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LAW AND ORDERS: THE PROBLEM OF PRESIDENTIAL LEGISLATION

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INTRODUCTION

"Separation of powers" is a difficult doctrine. Few principles are so basic to American notions of democracy, yet so misleading. Few principles seem more vital in theory, yet more feeble in practice. Textbooks tell us that the Constitution is founded on a separation of powers; strictly speaking, it is not. In its opinions, the Supreme Court consistently pays homage to separated powers; yet, in its decisions, often ignores them. In their speeches, public officials pay lip-service to this principle; yet, in their actions, work hard to overcome it.

Like so much else in the Constitution, the American brand of separated powers is a compromise¹—a "practical piece of work for very practical purposes"²—a balance between the conflicting values of efficiency and accountability, concentrated power and diffused power. A central concern of the Framers was, of course, to prevent tyranny—to protect individual liberties from the depredations of government. The task was to devise a constitutional system which served their purpose. The liberal political "science" of the eighteenth century, drawing largely on Locke and Montesquieu, seemed to offer a solution.³ If concentrated power encouraged tyranny, it followed that its

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1. Farrand, for example, calls the Constitution a "bundle of compromises." He writes:

"The document which the convention presented Congress and to the country as the proposed new constitution for the United States was a surprise to everybody. No one could have foreseen the processes by which it had been constructed, and no one could have foretold the compromises by which the differences of opinion had been reconciled, and accordingly no one could have forecast the result.

M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 200-01 (1968).

2. *Id.* at 201.

3. That the Framers saw themselves as being engaged in a "scientific" rather than a "theoretical" project is one of the most striking aspects of their work.

opposite—divided and dispersed political power—would discourage it. As Montesquieu wrote: “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate enact tyrannical laws, to execute them in a tyrannical way.”⁴

Madison seemed to concur: “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.”⁵ Rational analysis, then, had suggested a solution: a separation of powers, an allocation of functions to distinct branches of government, coupled with clear rules to prevent one branch’s encroaching on the prerogatives of the others.

Yet this problem could not be dismissed quite so easily. Experience in politics taught the Framers that a strict separation of powers was as likely to promote tyranny as to prevent it. Power, after all, was tied to function. Complete independence in performing designated functions implied unbridled, and possibly abusive, power. Power, then, would not be the “check to power”⁶ that Montesquieu had proposed. Each branch could “spin independently and freely in its own orbit.”⁷

Thus most of the Framers conceded that a rigid separation of powers was unacceptable. Madison, for example, commented on “the impossibility and inexpediency of avoiding any mixture whatever of these departments.”⁸ He went on to embrace the principle of the New Hampshire Constitution, which held that government powers should be separated only as far as “the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.”⁹

Therefore, instead of separated powers—shared powers.¹⁰ Instead of divided government—mixed government.¹¹ Accordingly, Madison was forced to reinterpret Montesquieu, to find in his work support for the idea of shared powers. Thus Madison argued that, in Montesquieu’s call for separated pow-

4. Comment, *Delegation of Legislative Power—the Constitutionality of the Economic Stabilization Act of 1970*, 10 DUQ. L. REV. 431, 432 (1972) (quoting C. MONTESQUIEU, *SPIRIT OF THE LAWS* 151 (T. Nugent trans. 1949)).

5. Madison, *The Federalist*, No. 47, in *THE FEDERALIST PAPERS* 301 (C. Rossiter ed. 1964).

6. Comment, *supra* note 4, at 431 (quoting C. MONTESQUIEU, *SPIRIT OF THE LAWS* 150 (T. Nugent Trans. 1949)).

7. L. FISHER, *PRESIDENT AND CONGRESS* 2 (1972).

8. Madison, *supra* note 5, at 304.

9. *Id.*

10. See K. LOEWENSTEIN, *POLITICAL POWER AND THE GOVERNMENTAL PROCESS* 34-37 (1957). Loewenstein contends that the separation of powers doctrine is “obsolete and devoid of reality.” Instead, shared powers is the basis of liberal constitutionalism in the modern world.

11. FISHER, *supra* note 7, at 241-43.

ers, he “did not mean that these departments ought to have no *partial agency* in, or no control over, the acts of each other.”¹² Rather, Montesquieu meant only that “when 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.”¹³

The product was a constitution, not of separated powers, but of “separated institutions sharing powers.”¹⁴ The institutions of government were formally separated by the stricture that no member of one branch could simultaneously hold office in another.¹⁵ To an extent, the powers of government were separated as well: the three branches were allocated particular functions over which they held primary responsibility. But most importantly, powers were shared. Dual concurrence, for example, was required for policymaking. Through his ability to convene and adjourn Congress,¹⁶ recommend¹⁷ and veto¹⁸ legislation, the President acts formally as a lawmaker.¹⁹ Through its grant of authority and funds, and its exercise of oversight and investigation, Congress contributes to administration. These facts are familiar enough. The key point, however, is this—that it is shared powers, rather than separated institutions, which promotes the value of “checks and balances,” and thus limits the governmental threat to individual liberties.

As a description of the actual functioning of government, then, the term “separation of powers” is quite misleading.²⁰ Indeed, it seems fair to say that the constitutional commitment to this doctrine has been, at best, “vague and uncertain.”²¹ Granting this, what significance does the separation doctrine

12. Madison, *supra* note 5, at 302.

13. *Id.* at 302-03.

14. R. NEUSTADT, *PRESIDENTIAL POWER* 33 (1961).

15. U.S. CONST. art. I, § 6, cl. 2.

16. U.S. CONST. art. II, § 3.

17. *Id.*

18. U.S. CONST. art. I, § 7, cl. 2.

19. President Eisenhower used to assert, “I am part of the legislative process.” See NEUSTADT, *supra* note 14, at 33.

20. Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435, 436 (1974).

21. Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 RUTGERS L. REV. 449, 465 (1958). Indeed, the extent of this commitment has been so vague that we should probably begin to ask some new questions. That is, given the actual commitment to shared powers, how is it that separation of powers became so quickly and deeply entrenched in popular myth? Why do judges, political leaders, and commentators persist in using the term to characterize the constitutional framework? In this regard, it is interesting to look again at THE FEDERALIST, No. 47. There, Madison was concerned to defend the constitution against some of its critics—in particular, against those “more respectable adversaries to the Constitution” who believed that it violated the “political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct.” See Madison, *supra* note 5, at 301. In other words, even then, it was apparent that the Constitution was not strictly enforcing a separation of powers. In his early commentaries on the Constitution Justice Story observed that the framers “. . . endeavored to prove that a rigid adherence to separation of powers in all cases would be subversive

have? Jaffe argues that "separation of powers has probably always been understood to be an expression of a general attitude, rather than an inexorable table of organization. So understood it is a valuable element of political wisdom."²²

Corwin is more precise in analyzing this "general attitude." He adduces three "core principles" in the idea of separated powers: First, that the three functions should be reciprocally limiting; second, that each department should be able to defend its characteristic functions from intrusion by either of the other departments; and third, that none of the departments may abdicate its powers to either of the others.²³

Of course, even this account is a bit loose. The Constitution provides little help in setting strict limits—in defining illegitimate intrusion and abdication. It allocates functions and powers broadly, but leaves considerable room for political struggle. Most of the weapons which it issues to the participants are familiar enough: presidential recommendations, congressional vote; presidential veto, congressional over-ride. Some weapons, however, are at best implicit in the Constitution, but have been developed to great effect by the contending branches. If Congress appropriates too much, the President can impound the funds. If it appropriates too little, he can transfer or reprogram the money from other sources.²⁴ If Congress fails to act at all, the President can often achieve the same result by issuing an executive order. Congress can use its committees and the Government Accounting Office to investigate executive administration; the President may claim executive privilege to resist those efforts.²⁵ Congress can demand to exercise its right to "advise and consent" in foreign policy; the President can establish executive agreements to elude that demand.²⁶ Congress can delegate considerable authority to executive agencies, and then try to control executive actions with committee vetoes, or override them entirely through concurrent resolutions.²⁷ As a last resort, Congress can use the threat of impeachment to curb executive encroachment. Perhaps the

of the efficiency of the government, and result in the destruction of the public liberties." See FISHER, *supra* note 7, at 2 (quoting, 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 396 (5th ed. M. Bigelow 1891)).

22. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 28-29 (1965).

23. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 9 (4th rev. ed. 1957).

24. See Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROB. 135, 147-155 (1972); M. GREEN, WHO RUNS CONGRESS? 116-121 (1975); and Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control over Executive Discretion*, 22 STAN. L. REV. 1240 (1970).

25. See Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. pt. 1, at 1044, p. 2, at 1288 (1965); Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1 (1974).

26. See Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV., 33-44 (1972).

27. See Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

only power which the President lacks is that of dissolving Congress entirely and calling new elections.²⁸

In this paper, we want to look more closely at but one of the weapons in the arsenal of presidential-congressional conflict—the executive order. Executive orders have become the most important means of presidential legislation. As such, they are central to an analysis and critique of separated powers. Many commentators see executive orders as subverting the vitality of the Constitution. For some, they represent a dangerous trend in executive usurpation.²⁹ For others, they reflect a continuing policy of congressional abdication.³⁰ For still others, they are prompted by an inappropriate judicial deference toward the executive.³¹

The popularity of such criticisms, however, should not preclude further analysis. The continuing use of executive orders as a lawmaking tool prompts questions from several perspectives. The constitutional lawyer is likely to ask: Do Presidents have the authority, under the Constitution, to issue executive orders? If so, over what sorts of issues or policy areas? Does Congress have the authority to delegate its powers to the executive branch? If so, according to what standards or guidelines? The political scientist will ask somewhat different questions: First, the analytical problem: What, exactly, do we mean when we speak of “presidential power” in relation to Congress? Then: Has this power increased in significant ways? Have executive orders played a part in that trend? Why has Congress apparently been eager to delegate its legislative power to the executive branch? Finally, the reformer will want to ask: Do executive orders undermine American democracy? Do they violate the dual concurrence which the Constitution prescribed for legislation? If so, what can be done about it?

This paper is an attempt to raise and respond to some of these questions. In examining the constitutional issues, we shall develop a framework for analyzing the validity of executive orders, in general, and then apply it to orders in two specific areas of domestic policymaking, civil rights and economic stabilization. This analysis will suggest a central conclusion: Although the courts generally uphold executive orders, these orders have in some cases been of—at best—dubious constitutionality. On some occasions, Presidents have issued orders without specific statutory authority, only to have the courts find it for them. On others, Congress has delegated power to the executive so broadly that the President has lacked adequate standards with

28. This weapon is not unique to parliamentary systems. The constitution of the French Fifth Republic grants the President the right to dissolve the National Assembly and Senate.

29. See Remmert, *Executive Order 11,246: Executive Encroachment*, 55 A.B.A. J. 1037 (1969).

30. See M. GREEN, *supra* note 24, at 135-138.

31. See Velvel, *Judicial Abdication on Separation Powers: Wage-Price Freeze Act*, 29 NAT'L LAW. GUILD PRAC. 95 (1972).

which to work. The subsequent executive orders have, accordingly, been without clear statutory basis.

In considering the political issues, we shall focus on the role of Congress in national policymaking. In particular, we shall try to explain the congressional policy of broadly delegating legislative power to the executive. Such an account will result from looking at the political incentives faced by individual Congressmen. This analysis will suggest two conclusions: First, that contrary to the conventional wisdom of the 1960's,³² Congress exerts significant influence over national policy. Nevertheless, this fact is to be distinguished from the care it takes in formulating that policy. On this score, the critics of Congress are correct; the legislative branch has been quite lax. Second, in some cases, executive orders are as much a reflection of presidential weakness, as of presidential strength. In other words, Presidents may decide to legislate by executive order when they have failed to move desired bills through Congress. This poses a problem for democratic theory, however, since it is precisely in those instances where the President legislates by order—when he has previously failed or expects to fail in Congress—that executive orders may be least acceptable.

There are two main threats to the doctrine of separated powers—usurpation and abdication. To the extent that any branch falls prey to either of those dangers, the federal government can not be self-limiting. Executive orders, then, are a critical test for the separation doctrine, and a challenge to the integrity of the Constitution.

I

THE CONSTITUTIONAL CONTEXT

A. Background: Definitions and Use

It somehow seems fitting that the first case in modern constitutional law, *Marbury v. Madison*,³³ should have been provoked by an executive order. Executive orders have always been central to the tension between branches of government. Only since the New Deal, however, have they received much popular and scholarly attention.

Interestingly, we still lack a precise definition of executive orders. The only statute on the subject, the Federal Register Act of 1935,³⁴ calls for the publication of all executive orders, but fails to define them. There have been several executive orders providing instructions for the publication of orders and proclamations,³⁵ yet none attempts a definition.

