a specific situation, particularly in the area of foreign policy.<sup>349</sup> The most notable example of this situation occurred in *Dames & Moore v. Regan*, a case stemming from the Iran hostage crisis.<sup>350</sup> The Supreme Court held that previous legislation “closely related” to this type of presidential authority evidenced “legislative intent to accord the President broad discretion” in taking action during the emergency.<sup>351</sup> The presidential orders suspending personal claims against Iranian assets were upheld.<sup>352</sup>

344. *EEOC v. Delaware Dep’t of Health & Soc. Servs.*, 595 F. Supp. 568, 573-74 (D. Del. 1984).

345. 300 U.S. at 143-44.

346. *Id.* at 146-48 (citation omitted).

347. 300 U.S. 297, 300-01 (1937).

348. *Id.* at 300.

349. *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (“[W]e cannot ignore the general tenor of Congress’ legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, ‘especially . . . in the areas of foreign policy and national security,’ imply ‘congressional disapproval’ of action taken by the Executive.”) (citation omitted) (second alteration in original).

350. *Id.* at 662.

351. *Id.* at 678-79 (“On the contrary, the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to ‘invite’ ‘measures on independent presidential responsibility.’ At least this is so where there is no contrary

In some instances, courts have held a complete lack of congressional action to indicate congressional acquiescence to the presidential order. In these instances, congressional indifference to a matter is treated almost like congressional approval. In *Bailey v. Richardson*, for instance, it was held that the President had the authority to establish procedures for "loyalty investigations" of civil service employees.<sup>353</sup> The appellate court held that the "President, absent congressional restriction, may remove from Government service any person of whose loyalty he is not completely convinced."<sup>354</sup> Since no congressional enactment restricted the President's action, the order was legal.

Naturally, Congress may directly ratify an action of the President; it may also overturn the action unless the President's authority stems directly from the Constitution and overrides any congressional authority over the matter.<sup>355</sup> However, it should be noted that overturning a presidential directive requires more than enactment of legislation according to the normal legislative processes. It is not enough for Congress to have enough votes to simply pass a statute overturning the presidential order. It must also have enough votes to overcome the probable presidential veto. This increased difficulty in overcoming presidential orders is another danger inherent in broad executive powers.

### 3. Contradicting Congress

Perhaps the easiest situation to evaluate is one in which the President is found not only to lack constitutional or statutory authority, but also to have acted in contradiction to congressional action. The President has no authorization to act in this type of situation, even in an emergency.<sup>356</sup> As Justice Jackson

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indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.") (citation omitted).

352. *Id.* at 686–88. The Court stated that it was "thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority." *Id.* at 688.

353. 182 F.2d 46, 65–66 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

354. *Id.* at 65 ("It is our clear opinion that the President, absent congressional restriction, may remove from Government service any person of whose loyalty he is not completely convinced. . . . We conclude that the Executive Order before us and the proceedings under it violated no congressional limitation upon the executive power of removal; that no constitutional right was involved in this non-appointment or dismissal; and that, in so far as the circumstances imposed hardship upon the individual, the exigencies of government in the public interest under current conditions must prevail, as they always must when a similar clash arises.").

355. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

356. Monaghan, *supra* note 66, at 24 (noting that the President cannot take an action



stated, presidential action “incompatible with the expressed or implied will of Congress” is presidential power “at its lowest ebb.”<sup>357</sup> If the President’s action is incompatible with the will of Congress, then the only possible justification for the action is that it is based on presidential authority derived from the Constitution.<sup>358</sup> Where such a showing cannot be made, the presidential directive must be overturned.

A few cases have partially overturned actions because the presidential directive, either in part or as applied, contravened the will of Congress without an independent basis for presidential authority. Only three executive orders, however, have been overturned in their entirety. Of these, only one was overturned by the Supreme Court. As discussed above, the *Youngstown* court found that President Truman’s executive order contravened the will of Congress and made a policy decision that should have been left to the legislature in the absence of independent constitutional authority granted to the President.<sup>359</sup> For this reason, the executive order was overturned.

Two other executive orders have been overturned by lower courts. The courts in *Chamber of Commerce v. Reich*<sup>360</sup> and *Building & Construction Trades Department v. Allbaugh*<sup>361</sup> each overturned an executive order on the grounds that it conflicted with the NLRA.<sup>362</sup> In the *Chamber of Commerce* case, decided in 1996, the President made no specific claim of independent constitutional power;<sup>363</sup> instead, he based his primary claim of authority on the Procurement Act.<sup>364</sup> The court rejected the government’s claim that the Procurement Act could support President Clinton’s authority in this instance. It instead

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contrary to the expressed intent of Congress simply by claiming the existence of an emergency) (citing *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804)).

