WITH THE STROKE OF A PEN

EXECUTIVE ORDERS AND PRESIDENTIAL POWER

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To Susan

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Executive Orders and the Law

WHAT, PRECISELY, is an executive order? In the most formal sense, an executive order is a directive issued by the president, "directing the executive branch in the fulfillment of a particular program,"[1] targeted at executive branch personnel and intended to alter their behavior in some way, and published in the *Federal Register.* Executive orders are instruments by which the president carries out the functions of the office, and every president has issued them (although there was no system for tracking them until the twentieth century). A 1974 Senate study of executive orders noted that "from the time of the birth of the Nation, the day-to-day conduct of Government business has, of necessity, required the issuance of Presidential orders and policy decisions to carry out the provisions of the Constitution that specify that the President 'shall take care that the laws be faithfully executed.' "[2] The lack of any agreed-upon definition means that, in essence, an executive order is whatever the president chooses to call by that name.[3]

Several authors have offered their own definitions and categories, but they tend to be contradictory. Robert Cash describes executive orders as presidential directives and orders "which are directed to, and govern actions of, governmental officials and agencies."[4] William Neighbors notes that even though the terms "executive order" and "proclamation" are frequently interchanged, executive orders are "used primarily in the executive department, [issued] by the president directing federal government officials or agencies to take some action on specified matters";[5] in contrast, proclamations are "used primarily in the field of foreign affairs, for ceremonial purposes, and when required . . . by statute." Corwin described proclamations as "the social acts of the highest official of government, the best known example being the Thanksgiving Proclamation," which was first issued by Washington but which has been issued every year since 1863.[6]

These distinctions, while accurate on average, are wrong enough of the time to make them less useful for a comprehensive classification. The argument that executive orders are targeted at the behavior of executive branch officials and not the public at large reflects a limited and formalistic perspective of public administration. One could hardly classify in this

way Reagan's Executive Order 12291, which fundamentally reshaped the regulatory process, or the series of civil rights orders which directed executive branch officials to use their power and resources to effect substantial and dramatic social change. Presidents have used executive orders to significantly alter baseline "private rights," or the rights of individuals that are commonly understood to be part of an established landscape of private property and personal freedoms. Through executive orders, presidents have shaped the employment practices of government contractors, the travel rights of American citizens, foreign economic policy, private claims against foreign governments, and claims on natural resources on government-owned lands.[7] Terry Eastland, a Justice Department official in the Reagan administration, has noted the blurred line between purely governmental and private effects: "In theory executive orders are directed to those who enforce the laws but often they have at least as much impact on the governed as the governors."[8]

Nevertheless, it is possible to differentiate among the different executive instruments and identify some distinctive characteristics of executive orders. The major classes of presidential policy instruments are executive orders, proclamations, memoranda, administrative directives, findings and determinations, and regulations. Of these, executive orders combine the highest levels of substance, discretion, and direct presidential involvement.[9] Compared with proclamations, which are usually, but not always, ceremonial,[10] executive orders are a "more far reaching instrument for administrative legislation" and have more substantive effects.[11] Presidential memoranda and directives more often address issues that are temporary or are used to instruct agency officials to take specified action in accordance with established regulatory or departmental processes.[12] Determinations and findings refer to particular decisions the president must issue on the record in order to carry out specific authority that has been delegated by Congress to the executive branch. Although these boundaries are fluid, there is little doubt that presidents and their staffs consider executive orders to be the most important statements of executive policy.

It is more useful to think of executive orders as a form of "presidential legislation"[13] or "executive lawmaking,"[14] in the sense that they provide the president with the ability to make general policy with broad applicability akin to public law.[15] For over a century the Supreme Court has held that executive orders, when based upon legitimate constitutional or statutory grants of power to the president, are equivalent to laws.[16] In *Youngstown*, the Court concluded with some force that executive orders lacking a constitutional or statutory foundation are not valid, and longstanding judicial doctrine holds that when an executive order conflicts

with a statute enacted pursuant to Congress's constitutional authority, the statute takes precedence.[17]

Since executive orders are a tool of the president's executive power, their reach extends as far as executive power itself. The question of when a president can legally rely on an executive order, therefore, is the same as the question of when the president can bring into effect the executive power generally. It is not a coincidence that many of the most important Supreme Court rulings on presidential power have involved executive orders, including *Youngstown*, *Korematsu v. United States*, *Schechter Corp. v. United States*, *Cole v. Young*, and *Ex Parte Merryman*.

An understanding of executive orders thus requires an investigation into the nature of the president's executive power. My intent is not to derive a comprehensive legal theory of the presidency. Such an effort is not only beyond the scope of what I wish to do, it is also pointless, since decades of scholarship and judicial doctrine have failed to come to definitive conclusions on the subject; it may well be that the constitutional language is indeterminate. My aim is more modest—to identify the main trends in the development of presidential power and connect them to the use of executive orders as an instrument of that power.

Executive Orders and Debates over the Executive Power

The president's authority to issue executive orders comes from three sources: grants of constitutional power, congressional delegations of its legislative authority through statutes, and the possibility that there exist inherent prerogative powers within the office. Within the first two classes of authority, there are powers that are enumerated and others that are implied by the existence of the enumerated powers.

This neat classification, however, obscures important ambiguities. On even such basic questions as whether the opening sentence of Article II ("The executive Power shall be vested in a President of the United States of America") is a description or a grant of power, firm answers remain elusive. Scholars are at odds on a wide range of issues: does the president have any inherent or extraconstitutional powers? Are independent regulatory agencies—whose heads are protected against presidential removal and thus vested with independent executive authority—constitutional? Is the presidency unitary, possessing plenary power over administration?[18] As Monaghan puts it, "very considerable disagreement exists concerning many legal aspects of the presidency."[19]

The classic statement of presidential power is Justice Robert Jackson's analysis in his concurring opinion in *Youngstown*, in which he identified three categories of presidential power:

> Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress . . .
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at his lowest ebb, for then he can rely only upon his constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claims to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[20]

The extent of the president's power thus depends on a reading of the president's constitutional powers in relation to any concurrent powers Congress may have, whether Congress has delegated power to the president via statute or whether Congress has acted (either expressly or implicitly) in a manner that contravenes the president's act. This categorization leads to several additional layers of analysis and ambiguity. If the president's powers exist in relation to Congress's powers, we must be able to identify the scope of both in order to understand the extent of either. If the degree of concurrent power depends on the level of congressional "inertia, indifference, or quiescence," we must then be able to define those terms. Finally, Jackson leaves open the possibility that on some questions of presidential power—in the "zone of twilight"—it may well be impossible to identify general principles, as opposed to ad hoc measures that depend entirely on the case-by-case circumstances. This sets the stage for fluid boundaries and also gives the president wide latitude, since Congress will typically be less able to undertake collective action (Moe's argument) either in favor or in opposition to the president.