32. See, Huntington, *Congressional Responses to the Twentieth Century*, in *THE CONGRESS AND AMERICA'S FUTURE* 5 (D. Truman ed. 1965).

33. 5 U.S. (1 Cranch) 137 (1803).

34. 49 Stat. 501 (1935), 44 U.S.C. 1505 (1970).

35. The Order currently in effect is Exec. Order No. 11030, 3 C.F.R. 610 (1959-1963) (compilation), *reprinted in* 44 U.S.C. § 1505 app., at 11081 (1970).

Commentators have attempted, without complete success, to remedy this. They have been hard pressed, in particular, to distinguish executive orders from presidential proclamations. One writer, for example, "classifies" as executive orders "all directives of the President which are directed to, and govern actions of, government officials and agencies."³⁶ Such orders, then, have only an "indirect" impact on private citizens. In contrast, presidential proclamations are directed at the individual citizen; they have a "direct" impact.³⁷ But, since Presidents are more limited in their power to command citizens directly, proclamations are almost always hortatory or ceremonial in design. Unfortunately, Presidents do not always follow this neat distinction. President Kennedy's naval blockade of Cuba, for example, was implemented under a presidential proclamation, rather than an executive order.³⁸

There is still a further problem with this definition. In command of a huge federal establishment, Presidents are constantly issuing orders to executive agencies and personnel. Yet, only a fraction of these commands are codified in the Federal Register as executive orders, presumably because of their weightier policy content. Unfortunately, the statutes, executive orders, and commentators all fail to provide any guidance on this question. Indeed, the definition just cited precludes any distinction between verbal and written commands, codified and uncodified executive orders.³⁹ In this paper, we can do little but note these definitional problems. We shall, however, be restricting our analysis to published executive orders with clear legislative intent and impact.

Valuable, brief histories of executive orders have appeared elsewhere.⁴⁰ Several points merit inclusion here. Franklin Roosevelt used executive orders most frequently.⁴¹ Although subsequent Presidents have reduced the number of executive orders, they have broadened their scope. Since Franklin Roosevelt, Presidents have used executive orders to special effect in several policy areas, most notably civil rights, economic stabilization, and the gathering and protection of national security information. In each of these areas, recent Presidents have greatly extended the initiatives originally taken by Franklin Roosevelt.

In the area of civil rights, for example, Roosevelt began in World War II

36. Cash, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME LAW. 44 (1963-1964).

37. *Id.*

38. Pres. Proclamation No. 3504, 3 C.F.R. 232 (1959-1963 Compilation).

39. Cash, *supra* note 36.

40. See Keenan, *Executive Orders: A Brief History of their Use and the President's Power to Issue Them*, in SENATE SPECIAL COMM. ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, 93d CONG., 2d SESS., EXECUTIVE ORDERS IN TIMES OF WAR AND NATIONAL EMERGENCY 20 (Comm. print 1974); Neighbors, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 109-112 (1964).

41. See Keenan, *supra* note 40, at 40-47.

by declaring a national policy of nondiscrimination in hiring for government and defense industries.⁴² This was followed, in 1948, by President Truman's order to desegregate the armed services,⁴³ which led in turn to a series of broader executive orders enforcing nondiscrimination in government sponsored housing programs,⁴⁴ "affirmative action" in minority employment by private businesses working under government contract,⁴⁵ and most recently, even stronger "preferential treatment" in minority hiring by government contractors.⁴⁶

Similarly, modern experience with economic controls can be traced to World War II. Working under the "unlimited emergency"⁴⁷ created by the War, President Roosevelt used executive orders to establish, first, an Office of Price Administration⁴⁸ and then, an Office of Economic Stabilization,⁴⁹ granting them broad authority to regulate prices, wages, and profits.⁵⁰ Almost thirty years later, President Nixon drew on this precedent to create, by executive order, during the relative peace of the 1970's, an even more elaborate bureaucracy for economic controls.⁵¹

Finally, the modern growth of the American intelligence establishment has been authorized almost entirely by executive directive. The Central Intelligence Agency, for example, was established by the National Security Act of 1947. This Act endowed the Agency with primarily "ministerial" functions, but gave the Director of Central Intelligence the authority to "perform such other functions and duties related to intelligence" as the President "may from time to time direct."⁵² Since that time, the intelligence activities of the CIA have been controlled and its administration restructured by a series of presidential directives, only some of which have been made public and codified as executive orders. For example, in 1967, an executive order was used to prohibit the CIA from giving any "covert financial support" to any educational or voluntary organization.⁵³ In 1973, Executive Order 11652 reformed the system for classifying information in the possession of the federal intelligence

42. Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 Compilation).

43. Exec. Order No. 9981, 3 C.F.R. 772 (1943-1948 Compilation).

44. Exec. Order No. 11063, 3 C.F.R. 652 (1959-1963 Compilation).

45. Exec. Order No. 10925, 3 C.F.R. 448 (1959-1963 Compilation).

46. Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965 Compilation). A useful account of presidential use of executive orders in the area of civil rights is R. MORGAN, *THE PRESIDENT AND CIVIL RIGHTS: POLICY-MAKING BY EXECUTIVE ORDER* (1970).

47. Pres. Proclamation 2487, 3 C.F.R. 234 (1938-1943 Compilation).

48. Exec. Order No. 8734, 3 C.F.R. 921 (1938-1943 Compilation).

49. Exec. Order No. 9250, 3 C.F.R. 1213 (1938-1943 Compilation).

50. Exec. Order No. 9328, 3 C.F.R. 1267 (1938-1943 Compilation), placed ceilings on wages and commodity prices.

51. Exec. Order No. 11615, 3 C.F.R. 602 (1971-1975 Compilation); Exec. Order 11627, 3 C.F.R. 621 (1971-1975 Compilation).

52. *Memo Said to Cast Doubts of Legality of CIA's Actions*, N.Y. Times, Feb. 8, 1976, at 1, col. 4, 35, col. 7.

53. Marwick, *Reforming the Intelligence Agencies*, 1 *FIRST PRINCIPLES* No. 7, at 9 (1976).

agencies.⁵⁴ In 1976, President Ford, used Executive Order 11905 to impose a series of restrictions on intelligence activities and enact procedures for rendering the intelligence agencies accountable to the President.⁵⁵ Taken together, the directives in this executive order comprised what the President called “the first major reorganization of the intelligence community since 1947.”⁵⁶

It is apparent, then, that through the use of executive orders, Presidents can initiate important public policies. The question is whether those policy initiatives are constitutional.

B. Sources of Authority

Analysis of executive orders must begin with Article II of the Constitution. This article provides for the executive power of the federal government, but is constructed rather more loosely than article I, which provides for the legislative power. Thus one is forced to wonder whether the vesting of “executive power” in a “President of the United States of America”⁵⁷ merely confers a title or, instead, assigns a broad set of powers. Presidents, themselves, have disagreed in their response. Taft, for example, is associated with a “constitutional theory” of presidential power—a narrow interpretation of article II.⁵⁸ In contrast, Theodore Roosevelt advocated a “stewardship theory” of the Presidency—that “every executive officer, and above all every executive officer in high position, was steward of the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin.”⁵⁹ For

54. *Id.* at 7; Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Compilation).

55. Exec. Order No. 11905, 3 C.F.R. 90 (1976 Compilation).

56. Center for National Security Studies, *President Ford's Intelligence Proposals: A Charter for Abuse*, 1 INTELLIGENCE REPORT 1 (1976). It should also be noted that, between 1960 and 1974, the Federal Bureau of Investigation conducted over 500,000 separate intelligence investigations of American individuals and groups suspected of being subversive. There was no clear statutory authorization for such action. Instead, the Bureau claimed that authority had been provided by a series of presidential measures, including an oral statement by Franklin Roosevelt in 1936, written directives in 1939, 1943, 1950, and 1953, and executive orders in 1953 and 1971. There is some doubt, however, whether any of these measures authorized the specific kinds of investigations undertaken by the Bureau. For discussion of this point, see Theoharis, *The FBI's Stretching of Presidential Directives, 1936-1953*, 91 POL. SCI. Q. 649 (1976); *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 1st & 2d Sess., pt. 2, 2-31, app (1975-1976) (statement of Elmer Staats, Comptroller General); Berman, *The Case for a Legislated FBI Charter*, 1 FIRST PRINCIPLES No. 10, at 3 (1976).

57. U.S. CONST. art. II, § 1, cl. 1.

58. In his book, *OUR CHIEF MAGISTRATE AND HIS POWERS*, Taft wrote: “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.” E. CORWIN, *supra* note 23, at 153 (quoting W.H. TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 139-40 (1916)).

59. *Id.* (quoting T. ROOSEVELT, *AUTOBIOGRAPHY* 388-89 (1919)). Roosevelt goes on to note his “insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. . . . My belief was that it was not only [the President's] right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.”

Taft, the President had power to act only with specific authorization. For Roosevelt, he had power to act whenever there was no specific prohibition against doing so.

Presidents since Franklin Roosevelt, with the possible exception of Eisenhower, all appear to have held to some theory of presidential "prerogative." This is typified by the startling assurance of Franklin Roosevelt that, "In the event that Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act."⁶⁰ The pleadings of Assistant Attorney General Baldrige before the Supreme Court in *Youngstown Sheet and Tube Co. v. Sawyer*⁶¹ and of Presidential Assistant John Ehrlichman before the Senate Special Committee on Watergate⁶² expand on this theme. The claim is that article II confers on the President certain "inherent powers"—a "residuum of power . . . which authorizes him . . . to take such actions as he may deem to be necessary. . . ."⁶³

The courts have been forced to face this claim several times. Their general approach has been interesting. They have consistently invoked the narrow "constitutional theory" of President Taft, yet have often been both generous and ingenious in finding sources of authority for executive action.⁶⁴ The courts have, however, rejected the boldest claims of the "inherent powers" argument. From the set of limitations imposed by the Supreme Court, we can develop an analysis of individual executive orders.

The majority opinion in *Youngstown* provides a useful starting point. The issue was the constitutionality of Executive Order No. 10340, by which President Truman had ordered the Secretary of Commerce to seize and operate most of the country's steel mills in order to avert a nationwide strike of steel workers. Speaking for the majority, Mr. Justice Black was quite explicit in asserting that, "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."⁶⁵

60. Neighbors, *supra* note 40, at 109 (quoting F. Roosevelt's Labor Day Address to Congress, 88 CONG. REC. 7052, 7054 (1942)).

61. The Court asked Mr. Baldrige, "So you contend the Executive has unlimited power in time of an emergency?" He replied, "He has the power to take such action as is necessary to meet the emergency." See Comment, *Inherent Presidential Power: Protection or Usurpation?*, 3 SAN FERN. V. L. REV. no. 1, 59, 63 (1974).

62. *Id.* at 76-81. This argument can actually be traced back to Hamilton, who argued generally that, "Energy in the executive is a leading character in the definition of good government." E. CORWIN, *supra* note 23, at 15 (quoting A. HAMILTON, FEDERALIST No. 70, 198 (Fairfield ed. 1966)). According to Corwin, Hamilton believed ". . . first that the opening clause of Article II is a grant of power; secondly, that the succeeding more specific grants of the article, except when 'coupled with express restrictions or limitations,' 'specify the principal articles' implied in the general grant and hence serve to interpret it. . . ." *Id.* at 179.

63. See Comment, *supra* note 61, at 65 (quoting *Youngstown Sheet & Tube v. Sawyer*, 103 F. Supp. 574 (D.D.C. 1952), *aff'd* 343 U.S. 579 (1952)).

64. See notes 118-124 *infra* and accompanying text.

65. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 585 (1952).

C. Constitutional Authorization

Authorization for executive orders, then, must be either direct or implied in an act of Congress or the Constitution. What are the specific conditions which might confer such authority? Several sections in Article II of the Constitution have been taken to authorize executive orders.⁶⁶

First, of course, is section I—that “executive power be vested in a President of the United States.” We have already mentioned the difficulty of interpreting this clause.⁶⁷ Twentieth century Presidents have typically called for a broad construction of the clause, using it to justify both executive orders without specific congressional authorization⁶⁸ and executive privilege.⁶⁹

The second relevant portion of article II is section II, clause I: “The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states when called into actual service of the United States.”⁷⁰ This clause has been used to justify a number of important executive orders. For example, Franklin Roosevelt’s internment of Japanese Americans appealed specifically to the Commander-in-Chief clause,⁷¹ as did Truman’s order to desegregate the military.⁷² In *Youngstown*, the Solicitor General also invoked the Commander-in-Chief clause.⁷³

A full analysis of the Commander-in-Chief clause and its relevance to presidential law-making is beyond the scope of this paper. Suffice it to say that, in using this clause to authorize executive orders, one must draw several distinctions. First is between military personnel and civilian populations as objects of the order. Second is among *de jure* war, *de facto* war, and peace as timings for the order. Third is between the domestic and foreign arenas as settings for the order. The President’s authority under the Commander-in-Chief clause seems strongest when exercised over military personnel involved in a declared war against a foreign power. It seems more dubious, however, when applied to civilian populations, as with Lincoln’s revocation of habeas corpus,⁷⁴ or Roosevelt’s internment policy,⁷⁵ or during *de facto*, rather than

66. This analysis will attempt to indicate the extent to which specific constitutional provisions offer authority for executive orders. This task is complicated by a basic problem: Presidents often appeal to the supposed authorization of two or more constitutional provisions (often coupled with congressional authorization, as well). In such cases, it is difficult to discern the precise role of the individual clauses.