357. *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

358. This analysis was used in *Youngstown*. The Court found not only that President Truman lacked statutory authority, but also that his action ran contrary to congressional action on the subject. *Id.* at 585–86. Therefore, presidential authority derived from the Constitution was necessary to keep the executive order from being overturned. *Id.* at 587. Since such a showing could not be made, the order was held to be invalid. *Id.* at 588.

359. *Id.*

360. 74 F.3d 1322 (D.C. Cir. 1996).

361. 172 F. Supp. 2d 138 (D.D.C. 2001).

362. *Chamber of Commerce*, 74 F.3d at 1339; *Allbaugh*, 172 F. Supp. 2d at 162.

363. The executive order generally cited the President’s authority as derived from “the Constitution and the laws of the United States of America, including [the Procurement Act].” Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (Mar. 10, 1995). However, counsel for the government relied upon the statutory claim of authority in arguing its case.

364. See *Chamber of Commerce*, 74 F.3d at 1324.

determined that, under rules of statutory construction, a recent (but general) statute such as the Procurement Act could not “trump” an earlier (but more specific) directive of Congress found, in this instance, in the NLRA.<sup>365</sup> The court observed that the “later statute displaces the first only when the statute ‘expressly contradict[s] the original act’ or if such a construction ‘is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.’”<sup>366</sup> Accordingly, the Procurement Act could not support the President’s claim to authority in the face of the “unacceptable conflict” with another statute that was found.<sup>367</sup> In the absence of a claim of constitutional authority, no further analysis was necessary. The President, lacking both statutory and constitutional authority, could not issue an executive order that stood in contradiction to congressional policy.<sup>368</sup>

The second of these cases, *Building & Construction Trades Department v. Allbaugh*, overturned an executive order issued by President George W. Bush.<sup>369</sup> Multiple claims of authority were made by the government during litigation, although the Procurement Act was the only specific authority cited by the President in the text of his order.<sup>370</sup> In arguing the case, the government abandoned the argument that the Procurement Act provided support for Section 3 of Executive Order 13,202. Instead, it cited additional statutes and the President’s constitutional power “to supervise and guide subordinate executive officials” as a basis for the President’s authority to issue Section 3.<sup>371</sup> The court, however, rejected the government’s claims that either the cited statutes or the Constitution granted the President authority to issue Section 3 of Executive Order 13,202.<sup>372</sup>

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365. *Id.* at 1333.

366. *Id.* (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976))) (alterations in original).

367. *Id.* To determine whether there was an “unacceptable conflict,” the court turned to the “body of Supreme Court cases that mark out the boundaries of the field occupied by the NLRA. . . . [referred to as] the NLRA ‘pre-emption doctrine.’” *Id.* at 1333–34.

368. Indeed, the *Chamber of Commerce* court deemed President Clinton’s order “regulatory in nature.” *Id.* at 1339. In the words of the *Youngstown* court, the order executed a “presidential policy . . . in a manner prescribed by the President” rather than a “congressional policy . . . in a manner prescribed by Congress.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

369. 172 F. Supp. 2d 138 (D.D.C. 2001).

370. The order cited “the Constitution and laws of the United States of America, including the Federal Property and Administrative Services Act” as authority for the President’s action. Exec. Order No. 13,202, 66 Fed. Reg. 11,225 (Feb. 22, 2001), amended by Exec. Order No. 13,208, 66 Fed. Reg. 18,717 (Apr. 11, 2001).

371. *Allbaugh*, 172 F. Supp. 2d at 158–59.

372. *See id.* at 162.

In the absence of statutory or constitutional authority, the court invalidated Section 3 of the order as “beyond the scope of the President’s authority.”<sup>373</sup>

Unfortunately, what the *Allbaugh* court began correctly, it then concluded imprecisely. The court seems to have bought the plaintiffs’ contention that “the D.C. Circuit [in *Chamber of Commerce*] requires that an Executive Order in conflict with the NLRA is [automatically] invalid under NLRA preemption doctrine and must be enjoined.”<sup>374</sup> In accordance with this view, the last eleven pages of the district court’s opinion are dedicated to determining whether “EO 13202 [is] preempted by the NLRA.”<sup>375</sup> However, the *Chamber of Commerce* court was asked only to evaluate the legality of an executive order that was based upon the Procurement Act and in conflict with the NLRA.<sup>376</sup> The holding cannot be extended further. As discussed above, the court determined that the Procurement Act was essentially “trumped” by the more specific statute on point, the NLRA;<sup>377</sup> therefore, if the President’s claim to authority was found solely in the Procurement Act, his authority was non-existent.<sup>378</sup> Executive orders issued based on other sources of authority were not addressed by *Chamber of Commerce*. For instance, it is difficult to imagine that a court would automatically invalidate an executive order dealing with a military labor issue, but based upon the Commander-in-Chief power.