An example demonstrates the imprecision of presidential power both in theory and in practice. Consider the narrow and relatively straightfor-

ward question of whether presidents have the authority to fire executive officers whom they appoint. The president's right to control subordinates stems from the vesting and take care clauses in Article I. The removal power is central to the president's ability to control executive functions, since the president can fire those officials who interfere with administration, and the threat of removal should induce compliance.

The question, while technical, is hardly academic. Congress struggled with this issue from the earliest days of the Republic, debating at length in 1789 whether the president required the Senate's approval to fire officials who were appointed with the advice and consent of the Senate (after a lengthy debate, and a tie vote in the Senate, broken by Vice President John Adams, the Congress acceded to presidential discretion on the matter). Andrew Johnson's refusal to abide by the Tenure in Office Act was the titular reason for his impeachment (although his opponents were looking only for an excuse to move against him).

So-called Unitarians[21] view these vestments as providing for complete control over the executive branch and its activities. To proponents of this view, the executive power necessarily confers upon the president the ability to "control subordinate executive officers through the mechanism of removal, nullification, and executive of the discretion 'assigned' to them himself."[22] Unitarians question in particular the constitutionality of any executive branch office that is not subject to presidential dismissal. The list of suspect offices includes independent regulatory agencies, whose officers are independent of the president, and independent counsels.

Yet for every authoritative law review article that supports the Unitarian thesis, another takes the opposite position. Lawerence Lessig and Cass Sunstein characterize as "just plain myth" the notion that the Framers intended to create a unitary executive with plenary administrative control.[23] Instead, they argue, the Constitution created overlapping executive and legislative powers, with the president clearly in charge of most executive functions but with Congress able to stipulate administrative details of others.

Is it possible to resolve this difference of opinion on the narrow question of the removal power? Probably not. Article II lacks the detail necessary to untangle these questions, and the courts have failed to provide a coherent framework for setting the boundaries of the removal power.[24] In *Myers v. the United States*, 272 U.S. 52 (1926), Chief Justice William Howard Taft ruled that the president had unlimited constitutional authority to remove those executive officers whom he had appointed, a right that Congress could not interfere with. In making this argument, he backed away from a constrained view of presidential power he had articulated ten years earlier.[25]

Holding that the grant of executive power gives the president the power to "secure that unitary and uniform execution of the laws which Article II of the constitution evidently contemplated,"[26] Taft found that the removal power is critical to the president's ability to control the behavior of subordinates. Ten years after *Myers*, in *Humphrey's Executor v. United States*, the Court backed away from the earlier ruling, holding that Congress could limit the president's removal power in certain kinds of offices—those that carry out "quasi-legislative" or "quasi-judicial" functions, as opposed to offices with purely administrative duties.[27] An immediate problem is that the Court never clearly defined what it meant by quasi-judicial or quasi-legislative, and sixty years later an analysis noted these are terms "whose meanings are at best quasi-clear."[28]

Most recently, the Court addressed the removal power in *Bowsher v. Synar*, a case that originated out a provision of the Gramm-Rudman-Hollings deficit reduction law. GRH authorized the comptroller general to impose automatic spending cuts (or sequestrations) when the budget deficit exceeded statutory targets. In this case, the Court ruled that since the comptroller general was an agent of Congress and removable only by congressional action, "Congress in effect has retained control over the executive of the Act and has intruded into the executive function."[29] As such, Congress had improperly exercised executive power and the Court overturned the law. Congress subsequently revised the law, placing the sequestration authority within the Office of Management and Budget.

Critics of these and other rulings on the appointment power argue that the Court shifts between different conceptions of presidential authority without any coherent framework.[30] *Myers* takes a flatly formalist perspective: the Constitution assigns powers exclusively to each branch, and the others may not encroach upon that power. *Humphrey's Executor* adopts a more functionalist view, which considers how a particular distribution of powers furthers the general purpose of general legislative or executive functions.

These questions are not merely hypothetical: Lessig and Sunstein argue that "they assumed special importance in connection with efforts by President Bush to assert close control over government regulation; they have new urgency as a result of likely new efforts by President Clinton to claim authority over a government staffed largely by Republican Presidents. Heated struggles arose between President Bush and Congress over a range of unresolved issues. Similar issues are likely to rematerialize during the Clinton administration, and these debates will undoubtedly raise new issues about exactly how unitary the executive branch can claim to be."[31]

Ultimately there is no conclusive answer to the question of how far the executive power reaches. Even after two hundred years of precedent and judicial opinion, the nature and scope of presidential power remain aston-

ishingly ambiguous. Supreme Court justice Robert Jackson concluded in 1952 in his *Youngstown* concurrence that "a judge, like an executive advisor, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves . . . a century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question."[32] Among the respected sources on each side of such questions, Jackson went on, "a Hamilton may be matched against a Madison. . . . Professor Taft is counterbalanced by Theodore Roosevelt . . . it even seems that President Taft cancels out Professor Taft."[33] In the end, we are left with competing theories of presidential power and constitutional interpretation rather than a definitive framework.[34]

Constitutional Vestments

Constitutionally, Article II vests "the executive Power" in the president of the United States (although disputes remain over whether this is an affirmative grant of power or merely a description of the language that follows), designates the president as the commander in chief, and gives him the power to negotiate treaties, and to appoint judges, ambassadors, and executive branch officers with the advice and consent of the Senate. The president has the power to grant pardons, and to require executive branch officials to provide written opinions "upon any subject relating to the duties of their respective offices." Article II also authorizes presidents to recommend measures to Congress as they deem "necessary and expedient," and requires them to give information on the state of the Union "from time to time." The broadest grant of authority is contained in the charge that the president "shall take care that the laws be faithfully executed," which contains both limits on presidential behavior (requiring presidents to faithfully carry out the will of Congress as expressed in statutes) and an implied affirmative grant, permitting some discretion in the performance of executive and implementation duties.

Legal scholars have long commented on the imprecision and brevity of Article II's language, especially in comparison with the more explicit and detailed wording of Article I (which defines Congress's power). J. G. Randall, in his comprehensive history of Lincoln's use of the executive power during the Civil War, wrote in 1926 that "there is a certain looseness in the constitutional grant of executive power which is in explicit contrast to the specification of the powers of Congress. It is the 'legislative powers *herein granted*' that are bestowed upon Congress, but it is simply the 'executive power' that is vested in the President. In consequence of the

meager enumeration of presidential powers in the Constitution, this branch of our law has undergone a process of development by practice and by judicial decision."[35] The comparative vagueness of the vesting clause, according to Steven Calabresi and Kevin Rhodes, "suggests that the President is to have *all* of the executive power,"[36] a conclusion with implications for defining the scope of implied presidential power.