67. See notes 57-64 *supra* and accompanying text.

68. See 343 U.S. at 587.

69. See note 25 *supra*.

70. U.S. CONST. art. II, § 2, cl. 1.

71. See *Hirabayashi v. United States*, 320 U.S. 81, 85-86 (1943).

72. See note 43 *supra*.

73. In *Youngstown*, however, this appeal to the Commander-in-Chief clause was explicitly rejected. See 343 U.S. at 587.

74. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861); 6 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 18 (1897). See also *The Amy Warwick*, 67 U.S. (2 Black) 635 (1863) (The Prize Cases).

75. See note 71 *supra*.

declared war, as with Truman's seizure of the steel mills.

President Lincoln contended that the Commander-in-Chief clause, combined with the "take care" clause gave him a broad "War Power" to be exercised in times of national emergency. This position was upheld by the Supreme Court in the *Prize* cases.⁷⁶ Succeeding Presidents have adopted Lincoln's constitutional argument, although never acting quite to his extreme. They have been assisted both by Congress' tendency to delegate power generously during times of perceived national emergency, and by its hesitancy to terminate declared emergencies.⁷⁷

The third significant portion of article II is section III, the provision that the President "take care that the laws be faithfully executed. . . ."⁷⁸ There appear to be two basic applications of this clause. First is to create a role for the President as the nation's "administrative chief."⁷⁹ Required by the Constitution to implement specific policies set by Congress, the President may then announce administrative commands through executive orders. Thus, at the least, this clause simply authorizes the President to obey Congress. His authority to issue orders under such conditions is well established. Indeed, it is then at its strongest. As Mr. Justice Jackson observed in *Youngstown*, "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."⁸⁰ When Presidents claim express or implied Congressional authorization for their orders, the orders themselves can be challenged on the grounds that they exceeded the intent of Congress.⁸¹

A broader interpretation of the "take care" clause is possible, however. The clause, it can be argued, authorizes the President not simply to implement specific directives of Congress, but to enforce the laws in general.⁸² Thus the President enjoys considerable freedom to choose which among the panoply of existing laws he will enforce, and when he will enforce them. In the absence of Congressional authorization, the "take care" clause can be used to bolster a theory of presidential stewardship.⁸³ As a result, "The President's

76. See note 74 *supra*.

77. The national emergency declared by Truman during the Korean War, for example, was not terminated until 1976. The National Emergency Act, enacted on September 14, 1976, ended four different states of national emergency, one of which was first declared in 1933. In all, about 470 different statutes and presidential decrees had been enacted under the conditions of these declared emergencies. See *President Signs New Law Ending 4 States of National Emergency*, N.Y. Times, September 15, 1976, at 24, col. 1.

78. U.S. CONST. art. II, § 3.

79. See E. CORWIN, *supra* note 23, at 69.

80. 343 U.S. at 635.

81. The two most notable, successful challenges have been *Youngstown* and *Cole v. Young*, 351 U.S. 536 (1956).

82. See E. CORWIN, *supra* note 23, at 104.

83. In *Youngstown*, for example, the Solicitor General argued that the "take care" clause provided authority for the presidential seizure of the steel mills. See 343 U.S. at 646.

duty 'to take care that the laws be faithfully executed' becomes often a power to make the laws."⁸⁴

The fourth important provision has a somewhat more ambiguous grounding in the Constitution. This is the designation of the President as the sole representative of the United States in foreign affairs—that the President is "exclusively responsible for the conduct of diplomatic and foreign affairs."⁸⁵ This principle has been accepted since at least the 1790's. Yet, the source of this power is still not entirely clear. Is it inherent, constitutionally derived, or delegated by Congress? The Constitution does grant the President some power relevant to the pursuit of foreign policy—most notably, the power to make treaties (with the advice and consent of the Senate),⁸⁶ the power to appoint ambassadors, other public ministers, and consuls,⁸⁷ and the power to receive ambassadors and other public ministers.⁸⁸ At the same time, the Constitution reserves to Congress the right, among others, to regulate commerce with foreign nations.⁸⁹ Thus, despite the tradition of presidential responsibility for foreign affairs, the Constitution clearly grants Congress a major role. One commentator sees it as according to Congress a "coordinate, if not dominant, role in the initiation of war, whether declared or not."⁹⁰ Moreover, "control of commercial policy was largely assigned to Congress, and [the Framers] thought that commercial relations would constitute a major portion of America's overall relations with the world."⁹¹

The President's powers in foreign affairs are greatest in the field of making treaties, as evidenced by the continuing use of executive agreements. Even after the War Powers Act,⁹² the President's ability to wage war, without a formal declaration by Congress, remains formidable. In the field of foreign commerce, however, Presidents have been forced to rely on delegations of power from Congress. There are several examples. Perhaps most prominent is Franklin Roosevelt's proclamation forbidding arms shipments to either Paraguay or Bolivia in 1932, issued under the terms of a Joint Resolution of Congress, and upheld in *United States v. Curtiss-Wright Export Corporation*.⁹³

84. E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 152 (rev. ed. 1973).

85. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950).

86. U.S. CONST. art. II, § 2, cl. 2.

87. *Id.*

88. U.S. CONST. art. II, § 3.

89. U.S. CONST. art. I, § 8, cl. 3.

90. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1, 30 (1973).

91. *Id.*

92. See Allison, *Making War: The President and Congress*, 40 *LAW AND CONTEMP. PROB.* no. 3, at 86 (1976).

93. *United States v. Curtiss-Wright Export Corp.* 299 U.S. 304 (1936); Pres. Proclamation No. 2087, 48 Stat. 1744 (1933-1934).

D. Congressional Authorization

Congressional authorization for executive orders can be either direct or implicit. Direct authorization will typically be expressed in statutory delegations. Implicit authorization has, on occasion, been inferred by the courts from the fact of continued congressional inaction in the wake of executive initiatives. With the former, the problem is to determine the constitutionality of those delegations: does the statute represent an excessive, and thus unconstitutional, abdication of congressional authority? With the latter, the problem is to discern congressional will: does congressional quiescence necessarily imply acceptance of presidential action?

The theory of separated powers would seem to prohibit delegations of power by any branch of government.⁹⁴ Yet, a long line of court decisions upholds the practice of delegation (although often seeming to cling to the principle of non-delegation).⁹⁵ One need not trace this history to demonstrate the validity of delegation. As Fisher observes, one need only look at the debates and performance of the Framers. Thus, at the Philadelphia Convention, it was recommended that the executive carry out such powers "as may from time to time be delegated by the National Legislature." But since the legislative power to delegate was thought to be implicit in the power to carry all laws into effect, this claim seemed superfluous and was omitted. Moreover, delegations were carried out as early as the first Congress, which included, after all, a number of the constitutional Framers.⁹⁶

The problem, then, is to determine, not whether Congress can delegate, but what, exactly, and how much. The courts have continually faced these questions, but their responses have not been entirely consistent. Through the nineteenth century, they simply denied the obvious—that Congress was delegating the power to make law. Thus, they argued, the executive was being empowered simply to find facts or "fill up the details"⁹⁷ of congressional policy. Only in the twentieth century has the Supreme Court taken a different position. The two transitional cases are *Butfield v. Stranahan* (1904) and *J.W.*

94. Commentators have typically seen the non-delegation doctrine as logical corollary of separation of powers. A recent analysis, however, suggests that the origin of the presumption against delegation lies, instead, in the doctrine of constitutional supremacy—the "simple expectation in the constituent act of establishing government that neither the government nor any of its parts should change the constitutional arrangement of offices and powers." See S. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 36-37 (1975).

95. In *Field v. Clark*, for example, the Supreme Court stated, "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." See *Field v. Clark* 143 U.S. 649, 692 (1892). As recently as 1932, the Court observed, "That the legislative power of Congress cannot be delegated is, of course, clear." See *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932). In both cases, the Court upheld the disputed delegations of congressional power.

96. Fisher, *Delegating Power to the President*, 19 J. OF PUB. L. 251, 253 (1970).

97. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

Hampton v. United States (1928).⁹⁸ In *Buttfield*, the Court upheld a broad congressional delegation in the area of foreign commerce, saying, "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."⁹⁹

In *Hampton*, the Court went a step closer toward acknowledging the essentially legislative nature of such delegations. Interestingly, the author of the majority opinion was former President and then Chief Justice Taft, who might have been expected to look with disfavor on broad delegations. Yet it was Taft who drafted the well-known word formula of *Hampton*: "If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."¹⁰⁰

It is, of course, the ambiguity of this formulation that strikes one most. Is Taft saying that, with the incorporation of an intelligible principle, the delegation ceases to be of legislative power? Or is he saying that, even with an intelligible principle, the delegation is essentially legislative, yet still acceptable?

Whatever Taft's precise meaning, the *Hampton* decision led to further rejection of the nineteenth century legal fictions. Most important were the famous New Deal cases, *Panama Refining Co. v. Ryan*¹⁰¹ and *Schechter Poultry Corp. v. United States*.¹⁰² In these cases, the Court actually overturned the congressional delegations in question, but seemed at last to concede that such delegations will inevitably be of legislative power. Having accepted this, it began to set tentative guidelines for delegations. In particular, these cases establish three principles: that delegation of powers must be to other public officials, not to private groups; that Congress must clearly define the policy which it wants implemented; and that Congress must provide standards to regulate the actions of administrative officials.

Standards are the key. Subsequent delegation cases have been decided ac-

98. *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

99. 192 U.S. at 496.

100. 276 U.S. at 409. Some years later, in *Yakus v. United States*, 321 U.S. 414, 424-25 (1943), the Court expanded on this point: "The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective."

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

102. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

ording to the presumed adequacy of the standards incorporated by Congress in its statutes. The function of standards is clear: once delegations have been accepted, standards are essential to preserving at least a semblance of accountability. In *Arizona v. California* (1963), Mr. Justice Harlan elaborated:¹⁰³

The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of power required by the Constitution. First, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. Second, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

Thus there are two avenues of attack on an executive order claiming direct authorization by Congress. The first is to demonstrate that the substance of the order exceeds the terms of the authorization. The second is to challenge the authorization itself, to suggest that the statute contains inadequate standards for guiding executive action. Neither attack is easily sustained. In recent years, several executive measures have been struck down for exceeding the statutory intent of Congress.¹⁰⁴ Since the New Deal, however, none of the many statutes delegating congressional power to the executive has been overturned. In large part, this is because the established standards are quite broad. Indeed, it seems that, given the nature of written law, it would be difficult not to find a statement of policy and standards—an “intelligible principle”—in all congressional statutes. This points to a further problem. The courts have imposed only tentative guidelines; they have set no fixed, clear limits on delegation at all.

In assessing executive orders, the key problem is to discern congressional will. As Chief Justice Stone put it in *Yakus v. United States*, “. . . the only concern of courts is to ascertain whether the will of Congress has been obeyed.”¹⁰⁵ Even in cases of specific statutory authorization, this may be difficult. When Congress has not enacted a statute, it is, of course, even more difficult. Cases of congressional inaction are not infrequent. As we shall see, it is when Congress does not take initiative that Presidents may be most tempted to legislate through executive orders. This creates a paradox: in cases where Presidents are most likely to legislate by order, their authority to do so is least clear.

The courts, however, have devised a means of resolving this paradox. Ingeniously enough, they have found, in congressional inaction, tacit support for independent, unauthorized executive action. This approach—the “acquiescence doctrine”—dates back to *United States v. Midwest Oil Company*

103. *Arizona v. California*, 373 U.S. 546, 626 (1963).

104. See note 81 *supra*.

105. 321 U.S. at 425.