Presidential directives issued in contravention of the will of Congress are automatically invalid; however, *this is only so* where there is no independent claim of authority by the President. If there is an independent claim of authority by the President, this claim must be evaluated. As Justice Jackson stated, “[w]hen 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.”<sup>379</sup> The President has his own constitutional powers. His authority is not derived *solely* from congressional delegation; therefore, simple contradiction of congressional action is not enough. The President must also lack his own independent authority over the matter. The *Chamber of Commerce* court appears to have caught this caveat, while the *Allbaugh* court missed it.

### C. Other Separation of Powers Jurisprudence

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373. *Id.*

374. *Id.* at 146.

375. *Id.* at 162.

376. *See* *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332–39 (D.C. Cir. 1996).

377. *See id.* at 1333–34.

378. *Cf. id.* at 1332.

379. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

The doctrine of separation of powers has been discussed by the Supreme Court in other contexts and may provide some guidance if the Court is ever asked to clarify its position on presidential power. As is the case with precedents on presidential directives, the line of cases discussing separation of powers is somewhat limited. Some academics have declared that the jurisprudence surrounding separation of powers issues is in "an abysmal state."<sup>380</sup> However, the Court has clearly expressed its resolve to uphold the doctrine of separation of powers. In doing so, the Court has emphasized three main considerations that will be taken into account when addressing a separation of powers issue.

First, the Court has emphasized the "single, finely wrought and exhaustively considered" procedure deliberately fashioned by the Framers.<sup>381</sup> Not only must this procedure be upheld until and unless the Constitution is amended,<sup>382</sup> but courts also note that the current system is one that was put into place by the Founders because they deemed the protection of liberty more important than "efficiency."<sup>383</sup> The Supreme Court has stated:

In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. The records of the Convention and debates in the States preceding ratification underscore the com-

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380. E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 506 (1989).

381. *INS v. Chadha*, 462 U.S. 919, 951 (1982) ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."); see also *Clinton v. City of New York*, 524 U.S. 417, 448-49 (1998) ("Third, our decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution. The Balanced Budget Act of 1997 is a 500-page document that became 'Public Law 105-33' after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may 'become a law.' . . . Something that might be known as 'Public Law 105-33 as modified by the President' may or may not be desirable, but it is surely not a document that may 'become a law' pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution.").

382. *Clinton*, 524 U.S. at 449 ("If there is to be a new procedure in which the President will play a different role in determining the final text of what may 'become a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.").

383. *Chadha*, 462 U.S. at 959.

mon desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President.<sup>384</sup>

Just as “efficiency considerations” have failed to uphold unilateral action by Congress without presentment to the President, so unilateral action by the President cannot be upheld as a constitutional exercise of the executive power. Where there is a balancing test to be performed between efficiency and protection of liberty, the Constitution always falls on the side of liberty. It may be “obviously easier” for action to be taken by the President without consulting Congress in some circumstances; however, the Founding Fathers considered this argument long ago and determined that “other values [ranked] higher than efficiency.”<sup>385</sup>

The second consideration addressed by the Court is similar to the first, and it emphasizes the stated belief of the Founders that preservation of a separation of powers is essential “to preclude the exercise of arbitrary power.”<sup>386</sup> Justice Kennedy recently expressed this sentiment:

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384. *Id.* at 958–59.

385. *Id.* at 959; *see also* *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (“That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

386. *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency *but to preclude the exercise of arbitrary power*. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”) (emphasis added).

Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>387</sup>

Separation of powers is "the absolutely central guarantee of a just Government"<sup>388</sup> and is therefore endorsed and protected "as a vital check against tyranny."<sup>389</sup>

Last, the Court has emphasized that, while separation of powers is necessary, a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."<sup>390</sup> As Justice Brandeis stated, "The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others . . ."<sup>391</sup> Therefore, a law passed by the legislative branch is not valid unless and until the President has had the opportunity to exercise his "limited and qualified power to nullify proposed legislation by veto."<sup>392</sup> In the same way, a court cannot uphold a law that stems solely from the President. Both the President and Congress have their appropriate roles to play in the legislative process.<sup>393</sup> While the Court is unlikely to al-

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387. *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring) (citation omitted) (alteration in original).

388. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) ("The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolute central guarantee of a just Government. In No. 47 of *The Federalist*, Madison wrote that '[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.'") (citation omitted) (alteration in original).

389. *Bowsher*, 478 U.S. at 748 ("The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny." (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976))).

390. *Id.* at 748-49 (quoting *Buckley*, 424 U.S. at 121); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

391. *Myers*, 272 U.S. at 291 (Brandeis, J., dissenting), cited in *Bowsher*, 478 U.S. at 749.

392. *INS v. Chadha*, 462 U.S. 919, 947 (1982).

393. *Cf. Loving v. United States*, 517 U.S. 748, 757-58 (1996) ("Deterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power among three branches, however. By allocating specific powers and responsibilities to a branch

low usurpations of legislative power by the executive, it is equally unlikely to allow a complete exclusion of the President from his proper role in the legislative process.

## V. ATTEMPTS TO CURB PRESIDENTIAL LAWMAKING

Attempts to restrain executive encroachments into the province of the legislature have been few and largely unsuccessful. Those who try to bring cases before courts often find their cases dismissed for lack of standing. Congressional efforts to curb presidential lawmaking have recently increased, but legislation typically fails for a lack of support when it comes time for a vote. Unfortunately, until the American people gather in large numbers and begin to demand reform, the congressmen they have elected are unlikely to give this issue of presidential power the attention that it deserves.

### A. Seeking Judicial Remedies

One of the primary problems with challenging the use of executive power through judicial methods is the likelihood that no court will hear the case.<sup>394</sup> Courts will resolve separation of powers issues; however, they will not mediate "political questions" or disputes that are strictly between the executive and legislative branches.<sup>395</sup> Many cases also suffer from an inability of the plaintiff to

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fitted to the task, the Framers created a National Government that is both effective and accountable. Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking. Ill suited to that task are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control. The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.").

394. Similar problems exist in seeking enforcement of an executive order against another party. In these cases, standing will only be granted if the executive order itself or the statute upon which it is based provides for a private right of action. *E.g.*, *Zhang v. Slattery*, 55 F.3d 732 (2nd Cir. 1995) (holding that there is generally no private right of action to enforce obligations imposed by executive orders, but that a cause of action will be found where a congressional order or the executive order itself creates private rights of action); *see also Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D.S.D. 1995) (holding that presidential memorandum was not judicially enforceable in a private civil suit as it created no enforceable duty and was not based in congressional action); *Watershed Assoc. Rescue v. Alexander*, 586 F. Supp. 978 (D. Neb. 1982) (declining to review case where executive order did not appear to grant a private right of action).

395. *Sterling*, *supra* note 137, at 123 (noting that courts do not usually address the

obtain standing.<sup>396</sup> Even where standing is found, courts may find that an action of the President is not reviewable where the presidential directive was based on a statute committing a decision to the discretion of the President.<sup>397</sup> The reluctance of courts to get involved may best be exemplified by the fact that only three executive orders have been overturned in their entirety.

The most recent case in which a court declined to get involved was *Chenoweth v. Clinton*.<sup>398</sup> In *Chenoweth*, a group of congressional representatives attempted to enjoin implementation of the American Heritage Rivers Initiative created by President Clinton after legislation failed to come to a vote in Congress.<sup>399</sup> The representatives claimed that President Clinton's order "deprived [them] of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation."<sup>400</sup> The court, however, refused to reach the merits, instead relying upon *Raines v. Byrd*<sup>401</sup> and holding that institutional injury to the power of Congress does not grant standing in court.<sup>402</sup> The court held that disputes between the branches should instead be treated as political disputes, as they have been historically.<sup>403</sup>

### B. Congressional Action

Congress has fared only slightly better in its attempts to restrain the executive. Except when faced with a particularly controversial presidential directive, Congress has not been able to effectively propose legislation limiting the scope of presidential power. There are still many members of Congress who do not seem to see the current use of presidential orders as particularly egregious. When a bill limiting presidential directives is put to a vote, it fails to pass. Unfortunately, even if a majority of votes were scraped together and legislation were passed, it would be difficult, if not impossible, to overcome a presidential

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validity of executive orders); William J. Olson, *S. 1795—The Executive Orders Limitation Act*, The Liberty Committee, available at <http://www.thelibertycommittee.org/s1795analysis.htm> (last visited Oct. 26, 2000) (discussing the reluctance of the courts to get involved in "political questions").