A second major difference between Articles I and II—the explicit grant of "necessary and proper" powers to Congress, with no analogous grant to the president—has been interpreted as either a recognition that the existence of implied executive power was so plain that it needed no such elasticity to effectuate it, or as evidence that "the domain of implied executive power is Congress', *not* the President's."[37]

Consider the meaning of the vesting clause itself. If the clause is a description, then presidential powers are simply limited to those that are enumerated in the remainder of Article II. If the clause is a more general grant of power, then the president can draw upon a broader range of implied "executive" powers beyond those mentioned in the text. Calabresi and Saikrishna Prakesh analyze the clause in great detail, and find significance in the differences and similarities between the Article II clause and analogous vesting language in Articles I and III. Article I provides that "all legislative powers *herein granted* shall be vested in a Congress of the United States" (§1, emphasis added); Article III that "the judicial power of the United States shall be vested in one supreme Court, and in other inferior courts as the Congress may from time to time ordain and establish" (§1). They conclude that the specificity and conditions in Articles I and III, combined with the relative simplicity of Article II's vesting language, support the contention that "the Vesting Clause of Article II must be read as conferring a general grant of the 'executive power' " to the president .[38] Monaghan, in contrast, finds that "the 'legislative history' of the difference in language between the legislative powers 'herein granted' and 'The Executive power' provides no basis for ascribing any importance to this difference."[39] He attributes the differences to minor changes in drafting rather than any substantive statements about the scope of the executive versus legislative powers.

These disputes are part of a debate that dates from the beginning of the Republic and continues today. Only a few years after collaborating on the *Federalist Papers*, Alexander Hamilton and James Madison became embroiled in a contentious dispute over the president's implied powers. In 1793, shortly after war broke out between France and Great Britain, President George Washington issued his famous Neutrality Proclamation. In the proclamation Washington, who "was convinced that the nation must remain neutral at all costs,"[40] announced that American citizens were not to become involved in the hostilities (by, for example, participat-

ing in the seizure of French or British ships), and that the U.S. government would not protect them in the event that they did. Congress was not in session when the issue arose and the cabinet advised against calling a special session, so Washington issued the proclamation solely on his own authority.[41] Even though the constitutional issues were considered in the context of a highly charged political atmosphere, because of strong domestic pro-French sentiment left over from the Revolutionary War, the debate highlighted the ambiguities of the president's legal powers and the clear gaps in constitutional language that made the disputes over presidential power so difficult to resolve. The question raised by the proclamation can be clearly stated: does the president have the authority to declare the *absence* of a state of war, given the clear congressional power to *declare* war?

Hamilton thought so. Following up on his *Federalist* writings which argued for an energetic executive,[42] he identified the president as the locus of foreign policy power, including the power to interpret treaties. In a public debate with Madison, Hamilton argued that the Neutrality Proclamation did nothing but inform citizens of the current state of relations between the United States, France, and Britain. He maintained that the president had only affirmed the existing state of affairs until Congress could make its own determination as to the existence of war or peace.[43] As such, the president had done nothing to encroach upon the congressional war power. Madison disagreed, strongly so, and he attacked Hamilton's theory of presidential power as nothing more than a justification for the president to employ the royal prerogatives of the British monarch. In making this argument, Madison was responding more to the general model of executive power that Hamilton had originally set out than to Hamilton's specific defense of the Neutrality Proclamation (which Madison evidently thought might be justifiable under a limited interpretation of presidential power).[44]

The key constitutional question, which remained unresolved until the end of the nineteenth century, was the extent of the president's *implied* powers, since the Constitution neither affirmed nor denied explicitly that the president could issue such a proclamation.[45] The split between Hamilton and Madison over the president's power, which was taking place in a broader context of which the Neutrality Proclamation was only one part, played a key role in the deepening of ideological splits among governing elites. That schism, according to historian James Rogers Sharp, in turn led to the development of "proto-parties" and to the "broadening of the base of national politics" as Hamilton, Madison, Jefferson, and others tried to solicit popular support for their versions of government.[46]

Since first recognizing the legitimacy of implied presidential powers in 1890, the Supreme Court has expanded the scope of what is implied by

the enumerated powers. In the case of *In re Neagle*, 135 U.S. 1 (1890), the Court validated the president's authority to take independent action in executing the law, even when that action has not been expressly authorized by statute. Any "obligation that is fairly and properly inferable" from the Constitution, the Court ruled, has the same status in law as powers specifically mentioned.[47] Peter Shane and Harold Bruff note that *Neagle*, and a similar case arising out of railroad strikes in 1895, *In re Debs*, 158 U.S. 564 (1895), "stated broad support for presidential action taken without statutory authorization."[48]

Two cases of implied powers are especially relevant for a study of executive orders: presidential control over classified information, and presidential assertions of broad authority in intelligence collection. Although I treat these subjects in detail in chapter five, a brief summary of presidential control over executive branch information shows the degree to which presidents have successfully expanded the scope of their implied power.

The Constitution is completely silent on the issue of whether the president has the authority to keep information from the public (and, in the related doctrine of executive privilege, from the other two branches of government). Again there are clear differences in the explicit constitutional vestments in Articles I and II. Article I explicitly grants Congress the right to keep its proceedings closed to the public, requiring that each chamber publish a record of its proceedings, "excepting such parts as may in their judgment require secrecy." There is no analogous language granting the president similar powers. Mark Rozell argues that the lack of specific language in Article II reflects the Framers' opinion that secrecy was such an obvious executive power that they saw no need to mention it.[49] The courts have consistently agreed, holding that the president as a matter of course has access to reports that "are not and ought not to be published to the world,"[50] and that "in the area of basic national defense, the frequent need for absolute secrecy is, of course, self evident."[51]

The doctrine of executive privilege is based on the theory that in order to carry out the executive function, presidents must have the ability to obtain the confidential advice of their advisors. Beginning with Washington's refusal to provide Congress with information pertaining to a failed military mission in 1792, presidents have asserted the right to keep certain information from Congress and the courts. There is no explicit constitutional authorization for such a practice; the Supreme Court has justified its existence as deriving "from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings."[52] Executive privilege is not absolute, and the courts have stepped in to require disclosure of information related to criminal pro-

ceedings or investigations.[53] In 1998 President Clinton asserted executive privilege to bar questioning of two aides, Bruce Lindsey and Sidney Blumenthal, as part of an independent counsel investigation into Clinton's involvement in Whitewater and related matters. In a sealed order issued in early May 1998, a federal judge denied the executive privilege claim and ordered the two to submit to questioning before a grand jury.