(1915).¹⁰⁶ There, the Court was forced to rule on an executive order designed to withdraw public lands from private acquisition, but promulgated without specific authorization from Congress. Congress, it decided, has long known of similar executive orders. Its continued silence could, therefore, be construed as consent:

Government is a practical affair intended for practical men, and the rule that long acquiescence in a governmental practice raises a presumption of authority applies to the practice of withdrawal by the Executive of lands opened by Congress for occupation. While the Executive cannot by his course of action create a power, a long continued practice to withdraw lands from occupation after they have been opened by Congress, known to and acquiesced in by Congress, does raise a presumption that such power is exercised in pursuance of the consent of Congress or of a recognized administrative power of the Executive in the management of the public lands.¹⁰⁷

This decision is perhaps most interesting for its implicit political theory. It presumes on the side of presidential initiative. By requiring specific prohibitions against, rather than specific authorization for, executive action, *Midwest Oil* moved the Court close to an acceptance of Theodore Roosevelt's stewardship theory.¹⁰⁸

There is a basic problem with the acquiescence doctrine, however. There is simply no good reason to assume that congressional silence does, in fact, imply consent. The Court in *Midwest Oil* assumed that inaction can be taken as a sign of congressional support for executive orders. This seems questionable. American democracy was not meant to be majoritarian; the organization of Congress reflects that design. Congressional policy need not embody majority sentiment. As Choper puts it:

If there is any single axiom that describes the Congress, it is that neither the method for selection of its members nor its actual modes of behavior result in the automatic translation of the majority will into detailed legislation. . . . The result is the possibility, indeed not infrequently the actuality, of minority control over the making of government policy.¹⁰⁹

Choper is worried primarily about the inability of Congress to express the majority of the public's opinion accurately. It is no less true, however, that the structure of Congress may prevent it from expressing the majority of Congress' opinion directly. In particular, the existence of bicameralism, filibuster (ended only by a two-thirds vote for cloture), and a strict division of policymaking labor characterized by deference to committees and, especially, to committee chairmen, provides minorities with ample opportunity to obstruct legislation they oppose. Thus, in any specific instance, the mere fact of

106. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

107. *Id.* at 472, 474.

108. See note 59 *supra* and accompanying text.

109. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 817 (1974).

congressional "failure" to pass a proposed bill need not imply majority opposition to that bill. At the least, any attempt to assess the "will" or position of Congress must probe more deeply to look at forces that may have sidetracked a proposal, or perhaps even to suggest ones that may account for its not being raised in the first place.

Furthermore, to speak of congressional "silence," or "acquiescence," or "will" is to deal in abstractions. The *Midwest Oil* decision, as well as more recent sweeping criticisms of congressional "inertia" tend to reify the concept of Congress, and thus to impede our understanding of its internal politics. Again, silence need not imply some sort of unanimous, or even majority, tacit consent. Instead, it may reflect deep divisions between powerful interests. It is not at all clear that, in such cases, either the courts, or critics, should presume in favor of presidential action. Choper notes, with some dismay, the "negativism" of congressional policymaking. He quotes an observation that "a distinguishing feature of our system . . . is that our governmental structure, institutional habits, and political parties . . . have combined to produce a system in which major programs and major new directions cannot be undertaken unless supported by a fairly broad popular consensus. This normally has been far broader than 51 per cent, and often bi-partisan as well."¹¹⁰ Curiously, Choper seems not even to consider the possibility that this may be a benefit, rather than a cost. It is at least arguable that it is precisely the boldest innovations that require the most deliberate debate and analysis. In most cases, to approve of a broad presidential prerogative may serve only to risk a calamitous policy and to undermine democratic decision procedures.

Of course, one need not concede that congressional slowness is typically beneficial. Yet, even then, it need not follow that the President should enjoy legislative prerogative. In that case, the problem is to weigh the presumed social benefits of the desired policy against the possible costs of evading Congress and undermining democratic norms.¹¹¹

This analysis suggests that the acquiescence doctrine fails to resolve this paradox of presidential legislation. It succeeds primarily in legitimating presidential law-making when it is least desirable. Congressional inaction may reflect a period of policy "incubation,"¹¹² in which new ideas are being considered and consensus is being built. For example, Congress has often been criticized for its failure to intercede earlier and end American involvement in Viet Nam. Yet such criticisms typically overlook the deep divisions within Congress, and the country as a whole, which prevented such action. Throughout the 1960's and early 1970's changing events and membership

110. *Id.* at 830-831 (quoting R. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 10 (1968)).

111. This is the approach taken by Mr. Justice Douglas in *Youngstown*. See 343 U.S. at 633 (Douglas, J., concurring).

112. Polsby, *Strengthening Congress in National Policy-Making*, 59 *YALE L. REV.* 481, 489 (1970).

were altering the components of congressional will. Sweeping attacks on congressional "inertia" may miss this reality of politics. Similarly, until 1964, divisions within Congress prevented the passage of substantial legislation on civil rights. A series of Presidents, however, felt compelled to take innovative action in this area, and as the next section will show, the courts uniformly supported their moves.

Executive orders are clearly important for American politics and policy, and have frequently been considered by the courts. Yet the bases by which they may be authorized have rarely been analyzed closely. Mr. Justice Jackson's formulation in *Youngstown* remains the most definitive account.¹¹³ It was the purpose of this section to elaborate Jackson's analysis somewhat—to develop a framework with which to assess the constitutionality of such orders. It remains to apply that framework to specific cases.

E. Executive Orders and Usurpation: The Case of Civil Rights

Not until 1964 did Congress enunciate a national policy on civil rights. In the thirty years before that, policy in the field was made by the President and Supreme Court. The standard presidential policymaking tool was the executive order. Initiatives were first taken by Roosevelt and Truman to desegregate the military services. Their orders initially concerned military personnel in times of declared war and national emergency.¹¹⁴ These initiatives were then extended to affect civilian groups in peacetime. These included orders calling for, first, nondiscrimination,¹¹⁵ then, affirmative action, in employment by government contractors,¹¹⁶ and later, nondiscrimination in filling government funded housing.¹¹⁷

The passage of the Civil Rights Act of 1964 is significant for the analysis of the executive orders in this field. Before 1964, orders concerning civil rights were promulgated without specific congressional authorization. In considering the validity of such orders, the task is to determine, first, whether Presidents possessed sufficient constitutional authorization for their actions, and second, whether any related statutes, or even congressional inaction, can be construed as providing direct or implied authorization of executive action. For orders issued after 1964, the task is to determine whether Presidents exceeded the statutory guidelines set out in 1964. Brief analysis of a pre-1964 executive order will reveal some of the constitutional and political problems associated with them.

On March 6, 1961, John Kennedy issued Executive Order No. 10925. This

113. See 343 U.S. at 635-638 (Jackson, J., concurring).

114. See notes 42-43 *supra*.

115. Exec. Order No. 10,590, 3 C.F.R. 237 (1954-1958 Compilation).

116. See note 45 *supra*.

117. See note 44 *supra*.

order replaced the Committee on Government Employment Policy and the Government Contract Committee with a Presidential Committee on Equal Employment Opportunity. The purpose of the order, and its Committee, was to enforce a policy of nondiscrimination in both government employment and private employment conducted under government contract. The order went beyond previous orders of nondiscrimination. It gave the Committee broad powers to investigate the employment practices of contractors, and to punish them if they failed to comply with employment regulations. It required, for the first time, that both government contractors and agencies go beyond mere nondiscrimination in hiring. It ordered them to take "affirmative action" to equalize employment opportunities for minorities.¹¹⁸

The President's decision to rely on an executive order rather than congressional legislation is readily explained. For him, civil rights was essentially a moral issue; yet, it was just as clearly a political problem. During the 1960 election campaign, he had sought to cement the New Deal Democratic coalition with a pledge of leadership in civil rights. After his inauguration, however, he failed to include civil rights recommendations in his legislative program. His reasons were clear: he feared a loss of support from Southern Democrats for policy proposals which held a higher priority in the White House. At a press conference in March 1961, he described the problem. There were, Kennedy contended, a "good deal of things we can do now in administering laws previously passed by the Congress, particularly in the area of voting, and also by using the powers which the Constitution gives to the President through executive orders." He added, "When I feel that there is a necessity for a congressional action, with a chance of getting that congressional action, then I will recommend it to Congress."¹¹⁹ Thus, in acting through an executive order, the President was honoring a campaign pledge which he could not expect Congress to heed. In fact, it was not until June 1963, that Kennedy, at last, submitted civil rights proposals to Congress. This was in response to confrontations over the admission of blacks to the University of Alabama. He sensed, apparently, that Congress could not, in such a crisis, avoid taking action. As he put it, "The events in Birmingham and elsewhere have so increased the cries for equality that no city or state or legislative body can prudently choose to ignore them."¹²⁰

Under closer to normal conditions, however, Congress could not be expected to act. Executive Order No. 10925 provided the desired policy despite a reluctant Congress. An analysis of its validity is complicated by one factor: The Executive was quite vague in specifying its presumed bases of authoriza-

118. See R. MORGAN, *supra* note 46, at 46-47.

119. The President's News Conference of March 8, 1961, 1961 PUB. PAPERS. 152, 156-57.

120. Special Message to the Congress on Civil Rights and Job Opportunities, June 19, 1963, 1963 PUB. PAPERS. 483, 483.

tion. It appealed only to the "Constitution" and "statutes" of the United States. As a result, the courts, when considering this order, were forced to infer specific sources of authorization.

The order's reference simply to the "Constitution" suggests a broad interpretation of executive powers. Since there is not even a hint of national emergency in the terms of the order, the Commander-in-Chief clause does not seem to apply. Nor, of course, does the President's inherent power in foreign affairs. This leaves the "executive power" and "take care" clauses as possible bases for issuing the order.

Discerning sources of statutory authority for the order is even more difficult. Since the order appeals to "statutes," albeit vaguely, direct authorization must be found. The courts considered Executive Order No. 10925 twice, in *Farmer v. Philadelphia Electric Company* (1964),¹²¹ and in *Farkas v. Texas Instrument, Inc.* (1967).¹²² In both cases, they upheld the order, finding adequate statutory authorization for it in the Federal Property and Administrative Services Act of 1949.¹²³ There, Congress stated its policy: "It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for the (a) procurement and supply of personal property and nonpersonal services, including related functions such as contracting . . ." ¹²⁴ To this end, it delegated powers to the President: "The President may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the administrator and executive agencies in carrying out their respective functions hereunder."¹²⁵ From this, the courts in *Farmer* and *Farkas* concluded that the President had adequate authority to establish regulations governing the hiring practices of government contractors.

There are several problems with this ruling. First, a closer look at the 1949 Act indicates that its policy aims are quite different from those of the executive order. The 1949 Act was designed specifically to rationalize property management by the federal government, that is, to "simplify the procurement, utilization, and disposal of government property. . ." ¹²⁶ Executive Order No. 10925, in contrast, was concerned only incidentally with the procurement and management of property and services. Its essential aim was to promote social equality, a worthy enough goal, but not one contemplated by the 1949 Act. The language which the Court of Appeals used in its decision in *Farkas* seems to reveal its own ambivalence on this point:

121. *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3 (3d Cir. 1964).

122. *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967).

123. 63 Stat. 377 (1949) (codified in scattered sections of 40, 41, 44, 50 app. U.S.C.).

124. 40 U.S.C. § 471 (1970).

125. 40 U.S.C. § 486(a) (1970).

126. 63 Stat. 377 (1949).

We would be hesitant to say that the antidiscrimination provisions of Executive Order No. 10925 are so unrelated to the establishment of "an economical and efficient system for . . . the procurement and supply of property and services," 40 U.S.C.A. 471, that the order should be treated as issued without statutory authority We, therefore, conclude that Executive Order No. 10925 was issued pursuant to statutory authority, and has the force and effect of law.¹²⁷

Thus the court seems to be conceding that the Order is, in fact, unrelated to the aims of the 1949 Act, but apparently not so unrelated as to have denied authority to the executive order. Unfortunately, the court did not suggest how unrelated an order would have to be before it could be said to have violated the intent of the 1949 Act.

Second, the 1949 Act sought to simplify government procedure; it empowered the President to prescribe only such measures as would establish an "economical and efficient" system for procuring property and services. Yet, it is arguable that affirmative action only complicates the procurement of services—that it is uneconomical and, for that reason, inefficient.¹²⁸ Affirmative action, after all, imposes search costs on the contractor. He must advertise the project and interview minority personnel. He may then be forced to provide special training. One can reasonably expect these increased costs to be passed on to the government in the form of higher bids by the contractors. If this argument is correct, it suggests that the policy embodied in Executive Order No. 10925 is actually inconsistent with the provisions of the Federal Property and Administrative Services Act. In that case, the order could not properly be said to have direct congressional authorization.