396. *Hearing on Executive Orders*, *supra* note 33, at 130 (statement of William Olson, co-author, Cato Study) (discussing the difficulty for plaintiffs in getting claims heard on the merits when they are based on allegedly invalid executive orders).

397. *E.g.*, *Dalton v. Specter*, 511 U.S. 462, 474 n.6 (1994).

398. 181 F.3d 112 (D.C. Cir. 1999).

399. *Id.*

400. *Id.* at 113.

401. 521 U.S. 811 (1997) (failing to find standing when congressmen brought suit claiming that the line-item veto is unconstitutional).

402. *Chenoweth*, 181 F.3d at 115.

403. *Id.* at 113–14.



veto.<sup>404</sup> As a result, it is imperative that President Bush, as well as representatives in Congress, support the initiative to restrain improper presidential action.

While Congress has held hearings in response to particular executive orders, it has been slow to address the issue of presidential directives as a general policy matter.<sup>405</sup> Fortunately, there are signs that Congress may remedy its previous failure to address means whereby the executive may be effectively kept within the constitutional bounds. Whereas previous Congresses have not introduced legislation relating to executive orders except in an attempt to repeal specific presidential policies,<sup>406</sup> bills have been considered in the 105th, 106th, and 107th Congresses. In each Congress, legislation was introduced to place restraints on the use of presidential directives as a general policy matter.<sup>407</sup> These bills focused on such remedies as requiring presidents to specifically cite authority for orders; providing for a thirty-day notice period before orders go into effect; granting standing to congressional representatives, state governments, and individuals affected by an order;<sup>408</sup> and stripping the President of his power to declare national emergencies.<sup>409</sup>

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404. See, e.g., *Curb Government by Fiat*, *supra* note 178 (noting the difficulty of overcoming a presidential veto on a bill curbing executive power); Murray, *supra* note 1 (“In practical terms . . . a confrontation [between branches] . . . would require Congress to pass a bill blocking an order, then muster two-thirds majorities in both houses to overcome a presidential veto of that bill.”).

405. The exception to this statement is a study completed on executive orders in 1972 by a special Senate committee. See *supra* notes 143–46 and accompanying text; see also OLSON & WOLL, *supra* note 11, at 19. The study resulted in the passage of the National Emergencies Act of 1976 (“NEA”), which ended all then-existing states of national emergency and gave Congress the power to end future emergencies by joint resolution. OLSON & WOLL, *supra* note 11, at 19. Congress also passed the International Emergency Economic Powers Act, which limited emergency powers available to the President when the nation is not at war. *Id.* Unfortunately, these acts did not have a long-term impact. No emergency has ever been terminated under the NEA, and many states of emergency are in effect today. See Edwards, *supra* note 2, at 18; Murray, *supra* note 1.

406. See, e.g., Terrorist Elimination Act of 1998, H.R. 4861, 105th Cong. (1998); The Federalism Act of 1998, H.R. 4422, 105th Cong. (1998); The State Sovereignty Act of 1998, H.R. 4196, 105th Cong. (1998); Fairness in Federal Contracting Act of 1995, S. 989, 104th Cong. (1995).

407. The Separation of Powers Restoration Act, H.R. 864, 107th Cong. (2001); The Presidential Order Limitation Act of 2001, H.R. 23, 107th Cong. (2001); The Executive Orders Limitation Act of 1999, S. 1795, 106th Cong. (1999); The Separation of Powers Restoration Act, H.R. 2655, 106th Cong. (1999); H.R. Con. Res. 236, 105th Cong. (1998); see also *supra* note 34 and accompanying text.

408. The hearings on the bills included discussions regarding the ability of Congress to constitutionally expand standing in this area. See Testimony of Elliot Mincberg, *su-*

## VI. RECOMMENDATION AND CONCLUSION

It is virtually undisputed that policymaking by American presidents has grown exponentially in recent years.<sup>410</sup> While the courts and Congress have made tentative attempts to restrain lawmaking by the President, these attempts have, to date, been largely unsuccessful.<sup>411</sup> This is a disgraceful state of affairs. It contravenes the intent of the Founding Fathers, who expected that each branch would keep the others from overstepping their constitutional bounds. Madison once expressed this sentiment: "But ambitious encroachments of the federal government . . . *would be signals of general alarm. Every government would espouse the common cause . . . . Plans of resistance would be concerted.*"<sup>412</sup>

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*pra* note 278, at 60 (answering questions from committee members regarding the constitutionality of granting standing as proposed by H.R. 2655). Professor Minberg opined that Congress had the ability to expand standing, but that constitutional limits would be imposed in terms of ensuring the existence of a "case or controversy" and in granting standing to itself or its members. *Id.*