In practice, presidents have asserted almost total control over the definition and disposition of classified information, by setting out standards for classification and security clearances in a series of executive orders. Numerous congressional efforts to impose some kind of legislative framework to guide government information policy have had little impact on defense and national security information, which remain the exclusive domain of the executive branch.

Delegated Powers

Congressionally delegated powers make up the second major class of presidential power. Even though Congress may not, at least in theory, transfer its lawmaking power to another branch, it has routinely delegated "substantial discretionary authority to the executive branch" to flesh out the details of policy and implementation.[54] Examples of this delegation have included the power to set tariffs and impose trade restrictions, regulate industries, set agricultural marketing and production quotas, issue environmental protection rules, and specify aggravating factors for punishment under the Uniform Code of Military Justice.

The idea behind delegation is that Congress makes broad policy decisions, and then grants agency officials the discretion needed to effectively define and carry out those policies.[55] Congress's motivations for delegating can range from a recognition that complex regulations require more technical expertise than legislators can realistically provide, to a desire to insulate administration from the parochialism and logrolling inherent in the legislative process, to a desire to transfer blame for a potentially unpopular policy to a bureaucracy.[56]

Judicial doctrine holds that delegation is constitutionally permissible as long as Congress sets out an "intelligible principle" to which the executive branch must adhere in carrying out the delegated powers.[57] Subsequent rulings rendered this standard imprecise, upholding delegations under broad and ambiguous principles. "[The Court has] allowed railroad regulation under 'just and reasonable rates,' broadcast licensing in the 'public interest, convenience, or necessity,' and trade regulation of 'unfair methods of competition.' "[58] The Supreme Court has rejected a legislative delegation of power only twice, both times in 1935. In the second of the

two cases,[59] *A.L.A. Schechter Poultry Corp. v. United States*,[60] the Court overturned the 1933 National Industrial Recovery Act, which granted to the president the authority to define "codes of fair competition" that governed wages, working conditions, and trade practices in different industries. The codes themselves were promulgated in a series of 398 executive orders issued between July 1933 and May 1935.[61] The Court ruled that NIRA gave the president too much authority to "[enact] laws for the government of trade and industry throughout the country" without meaningful statutory restrictions.[62] Nevertheless, since then no other Court has enforced this so-called *Schechter* rule, and "attempts to resurrect the nondelegation doctrine have been consistently unsuccessful."[63] That may change, however. In May 1999 the D.C. Circuit Court of Appeals overturned regulations issued by the Environmental Protection Agency pursuant to the Clean Air Act, holding that the agency had failed to articulate an intelligible principle to justify the rules. As such, the pollution regulations "[effected] an unconstitutional delegation of legislative power."[64] Although it was not completely clear from the decision whether the Clean Air Act itself violated the nondelegation doctrine, the case appeared to signify a step back from the long-standing deference the courts had previously shown. In May 2000 the Supreme Court accepted the case for its 2000–2001 term, raising the prospect of a fundamental reevaluation of decades of jurisprudence.

Congressionally delegated powers give the president wide latitude in carrying out statutory provisions, often in ways that Congress did not anticipate. Congress typically places some conditions upon the exercise of delegated power in addition to the general principles required to pass judicial scrutiny. The Administrative Procedures Act of 1946 imposed procedural requirements on executive branch rulemaking and regulatory functions, and Congress often requires detailed reporting and oversight. Even so, these restrictions still leave presidents with substantial maneuvering room and can even backfire, as the courts have often interpreted legislative restrictions on delegated power as explicit authorization of implied presidential authority.

The range of discretion available to presidents through delegated powers, as well as the relationship between executive orders and policy outcomes, is clearly illustrated by government contracting regulations. Presidents have used their implied and delegated powers in this area to make sweeping policies, including affirmative action requirements for government contractors.

Congress, through its power of the purse, establishes and funds programs to purchase goods and services from the private sector. Although legislation stipulates many of the goals and processes of these programs, the actual process of awarding and administering contracts is a classic

executive function.[65] Congress has long recognized as much, and even though there is a complex statutory framework that governs procurement broadly, "the development of detailed procurement policies and procedures has generally been left to the procurement agencies" and, by extension, to the president.[66] Within the boundaries and requirements established by law, the president retains the authority to set the conditions under which procurement will take place.

In addition to the constitutional authority as chief executive to administer contract policy within the boundaries set by law, Congress has expanded the scope of this power by explicitly delegating to the president the authority to promulgate contract rules and regulations. In 1949, in response to recommendations that the government centralize and streamline its administrative processes for procurement and management, Congress enacted the Federal Property and Administrative Services Act, or FPASA (40 U.S.C. 471 et seq.). FPASA gives the president the authority to "prescribe such policies and directives" respecting government administration and the management and disposal of government property. Elsewhere in the act, Congress specified its intent "to provide for the Government an economical and efficient system" for procurement and property management.

With this law, Congress gave the president the power to set and administer procurement policy within the boundaries set by statute, and presidents have used it to set many of the conditions under which private companies will receive government contracts. Federal courts have consistently ruled that under the act presidents can make decisions about how the government will carry out its contracting function, as long as the policies are related to the goals of economy and efficiency. Over time presidents have expanded the permissible interpretations of what this means to include policies with broad social and political consequences.

In a 1961 opinion on the president's authority to impose conditions on government contractors, the attorney general concluded that "except to the extent that Congress has either required or prohibited certain types of government contracts or certain provisions to be included in such contracts, the Executive Branch of the Government has discretion to contract in such manner and on such terms as it considers appropriate to the discharge of its constitutional and statutory responsibilities."[67] The government's authority to do this is clear: "No one has a right to a Government contract. . . . Those wishing to do business with the Government must meet the Government's terms; others need not."[68]

Presidents have carried out this power by specifing that in order to be eligible to bid on and receive government contracts, contractors must adhere to particular requirements and conditions. In making these rules

presidents have, at various times, required favorable treatment for contractors in labor surplus areas, imposed wage and working-hour requirements, and barred the use of state prisoners as laborers on federal contracts. During the early years of the New Deal, the Roosevelt administration issued an executive order requiring government contractors to comply with codes of fair competition promulgated under the National Industrial Recovery Act.[69] Although this and other NIRA orders became moot when the Supreme Court struck the law down in 1935, it had an enduring legacy, as it served as a blueprint for the Walsh-Healy Act.[70]

Given the scope of government procurement activity and the number of companies involved, such "administrative" rules can have a sweeping effect. The most controversial of these provisions have been those which prohibited contractors from discriminating on the basis of race and which created a variety of oversight mechanisms to enforce the policy (with varying degrees of success). FDR, Truman, and Eisenhower all issued executive orders requiring government contractors to abide by nondiscrimination policies, with authority stemming from "various War Powers Acts and Defense Production Acts passed between 1941 and 1950."[71]

More recently, presidents have asserted their authority through the delegated powers in FPASA to broaden the scope of their contracting power to include general social policy. In 1978 President Carter issued Executive Order 12092, which required government contractors to adhere to wage and price guidelines issued by the Council on Wage and Price Stability.[72] It was the first executive order that explicitly cited FPASA as the authority to "achieve broad national goals through the federal procurement system."[73] The order, and its subsequent implementing regulations, required all contractors receiving more than $5 million to certify their compliance with the wage and price guidelines. Those who refused would be subject to termination on existing contracts and would be ineligible to receive future contracts.