Third, on several occasions, Congress had been forced to respond to earlier executive initiatives in civil rights. Its judgment had consistently been negative. In 1951, for example, it had expressly refused to continue the Fair Employment Practices Committee, which had been created in 1941 by Franklin Roosevelt's Executive Order No. 8802. Some years later, Congress refused to provide support for the Committee on Government Contracts, which had been created in 1953 by Executive Order No. 10479. In the three years between the promulgation of Executive Order No. 10925 and the decision in the *Farmer* case, Congress continued to deny support for the presidential initiative. In *Farmer*, the court conceded these points. It observed:

. . . Congress has not directly appropriated any money for carrying out the policies announced in the executive order. A report by the Committee on Government Contracts notes that attempts to secure some form of congressional sanction for the program failed in the 1958-59 session and were defeated at both the regular and special session in 1960.¹²⁹

127. 375 F.2d at 632, n.1.

128. In reply, it could be argued that the short-term costs of the program might yield greater long-term benefits by reducing unemployment and economic unrest among minority groups.

129. 329 F.2d at 8, n.9.

Thus the response of Congress to executive actions in civil rights, from 1950 to 1964, can hardly be characterized as one of "acquiescence" or tacit consent. Accordingly, it would be difficult indeed to discern some form of implicit congressional authorization for Executive Order No. 10925.

The remaining question is whether the President possessed sufficient constitutional authority to act independently of Congress. President Kennedy apparently believed that the "executive power" and "take care" clauses conferred upon him adequate authority to issue the order. Indeed, it is arguable that his responsibility under the "take care" clause to implement the spirit of the Fifth and Fourteenth Amendments obliged him to act. Unfortunately, this issue was neither raised before nor addressed by the courts in either *Farmer* or *Farkas*.

In the end, the courts based their support of the executive order on a finding of adequate statutory authority. This analysis has suggested that these courts were ingenious, but possibly incorrect, in their finding. As we have seen, the statute which was supposed to have provided the necessary authority was originally intended for quite different purposes. Moreover, the executive order may actually have violated the expressed will of Congress in two ways. First, it could, with some justification, be said to have violated the standard of "economical and efficient" procurement of services set by the Federal Property and Administrative Services Act. Second, it appears to have violated the negative opinion on civil rights which Congress had made manifest in the years immediately preceding the executive order.¹³⁰

This point is perhaps most important. The essential task of the courts, after all, is to determine if the will of Congress has been obeyed. In *Youngstown*, for example, the Supreme Court had relied heavily on its observation that, when Congress had debated the Taft-Hartley Act in 1947, it had explicitly refused to give Presidents the power to seize factories.¹³¹ Similarly, Congress had expressly refused to support the presidential policy on civil rights. These actions represent a more direct congressional commentary on civil rights than the provisions of the 1949 Act on property procurement. Accordingly, there is some reason to question the validity of the statutory authorization found by the courts for Executive Order 10925.

This executive order was promulgated in the famous "zone of twilight" described by Jackson in *Youngstown*.¹³² Congress and the President clearly have concurrent authority to make policy in the area of fair employment. Yet, since the President expected to be denied the concurrence required for law,

130. One commentator wrote: "Congress has expressly refused to continue the FEPC [Fair Employment Practices Commission] and has declined to enact antidiscriminatory legislation. For the executive to attempt to reach the same result by indirection, through the Government contract device, is an unconstitutional attempt to legislate where Congress has refused to do so. See Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 VIRGINIA L. REV. 857 (1957).

131. See 343 U.S. at 586.

132. *Id.* at 637-38 (Jackson, J., concurring).

he attempted to legislate unilaterally through an executive order. Morgan describes the circumstances: "While there was insufficient support for fair employment legislation to overcome inertia and the procedural obstacles in both houses of Congress, there was also insufficient congressional opposition to discourage the President from acting."¹³³

Thus it is in this "zone of twilight" that Presidents will be most tempted to make policy through an executive order. As Jackson observed, ". . . congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."¹³⁴ Yet, it is also in such circumstances that presidential authority to make law is least clear.

In this case of Executive Order No. 10925, in particular, President Kennedy may actually have gone farther, by defying the will of Congress expressed in 1957, 1959, and 1960.¹³⁵ Accordingly, his authority would seem weaker still. As Jackson continued: "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."¹³⁶ With this executive order, there was no question of the right of Congress to act as it did. As a result, Kennedy's power to issue the order would seem to have been "at its lowest ebb"—so low, in fact, that to sustain the order, the courts were forced to find a basis of authorization in a largely unrelated statute.

This analysis of Executive Order No. 10925 illuminates some of the problems of presidential legislation. First, it suggests the power of the executive order as a policymaking tool. It provides Presidents with great latitude to achieve their political goals despite a divided or reluctant Congress. Second, it reveals one of the basic tensions of the American constitutional system—a tension often confronted by the courts. That is between the requirement of adherence to constitutionally mandated procedures for legislative decisionmaking and the demand for prompt, efficient achievement of desired public goals. The hopes of the nation often rest with the President; it is the task of Congress to realize those hopes. Yet, as Mr. Justice Douglas noted, "Legislative action may . . . often be cumbersome, time-consuming, and apparently inefficient."¹³⁷ The result is often deadlock, with presidential legislation seeming to provide an attractive solution. That apparent inefficiency of the legislative process, however, is simply a "price" which "we pay . . . for our system of checks and balances, for the distribution of powers among the three branches

133. R. MORGAN, *supra* note 46, at 58.

134. 343 U.S. at 637.

135. *See* notes 129-130 *supra*.

136. 343 U.S. at 637.

137. *Id.* at 629 (Douglas, J., concurring).

of government.”¹³⁸ In return, we gain some assurance that different positions will be heard, that conflicting interests will be reconciled into coalitions, that a consensus will be formed. Most importantly, we gain some protection against arbitrary executive action. When the courts are too eager to provide justification for presidential policymaking, they both undermine these constitutional norms and encourage continued, and possible excessive, executive action.

In the field of civil rights, presidential action came perilously close to usurping the legislative prerogatives of Congress. When these initiatives were challenged, they found support in the courts. Often, however, Congress itself encourages far-reaching presidential policymaking by delegating legislative power to the President and his subordinates. On occasion, such delegations have seemed almost to represent an abdication of congressional power and responsibility.

F. Executive Orders and Abdication: The Case of Economic Stabilization

Since the New Deal, regulation of the economy has become a basic task for the federal government. The National Industrial Recovery Act of 1933 was the first major attempt to control aspects of the national economy.¹³⁹ This was followed by extensive programs of wage and price controls during both World War II¹⁴⁰ and the Korean War.¹⁴¹ Most recently, from 1971 to 1974, the Nixon Administration conducted an even more elaborate, four phase program of economic controls, an effort unprecedented in peacetime.

Each of these programs was made possible by congressional action—in particular, by broad delegations of policymaking authority to the President or other executive branch administrators. Three of these delegations were challenged in the courts. The delegation involved in the NIRA was overturned by the Supreme Court in the *Schechter* case. The Emergency Price Control Act of 1942¹⁴² and the Economic Stabilization Act of 1970¹⁴³ were both upheld. The issue, in each case, was essentially the same: did Congress impose clear limits on the power it delegated? Did it provide standards adequate to guide executive branch action, to prevent arbitrary presidential decisions, and to hold both Congress and the President accountable before the public and courts?

A brief look at the most recent such delegation—the Economic Stabilization Act of 1970—is useful for the study of executive orders. The legislative history of the Act suggests some of the reasons for Congress’ tendency to delegate broadly. An analysis of the court challenge to this delegation pro-

138. *Id.* at 633.

139. 48 Stat. 195 (1933-34).

140. *See* Emergency Price Control Act of 1942, 56 Stat. 23 (1942).

141. *See* Title IV, Defense Production Act of 1950, 64 Stat. 798 (1950).

142. *Yakus v. United States*, 321 U.S. 414 (1943).

143. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

vides further evidence of the means which the courts have found to sustain the policies effected by Presidents through executive orders.

Beginning in the late 1960's, the American economy entered a period of severe inflation, as high consumer demand combined with the pressures of the Viet Nam war to push prices rapidly upward.¹⁴⁴ Calls for some form of wage and price controls were quickly heard, but were ignored by the Executive. The arrival, in 1969, of a Republican President provided the opportunity for fresh approaches to cure these economic ills. But this opportunity was not taken. In fact, in a radio address of June 1970, President Nixon emphatically ruled out a wage and price freeze, arguing: "I will not take this nation down the road of wage-and-price controls, however politically expedient they may seem. They only postpone a day of reckoning, and in so doing they rob every American of an important part of his freedom".¹⁴⁵

Nevertheless, demands for more decisive measures continued, and began to take root in Congress. In March 1970, the Joint Economic Committee called for more active presidential restraint of wage and price increases. In May, the Chairman of the House Banking Committee, Wright Patman, wrote to the President, offering "to give you any tools which you feel are needed to bring the current economic situation under control."¹⁴⁶ In August, legislative steps were taken. In a measure remarkable for its delegating power both so broadly and with so few words, Congress gave the President authority to initiate wage and price controls. The sections of the Economic Stabilization Act which accomplish the delegation are as follows:

Section 202. Presidential Authority—(a). The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970. Such orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities.

Section 203. Delegation—The President may delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he may deem appropriate.

Some months later, Section 202 of the Act was amended to include an additional stricture:

(b). The authority conferred on the President by this section shall not be exercised with respect to a particular industry or segment of the economy unless the President, after taking into account the seasonal nature of the employment, the rate of employment or underemployment, and other mitigating factors, determines that prices or wages in that industry or segment of the economy have increased at a rate which is grossly disproportionate to the rate at which prices or wages have increased in the economy generally.¹⁴⁷

144. This account is taken largely from L. SALAMON, *THE MONEY COMMITTEES* 311-390 (1975).

145. *Id.* at 313.

146. *Id.* at 315.

147. Comment, *supra* note 4, at 453-454.

The ostensible aim of the Act was to give the President those policymaking tools which Wright Patman had offered him in May. But Nixon had already indicated his dislike for such tools. Moreover, the law only authorized him to act, it did not require anything of him. Thus there was surely another motivation for the Act. As one commentator explains it:

The idea, in short, was to put the President on the spot, to place squarely on his shoulders the politically unpopular chore of imposing wage and price controls while relieving the Democrats of any responsibility for the state of the economy in anticipation of the upcoming November 1970 elections.¹⁴⁸

Whatever the reasons behind the bill, the dangers of the measure were readily apparent. The President's own Federal Reserve Board Chairman, Arthur Burns, argued before a congressional committee, "You are giving too much power to the President under this legislation. You are giving the President virtually dictatorial power."¹⁴⁹ Senator William Proxmire complained that the law gave the President "unprecedented power to control wages and prices with virtually no congressional standards or criteria on how the authority should be used and no legal safeguards for affected parties."¹⁵⁰

For almost a year, the President refused to exercise the power granted him. In the meantime, Congress amended and extended the Act.¹⁵¹ Finally, on August 15, 1971, the President surprised the country and Congress by taking action. He declared a ninety-day freeze on all non-agricultural wages and prices and created a Cost of Living Council to administer the program.¹⁵² On October 15, 1971, through another executive order, he created additional administrative machinery to implement the stabilization program.¹⁵³

This "New Economic Policy" was quickly challenged in the courts. A national trade union, the Amalgamated Meat Cutters, realized that the freeze would prevent implementation of a wage increase which it had won for its members through collective bargaining in 1970. Accordingly, it brought suit before a three judge District Court to have the original Economic Stabilization Act and Executive Order No. 11615, which was issued under it, overturned.¹⁵⁴ The Act, the union argued, was unconstitutional because it vested "unbridled legislative power in the President"; it was a "naked grant of authority" to determine whether wages and prices "will be controlled, and the scope, manner and timing of those controls."¹⁵⁵ The "net result" of the delegation, it

148. SALAMON, *supra* note 141, at 316.

149. *Id.* at 322.

150. *Id.* at 327.

151. *See* note 147 *supra*.

152. *See* note 51 *supra*.

153. *Id.*

154. *See* note 143 *supra*. (This was the only court to address the constitutionality of the Economic Stabilization Act).