409. See H.R. 864; H.R. 23; S. 1795; H.R. 2655; see also Heath, *supra* note 129 (discussing legislation in Congress concerning executive orders); Jena Heath, *For Paul, Another Lonely Battle: Texas Congressman Known as "Dr. No,"* AUSTIN AM-STATESMAN, Oct. 30, 1999, at A1 (relating statement of Rep. Ron Paul that Congress should "flex some muscle" and restore the power balance between Congress and the White House); William J. Olson, *H.R. 2655—The Separation of Powers Restoration Act*, The Liberty Committee, at <http://www.thelibertycommittee.org/hr2655analysis.htm> (last visited Oct. 26, 2000); Olson, *supra* note 395.

410. Testimony of Hon. Jack Metcalf, *supra* note 3, at 13 ("[I]t doesn't take an historian, a lawyer or even a politician, to realize that Congress has ceded, to the Executive Branch, its fundamental Constitutional duty. I am alarmed at this action and by what I perceive to be a "culture of deference" within the Capitol. By that I mean we allow the President to in effect legislate through executive orders and proclamations. I find this trend deeply disturbing.").

411. See *supra* Part V.

412. THE FEDERALIST NO. 46, at 333 (James Madison) (Benjamin Fletcher Wright ed., 1996) (emphasis added), *cited in* Sterling, *supra* note 30, at 110. Professor Sterling notes that today's picture of a federal government acting in concert to circumvent the Constitution would be unimaginable to our Founding Fathers. *Id.*; see also Bowman, *supra* note 40, at 118 ("The great security (said Madison) against a gradual concentration of the several powers in the same department consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.").

Columnist Joseph Sobran, in discussing Madison's views in this area, stated:

James Madison observed that liberty is lost more often through gradual encroachments than through sudden revolutions. This is also known as the boiling-frog princi-

Madison was speaking of encroachments on the state governments by the federal government, but the same sentiment should apply when the executive encroaches on the legislative power. Signals of general alarm must be sounded, and they must be sounded now.<sup>413</sup>

The American people endowed the government with power. They now have a duty to ensure that this power is used in accordance with the Constitution granting it such authority. Unfortunately, Americans have largely failed in their duty to keep government limited to its constitutional bounds. In particular, they have failed to rein in the President when he seeks to unilaterally implement policy without congressional approval. Americans fail to demand that Congress rein in the President; instead, they demand that the President act as their “ultimate” benefactor. When Congress proves reluctant, they turn to the President to dispense government bounty. Such demands are remarkably shortsighted. The President dispensing bounty today may be a tyrant tomorrow.<sup>414</sup>

The Founding Fathers instituted separation of powers for a reason: to secure the rights and liberties of the American people.<sup>415</sup> In limiting executive power, the question is not whether a particular policy is reasonable<sup>416</sup> or whether

ple: if the water heats slowly, they say, the frog doesn't notice the fatal increase and fails to jump out in time.

“I don't know about the frogs, but I keep an eye on people, and I've concluded that they'll put up with anything if they can get used to it by slow degrees until they're convinced it's the way things have always been. We've long since passed the point our ancestors would have recognized as the dividing line between liberty and tyranny.”

E-mail from Chuck Muth, Editor, GOP News & Views, to ListMembers (Sept. 10, 2001, 9:42:51EST) (on file with author) (quoting Joseph Sobran).

413. Cf. Kenny, *supra* note 167 (“A long history of abuse of power hardly justifies its continuance . . . . It was, after all, against ‘a long train of abuses and usurpations’ that the colonists issued their Declaration of Independence.”); Starr, *supra*, note 7, at 7 (“If you don't respect our structure of government, the edifice erected at the Founding by our wisest generation, then you do not protect our system of ordered liberty. May we, now in this dawn of the new century, recapture our love for our constitutional system for the structure that has allowed this great Republic to grow and prosper.”).

414. Cf. Bowman, *supra* note 40, at 118 (“It may be said with little fear of contradiction that wherever the separation of powers principle is practiced it promotes limited government, political liberty, and respect for human rights, and that where the separation of powers does not exist, where all power is held either by law or in fact by one monolithic organ of state, the subjects groan, just as in Montesquieu's day, under the weight of tyranny and oppression.”).

415. OLSON & WOLL, *supra* note 11, at 2 (discussing the Founding Fathers' belief that checks and balances and separation of powers serve as a protection from governmental excesses).