A federal appeals court upheld the president's authority to issue this order in a split decision, ruling that the FPASA grants the president statutory authority over procurement, and that the president's action was not barred by the statute creating the Council on Wage and Price Stability (*AFL-CIO v. Kahn*, 618 F. 2d 784, D.C. Cir.). Of particular relevance was the court's finding that presidents may, under the act, promulgate procurement regulations in order to advance broad social policy, as long as there is a "close nexus" between those policies and the FPASA's stated goals of economy and efficiency. In reaching this conclusion, the court again referred to the acquiescence doctrine. Citing the various nondiscrimination orders issued by presidents since the 1940s, the opinion found it "useful to consider how the procurement power has been exercised

under the Act," and took the history of the practice and the absence of congressional resistance as an indication that a broad interpretation of the law was warranted. "Of course, the President's view of his own authority under a statute is not controlling," the appeals court wrote, "but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is entitled to great respect."[74]

Executive Order 12092, then, was a valid exercise of presidential power that affected—through a purely administrative rule—billions in procurement dollars and the interests of thousands of current and potential government contractors. Even more, Carter administration officials admitted that the order, though targeted specifically at government contractors, was likely to have economywide effects, because other companies would be forced to lower their own costs in order to compete with federal contractors on private contracts.[75]

Clinton, to his dismay, discovered that this power does not extend indefinitely. In March 1995 he issued Executive Order 12954, which barred federal contractors from hiring permanent replacements for striking employees.[76] Clinton cited the FPASA in the order, claiming that the practice of hiring permanent replacements hurt labor relations and, by inference, contractor productivity. "By permanently replacing its workers," the order stated in a lengthy preamble designed to establish the necessary nexus between replacement workers and economy and efficiency, "an employer loses the accumulated knowledge, experience, skill, and expertise of its incumbent employees. These circumstances then adversely affect the businesses and entities, such as the Federal Government, which rely on that employer to provide high quality and reliable goods or services." No contract over $100,000 would be awarded to a firm if the secretary of labor had certified that any organizational unit within the company had hired permanent replacements.

A coalition of business groups led by the U.S. Chamber of Commerce sued in federal court, challenging the legality of the order on the grounds that Congress had specifically authorized the hiring of permanent replacements in the National Labor Relations Act (NLRA), and that the statute thus preempted the executive order.[77] The appellants challenged the order on two other grounds, that the president had failed to make a finding that permanent replacements in fact had an adverse effect on "economy and efficiency" as required by FPASA, and that the lack of findings constituted an unconstitutional delegation of legislative authority to the president. I focus on the conflict between the NLRA and the executive order because the court considered it "appellants' most powerful argument on the merits" and because it most directly confronts the issue of the reach of executive orders generally.[78]

The court, agreeing with the challenge, overturned two district court decisions that argued that the executive order "was entitled to *Chevron*-like deference and was reasonable because it furthered the statutory values of 'economy' and 'efficiency.' "[79] To the appeals court, the central issue was the conflict between the NLRA and the executive order, as Clinton's order posed issues not raised by other procurement-related orders (such as Johnson's 11246 or Carter's 12092) which did not conflict directly with any statute. Ultimately, the court concluded that Clinton's order was regulatory in nature and that it impermissibly encroached upon labor relations in contravention to the NLRA.

Although Clinton lost in his bid to unilaterally alter labor policy, the judicial rebuff did not constitute a significant departure from the judiciary's typical deference. The court found that an explicit statutory provision (the right under the NLRA to hire replacement workers) trumps a broad but general delegation of authority (the president's power to regulate procurement through the FPASA). Despite the decision's notice of failed legislative efforts to enact a replacement worker policy similar to what was in the executive order, little weight was given to interpreting this congressional "silence." It was not necessary to, and the court did not, retreat from the existing doctrine of acquiescence or deference that might have validated the president if the legislation in question had been less specific.

At the end of the decision the appeals court took issue with the government's claim that the order was narrow in its effect, implicitly undercutting the politics–administration dichotomy: "It does not seem possible to deny that the President's Executive Order seeks to set a broad policy governing the behavior of thousands of American companies and affecting millions of workers . . . the impact of the Executive Order is quite far reaching. It applies to *all* contracts over $100,000, and federal government purchases totaled $437 billion in 1994, constituting approximately 6.5% of the gross domestic product. . . . Federal contractors and subcontractors employ 26 million workers, 22% of the labor force."[80]

Both the IEEPA and the FPASA delegations show the broad range of "residual decision rights" that presidents may exercise, through executive orders, under statutorily defined powers. Although the replacement workers issue shows that the courts will step in to invalidate specific decisions taken under delegated powers, there is less willingness to invalidate the underlying delegations themselves as unconstitutional.

Legislative delegation has become more common since the advent of the modern regulatory state. Critics claim that expansive delegation replaces legislative deliberation with unaccountable bureaucracies, and some legal theorists argue that independent regulatory agencies are unconstitutional. The courts, though, recognized the legitimacy of independent regulatory

agencies in *Humphrey's Executor*, and it is difficult to imagine a circumstance in which the judiciary would reconsider its ruling in that case and thereby undercut such a broad scope of government activity.