155. 337 F. Supp. at 745.

contended, was "a legislative initiation of control by bare executive fiat, with completely unlimited authority put at the disposal of the President."¹⁵⁶

Writing the opinion of the court, Judge Harold Leventhal rejected the claims of the union. The union's charge, he conceded, was "a formidable fusillade, devastating verbally and not without force analytically."¹⁵⁷ In this congressional act, he admitted, "The Rule of Law [had] been beleaguered." But, he insisted, it had not been "breached."¹⁵⁸ As Leventhal noted, the Constitution does not forbid every delegation of legislative power. "The problem," rather, "is one of limits."¹⁵⁹ More precisely, he argued, borrowing language from *Yakus*, "The issue is whether the legislative description of the task assigned 'sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.'"¹⁶⁰ "Under these governing concepts," the court concluded, "we cannot say that there is such an absence of standards that it would be impossible to ascertain whether the will of Congress has been obeyed."¹⁶¹

The standards which the court found were both explicit and implicit in the Act. The explicit standards were found in Sections 202(a) and 202(b) of the law: the President could not stabilize wages and prices at any level lower than that prevailing on May 25, 1970; he was allowed to make "such adjustments as may be necessary to prevent gross inequities"; he was not to single out any industry or sector of the economy, unless he found that price or wage increases in that industry or sector of the economy were "grossly disproportionate" with those in the economy as a whole.¹⁶² Implicit standards could be deduced from several sources, including the legislative history of the 1970 Act, and the legislative and judicial experience with the 1942 and 1950 programs. Finally, several other limits on executive action could be found. First, the statute itself was self-terminating. Unless Congress chose to extend the Act, the President's authority would automatically end on April 30, 1972.¹⁶³ Second, the court found "implicit in the Act" a "requirement that any action taken by the Executive under the law, subsequent to the freeze, must be in accordance with further standards developed by the Executive."¹⁶⁴ To be sure, the court admitted, "This 1970 Act gives broadest latitude to the Executive." Yet, it also implies "an on-going requirement of intelligible administrative policy that is corollary to and implementing of the legislature's ultimate

156. *Id.* at 755.

157. *Id.*

158. *Id.*

159. *Id.* at 745.

160. *Id.* at 746.

161. *Id.* at 747.

162. See note 147 *supra* and accompanying text.

163. 337 F. Supp. at 754.

164. *Id.* at 758.

standard and objective.”¹⁶⁵ Finally, the decisions of the administrative agencies created by the executive order would be subject to judicial review under the Administrative Procedure Act.¹⁶⁶

Several points can be made about this court’s decision. First, the court may have overstated the extent to which the Act “marks the field within which the Administrator is to act . . .”¹⁶⁷ The initial standard involves the level of stabilization. Prices cannot be set lower than their level of May 25, 1970. But it is important to recall that the law was not passed until August 1970, and that the President did not act under it until a year later—almost fifteen months after the date of the May 25, 1970 price floor. In that time, prices had risen by approximately six per cent. The President could hardly be expected to roll back wages and prices. In short, the price floor stated in the Act, long since surpassed by the reality of inflation, provided very little guidance to the President. The President, moreover, was granted complete freedom over the timing of controls and the ceiling levels he could impose.

The other explicit standards seem only slightly more restrictive. For example, in Section 202(a), the President is not required to prevent “gross inequities”; he is simply allowed to do so if he so chooses. As the Act puts it, his regulations “*may* provide” for the prevention of gross inequities. Moreover, Congress offered no definition of the term, “gross inequities”; the President, apparently, is to determine its meaning. Similarly, the court stressed the requirement in Section 202(b) that the President not single out any industry or sector of the economy for controls. But this clause also contains the broad loophole that the President may single out an industry if he determines that its rate of increase in prices or wages has been “grossly disproportionate” to that in the economy as a whole. Again, the definition of “grossly disproportionate” is left entirely to the President.¹⁶⁸

In the end, the court seems to have been most influenced, not by these explicit standards, but by other factors from which it could infer an exercise of legislative will and construct a set of implicit standards. From a reading of the legislative history, for example, it concluded that Congress had deliberated this measure fully, and decided simply that maximum flexibility was needed for an effective attack on inflation. Thus, the court stated, “We cannot say that this delegation was unreasoned, or a mere abdication to the Pres-

165. *Id.* at 759.

166. *Id.* at 759-60.

167. *See* note 160 *supra*.

168. These key terms of the Act—“inequities” and “disproportionate”—are open to a variety of reasonable definitions. Mr. Justice Roberts noted this problem in his dissent in *Yakus*. There, speaking of similar words in the Emergency Price Control Act, he commented: “It hardly need be said that men may differ radically as to the connotation of these terms and that it would be very difficult to convict anyone of error in judgment in so classifying a given economic phenomenon.” 321 U.S. at 449-50.

ident to do whatever he willed."¹⁶⁹ It should be noted, however, that in interpreting the legislative history of the Act in this manner, the court chose to ignore the bluntly political motives which other commentators had imputed to Congress.

Further, the court seemed to stress the self-terminating nature of the statute, according to which, no matter what the President had or had not done under the authority of the Act, Congress would be obliged to "undertake an affirmative review without prolonged delay, without the option of acquiescence by inaction."¹⁷⁰ Similarly, decisions of the executive could be appealed under the Administrative Procedure Act. It is important to note, however, that these two factors represent, not standards which guide the President while he is making a decision, but avenues of recourse to be pursued after he has made and implemented his decision.

Most interesting is the court's construction of implicit standards. The 1942 Act had included a provision that stabilization decisions be "generally fair and equitable." The court, in 1971, concluded that such a "broad equity standard is inherent in a stabilization program" and thus implicit in the 1970 Act.¹⁷¹ Similarly, the 1942 Act required that the Executive accompany all regulations with a "statement of considerations" used in determining them. In 1971, the court again seemed to assume that this requirement was implicit in the 1970 Act, and would help "limit the latitude of subsequent executive action."¹⁷²

Having found these standards, however, the court then seemed to reverse itself by arguing that the President need not be limited by them. There were, it observed, "significant differences between the inflationary problems of 1970 and the inflationary problems of 1942 and 1950" which provided "additional reasons for differences in policies."¹⁷³ Thus: "We do not suggest that the 1970 law was intended as or constitutes a duplicate of the earlier laws The approaches and decisions under the earlier laws are certainly not frozen as guidelines for the present law."¹⁷⁴ In short, the 1942 and 1950 statutes are said to provide standards for the 1970 program. Nevertheless, action taken under the 1970 Act is not to be limited by these earlier statutes. The court never indicates how it proposes to resolve this tension.¹⁷⁵

This analysis suggests some of the court's intentions. The court seemed impressed by the gravity of the country's economic situation, and thus was inclined to approve decisive executive action. As it remarked, "The present

169. 337 F. Supp. at 751.

170. *Id.* at 754.

171. *Id.* at 757.

172. *Id.* at 758.

173. *Id.* at 749.

174. *Id.* at 748.

175. Comment, *supra* note 4, at 459.

administration is entitled to a fresh approach.”¹⁷⁶ To sustain the congressional delegation and the executive order issued under it, it sought only the minimum exercise of congressional will, some indication that Congress had deliberated the Act carefully—some assurance that the “whole program” had not been “set adrift without any rudder.”¹⁷⁷ From the history of the legislation and the record of previous statutes, the court found the sense of congressional direction it sought, the barest fragments of a guiding “rudder.” By so doing, it maintained the modern tradition of upholding broad delegations of congressional power.

II

THE POLITICAL CONTEXT

Presidential legislation is a political, as well as a constitutional, problem. Its uses are shaped by the existing power relations among the President, Congress, and the courts. Its implementation, in turn, shapes the nature of those relations. In this section, we want only to make a few points concerning the political dimension of executive orders. In particular, we shall look briefly at the role of Congress in national policymaking, at the impact of executive orders on the evolution of presidential power, and at the implications of executive orders for democratic theory.

A. Congress and National Policymaking

Political scientists have long attacked legislatures. For Bagehot¹⁷⁸ and Mill,¹⁷⁹ legislatures were essential to democracy in large countries. Yet, both writers questioned the ability of representative assemblies to make law effectively. As early as 1921, Bryce was able to observe a “decline”—indeed, a “pathology”—of legislatures. “The dignity and moral influence of representative legislatures,” he noted, “have been declining.”¹⁸⁰

In the 1950's and early 1960's, this assessment became conventional wisdom. American political scientists were especially critical of Congress. With the institutionalization of the Presidency, the growth of the executive establishment, and the rise of presidential initiative in legislation and budgeting, the law-making role of Congress had, in the opinion of many, all but evaporated. This trend, however, was not cause for alarm. In fact, it was probably beneficial, since the Presidency was somehow more representative, and the executive branch bureaucracy more expert in policymaking than Congress.

176. 337 F. Supp. at 748.

177. *Id.* at 749.

178. See W. BAGEHOT, *THE ENGLISH CONSTITUTION AND OTHER POLITICAL ESSAYS* 203-204, 229-235 (1920).

179. See J.S. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 141-51 (1948).

180. 2 J. BRYCE, *MODERN DEMOCRACIES*, 345, 356 (1921).

The proper role for Congress, then, was limited.¹⁸¹ It was to perform constituency functions: acting as an ombudsman on citizen complaints; "mobilizing consent" among the public for presidential policy initiatives.¹⁸²

As a description of political "reality," this assessment has always been greatly exaggerated. Writers from Huitt,¹⁸³ Polsby,¹⁸⁴ and Wildavsky¹⁸⁵ to Price,¹⁸⁶ Orfield,¹⁸⁷ and Cronin¹⁸⁸ have all provided a more balanced account of the impact of Congress on national policy, especially domestic policy. Moreover, with an ideological change in the White House—that is, Republican Presidencies from 1969 to 1977—the image of Congress as the "negative" force in federal government had to be revised. As a normative theory, this image of Congress contradicts the basic principles of American democracy. There can be little doubt that the constitutional Framers intended Congress to be the primary source of legislative initiative.¹⁸⁹ Furthermore, arguments for the greater representativeness of the Presidency are hardly persuasive. Watergate-era revelations about special interest influence in the executive branch have shattered, perhaps irrevocably, any notions that the Presidency necessarily represents "all of the people."

Yet the critique of Congress is powerful in one major respect. Our analysis must distinguish between taking initiative in policy, and drafting that policy thoughtfully. Congress has amply demonstrated its willingness to initiate policy, especially in emergencies. It has been less successful, however, in formulating policy in a detailed fashion. (The tax laws, of course, are a striking exception). In particular, Congress has tended to rid itself of difficult policy concerns, such as economic stabilization, by delegating power to the President. Thus a paradox: the most decisive exercises of congressional legislative power often consist in broad delegations of that power to the President.

The problem, then, is to resolve this paradox, to explain why Congress has been inclined (some might say, eager) to delegate its power so broadly. In fact, there are two distinct questions to be considered. First, why must Congress delegate at all? Second, why has it delegated so much power, so often?

Answers to the first question are familiar enough. Congress, it is agreed, simply cannot administer the laws itself. Historically, Congress met only infre-

181. See Huntington, *supra* note 32.

182. See Beer, *The British Legislature and the Problem of Mobilizing Consent*, in *LAWMAKERS IN A CHANGING WORLD* 30 (E. Frank ed. 1966).

183. See Huitt, *Congress, The Durable Partner*, in *LAWMAKERS IN A CHANGING WORLD* 9 (E. Frank ed. 1966).

184. See N. POLSBY, *CONGRESS AND THE PRESIDENCY* (1964).

185. See Wildavsky, *The Two Presidents*, in *THE PRESIDENT* 230 (A. Wildavsky ed. 1969).

186. See D. PRICE, *WHO MAKES THE LAWS?* (1972).

187. See G. ORFIELD, *CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE* (1975).

188. See T. CRONIN, *THE STATE OF THE PRESIDENCY* 85-116 (1975).

189. See De Grazia, *Toward a New Model of Congress*, in *CONGRESS: THE FIRST BRANCH OF GOVERNMENT* 12 (A. De Grazia ed. 1967).

quently. Delegation was needed to ensure the continuity of administration. Today delegation is just as necessary:

Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become futility [The] burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues.¹⁹⁰

Congress cannot anticipate all future needs. Therefore it must word its statutes broadly, and grant administrators discretion over the timing of implementation. As society, social needs, and the law have all become more complex, it has been argued, the need for flexibility has increased. Thus the Supreme Court has observed:

In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing, for example, a tariff rate, a railroad rate, or the rate of wages to be applied in particular industries by a minimum wage law. The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable.¹⁹¹

The problem with these arguments is that they can neither explain nor justify the extreme grants of administrative discretion which have characterized Congress. The argument about complexity, in particular, cuts both ways. It may be that complexity requires flexibility. Yet it seems just as true that complexity, and increased governmental attempts to cope with it, require careful thought and clear guidelines. Thus there is surely force to Lowi's observation that: "As public control extended to wider and more novel realms, delegation became a virtue rather than a problem. *The question of standards disappeared as the need for them increased.*"¹⁹²

An understanding of Congress' inclination to delegate broadly requires a closer look at the politics of congressional policymaking. Put simply, individual Congressmen seem to lack incentives sufficient to prompt them to draft proposals carefully and limit delegations. In a country where public awareness of Congress is both limited and intermittent, Congressmen are rarely the object of close public scrutiny.¹⁹³ In crises, where public attention and demands are forced on Congress, that institution can be expected to act. But even then, as Mayhew has noted, the political payoff for the individual Congressman lies in taking the "right position," rather than in laboring to

190. See FISHER, *supra* note 7, at 72 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940)).

191. Fisher, *supra* note 96, at 268 (quoting *Opps Cotton Mills Inc. v. Administrator*, 312 U.S. 126, 145 (1941)).

192. T. LOWI, *THE END OF LIBERALISM* 132-133 (1969).

193. See Stokes and Miller, *Party Government and the Saliency of Congress*, 26 *PUB. OPINION Q.* 531 (1962).

draft policy coherently, or even in seeing his side win.¹⁹⁴ The public, apparently, has little interest in the nuances of power relations between President and Congress. Its desire, especially in crises, is for action. Edelman has argued that the public's demand is for an assurance that something is being done, and assurance which need only be symbolic, not substantive.¹⁹⁵ The simplest response for Congress, then, is to create a highly visible executive agency, and to endow it with a broad mandate. For Congressmen, the development of strict guidelines and maintenance of oversight after performing the delegation are less rewarding, politically, than simply producing the symbol.