416. *Curb Government by Fiat*, *supra* note 178 (“The issue in these actions [of President Clinton] is not the rightness or wrongness of the policies, but the limits to presiden-

a particular President will use power responsibly. Instead, the question concerns what kind of system should be put into place to protect the public from future abuse of power. The importance of making institutional and structural, rather than personal, decisions was emphasized by one Senate Foreign Relations Committee, which eventually apologized for "commit[ing] the error of making a *personal* judgment about how a particular President would [act] . . . [when] [i]t should have made an *institutional* judgment about whether it was appropriate under the Constitution to grant such authority to *any* President."<sup>417</sup> James Madison similarly emphasized the importance of preventing *any* executive from gaining too much legislative power: "'[I]f the equilibrium of the three bodies, legislative, executive, and judiciary, could be preserved, if the legislature could be kept independent, I should never fear the result of such a government, but I could not but be uneasy when I saw the executive had swallowed up the legislative branch.'"<sup>418</sup> America is fast approaching such a point. The equilibrium is beginning to slip, and the executive is on a fast track toward swallowing up the legislative branch. What can be done about it?

Ultimately, the source of change is the American people. Americans must be educated, not only about constitutional structure, but also about the dangers of straying from this structure. Sadly, there are few leaders available to implement this educational task, but perhaps those few congressional leaders aware of the problem or our new President can take advantage of their access to the media to draw attention to this problem.

Once Americans begin to demand reform, it is the duty of Congress and the President to limit their actions within constitutional bounds.<sup>419</sup> As the leader of our country and the head of the executive branch, President Bush should be the first to propose reform for the manner in which presidential directives are used. Particularly now, during this time of war, the President should be careful and deliberate in his use of presidential directives. He should learn from the mistakes of former presidents who used power broadly during times of crisis, only to provide precedents for future, improper expansions of presidential power. President Bush should distinguish between those areas of foreign policy in which he has been given more discretion by the Constitution and those areas of domestic concern in which his power is more limited. Then he should work to

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tial power.").

417. FISHER, *supra* note 55, at xi (citing S. REP. NO. 91-129, at 23 (1969)).

418. *Hearing on Executive Orders*, *supra* note 33, at 128 (statement of William Olson, co-author, Cato Study) (quoting Thomas Jefferson (quoting James Madison)).

419. *Cf.* Statement of Hon. Ron Paul, *supra* note 86, at 31-32 (noting that the Founding Fathers expected each branch to defend itself from encroachments by other branches and that Congress must protect itself since the courts have shown themselves reluctant to rein in the President).

convey that distinction to the American people and to clarify what basis he has for any particular order that he issues.

If President Bush (or any future president) fails to limit himself to his proper sphere of action, then Congress has several tools at its disposal. It should use these tools to protect itself from encroachments by the executive branch. First, it can—and should—be less generous in its delegation of authority. Any delegation of authority should be precise and narrow.<sup>420</sup> Other oversight mechanisms may be implemented,<sup>421</sup> and the possibility of including some presidential action within the purview of the APA may also be considered.<sup>422</sup> Where possible, sunset provisions should be incorporated into bills delegating authority. Such strict restrictions on presidential power will severely limit those presidential orders falling into the first—and broadest—area of presidential authority: orders with express constitutional or statutory authority.

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420. *Hearing on H.R. 3131*, *supra* note 3, at 53–54 (testimony of Thomas B. Griffith, Wiley, Rein & Fielding, Washington, D.C.) [hereinafter Testimony of Thomas B. Griffith] (“To maintain the Framers’ vision of separated powers, Congress must guard its own authority as well, by delegating to the executive no more authority than is essential to accomplish a set task . . . Congress should not be surprised that the executive will fully use any authority delegated by Congress and then some.”); *Hearing on Executive Orders*, *supra* note 33, at 8 (testimony of Douglas Cox, Principal Deputy Assistant Attorney General, Department of Justice) [hereinafter Testimony of Douglas Cox] (discussing the ability of Congress to pass a contrary statute if it disagrees with presidential policy).

421. In addition to responding to contrary statutes with contrary legislation or a lack of funds to finance the presidential policy, it has been suggested that Congress require the President to specifically identify the source of his authority when issuing an executive order. Testimony of Thomas B. Griffith, *supra* note 420, at 53. Others have suggested that there should be a notice period after an executive order is issued. During this time, Congress can review the order and “consider whether a congressional response is necessary.” Testimony of Douglas Cox, *supra* note 420, at 8; *see also* Testimony of Thomas B. Griffith, *supra* note 420, at 53.