Inherent Presidential Powers—Executive Prerogative

The third source of presidential power—inherent executive powers—is by far the most controversial, and its existence is disputed. Many legal scholars argue against the notion of inherent powers, concluding that it "is incompatible with the very purpose of a limited, written Constitution."[81] Presidents have nevertheless asserted, particularly during national emergencies, that they possess powers beyond those mentioned in the Constitution. In its strongest form, this argument presupposes the existence of a prerogative power, or the authority "to act on behalf of the United States in the absence of law, or in defiance of it."[82]

Presidents, not surprisingly, tend to view broad executive power more sympathetically once they are in office. Many times, proponents of limited presidential authority adopt a decidedly different stance while in office (as Professor Taft did once he became President Taft). Thomas Jefferson took a very constrained view of the office while serving as Washington's secretary of state, splitting with Hamilton over the Neutrality Proclamation and other issues of executive power. As president, however, he carried out the Louisiana Purchase, expending funds and acquiring territory without any congressional mandate. Taft was involved in several confrontations with Congress over separation of powers issues, at one point even directing his cabinet secretaries to disregard a statute that prohibited them from participating in a centralized budget planning exercise (see chapter four). Another example from the twentieth century is Robert Jackson, who as attorney general argued in favor of the same inherent presidential powers that he would later emphatically reject as a Supreme Court justice. In 1940 Attorney General Jackson argued that the president had the authority to transfer U.S. warships to Great Britain, via executive agreement rather than a treaty, in return for access to British military bases (the so-called destroyers-for-bases deal), even though only two months before Congress had enacted a statute that seemed to prohibit such an exchange. In his legal opinion to the president, Jackson relied heavily on the Supreme Court's 1936 *United States v. Curtiss-Wright Export Corporation* decision (299 U.S. 304), in which Chief Justice Sutherland set out a sweeping theory of inherent presidential prerogative in foreign affairs. *Curtiss-Wright*, said Jackson, "explicitly and authoritatively defined" the president's power in foreign affairs, and permitted Roosevelt to deal with Britain however he saw fit.[83]

Whether or not presidents in theory possess a valid prerogative power, they have repeatedly acted as though they do. Theodore Roosevelt was the first president to suggest that presidents had a limited prerogative power, which he advanced in his notion of the "stewardship" presidency. Roosevelt argued 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 its laws,"[84] a position that leaves open the possibility that the president can act beyond the law, though not in contravention to it. William Howard Taft was a vigorous critic of this view, deeming it an "unsafe doctrine" because it could be used to justify an unlimited and arbitrary exercise of presidential power.[85] Instead, in his more limited theory of presidential authority, Taft held 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 of power as proper and necessary to its exercise."[86] Some commentators have read Roosevelt to mean that the president has merely implied powers, not prerogative powers. In fact, his view is much stronger, for two reasons. First, Roosevelt explicitly argued that the president could act unless the Constitution or law expressly forbade it. The president could, as a result, not only read the existence of implied powers stemming from enumerated powers, but act in those cases when the Constitution or laws were completely silent. Second, Taft offered his argument in direct opposition to Roosevelt, and Taft clearly recognized the legitimacy of "justly implied" powers.

To historian Forrest MacDonald, the primacy of the stewardship role and its reliance on implied powers was a major impetus to the rise of presidential lawmaking through executive orders and proclamations—"decrees that had the force of law"—as a tool of presidential power.[87] It is no accident that Theodore Roosevelt was the first president to make extensive use of executive orders.[88] Nor is it coincidental that executive orders became more common in the late nineteenth century, precisely at the time when enduring government institutions began to form along with an expansion of state administrative capacity.

Most executive orders in the eighteenth and nineteenth centuries in fact involved routine administrative procedures; the first order, it is generally agreed, consisted of Washington's June 1789 instruction to executive branch heads to submit a "clear account" of their departmental affairs.[89] The bulk of executive orders issued between 1880 and 1900 addressed civil service matters and the disposition of publicly owned land (see chapter three). Theodore Roosevelt issued 1,091 orders during his two terms,

nearly as many as had been issued by all previous presidents over the prior 111 years (1,259).

The most powerful historical examples of executive prerogative remain Lincoln's actions in 1861, taken after the outbreak of the Civil War but before Congress convened in July. Acting on his own, Lincoln ordered a blockade of Southern ports, suspended habeas corpus, increased the size of the army and navy, expended government funds in the absence of any congressional appropriation, censored the mail, and imposed restrictions on foreign travel, though "he had no authority to do these things."[90] Lincoln defended his actions by claiming, first, that they were in fact legal and, second, that they were required by the extraordinary danger the Union faced, though the view has long been that these acts were "unconstitutional and extralegal."[91] With respect to his suspension of habeas corpus, Lincoln asked his famous rhetorical question in the context of a broader argument about presidential prerogative: "The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law . . . should to a very limited extent be violated? To state the question more directly, Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?"[92] Congress ultimately granted retroactive legislative authorization for most of these acts, but taken as a whole, Lincoln's exercise of presidential authority asserted "for the first time in our history, an initiative of indefinite scope and legislative in effect in meeting the domestic aspects of a war emergency."[93]

Franklin Roosevelt made a similar claim of executive prerogative during World War II. In February 1942 Congress passed the Emergency Price Control Act, which gave the president the authority to regulate prices in order to check inflation. The administration felt that provisions governing agricultural rendered the act "unfair and unworkable," because the law restricted the president's ability to impose ceilings on farm products.[94] Over the summer, Assistant Attorney General Oscar Cox proposed that the president's commander-in-chief powers could justify working around the restrictive provisions, much as Roosevelt had done in seizing the manufacturing facilities of North American Aviation in the absence of specific authorization.[95] Cox concluded that "an amendment to the Price Control Act is probably desirable in this connection," and FDR requested the revisions in September 1942.

The way in which FDR asked for changes generated considerable controversy. In an often-cited message to Congress, Roosevelt declared:

> I ask that Congress take this action by the first of October. Inaction on your part by that date will leave me with the inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by the threat of economic chaos.
>
> In the event that Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act . . .
>
> The President has the power, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war.[96]

Roosevelt was undoubtedly aware of the connections between his assertion of unilateral power and what previous presidents had done during wartime emergencies: Oscar Cox's files on the Price Control Act contain an August 25, 1942, memorandum detailing the use of emergency powers by Lincoln and Woodrow Wilson in the absence of legislation. The memo considered some of Wilson's executive orders "drastic," particularly his order of January 17, 1918, in which "he suspended the operation of practically all industries east of the Mississippi River for a period of five days beginning January 18. . . . This order was promulgated in spite of protests from every part of the country, opinions that the order exceeded the authority of the Executive, and an official resolution of the Senate asking for delay and explanation."[97]

Corwin found FDR's words nothing short of astonishing, interpreting them as a message to Congress that " 'Unless you repeal a certain statutory provision forthwith, I shall nevertheless treat it as repealed' . . . [this message] can only be interpreted as a claim of power on the part of the President to suspend the Constitution in a situation deemed by him to make such a step necessary."[98]