Other factors may also be involved. One is the pressure to forage coalitions out of a divided Congress. Legislators can agree on a policy for different reasons. To force them to make those reasons explicit, to specify their intentions, by embodying them in detailed legislation, may only undermine the agreement on that proposal. A second factor may be lack of expertise and time among Congressmen and their staffs. When faced with vocal public demands and limited time, Congressmen may be satisfied with any legislation rather than carefully drawn legislation. Third, and perhaps most important, is the relationship between Congress and interest groups. Congress faces a large number of demands, which are earnestly expressed by well organized groups. For almost every demand, there will be organized opposition: action is bound to offend someone. Yet, action cannot be avoided. Vague legislation is a standard congressional response. As Judge Henry Friendly explains it:

[In the face of interest group pressure] the optimum is to do nothing, since failure will be understood by those desiring the legislation whereas success will not be forgiven by those opposing [it]. If legislation there must be, the very necessity of a text arouses further opposition; hence the tendency to soften it in the sense of compromise and even of unintelligibility.¹⁹⁶

Delegation is another standard response. Bauer, Pool, and Dexter describe it, "If the demands exceed what the Congressman can effectively handle, then he may happily yield up a significant portion of his power."¹⁹⁷ A member of Congress, Senator Robert Packwood, is even more succinct, "We can delegate powers to the President, then sit back and carp or applaud, depending on whether what he does is popular or unpopular."¹⁹⁸

Delegation, then, has proved most useful for the Congress. It enables Congressmen to cope with pointed political demands. It makes the President

194. D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 61-73 (1974).

195. J.M. EDELMAN, THE SYMBOLIC USES OF POLITICS 37-38 (1964).

196. S. BARBER, *supra* note 94, at 4 (quoting H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 167 (1962)).

197. Fisher, *supra* note 96, at 262 (quoting A. BAVER, I. POOL, & L. DEXTER, AMERICAN BUSINESS AND PUBLIC POLICY: THE POLITICS OF FOREIGN TRADE 37 (1963)).

198. S. BARBER, *supra* note 94, at 4 (quoting Senator Robert Packwood, TIME, January 15, 1973 at 12).

responsible for potentially unpleasant policy measures. But to explain the emergence of a practice or institution is not necessarily to justify it. Simply to account for a practice is not to say that it is either necessary or acceptable. Explanation implies justification only if we make one of the three following assumptions: first, that the practice is inevitable and not subject to **change** (a conclusion that typically results from particular assumptions about human nature); second, that the benefits of the practice exceed its costs; or third, that the cost of altering or ending the practice would exceed the benefits of doing so.

Can the practice of broad congressional delegations be justified, and accepted, according to these criteria? We think not. First, there is nothing "natural" or inevitable about broad delegations. Delegations were not always as consistently broad as they have become. Arguments have been made to suggest a sort of technological imperative behind broad delegations. That is, delegation is said to be required by the complexity of existing social problems. Yet, as we have already argued, these claims are not persuasive. Complexity is as much a reason for precise standards and limited exercise of presidential power as it is for broad delegations. What has changed, however, is the popular ideology concerning delegations. Lowi notes that, "Historically, delegation had a rather technical meaning that emerged as the price to be paid in order to reap the advantages of administration." Today, in contrast, delegation has "come to be considered a good thing in itself, flowing to administrators without guides, checks, safeguards."¹⁹⁹ The courts, clearly, have adopted this ideology; their adoption of it has encouraged still greater delegation. There is no reason to believe, however, that the current prevailing assumption that delegation is typically a benefit is superior to the earlier assumption that delegation is a cost, to be accepted only grudgingly.

This suggests the difficulty of attempting a cost-benefit analysis of congressional delegation, or of any practice, for that matter. The assignment of costs and benefits is highly value-laden. Values differ and change. We have already mentioned the benefits, to Congress, of broad delegation. In addition, one could argue that the use of delegation to expedite legislative business in the face of time constraints and public demands represents a benefit to the public. Against this must be weighed what we take to be certain social costs. First, excessive discretion combined with an absence of clear standards perverts the administrative process. Administrators are made more susceptible to interest-group pressure. As Friendly puts it, "Lack of definite standards creates a void into which attempts to influence are bound to rush; legal vacuums are quite like physical ones in that respect."²⁰⁰ Second, excessive delegation encourages further presidential initiatives and promotes increased

199. T. Lowi, *supra* note 192, at 127.

200. S. Barber, *supra* note 94, at 3 (quoting H. Friendly, *supra* note 193 at 22.)

presidential power. Presidential action taken under authorization of blanket delegation borders on the undemocratic. In such cases, as with economic stabilization, the policy can barely be said to have the dual concurrence required by the Constitution. Moreover, in the absence of clear standards, the executive action cannot be made subject to careful judicial review.

It is even more difficult to assess the potential costs and benefits of implementing a reform which limited congressional delegation. We may speculate on a few points, however. First, one potential cost to Congress is clear. Were Congress unable to delegate so easily, it would be forced to draft the law more carefully. As a result, it might offend some clientele interests; some agreements might not stand. In short, life for Congressmen might become a shade more difficult. As a result, fewer laws might be passed. This might not be bad. As Moynihan has argued, our public policies have, to date, not coped adequately with social complexity.²⁰¹ Failure should, perhaps, force humility. More analysis and debate, in other words, rather than hasty action, may be the best responses to complexity.

Second, to limit delegation would be to deny Congress the right to pass responsibility on to the President. This, of course, is exactly as it should be. The Constitution intended Congress and the President to share responsibility for policymaking. The current congressional practice of delegation represents an illegitimate evasion of that responsibility. Some limitation is quite desirable.

This analysis suggests that one aspect of congressional policymaking, or the avoidance of policymaking—its practice of broad delegation—can and should be reformed. Proposals for reform, however, must not overlook the benefits which delegation provides for Congress. These benefits represent obstacles to the reformer and will have to be overcome.

B. Executive Orders and Presidential Power

Even before Watergate, many commentators had detected a dramatic rise in presidential power. This trend was tied to the decline of Congress as a law-making body (although the direction of causality was never postulated). Indeed, this model had an almost hydraulic simplicity: as presidential power went up, congressional power went down. The problem with this model is its portrayal of relations between President and Congress as a zero-sum game—that increases in the power of one must come at the expense of the other. An alternative assumption is possible. The range and impact of governmental activities have grown enormously. Thus if we define the “power” of these institutions in terms of their impact on society, we might well conclude that the power of both President and Congress has increased. (If we define “authority” in terms of the trust, respect, and confidence displayed toward these institutions, we might add that the authority of both has declined).

201. Moynihan, *Policy vs. Program in the 70's*, 20 *PUB. INTEREST* 90 (1970).

This points to the central analytical problem. Writers are rarely precise in discussing the power relations between President and Congress. What, exactly, does it mean to say that the President's power in relation to Congress has increased? A full analysis of the concept of power is hardly appropriate here. We can, however, begin to draw some simple distinctions concerning the notion of presidential power. Following James D. Barber, we should distinguish between presidential power as an ability to act independently of Congress, and presidential power as an ability to make Congress do what the President wants.²⁰² Writers have generally failed to draw this distinction, leading them to incorrect conclusions.

There is extensive evidence that Presidents have enjoyed surprisingly little of the second type of power. As a rule, that is, they have not been able to get Congress to obey their will, especially in domestic policymaking. Although it is not entirely clear, this power of the President may actually have declined in recent years.

Much has been made of the rise of presidential initiative in law-making. The key, of course, is the extent to which Congress approves presidential proposals. Here, Presidents have not enjoyed great success, at least not in domestic policy. Thus, from 1938 until his death, Roosevelt failed to secure a single piece of significant domestic legislation.²⁰³ Truman was defeated on most of his domestic policy proposals, except perhaps in housing.²⁰⁴ Eisenhower failed in his general policy of limiting government action.²⁰⁵

Polsby analyzed the fate of presidential proposals from 1954 to 1963. He found that, "In general, between one-third and two-thirds of presidential proposals are enacted in some recognizable form by Congress, with the median for [those] ten years lying well below the 50 per cent mark."²⁰⁶ More recently, Cronin has observed that, in his approximately three years in office, Kennedy secured congressional approval for only 40 per cent of his proposals. Moreover, in the first three years of the Nixon presidency, Congress approved only 33 per cent of the programs requested by the White House.²⁰⁷

These findings illustrate the difficulties faced by Presidents in their attempts to mobilize Congress. The most notable presidential successes seem to occur in times of crisis—Franklin Roosevelt's Hundred Days, for example, or after John Kennedy's assassination. At other times, Presidents have not found Congress to be especially pliant. In fact, the Congress has provided several major examples of its own policy initiatives—the space program in the 1950's,

202. J. Barber, *The President's Personal Power*, in *Presidents Power, and the Press* (A. Aufses and J. Barber eds. 1977) (unpublished manuscript on file at Duke University).

203. Wildavsky, *The Two Presidencies*, in *THE PRESIDENCY* 231 (A. Wildavsky ed. 1968).

204. *Id.*

205. *Id.*

206. N. POLSBY, *supra* note 184, at 101.

207. T. CRONIN, *supra* note 188, at 87.

health care reform in the 1960's,²⁰⁸ economic stabilization and planning in the 1970's.

At the same time, however, the recent history of executive orders shows that presidential power of the first type—the ability to act independently of Congress—has remained great, and has perhaps even increased. Indeed, we might propose a tentative hypothesis: that Presidents have come to rely on executive orders in order to make up for their inability to mobilize Congress. Experience demonstrates that Presidents can expect the support of the courts. Thus when they seek a particular policy, but doubt their ability to move it through Congress, they can simply attempt to achieve that aim through an executive order. The history of policymaking in civil rights provides, as we have seen, the most notable example.

Several related factors, in particular, make executive orders especially attractive policymaking tools for a President. First is speed. Even if a President is reasonably confident of securing desired legislation from Congress, he must wait for congressional deliberations to run their course. Invariably, he can achieve far faster, if not immediate, results by issuing an executive order. Moreover, when a President acts through an order, he avoids having to subject his policy to public scrutiny and debate. Second is flexibility. Executive orders have the force of law. Yet they differ from congressional legislation in that a President can alter any executive order simply with the stroke of his pen—merely by issuing another executive order. As noted earlier, Presidents have developed the system of classifying national security documents in precisely this manner.²⁰⁹ Finally, executive orders allow the President, not only to evade hardened congressional opposition, but also to preempt potential or growing opposition—to throw Congress off balance, to reduce its ability to formulate a powerful opposing position.

Each of these factors was manifested in Gerald Ford's Executive Order No. 11905, which restructured the management of the country's foreign intelligence agencies.²¹⁰ Throughout 1975, committees in the House and Senate investigated the intelligence agencies and considered reform proposals. Toward the end of the year, their efforts began to falter. In December, the chief of the CIA station in Athens was assassinated. In January 1976, Congress became mired in controversy when the report of the House Intelligence Committee was leaked to the press. In February, the President acted. He issued an executive order which, he said, would "eliminate abuses and questionable activities on the part of the foreign intelligence agencies while at the same time

208. See J. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS* 287-321 (1968).

209. See note 54 *supra*.

210. See note 55 *supra*.

permitting them to get on with their vital work of gathering and assessing information.”²¹¹

This order achieved several aims for the President. First, it won public support for him. In particular, he appeared, through this order, to be both as eager for reform and more decisive than Congress. He created the impression that he was “carrying out by executive action many of those very reforms upon which Congress embarked through the legislative process.”²¹² Second, he “stole the march”²¹³ on Congress by creating his own Board of Overseers for foreign intelligence. A central issue in the reform effort had been creation of a new oversight mechanism. By taking this moderate action, and enlisting some public and congressional support for it, the President made agreement by an already confused Congress on more severe oversight measures less likely. Finally, and perhaps most importantly, the executive order actually authorized a wide range of domestic activities by the foreign intelligence agencies. By combining broad prohibitions with a series of more specific exceptions, the order gave, for the first time, clear authorization for domestic intelligence gathering—precisely the sorts of activities which the congressional committees had originally been formed to investigate and which those committees had been expected to restrict through legislation.²¹⁴ In the end, Executive Order No. 11905 succeeded remarkably in undermining the prospects for legislative reform of the intelligence establishment. As one top CIA official was quoted as saying, “I hate to say this, but I think we’ve won too much.”²¹⁵

Executive orders, then, have become a critical weapon in the arsenal of presidential policymaking. Yet, it must be remembered that they may be used primarily to compensate for inadequacies elsewhere. Thus executive orders have certainly contributed to presidential strength, but, in a sense, they are a reflection of presidential weakness.