422. Interview with Professor Thomas Odom, Oklahoma City University School of Law (Nov. 15, 2000) (suggesting that the APA be extended to the President when executive orders are issued based on statutory delegations of authority). The Supreme Court declined to extend the APA to the President in *Franklin v. Massachusetts*; however, this holding was based on the fact that the Act’s definition of “agency” does not make provision for either the exclusion or inclusion of the President. 505 U.S. 788, 800–01 (1992) (“The President is not explicitly excluded from the APA’s purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed for abuse of discretion.”).

Second, Congress should be diligent both in monitoring executive orders and in speaking to those that it disagrees with as a matter of policy.<sup>423</sup> As it does so, the range of orders that Congress can be said to have “acquiesced” to will be limited.<sup>424</sup> Additionally, where possible, Congress can pass legislation speaking to the amount of independent responsibility that it does or does not expect the President to take in certain areas. For instance, legislation could be passed limiting the situations in which the President may or may not declare a state of emergency. In conjunction with the legislation limiting declaration of an emergency by the President, Congress can mandate that a state of emergency may not be maintained beyond a certain period of time without the express consent of Congress. In this way, the President will not be able to grant himself authority by declaring a state of emergency at will.

Next, Congress can pass legislation granting standing to individuals or businesses harmed by an unconstitutional presidential directive. In some instances, the ability of Congress to constitutionally grant standing may be limited.<sup>425</sup> However, where it can do so, it should consider making such a remedy available.

The increased use of executive orders and other presidential directives is a problem in modern-day America that should not be ignored any longer. Despite the fact that the Constitution does not give any one individual an “executive pen” enabling that individual to unilaterally write his preferred policy into law, Americans, their congressmen and their presidents have acted as if it does. This abuse of power cuts across party lines.

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423. The Founders intended that the branches of government be separate, but “blended” to further protect the freedom of the people. See discussion *supra* notes 54–60 and accompanying text. If Congress appropriately monitors the President’s participation in lawmaking procedures, it merely furthers the goals of the Founders under which different departments are to “be so far connected and blended as to give to each a constitutional control over the others . . . [that freedom might] be duly maintained.” THE FEDERALIST NO. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1996).

424. Of course, part of the problem inherent with the expansive use of executive orders is that it is more difficult to pass a contrary statute overturning an executive order than to pass congressional policy in the first place. This is due in part to the political difficulty inherent in overturning certain policies—i.e. overturning a national monument designation—and also due to the increased likelihood of a presidential veto.

425. A discussion of the issues involved in determining whether standing can be constitutionally granted is beyond the scope of this article. Most likely, some individuals and businesses can be granted standing on a case-by-case basis, but no “congressional standing” can be granted. See *Raines v. Byrd*, 521 U.S. 811 (1997); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999); see also Testimony of Elliot Mincberg, *supra* note 262, at 60–61 (questioning of Mr. Mincberg regarding the issue of standing).

The Republican party is now in control of the presidency and the House of Representatives. It would be a mistake for Republicans—who have complained about the executive orders issued by President Clinton—to now further the problem by issuing unconstitutional orders themselves.<sup>426</sup> Instead, Republicans and Democrats should work together to enforce limits on the use of executive power. Failing to do so may seem harmless to Republicans who now have “their guy” in the White House; however, we, as a nation, should not maintain such a short-term view of the use of executive power. Instead, we should adopt the long-term view of the Founders who, in their wisdom, implemented safeguards to protect the nation against tyranny and arbitrary rule. If we do not, it may be some time before we reap the consequences of our inaction, but as President Rutherford B. Hayes stated, eventually “a Napoleon” will become president, and our nation will then certainly pay the price.<sup>427</sup>

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426. Some have suggested that President Bush should resolve the problems created by Clinton’s excessive use of executive orders by issuing his own executive orders. However, inappropriate presidential lawmaking cannot and should not be justified based on improper precedents set by prior presidents. See, e.g., discussion *supra* notes 103–104 and accompanying text; see also Grigg, *supra* note 104 (“[Some people hope] that a ‘conservative’ Republican President would issue his own executive orders to supersede whatever previous executive orders he disagrees with. Never mind that neither a Republican nor a Democratic President has the authority to legislate.”). However, it is possible that the President may find himself faced with a situation, as with the stem-cell research decision, in which failure to act does not protect the congressional sphere of authority so much as it entails implementation of a policy improperly created by a previous president. In general, President Bush should seek to curb the use of presidential directives as much as possible and should encourage more permanent, legislative solutions; however this task may not always be as easy as it appears on the surface.

427. OLSON & WOLL, *supra* note 11, at 14 (citing WATSON, *supra* note 11, at 930n (citing Interview with Rutherford B. Hayes, President of the United States)).