Although Congress did what the president asked, albeit a day late, not everyone accepted FDR's sweeping assertion of power. Senator Robert Taft (R-Ohio), objected in strong terms: "If the President can change the price law by Executive order, he can draft men in violation of the Selective Service Act by Executive order . . . if this doctrine is sustained in wartime it can easily be stretched to cover the post-war period and a whole series of possible later emergencies until we have a complete one-man dictatorship. Then government by the people will have vanished from America."[99] Similarly, Senator Robert LaFollette, Jr. (Prog.-Wisc.) complained that FDR had "placed a pistol at the head of Congress."[100]

Corwin attributes Roosevelt's success in assuming powers far beyond what was constitutionally authorized to the unique emergency that World War II posed, and the fact that the public simply accepted what FDR did. Roosevelt was clearly aware of the importance of having the public be-

lieve in the legitimacy of what he was doing. In February 1943 Oscar Cox wrote Harry Hopkins about a recent poll in which 78 percent of the public said it was acceptable for the president, as commander in chief, "to make important decisions before consulting Congress." Cox suggested a public relations effort "to get across to the public some of the historical and other reasons why the Chief Executive, in time of war, has to have a good deal of scope in decisions in the same way that a commanding general in the field does."[101]

Truman, as I noted in chapter one, initially based his steel seizure decision on assertions that the president had virtually unlimited authority to act in emergencies. The solicitor general had claimed that the president had authority to seize the steel mills based "upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case."[102] The majority in *Youngstown* had no difficulty dismissing that argument, holding that no interpretation of either the commander-in-chief power or the take care clause could justify Truman's act of presidential lawmaking. Jackson's concurring opinion specifically rejected the emergency inherent-powers argument.

The Significance of Precedent and Presidential Practice

The ambiguities of executive power provide the president with substantial room—residual decision rights, to use Moe's term—in which to maneuver. The limits on executive orders—that they must be tied to a grant of executive authority, and that they may not contradict a statute—are more flexible than they appear, in large part because the demarcation between executive and legislative powers is not always clear. Legal scholar E. Donald Elliot has criticized the Supreme Court's rulings on separation of powers questions as "abysmal," arguing that Justices have focused far too much attention to questions of whether a particular power is legislative or executive in nature (a task he considers futile and which has not, in his view, provided any definitional clarity), and too little on "abstracting and elaborating theories of what goals separation of powers should serve, and then asking whether a particular function should be deemed to be executive in light of these goals."[103] The lack of any cohesive theory of executive power (or even a precise definition of what, exactly, executive power is) leaves as the only option the practice of defining those powers "implicitly, through a series of ad hoc decisions about specific practices."[104]

Because the specific boundaries between the branches are amorphous, presidents have an incentive to poke at the limits to see how Congress, in

particular, will respond. At times presidents can appear to step close to the limits, or even over them, without sanction. No power is more central to the legislative function, for example, than the authority to spend money (the "power of the purse").[105] The president may not spend public money in the absence of a congressional appropriation, nor is it permissible for the President to refuse to spend money that Congress has appropriated. There are times when this restriction does not apply, as when Congress fails to enact either an appropriations bill or a continuing resolution authorizing expenditures; this occurred in 1995, when Congress refused to provide funds for the executive branch during a confrontation with the president over the budget. In these cases, according to a 1981 Opinion of the Attorney General, the president has the authority under the Anti-Deficiency Act to "fulfill certain legal obligations connected with the orderly shutdown of agency operations," and there may be cases where the president may expend funds to carry out the constitutional responsibilities of the office.[106]

As the Exchange Stabilization Fund episode described in chapter one demonstrates, though, presidents can interpret congressional intentions flexibly, using appropriated funds in a manner that Congress clearly did not anticipate. President John Kennedy went even further, establishing the Peace Corps in 1961 by executive order and funding it without any appropriations.[107] To operate the new agency, Kennedy relied on contingency funds provided by the Mutual Security Act until Congress provided a specific authorization seven months later.[108]

The Supreme Court has, in addition, found ways around the apparently unambiguous declaration that statutes take priority over executive orders when the two conflict. In *U.S. v. Midwest Oil Co.*, 236 U.S. 459 (1915), the Court upheld the president's authority, under certain conditions, to issue executive orders or proclamations that have the effect of invalidating a law. At issue in *Midwest* was whether the president could prohibit private entities from purchasing the mineral rights for or title to public lands, when Congress had by law allowed the purchase of such rights. In 1897 Congress had declared that all public lands with petroleum deposits were to be "free and open to occupation, exploration, and purchase by citizens of the United States."[109] In 1909, in response to the rapid depletion of oil reserves on California and Wyoming public lands, President Taft issued a proclamation temporarily withdrawing 3 million acres from any mineral or oil exploitation. Midwest Oil, which had purchased oil rights to some of the land in question, argued that the order unconstitutionally withdrew land that Congress had specified should be open to exploration.

The Supreme Court upheld the president, largely on the grounds that Congress had implicitly accepted the president's authority to make such withdrawals, despite the fact that Taft's order appeared to violate explicit

statutory language. Noting that Congress had not challenged 252 presidential withdrawal orders before 1910, the Court reasoned that "the long-continued practice, known to and acquiesced in by Congress, [had] raised a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands."[110]

The relative institutional capabilities of the presidency and Congress to adapt and respond have also played a role, as have long-standing judicial doctrines that give the president important advantages. In the past few decades the judiciary has through various decisions created a presumption that favors presidential initiative. Unless a presidential act contravenes a clear and explicit statutory or constitutional prohibition that directly addresses the action, the courts are likely to side with the president. In a series of decisions in the 1980s that expanded the scope of executive power, the Supreme Court indicated a willingness to validate executive action in the absence of an explicit congressional prohibition (which must take legislative form), to find implicit congressional consent in legislation that provides authority to the president in tangential policy areas, and to uphold executive interpretations of ambiguous statutes unless Congress has spoken precisely to the issue in point. These patterns hold true in domestic as well as in foreign policy, but take on additional weight in foreign affairs when combined with the traditional deference to presidential action in that arena.