C. Executive Orders and Democratic Theory

A few principles are central to the American concept of democracy. Most basic is a commitment to the rule of law, to the belief that policy should be enacted only according to constitutional procedures. Adherence to these procedures promotes democratic values. Dual concurrence in legislation, the sharing of powers, checks the abuse of governmental power. The careful assignment of functions increases accountability to the public.

Executive orders are a challenge to democratic theory. Their extensive

211. Stern and Pincus, *Backing Away from the FBI and CIA*, Durham Morning Herald, April 22, 1976, at 4, col 3 (quoting President Ford).

212. *Id.*

213. *Id.*

214. Center for National Security Studies, *supra* note 56, at 2-3.

215. Stern and Pincus, *supra* note 211, at 4, col 1.

use by recent Presidents undermines democratic decision procedures, and threatens the rule of law. Instead, they create a system of what Borosage has neatly labelled "para-laws". These, he observes:

. . . are the internal regulations of the bureaucracy, premised upon a claim to inherent power, a grant of a broad and uncharted power from the legislature, or simply established without reference to any legal basis. The para-legal gives the appearance of legality and regulation by law to executive agencies, without the reality of legislative determination and definition.²¹⁶

Such a system provides policy quickly and decisively. By evading the Congress, however, it sacrifices accountability and consent. In short, it replaces government by law with rule by orders.

Thus there exists a tension between the values of speed and accountability. The demand for decisiveness conflicts with the need for deliberation.²¹⁷ Interestingly, a belief in the independent value of speed in decision-making is of relatively recent origin. It is certainly not what the framers intended. As Brandeis remarked in *Myers v. United States*: the intent of the Constitution was "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."²¹⁸

The danger today is not from aristocracy, but from autocracy. The rise of presidential legislation removes the traditional safeguards against the exercise of arbitrary power. In return, it is not even clear that the public has received the benefits of more enlightened policy. We have already challenged the assumption of a positive value in speed of decision-making, as such. In other words, in the face to social complexity, the most desirable reform may be a return to constitutional principles.

III

THE PROBLEM OF REFORM

Proposals for reform must be based on an analysis of the supposed problem. In this paper, we have identified what we consider to be a problem of American government, and suggested that it is subject to change, if not complete solution. We recognize, however, that there are many reasons, both good and bad, for the evolution of this problem. These reasons represent obstacles in the pathway to reform.

For example, we have argued that a major cause of presidential legislation is the tendency of Congress to delegate its own legislative power broadly. Broad delegation enables Congress to cope with immediate political pressures.

216. Borosage, *Secrecy vs. the Constitution*, 12 SOCIETY No. 3, 71, 73 (1975).

217. See notes 137-138 *supra* and accompanying text.

218. *Myers v. United States*, 272 U.S. 52,293 (1926) (Brandeis, J., dissenting).

Thus Congress can be expected to resist attempts at reform. Accordingly, reformers will have either to induce the public to alter the nature of its political demands, or induce Congress to respond to those demands in a different manner.

Similarly, we have argued that the courts have encouraged presidential legislation by refusing to overturn either congressional delegations or executive orders. What has emerged is a pattern of judicial deference to presidential actions. Corwin suggests two reasons for this tendency. First, the courts have always recognized that they cannot coerce compliance from the executive branch. Thus, except for the most extreme cases, they tend to avoid confrontations. Second, the conferral of powers described in article III of the Constitution closely resembles that of article II. Thus a broad interpretation of article II seems to imply a broad interpretation of article III.²¹⁹ Acceptance of presidential power promotes acceptance of judicial authority. Thus there is some reason to expect the courts to resist significant change. Yet, it is also true that the courts respond to change in public ideology and opinion. Surely, their support for executive initiative in the last thirty years has been due, in part, to their belief that the public demanded it. Accordingly, the best means of moving the courts to reform might be to demonstrate the limitations of the prevailing ideology, and work to create broad support for a new approach.

The problem of presidential legislation results from an interaction of the Executive, Congress, the courts, and the public. Reform must seek to alter the behavior of each.

A. The Executive

The framers appreciated the inclination of powerful political leaders to seek still greater power. Accordingly, they attempted to pit institutions against each other, to use shared ambition as means of restraint. Until relatively recently, such skepticism about the motives of political leaders had been common. It suggests to the reformer that he not expect voluntary self-restraint by any political institution or leader, especially one which has already grown as large as the Presidency. With this in mind, we can propose several means of controlling presidential legislation.

First, Congress should draft standards to regulate the publication of executive orders. The existing orders and legislation concerning executive orders fail to provide such standards. They simply spell out procedures which the President should follow if he decides to publish the order. The failure to provide such standards has led to yet another paradox: the federal establishment has grown greatly in the last forty years; the President is in control of a much larger bureaucracy. Yet the number of published orders has declined. Clearly, there are many substantive directives being issued, but not published.

219. E. CORWIN, *supra* note 84, at 175-176.

Some must, no doubt, remain classified on national security grounds. Others are more questionable.

There is no question of eliminating executive orders entirely. They have been legitimated by the courts, and have the force of law. Moreover, when issued under proper constitutional and congressional authorization, they are essential to effective administration. The need is to increase the President's accountability for the orders he issues. The first step toward improved accountability is stricter rules for, and hence increased, publication.

A second step would be for Congress to draft stricter standards concerning the sources of authority claimed by individual executive orders. Orders often appeal vaguely to the "Constitution" or "statutes" as sources of authority. This invites judicial construction of sources of authority, and continued presidential initiatives without clear congressional and constitutional mandate. In the future, orders should be required to specify the explicit source or sources of authority under which they have been issued.

Also, the courts will have to become less deferential to presidential initiatives. We have seen cases in which the courts constructed authorization for executive orders which, themselves, claimed only the flimsiest bases of support. In so doing, the courts provided precedent and encouragement for further initiatives. In the future, the courts should demand more precise appeals to constitutional and congressional authority. They should save their ingenuity for other endeavors. The courts cannot, of course, be coerced into taking such measures. Change will result only from the emergence of a demand for reform.

B. Congress

Congress is the most venerable target of reform in the federal government. It remains, today, essentially what it was in Woodrow Wilson's time—a diverse collection of self-seeking individuals. In the absence of strong party leadership, Congress lacks an effective mechanism of central coordination; the fate of legislation is subject largely to the initiative of individuals. It is not surprising, then, that the analysis and critique of Congress, today, is essentially what it was for Wilson: Congress, it is generally agreed, needs stronger leadership.²²⁰

It is clear that Congress has encouraged presidential law-making, as much through broad delegations as through inaction or silence. Inaction, we have argued, may result from deep divisions which take time to resolve, or from minority obstruction. This is exactly as the Constitution intended. Presidential legislation in the face of such inaction must be considered, on its face, an example of intrusion into the prerogatives of Congress. In contrast, the con-

220. See W. WILSON, CONGRESSIONAL GOVERNMENT (1901).

gressional practice of delegation borders on the abdication of power so feared by the separation doctrine. Thus Congress must either be induced or coerced into curbing its inclination to delegate.

The movement to reform Congress has already begun. Early results suggest that it has not succeeded entirely in overcoming the centrifugal tendencies of that institution. For the purposes of this discussion, two related steps are essential. First, Congress must limit the generosity of its delegations to the executive. Second, it must become more diligent in drafting those delegations—stricter, in other words, in providing clear policy and standards to guide executive action. There are at least two possible means of promoting such change.

First, reform can perhaps be encouraged. It has been argued that insufficient resources and inadequate staffs are, in part, responsible for the haphazard style of congressional bill-drafting. This argument, of course, is also used to explain the “decline” of Congress. Since we have challenged the belief that Congress has, in fact, declined, we should also treat this argument with some skepticism. In particular, this argument seems to understate both the expertise and influence of congressional staffs in formulating policy.²²¹ Yet there seems no good reason not to improve the information gathering and analytical capacity of Congress. It may have the important direct consequence of tightening up legislation. It may also have valuable indirect effects. For example, it could help improve both the public image of Congress and the morale of Congressmen. This, in turn, might raise the expectations concerning congressional performance among both the public and Congressmen. If so, it could encourage better performance.

The development of the Congressional Budget Office may ultimately prove illuminating in this respect. It represents an attempt by Congress to improve its analytical ability and to coordinate appropriations. The early reviews of the performance of the Budget Office have been tentative, but generally favorable.²²² Success in this reform can only improve the prestige of Congress, and perhaps encourage it to attempt other means to improve policymaking.

Second, the non-delegation doctrine should be revived.²²³ Davis is surely correct in observing that the doctrine has failed to prevent excessive delegations of congressional legislative power. Yet, his proposal that the doctrine be abandoned entirely seems premature, especially since he sees the doctrine as being replaced primarily by the hope of voluntary rule-making by agencies in

221. See D. PRICE, *supra* note 186, at 289-333.

222. See, e.g., CAPRON, *The Congressional Budget Office*, in COMMISSION ON THE OPERATION OF THE SENATE, CONGRESSIONAL SUPPORT AGENCIES: A COMPILATION OF PAPERS 75 (1976).

223. For a suggestion that such a revival has already begun, see Freedman, *Delegation of Power and Institutional Competence*, 43 UNIV. CHI. L. REV. 307 (1976).

the executive branch.²²⁴

The responsibility here belongs to the courts. As Lowi has argued, the courts must force Congress to perform the task assigned it by the Constitution.²²⁵ Through their power to overturn legislation, they must coerce constitutional lawmaking.

C. Courts

The task for the courts, therefore, is clear. Rather than construct authorization for baseless executive orders, they must demand that the executive specify its sources of authority. Rather than construct standards in broad delegation, they must demand that Congress provide them, for surely, if the Supreme Court can require an administrative agency, which must act according to congressionally approved procedures, to specify the sources of its power to act in a particular manner (as it did in *S.E.C. v. Chenery*),²²⁶ then the obligation to impose such a constraint on the President himself, who may act without procedural requirements, is considerably greater. The courts themselves undermine judicial review when they construct the guidelines which the other branches either refuse to provide or are unable to find. The pursuit of accountability is futile if the courts act as a willing accomplice in the attempts of the other two branches to escape it.

The courts have apparently been sympathetic to the substance of presidential policy initiatives. Thus they have been somewhat lax in ensuring that procedural safeguards be maintained. We now appreciate the dangers inherent in a retreat from law. The courts possess the tools to reconstruct it.

D. The Public

In several ways, post-Watergate politics resembles that of the Progressive era: in their shared desire for neutral competence; in their ambivalence toward executive leadership; in their discomfort with the concept of power. It seems fitting, therefore, to conclude with an appeal to the public—in particular, with an appeal for a more enlightened public opinion.

Participation is a defining characteristic of democracy. Formal mechanisms of accountability are of little value unless the public uses them to oversee the performance of government. Ultimately, the most effective restraint on power may be a vigilant public—a public not satisfied with symbolic assurances, a public sensitive to the interplay of political forces, and attentive to potential threats to democratic procedures. Thus today, as always, involvement by an astute public is essential for harnessing democratic political institutions.

224. See Davis, *A New Approach to Delegation*, 36 UNIV. CHI. L. REV. 713 (1969).

225. T. LOWI, *supra* note 192, at 297-299.

226. *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947).

CONCLUSION

The Constitution expects both conflict and cooperation between President and Congress. Presidential legislation enables the executive to escape conflict and avoid cooperation. It undermines democratic norms when it enacts policy without full concurrence or accountability. Executive orders cannot, and should not, be eliminated from the practice of American government. There must, however, be stricter standards to regulate their use.

A remedy to the problem of presidential legislation, then, lies in a return to constitutional principles. This will necessarily involve some limitation on the scope of executive action—in particular, on the ability of Presidents to act independently of Congress. In this sense, only, will it reduce the power of the President; it will not impair the ability of the President to influence Congress legitimately. More importantly, it offers an opportunity to increase public trust and respect for government by restoring the branches of government to their proper constitutional roles. In this sense, a return to constitutional principles will increase the authority of both President and Congress.