Much of the time, analyses of the president's constitutional power rely on historical evidence of how individual presidents viewed that power and how they put it into practice. Practice matters because of the importance of precedent to the expansion of presidential power, because the parameters of presidential authority have often been shaped by case-by-case judicial review, and because presidents have used their authority (often through executive orders) in order to shape institutional patterns and processes that in turn enhance their ability to exercise administrative control. Each time a president relies on executive prerogative to take some type of action, it makes it easier for a future president to take the same (or similar) action. "The boundaries between the three branches of government are . . . strongly affected by the role of custom or acquiescence. When one branch engages in a certain practice and the other branches acquiesce, the practice gains legitimacy and can fix the meaning of the Constitution."[111]

The difficulty in pinpointing the "correct" distribution of powers contributes to the importance of precedent. This much the judiciary recognizes, as it has long held that custom or long-standing presidential practice can legitimate the exercise of a specific power. The acquiescence doctrine, for example, originated in *Midwest Oil*, in which the Court

concluded that President Taft's withdrawal of public lands was authorized by Congress's traditional deference to presidential control in this domain. Although presidents cannot create powers they otherwise do not have through this practice, and the Court has rejected some long-standing practices as unconstitutional (the legislative veto, for example), the doctrine continues to work its way into presidential-legislative relations.[112] Fisher cites congressional acquiescence as a factor in the shift of the war power from Congress to the president, but he sees no practical alternative to relying on custom. A prohibition on the use of custom would require "several hundred amendments to the Constitution and a willingness to keep it in a perpetual state of agitation and flux."[113]

In a concurring opinion in *Youngstown*, Justice Felix Frankfurter offered more details about the acquiescence doctrine, and set out some of the limits as well. "In short, a systematic, unbroken, executive practice," he wrote, "long pursued to the knowledge of Congress but never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive power' vested in the President by §1 of Art. II."[114] The steel seizure did not constitute such a "systematic, unbroken executive practice," since Congress had spoken clearly on the seizure question over the years, and presidents had only rarely resorted to such action without clear statutory authority.

After analyzing the history of congressional authorization of industrial seizures (which were enacted in sixteen separate laws between 1916 and 1952), Frankfurter concluded that Congress had carefully circumscribed all such grants.[115] There were, moreover, only a few examples of presidential seizures apart from either statutory authorization or extraordinary circumstances. Presidents Franklin Roosevelt and Woodrow Wilson had seized transportation, communication, and industrial facilities, but Frankfurter found that all but three of these seizures (a) took place pursuant to existing law or under a claim that the president was acting pursuant to law or (b) occurred after Congress had declared war.

It is ironic, though, that the majority opinion in the steel seizure case and several of the concurring opinions gave great weight to Congress's refusal to grant Truman the explicit statutory authority to seize the mills. To Lawrence Tribe, "a decisive majority of five Justices treated Congress' silence as speech—its *nonenactment of authorizing legislation* as a legally binding expression of *intent to forbid* the seizure at issue."[116] This potentially significant limit on presidential power, however, was vitiated in *Dames & Moore v. Regan*, the hostage agreement case in which the Court found broad authorization of Carter's use of executive orders to nullify attachments on Iranian-held assets in the United States. As with Truman's steel seizure, the hostage agreements were not explicitly authorized by

any statute. However, the Court found implicit authorization in "three not-quite-applicable pieces of legislation."[117] Even though Chief Justice William Rehnquist, in the majority opinion, held that neither the International Economic Emergency Powers Act nor the Hostage Act of 1868 specifically authorized the suspension of private claims against Iran, he did find "both statutes highly relevant in the looser sense of indicated congressional acceptance of a broad scope for executive action in circumstances such as this case."[118] The Court also noted the "history of legislative acquiescence" in upholding Executive orders, despite the fact that the Senate, in particular, had objected to other executive claim settlements, in some cases forcing a renegotiation of terms.[119]

Critics of the acquiescence doctrine note the potential for "bootstrapping" of presidential power, whereby presidents can, over time, accrue power that they should not have simply because they have exercised it enough times. Since the Court has ruled that Congress may only express its disapproval of executive branch action through legislation and not through more informal mechanisms such as the legislative veto,[120] Koh has argued that the rulings, when taken together, "create a one-way 'ratchet effect' that effectively redraws the categories described in Justice Jackson's *Youngstown* concurrence."[121]

The Executive Power and Executive Orders

How do executive orders fit into this framework of presidential power? The legal connection is clear, since federal courts have long considered executive orders to be the equivalent of statutes when they are issued pursuant to the president's legitimate constitutional or congressionally delegated powers.[122] Their validity stems from their status as an instrument through which the president exercises his legal authority; in effect, the president may use an executive order to do anything permitted within the bounds of this authority. Most often, executive orders consist of presidential instructions to officers of agencies and departments, directing them to take specified action. This description is less technical than it may seem, since even administrative rulings can have consequences that reach far beyond executive branch boundaries. Most of the time presidents are free to choose the instrument they wish to use to carry out their executive function (proclamations, administrative directives, findings, executive orders, and so on), although Congress can stipulate that the president use one or another of these instruments for a particular purpose. The federal courts do not distinguish between executive orders and proclamations

and hold that the two formats are equivalent for the purposes of carrying out the president's legal authority.[123]

Judicial review of executive orders extends back to *Little v. Barreme*, 2 Cranch 170 (1804). That case originated in a U.S. Navy captain's seizure of a Danish vessel sailing from a French port, based on standing orders from President John Adams. Acting in his capacity as commander in chief, Adams had ordered the navy to seize all vessels traveling to or from France. Adams's order, in turn, was issued pursuant to a statute that authorized the seizure of vessels sailing to French ports. Chief Justice John Marshall found that the capture was not authorized by statute, and ordered the captain to pay damages. The decision established the clear principle that "congressional policy announced in a statute necessarily prevails over inconsistent presidential orders and military actions. Presidential orders, even those issued as Commander in Chief, are subject to restrictions imposed by Congress."[124]

Executive orders have a substantive impact on policy and power, because implementation and administration have substantive impact, and because of the significance of precedent to the exercise of presidential legal authority. The "politics–administration" dichotomy paradigm that once dominated the public administration literature—and, as I note below, found its way into major Supreme Court rulings on the extent of presidential power—has been supplanted by the more persuasive notion that administration inevitably involves politics, insofar as the processes by which agencies implement statutes and programs affect public rights and policy outcomes.

One question that executive orders raise is enforcement, and the ability of private citizens to pursue claims through the courts. Claimants can, of course, challenge the validity of executive orders on the grounds that they exceeded the president's constitutional or statutory authority.[125] Additionally, as a general rule the courts have jurisdiction in disputes arising over executive orders issued pursuant to delegated statutory authority, or those directed at nongovernmental parties. In practice, however, it is almost impossible for private claimants to allege violations of an executive order itself or seek damages as a remedy for violations against another private party.[126] Recent court rulings are consistent on this point, holding that executive orders do not generally permit citizens to insist on judicial enforcement of the orders' requirements.[127] More commonly, aggrieved parties must rely exclusively on administrative remedies to resolve disputes that may arise.[128] An executive order issued as part of a statutory delegation of power, or as part of the process of carrying out a statute, may create enforceable private rights, but only if the statute or the order clearly intended to create such a right.[129] Presidents routinely seek to preempt